

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

Michael Lee Stands,)	
)	
Defendant and Appellant,)	
vs.)	Supreme Ct. No. 20200179
)	
State of North Dakota,)	District Ct. No. 09-2019-CR-04757
)	
Plaintiff and Appellee.)	

APPELLEE'S BRIEF

Appeal from Order Denying Appellee's Motion to
Suppress entered February 11, 2020
East Central Judicial District
the Honorable Steven McCullough, Presiding

ORAL ARGUMENT REQUESTED

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[¶ 1] TABLE OF CONTENTS

Paragraph No.

TABLE OF CONTENTS	¶ 1
TABLE OF AUTHORITIES.....	¶ 2
STATEMENT OF ISSUE	¶ 3
STATEMENT OF CASE.....	¶ 5
STATEMENT OF FACTS.....	¶ 8
STANDARD OF REVIEW.....	¶ 12
LAW AND ARGUMENT.....	¶ 14
I. The district court correctly found Stands consented to the search of this person	¶ 15
II. The district court correctly found Stands was lawfully detained	¶ 19
CONCLUSION	¶ 19
ORAL ARGUMENT REQUESTED	¶ 25
CERTIFICATE OF COMPLIANCE	¶ 30
CERTIFICATE OF SERVICE.....	¶ 33

[¶ 2] **TABLE OF AUTHORITIES**

Paragraph No.

STATE CASES:

State v. Hawkins, 2017 ND 172, 898 N.W.2d 446 ¶ 13

State v. Odom, 2006 ND 209, 772 N.W.2d 370 ¶ 16

State v. Mitzel, 2004 ND 157, 685 N.W.2d 120 ¶ 17

Terry v. Ohio, 392 U.S. 1 (1968) ¶ 18

State v. Fields, 2003 ND 81, 662 N.W.2d 242..... ¶ 20

State v. Mitzel, 2004 ND 157, 685 N.W.2d 120 ¶ 20

Arizona v. Johnson, 555 U.S. 323 (2009) ¶ 20

State v. Vetter, 2019 ND 138, 927 N.W.2d 435..... ¶ 21, 22, 23, 24

State v. Adan, 2016 ND 215, 886 N.W.2d 841 ¶ 24

NORTH DAKOTA CONSTITUTIONAL PROVISIONS:

N.D. Const. art. I, § 8 ¶ 16

UNITED STATE CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. IV ¶ 16

[¶ 3] STATEMENT OF ISSUE

[¶ 4] Whether the district court properly denied Michael Stands' Motion to Suppress Evidence.

[¶ 5] STATEMENT OF CASE

[¶ 6] This case comes to this Court from an appeal brought after the district court denied Michael Stands' Motion to Suppress on February 11, 2020. Appellant's Appendix at page 16-17 ("App. 16-17"). Stands appeals the district court's order denying his Motion to Suppress. App. 27.

[¶ 7] On November 6, 2019, Stands was charged with Possession with Intent to Manufacture or Deliver Methamphetamine (Class B Felony) and Unlawful Possession of Drug Paraphernalia – Manufacture (Class C Felony). App. 3-5. On December 30, 2019, Stands filed a Motion to Suppress. App. 8-11. On January 8, 2020, the State filed a Response to Defendant's Motion to Suppress. App. 12-15. On February 4, 2020, the district court held a motion hearing in which it denied Stands' Motion to Suppress. App. 3-5. On February 11, 2020, the district court signed an Order Denying Defendant's Motion to Suppress. App. 16-17. On June 22, 2020, Stands conditionally pled guilty to the offenses. App. 3-5. On July 9, 2020, Stands filed a Notice of Appeal. App. 27.

[¶ 8] STATEMENT OF FACTS

[¶ 9] On November 5, 2019, at approximately 07:18 a.m., Officer Heidi Witzel of the Fargo Police Department conducted a traffic stop on a vehicle. Transcript of February 4, 2020 hearing at page 5 lines 19-25 ("Tr. 5: 19-25"). After

the vehicle parked, Michael Stands exited the vehicle and stood by the rear left fender. Tr. 6: 6-8. Stands identified himself but did not have a driver's license on his person. Tr. 7: 10-13. During this encounter, Officer Witzel ran Stands' license and learned his license was suspended. Tr. 11:1. Officer Witzel also called for a drug dog sniff while in her vehicle running Stands' information; however, there was not one available. Tr. 16: 3-24. Officer Witzel proceeded with the traffic stop as if a drug dog was not coming to this traffic stop. Tr. 22: 8-10. During the early portion of the traffic stop, Stands kept putting his hands in his pockets. Tr. 6: 22-24. Officer Witzel asked Stands to step to the rear of her vehicle. Tr. 6: 24-25.

[¶ 10] Officer Witzel asked if she could search Stands. Tr. 7: 1. Stands raised his hands to shoulder height, mumbled something, and shook his head yes. Tr. 2-3. Officer Witzel testified Stands mumble was him stating "mm-hmm" and shaking his head in an affirmative manner. Tr. 8: 3-9. When Stands raised his hands, Officer Witzel noticed a scale in his pocket. Tr. 7: 20-22. Officer Witzel saw the scale before she conducted the search of Stands' person. Tr. 8: 12-13. During the search of Stands' person, Officer Witzel took the scale out of Stands' pocket and noticed it had methamphetamine residue. Tr. 9: 1-3. Officer Witzel proceeded to search Stands' person finding an unused pipe and approximately \$2,000 in United States currency. Tr. 9: 4-11. Officer Witzel detained Stands after the consensual search of his person and placed him in the back seat of her patrol vehicle. Tr. 9: 12-20.

[¶ 11] Officer Witzel called for a drug dog sniff shortly after she located the scale in Stands' pocket. Tr. 10: 7-12. Detective Bret Witte of the Fargo Police

Department responded and conducted a sniff of Stands' vehicle with his K-9 partner approximately thirty minutes after the initiation of the traffic stop. Tr. 11: 2-8. Witte's K-9 positively alerted on the vehicle. Tr. 11: 9-10. Officer searched Stands' vehicle and located methamphetamine. Tr. 11: 14-16.

[¶ 12] **STANDARD OF REVIEW**

[¶ 13] The North Dakota Supreme Court reviews a district court's decision on a motion to suppress as follows:

In reviewing a district court's decision on a motion to suppress evidence, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We will affirm a district court's decision on a motion to suppress if there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of evidence. Our standard of review recognized the importance of the district court's opportunity to observe the witnesses and assess their credibility. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law.

State v. Hawkins, 2017 ND 172, ¶ 6, 898 N.W.2d 446.

[¶ 14] **LAW AND ARGUMENT**

[¶ 15] **I. The district court correctly found Stands consented to the search of his person.**

[¶ 16] Unreasonable searches and seizures are prohibited by the federal and state constitutions. U.S. Const. amend. IV; N.D. Const. art. I, § 8. "Warrantless searches are unreasonable unless they fall within a recognized exception to the warrant requirement." State v. Odom, 2006 ND 209, ¶ 9, 772 N.W.2d 370. "Consent is a well-established exception to the warrant requirement." Id. The scope of an

individual's consent is reviewed by considering what an objectively reasonable person would have understood the consent to include. Id. at ¶ 10. The reasonableness inquiry is applied to the understanding of the officer who is conducting the search. Id. Whether a search exceeds the scope of consent is a factual question, subject to the clearly erroneous standard of review. Id.

[¶ 17] In this case, Officer Witzel asked Stands if he would consent to a search of his person. Stands raised his hands, mumbled “mm-hmm”, and nodded his head yes that Officer Witzel could search him. Stands clearly consented to the search of his person. Stands tries to argue he did not consent to the search but rather was merely acquiescing to police authority. See State v. Mitzel, 2004 ND 157, 685 N.W.2d 120. Stands leaves out the relevant factors in his argument; specifically, that he said “mm-hmm” and he shook his head in the affirmative. Stands' actions and words show he consented to the search of his person.

[¶ 18] Stands also tries to argue on appeal the search was a limited Terry frisk for weapons. See Terry v. Ohio, 392 U.S. 1 (1968). A Terry frisk is not the same as a consensual search. The district court found this was not the type of search justified by officer safety (Terry frisk) and concluded this was a consensual search. Tr. 24: 19-22. If the search conducted by Officer Witzel was a Terry frisk there would have been no need for her to ask for consent to search Stands' person. Since this search was not a Terry frisk and Stands clearly consented to the search of his person this Court should affirm the district court finding that this was a valid consent search.

[¶ 19] **II. The district court correctly found Stands was lawfully detained.**

[¶ 20] When conducting a traffic stop, an officer can temporarily detain the traffic violator at the scene of the stop. State v. Fields, 2003 ND 81, ¶ 8, 662 N.W.2d 242. This Court stated a reasonable period of detention includes the amount of time necessary for the officer to complete his duties resulting from the traffic stop. State v. Phelps, 2017 ND 141, ¶ 10, 896 N.W.2d 245. Those duties may include:

[R]equesting the driver’s license and registration, requesting that the driver step out of the vehicle, requesting that the driver wait in the patrol car, conducting computer inquiries to determine the validity of the license and registration, conducting computer searches to investigate the driver’s criminal history and to determine if the driver has outstanding warrants, and making inquiries as to the motorist’s destination and purpose.

Id. (citations and quotations omitted). “An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” Arizona v. Johnson, 555 U.S. 323, 333 (2009).

[¶ 21] “As long as a traffic stop is not extended in order for officers to conduct a dog sniff, the dog sniff is lawful.” State v. Vetter, 2019 ND 138, ¶ 10, 927 N.W.2d 435. If a dog sniff is conducted while the purposes of the traffic stop are still being performed and the traffic stop is not prolonged or delayed, there is no need to consider whether reasonable suspicion is present to support extending the stop. Id. “If the purpose of the stop was completed, or there was an unreasonable

delay prior to completion, then reasonable suspicion would be required to justify the seizure.” Id.

[¶ 22] This Court makes allowances for other conversations not absolutely necessary to the traffic stop. Id. at ¶ 17. In Vetter, the officer spent approximately one minute asking the driver about whether the shaking of his vehicle was due to concealment of contraband and handing off the ticket writing to a secondary officer. Id. at ¶ 15. This Court, when referencing the approximate minute which was not strictly used for the purpose of a traffic stop, held that “[a]bsent evidence of an officer deliberately delaying a stop so that, for example, a drug-detecting dog may arrive, such minor inefficiencies in traffic stops are unlikely to establish a Fourth Amendment violation. Id. at ¶ 16 (citation omitted).

[¶ 23] In this case, Officer Witzel asked a brief question of whether Stands had anything on his person. This question and answer took a matter of a few seconds. Officer Witzel then asked Stands if she could search Stands’ person. Stands consented to the search of his person. The search took a short amount of time. During the search of Stands’ person, Officer Witzel located a scale with methamphetamine residue, a methamphetamine pipe, and approximately \$2,000 in United States currency. Stands wants this Court to conclude this brief period of questioning and/or searching unconstitutionally extended his stop. Stands’ argument goes against this Court’s clear precedent in Vetter.

[¶ 24] Stands finally seems to argue his detention for approximately thirty minutes waiting for the drug dog to arrive unconstitutionally extended his stop. A

stop, however, may be prolonged if an officer has reasonable suspicion to justify detaining an individual for inquires unrelated to the stop. Vetter, at ¶ 6. After the search of Stands' person, Officer Witzel had the reasonable suspicion necessary to justify detaining Stands until a drug dog arrived and the search of the vehicle took place. See State v. Adan, 2016 ND 215, 886 N.W.2d 841 (concluding officers could detain an individual for forty-five minutes while waiting for a drug dog to arrive because the officer had reasonable suspicion).

[¶ 25] **CONCLUSION**

[¶ 26] Officer Witzel's question to Stands about whether he had anything on his person did not unconstitutionally extend the traffic stop. Stands consented to the search of his person resulting in Officer Witzel locating items of contraband. After the search of Stands' person, Officer Witzel had the reasonable suspicion necessary to detain Stands for approximately thirty minutes until the drug dog arrived and the search of Stands' vehicle took place. Therefore, the State respectfully request this Court affirm the district court's Order Denying Defendant's Motion to Suppress.

[¶ 27] **ORAL ARGUMENT REQUESTED**

[¶ 28] The State requests oral argument to clarify the State's position, answer any questions, and respond to any arguments the Appellant brings up at oral argument.

[¶ 29] Respectfully submitted this 28th day of October, 2020.

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[¶ 30] CERTIFICATE OF COMPLIANCE

[¶ 31] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8).

The page count is twelve pages.

[¶ 32] Dated this 28th day of October, 2020.

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[¶ 33] CERTIFICATE OF SERVICE

[¶ 34] A true and correct copy of the foregoing document was sent by e-mail on 28th day of October, 2020, to Kiara C. Kraus-Parr at service@kpmwlaw.com.

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