

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

COPY

State of North Dakota,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 Jeremiah James Johnson,)
)
 Defendant-Appellant.)

SUPREME COURT NO. 20090115

APPELLANT'S BRIEF

APPEAL FROM THE MARCH 20, 2009 CRIMINAL JUDGMENT
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA
THE HONORABLE GEORGIA DAWSON PRESIDING

ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE PRESENTED

- I. Whether Defendant consented to the blood test when he communicated to the trooper that he would only take the test on the condition that his attorney was present and where Defendant's attorney was not present for the test?

STATEMENT OF THE CASE

Defendant-Appellant Jeremiah Johnson appeals from his judgment and conviction of driving under the influence. Defendant seeks reversal on the grounds that Defendant did not consent to the blood test.

On September 14, 2008, Defendant was charged with driving under the influence in violation of N.D.C.C. § 39-08-01. (A-3)¹ Subsequently, on November 24, 2008, Defendant filed a Motion to Suppress, arguing he did not consent to the blood test. (Motion to Suppress, docket sheet No. 9)

On December 30, 2008, a hearing on the Motion to Suppress was held before Judge Douglas R. Herman. At the end of the hearing, Judge Herman denied the motion. "Consent was given, and it was not effectively withdrawn, and on that basis the Motion to Suppress is denied." (A-6) Thereafter, on January 5, 2009, an Order denying the Motion to Suppress was filed. (A-4).

On March 5, 2009, Defendant entered a Conditional Plea of guilty, reserving the right to appeal and seek review of

the Order. (A-7) After acceptance of the Conditional Plea, Judge Georgia Dawson sentenced Defendant to a thirty day suspended jail sentence, a \$425.00 fine, \$225.00 in administrative fees, and completion of a chemical dependency evaluation. (A-9)

Thereafter, on April 7, 2009, Defendant filed his Notice of Appeal, appealing his March 20, 2009 judgment of conviction. (A-10)

STATEMENT OF THE FACTS

The essential facts are not in dispute. Although there are conflicts in testimony between Trooper Mitchell Rumble and Defendant, the essential facts are gleaned from Trooper Rumble's testimony.

According to Trooper Rumble, on September 14, 2008, Defendant was arrested for driving under the influence. The six foot and 220 pound Rumble read Defendant the implied consent advisory. Trooper Rumble requested Defendant take a blood test at Innovis Hospital. Thereupon, Defendant wanted to call his attorney, Richard Varriano. (T 5-6, 14)²

Defendant corroborated Trooper Rumble's testimony. He testified that he wanted to call Mr. Varriano because he did not know his rights and had a question about whether to take the test or not. (T 22)

Trooper Rumble transported Defendant to the hospital. At the hospital, Trooper Rumble gave Defendant a telephone so

he could call his attorney. Defendant tried to get a hold of Mr. Varriano for approximately 15 minutes, but was unsuccessful. (T 6)

Trooper Rumble asked Defendant if he would take the blood test. According to Trooper Rumble, Defendant said that he would only take the test on the condition that his attorney was present for the test. (T 13) "I'm not refusing the test. I want my attorney there with me." (T 6)

After hanging up the telephone, Defendant was taken into the examination room. (T 19) The examination room was approximately 10 feet by 20 feet. Defendant was placed in a chair while Trooper Rumble was standing approximately three to five feet from Defendant. (T 15) The only people in the room were the nurse, Trooper Rumble, and Defendant. (T 10) Mr. Varriano was not present. (T 14)

In the examination room, as the nurse was preparing the blood draw, Defendant in a low voice said, "I didn't agree to this." (T 7,24) According to Trooper Rumble, he asked Defendant to clarify his statement and asked Defendant if he was refusing. For approximately two minutes, Defendant did not answer. (T 7)

Trooper Rumble then instructed the nurse to draw blood from Defendant. (T 7) According to Trooper Rumble, Defendant did not struggle with the nurse or resist the blood draw. (T 11) However, according to Trooper Rumble's written report, Defendant "would not cooperate" and "Johnson would

not hold up his arm, and let his upper body go limp." (T 13)

ARGUMENT

- I. The Defendant did not consent to the blood test when he communicated to the trooper that he would only take the test on the condition that his attorney was present and where Defendant's attorney was not present for the test.

In State v. Salter, 2008 ND 230, ¶ 5, 758 N.W.2d (702), this Court announced the well established standard of review in a motion to suppress case:

"This Court defers to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. This Court will affirm a district court decision regarding a motion to suppress if there is sufficient competent evidence fairly capable of supporting the district court's findings, and the decision is not contrary to the manifest weight of the evidence. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law."

The Fourth Amendment of the United States Constitution and Article I, § 8 of the North Dakota Constitution prohibits unreasonable searches and seizures. The State has the burden of proof to show that a warrantless search falls within an exception to the warrant requirement. State v. Avila, 1997 ND 142, ¶ 16, 566 N.W.2d 410. The trial court needs to

determine whether consent was voluntary under the circumstances. Id. Voluntariness is determined by the totality of the circumstances. Id.

Pursuant to N.D.C.C. § 39-20-01, consent to submit to a blood test is implied. "If the statutory requirements have been complied with, a person's consent to the chemical test is implied and the person must affirmatively refuse to submit to the testing in order to withdraw the consent." State v. Salter, 2008 ND 230, ¶ 7, 758 N.W.2d (702). Under N.C.C.C. § 39-20-04, if the person affirmatively refuses to submit to testing, the test must not be given. Id.

Here, the State failed to prove that consent was voluntarily given because Defendant affirmatively refused to take the test. Under the totality of the circumstances, the State did not prove that Defendant gave consent to take the blood test.

Defendant clearly communicated to Trooper Rumble that he was only taking the test if his attorney was present during the test:

"Q. Okay. So I don't want to put words in your mouth, but let me just get this straight. The Defendant said he would take the blood test, according to your testimony, on the condition if his attorney was present. Is that a correct statement?

A. Yes." [Motion to Suppress Hearing Transcript p. 13]

Since the condition was not satisfied, i.e., Defendant's

attorney was not present, Defendant affirmatively refused to take the test.

Moreover, the evidence is undisputed that in the examination room when the nurse was preparing to draw blood, Defendant told Trooper Rumble "I did not agree to this." (T 7) According to Trooper Rumble, this was the only communication that Defendant uttered in the room. (T 19)

The State's reliance on the fact that Defendant did not resist the trooper with force or communicate to the trooper multiple times that he was not taking the test is misguided. Salter and the implied consent law does not abrogate the Fourth Amendment consent case law in North Dakota.

"Contrary to the trial court's apparent reasoning, to sustain a finding of consent, the State must show affirmative conduct by the person alleged to have consented that is consistent with the giving of consent rather than merely showing that the person took no affirmative actions to stop the police from [searching]." State v. Avila, 1997 ND 142, ¶ 17, 566 N.W.2d 410. In Avila, the person's failure to physically block the police from entering was not indicative of consent. Id.

Here, Defendant clearly communicated to Trooper Rumble that he would only take the test on the condition that his attorney was present. The evidence is undisputed that attorney Richard Varriano was not present in the examination room. Under Avila, he was under no obligation to repeat his

unambiguous statement more than once. Nor was he required to fight with the nurse and Trooper Rumble in order to show that he did not consent.

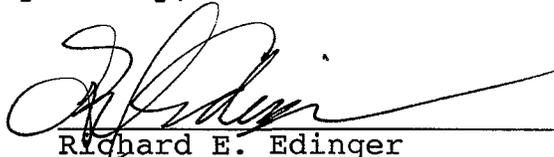
Defendant's statement that "I did not agree to this" reaffirmed his unambiguous statement that he was not taking the test because his attorney was not present. Under Avila, Defendant was not obligated to communicate repeatedly his desire not to take his test.

Here, the evidence does not support Judge Herman's findings because he ignored the critical fact that Defendant unambiguously communicated to Trooper Rumble that he would only take the test on the condition that his attorney was present. Moreover, Judge Herman ignored well established Fourth Amendment consent law. The State has the burden of proof to show that Defendant consented. Under Avila, Defendant was not obligated to repeat his attorney condition multiple times. Nor was he obligated to physically resist the nurse or Trooper Rumble to show that he did not consent.

CONCLUSION

WHEREFORE, the reasons stated herein, Defendant respectfully requests that this Honorable Court reverse the March 20, 2009 Judgment, allow Defendant to withdraw his Conditional Plea of guilty, and suppress the blood test results because Defendant did not consent to the test.

Dated this 21st day of May, 2009.



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