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FEBRUARY 3, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

	)	**Supreme Court File Nos.**
State of North Dakota,	)	**20190323 & 20190324**
	)	
Plaintiff and Appellee,	)	**Burleigh County No.**
	)	**08-2017-CR-04060**
v.	)	**08-2019-CR-00950**
	)	
Richard Powley,	)	**APPELLANT'S BRIEF**
	)	
Defendant and Appellant.	)	

Appeal from the criminal judgment entered October 16, 2019 and the amended criminal judgment entered October 18, 2019, respectively, in Burleigh County district court, south central judicial district, North Dakota the Honorable Bruce Romanick, presiding.

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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TABLE OF AUTHORITIES

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N.D.C.C. § 29-28-03 ..... ¶ 1

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Defendant's written arguments on their merits.

Transcript References:

The Preliminary hearing for case 08-2017-CR-04060 was conducted on February 9, 2018. The transcript of that hearing is referred to as [PH cr4060] in this brief. The Preliminary hearing for case 08-2019-CR-00950 was conducted on May 13, 2019. The transcript of that hearing is referred to as [PH cr950] in this brief. A motion to suppress was held on May 17, 2018. The transcript of that hearing is referred to as [MH] in this brief.

JURISDICTION

[¶ 1] The Defendant, Richard Powley, timely appealed the criminal judgment arising out of the district court. This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06 which states:

> "An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:
>
> 1. A verdict of guilty;
> 2. A final judgment of conviction;
> 3. An order refusing a motion in arrest of judgment;
> 4. An order denying a motion for new trial; or
> 5. An order made after judgment affecting any substantial right of the party."

STATEMENT OF THE ISSUES

I. Whether the district court erred by denying Mr. Powley's motion to suppress evidence from law enforcement's warrantless search.

STATEMENT OF CASE

[¶ 2] This is a criminal matter on direct appeal from the southeast judicial district, Burleigh County criminal judgments. These cases were before the district court in *State v. Powley*, 08-2017-CR-04060 and 08-2017-CR-00950. The complaints were filed with the court on December 22, 2017 and April 8, 2019, respectively. All counts were dismissed by the State except

for Count one, GSI – unaware, in violation of N.D.C.C. § 12.1-20-03(1)(c), from case CR-950 and counts one and two, GSI - Sexual act-Force, in violation of N.D.C.C. § 12.1-20-03(1)(a), from case CR-4060. Mr. Powley made a motion to suppress in case CR-4060 in April of 2018 and again in Case CR-950 in June of 2019. The court denied the motion to suppress. On May 13, 2019, the Court indicated that joinder would be appropriate as all the remaining counts were from the same incident. Mr. Powley, through his counsel, agreed to the joinder. PH cr950 pp. 15-16. Mr. Powley proceeded to trial on the remaining three counts on June 20, 2019.

[¶ 3] Mr. Powley was found guilty of one count of gross sexual imposition – unaware victim, in violation of N.D.C.C. § 12.1-20-03(1)(c), a class A Felony, and two counts of gross sexual imposition - sexual act by force, in violation of N.D.C.C. § 12.1-20-03(1)(a), a class AA Felony. The criminal judgment was entered in this case on October 15, 2019 and an amended criminal judgment was entered on October 17, 2019 in case 08-2017-CR-00950. He was sentenced to serve to serve with the Department of Corrections and Rehabilitation (DOCR) 30 years with 10 years suspended, in case cr4060 and 20 years with ten years suspended in case cr950, along with registration supervised probation upon release. Mr. Powley now timely appeals the criminal judgments in this case.

STATEMENT OF FACTS

[¶ 4] Mr. Powley's home was searched pursuant to parole and probation as part of an unrelated matter on July 17, 2017. PH cr4060, pp. 3, 4. Mr. Powley was arrested on the same day. Mr. Powley was on parole at the time of his arrest. *Id. See also* Appendix p. 61. On July 26, 2017, Mr. Powley's phone was seized by Detective Johnson and searched by the Bismarck Police Department, specifically Detective Rask and Detective Johnson. *Id*. at pp. 3, 4, 17. There was never any evidence presented that Parole Officers authorized the search of Mr. Powley's phone. Officer's did not obtain a warrant for the phone before searching it. PH cr950 p. 9. Several videos were discovered as a result of the warrantless search. *See* PH cr4060. The videos led directly to the charges and convictions upon review in these matters.

[¶ 5] On April 18, 2019, and again on June 20, 2019 in case cr950, Mr. Powley, through his counsel, moved to suppress the videos discovered based upon the warrantless search of his phone by Bismarck police. A motion hearing was held on May 17, 2019. At the hearing, Mr. Powley, through his counsel, moved the court again for judgment in his favor based upon the State's untimely response. MH p. 3. He also restated his position that a warrant was required to search his phone. *Id.* at p.5. The State in their responsive argument argued that Mr. Powley is subject to a search by a parole or probation officer. *Id.* at p. 7.

[¶ 6] The Court allowed the State's untimely response and denied Mr. Powley's motion for suppression based on Mr. Powley's parole, rather than

probation status. The district court determined that N.D.C.C. § 12-59 would control, as well as the case of *Samson v. California* 547 U.S. 843 (2006), and the probation condition terms Mr. Powley signed in case 08-2017-CR-2172, three months after the search occurred. *Order Denying Defendant's Motion to Suppress* ¶¶ 3, 4, 6; *See* Appendix p. 42.

LAW AND ARGUMENT

I. Whether the district court erred by denying Mr. Powley's motion to suppress evidence from law enforcement's warrantless search.

[¶ 7] In reviewing a district court's decision on a motion to suppress, this Court gives deference to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. *State v. Schmidt*, 2015 ND 134, ¶ 5, 864 N.W.2d 265. "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.* (*quoting State v. DeCoteau*, 1999 ND 77, ¶ 6, 592 N.W.2d 579). Questions of law are fully reviewable, and whether a finding of fact meets a legal standard is a question of law. *Schmidt*, at ¶ 5.

[¶ 8] The Fourth Amendment of the United States Constitution and Article 1, § 8, of the North Dakota Constitution protect individuals from unreasonable governmental searches and seizures. *State v. Gregg*, 2000 ND 154, ¶ 22, 615 N.W.2d 515. For a search to be reasonable under the Fourth Amendment, a warrant is required, unless an exception to the warrant

requirement applies. *State v. Genre*, 2006 ND 77, ¶ 17, 712 N.W.2d 624 (N.D. 2006). It is the State's burden to show that an exception to the search warrant requirement applies. *State v. Mitzel*, 2004 ND 157, ¶ 12, 685 N.W.2d 120 (N.D. 2004). This Court has interpreted the North Dakota Constitution to provide the same protections for probationers as provided by the United States Constitution. *State v. Maurstad,* 2002 ND 121, ¶ 11, 647 N.W.2d 688. This Court has not explicated stated if the rights of paroles are more restricted than those of probationers.

[¶ 9] The district court found that Mr. Powley was a parolee and therefore the reasoning in his motion to suppress was unpersuasive as it dealt with probationers. However, the case the district court specifically relies upon, *Samson v. California*, uses the same State interest as the basis for a suspicionless search of **parolees** and **probationers** asserting, "a State's interests in reducing recidivism, thereby promoting reintegration and positive citizenship among probationers and parolees, warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Samson* 547 U.S. at 844. The court in *Samson* did explain why parolees may have a more limited expectation of privacy "because parole is more akin to imprisonment than probation is. "The essence of parole is **release from prison**, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence."

Morrissey v. Brewer, 408 U. S. 471, 477." *Emphasis Added Samson*, 547 U.S. at 843.

[¶ 10] The district court further explained that specifically *Ballard* and *White* were unpersuasive cases because they dealt only with probation searches. *See State v. Ballard*, 2016 ND 8, 874 N.W.2d 61 (N.D. 2016); *State v. White* 890 N.W.2d 825 (N.D. 2017). This was an oversimplification of both those cases. In *Ballard* this Court remarked upon the State's interest in restraining the liberty of an unsupervised probationer was much less than its "overwhelming" interest in supervising parolees who had been **released from prison** verses that of an unsupervised probationer with minimal probation conditions, who naturally had a greater expectation of privacy. *State v. Ballard*, 2016 ND 8, ¶¶ 37, 40, 874 N.W.2d 61. It was not simply an individual's designation of parole or probation, but the actual physical and legal restraints they were currently subjected to that justified the government's interests in warrantless searches.

[¶ 11] The district court completely ignores the reasoning in *Samson* to come to its conclusion. *Samson* very clearly asserts that the California Parole statute in question, which allows greater State intrusion than at issue before the Court in this matter, is clearly attempting to address the government's interest of more strictly monitoring an individual who has been **released from prison**, is being reintroduced into society, but is still serving a sentence. That interest is not present in the case before the Court. Mr.

Powley was in custody of ND DOCR at the time of the search. Additionally, his terms of parole clearly stated,

> "In consideration of being **released from the custody of the North Dakota Department of Corrections and Rehabilitation Correctional** on parole, I agree to abide by the following conditions: 6. I shall allow my person, place of residence and any outbuildings or curtilage, vehicle, or property I own, lease or possess; to be searched and any contraband and evidence found may be seized at any time of day or night by a parole officer without requiring the parole and probation officer to obtain or present a search warrant."

Emphasis Added Appendix p. 64. However, a parole or probation officer did not conduct the search as would be required if he were not in ND DOCR custody. Therefore, the search of Mr. Powley's phone was illegal and should have been suppressed by the district court.

[¶ 12] The district court specifically finds that Mr. Powley's argument is unpersuasive because of **probation** search conditions he signed months **after the cell phone search** occurred. *See Order Denying Defendant's motion to Suppress* ¶ 6. The court again disregards the actual parole terms that would have been in place, which require the search to be conducted by a parole or probation officer. The search was not done by either a parole or probation officer and is therefore a warrantless search without a valid exception. Generally, evidence unlawfully seized in violation of the Fourth Amendment must be suppressed under the exclusionary rule. *State v. Utvick*, 2004 ND 36, ¶ 26, 675 N.W.2d 387 (N.D. 2004). "Any evidence obtained as a result of illegally acquired evidence must [also] be suppressed as 'fruit of the poisonous tree'…." *State v. Gregg*, 2000 ND 154, ¶ 39, 615 N.W.2d 515 (N.D.

2000). All evidence obtained from the warrantless search of Mr. Powley's cell phone should have been suppressed by the district court as fruits of the poisonous tree.

[¶ 13] Finally, the district court reasons that Mr. Powley's motion to suppress should be denied because his argument is in direct conflict with N.D.C.C. § 12-59-15 which controls parole status in North Dakota. Mr. Powley's argument to the court, in his brief and at the motion to suppress hearing, was because Mr. Powley was taken into custody the terms of his parole no longer applied. The reason for their application no longer existed, factually Mr. Powley was no longer on parole which would require his release from custody. Even if his parole may not have been legally revoked the government's interest in warrantless searches no longer apply. If the parole board determined that Mr. Powley's parole should not be revoked and he was once again released from custody, the government would at that time again have a legitimate interest in warrantless searches. The district court failed to address this argument and simply asserted that section 12-59-15 was controlling. However even if the district court looked to section 12-59-15 for guidance the evidence should have been suppressed.

[¶ 14] Statutory construction, or interpretation, of a criminal statute is a question of law, fully reviewable by this Court. *State v. Corman*, 2009 ND 85, ¶ 15, 765 N.W.2d 530. Words in a statute are given their ordinary meaning unless defined by statute or if a conflicting intent is clear. N.D.C.C.

§ 1-02-02. Statutes are construed as a whole and are read to give meaning to related provisions. N.D.C.C. § 1-02-07. "Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language." N.D.C.C. § 1-02-03. Additionally, penal statutes are generally strictly construed against the government. *Corman*, at ¶ 15. The law the district court cited in support of denying Mr. Powley's motion to suppress, N.D.C.C. § 12-59-15(2), reads:

> "Upon issuance of a warrant of arrest for a parole violation, the running of the time period of parole must be suspended until the parole board issues a final order under this section. The parolee is entitled to credit for time spent in physical custody from the time of arrest until the time the parole board issues a final order."

The warrant issued by the parole board for Mr. Powley was dated July 19, 2017. App. p. 62. According to N.D.C.C. § 12-59-15(2) "the running of his period of parole **must be suspended**." *Emphasis added*. The ordinary meaning of that sentence, in this factual context, is after July 17, 2017 Mr. Powley's parole was suspended. Therefore, the search that occurred on July 26, 2017 was not done pursuant to his parole status and the district court should have suppressed all evidence obtained as a result of the warrantless search of his phone.

CONCLUSION

[¶ 15] The search of Mr. Powley's phone was not performed pursuant to his parole status, or by the conditions of his parole terms, or as a result of

a valid warrant being issued. Therefore, the district court erred by denying Mr. Powley's motion to suppress.

[¶ 16] WHEREFORE the Defendant respectfully requests the Court to reverse the verdict and judgment of the trial court.

Dated this 3rd day of February, 2020

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	)	**08-2017-CR-4060**
v.	)	**08-2019-CR-0950**
	)	
Richard Powley,	)	**CERTIFICATE OF**
	)	**COMPLIANCE**
Defendant and Appellant.	)	

[¶ 1] This Appellant's Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: February 3, 2020.

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	)	
Richard Powley,	)	**CERTIFICATE OF SERVICE**
	)	
Defendant and Appellant.	)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief with Certificate of Compliance
Appellant's Appendix

And that said copies were served upon:

Julie Lawyer, State's Attorney, bc08@nd.gov

by electronically filing said documents via email. Also served upon:

Richard Powley #39238
c/o ND DOCR
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by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: February 3, 2020.

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[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief -revised

And that said copies were served upon:

Julie Lawyer, State's Attorney, bc08@nd.gov

by electronically filing said documents via email. Also served upon:

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by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: February 7, 2020.

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