



North Dakota Attorney General's LAW REPORT

Wayne Stenehjem, Attorney General
State Capitol - 600 E Boulevard Ave. Dept 125
Bismarck, ND 58505-0040
www.attorneygeneral.nd.gov
(701) 328-2210

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

Reasonable Suspicion to Detain

Adan was driving a vehicle on I-94, speeding and following too closely to the vehicle in front of him. When he was pulled over he left his blinker on and appeared nervous when speaking to the officer. A blanket covered most of the back seat. The officer also noticed an open air freshener, a bottle of Ozone scent spray, a GPS system, eye drops, a lighter, and an energy drink.

Adan was asked to go back to the patrol car. Adan was nervously fidgeting and told the officer the car was a rental. He said he had rented it in St. Cloud and was dropping a friend off in Watford City. The passenger, who was also nervous, described their travel plans differently and couldn't remember who had been with them. The passenger was also on probation for possession of methamphetamine. Adan was issued a warning and asked if he would answer a few more questions. When asked, Adan would not consent to a search of the vehicle. The officer asked for a K-9 unit and it arrived 45 minutes later and indicated the presence of narcotics. A search revealed over 2 pounds of marijuana.

Adan filed a motion to suppress evidence based on the search, which was denied. He then entered a conditional plea of guilty to possession with intent to deliver and appealed the suppression issue.

A trial court's findings of facts are deferred to on an appeal of a denial of a motion to suppress. *State v. Kitchen*, 1997 ND 241, ¶ 11, 572 N.W.2d 106. Questions of law however are fully reviewable, including whether the facts support a finding of reasonable and articulable suspicions to stop. *State v. Fields*, 2003 ND 81, ¶ 6, 662 N.W.2d 242. Here, the traffic violation alone gave the officer probable cause to initiate a traffic stop. It is what occurred next that the parties disagree about.

A temporary detention during a traffic stop is okay for as long as it takes to issue the citation or a warning. *State v. Fields*, 2003 ND 81, ¶ 8. To continue the temporary detention the officer must have a reasonable suspicion that criminal activity is present to avoid violating the person's Fourth Amendment rights. *Fields* at ¶10. In its review the court must look at the totality of the circumstances and apply an objective standard, taking into account the officer's training and experience. *Fields* at ¶ 13.

In upholding the trial court's ruling the court looked at several factors which, in combination, justified the continued detention of Adan. His nervousness was a pertinent consideration in determining reasonable suspicion, but not enough on its own. *State v. Heitzmann*, 2001 ND

136, ¶ 15, 632 N.W.2d 1. Inconsistencies about the details of a trip may also be used in forming reasonable suspicion. *State v. Deviley*, 2011 ND 182, ¶ 12, 803 N.W.2d 561. Adan and his passenger were both nervous and the details about their travel plans were inconsistent.

The presence of masking odors is a relevant factor, especially the presence of multiple air fresheners. *State v. Franzen*,

2010 ND 244, ¶ 16, 792 N.W.2d 533. The officer testified the GPS and eye drops were important indicators of drug trafficking based on his training and experience. The passenger also had a criminal history, which assisted in a finding of reasonable suspicion. *United States v. Sandavol*, 29 F.3d 537, 542 (10th Cir. 1994). All these factors justified Adan's detention until the K-9 unit arrived.

State v. Karna, 2016 ND 232, 887 N.W. 2d 549

Emergency Exception to Search Warrant

Karno's brother made a 911 call stating Karno had told him Karno had shot their father. Officers knew Karno lived with his father. When they arrived Karno was smoking outside the residence and denied shooting his father. An officer entered the home, and saw a rifle, so he went back outside and detained Karno. The officer then went back inside to search and found the father asleep in his bedroom, unhurt. The officer inquired about other weapons in the home and the father gave his permission to search Karno's room for a gun. In Karno's bathroom drugs and drug paraphernalia were found. Karno was charged for those items and moved to suppress the evidence asserting law enforcement entered his home without a warrant or an exception to the warrant requirement. The trial court denied that motion finding the facts justified an emergency exception. Karno conditionally pled guilty and appealed that ruling.

A trial court's findings of fact are upheld if, after any conflicts in the testimony are resolved in their favor, there is sufficient competent evidence supporting these findings and the decision is not contrary to the manifest weight of the evidence.

City of Fargo v. Thompson, 520 N.W.2d 578, 581 (N.D. 1994).

Warrantless searches are unreasonable unless the search falls under a recognized exception. *City of Fargo v. Lee*, 1998 ND 126, ¶ 10, 580 N.W.2d 580. One of these exceptions is exigent circumstances which include emergency situations requiring swift action to prevent imminent danger to life or serious damages to property. *State v. Nagel*, 308 N.W.2d 539, 543 (N.D. 1981). This exception allows law enforcement to enter a dwelling without a warrant to render emergency assistance to a person whom they reasonably believe is in distress. *City of Fargo v. Ternes*, 522 N.W.2d 176, 178 (N.D. 1994).

This emergency exception has three parts. The police must first have reasonable grounds to believe an emergency is at hand and immediate assistance is needed to protect life or property. *State v. Nelson*, 2005 ND 11, ¶ 12, 691 N.W.2d 218. Secondly, the search must not be primarily motivated by an intent to arrest and/or seize evidence. *Id.* Finally, a reasonable basis, akin to probable cause, must connect the

emergency with the area or place to be searched. *Id.*

The facts in this case supported the district court's conclusion that exigent

circumstances existed justifying the entry into Karno's home to check on his father. Karno's conviction was upheld.

State v. Romanick, 2017 ND 42, 890 N.W.2d 803

Supervisory Writ

An investigation led to criminal charges against the Ward County Sheriff for improper medical care given to an inmate who died. The prosecutor mistakenly listed the wrong year for the violation in the complaint, but the proper date was identified in all other documents provided to the defendant. Shortly before trial the prosecutor noticed this error and moved to amend the complaint to list the proper date of the crime. The defense objected and the district court concluded the amendment would substantially prejudice the defendant because time is an essential element of the crime. In an unusual move the State petitioned the Supreme Court for a supervisory writ requiring the district court to grant the amendment to the Complaint.

The North Dakota Supreme Court's discretionary authority to issue supervisory writs is exercised on a case-by-case basis after reviewing the unique circumstances of that case. *State v. Louser*, 2017 ND 10, ¶ 5, 890 N.W.2d 1. This authority is used rarely and cautiously, and only to correct errors in order to prevent injustice in extraordinary cases when no other adequate remedy exists. *State ex rel. Harris v. Lee*, 2010 ND 88, ¶ 6, 782 N.W.2d 626. This case involved allegations regarding an elected official's duties and responsibilities to

provide adequate medical care to persons in his custody. There is a significant and vital public interest in the accountability of this type of public official's actions or inactions. The state did not have an adequate alternative remedy because the state's ability to appeal is very limited. Therefore, this case was determined to be appropriate for supervisory writ.

The main purpose of a criminal complaint is to inform the defendant of the charge so he can prepare a defense. *State v. Schwab*, 2003 ND 119, ¶ 9, 665 N.W.2d 52. Under N.D.R.Crim. P. 3(c) a complaint may be amended any time before a finding or verdict if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. The defect in this complaint was an incorrect date, but both of the dates listed were within the two year statute of limitations for a misdemeanor. N.D.C.C. § 29-04-03.

The crime charged was a crime regardless of the specific date charged. The Court determined that the incorrect date was a clerical error not an essential element of the charges. The district court abused its discretion and was directed to grant the state's motion to amend the complaint.

State v. Kaul, 2017 ND 56, 891 N.W.2d 352

Searches of Probationers Residences

Officers were conducting a probationary search at a residence. When officers heard noise at the front door and opened it, Kaul was standing there so he was let in. Kaul agreed to a search of his person and vehicle and nothing was found. Kaul denied consent to search his backpack and officers called for a K-9 to sniff it because Kaul was acting very nervously and was a known drug user.

About 15 minutes later, the K-9 arrived and alerted on the backpack. Kaul again denied consent to search the backpack so the officers seized it. Kaul, however, was allowed to leave. Officers obtained a search warrant for his backpack and found methamphetamine and drug paraphernalia. Kaul was charged for these items and filed a motion to suppress evidence based on an illegal search and seizure. A hearing was held and Kaul's motion was granted. The State filed an appeal on that ruling.

In reviewing a decision on a motion to suppress deference is given to the district court's findings of facts and conflicts in testimony are resolved in favor of upholding the district court's ruling. *State v. Tognotti*, 2003 ND 99, ¶ 5, 663 N.W.2d 642. Questions of law however are fully reviewable and whether a finding of fact meets a legal standard is a question of law. *State v. Gefroh*, 2011 ND 153, ¶ 7, 801 N.W.2d 429. Deciding if law enforcement violated constitutional rights involving searches or seizures is also a question of law. *State v. Uran*, 2008 ND 223, ¶ 5, 758 N.W.2d 727.

The parties agreed Kaul was seized when he came into contact with law enforcement. The state asserts his seizure was lawful because they are allowed to detain individuals when the intrusion on privacy is minimal compared to the interest in crime prevention, detection and officer safety. *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013). Three law enforcement interests must be weighed in situations like this: (1) preventing flight if incriminating evidence is found; (2) minimizing the risk of harm to the officers; and (3) facilitating the orderly completion of the search. *Michigan v. Summers*, 452 U.S. 692 (1981).

In this case the district court found that the first factor was not applicable because the officers allowed Kaul to leave the residence when they took his backpack. The district court agreed officer safety was an issue but was not enough on its own to justify the detention. The third factor was also not present, again because the officers allowed Kaul to leave before the search was completed.

In upholding the district court's ruling emphasis was placed on the fact that Kaul was not an occupant of the residence and that no search warrant existed (it was a probationary search). The Court determined that the *Summers* rule does not apply to seizures of a non-occupant incident to another individual's probationary search.

State v. Ashby, 2017 ND 74, 892 N.W.2d 185

Reasonable Suspicion to Stop

A highway patrol officer received a BOLO notice about a vehicle with concerns the driver was under the influence of drugs and that the vehicle contained two small children. The officer spotted a vehicle matching the description and began to follow it. Almost immediately the vehicle turned into a rest area at Sykeston as if evading the officer. The officer pulled over down the road and noticed two small children and two adults exit the vehicle for five minutes but no one entered the restrooms.

During this time the officer made a couple of phone calls to verify the BOLO. He learned the vehicle was in fact registered to Caren Ashby and Matthew and Caren Ashby were both heavy users of heroin and methamphetamine. He also learned the local drug task force was investigating the Ashbys. Caren's grandmother had informed authorities that she was supposed to watch the children that day and that Caren was high on heroin. As the vehicle left the rest area the officer again followed it. He contacted his supervisor about his concerns and to confirm whether he should make a welfare stop of the vehicle. He had not witnessed any traffic violations but did stop the vehicle. Matthew Ashby told officers there was a marijuana pipe and a search revealed that and additional contraband. Ashby was charged and moved to suppress the evidence claiming an unlawful stop and search. The district court agreed and suppressed the evidence. The state appealed that ruling.

The stop of Ashby's vehicle was a seizure within the protection of the United

States and North Dakota Constitutions. Deference is given to a district court's findings of facts. *State v. Knox*, 2016 ND 15, ¶ 6, 873 N.W.2d 664. A district court's ruling will be upheld if there is sufficient competent evidence to support it and it is not contrary to the manifest weight of the evidence. *Id.* Questions of law though are fully reviewable including whether findings of fact meets a legal standard. *Id.* Whether the facts of a case support a reasonable and articulable suspicion is a question of law and is fully reviewable on appeal. *City of Dickinson v. Hewson*, 2011 ND 187, ¶ 6, 803 N.W.2d 814.

Whether the officer had reasonable suspicion in this case centers primarily around the information provided to the officer and the reliability of the tip provided by Caren's grandmother. The reliability of an informant is important in a determination of reasonable suspicion. *State v. Knox*, 2016 ND at ¶ 8. Information from a readily identifiable informant has a higher indicia of reliability than information from an anonymous informant. *City of Dickinson v. Hewson*, 2011 ND at ¶ 10. The grandmother had expressed concern for the two children's wellbeing. The information in this tip raised the possibility of several criminal violations, including DUI, endangerment of a child, and reckless endangerment. Based on the totality of the circumstances, the traffic stop was supported by a reasonable suspicion. The suppressed evidence is now available for the prosecution to proceed with on the original charges.

State v. Conrad, 2017 ND 79, 892 N.W.2d 200

Theft/Exploitation of a Vulnerable Adult

Conrad was charged with both theft of property and exploitation of a vulnerable adult for using more than \$50,000 in funds deposited by her mother into a joint bank account. The account listed the mother as “member” and Conrad as “joint owner.” Probable cause was found but the district court later granted a motion to dismiss the charges based on the civil dispute doctrine. The state appealed that ruling. On appeal the civil dispute doctrine is treated as a question of law and is fully reviewable. *State v. Herzig*, 2012 ND 247, ¶ 19, 825 N.W.2d 235.

Both of the charges in this case required the Defendant to take, obtain, or use another’s property. N.D.C.C. § 12.1-23-10(8) defines property of another as “property in which a person other than the actor . . . which the actor is not privileged to infringe without consent, regardless of

the fact the actor also has an interest in the property.” This allows a joint account holder to be charged with theft, for example, for misuse of joint account funds, *State v. Cox*, 325 N.W.2d 181, 183 (N.D. 1982).

The trial court ruled that the money had been a gift to Conrad by her mother. That area of the law is well settled (inter vivos gifts) and does not need a court to apply the civil dispute doctrine. Doing this would allow for the dismissal of theft charges every time a defendant claims the stolen property was a gift. Conrad’s claim only asserts a question of fact to be determined by the fact finder (the jury) not a question of law for the trial judge. *State v. Perreault*, 2002 ND 14, ¶ 11, 638 N.W.2d 541. The case was sent back to the trial court for further proceedings.

State v. Gray, 2017 ND 108, _____ N.W.2d _____

Disorderly Conduct

It was reported to law enforcement that Gray was trying to look into his neighbor’s house using binoculars. The neighbors were fearful of Gray and stayed inside. When officers spoke to Gray about this he became upset and began yelling. He told officers he had been watching the neighbors because he was afraid of them shooting him. Gray was advised to stop and cited for disorderly conduct.

The day of trial Gray filed two motions to dismiss, claiming the complaint was illegal and that he was engaged in constitutionally protected activity. Gray’s

trial proceeded and he was convicted of disorderly conduct.

On appeal Gray argued his conduct wasn’t illegal because he was engaged in constitutionally protected activity. Gray filed his motion to dismiss well outside the deadline given by the trial court in its scheduling order. However, the trial court made no record of its denial of Gray’s motions.

Great did not file a trial transcript on appeal either, making it impossible for a meaningful and intelligent review of the issues Gray appeals. Pro se litigants like

Gray are bound by the rules of procedure, even if they don't understand those rules. *Jury v. Barnes Cnty. Mun.*

Airport Authority, 2016 ND 106, ¶ 14, 881 N.W.2d 10. Gray's conviction was upheld.

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