

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

State of North Dakota,	)	Supreme Court No. 20210098
	)	
Plaintiff and Appellee,	)	Civil No. 02-2020-CR-297
	)	
vs.	)	
	)	
Randy Scott Jensen,	)	
	)	
Defendant and Appellant.	)	

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**BRIEF OF DEFENDANT-APPELLANT RANDY SCOTT JENSEN**

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Appeal from the Amended Judgment dated March 29, 2021

In District Court, Barnes County, State of North Dakota

The Honorable Jay A. Schmitz

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## **STATEMENT OF THE ISSUES**

¶1 Whether the District Court abused its discretion in denying Appellant’s motion to suppress evidence.

## **STATEMENT OF THE CASE**

¶2 This is an appeal of the Southeast Judicial District’s Order Denying Randy Jensen’s (“Jensen”) Motion to Suppress Evidence. App. 18. Jensen was charged with unlawful possession of a controlled substance, unlawful possession of drug paraphernalia, and driving under suspension. App. 6. Jensen was involved in a traffic stop for traveling 35-36 miles per hour in a 25 mile per hour zone. App. 8. Jensen consented to law enforcement to search his vehicle and a glass smoking device with burnt residue, a red straw with crystal-like substance and two baggies containing a crystal-like substance was found. App. 8. Jensen was arrested. App. 8.

¶3 Jensen filed a motion to suppress the evidence obtained as a result of the traffic stop, arguing that Jensen asserts he was going 24 miles per hour, and that he did not give consent to search his vehicle. App. 11. The District Court denied the motion to suppress evidence. App. 22. Jensen entered a conditional plea of guilty to the following charges: Unlawful possession of a controlled substance; Unlawful possession of drug paraphernalia; and Driving under suspension. App. 18. Judgment was entered on March 29, 2021. App. 18. Jensen filed a notice of appeal on April 1, 2021. App. 23.

## **STATEMENT OF FACTS**

¶4 On July 21, 2020, at approximately 3:15 a.m., officer Ian Jacobson observed a vehicle traveling between 35-36 miles per hour in a 25 mile per hour zone on the 700 block of 8<sup>th</sup> Avenue SW in Valley City, and commenced a stop. App. 6. The stop took place on

the I-94 East bound on-ramp, and Jensen jumped out of the vehicle and provided a copy of his identification. App. 8. Officer Jacobson confirmed Jensen's drivers license status was revoked. App. 8. Jensen was frisked to check for weapons. App. 8. Jensen was asked if there was anything in the vehicle that law enforcement should know about, and according to law enforcement, Jensen responded "No, Search it." App. 8.

¶5 Law enforcement commenced a search of his vehicle to find an eagle 20 cigarette box on the front passenger floor mat containing a glass smoking device with burnt residue, a red straw with a crystal-like substance, and a small baggie containing a crystal-like residue, and another officer on scene, Officer Jason Runge, located another cigarette box on the driver's side floor mat, which had a small baggie containing a white crystal-like substance. App. 8. Jensen was placed under arrest. App. 8.

¶6 Jensen filed a motion to suppress, arguing that 1. He was traveling 24 miles per hour in the 700 block of 8<sup>th</sup> Avenue SW, Valley City, and that his vehicle was searched without consent. App. 11. The State responded arguing that search incident to arrest is applicable in this case, allowing a search of the arrestee and the area within the arrestee's immediate control; and consent is applicable in this case, allowing a search of the vehicle. App. 14.

¶7 A hearing was held on March 29, 2021, on the Motion to Suppress Evidence. App. 22. During opening statements, counsel for Jensen argued that consent search case law in that it must clearly appear that a defendant voluntarily waived his rights and knowingly permitted the search. Tr. p. 5, lns. 1-5; Mar. 29, 2021. Counsel continues to distinguish that Jensen told law enforcement they "may look" in his vehicle, not "search" his vehicle, and that Jensen did not give permission to search his vehicle. Tr. p. 5, lns. 8-22; Mar. 29,

2021. Therefore, Jensen's position is that there was no clear consent given by Jensen to search the vehicle, and it is an invalid search. Tr. p. 5-6, lns. 23-5; Mar. 29, 2021.

¶8 Officer Runge, with the Valley City Police Department, and on July 21, 2020, was on duty training Officer Ian Jacobson. Tr. p. 9, lns. 1-7; Mar. 29, 2021. He testified that at the beginning of the shift, the radar was calibrated. Tr. p. 15, lns. 14-22; Mar. 29, 2021. Officer Runge recalls pulling Jensen over around 3:00 am that evening in the area of 8<sup>th</sup> Avenue Southwest in Valley City for speeding. Tr. p. 9-10, lns. 21-12; Mar. 29, 2021. When Runge saw the vehicle around 3:00 am, that was the only vehicle on the road, and appeared to be driving faster than the normal speed limit, so they checked the radar and the speed was bouncing between 35 miles per hour and 36 miles per hour in a speed limit of 25 miles per hour. Tr. p. 10-11; lns. 21-13; Mar. 29, 2021. The squad car was turned around and a traffic stop was initiated and the stop took place on the on ramp to I-94. Tr. p. 11, lns. 15-18; Mar. 29, 2021.

¶9 When the vehicle stopped, the driver, later identified as Jensen, jumped out of the vehicle and started approaching the law enforcement vehicle. Tr. p. 12, lns. 2-6; Mar. 29, 2021. Officer Runge jumped out of the passenger seat, told Jensen to stop and stay in his vehicle, and Officer Jacobson echoed Officer Runge. Tr. p. 4-9; Mar. 29, 2021. Jensen went back to his vehicle and Officer Jacobson conducted a regular interview with Jensen. Tr. p. 12, lns. 20-21; Mar. 29, 2021. Officer Runge asked Jensen if there was anything in the vehicle that we needed to know about and according to Officer Runge, Jensen said "no, search it." Tr. p. 13, lns. 12-13; Mar. 29, 2021. Officer Runge understood this to mean the vehicle could be searched. Tr. p. 13, lns. 22-24; Mar. 29, 2021. During the search, Jensen was not under arrest, and was standing next to Runge and never asked them to stop

searching the vehicle once the search started. Tr. p. 6-13; Mar. 29, 2021. At some point, officers confirmed Jensen had a revoked license. Tr. p. 17, lns. 14-19; Mar. 29, 2021. After the search took place, and it was confirmed Jensen had a revoked license, he was placed under arrest. Tr. p. 19, lns. 6-12; Mar. 29, 2021.

¶10 Officer Ian Jacobson confirmed seeing Jensen's vehicle speeding at around 35-36 miles per hour in a 25 mile per hour zone and initiated the traffic stop for speeding. Tr. p. 23-24, lns. 6-9; Mar. 29, 2021. Officer Jacobson approached Jensen in his vehicle, obtained his license, to find out it was revoked. Tr. p. 25, lns. 6-13; Mar. 29, 2021. Jensen was patted down by Officer Jacobson for weapons and echoed Runge's testimony in that he heard Jensen state "No, search it" in response to Runge asking if anything was in the vehicle. Tr. p. 25-26, lns. 20-3; Mar. 29, 2021. However, during cross examination, Officer Jacobson did not recall if Jensen said "go ahead and look" or "search it." Tr. p. 29, lns. 2-6; Mar. 29, 2021. Officer Jacobson searched the vehicle to find an eagle 20 cigarette box on the front passenger floor mat containing a glass smoking device with burnt residue, a red straw with a crystal-like substance, and a small baggie containing a crystal-like residue, and Officer Runge found white crystal-like substance. Tr. p. 26, lns. 4-14; Mar. 29, 2021.

¶11 Officer Runge's bodycam was played for the Court, and it was confirmed that Jensen did not state "search it" but stated "go ahead and look," and law enforcement started to search the vehicle. Tr. p. 34, lns. 21-22; Mar 29, 2021. Officer Jacobson went inside the vehicle, handed items to Jensen, and went to the back door of the vehicle and testified that he saw a glass smoking device while standing outside of the vehicle shining a flashlight in the vehicle, then proceeded to search. Tr. p. 34-35, lns. 21-23; Mar. 29, 2021.

¶12 The Court determined that the search incident to arrest exception did not apply in this case, as Jensen had not been told he was under arrest. Tr. p. 38, lns. 16-18; Mar. 29, 2021. The Court further determined that “go ahead and look” or “go ahead and search” both mean the same thing in the context of the conversation, and that Jensen knew a search would take place and at no time did he say no or object or clarify, and a reasonable officer would understand it as they did and search the vehicle. Tr. p. 39, lns. 3-10; Mar. 29, 2021. The Court found valid consent was given and the motion to suppress was denied. App. 22, Tr. p. 43-44, ln. 20-1; Mar. 29, 2021.

¶13 Once the Court denied the motion to suppress, Jensen requested to enter a “[c]onditional plea subject to the right to appeal the denial of the motion to suppress. And I believe we have an agreement with the State on what the sentence recommendation would be.” Tr. p. 45, lns. 13-15; Mar. 29, 2021. The Court further reiterated to Jensen that as part of an agreement on a sentencing recommendation, Jensen will “be preserving [his] right to appeal [the] ruling on the motion to suppress.” Tr. p. 48, lns. 6-11; Mar. 29, 2021. Judgment was entered pursuant to Jensen’s conditional guilty plea on March 29, 2021. App. 18. Jensen timely filed a notice of appeal on April 1, 2021. App. 23.

## **LAW AND ARGUMENT**

### **I. The Standard of Review.**

¶ 14 This Court has held when reviewing a district court’s ruling on a motion to suppress:

When reviewing a district court's ruling on a motion to suppress, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We recognize that the district court is in a superior position to assess the credibility of witnesses and weigh the evidence. Generally, a district court's decision to deny a motion to suppress will not



be reversed if there is sufficient competent evidence capable of supporting the district court's findings, and if its decision is not contrary to the manifest weight of the evidence. 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. Goebel, 2007 ND 4, ¶ 11, 725 N.W.2d 578 (internal citations omitted). Whether facts support a finding of reasonable and articulable suspicion is a question of law. State v. Ostby, 2014 ND 180, ¶6, 853 N.W.2d 556; State v. Fields, 2003 ND 81, ¶6, 662 N.W.2d 242; State v. Adan, 2016 ND 215, ¶ 9, 886 N.W.2d 841.

## **II. The District Court abused its discretion in denying Appellant's motion to suppress evidence.**

¶ 15 “The Fourth Amendment to the United States Constitution and art. I, § 8, of the North Dakota Constitution protect individuals from unreasonable searches and seizures.”

State v. Ballard, 2016 ND 8, ¶8, 874 N.W.2d 61. The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. Amend. 4.

¶16 Searches and seizures without a warrant or an exception are unreasonable under the Fourth Amendment. State v. DeCoteau, 1999 ND 77, ¶ 7, 592 N.W.2d 579. One exception, is when an individual gives consent to search. Id. at ¶ 9. “A consent search ‘must be conducted according to the imitations placed upon an officer’s right to search by the consent or the search loses its validity.’” Id. at ¶ 9 (citing State v. Huether, 453 N.W.2d 778, 782 (N.D. 1990)).

The trial court needs to determine whether the consent was voluntary under the totality of the circumstances. State v. Page, 277 N.W.2d 112, 116 (N.D.1979). To be voluntary, the consent must not be coerced by explicit or implicit means or by implied threat or covert force. State v. Larson, 343 N.W.2d 361, 364 (N.D.1984). Although the existence or absence of certain factors concerning the characteristics and condition of the person at the time of consent and the details of the setting in which the consent was obtained are significant in deciding voluntariness, no one factor in and of itself is determinative. State v. Discoe, 334 N.W.2d 466, 468 (N.D. 1983) Avila, 1997 ND 142, 16, 566 N.W.2d 410. The question whether a search exceeds the scope of consent is a factual one. In a preliminary proceeding, a district court's findings of fact of a criminal case will not be set aside if, "after conflicts in the testimony are resolved in favor of affirmance, 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 the evidence." State v. Zimmerman, 529 N.W.2d 171, 173 (N.D.1995) (citing Thompson, 520 N.W.2d at 581).

Id. at ¶ 9. "[T]o sustain a finding of consent, the State must show affirmative conduct by the person alleged to have consented that is consistent with the giving of consent, rather than merely showing that the person took no affirmative actions to stop the police from entering." Id. at ¶ 11 (citing Avila, 1997 ND 142, p. 17, 566 N.W.2d 410). The waiver of constitutional rights by a defendant is not to be inferred lightly, but must be clearly and intentionally made, and every reasonable presumption is indulged against the waiver. State v. Manning, 134 N.W.2d 91 (N.D. 1965) (citing United States ex rel. Pierce v. Lane, D.C., 193 F.Supp. 395 (1961)). In DeCoteau, the homeowner opened the front door to her residence, and the District Court found that her act of opening the door and allowing law enforcement to follow her into the home was not consent and was not enough to obviate the warrant requirement for entry into a person's home. Id. at ¶ 12.

¶17 In the present case, Jensen argues that he did not give consent to search his vehicle, but rather to look from the outside. Officer Jacobson did not recall if Jensen said "go ahead

and look” or “search it.” Tr. p. 29, lns. 2-6; Mar. 29, 2021. The video presented to the Court showed that Jensen said “go ahead and look,” and law enforcement started to search the vehicle. Tr. p. 34, lns. 21-22; Mar 29, 2021. www.Dictionary.com defines “look” as “to turn one’s eyes toward something or in some direction in order to see,” and defines “search” as “to go look through (a place, area, etc.) carefully in order to find something missing or lost.” The words are not synonyms. Pursuant to State v. Manning, this Court is to take every reasonable presumption against the waiver, and that is what Jensen is requesting this Court do today.

### CONCLUSION

¶18 The Appellant respectfully requests this Court reverse the District Court’s Judgment.

Dated this 20<sup>th</sup> day of July, 2021.

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### CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Appellant brief contains 11 pages consisting of the cover page through the conclusion and signature block and complies with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

Dated the 20<sup>th</sup> day of July, 2021.

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**CERTIFICATE OF SERVICE**

True and correct copies of *BRIEF OF APPELLANT* and *APPENDIX OF APPELLANT* were e-mailed to the following this 20<sup>TH</sup> day of July, 2021:

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