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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
Plaintiff/Appellee,	)	Supreme Court No. 20150042
vs.	)	
Adrian Williams,	)	Stutsman County District No. 47-2013-CR-00206
Defendant/Appellant.	)	

ON APPEAL FROM A FINDING OF GUILTY AND SENTENCE
FROM THE DISTRICT COURT
FOR THE SOUTHEAST JUDICIAL DISTRICT
STUTSMAN COUNTY, NORTH DAKOTA
THE HONORABLE JOHN E. GREENWOOD, PRESIDING

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Contents……………………………………………………………..……p. 2

Table of Authorities ....p. 3

Statement of the Issues .... ¶ 1

Statement of the Case ....¶ 5

Statement of the Facts ....¶ 14

Jurisdiction ....¶ 25

Standard of Review ....¶ 27

Argument ....¶ 30

I. The search of the defendant's hotel room without a warrant was unreasonable and did not fall within a well-recognized exception to the warrant requirement. ....¶ 31

II. The search warrant was not supported by probable cause after removing evidence found as a result of the officers' unconstitutional activity. ....¶ 45

III. The trial court abused its discretion when it denied the defendant's order for transcripts of evidentiary hearings. ....¶ 57

Conclusion ....¶ 61

TABLE OF AUTHORITIES

NORTH DAKOTA CONSTITUTION

N.D. Const. art. VI, § 6 ....¶ 26

UNITED STATES SUPREME COURT CASES

California v. Greenwood, 486 U.S. 35 (1988) ....¶ 35

Chapman v. United States, 365 U.S. 610 (1961) ....¶ 35

Florida v. Wells, 495 U.S. 1 (1990) ....¶ 39

Georgia v. Randolph, 547 U.S. 103 (2006) ....¶ 37

Illinois v. Rodriguez, 497 U.S. 177 (1990) ....¶ 37

Katz v. United States, 389 U.S. 347 (1967) ....¶¶ 33, 38

Mapp v. Ohio, 367 U.S. 643 (1961) ....¶ 49

O'Connor v. Ortega, 480 U.S. 709 (1987) ....¶ 35

Payton v. New York, 445 U.S. 573 (1980) ....¶ 34

Stoner v. California, 376 U.S. 483 (1964) ....¶¶ 34, 35

United States v. Chadwick, 433 U.S. 1 (1977) ....¶ 34

United States v. Leon, 468 U.S. 897 (1984) ....¶ 52

United States v. Matlock, 415 U.S. 164 (1974) ....¶ 37

Whren v. United States, 517 U.S. 806 (1996) ....¶ 39

Wong Sun v. United States, 371 U.S. 471 (1963) ....¶¶ 44, 49

FEDERAL CIRCUIT COURT CASES

United States v. Carter, 854 F.2d 1102 (8th Cir. 1988) ....¶ 36

United States v. Conner, 127 F.3d 663 (8th Cir. 1997) ....¶ 34

United States v. Cooper, 203 F.3d 1279 (11th Cir. 2000) ....¶ 36

United States v. Mercer, 541 F.3d 1070 (11th Cir. 2008) ....¶ 37

NORTH DAKOTA STATE CASES

Phillips v. State, 2014 ND 10, 841 N.W.2d 731 ....¶¶ 29, 59, 60

Roth v. State, 2007 ND 112, 735 N.W.2d 882 ....¶ 53

State v. Gill, 2008 ND 152, 755 N.W.2d 454 ....¶ 32

State v. Hayes, 2012 ND 9, 809 N.W.2d 309 ....¶ 28

State v. Holly, 2013 ND 94, 833 N.W.2d 15 ....¶¶ 28, 46, 50, 54

State v. Johnson, 2011 ND 48, 795 N.W.2d 367 ....¶ 51

State v. Kieper, 2008 ND 65, 747 N.W.2d 497 ....¶ 52

State v. Kunkel, 455 N.W.2d 208 (N.D. 1990) ....¶ 40

State v. Lunde, 2008 ND 142, 752 N.W.2d 630 ....¶¶ 48, 53

State v. Nguyen, 2013 ND 252, 841 N.W.2d 676 ....¶ 33

State v. Nickel, 2013 ND 155, 836 N.W.2d 405 ....¶¶ 32, 33, 44

State v. Pederson, 2011 ND 155, 801 N.W.2d 723 ....¶ 34

State v. Phelps, 297 N.W.2d 769 (N.D. 1980) ....¶ 54

State v. Ressler, 2005 ND 140, 701 N.W.2d 915 ....¶ 40

State v. Sommer, 2011 ND 151, 800 N.W.2d 853 ....¶ 32

State v. Swenningson, 297 N.W.2d 405 (N.D. 1980) ....¶ 35

NORTH DAKOTA STATUTES

N.D.C.C. § 29-28-06 ....¶ 26

NORTH DAKOTA RULES

N.D.R.App.P. 10(b)(1) ....¶ 58

[¶ 1] STATEMENT OF THE ISSUES

[¶ 2] I. The search of the defendant's hotel room without a warrant was unreasonable and did not fall within a well-recognized exception to the warrant requirement.

[¶ 3] II. The search warrant was not supported by probable cause after removing evidence found as a result of the officers' unconstitutional activity.

[¶ 4] III. The trial court abused its discretion when it denied the defendant's order for transcripts of evidentiary hearings.

[¶ 5] STATEMENT OF THE CASE

[¶ 6] This is an appeal arising from a finding of guilty following a jury trial in Stutsman County District Court to the charges of (1) possession of controlled substance with intent to deliver; (2) possession of controlled substance with intent to deliver; (3) possession of drug paraphernalia; and (4) possession of controlled substance.

[¶ 7] Adrian Williams was charged by criminal complaint with four offenses: (1) possession of controlled substance (oxycodone) with intent to deliver, a class A felony, in violation of N.D.C.C. § 19-03.1-23(1)(a); (2) possession of controlled substance (cocaine or salt, isomer, derivative or compound thereof) with intent to deliver, a class A felony, in violation of N.D.C.C. § 19-03.1-23(1)(a); (3) possession of drug paraphernalia, a class C felony, in violation of N.D.C.C. § 19-03.4-03; and (4) possession of controlled substance, a class C felony, in violation of N.D.C.C. § 19-03.1-23(7). All these offenses were alleged to have occurred on March 14, 2013. On June 6, 2013 Williams was charged by criminal information with the same offenses. Appendix of Appellant, 14-15.

[¶ 8] Numerous pretrial motions were filed by Williams in this matter. This appellant brief will focus on the motions and rulings as they pertain to the issues raised herein.

[¶ 9] Williams filed a motion to suppress evidence and brief on November 4, 2013, alleging that the law enforcement officers involved in this case violated Williams' Fourth Amendment right against unreasonable searches and seizures. Appendix, 16-26. Williams challenged the warrantless search of his hotel room at the Holiday Inn in Jamestown, North Dakota. The State filed a response to the suppression motion.

[¶ 10] On January 2, 2014 the trial court held an evidentiary hearing on the suppression motion. The trial court heard testimony from Lisa Vancil, Detective Thomas Nagel, Detective Leroy Gross, Officer Robert Schlenvogt, Officer Michael Lucht, and Deputy Jameson Overvold. The trial court denied Williams' motion to suppress evidence. Appendix, 26.

[¶ 11] A jury trial was held November 18-22, 2014. The State called the same witnesses as the suppression hearing, and in addition called April Dullum, Nicole Burns, Erik Hanson, Charlene Keller, and Mark Hardy. Williams called Donesha Robinson, Baher Barsoum, Officer Michael Lucht, Jerry Bergquist, Scott Sandness, Lisa Vancil, Captain Gary Peterson, Special Agent Arnie Rummel, Corporal Sidney Mann, Deputy Jameson Overvold, and Detective Leroy Gross. Williams also testified on his own behalf.

[¶ 12] The jury found Williams guilty on all four counts alleged in the criminal information. Williams was sentenced on February 6, 2015 to serve time with the North Dakota Department of Corrections and Rehabilitation as follows: five years on Count 1,

eight years on Count 2, five years on Count 3, and five years on Count 4. Appendix, 27-28. These sentences run concurrent, with credit for time served since March 13, 2013. Id. Williams was also ordered to pay $1,435.00 in court fees. Id.

[¶ 13] Williams timely filed a notice of appeal on February 17, 2015. Appendix, 29-30. Williams filed an order for jury trial transcripts on February 17, 2015. Appendix, 31-33. On July 2, 2015, Williams filed an amended order for pretrial hearing transcripts to include nine pretrial hearings and the sentencing hearing. Appendix, 34-35. The trial court produced the transcripts for the jury trial. The court approved a transcript for the November 7, 2014 hearing, but denied Williams' order for the other hearing transcripts. Appendix, 36-38. Williams now appeals the trial court's ruling on Williams' motion to suppress filed November 4, 2013. Williams argues law enforcement violated his Fourth Amendment right against unreasonable search and seizure by searching Williams' hotel room without a warrant. Williams argues that without the unconstitutional search of his hotel room, there was not sufficient evidence for a finding of probable cause to issue the search warrant. Williams also argues the trial court abused its discretion when it denied Williams' order for transcripts of pretrial hearings.

[¶ 14] STATEMENT OF THE FACTS

[¶ 15] On March 13, 2013 law enforcement officers in Jamestown, North Dakota set up a sting operation at the Holiday Inn Express related to an investigation for gross sexual imposition (GSI). Adrian Williams was suspected of forcing a female into engaging in a sexual act approximately one week prior. The alleged victim was an employee at the Holiday Inn. Williams was a frequent guest at the hotel, staying there on a weekly basis. Partial Transcript of Suppression Motion (Tr. Supp. Hrg.), January 2,

2014, 6:22 to 7:2; Appendix, 59-60. Williams was not staying at the Holiday Inn when the GSI was reported.

[¶ 16] Lisa Vancil, the general manager of the Holiday Inn, was contacted by law enforcement officers shortly after the GSI was reported. Tr. Supp. Hrg., 11:17 to 12:9; Appendix, 64-65. After the initial investigation, Vancil was contacted again by law enforcement about when Williams would be returning to the Holiday Inn. Tr. Supp. Hrg., 12:14 to 13:2; Appendix, 65-66. After Williams arrived back at the Holiday Inn, Vancil called the law enforcement center to notify Detective Tom Nagel that Williams had arrived and checked in to the Holiday Inn. Tr. Supp. Hrg., 13:17 to 13:21; Appendix, 66. Detective Nagel came to the Holiday Inn at that time and coordinated a pretext phone call by the alleged victim to Williams' hotel room. Tr. Supp. Hrg., 14:7 to 15:7; Appendix, 67-68. The phone call was recorded by Detective Nagel. After only a few minutes, Williams told the alleged victim he wanted to speak to her face-to-face and he was coming to the front desk. Tr. Supp. Hrg., 16:1 to 16:4; Appendix, 69.

[¶ 17] Prior to the pretext call being made by the alleged victim, law enforcement officers had positioned themselves in the room adjacent to Williams' hotel room. Vancil allowed the officers to take position next to Williams' room. Tr. Supp. Hrg., 16:9 to 16:14; Appendix, 69. When Williams decided he wanted to talk with the alleged victim face-to-face, Detective Nagel informed the officers in the room next to Williams to "go ahead and effect the arrest" for GSI. Tr. Supp. Hrg., 62:20 to 62:24; Appendix, 115. Williams was arrested by Sergeant Leroy Gross and Deputy Jamison Overvold in the hallway of the third floor. Officers found no contraband on Williams at the time he was

arrested. Tr. Supp. Hrg., 63:16 to 63:23; Appendix, 116. Williams was taken out of the Holiday Inn by law enforcement officers.

[¶ 18] The hotel manager expressed her concern with Detective Nagel about Williams' arrest and the possibility of him getting out of jail. Vancil testified that she did not talk to law enforcement about removing Williams' property before he was arrested, but after he was arrested she was fearful he would come back to the property. Tr. Supp. Hrg., 18:17 to 19:4; Appendix, 71-72. Vancil asked Detective Nagel the best way to remove Williams' property from the hotel. Tr. Supp. Hrg., 19:13 to 19:17; Appendix, 72. Detective Nagel told Vancil to check hotel policy but law enforcement had assisted with this endeavor in the past. Tr. Supp. Hrg., 64:23 to 65:11; Appendix, 117-18. Vancil checked hotel policy and determined she could rightfully remove Williams' property. Tr. Supp. Hrg., 20:7 to 20:11; Appendix, 73. Vancil called law enforcement to assist in her in removing Williams' property from his hotel room because she did not want to be accused of stealing anything. Tr. Supp. Hrg., 20:13 to 20:17; Appendix, 73.

[¶ 19] Detective Gross, Deputy Overvold, and Officer Mike Lucht were at the hotel to assist and Vancil took them directly to Williams' room. When the officers stepped out of the elevator on the third floor, they observed a small white plastic baggy in the area where Williams was arrested. The officers testified they had not seen that plastic baggy in the area at the time Williams was arrested. Tr. Supp. Hrg., 95:21 to 96:14; Appendix, 148-49; 179:2 to 179:5; Appendix, 229. The officers suspected the baggy contained a controlled substance.

[¶ 20] The officers were let into Williams' hotel room by the manager. Tr. Supp. Hrg., 25:3 to 25:9; Appendix, 78; 97:5; Appendix, 150; 181:10 to 181:12; Appenix, 231.

Vancil testified that after the plastic baggy was found in the hallway she "wanted the local law enforcement to take responsibility from that point on because of the drugs, to become responsible for it[.]" Tr. Supp. Hrg., 24:18 to 24:20; Appendix, 77.

[¶ 21] Vancil wanted to inventory and remove Williams' belongings from the hotel room. Tr. Supp. Hrg., 25:13 to 25:16; Appendix, 78. Detective Gross testified that an inventory was done as a precautionary measure because officers were asked to evict an individual accused of a crime and the officers didn't want to be accused of stealing anything from the hotel room. Tr. Supp. Hrg., 97:8 to 97:19; Appendix, 150. Deputy Overvold testified the officers were not asked by management to do an inventory of Williams' property in the hotel room. Tr. Supp. Hrg., 181:1 to 181:3; Appendix, 231.

[¶ 22] The officers took inventory of all Williams' property in the hotel room, including his coat pockets and a duffel bag. One clean glass pipe, commonly used for ingesting controlled substances, was found in a coat pocket. The officers determined the clean pipe was not drug paraphernalia and continued the search. The officers searched a black duffle bag and found multiple glass smoking devices, including one with white residue. Tr. Supp. Hrg., 153:4 to 153:8; Appendix, 203.

[¶ 23] Officer Lucht testified that since the plastic baggy was found where Williams was arrested, the officers would find more plastic baggies in Williams' room and his vehicle. Tr. Supp. Hrg., 154:6 to 154:24; Appendix, 204. A canine officer was directed to conduct an open air sniff around Williams' vehicle before the officers left the hotel to get a search warrant. Tr. Supp. Hrg., 155:10 to 155:12; Appendix, 205.

[¶ 24] A search warrant was authorized by Judge Thomas Merrick. The search warrant permitted the officers to search "Room #321 and 2012 Ford Fusion Ill License

P85-9611 in the Holiday Inn Parking Lot[.]" Appendix, 39. The search of the hotel room did not reveal any more contraband than what was already found by the officers in the black duffel bag. Williams' vehicle was moved from the hotel parking lot to the law enforcement center in order to effect the search. Tr. Supp. Hrg., 184:11 to 184:20; Appendix, 234. The search of the vehicle revealed several heat sealed bags taped under the hood. Oxycodone pills were found on the left side of the hood. Small plastic baggies matching the baggy found in the hotel hallway were found on the right side of the hood. The small plastic baggies contained Alpha-pyrrolidinopentiophenone (Alpha-PVP) and 4-methyl-N-ethylicathinone (4-MEC).

[¶ 25] JURISDICTION

[¶ 26] Appeals are allowed from lower district courts to the Supreme Court as provided by law. N.D. Const. art. VI, § 6. A defendant may appeal from a verdict of guilty and final judgment of conviction. N.D.C.C. § 29-28-06.

[¶ 27] STANDARD OF REVIEW

[¶ 28] A trial court's order denying a motion to suppress will be affirmed if there is sufficient competent evidence to support the trial court's findings and the decision is not contrary to the manifest weight of the evidence. State v. Holly, 2013 ND 94, ¶ 11, 833 N.W.2d 15. Whether a finding of fact meets a legal standard is a question of law, which is fully reviewable on appeal. Id. The determination of whether probable cause exists to issue a search warrant is a question of law. Id. A warrantless search involves constitutional issues, which are questions of law and fully reviewable on appeal. State v. Hayes, 2012 ND 9, ¶ 11, 809 N.W.2d 309.

[¶ 29] A trial court's order denying an indigent defendant's request for trial transcripts is reviewed under the abuse of discretion standard. Phillips v. State, 2014 ND 10, ¶ 18, 841 N.W.2d 731.

[¶ 30] ARGUMENT

[¶ 31] I. The search of the defendant's hotel room without a warrant was unreasonable and did not fall within a well-recognized exception to the warrant requirement.

[¶ 32] The Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution protects individuals from unreasonable searches and seizures. State v. Sommer, 2011 ND 151, ¶ 9, 800 N.W.2d 853. The Fourth Amendment provides the right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. State v. Gill, 2008 ND 152, ¶ 13, 755 N.W.2d 454. Searches without a warrant are unreasonable unless they fall within one of the few recognized exceptions. Id. The burden is on the government to show an exception existed to justify a warrantless search. Id. "A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. . . . A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property." State v. Nickel, 2013 ND 155, ¶ 20, 836 N.W.2d 405 (internal citations omitted).

[¶ 33] The court uses a two-prong test to measure a person's reasonable expectation of privacy. First, the person has exhibited an actual (subjective) expectation of privacy, and second, the expectation of privacy is one that society recognizes as reasonable. State v. Nguyen, 2013 ND 252, ¶ 8, 841 N.W.2d 676 (citing Katz v. United

States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). If the person has a reasonable expectation of privacy in an area, law enforcement must obtain a warrant prior to searching the area unless an exception to the warrant requirement applies. Nguyen, 2013 ND 252, ¶ 8, 841 N.W.2d 676. The Fourth Amendment holds a strong preference for law enforcement to obtain warrants. Nickel, 2013 ND 155, ¶ 22, 836 N.W.2d 405. Without a well-recognized exception to the warrant requirement, the evidence seized subsequent to a warrantless search must be suppressed. Id.

[¶ 34] A warrantless search of a person's home violates the Fourth Amendment. Payton v. New York, 445 U.S. 573, 585 (1980). This protection also extends to the privacy a person expects in a hotel room. Stoner v. California, 376 U.S. 483, 490 (1964); United States v. Conner, 127 F.3d 663, 666 (8th Cir. 1997); State v. Pederson, 2011 ND 155, ¶ 10, 801 N.W.2d 723. This constitutional protection belongs to the hotel room occupant; the protection cannot be waived by a hotel employee. Stoner, 376 U.S. at 489. The mere fact that a person is the hotel manager does not give that person the authority to allow police to enter and search the rooms of guests. Id., n. 7. The Fourth Amendment protects people, not places, from unreasonable government intrusions into their legitimate expectations of privacy. United States v. Chadwick, 433 U.S. 1, 7 (1977).

[¶ 35] The mere possibility that a third party may enter a hotel room and rummage through the guest's items does not negate the guest's expectation of privacy against unreasonable searches and seizures by law enforcement officers. The owner of the premises cannot consent to a search when the premises is under the control of another person. State v. Swenningson, 297 N.W.2d 405, 408 (N.D. 1980). The United States Supreme Court has repeatedly rejected the invasion of privacy on the ground that privacy

is not absolute. California v. Greenwood, 486 U.S. 35, 54 (1988) (citing Chapman v. United States, 365 U.S. 610, 616-17 (1961) (search of a house invaded tenant's Fourth Amendment rights even though landlord had authority to enter house for some purposes); Stoner, 376 U.S. at 487-490 (implicit consent to janitorial personnel to enter motel room does not amount to consent to police search of room); O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (a government employee has a reasonable expectation of privacy in his office, even though "it is the nature of government offices that others -- such as fellow employees, supervisors, consensual visitors, and the general public -- may have frequent access to an individual's office")).

[¶ 36] To determine whether a person had a reasonable expectation of privacy in a hotel room, the court should look at whether the person paid for the room or whether the person's belongings were in the room. United States v. Cooper, 203 F.3d 1279, 1284 (11th Cir. 2000) (citing United States v. Carter, 854 F.2d 1102, 1105 (8th Cir. 1988)). Williams had a reasonable expectation of privacy in his hotel room. He was a regular guest at the Holiday Inn Express and a priority club member. His room was reserved for him on a weekly basis. He was familiar to hotel staff and employees. The Holiday Inn Express was Williams' home when he was in Jamestown and Williams had an expectation of privacy in his hotel room.

[¶ 37] A hotel guest has no reason to expect that the manager will allow anyone but hotel employees into the guest's room. Georgia v. Randolph, 547 U.S. 103, 112 (2006). State law property rights, common law contractual agreements, or other general common understandings do not permit a third party to waive the guest's constitutional rights. Id.; United States v. Matlock, 415 U.S. 164, n. 7 (1974).

> [T]he general rule is that a hotel employee does not have authority to consent to a warrantless search of a room rented to a guest. [Stoner, 376 U.S. 483.] Nonetheless, a warrantless entry is valid when it is based upon the consent of a third party whom the police, at the time of entry, reasonably believed possessed authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 2800, 111 L.Ed.2d 148 (1990). The "determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution and relief that the consenting party had authority over the premises?" Id. at 2801.

United States v. Mercer, 541 F.3d 1070, 1074 (11th Cir. 2008). The officer must determine whether the consent of a third party would also be consent of the protected person given the circumstances. Illinois v. Rodriguez, 497 U.S. 177, 188 (1990).

[¶ 38] The officers' collective mindset upon entering Williams' hotel room was not solely to evict him and inventory his property for the hotel manager. Officer Lucht testified that because the plastic baggy was found where Williams was arrested, the officers would find more plastic baggies in Williams' room and his vehicle. Tr. Supp. Hrg., 154:6 to 154:24; Appendix, 204. Searches conducted because officers reasonably expected to find evidence of the crime and use the least intrusive means necessary to conduct the search are invalid. Katz, 389 U.S. at 356-57. Officers must adhere to the judicial process, to have a neutral magistrate determine probable cause to search, otherwise the search is unreasonable. Katz, 389 U.S. at 57. An officer of reasonable caution could not believe that the manager had authority over Williams' room at the time the officers entered. Williams was already under arrest and removed from the hotel for a separate crime. Upon reentering the third floor hallway, officers found what they believed to be drugs in the spot where Williams was arrested. The officers then picked up the plastic baggy without cataloguing the seizure, walked into the hotel room with the

baggy, then returned to the spot where the baggy was seized to set the baggy back on the floor and take a photograph. Tr. Supp. Hrg., 96:1 to 96:14; Appendix, 149.

[¶ 39] "[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." Florida v. Wells, 495 U.S. 1, 4 (1990). The purpose of an inventory search is not to provide the officer a means of discovering evidence of a crime. Id. The officer may not use the inventory search as a pretext for a broader search. Id., 5 (Brennan, J., concurring). The authority to search without a warrant and without probable cause is limited to very few exceptions. Whren v. United States, 517 U.S. 806, 811-12 (1996).

[¶ 40] The argument that an inventory search is an exception the warrant requirement is not persuasive in Williams' case. An inventory search protects the suspect's property while it is in police custody and protects the police from claims of lost, stolen or vandalized property. State v. Ressler, 2005 ND 140, ¶ 23, 701 N.W.2d 915. "[I]nventories conducted according to reasonable police regulations relating to inventory procedures administered in good faith are permissible under the [F]ourth [A]mendment." Id. Absent this caretaking function, an inventory search is unreasonable and violates the Fourth Amendment. State v. Kunkel, 455 N.W.2d 208, 211-12 (N.D. 1990).

[¶ 41] In the immediate case, the search of Williams' room was not conducted in accordance with police regulations. Rather, the inventory was conducted in accordance with hotel policy. The officers were not acting in good faith because, before they entered Williams' hotel room, they had evidence of two crimes: GSI and possession of a controlled substance. Certainly an officer of reasonable caution would be able to determine that Williams' hotel room may contain further evidence of these crimes. And,

given the circumstances, an officer could not believe that Williams would have consented to a search of his hotel room. The inventory search was a ruse for general rummaging in Williams' hotel room to find evidence of contraband. It was not done to protect Williams' property nor was it done to protect the officers' interests.

[¶ 42] In addition to the failings of the officers to exercise reasonable caution, the officers were not acting at the request of the hotel manager to evict Williams. Instead an officer informed the hotel manager of law enforcement's ability to help evict an unwanted person. Detective Nagel testified to the following:

> As I was leaving the hotel [Vancil] had stopped me and she was voicing her concern about if Adrian was going to get out of jail, she was worried about her -- safety of her staff and for Jane and her guests and she had asked me about -- about what to do with his things and stuff and at that time I advised her she needs to check with her policy, procedure or with her boss and see how they handle that situation. And I told her that the police department has assisted in taking personal property for safe keeping and if she wanted that she could call down to the police department and request our assistance. But she would have to check with her policy, procedures to see how they would conduct their business.

Tr. Supp. Hrg., 64:23 to 65:11; Appendix, 117-18 (emphasis added). It is apparent that the hotel manager did not request law enforcement assistance of her own volition. With the suggestion from Detective Nagel, the hotel manager checked hotel policy and, within minutes after Williams was removed from the hotel in handcuffs, called the law enforcement center to get assistance to evict Williams from his hotel room.

[¶ 43] The officers inventoried Williams' hotel room in the midst of a criminal investigation without obtaining a warrant. There was no evidence the officers were protecting Williams' property interest or their own interests. The officers claimed they were conducting inventory on behalf of the hotel manager's request and the inventory was for their own protection. Detective Gross testified that he was doing it based on his

own personal feelings. Tr. Supp. Hrg., 97:8 to 97:19; Appendix, 150. How could any officer, presented with the evidence available to law enforcement at the Holiday Inn Express at the time Williams' room was searched, not realize he was in the middle of a criminal investigation? Detective Gross knew during the inventory of Williams' room that the first pipe was for illegal narcotics. Transcript, Application for Search Warrant (Tr. App. Warr.), March 13, 2013, 6:9 to 6:17; Appendix, 49. Yet he continued on until he could find an actual pipe with residue.

[¶ 44] The officers should not be able to hide behind the guise of an inventory search to justify the warrantless search of Williams' room. The search of Williams' room was unreasonable and in violation of the Fourth Amendment. The items seized as a result of the search must be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963); Nickel, 2013 ND 155, ¶¶ 32-33, 836 N.W.2d 405.

[¶ 45] II. The search warrant was not supported by probable cause after removing evidence found as a result of the officers' unconstitutional activity.

[¶ 46] Assuming the Court finds Williams' hotel room was searched in violation of the Fourth Amendment, the remaining application for search warrant lacks probable cause. A search warrant must be based on a showing that facts and circumstances relied on by the magistrate with regard to contraband will probably be found in the place to be searched. Holly, 2013 ND 94, ¶ 12, 833 N.W.2d 15. The Court uses the totality-of-the-circumstances test to determine whether the magistrate had probable cause. Id. While each piece of information, standing alone, may not be sufficient for probable cause, the sum total of what the officer knew and observed may be sufficient. Id.

[¶ 47] In Williams' case, the affidavit for search warrant put forth the following circumstances: (1) Officers found a small plastic baggy with white powder in a hotel hallway; (2) the place where the baggy was found was the same place where Williams was arrested; (3) the amount of time that passed between Williams' arrest and when the baggy was found was sufficient for Detective Gross to go from the hotel to the law enforcement center and back; (4) the hallway was not secured by law enforcement; (5) the hotel manager let the officers into Williams' hotel room; (6) a drug-sniffing dog was present at the hotel at the time the officers entered Williams' hotel room; (7) officers began rummaging through Williams' personal effects and found a clean glass smoking device; (8) officers continued their search of Williams' hotel room and found a second glass smoking device with residue inside Williams' duffle bag; and (9) at the time the second glass smoking device was found, the drug-sniffing dog was dispatched to the parking lot and subsequently alerted to the presence of narcotics in Williams' vehicle. appx - affidavit for search warrant. Detective Gross provided additional testimony in support of the search warrant that twenty minutes passed from the time Williams was arrested to the time officers returned to the hotel. Tr. App. Warr., 5:21 to 5:23; Appendix, 48.

[¶ 48] The totality-of-the-circumstances test requires this Court to look only at the four corners of the affidavit or application for the search warrant. State v. Lunde, 2008 ND 142, ¶ 12, 752 N.W.2d 630. Removing the evidence found after the illegal search of Williams' hotel room from the totality of the circumstances leaves this Court with the following information: (1) a plastic baggy containing suspected drug residue was found in a hotel hallway twenty minutes after Williams was arrested and removed from the

premises; and (2) the hallway was not secured by law enforcement so no officer can say with any certainty where the baggy came from except that it was found in the same general area as Williams.

[¶ 49] According to the four corners of the affidavit, the inventory search of Williams' hotel room that revealed one clear pipe and one dirty pipe occurred after illegal entry by the officers. The drug-sniffing dog was not dispatched to Williams' vehicle until after the dirty pipe was found. The dirty pipe and the dog's indication on Williams' vehicle came after the illegal search. Therefore, these facts are fruit of the poisonous tree and should be removed from the totality of the circumstances in the application for the search warrant. See, Mapp v. Ohio, 367 U.S. 643 (1961); Wong Sun, 371 U.S. 471 (1963).

[¶ 50] The exclusionary rule is a judicial sanction against law enforcement for unlawful intrusion into a person's Fourth Amendment rights against unreasonable search and seizure. Holly, 2013 ND 94, ¶ 48, 833 N.W.2d 15. Accordingly, evidence seized in violation of the Fourth Amendment must be suppressed. Id.

[¶ 51] What is left in support of the search warrant fails the probable cause standard. Marginal cases are decided in favor of the trial court's findings and deference is given to the trial court's determination of probable cause. State v. Johnson, 2011 ND 48, ¶ 10, 795 N.W.2d 367. Even giving the trial court's determination every benefit of the doubt, probable cause is lacking after the exclusionary rule is applied. There was no showing that narcotics would probably be found in Williams' hotel room based on one clear plastic baggy in the hotel hallway.

[¶ 52] The State cannot rely on the good faith exception to the warrant requirement to uphold the search warrant. The good faith exception does not suppress evidence seized when an officer acts in good faith on the magistrate's determination of probable cause. State v. Kieper, 2008 ND 65, ¶ 15, 747 N.W.2d 497 (citing United States v. Leon, 468 U.S. 897 (1984)). "In applying the good faith exception, the court must determine whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Id. (citations omitted). Suppression of evidence is an appropriate remedy when (1) the issuing magistrate was misled by false information by the affiant; (2) the magistrate totally abandoned the role of acting in a neutral and detached manner; (3) the warrant was based on an affidavit lacking in probable cause; and (4) a reasonable law enforcement officer could not rely on a facially deficient warrant. Id. Williams argues that the affidavit and application for the warrant lacked probable cause.

[¶ 53] To establish probable cause, there must be a nexus between the place to be searched and the contraband sought. Lunde, 2008 ND 142, ¶ 11, 752 N.W.2d 630. Mere suspicion that criminal activity is taking place, requiring further investigation, is not probable cause. Id. This Court "must determine whether the underlying documents are devoid of factual support, not merely whether the facts they contain are legally sufficient." Roth v. State, 2007 ND 112, ¶ 32, 735 N.W.2d 882 (citations omitted). The good faith exception should not apply in Williams' case because, after excluding all evidence found as a result of the illegal search of Williams' hotel room, there is insufficient evidence remaining to support a finding of probable cause for the search warrant. See generally, Lunde, 2008 ND 142, ¶¶ 19-25, 752 N.W.2d 630 (officer's

assertions for the search warrant were so lacking in any "nexus" between criminal activity and the place to be searched that the good faith exception could not apply).

[¶ 54] The State cannot rely on the inevitable discovery exception to uphold the search warrant. North Dakota uses a two-part test to determine whether the inevitable discovery doctrine should apply.

> First, use of the doctrine is permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and must show how the discovery of the evidence would have occurred.

Holly, 2013 ND 94, ¶ 54, 833 N.W.2d 15 (citing State v. Phelps, 297 N.W.2d 769, 774 (N.D. 1980)). The purpose of this two-part test is to discourage unconstitutional shortcuts by law enforcement officers in seizing evidence that would otherwise be excluded or suppressed. Holly, 2013 ND 94, ¶ 54, 833 N.W.2d 15. When an unconstitutional shortcut is taken by an officer, the inevitable discovery exception is not available. Id., ¶ 55.

[¶ 55] According to Detective Gross's affidavit in support of the application for search warrant, the drug-sniffing dog was not deployed to the parking lot until after the second smoking device (the dirty pipe) was found in Williams' hotel room. The affidavit reads:

> The manager then used her key to open room #321 and allowed the investigators to enter. Upon beginning inventory of items in the room, the detectives took pictures of items and then began inventorying personal belongings. One jacket and a black case was inventoried and a brand new clean glass pipe or smoking device was found. The inventory continued until S/A Lucht picked up a black duffle bag and looked inside. S/A Lucht showed your affiant a glass smoking device, or pipe with white residue. The pipe looked like a common device in which illegal drugs are smoked and was used as the white residue was evident. The inventory search was then stopped.

> At this time, S/A Lucht and Cpl. Sid Mann went out in the parking lot. Mann and Lucht returned to the hotel lobby and met with your affiant. Cpl [sic] Mann informed your affiant that his K-9 dog alerted to the suspects [sic] vehicle in the parking lot. Cpl. Mann stated his dog indicated on the driver's door between the front and back door, indicating the presence of illegal narcotics by sitting in place at the site of the indication.

Appendix, 41-42.

[¶ 56] It is apparent from Detective Gross's affidavit that the drug dog was not used in the parking lot until after the officers illegally searched Williams' hotel room. According to the affidavit, the search of the hotel room and open air sniff search of Williams' vehicle were not contemporaneous. The use of the drug dog was only triggered by the seizure of the used smoking device. The use of the drug dog was accelerated by the illegal search of the hotel room. For this reason, the inevitable discovery exception is not available to law enforcement to support the search warrant.

[¶ 57] III. The trial court abused its discretion when it denied the defendant's order for transcripts of evidentiary hearings.

[¶ 58] The trial court denied Williams' request for the complete transcript from the suppression hearing held January 2, 2014, as well as several other evidentiary hearings in this matter. Appendix, 36-38. The appellant has the duty to order transcripts of any evidentiary hearing in order for the Supreme Court to properly review the trial court's findings. N.D.R.App.P. 10(b)(1). Williams filed an amended order for transcripts on July 2, 2015, requesting several transcripts from evidentiary hearings. Appendix, 34-35.

[¶ 59] The judge's order denying Williams' motion to suppress, filed January 6, 2014, stated, "The Court considered the record, the testimony of both parties' witnesses,

the briefs, and the arguments of counsel. After considering the law and the facts, the court stated its findings on the record on the 2nd of January 2014." Appendix, 26. The trial court only provided the parties with a partial transcript from the January 2, 2014 hearing. Appendix, 54-250. This transcript includes testimony of all witnesses, but does not include the judge's findings. Without a transcript, there are no findings of fact or other indication as to the reasons for the Defendant's motion that will enable his appellate counsel to make arguments on behalf of the Defendant. Phillips v. State, 2014 ND 10, ¶ 15, 841 N.W.2d 731. The issue presented in Phillips is similar to Williams' case. Phillips' appellate attorney was not the same attorney who was present at the evidentiary hearing. The Supreme Court found Phillips' appellate attorney was unable to address the findings and rulings by the court because the attorney did not have transcripts. Id., ¶ 17. Williams' appellate counsel is presented with the same issue that was addressed in Phillips. Williams' appellate counsel cannot know the trial court's findings stated on the record unless a transcript is provided.

[¶ 60] The benefit for Williams' to have a complete transcript of the January 2, 2014 hearing is apparent. The trial court's one-sentence conclusion to a full day of testimony involving six witnesses in no way makes clear the trial court's findings with regard to the issues presented. The transcript is crucial to establishing the claims Williams' raises in his appeal. A lack of transcript leaves the Supreme Court with an inadequate record to review Williams' claims. See, Phillips, 2014 ND 10, ¶¶ 17-18, 841 N.W.2d 731. The trial court abused its discretion when it denied Williams' request for a complete transcript from the January 2, 2014 hearing.

[¶ 61] CONCLUSION

[¶ 62] Law enforcement officers violated Williams' Fourth Amendment rights by searching his hotel room without a warrant. A legitimate exception to the warrant requirement did not apply. As a result of this illegal search, officers found contraband in the hotel room and sought a search warrant for Williams' hotel room and vehicle. The illegal search of Williams' hotel room tainted the remainder of the investigation, and any evidence found after the officers illegally entered Williams' hotel room is fruit of the poisonous tree. The exclusionary rule holds that any evidence seized in violation of Williams' Fourth Amendment rights must be suppressed.

[¶ 63] Williams requests the Supreme Court reverse the criminal judgments which are based on evidence found in his hotel room and vehicle and remand to the trial court for entry of an order granting Williams' motion to suppress evidence. Williams requests the Supreme Court find the trial court abused its discretion when the trial court denied Williams' order for transcripts of pretrial evidentiary hearings.

[¶ 64] The Appellant respectfully prays that the Court grant the relief requested.

Dated this 27th day of August, 2015.

Respectfully submitted,

/s/ Lee M. Grossman

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court Nos. 20150042
Plaintiff-Appellee,	)	
	)	
-vs-	)	District Court Case No.
	)	47-2013-CR-00206
	)	
	)	**CERTIFICATE OF SERVICE**
Adrian Scott Williams,	)	
Defendant-Appellant.	)	
	)	

I, Lee M. Grossman, do hereby certify that on August 27, 2015, I served the following documents:

1. Brief of Appellant
2. Appendix of Appellant

On:

Frederick R. Fremgen
Stutsman County State's Attorney
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Supreme Clerk of Court
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supclerkofcourt@ndcourts.gov

by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

Dated this 27th day of August, 2015.

I, Lee M. Grossman, hereby certify that pursuant to Rules 5(b) and 5(f), NDRCivP, that on the 27th day of August, 2015, I deposited, with postage prepaid by first class mail, in the United States post office at Valley City, North Dakota, a true and correct copy of the following document(s):

1. Brief of Appellant

2. Appendix of Appellant

The copies of the foregoing were securely enclosed in an envelope and addressed as follows:

Adrian Scott Williams
#40889
NDSP 3100 E. Railroad Ave
Bismarck, ND 58506

To the best of my knowledge, information, and belief, such address was the last known post office address of the party intended to be so served. These above-referenced documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, Rule 5.

__/s/ Lee M. Grossman____

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