North Dakota Attorney General's LAW REPORT

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

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State v. Rivera, 2018 ND 15, 905 N.W.2d 739

Sentencing Issues

Rivera was charged with numerous offenses involving taking photographs of unsuspecting women in dressing rooms at various stores. The charges were joined for trial and he was found not guilty on all felony charges but guilty on the misdemeanor charges. Rivera was sentenced to one year imprisonment on each conviction with the three sentences to run consecutively (3 years total).

Rivera argued that his sentencing was improper based on N.D.C.C. § 12.1-32-11(3):

> When sentenced only for misdemeanors, a defendant may not be consecutively sentenced to more than one year, except that a defendant being sentenced for two or more class A misdemeanors may be subject to an aggregate maximum not exceeding that authorized by section 12.1-32-01 for a class C felony if each class A misdemeanor was committed as part of a different course of conduct or each involved a substantially different criminal objective.

Rivera alleged he could only be sentenced to consecutive sentences if each misdemeanor was part of a different course of conduct or involved a substantially different criminal objective. "Course of conduct" is not defined in the statute and has not been defined before by the courts. The State argued the phrase should be defined as three or more offenses committed against different victims on different days in different locations. The facts in this case did involve different crimes committed against different victims on different dates. The Court found each of Rivera's consecutively sentenced offenses were committed as part of different courses of conduct and the sentence imposed was proper. Rivera's conviction and sentence was affirmed.

State v. Adams, 2018 ND 18, 905 N.W.2d 758

Standing to Contest a Search

Officers responded to a report of suspicious activity in a parking lot and observed individuals displaying odd behavior that was consistent with drug use. An officer also observed a blue container inside a vehicle containing a crystal/powder substance. Three individuals were in the vehicle including Adams. Officers searched the vehicle without permission and seized numerous items related to drug use.

Adams moved to suppress the evidence seized from the vehicle arguing his Fourth Amendment rights were violated. The trial court ruled Adams did not have a reasonable expectation of privacy in the containers inside the vehicle and did not have standing to challenge the search and seizure of those items. Adams was found guilty of possession of drug paraphernalia at trial.

On appeal Adams asserts he had a reasonable expectation of privacy for the items seized from the containers in the vehicle. A district court's findings of fact in a motion to suppress are deferred to on appeal. *State v. Gatlin*, 2014 ND 162, ¶ 4, 851 N.W.2d 178. The trial court's decision will not be reversed if there is sufficient competent evidence supporting it. *Id.* Whether an individual has a reasonable expectation of privacy in a certain area is reviewed under a de novo standard. *State v. Williams*, 2015 ND 103, ¶ 14, 862 N.W.2d 831. A reasonable expectation of privacy requires the individual to have an actual subjective expectation of privacy and that expectation must be one society recognizes as reasonable. *State v. Gatlin*, 2014 ND 162, ¶ 5, 851 N.W.2d 178.

A lessor expectation of privacy exists in vehicles because they can move. *State v. Stockert*, 245 N.W.2d 266, 269 (N.D. 1976).

In analyzing whether a person has a reasonable expectation of privacy in a container found within a vehicle, courts look at several factors: does the individual assert ownership of the vehicle or the container; does the individual present evidence establishing possessory interest in the container; was the individual present at the time of the search; and does the container itself have identifying markings. *U.S. v. Smith*, 621 F.2d 483, 487 (2nd Cir. 1980).

Adams did not assert ownership of the vehicle or the containers. He also did not present any evidence of a possessory interest in the containers. He was present but only objected to the search of a second vehicle (which was not searched). The containers in question did not contain any identifying marks demonstrating ownership. Adams therefore did not have a reasonable expectation of privacy or standing to challenge the search or seizure. Adams' conviction was upheld.

State v. Shaw, 2018 ND 32, 905 N.W.2d 905

Witness Unavailable to Testify at Trial

Two men broke into an apartment and one of them shot and killed the occupant. One of the men, Dametrian Welch, testified he went with Delvin Shaw to the apartment but that Shaw was the one who shot/killed the occupant. Shaw was found guilty by a jury. His conviction was overturned and before the second trial the State filed notice of its intent to introduce evidence Shaw was involved in a burglary in that same building four days before the murder. The State claimed this evidence showed Shaw's motive and intent. The defense objected, the evidence was irrelevant and too prejudicial.

Welch refused to testify at the second trial. The trial court found him to be "unavailable" and allowed an audio recording of his previous testimony from the first trial to be played for the jury at the second trial. Shaw was found guilty of burglary and murder again.

Evidentiary rulings made by a trial court are reviewed for an abuse of discretion.

State v. Campbell, 2017 ND 246, ¶ 12, 903 N.W.2d 97. The trial court must act in an arbitrary or unreasonable manner in misinterpreting the law or its ruling must not be the product of a rational mental process for its ruling to be overturned.

North Dakota Rules of Evidence 404(b) states:

> **Crimes, Wrongs, or Other Acts.**
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The prosecutor must:
> (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
> (B) do so before trial or during trial if the court, for good cause, excuses lack of pretrial notice.

To determine whether evidence of prior bad acts is admissible at trial involves a three part test: the trial court must look at why the evidence is being offered; the evidence of the prior acts must be substantially reliable; and there must be proof of the crime charged which will allow the jury to find guilt or innocence without consideration of the prior bad acts evidence. *State v. Shaw*, 2016 ND 171, ¶ 8, 883 N.W.2d 889. The third step is generally covered by a jury instruction regarding the admissibility of the evidence and its use for a limited purpose. *Id.*

Even if the bad acts evidence passes this three part test, it may still be excluded if the danger of unfair prejudice to the defendant substantially outweighs its probative value. N.D.R. Ev. 403(a). On appeal the Court found the trial court did not abuse its discretion in admitting the evidence regarding Shaw's involvement in the earlier burglary.

The trial court also found Welch was an unavailable witness pursuant to N.D.R. Ev. 804(a)(2):

> **a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
> ***
> (2) refuses to testify about the subject matter despite a court order to do so;

Welch's prior testimony was played for the jury and Shaw's conviction was upheld.

State v. Bruce, 2018 ND 45, 907 N.W.2d 773

Marsy's Law and Restitution

Bruce was charged with multiple crimes including manslaughter. Bruce eventually pled guilty to negligent homicide as part of a plea agreement. Restitution was to be determined later. At the restitution hearing the State requested reimbursement of funeral expenses, travel expenses of family members, and some personal items totaling $7,157.20. The court ordered Bruce to pay the whole amount.

On appeal Bruce argued the victim's father should not receive restitution for funeral expenses because he had received money from a life insurance policy. Essentially Bruce alleged the victim's father did not have funeral expenses requiring reimbursement per N.D.C.C. § 12.1-32-08(1)(a) which states:

> The reasonable damages sustained by the victim or victims of the criminal offense, which damages are limited to those directly related to the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action. This can include an amount equal to the cost of necessary and related professional services and devices relating to physical, psychiatric, and psychological care. The defendant may be required as part of the sentence imposed by the court to pay the prescribed treatment costs for a victim of a sexual offense as defined in chapters 12.1-20 and 12.1-27.2.

The district court found that having life insurance did not negate the fact the victim's father incurred expenses for the funeral of his son. This ruling was affirmed on appeal.

Additionally, the State requested travel expenses for the father to travel to and from Minot for court hearings. The State recently adopted "Marsy's Law" which is now part of the State's constitution. Section 25(1)(n) N.D. Const. art. I states:

> The right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct. All monies and property collected from any person who has been ordered to make restitution shall be first applied to the restitution owed to the victim before paying any amounts owed to the government.

The question of whether travel expenses may be claimed as reasonable damages sustained by a victim had not been answered in North Dakota.

In upholding these expenses the Court reasoned that the victim's father would not have driven to and from Minot for court, but for Bruce's criminal conduct. Therefore, those expenses were a direct result of Bruce's crimes and subject to repayment as restitution.

State v. Terrill, 2018 ND 78, 908 N.W.2d 732

Search and Seizure

Fargo Police Department executed a search warrant at a motel room in Fargo. When they knocked they could hear people scrambling around in the room so they forcibly entered. Two people were found flushing narcotics down the toilet and Terrill was trying to hide behind a bed. The motel room was littered with drug paraphernalia including needles and baggies, both on the floor and the nightstand next to the bed. These items were located close to Terrill but not within his arm's reach. Terrill was arrested and on his person he had approximately one ounce of methamphetamine. Terrill was charged with possession of methamphetamine with intent to deliver and possession of drug paraphernalia. Terrill moved to suppress all the evidence. The trial court denied his

motion finding he was in constructive possession of the drug paraphernalia by the bed and that gave officers probable cause to arrest him (which lead to the discovery of the methamphetamine).

A trial court's decision on a motion to suppress is given deference to its findings of fact. *State v. Kaul*, 2017 ND 56, § 5, 891 N.W.2d 352. The decision is upheld if the facts support it and it is not contrary to the manifest weight of the evidence. *Id.* Questions of law, however, are fully reviewable on appeal (including whether law enforcement violated constitutional protections against unreasonable searches and seizures). *Id.*

Terrill claims officers did not have probable cause to arrest or search him. An arrest is a seizure for Fourth Amendment analysis and requires probable cause. This can be established by knowledge that would give a prudent person reasonable grounds to believe Terrill committed a crime. *See State v. Spidahl*, 2004 ND 168, ¶ 10, 686 N.W.2d 115.

Constructive possession of drug paraphernalia constitutes probable cause for an arrest. *State v. Woinarowicz*, 2006 ND 179, ¶ 29-31, 702 N.W.2d 635. To demonstrate constructive possession, the state must show the accused had the power and capability to exercise dominion and control over the paraphernalia. *State v. Morris*, 331 N.W.2d 48, 53 (N.D. 1983).

Terrill was in a hotel room that was littered with syringes and baggies. These items are commonly used to sell and ingest methamphetamine. The testimony also showed Terrill was in close proximity to these items as he hid by the bed/night stand. Terrill was the only person in the bedroom. The evidence shows Terrill was in constructive possession of drug paraphernalia and therefore subject to arrest. Terrill was then searched after his arrest and found to be in possession of an ounce of methamphetamine. Terrill's conviction was upheld.

City of Bismarck v. Brekhus, 2018 ND 84, 908 N.W.2d 715

Hot Pursuit

A Bismarck police officer saw a vehicle drive into an snowbank, then back out and drive away at an unsafe speed. The officer activated his lights and tried to stop the vehicle but it didn't stop. The officer followed the vehicle while it made several turns, for about 30 seconds, then it entered a garage. The garage was not attached to a residence, and the overhead door remained open. Brekhus was told to stay in her vehicle as the officer entered the open garage. The officer noticed the odors of alcohol and burnt marijuana, and that Brekhus had blood shot eyes and difficulty speaking with the officer. Brekhus was told to come out of the garage to perform field sobriety tests.

The officer read the implied consent to her and she refused, after which she was arrested for DUI. Brekhus gave the officer permission to retrieve the vehicle registration and insurance card from her vehicle. In plain view in the vehicle was a glass smoking device containing marijuana which was seized.

Brekhus was charged with DUI and possession of drug paraphernalia and

marijuana. She moved to suppress the evidence claiming her rights were violated when the officer entered her garage. The district court suppressed the evidence finding a violation of her constitutional rights when the officer entered her garage without a warrant or an exception to the warrant requirement. The city appealed that ruling.

A decision on whether to suppress is upheld if sufficient evidence is shown which supports the trial court's finding and the decision is not contrary to the manifest weight of the evidence. *State v. Odom*, 2006 ND 209, ¶ 8, 722 N.W.2d 370. Questions of law however, are fully reviewable on appeal. *Id.* The city claims the entry into the garage was within the exigent circumstances exception to the warrant requirement.

Citizens are protected from unreasonable searches and seizures in their homes pursuant to the federal and state constitutions. *State v. Friesz*, 2017 ND 177, ¶ 15, 899 N.W.2d 688. A search occurs when law enforcement intrudes on a person's reasonable expectation of privacy. *State v. Winkler*, 552 N.W.2d 347, 351 (N.D. 1996). A person may have an expectation of privacy in their garage, at least in what could not be seen from outside the garage. *Id.*

A person standing within an open doorway of a home has been determined to be in a public place and may be arrested without a warrant. *City of Fargo v. Steffan*, 2002 ND 26, ¶ 12, 639 N.W.2d 482. The exigent circumstances exception for a warrant allows warrantless entry onto private property when police are in hot pursuit (among other situations). *Kentucky v. King*, 563 U.S. 452, 460 (2011). N.D.C.C. § 40-20-05(2) defines hot pursuit as:

> A police officer in "hot pursuit" may continue beyond the one and one-half mile [2.41 kilometers] limit to make an arrest, in obedience to a warrant or without a warrant under the conditions of section 29-06-15, if obtaining the aid of peace officers having jurisdiction beyond that limit would cause a delay permitting escape. As used in this subsection, "hot pursuit" means the immediate pursuit of an individual endeavoring to avoid arrest. The jurisdiction limits in subsection 1 do not apply to a police officer acting pursuant to a joint powers agreement with another jurisdiction.

N.D.C.C. 29-06-15(1)(a) allows an officer to arrest an individual for offenses committed in the officer's presence.

> 1. A law enforcement officer, without a warrant, may arrest a person:
>   a. For a public offense, committed or attempted in the officer's presence and for the purpose of this subdivision, a crime must be deemed committed or attempted in the officer's presence when what the officer observes through the officer's senses reasonably indicates to the officer that a crime was in fact committed or attempted in the officer's presence by the person arrested.

The city argued that when Brekhus refused to pull over, that act created probable cause to arrest her for fleeing, or eluding a peace officer. (N.D.C.C. § 39-10-71.) The City says this evasion justified the warrantless entry into her garage. Additionally, the officer's pursuit of Brekhus (both in the patrol car and on

foot) were immediate and uninterrupted. Finally the officer's entry into the garage was limited to removing Brekhus and inquiring why she hadn't stopped.

On appeal the Court agreed and reversed the trial court's decision to suppress the evidence. The case was remanded for additional proceedings.

State v. Wilder, 2018 ND 93, ____ N.W.2d ____

Right to Remain Silent

Wilder was charged with murder and found guilty after a jury trial. On appeal he argues his conviction should be reversed because of prosecutorial misconduct. Wilder believes he is entitled to a new trial because the State's comments during closing argument violated his constitutional right to remain silent.

The State can't impeach a defendant or comment on his decision to remain silent after he was arrested if he was advised of his *Miranda* rights. *Doyle v. Ohio*, 426 U.S. 610, 617-19 (1976). Wilder did not object to the State's comments on these items at trial, but since it involves a constitutional right it may still be reviewed on appeal. *State v. Gaede*, 2007 ND 125, ¶ 18, 736 N.W.2d 418.

A cellmate testified that Wilder told him a story that he had not told police about how his wife was killed (some mystery guy with a knife). The State told the jury Wilder didn't tell the police that story because he was guilty. This was a improper comment of his post arrest silence.

This improper comment triggers a harmless error analysis whereby the State must prove beyond a reasonable doubt that the comments did not contribute to the guilty verdict. *State v. Anderson*, 2016 ND 28, ¶ 14, 875 N.W.2d 496. Wilder does not challenge the sufficiency of the evidence of guilt on his appeal. (DNA evidence played a huge role in this case.)

On appeal, the Court found that the improper references were few and brief. Additionally, Wilder had not objected during the trial. The Court determined the comments, while improper, were harmless error and Wilder's conviction was affirmed.

State v. Cook, 2018 ND 100, ____ N.W.2d ____

Chain of Custody

Cook was arrested during a search of a hotel room in Fargo. Various items of drug paraphernalia, methamphetamine, scales, etc., were found. A search of Cook's vehicle also revealed items of paraphernalia. Cook was charged with multiple drug charges. At trial Cook objected to the introduction of various exhibits claiming a lack of foundation and an improper chain of custody. The exhibits were conditionally received by the court and were later admitted once the proper chain of custody and foundational testimony was provided.

Cook argues the trial court abused its discretion by admitting physical evidence and a report which had breaks in the chain of custody.

An unbroken chain of custody is not required to admit evidence if the trial court is reasonably satisfied the item offered is what it is purported to be and its condition is substantially unchanged. *State v. Haugen*, 448 N.W.2d 191, 196 (N.D. 1989).

Defects in the chain of custody of an item of evidence go to the weight of the evidence, not its admissibility. *Id.* The trial court has discretion to admit exhibits and its decision will not be reversed unless it abused its discretion. *Id.* Additionally, not every person who laid hands on the evidence must be called to testify. *State ex rel. Madden v. Rustad*, 2012 ND 242, ¶ 11, 823 N.W.2d 767.

In this case the witnesses might have been called out of order but a proper foundation was still made and the exhibits were properly admitted into evidence.