First Judicial Circuit Court

410 Walnut, Suite 201
Yankton, SD 57078

Tami A. Bern
Magistrate Judge

Phone: (605) 668-3090
Fax: (605) 668-3093

Circuit Administrator
Kim L. Allison
Chief Court Services Officer
Francis McCabe
Circuit Assistant
Joan Novak

Presiding Judge
Arthur L. Rusch
Circuit Judges
Glen W. Eng
Steven R. Jensen
Bruce V. Anderson
Timothy W. Bjorkman
Magistrate Judges
Patrick W. Kiner
Tami A. Bern

January 29th, 2010

Mr. Brian Radke
3500 S. First Avenue Circle
Suite 201
Sioux Falls, SD 57105

Ms. Tiffany Landeen-Hoecke
Turner Co. State's Attorney
PO Box 700
Parker, SD 57053

RE: Memorandum Opinion—State v. Daniel Reed Christensen (Turner Co. Crim. 09-82)

Dear Counsel:

This matter came on for hearing on Defendant's Motion to Suppress on the 13th – 14th days of January, 2010. Mr. Christensen was personally present and with his counsel, Brian Radke. The State was present and represented by its State's Attorney Tiffany Landeen-Hoecke. The court having heard the testimony of the witnesses and having considered the evidence received as well as the arguments and briefs of counsel enters its decision as set forth in this correspondence.

FACTS

Second Chance Rescue is a nonprofit corporation organized pursuant to SDCL 40-2-1 for the purpose of preventing cruelty to animals. Turner County contracts with Second Chance Rescue for animal control enforcement. Rose Quinn and Dana Wigg are employed as animal control officers with Second Chance. Neither Rose Quinn nor Dana Wigg are members of Second Chance Rescue. A circuit court judge serving the 2nd judicial circuit executed an oath of office to Dana Wigg as an animal control officer on July 10th, 2008. Dana Wigg submitted a resume of her qualifications prior to the oath of office. A circuit court judge serving the 2nd judicial circuit executed an oath of office to Rose Quinn on May 6th, 2005. Rose Quinn was not requested to submit evidence of her qualifications prior to the oath office and none were given.

On April 9, 2009, the Turner County law magistrate issued a warrant of arrest for Defendant for the offense of Failure to Obtain a Sales Tax License contrary to SDCL 10-45-48.1(5), a class 1 Misdemeanor. The bond was set at $500 unsecured. Two deputies from the Turner County Sheriff's Office, Revenue Agent Lara Cunningham, DCI Agent Jim Severson and Animal Control Officers (ACO) Rose Quinn and Dana Wigg travelled to Defendant's residence. The deputies were present to serve the arrest warrant. Agent Cunningham was there to serve a

three day notice for failure to have a state sales tax license. ACOs Quinn and Wigg were requested to accompany law enforcement. The reason for their presence is unclear. Some witnesses testified the ACOs were present to make sure the dogs were cared for after Mr. Christensen was arrested while others testified that the ACOs were present to contain or control any loose dogs on the premises that may endanger the officers serving the warrant and the three day notice. While in the driveway of the residence, ACO Quinn observed that a building housing dogs was dilapidated. The chain link fence had jagged edges and the dogs used rough holes in the wall for ingress and egress.

Mr. Christensen was not at his home. What happened next is the subject of conflicting testimony. ACO Quinn testified that she went across the street and waited until Mr. Christensen returned home and did not inspect the property until after he was arrested and removed from the premises. ACO Quinn also believed Revenue Agent Cunningham possessed a search warrant authorizing search of the premises. Law enforcement and Revenue Agent Cunningham testified that after Mr. Christensen was not located, law enforcement, Revenue Agent Cunningham and ACO Quinn then proceeded to look around Mr. Christensen's farm place in an effort to locate him. During one of these events, ACO Quinn made further observations regarding the condition of the facilities in which Mr. Christensen's dogs were kept. At some point, Mr. Christensen returned home and spoke with ACO Quinn. Mr. Christensen advised that he intended to move the dogs to a newer Morton building on the property. ACO Quinn also learned that Mr. Christensen kept his Weimaraner dogs at his son, David Christensen's farm place. No further action was taken in regard to the observations made at Defendant's property at that time.

Sometime in July, ACOs Quinn and Wigg stopped by Mr. Christensen's residence on their way back from another call. The ACOs visited with Mr. Christensen regarding the animals and whether they had been moved to the Morton building. No further action was taken as a result of this contact and none of the information derived from this contact was contained in any of the applications for search warrant in this matter.

On August 17th, 2009, ACO Quinn received a complaint regarding the condition of a Weimaraner puppy purchased from Defendant. Jacob Whitcomb advised ACO Quinn that he had purchased a Weimaraner puppy from Defendant that was sick. Mr. Whitcomb's vet advised that the puppy was examined for lethargy, anorexia and bloody diarrhea. The puppy tested positive for parvo virus. The vet opined that the puppy had been removed from its litter too young and was vaccinated too young. It's prognosis for recovery was fair to guarded. ACO Quinn made application to the lay magistrate for a search warrant of David Christensen's property where ACO Quinn believed Daniel Christensen housed his Weimaraner dogs. In addition to the foregoing information regarding the condition of the puppy, ACO Quinn averred that she "has investigated Mr. Dan Christensen.....Mr. Christensen's property is very border line in conditions. In speaking with him he has always stated that we do not need to go to the address of his son David. This is the location of all the Weimaraner dogs...It is also a concern that the victims in this case were met at the driveway of the property and were not allowed access to see the other dogs contained therein. Mr. Christensen handed them the puppy and a scratch piece of paper and drove off...There are indications in Dr. Patti Canchola's report which indicated to me that this puppy was living in filthy conditions." See Affidavit in Support of Request for Search Warrant and attachments. While there were no references in Dr. Canchola's

report regarding living conditions, the statements of the puppy's owners state that when the puppy was received he was "filthy" with dirty ears and feces on his coat. The lay magistrate issued a search warrant for the David Christensen property on August 27th, 2009 authorizing law enforcement "to check the well being of all animals on property therein". The warrant was executed by Deputy Ostrem with the assistance of ACO Quinn that same day. A return of the warrant was filed on September 2nd, 2009 stating no items were seized pursuant to the warrant, the conditions of the kennels and dogs were checked, the overall health of the dogs appeared ok, some of the kennels were surrounded with feces, some water was not clean and appeared contaminated and some dogs were without water. No Weimaraner pups were found.

On September 2nd, 2009, ACO Quinn submitted two new affidavits in support of search and seizure warrant for property owned by Daniel Christensen and David Christensen respectively to the circuit court. ACO Quinn cited her April 9th, 2009 observations regarding the dilapidated buildings as well as complaints made from the winter of 2007 and December, 2008. She then went on to aver the identical allegations regarding the puppy sold to Jacob Whitcomb that was the basis for issuance of the search warrant of August 27th. ACO Quinn failed to disclose to the issuing court the existence of the August 27th search warrant as well as the facts that no Weimaraner pups were found at that time and that the overall health of the dogs present "appeared ok". The circuit court granted the search and seizure warrant in regard to the David Christensen property authorizing the search of all buildings for "removal of all animals and evidence collection." The circuit court denied the application for search and seizure as to the Daniel Christensen property but offered ACO Quinn the opportunity to supplement the affidavit with sworn testimony. ACO Quinn advised that she had assisted in a "search warrant" with Lara Cunningham but was unsure of the date. She then reiterated the April 9th observations which were already in the affidavit in support of search warrant regarding the condition of the buildings in which the dogs were housed. She then testified that on April 9th the water was filthy, the kennels were full of feces, the dogs had scars, their coats were not shiny, some dogs appeared thin and some dogs appeared hyper and scared. The circuit court then issued the search and seizure warrant for the Daniel Christensen property authorizing the search of all buildings for "removal of all animals and evidence collection."

The warrants were largely executed by agents from the Humane Society of the United States with assistance from ACOs Quinn and Wigg. No South Dakota licensed participated in execution of the warrant. Turner County law enforcement was present but their role was confined to keeping the peace as a result of the conduct of Defendant and others who arrived on the scene at his behest. Defendant summoned his veterinarian who was denied access to the animals on scene but offered a very cursory opportunity to examine the animals after they had been taken into custody and relocated.

DECISION

Both the United States and South Dakota Constitutions protect individuals from unreasonable search and seizure. U.S. Const. amend. IVVV; S.D. Const. art. VI, §11. The South Dakota constitution in particular provides:

> 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 affidavit, particularly describing the place to be searched and the person or thing to be seized.
>
> Id.

Accordingly, police ordinarily must obtain a warrant based on probable cause and issued by a neutral magistrate before searching or seizing an individual's property. *State v. DeLaRosa*, 2003 SD 18, ¶ 7, 657 N.W.2d 683, 685 (citing *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889, 905 (1968)).

1. Standing

Not every Defendant is entitled to challenge a search or seizure. Fourth Amendment rights are personal in nature and may not be vicariously asserted by others. 68 Am Jur 2d Searches and Seizures §8. The South Dakota Supreme Court has set forth the standard for determining whether a particular person has standing to challenge a search or seizure as follows: "An individual must have a reasonable expectation of privacy in the place searched ***or the article seized*** before the Fourth Amendment will apply." *State v. Christensen*, 2003 SD 64, ¶ 11, 663 N.W.2d at 694 (citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

A. Standing Re: Seizure of Property

While often considered in the same context, the standard for determining standing to challenge a seizure of property differs than that required for a search of an area. A possessory interest in the item seized is sufficient to establish standing to contest the seizure. *Soldal v. Cook County, Ill.*, 506 U.S. 56, ----, 113 S.Ct. 538, 544, 121 L.Ed.2d 450 (1992); *see also United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984) (defining a Fourth Amendment seizure as "a meaningful interference with an individual's *possessory interest* in that property") (emphasis added).

In *Soldal*, the United States Supreme Court held:

> ...our cases unmistakably hold that the Amendment protects property as well as privacy. This much was made clear in *Jacobsen, supra,* where we explained that the first Clause of the Fourth Amendment
>
> "protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs where there is some meaningful interference with an individual's possessory interests in that property." 466 U.S., at 113, 104 S.Ct., at 1656 (footnote omitted).
>
> *Id.* at 62-63.

Both search warrants 09-11 and 09-12 authorize "removal of all animals". One hundred seventy-three of the Defendant's dogs were taken into the state's custody pursuant thereto. This

clearly constitutes a seizure of the Defendant's possessory interests in that property and confers standing to contest the warrants authorizing that seizure.

B. Standing Re: Search of Area

Even if Defendant's possessory interests alone were insufficient to confer standing, he had a reasonable expectation of property in the area searched under both warrants. Our court has recently set forth the standard to determine whether a reasonable expectation of privacy exists in an area searched in *State v. Thunder*, 2010 WL 31796, §16 (SD):

> "An individual must have a reasonable expectation of privacy in the place searched or the article seized before the Fourth Amendment will apply." *Christensen*, 2003 SD 64, ¶ 11, 663 N.W.2d at 694 (citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). A two-part test determines whether an individual has a reasonable expectation of privacy in the area searched. *Cordell v. Weber*, 2003 SD 143, ¶ 12, 673 N.W.2d 49, 53 (citing *State v. Lowther*, 434 N.W.2d 747, 754 (S.D.1989)). First, we consider whether the defendant exhibited an actual subjective expectation of privacy in the area searched. *Id.* Second, we consider whether society is prepared to recognize that expectation of privacy as reasonable. *Id.* Whether a person has a legitimate expectation of privacy in the place to be searched is determined on a "case-by-case basis, considering the facts of each particular situation." *State v. Hess*, 2004 SD 60, ¶ 17, 680 N.W.2d 314, 322 (citation omitted).

Under certain circumstances, there is a reduced expectation of privacy in commercial properties that are "closely regulated" industries regardless of a defendant's subjective expectation of privacy in the area. *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636 U.S.N.Y.,1987. While the Animal Welfare Act, 7 U.S.C. 2131 et seq., provides for regulation of certain breeding operations and may possibly give rise to an argument of a reduced expectation of privacy, there is no evidence that Defendant is an animal breeder subject to Animal Welfare Act regulation and inspection and the court finds no grounds for a reduced expectation of privacy on that basis. SDCL 10-45-45 and 10-59-5 provide for inspection of records by the secretary of revenue for sales tax purposes and in no way diminishes Mr. Christensen's expectation of privacy in property outside of those records.

Clearly, Defendant has an actual subject expectation of privacy in his own property that was the subject of SW 09-12. *State v. Vogel*, 428 NW2d 272 (SD 1988); *State v. Tullous*, 692 NW2d 790, 792 (SD 2005). The buildings and surrounding fenced area where the dogs were housed are curtilage of the Defendant's home in light of the proximity of the area to the home, the fact that the buildings are enclosed and fenced in to house animals and the same are not generally visible to people passing by. *State v. Frey*, 440 NW2d 721, ___ (SD 1989). Defendant's expectation of privacy extends to the currtilage and outbuildings where the dogs were housed.[1] The inquiry, therefore, is limited to the search of David Christensen's property.

---

[1] The curtilage area is protected under the Fourth Amendment as a place in which the occupant has a reasonable expectation of privacy that society is prepared to accept. 68 Am Jur 2d Searches and Seizures §66. The curtilage of a home may include all outbuildings used in connection with the residence, such as garages, sheds and barns, and also yards, and lots connected with and in the close vicinity of the residence, but an open pasture or wooded area

The burden is on Defendant to show that he had a reasonable expectation of privacy in David Christensen's farm place. *Minnesota v. Carter*, 525 US 83, 88, 119 S.Ct. 469, 471 (1998).

The facts establish that David Christensen is the son of Defendant; Defendant breeds and raises dogs which are located on both his farm place and that of David Christensen; Defendant has been engaged in this occupation for at least two years; the dogs are housed in enclosed outbuildings of the farm place with fenced in access to the area outside of the outbuilding; Defendant effected the transfer of a puppy that he sold by meeting the customer at the end of the driveway of David Christensen's property. There was no evidence as to whether Defendant compensated his son for use of the property. Therefore, the court concludes that Defendant was allowed to use utilize the buildings as a guest of his son.

In the context of social guests, our state supreme court has held that a defendant who had an intimate relationship with his girlfriend and had spent the night at girlfriend's apartment overnight had a legitimate expectation of privacy in her apartment. *State v. Hess*, 680 NW2d 314 (SD 2004). It subsequently found standing for guests who fall somewhere between overnight guests and those simply permitted on the property. In *State v. Tullous*, the court held that a defendant who knew where the house key was located, had ready access to the home, regularly stayed overnight and had been friends with the homeowners for a long time had standing to challenge a search conducted thereon. *Id.* 692 NW2d 790, 794.

A guest's placement of property on the premises can also give rise to an expectation of privacy. 6 Wayne R. LaFave, Search and Seizure §11.3(c), at 166 (4th ed. 2004). LaFave finds, "It would seem clear beyond question that a defendant has standing if he is specifically permitted by the person with the possessory interest in the premises to store some specified effects there and is also permitted to enter the premises to check on those effects from time to time." *Id.*

Here, Defendant has a familial relationship with the owner of the premises searched and has been housing and caring for his animals on that property for some time. Under these circumstances, the court finds that Defendant has a subjective reasonable expectation of privacy in the David Christensen property that society is also prepared to accept as reasonable.

2. Violations Of State Statutes In Regard To Application And Execution Of Search Warrant.

Defendant alleges violations of numerous state statutes in application for and execution of the search warrants.

---

beyond the fenced residence property does not constitute part of the curtilage. Id. at §69. See also *U.S. v. Santa Maria*, 15 F.2d 879, 882-3 (9th Cir.1994), "The Fourth Amendment protects structures other than dwellings. "[O]ne may have a legally sufficient interest in a place other than her own house so as to extend Fourth Amendment protection from unreasonable searches and seizures in that place." *United States v. Broadhurst*, 805 F.2d 849, 851 (9th Cir.1986). "[A] structure need not be within the curtilage in order to have Fourth Amendment protection." *Id.* at 854 n. 7;*see also Dow Chemical Co. v. United States*, 476 U.S. 227, 236, 106 S.Ct. 1819, 1825, 90 L.Ed.2d 226 (1986) (reasonable expectation of privacy in interior of covered buildings); *United States v. Wright*, 991 F.2d 1182 (4th Cir.1993) (barn); *United States v. Johns*, 851 F.2d 1131, 1135-36 (9th Cir.1988) (per curiam) (storage locker), *cert. denied*,505 U.S. 1226, 112 S.Ct. 3046, 120 L.Ed.2d 913 (1992); *United States v. Trickey*, 711 F.2d 56 (6th Cir.1983) (outbuilding outside curtilage located on residential property with boarded up windows); *United States v. Hoffman*, 677 F.Supp. 589, 596 (E.D.Wis.1988) ("[A] person can have a protected expectation of privacy in buildings (*i.e.*, barns, garages, boathouses, stables, etc.) that are located far outside the area of the **curtilage** of the home.").

A. Alleged Violation of SDCL 40-1-41.

Defendant alleges that the State violated SDCL 40-1-41 in execution of its search warrants and the April 9th, 2009 "investigation", therefore, any evidence derived therefrom must be suppressed.

SDCL 40-1-41 provides as follows:

> 40-1-41. Animal abuse - Licensed veterinarian to attend investigations of commercial breeding operations - Definition of commercial breeding operation - Exclusions.
>
> A veterinarian licensed in the State of South Dakota shall be in attendance during any portion of an investigation of a commercial breeding operation that is conducted on the premises of the commercial breeding operation. For purposes of this section the term, commercial breeding operation, means any person engaged in the business of breeding dogs or cats who sells, exchanges, or leases dogs or cats in return for consideration or who offers to do so, whether or not the dogs or cats are bred, raised, trained, groomed, or boarded by the person. Any person who owns or harbors three or fewer unaltered dogs or cats for breeding purposes that are at least six months of age is not a commercial breeding operation. Any person who sells, exchanges, or leases thirty or fewer dogs or cats in a twelve-month period is not a commercial breeding operation if all such dogs or cats are sold, exchanged, or leased to a final owner rather than for later retail sale or brokered trading. Any person knowingly selling, exchanging, or leasing any dogs or cats for later retail sale or for brokered trading is a commercial breeding operation.

There is insufficient evidence to establish that Defendant is a commercial breeding operation within the meaning of SDCL 40-1-41. The only evidence as to the actual sale of animals is the solitary sale contained in the application for search warrant. Although the Defendant introduced records of veterinarian inspections obtained for the purpose of sale of an animal, there is no evidence those animals were sold and the specifics thereon.

Even if the court were to find that this statute had been violated, it does not provide for exclusion of evidence as a remedy. Evidence obtained in violation of a criminal statute is not automatically subject to suppression. *State v. Miller*, 429 NW2d 26 (SD 1988). There is no legislative history which is of guidance to the court in interpreting the legislature's intent in exacting 40-1-41. Even if the court were to construe the statute as being designed to protect the rights of commercial breeders rather than those of abused or neglected animals, the court finds that violation of this statute did not significantly affect the defendant's substantial rights.[2] Although not licensed by the State of South Dakota, veterinarians were present during the seizure of the animals and provided information in support of the application for search warrants; the violation did not further invade the privacy of the defendant; the things seized would have

[2] As to the issue of violation of statute and the exclusionary rule, LaFave opines that in the absence of legislative guidance...."the most that the court can do with respect to a violation of a statute or rule of court is to determine whether 'the violation significantly affected...the defendant's substantial rights.'" 1 Wayne R. LaFave, Search and Seizure §1.5(b), at 163 (4th ed. 2004) citing Unif.R.Crim.P 461(a), 10 U.L.A. 127 (2001).

been discovered regardless of compliance with the statute and SDCL 23A-13-3 permits the Defendant to inspect any tangible evidence taken from him.

B. Alleged Violation of SDCL 40-1-33.

Defendant further alleges that the dogs were seized in violation of SDCL 40-1-33. That statute provides as follows:

40-1-33. Noninterference with veterinarian or accepted agricultural pursuits.

> Nothing in this chapter and chapter 40-2 may be construed to interfere with an animal under the direct and proper care of a licensed veterinarian or with persons engaged in standard and accepted agricultural pursuits.

Defendant alleges that the dogs seized were under the care of his veterinarian, Dr. Eileen Hora. While evidence was received as to bills submitted for veterinarian services provided to Defendant, there is no correlation between whether those services were for any of the dogs seized pursuant to the warrant. The court finds the statute inapplicable to the execution of the warrants in this matter and finds that, even if the statute had been violated, such does not implicate suppression of evidence as set forth in 2.A above.

C. ACO Quinn was not animal control officers as defined by SDCL 40-2.

Defendant alleges ACO Quinn was without authority to enforce or investigate alleged violations of SDCL 40-1 or make application for search warrants 09-10, 09-11 and 09-12 as she was not an animal control officer as defined by state statute.

SDCL 40-2-9 defines animal control officer as follows:

> For the purposes of this chapter and chapter 40-1, an animal control officer is any person employed, contracted, or appointed pursuant to § 40-2-7 by an animal care and control agency or humane society to aid in the enforcement of ordinances or laws regulating the care and control of animals.

The statute clearly authorizes three methods by which a person may be an animal control officer. The evidence established that Second Chance was a nonprofit corporation organized for the purpose of preventing cruelty to animals. Second Chance contracts with Turner County for the enforcement of laws governing animal care and control. ACO Quinn and Wigg are both employees of Second Chance. Accordingly, they are granted status as animal control officers by virtue of their employment with both an animal care and control agency and a humane society. Compliance with SDCL 40-2-6 regarding appointment of ACOs is not necessary for those who are employed pursuant to SDCL 40-2-8 and 9.

D. Search Warrants Were Not Executed By Law Enforcement

Defendant asserts that the Humane Society of the United States with assistance from other organizations executed the search warrant in violation of state law.

SDCL 23A-35-1 provides that, "A search warrant is a written order, issued in the name of the state, signed by a committing magistrate, directed to a law enforcement officer, commanding him to search for designated personal property and to bring it to the magistrate."

SDCL 40-2-7(4) authorizes animal control officers to execute search warrants when accompanied by law enforcement and to seize evidence relating to violations of SDCL 40-1.

While these statutes specifically require search warrants be executed by law enforcement or an animal control officer accompanied by law enforcement, courts have authorized private persons to aid in the execution. See *Huggins v. Oklahoma,* 861 P.2d 1007, 1009 (Okla.App.1993) (allowing "the use of private persons to help law enforcement officials in the execution of a search"); *People v. Boyd,* 123 Misc.2d 634, 474 N.Y.S.2d 661, 666 (Sup.Ct. 1984) ("[T]he five sister states that have had occasion to consider the issue of civilian assistance in search warrant situations have all ruled that police need not forego [that] type of aid...."); *United States v. Crouton,* 623 F.2d 485 (6th Cir.1980), (attendance of telephone company employees at a search to identify company equipment was not unconstitutional); Williams v. State, 240 Pw2d 1132 (Okla. 1952). *See also* 18 U.S.C. § 3105 (1985) (authorizing persons "in aid of the officer" to accompany law enforcement officers in enforcing federal search warrants);

American Jurisprudence acknowledges that private persons may aid in the execution of a search warrant as long as accompanied by law enforcement, "An officer requiring the aid of a private person for the execution of a search warrant must be personally present with such person at the time of its execution." 68 Am Jur 2d Searches and Seizures § 289.

South Dakota statute contemplates the assistance of private citizens when requested by law enforcement. See SDCL 23A-3-5 commanding every person to assist law enforcement in making an arrest if the officer so requests.

Given the magnitude of the warrant, the volume of items seized and the fact the items seized are living creatures as opposed to inanimate objects, the court finds the assistance of humane societies clearly reasonable and not a violation of constitutional dimensions. The execution was made in the personal presence of ACO Quinn and law enforcement and there is no evidence as to personal or commercial gain derived from the execution as to those private entities assisting.

3. Probable Cause to Issue Search Warrant

Defendant claims ACO Quinn's affidavits in support of the search warrants were insufficient to establish probable cause for the search and seizures in SW 09-10, 09-11 and 09-12.

The South Dakota Supreme Court has recently reiterated the standard of review for determining whether probable cause existed for issuance of a search warrant as follows:

> When considering the sufficiency of evidence supporting a search warrant we are required to "look 'at the totality of the circumstances to decide if there was at least a "substantial basis" for the issuing judge's finding of probable cause.'"
>
> [O]ur inquiry is limited to determining whether the information provided to the issuing court in the warrant application was sufficient for

> the judge to make a "'common sense' determination that there was a 'fair probability' that the evidence would be found on the person or at the place to be searched." On review, we are limited to an examination of the facts as contained within the four corners of the affidavit. Furthermore, we review the issuing court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing. *State v. Dubois*, 2008 SD 15, ¶10, 746 NW2d 197, 202 (quoting *State v. Helland*, 2005 SD 121, ¶12, 707 NW2d 262, 268) (internal citations omitted).
>
> It is not the duty of this Court to review the lower court's probable cause determination de novo, but rather to examine the court's decision with "great deference." Id. ¶11, 746 NW2d at 202-03 (citing *Helland*, 2005 SD 121, ¶17, 707 NW2d at 269); see also *State v. Raveydts*, 2004 SD 134, ¶8, 691 NW2d 290, 293; *State v. Jackson*, 2000 SD 113, ¶9, 616 NW2d 412, 416. This Court must "'draw every reasonable inference possible in support of the issuing court's determination of probable cause to support the warrant.'" *Dubois*, 2008 SD 15, ¶11, 746 NW2d at 203 (quoting *Helland*, 2005 SD 121, ¶17, 707 NW2d at 269).
>
> *State v. Gillmore*, 2009 SD 11, §7.

In applying this standard, it is clear that the search warrant issued in SW 09-10 as to the David Christensen property on August 27th, 2009 was made upon probable cause.

A. Omission of August 27th, 2009 warrant and observations.

Defendant alleges that SW 09-11 and 09-12 are invalid as a result of ACO Quinn's omission to the issuing court regarding the 09-10 search warrant executed six days before and the observations made thereon.

The standard for reviewing an alleged false affidavit is set forth in *State v. Helland*, 707 NW2d 262, 273 (SD 2005):

> An affidavit that is purported to contain recklessly and intentionally misleading information or material omissions is reviewed under the two-part analysis in *Franks v. Delaware*, 438 US 154, 98 SCt 2674, 57 LEd2d 667 (1978). *State v. Brings Plenty*, 459 NW2d 390, 401 (SD 1990) (citing *Habbena*, 372 NW2d 450). "First, the defendant must show by a preponderance of the evidence that a ... statement knowingly and intentionally, or with reckless disregard for the truth, was [omitted] ... by the affiant in the warrant affidavit. Second, the allegedly [omitted] ... statement must be necessary to the finding of probable cause." Id. (citing *Habbena*, 372 NW2d at 456). Omissions will only be considered misrepresentation for purposes of the analysis, when the omissions cast doubt on the existence of probable cause. Id. (citing *United States v. Dennis*, 625 F2d 782, 791 (8thCir 1980).

1. Preliminary Showing.

In order to be entitled to a Franks hearing, a Defendant must make a substantial preliminary showing a deliberate falsehood or reckless disregard for the truth and that such is

necessary for the probable cause determination. US v. Peneaux, 2008 DSD 3. The court finds that the Affidavit in Support of Search Warrant in SW 09-10, 09-11 and 09-12, Return of Search Warrant and Inventory in 09-10 and sworn testimony of ACO Rosey Quinn in support of SW 09-12, in and of themselves, meet this burden.

2. Material Evidence Was Intentionally Omitted in Affidavit in Support of Search Warrant in 09-11 and 09-12.

The Defendant must show by a preponderance of the evidence that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit. The Defendant must then show that the false statement is necessary to the finding of probable cause. *State v. Brings Plenty*, 459 NW2d 390, 401 (quoting *State v. Habenna*, 372 NW2d 450, 456 (SD 1985). The first prong of the Franks test applies to material omissions as well. *United States v. Reivich*, 793 F.2d 957, 960 (8th Cir.1986).

The standard for determining whether an omission comes within the Franks rule was set forth in *United State v. Jacobs*, 986 F2d 1231, 1234 (8th Cir. 1993):

> In order for this omission to be a violation of *Franks* and *Reivich,* the defendant must make two showings. The first is a showing that the police omitted the information with the intent to make, or in reckless disregard of whether they made, the affidavit misleading. *Reivich,* 793 F.2d at 961;*United States v. Lueth,* 807 F.2d 719, 726 (8th Cir.1986).

It is abundantly clear that the circuit court was not advised that a search warrant was executed six days before submission of the affidavits in 09-11 and 09-12 upon largely the same information; that no Weimaraner puppies were even found at the location; and that the overall health of the dogs present appeared "okay". ACO Quinn testified that she was specifically directed ***not*** to disclose that information to the issuing court although she did find it relevant to disclose prior incriminating evidence dating back to November, 2007. The omitted evidence was highly probative in determining whether the animals were subject to abuse and neglect at the time of issuance of the warrant. Clearly, any reasonable person would know that the omitted information was the type the issuing court would want to know in determining probable cause. While she later testified that she did disclose that information to the court, it is not contained in any affidavit nor is it contained in the six pages of sworn testimony offered to supplement the affidavit in support of search warrant for Daniel Christensen's property after it had initially been denied by the issuing court. The court finds ACO Quinn intentionally misled the issuing court by omitting material information in her affidavits and supplemental testimony.

3. Inclusion Of The Omitted Information Would Have Defeated Probable Cause.

While the first prong of the Franks test has been met, such does not constitute an invalid warrant per se.

> The omission must be material, and substantially misleading, in that it materially influenced the issuance of the warrant, or could reasonably have affected the finding of probable cause, or involves facts the omission of which would distort

the probable cause analysis, or in that the omitted facts cast doubt on the existence of probable cause or would have materially influenced the magistrate to deny the warrant, or in that there is a substantial possibility that such facts would have altered the magistrate's determination or a reasonable magistrate's determination. The existence of probable cause should be determined by treating the omitted facts as being included in the affidavit. An omission which weakens an application is not material.

79 C.J.S. Searches §207.

The Defendant must show "... that the affidavit if supplemented by the omitted information would not have been sufficient to support a finding of probable cause. *Reivich* at 971 citing *United States v. Stanert*, 762 F.2d 775, 782 (9th Cir.), *amended*, 769 F.2d 1410 (9th Cir.1985); *United States v. Martin*, 615 F.2d 318, 328 (5th Cir.1980); *cf. Franks*, 438 U.S. at 155-56, 171-72, 98 S.Ct. at 2676, 2684.

In performing this analysis, the court reconstructs the affidavit in support of search warrants 09-11 and 09-12.[3] As reconstructed the supplemented information would show as follows:

1) On April 9th, 2009 ACO Quinn observed the kennels containing dogs at Dan Christensen's residence were dilapidated, in disrepair and full of feces. The ingress and egress openings had rough edges with nails sticking out. The drinking water was filthy. The dogs' coats were not shiny and some dogs appeared thin. The dogs seemed hyper and/or scared. Defendant advised ACO Quinn that the Weimaraner dogs were kept at his son, David Christensen's, property;

2) On August 13th, 2009 a buyer complained that a Weimaraner puppy purchased from Defendant had parvo virus as a result of being removed from its mother too early and vaccinated too early. The puppy was filthy with dirty ears and feces stuck to the fur;

3) On August 27th, 2009 ACO Quinn and Deputy Ostrem executed a search warrant on the David Christensen property. They found no Weimaraner puppies at the premises. While two dogs with litters had no water and other water was "dirty" and "appeared contaminated", the overall health of the dogs present appeared okay. The kennels to the North of the property were surrounded with feces.

a. April 9th, 2009 observations by ACO Quinn are stale.

The Court of Appeals for the Eighth Circuit stated the basic rule of probable cause in United States v. Steeves, 525 F2d 33, 37:

It is axiomatic by now that under the fourth amendment the probable cause upon which a valid search warrant must be based ***must exist at the time at which the warrant is issued, not at some earlier time***. That was recognized more than forty years ago in the leading case of *Sgro v. United States*, 287 US 206, 53 SCt 138, 77 LEd 260 (1932).

[3] The search warrant issued by the law magistrate in 09-10 on August 27th, 2009 is not subject to Franks analysis as no material omission or false statement has been shown in regard to the affidavit in that file.

See also 3 Wright, Federal Practice and Procedure §662.

State v. Roth, 269 NW2d 808, 812 (SD 1978). (Emphasis Added).

"The doctrine of 'staleness' applies when information proffered in support of a search warrant application is so old that it is questionable whether the fruits or evidence of a crime will still be found at a particular location." 68 Am Jur 2d Searches and Seizures §193.

ACO Quinn's most recent observations contained in the September 2nd, 2009 affidavits in support of SW 09-11 and 09-12 are almost five months old. Elapsed time alone, however, does not establish staleness. *State v. Weiker*, 279 NW2d 683 (SD 1979). If more recent evidence corroborates stale information, probable cause may lie that evidence of wrongdoing still exists on the premises. *U.S. v. Spikes*, 158 F.3d 913 (6th Cir. Ohio). The observation that the overall health of the dogs was okay made pursuant to the execution of the August 27th, 2009 warrant refutes the August 13th, 2009 complaint which could have served as corroboration of the April 9th, 2009 evidence. Without such corroboration and in the face of more current exculpatory evidence as to the condition of the animals, the April 9th, 2009 observations and any information prior to that time is stale and should not be utilized in determining whether probable cause exists for issuance of the search warrant. Accordingly, the court is left with evidence that a sick Weimaraner puppy was sold, however, no Weimaraner puppies are now located on the premises and the overall health of the dogs currently present on the property appear fine. This information is simply insufficient for the issuing court to make a "'common sense' determination that there was a "fair probability" that the evidence would be found on the person or at the place to be searched.[4] Where the remaining content of the affidavit in support of the search warrant is insufficient to establish probable cause, "..the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *State v. Hibbard*, 273 NW2d 172, 176 (SD 1978) (citing *Franks*, 438 US at 155).[5]

B. Good Faith Exception To The Exclusionary Rule Does Not Apply.

Even if a warrant is found to be invalid, the evidence seized therefrom is not always excluded. "Under the 'good faith' exception, 'evidence is admissible when police officers reasonably rely on a warrant that is subsequently invalidated because a judge finds there was an insufficient basis for the issuing magistrate to find probable cause.'" *State v. Saiz*, 427 NW2d 825, 828 (SD 1988). The premise rests upon the notion that the exclusionary rule is not implicated where there is no police misconduct to deter. Such is not the case here. In finding the good faith exception did not apply where the warrant was invalidated because of the officer's error, the South Dakota Supreme Court quoted *United States v. Leon*, as follows:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that

[4] See *State v. Berry*, 92 SW3d 823 (Mo. 2003) holding search warrant held insufficient for lack of probable cause where deputy had observed neglectful conditions nine months prior and more recently observed dilapidated buildings housing large variety of animals and believed that the dogs were being neglected.

[5] Clearly, search warrant 09-11 of David Christensen's property was also duplicative as that property was already subject to search on August 27th, 2009 by virtue of search warrant 09-10. No evidence has been introduced as to facts occurring after that date which would justify a second invasion of privacy.

the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

State v. Belmotes, 2000 SD 115, §14 citing *Leon*, 468 US at 919, 104 SCt at 3419, 82 LEd2d at 696 (quoting *United States v. Peltier*, 422 US 531, 542, 95 SCt 2313, 2320, 45 LEd2d 374, 384 (1975)).

In conclusion, as stated in *United States v. Stanert*, "By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning." Id. at 762 F2d 775, 781 (9th Cir. 1985).

The Defendant's Motion to Suppress is denied as to SW 09-10. The Defendant's Motion to Suppress is granted as to SW 09-11 and 09-12. Counsel for Defendant may prepare Findings of Fact, Conclusions of Law and an Order to that effect.

Sincerely,

/s/ Tami Bern

Tami Bern
Magistrate Court Judge