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OCTOBER 8, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, Plaintiff/Appellee, v. ALEXIS DOWDY, Defendant/Appellant.	)))))))))	Supreme Court No. 20180204 Burleigh Co. No. 08-2017-CR-02435

REPLY BRIEF OF APPELLANT

Appeal from a Criminal Judgment

dated April 23, 2018, and filed April 24, 2018

and the adverse determination within the Order on Motion to Suppress Evidence

dated and filed March 20, 2018

following briefing, with evidentiary exhibits, but no evidentiary hearing

Burleigh County District Court, South Central Judicial District

The Honorable Thomas J. Schneider

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[¶3] Recently, this Court ruled that a law enforcement officer is not necessarily limited to advising only of the implied consent advisory contained in N.D.C.C. § 39-20-01(3)(a), and that it may be permissible to inform of additional accurate, non-coercive language. *See Korb v. N.D. Dep't of Transportation*, 2018 ND 226. In *Korb*, where the officer added additional language from the statute, this Court said: "If the additional language provided by the officer is accurate, its presence does not alter the sufficiency of a complete, accurate implied consent advisory under N.D.C.C. § 39-20-01(3)," so long as the "[a]dditional information" does "not materially mislead or coerce the driver." *See id.* at ¶12.

[¶4] In our case, the trooper informed an already-arrested Dowdy that "[r]efusal to take the post-arrest breath test as directed by a law enforcement officer is a crime punishable in the same manner as DUI and includes being arrested. (Appendix ("App.") at 13) (Exhibit A, below; Index #22 - law enforcement in-car video recording of the July 23, 2017, incident at time-stamp 00:41:00). What purpose is there to threaten arrest to a person already arrested? What purpose is there to threaten arrest to a person if they would refuse a "post-arrest" test?

[¶5] Presumably, this means that the officer will be requiring the driver to submit to a test after he arrests the driver. So, if you [driver] refuse that post-arrest test, you will be arrested again. That is what the trooper advised. Does this mean that the driver will be arrested again after bonding out, so as to fulfill the threatened promise? Indeed, Dowdy's sworn statement shows that she submitted to the test because she did not want to be arrested again. (App. 16).

[¶6] "Even when the officer properly gives the implied consent notice, if the officer gives additional, deceptively misleading information that impairs a defendant's ability to make an informed decision about whether to submit to testing, the defendant's test results or evidence of his refusal to submit to testing must be suppressed." *See McHugh v. State*, 645 S.E.2d 619, 621 (Ga. Ct. App. 2007). "Additional information must not materially mislead or coerce the driver." *See Korb*, 2018 ND 226, at ¶12.

[¶7] Here, the trooper, who did not ask for an expression of consent and was not given an expression of consent, informed an already-arrested Dowdy that she was required to submit to the "post-arrest" test, or she would suffer arrest. At a minimum, this is confusing and materially misleading. All officers know that adding the phrase "includes being arrested" only ratchets up the coercion, and does not accurately inform of the officer's future intentions with the already-arrested driver. The only purpose of the additional language is to coerce.

[¶8] Although, per *Korb*, the trooper was not limited to the language of N.D.C.C. § 39-20-01(3)(a), he was limited to language that is accurate, not misleading, and non-coercive. The trooper's post-arrest threat to arrest again failed the *Korb* limitation, and it impaired Dowdy's ability to make an informed decision. Accordingly, under *Korb* and the terms of N.D.C.C. § 39-20-01(3)(b), Dowdy's chemical test evidence "is inadmissible" in this criminal proceeding.

[¶9] On the issue of consent, the State argues that "Dowdy was clearly informed of ... her right to refuse a Chemical Breath Test, prior to being asked to submit to one." *See* Brief of Appellee, at p.10, ¶22. First, the State does not direct us to anywhere in the record where Dowdy was informed of a right to refuse. Dowdy was not

so informed. Second, the State suggests that Dowdy was asked to submit to a post-arrest chemical test, but does not direct us to any evidence of this in the record. There is none. Dowdy was not "asked" to submit or to consent and Dowdy did not consent. Instead, Dowdy was informed that she had already consented to testing and that the law required[1] her to submit. There was no request for post-arrest testing.

[¶10] The States accurately notes that the burden is on the State to "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." *See* Brief of Appellee, at p.11, ¶21. The State has shown no such affirmative conduct. The record is devoid of evidence that Dowdy affirmatively agreed to submit to the chemical test.

[¶11] All the record shows is Dowdy's acquiescence to a claim of lawful authority. When an individual acquiesces to a claim of lawful authority by an officer, there is no act of consent; there is instead acquiescence. Acquiescence is not consent. Ms. Dowdy's conduct showed compliance, not consent. Dowdy acquiesced to the trooper's authority. "Mere acquiescence to police authority is insufficient to show consent." *See State v. Mitzel*, 2004 ND 157, ¶16, 685 N.W.2d 120 (emphasis added).

[¶12] Furthermore, the State acknowledges that "Trooper Rost did add additional statements not specifically listed under N.D.C.C. § 39-20-01(3)(a)," but argues "those statements helped explain the situation and the applicable North Dakota case law concerning DUI/Refusal investigations." *See* Brief of Appellee, at p.11, ¶22. What is

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[1] Merriam-Webster defines the word "require" as follows: "to impose a compulsion or command on **:** compel."

See <https://www.merriam-webster.com/dictionary/require>.

most troubling, here, is that the State fails to explain why the trooper added the threat of re-arrest ("includes being arrested") to the statutory advisory when advising an already-arrested Dowdy or how that "helped explain the situation" to Dowdy.

[¶13] Any reasonable person in Dowdy's position (under arrest and being informed of a "post-arrest" test), would logically think that a later re-arrest will happen upon refusal of the "post-arrest" test. Informing a DUI arrestee that "he would be subject to re-arrest for the additional crime of refusal to consent" to the post-arrest chemical test, weighs against voluntariness. *See State v. Yong Shik Won*, 372 P.3d 1065, 1083 (Hawaii 2015).

[¶14] There is no practical reason to issue a threat of re-arrest to an arrested person other than to coerce. The threat of arrest is coercive. "[C]onsent obtained under threat of subjecting [the defendant] to … an arrest cannot be said to be voluntary." *See McMorran v. State*, 46 P.3d 81, 85 (Nev. 2002); *see also United States v. Ocheltree*, 622 F.2d 992, 994 (9th Cir. 1980).

[¶15] The State steers clear of *Bumper* and really makes no effort to distinguish the legal principles of *Bumper* from our case. *See Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968) (holding that when an officer notifies a homeowner that he has a search warrant and the authority to search, but does not in fact have a search warrant or the authority to search, any consent that arises out of that notification is tainted with coercion). Indeed, the South Dakota Supreme Court agrees that the *Bumper* rationale applies to DUI searches, just like searches of the home. *State v. Medicine*, 865 N.W.2d 492 (S.D. 2015).

[¶16] The *Medicine* court determined that South Dakota's implied consent advisory, which informed "Medicine that he had already consented" to a chemical test "by operation of [the implied consent] law" and then asked Medicine if he would "submit" to a chemical test, is unconstitutionally coercive like law enforcement's advisory of authority in *Bumper*. *See Medicine*, 865 N.W.2d at 496. The South Dakota court found Medicine's situation analogous to *Bumper*, stating that "an officer's assertion that a defendant has already consented is functionally equivalent to an assertion that the officer possesses a warrant—both claims are assertions that the officer has authority to conduct a search." *See Medicine*, 865 N.W.2d at 498 (citing *Bumper*, 391 U.S. 543). The *Medicine* court ruled that Medicine's submission to testing under such an advisory, and his compliance with official requests to submit, "cannot . . . be considered free and voluntary." *See id*.

[¶17] In our case, like *Medicine*, Dowdy had already been placed under arrest at the time she gave consent, and she was handcuffed, placed in a patrol vehicle, and twice told the State had a right to take the test. Like *Medicine*, Dowdy submitted to chemical testing because she was told she had already consented to testing, because she was told she was required to "submit" to testing, and because she was threatened with a later re-arrest if she failed to comply with the trooper's directive. (App. 16). But for these coercive and misleading advisories, Dowdy would not have submitted to the test, had she known she could refuse. (App. 16). Like *Medicine*, Dowdy's submission to testing in this setting and under such an advisory, and her compliance with official requests to submit, cannot be considered free and voluntary consent.

[¶18] Like *Medicine*, the implied consent advisory in this case "actually contributed to [Dowdy's] belief that [s]he was required" to submit to the chemical test. *See Medicine*, 865 N.W.2d at 498. Informing a driver that she has statutorily-consented to a chemical test, without informing of her statutory right to refuse, is tantamount to informing the driver she has no right to refuse the test. This one-sided advisory, along with the extra-statutory threat of re-arrest, poisons the process with coercion and it effectively nullifies the statutory right to refuse testing.

[¶19] Moreover, the trooper did not ask for consent and Dowdy did not grant consent. In our case, like *Medicine*, there was no voluntary consent. Because there was no voluntary consent, the chemical test was acquired in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota, and it should be suppressed.

[¶20] CONCLUSION

[¶21] For the foregoing reasons, and those advanced in her initial briefing, Ms. Dowdy respectfully requests relief from this Court.

Respectfully submitted
this 8th day of October, 2018.

/s/ *Dan Herbel*

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[¶22] CERTIFICATE OF SERVICE

[¶23] The undersigned hereby certifies that, on October 8, 2018, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Karlei K. Neufeld, Assistant Burleigh County State's Attorney, at the following:

Electronic filing to: < bc08@nd.gov >

Karlei K. Neufeld
Office of the Burleigh County State's Attorney

Dated this 8th day of October, 2018.

/s/ *Dan Herbel*
_____
Dan Herbel