

ORIGINAL (e-filed)

20080080

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR - 5 2008

STATE OF NORTH DAKOTA,)
)
Plaintiff/Appellee.)
)
v.)
)
PATRICK SALTER,)
)
Defendant/Appellant.)

STATE OF NORTH DAKOTA

Supreme Court No. 20080080

Burleigh Co. No. 07-K-2327

REPLY BRIEF OF APPELLANT

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

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[¶1] TABLE OF AUTHORITIES

North Dakota statutes

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| N.D.C.C. § 39-20-01 | ¶6 |
| N.D.C.C. ch. 39-20 | ¶¶5-6 |

North Dakota cases

| | |
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| <i>Brewer v. Ziegler</i> , 2007 ND 207, 743 N.W.2d 391 | ¶4 |
| <i>City of Bismarck v. Hoffner</i> , 379 N.W.2d 797 (N.D. 1985) | ¶8 |
| <i>Grosgebauer v. N.D. Dept of Transportation</i> , 2008 ND 75, 747 N.W.2d 510 | ¶¶5-6 |
| <i>Interest of R.P.</i> , 2008 ND 39, 745 N.W.2d 642 | ¶6 |
| <i>Peterson v. Ziegler</i> , 2008 ND 115 | ¶4 |
| <i>State v. Abrahamson</i> , 328 N.W.2d 213 (N.D. 1982) | ¶9 |
| <i>State v. Anderson</i> , 336 N.W.2d 634 (N.D. 1983) | ¶7 |
| <i>Throlson v. Backes</i> , 466 N.W.2d 124 (N.D. 1991) | ¶6 |

United States Supreme Court cases

| | |
|---|----|
| <i>Schmerber v. California</i> , 384 U.S. 757, 86 S.Ct. 1826 (1966) | ¶5 |
|---|----|

[¶2] LAW AND ARGUMENT

[¶3] The State inaccurately informs this Court that “[t]he crux of [Salter’s] argument is that Trooper Arndt’s recitation of the implied consent advisory once was insufficient.” *See* Appellee’s Brief at 4. This is not the crux of Mr. Salter’s argument. Rather, Mr. Salter argues that he did not consent to the blood test and that whether the implied consent advisory was given is but one factor to consider in a totality of circumstances in determining whether there was consent.

[¶4] The State also wrongly cites *Peterson v. Ziegler* as dispositive on Mr. Salter’s argument. *See* Appellee’s Brief at 4. *Peterson* did not involve the issue of consent as “Peterson consented to the blood-alcohol test.” *See Peterson v. Ziegler*, 2008 ND 115 at ¶¶12-13 (citing *Brewer v. Ziegler*, 2007 ND 207, 743 N.W.2d 391 as applicable “when a person voluntarily submits to a ... test”).

[¶5] Additionally, the State asserts that “under Schmerber and N.D.C.C. ch. 39-20, a law enforcement office [sic] may direct a driver to submit to chemical testing without obtaining the person’s actual consent.” *See* Appellee’s Brief at 5. However, the State cites no authority for such a loose proposition of law and, indeed, the State’s assertion is not consistent with the law. In fact, under North Dakota law “[a] driver may not be tested against his will.” *See Grosgebauer v. N.D. Dept of Transportation*, 2008 ND 75, ¶8, 747 N.W.2d 510.

[¶6] Instead, a driver has the option of “deciding whether to consent to chemical testing under N.D.C.C. § 39-20-01.” *See Interest of R.P.*, 2008 ND 39, ¶24, 745 N.W.2d 642. “[A] driver has no obligation to submit to chemical testing until the officer makes a valid request for testing in compliance with the relevant statutory provisions.” *See*

Throlson v. Backes, 466 N.W.2d 124, 126-27 (N.D. 1991). North Dakota's statutory scheme [N.D.C.C. ch. 39-20] requires communication between the officer and the driver in which the officer requests submission to the test." *See Grosgebauer*, 2008 ND 75 at ¶11.

[¶7] Finally, the State suggests, in an oddly worded sentence, that the trial court found "that the Appellant had consented to the test." *See Appellee's Brief* at 6. This is not entirely precise. More accurately, the trial court seemed perplexed by the consent issue, as follows:

THE COURT: ... "Doesn't the whole issue of consent and informing of the implied consent and all that, doesn't that all go to the administrative? I mean, that really doesn't have anything to do with the criminal proceedings, does it? (Tr. at 1, L. 20-21).

MR. HERBAL: Your Honor, I believe it's one factor in the totality of the circumstances. Like for example, *State v. Anderson*, 336 NW2d, 634. That was the North Dakota Supreme Court's analysis of the totality of the circumstances. That's a one factor, whether or not the implied consent advisory was read to the individual. Secondly, whether or not Mr. Salter was actually asked to submit to a test. We contend that he was not. He was instructed by the trooper that we are going to St. Alexius for a blood draw, was never asked to provide a blood sample. And certainly didn't consent. And one of the issues is whether or not the consent was voluntary — (Tr. at 1, L. 23 – 2, L. 5).

THE COURT: ... "you know you keep making it sound like he has to somehow affirmatively consent."

(Tr. at 1, L. 20 – 2, L. 9). Mr. Salter does not believe the foregoing resolved the factual dispute of whether Mr. Salter consented to the blood draw.

[¶8] Also, "the standard for determining the validity of consent to the extraction of a blood specimen is whether the consent was given voluntarily." *See City of Bismarck v. Hoffner*, 379 N.W.2d 797, 800 (N.D. 1985). The trial court did not address the issue of whether any purported consent was given voluntarily and performed no analysis on the

totality of the circumstances with respect to voluntariness. Indeed, the following exchange shows that the trial court had no intention of performing any such analysis:

“MR. HERBAL: Well, and Your Honor, our argument is that the implied consent is but one factor in the totality of the circumstances.

THE COURT: The totality of what circumstances? Circumstances of what?

MR. HERBAL: Whether or not there was consent and whether that consent was voluntary—

THE COURT: There already is consent. In North Dakota you’re deemed to have consented to submit to chemical tests unless you affirmatively refuse.

MR. HERBAL: Provided the statutory requirements are met.”

(Tr. at 12, L. 11-18).

[¶9] “The central issue at the suppression hearing should have been the consent exception to the Fourth Amendment search-warrant requirement.” *See State v. Abrahamson*, 328 N.W.2d 213, 217 (N.D. 1982). It was not. The trial Court did not resolve the issues of consent and voluntariness.

[¶10] Accordingly, Mr. Salter asks this Court to reverse and remand to the trial court for findings on the issue of consent and, if affirmative consent is found, on the issue of the voluntariness of that consent. Alternatively, Mr. Salter asks this Court to reverse and Order suppression of the blood test result because he did not consent to the blood test.

[¶11] CONCLUSION

[¶12] For the foregoing reasons, Mr. Salter respectfully requests relief from this Court.

Respectfully submitted
this 5th day of August, 2008.

/s/ Dan Herbel

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[¶13] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 5, 2008, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Tyrone Turner, counsel for Appellee, at the following:

Electronic filing TO: "Tyrone Turner" < tturner@nd.gov >

Date this 5th day of August, 2008.

/s/ Dan Herbel

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