20170036
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 19, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellant,	)	Supreme Court No. 20170036
vs.	)	District Ct. No. 09-2016-CR-01933
	)	
Steven Floyd Helm,	)	
	)	
Defendant and Appellee.	)	

APPELLANT'S REPLY BRIEF

Appeal from the January 9, 2017 Order Granting Defendant's Motion to Dismiss Count 2
East Central Judicial District
the Honorable Frank L. Racek, Presiding

Reid A. Brady, NDID #05696
Cherie L. Clark, NDID #06306
Assistant State's Attorneys
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorneys for Plaintiff/Appellant

[¶ 1] **TABLE OF CONTENTS**

Paragraph No.

[¶ 2] **TABLE OF AUTHORITIES**

[¶ 3] **ARGUMENT**

[¶ 4] This case centers on the validity of the exposure distinction. The State argues that urine tests conducted without requiring exposure of the genitals are reasonable searches incident to arrests for drug-based DUIs. The Defendant contends that such tests are not reasonable.

[¶ 5] One ground the Defendant advances to support his contention is that Skinner and Von Raab (two cases supporting the exposure distinction) are distinguishable because they were not criminal cases. (Appellee's Brief ¶ 27.) That ground ignores the fact that Birchfield (a consolidation of criminal and administrative cases) relied heavily on Skinner in analyzing privacy interests in the context of chemical tests incident to arrest. Further, Skinner cited Von Raab, and consistent with Von Raab, recognized the reduced intrusiveness of urine tests conducted without requiring exposure of the genitals.

[¶ 6] Another ground the Defendant uses to support his contention is that the exposure distinction is unworkable as a categorical rule, asserting it relies on too fine a point. (Appellee's Brief ¶¶ 24, 30.) That ground is contradicted by application of precedent. Indeed, the exposure distinction sets forth a rule broadly categorizing every urine test into one of two types and guiding law enforcement officers to act the same way in every case, regardless of specific facts – just as

Riley prescribed. Riley v. California, 134 S.Ct. 2473, 2491-92 (2013) ("[I]f police are to have workable rules, the balancing of the competing interests ... must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.") (internal quotations and citation omitted).

[¶ 7] **I. The Defendant's claim that Skinner and Von Raab are inapplicable because they are civil cases ignores Birchfield's reliance on Skinner and Skinner's reliance on Von Raab.**

[¶ 8] Avoiding the exposure distinction rooted in Skinner and Von Raab, the Defendant contends that those cases are inapplicable because they did not involve criminal matters. (Appellee's Brief ¶ 27.) The Defendant cites no authority for his contention. (Appellee's Brief ¶ 27.)

[¶ 9] The Defendant's contention is further undermined by Birchfield's reliance upon Skinner. It is true that protection against governmental intrusion is greatest when the aim is criminal investigation. See Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 538-39 (1967). But Birchfield, a consolidation of two criminal cases and an administrative case, cited Skinner at least eight times in the majority opinion. Birchfield v. North Dakota, 136 S.Ct. 2160, 2173-83 (2016). Many of those citations were pivotal – involving the Court's analysis of privacy concerns and their impact on the categorical rule for breath tests. Id. at 2176-78. Indeed, the Court cited Skinner when setting out the third factor in assessing privacy interests (i.e., whether participation in the test is likely to cause any great enhancement in the embarrassment that is inherent in any

arrest) and in concluding that breath tests do not implicate significant privacy concerns. Id. at 2177. In other words, Birchfield adopted Skinner's privacy principles. See id. at 2176-78

[¶ 10] Skinner, in turn, relied upon Von Raab. At Skinner's outset, it quoted Von Raab for the premise that urinating is a very private act in which persons have a reasonable expectation of privacy. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (689). Both the Defendant and the district court found this premise important enough to cite. (Appellee's Brief ¶ 25, App. 12.) Also compelling is Skinner's recognition, albeit without citing Von Raab, of the reduced intrusiveness when a urine sample is not given "under the direct observation of a monitor[.]" Skinner, at 627. That principle is at the root of Von Raab. National Treasury Employees Union v.Von Raab, 816 F.2d 170, 177 (5th Cir. 1987). Indeed, Von Raab identified scope and manner of test administration as a key factor in assessing the reasonableness of the scheme and expressly highlighted the exposure distinction: "Unlike the procedure used when firefighters in Capua v. City of Plainfield, the tester does not watch the employee while the urine sample is being produced." Id.

[¶ 11] In sum, Skinner and, in turn, Von Raab, are foundations for Birchfield. The Defendant's attempt to avoid that foundation is understandable, but not supportable. Skinner and Von Raab's exposure distinction should be used in the analysis of this case.

[¶ 12] **II. <u>The Defendant's claim that the exposure distinction is unworkable is undermined by the distinction's creation of a simple rule that law enforcement officers could apply in every case – independent of specific facts – and its capacity to broadly categorize every urine test into one of two types</u>**.

[¶ 13] In criticizing the exposure distinction, the Defendant suggests that it is not workable as a categorical rule. (Appellee's Brief ¶¶ 24, 30.) Application of the controlling authority shows otherwise.

[¶ 14] A requirement for a search incident to arrest exception is that it "must in <u>large part</u> be done on a categorical basis[.]" <u>Riley v. California</u>, 134 S.Ct. 2473, 2491-92 (2013) (internal quotations and citation omitted) (emphasis added). The requirement helps ensure that "police [] have workable rules" and searches are not done in an "ad hoc, case-by-case fashion by individual police officers." <u>Id.</u>

[¶ 15] <u>Von Raab</u> and <u>Capua</u> show that the exposure distinction can be used to help broadly assess reasonableness. <u>Von Raab</u>, 816 F.2d at 177; <u>Capua v. City of Plainfield</u>, 643. F. Spp. 1507, 1514 (D.N.J. 1986). Indeed, <u>Von Raab</u> and <u>Capua</u> used the distinction while assessing entire programs for urine testing. <u>Von Raab</u>, at 177; <u>Capua</u>, at 1514. Using the distinction does not convert the search (i.e., urine test) from one based on a categorical rule. Its broadly applicable standard creates one category of reasonable searches incident to arrest: those conducted without requiring exposure of arrestees' genitals. To conduct a test under the rule, an officer would not need to know anything about the DUI arrestee or the surrounding circumstances; the officer would simply conduct the test without requiring exposure of the genitals. The officer would act that same way in every

case. The exposure distinction thus meets Riley's requirement, creating a workable rule for police requiring no ad hoc or case-by-case decision-making by officers. See Riley, at 2491-92.

[¶ 16] Although the Defendant emphasizes that the record is silent about how law enforcement would implement the exposure distinction when testing female arrestees, that is irrelevant. Implementation of the exposure distinction does not bear on the fundamental issue: whether urine tests conducted without requiring exposure of the genitals are reasonable searches incident to arrest for drug-based DUIs.

[¶ 17] Nor relevant is the Defendant's claim that a testing scheme based on the exposure distinction would be unreliable. (Appellee's Brief 30.) The State would challenge the accuracy of the claim; indeed, circumstantial evidence could exist showing that an arrestee did not contaminate a sample, e.g., a thorough search was done before the urine test and the arrestee had no access to liquids. See generally, State v. Noorlun, 2005 ND 189, ¶ 20, 705 N.W.2d 819 ("A conviction may be justified on circumstantial evidence alone if the circumstantial evidence has such probative force as to enable the trier of fact to find the defendant guilty beyond a reasonable doubt."). But more importantly, reliability is an evidentiary issue for trial.

[¶ 18] CONCLUSION

[¶ 19] The Defendant's criticism of the exposure distinction is flawed because he ignores two critical concepts: (1) Birchfield is based on the privacy principles of Skinner and Von Raab, and (2) Riley requires that a search incident to arrest exception be in large part done on a categorical basis so that officers have a workable rule without the need to make case-by-case determinations. Skinner and Von Raab show that when urine tests are conducted without requiring exposure of arrestees' genitals, invasiveness is reasonably reduced. The exposure distinction also satisfies Riley, creating a broad category of reasonable searches incident to arrest and setting out an easy-to-follow rule for law enforcement officers to apply in every case – without regard to any case-specific facts. Applying precedent thus shows that urine tests conducted without requiring exposure of the genitals are reasonable searches incident to arrest for drug-based DUIs. The Defendant was properly charged with refusing to submit to a urine test that would have been conducted without exposure of his genitals after his arrest for a drug-based DUI. The State requests that this Court reverse the district court's order dismissing the refusal charge.

[¶ 20] Respectfully submitted this 19th day of May, 2017.

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696
Assistant State's Attorneys
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorneys for Plaintiff-Appellant

[¶ 21] CERTIFICATE OF SERVICE

[¶ 22] A true and correct copy of the foregoing document was sent by e-mail to Monty Mertz on the 19th day of May, 2017 to Monty G. Mertz at fargopublicdefender@nd.gov.

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696

20170036
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 24, 2017
STATE OF NORTH DAKOTA

[¶ 20] Respectfully submitted this 19th day of May, 2017.

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696
Assistant State's Attorneys
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorneys for Plaintiff-Appellant

[¶ 21] CERTIFICATE OF SERVICE

[¶ 22] A true and correct copy of the foregoing document was sent by e-mail to Monty Mertz on the 19th day of May, 2017 to Monty G. Mertz at fargopublicdefender@nd.gov.

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696

[¶ 23] A true and correct copy of the foregoing document was sent by e-mail to Dan Herbel on the 24th day of May, 2017 to Dan Herbel at herbellawfirm@yahoo.com.

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696