IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

City of Bismarck

Appellee,

v.

Donald Leo Weisz

Appellant.

Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Thomas J. Schneider

SUPREME COURT NO. 20170191
BURLEIGH COUNTY NO. 08-2017-CR-00131

****

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

ISSUE : **Weisz was arrested in violation of N.D.C.C. § 29-06-17, and in violation of the Fourth Amendment of the United States Constitution, made applicable through the Fourteenth Amendment, and even greater protection afforded by Article I, Section 8 of the North Dakota State Constitution.**

STATEMENT OF THE CASE

Nature of the Case.

[¶ 1] This is an appeal of the Criminal Judgment entered on April 26, 2017 (App. pp. 7-10; Doc. ID Nos.: 25-26), wherein Donald Weisz entered a conditional plea on April 26, 2017, to the charge of Actual Physical Control, a Class B Misdemeanor, in violation of N.D.C.C. § 39-08-01. (App. p. 9; Doc ID. No. 25).

Course of Proceedings/Disposition of the Court Below.

[¶ 2] On January 15, 2017, Weisz was charged with Actual Physical Control, a Class B Misdemeanor, in violation of N.D.C.C. § 39-08-01. (App. p. 3; Doc. ID No.: 1). Weisz filed a Motion to Suppress Evidence on March 17, 2017, (Doc. ID Nos.: 14-18), and the City filed a Response on March 28, 2017. (Doc. ID No. 19).

[¶ 3] An evidentiary hearing was held on March 30, 2017 (Tr.), and the Court issued an Order on March 30, 2017 denying the Motion. (App. p. 4; Doc. ID No. 20). On April 26, 2017, Weisz entered a conditional plea to the charge of Actual Physical Control, a Class B Misdemeanor, in violation of N.D.C.C. § 39-08-01. (App. pp. 7-9, Doc ID. No. 25). The Court accepted the conditional guilty plea on April 26, 2017, (App. p. 10, Doc. ID No. 26). On May 26, 2017, the parties entered a stipulation for consent to a conditional plea (App. pp. 5-6, Doc. ID No. 34), and the Court accepted the stipulation for consent to a conditional plea. (App. p. 6, Doc. ID no. 36). Weisz timely filed his Notice of Appeal on May 25, 2017.

(App. p. 11, Doc. ID No.: 29).

STATEMENT OF FACTS

[¶ 4] (Note: the transcript page numbers are incorrectly numbered.) On January 14, 2017, Bismarck Police Officer Taylor Roman was dispatched to Winnipeg Drive for the report of an accident. (Tr. p. 4, lines 9-11). Roman was not given any description of the suspect. (Tr. p. 8, lines 11-13). She arrived on scene and found a white Chevy pickup facing northbound on Winnipeg Drive. (Tr. p. 5, lines 14-15). The vehicle was off of the roadway and parked in the ditch. (Tr. p. 5, lines 18-22). The keys were not in the vehicle. (Tr. p. 12, lines 14-17). Roman did not know how the vehicle got where it was. (Tr. p. 14, lines 12-15). Roman did not any footprints leading away from the vehicle. (Tr. p. 6, lines 4-6).

[¶ 5] Bismarck Police Officer Luke Kern also arrived on scene. (Tr. p. 22, line 16). Roman noticed a male who was walking downhill and stumbling. He was walking southbound on Winnipeg Drive and approaching the officers standing near the vehicle. (Tr. p. 6, lines 11-16). Kern saw that the male was walking south on Winnipeg and having difficulty maintaining his balance. (Tr. p. 22, lines 4-6). Roman noticed the male had a smell of alcohol and slurred speech. (Tr. p. 7, lines 24-25; p. 8, lines 8-11). Kern noticed that the male had a strong odor of alcoholic beverage, a poor sense of balance, blood shot eyes, and slurred speech. (Tr. p. 23, lines 8-11; Tr. p. 24, lines 3-4). It was very icy out, and they were standing downhill, so they detained the male. (Tr. p. 8, lines 16-19).

[¶ 6] Roman determined that the registered owner of the vehicle was Donald Weisz. (Tr. p. 11, lines 18-19). Officer Kern identified the male as Donald Weisz. (Tr. p. 21-22). Roman also found the registered address to be on Brandon Place, a cross street from Winnipeg Drive, and in the area. (Tr. p. 11, line 15, p. 12, line 1; Tr. p. 14, lines 6-8).

[¶ 7] Weisz never admitted to driving the vehicle. (Tr. p. 13, lines 16-18). Roman did not know if Weisz ever drove the vehicle. (Tr. p. 15, lines 9-11). Roman did not investigate the vehicle to see if it was warm. (Tr. p.15, lines 18-20). Roman did not know if there was more people in the vehicle. (Tr. p. 15, lines 12-14). Roman did not know the time the vehicle may have been driven, (Tr. p. 15, lines 15-17), and even with the snow tracks, Roman did not know when the vehicle may have been driven. (Tr. p. 17, lines 23-25).

[¶ 8] Kern did not what time the crash occurred. (Tr. p. 28, lines 14-17). Kern never had the opportunity to look at the other side of the vehicle to see if there were footprints in the snow from the passenger side of the vehicle. (Tr. p. 28, lines 18-21). Kern did not know if there were footprints on the other side of the vehicle. (Tr. p. 29, lines 13-15). The officers were unable to determine where the footprints from the driver's side came from. (Tr. p. 29, lines 17-20). The vehicle was parked close to trees but there was room for passengers to get out of the vehicle. (Tr. p. 32, lines 21-24).

[¶ 9] Kern did not ask Weisz where he was coming from, (Tr. p. 24, lines 10-11), but at one point Weisz mentioned, "I came from East 40." (Tr. p. 25, lines 8-9). The East 40 is a steak and seafood restaurant with a bar serving alcohol. (Tr. p. 24, lines 23-25, p. 25, lines 1-3). The East 40 was approximately 1.5 miles south of accident scene. (Tr. p. 10,lines 4-5; Tr. p. 24, lines 23-25, p. 25, lines 1-15). Roman did not know when Weisz came from the East 40 or how Weisz came from the East 40. (Tr. p. 15, lines 18-23). Weisz did not say what he was doing on Winnipeg Drive. (Tr. p. 26, lines 2-5). Kern placed Weisz under arrest on the charge of Actual Physical Control. (Tr. p. 28, lines 14-16).

STANDARD OF REVIEW

[¶ 10] This Court gives deference to the district court's findings of fact when reviewing a motion to suppress evidence, *State v. DeCoteau*, 1999 ND 77, ¶ 6, 592 N.W.2d 579, and a district court's findings of fact on a motion to suppress will not be reversed if there is sufficient competent evidence fairly capable of supporting the court's findings, and the decision is not contrary to the manifest weight of the evidence. *Id.* Matters of law are fully reviewable by this Court on appeal. *Id.*

LAW AND ARGUMENT

ISSUE : Weisz was arrested in violation of N.D.C.C. § 29-06-17, and in violation of the Fourth Amendment of the United States Constitution, made applicable through the Fourteenth Amendment, and even greater protection afforded by Article I, Section 8 of the North Dakota State Constitution.

City's Burden of Proof.

[¶ 11] A person alleging his rights have been violated under the Fourth Amendment has an initial burden of establishing a prima facie case of illegal seizure. *State v. Smith*, 1999 ND 9, 589 N.W.2d 546 , 548 ¶ 10. However, after the defendant has made a prima facie case, the burden of persuasion is shifted to the State to justify its actions. *Id.* Thus, the prosecution must establish the validity of a warrantless search and seizure, *McDonald v. United States*, 335 U.S. 451, 456 (1948), and the State has the burden of showing that a warrantless search falls within an exception to the warrant requirement. *State v. Avila*, 566 N.W.2d 410 (N.D.1997).

Fourth Amendment.

[¶ 12] "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment". *State v. Harris*, 286 N.W.2d 468 (N.D. 1979), *citing United*

States v. Robinson, 414 U.S. 218, 235 (1973). However, whether the arrest was valid depends on state law. *Harris, supra, citing Ker v. California*, 374 U.S. 23, 37 (1963)(emphasis added). Pursuant to N.D.C.C. § 29-06-15(f), a peace officer has authority to arrest without a warrant on a charge, made upon reasonable cause, of driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages.

[¶ 13] Probable cause to arrest exists when an officer has knowledge that would give a prudent person reasonable grounds to believe an offense has been or is being committed. *State v. Overby*, 1999 ND 47, ¶ 13, 590 N.W.2d 703. In order to have probable cause to arrest driving while under the influence, the evidence must indicate a connection between the drinking and driving. *Bohlig v. Commission of Public Safety*, 379 N.W.2d 714, 716 (Minn.App.1986).

[¶ 14] Likewise, in order to arrest Weisz for driving under the influence, the law enforcement officer was required to first establish with probable cause that Weisz was driving the vehicle. *Sayler v. North Dakota Dept. of Transp.*, 2007 ND 165, 740 N.W.2d 94. In *Sayler*, this Court found that Sayler had admitted to driving, thereby establishing the necessary probable cause that he was the driver of the vehicle.

[¶ 15] In *State v. McCave*, 282 Neb. 500, 519, 805 N.W.2d 290 (Neb.2011), the Nebraska Supreme Court found that the arresting officer did not have probable cause that the defendant had driven the vehicle. The Court found that the officers did not attempt to determine the relevant facts and that the facts did not support any inference when two other possibilities were equally plausible. The Court stated:

> In contrast to events in our previous cases, the officers did not encounter a suspect in his or her vehicle who admitted to driving at some point before the encounter; no citizen informant had reported that the suspect was driving while intoxicated or

> driving erratically; no witness at the scene reported that the suspect had driven the vehicle immediately before the police arrived, and the officers did not encounter the suspect in a location where the suspect could not have been unless the suspect had driven the vehicle while intoxicated.
>
> *Id.* at 519.

[¶16] In *Stolle v. Dir. of Revenue*, 179 S.W.3d 470 (Mo.App.2005), the arresting officer did not observe the defendant driving or the accident. *Id.* at 472. The officer arrived at the defendant's home more than half an hour after encountering the damaged vehicle. *Id.* The defendant admitted driving and said she was on her cell phone and attempted to turn, overcorrected, and hit a tree. *Id.* The officer smelled alcohol when speaking with the defendant. *Id.* The defendant said she had consumed two or three beers. *Id.*

[¶17] "However, Officer did not know whether [the defendant] had consumed any alcoholic beverages prior to the accident nor did she know when the [defendant] had consumed the alcoholic beverages. Further, there was no explicit or tacit understanding as to when [the defendant] consumed the beer." *Id.* In affirming the trial court's determination that the arresting officer did not have probable cause to believe the defendant was driving a motor vehicle in an intoxicated condition, the Missouri Court of Appeals noted, "The mere fact that a person has consumed alcoholic beverages at some undetermined point in time cannot give rise to probable cause that the person is intoxicated." *Id.* at 472 n. 1.

[¶18] *Domsch v. Dir. of Revenue*, 767 S.W.2d 121 (Mo.App.1989), is also instructive. Domsch rear-ended another vehicle, exchanged identifying information with the other driver, and then left the accident scene. *Id.* When the arresting officer arrived at the scene, the other driver provided him with a description of Domsch's vehicle and its license number. *Id.* at 123. An hour and forty minutes after the accident occurred, the arresting officer located

Domsch at a restaurant. *Id.* at 121. After observing that Domsch could not remember the name of the other driver in the accident, that Domsch had eaten a meal, that there were no alcoholic beverages in his presence, that Domsch had a strong odor of alcohol about his breath and was unsteady on his feet and was staggering, the officer arrested him. *Id.*

[¶ 19] The Missouri Court of Appeals affirmed the trial court's determination that the director had failed to carry his burden of proving that the arresting officer "had probable cause to believe that an alcohol related traffic offense had occurred because evidence that the Petitioner was intoxicated when found by the police was not substantial proof as to his condition an hour and forty minutes earlier." *Id.* at 122, 124.

[¶ 20] Similarly, in *Warren v. Director of Revenue*, 416 S.W.3d 335 (Mo.App.2013), the arresting officer responded to the scene of a one-vehicle accident on Ball Park Road. No one was present at the scene, and during his investigation he determined that the crashed vehicle belonged to Warren. *Id.* While he was investigating the scene, he received a call from dispatch that a subject who had been involved in a crash was requesting an ambulance at a location about five miles from the accident scene. *Id.*

[¶ 21] The officer went to the other location and found Warren in respiratory distress and administered medical treatment until the ambulance arrived and took Warren to the hospital. *Id.* He went to the hospital, where he arrested Petitioner for driving while intoxicated. *Id.* The Missouri Court of Appeals held that the police officer lacked reasonable grounds to believe that Warren was driving a vehicle while in an intoxicated condition. *Id.*

[¶ 22] In this case, neither officer could establish if Weisz had ever driven the vehicle prior to arresting him on the charge of Actual Physical Control. Both officers made assumptions that Weisz had driven the vehicle but never attempted to determine the relevant facts as to

whether or not he ever drove the vehicle, or when the vehicle was driven, or where and when he consumed alcohol. The officers did not encounter Weisz in his vehicle, nor did they ever ask him if he had driven the vehicle, or when the vehicle was driven, or where and when he consumed alcohol. No citizen informant had reported that Weisz was driving while intoxicated or driving erratically, nor were there any witnesses. In short, the complete failure to sufficiently investigate the facts only led to assumptions rather than actual facts, and as the foregoing cases observe, the mere fact that a person has consumed alcoholic beverages at some undetermined point in time cannot give rise to probable cause that the person has driven under the influence, or for that matter, that they have even driven a vehicle at all.

[¶ 23] As this case lacks the necessary facts to support probable cause, Weisz was arrested in violation of N.D.C.C. § 29-06-17, and also in violation of the Fourth Amendment of the United States Constitution, made applicable through the Fourteenth Amendment, and even greater protection afforded by Article I, Section 8 of the North Dakota State Constitution.

Fruit of the Poisonous Tree.

[¶ 24] The exclusionary rule prohibits evidence seized during an unlawful search from constituting proof against the victim of the search, as such evidence is "fruits of the poisonous tree." *Wong Sun v. United States,* 371 U.S. 471 (1963). Thus, any subsequent evidence gained as a result of the initial illegally acquired evidence is considered, "fruit of the poisonous tree" and must likewise be suppressed, unless an exception to the warrant requirement for the search exists. *State v. Kitchen*, 1997 ND 241, 572 N.W.2d 106, ¶ 9, *citing Wong Sun v. United States*, 371 U.S. 471 (1963).

Greater Protection.

[¶ 25] Weisz also argues that he should be afforded even greater protection under the North

Dakota State Constitution regarding the protection against unreasonable searches and seizures. The Supreme Court has stated that "[t]he North Dakota Constitution may afford broader individual rights than those granted under the United States Constitution." *State v. Rydberg*, 519 N.W.2d 306, 310 (N.D.1994); *see also State v. Nordquist*, 309 N.W.2d 109, 113 (N.D.1981); *State v. Stockert*, 245 N.W.2d 266, 271 (N.D.1976); *State v. Matthews*, 216 N.W.2d 90, 99 (N.D.1974).

Article 1, Section 8 of the North Dakota State Constitution reads:

> The right of the people to be secure in there 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.

Id.

In *State v. Klodt*, 298 N.W.2d 783 (N.D.1980), the Court stated:

> *It is within the power of this court to apply higher constitutional standards than are required of the States by the Federal Constitution.*

More importantly, this Court stated:

> *We agree that Article 1, section 8, N.D. Constitution, may afford individual greater protection against unreasonable searches and seizures than that which the Fourth Amendment provides.*

Id.

[¶ 26] In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), the Supreme Court held that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. The *DeFillippo* court noted that "[t]he purpose of the exclusionary rule is to deter unlawful police action" 443 U.S. at 38 n.3. By contrast, the emphasis of Article 1, section 8 of the North Dakota State Constitution should be on protecting an individual's right to privacy rather than on curbing governmental actions. *See State v. Lampman*, 724 P.2d 1092 (Wash.App.1986).

CONCLUSION AND PRAYER FOR RELIEF

[¶ 27] In this case, Weisz was arrested in violation of N.D.C.C. § 29-06-17, the Fourth Amendment of the United States Constitution, made applicable through the Fourteenth Amendment, and even greater protection afforded by Article I, Section 8 of the North Dakota State Constitution. Thus, the subsequent arrest was illegal, and the evidence gained thereafter was "fruits of the poisonous tree". *Wong Sun v. United States*, 371 U.S. 471 (1963).

[¶ 28] WHEREFORE, the Appellant, Donald Leo Weisz, by and through his attorney, Chad R. McCabe, prays for this honorable Court to reverse the district court's denial of his motion to suppress the chemical test.

Dated this 28th day of September, 2017.

/s/ Chad R. McCabe
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CERTIFICATE OF SERVICE

[¶ 29] A true and correct copy of the foregoing document was sent by electronic transmission on this 28th day of September, 2017, to the following:

Melanie lacour
Asst. City Attorney
Email: mlacour@bismarcknd.gov

/s/ Chad R. McCabe
CHAD R. MCCABE