

**IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA**

State of North Dakota,)	
)	
v.)	Supreme Court No.: 20180320
Plaintiff and Appellee,)	District Court No.: 36-2018-CR-00200
)	
v.)	
)	
Joseph Valles,)	
)	
Defendant and Appellant.)	
)	

**APPEAL FROM THE DISTRICT COURT’S CRIMINAL JUDGMENT DATED
AUGUST 8, 2018 IN RAMSEY COUNTY, NORTHEAST JUDICIAL DISTRICT,
NORTH DAKOTA, THE HONORABLE LONNIE OLSON, PRESIDING**

BRIEF OF THE APPELLEE

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ISSUES PRESENTED

[¶1] I. Whether the District Court properly denied Mr. Valles's motion to suppress.

STATEMENT OF THE CASE

[¶2] This is an appeal following Mr. Valles's conditional plea of guilty to possession of a controlled substance with intent to deliver, violation of a domestic violence protection order, possession of a controlled substance (2 counts) and possession of drug paraphernalia entered after the district court denied Mr. Valles's motion to suppress evidence found on a cell phone. The District Court considered the cell phone abandoned property and thus found Mr. Valles had no reasonable expectation of privacy in the cell phone and contents found thereon.

STATEMENT OF THE FACTS

[¶3] On or about April 5, 2018, a citizen found a cell phone in a parking lot. (Transcript, p. 15, ln 13-14). This citizen brought the cell phone to the Devils Lake Police Department on April 6, 2018. (Transcript, p. 15-16, ln 25-2) In an attempt to identify the owner of the cell phone, Officer Mickelson tried a common swipe passcode and unlocked the phone. (Transcript, p. 7, ln 4-6) Officer Mickelson went to the photo section of the phone to try identify who may be the owner of the phone. (Transcript, p. 7, ln 8-9). Officer Mickelson recognized Mr. Valles in the photos. (Transcript p. 7, ln 8-9) Officer Mickelson also recognized Jessica Bear in the photos. (Transcript p. 9, ln 8) Officer Mickelson testified he was aware of an order prohibiting contact between Mr. Valles and Ms. Bear. (Transcript p. 33, ln 20-23) Officer Mickelson observed what he believed to be controlled substances and paraphernalia in the photos. (Transcript p. 11, ln 10-15) Officer Mickelson testified

nobody contacted the police department to report a missing cell phone. (Transcript p. 16, ln 22-24). Officer Mickelson testified nobody contacted the police to report a stolen phone. (Transcript p. 17, ln 2-4) Officer Mickelson testified he turned the phone over to Lake Region Task Force Officer Juarez. (Transcript p. 13-14, ln 24-9).

[¶4] Officer Juarez testified he received the phone on April 6, 2008 from Officer Mickelson. (Transcript p. 44, line 20-22) Officer Juarez testified the cell phone was found in a parking lot approximately a half mile from Mr. Valles's residence. (Transcript p. 46, ln 8-10) Officer Juarez testified he looked through the photos, video, Facebook messenger, call log contained on the cell phone. (Transcript p. 46-47, ln 11-3) Officer Juarez testified the date stamp of the video with Mr. Valles and Ms. Bear was April 2, 2018 at 10:00 am. (Transcript p. 47, ln 5-11) Officer Juarez testified he viewed messages through Facebook messenger about people looking for drugs. (Transcript p. 48-49, ln 18-2) Officer Juarez also testified he was familiar with the location of the video based on prior contacts with Mr. Valles. (Transcript p. 49, ln 16-21). Officer Juarez testified following his viewing of the portions of the phone he applied for a search warrant of the residence of Mr. Valles. (Transcript p. 50, ln 3-6)

[¶5] Officer Juarez testified after executing the search warrant on April 6, 2018, items of drug paraphernalia, as well as Ms. Bear were found at the residence of Mr. Valles. (Transcript p. 50-51, ln 22-6) Mr. Valles was not home at this time. (Transcript p. 51, ln 9-10) Officer Juarez testified he asked an officer who lives in the area of Mr. Valles to let Officer Juarez know if Mr. Valles showed up at home. (Transcript p. 52, ln 2-7).

[¶6] Officer Juarez testified on April 8, 2018 around 4:00 pm, he received information that Mr. Valles arrived at home. (Transcript p. 52, ln 8-14). Officer Juarez testified Mr.

Valles was arrested at this time for violation of the protection order. (Transcript p. 52, ln 15-23) Officer Juarez testified during the arrest, items believed to be controlled substances were located on Mr. Valles's person. (Transcript p. 53, ln 1-3). Officer Juarez testified Mr. Valles, post-*Miranda*, indicated there was marijuana inside his vehicle. (Transcript p. 54, ln 11-25) Officer Juarez testified items of marijuana, and marijuana paraphernalia were located inside of Mr. Valles's vehicle. (Transcript p. 57, ln 4-11).

[¶7] Officer Juarez testified a second search warrant was obtained on April 8, 2018 for the residence of Mr. Valles. (Transcript p. 57, ln-13-19) Officer Juarez testified additional items of controlled substances and drug paraphernalia were located in the residence of Mr. Valles. (Transcript p. 58, ln 3-10)

[¶8] Following argument by the State and Mr. Valles, the district court took the matter under advisement and issued an Order on August 1, 2018 denying Mr. Valles's motion to suppress. (Appellant's Appx. at 4)

[¶9] On August 8, 2018 Mr. Valles entered a conditional plea of guilty, approved by the District Court on August 9, 2018. (Appellant's Appx. at 6).

LAW AND ARGUMENT

I. The District Court properly denied Mr. Valles's motion to suppress

[¶10] In State v. Adams, 2018 ND 18, ¶8-9, 905 N.W.2d 758, this court recently addressed the standard of review on appeal and noted:

When reviewing a district court's decision on a motion to suppress: We will defer to a [district] court's findings of fact in the disposition of the motion to suppress. Conflicts in testimony will be resolved in favor of affirmance, as we recognize the [district] court is in a superior position to assess credibility of witnesses and weigh

the evidence. Generally, a [district] court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the [district] court's findings, and if its decision is not contrary to the manifest weight of the evidence.

State v. Gatlin, 2014 ND 162, ¶4, 851 N.W.2d 178 (citations omitted).

Whether an individual has a reasonable expectation of privacy in an area is reviewed under the de novo standard of review. State v. Williams, 2015 ND 103, ¶ 14, 862 N.W.2d 831.

[¶11] A warrantless search or seizure of property that has been abandoned does not violate the fourth amendment. State v. Huether, 453 N.W.2d 778 (ND 1990). Abandonment does not turn on a defendant's subjective intent, but rather on "the objective facts available to the investigating officers." U.S. v. Crumble, 878 F.3d 656, 659 (8th Cir. 2018) (petition for certiorari docketed June 25, 2018). The issue is whether the defendant in leaving the property has relinquished his reasonable expectation of privacy. Id. at 659-660. A finding of abandonment depends on the totality of circumstances, with two important facts being denial of ownership and physical relinquishment of the property. Id.

[¶12] The facts found by the district court are that Mr. Valles did not report his cell phone stolen or missing. Mr. Valles presented no evidence showing he did anything to preserve his right to privacy in the contents of the phone or of the phone itself. The cell phone was found on April 5, 2018, in a location approximately one-half mile away from Mr. Valles's residence. The phone was turned over to law enforcement on April 6, 2018. At no time during the three- day period did Mr. Valles ever report his cell phone stolen or missing. It is reasonable to conclude that he abandoned the cell phone and whatever right to privacy he may have had in it.

[¶13] A reasonable expectation of privacy has two elements: 1) the individual must exhibit an actual, subjective expectation of privacy, and 2) that expectation must be one that society recognizes as reasonable. State v. Gatlin, 2014 ND 162, ¶5, 851 N.W.2d 178. It is the State's position that a cell phone left discarded in a parking lot, openly exposed to the public is not an effect that one can reasonably presume is protected. See Katz v. United States, 389 U.S. 347 (1967). There was no evidence presented by Mr. Valles that he had no ability to recover his cell phone if it wasn't his intent to abandon it. Mr. Valles indicates in his brief he couldn't do anything about reporting his lost cell phone. However, Mr. Valles doesn't indicate why he wasn't able to do so, just that he was merely out of town.

CONCLUSION

[¶ 14] The district court properly denied Mr. Valles's motion to suppress. The Appellee requests that the Court affirm the district court decision.

Respectively submitted on December 27, 2018.

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Joseph Valles,)	Certificate of Service
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)	

The undersigned, being of legal age, being first duly sworn deposes and says that she served true copy of the following:

Appellee's Brief

Upon:

Ulysses Jones, Appellant's Attorney, by electronic mail at joneslawoffice@gondtc.com

Dated December 27, 2018

/s/Kari M. Agotness

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