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Searches and Seizures – Nighttime Execution: The North Dakota Supreme Court Finds Warrant Lacking Separate Probable Cause for Nighttime Execution State v. Holly, 2013 ND 94, 833 N.W.2d 15

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SEARCHES AND SEIZURES—NIGHTTIME EXECUTION: THE NORTH DAKOTA SUPREME COURT FINDS WARRANT LACKING SEPARATE PROBABLE CAUSE FOR NIGHTTIME EXECUTION

State v. Holly, 2013 ND 94, 833 N.W.2D 15

ABSTRACT

In *State v. Holly*, the North Dakota Supreme Court rejected the good-faith exception and inevitable discovery doctrine as exceptions to an "anytime" warrant found to be lacking separate probable cause for nighttime execution. Holly alleged the warrant affidavit lacked probable cause, making the search of his vehicle and residence illegal. The court reversed the defendant's criminal judgments that were based on evidence found in his residence, but affirmed criminal judgments based on the evidence found in the defendant's vehicle. In finding an invalid search of the appellant's home, but a valid search of the car in the driveway, the North Dakota Supreme Court altered what constitutes a "reasonable" search and seizure within the meaning of the North Dakota Constitution.

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I. FACTS

On February 7, 2011, law enforcement received information from Micah Sesseman that John Holly, the informant's roommate, would be transporting marijuana and prescription drugs from Whitefish, Montana to their shared residence in Minot, North Dakota.[1] Sesseman informed law enforcement that Holly would be traveling in a white Ford Ranger with Texas license plates, that the vehicle would be driven by his girlfriend, a third roommate, and that Holly and his girlfriend would arrive in Minot the

1. State v. Holly, 2013 ND 94, ¶ 2, 833 N.W.2d 15, 20.

following evening.[2] On February 8, Officer Graham visited the defendant's residence to meet with Sesseman.[3] While Officer Graham was at the shared residence, Sesseman entered Holly's bedroom.[4] From where Officer Graham stood in the living room, he observed a glass smoking device on Holly's dresser.[5]

After visiting Sesseman, Officer Graham sought a search warrant for Holly's vehicle and residence.[6] The magistrate issued a warrant allowing law enforcement to search the vehicle and residence during the daytime.[7] At the request of Officer Graham, the warrant was later modified, with judicial approval, to "anytime" and was executed on February 8, 2011 at 10:14 p.m.[8] From Holly's vehicle, the officers seized two plastic bags of marijuana, one plastic bag of approximately twenty-six pills of Clonazepam,[9] a plastic bag of Psilocyn,[10] hallucinogenic mushrooms, and one glass smoking device.[11] From Holly's residence, the officers seized a plastic bag containing aluminum foil that contained Testosterone Propionate,[12] a digital scale with marijuana residue, a plastic tub containing various size plastic bags and marijuana residue, a glass smoking device, and one metal smoking device.[13]

Holly moved to suppress the evidence seized in his home and residence based on a lack of probable cause.[14] Specifically, the defendant alleged the warrant affidavit did not establish the reliability of the informant or the separate probable cause required for the issuance of an "anytime" warrant.[15] Holly also argued that law enforcement's observation of a glass smoking device in his bedroom constituted an illegal search.[16] Additionally, Holly moved to suppress the evidence based on the warrant affidavit's reference

2. *Id.*
3. *Id.* ¶ 3.
4. *Id.*
5. *Id.*
6. *Id.* ¶ 4.
7. *Id.*
8. *Id.* ¶ 5, 833 N.W.2d at 21.
9. Clonazepam is a benzodiazepine prescription medication that decreases abnormal electrical activity in the brain and is often used to treat seizures and panic attacks.
10. A hallucinogenic compound generally found in psychedelic mushrooms.
11. *Holly,* ¶ 5, 833 N.W.2d at 21.
12. Testosterone Propionate is a steroid that increases testosterone levels in the body and is typically prescribed for individuals who are unable to produce necessary levels of testosterone on their own.
13. *Holly,* ¶ 5, 833 N.W.2d at 21.
14. *Id.* ¶ 6, 833 N.W.2d at 22.
15. *Id.*
16. *Id.*

to "six pounds" of marijuana.[17] The motion argued Officer Graham either intentionally, or with reckless disregard for the truth, referenced the marijuana in an attempt to mislead the magistrate when obtaining the search warrant.[18] The trial court denied the motion to suppress.[19] The trial court concluded that Officer Graham did mislead the magistrate even though the information was later found to be incorrect.[20] The trial court found Holly guilty of six counts of possession of controlled substances[21] and possession of drug paraphernalia.[22] While the court found Holly not guilty on the charge of possession of marijuana with intent to deliver, it did find Holly guilty of a lesser-included offense of possession of a controlled substance—- marijuana greater than one ounce.[23] On appeal, Holly argued the trial court erred in finding him guilty of a lesser-included offense, denying his motions to suppress, and denying his motion for a judgment of acquittal.[24]

II. LEGAL BACKGROUND

Article I, section 8 of the North Dakota Constitution, which includes language modeled after the Fourth Amendment of the United States Constitution, protects citizens against unreasonable searches and seizures.[25] As part of this protection, a search conducted without a warrant is presumed to be invalid.[26] To obtain a search warrant, law enforcement officers must establish probable cause.[27] In North Dakota, probable cause exists where

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17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Specifically, the trial court found Holly guilty of: (1) possession of a schedule III controlled substance greater than one ounce; (2) possession of a schedule III controlled substance; (3) possession of drug paraphernalia, other than marijuana; (4) possession of drug paraphernalia, marijuana; (5) possession of Psilocyn; (6) possession of a schedule IV controlled substance; and (7) possession of drug paraphernalia, other than marijuana. *Id.* ¶ 1, 831 N.W.2d at 20.
22. *Id.* ¶ 8, 831 N.W.2d at 21.
23. *Id.*
24. *Id.* ¶ 9.
25. N.D. CONST. art. I, § 8 guarantees:

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

26. Courts often state that warrants are preferred. In cases where there is no warrant, the burden of proving the search's validity is on the government.
27. Probable cause arises when "the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Carroll v. United States, 267 U.S. 132, 162 (1925).

the "facts and circumstances relied on by the magistrate would warrant a person of reasonable caution to believe the contraband . . . will be found in the place to be searched."[28] The North Dakota Supreme Court uses a totality of the circumstances approach in determining whether information presented to a magistrate was sufficient to establish probable cause.[29] Specifically, the court has found that probable cause is "the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers."[30] The Court has declared that the standard for probable cause "does not require the commission of the offense be established with absolute certainty, or proved beyond a reasonable doubt and may even be less than a preponderance of the evidence."[31]

There are a number of ways to establish probable cause, including personal observations, hearsay, and a combination of the two, which is known as corroboration.[32] The North Dakota Rules of Criminal Procedure allow for a probable cause finding to be "based upon hearsay evidence in whole or in part."[33] Hearsay used to establish probable cause may come from a named or unnamed informant.[34] In North Dakota, police officers and ordinary citizens are presumed to be reliable, while the credibility of a person from "criminal milieu" must be established.[35]

Federal law recognizes that a source's veracity may be reinforced by independent police verification where it was initially insufficient, and the source's basis of knowledge may be reinforced by verified details.[36] While the sources of information in the affidavit can vary, the four corners rule[37] establishes that a reviewing court cannot consider anything *not in* the warrant, affidavit, or recorded testimony when considering probable

28. State v. Nelson, 2005 ND 59, ¶ 3, 693 N.W.2d 910, 913.

29. *Holly*, ¶ 12, 833 N.W.2d at 22.

30. State v. Guthmiller, 2002 ND 116, ¶ 10, 646 N.W.2d 724, 728.

31. State v. Spidahl, 2004 ND 168, ¶ 11, 686 N.W.2d 115, 118.

32. North Dakota Rule of Criminal Procedure 41 is an adaptation of Federal Rule of Criminal Procedure 41 and implements the provisions of the Fourth Amendment and Article 1, section 8 of the North Dakota Constitution.

33. N.D. R. CRIM. P. 41(c)(1)(c).

34. A confidential informant is a person known to the police, but whose identity is concealed from the magistrate. State v. Roth, 2004 ND 23, ¶ 11, 674 N.W.2d 495, 500.

35. State v. Boushee, 284 N.W.2d 423, 430 (N.D. 1979).

36. Spinelli v. United States, 393 U.S. 410, 418 (1969).

37. "In making this independent determination as to the existence of probable cause, the reviewing court may not look beyond the four corners of the affidavit or application for issuance of the warrant." State v. Schmalz, 2008 ND 27, ¶ 13, 744 N.W.2d 734, 738.

cause.[38] After a probable cause finding has been made, a reviewing court gives great deference to the issuing court's determination.[39]

A. SEARCH AND SEIZURE IN NORTH DAKOTA

Most search and seizure related issues are addressed by statute or rule.[40] In general, North Dakota requires search warrants to be served within ten days of issuance. In addition, warrants must be served during the daytime hours of 6:00 a.m. to 10:00 p.m., unless a magistrate authorizes an anticipatory or nighttime warrant.[41]

1. Nighttime Execution: When Law Enforcement Needs Separate Probable Cause

The North Dakota Supreme Court was first presented with the issue of nighttime service of a search warrant in *State v. Schmeets*.[42] Schmeets was charged with the possession of a controlled substance after law enforcement found cocaine in his residence during a search conducted pursuant to a warrant.[43] Schmeets sought to suppress the evidence on the grounds that the search warrant lacked probable cause and had been executed at night in violation of Rule 41(c) of the North Dakota Rules of Criminal Procedure.[44] The district court denied the motion to suppress, and Schmeets appealed the conviction.[45] On review, the North Dakota Supreme Court articulated that the purpose of Rule 41(c) "is to protect citizens from being subjected to the trauma of unwarranted nighttime searches."[46] The court acknowledged that the form on which the warrant in *Schmeets* was drafted created confusion regarding the specific time for execution.[47] Ultimately, however, the court declined to rule on the issue, having already found the warrant invalid due to insufficient probable cause.[48]

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38. *See generally* State v. Schmeets, 278 N.W.2d 401 (N.D. 1979).

39. State v. Holly, 2013 ND 94, ¶ 11, 833 N.W.2d 15, 22.

40. Specifically, criminal procedure rules are addressed by North Dakota Rule of Criminal Procedure 41 and Federal Rule of Criminal Procedure 41.

41. North Dakota Rule of Criminal Procedure 41(c) provides: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." N.D. R. CRIM. P. 41(c).

42. *Schmeets*, 278 N.W.2d at 404.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id*. at 410.

47. *Id*.

48. *Id.*

In *State v. Fields*,[49] the North Dakota Supreme Court found a violation in the execution of a nighttime search warrant.[50] Looking to Rule 41(c)(1), the court considered whether the magistrate had adequate probable cause for authorizing a nighttime search of Fields's home.[51] The court reiterated that probable cause for a nighttime search "exists upon a showing that the evidence sought may be quickly and easily disposed of, and . . . drugs are such evidence."[52] The court found the facts insufficient to support the government's argument that the defendant's odd hours and propensity for violence constituted sufficient probable cause for nighttime execution, and suppressed the evidence.[53] Perhaps most importantly, this case resulted in an overruling of the per-se rule justifying the issuance of nighttime search warrants in drug cases.[54]

In another post-conviction case, *Roth v. State*,[55] the North Dakota Supreme Court again addressed a challenge based on the authorization of a nighttime search.[56] The district court had not decided whether there was probable cause for a nighttime search.[57] On review, the majority found that there were adequate facts to support the necessary probable cause for a nighttime search where the defendant was likely to be cooking methamphetamine during nighttime hours, as shown by law enforcement's surveillance of the defendant's activities.[58] The majority also noted in dicta that the good-faith exception would also apply in this case.[59] However, the *Roth* decision was not unanimous, and Justice Maring's dissent expressed her belief that there was neither probable cause nor a good-faith exception.[60]

2. Open Fields and Plain View Doctrine: When Law Enforcement Does Not Need Probable Cause

Since the Fourth Amendment protections are limited to "persons, houses, papers, and effects," they do not apply where contraband is

49. 2005 ND 15, 691 N.W.2d 233.
50. *Id.* ¶ 1, 691 N.W.2d at 234.
51. North Dakota Rule of Criminal Procedure 41(c)(1) requires the issuing magistrate find a sufficient showing of probable cause to justify the authorization of a nighttime search. N.D. R. CRIM. P. 41(c)(1).
52. *Fields*, ¶ 10, 278 N.W.2d at 237.
53. *Id.* ¶ 14, 278 N.W.2d at 238.
54. *Id.* ¶ 10, 278 N.W.2d at 237.
55. 2007 ND 112, 735 N.W.2d 882.
56. *Id.* ¶ 1, 735 N.W.2d at 882.
57. *Id.* ¶16, 735 N.W.2d at 890.
58. *Id.* ¶ 27, 735 N.W.2d at 892-93.
59. *Id.* ¶ 30, 735 N.W.2d at 893.
60. *Id.* ¶ 36, 735 N.W.2d at 895.

observed in an open field.[61] At common law, open fields include anything outside of the home or curtilage.[62] The rationale for this doctrine lies in language of the Fourth Amendment and case law emphasizing society's reasonable expectations of privacy.[63] Similarly, the plain view doctrine allows items that are evidence of a crime to be seized without a warrant when they are in plain view of a law enforcement officer who is standing inside a constitutionally protected area.[64]

B. APPLICATION OF THE EXCLUSIONARY RULE IN NORTH DAKOTA

The exclusionary rule operates to suppress evidence where there has been a constitutional violation.[65] States courts, which find violations of rules and statutes, may or may not suppress evidence. As a general rule, North Dakota does not use exclusionary remedies for statutory violations.[66] Violations of rules, such as Rule 41, are not required to have suppression remedies, but the North Dakota Supreme Court has suppressed evidence where it has found rule violations, generally without discussion about whether an exclusionary sanction is required.[67]

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61. The Fourth Amendment of United States Constitution states the right of the people to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized." U.S. CONST. amend. IV.

62. Curtilage is considered to be the land immediately surrounding and associated with the home. The curtilage "is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" Boyd v. United States, 116 U.S. 616, 630 (1886).

63. The United States Supreme Court has found no illegal search where law enforcement installed a microphone to the outside of a public telephone booth because there was no physical penetration of the booth and because the defendant could have no reasonable expectation of privacy speaking at a public telephone booth. Katz v. United States, 389 U.S. 347, 361 (1967).

64. In *Horton v. California*, law enforcement had probable cause to search a home for evidence of a robbery. 496 U.S. 128, 130-31 (1990). The warrant neglected to list potential weapons, which law enforcement found in plain view while searching for proceeds of the robbery. *Id*. at 131. The majority found the plain view doctrine applied because law enforcement was not searching beyond its authorization when it found the weapons. *Id*. at 142.

65. There are multiple suppression rules, including the Fourth Amendment guarantee against unreasonable searches and seizures, the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to counsel, and the Due Process Clause of the Fifth and Fourteenth Amendments.

66. *But see* Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 290 (N.D. 1987) (finding a "qualified" statutory right for defendant to consult with attorney before making chemical test decisions in a DUI driver's license case.").

67. Following United States Supreme Court precedent, the North Dakota Supreme Court generally applies exclusionary remedies where it finds a violation of the state constitution. *See* State v. Lunde, 2008 ND 142, ¶ 15, 752 N.W.2d 630, 636.

1. The Good-Faith Exception

The United States Supreme Court developed the reasonable good-faith exception as an exception to the exclusionary rule when the costs of exclusions outweigh the benefits.[68] The rationale behind the exception is that no deterrence purposes are served where a police officer who objectively, and in good faith, obtains and executes a warrant that is later found to be invalid.[69] North Dakota adopted the good faith exception in *State v. Herrick*,[70] but avoided its application under the North Dakota Constitution.[71] The court found that police officers acted in objectively reasonable reliance on a no-knock warrant issued by a judge.[72] In the dissent, Justice Maring emphasized her view that the court should have directly addressed the good faith exception as it applies to the state Constitution, and Justice Maring cited North Dakota cases relying upon the state constitution.[73]

North Dakota recognizes the four federally recognized exceptions to the good-faith doctrine.[74] The North Dakota Supreme Court has stated that an officer's reliance on the magistrate's authorization is not reasonable where:

> (1) the issuing magistrate was misled by false information intentionally or negligently given by the affiant; (2) when the magistrate totally abandoned her judicial role and failed to act in a neutral and detached manner; (3) when the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;' and (4) when a reasonable law enforcement officer could not rely on a facially deficient warrant.[75]

2. The Inevitable Discovery Doctrine

Another federal exception to the exclusionary rule recognized in North Dakota is the inevitable discovery doctrine.[76] In *State v. Phelps*,[77] the

68. United States v. Leon, 468 U.S. 897, 922 (1984).
69. *Id.* at 921-22.
70. 1999 ND 1, 588 N.W.2d 847.
71. *Id.* ¶ 27, 588 N.W.2d at 852.
72. *Id.* ¶ 20, 588 N.W.2d at 851.
73. *Id.* ¶ 52, 588 N.W.2d at 856.
74. *Id.* ¶ 15, 588 N.W.2d at 850.
75. *Id.* (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).
76. The inevitable discovery doctrine allows the government the opportunity to prove that law enforcement would have discovered the illegally obtained evidence regardless of the illegal search or seizure. State v. Smith, 2005 ND 21, ¶ 31, 691 N.W.2d. 203, 212.
77. 287 N.W.2d 769 (N.D. 1980).

North Dakota Supreme Court examined evidence derived from information that was obtained through an illegal search. The court held that the evidence would not be inadmissible if the police had not acted in a bad-faith effort to accelerate the discovery of the evidence and if the evidence would have been discovered despite the illegal activity.[78]

In order for the inevitable discovery doctrine to apply, the state must meet a two-prong test.[79] First, the court stated, "use of the doctrine is permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question," and next, "the State must prove that the evidence would have been found without the unlawful activity and must show how the discovery of the evidence would have occurred."[80] In *Phelps*, the state submitted photographs of the defendant to illustrate what police officers observed about the defendant prior to the illegal search.[81] This proved that the officers were aware of the defendant's wounds, regardless of the search of his clothes.[82]

In *State v. Johnson*,[83] a deputy sheriff seized an air compressor without a warrant believing it to be stolen property.[84] The district court denied Johnson's motion to suppress based on unlawful seizure, stating it found no reasonable expectation of privacy in Johnson's driveway, where the item had been located.[85] Applying the two-prong test developed in *Phelps*, the North Dakota Supreme Court rejected the inevitable discovery doctrine.[86] The court found the state could not satisfy the first prong requiring law enforcement to not have acted in bad faith in an effort to accelerate the discovery of the evidence in question.[87] With somewhat strong language, the court found that "in no instance is this type of shortcut more apparent than in [this] case in which the warrant requirement was bypassed in the absence of exigent circumstances."[88]

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78. *Id.* at 775.

79. *See* State v. Williams, 285 N.W.2d 248, 258 (Iowa 1979) (adopting a two-prong inevitable-discovery theory similar to that of other states, as promoted in Professor LaFave's treatise, 6 WAYNE R. LAFAVE ET AL., SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4, at 622 (1978)).

80. *Phelps*, 287 N.W.2d at 775.

81. *Id.*

82. *Id.*

83. 301 N.W.2d 625 (N.D. 1981).

84. *Id.* at 626.

85. *Id.*

86. *Id.* at 629.

87. *Id.*

88. *Id.*

III. ANALYSIS

Holly presented two issues: (1) whether the magistrate had sufficient, separate probable cause for the issuance of a nighttime search of Holly's residence and vehicle; and (2) whether the evidence would be admissible due to either the good-faith or inevitable discovery exceptions.[89] *Holly* is particularly interesting given the court found the nighttime execution of the warrant to be invalid as applied to the home, but valid as applied to the car outside.[90] The court's five justices were unable to write a unanimous opinion on the facts of the *Holly* case, which discusses aspects of North Dakota's search and seizure law as it applies to law enforcement and judiciary branches across the state.[91]

A. THE MAJORITY OPINION

Writing for the majority, Justice Maring[92] began by addressing Holly's claim that the warrant affidavit failed to show sufficient separate probable cause for authorizing a nighttime search. The court first looked to North Dakota's established case law. Following precedent, Justice Maring acknowledged that the mere existence of drugs does not lead to an inference that evidence will be easily disposed of.[93] A law enforcement officer must set forth facts for believing the evidence will be destroyed.[94] Since Deputy Graham testified that unsworn statements were used to request nighttime execution of the warrant, the court relied only on the face of the affidavit for determining whether probable cause existed.[95]

The search warrant in this case applied to Holly's residence, persons at the residence, and vehicle.[96] The affidavit included that:

> (1) Holly would be transporting marijuana and other unknown prescription drugs in his white Ford Ranger; (2) Holly advised Sesseman that he . . . would be leaving Whitefish, MT in the morning hours of 2/8/2011 and expected to arrive in Minot during the evening hours; (3) Holly was planning to purchase six pounds of marijuana and some prescription drugs to bring back to Minot;

89. State v. Holly, 2013 ND 94, ¶ 2, 833 N.W.2d 15, 20.
90. *Id.*
91. Chief Justice VandeWalle and Justice Kapsner concurred with the majority opinion. Justice Crothers concurred in part and dissented in part, and Justice Sandstrom dissented from the majority opinion.
92. *Holly*, ¶ 10, 833. N.W.2d at 21.
93. *Id.* ¶ 36, 833 N.W.2d at 26.
94. *Id.*
95. *Id.* ¶ 40, 833 N.W.2d at 28.
96. *Id.* ¶ 41.

> (4) [b]ased upon [Deputy Graham's] training and experience vehicles are often used for storage and hiding drugs related paraphernalia; (5) Sesseman witnessed Holly smoking marijuana in the residence; and (6) Deputy Graham observed a multi-colored glass smoking device, commonly called a bong, sitting on a dresser along the west wall of [Holly's] bedroom through an open door.[97]

Using a totality of the circumstances approach, Justice Maring wrote that a "vehicle's inherent mobility provides exigent circumstances to reasonably infer that the illegal contraband would not be found again if law enforcement must wait and procure a search warrant."[98] Therefore, the separate probable cause necessary for nighttime execution of a search of Holly's vehicle existed on the face of the affidavit.[99] Distinguishing *Roth*, however, the majority opinion held that the warrant affidavit "did not contain particularized facts indicating the need to apprehend and search Holly's residence at the time of the alleged commission of the crime" because it lacked information indicating that the evidence would be destroyed prior to daytime.[100]

The majority opinion rejected the state's argument that the good faith exception should apply in regards to the nighttime search of Holly's residence.[101] Instead, the majority found the good-faith exception[102] did not apply because "a reasonably well-trained officer would know that this nighttime search warrant, which lacked in indicia of probable cause that the contraband would be easily destroyed or quickly removed from the residence, was invalid."[103] In addition, the majority declined to apply the inevitable discovery doctrine.[104] The court found that the state had failed to prove law enforcement had not acted in bad faith when it disregarded search warrant procedure to accelerate the discovery of evidence.[105]

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97. *Id.* (quotations omitted).
98. *Id.* ¶ 43.
99. *Id.*
100. *Id.* ¶ 47, 833 N.W.2d at 29-30.
101. *Id.* ¶ 52, 833 N.W.2d at 31.
102. An officer's reliance on the magistrate's authorization is not objectively reasonable, and suppression remains appropriate: "when the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* ¶ 50, 833 N.W.2d at 30.
103. *Id.* ¶ 52, 833 N.W.2d at 31.
104. *Id.* ¶ 56, 833 N.W.2d at 33.
105. *Id.* ¶ 61, 833 N.W.2d at 34.

B. JUSTICE CROTHERS' CONCURRENCE IN PART AND DISSENT IN PART

Justice Crothers disagreed with the majority's opinion as it applied to the inevitable discovery doctrine and the suppression of evidence.[106] Justice Crothers first looked to the language of the Fourth Amendment and noted "[t]he Amendment does not address execution of warrants at night, and we must be guided by precedent to decide whether a particular search was lawful."[107] In addition, Justice Crothers stressed that the majority of the court agreed that the authorized warrant was valid in light of the Fourth Amendment.[108] Rather than finding Officer Graham's actions to be in bad faith, Justice Crothers reflected that Officer Graham was "[o]bviously mindful that execution of search warrants at night need explicit authorization" and sought and received judicial approval of such a search.[109]

Justice Crothers reflected on the facts of *Holly* with a broad perspective when he wrote:

> Judicial authorization was received at the same time for nighttime execution of both the home and the vehicle warrants. Authorization for nighttime execution of neither warrant was supported by a showing of "separate probable cause." Yet we uphold the nighttime vehicle search based on the recognized exigency that vehicles are inherently mobile and the suspected contraband "would not be expected to be in Holly's vehicle the following day or might be removed if the search was delayed to daytime."[110]

Justice Crothers also analyzed how the rationale for limiting nighttime searches applied to the facts of the case.[111] For example, Justice Crothers noted that Holly and Holly's girlfriend were seized immediately upon their arrival, which happened to be fourteen minutes later than the "inflexible, one size fits all, rule crafted by this Court that 'daytime' ends at 10:00 p.m."[112] Since it was clear that neither Holly nor his girlfriend were asleep

106. *Id.* ¶ 79, 833 N.W.2d at 37.
107. *Id.* ¶ 80.
108. *Id.* ¶ 81.
109. *Id.*
110. *Id.* ¶ 82, 883 N.W.2d at 38 (internal citations omitted).
111. *Id.* ¶ 83. Typically, restricting the execution of search warrants to specific "daytime" hours is done so as a safety precaution; there is inherent risk for law enforcement in nighttime searches, when a homeowner has likely been sleeping and is particularly vulnerable. State v. Schmeets, 278 N.W.2d 401, 410 (N.D. 1979).
112. *Holly*, ¶ 83, 883 N.W.2d at 38 (citation omitted).

at the time the warrant was executed, and it was unlikely that Sesseman, the remaining roommate, was asleep "during execution of the warrants that his information and participation helped procure," the rationale behind avoiding nighttime execution of a warrant was not served by the exclusion of evidence found in Holly's residence.[113]

Those additional facts, Justice Crothers noted, are particularly important in determining the applicability of the good-faith and inevitable discovery doctrines.[114] Justice Crothers stated that he was compelled to agree that Officer Graham's failure to establish separate probable cause to search the residence may not have been in good faith.[115] Justice Crothers continued, however, by explaining that he did not agree with "the majority's apparent leap from the lack of good faith under the good faith exception to a determination of bad faith under the inevitable discovery doctrine."[116] The test for the inevitable discovery doctrine, Justice Crothers explained, is the presence of bad faith, rather than the absence of good faith.[117] Since the search of both Holly's vehicle and residence would have been legal and in good-faith during daytime hours, Justice Crothers argued that the record did not support a conclusion that law enforcement's actions were accomplished with bad faith when they occurred fourteen minutes late.[118]

C. JUSTICE SANDSTROM'S DISSENT

In dissent, Justice Sandstrom also began his analysis by looking to the language of the Fourth Amendment.[119] Citing the United States Supreme Court, Justice Sandstrom emphasized that "[t]he touchstone of the Fourth Amendment is reasonableness."[120] With this touchstone in mind, Justice Sandstrom wrote:

> The magistrate had determined there was probable cause to believe drugs and other evidence were inside the house, so once the search of the vehicle began in the driveway, one of two things was going to happen—those inside the house were going to remove or

113. *Id.*
114. *Id.* ¶ 84.
115. *Id.* ¶ 85.
116. *Id.*
117. *Id.* ¶ 87, 883 N.W.2d at 39.
118. *Id.* ¶ 90.
119. *Id.* ¶ 92, 833 N.W.2d at 39-40.
120. *Id.* (citing Florida v. Jimeno, 500 U.S. 248, 250 (1991)).

> destroy the drugs and other evidence, or, as Justice Crothers concludes, they were inevitably going to be discovered.[121]

Justice Sandstrom continued by referencing the Chief Justice's concurrence in *State v. Fields*,[122] which distinguished between the rejected per-se presumption that drugs are easily disposed of as it applies to no-knock violations and as it applies to nighttime execution of search warrants.[123] The Chief Justice wrote that "evidence that a subject of a search warrant consumed or delivered drugs within a few hours of their receipt or made deliveries in the nighttime hours would justify issuance of a nighttime search warrant."[124] Emphasizing reasonableness, Justice Sandstrom advocated that "the high risk of destruction of the drugs in the house while the vehicle was being searched in the driveway provides the touchstone of reasonableness of the nighttime search warrant here."[125]

IV. IMPACT

Both judiciary and law enforcement in North Dakota are impacted by the *Holly* decision. Law enforcement, prosecutors, and magistrates will not be able to use either the good faith exception, or inevitable discovery doctrine, as a remedy to the exclusionary rule where a search warrant executed through nighttime service was not supported by separate probable cause. The North Dakota Supreme Court's decision warns warrant applicants and authorizers alike that what constitutes sufficient probable cause to search a premises at night can vary even in cases where the defendant, contraband, and location are the same. The *Holly* decision serves to emphasize to North Dakota's law enforcement that they will be held to a strict standard in cases where they seek to search for or seize evidence. Although the good faith exception can apply where a defendant's claim is based on the federal constitution, the North Dakota Supreme Court has not explicitly held that the same exception applies to the state constitution.[126] As the court has stated, it is "axiomatic (that) our state constitution may provide greater protections than its federal counterpart."[127]

The *Holly* decision reflects the court's view that separate and adequate probable cause for a nighttime search must be strictly enforced. The strict interpretation of nighttime search requirements may serve to narrow law

121. *Id.*
122. 2005 ND 15, ¶ 18, 691 N.W.2d 233, 238.
123. *Id.* ¶ 93, 833 N.W.2d at 40.
124. *Fields*, ¶ 18, 691 N.W.2d at 239.
125. *Holly*, ¶ 94, 833 N.W.2d at 40.
126. State v. Lunde, 2008 ND 142, ¶¶ 17, 19, 752 N.W.2d 630, 636-37.
127. State v. Herrick, 1999 ND 1, ¶ 22, 588 N.W.2d 847, 851.

enforcement's ability to use them. In fact, the *Holly* decision and those following it may actually serve to blur the lines between a nighttime warrant and a no-knock warrant. Recently, Justice Sandstrom noted his view that the North Dakota Supreme Court "has gotten off track in equating nighttime search warrants with no-knock search warrants in drug cases."[128] Looking to decisions of the United States Supreme Court, Justice Sandstrom found that "equating nighttime searches with no-knock searches [. . .] is misplaced. What [the North Dakota Supreme Court has] done by opinion [it] can undo by opinion. And I would do so."[129]

A. "REASONABLENESS" UNDER THE FOURTH AMENDMENT

As Justice Sandstrom explained, the *Holly* decision further defines what North Dakota recognizes as a reasonable search pursuant to the state constitution.[130] While Justice Sandstrom expressed his view that the search in *Holly* was a reasonable one, the majority of the court sent the message to North Dakota law enforcement that it is in fact unreasonable for an officer or a judge to rely on an anytime warrant lacking in separate probable cause as it applies to a suspect's place of residence.[131] Whether it is a constitutional requirement for warrants to be served during the "daytime" hours of 6:00 a.m. to 10:00 p.m. may be interpreted differently from state to state. For example, the Minnesota Court of Appeals found there was no constitutional violation where the defendant is not at home during the search.[132] Perhaps a traditional, textual interpretation of the constitution would focus less on the exact time of execution and instead consider the "reasonableness" of the search in its entirety. More broadly, the *Holly* case leaves us to wonder if it is unreasonable to execute a search warrant fourteen minutes late, and if suppression of the evidence is the correct remedy.

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128. State v. Zeller, 2014 ND 65, ¶ 29, 845 N.W.2d 6, 15 (Sandstrom, J., dissenting). The goal of North Dakota Rule of Criminal Procedure 41(c), to protect citizens from the trauma of unwarranted nighttime searches, is no longer necessary. The reality is that "[w]e are no longer a sleepy village where television goes off the air at 11 or 12, and every business is shut down during the night. Today people work around the clock. The drug culture appears to be particularly alive at night." *Id*.

129. *Id*.

130. *Holly*, ¶ 92, 833 N.W.2d at 40.

131. *Id.*

132. State v. Jordan, 726 N.W.2d 534, 541 (Minn. Ct. App. 2007), *rev'd* in State v. Jordan, 742 N.W.2d 149, 151 (Minn. 2007).

B. DISTINGUISHING *ROTH V. STATE*

In North Dakota's brief, the government contended that *Holly* was analogous to *Roth*.[133] In *Roth*, the court found probable cause to support the nighttime execution of a warrant where it was likely that Roth would be manufacturing methamphetamine during the night.[134] In order for law enforcement to establish Roth's role in the manufacturing process, the search needed to be conducted during those hours.[135] The state alleged that, similar to the *Roth* case, law enforcement in the *Holly* case needed to execute the warrant at the actual time of Holly's arrival in order to more effectively establish his role in the transport and delivery of the drugs.[136] If law enforcement had done otherwise, the government stated, "evidence indicating that Holly had brought illegal substances back from Whitefish, Montana would not have been as convincing, and further, left open questions relating to the reliability of the reporting party."[137]

The North Dakota Supreme Court did not agree with the government's position.[138] Officer Graham's affidavit stating that Holly and his girlfriend were transporting drugs into North Dakota and were expected to arrive in the evening hours was not sufficient to establish the separate probable cause needed for nighttime execution, because the information was not provided to the magistrate under sworn testimony.[139] The Court distinguished *Holly* by stating that, unlike *Roth*, "the warrant affidavit did not contain particularized facts indicating the need to apprehend and search Holly's residence at the time of the alleged commission of a crime."[140] The Court does not disclose whether those facts, had they been included in sworn testimony, would have been sufficient for nighttime execution.

V. CONCLUSION

In *Holly*, the North Dakota Supreme Court held that without a separate showing of probable cause, law enforcement cannot rely on the good-faith exception or the inevitable discovery doctrine where there is nighttime service of a search warrant.[141] While this ruling clarifies North Dakota's two-prong application of the inevitable discovery doctrine, it remains

133. Brief for Appellee at 7, *State v. Holly*, 2013 ND 94, 833 N.W.2d 15 (No. 20120324).
134. Roth v. State, 2007 ND 112, ¶ 27, 735 N.W.2d 882, 892.
135. *Id.*
136. *Holly*, ¶ 46, 833 N.W.2d at 29.
137. Appellee's Brief, *supra* note 133, at 7.
138. *Holly*, ¶ 47, 833 N.W.2d at 29.
139. *Id.*
140. *Id.*
141. *Id.* ¶ 1, 833 N.W.2d at 20.

unclear under what circumstances North Dakota will recognize a good-faith exception. Holding that law enforcement could not have believed a search of Holly's home to be reasonable, but finding the vehicle search valid, the *Holly* decision may contribute to confusion amongst North Dakota's law enforcement regarding what is a reasonable search pursuant to the North Dakota Constitution.

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