20140153
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 4, 2014
STATE OF NORTH DAKOTA

# IN THE SUPREME COURT

# STATE OF NORTH DAKOTA

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| **STATE OF NORTH DAKOTA,** | ) | |
| **Appellee,** | ) | **Supreme Court No. 20140153** |
| **vs.** | ) | **District Court No. 08-2013-CR-02947** |
| **ROBERT ALLEN SCHNEIDER,** | ) | |
| **Appellant.** | ) | |

# APPELLANT'S BRIEF

**Appeal from Judgment Entered Upon Conditional Guilty Pleas Reserving the Right to Appellate Review of the District Court's Order Denying Motion to Suppress, Entered on April 14, 2014, by the Burleigh County District Court, South Central Judicial District, State of North Dakota, The Honorable Bruce B. Haskell Presiding.**

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## [¶ 3] STATEMENT OF THE ISSUE

**[¶ 4]** Whether the District Court abused its discretion in denying Schneider's motion to suppress evidence by finding the arresting officer did not effectuate a "seizure" of Schneider within the context of the Fourth Amendment.

## [¶ 5] STATEMENT OF THE CASE

**[¶ 6]** Robert Allen Schneider (hereinafter "Schneider") appeals from the criminal judgment entered by the Honorable Bruce B. Haskell, South Central District Court, on April 14, 2014. (J.A. 9.) Schneider was charged with possession of a controlled substance by a driver – marijuana, pursuant to N.D.C.C. § 19-03.1-23, a class A Misdemeanor and possession of drug paraphernalia, pursuant to N.D.C.C. § 19-03.4-03, a class A misdemeanor. (J.A. 4.)

**[¶ 7]** On January 6, 2014, Schneider filed a pretrial motion to suppress the evidence seized by Deputy Vyska, Schneider did not request oral arguments. (J.A. 7-8.) The State's Attorney filed a response on January 9, 2014, and did not request oral arguments or a hearing. (R. at Doc ID # 21.) On January 28, 2014 Judfge Haskell issued an Order denying Schneider's motion to suppress. (J.A. 10-14.) Schneider filed a motion to reconsider and requested oral arguments on January 31, 2014. (J.A. 14.) The State did not respond. On February 21, 2014, Judge Haskell issued an Order denying the motion to reconsider and the request for oral argument. (J.A. 16.)

**[¶ 8]** Schneider subsequently entered a Rule 11 Conditional Guilty Plea to the charges on April 14, 2014, reserving the right to appeal the district court's order denying his motion to suppress and his motion to reconsider pursuant to North Dakota Rule of Criminal Procedure 11(a)(2). (J.A. 17.)

**[¶ 9]** Schneider filed a timely notice of appeal on April 28, 2014, and an Amended Notice of Appeal on May 6, 2014 pursuant to North Dakota Rule of Appellate Procedure 4. (J.A. 22, 23.) The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-28-06 and N.D. Const. art. VI, § 2.

## [¶ 10] STATEMENT OF THE FACTS

**[¶ 11]** On November 6, 2013, Deputy Jeffery Vyska of the Burleigh County Sheriff's Department conducted what he classified as a "welfare check" on a vehicle that was parked at the Double Ditch Historical Site. (J.A. 9.) The vehicle was parked off the main road on a side gravel road leading into the site. (R. at Doc ID # 14 at 00:11.) As Deputy Vyska drove up to Schneider's vehicle, the squad car video shows the flashing lights of the Deputy's patrol car reflecting off of a sign and the rear of Schneider's vehicle. (R. at Doc ID # 14 at 00:22.) Deputy Vyska left his flashing lights activated throughout the entire encounter. (R. at Doc ID # 14 at 00:00 – 42:20.)

**[¶ 12]** Deputy Vyska approached the driver's door of Schneider's vehicle; however, no audio is available of their encounter until Deputy Vyska visibly turns his microphone back on after five minutes of conversing and searching Schneider. (R. at Doc ID # 14 at 01:15 – 06:49.) Per the report, and Deputy Vyska's affidavit, Deputy Vyska identified Schneider and immediately thereafter "asked if there was anything illegal in the vehicle," to which Schneider replied "there was not." (J.A. 6, 9.) Deputy Vyska then requested consent to search the vehicle and pat down Schneider, at which time, consent was provided. (J.A. 6, 9.)

**[¶ 13]** The pat down search yielded an Advil bottle in Schneider's pants pocket. Deputy Vyska opened the bottle and found marijuana within. (J.A. 6, 9.) Schneider then stated there was

more marijuana in a metal container inside the vehicle. (J.A. 9.) After securing Schneider in handcuffs in the rear of the patrol vehicle, Deputy Vyska searched Schneider's vehicle and discovered the additional marijuana and "wooden smoking device." (J.A. 6, 9.) At that time, Deputy Vyska issued Schneider two citations and released him. (R. at Doc ID # 14 at 42:00.)

## [¶ 14] ARGUMENT

**[¶ 15]** The District Court erred in denying Schneider's motion to suppress as a result of an unconstitutional seizure under the Fourth Amendment. Deputy Vyska's "casual encounter" immediately converted to a seizure through Deputy Vyska's show of authority, wherein the deputy used his patrol car's flashing lights to detain Schneider without any reasonable or articulable suspicion a crime was or was about to be committed. Moreover, Deputy Vyska made no attempt to communicate with Schneider in a "conversational manner." Deputy Vyska approached Schneider's vehicle, after the unconstitutional detention, and immediately asked "if there was anything illegal in the vehicle." (J.A. 6, 9.) Deputy Vyska's conduct does not fall under the Community Caretaker Exception. Therefore, the District Court abused its discretion in denying Schneider's motion to suppress and should be reversed.

**[¶ 16]** This Court has held when reviewing a district court's ruling on a motion to suppress, the Court defers to the district court's finding of fact and resolves conflicts in testimony in favor of affirmance. (See State v. Goebel, 2007 ND 4, 725 N.W.2d 578); however, this case has no evidentiary issues, no witnesses were called, and no hearings were held. The district court did not resolve conflicts in testimony. The decision in this case did not rely on credibility of witnesses, nor did the district court weigh any evidence, as the facts are uncontested. At issue before the Court is purely a question of law and the misapplication of that question of law. Questions of law are fully reviewable on appeal and therefore, the standard of

review in this case is *de novo*. State v. Genre, 2006 ND 77, ¶ 12, 712 N.W.2d 624, 629-630. Under the *de novo* standard of review, this Court may view the facts and records as if viewing them for the first time.

**[¶ 17]** ***A. Deputy Vyska's Actions Went Far Beyond That Of A "Welfare Check;" Therefore, Triggering A "Seizure" Under The Fourth Amendment.***

**[¶ 18]** Despite Schneider sitting in a parked vehicle, Deputy Vyska's approach with his overhead lights flashing was a "show of authority," which effectuated a "seizure" under the Fourth Amendment requiring reasonable and articulable suspicion of criminal activity.

**[¶ 19]** The Fourth Amendment to the Constitution of the United States and Article 1, Section 8 of the North Dakota Constitution protect individuals from unreasonable searches and seizures. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. Amend. 4.

**[¶ 20]** "The Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and Article I, § 8 of the North Dakota Constitution protects individuals from unreasonable searches and seizures by the government." State v. Blumler, 458 N.W.2d 300, 301 (N.D. 1990). U.S. Const. amend. IV; U.S. Const. amend. XIV; N.D. Const. art. I, § 8..

**[¶ 21]** Courts have routinely held however, that not every police contact with a citizen in a vehicle is a seizure. In fact, the United States Supreme Court stated; "[l]ocal police officers…frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in…functions, totally divorced from detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady v. Dombrowski, 413 U.S. 433, 441 (1973). This allows police officers to engage in community caretaker functions or welfare checks.

**[¶ 22]** Additionally, this Court outlined criteria delineating between a "casual encounter" and a "seizure" in the context of "parked vehicles."

> We have explained that an officer's approach of a parked vehicle is not a seizure if that officer inquires of the occupant in a conversational manner and does not order the person to do something, and does not demand a response…[a] seizure occurs within the context of the Fourth Amendment only when the officer, by means of physical force **or** show of authority, has in some way restrained the liberty of a citizen…a person has been seized within the context of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

Richter v. N.D. Dep't of Transp., 2010 ND 150, ¶ 10, 786 N.W.2d 716, 720 (emphasis added) (internal citations omitted).

**[¶ 23]** This Court has clarified that the use of flashing lights is a show of authority. State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992) (holding "[w]e conclude that, whichever set of lights…used, the pursuit with flashing lights…converted the encounter into a stop by an official police vehicle"). Therefore, the mere fact that Deputy Vyska approached Schneider's parked vehicle with his flashing lights immediately escalated this encounter into a seizure, regardless of Deputy Vyska's characterization of this encounter in his report. See Oregon v. Walp, 672 P.2d 374 (Or. Ct. App. 1983) (holding, a seizure occurred when a police car pulled up behind a car

stopped on the shoulder of the road and the officer turned on the overhead lights); See also Washington v. Stroud, 634 P.2d 316 (Wash. Ct. App. 1981) (holding officer's use of both emergency lights and high-beam headlights to summon occupants of a parked car was a show of authority that constituted a seizure).

**[¶ 24]** Therefore, Deputy Vyska used a show of authority, as defined by this Court, when approaching Schneider's parked vehicle through the use of his overhead flashing lights. Through this action Deputy Vyska escalated this encounter into a "traffic stop" or "seizure." By that very nature, per this Court, Deputy Vyska required reasonable and articulable suspicion in order to effectuate this "traffic stop" or "seizure," which he did not have.

**[¶ 25]** ***B. Deputy Vyska Lacked Any Reasonable And Articulable Suspicion Of Criminal Activity, Therefore His "Seizure" Of Schneider Was Illegal.***

**[¶ 26]** Deputy Vyska's actions at the scene of the traffic stop were investigatory in nature. This was not a "welfare check" as Deputy Vyska attempted to classify it in his report. Regardless of how this Court views the "stop" of Schneider; Deputy Vyska illegally escalated this encounter into a "seizure" without any articulable or reasonable suspicion that a crime had been or was being committed.

**[¶ 27]** The Court's analysis of the ways in which law enforcement officers can interact with citizens provides only a limited number of permissible law enforcement encounters available to police when interacting with citizens. They are: "(1) arrests, which must be supported by probable cause; (2) Terry stops,…seizures which must be supported by a reasonable and articulable suspicion of criminal activity; and (3) community caretaking encounters, which do not constitute Fourth Amendment seizures." State v. Torkelsen, 2006 ND 152, ¶ 10, 718 N.W.2d 22 (citations omitted). In this case, Deputy Vyska clearly was conducting a Terry stop because of the use of his overhead lights in initiating contact with Schneider.

However, because Deputy Vyska did not have reasonable and articulable suspicion that criminal activity was afoot, this seizure and line of questioning was unconstitutional.

**[¶ 28]** Under Terry v. Ohio, 392 U.S. 1 (1968), police may, in appropriate circumstances and in an appropriate manner, detain an individual for investigative purposes when there is no probable cause to make an arrest if a reasonable and articulable suspicion exists that criminal activity is afoot. Anderson v. Dir. N.D. Dep't of Transp., 2005 ND 97, ¶ 9, 696 N.W.2d 918. This Court has said an officer has reasonable and articulable suspicion if: "(1) when the officer relied on an appropriate directive or request for action from another officer; (2) when the officer received tips from police officers or informants, which were then corroborated by the officer's own observations; or (3) when the officer directly observed illegal activity." Id. In the case at hand, Deputy Vyska was not "called" to the scene of Schneider's vehicle out of concern by dispatch or another officer. Deputy Vyska simply observed a vehicle pulled onto an approach and effectuated a "traffic stop" or "seizure" for no reason whatsoever.

**[¶ 29]** This Court's jurisprudence in this matter is quite clear and has held that "an officer may **not** escalate a consensual encounter into a seizure unless a valid reason arises for doing so." Langseth, 492 N.W.2d at 300 (emphasis added). Deputy Vyska's own report indicates that he made no other inquiry of Schneider other than "if there was anything illegal in the vehicle." (J.A. 6, 9.) Schneider's response was that "there was not." (J.A. 6, 9.) At that time, Deputy Vyska had no reason to believe any crime was being committed or about to be committed. Deputy Vyska makes no indication in his report that he smelled an odor, saw smoke, knew Schneider to have a criminal history, or had any suspicion whatsoever of criminal activity. It was precisely at this point during the encounter when Deputy Vyska continued to "investigate" Schneider that Deputy Vyska's conduct violated Schneider's Fourth Amendment rights.

**[¶ 30]** The first indication of any "suspicion" of criminal activity was in the State's response brief to Schneider's initial motion to suppress, wherein the State indicates, "[t]his is also a suspicious area due to drug violations." (R. at Doc ID # 21 pg. 1.) Should we retroactively transfer this suspicion back to Deputy Vyska, this Court has already addressed this issue in that, "awareness of past [crimes] in an area amounted to no more than a vague hunch of illegal activity" and is therefore legally insufficient to raise reasonable and articulable suspicion. City of Minot v. Johnson, 1999 ND 241, ¶ 11-12. 603 N.W.2d 485, 488. Moreover, in the State's response brief to Schneider's original motion to suppress, the State concedes that "Deputy Vyska **did not** have reasonable suspicion to stop the Defendant." (R. at Doc ID # 21 pg. 2) (emphasis added).

**[¶ 31]** Therefore, Deputy Vyska's encounter with Schneider was more akin to a Terry stop and not a "welfare check." Terry stops require reasonable and articulable suspicion of criminal activity; which the State has already conceded that Deputy Vyska did not have. Consequently, Deputy Vyska's seizure of Schneider was unconstitutional.

## [¶ 32] CONCLUSION

**[¶ 33]** In conclusion, Deputy Vyska's use of flashing lights as he approached Schneider's vehicle was the requisite "show of authority" to constitute a seizure under the Fourth Amendment. Deputy Vyska did not have reasonable or articulable suspicion to believe criminal activity was afoot. Nor did he have any reason to believe Schneider was in need of assistance to justify a "welfare check." Additionally, Deputy Vyska's actions and questioning at the scene were more attributable to those of a Terry stop. For these reasons the district court misapplied the well establish jurisprudence of this Court in denying Schneider's motion to suppress.

Therefore, Schneider respectfully requests that this Court reverse the district court's order denying the motion to suppress and remand this case.

Dated this 4th day of June, 2014.

*/s/ Samuel A. Gereszek*

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| **ROBERT ALLEN SCHNEIDER,** | ) | |
| **Petitioner – Appellant.** | ) | |

**CERTIFICATE OF SERVICE**

I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *APPELLANT'S BRIEF (in Microsoft word format); and,*
2. *JOINT APPENDIX (in .pdf format)*

On the following:

**Clerk of the Supreme Court**
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All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this 4th day of June, 2014.

**HAMMARBACK & SCHEVING, P.L.C.**

*/s/ Samuel A. Gereszek*

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I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *APPELLANT'S BRIEF (in Microsoft word format); and,*
2. *JOINT APPENDIX (in .pdf format)*

On the following:

**Robert Allen Schneider**
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Served via U.S. Mail

Dated this 6th day of June, 2014.

**HAMMARBACK & SCHEVING, P.L.C.**

*/s/ Samuel A. Gereszek*

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