

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota,)	
)	Supreme Court No. 20140318
Plaintiff/Appellant,)	
)	District Ct. No. 18-2013-CR-02246
vs.)	
)	
Evan Joseph Taylor,)	
)	
Defendant/Appellee.)	

ON APPEAL FROM MOTION TO SUPPRESS MEMORANDUM DECISION AND
ORDER
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE LAWRENCE E. JAHNKE PRESIDING

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

- I. [¶1] Whether officers exceeded the scope of the search warrant?

STANDARD OF REVIEW

[¶2] “Prosecutors must support their appeals from an order suppressing evidence with an explanation of the relevance of the suppressed evidence.” State v. Emil, 2010 ND 117, ¶ 6, 784 N.W.2d 137. In this case, the Prosecuting Attorney’s Statement states that the Defendant “was charged with possession of more than one ounce of marijuana and possession of drug paraphernalia, marijuana”. (Doc ID #81). The Statement also explains how the “Trial Court suppressed the contraband found in the Defendant’s bedroom”, and “[w]ithout this evidence, the State is unable to proceed with the charge of possession of more than one ounce of marijuana as the total amount of marijuana found in the common area of the residence amounted to only 2.0 grams”. Id. Consequently, the non-suppressed evidence is insufficient for the charge of possession of more than one ounce of marijuana. Id. The States authority to appeal is governed by N.D.C.C. §29-28-07.

[¶3] When reviewing the district court’s decision on a motion to suppress, this Court:

[D]efers to the district court’s findings of fact and resolve conflicts of testimony in favor of affirmance. The district court’s decision is affirmed unless there is no sufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence.

State v. Bollingberg, 2004 ND 30, ¶ 13, 674 N.W.2d 281 (citing State v. Tognotti, 2003 ND 99, ¶ 5, 663 N.W.2d 642; State v. Matthews, 2003 ND 108, ¶ 8, 665 N.W.2d 28). However, if the review involves a question of law, it is fully reviewable on appeal. Id. Questions of law are reviewable de novo. State v. Kitchen, 1997 ND 241, ¶ 12, 572 N.W.2d 106.

STATEMENT OF THE CASE

[¶4] On October 25, 2013, Evan Joseph Taylor, hereinafter referred to as Taylor, was charged with possession of controlled substance with intent to deliver, a Class B Felony, and possession of drug paraphernalia, marijuana, a Class A Misdemeanor. (Doc ID #2). On December 18, 2013, amended information was filed charging Taylor with possession of more than one ounce of marijuana, a Class C Felony, and possession of drug paraphernalia, marijuana. (Doc ID #37).

[¶5] On January 21, 2014, the State received the Defendant's Motion to Suppress Evidence and Legal Brief in Support of Motion to Suppress Evidence. (Doc ID #44&45). On January 29, 2014, the State filed a Motion to Extend the Time for Filing the State's Response to the Defendant's Motion. (Doc ID #51). That motion was granted by the Court on February 4, 2014. (Doc ID #55). On February 17, 2014, the State filed their Brief in Opposition to Defendant's Motion to Suppress. (Doc ID #57). On February 26, 2014, Taylor filed his Response to State's Brief in Opposition. (Doc ID #60).

[¶6] On February 28, 2014, Taylor then filed a Motion for Continuance and a Brief in Support of Motion for Continuance. (Doc ID #66&67). On March 4, 2014, State's Response to Defendant's Motion for Continuance was filed. (Doc ID #69). On March 10, the Court filed the Order Granting Motion for Continuance. (Doc ID #70). On April 17, 2014, and June 5, 2014, Motion Hearings were held before the Honorable Lawrence E. Jahnke. On August 20, 2014, the Court filed the Memorandum Decision and Order. (Doc ID #77). On September 9, 2014, the State filed a Notice of Appeal. (Doc ID #80).

[¶7] This is an appeal from the Memorandum Decision and Order on Defendant's/Appellee's Motion to Suppress. (Doc ID #77).

STATEMENT OF THE FACTS

¶8] On October 11, 2013, the Grand Forks Narcotics Task Force received information that Justin Nathe and his counterparts were part of a drug trafficking organization located in the Grand Forks, North Dakota area. (Doc ID #10, p. 2). In his affidavit in support of a search warrant, Task Force Agent Devan Greuel swore he was advised that Nathe and his unknown counterparts were distributing marijuana, psilocybin mushrooms, LSD, MDMA, and numerous types of illegal research chemicals. Id. The investigation revealed that Justin Nathe lived at 1817 1st Avenue North in Grand Forks, North Dakota, a single family dwelling. Id.

¶9] On October 21, 2013, the Grand Forks Narcotics Task Force conducted a garbage pull at the 1817 1st Avenue North home. (Doc ID #10, p. 3). During the search of the garbage, Task Force Agents located a small zip lock style baggie containing residue which tested positive for marijuana, two small screens which had burnt residue and the odor of marijuana, and two large plastic bags containing marijuana residue. Id. Also located in the garbage was a cut and emptied cigar wrapper which Agent Greuel explained in his affidavit is commonly used to make large marijuana cigarettes. Id. Agents also located a pay stub addressed to Justin Nathe at 1817 1st Ave N and a receipt with the name Austin on it. Id.

¶10] Based on the information received by the Task Force that Nathe, along with unknown counterparts, were involved in a drug trafficking ring and the actual drug evidence located in the garbage taken from 1817 1st Avenue North, Agent Greuel requested a search warrant be issued for the 1817 1st Avenue North residence. (Doc ID #10, p. 4). The purpose of the search warrant was to seize all controlled

substances, including but not limited to marijuana, psilocybin mushrooms, LSD, MDMA, DMT, all controlled substance paraphernalia and storage containers, any business records related to the sale of controlled substances, monies derived from the trafficking in controlled substances, and any cellular phones used to facilitate the trafficking and sale of controlled substances within Grand Forks County. Id.

[¶11] Agent Greuel's affidavit for a search warrant was submitted to Grand Forks County District Court. (Doc ID #10, p. 5). Magistrate Vigeland found that there were reasonable grounds to believe that the crime of possession of marijuana, possession of controlled substances, possession of drug paraphernalia, and possession of controlled substances with the intent to deliver may be taking place in the County of Grand Forks, North Dakota and that evidence and or proceeds of those crimes may be located at 1817 1st Avenue North, Grand Forks, North Dakota. (Doc ID #11).

[¶12] Based on this finding of probable cause, a search warrant was signed. Id. The search was to be conducted during the daytime hours only. Id. The search warrant commanded to “conduct this search of the residence of 1817 1st Avenue North in Grand Forks, and that such search shall be for the purposes of looking for and seizing all controlled substances, drug paraphernalia, and any funds derived from the sale of controlled substances, fruits of the crime and cell phones utilized in the initiation and conduction of illegal activities.” Id. The search warrant was signed on October 23, 2013. Id.

[¶13] On October 24, 2013, at approximately 1:17 p.m., Agent Greuel along with other members of the Task Force executed the search warrant for 1817 1st Avenue North.

(Doc ID #77). The residence was a single family dwelling with four bedrooms. Motion Hrg Tr. p. 9; June 5, 2014. Nathe's bedroom was found to be on the main floor, and Taylor's bedroom was found to be in the basement. Id. Justin Nathe, Evan Taylor and John Tomczak were all present at the time of the search. Id.

[¶14] Agents conducted a knock and announce warrant. Id. at 16. There are two entrances to the residence: one door to the north of the residence and one door to the west of the residence. Id. Agent Greuel knocked loudly on the west side door announcing several times, "Police, search warrant, come to the door." Id. Agent Greuel testified that Nathe was the one who answered the door. Id. When Agent Greuel first entered the side door, he noticed there was a staircase going down and a kitchen to the right. Id. at 17. The staircase going down leads to the basement where Taylor's bedroom is. Id. Once the residence was secured by agents, all three residents present were seated in the living room. Id. at 9. Agent Greuel identified the residents as Nathe, Taylor, and John Tomczak. Id. Agent Greuel learned that a fourth roommate, Joseph Horski, was not present. Id. at 10.

[¶15] During the search of the residence, agents located numerous items of marijuana paraphernalia which were placed throughout the common areas of the residence. Id. at 20. For example, in the upstairs common living room, there was a pill bottle containing marijuana, a clear glass bowl containing residue, a plastic container with residue, and a clear glass bong. Id. In the main floor living room, agents found a clear glass smoking device, a silver metal grinder with marijuana, and a homemade pumpkin smoking device. Id. Agents also noted the smell of marijuana in the residence. Id. at 22.

[¶16] Agents then searched each room of the residence. Specifically, agents searched the bedroom of the defendant, Taylor. Id. at 21. In plain view, agents observed a plastic bag containing marijuana located on top of a refrigerator. Id. Also, located in Taylor's room under his bed was a large box containing a large amount of marijuana and a handgun. (Doc ID #77). Taylor was then placed under arrest and transported to Grand Forks County Correctional Center. Id.

LAW AND ARGUMENT

I. Officers did not exceed the scope of the search warrant.

[¶17] On October 23, 2013, a Search Warrant was obtained for the residence of 1817 1st Avenue North, Grand Forks, ND. On October 24, 2013 officers executed the search warrant and seized drugs and drug paraphernalia from within this residence.

[¶18] On August 20, 2014 the district court issued a Memorandum and Order suppressing the evidence located in one of the bedrooms within this residence; specifically, within the bedroom of defendant, Evan Taylor. The district court opined that “[t]he gut issue in this case is not whether the issuance of the search warrant was justified, but rather whether the contraband found in [Taylor’s] bedroom on October 24, 2013, was lawfully seized pursuant to that warrant.” (Doc ID #77).

[¶19] Therefore, the issue presented is not whether there were reasonable grounds to issue the warrant, but whether the officers exceeded the scope of that warrant when they searched Evan Taylor’s bedroom within this residence. “The authority to search is limited to the place described in the warrant and does not include additional or different places.” State v. Erickson, 496 N.W.2d 555, 560 (N.D. 1993), (citing Keiningham v. United States, 287 F.2d 126, 129 (D.C.Cir. 1960)). Further, a search operated pursuant to a search warrant may expand to the whole vicinity protected by the warrant’s description. Id. In some situations, the search may even stretch to buildings considered to be within the curtilage of the grounds explained in the warrant. Id. A lawful search usually extends to adjacent areas, in which the property of the search may be found. Id.

[¶20] In this case, the search warrant authorized the search of the residence located at 1817 1st Avenue North in Grand Forks, and that such search shall be for the

purposes of looking for and seizing all controlled substances, drug paraphernalia, and any funds derived from the sale of controlled substances, fruits of the crime and cell phones utilized in the initiation and conduction of illegal activities.” (Doc ID #11). The Search Warrant Affidavit indicates that this is a single family dwelling. (Doc ID #10, p 2) The affidavit provides a nexus between the drugs and this residence based upon intel that Justin Nathe and his counterparts were distributing controlled substances in the Grand Forks area; Justin Nathe resided at 1817 1st Avenue North; a garbage pull completed three days prior to the execution of the warrant revealed drugs and drug paraphernalia in a garbage bag placed outside this residence which also contained documents with the name Austin, and Justin Nathe with the address of the residence. (Doc ID #10).

[¶21] This case is similar to the facts in State v. Driscoll, 2005 ND 105, 697 N.W.2d 351. In Driscoll, officers obtained and executed a search warrant at the apartment unit of Scott Olson. Driscoll at ¶3. “During the search of the bedroom, police discovered a purse belonging to Driscoll which contained drugs.” Id. at ¶3. At the time, law enforcement was working with a CI to buy cocaine and methamphetamine from an individual named Williams. Id. at ¶2. During the controlled buy, Williams entered an apartment unit rented by Scott Olson. Id. “A search of the Fargo Police computing system revealed Olson had been named with several other individuals in cocaine trafficking in the Fargo/Moorhead area”. Id. Driscoll argued that the contents of her purse should have been suppressed because the police needed to obtain a second warrant to validly inspect the purse. Id. at ¶11. Driscoll claimed that “the search was a violation of her reasonable expectation of privacy because the purse and its contents were not sufficiently particularized in the detective’s affidavit”. Id. Driscoll further argued that

“some items are so private and personal that the law should afford these items significantly more protection under the Fourth Amendment”. Id. “The search warrant made no mention of Driscoll or her personal property.” Id. at ¶14. The holding in Driscoll permitted the search of the purse pursuant to the warrant as the purse could reasonably house the object of the search, whether the purse was open or not. Id. at ¶18.

[¶22] The Driscoll opinion reiterated the holding in State v. Erickson, 496 N.W.2d 555,560 (N.D.1993), “that a search conducted pursuant to a search warrant may extend to the entire area covered by the warrant’s description.” Driscoll, 2005 ND 105, ¶16.

“Further: A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest

in the prompt and efficient completion of the task at hand.” Driscoll at ¶17, *citing* United States v. Ross, 456 U.S. 798, 820-21, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

[¶23] Therefore, the searching of Taylor’s bedroom, whether or not it was his own private or personal belongings, were covered under the warrant to search the residence as it was reasonable to believe that it contained the object of their search. “If, in the course of executing a valid search warrant, police come across an item, be it particularized in the warrant or not, that could reasonably contain the object of their search, they are authorized to search regardless of whether the item is arguably “private” or “personal.” Driscoll at ¶19. “The language from *Ross* stands for no less proposition, *citing*, 2 Wayne R. LaFave, *Search and Seizure* § 4.10(b), at 742-43 (4th ed.2004) (noting that officers executing a warrant for marijuana may search a wallet, as this is a plausible repository for marijuana).

[¶24] In this case, the place to be searched was 1817 1st Ave. N, Grand Forks, This residence is a typical 4 bedroom house with a front door, side door, kitchen, living room and basement. Motion Hrg Tr. p. 9, 17 & 19; June 5, 2014. When officers arrived at the residence they approached the side door. Id. at p 17. The door was answered by Justin Nathe. Id. This door leads directly into the kitchen and stairway to the basement. Id. Officers searched all rooms within the residence, including the room identified as being Evan Taylor’s, which was in the basement. Id. at p. 21. Law Enforcement found several items of contraband in plain view throughout the residence to include marijuana, a clear glass bowl containing residue, a plastic container with residue, a clear glass bong, a glass smoking device, a metal grinder with marijuana and a homemade pumpkin

smoking device used to ingest controlled substances. Id. at 20-21. When officers entered the home they detected the odor of burnt marijuana. Id. at p. 22. A plastic bag containing marijuana was located on top of a fridge in Evan Taylor's room. Id. at p. 21. This was observed in plain view by officers when they approached the doorway of the bedroom. Id.

[¶25] It was reasonable for officers in this case to believe that Taylors bedroom may have contained controlled substances, drug paraphernalia, and any funds derived from the sale of controlled substances, fruits of the crime and cell phones utilized in the initiation and conduction of illegal activities. At the time of the execution of the warrant, law enforcement had just observed numerous items of drug paraphernalia in the commons area, the residence smelled like burnt marijuana and officers observed a bag of marijuana sitting on top a fridge in this bedroom. Additionally, a garbage pull three (3) days prior yielded drug paraphernalia coming from the residence. At the time, officers would have no idea where within the residence the object of the search may be located or which resident within the house threw the drugs in the garbage can. Especially when law enforcement observed two different names on documentation associated with this address in the garbage with the drugs and drug paraphernalia. (Motion Hrg. P. 22-25; June 5, 2014). Should law enforcement be required to specifically articulate the exact location of the drugs within a residence or the person who threw the drugs in the garbage can, it would be an unworkable and impossible task.

[¶26] Therefore, the district court's ruling essentially would render any future garbage pull search warrants unobtainable as law enforcement would never know where the drugs came from or were stored within the residence. Furthermore, the district courts

basis for the ruling was that this residence was occupied by others and is located in a college town where this type of living arrangement was common. (Doc ID # 77, p.2) If this were the standard, our search and seizure law would apply differently to individuals who live together in a single family residence depending upon if the residence is located in a college town and whether the occupants are related and how they are related. This seems to be an uneven application of our search and seizure laws and the rights applied under the Fourth Amendment. The district court further ruled that “noteworthy is the fact that it was not revealed in the warrant application that Nathe occupied a residence that was occupied by others as well, although this was apparent by they number of vehicles usually parked there.” (Doc ID # 77, p.2) However, the testimony indicated that prior to the execution of the warrant, law enforcement did know how many people lived in the residence and the multiple vehicles were only observed at the time the warrant was executed. (Motion Hrg. p. 10-12 & 23). So, this information could not have been in the Affidavit. Nonetheless, the district courts holding would indicate a different standard be applied if there are multiple vehicles at the residence which could indicate it may be occupied by several individuals.

[¶27] In this case, Taylor was a resident of this house. Just like in Driscoll, the initial target of the investigation was not the defendant and the object of the search revolved around suspected drug trafficking and/or drugs and drug paraphernalia. Also, like in Driscoll, Taylor’s name or property was not mentioned in the search warrant affidavit or the search warrant itself. However, it was reasonable to conclude that the object of the search may be located within a bedroom of this residence. Therefore, the search of Taylors bedroom should have been permitted pursuant to the warrant even

though his name was not specifically mentioned. The search in this case was for a place not a person.

[¶28] The North Dakota Supreme Court holds that probable cause to search exists if “certain identifiable objects are probably connected with criminal activity and are probably to be found at the present time at an identifiable place.” State v. Frohlich, 506 N.W.2d 729, 732 (N.D. 1993). For this reason, the Court has rejected the idea that a search warrant is invalid because there was no offer of proof which connected a crime with the individuals involved. Id. A search warrant may be issued without the slightest clue as to the identity of the criminal as long as there is probable cause to believe that evidence of criminal activity will be located at the place to be searched. Id. This Court explained this statement further by stating:

[t]here is no constitutional requirement that [a search] warrant name the person who owns or occupies the described premises. The specificity required by the Fourth Amendment is not as to the person against whom the evidence is to be used, but rather as to the place to be searched and the thing to be seized. Indeed, probable cause might well be established to suspect that illegal activity, evidence thereof or contraband was at a given location without implicating any particular person. Id.

[¶29] In the Frohlich case, the Morton County Court issued a search warrant for an apartment. Officers were aware of the names of two of the occupants, but knew that several others were staying there. Id. at 731. Upon execution of the search warrant, officers located the stolen property they were looking for. The defendant moved to suppress the evidence on the basis that no evidence was presented that connected the crime to the individuals involved. Id. The trial court granted the motion. Id.

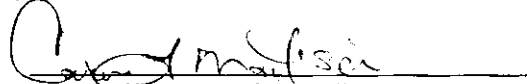
[¶30] In reversing the trial court's decision, this Court "reject[ed] the trial court's evident conclusion that [the] search warrant was invalid because there was no 'testimony given which connected the crime with the individuals involved.'" Id. at 732. The Court held, "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." Id.

[¶31] As stated in Erickson, "a lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate act of entry or opening may be required to complete the search." State v. Erickson, 496 N.W.2d 555, 560 (N.D. 1993), (quoting United States v. Ross, 456 U.S. 798, 820-21, 102 S.Ct. 2157, 2170-71, 72 L.Ed.2d 572 (1982)).

CONCLUSION

[¶32] Therefore, the State respectfully requests that this Court reverse the district court's Order suppressing the evidence located within Evan Taylor's bedroom.

Respectfully submitted this 3 day of December, 2014.



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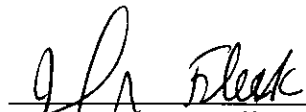
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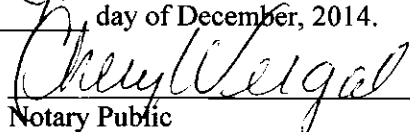
STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that on the 4th day of December, 2014, she served via e-mail true copies of the following documents:

BRIEF OF APPELLANT
APPENDIX OF APPELLANT
CONSENT TO APPEARANCE UNDER THE SENIOR PRACTICE RULE

and that said email was served on the address of:
Tyler J. Morrow and said e-mail address is: tyler@ralawfirms.com

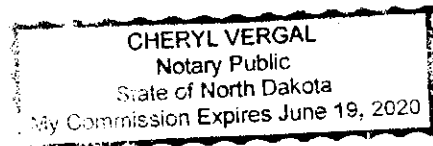


States Attorney's Office


Notary Public

Subscribed and sworn to before me this _____ day of December, 2014.

jlf



IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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 Plaintiff/Appellant,) Supreme Court No. 20140318
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 vs.) District Ct. No. 18-2013-CR-02246
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 Evan Joseph Taylor,)
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 Defendant/Appellee.)

AFFIDAVIT OF SERVICE
BY E-MAIL
SA#128233

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

¶1 The undersigned, being of legal age, being first duly sworn deposes and says that on the 10th day of December, 2014, she served via e-mail true copies of the following documents:

APPENDIX OF APPELLANT

and that said email was served on the address of:
Tyler J. Morrow and said e-mail address is: tyler@ralawfirms.com

JR Fleck

States/Attorney's Office

Subscribed and sworn to before me this 10th day of December, 2014.

Jennifer Alvstad

Notary Public

jlf

JENNIFER ALVSTAD
Notary Public
State of North Dakota
My Commission Expires Mar. 19, 2015