ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20080036

Corey Richter,

Appellant,

v.

North Dakota Department of Transportation,

Appellee.

Supreme Ct. No. 20080036

District Ct. No. 07-C-0650

APPEAL FROM THE DISTRICT COURT
MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE ROBERT O. WEFALD

BRIEF OF APPELLEE

State of North Dakota
Wayne Stenehjem
Attorney General

By: Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellee.

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500 North 9th Street
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Facsimile (701) 328-4300

Attorneys for Appellee.

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II. Whether Richter's Fourth Amendment rights were violated.

III. Whether Richter failed to object to the admissibility of the evidence in a timely manner and waived his claim of error.

STATEMENT OF CASE

Mandan Police Officer Peter Czapiewski arrested Corey Richter ("Richter") on July 22, 2007, for the offense of driving a vehicle while under the influence of intoxicating liquor. (Appendix to Appellant's Brief ("Richter App.") 5, ll. 2-8; 11, ll. 11-12). Richter was served with a "Report and Notice Under Chapter 39-20 or 39-06.2 NDCC." (Appendix of Appellee ("DOT App.") 2.) Richter requested a hearing on July 25, 2007, in accordance with N.D.C.C. § 39-20-05. (DOT App. 3.)

The administrative hearing was held August 15, 2007. (Richter App. 1.) The hearing officer considered the following issues pertaining to Richter's refusal to submit to an onsite screening test under N.D.C.C. § 39-20-14:

> (1) [w]hether a law enforcement officer had reason to believe the person committed a moving traffic violation or was involved in a traffic accident as a driver;
>
> (2) [w]hether in conjunction with the violation or the accident, the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol; and
>
> (3) [w]hether the person refused to submit to the onsite screening test.

(DOT App. 6.) The hearing officer considered the following issues pertaining to Richter's refusal to submit to an alcohol concentration test under N.D.C.C. § 39-20-01:

> (1) [w]hether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance;

(2) [w]hether the person was placed under arrest; and

(3) [w]hether the person refused to submit to the test or tests.

(DOT App. 6.)

Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision. (Richter App. 40.) The hearing officer concluded the evidence was insufficient to warrant revocation of Richter's driving privileges for refusing to submit to an alcohol concentration test under N.D.C.C. § 39-20-01. (Richter App. 40.) The hearing officer, however, concluded the evidence warranted the revocation of Richter's driving privileges for a period of four years based upon his refusal to submit to an onsite screening test under N.D.C.C. § 39-20-14. (Richter App. 40.)

STATEMENT OF FACTS

On July 22, 2007, at approximately 12:15 a.m., Mandan Police Officer Peter Czapiewski ("Officer Czapiewski") responded to a report by a North Dakota Game and Fish Department game warden of a vehicular accident in the Marina Bay parking lot. (Richter App. 5, ll. 2-14; 13, ll. 8-11.) When Officer Czapiewski arrived at the scene, the vehicle which struck an unattended vehicle in the Marina bay parking lot was located in the adjacent, but separately fenced, parking lot of the Broken Oar liquor establishment. (Richter App. 12, ll. 2-14.) One of several game wardens at the scene when Officer Czapiewski arrived, identified Richter as the driver of the vehicle. (Richter App. 5, ll. 14-17; 12, ll. 18-23; 28, ll. 23-25.)

Upon being questioning by Officer Czapiewski, Richter admitted he backed his vehicle into the parked vehicle while he was attempting to avoid having his vehicle struck by a boat being towed by a pickup. (Richter App. 5, l. 25; 6, ll. 1-3, 16-25; 10, ll. 12-19; 18, ll. 2-20; 29, ll. 1-10.) Officer Czapiewski

testified he observed a dent on the trunk lid of the unattended vehicle, a cracked light for illuminating the vehicle model, and scraped paint. (Richter App. 7, 1-10; 15, 9-12.) Officer Czapiewski testified, based upon his observation of the vehicle, "[t]he damage on the vehicle appeared to be over a thousand dollars. So it was a reportable accident." (Richter App. 7, ll. 19-20.) Officer Czapiewski testified the owner of the vehicle at a later date confirmed there had been no damage to the rear of the vehicle prior to the accident. (Richter App. 16, ll. 21-25; 17, ll. 1-6.)

Officer Czapiewski also testified he observed Richter "had paint scrapings off of his bumper and his bumper was dented and then pushed forward on the driver's side of the vehicle." (Richter App. 7, ll. 10-12; 15, ll. 13-17.) Officer Czapiewski testified the "[d]amage looked fresh on both vehicles," and with respect to the unattended vehicle, "there was a fresh coat of dust all the vehicle" and "where the accident had occurred, the damage was all the dust was scraped off." (Richter App. 9, ll. 22-24; 17, ll. 10-15.) Officer Czapiewski testified Richter committed the traffic violation of improper backing. (Richter App. 10, ll. 3-17.)

Officer Czapiewski testified "[w]hile speaking with [Richter], [he] smelled a strong odor of alcoholic beverage on his breath." (Richter App. 6, ll. 3-5; 11, ll. 20-23.) Officer Czapiewski also testified Richter "swayed a little bit in the wind." (Richter App. 6, ll. 5-6; 13, ll. 24-25; 14, l. 1.) Richter testified he disagreed with Officer Czapiewski's statements regarding "the swaying stuff and strong odor of alcohol because [he] only had two beers." (Richter App. 30, ll. 4-12.) Richter explained "[b]ut if he can smell alcohol on my breath after I just got done drinking one . . . one beer ten minutes before this happened, of course you can smell alcohol." (Richter App. 30, ll. 12-14.) Richter testified he believed he did not

exude a "strong odor of alcohol" or that he was swaying. (Richter App. 30, ll. 15-17, 20-21.)

Officer Czapiewski requested Richter submit to field sobriety tests; however, Richter would not agree to the request. (Richter App. 10, ll. 18-24.) Officer Czapiewski informed Richter of the implied consent advisory and requested he submit to an S-D2 onsite screening test. (Richter App. 11, ll. 1-3.) Richter informed Officer Czapiewski he would not take the test. (Richter App. 11, ll. 4-7.) Officer Czapiewski again advised Richter of the consequences of refusing to take the test; however, Richter continued to decline to take the test. (Richter App. 11, ll. 8-10.) Officer Czapiewski informed Richter of the implied consent advisory and requested he submit to a blood test. (Richter App. 11, ll. 14-15.) Richter refused to submit to Officer Czapiewski's request for a blood test. (Richter App. 11, ll. 14-15.)

Officer Czapiewski placed under arrest for driving while under the influence of intoxicating liquor. (Richter App. 11, ll. 12-13.) Officer Czapiewski testified he based his decision to arrest Richter for driving while under the influence on his observations of the strong odor of alcohol beverage on Richter's breath, his swaying, and the game warden's statements regarding Richter's driving. (Richter App. 12, ll. 5-12.) Officer Czapiewski only identified "odor of alcoholic beverage" as the basis for probable cause to arrest on the Report and Notice. (Richter App. 19, ll. 17-25; DOT App. 2.)

Richter testified he initially attempted to park his vehicle in the Marina Bay parking lot upon arriving at the Broken Oar, rather than parking in the Broken Oar parking lot in order to avoid the traffic at the establishment. (Richter App. 21, ll. 2-11; 22, ll. 14-22.) Upon entering the parking lot, however, an individual identified as the owner of Marina Bay, informed him he could not park in the lot

because he was patronizing the Broken Oar, rather than Marina Bay. (Richter App. 22, ll. 23-25; 23, ll. 1-6; 25, ll. 7-11.) Richter testified that while attempting to turn his vehicle around in the lot, another vehicle towing a boat backed towards his vehicle and he, in turn, responded by backing up his vehicle resulting in it "apparently" striking the unattended vehicle. (Richter App. 23, ll. 7-25; 24, ll. 1-4.) Richter testified he did not stop to check for damage at the time "so [he] could just not block traffic and not have more wardens yelling at [him] for being in there." (Richter App. 31, ll. 9-11.) Instead, Richter moved his vehicle to the Broken Oar parking lot and because he "didn't know for sure if [he] hit the car or not" . . . "[he] was going to park and go over and take a look at it and see what happened." (Richter App. 24, ll. 13-17.)

Richter testified that as he parked his vehicle in the Broken Oar lot, two game wardens approached him and informed him "[he] hit a vehicle." (Richter App. 25, ll. 13-18.) Richter volunteered "[l]et's go over and check it out," and walked to the vehicle with the game wardens. (Richter App. 25, ll. 19-25; 26, ll. 1-2.)

Richter testified the only damage he observed was a "bend" smaller than the width of his hand on the vehicle. (Richter App. 26, ll. 3-13.) Richter stated he did not observe any damage to his own vehicle or to the vehicle's illumination light. (Richter App. 26, l. 18; 30, ll. 22-23.) Richter disagreed with Officer Czapiewski's testimony that there was "a dent in [his] bumper," and his statement regarding the amount of monetary damage to the vehicle. (Richter App. 30, ll. 17-19; 31, ll. 14-18.) Richter also testified the game wardens and he rubbed the dust off the vehicle while inspecting it for damage. (Richter App. 32, ll. 1-5.)

Richter testified he did not believe there was sufficient damage to involve law enforcement and he asked the game wardens he either be allowed to leave

his name and information on the vehicle's windshield or proceed to the Broken Oar to locate the owner of the vehicle. (Richter App. 26, ll. 14-24; 27, ll. 1-6, 15-18.) Richter stated the game wardens discussed the matter with their supervisor who informed the wardens to call the police, rather than allow him to leave his information on the vehicle or go to the Broken Oar. (Richter App. 27, ll. 6-25.)

When asked by his counsel whether he "[felt] like [he] could leave that situation," Richter responded he did not. (Richter App. 28, ll. 1-2.) Richter testified he "asked several times if [he] could leave and why [he] couldn't and why [he] couldn't go in the Broken Oar and find the owner, and [the game wardens] flat out said, you have to wait for the police." (Richter App. 28, ll. 2-5.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Richter argued after the close of evidence at the administrative hearing, the game wardens purportedly exceeded their statutory powers under N.D.C.C. § 20.1-02-15 through their contact with him and allegedly violated his Fourth Amendment rights. (Richter App. 33; ll. 5-25; 34, ll. 1-20.) During closing argument, Richter argued all evidence obtained after the game wardens made contact with him should be suppressed and held "inadmissible at this hearing." (Richter App. 33, ll. 6-8; 34, ll. 22-23.) The hearing officer did not make an express determination regarding the alleged illegality of Richter's seizure; however, he concluded "[h]earing officers have no authority to suppress evidence." (Richter App. 40.)

Richter appealed the administrative decision to the Morton County District Court. (DOT App. 9.) In his Specification of Error, Richter identified his issue on appeal as follows:

> Defendant's 4th Amendment right was violated. All evidence obtained after the illegal seizure of Richter's person should have been suppressed.

(DOT App. 10.) The Department argued the evidence was insufficient to establish the game wardens were acting other than with the rights of private citizens in detaining Richter until Officer Czapiewski arrived and no illegal seizure occurred. (Richter App. 46-47.)

Judge Robert O. Wefald issued the Court's Order Affirming Hearing Officer's Decision on January 17, 2008. (Richter App. 42-47.) The district court stated "[t]he question for this reviewing Court is whether the two game wardens violated Richter's 4th Amendment rights when they refused to allow him to leave their presence until the Mandan police office arrived and ultimately arrested Richter." (Richter App. 44.) The district court ruled:

> [T]he real question is whether game wardens acting outside of their jurisdiction as private citizens have the right to seize someone for the commission of crime, particularly, when unlike a private citizen, they are armed and in uniform. **Littlewind**, supra., makes it clear that they do have the right to seize someone outside of their jurisdiction who has committed a crime in their presence.
>
> Richter's specification of error citing the need to suppress evidence is DENIED.

(Richter App. 47.)

Judgment was entered on January 24, 2008. (DOT App. 13.) Richter appealed the Judgment to the North Dakota Supreme Court. (Richter App. 49.) The Department requests this Court affirm the judgment of the Morton County District Court and the administrative revocation of Richter's driving privileges for a period of four years.

STANDARD OF REVIEW

"The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of administrative license suspensions." Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. "On appeal from a district court's review of an administrative agency's decision, [the North Dakota Supreme Court]

review[s] the agency decision." Elshaug v. Workforce Safety & Ins., 2003 ND 177, ¶ 12, 671 N.W.2d 784. Section 28-32-46, N.D.C.C., provides that the Court must affirm an administrative agency's order unless one of the following is present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

"When reviewing the agency's factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that agency, but determine[s] only whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence from the entire record." Ringsaker, 1999 ND 127, ¶ 5, 596 N.W.2d 328. The Supreme Court's "standard of review for a claimed violation of a constitutional right . . . is de novo." State v. Campbell, 2006 ND 168, ¶ 6, 719 N.W.2d 374, cert. denied, Campbell v. N.D., 127 S.Ct. 1150 (U.S. Jan. 22, 2007) (No. 06-564).

LAW AND ARGUMENT

I. Richter was not illegally seized.[1]

Section 29-06-20(1), N.D.C.C., authorizes a private person to arrest another "[f]or a public offense committed or attempted in the arresting person's presence." Relying on the statutory authority of section 29-06-20(1), the North Dakota Supreme Court has stated:

> The general rule is that a police officer acting outside of his jurisdiction is without official capacity and without official power to arrest. . . However, a police officer acting outside of his jurisdiction has the same power of arrest as does a private citizen. . . .

State v. Littlewind, 417 N.W.2d 361, 363 (N.D. 1987) (citations omitted).

In response to Littlewind's argument that the arresting officer could not be treated as a private citizen "because [the officer] used the 'incidents of an officer's authority,' that is, police car, red lights, uniform, badge and handcuffs, to effect [his] arrest," the Supreme Court cited cases from Florida's district courts of appeals, including the decision in State v. Phoenix, 428 So.2d 262 (Fla. Dist. Ct. App. 1982), regarding the application of the "'under color of office' doctrine." Littlewind, 417 N.W.2d at 363. The Supreme Court, however, determined "resort to the Florida rule" was not warranted due to its determination the arresting officer was in "fresh pursuit" of Littlewind, and therefore, declined to adopt the rule. Id.

In Phoenix, the Florida district court of appeals considered the issue of "whether police officers who conducted a covert surveillance outside their jurisdiction could make valid 'citizen's arrests' even though they used a marked police car and asserted their official position in stopping the arrestees."

---

[1] The Department has not asserted the game wardens were acting within their statutory jurisdictional limits and the argument Richter presented on appeal regarding this matter, including his reliance on the Supreme Court's decision in State v. Albaugh, 1997 ND 229, 571 N.W.2d 345, is moot.

428 So.2d at 264. In the course of the surveillance of a smuggling operation, which began in Martin County, members of that county's sheriff's department followed the suspects' vehicle into the adjacent St. Lucie County. Id. While waiting outside the gate to a ranch to which the vehicle traveled, the Martin County sheriff "made an effort to notify St. Lucie County authorities of the suspected smuggling operation." Id. Before the local authorities arrived, however, two suspect vehicles left the ranch with one vehicle "head[ing] north further into St. Lucie County." Id. The Martin County law enforcement authorities "pursued the northbound truck and stopped it in St. Lucie County by using the blue flashing lights of their police car." Id. "Guns drawn and pointed, they identified themselves as police officers, ordered the occupants to get out of the truck and lie face down in the grass, and opened the back of the truck where they discovered marijuana." Id.

The trial court granted the defendants' motions to suppress evidence concluding "the stop and search of the camper-truck in St. Lucie County was unlawful because the officers were acting 'under color of office' outside their jurisdiction," and as a result, the evidence gathered was allegedly tainted by the purported illegal arrests and was "fruit of the poisonous tree." Id. at 265. The state appealed the orders suppressing the evidence. Id. at 264.

The Florida district court of appeals reasoned:

> In the sense that an arrest normally results from a police investigation, it can be said that the power of officers to make a valid citizen's arrest is circumscribed by the 'under color of office' doctrine. But that doctrine is more accurately understood if it is viewed as a limitation on the power of police to conduct investigations and to gather evidence outside their jurisdiction.
>
> Pursuant to the 'under color of office' doctrine, police officers acting outside their jurisdiction but not in fresh pursuit may not utilize *the power of their office* to gather evidence or ferret out criminal activity not otherwise observable. . . The purpose of this doctrine is to prevent officers from improperly asserting official authority to gather

> evidence not otherwise obtainable. Thus, when officers unlawfully assert official authority, either expressly or implicitly, in order to gain access to evidence, that evidence must be suppressed. . . .
>
> An arrest based on evidence obtained by the unlawful assertion of official authority is likewise illegal; and any 'fruits' of that arrest must be suppressed as 'fruits' of the unlawful assertion of authority. Because of this result, the language of the case law indicates that the 'under color of office' doctrine limits the power to arrest. But this doctrine does not prevent officers from making an otherwise valid citizen's arrest just because they happen to be in uniform or otherwise clothed with the indicia of their position when making the arrest. When officers outside their jurisdiction have sufficient grounds to make a valid citizen's arrest, the law should not require them to discard the indicia of their position before chasing and arresting a fleeing felon. Any suggestion that officers could not make a valid citizen's arrest merely because they happened to be in uniform or happened to be in a police car at the time they inadvertently witnessed a felony outside their jurisdiction would be ridiculous. . . .

Id. at 265-266 (original emphasis) (internal citations and footnote omitted).

The Florida district court of appeals stated the trial court record demonstrated "at the time the occupants of the St. Lucie County truck were arrested, the sheriff and his officers had not asserted their official position for any purpose other than to make the arrests." Id. at 266. "The evidence upon which the arrests were based was obtained before confronting any persons in St. Lucie County and without any unlawful assertion of official authority vis-a-vis the occupants or a third party." Id. The court concluded "the evidence upon which the officers sought to justify the arrests was not unlawfully obtained in violation of the 'under color of office' doctrine, and the trial court erred in concluding that the officers were powerless to make citizen's arrests." Id. at 266-67. The district court of appeals remanded the matter for the trial court to determine "whether the officers had sufficient and validly obtained grounds to make citizen's arrests." Id. at 267.

The Florida district court of appeals' decision in Phoenix, with its analysis of the "under color of office" doctrine, has been cited with approval by courts of

other jurisdictions in support of "[t]he prevailing view . . . that if the circumstances were such that a private citizen would have had the authority to make a citizen's arrest under the same circumstances, then [an] extrajurisdictional warrantless arrest [by a law enforcement officer] is legal." Hill v. State, 665 So.2d 1024, 1027 (Ala. Crim. App. 1995). See also State ex rel. State v. Gustke, 516 S.E.2d 283, 289 (W. Va. 1999) ("It has often been recognized that a police officer who is without *official* authority to make an arrest may nevertheless make the arrest if the circumstances are such that a private citizen would have the right to arrest either under the common law or by virtue of statutory law.") (original emphasis); State v. Slawek, 338 N.W.2d 120, 121 (Wis. Ct. App. 1983) ("An extensive line of cases from other states . . . upholds the validity of an extraterritorial arrest made by a police officer who lacked the official authority to arrest when the place of arrest authorizes a private person to make a citizen's arrest under the same circumstances.").

In Hill, the defendant appealed his conviction for public intoxication based, in part, on the ground the law enforcement officer was outside of her jurisdiction when the officer arrested him. 665 So.2d at 1026. After arriving at the location of a reported domestic dispute, two Blount County deputy sheriffs observed Hill "standing on the opposite side of the road with a woman who was holding a baby" and "making 'grabbing hand motions' towards the woman." Id. at 1024-25. When Deputy Ratcliff "turned on the patrol car's emergency lights and got out of the car," Hill and the woman fled toward a nearby house despite the deputy's order to stop. Id. at 1025. The individuals stopped at the front porch of a house, where, during questioning regarding the reported disturbance, Deputy Ratliff "determined that Hill was intoxicated, and she arrested him for public intoxication." Id. Subsequently it was determined "the incident resulting in Hill's

arrest occurred approximately 500 feet from the Blount County-St. Clair County line, in St. Clair County. Ratliff observed Hill's conduct in St. Clair County and arrested Hill in St. Clair County." Id. at 1026-1027.

The Alabama criminal court of appeals determined "Ratliff was not within the jurisdiction in which she was authorized to make an official arrest as a deputy sheriff." Id. at 1027. The court stated "[w]hether a deputy can make a warrantless arrest outside the deputy's jurisdiction under these circumstances appears to be an issue of first impression in Alabama." Id. Finding the reasoning to be "persuasive," the court relied upon the Florida district court of appeals' analysis of the "under color of office" doctrine in Phoenix, and adopted the rule expressed in the case. Id. Applying the Florida rule, Alabama court held "Ratliff arrested Hill for public intoxication, a public offense, which was committed in Ratliff's presence, and which was ongoing at the time of the offense. Accordingly, Ratliff was within her authority as a private citizen to lawfully arrest Hill for public intoxication." Id. at 1028.

In Gustke, the West Virginia Supreme Court of Appeals reviewed the state's writ seeking to prohibit the trial court from dismissing an indictment against the defendant for driving while under the influence of alcohol based upon the ground the law enforcement officer who stopped the defendant "was outside of his territorial jurisdiction" and the stop allegedly was illegal. 516 S.E.2d at 286-87. While on his way home in marked police car after the completion of his shift and still in uniform, a Parkersburg city police officer observed a vehicle outside the city limits "being driven erratically and . . . weaving from lane to lane." Id. at 286. The police officer contacted the Wood County Sheriff's Department which had jurisdiction to make a stop in the vicinity of the vehicle and advised the sheriff's department "with its authorization, he could stop the vehicle until such

time as a sheriff's deputy could arrive at the scene." Id. After being granted "authorization to make the stop," the city police officer "engaged the siren and lights on his cruiser and stopped the vehicle." Id. The police officer "instructed the driver to wait until a Sheriff's deputy could arrive and asked the driver for some form of identification." Id. The sheriff's deputy who responded to the report by the police officer conducted an investigation of the driver based upon his personal observations and field sobriety tests, and placed the driver under arrest for driving while under the influence of alcohol. Id.

The West Virginia Supreme Court of Appeals determined "[b]ecause the arrest was not made in connection with a matter that arose within the territorial boundaries of [the city police officer's] jurisdiction, and did not come within the scope of his official duties, he did not have official authority as a police officer to make the arrest."[2] Id. at 289. The court stated it was unpersuaded by the defendant's argument based upon the "color of office" doctrine the city police office "could not have been acting as a private citizen when he made the traffic stop because he used the indicia of his office to facilitate the stop." Id. at 292. The court quoted at length the analysis of the doctrine as set forth by the Florida district court of appeals in Phoenix, and ruled:

> After stopping Mr. Braverman, Officer Wigal merely asked to see his identification and requested that he wait for the arrival of a Sheriff's deputy. No evidence regarding Mr. Braverman's sobriety, or lack thereof, was collected by Officer Wigal. It was only after Deputy Rhodes arrived that field sobriety tests were conducted. . . . Because Officer Wigal did not use the indicia of his official position as a law enforcement officer to gather evidence against Mr. Braverman, we need not decide today whether to adopt the 'under color of office' doctrine, but leave that question for a more appropriate case.

---

[2] The court's statement is not consistent with the facts of the case, which demonstrate the arrest was made by a county deputy sheriff acting within his territorial jurisdiction, and that the city police officer only detained the defendant. The state's position was based upon "the theory of common law detention by a private citizen." Gustke, 516 S.E.2d at 288-89.

Id. at 293.

In this case, the undisputed evidence establishes Richter's vehicle struck an unattended vehicle in the Marina Bay parking lot, and rather than first stopping and inspecting the vehicle for damage, Richter drove his vehicle to the separately fenced Broken Oar parking lot. (Richter App. 24, ll. 7-25; 25, ll. 1-4.) The undisputed evidence further establishes Richter's actions of striking the unattended vehicle and promptly leaving the Marina Bay parking lot were witnessed by two North Dakota Department of Game and Fish game wardens, and that the game wardens approached Richter after he moved his vehicle to Broken Oar parking lot and informed him "[he] hit a vehicle." (Richter App. 25, ll. 13-17.)

Richter testified he volunteered "[l]et's go over and check it out," and walked to the vehicle with the game wardens. (Richter App. 25, ll. 19-25; 26, ll. 1-2.) Richter failed to present any evidence to establish the game wardens were in uniform, displayed badges, bore firearms, used Game and Fish Department vehicles, or used force when detaining him.[3] The only indicia suggestive of the game wardens' use of their official authority was the contact they made with their supervisor who informed the wardens to call the police, rather than allow Richter to leave his information on the vehicle or go to the Broken Oar. (Richter App. 27, ll. 6-25.) This single benign act, upon which Richter relies, pales in comparison to the actions of the law enforcement officers in Phoenix, Hill, or Gustke. Significantly, Richter presented no evidence that, during the course of his detention, the game wardens gathered any evidence -- in this case, regarding his

[3] The district court appears to suggest the game wardens were "armed and in uniform." (Richter App. 47). No evidence in the administrative record supports the statement.

possible impairment as the result of alcohol consumption -- which would not have been observable by any private citizen under the circumstances.

The game wardens' observations were sufficient to lead a reasonable person to reasonably conclude at the time the wardens approached Richter, he had committed a "public offense" by acting contrary to the requirements of N.D.C.C. § 39-08-07 (Duty upon striking unattended vehicle – Penalty), which provides, subject to a class A misdemeanor penalty, a "[d]river of any vehicle which collides with any vehicle which is unattended shall immediately stop." [Emphasis added.] See Littlewind, 417 N.W.2d at 363 ("A misdemeanor is a public offense.").

Contrary to Richter's position, the fact he was not charged with violating section 39-08-07 is not relevant to what reasonably can be inferred as the reason the game wardens approached and subsequently detained Richter. See State v. Jones, 386 S.E.2d 217, 221 (N.C. Ct. App. 1989) (the fact the defendant who was convicted of drug offenses after being stopped based upon the suspicion of driving while impaired "was not charged thereafter with a DWI offense is not relevant to the [law enforcement officer's] initial suspicions" leading to the stop). Further, Richter's alleged excuse for not "immediately" stopping after the vehicular accident, and his self-serving testimony that he intended to return to the damaged vehicle are not relevant "[b]ecause [s]ection 39-08-07 includes no culpability requirement the violation is a strict-liability offense, punishable without regard to intent, knowledge, willfulness, or negligence." State v. Olson, 356 N.W.2d 110, 112 (N.D. 1984). Richter's argument that, by moving to a separate parking lot, he stopped as close as possible to the scene of the accident based upon his fear of the Marina Bay's owner simply is not realistic nor is it credible. Richter's argument regarding the extent of the monetary damages he caused the

unattended vehicle and his statutory obligation under N.D.C.C. § 39-08-07 need not be addressed due to the fact that, by the time the extent of the monetary amount of the damage was assessed, Richter already had engaged in a "public offense" by failing to immediately stop after striking the vehicle.

In this case, the circumstances were such that a private citizen would have had the right to arrest Richter by virtue of N.D.C.C. § 29-06-20(1). The game wardens had the right to detain Richter until the arrival of the Mandan police officer. Richter was not illegally seized.

II. Richter's Fourth Amendment rights were not violated.

The North Dakota Supreme Court has stated "[t]he Fourth Amendment of the United States Constitution and article I, § 8 of the North Dakota Constitution guarantee '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.'" State v. Oliver, 2006 ND 241, ¶ 6, 724 N.W.2d 114. With respect to the protection of the Fourth Amendment, the United States Supreme Court, however, has stated:

> This Court has . . . consistently construed this protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' . . .

U.S. v. Jacobsen, 466 U.S. 109, 113-114 (1984) (internal citation omitted). Accordingly, the Fourth Amendment is not applicable if a law enforcement officer is deemed to be acting as a private citizen during the seizure of a person. See U.S. v. Layne, 6 F.3d 396, 399 (6th Cir. 1993) ("defendant's arrest effected by officers acting outside their geographical jurisdiction was valid under the Tennessee private citizen's arrest statute," and "arrest did not violate the Fourth Amendment"); Hudson v. Commonwealth of Va., 585 S.E.2d 583, 585 n.1 (Va. 2003) ("Hudson concedes that if Officer Wills was deemed to be acting as a

private citizen, and not as a police officer when he detained Hudson, then his Fourth Amendment argument is 'wholly inapplicable.'") (citing Jacobsen, 466 U.S. at 113).

In this case, the game wardens were acting with the rights of private citizens when they detained Richter, rather than under the "color of office." Under these circumstances, the protection of the Fourth Amendment was wholly inapplicable. Richter's Fourth Amendment rights were not violated.

III. Richter failed to object to the admissibility of the evidence in a timely manner and waived his claim of error.

"Constitutional rights 'may be lost as finally as any others by a failure to assert them at the proper time.'" Ramirez v. State, 941 A.2d 1141, 1156 (Md. 2008) (citation omitted). See also State v. Martinez, 653 P.2d 879, 884 (N.M. Ct. App. 1982) ("Constitutional rights of confrontation may be lost, as other rights, by a failure to assert them at the proper time.").

Within the context of a criminal proceeding, "the appropriate vehicle for challenging the admissibility of evidence based on an alleged search and seizure violation is a motion to suppress." State v. Green, 567 S.E.2d 505, 508 (S.C. Ct. App. 2002). See, e.g., State v. Leher, 2002 ND 171, ¶ 3, 653 N.W.2d 56 (motion to suppress evidence filed based upon alleged lack of reasonable and articulable suspicion); People v. Ferguson, 135 N.W.2d 357, 359 (Mich. 1965) ("if the factual circumstances [regarding the alleged illegal seizure] are known to defendant in advance of trial, he is responsible for communicating them to his lawyer immediately and his lawyer, in turn, is responsible for making a proper motion [to suppress] in advance of trial"). See also State v. Demars, 2007 ND 145, ¶ 4, 738 N.W.2d 486 ("Demars moved the district court to suppress the evidence against him, arguing Officer O'Donnell was outside of his geographical jurisdiction when he stopped Demars."); Littlewind, 417 N.W.2d at 363 ("Littlewind . . . argue[d] that

the trial court erred in denying his motion to suppress evidence obtained through the BIA officer's illegal extraterritorial arrest.").

"[E]ven if a defendant specifically waives the right to have a pretrial motion to suppress heard, the trial court still has the discretion to consider constitutional challenges upon an appropriate objection when the evidence is offered at trial." B.M. v. State, 915 So.2d 649, 651-52 (Fla. Dist. Ct. App. 2005) (citing J.L.A. v. State, 707 So.2d 380, 381 (Fla. Dist. Ct. App. 1998)). However, if "no appropriate contemporaneous objection [is] made . . . the issue [is] not preserved for appeal." J.L.A., 707 So.2d at 381. "Raising the issue in closing argument after [the product of alleged illegal search and seizure] was admitted did not preserve the issue." Id. See also State v. Pederson-Maxwell, 619 N.W.2d 777, 780 (Minn. Ct. App. 2000) ("In order for constitutional challenges to the admission of evidence to be timely, objections to such evidence must be raised at the omnibus hearing. . . . These evidentiary objections take the form of pretrial motions to suppress.") (internal citations omitted); State v. Burnley, 910 P.2d 1294, 1295 (Wash. Ct. App. 1996) ("Motions to suppress made at the close of the State's case are clearly untimely."); Martinez v. State, 453 P.2d 304, 306 (Okla. Crim. App. 1969) (citing Shirey v. State, 321 P.2d 981, 988 (Okla. Crim. App. 1958)) ("an objection to evidence obtained by an illegal arrest or search and seizure must be interposed at the first opportunity and should be made either at the beginning of the trial by motion to suppress the evidence, or during the course of the examination as soon as it becomes apparent that the State will rely thereon, and the defendant failing to make timely objection waives the right to be heard on such questions.").

North Dakota's Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, does not incorporate the North Dakota Rules of Criminal Procedure, including its

procedure to move to suppress evidence. Instead, section 28-32-24(1), N.D.C.C., provides "[t]he admissibility of evidence in any adjudicative proceeding before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence." Rule 103, N.D.R.Evid., provides:

> (a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; . . .

The North Dakota Supreme Court has ruled:

> A touchstone for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court, so the trial court could intelligently rule on it. . . . In Freed, we explained under Rule 103(a)(1), N.D.R.Ev., 'error may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and ... a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.' Id. A party must object at the time the alleged error occurs, so the trial court may take appropriate action if possible to remedy any prejudice that may have resulted. . . . Failure to object acts as a waiver of the claim of error. . . .

State v. Buchholz, 2004 ND 77, ¶ 7, 678 N.W.2d 144 (quoting State v. Bell, 2002 ND 130, ¶ 9, 649 N.W.2d 243) (internal citations omitted). "It is a well-established tenet of appellate procedure that objections to the introduction of evidence must be raised at the very time the evidence is introduced, or the objections will be waived." State v. Wishnatsky, 491 N.W.2d 733, 734-735 (N.D. 1992).

In this case, Richter had actual knowledge of his detention by the game wardens until the arrival of the Mandan police officer, and was aware of his legal argument the game wardens allegedly were acting outside their statutory jurisdiction when they detained him. Despite Richter's knowledge prior to the

hearing of his purported defenses, Richter failed to raise any objection to Officer Czapiewski's testimony regarding his investigation of Richter for driving while under the influence of intoxicating liquor. In fact, Richter supplemented and reinforced Officer Czapiewski's testimony through cross-examination.

Richter argued after the close of evidence at the administrative hearing, the game wardens purportedly exceeded their statutory powers under N.D.C.C. § 20.1-02-15 through their contact with him and allegedly violated his Fourth Amendment rights. (Richter App. 33; ll. 5-25; 34, ll. 1-20.) During closing argument, Richter argued all evidence obtained after the game wardens made contact with him should be suppressed and held "inadmissible at this hearing." (Richter App. 33, ll. 6-8; 34, ll. 22-23.) The hearing officer did not make an express determination regarding the alleged illegality of Richter's seizure; however, he concluded "[h]earing officers have no authority to suppress evidence." (Richter App. 40.)

The hearing officer correctly stated he did not have authority to suppress evidence as that procedure is applied in criminal proceedings. Richter failed to object to the admissibility of the evidence in a timely manner. In accordance with the North Dakota Rules of Evidence and supporting caselaw, Richter waived his claim of error.

CONCLUSION

The Department respectfully requests that this Court affirm the judgment of the Morton County District Court and the Department's decision revoking Richter's driving privileges for a period of four years.

Dated this 7th day of April, 2008.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____

Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellee.

20080036

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Corey Richter, Appellant, v. North Dakota Department of Transportation, Appellee.	**Supreme Ct. No. 20080036** **District Ct. No. 07-C-0650** **AFFIDAVIT OF SERVICE BY MAIL**

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APR - 2008
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Melissa Castillo states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 7th day of April, 2008, I served the attached **BRIEF OF APPELLEE and APPENDIX OF APPELLEE**, upon Corey Richter, by and through his attorney Jodi L. Colling, by placing a true and correct copy thereof in an envelope addressed as follows:

Jodi L. Colling
Dickson Law Office
P.O. Box 1896
Bismarck, ND 58502-1896

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Melissa Castillo

Subscribed and sworn to before me
this 7th day of April, 2008.

Notary Public

DONNA J. CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2009