

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	Supreme Court No. 20150250
vs.)	
)	District Court No. 09-2013-CR-03747
Chili Carlene Musselman,)	
)	
Defendant-Appellant.)	

Appeal from Order Denying Motion to Suppress dated October 6, 2014, and
Criminal Judgment and Commitment filed November 14, 2014.
Cass County District Court
East Central Judicial District
The Honorable Thomas R. Olson, Presiding

APPELLEE’S BRIEF

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[¶3] ISSUES PRESENTED

I. [¶4] Whether the district court properly concluded that reasonable and articulable suspicion existed when officers stopped Musselman at the train depot.

[¶5] STATEMENT OF THE CASE

[¶6] Musselman was charged by Information on October 23, 2013, with Possession of Methamphetamine with Intent to Deliver – 3rd Offense with a 20 year minimum, mandatory sentence. (Appellant’s App. at 7.) She filed a Motion to Suppress and Dismiss with Supporting Brief dated September 18, 2014, alleging law enforcement did not have the requisite basis to stop and question Musselman. (Appellee’s App. at 5.) The State filed its Reply Brief in Opposition to Motion to Suppress dated September 23, 2014. (Appellee’s App. at 14.) A hearing was held on October 3, 2014. (Appellee’s App. at 4.) The trial court issued its Order Denying Motion to Suppress dated October 6, 2014. (Appellant’s App. at 17.) A jury trial was held October 7-8, 2014, resulting in a verdict of guilty. (Appellant’s App. at 8.) Musselman was sentenced to 20 years imprisonment with the DOCR with credit for 142 days, and fees waived by Criminal Judgment filed November 14, 2014. (Appellant’s App. at 19.) She filed a Notice of Appeal on March 13, 2015, beyond the thirty day limit. (Appellant’s App. at 21.) The appeal was dismissed by order of this Court on April 2, 2015. (Appellant’s App. at 25.) Musselman then filed for post-conviction relief on June 18, 2015, in case number 09-2015-CV-01203. (Appellee’s App. at 17.) A hearing was held on August 4, 2015. (Appellee’s App. at 6.) The trial court ordered partial

relief by allowing this appeal on August 10, 2015. (Appellant's App. at 32.)

Notice of Appeal was filed on August 26, 2015. (Appellant's App. at 26.)

[¶7] STATEMENT OF FACTS

[¶8] The following facts were elicited at the suppression hearing.

[¶9] In October of 2013 Det. Matt Christensen received information from Det. Ryan Jensen of the Fargo Police Department that someone was going to be coming from the Washington area with methamphetamine and possibly heroin. (Suppression Hearing Transcript (S.H.Tr.) at 10:1-12.) About two days later, Jensen informed Christensen that Chili Musselman was coming on an Amtrak train with two ounces of methamphetamine and two ounces of heroin. (S.H.Tr. at 10:18-24.) Christensen passed the information on to Task Force Officers Chris McCarthy, John Burkle, and Dan Heidbreder because he knew they were investigation Musselman in another case. (S.H.Tr. at 11:1-4.) He was asked to participate in attempting to talk to Musselman when she got off the train. (S.H.Tr. at 11:7-9.) While waiting they noticed a green Blazer pull up. (S.H.Tr. at 11:25-12:1.) The plates were run and came back to Musselman as the owner. (S.H.Tr. at 12:2-3.) McCarthy believed the driver was Steven Buzalsky. (S.H.Tr. at 12:3-4.) After the train arrived, a male and female came out and walked toward the Blazer. (S.H.Tr. at 12:5-6.) The male got out of the Blazer. (S.H.Tr. at 12:7.) McCarthy identified the woman as Musselman and the male from the Blazer as Buzalsky. (S.H.Tr. at 12:7-10.) Jensen had obtained the information about Musselman's travel situation from a person involved in another case by the name of Bill

Satrang. (S.H.Tr. at 13:6-11.)

[¶10] McCarthy had been told by Christensen that Musselman would be riding the Amtrak train from Washington to Fargo to arrive on October 23. (S.H.Tr. at 18:6-12.) McCarthy, Burkel, Heidbreder, and several other officers were working a case involving methamphetamine being brought from Washington to Fargo and Musselman had been implicated. (S.H.Tr. at 18:17-21.) One source of this information was an interview with James Paul. (S.H.Tr. at 25:16-22.) McCarthy contacted Amtrak and verified that Musselman was traveling on the train scheduled to arrive in Fargo on October 23, 2013, at 2:13 a.m. and that a male named Richard Moszer was traveling with her. (S.H.Tr. at 18:25-19:3.) McCarty got several officers together and put an operation plan together. (S.H.Tr. at 19:5-6.) The train was a few hours late. (S.H.Tr. at 19:8.) They went to the Amtrak station and waited. (S.H.Tr. at 19:12-13.)

[¶11] When Musselman and Moszer came out of the station, Buzalsky got out of the car and began walking toward them. (S.H.Tr. at 19:21-24.) McCarthy and the other officers approached them and McCarthy told Musselman he wanted to speak with her. (S.H.Tr. at 19:25-20-1.) The reason for talking to her was that the information received from Christensen matched up with the information they had received in the other case. (S.H.Tr. 20:11-16.) The only time McCarty told Musselman she was being detained was after they obtained the methamphetamine from her. (S.H.Tr. 24:9-10.)

[¶12] The following additional facts were elicited at the trial.

[¶13] Detective Collin Gnoinsky was assigned surveillance duties at the Amtrak station. (Trial Transcript (T.Tr. at 18:24-25.) He did not see Musselman until she had been detained. (T.Tr. at 19:12-13.) Task Force Officer McCarthy, Detective Christensen, and Task Force Officer Larson were present at the Amtrak station. (T.Tr. at 34:1-3.)

[¶14] When the officers approached Musselman, Buzalsky, and Moszer, Christensen spoke to Moszer while McCarthy spoke to Musselman. (T.Tr. at 77:4-6.) Christensen had no direct contact with Musselman. (T.Tr. at 78:2-4.) There were eight to ten officers present at the Amtrak station. (T.Tr. at 86:5-6.) McCarthy spoke to Musselman along with Burkel and Task Force Officer Ori Oksendahl. (T.Tr. at 87:4-5.) Musselman was defensive and denied being involved with narcotics. (T.Tr. at 87:17-19.) Musselman was not read *Miranda* rights at the station. (T.Tr. at 87:22-23.) They spoke to Musselman for about twenty minutes. (T.Tr. at 87:25 to 88:3.) When Musselman was allowed to talk to Buzalsky, she tried to give him a black cylinder that was confiscated and had methamphetamine in it. (T.Tr. at 88:7-18.) Earlier, McCarthy had told Musselman she was not under arrest, but was being detained. (T.Tr. at 95:24 to 96:2.)

[¶15] **STANDARD OF REVIEW**

[¶16] “Our standard of review for violations of constitutional rights is de novo.” State v. Sevigny, 2006 ND 211, ¶ 28, 722 N.W.2d 515 (citing State v. Messner, 1998 ND 151, ¶ 8, 583 N.W.2d 109).

[¶17] “When this Court reviews a district court’s decision to grant or deny

a motion to suppress, the district court's findings of fact are given deference, and conflicts in testimony are resolved in favor of affirmance. Questions of law are fully reviewable on appeal." State v. Hurt, 2007 ND 192, ¶ 5, 743 N.W.2d 102. (citations omitted).

[¶18] LAW AND ARGUMENT

I. [¶19] The district court did properly conclude that reasonable and articulable suspicion existed when officers stopped Musselman at the train depot.

[¶20] Musselman's argument stems from the trial judge's decision to deny a motion to suppress. The facts stated in Musselman's brief come from both the motion hearing and the trial. Although the facts taken from the trial are accurate, they were not available to the judge in making his decision on the motion.

[¶21] Musselman's argument is that, because eight to ten officers were present during the contact and questioning at the Amtrak station, her 4th Amendment rights were violated. At the motion hearing there was no testimony to corroborate that. Even at the trial, the testimony did not corroborate that position. The testimony at trial was that about ten officers were at the Amtrak station, but only three of them were directly involved in questioning Musselman. Additionally, the testimony showed that some of the ten officers were questioning the other two people present at the station.

[¶22] The officers' testimony, both at the motion hearing and at trial, was that the intent was to make contact and question Musselman. A decision on any other action such as an arrest would be made during the questioning. This intent is

corroborated by the actions of the officers in approaching, immediately announcing their intent, and only having three officers directly interacting with Musselman.

[¶23] There are three permissible types of law enforcement-citizen encounters: (1) arrests, which must be supported by probable cause; (2) Terry stops, which must be supported by a reasonable and articulable suspicion of criminal activity, and (3) community caretaking encounters, which are not Fourth Amendment seizures. See State v. Olson, 2007 ND 40, ¶ 9, 729 N.W.2d 132; and See Terry v. Ohio, 392 U.S. 1 (1968). Under the doctrine announced in Terry, “police may, in appropriate circumstances and in an appropriate manner, detain an individual for investigative purposes when there is no probable cause to make an arrest if a reasonable and articulable suspicion exists that criminal activity is afoot.” State v. Torkelsen, 2006 ND 152, ¶ 11, 718 N.W.2d 22.

[¶24] To determine whether a reasonable suspicion exists, we consider the totality of the circumstances and apply an objective standard, taking into consideration the inferences and deductions an investigating officer would make based on the officer's training and experience. The question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity. Whether the facts support a reasonable and articulable suspicion is a question of law

State v. Franzen, 2010 ND 244, ¶12, 792 N.W. 2d 533 (quotations and citations omitted).

[¶25] This standard is less than that of probable cause.

Although the concept of reasonable suspicion is not readily reduced to a neat set of legal rules, we have held that reasonable suspicion does require

more than a “mere hunch.” Reasonable suspicion is a less stringent standard than probable cause. To establish probable cause, an officer must have reasonable trustworthy information sufficient to warrant a person of reasonable caution to believe an offense has been or is being committed.

State v. Loh, 2000 ND 188, ¶ 5, 618 N.W.2d 477. (Citations omitted.)

[¶26] Here, the officers had more than enough information for a reasonable articulable suspicion. A confidential informant, Bill Satrang, had relayed that Musselman would be arriving in Fargo on October 23 from Washington with drugs. She would be traveling by Amtrak. Musselman was already part of an investigation regarding bringing drugs from Washington. This information came from another informant, James Paul. A man drove her vehicle to the Amtrak station just before she was to arrive. Amtrak confirmed she was on the train.

[¶27] To determine whether a reasonable suspicion exists, we consider the totality of the circumstances and apply an objective standard, taking into consideration the inferences and deductions an investigating officer would make based on the officer's training and experience. The question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity. Whether the facts support a reasonable and articulable suspicion is a question of law

State v. Deviley, 2011 ND 182, ¶ 8, 803 N.W. 2d 561, (citing State v. Franzen, 2010 ND 244, ¶12, 792 N.W. 2d 533) (quotations and citations omitted). Based upon the totality of the circumstances, the officers had a reasonable and articulable basis to stop Musselman.

[¶28] A seizure occurs ““only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.”” State v. Gay, 2008 ND 84 ¶ 17, 748 N.W.2d 408, 415 (quoting Terry v. Ohio, 392 U.S. 1,

19 n. 16 (1968)). If a seizure has in fact occurred, the next inquiry is whether the seizure was reasonable. Id., at ¶14. “However, not all encounters between law enforcement officers and citizens constitute seizures.” Abernathy v. Dep't of Transp., 2009 ND 122, ¶ 8, 768 N.W.2d 485.

When analyzing if a seizure has occurred, the Court looks at whether there was the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

State v. Steffes, 2010 ND 232, ¶ 8, 791 N.W.2d 633 (citations omitted).

[¶29] As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification... Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 554 (1980).

[¶30] There is no question that a seizure occurred. Musselman attempts to use the fact that up to ten officers were present to nullify the reasonableness of the stop. This is not the basis for determining whether there is a reasonable and articulable basis for the stop. It only goes to whether this was a consensual or Terry stop. There are two other factors that show Musselman's theory is wrong. First, only three officers were dealing directly with Musselman. Second, there were two other persons who needed to be watched and talked to.

[¶31] **CONCLUSION**

[¶32] Therefore, the State respectfully requests this Court affirm the trial court's decision denying suppression and the jury verdict of guilty.

Dated this 6th day of January 2016. (date filled in on January 8, 2016)

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[¶33] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on the 6th day of January, 2016, to: pulkrabek@lawyer.com

Gary E. Euren

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)
)
Plaintiff - Appellee,)
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vs.)
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Chili Carlene Musselman,)
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Defendant - Appellant.)
_____)

**AFFIDAVIT OF SERVICE
BY E-MAIL**
Supreme Court No. 20150250
Cass Co. No. 2013-CR-03747

[¶1] Trina A Hiemer, being first duly sworn on oath, deposes and state that she is of legal age and that on this date she sent by e-mail, a true and correct copy of the following document in the above-entitled action:


Appellee's Brief (date added to signature page)

[¶2] A copy of the foregoing were sent by e-mail as follows:

Supreme Court: supclerkofcourt@ndcourts.com

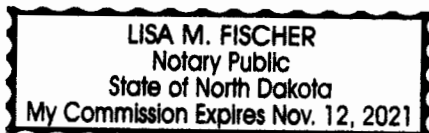
Ben Pulkrabek: pulkrabek@lawyer.com

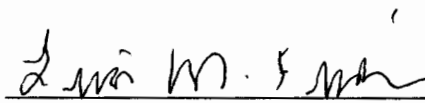
Dated this 8th day of January, 2016.



Trina A Hiemer

Subscribed and sworn to before me this 8th day of January, 2016.





Notary Public