

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	Supreme Court No. 20210041
vs.)	
)	District Court No. 02-2020-CR-00138
Dylan Marsolek,)	
)	
Defendant-Appellant.)	

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM DISTRICT COURT ORDER DENYING MOTION TO SUPPRESS
AND/OR DISMISS DATED 08/07/2020, CRIMINAL JUDGMENT DATED 02/04/2021,
AND AMENDED CRIMINAL JUDGMENT DATED 02/08/2021

BARNES COUNTY DISTRICT COURT
SOUTHEAST ~~SOUTHWEST~~ JUDICIAL DISTRICT
HONORABLE JAY SCHMITZ, PRESIDING

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STATEMENT OF THE ISSUE

[¶ 1] Whether the District Court correctly denied the defendant's motion to suppress.

STATEMENT OF THE CASE

[¶ 2] Appellant, Dylan Marsolek (“Marsolek”) was charged with one count of Possession with Intent to Deliver Methamphetamine in violation of N.D.C.C. § 19-03.1-23(1)(a), a B Felony, and Unlawful Possession of Drug Paraphernalia, in violation of N.D.C.C. § 19-03.4-03(2), a C Felony, by Criminal Information dated April 17, 2020.

[¶ 3] A motion to suppress was filed by Marsolek on June 26, 2020. A response to the motion was filed by the State on July 9, 2020. A motion hearing was held on July 21, 2021 at which time Deputy Nathan Morten (Deputy Morten) of the Barnes County Sheriff’s Department, provided testimony. The matter was taken under advisory by the Court after the hearing was concluded. Marsolek filed a supplemental brief after the hearing on July 28, 2020. A hearing was held on August 26, 2020 to provide a verbal order on Marsolek’s motion to suppress hearing. Judge Schmitz denied Marsolek’s motion to suppress and an order was signed by the Court on August 6, 2020.

[¶ 4] Marsolek changed his plea on the charges on September 2, 2020. A subsequent conditional change of plea and sentencing hearing was held on February 5, 2021. A criminal judgment was entered on February 4, 2021. An amended judgment was entered on February 8, 2021 to include the conditional right to appeal language.

[¶ 5] This appeal subsequently ensued with a notice of appeal and order for transcripts on February 10, 2021.

STATEMENT OF THE FACTS

[¶ 6] On April 16, 2020, Deputy Morten observed a vehicle with an obstructed windshield and an unrestrained back passenger. (Tr. Suppr. Hrg. pg. 7) Deputy Morten stopped the vehicle on County Road 22 in Barnes County. (Tr. Suppr. Hrg. pg. 8) Once the vehicle stopped Deputy Morten saw the driver reach over to the passenger side of the vehicle. (Tr. Suppr. Hrg. pgs. 25-26) Deputy Morten characterized the movement as a "...it looked like he was reaching down and putting something underneath the seat..." (Tr. Suppr. Hrg. pg. 33)

[¶ 7] Deputy Morten approached and talked to the vehicle's driver, Howard Larson Jr. ("Larson"), and thought Larson was behaving in a "jumpy" manner. (Tr. Suppr. Hrg. pg. 9) Larson stated that they were driving to Jamestown from Fargo but were sightseeing. (Tr. Suppr. Hrg. pg. 9) Deputy Morten asked the passengers in the vehicle, Marsolek and Esther Cruz ("Cruz") for their ID's. (Tr. Suppr. Hrg. pg. 9) When asked, Larson immediately asked why they needed to give them to Morten and told Morten they (Cruz and Marsolek) did not have an ID. (Tr. Suppr. Hrg. pgs. 9-10) Marsolek, the front-seat passenger, gave Deputy Morten his name and date of birth. (Tr. Suppr. Hrg. pg. 10) Cruz, the back-seat passenger gave Deputy Morten the name "Irene Daniels" with a birthday of 07/07/1977. (Tr. Suppr. Hrg. pg. 10)

[¶ 8] Because Deputy Morten's radio was not functioning properly dispatch sent other law enforcement units to his location to check on him. (Tr. Suppr. Hrg. pg. 13) At least four other law enforcement officers showed up, including, Barnes County Sheriff's Deputy Josh Magnuson ("Deputy Magnuson"), Barnes County Sheriff's Sergeant Steve Loibl

(“Sergeant Loibl”), Highway Patrol Trooper Charles Kelly (“Trooper Kelly”), and an unnamed Highway Patrol Trooper. (Tr. Suppr. Hrg. pgs. 14, 17)

[¶ 9] Deputy Morten was notified by dispatch that Larson’s driving privileges were suspended. (Tr. Suppr. Hrg. pg. 13) Dispatch relayed that Larson had a history of drug related crimes. (Tr. Suppr. Hrg. pg. 14) Deputy Morten told Larson the information regarding his suspension and Larson responded that he thought that he was fine to drive due to a “Governor’s Waiver” that stemmed from COVID. (Tr. Suppr. Hrg. pg. 15) Deputy Morten spoke with the two Highway Patrol Troopers who agreed with Deputy Morten’s assessment that the behavior of the car occupants was unusual and “jumpy,” and that the story regarding their route from Fargo to Jamestown did not make sense. (Tr. Suppr. Hrg. pgs. 17-18) Three independent officers, with various levels of training and experience, all made note of the same suspicious behavior. (Tr. Suppr. Hrg. pg. 18) Three independent officers believed that Larson should be asked to step out of his vehicle so that Deputy Morten could speak with Larson while Deputy Morten issued a citation. (Tr. Suppr. Hrg. pgs. 18-19)

[¶ 10] Eventually Larson was asked to step out of his car by Deputy Morten. (Tr. Suppr. Hrg. pg. 19) While escorting Larson to his patrol vehicle Deputy Morten asked Larson if he had any weapons, guns, or knives on him. (Tr. Suppr. Hrg. pg. 19) Larson stated he had a lighter in his pocket and reached into his right pocket, and while doing so, Deputy Morten observed a hypodermic needle in Larson’s pocket. (Tr. Suppr. Hrg. pg. 19) Deputy Morten noted that syringes like these is an object that could potentially hurt Deputy Morten. (Tr. Suppr. Hrg. pg. 19)

[¶ 11] The car was subsequently searched by Deputy Morten, Sergeant Loibl, and Deputy Magnuson, and contraband was located. (Tr. Suppr. Hrg. pgs. 27-30)

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ITS DECISION TO DENY THE DEFENDANT'S MOTION TO SUPPRESS.

a. Standard of Review

[¶ 12] In reviewing a district court's decision on a motion to suppress evidence, the Supreme Court defers to the district court's findings of fact and will resolve any conflicts in testimony in favor of affirmance of the district court's decision. State v. Doohen, 2006 ND 239, 8, 724 N.W.2d 158, 160. A district court's decision on a motion to suppress will be upheld if the decision is not contrary to the manifest weight of the evidence and there is sufficient competent evidence capable of supporting the trial court's findings. Id. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law. Id.

b. The District Court Correctly Concluded That the Traffic Stop Did Not Exceed a Time Period that was Reasonably Necessary to Complete the Mission of the Stop.

[¶ 13] "An officer may detain an individual at the scene of a traffic stop for a reasonable period of time necessary for the officer to complete his duties resulting from the traffic stop." State v. Deviley, 2011 ND 182, ¶ 9, 803 N.W.2d 561 (quoting State v. Franzen, 2010 ND 244, ¶ 8, 792 N.W.2d 533). The officer may check the driver's license and registration, ask the driver about his destination and purpose, and request the driver step over to the patrol car. State v. Guscette, 2004 ND 71, ¶ 7, 678 N.W.2d 126. The officer may also ask a passenger similar questions to confirm the information the driver provided. United States

v. Brown, 345 F.3d 574, 578 (8th Cir. 2003). The investigative detention may continue as long as reasonably necessary to conduct duties relating to a traffic stop and to issue a warning or citation. Deviley, at ¶ 9.

[¶ 14] Recently, in State v. Cook, 2020 ND 69, 940 N.W.2d 605 (N.D. 2020), the Court summarized the standard related to the prolonging of a stop, in cases similar to this one.

“In Vetter, we summarized the law on when a traffic stop becomes an illegal seizure:

Traffic violations justify a stop by police officers. When an officer seizes an individual for a traffic violation, it justifies a police investigation of that violation. Because a routine traffic stop is relatively brief, it is more like a "Terry stop" than an arrest. The time it takes to complete the "mission" of the stop, to "address the traffic violation that warranted the stop and attend to related safety concerns," is a permissible length of time to detain someone. However, a stop may not extend longer than the amount of time necessary to effectuate the purpose of the traffic stop. An officer's seizure of a person is permitted only until the tasks tied to the traffic infraction are— or reasonably should have been— completed. A traffic stop prolonged beyond the "time reasonably required to complete the stop's mission" is unlawful. Unrelated inquiries are permitted during a stop as long as they do not prolong the stop and extend the time the individual is detained. A stop may be prolonged only if the officer has reasonable suspicion to justify detaining the individual for inquiries unrelated to the stop.” State v Vetter, 2019 ND 138, ¶ 5-6, 927 N.W.2d 435 (internal citations omitted).

[¶ 15] In this case, the State agrees that this stop took longer than what a typical stop would take. However, the State also submits that had Deputy Morten’s equipment been functioning properly, the stop would have been conducted in a reasonable amount of time. The prolonging of the stop related to Deputy Morten and his addressing of his equipment was not unreasonable. The Court assessed all of the time spent by Deputy Morten related to each specific task he was completing during the stop. At the conclusion of this, the Court noted “The elongation has been almost – or is entirely due to the problems with the computer system and Deputy Morten’s patrol vehicle. Other than that minute and a half

conversation possibly with the HP officers, although that did not seem to be particularly directed at anything other than an informal discussion as he was thanking them for coming to the scene.” (Tr. Aug. 6, 2020 Hrg. pgs. 11-12). The State submits the District Court is correct in its assessment that this stop was not unreasonably prolonged, or that there was not an unnecessary elongation of the traffic stop.

c. The District Court Correctly Concluded That Asking a Driver to Step Out of Their Vehicle was Constitutionally Permissible.

[¶ 16] Unreasonable searches and seizures are prohibited by the Fourth Amendment and Art. I, § 8 of the North Dakota Constitution. State v. Woinarowicz, 2006 ND 179, ¶ 21, 720 N.W.2d 635, 642. During the temporary detention of a traffic violator, the offender is subject to the arresting officer's authority and restraint until the officer completes the issuance of the traffic citation. State v. DuPaul, 509 N.W.2d 266, 270 (N.D.1993). A police officer's order that a driver exit his vehicle after a legitimate stop does not constitute a violation of that driver's rights under the Fourth Amendment or N.D. Const. art. I, § 8. Pennsylvania v. Mims, 434 U.S 106, 110-11 (1977); State v. Heitzmann, 2001 ND 136, ¶ 10, 632 N.W.2d 1, 6; State v. Mertz, 362 N.W.2d 410, 412-13 (N.D.1985). A police officer may order a driver into his patrol car while the officer competes his duties relating to the traffic stop. Mertz, 362 N.W.2d at 413. Following a traffic stop, an officer may order a driver and any passengers out of a vehicle. Knowles v. Iowa, 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998).

[¶ 17] There is not a dispute in the facts that Deputy Morten lawfully stopped Larson's vehicle. Deputy Morten is allowed to ask occupants of the vehicle, in this case, Larson, Marsolek, and Cruz, to exit their vehicle, pursuant to the Court's holdings in Mims,

Heitzmann, Knowles, and Mertz, while he completed his traffic citations.

[¶ 18] Warrantless searches are unreasonable unless they fall within a recognized exception to the warrant requirement. Mertz, 362 N.W.2d at 413. Officer safety is also an exception to the warrant requirement of the Fourth Amendment. State v. Scheett, 2014 ND 91, ¶ 9, 845 N.W.2d 885. Where, in light of his experience, an officer observes unusual behavior that reasonably leads him to conclude that criminal activity may be afoot and that the person he is dealing with may be armed and dangerous, the officer may conduct a pat down search for purposes of discovering weapons which may be used to assault him. Terry v. Ohio, 392 U.S. 1, 27 (1968). The legality of a protective search, “does not depend upon the searching officer actually fearing that the suspect is dangerous; rather, such a search is valid if a hypothetical officer in the same circumstances could reasonably believe the suspect is dangerous.” U.S. v. Plummer, 409 F.3d 906, 909 (8th Cir. 2005).

[¶ 19] Although the District Court noted that there was nothing that “occurred during that time that would give rise to a reasonable suspicion to search or to detain Howard Larson or his passengers for a drug investigation” (Tr. Aug. 6, 2020 Hrg. pg 13) the State submits that there was in fact, reasonable suspicion to commence a drug investigation, while also asking Larson to exit the vehicle to complete the citation.

[¶ 20] In this case, Deputy Morten explained his reasonable suspicion as to why he believed criminal activity may be afoot throughout the suppression hearing. Deputy Morten talked about how he and the two Troopers believed there was something off with the car, Deputy Morten talked about how Larson’s answers were evasive, how the trip plan for sightseeing seemed odd to Deputy Morten, how Larson was acting more nervous than what

he believed was normal for a traffic stop, how Larson had a history of narcotics, how Larson answered the questions directed at Marsolek and Cruz, as well as how Larson had reached over in a downward motion to the passenger area prior to being stopped. All of these indications, when placed together as a whole, created reasonable suspicion for Deputy Morten that criminal activity may be afoot.

[¶ 21] “When the state's interest in the protection and safety of its police, who patrol the roadways, is weighed against the minor intrusion on a passenger's liberty in momentarily leaving a vehicle, safety predominates.” New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

[¶ 22] Deputy Morten testified about the dangers of people having a hypodermic needle and how that item could potentially injure himself, or an officer. Deputy Morten's questions to Larson regarding whether he had any weapons on his person prior to entering Deputy Morten's squad car is one that falls under the holding in Belton. A question related to the possession of a weapon comes down to a minor inconvenience versus officer safety, and in questions like this, when one is weighed against the other, safety needs to predominate, as the Court held in Belton.

[¶ 23] Once the hypodermic needle was observed in Larson's pocket, the State submits all of the Courts further findings were correct in that reasonable suspicion and probable cause all existed to search, resulting in no violations of the defendant's Fourth Amendment rights.

CONCLUSION

[¶ 24] There was no error in determining that this traffic stop was not unnecessary elongated, or prolonged. There was no error in determining Deputy Morten had a right to

ask Larson to step out of his vehicle due to the Courts holdings in several cases, including Mimms. Based on the foregoing, the State respectfully asks this Court to affirm the District Court's decision to deny Marsolek's Motion to Suppress.

Dated the 7th day of June, 2021.

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v.)	Barnes Co. File No. 02-2020-CR-00138
)	
)	
Dylan Marsolek,)	CERTIFICATE OF
)	COMPLIANCE
Respondent/Appellant.)	

Pursuant to North Dakota Rules of Appellant Procedure 32(e), I certify the Appellee’s Brief is not in excess of thirty-eight (38) pages. The document consists of fifteen (15) pages, including the cover page, table of contents, table of authorities, the written brief, the certificate of electronic service and the certificate of compliance.

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Dylan Marsolek,)	CERTIFICATE OF
)	ELECTRONIC SERVICE
Respondent/Appellant.)	

I hereby certify that on June 9th, 2021, I served an electronic copy of Appellee’s Brief via e-mail through the Supreme Court File and Serve System upon:

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