

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,)	
)	
Plaintiff-Appellee;)	
)	
-vs-)	
)	
JEREMY K. BALLARD,)	Supreme Court No. 20140333
)	
Defendant-Appellant.)	District Court No. 12-2014-CR-00054
.....)	

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM ORDER DENYING MOTION TO SUPPRESS

Divide County District Court
Northwest Judicial District
Honorable Paul W. Jacobson

Seymour R. Jordan
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STATEMENT OF THE ISSUE

[¶1] Whether the District Court erred in denying the Defendant's Motion to Suppress Evidence when a probation search was done without reasonable suspicion.

STATEMENT OF THE CASE

[¶2] The State concurs with Ballard's Statement of the Case.

STATEMENT OF FACTS

[¶3] The State agrees with Ballard's Statement of Facts.

ARGUMENT

[¶4] It is the State's position that the search conducted by Deputy Hubble was lawful. The State's arguments are the search was lawful under one of two exceptions to the Fourth Amendment: 1) the search was a proper probationary search; and/ or 2) Mr. Ballard freely and voluntarily consented to the search through the plea agreement he made with the State.

The search was a proper probationary search

[¶5] The first arguments from the State is the search that was conducted was a legal probationary search. This court has stated the following related to a probation search of a probationer without reasonable suspicion:

““The United States Supreme Court, in *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), discussed the requirements the Fourth Amendment imposes on searches of probationers and places where probationers are found. *Griffin* upheld the seizure of a gun in the probationer's home by probation officers acting without a warrant. *Id* at 870. The search was conducted under a Wisconsin regulation authorizing a warrantless search of a probationer or his home if there were “reasonable grounds” to believe contraband was present. *Id* at 870–71. The Court recognized “[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be ‘reasonable.’ ” *Id* at 873, 107 S.Ct. 3164. The Court stopped short, however, of equating reasonableness with particularized suspicion. *Id* at 872, 107 S.Ct. 3164. In fact, the Court declined to “embrace a new principle of law” and articulate a federal reasonable grounds standard. *Id*.

Recognizing probation is a special circumstance, the Court acknowledged a “[s]tate’s operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents ‘special needs’ beyond normal law enforcement” that justify departure from the usual warrant and probable cause requirements. *Id.* at 873–74, 107 S.Ct. 3164. These special needs and benefits presented by a state’s probation system compel a probationer to occupy the unusual status of a citizen with only conditional, rather than absolute liberty. *Id.* . . . “This Court declined to impose a requirement probationary searches may only be carried out upon a showing of “probable cause” or “reasonable suspicion.” *Id.* In one post-*Griffin* case, we again specifically declined to impose the requirement that probation-searches may be conducted upon suspicion or probable cause. *State v. Raywalt*, 444 N.W.2d 688, 690 (N.D.1989). . . .” “While the dissenters in *Griffin* would have imposed a reasonable suspicion, or possibly even a probable cause standard, the majority clearly rejected that proposition. See *U.S. v. Conway*, 122 F.3d 841, 842 (9th Cir.1997) (under *Griffin*, a probationary search is permissible if conducted under a state law satisfying the Fourth Amendment’s reasonableness standard). *Griffin* does not specifically require reasonable suspicion; it requires the search to be reasonable under a state’s statute on probationer searches. Further, nothing in *Griffin* suggests the clear logic and holding of *Perbix* should be reversed.”

State v. Smith, 1999 ND ¶9-¶18, 589 N.W.2d 546. The State is aware that the issue of the probationary search was addressed by this court in *State v. Maurstad*, where this court referenced

the *Smith* case and stated the following, “We need not apply our prior case law holding reasonable suspicion or probable cause is unnecessary for a probationary search to be valid, *See Smith*, 1999 ND 9, ¶9, 589 N.W.2d 546; *State v. LaFromboise*, 542 N.W.2d at 112 (N.D. 1996); *State v. Perbix*, 331 N.W.2d at 21 (N.D. 1984); N.D.C.C. § 12.1–32–07(4).” *State v. Maurstad*, 2002 ND 121, ¶ 28, 647 N.W.2d 688. This court also has also acknowledged that the probation search must be reasonable “Any search conducted under a condition of probation must be conducted in a reasonable manner. U.S. Const. amend. IV. The terms of the condition do not authorize searches conducted in an unreasonable manner.” *State v. Krous*, 2004 ND 136, ¶ 21, 681 N.W.2d 822.

[¶6] The State must prove that the probationary search was reasonable. The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined “by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). Inherent in the very nature of probation is that probationers “do not enjoy ‘the absolute liberty to which every citizen is entitled.’ ” *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). In assessing the governmental interest side of the balance, it must be remembered that “the very assumption of the institution of probation” is that the probationer “is more likely than the ordinary citizen to violate the law.” *Griffin v. Wisconsin*, 483 U.S. 880, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987).

[¶7] The State would argue that the issue relating to probationary searches and the requirement of reasonable suspicion or probable cause was ripe to address in *Maurstad* and

overturn *Smith* and *LaFromboise*, however this Court chose not to. Since this Court chose not to overturn its rulings in *Smith* and *LaFromboise*, those cases are still binding mandatory authority in the present case and it is the State's position that there is still no requirement for a probation search to be supported by probable cause or a reasonable suspicion so long as the search is reasonable. Based upon that argument, it is the State's argument that law enforcement was authorized to search Mr. Ballard on the date in question, so long as the search was reasonable.

[¶8] The State submits to this Court that the search was reasonable. The state submits that the government interest in this search outweighs the degree to which this search impeded on Mr. Ballard's privacy. Mr. Ballard also has a lower expectation of privacy being that he was on probation. Additionally, the State submits to the Court that one purpose of probation is rehabilitation. Here in this case the underlying charges that resulted in Mr. Ballard being on probation was ingesting methamphetamine. The State would request that this Court take judicial notice of the addictiveness of methamphetamine and how serious of a problem methamphetamine has become not only in the northwest portion of North Dakota but also throughout the state of North Dakota. Deputy Hubble under oath said that he was conducting a probation check. The State believes that the primary purpose of probation is rehabilitation and attempt to circumvent recidivism. The State would submit that the search was related to rehabilitation and recidivism. The State is unaware of any information that Mr. Ballard was being investigated for any possible criminal activity. Based upon the foregoing the State submits that the search was reasonable because of the government interest relating to the rehabilitation of Mr. Ballard and promoting justice by attempting to verify that Mr. Ballard was being law

abiding. If this court does not accept the State's argument that this was a valid probationary search the State would next argue that Mr. Ballard consented to this search.

Mr. Ballard consented to the probationary search

[¶9] Consent is another clearly delineated exception to the warrant requirement. *State v. Woinarowicz*, 2006 ND 179, ¶ 21, 720 N.W.2d 635; *State v. Genre*, 2006 ND 77, ¶ 17, 712 N.W.2d 624. Whether an officer has consent is a question of fact. *State v. Mitzel*, 2004 ND 157, ¶ 13, 685 N.W.2d 120. To be voluntary, the consent must not be coerced by explicit or implicit methods or through implied threats or covert force. *State v. Avila*, 1997 ND 142, ¶ 16, 566 N.W.2d 410. This court will consider two elements when determining voluntariness: “(1) the characteristics and condition of the accused at the time of the consent, and (2) the details of the setting in which the consent was obtained.” *Mitzel*, 2004 ND 157, ¶ 26, 685 N.W.2d 120.

[¶10] Specifically regarding consent and probation searches this court held allowing warrantless probationary searches when the conditions of probation include a condition such as in . . . N.D.C.C. § 12.1–32–07(4)(n), and we hold the condition of probation in this case which includes the word “submit” means that the probationer consents to reasonable warrantless searches without any request for consent by officers. *Krous*, 2004 ND 136, ¶19, 681 N.W.2d 822. [The defendant] consented to having her Fourth Amendment rights limited when she accepted the conditions of probation. *Id.* The Alaska Court of Appeals recognized the ability of a probation officer to abuse this grant of authority by searching a probationer's person, vehicle, or place of residence to harass a probationer. *Id.* at ¶21. We also recognize this potential abuse. Any search conducted under a condition of probation must be conducted in a reasonable manner. U.S.

Const. amend. IV. The terms of the condition do not authorize searches conducted in an unreasonable manner. *Id.*

[¶11] Mr. Ballard's criminal judgment states that he is to "submit" to a search. Appendix p. 24. Based upon that language found in his judgment and the case law stated above the State would argue that it is clear binding mandatory authority that Mr. Ballard has consented to a reasonable search of his person, place of residence and his vehicle. The state would also argue that this search is reasonable for the reasons stated in paragraph 8. *Supra* ¶8.

CONCLUSION

[¶12] For all of the foregoing reasons the State requests that this Court adhere to the previous cases that have been decided by this Court and hold that there is not a requirement of reasonable suspicion or probable cause for a probation search so long as it is reasonable. The State would also submit to the Court that the search that was conducted was reasonable based upon the aforementioned argument. If the Court finds that a reasonable suspicion is required for a probation search the State would request that this Court find that Mr. Ballard consented to this search and despite the Court's decision on the former, that the search that was conducted is reasonable. The main concern for the State is to support the basis of probation which is in the State's opinion to deter recidivism and relapse in drug related cases. Controlled substances are a serious problem in North Dakota and the State submits to this Court that continuing to allow a probation search without reasonable suspicion will further the basis for probation in all cases and more specifically in this case assist defendants with controlled substance addiction issues.

Dated this ____ day of January, 2015.

Respectfully submitted,

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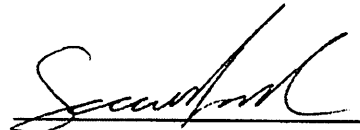
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State of North Dakota, Plaintiff-Appellee, vs. Jeremy K. Ballard, Defendant-Appellant.	Supreme Court No. 20140333 Criminal No. 12-2014-CR-00054 CETRIFICATE OF SERVICE
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I, Seymour Jordan, being first duly sworn, hereby certify that a true and correct copy of the foregoing Brief of Plaintiff- Appellee was on the 31st day of December, 2014, served electronically via email upon:

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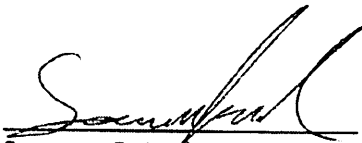
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