

ORIGINAL

20080080

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

RECEIVED BY CLERK
SUPREME COURT JUL 23 2008

State of North Dakota,
Plaintiff-Appellee,

-vs-

Patrick Salter,

Defendant-Appellant.

Supreme Ct. No. 20080080

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 22 2008

District Ct. No. 08-07-k-2327
SA No. M1949-07-11

STATE OF NORTH DAKOTA

BRIEF OF PLAINTIFF-APPELLEE

Appeal from Criminal Judgment
dated and filed May 7, 2008
and the adverse determination within the February 27, 2008, Order
denying the Defendant's Motion to Suppress Evidence
Burleigh County District Court
South Central Judicial District
The Honorable Bruce B. Haskell, Presiding

Tyrone J. Turner
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ISSUES

1. Whether the Trial Court Erred When it Denied Appellant's Motion to Suppress Evidence?

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STATEMENT OF CASE

A Uniform Traffic Complaint and Summons was filed in the Burleigh County District Court on October 16, 2007, charging the Appellant with having committed the offense of Driving a Vehicle Under the Influence of Intoxicating Beverages, in violation of North Dakota Century Code § 39-08-01, on October 14, 2007. (Appellant's Appendix 3) On December 26, 2007, the Appellant filed a Motion to Suppress Evidence, seeking suppression of the blood-alcohol concentration (.bac) results. (Appellant's Appendix 4) On December 31, 2007, the Appellee filed a timely response thereto. (Appellant's Appendix 10) On January 4, 2008, the Appellant filed a Reply to the Appellee's Response. (Appellant's Appendix 12) On February 27, 2008, a hearing was held on the motion. (Appellant's Appendix 14) At the hearing, North Dakota Highway Patrol Trooper Derek Aarndt testified and authenticated a digital video disc (DVD) recording of the traffic stop and arrest of the Appellant. (Suppression Hearing Transcript pp. 3-10) The DVD was introduced into evidence and was made part of the record (Appellee's Appendix 1; Tr. at pp. 6-7) In denying the motion, the Court found that the Appellant had been advised of the administrative consequences for failing to submit to requested testing and that the Appellant possessed no right to have the implied consent advisory recited to him multiple times. (Tr. at p.11-13). On March 12, 2008, the Appellant conditionally plead guilty to the charge of DUI. (Appellant's Appendix 16) On March 27, 2008, the Appellant filed a Notice of Appeal. (Appellant's Appendix 19) On May 22, 2008, an Amended Notice of Appeal was filed. (Appellant's Appendix 23)

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STANDARD OF REVIEW

In reviewing a court's decision on a motion to suppress evidence, deference is given to the court's findings of fact and conflicts are to be resolved in favor of affirming the district court's decision. See State v. Gref, 2006 ND 196, ¶ 7, 721 N.W.2d 381. If there is sufficient competent evidence fairly capable of supporting the trial court's findings and the decision is not contrary to the manifest weight of the evidence, the decision on the suppression motion will be affirmed. See Id.

1
2 DISCUSSION

3 The crux of the Appellant's argument is that Trooper Arndt's
4 recitation of the implied consent advisory once was insufficient, and as a
5 result, the blood test results should have been thrown out as the fruit of an
6 unreasonable search.

7 The dispositive case on this issue is the recent decision handed down
8 by the Court in Peterson v. Ziegler, 2008 ND 115, ¶¶ 12-14. In Peterson, the
9 appellee-driver similarly claimed that since the arresting officer had not
10 recited the implied consent advisory prior to a blood draw, the blood test
11 results should have been suppressed. However, this Court rejected that claim,
12 holding that the implied consent advisory serves the purpose of informing the
13 person of the consequences of refusing to take a chemical test. Id. at ¶ 13.
14 When a person submits to the blood-alcohol test, they are not subject to said
15 consequences and, therefore, are not harmed by the arresting officer's failure
16 to repeat the implied consent advisory. Id. at ¶ 1. ¶ 13

17 In addition, law enforcement officers are authorized to obtain a blood
18 sample from a person pursuant to a search incident to arrest, regardless of the
19 person's consent. Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16
20 L.Ed.2d 908 (1996). In North Dakota, the above has been statutorily
21 modified, providing, in part, as follows:

22 Any person who operates a motor vehicle on a highway or on
23 public or private areas to which the public has a right to access
24 for vehicular use in this state is deemed to have given consent,
25 and shall consent, subject to the provisions of this chapter, to
a chemical test, or tests, of the blood, breath, saliva, or urine for
the purposes of determining the alcohol, other drug, or
combination thereof, content of the blood.

26 NDCC § 39-20-01.

1 In other words, pursuant to the above statute, a person impliedly agrees
2 to submit to chemical testing by driving on a North Dakota highway.
3 Therefore, under Schmerber and N.D.C.C. ch. 39-20, a law enforcement
4 office may direct a driver to submit to chemical testing without obtaining the
5 person's actual consent.

6 Although each person who drives a vehicle on a highway in North
7 Dakota impliedly consents to chemical testing, the legislature has granted the
8 driver arrested for DUI the right to withdraw the implied consent. State v.
9 Mertz, 362 N.W.2d 410, 413-14 (N.D. 1985). The driver must affirmatively
10 refuse to submit to testing in order to withdraw the implied consent. Id. at
11 414. In the case at hand, the Appellant did not withdraw his implied consent
12 nor did he affirmatively refuse to submit to a blood draw.

13 In addition, a cursory review of the DVD recording in this matter
14 reveals that the Appellant consented to the blood draw. At approximately
15 3:16 a.m., or thirty-three minutes and fifty-four seconds into the DVD
16 recording, the Trooper is heard informing the Appellant that the advised
17 consent still applied and asking the Appellant to submit to a blood draw.
18 (Appellee's Appendix 1) The Trooper testified at the hearing that the
19 Appellant then consented to the draw. (Tr. at p.9) The blood draw was then
20 immediately performed. Although the Appellant did not testify at the
21 hearing, an Affidavit signed by the Appellant was introduced wherein
22 Appellant claimed that he had not consented to the draw. (Appellant's
23 Appendix 8) The Court considered the conflict between the Troopers'
24 testimony and the Appellant's submitted Affidavit and resolved it by finding
25 that the conflict essentially boiled down to a question of credibility. The
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1 Court specifically found the Trooper's testimony believable. (Tr. at p. 13)
2 Recognizing the importance of the trial court's opportunity to assess the
3 credibility of witnesses, a reviewing court must give great deference to any
4 decision regarding the issue of suppression. State v. Placek, 386 N.W.2d 36
5 (N.D. 1986).

6 In finding that the Appellant had consented to the test, it is well
7 established that a law enforcement officer may subject a person to chemical
8 testing if the person voluntarily consents to the test. See e.g. City of Bismarck
9 v. Hoffner, 379 N.W.2d 797 (N.D. 1985); State v. Abrahamson, 328 N.W.2d
10 213 (N.D. 1982); Wanna v. Miller, 136 N.W.2d 563 (N.D. 1965).

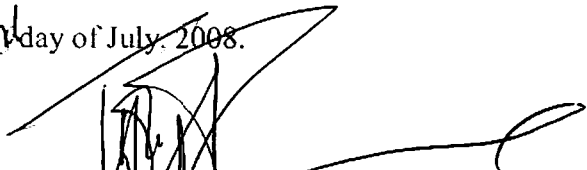
11 Finally, and in no small part it should be noted that the purpose of
12 suppression is to deter police misconduct. State v. Saavedra, 396 N.W.2d 304
13 (N.D. 1986). A review of the DVD shows Trooper Aarndt treating the
14 Appellant professionally and cordially throughout the encounter. There exists
15 nothing to support the Appellant's claim that the Trooper acted to compel or
16 coerce the Appellant in a manner designed to overcome his freewill.

CONCLUSION

The trial court did not err when it found the Appellant had been informed of the implied consent statute, that he had not affirmatively withdrawn his consent, and that he had voluntarily consented to testing for blood-alcohol concentration.

Based thereon, the Appellant's appeal should be denied. The District Court Judge's Order denying the Appellant's Motion, dated February 27, 2008, and the Criminal Judgment, dated May 7, 2008, should each be affirmed.

Dated this 22nd day of July, 2008.



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Patrick Salter.)
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.....) SA. No. M1949-07-11
STATE OF NORTH DAKOTA)
COUNTY OF BURLEIGH) ss
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Lacie Christensen, being first duly sworn, depose and say that I am a
United States citizen over 21 years old, and on the date of July 22nd, 2008, I
deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid.
addressed to:

Dan Herbel
Herbel Law Firm
3333 E Braodway Ave, Ste#1205
Bismarck ND 58501

which address is the last known address of the addressee.

Lacie Christensen
Lacie Christensen

Subscribed and sworn to before me this 22nd day of July, 2008.

BONNIE K. WEIGEL *Bonnie K. Weigel*
Notary Public Bonnie K. Weigel, Notary Public
State of North Dakota Burleigh County, North Dakota
My Commission Expires July 30, 2010 Commission Expires: 07-30-2011