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

November 2018

Collins v. Virginia, 138 S. Ct. 1663, 584 U.S. ____ 2018

Automobile Exception/Parked Vehicle

An officer saw a motorcycle commit a traffic infraction so he tried to stop it, but the person on the motorcycle fled. A few weeks later another officer saw the same motorcycle speeding and pursued it, but it got away. Following an investigation, law enforcement believed the motorcycle had been stolen and was in Collins' possession. From the street an officer could see a motorcycle under a white tarp parked in the same spot as a photograph of the motorcycle in question when it as uncovered. The picture was on Collins' Facebook page.

The officer did not have a search warrant but decided to walk up the driveway to look at the motorcycle. He pulled the tarp off and saw that it was the motorcycle in question. He ran the license plate and VIN# to confirm it had been stolen. He covered the motorcycle and then went to his car to wait for Collins. Collins later stated the motorcycle was his but he had purchased it without getting a title. Collins was arrested and indicted on theft charges. Collins filed a motion to suppress claiming the search was illegal. His motion was denied and Collins appealed.

The issue on appeal was whether the automobile exception to the Fourth Amendment permits an uninvited police officer, who does not have a warrant, to enter the curtilage of a home to secure a vehicle parked there. This issue involves the automobile exception to the warrant requirement and the protection extended to the curtilage of a home.

The mobility of vehicles is the justification behind the automobile exception to the requirement of a search warrant. *California v. Carney*, 471 U.S. 386, 390 (1985). Officers may search an automobile without having obtained a warrant as long as they have probable cause. *Id.* at 392-93.

The curtilage of a home is given strong Fourth Amendment protection, *Florida v. Jardines*, 569 U.S. 1, 6 (2013). The curtilage, which is the land immediately surrounding and associated with the home, is considered part of the home itself. *Jardines*, 569 U.S. at 6. When an officer physically enters the curtilage to gather evidence, a search under the Fourth Amendment has occurred. *Id.*, 569 U.S. at 11.

In this case the top of the driveway was covered by a brick wall and the house on three sides. The motorcycle was located inside this enclosed space. The Court deemed this area to be part of the curtilage of the hose. By entering this area the officer invaded the curtilage and Collins' Fourth Amendment interest in the motorcycle. The search was not allowed because the scope of the automobile exception only covered the motorcycle, not the area around it which was protected as curtilage of the house. The automobile exception did not justify an intrusion on Collins' separate and significant Fourth Amendment interest in his home and curtilage. The decision was reversed and sent back to the lower court.

Carpenter v. United States, 138 S. Ct. 206, 585 U.S. ____ (2018)

Search of Cell Phone Site Information

Cell phone locations are tracked by their distance to the nearest cell tower site. Each time a phone connects to a cell site it generates a time-stamped record known as call-site location information (CSLI). Due to the high number of phones, the coverage area of each cell site has shrunk, especially in urban areas. CSLI can be a gauge used for text message information. In an investigation of a robbery ring, prosecutors applied for court orders to obtain Carpenter's cell phone records. Carpenter eventually was charged with multiple counts of robbery. Prior to trial he moved to suppress the cell site data arguing the seizure of that information violated the Fourth Amendment because it was obtained without a warrant supported by probable cause. The cell phone records were important because they established location evidence used against Carpenter.

The application of Fourth Amendment to technological innovations leading to the Government's capacity to encroach upon new areas is important to assure preservation of privacy against the government that existed when the Fourth Amendment was adopted. *Kyllo v. United States*, 533 U.S. 27, 34 (2011).

Digital data does not fit neatly into existing precedents. Digital data allows the government to chronicle a person's past movements through the recording of his cell phone signals by a third party. The Court determined this location information was the product of a search and required a search warrant. A cell phone has almost become a part of every human, with them at all times (thus different from GPS and surveillance cameras). CSLI must be obtained via a search warrant supported by probable cause to be used against the individual.

State v. Broom, 2018 ND 135, 911 N.W.2d 895

Terry Frisk/Automobile Stop

Law enforcement stopped a car that was reported stolen. Because this was a felony stop they approached the vehicle with their handguns out. Broom was the passenger, and was known to officers from previous drug arrests. She refused to get out of the car and made furtive movements in the passenger compartment.

Broom was removed from the car and an officer conducted a pat down search of her. A large, soft bulge was felt in her bra which she claimed was cash. The package was retrieved and found to contain cash, drugs, and drug paraphernalia. Broom was charged with possession of drug paraphernalia and controlled substances.

Broom moved to suppress the evidence, but the trial court denied her motion. On appeal Broom alleges the officer exceeded the scope of the Terry frisk by searching her bra. A valid Terry frisk consists of a limited patting down of the outer clothing of the suspect to locate concealed items which might be used as weapons. *State v. Heitzman*, 2001 ND 136, ¶ 13, 632 N.W.2d 1. If the object felt reasonably suggests it might be a weapon based on the size and hardness, the officer is entitled to continue the search to the person's inner garments to determine if it is in fact a weapon. *Id.*

Broom was uncooperative but no officer testified they feared for their safety or were concerned she was armed and dangerous. The officer doing the pat down did not testify the bulge in Broom's bra was of a size or hardness that suggested it might be a weapon. Therefore officers did not have a reasonable and articulable suspicion Broom was armed and dangerous justifying a more

intrusive search beyond the initial frisk. The district court's denial of Broom's motion to suppress was reversed and the evidence seized was suppressed.

State v. Erickson, 2018 ND 133, 911 N.W.2d 913

Traffic Stop

Erickson was stopped in relation to a suspected stolen vehicle. The officer noticed the license plate did not match the one in the reported stolen vehicle and approached Erickson to tell the driver of the mistake. The officer then recognized Erickson and knew he was driving with a suspended license. The officer also saw an open case of beer in the front seat by Erickson and an odor of an alcoholic beverage coming from Erickson. Erickson was arrested for driving under suspension and DUI. Erickson moved to suppress the evidence claiming the reason for the traffic stop (stolen vehicle) didn't exist any longer as the officer approached Erickson's vehicle. The motion was denied.

A stop becomes improper if the original purpose of the stop ceases and no reasonable suspicion of other crimes exists. *State v. Fields*, 2003 ND 81, ¶ 10, 662 N.W.2d 242. Here Erickson's vehicle was dirty so the plate couldn't be read. Erickson also does not contest the stop. The deputy testified he approached Erickson's car just to let him know why he was stopped and that he was free to go. Ending a stop with "you are free to go" is not prohibited by the Fourth Amendment. Once the officer made contact with Erickson he immediately developed reasonable suspicion that a crime had been committed and was free to continue his investigation. Erickson's motion to suppress was properly denied.

State v. Ngale, 2018 ND 172, 914 N.W.2d 495

Reserve Deputy vs Special Deputy

An unlicensed peace officer, a volunteer reserve deputy, made a traffic stop that led to DUI charges against Ngale. Ngale moved to suppress all the evidence claiming the seizure was unlawful because the officer was unlicensed and thus not able to perform peace officer duties. The district court denied his motion and Ngale appealed that ruling.

The controlling statutes are:

> **12-63-02. License required.**
> An individual may not perform peace officer law enforcement duties in this state unless the individual is licensed as required in this chapter.
>
> **12-63-03. Persons and practices not affected.**
> This chapter does not prevent or restrict the practice of peace officer duties or activities of:
>
> * * *
>
> 2. A reserve officer such as an individual used by a municipal, county, or state law enforcement agency to provide services to that jurisdiction on a nonsalaried basis and who is granted full arrest authority.

The trial court concluded the person here was a reserve deputy exempt from licensing per N.D.C.C. § 12-63-03(2). The individual was not compensated for his time but still had full arrest authority. Reserve officers are not required to be licensed.

In contrast, the requirements of a special deputy include, per N.D.C.C. § 11-15-02

> **11-15-02. Sheriff may appoint special deputies - Compensation.**
> The sheriff may appoint and qualify special deputies in such numbers as are

> required by the conditions. Each special deputy shall receive compensation for services rendered and the same mileage allowance as regular deputies, which must be paid by the county within the limits of funds budgeted for such purpose. The sheriff shall have the sole power of appointing special deputies and may remove them at pleasure.

Special deputies are compensated for their services. The trial court's ruling was affirmed.

State v. Hunter, 2018 ND 173, 914 N.W.2d 527

Miranda/False Confession

Hunter was arrested on several unrelated warrants but was also a person of interest in a homicide investigation. He was interviewed at the police station and made incriminating statements related to the homicide case. He eventually was charged with two counts of murder and one count of arson.

Hunter moved to suppress these statements arguing they were coerced, were not voluntary and he wasn't advised of his Miranda rights. The trial court denied that motion and he was convicted of all the charges at trial. He appealed the denial of the motion to suppress.

Law enforcement is required to give a person who is subject to custodial interrogation the Miranda warning, including advising them of the right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Hunter claimed that even if he was given the warnings when he was arrested the officers were required to, and didn't, advise him of the warnings again before questioning him. The trial court found Hunter was advised of his rights upon his arrest and since the interview took place within an hour, additional warning were unnecessary. On appeal the Supreme Court upheld this finding.

Hunter also argued the trial court erred by excluding the proposed testimony of a false confession expert. The decision to allow expert testimony, or not, is in the trial court's discretion and will not be reversed unless it abused that discretion. *State v. Campbell*, 2017 ND 246, ¶ 6, 903 N.W.2d 97.

N.D.R. Ev. 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

The trial court allowed Hunter to make an offer of proof regarding the testimony and then denied the testimony. The court concluded the existence of false confessions is common knowledge and the testimony wasn't necessary. The jury was also instructed that false confessions do exist. The Supreme Court found the trial court did not abuse its discretion in these actions. Hunter's convictions were upheld.

State v. Pickens, 2018 ND 198, 916 N.W.2d 612

Jury Deliberation Issues

Pickens was charged with and found guilty of Gross Sexual Imposition. Part of the evidence offered at trial was a video recording of one of the victims and an audio recording of another interview. These minor victims also testified at trial.

During jury deliberations the jury requested transcripts of the testimony of two of the

minors. Transcripts weren't readily available so the judge informed the jury they would have to rely on their recollection of the testimony. The jury also asked to watch the video interview of the minor. The judge instead instructed the clerk of court to play the video for them in the jury room. Pickens appealed arguing the court's response to the jury prejudiced his substantial rights and thus warranted a new trial.

N.D.R. Crim. P. 43(a)(3)(A) states:

> In General. If, after beginning deliberations, the members of the jury request information on a point of law or request to have testimony read or played back to them, they must be brought into the courtroom. The court's response must be provided in the presence of counsel and the defendant.

N.D.R. Crim. P. 43(a)(1)(B) states: "every trial stage, including jury impanelment and the return of the verdict."

A trial court should not communicate to the jury without the defendant present. *State v. Klose*, 2003 ND 39, ¶ 32, 657 N.W.2d 276. The jury's note asking for a transcript of two minors' testimony was answered by the court saying none existed. The Supreme Court found this to be an error and that the jury should have been brought into open court to be advised the audio of that testimony was available. Essentially, a trial court must allow a jury to rehear any testimony it wants to. *State v. Austin*, 2007 ND 30, ¶ 19, 727 N.W.2d 790. The court should have asked the jury to clarify if there was specific testimony it wanted to review (to save time). *State v. Jahner*, 2003 ND 36, ¶ 6, 657 N.W.2d 266.

The trial court also erred in how it handled the jury's request to review the video-taped interview. The court instructed the clerk of court to enter the jury room and play the video for them. N.D.C.C. § 29-22-02 states:

> The jurors shall retire in charge of one or more officers who must be sworn to keep them together in some private and convenient place until they have rendered their verdict. Such officer or officers shall furnish food and other necessaries to the jurors, at the expense of the state, as directed by the court, and may not speak to nor communicate with such jurors or any of them nor permit any other person so to do except by order of the court. Men and women jurors may retire, when rest or sleep or propriety requires it, to separate rooms.

The clerk was instructed only to play the video but there was no record of what exactly happened in the jury room. The Supreme Court found the cumulative effect of these errors denied Pickens the right to a fair trial and his substantial rights were prejudicial. *State v. Parisien*, 2005 ND 152, ¶ 22, 703 N.W.2d 306. Pickens' conviction was reversed and the case remanded for a new trial.

State v. Brickle-Hicks, 2018 ND 194, 916 N.W.2d 781

Miranda Warnings

Bismarck Police responded to a call from an emergency room where Brickle-Hicks was and was saying he had been assaulted. He had blood on his clothing. Officers took a statement and he was discharged from the hospital. Later that morning a deceased female, with multiple injuries, was found. An officer contacted him and the next day Brickle-Hicks came to the police department to be interviewed. The *Miranda* warnings were read to him and he signed a waiver of those rights.

Officers interviewed Brickle-Hicks for 2 ½ hours and that interview was recorded. He made incriminatory statements about the female's death. He also provided items of his clothing for testing. Brickle-Hicks was

charged with murder of the female. He moved to suppress his statements claiming his *Miranda* rights were violated. Brickle-Hicks also sought suppression of the seized clothing. These motions were denied and are the subject of his appeal. Brickle-Hicks was found guilty at trial of the murder charge.

Individuals subject to custodial interrogation are entitled to the warnings about their right to remain silent, that any statement can be used against them, the right to an attorney, and that the attorney can be appointed prior to questioning. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). Brickle-Hicks argues his signature on the waiver does not establish he voluntarily, knowingly, and intelligently waived those rights. *State v. Webster*, 2013 ND 119, ¶ 20, 834 N.W.2d 283. To be a valid waiver it must be shown that the choice was made free of all intimidation, coercion, or deception. *Id.* at ¶ 21. The waiver must also have been made with awareness of the nature of these rights and the consequences of waiving them. *Id.* Only then can the waiver be declaimed truly voluntary and admissible against the individual.

The trial court determined Brickle-Hicks was not intimidated, deceived or coerced into waiving his rights. It also found Brickle-Hicks had sufficient verbal and reading skills to understand the consequences of his action. He had significant previous interactions with law enforcement and in this interview he corrected officers and clarified several things. On appeal this finding was upheld because Brickle-Hicks' wavier was voluntarily, knowingly, and intelligently done. The murder conviction was upheld.

State v. Wangstad, 2018 ND 217, ____ N.W.2d ____

Social Media Posts Used at Trial

Law enforcement responded to a call of a man with a gun at a hotel. The officers knocked on the room's door and announced "police." A female opened the door and was told to get to the ground. Two officers entered and noticed Wangstad standing by a desk making a quick movement, and then he fired a gun at one of the officers. No one was hurt and Wangstad was charged with attempted murder. At trial he admitted firing the gun but claimed he wasn't firing at the officers. He was convicted at trial. On appeal he argues comments he made on social media posts prior to the alleged crime should not have been admitted into evidence at trial.

The state offered portions of two social media posts authored by Wangstad as evidence of his state of mind, arguing the posts demonstrated he had an anti-law enforcement disposition and violent intentions. Wangstad argued the posts were not relevant and even if they were, their prejudicial effect outweighed their probative value. N.D.R. Ev. 403. The trial court denied his objection, admitted the evidence, but offered to enter the posts in their entirety if Wangstad wanted. He chose to have both posts entered in their entirety.

Trial courts have broad discretion in determining whether to admit or exclude evidence and will only be reversed on appeal for an abuse of discretion. *State v. Chisholm*, 2012 ND 147, ¶ 10, 818 N.W.2d 707. In this case the trial court acknowledged the posts were prejudicial. Then the court balanced the probative value of the posts and any possible prejudice created by the posts. The court also noted the increasing use of social media posts in all types of court cases. The Supreme Court agreed with the trial court and decided the trial court acted reasonably in admitting the evidence. Wangstad's conviction was upheld.

This report is intended for the use and information of law enforcement officials and is not to be considered an official opinion of the Attorney General unless expressly so designated. Copies of opinions issued by the Attorney General since 1942 are available on our website, www.attorneygeneral.nd.gov, or can be furnished upon request.