

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20200300 & 20200301
Ward County District Case No. 51-2020-CR-01476 & 51-2020-CR-01482

STATE OF NORTH DAKOTA,

Plaintiff and Appellant

v.

KRISTEN DANIELLE HOWARD and OSHAYA INEZ WATKINS.

Defendants and Appellees,

APPEAL FROM ORDER OF DISMISSAL IN THE DISTRICT COURT, NORTH CENTRAL
JUDICIAL DISTRICT, WARD COUNTY, STATE OF NORTH DAKOTA

THE HONORABLE STACY J. LOUSER, DISTRICT JUDGE

BRIEF OF DEFENDANT/APPELLEE KRISTEN DANIELLE HOWARD

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STATEMENT OF ISSUES

¶1.] Did the District Court correctly determine that the State failed to meet its burden of establishing probable cause that the offenses of Conspiracy to Commit Burglary and Conspiracy to Commit Aggravated Assault were committed by the Defendants?

STATEMENT OF THE CASE

¶2.] The State charged defendant Kristen Danielle Howard on August 6, 2020 with Conspiracy to Commit Burglary and Conspiracy to Commit Aggravated Assault, class C felonies in violation of N.D.C.C. § 12.1-22-02, 12.1-17-02, and 12.1-06-04. Howard made her initial appearance on August 7, 2020. On August 31, 2020, the State motioned to join Howard's case with that of Oshaya Watkins, her alleged co-conspirator. The motion to join was unopposed and granted. A preliminary hearing in the case was held on October 15, 2020.

¶3.] After the State presented its evidence at the preliminary hearing, the Court heard arguments and ultimately issued written orders dismissing both counts against Howard and Watkins. App. 9-14. The State timely appealed, alleging that the District Court misinterpreted or misapplied the law regarding probable cause, and therefore erred when it failed to find probable cause to bind the Defendants over for trial.

STATEMENT OF FACTS

¶4.] The State presented its preliminary hearing evidence through the testimony of Ward County Sheriff's Deputy Schiller. He testified that his department had been contacted by Kayla Kelley, who worked with Kristen Howard and Oshaya Watkins at Community Action. App. 22. Kelley reported that she had been part of a conversation with Howard and Watkins at work wherein Howard stated that she had learned her husband was having

an extramarital affair with Jane Doe. App. 23. Jane Doe was enlisted in the Air Force. Howard discussed getting even with Jane Doe by slipping a controlled substance in her drink so that she would fail her next Air Force drug test. App. 23, 26. There was no mention of what exact controlled substance Howard discussed, but Deputy Schiller testified that he believed it would be some form of Adderall. App. 23. Next, Howard and Watkins discussed getting Jane Doe drunk, taking her keys, and planting a controlled substance in her living quarters. Id. Howard stated that she had a controlled substance they could use. Id.

[¶5.] Sometime after the conversation ended, Kayla Kelley contacted law enforcement and reported what she had heard discussed. App. 24. She also provided a recording of the conversation that she had made. Id. Deputy Schiller began an investigation. He contacted Howard's husband and confirmed that he was engaged in an extramarital affair with Jane Doe. App. 24-25. Next, he reviewed text messages that Jane Doe had received from an unknown number earlier in the day. App. 25. The telephone number from which the text messages were sent did not match the telephone numbers of either Howard or Watkins. App. 31. The caller/texter identified themselves as "Mandy". App. 30. There were text messages exchanged about meeting later that evening, though no plans were finalized between Jane Doe and the sender. App. 30-31. No meeting ever took place between Jane Doe, Howard, or Watkins. App. 31. When contacted by law enforcement, Jane Doe stated that she had never met Howard or Watkins. App. 30.

STANDARD OF REVIEW

[¶6.] For the purposes of a preliminary hearing, in determining if probable cause exists, the District Court may judge credibility and make findings of fact. State v. Gratton, 2020

ND 41, ¶8, 938 N.W.2d 902. The Supreme Court will not reverse the District Court findings if, after resolving conflicts in the evidence in favor of affirming, sufficient evidence exists that support the District Court’s findings and the decision is not contrary to the manifest weight of the evidence. Id. Whether the facts found by the court constitute probable cause is a question of law fully reviewable on appeal. Id.

LAW AND ARGUMENT

A. The District Court correctly determined that the State had failed to meet its burden of establishing probable cause that the offenses of Conspiracy to Commit Burglary and Conspiracy to Commit Aggravated Assault were committed by Defendant Kristen Howard.

[¶7.] Preliminary hearings are held to determine if there is probable cause and whether a trial should be held for a jury to determine guilty or innocence. Gratton, 2020 ND 41, ¶9. The preliminary hearing is essentially a “screening device to ferret out groundless and improvident prosecutions and to prevent the accused detention without probable cause.” Walker v. Schneider, 477 N.W.2d 167, 172 (N.D. 1991).

[¶8.] A person commits conspiracy if he agrees with one or more persons to engage in or cause conduct which, in fact, constitutes an offense or offenses, and any one or more of such persons does an overt act to effect an objective of the conspiracy. The agreement need not be explicit but may be implicit in the fact of collaboration or existence of other circumstances. N.D.C.C. § 12.1-06-04.

[¶9.] A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein. N.D.C.C. 12.1-22-02.

[¶10.] A person is guilty of class C felony aggravated assault if that person:

- a. Willfully causes serious bodily injury to another human being;
- b. Knowingly causes bodily injury or substantial bodily injury to another human being with a dangerous weapon or other weapon, the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury;
- c. Causes bodily injury or substantial bodily injury to another human being while attempting to inflict serious bodily injury on any human being; or
- d. Fires a firearm or hurls a destructive device at another human being.

N.D.C.C. § 12.1-17-02.

[¶11.] The District Court made detailed factual findings based on the testimony presented and determined that “no steps were taken to effectuate the ‘plan’ discussed in the audio recording.” App. 13. The Court stated that “the only evidence presented was that Watkins, Howard, and Kelley had a discussion regarding Jane Doe, ‘slipping something’ into Jane Doe’s beverage, trying to interfere with Jane Doe’s employment and that Jane Doe had received a general text message from an unidentified number asking her to ‘go out’.” App.13. “Neither Watkins nor Howard were alleged to have made contact with Jane Doe nor her residence nor was there any evidence that Watkins or Howard took steps to obtain any substance intended to be used on Jane Doe.” App. 14. In summary, the Court determined that the State had failed to meet its burden of probable cause on the “overt act” element of conspiracy.

[¶12.] The State argues on appeal that the District Court should have found that Howard had undertaken an overt act to effect an objective of the conspiracy by allegedly procuring a controlled substance. The State cites very little from the record in support of its argument. Deputy Schiller testified that during the discussion between Howard, Watkins, and Kelley,

Howard stated that “she had the drug.” App. 23. However, when prompted, he declined to state that Howard had actively “procured” the drug. Id. There was no evidence presented as to what the alleged controlled substance was (apart from Schiller’s speculation that it was Adderall-like), how it was obtained, when it was obtained, or under what circumstances it was obtained. There was no controlled substance actually recovered by law enforcement during their investigation. There is simply an alleged statement by Howard that she “had” an unidentified controlled substance. App. 23. There is no other evidence that she had actually undertaken any action to procure a controlled substance as part of the conspiracy.

[¶13.] The District Court made detailed findings of fact in support of its order of dismissal. The court did not reach the conclusion that there was evidence that Howard had “procured” a controlled substance or undertaken any overt act regarding a controlled substance as the State alleges. Indeed, the record is devoid of evidence supporting the State’s assertion. The State argues that evidence was overlooked, but fails to make specific citation to any particular overlooked evidence. In fact, the Court clearly weighed what evidence was presented and reached the conclusion: “...nor was there any evidence that Watkins or Howard took steps to obtain any substance intended to be used on Jane Doe.” App. 14. Given the scant evidence presented by the State, and the lack of any clear citation to overlooked evidence, there is certainly sufficient evidence supporting the District Court’s factual findings. To the extent there is an actual conflict in the evidence, the conflict must be resolved in favor of affirming the District Court’s findings. Gratton, 2020 ND 41, ¶8, 938 N.W.2d 902.

[¶14.] The State also argues that the District Court erred in its findings regarding text messages received by Jane Doe. The State argues that the District Court should have inferred that the text messages described by Jane Doe were sent by Watkins and that they constituted an overt act in furtherance of the conspiracy.

[¶15.] With respect to the text message, the District Court found: “Jane Doe received a general text message from an unidentified number asking her to ‘go out’.... As to the text message, because the same was general in nature and was from an unknown number, there is no nexus between Howard, Watkins and the message.” App. 13-14.

[¶16.] Deputy Schiller testified that the name that Jane Doe had attached to the text messages was “Mandy”. App. 30. He testified that during his investigation, he had determined accurate telephone numbers for both Howard and Watkins, and that the text messages had not come from either telephone number. App. 31. He testified that the text messages discussed possibly meeting at some point in the future, but that no plans had actually been made between the texter and Jane Doe. App. 30. No meeting took place between Jane Doe, Howard, and Watkins. App. 31.

[¶17.] The State argues on appeal that the District Court should have inferred that the text messages from “Mandy” were actually from either Watkins or Howard. The State argues that the District Court “must draw the inference favorable to the prosecution”, relying on Roe v. State, 2017 ND 65, ¶7, 891 N.W.2d 745. However, the Roe case involves a situation of conflicting witness testimony where at least one version of the preliminary hearing testimony supported the State’s charges. The case at hand is distinguishable. There is not conflicting evidence. There is a lack of evidence. The evidence in the case record does not support any inference that the text messages were sent from Howard or Watkins in

furtherance of the alleged conspiracy. The text messages do not match either of their telephone numbers and purport to come from a different person entirely.

[¶18.] The District Court considered the evidence before it and correctly determined that the State had failed to demonstrate a nexus between the text messages and either Howard or Watkins. Moreover, the Court held that the text messages were “general in nature” and thus did not constitute an overt act in furtherance of the conspiracy. App. 14. For the purposes of a preliminary hearing, in determining if probable cause exists, the District Court is allowed to judge credibility and make findings of fact. Gratton, 2020 ND 41, ¶8, 938 N.W.2d 902. The District Court did so here, and its findings are not contrary to the manifest weight of the evidence (or the lack thereof). The Court did not ignore evidence or draw negative inferences against the State’s evidence. The Court simply declined to engage in tortured speculation that simply because Watkins mentioned going out with Jane Doe at some point in the future that the particular text message at issue must have come from Watkins – the mismatched name and telephone number notwithstanding.

[¶19.] The applicable standard of review dictates that conflicts in the District Court’s findings must be resolved in favor of affirmance. Id. Both the case record and the District Court’s detailed factual findings support the conclusions reached. The Court should therefore affirm the District Court’s order of dismissal.

CONCLUSION

[¶20.] For the reasons stated above, Defendant Kristen Danielle Howard respectfully requests that the District Court’s judgment be AFFIRMED.

DATED this 12th day of February, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellee certifies that the attached brief complies with the page limitation stated in North Dakota Rule of Appellate Procedure 32(1)(8)(A). The page count of the filed electronic document is 11 pages, exclusive of this Certificate of Compliance.

/s/ Erich M. Grant

Erich M. Grant

CERTIFICATE OF SERVICE

I hereby certify that, on February 17, 2021, I served the foregoing document on the following parties by electronic mail transmission, through the filing portal, and that notice of filing and the documents will be sent to the following:

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