North Dakota Attorney General's LAW REPORT

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ANTICIPATORY SEARCH WARRANT

In *United States v. Grubbs*, ____ U.S. ____ (2006), the court upheld the issuance of anticipatory search warrants, upon probable cause, under the Fourth Amendment.

A search warrant was obtained to search defendant's house on the basis of an affidavit explaining that the warrant would be executed only after a controlled delivery of contraband to that location. The defendant had purchased a videotape containing child pornography from a website operated by an undercover postal inspector. Officers from the postal inspection service arranged a controlled delivery of a package containing the videotape to the defendant's residence. A search warrant application, accompanied by an affidavit describing the operation in detail, was submitted to a magistrate. The affidavit informed the court that execution of the search warrant would not occur unless or until the parcel had been delivered and had been physically taken into that residence.

In addition to describing the triggering condition for execution of the warrant, the affidavit referred to two attachments which described the defendant's residence and the items the officers would seize.

The search warrant was issued as requested and, two days later, an undercover postal inspector delivered the package. It was taken inside. Inspectors detained the defendant as he left his home a few minutes later and then entered the house and commenced the search.

In upholding the search warrant, the court concluded that anticipatory search warrants are not categorically unconstitutional. An anticipatory search warrant is a warrant based upon an affidavit showing probable cause that at some future time, but not presently, certain evidence of a crime will be located at a specified place. Most anticipatory warrants subject execution to some condition precedent, other than the mere passage of time, as a triggering condition.

If the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the search location. The triggering condition which establishes probable cause has yet to be satisfied when the warrant is issued. The defendant argued that anticipatory search warrants contravene the Fourth Amendment's provision that no warrant would be issued except upon probable cause.

The court rejected the defendant's view. Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place. Because the probable cause requirements looks to whether evidence will be found when the search is conducted, all warrants are, in a sense, "anticipatory." In a typical case where the police seek permission to search a house for an item they believe is already located there, the magistrate's determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed. The anticipatory nature of warrants is even clear in the context of electronic surveillance. When an anticipatory warrant is issued, the fact the contraband is not presently located at the place described in the warrant is immaterial so long as there is probable cause to believe it will be there when the search warrant is executed.

Anticipatory warrants are no different in principle than ordinary warrants. They require the magistrate to determine the probability that contraband, evidence of the crime, or a fugitive will be on the described premises when the warrant is executed. The probability determination for a conditioned anticipatory

warrant looks to the likelihood that the condition will occur and that a proper object of the seizure will be on the described premises. For a conditioned anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that if the triggering condition occurs there is a fear of probability that contraband or evidence of a crime will be found in a particular place, but, also, that there is probable cause to believe the triggering condition will occur. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable cause determination.

In this case the occurrence of a triggering condition - successful delivery of the videotape to the defendant's residence - would plainly establish probable cause for the search. In addition, the affidavits established probable cause to believe the triggering condition would be satisfied. Although it was possible the defendant could have refused delivery of the videotape he had ordered, that was unlikely.

The court also rejected the argument that the triggering condition for an anticipatory search warrant must be set forth in the warrant itself as opposed to affidavits or other attachments. The Fourth Amendment does not set forth some general "particularity requirements." It specifies only two matters that must be "particularly described" in the warrant: the place to be searched and the persons or things to be seized. Nothing in the language of the Constitution or the court's decision interpreting the language suggest that, in addition to the requirements of the Fourth Amendment, search warrants also include a specification of the precise manner in which they are to be executed. The Fourth Amendment's particularity requirement does not include conditions precedent to execution of the warrant. The Fourth Amendment also does not require the warrant set forth the magistrate's basis for finding probable cause (even though probable cause is the quintessential precondition to the valid exercise of executive power), much less a description of a triggering condition.

The defendant also argued that listing the triggering condition in the warrant itself is necessary to assure the individual whose property was search or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search. This argument assumes the executing officer must present the property owner with a copy of the warrant before conducting his search. In fact, neither the Fourth Amendment nor F.R.Crim.P. 41 imposes such a requirement. The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant but by interposing the deliberate, impartial judgment of a judicial officer between the citizen and the police and by providing a right to suppress evidence improperly obtained and a cause of action for damages.

SEARCH AND SEIZURE - CO-OCCUPANT CONSENT

In *Georgia v. Randolph*, ____ U.S. ____ (2006), the court held that consent to enter and search a premises by one occupant is not effective as to another occupant who is physically present but refuses to permit entry.

The defendant's estranged wife told officers that drug evidence was in her husband's home. The defendant, her husband, was asked for permission to search the house but he refused. The officer then asked the defendant's wife for consent to search, which she readily gave. She led the officer to an upstairs bedroom she identified as her husband's, where the officer noticed cocaine. The Georgia Supreme Court approved the suppression of evidence found in the house, concluding the wife's consent was ineffectual in light of defendant's explicit refusal to permit entry when he was physically present on the premises.

The Fourth Amendment recognizes a valid warrantless entry and search of a premises when officers obtain a voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to use of evidence obtained. In this case, however, the objection was made by the co-occupant who was present at the scene and expressly refused to consent to the entry or search. The court had previously recognized that searches are valid under the Fourth Amendment with a voluntary consent of an individual possessing authority over the premises. That person might be the householder against whom evidence is sought or a fellow occupant who shares common authority over property when

the suspect is absent. The exception for consent extends to entry and searches with the permission of the co-occupant whom the police reasonably, but erroneously, believe to have shared authority as an occupant. However, the court recognized that none of its co-occupant consent to search cases presented the further fact of a second occupant physically present and refusing permission to search and later moving to suppress evidence found in the search.

Fourth Amendment rights are not limited by the law of property and a third party's "common authority" to consent to search is not synonymous with a technical property interest. The common authority that counts under the Fourth Amendment may be broader than the rights accorded by property law. The constant element in assessing Fourth Amendment rights in the consent cases is the great significance given to widely shared social expectations. These expectations are naturally enough, influenced by the law of property but not controlled by its rules. Prior court cases, recognizing that solitary co-inhabitant may sometimes consent to a search of shared premises, stand for the proposition that the reasonableness of such a search is, in significant part, a function of commonly held understanding about the authority which co-inhabitants may exercise in ways affecting each other's interests. Individuals who share a premises understand that any one of them may admit visitors with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. Shared tenancy is understood to include an "assumption of risk" on which police are entitled to rely. There may be, however, some situations in which no common authority could sensibly be suspected by the police. A person on the scene who identifies himself as a landlord or hotel manager could call up no customary understanding of authority to admit guests without the consent of the current occupant. A tenant in the ordinary course does not take rented premises subject to any formal or informal agreement that the landlord may let visitors into the dwelling, and a hotel guest customarily has no reason to expect the manager to allow anyone but hotel employees into his room. Neither state law property rights nor common contractual arrangements nor any other source points to a common understanding of the authority to admit third parties generally without the consent of a person occupying the premises. When it comes to searching through bureau drawers, there will be instances when even a person clearly belonging on the premises as an occupant may lack any perceived authority to consent. A child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller might well be admitted but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parent's bedroom.

In Minnesota v. Olson, 495 U.S. 91 (1990), the court held that overnight house guests have a legitimate expectation of privacy in their temporary quarters because it was unlikely that the host would admit someone who wants to see or meet with the guest over the objection of the guest. If that customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it will follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim.

Without some very good reason, no sensible person would go inside a premises when one occupant stood there saying "stay out."

There is no common understanding that one co-tenant generally has right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders. Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. The cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place.

Unless there is evidence the police have removed the potentially objecting tenant from the entrance of the premises for the sake of avoiding a possible objection, consent of the other co-tenant to enter and search the premises would continue to be reasonable when the possible objecting co-tenant is not physically present on the premises. Law enforcement officers are not required to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they have already received. If a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission is not sufficient for a reasonable search. However, if the potential

objector is nearby but is not invited to take part in the threshold discussion, that person will lose out.

The court established a straight forward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. In this case, the defendant's refusal to permit entry and search is clear and nothing in the record justifies the search on grounds independent of his estranged wife's consent. The police did not argue that the wife gave any indication of the need for protection inside the house which might have justified entry into the portion of the premises where the police found the cocaine. The state also does not claim the entry and search could have been upheld under circumstances owing to some apprehension by the police officers that the defendant would destroy evidence of drug use before a warrant could be obtained.

DISORDERLY CONDUCT RESTRAINING ORDER - DOUBLE JEOPARDY - JURY INSTRUCTIONS

In *State v. Bertram*, 2006 ND 10, 708 N.W.2d 913, the court affirmed defendant's convictions of violation of a disorderly conduct restraining order, criminal trespass, and contact by bodily fluids.

In a default divorce decree, the defendant's ex-wife was awarded their residence. Thirteen days after the decree, his ex-wife obtained, and had served on him, a temporary disorderly conduct restraining order prohibiting the defendant from having any contact with her other than through an attorney and prohibiting him from coming within 100 feet of the ex-wife's residence or place of employment. Several days later, defendant entered the residence through a window and spoke with her. He was attempting to obtain business and tax records in an office within the residence.

After the defendant was charged with violating the disorderly conduct restraining order and with criminal trespass, the defendant, while in custody, spit on a correctional officer as the officer was attempting to administer medications. The defendant was then charged with contact by bodily fluids.

The defendant first claimed he could not be guilty of criminal trespass because he entered a dwelling in which he had resided for the last eleven to fourteen years, and that the default divorce judgment was an illegal judgment which was subsequently determined to be invalid. He also stated that before he entered the house, he had been told by three lawyers he could enter it, and, based on said legal advice, claimed he believed he was entitled to enter the house. He did, however, admit he received the divorce decree and had been informed by his ex-wife that he could not come to the house without her approval. The locks had been changed on the house. The defendant admitted he had entered the home through the window.

The court rejected defendant's claim that he was entitled to rely on the advice of his attorneys. Legal advice generally is not a defense to a criminal prosecution but in some circumstances may be used to negate the required mens rea. The defendant, at trial, was not precluded from testifying he relied upon the legal advice of attorneys in entering the house but the jury still determined he knew he was not licensed or privileged to be on the premises. The court also rejected defendant's claim that he was entitled to be in the house because the default divorce judgment was later reopened. An invalid order must be obeyed until stayed or reversed by orderly review. When the defendant entered the house the divorce decree had not been reopened, and later proceedings on the judgment did not, as a matter, of law relieve him from criminal liability for criminal trespass.

The court also concluded that simultaneous prosecutions for criminal trespass and violation of the disorderly conduct restraining order did not violate the double jeopardy clauses of the state and federal constitutions. Applying the "same elements" test, a court will determine whether each offense contains an element not contained in the other. If each of the offenses have the same elements, they are the same offense and double jeopardy bars additional punishment and successive prosecution. The "same elements" test from Blockburger v. United States, 284 U.S. 299 (1932), is applied to double jeopardy claims and not a "same evidence" test. Neither a common episode nor the same evidence determines double jeopardy.

In this case, the defendant was charged with two separate offenses. The criminal trespass charge required proof that the defendant entered or remained in a dwelling knowing he was not licensed or privileged to be in the dwelling. The violation of the disorderly conduct restraining order charge required the additional element of proof that the defendant knew about the restraining order prohibiting him from contacting his ex-wife or being within 100 feet of her home. The defendant violated that order by entering her home and speaking with her. Although the residence was involved factually in both crimes, the two crimes each contained an element not included in the other. The prosecutions for criminal trespass and violation of disorderly conduct restraining order did not violate the double jeopardy clauses of the state and federal constitutions.

The defendant also claimed the trial court committed error in failing to instruct that "willful" culpability is required to prove a violation of disorderly conduct restraining order. He did not object at trial to the jury instruction for violation of disorderly conduct restraining order and the court did not find obvious error affecting his substantial rights. The trial court instructed the jury on the essential elements of the offense in language tracking the statute, which required the state to prove beyond a reasonable doubt that the defendant had knowledge of the order and that he violated one or more provisions of the order. The defendant's knowledge of the order satisfies the culpability requirement for violation of a disorderly conduct restraining order.

The court also rejected the defendant's claim that the information was defective because it did not allege the correctional facility employee was acting within the scope of employment which required or caused the contact with bodily fluids. N.D.C.C. § 12.1-17-11 includes language requiring the victim of contact by body fluids to be acting in the scope of employment but also includes an additional requirement precluding criminal liability if the victim, as an employee of a correctional facility or the Department of Corrections and Rehabilitation, does an act within the scope of employment which required or caused the contact. To convict a person of contact by bodily fluids, the state must prove the employee was acting in the scope of employment but did not commit an act within the scope of employment which required or caused the contact.

In this case, the deputy was administering medications when contacted by the defendant's saliva. The defendant's defense to the charge was that if his bodily fluids came into contact with the deputy, such contact was the result of the deputy acting in the course of his employment. Citing State v. Frankfurth, 2005 ND 167, 704 N.W.2d 564, the defendant asserted the Information was defective for omitting language which would require the state to prove the nonexistence of actions within the scope of employment that required or caused the contact.

The court declined to expand Frankfurth beyond the circumstances of that case. The validity of the Information was not raised until a post-trial motion under N.D.R.Crim.P. 34 for arrest of judgment by Frankfurth. In this case, the issue was raised during trial and there was no timely motion under N.D.R.Crim.P. 34 for arrest of judgment. Even if error did occur, Frankfurth was not controlling and a harmless error analysis was appropriate under the circumstances.

In the absence of any evidence that the defendant relied on the Information to his detriment or was otherwise prejudiced, the court concluded the error in this case, the drafting of an insufficient charging document, was subject to the harmless error analysis and the defect of the Information was harmless. The Information in this case cited the statute. Although the court did not require the Information be amended, it did include language in the instruction on the essential elements of the offense that the employee was acting within the scope of employment but did not do an act which required or caused the contact. The matter was argued by the defendant's counsel. The defendant did not argue that he was misled or confused by the omission of the disputed language from the Information. It would be a waste of judicial resources to retry a defendant who has not demonstrated prejudice or harm. The error in the Information did not affect the defendant's substantial rights and was harmless.

APPEAL

In *State v. Smith*, 2006 ND 14, 709 N.W.2d 713, the court affirmed an order denying the defendant's motion to refund fines of administrative fees imposed after his conviction for delivery of alcoholic beverages to a minor.

The defendant's vehicle was stopped and he was subsequently charged with possession of drug paraphernalia, possession of a controlled substance, possession of a controlled substance with intent to deliver, and delivery of alcoholic beverages to a minor. After a jury trial, the defendant was found guilty of all charges except for possession of a controlled substance with intent to deliver.

The defendant filed a notice of appeal.

Four cases numbers were assigned to the four different offenses. The defendant's motion to suppress evidence listed only one case number and not the other three case numbers, including the one involving the charge of delivery of alcoholic beverages to a minor. When the appeal was heard by the Supreme Court, the Court concluded that the omission of the criminal case numbers on the memorandum and order denying the defendant's motion to was a clerical error and that the defendant property preserved his right to appeal. However, in State v. Smith, 2005 ND 21, 691 N.W.2d 203, the court only considered two criminal judgments, possession of drug paraphernalia and possession of a controlled substance. The court did not discuss the delivery of alcoholic beverages case.

After the first appeal, the district court concluded that the vehicle stop was unlawful and dismissed all charges except the charge for delivery of alcoholic beverages to a minor. The district court also concluded that, because the opinion in the defendant's first appeal did not specifically mention the delivery charge case number has been omitted by clerical error, the defendant had not properly appealed that case. Therefore, the district court concluded the conviction on that charge was final, never appealed, and the court did not dismiss it.

After the opinion in the first appeal was issued, the defendant filed a motion to refund fines of administrative fees for the alcoholic beverage case.

The court noted that its opinion in the first case did not consider the alcoholic beverage charge to be appealed at the time. The court clearly left that case out of its opinion. It decided all the issues presented but did not discuss the charge of delivery of alcoholic beverages to a minor. The two case numbers considered in the first appeal were drug-related violations whereas the other charge was an alcohol related violation. The defendant allowed the case to proceed through appeal, oral argument, and written opinion without ever attempting to correct the notice of appeal. He did not ask to file a petition for rehearing asking the court to consider the alcoholic beverage related violation.

The state relied on the fact that the alcoholic beverage case was not addressed in the first appeal and believed the conviction in the case was no longer appealable. It would be prejudicial to the state for the court to now construe the notice of appeal as sufficient to have appealed the alcoholic beverage case when the court obviously did not consider it as a part of the first appeal. The appeal was too late and was not before the court.

The defendant's motion for refund of fines of administrative fees paid related to his three criminal convictions, two of which were dismissed after the first appeal. The district court found the fees and administrative fees paid by the defendant to be appropriate in light of his conviction in the alcoholic beverage related case. The district court did not abuse its discretion when denying the defendant's motion.

SENTENCING - CREDIT FOR TIME SERVED

In *State v. Schrum*, 2006 ND 18, 709 N.W.2d 348, the court found that the defendant was entitled to credit upon his sentence for 13 days incarcerated from his arrest to being released on bond.

A defendant has the burden of showing entitlement to additional credit for time served. Although a defendant is not to be credited for time spent in custody for an unrelated charge, the incarceration records and the defendant's

affidavits provided a chronology of the time between his initial arrest and the charges that were the subject of the sentence and his subsequent release.

WITHDRAWAL OF GUILTY PLEA - PLEA AGREEMENT

In *State v. Feist*, 2006 ND 21, 708 N.W.2d 870, the court held that when an ambiguity exists on the record as to whether a plea agreement existed between the parties and the trial court did not substantially comply with the requirements of N.D.R.Crim.P. 11(c), a withdrawal of a guilty plea may be necessary to correct a manifest injustice.

On the day set for his preliminary hearing the defendant pled guilty to the felony charge of possession of a bomb or explosive device. The court did not ask if a plea agreement existed and no mention of a plea agreement was made on the record during this proceeding. The case was continued for sentencing and for a presentence investigation.

At the first sentencing hearing, the defendant claimed he had a plea agreement with the assistant state's attorney. A different assistant state's attorney, who appeared at the sentencing, was not aware of any agreement. The case was continued to clear up the ambiguity as to what agreement existed in the bomb case.

In an unrelated offense, the defendant was also charged with reckless endangerment for the possession of venomous snakes. Following the continuance on the sentencing in the bomb case, the district court held a combined change of plea hearing on the snake case and sentencing hearing on the bomb case. In the snake case, the defendant pled guilty to a class A misdemeanor of reckless endangerment. The court then discussed the sentencing on the bomb case and inquired into the existence of a plea agreement. The assistant state's attorney stated that the plea agreement in both cases would be for two years with all but six months suspended. The court stated it would reject the plea agreement if it was accepted on the snake case but not on the explosive case. The defendant then requested a jury trial in both cases.

In a later written order, the trial court denied the withdrawal of the defendant's guilty plea although there was no formal motion to withdraw a guilty plea in the record pending before the court at the time.

The court later held a sentencing hearing in the bomb case and the defendant requested a withdrawal of his guilty plea. The assistant state's attorney disagreed that there ever was a plea agreement for that case. This was disputed by the defendant. After hearing the testimony and recommended sentences, the court sentenced the defendant to five years at the state penitentiary with all but two years suspended. On appeal, the defendant argued the court was required to allow him to withdraw his guilty plea because a binding plea agreement existed and, in the alternative, that the trial court abused its discretion in not allowing him to withdraw his plea of guilty because not doing so resulted in a manifest injustice.

The state argued there was no binding plea agreement, only a nonbinding sentence recommendation.

The court noted that there is a significant difference between an agreement to make a nonbinding recommendation of sentence and a binding plea agreement under N.D.R.Crim.P. 11(d). If the parties agree to a nonbinding recommendation of sentence, the state fulfills its obligation when it makes the specified nonbinding recommendation and the trial court may impose a harsher sentence than the one recommended without allowing the defendant to withdraw the guilty plea. However, when presented with a binding plea agreement, the court is limited to three options: the court may accept the agreement, reject the agreement, or defer its decision until receipt of a presentence report. If the court accepts a binding plea agreement, the court may not impose a sentence less favorable than the sentence provided by the plea agreement. If the court rejects a binding plea agreement, the court must inform the defendant it is not bound by the agreement, must allow the defendant to withdraw the plea, and must inform the defendant that if the defendant persists in pleading guilty, the court may impose a sentence less favorable than the one provided for in the plea agreement.

Although there was a dispute as to whether a plea agreement had been reached, the records established that at least plea negotiations had occurred. In cases where the nature of a plea

agreement is ambiguous, the trial court should clarify the matter on the record. In this case, the court did not attempt to clarify the nature of the agreement on the record. A written plea agreement placed in the record would have eliminated the ambiguity of whether the defendant and the state's attorney had reached an agreement, but not all plea agreements are reduced to writing. If there was a plea agreement that was rejected, the district court violated N.D.R.Crim.P. 11(d)(4) in not allowing the defendant to withdraw his guilty plea. Because the court could not conclusively determine that there was an actual plea agreement in the case, the court must decide if withdrawal of the guilty plea was necessary to prevent a manifest injustice under N.D.R.Crim.P. 32.

Rule 32 should be liberally construed in favor of the defendant and leave to withdraw a guilty plea before sentencing should be freely granted. The determination of a manifest injustice or the occurrence of a fair and just reason are within the trial court's discretion and will be reversed on appeal only for an abuse of that discretion.

In this case, the trial court failed to substantially comply with Rule 11(c). This resulted in confusion on the record demonstrating ambiguity about plea negotiations. The confusion likely occurred because multiple assistant state's attorneys were involved in the two cases. The confusion was compounded when the court indicated it would reject the plea agreement and discuss setting both cases for trial but then later denied the defendant's motion to withdraw his guilty plea. The trial court did not ask whether the guilty plea was a result of plea negotiations or of discussions with the state's attorney. Because the record showed the trial court did not substantially comply with Rule 11(c) and there was ambiguity apparent on the record as to whether a plea agreement existed between the parties, the withdrawal of the defendant's guilty plea was necessary to correct a manifest injustice.

VOIR DIRE

In *State v. Nikle*, 2006 ND 25, 708 N.W.2d 867, the court determined that the circumstances of a potential juror's comments during voir dire were not so prejudicial that the trial court would have been required to dismiss the jury pool in its entirety.

The defendant was charged with three counts of methamphetamine. During voir dire, a potential juror was asked whether juror knew people associated with, or circumstances surrounding, the case. A jury member stated that the juror recognized the defendant from work at Super Target with security. Upon further inquiry by the judge, the potential juror believed that the defendant came through the juror's line and bought Sudafed. No objection was made to this line of questioning by defense counsel. The defense counsel questioned the potential juror regarding restrictions on the purchase Sudafed and the "Methamphetamine Watch" program in general. The potential juror assured both the judge and counsel that the juror could remain fair and impartial. The juror was not challenged for cause and no preemptory challenged was used to excuse her. This person was not ultimately on the final jury that convicted the defendant.

Statements made by members of the jury panel may rise to the level that the entire pool is tainted. The court places faith in a juror's ability to maintain impartiality. Great weight is given to a potential juror's claim that he or she will remain impartial.

The potential juror's statement pertained neither to the defendant's past criminal activity nor to current charges. Although the defendant may be correct that the average North Dakota citizen associates Sudafed with manufacture of methamphetamine, the average citizen is also aware that it is not crime to purchase or possess Sudafed. The potential juror's statement was made at the beginning of voir dire and she later repeatedly reported her ability to remain fair and impartial. Most, if not all, of remaining members of the jury panel were subsequently asked at some point whether they could remain fair and impartial. Giving great weight to the claims of individual members of the panel, the court saw no indication that any legal rule was violated when the court failed to reject the panel.

POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL

In *Dunn v. State*, 2006 ND 26, 709 N.W.2d 1, the court affirmed Dunn's summary dismissal of his petition for post-conviction relief.

After his conviction of conspiracy to assault or kill another inmate, Dunn filed a pro se motion for post-conviction relief asserting ineffective assistance of counsel. This petition was summarily dismissed without an evidentiary hearing.

The Uniform Post Conviction Procedure Act allows for two types of dismissal. First, the state may move for dismissal of an application under N.D.C.C. § 29-32-01.6 which is similar to a motion based on the pleadings under N.D.R.Civ.P. 12(b) that allows the petitioner ten days to respond in accordance with N.D.R.Ct. 3.2. The second type of dismissal permits either party to move for summary disposition of an application under N.D.C.C. § 29-32.1-09 which is akin to N.D.R.Civ.P. 56 motion for summary judgment.

In this case, the state moved for summary dismissal under the second type of dismissal attaching with its motion numerous affidavits and exhibits supporting its position that no genuine issue of material fact existed. Although the state indicated that Dunn was bound by a ten day response time under N.D.R.Ct. 3.2, the state clearly intended the court to go beyond the pleadings and Dunn should have been subject to a 30 day response time since the motion was analogous to a motion for summary judgment under N.D.R.Civ.P. 56.

Following the state's motion, Dunn's response consisted of a brief, a reiteration of the facts in his argument, and a short transcript excerpt**.** He failed to supply any evidence showing an issue of material fact.

Summary dismissal is normally inappropriate for post-conviction relief claims arguing ineffective assistance of counsel because such claims typically require development of a record in an evidentiary hearing. However, the summary judgment rules regarding burdens and burden shifting apply even in ineffective assistance of counsel post-conviction relief cases. Summary dismissal remains appropriate if the petitioner fails to raise a genuine issue of material fact. Dunn's failure to properly respond to the state's motion was fatal and the district court's dismissal of the action was appropriate.

SEARCH WARRANT - PARTICULARITY REQUIREMENT - INFORMANT

In *State v. Stewart*, 2006 ND 39, 710 N.W.2d 403, the court affirmed the defendant's convictions of drug and theft offenses.

The defendant was suspected of numerous crimes involving methamphetamine and a search warrant was issued based upon information from four criminal informants who were members of the "criminal milieu" as well as surveillance of the defendant's home and his shop. Surveillance by the officers revealed suspicious visits from seven or eight vehicles per night but no criminal activity was directly observed.

During execution of the search warrant, one officer viewed in plain sight two vehicles containing a Coleman can, paper towels, and a propane tank with a new valve, all possible instruments in the manufacture of methamphetamine. Inside the shop, another officer saw a number of tools matching descriptions of tools on inventory lists from recent burglaries. Following these observations, the officers sought to expand their search and applied by telephone for a second warrant. The district court issued a warrant authorizing the officers to search the defendant's auto shop and 200 junked vehicles on his property for a variety of items not identified specifically but including controlled substances, drug paraphernalia, monies derived from drug transactions, records pertaining to drug trafficking, and stolen property from Walsh and Grand Forks Counties.

The defendant argued that the first warrant was not supported by probable cause because the informants, as part of the "criminal milieu," were inherently unreliable and the police surveillance failed to reveal any criminal activity. The court concluded that the informants' reliability was established and their statements, combined with the officers surveillance, provided adequate probable cause for the first search warrant to be issued.

Although few search warrants would be issued if the information had to come only from saints, the reliability of informants within the criminal mileu must be established. Reliability of an informant can be established numerous ways such as corroboration through independent investigation, by the affiant's vouching or assertion that the informant is reliable, or by the informant giving detailed information overcoming any doubt.

All four informants gave detailed, first-hand information, much of which was internally corroborated. In addition, consideration of the police officers' surveillance testimony was reasonable in establishing probable cause. Even though the officers did not see any crimes being committed, testimony of suspicious activity was relevant in establishing probable cause because an issuing judge or magistrate may consider inferences and deductions that a trained and experienced officer makes. Viewing the totality-of-the-circumstances and deferring to the district court, the court concluded the statements of the criminal informants plus the trained officers' deductions yielded probable cause for the first search warrant.

A search warrant must describe with particularity the places to be searched and items to be seized. This requirement is set forth to prevent exploratory rummaging. However, the degree of particularity required remains flexible. Whether a warrant is sufficiently particular depends upon the surrounding circumstances including the purpose of the warrant, the crime involved, the place to be searched, and the nature of the items sought.

The defendant claimed that the second search warrant authorizing the search of approximately 200 junked vehicles was overbroad in the area it authorized the officers to search, all vehicles on his property, and overbroad in the items it authorized the officers to seize, stolen property from Walsh and Grand Forks Counties, rather than listing specific items.

While the defendant may have been correct that warrants based on what the officers "may" find rather than probable cause are invalid, the court did not find the warrant issued in this case involved such a vague and improper search and seizure authorization.

The flexible particularity requirement allows an issuing judge or magistrate to consider the circumstances at hand. The search was of a business premises and vehicles, most junked or immobile, located there. There was no risk of confusion over which vehicles were to be searched or whether the vehicles would have come and gone in the meantime as the search under the first warrant was simultaneously occurring. Although the prohibition on unreasonable searches and seizures extends to business premises, the expectation of privacy on commercial premises is less than the expectation in an individual's home. The district court did not err in concluding a search of the entire business premises, including the vehicles thereon, was reasonable and supported by probable cause.

Although the defendant was also correct that "property stolen from the Walsh and Grand Forks Counties" gave no indication to an ignorant party what property is to be seized, the warrant was not fatally unspecific. The officers were not ignorant parties. Those seeking the warrant had a detailed list of the stolen property and, in fact, offered to fax the list to the issuing judge. The warrant and its execution were reasonable and proper.

WRIT OF AUDITA QUERELA - OPPOSITE SEX INMATE SURVEILLANCE

In *State v. Ernst*, 2006 ND 41, 710 N.W.2d 678, the court denied the defendant's motion to reverse his conviction.

The defendant had pled guilty to indecent exposure and was sentenced to 12 months in prison. While in prison, the defendant filed grievances and verbal complaints about female prison guards watching him shower naked. He then filed a motion in the district court claiming that the state should be estopped from complaint of his conduct when the state authorized and condoned "peeping tomettes." The court interpreted the defendant's motion as an attempt to withdraw his guilty plea and found that the defendant failed to show the withdrawal of his guilty plea was necessary to prevent a manifest injustice.

On appeal, the defendant claimed that the writ of audita querela supported reversal of his conviction. A writ of audita querela is available to a judgment debtor who seeks a rehearing of a matter on grounds of newly discovered evidence or newly existing legal defenses. This writ has been abolished by N.D.R.Civ.P. 60(b). In a limited

number of criminal and immigration cases in the federal courts, the writ is available providing a defendant can show a legal, as contrasted with an equitable, objection to a conviction that has arisen subsequent to the conviction and is not redressable pursuant to another post-conviction remedy.

The defendant provided no legal objection to his conviction or his sentence. His complaint relates to female prison guards watching him shower. The court noted that it had been recognized that opposite sex surveillance of male inmates is constitutionally permissible because minimal intrusions on prisoner's privacy are outweighed by institutional concerns for safety and equal employment opportunity. The defendant failed to establish any basis for relief under the post-conviction relief statute or under N.D.R.Crim.P. 35.

INVESTIGATORY STOP - INFORMANT - MIRANDA AND VEHICLE SEARCH PUBLIC SAFETY EXCEPTION

In *State v. Anderson*, 2006 ND 44, 710 N.W.2d 392, the court affirmed denials of the defendant's motions to suppress, concluding that investigatory stop and later search of a vehicle were proper.

A deputy received a call from an individual who informed the deputy that this individual's son and his brother were traveling to Fargo to settle bad drug deals. This individual was identified and known by the deputy. This known informant told the deputy that he believed his brother was heavily armed, was wearing a bullet proof vest, and was with the informant's son. The informant was worried about his brother and his son's safety and wanted the deputy's help.

The deputy knew the informant's brother and the type of vehicle he drove. Prior to the informant's call, the deputy had received information from the brother's ex-wife who believed the brother had a handgun in the console of his pickup and that he often carried an AK-47.

Later that evening, the informant again contacted the deputy telling him that his brother was at McDonalds or a convenience store in Fargo waiting further directions to the intended target's residence. The deputy provided the Fargo Police Department with all the information and that information was related to its officers.

A Fargo police officer observed a green four-door Ford pickup, matching the description of the informant's brother's vehicle, at a McDonald's drive through in north Fargo. After conducting a license check on the vehicle, the officer believed a high risk stop was necessary for officer safety.

After other officers arrived at the scene and the suspect's vehicle had pulled into the parking lot, the vehicle was stopped. The informant's brother was not cooperative during the stop but was finally handcuffed. He was told that he was not under arrest but was being detained pending investigation and that he was being handcuffed for officer safety. While handcuffing the brother, but before giving a Miranda warning, the officer asked the brother if he had any weapons. The brother stated there was a rifle in the truck.

The same procedure was followed with the informant's son who cooperated with the officer's request. The officer testified at the suppression hearing that he was not sure if anyone else was in the vehicle and had asked any other occupants to exit the vehicle. The incident took place at night and the pickup had tinted windows. Since the officer could not visually determine if anyone else was inside the vehicle, he and a second officer approached the passenger side of the vehicle and opened the rear door. Upon opening the door, the officer immediately saw an uncased AK-47 style rifle lying on the floor of the vehicle and, after another search, found a switchblade, ammunition, a machete, and a 9 mm handgun.

Both the informant's brother and the informant's son were subsequently charged with carrying a concealed firearm or dangerous weapon. A request to suppress evidence as a result of the vehicle search was denied.

In upholding the investigatory stop of the vehicle, the court recognized that information from an informant may provide the factual basis to establish reasonable suspicion for an investigatory stop. The court will examine the totality-of-the-circumstances including the quantity, or content, and quality, or degree of reliability, of the officer's information. As a general rule, the lesser the quality or reliability of the tip, the greater the quantity of information required to raise a reasonable suspicion.

The court first rejected the claims that the informant was a member of the "criminal milieu." A member of the "criminal milieu" is someone who is himself involved in criminal activity or is at least someone who enjoys the confidence of criminals. The reliability of an informant who is a member of the "criminal milieu" must be established and, unlike information provided by a citizen informant, the information provided by a member of the criminal milieu is not presumed reliable. Reliability may be established in a number of ways, including corroboration through independent investigation.

A citizen informant is someone who volunteers information, does not want anything in return for the information, and is not at risk or in fear of going to jail. Information provided by a citizen informant is presumed reliable.

The court found it unnecessary to determine whether the informant was a citizen informant or a member of the criminal milieu because it did not influence the outcome of the case. The information from the informant had a higher indicia of reliability because he was a known informant who voluntarily gave the deputy information on prior occasions. Except for one occasion, the informant was always truthful. The informant did not ask for anything in exchange for the information and he was not at risk for going to jail in connection with this incident. The informant volunteered the information knowing that his son could be arrested if law enforcement learned about this brother's and son's plan. After the informant's information was relayed to the Fargo Police Department, officers corroborated enough information to reasonably believe the vehicle belonged to the informant's brother and that the informant's brother was involved in criminal activity. Under the totality-of-the-circumstances, the officers had a reasonable and articulable suspicion to justify an investigatory stop of the vehicle.

The defendants further argued that the investigatory stop immediately became an arrest when the officers ordered them out of the vehicle at gunpoint, ordered them to lie on the ground, handcuffed them, and placed them in the backseat of the squad car.

The existence of an arrest is a question of law. There is no bright line rule determining when a seizure becomes a defacto arrest. A seizure occurs whenever an officer stops an individual and restrains his freedom. That seizure must be reasonable. In determining if a seizure is reasonable, the court will balance the public interest with the individual's right to personal security free from arbitrary interference by police officers. The court will consider law enforcement purposes served by the stop in the time needed to achieve those purposes. An officer's safety is a legitimate and weighty interest which also must be considered when determining if a seizure is reasonable.

It is unreasonable to require that police officers take unnecessary risks in the performance of their duties. They are entitled to use forcible means reasonably necessary to protect their personal safety and to maintain the status quo to achieve the purpose of the stop. The totality-of-the-circumstances in this case leads to the conclusion that the officers took reasonable safety precautions and conducted an investigatory stop rather than a defacto arrest. The officers had information that the defendants were heavily armed, on their way to a known drug dealer's home to settle a score over a bad drug deal, and the informant's brother was wearing a bullet proof vest and had weapons to use if he encountered trouble with law enforcement. Under these circumstances, the officers fears for their personal safety was reasonable and justified the safety precautions used to remove the defendants from the vehicle.

The informant's brother also argued that the statements he made to the officers relating to the rifle in the pickup was illegally obtained because the officers had not given him a Miranda warning. He argued the statement was made during a custodial interrogation.

Public safety is one exception to the general requirement for a Miranda warning. An officer may question someone in custody without first giving a Miranda warning if the answer to the question is necessary to secure the officer's safety or the safety of the public. The question must not be designed solely to elicit testimonial evidence from the person. Before giving the informant's brother the Miranda warning, the officer testified that he asked the brother if he had a weapon. The brother replied that there was a weapon in the vehicle. The officer did not ask the brother if he had a weapon for the purpose of collecting evidence, but for purposes of officer and public safety. The statement in the parking lot fell within the public safety exception to Miranda and was admissible. His further statements at the police

station after the Miranda warning were also admissible.

The court also rejected the defendant's arguments that the evidence seized during the search of the vehicle should be suppressed because the search was warrantless and not within a recognized exception to the warrant requirement. In this case, a search of the vehicle was necessary to determine if there were other occupants in the vehicle and was a valid search under the officer safety exception to the warrant requirement. The officers could not see inside the pickup to determine if there were other occupants. The incident occurred at night and the pickup had tinted windows and sat off the ground. When the potential danger to officers or the public is weighed against the minor intrusion on the individual's privacy interest, safety outweighs the individual's interest. Under these circumstances the defendant's right to be free from an unreasonable search was not infringed when the officers opened the door of the vehicle to determine if there were other occupants in the vehicle. The search was reasonable. Upon opening the door, the officers saw the uncased AK-47 style rifle lying on the floor in plain view. An uncased rifle of this type is a violation of a Fargo ordinance. At this point, the officers had probable cause to arrest the defendants and a seizure of the evidence was incident to a lawful arrest.

CIVIL FORFEITURE - ACQUITTAL OF CRIMINAL CHARGE

In *State v. Bergstrom*, 2006 ND 45, 710 N.W.2d 407, the court reversed and remanded a district court order forfeiting property for a new hearing.

The defendant was tried for possession of marijuana and methamphetamine with intent to deliver and possession of drug paraphernalia. He was convicted of the drug paraphernalia charge but acquitted of the other two charges.

Items seized as evidence in the case included marijuana, methamphetamine, drug paraphernalia, two vehicles and keys, $1,536 in cash, a television, a VCR, and electronics used for home security system.

Seventy-five days after his acquittal of the marijuana and methamphetamine charges, the defendant moved for return of the keys, the cash, the television, the VCR, and the home security system. There was nothing in the record to establish that he served the motion on the state.

Several months later, the defendant's drug paraphernalia conviction was affirmed. The district court requested information relating to the status of the seized property and the assistant state's attorney replied that the property had been returned but that the court would be advised as to what property remained in the custody of the Bismarck police.

Shortly thereafter, the district court granted the defendant's motion for return of property indicating that only the VCR needed to be returned. The record did not reflect the correspondence between the assistant state's attorney and the judge or that the judge's later order was sent to the defendant.

Several months later, the state moved to forfeit the $1,536 cash, drugs, and drug paraphernalia. The state's motion mentioned the defendant's motion made 75 days after his acquittal of the drug offenses but it did not mention the earlier letter to the court that provided the basis for the court's order granting the motion for return of property.

The state's motion to forfeit the property was 468 days after the defendant's acquittal of the drug charges, 393 days after the defendant's motion to return his property, and 201 days after the court affirmed the defendant's paraphernalia conviction. The court granted the state's motion to forfeit the cash, drugs, and drug paraphernalia, and found that the 201 day delay between the opinion affirming the conviction and the motion for forfeiture was justified.

On appeal, the defendant argued that the forfeiture of the cash was inappropriate because the money was not proceeds of the criminal drug offense but was earned legally and was not within the statutory definition of "forfeitable property."

A trial court's decision on whether an item of property is forfeitable is a finding of fact that will not be overturned unless it is clearly erroneous. The finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, on the entire record, the court is left with a definite and firm conviction that a mistake has been made.

N.D.C.C. ch. 29-31.1 allows for forfeiture and disposition of certain seized property relating to a criminal offense. The forfeiture action is a civil proceeding governed by N.D.C.C. §§ 19-03.1-36.1 through 19-03.1-36.7.

Forfeiture is a two stage process. The state must first show probable cause exists for the forfeiture action. Probable cause exists when reasonable grounds exist to believe the property was probably connected with criminal activity. The burden then shifts to the claimant to prove the property is not subject to forfeiture. The claimant's burden of proof is a preponderance of the evidence and property may be forfeited if it is more probable than not that the property was used in a criminal offense. Forfeiture under N.D.C.C. ch. 29-31.1 is a separate civil proceeding from the underlying criminal proceeding. The burden of each party does not change when the defendant is acquitted of the criminal charge. Forfeiture is not dependent upon a prosecution for, or conviction of, a criminal offense. North Dakota law requires the government first prove probable cause for the forfeiture action and the burden then shifts to the claimant to prove the property is not subject to forfeiture. Because of the lesser burden of proof in a civil forfeiture action, the government's probable cause burden is not modified. The jury's verdict finding the defendant not guilty of felony drug offenses and guilty of a misdemeanor drug paraphernalia charge is not relevant to the district court's decision on whether the state had probable cause to bring a forfeiture action.

The district court may not rely on its prior probable cause determination made when the search warrant was issued. The facts showing probable cause in the pretrial investigative stage of a case may or may not be facts showing probable cause to bring the civil forfeiture. The forfeiture's probable cause determination must take into account all relevant facts before the court at the time the court considers the forfeiture. The state must show that under the facts presently before the court, there was probable cause for the forfeiture action. By following the procedure in the Rules of Evidence, judicial notice of facts may be taken if appropriate.

The district court is required to make specific findings of fact regarding forfeiture of the cash. Findings of fact are adequate if they provide the Supreme Court with an understanding of the district court's factual basis used in reaching its determination. Lack of specificity alone does not make findings of fact erroneous.

In this case, the forfeiture hearing was held by telephone. The defendant appeared from a federal prison. The state's only offer of proof was the state's attorney's arguments that the civil forfeiture was not dependent on a conviction for the drug delivery charges and that the cash was proceeds of drug activity. The state requested the district court to take judicial notice of the criminal trial and all evidence received at it. The defendant argued that the forfeiture motion did not comply with the summons and complaint notice requirements denying him due process and the state's delay in asserting the forfeiture action also denied him due process. Neither party called a witness nor presented evidence. The district court neither granted nor denied the request to take judicial notice of the trial evidence.

The court concluded that the district court's findings of fact were inadequate to provide an understanding of the court's factual basis used to reach its decision to forfeit the cash. The findings did not disclose what facts from the criminal trial the district court relied upon to conclude the state had probable cause to bring the forfeiture action. The court reversed the district court's decision for lack of adequate findings of facts and remanded for a new hearing.

At the new hearing, the district court may take judicial notice of the evidence received in the criminal trial. Because the district judge presided over the criminal trial, the judge, on remand, make take judicial notice of the evidence presented in that trial. The court must specifically state if it has taken judicial notice of the trial evidence. The defendant must then be provided with an opportunity to present evidence that his cash was legally obtained. The court must weigh all the evidence including the evidence for which it takes judicial notice and the evidence the defendant presents. After reviewing all of the evidence, the district court must then specifically find facts as to whether there is probable cause for the forfeiture action and whether, by a preponderance of the evidence, the cash was proceeds of a criminal offense.

The defendant also claimed that his due process rights were violated because of the 201-day delay between the Supreme Court's opinion affirming his conviction upon the drug paraphernalia charge and the state's motion to forfeit the property. The district court's decision of whether the state's

delay in bringing a forfeiture action violated a due process right is a question of fact that will not be reversed unless clearly erroneous.

The state moved for forfeiture under N.D.C.C. ch. 29-31.1 and not section 19-03.1-36. The promptness requirement of section 19-03.1-36 does not apply to a chapter 29-31.1 forfeiture. A forfeiture under chapter 29-31 does have due process protections against undue delay, however.

The court applied the Barker v. Wingo, 407 U.S. 514 (1972), standard to determine whether a state forfeiture violated a claimant's due process rights. A Barker test involves balancing four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. No single factor is determinative and all relevant facts must be considered.

There is no bright line as to when delay become unreasonable and violates a claimant's due process rights. N.D.C.C. § 29-31.1-08 requires the state to retain forfeitable property that is evidence in a criminal proceeding until it is no longer needed in that proceeding. A criminal proceeding does not toll consideration of due process but may justify a delay. An underlying criminal case can justify forfeiture delay because the property may be evidence in the criminal case or the civil forfeiture action could hamper the government's prosecution.

A claimant has some ability to speed up the forfeiture process, such as requesting a court to compel a forfeiture or filing a motion for return of property. A claimant's failure to assert his right is an indication the claimant did not want an earlier judicial hearing.

Whether a claimant has been prejudiced by any delay depends upon whether the delay has hampered the claimant in presenting a defense on the merits, such as the loss of witnesses or other important evidence. The claimant may also show prejudice by showing the state's seizure deprived him of his ownership right to the property.

Upon the record of this case, the district court clearly erred in its due process analysis. Although the state needed to retain the defendant's property as evidence until the relevant criminal matters were completed, the cash would not be evidence in a retrial for possession of drug paraphernalia. The cash could have been evidence of possession of a controlled substance with intent to deliver, the charges of which the defendant was acquitted. The delay clock began when he was acquitted in June of 2003. The district court analyzed a much shorter delay.

Although the defendant's motion for return of property was referred to as a September 2004 motion, the date stamp placed on the motion, which was then entered into the record, shows the motion was received and filed in August of 2003, over a year before either the court or the state contend the motion was filed. The district court used the wrong date in its due process analysis. The correct date of the defendant's motion is important to weigh the third factor of the defendant's conduct in pursuing prompt action.

OUTRAGEOUS CONDUCT - CROSS EXAMINATION REGARDING CONVICTION

In *State v. Hoverson*, 2006 ND 49, 710 N.W.2d 890, the court affirmed the defendant's conviction for unlawful delivery of a controlled substance.

An NDBCI agent set up a controlled purchase of methamphetamine from the defendant. A confidential informant called the defendant to set up the purchase, went to the defendant's automotive shop to purchase the drugs, and, upon completing the purchase, provided law enforcement officers with the purchased drugs.

After his charge for unlawful delivery of a controlled substance, the defendant moved to dismiss the charge claiming that the state was guilty of outrageous conduct. The defendant claimed the agent was stalking and harassing him and supported his motion by offering evidence that over a two year period, the agent arrested the defendant on eight separate occasions for driving under suspension in which four arrests occurred after the agent saw the defendant driving around town. Two other arrests were the result of tips the agent received from members of the community. On two other occasions, the agent saw the defendant driving while conducting surveillance on the defendant's shop in connection with the drug investigation. On all eight occasions, the agent verified that the defendant's license was suspended.

The agent and the defendant had several encounters in which the agent stated that the defendant was his "project boy" and told the defendant that if he arrested him one more time, "he would get a free toaster or microwave."

The argument for outrageous government conduct usually arises in cases where government agents were involved in sting operations and is used in place of an entrapment defense. The defense is reserved only for the most intolerable government conduct. Government conduct is not outrageous simply because it may be somewhat offensive. To succeed with an outrageous government conduct defense, the defendant must show that the government's conduct is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. The level of outrageous conduct necessary to prove a due process violation is quite high and must shock the conscience of the court.

The court concluded that the conduct in this case was not so outrageous that due process principles absolutely barred the government from invoking judicial processes to obtain a conviction. The agent was involved in some degree in all eight of the defendant's prior arrest for driving under the suspension. In each case the defendant was arrested on valid charges after the agent witnessed him engaging in unlawful activity. Although some of the agent's statements to the defendant were inappropriate and unprofessional, the agent's conduct did not raise to the level of outrageous government conduct that would bar his prosecution.

The defendant also argued that he was prejudiced when the trial court refused to allow him to cross examination the confidential informant regarding the underlying details of the informant's prior theft conviction and other specific instances of conduct not resulting in a conviction.

A witness's character for truthfulness may be impeached through cross-examination regarding specific instances of conduct under N.D.R.Evid. 608(b) or through evidence of a conviction under N.D.R.Evid. 609(a).

A court has discretion to permit cross examination of a witness regarding specific instances of conduct under Rule 608. Under Rule 609, a court has discretion to permit a party to impeach a witness through the use of a felony conviction. However, if the court determines the conviction involves dishonesty or false statement, the evidence is automatically admissible.

The trial court determined that the confidential informant's prior theft conviction was admissible under Rule 609 in that it involved dishonesty or deceit based upon the underlying facts of the crime. Although theft of property is not generally considered a crime of dishonesty or deceit, the court has recognized that if a prior conviction is not included under Rule 609 by its definition, it may fall under the automatic admissibility provision if the underlying facts of the conviction involved dishonest or false statement. In this case, the district court concluded the informant's prior theft of property conviction involved deceit or dishonesty because he stole from his employer by writing checks and making charges in the name of the employer knowing he was not authorized to make them. The defendant adequately showed that the confidential informant's conviction for theft of property was a crime that qualified for impeachment. However, the trial court limited the defendant's cross examination of the confidential informant regarding that prior theft of property conviction to the name of the crime, the time and place of the conviction, and the punishment.

Under N.D.R.Evid. 608, it is within the court's discretion whether to allow a cross examination of a witness regarding the underlying facts of a conviction if these facts are probative of truthfulness or untruthfulness. In cases where the court looks to the underlying facts to determine if the crime involves dishonesty or deceit, the facts underlying the conviction may explain the crime in a more accurate and complete manner and cross examination may be more probative of untruthfulness than a simple reference to the name of the crime.

Allowing cross examination of a witness under Rule 608(b) regarding the underlying facts of a Rule 609 conviction should be used cautiously. In those cases, the court should keep the questioning narrow and brief, limiting it to that which bears directly on the witness's truthfulness or untruthfulness. Immediately following the questioning, the court should consider issuing a cautionary instruction to the jury that the evidence bears solely on the issue of the witness's credibility and should be considered only for that purpose. The trial court should also keep in mind that Rule 608 and Rule 609 are exceptions to Rule 404, which is the general prohibition against the use of character evidence to prove conduct.

In this case, the district court properly admitted evidence of the confidential informant's theft of property conviction under Rule 609. Under Rule 608(b), the court had discretion to permit limited cross examination of the informant on specific acts underlying the theft of property conviction to impeach his character for truthfulness. The court erred in not exercising its discretion to determine whether the testimony would be probative of truthfulness or untruthfulness. However, the error was harmless. Although the defendant did not question the informant regarding the facts of the specific theft conviction, abundant evidence was presented for the jury to judge the informant's credibility. This information included other details of the conviction and opinion testimony from people who considered the informant untruthful. The jury was informed that the informant was paid by law enforcement officers for his role in the controlled buy. The court also found that evidence was strong to support the conviction and, even if cross examination would have been allowed regarding the underlying facts of the theft conviction, such cross examination would have had very little impact upon the jury's verdict.

The defendant also claimed the district court committed error in precluding him from cross examining the informant under Rule 608(b) about specific instances of conduct not resulting in conviction. Mere accusations of a crime cannot be used to impeach the credibility of a witness. In this case, the district court concluded that the mere allegations of a crime could not be used to impeach a witness, and that the allegations of breaking and entering and stealing a car allegedly committed by the defendant were not probative of his truthfulness or untruthfulness. This was a proper application of the rule and the court did not abuse its discretion.

POST-CONVICTION RELIEF - SUMMARY DISMISSAL

In *Parizek v. State*, 2006 ND 61, ____ N.W.2d ____, the court reversed the district court's order dismissing Parizek's application for post-conviction relief.

Parizek was convicted of various drug offenses. In his application for post-conviction relief, Parizek alleged numerous claims of ineffective assistance of counsel and prosecutorial misconduct but no supporting documentation was filed with the application. An attorney subsequently appointed for Parizek filed a supplement to the application. The district court summarily dismissed the application, concluding the statements made by Parizek were nothing more than conclusory comments, that were not supported by facts or details.

N.D.C.C. § 29-32.1-09 does not allow the court to dismiss on its own motion an application for post-conviction relief but authorizes the court to grant a motion by either party for summary disposition. Summary dismissal of a post-conviction relief application is analogous to a dismissal of the civil complaint under N.D.R.Crim.P. 12 for failure to state a claim upon which relief can be granted. A trial court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The initial burden is on the moving party to show there is no genuine issue of material fact and, if that burden is met, the burden shifts to the nonmovant to demonstrate there is a genuine issue of material fact. For the summary disposition of the petition for post-conviction relief, the moving party bears the burden of showing there is no dispute as to either the material facts or the inferences to be drawn from the undisputed facts and the movant is entitled to judgment as a matter of law.

In this case, the state did not file a motion for summary dismissal of the application for post-conviction relief but only filed an opposition to the application that appeared to be an answer to the application. The state did not move or ask for a summary dismissal of the application. Rather, the district court summarily dismissed the application on its own accord.

Before the district court can summarily dismiss an application under N.D.C.C. § 29-32.1-09, there must be no dispute as to either the material facts or the inferences to be drawn from those undisputed facts. In this case, the district court's order denying the application for post-conviction relief concludes that Parizek did not set forth factual specifics nor provide detail about his accusations and conclusion. This is not a case where the court found the allegations facially invalid justifying summary dismissal similar to a judgment on the pleadings. The district court reviewed the record to determine whether there

was evidence supporting Parizek's claims without giving Parizek an opportunity to demonstrate there was a genuine issue of material fact. It was error to summarily dismiss the claims without an evidentiary hearing.

RIGHT TO SPEEDY TRIAL

In *State v. Moran*, 2006 ND 62, ____ N.W.2d ____, the court affirmed the defendant's conviction of DUI. The defendant was cited in municipal court for DUI in May of 1996. He did not appear and a bench warrant was issued for his arrest. The case was then dismissed in August of 1996, and referred to the Burleigh County state's attorney for prosecution. On October 1, 1996, a criminal complaint was filed against the defendant in state district court and a warrant for his arrest was issued eight days later.

On October 8, 1999, the warrant was served on the defendant and he promised to appear on October 19, 1999, with a later appearance change to October 26. He did not appear on the 26th but was rescheduled for November 9, 1999, when he also failed to appear. A bench warrant was issued for his arrest.

The defendant was not arrested until February of 2005. In July of 2005, after denial of his request to dismiss the case because of lack of speedy trial, he was tried before a jury and found guilty of DUI.

Rejecting the defendant's claim that he was denied his right to speedy trial, the court applied the Barker v. Wingo, 407 U.S. 514 (1972), four-factor test to decide whether the defendant's right to a speedy trial has been violated. This four-part test looks to the length of delay, the reason for the delay, the accused's assertions of his right to speedy trial, and the prejudice to the accused. No single factor is controlling and all factors must be weighed.

The length of the delay is a triggering factor. If the delay is longer then the delay usually allowed for criminal prosecutions, the delay is presumptively prejudicial and the court must complete a speedy trial analysis. Traditionally, a delay of one-year or more is considered presumptively prejudicial triggering the analysis. However, a presumptively prejudicial delay alone does not create a speedy trial violation and the other factors must still be weighed. The second factor, the reason for the delay, is closely related to the first factor. This factor weighs against the state if it engages in intentional or dilatory tactics that delay trial or if the state is negligent by not diligently pursuing prosecution. Delays caused by the defendant weigh against him. The government must actually try to serve a warrant or risk being negligent for not diligently pursuing the accused.

Both the state and the defendant bore some responsibility for the total delay. An arrest warrant was issued in 1996. The warrant was not served until three years later in 1999. The record contained no evidence of measures taken by law enforcement to serve the warrant. Although the state argued that merely issuing the warrant showed it was diligently pursuing the defendant, the state's inactive approach to serve the warrant for three years constituted negligence. The state bore responsibility for the delay between October 1996 and October 1999 by not actively pursuing the defendant.

Neither party disputed that the defendant caused the final delay lasting approximately six years.

Failure to assert the right to a speedy trial will make it difficult for the defendant to prove that he was denied a speedy trial. When a defendant does not know of the charge against him, not asserting the right until after arrest cannot weigh against him. He asserted his right in due course by moving to dismiss the matter in 2005 even though he did not assert his right in 1999 when he was first arrested. He claims he did not know of the charge against him until his arrest in 1999. Assuming that he did not know of the charge against him, he still did not timely assert his right to speedy trial. Rather than asserting his right in 1999 when he first could have, he evaded law enforcement for more than five years. The defendant failed to properly assert his right to a speedy trial by choosing instead to elude law enforcement.

The fourth factor, prejudice to the defendant, has three interests to protect: to prevent a pre-trial incarceration, to minimize anxiety and concern of the accused, and to limit the possibility that the defense will be impaired. The last interest is the most important. Because great delays make a defendant's showing of prejudice more difficult to

make, the defendant does not always have to affirmatively prove how his case had been eroded.

The defendant argued that when there has been long delays, prejudice may be conclusively presumed. When the state diligently pursues the defendant, the defendant must prove actual prejudice. When the state intentionally delays prosecution because of a bad faith motive, prejudice is presumed. When the state has been negligent by not diligently pursuing the defendant, such as in this case, the weight of the other factors and the length of the delay controls whether prejudice must be actual or may be presumed.

Under the facts of this case, the first of three factors do not favor a presumption of prejudice. They do not weigh heavily enough in the defendant's favor to support a presumption of prejudice. The district court properly found that the defendant must prove actual prejudice.

To establish actual prejudice, a defendant must factually link his loss of liberty with any specific prejudice to his right to a fair trial. The district court correctly found the defendant was not prejudiced. The arresting officer was the sole prosecution witness who remembered little about the arrest and had to rely heavily on his written report to refresh his memory during the trial. The district court granted the defendant's motion in limine excluding the Intoxilyzer report from evidence because the state did not give the defendant sufficient time to review the foundational documents. If anything, the delay helped the defendant by keeping potentially damaging evidence out and force the prosecution's witnesses to rely heavily on the reports rather than memory. The defendant did not call any witnesses on his own nor did he complain that he had to forego evidence because of the delay. The defendant's case could not have suffered any harm a speedy trial to seeks to avoid. The court refused to accept the defendant's invitation to reward him for successfully playing "catch me if you can" with law enforcement. Just as a fugitive cannot order law enforcement to "stop chasing me" and expect it to comply, a fugitive cannot be rewarded for successfully evading law enforcement.

PROBATION EXTENSION - RESTITUTION

In *State v. Stavig*, 2006 ND 63, ____ N.W.2d ____, the court reversed an order amending the defendant's criminal judgment, concluding the district court did not have authority to extend the defendant's probation for a third time and requiring the defendant to pay restitution.

In October of 1996, the defendant pled guilty to theft of property, sentenced to five years probation, and was ordered to pay $22,700 restitution in monthly payments. In March of 1997, his probation was revoked because he failed to turn over a lump sum insurance settlement as restitution and the criminal judgment was amended. At that time, the defendant was sentenced to five years imprisonment with two years suspended for three years following his release from prison and to pay the restitution. While still on probation in January of 2003, he voluntary requested, and the district court granted, the probation extension of two years so he could pay restitution.

In December of 2004, the state petitioned for revocation of the defendant's probation claiming he had not paid the total amount of restitution. Although the defendant had made monthly payments under the probation officer's plan as stipulated by the state, the only issue before the court was the total unpaid restitution. The court revoked his probation and extended probation for another five years ordering the defendant to pay restitution in monthly payments to be decided by his probation officer based on his ability to pay.

On appeal, the defendant claimed that, in light of his stipulation with the state, the district court committed clear error by revoking his probation for not making payments as requested by his probation officer. He also argued that the district court abused its discretion by extending probation for another five years.

A two step process is applied when reviewing a revocation of probation. First, a court will review whether the defendant has violated his or her probation under a clearly erroneous standard. Second, the court will review whether the district court abused its discretion by revoking the defendant's probation. Upon a review of the record, the court concluded the district court's order determined that the defendant violated the terms of his probation by failing to make the payments as requested by the probation officer.

This order was directly contrary to the stipulation the parties had agreed to on the record in that the defendant had paid the restitution as ordered by his probation officer. The only issue before the court was whether the defendant had violated his probation by failing to pay the amount of restitution.

Some restitution remained unpaid. Although the matter could be remanded for the district court to decide whether the defendant violated his probation by failing to pay the total amount owed, the defendant had already served three different probation periods, two imposed by the district court and one for which he volunteered.

Probation ordered in a felony case may not generally extend longer than five years. This period may be extended when a defendant has been ordered to pay restitution.

The court looked to the legislative history of N.D.C.C. § 12.1-32-06.1(2) to resolve an ambiguity as to whether that statutory provision construed the terms "an additional period of probation" to mean "additional periods of probation" allowing multiple additional periods of probation to pay restitution.

When the bill enacting N.D.C.C. § 12.1-32-06.1(2) was heard by the House and Senate Judiciary Committees, a representative explained that the bill would add five years of probation to the five years the court could already impose for a felony, thereby extending the total possible probation to ten years. Testimony for the bill supported the interpretation that the statute imposes only one additional period of probation not to exceed five years. The legislative history of N.D.C.C. § 12.1-32-06.1(2) reflected that "an additional period of probation not to exceed five years" was to mean one additional period of probation. The district court may impose only one additional period of probation not to exceed five years under this provision.

Based upon the record of this case, the court had placed the defendant on probation twice and he had served the two probation periods allowed by N.D.C.C. § 12.1-32-06.1(2) and the court could not order the defendant to be subject to another period of probation.

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