

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20150250

State of North Dakota,

Plaintiff and Appellee.

- vs -

Chili Carlene Musselman,

Defendant and Appellant

APPEAL FROM THE CRIMINAL JUDGMENT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CR. NO. 09-2013-CR-03747
THE HONORABLE THOMAS R. OLSON PRESIDING

BRIEF

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ABBREVIATIONS

Motion - M.
Volume - Vol.
Transcript - Tr.
Line - L.
Page - P.

STATEMENT OF THE ISSUES

[¶1] ISSUE:

I. Was the meeting and questioning of Ms. Musselman by eight to ten law officers on October 23, 2013 at 5:3 A at the Fargo train depot a seizure and a violation of Ms. Musselmans Fourth Amendment Right?

NATURE OF THE CASE

[¶2] Chili Carlene Musselman was charged in Cass County with the following offense, Possession of Methamphetamine with intent to deliver. Prior to trial on this charge she made a Motion to Suppress evidence claiming her Fourth Amendment Rights were violated. That Motion was denied.

[¶3] Her jury trial on this charge began on October 7, 2014 and ended on October 8, 2014 with a guilty verdict. Judgment and Sentence against Ms. Musselman was filed on November 14, 2014. Notice of Appeal and Notice of Filing the Notice of Appeal were filed on March 13, 2015. The North Dakota Supreme Court entered a dismissal of Ms. Musselman's appeal on April 2, 2015 because her appeal wasn't timely filed.

[¶4] A Post Conviction Appeal alleging ineffective assistance of counsel was filed on May 18, 2015 in the above entitled matter. That post conviction appeal ended with the district court expanding Ms. Musselman's appeals time on the judgment in her possession of methamphetamine with intent to deliver case.

[¶5] Ms. Musselman then filed another notice of appeal dated August 26, 2015. An Order for Transcript was then entered on August 26, 2015. The Notice of Filing the Notice of Appeal was also filed on August 26, 2015.

[¶6] A Motion to Supplement the record was filed on September 22, 2015.

[¶7] The Clerks Certificate of Appeal was filed on September 25th, October 1st and October 2nd of 2015.

[¶8] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶9] On October 23, 2013 at 5:30 a.m. eight to ten law enforcement officers and narcotics agents were at the train depot in Fargo, North Dakota to meet Defendant/Appellee Chili Carlene Musselman when she got off an Amtrak Train Tr. Vol.1, P.84, L.5-8. The reason these law officers and narcotics agents were meeting Ms. Musselman when she got off the Amtrak train is because of information they had that she was bringing back from the State of Washington methamphetamine and heroin. Because of this information they wanted to visit with her about this information and see how she would react.

[¶10] The above information that the eight to ten law officers and narcotics agents had about Ms. Musselman began at least 2 days before October 23, 2013 when Officer Ryan Jensen got a voice mail from Bill Satrang. That voice mail informed Officer Jensen that Ms. Musselman would be coming by train from the State of Washington and she would be bringing with her two ounces of methamphetamine and two ounces of heroin A Tr. P.10., L.5-25, P.13 L. 1-12.

[¶11] According to Deputy Christopher McCully prior to 2:45 a.m. on October 23, 2013 he and other law officers and narcotics agents got together to work out an operation plan on how to handle the arrival of Ms. Musselman. A. Tr. P.19, L.4-8.

[¶12] When Matt Christianson a Fargo Police Officer got together with the law officers and narcotics agents, they decided they should all meet at the Fargo, North Dakota train depot and talk to Ms. Musselman when she got off the Amtrak Train A Tr. P.11, L.1-9. Officer Christianson and the law officer, and narcotics agents then went to the Fargo, North Dakota train depot to await the arrival of the

Amtrak train that was bringing Ms. Musselman from the State of Washington to Fargo, North Dakota A Tr. P.11, L.22-25.

[¶13] While Officer Christianson, the law officers, and narcotics agents were awaiting the arrival of the Amtrak train a green blazer arrived at the depot. A check was run on the license plates on the green blazer. That check came back showing the owner of the green blazer was Ms. Musselman. One of the officers recognized the driver of the green blazer as Steven Buzalsky A Tr. P.11, L. 22-25, P.12, L.1-10

[¶14] When the eight to ten law officers and narcotics agents met Ms. Musselman at the Fargo, North Dakota train depot not one of them told her she didn't have to answer their questions or that she could if she wanted to just walk away from them A Tr. P.23, L.21-25, P.24, L.1-6.

[¶15] When the law officer and narcotics agents talked to Ms. Musselman about the information they had about bringing drugs from the State of Washington she became defensive and denied she had gotten or was bringing any drugs from the State of Washington. Tr. Vol 1, P.87, L.11-19.

[¶16] The talk between Ms. Musselman and the eight to ten law officer and agents at the Fargo train station lasted about 20 minutes. Toward the end of that talk Ms. Musselman asked to speak to her boyfriend, Steven Buzalsky. She was then allowed to speak to him. During that talk Ms. Musselman tried to put a black cylinder in Mr. Buzalsky's pocket. One of the law officers grabbed Ms. Musselman's arm. Then TFO Larson grabbed the black cylinder. At a later time

TFO Larson opened the black cylinder and found it contained Methamphetamine.
Tr. Vol.1, P.87, L.25 to P.89, L.20.

ISSUES

[¶17] ISSUE I. Was the meeting and questioning of Ms. Musselman by eight to ten law officers on October 23, 2013 at 5:3 A at the Fargo train depot a seizure and a violation of Ms. Musselmans Fourth Amendment Right?

ARGUMENT

[¶18] In this case the Defendant/Appellant, Chili Carlene Musselman in the District Court made a Motion to Suppress Evidence claiming her Fourth Amendment Constitutional rights in the United States Constitution were violated when eight to ten law enforcement officers and narcotics agents stopped her and questioned her on October 22, 2013 at 5 A.M. after she got off an Amtrak train at the Fargo, North Dakota train depot.

[¶19] Fourth Amendment to United States Constitution

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 persons or things to be seized.

[¶20] The Fourteenth Amendment makes the Fourth Amendment applicable to all States.

[¶21] The part of the North Dakota Constitution that is applicable to this case is Article 1 § 8.

Article 1 § 8 to the North Dakota Constitution:

Section 8. 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 warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

[¶22] After Ms. Musselman's Motion to suppress evidence was denied by the District Court, she decided to appeal that denial to the North Dakota Supreme Court. In her appeal Ms. Musselman claims it was a seizure and a violation of her Fourth Amendment Rights when eight to ten law enforcement officers and narcotics agents stopped and questioned her after she got off the Amtrak train at the Fargo, North Dakota train depot.

[¶23] Assistant Cass County States Attorney, Gary Euren's response to Ms. Musselman's above claim was made in the district court during the hearing on her suppression motion when he said, in V. Tr. P.29. L.13-19.

"The North Dakota Supreme Court has never held that the mere presence of officers with a person constitutes confinement of any kind. It does not - - the Court has specifically held that it does not objectively rise to the level of believing that a person can't leave. There has to be something more. There has to be some showing of force that they can't leave. There's been nothing like that here today."

[¶24] The Standard of Review on the denial of a suppression motion is set out in [¶11] of State vs Rahier 2014 ND 153, 849 N.W.2d 212:

[¶11] The applicable standard of review of a district court's decision to grant or deny a motion to suppress evidence is well established.

A trial court's findings of fact in preliminary proceedings of a criminal case will not be reversed if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. We do not conduct a de novo review. We evaluate the evidence presented to see, based on the standard of review, if it supports the findings of fact.

[¶25] Terry vs Ohio 392 US 1 (1968) allows person to be stopped by law enforcement officers for informational and/or investigatory purposes. Terry stops are made by a law enforcement officer at the scene after they have reasonable suspicion of a person criminal activity and swift action based on the spot observations of the officer is required.

[¶26] In Ms. Musselman's case, the eight to ten officers who met her on October 23, 2013 at 5:30 a.m. when she arrived at the Fargo, North Dakota train depot had the information at least 2 days before that she was coming to Fargo, North Dakota on an Amtrak train and would be bringing with her methamphetamine and heroin. On October 23, 2013 prior to these law officers and narcotics agents going to the train depot they had a meeting about Ms. Musselman coming to the Fargo train depot. At that meeting they all decided to go to the train depot and meet her.

[¶27] The above actions of the law officers and narcotics agents is not a situation where there is an officer at the scene who has a suspicion of Ms. Musselmanns criminal activity and swift action based on the spot observations of the officer is required. The situation in Ms. Musselman's case is one where the eight to ten law enforcement officers and narcotics agents had plenty of time to go

before a magistrate and get an arrest warrant and/or a search warrant. The eight to ten law enforcement officers and narcotics agents were or should have been aware of the fact that when such large numbers of law enforcement officers and narcotics agents meet an individual that individual will be intimidated and believe that she is under arrest, frightened and intimidated.

[¶28] Terry vs Ohio 392 US 1 (1968) allows a law enforcement officer to make a stop of an individual and to question and/or search when the officer has reasonable suspicion of criminal activity because of that individuals suspicious criminal actions. No doubt a Terry stop could involve a situation where there are two or three law officers at a scene where an individuals actions involve suspicious criminal activity. This suspicious criminal activity has caused the officers to decide that swift action is necessary so questioned and searched that individual.

[¶ 29] Terry doesn't allow the sending of more law enforcement officers and narcotics agents then are on most police forces in North Dakota to a train depot to create a scene where Ms. Musselmans might do something that would cause these law officers and narcotics agents to believe she involved in suspicious criminal activity.

[¶30] When Ms. Musselman got off the train she did nothing that could be considered suspicious criminal activity. Therefore these eight to ten law officers and narcotics agents at the depot had no reason to stop or talk to her. Since there was no reason to stop Ms. Musselman the law officers and narcotics agents

stopping of Ms. Musselman violated her rights under the Fourth Amendment to the United States Constitution.

[¶31] The State may argue Ms. Musselman didn't have to talk to them and was free to walk away, but the State can't argue that any of the eight to ten law officers and narcotics agents told her she didn't have to talk to them and could walk away.

[¶ 32] At the very least it was a show of force when eight to ten law enforcement officers and narcotics agents meet and questioned Ms. Musselman at the depot. Such a show of force would make any individual think he or she couldn't leave and had to answer all of the law enforcement officers and narcotics agents questions.

[¶33] After Terry the courts are still required to enforce their traditional responsibility to guard against police conduct that is overbearing, harassing, contrary to personal security and is without objective evidentiary justification that the constitution requires. In Ms. Musselmans case there was police conduct that is overbearing, harassing and is contrary to personal security. Such conduct must be condemned by the courts and the fruits of such conduct must be excluded from evidence at trials

[¶34] In Ms. Musselman's case eight to ten law enforcement officers and narcotics agents don't take her to the station house for questioning. Instead the eight to ten law officer and narcotics agents bring the station house equivalent to Ms. Musselman at the train depot and question her. Only one or two law enforcement officers were needed to question Ms. Musselmans.

[¶35] Reid vs Georgia 448 US 438, 100 S.Ct. 2752, 65 L. Ed. 2d 890, (1980) involves a stop of two airplane passengers at an Atlanta, Georgia Airport by a DEA agent. That agent was at the airport to uncover illicit commerce in narcotics.

[¶36] The following is Reid's ruling on the DEA agents stop:

We conclude that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree on this record, that the manner in which the petitioner and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing. Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, see *Terry v. Ohio, supra*, at 27-28, this is not such a case. The agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an "inchoate and unparticularized suspicion or hunch," 392 U.S., at 27, than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.

For these reasons, the judgment of the appellate court cannot be sustained insofar as it rests on the determination that the DEA agent lawfully seized the petitioner when he approached him outside the airline terminal. Accordingly, the petition for certiorari is granted, the judgment of the Georgia *442 Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

[¶37] Both Terry and Reid required observation by law officers at the scene that would give them reasonable suspicion that the person they were observing was involved in a criminal activity. In Ms. Musselman's case the only observations of the eight to ten law officers and narcotics agents of Ms. Musselman at the train depot was, Ms. Musselman got off the train and her boyfriend was there to meet her. Such observations in no way relate to any suspicious criminal activity.

[¶38] In the case now before the court the eight to ten law officers and agents have had information for at least two days that Ms. Musselman was going to arrive at the Fargo, North Dakota train depot and that she could be bringing methamphetamine and heroine from Washington State. Therefore these officers and agents had plenty of time to take this information to magistrate and let him decide if there is sufficient information for the issuance of an arrest warrant and/or a search warrant. Instead they all decided the law allows them to go as a group to the Fargo train depot and create a situation where they hoped Ms. Musselman would panic and do something to give them reasonable suspicion she was involved in criminal activity.

CONCLUSION

[¶39] Terry stops have allowed law enforcement officers in appropriate circumstances and in an appropriate manner to approach individual's for the purpose of investigating the law officer observations of that individual's criminal behavior. Appropriate circumstances require a law officer to observe an individual doing something that gives the law officer reasonable suspicion that the individual is involved in suspicious criminal activity and from the law officer's observations it is necessary that he take immediate action.

[¶40] In Ms. Musselmans case considering all that occurred at the Fargo, North Dakota train depot on October 23, 2013 at 5:30 a.m. it is apparent the eight to ten law officers and narcotics agents prior to stopping her when she got off the train made no observation of Ms. Musselman that would cause any of them to have

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CERTIFICATE OF SERVICE

[¶45] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on December 7th, 2015, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Gary E. Euren
Assistant State's Attorney
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The undersigned further certifies that on December 7th, 2015, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.

 /s/Sharon Renfrow _____
Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office