20190311
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 25, 2019
STATE OF NORTH DAKOTA

# IN THE SUPREME COURT

# STATE OF NORTH DAKOTA

| | |
|---|---|
| **STATE OF NORTH DAKOTA,** Plaintiff **~~Respondent~~ / Appellee,** **vs.** **FRANK RICHARD WEST,** Defendant **~~Petitioner~~ / Appellant.** | **Supreme Court No. 20190311** **District Court No. 18-2019-CR-00461** |

## APPELLANT'S BRIEF

**Appeal from Criminal Judgment Entered on October 15, 2019 by Grand Forks County District Court, Northeast Central Judicial District, State of North Dakota, The Honorable Lolita G. Hartl Romanick Presiding**

**Oral Arguments are REQUESTED as this case presents issues which have created a case of First Impression before this Court regarding a purported probation search in conjunction with the Constitutionally protected reasonable expectation of privacy**

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## [¶ 3] STATEMENT OF THE ISSUES

**[¶ 4]** Whether an invited house guest has standing to object to a probation search of personal property?

**[¶ 5]** Whether the search of this residence can qualify as a probation search at all under these circumstances?

## [¶ 6] STATEMENT OF THE CASE

**[¶ 7]** Frank West (hereinafter "West") appeals the district court's denial of his motion to suppress evidence by way of a Conditional Guilty Plea and Criminal Judgment dated October 25, 2019. A.A. at 59, 70, & 71. Following the district court's denial of West's motion to suppress, West plead guilty on a conditional basis to Possession with Intent to Manufacture/Deliver Marijuana, in violation of N.D.C.C. § 19-03.1-23(1)(b), a Class B Felony. West plead guilty on a conditional basis on October 14, 2019, preserving his right to appeal the district court's pretrial order to This Court under N.D.R.Crim.P. 11(a)(2). A.A. at 70.

**[¶ 8]** West's sentence was then deferred for a period of 18 months, while he is placed in supervised probation. A.A. at 71. West was given credit for the 222 days he had spent in pretrial custody as of October 14, 2019 and released to begin his deferred imposition of sentence.

**[¶ 9]** West then filed a timely notice of appeal on October 15, 2019, pursuant to N.D.R.App.P. 4. A.A. at 75. It should be noted, the criminal judgment is dated after the notice of appeal due to a clerical error in the judgment which was rectified on October 24, 2019. The District Court had jurisdiction under N.D.C.C.

§ 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-28-06 and N.D. Const. art. VI, § 2.

## [¶ 10] STATEMENT OF THE FACTS

**[¶ 11]** On March 6, 2019 probation officers along with Grand Forks Narcotics Task Force officers obtained access to 502 N. 48th St., Apt. 204, Grand Forks, North Dakota (hereinafter "the residence") from building management under the pretense of a probation search. A.A. at 19:14-19[1]. The probation search was in conjunction with the supervised probation of Darion Chaney. A.A. at 18:13-21. On the date of the search Mr. Chaney had been in custody at the Grand Forks Correctional Center (GFCCC) for twelve days, since February 23, 2019. A.A. at 20:6-7. Mr. Chaney was sitting in GFCCC on a 30-day Domestic Violence Court sanction, and not due to be released until March 20, 2019. A.A. 17:23-24.

**[¶ 12]** Upon the forcible entrance on March 6, 2019, law enforcement discovered West sleeping on the couch across from the main doorway. A.A. at 19:13-14. West was commanded to keep his hands visible so he could be detained immediately upon entering. A.A. at 33:23-25. West was compliant and with hands visible, informed officers of a firearm in the couch where he was lying. A.A. at 34:5-7. West was handcuffed and detained and remained detained throughout the search of the residence. A.A. at 25:6-11. West was not the subject of the search,

[1] Mr. West did not request a transcript in this case, as a partial transcript was obtained by the State for reference in closing briefs provided by the parties. The transcript is part of the record on appeal at Index #'s 87 & 91. The transcript is included within the Appellant's Appendix from pages 13-58 for quick reference. Therefore, reference to the transcript will be as follows:

- A.A. at pg. #:line # (Pg. # being the page number of the appendix)

West was not wanted under any outstanding warrants, West, simply by sleeping on that couch, had not done anything illegal. A.A. at 48:8-19.

**[¶ 13]** During the search of the residence marijuana was discovered in a grey suitcase by the front door. A.A. at 39:5-10. Despite the crime scene photographs to the contrary, showing the suitcase closed (A.A. at 9&10), both officers testified at the motion hearing the suitcase was 'open' A.A. at 29:7-8; 30:7-9; & 34:15-24. Upon discovery of the marijuana the two officers testified to two different reactions from West.

**[¶ 14]** Officer Llewllyn with Parole and Probation testified that West's "admissions" to the marijuana ownership and possession came in response to officer's inquiries:

> SKOGEN: Pertaining to the Marijuana, did you ever hear the defendant make any statements about the marijuana?
>
> LLEWELLYN: I heard one of the officers say that it smelled like marijuana, and then Mr. West affirmed it.
>
> SKOGEN: What do you mean by "affirmed it"?
>
> LLEWELLYN: Said, yup, or yes, something to that effect.

A.A. at 29:14-19

> GERESZEK: Okay. And so as soon as you walked in, you was -- you're saying you saw the marijuana in suitcase?
>
> LLEWELLYN: No, they could smell it. And, then, when you looked (indicating), they could tell some was in there. And they talked to him about it, but I left the room then at that point.

A.A. at 30:10-16

**[¶ 15]** However, Officer Johnson's testimony about West's response to the marijuana stood in the following contrast:

> SKOGEN: As you were searching the suitcase, did the defendant make any statements regarding the suitcase?
>
> JOHNSON: He did. He said the marijuana was his.
>
> SKOGEN: And how did he say that?
>
> JOHNSON: He just - - he just blurted it out. We didn't ask him any questions. He just said, "Oh, that's mine."

A.A. at 35:5-10

> GERESZEK: And you didn't ask him anything about the marijuana?
>
> JOHNSON: No we didn't really. We didn't inquire about marijuana….

A.A. at 47:6-9.

**[¶ 16]** The partial transcript does not include the testimony of the witness called by West, Ms. Sierra Chaney (Gist). Ms. Chaney was the leaseholder of the residence and was called only to provide testimony that West was an invited guest in her home. A.A. at 61, ¶ 8.

**[¶ 17]** Following testimony and briefing, the district court denied West's motion to suppress stating West lacked standing to suppress the evidence and that the search of the residence was lawful. A.A. at 59.

## [¶ 18] ARGUMENT

**[¶ 19]** West argues on appeal that the district court erred by first finding that West lacked standing. The district court reached this conclusion by analyzing the case at bar to an unrelatable case that stands in stark contrast to the facts present here and now. Second, West argues that the search of the residence was unlawful and cannot be reasonably categorized as a 'probation search' under these circumstances.

**[¶ 20]** When reviewing a district court's decision on a motion to suppress this Court has stated:

> We will defer to a trial court's findings of fact in the disposition of a motion to suppress. Conflicts in testimony will be resolved in favor of affirmance, as we recognize the trial court is in a superior position to assess credibility of witnesses and weigh the evidence. Generally, a trial court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the trial court's findings, and if its decision is not contrary to the manifest weight of the evidence.

State v. Genre, 2006 ND 77, ¶ 12, 712 N.W.2d 624. (hereinafter "Manifest Weight Standard")

**[¶ 21]** However, "questions of law are reviewed under the de novo standard of review." Id.

### [¶ 22] *A. The Search Was Not A Probation Search.*

**[¶ 23]** In order to properly understand the issues before this Court, the issues, as decided by the district court must be taken in reverse order. West argued from the very beginning, and then throughout the hearing, and again in closing argument briefing, that the search ***itself*** was unlawful, as it was ***not*** a probation

search. See Index # 30, ¶¶6-7; Index # 90, ¶22. Yet, despite that continued argument, the district court concluded that "West objects to the probation search of Darion's residence and the property therein based upon what West claims was a violation of Darion's rights under the Fourth Amendment." A.A. at 69, ¶29

**[¶ 24]** Because of this the district court analyzed the case at bar to this Court's decision in State v. Gatlin, 2014 ND 162, 851 N.W.2d 178. This is problematic because to do so, one must begin from the ***presumption*** that the search is "valid" as it was in Gatlin. Therefore, it must be first articulated that the search in question here was not and could not have reasonably been deemed a "probation search" and therefore, invalid as conducted as a warrantless search absent any valid exception to the warrant requirement.

**[¶ 25]** Conceding that the "alleged purpose of a probation search is irrelevant to the determination of its validity…." State v. Maurstad, 2002 ND 121, ¶ 31 647 N.W.2d 688; the proposition presented here, is this was not a probation search in the first place. This was an investigatory search plain and simple. The probationer, who was subject to the probation search, had been incarcerated for twelve days prior to the search, and was going to remain in custody for the next fourteen days. A.A. at 18:3-4.

**[¶ 26]** Probationary searches done contemporaneously with the probationer's arrest are deemed reasonable. See generally State v. Stenhoff, 2019 ND 106, ¶¶ 3, 4, 925 N.W.2d 429 (referencing the probationary search occurred 14 hours after the defendant was arrested for a probation violation); State v. Hurt, 2007 ND 192, ¶ 2, 743 N.W.2d 102 (referencing the probationary search occurred

immediately prior to the defendant's arrest); State v. LaFromboise, 542 N.W.2d 110, 112 (N.D. 1996) (referencing the probationary search occurred immediately prior to the defendant's arrest). This search was not done "contemporaneously" with the probationer's arrest twelve-days prior. Thus, any evidence that the probation officer sought was tainted by the significant passage of time. Moreover, the law enforcement agencies conducting this search were at odds as to why they were even there.

**[¶ 27]** Officer Llewellyn's testimony is that Parole and Probation's purpose and basis of the search was for Mr. Chaney's (the probationer) possession of guns. In fact, when specifically asked about Mr. Chaney and the sale of drugs, Officer Llewellyn's response was, "I don't remember any specifics about it. My concern was the firearms." A.A. at 17:14-15. Officer Llewellyn then goes on to clarify, "…the decision was made to do a probation search at the residence based on the information that we had received about the firearms and that we had reasonable suspicion to believe he was in possession of firearms." A.A. at 17:19-22. Officer Llewellyn also verified these suspicions through the Grand Forks Police Department and the "Task Force" as they "had spoken to the owners of Brothers Firearms." A.A. at 16:14-17.

**[¶ 28]** Yet by stark contrast, Officer Johnson testified he was contacted by Officer Llewellyn to assist with a probation search of the residence based on the suspected *sale of marijuana* by Darion Chaney. A.A. at 32:16-23 (See also A.A. at 50:25 & 51:1-4 – confirming that the probation officer's information regarding

the Chaney residence had to do with the sale and purchase of marijuana, no mention of firearms.)

**[¶ 29]** However, a commonsense application to the testimony shows the reality of what happened on March 6, 2019. It truly is as simple as taking Officer Johnson's statement that "It was ***my*** case. ***I*** was case agent." (A.A. at 35:24) in conjunction with his later testimony that a "cooperating individual" had provided information to Officer Johnson and the task force that Mr. Chaney had been selling marijuana. A.A. at 49:17-23. This was an investigation into drug dealing by the Grand Forks Narcotics Task Force.

**[¶ 30]** Finally, for the sake of arguendo, even if this search is analyzed under the "reasonableness" standard of probation searches, such an analysis must also fail. The "test" for a probationary search analysis is the fundamental Fourth Amendment test; in other words, the "reasonableness of the search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of the legitimate governmental interests." State v. Ballard, 2016 ND 8, ¶ 34, 874 N.W.2d 61. (Citing United States v. Knights, 534 U.S. 112 (2001)).

**[¶ 31]** The problem with such an analysis, is that it cannot be properly accomplished. The lineage of cases that assess the "reasonableness" of probation searches discuss the individual's status on the "continuum" of expectation of privacy. Samson v. California, 547 U.S. 843, 850 (2006) ("continuum" is the varying degrees of probation, parole, incarceration). The individual on this "continuum" that the test requires to be assessed for an intrusion of privacy was

Mr. Chaney. Yet, at the time of the search Mr. Chaney was in custody for twelve days. This fact was known to law enforcement at the time of the search. Therefore, the only potential people left in the residence were 'non-probationers' who are not on the "continuum" and then ***should*** be afforded the full force and protections of the Fourth Amendment. Moreover, by removing the "continuum" individual from the equation we are left with the inability to conduct requisite "reasonableness" analysis of a probation search, which makes the argument for itself that the search that was conducted, was not a probation search.

**[¶ 32]** However, by the district court's logic, a non-probationary individual sheds their Fourth Amendment protections upon entering the dwelling of a probationer regardless of the probationer's presence. The district court went so far to reason the suitcase here was subject to search regardless of ownership due to Mr. Chaney's probation terms and regardless of Mr. Chaney's presence. A.A. at 67, ¶ 24 & 68, ¶27. Yet, the district court's own logic is fundamentally flawed in its own order. The district court stated, "Since the suitcase was in a common area of the apartment to which Darion [Mr. Chaney] had access, it was subject to search. Therefore, the suitcase was not protected material under the Fourth Amendment and was a valid probation search." A.A. at 67, ¶24. It is undisputed that Mr. Chaney had been incarcerated for twelve days at the time of the search. A.A. at 61, ¶ 8. Thus, Mr. Chaney did not "have access" to any area of the residence for nearly two weeks before the search. Moreover, there was no evidence offered whatsoever as to 'when' the suitcase came to be in the residence. To conclude, as the district court did here, that Mr. Chaney "had access" one of two possibilities needed to be

'presumed." Either, we *presume* the suitcase was there in that spot sitting untouched for thirteen days, or we *presume* Mr. Chaney is able to escape the confides of jail on a whim and access the suitcase. Since absolutely no evidence was offered whatsoever as to the duration of the suitcase's presence, and the absurdity of Mr. Chaney's ability to escape-at-will was offered in jest, there is no competent evidence to support the district court's findings, and the district court's decision is contrary to the manifest weight of the evidence.

**[¶ 33]** The heritage of the Fourth Amendment protections weighs so heavily in favor of the citizens over the government in all other aspects, there stands no reason whatsoever those protections should be thrown away so hastily in areas such as these. Therefore, the *presumption* that the search was valid, was a clearly erroneous starting point for the district court.

**[¶ 34]** ***B. The District Court Erred In Finding That West Lacked Standing.***

**[¶ 35]** Court's no longer make a "standing" determination in the traditional sense. State v. Huether, 453 N.W.2d 778, 780 n.1 (N.D. 1990). Instead the courts look to whether the person in question had a "reasonable expectation of privacy." Id. The United States Supreme Court outlined this expectation in 2001, articulating that the individual subjective expectation of privacy, must be one that society recognizes as reasonable. Kyllo v. United States, 533 U.S. 27, 33 (2001). Our Supreme Court has long recognized that a "guest generally has a reasonable expectation of privacy in a host's home." State v. Ackerman, 499 N.W.2d 882, 885 N.D. 1993) (See Also State v. Oien, 2006 ND 138, ¶ 9, 717 N.W.2d 593).

**[¶ 36]** The fact remains undisputed, the leaseholder, Sierra Chaney, invited West to stay in the apartment. Thereby, providing West with the reasonable expectation of privacy that society recognizes, and courts have long held to be valid. Id. Mr. West has standing.

**[¶ 37]** The district court compared the present case to Gatlin, as previously noted. Ibid. ¶24. However, this case stands in stark contrast to Gatlin. In Gatlin law enforcement were let in the premises by a resident. 2014 ND 162, ¶ 2, 851 N.W.2d 178. However, here law enforcement forced entry and immediately began shouting commands at West. A.A. at 33:23-25. In Gatlin, the defendant was discovered hiding, and after a warrants check, the defendant was determined to have an active warrant. 2014 ND 162, ¶ 2, 851 N.W.2d 178. However, here West was immediately compliant, cooperative, and determined not to have any warrants. A.A. at 49:7-8. This case cannot logically be compared to Gatlin as the facts and circumstances are vastly different.

**[¶ 38]** ***A Warrantless Search Mandates The Suppression Of Evidence Via The Exclusionary Rule.***

**[¶ 39]** Upon viewing this search as the investigatory search that it was, then the only possible resolution is to deem the search as unlawful, as it was conducted without a warrant and absent a valid exception. "The Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and Article I, § 8 of the North Dakota Constitution require searches and seizures to be reasonable and warrants to be issued only upon a showing of probable cause." State v. Dodson, 2003 ND 187, ¶ 9, 671 N.W. 2d 825. All evidence obtained from searches in seizures which contravene the command of the

Fourth Amendment of the United States Constitution is inadmissible in state courts. State v. Phelps, 297 N.W.2d 769, 774 (N.D. 1980). "Absent an exception to the warrant requirement, the exclusionary rule mandates suppression of evidence obtained in violation of the protection against searches conducted without a warrant because they are per se unreasonable." State v. Haibeck, 2004 ND 163, ¶ 9, 685 N.W.2d 512. When a motion to suppress evidence asserts that law enforcement has conducted an unreasonable search and seizure, the burden of proof is on the government to show that the search and seizure was not unreasonable. State v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974).

**[¶ 40]** The only exception the State argued to apply in the case at bar is the probationary search exception. However, as articulated above, such an argument must fail. Therefore, there exists no valid exception to the warrant requirement, making the search of the residence, seizure and detention of West, and seizure of any evidence obtained therein the residence on March 6, 2019 a violation of the longstanding warrant requirement. Thereby mandating the suppression of such evidence.

## [¶ 41] CONCLUSION

**[¶ 42]** This Court can get to the conclusion argued by Appellant here via the "Manifest Weight Standard" quite easily. However, this Court can more easily find as a "question of law" that the district court simply failed to recognize there existed no valid exception to the warrant requirement under the de novo review standard. As such, case law mandates the suppression of evidence.

**[¶ 43]** Since the search of the residence was not a probation search, and there existed no valid exception to the warrant requirement for the search and seizure of the residence on March 6, 2019, as a matter of law, the district court erred in denying West's motion to suppress and the judgement against West must be vacated, this case must be reversed and remanded to the district court with instructions for a proper finding and the rightful suppression of the illegally obtained evidence.

Respectfully submitted this Monday, November 25, 2019.

*/s/ Samuel A. Gereszek* .

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| **STATE OF NORTH DAKOTA,** | ) | |
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| **Appellee,** | ) | **Supreme Court No.: 20190311** |
| **vs.** | ) | |
| **FRANK RICHARD WEST,** | ) | **District Court No.: 18-2019-CR-00461** |
| | ) | |
| **Appellant.** | ) | |

**N.D.R.App.P. 32(e)**
**CERTIFICATE OF COMPLIANCE**

[¶1] **COMES NOW** Samuel A. Gereszek, attorney for the Appellant, FRANK RICHARD WEST, and preparer of documents filed in association with the above captioned case on this day.

[¶2] Pursuant to N.D.R.App.P. 32(e) the documents filed on this day comply with the North Dakota Rules of Appellate Procedure as follows:

a. Appellant's Brief – Word count =3,821; Page Count = 17 (N.D.R.App.P 32(a)(8))

b. Appellant's Appendix – (N.D.R.App.P.25(a))

[¶3] This Certificate of Compliance is drafted to ensure the filings on this day are in compliance with the rules and specifically pursuant to N.D.R.App.P. 32(e).

Dated this Monday, November 25, 2019.

*/s/ Samuel A. Gereszek*

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| **Respondent / Appellee,** | ) | **Supreme Court No.: 20190311** |
| | ) | |
| **vs.** | ) | |
| | ) | **District Court No.: 18-2019-CR-00461** |
| **Frank Richard West,** | ) | |
| | ) | |
| **Petitioner / Appellant.** | ) | |
| | ) | |

## CERTIFICATE OF SERVICE

I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *Appellant's Brief (.pdf and Word);*
2. *Appellant's Appendix; and,*
3. *Certificate of Compliance.*

On the following:

| | | |
|---|---|---|
| **Clerk of the Supreme Court**<br>**North Dakota Supreme Court**<br><br>supclerkofcourt@ndcourts.gov | **Carmell F. Mattison**<br>**Attorney for Appellee**<br><br>sasupportstaff@gfcounty.org | Mr. Frank West<br>117 Saginaw Street<br>Pittsburgh, PA 15204<br><br>Served via U.S. Mail |

All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this Monday, November 25, 2019.

*/s/ Samuel A. Gereszek*

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