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FEBRUARY 10, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| State of North Dakota,<br><br>Plaintiff/Appellee,<br><br>vs.<br><br>Rodney Michael Rogahn,<br><br>Defendant/Appellant. | ) | Supreme Court No. 20150297<br><br><br><br>District Court No. 51-2013-CR-02610 |

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APPEAL FROM THE DISTRICT COURT
ORDER DENYING MOTION TO SUPPRESS AND
DENYING REQUEST FOR *FRANKS* HEARING ENTERED MARCH 14, 2014
IN AND FOR THE COUNTY OF WARD, STATE OF NORTH DAKOTA,
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE TODD L. CRESAP
JUDGE OF THE DISTRICT COURT, PRESIDING

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# BRIEF OF APPELLEE

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[¶4] II. Whether executing a daytime search warrant at 9:54 p.m. is unreasonable.

[¶5] III. Whether there was sufficient competent evidence fairly capable of supporting the district court's finding that Rogahn did not make a substantial preliminary showing of knowing, intentional, or recklessly made false statements in the search warrant affidavit, and whether that decision was not contrary to the manifest weight of the evidence.

## [¶6] STATEMENT OF THE FACTS

**[¶7]** On October 29, 2013, Officer Craig Sandusky ("Sandusky") of the Ward County Narcotics Task Force ("Task Force") signed an Application and Affidavit for a Search Warrant ("Affidavit") that was signed on 8:27 p.m. by Hon. Richard L. Hagar. Appellant's Appendix (hereinafter A.A.) page 26. The search warrant was signed for Rogahn's residence at 1852 16th St. SW, Lot 16, Minot, ND, and for a black Chrysler 200, a vehicle belonging to Trisha Engstrom. A.A. 26.

**[¶8]** The Affidavit offered by Sandusky presents evidence from controlled buys of marijuana on October 23, 2013 and October 29, 2013. A.A. 28. On October 23, 2013, the Task Force conducted a controlled buy with audio and video surveillance. A.A. 28. The controlled buy took place in the CVS parking lot in the vehicle of CI 13-2659 ("Informant"). A.A. 28. The Informant purchased one ounce of what Sandusky believed to be marijuana from Trisha Engstrom ("Engstrom") for $420. A.A. 28. After the controlled buy, Engstrom left the CVS parking lot and was followed by members of the Task Force. A.A. 28. The Affidaivit states that Engstrom went to 1852 16th St. SW, Lot 16, Minot, ND, the residence of Rodney Rogahn. A.A. 28. Engstrom entered Rogahn's residence. A.A. 28.

**[¶9]** On October 29, the Informant arranged to make another purchase of marijuana from Engstrom at the same location. A.A. 28. During the recorded transaction, the Informant asked Engstrom about purchasing a quarter pound of marijuana. A.A. 29. Engstrom told the Informant that she would need to contact her source to determine how much he would charge. A.A. 29. Engstrom told the Informant that if he could get the money, she could complete the sale later that evening. A.A. 29. After the controlled buy,

Engstrom traveled to her home, parked her vehicle, and immediately walked across the street to Rogahn's residence. A.A. 29.

**[¶10]** Within approximately five minutes of leaving the site of the controlled transaction, Engstrom sent the Informant a text message stating the prices for a quarter pound and a pound of marijuana. A.A. 29. The Informant asked, via text message, if the deal could be done that night and Engstrom said that it could. A.A. 29. During the text message exchange, Engstrom was not observed leaving Rogahn's residence. A.A. 29. During direct examination, Sandusky stated that, "[Engstrom] started walking towards the direction of [Rogahn's residence]. She wasn't physically observed going in to [Rogahn's residence] as the officers just drove by." A.A. 38. At the motion hearing, Sandusky clarified that Engstrom was observed walking to Rogahn's residence and nowhere else. Appellee's Appendix (hereinafter App.) page 1. Engstrom was not observed leaving the area of Rogahn's residence for ten to fifteen minutes after the first October 29 buy. App. 1.

**[¶11]** The Task Force arranged a third controlled buy of marijuana from Engstrom. A.A. 29. A search warrant for Rogahn's residence was signed prior to the third controlled buy. A.A. 29. The controlled buy occurred, Engstrom was arrested, and the Task Force initiated a search of Rogahn's residence beginning at 9:54 p.m. A.A. 32. The search continued until 11:25 p.m. on October 29, 2013. A.A. 32. Rogahn was arrested and charged with Possession of Marijuana with Intent to Deliver, Possession of Marijuana Paraphernalia, and Conspiracy to Deliver Marijuana. A.A. 13.

## [¶12] LAW AND ARGUMENT

**[¶13]** The Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and N.D. Const. Art. I § 8, require that searches and seizures be reasonable and that warrants be issued only upon a showing of probable cause. State v. Nelson, 2005 ND 59, ¶ 3, 693 N.W.2d 910. The existence of probable cause to issue a search warrant is a question of law. Id.

### [¶14] I. The district court properly found that the search warrant in this case was supported by probable cause.

**[¶15]** Rogahn argues that the district court erred in finding that the application and affidavit for search warrant had sufficient probable cause to issue a search warrant. The State disagrees.

**[¶16]** Probable cause to search does not require the same standard of proof necessary to establish guilt at trial; rather, probable cause to search exists if it is established that 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. Handtmann, 437 N.W.2d 830, 834 (ND 1989) (quoting State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988)). All the information presented to establish probable cause should be taken together, not analyzed in a piecemeal fashion. State v. Mische, 448 N.W.2d 415, 418 (N.D. 1989). When this Court reviews the validity of a search warrant, it considers only the information contained in the affidavit or application for issuance of the warrant. State v. Schmalz, 2008 ND 27, ¶ 13, 744 N.W.2d 734.

**[¶17]** This Court applies a totality-of-the-circumstances test to review whether the information before the magistrate was sufficient to find probable cause, independent of the district court's findings. State v. Damron, 1998 ND 71, ¶ 7, 575 N.W.2d 912. A

magistrate reviewing an affidavit or application for a search warrant is to make a practical, commonsense decision on whether probable cause exists to search that particular place and, when reviewing a doubtful or marginal case, this Court resolves in favor of the magistrate's determination. Id. at ¶ 6. If a substantial basis for the magistrate's conclusion exists, this Court generally will not disturb the magistrate's conclusion on appeal. Id.

**[¶18]** Rogahn argues that this case is similar to State v. Handtmann, 437 N.W.2d 830 (ND 1989). In Handtmann, an anonymous informant contacted Det. Dennis Bullinger ("Bullinger") to report that she had observed marijuana in another person's home. Id. at 831. The anonymous informant knew the home to belong to a family by the name of Begley. Id. The anonymous informant told Bullinger that a former resident of Bismarck-Mandan, whose identity she did not know, was currently at the house to drop off marijuana and would be making other drug deliveries in the area. Id. The anonymous informant described the location of the home, its features, and the features of a vehicle owned by the Begley's. Id. Law enforcement located the home described by the anonymous informant, and identified a vehicle registered to Jeff Stockert of Grafton, ND. Id. at 831-832. Bullinger followed Stockert to the defendant's house. Id. at 832. Bullinger could not see whether Stockert carried anything into or out of the defendant's house. Id. Bullinger testified that he knew Stockert personally and that he knew him to be "suspected of trafficking in narcotics" and a "low-life dirt bag." Id. at 832-833. Based upon this information, Bullinger applied for and was granted a search warrant. Handtmann challenged the search warrant on appeal, arguing that insufficient evidence

was present to the county court to establish probable cause. Id. at 833. This Court agreed with Handtmann. Id. at 834-835.

**[¶19]** Handtmann is distinguishable from the case at hand. In this case, the search warrant affidavit prepared by Sandusky contained sufficient information from which the magistrate could conclude that probable cause existed. Immediately after each buy, Engstrom traveled to Rogahn's residence. A.A. 28-29. During the October 29 buy, Engstrom indicated to the Informant that she needed to speak with her source to determine pricing information for a quarter pound of marijuana. A.A. 29. Immediately after the October 29 buy, Engstrom traveled to her home, parked her car, and immediately walked across the street to Rogahn's residence. A.A. 29. Engstrom then communicated with the Informant through text messaging about the price for a quarter pound of marijuana. A.A. 29. The information provided in the search warrant affidavit is greater than mere reputation evidence. In this case, Engstrom's conduct after each controlled transaction implicates Rogahn's involvement. Based upon this information, the magistrate reviewing the search warrant affidavit could make a practical, commonsense determination about the likeliness of Rogahn's involvement in Engstrom's marijuana enterprise.

**[¶20]** Rogahn next argues that this case is similar to State v. Thieling. 2000 ND 106, 611 N.W.2d 861. In Thieling, law enforcement secured a search warrant based upon trash which contained items associated with the possession and sale of methamphetamine and cocaine, recent visits at the suspect home by persons who were associated with drug activity, and the fact that the defendant, in the two weeks following the trash pull, did not place trash for pickup for two weeks. Id. at ¶ 2. Thieling moved to suppress evidence

arguing that the search warrant affidavit was not supported by probable cause. Id. at ¶ 4. This Court in Thieling found that the evidence set out in the search warrant affidavit could not support a finding of probable cause. Id. at ¶ 14.

**[¶21]** Thieling is readily distinguishable from the case at bar. In Thieling, the association evidence in the search warrant affidavit was that the defendant associated with a person who was charged with a drug crime three and a half years ago, a sibling who was convicted of a drug crime seventeen years ago, and a person whose roommate was convicted of drug crimes. Id. at ¶12. This Court found that these associations were "very remote links to drug activities." Id.

**[¶22]** In this case, Engstrom engaged in two controlled buys. A.A. 28-29. Immediately after each buy, Engstrom traveled to Rogahn's residence. A.A. 29. After the October 29 buy, Engstrom likely negotiated future drug transactions from Rogahn's home through text messaging. A.A. 17-18, 29. "In order to find probable cause based on association with persons engaging in criminal activity, some additional circumstances from which it is reasonable to infer participation in criminal enterprise must be shown." Thieling, 2000 ND 106, ¶ 12, 611 N.W.2d 861 (quoting United States v. Ingrao, 897 F.2d 860, 864 (7th Cir. 1990)). Engstrom's status as an active drug dealer, her return to Rogahn's home after each buy, and Engstrom's likely text messaging from Rogahn's home after the controlled buy constitutes additional circumstances beyond mere association from which the magistrate could reasonably infer participation by Engstrom and Rogahn in a criminal enterprise.

**[¶23]** Rogahn next argues that the district court erred in considering the text messages sent by Engstrom in its determination of probable cause. Specifically, Rogahn

argues that the district court found that the text messages were not necessary for a determination of probable cause in its analysis of Rogahn's request for a Franks hearing, but then includes the text messages in its affirmation of probable cause.

**[¶24]** The district court's order was not in contradiction. The district court found that it was a "reasonable and probable assumption" on the part of the affiant, as well as the court issuing the warrant, that Engstrom entered Rogahn's residence after the October 29 controlled buy. A.A. 21. The text messages sent by Engstrom after the October 29 buy would, therefore, have been sent while Engstrom was "most likely at Rogahn's residence." A.A. 17. The district court believed that Engstrom traveled to Rogahn's residence after the October 29 buy. The district court's belief that Engstrom was at Rogahn's residence does not prevent it from considering the facts of the case independent of that belief.

**[¶25]** Rogahn argues that if this Court were to accept the fact that Engstrom sent the text messages from Rogahn's residence, it would not add to the magistrate's determination of probable cause. Rogahn reads the search warrant affidavit too narrowly.

**[¶26]** This Court has held that the information presented in a search warrant should be taken together, not analyzed in a piecemeal fashion. State v. Mische, 448 N.W.2d 415, 418 (N.D. 1989). When read as a whole, it is clear from the search warrant affidavit that Engstrom had indicated to the Informant that she would have to contact her source for pricing information for a quarter pound of marijuana. A.A. 29. Engstrom then traveled directly to Rogahn's residence and texted pricing information to the Informant within five minutes of leaving the site of the second controlled buy. A.A. 29. Engstrom had previously traveled to Rogahn's residence following an earlier controlled buy of

marijuana. A.A. 28-29. The context provided in the search warrant affidavit makes the location of Engstrom's text messaging a relevant piece of information when determining whether Rogahn and Engstrom were engaged in a criminal enterprise.

**[¶27]** Rogahn argues that the district court misinterpreted his argument regarding the veracity of information presented to the magistrate. Specifically, Rogahn argues that the identity of the informant observing Engstrom after the October 29 buy was concealed from the magistrate and, because the informant was not identified or vouched for, this information was not reliable for the magistrate's determination of probable cause.

**[¶28]** "Courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." State v. Wacht, 2013 ND 126, ¶ 13, 833 N.W.2d 455 (quoting Illinois v. Gates, 462 U.S. 213, 236 (1983)). "Observations of fellow officers of the Government engaged in a common investigation are a plainly reliable basis for a warrant applied for by one of their number." United States v. Ventresca, 380 U.S. 102, 111 (1965). When the affidavit is read as a whole, it is clear that the details set forth in the affidavit were observed by law enforcement officers engaged in a common investigation. Each of the controlled buys participated in by Engstrom were recorded by law enforcement. A.A. 28-29. After each buy, the law enforcement officers followed Engstrom to Rogahn's residence. Rogahn makes no claim that any of the observations conveyed in the search warrant affidavit were made by persons other than officers working on behalf of the Task Force. A.A. 27-30. Because the observations were made by fellow officers of the government engaged in a common investigation, Sandusky and the warrant issuing magistrate were justified in relying on those representations.

**[¶29]** Because the district court and the warrant issuing magistrate were presented

with sufficient competent evidence in the search warrant affidavit to support a finding of probable cause, this Court should affirm the magistrate's finding of probable cause.

**[¶30] II. The district court properly denied Rogahn's motion to suppress by finding that the search of Rogahn's residence was not unreasonably executed.**

**[¶31]** The district court found that the search warrant was executed at 9:54 p.m. on October 29, 2013, that the search warrant was executed within approximately an hour and a half of when the warrant was obtained, and that the execution of the search warrant lasted approximately ninety minutes. A.A. 22-23. The Court found that there was no basis for setting aside the search which was properly initiated during the day time. A.A. 23. Rogahn argues that the search of his home was unreasonable as it was impermissibly executed at night in violation of the daytime only search warrant provision. The State disagrees.

**[¶32]** N.D.R.Crim.P. 41(c)(1)(E) provides that a warrant must be served in the daytime. Daytime is defined in N.D.R.Crim.P. 41(h)(2)(B) as the hours from 6:00 a.m. to 10:00 p.m., according to local time. The search warrant in this case was executed at 9:54 p.m. 9:54 p.m. falls is defined as daytime under N.D.R.Crim.P. 41(h)(2)(B).

**[¶33]** This Court has previously upheld daytime searches which extend into the night. In Gullickson v. State, law enforcement secured a daytime search warrant for a residence, executed a search at 9:50 p.m., and continued their search until after 10 p.m. 2014 ND 155, ¶ 14, 849 N.W.2d 206. Under an ineffective assistance of counsel claim, Gullickson challenged the execution of the search warrant in his case. Id. This Court held that a warrant served prior to 10 p.m. constituted a daytime search. Id. Specifically, this Court agreed with the district court that it would be "unreasonable for officers who

properly started a search to cease their work at 10 p.m. and guard the premises until resuming their search at 6 a.m. the following day." Id.

**[¶34]** Just as in Gullickson, pragmatic concerns justify the 9:54 p.m. execution of the warrant. Co-Defendant Trisha Engstrom, having been arrested, may have been able to bond or contact others from inside the Ward County Jail, which could have led to the destruction of evidence. Preventing the risk that evidence could be destroyed would have required a law enforcement officer to remain at the Rogahn residence until 6 a.m. the next day. Such an option is just as unreasonable here as it was in Gullickson. Further, guarding the Rogahn residence through the night could have caused more intrusion and delay than the prompt execution of the search warrant which occurred in this case.

**[¶35]** The district court found that there was no basis for any claim that the search took unreasonably long, that any individuals were adversely affected by the search that was conducted, or that anything else was unreasonable about the search. A.A. 22-23. Rogahn does not specify anything other than the time of execution of the warrant which would make this search unreasonable. Because the search warrant in this case was promptly executed during the day, the district court did not err in finding that the search warrant was reasonably executed.

**[¶36] III. The district court's decision to deny Rogahn's motion for a Franks hearing was based on sufficient competent evidence and was not contrary to the manifest weight of the evidence.**

**[¶37]** Rogahn alleges that the district court erred in denying his request for a Franks hearing because: (a) Sandusky made misleading statements regarding Engstrom walking across the street to Rogahn's residence, and (b) Sandusky made misleading statements regarding the text messaging by Engstrom. The State disagrees.

**[¶38]** A hearing under Franks v. Delaware, 438 US 154 (1978), is only required if:

> (1) a defendant makes a substantial preliminary showing, accompanied by an offer of proof, that false statements were made in support of a search warrant, either knowingly and intentionally or with reckless disregard for the truth, and (2) the allegedly false statements are necessary to a finding of probable cause.

State v. Rangeloff, 1998 ND 135, ¶ 10, 580 N.W.2d 593 (quoting State v. Handtmann, 437 N.W.2d 830, 836 (ND 1989)). The defendant's burden of proof necessary to make a threshold showing to support a Franks hearing is something less than a preponderance of evidence. Id.

**[¶39]** A district court's ruling on whether a "substantial preliminary showing" has been made is a finding of fact, but this Court reviews the district court's finding of fact under a separate, but comparable, standard. Id. This Court will not reverse a district court's finding of fact in preliminary proceedings of a criminal case "if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the [district] court's finding, and the decision is not contrary to the manifest weight of the evidence." Id. (quoting City of Fargo v. Thompson, 520 N.W.2d 578 (N.D. 1994)).

**[¶40]** Rogahn argues that Sandusky misstated Engstrom's course of travel in his search warrant affidavit and failed to include the fact that law enforcement didn't observe Engstrom physically enter Rogahn's residence. The district court found that Sandusky's statements regarding Engstrom's course of travel were based upon the "realistic and probable assumption of the drug Task Force team that [Engstrom] had entered the residence" and that this assumption would have been a reasonable assumption for the

affiant and the warrant issuing court. A.A. 15. The district court's position was supported by competent evidence.

**[¶41]** In his search warrant affidavit, Sandusky never states that Engstrom physically entered Rogahn's residence. A.A. 28-29. Sandusky specifically states that Engstrom was observed "immediately walk[ing] across the street to Rodney Rogahn's residence" after the October 29 buy. Id. When testifying at the motion hearing, Sandusky elaborated and said that Engstrom was observed walking to Rogahn's residence and nowhere else. App. 1. Engstrom was not observed leaving the area of Rogahn's residence for ten to fifteen minutes after the first October 29 buy. App. 1. Within five minutes of leaving the site of the controlled buy, Engstrom engaged in text message conversations with the Informant discussing a future drug transaction. A.A. 17. Rogahn cites to no evidence contradicting Sandusky's representations in the warrant affidavit.

**[¶42]** This Court has stated that, "Courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." State v. Wacht, 2013 ND 126, ¶ 13, 833 N.W.2d 455 (quoting United States v. Ventresca, 380 U.S. 102 (1965)). The commonsense reading of the search warrant affidavit is the reading adopted by the district court: that Engstrom was observed walking to Rogahn's residence and was not observed leaving that area for ten to fifteen minutes. A.A. 17-18. A reviewing magistrate could make a commonsense determination that Engstrom probably entered Rogahn's residence following the October 29 buy.

**[¶43]** Rogahn next argues that Sandusky's statements regarding Engstrom's course of travel are particularly troubling because law enforcement could not have observed Engstrom leaving Rogahn's residence because they never saw her enter. This

argument does not hold water. Task Force officers saw Engstrom walk to Rogahn's home and nowhere else. App. 1. Engstrom was not observed leaving the area of Rogahn's residence for ten to fifteen minutes after her arrival. Id. Had Engstrom entered Rogahn's residence and remained in the residence while texting the Informant, law enforcement would not have been able to see her leave the home.

**[¶44]** Even if this Court accepts the Rogahn's argument that Sandusky misstated Engstrom's course of travel, Sandusky's statement does not rise to the level of a knowing, intentional, or reckless disregard for the truth. The district court found that Rogahn made no showing that the statement made in the search warrant affidavit was done knowingly, intentionally, or with reckless disregard for the truth. A.A. 20-21. To the contrary, the district court found that Sandusky "properly relied upon representations made to him by other law enforcement officers on the drug Task Force team" and that these assumptions were not without basis given Engstrom's prior conduct. A.A. 20-21. Rogahn does not explain how Sandusky's alleged misrepresentations were made intentionally, knowingly, or with reckless disregard for the truth. If a level of culpability were to attach to Sandusky's alleged misrepresentation that culpability would appear to be negligence. This Court has held that "mere negligence by the affiant, however, does not constitute reckless disregard for the truth." State v. Schmitt, 2001 ND 57, ¶ 15, 623 N.W.2d 409.

**[¶45]** Because Sandusky's statement was an accurate depiction of what occurred, and because Rogahn has made no showing that Sandusky's alleged misstatement was made intentionally, knowingly, or with reckless disregard for the truth, the district court made an appropriate finding, based upon competent evidence, that Rogahn failed to make

a substantial preliminary showing to support his motion for a Franks hearing. This Court should defer to the district court's findings of fact and affirm its denial of Rogahn's motion for a Franks hearing.

## [¶46] CONCLUSION

**[¶47]** This Court should find that the district court did not err in finding that there was probable cause to support the issuance of a search warrant. This Court should find that the district court did not err in finding that the search was not unreasonably executed in violation of the daytime only provision of the search warrant. This Court should find that the district court's decision to deny Rogahn's motion for a Franks hearing was based upon sufficient competent evidence and that it was not contrary to the manifest weight of the evidence.

**[¶48]** Respectfully submitted this 10th day of February, 2016.

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