20090308

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
November 25 2009
STATE OF NORTH DAKOTA

CITY OF BISMARCK,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	Supreme Court No. 20090308
	)	
LAUNI BULLINGER,	)	
	)	Burleigh Co. No. 08-09-K-99
Defendant/Appellant.	)	

BRIEF OF APPELLANT

Appeal from Criminal Judgment

dated September 20, 2009, and filed September 21, 2009

and the adverse oral Order and determination

denying the Defendant's Motion to Suppress Evidence

Burleigh County District Court

South Central Judicial District

The Honorable Robert O. Wefald

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[¶2] STATEMENT OF THE CASE

[¶3] On December 13, 2008, Launi Bullinger was arrested for driving under the influence of an intoxicating liquor in Burleigh County, North Dakota. (Appendix ("App.") at 1). On January 14, 2009, Ms. Bullinger transferred her municipal case to district court for jury trial. (App. 2). On January 15, 2009, a Uniform Traffic Complaint and Summons was filed in the district court informing Ms. Bullinger that she was standing accused of the charge of DUI. (App. 1).

[¶4] On February 17, 2009, Ms. Bullinger filed a Motion to Suppress Evidence and asked the trial court to suppress the illegally obtained blood test because the test was submitted to under compulsion. (App. 5-7). Ms. Bullinger requested an evidentiary hearing. (App. 5-7). On February 17, 2009, the City of Bismarck filed a response brief opposing suppression. (App. 10-11).

[¶5] On April 7, 2009, an evidentiary hearing was held before the Honorable Robert O. Wefald. (App. 8). At the close of the hearing, Judge Wefald orally denied Ms. Bullinger's Motion but granted her request to brief the issue: "If you want to try to change my mind in writing, you can do so and I will take a look at it." (Suppression Hearing Transcript ("Tr.") at 39, lines ("L.") 4-8). Judge Wefald gave Ms. Bullinger until April 22, 2009, to submit a brief. (Tr. at 39, L. 10-18). On April 21, 2009, Judge Wefald granted Ms. Bullinger's e-mail request to extend her brief deadline to April 24, 2009. (App. 8a).

[¶6] On April 24, 2009, Ms. Bullinger filed a brief in support of her motion to suppress evidence by fax to Burleigh County Clerk of District Court. (App. 9-17). It appears the Clerk lost Ms. Bullinger's brief as it was not incorporated in the Register of

Actions. The city prosecutor filed a response brief in opposition of suppression on April 28, 2009. (App. 18-20).

[¶7] On May 13, 2009, the Court set a trial date of August 19, 2009. (App. 21). On August 14, 2009, four months after briefs had been submitted to the Court, Ms. Bullinger asked the Court the status of the suppression issue. (App. 21a). On August 18, 2009, the Court responded that it had ruled from the bench at the suppression hearing and that Ms. Bullinger should "be ready for trial tomorrow morning." (App. 21b). Judge Wefald did not reduce his ruling to a written Order and it is unclear whether the trial court reviewed the suppression briefs.

[¶8] On September 4, 2009, Ms. Bullinger changed her plea, by way of a Misdemeanor Petition, and entered a conditional plea of guilty to the charge of DUI, pursuant to N.D.R.Crim.P. 11 (a)(2), specifically reserving the right to appeal the trial court's April 7, 2009, oral Order denying her Motion to Suppress Evidence. (App. 24-26). On September 21, 2009, a Criminal Judgment was entered. (App. 22-23).

[¶9] On October 16, 2009, Ms. Bullinger filed a Notice of Appeal to this Court. (App. 27-28). Bullinger appeals and argues that her blood draw was submitted to under compulsion after Bullinger had withdrawn her implied consent and refused. Ms. Bullinger alleges that suppression is mandated by operation of law, particularly N.D.C.C. § 39-20-04. Ms. Bullinger also argues that the search for blood was performed under compulsion and therefore was done in an unreasonable manner, in contravention of State and Federal Constitutions.

[¶10] Ms. Bullinger asks this court to vacate the Criminal Judgment in this matter, reverse the district court's denial of her Motion to Suppress Evidence, remand to

the district court for withdrawal of Ms. Bullinger's conditional guilty plea, and order the suppression of the illegally obtained blood sample.

[¶11] STATEMENT OF THE ISSUES

I. After two breath tests came back invalid, Ms. Bullinger thereafter withdrew her implied consent to provide a blood sample and affirmatively refused the St. Alexius blood test; because she withdrew her consent no chemical test should have been given pursuant to N.D.C.C. § 39-20-04; since the test was performed under compulsion, it was performed in an unreasonable manner

[¶12] STATEMENT OF THE FACTS

[¶13] On "December 13, 2008," at 12:12 a.m., Officer Bolme of the Bismarck Police Department had "contact with the defendant," Launi Bullinger. (Suppression Hearing Transcript ("Tr.") at 3, lines ("L.") L. 13-16). After completing "three field sobriety tests," Ms. Bullinger was "placed under arrest." (Tr. at 12, L. 22-24). Officer Bolme "asked Launi to provide a breath sample" and "she agreed to provide that sample." (Tr. at 17, L. 17-21). Ms. Bullinger was then "transported to the Bismarck Police Department for the purpose of a chemical breath test." (Tr. at 13, L. 10-12).

[¶14] At the police station, Officer Lindelow conducted the intoxilyzer test and "attempted the first sample on the first test" at "1:02 in the morning." (Tr. at 22, L. 17-19). This first sample provided a readout indicating an invalid test at 1:02 a.m. (Tr. at 22, L. 20-22). Then, instead of immediately performing another test so as to clear the machine, Officer Lindelow waited 5 minutes before he performed the second sample on the first test. *See id*. Officer Lindelow waited 5 minutes "[e]ven though [he] knew that

test would be invalid." (Tr. at 25, L. 20-25). "[T]he second sample of the first test came back as a valid sample" at 1:07 a.m. (Tr. at 26, L. 1-3) and (Tr. at 18, L. 14-15).

[¶15] Officer Lindelow then "waited the 20 minutes and started the second test." (Tr. at 26, L. 4-6). "[T]he first subject sample on the second test" began at "1:28 a.m." (Tr. at 23, L. 23-25). The "first sample of the second test was a valid sample," so now Ms. Bullinger had provided "consecutive valid samples." (Tr. at 26, L. 11-16). The "second sample from the second test came back as an invalid sample." (Tr. at 26, L. 21-23). The "[s]econd test concluded at 1:34 [a.m.]." (Tr. at 24, L. 10-11). Ms. Bullinger was "cooperating with the officers and attempting to provide a valid sample." (Tr. at 31, L. 22-24).

[¶16] "[A]t that point there was somewhat more than a half hour left in the two-hour time period," so Officer Bolme "made the decision to have the defendant transported to the hospital for a blood test" because they had run "two tests and were unable to obtain an adequate sample from" Bullinger. (Tr. at 24, L. 12-20). "Officer Bolme … then told Launi [Bullinger] that they were going to go for blood." (Tr. at 27, L. 13-15).

[¶17] Ms. Bullinger "argued that she had given [Officer Bolme] a breath sample" and told Bolme that "she was trying to adequately provide a sample." (Tr. at 18, L. 19-24). "Ms. Bullinger also "had an argument about providing a blood sample 'cause she felt she had already provided two valid tests," but Officer Lindelow doesn't "know if that argument took place within that [intoxilyzer] room when [he] was present or if it took place when they were en route to the hospital." (Tr. at 27, L. 16-21). "[I]t was clear to

[Officer Bolme] that she didn't want to go for blood because she felt she had provided a sample, an adequate sample already." (Tr. at 19, L. 20 – 20, L. 2).

[¶18] Officer Bolme told Ms. Bullinger "that the next step would be to take [her] to the hospital and get a -- have a blood draw." (Tr. at 32, L. 24-25). Officer Bolme testified that Ms. Bullinger eventually consented to the blood test. (Tr. at 14, L. 23-24). "In the Intoxilyzer room," Officer Bolme told Bullinger that he was taking her to the hospital, but he did not specify which hospital. (Tr. at 33, L. 2-4).

[¶19] Subsequently, Officer Bolme told Ms. Bullinger that "we had to go to St. A.'s to have the blood draw." (Tr. at 33, L. 16-19). Ms. Bullinger told "him [she] did not want to go to St. Alexius," because she works there. (Tr. at 33, L. 24 – 34, L. 1). Upon "leaving the Intoxilyzer room on the way to the … police car, and on the way to the hospital" it "was a repeated conversation" between Officer Bolme and Ms. Bullinger that she did "not want to go to St. A's for the blood draw." (Tr. at 34, L. 2-7).

[¶20] Launi is "a certified registered nurse anesthetist" who works at "St. Alexius Hospital" and has been employed there "for approximately eight years." (Tr. at 30, L. 22 – 31, L. 5). Ms. Bullinger testified that she informed Officer Lindelow in the intoxilyzer room that she "worked at St. Alexius" because "[h]e asked me what I did and where I worked because I was saying I was worried I was going to lose my job … So, yes, he did, in fact, ask me where I worked and what I did." (Tr. at 33, L. 5-12).

[¶21] On direct examination, Officer Lindelow testified that he did not "know that Ms. Bullinger worked at St. Alexius." (Tr. at 25, L. 9-11). However, on cross examination, under penalty of perjury, Officer Lindelow altered his testimony back toward the truth by testifying that his direct testimony was "not accurate" and that he

"would not dispute" that Ms. Bullinger informed him "at the police department that she worked for St. Alexius." (Tr. at 27, L. 23 – 28, L. 13).

[¶22] Officer Bolme testified that "[o]nce we had arrived at the hospital, somewhere in there, [Bullinger] told me she works there." (Tr. at 15, L. 8-11). However, Ms. Bullinger testified that Officer Bolme knew that she worked at St. Alexius "before getting to the hospital" as "[t]hat information was relayed to him repeatedly as well." (Tr. at 33, L. 13-15).

[¶23] Ms. Bullinger told Officer Bolme she "would provide a sample at Medcenter One," but that she "would not supply a sample at St. Alexius." (Tr. at 34, L. 8-12). After Bullinger told Bolme that she "would not provide a sample at St. Alexius," Officer Bolme instructed Bullinger:

> "This is the next step because you weren't cooperating at the police station. So the next step is to get a blood test and we're doing that at St. Alexius."

(Tr. at 34, L. 13-17).

[¶24] Ms. Bullinger testified: "I interpreted it as I had no other choice but to submit to a blood test at St. Alexius Hospital because that is what he [Bolme] told me." (Tr. at 34, L. 21-25). Ms. Bullinger stated that she felt compelled to provide blood and testified:

> "I felt I could not refuse. A police officer is telling me this is the next step, this is what we're going to do because you weren't cooperating and this is the next step in line to do it, and this is where we're going and this is how it's going to be. … I felt I had no choice but to submit to a blood test at St. Alexius Hospital."

(Tr. at 37, L. 7-15). Ms. Bullinger was "handcuffed this entire time." (Tr. at 35, L. 14-15).

[¶25] Officer Bolme did not take Ms. Bullinger to Medcenter One, but instead took her to St. Alexius where her blood was "drawn by a nurse" – a co-worker of Ms. Bullinger. (Tr. at 15, L. 15-16). Officer Lindelow testified that it is "[a]pproximately half a mile" from Medcenter One to St. Alexius Hospital and that it is only "a few minutes ride" – "less than 5 minutes." (Tr. at 29, L. 1-10).

[¶26] STANDARD OF REVIEW

[¶27] "In reviewing a district court's decision on a motion to suppress evidence," this Court will "defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance." *See State v. Graf*, 2006 ND 196, ¶7, 721 N.W.2d 381. This Court "will affirm a district court's decision on a motion to suppress 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." *See id*. "Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law." *See State v. Salter*, 2008 ND 230, ¶5, 758 N.W.2d 702

[¶28] LAW AND ARGUMENT

I. After two breath tests came back invalid, Ms. Bullinger thereafter withdrew her implied consent to provide a blood sample and affirmatively refused the St. Alexius blood test; because she withdrew her consent no chemical test should have been given pursuant to N.D.C.C. § 39-20-04; since the test was performed under compulsion, it was performed in an unreasonable manner

[¶29] Both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution "prohibit unreasonable searches and

seizures" and "[t]he guiding principle behind these prohibitions is to safeguard personal privacy and dignity against unwarranted intrusions by the State." *See State v. Phelps*, 286 N.W.2d 472, 474 (N.D. 1979). "The extraction of … blood to determine … blood alcohol concentration is a search within the meaning of the Fourth Amendment." *See State v. Kimball*, 361 N.W.2d 601, 604 (N.D. 1985) (citing *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)).

[¶30] In *Schmerber v. California*, the United States Supreme Court was confronted with the question of "whether the means and procedures employed in taking [Schmerber's] blood respected relevant Fourth Amendment standards of reasonableness" when the blood was extracted from Schmerber over his refusal to submit to the blood draw. *See Schmerber*, 384 U.S. 757, 768 (1966). The *Schmerber* court determined that the extraction of blood was permissible, given the "special facts" of *Schmerber*, regardless of the driver's consent, where he had been taken to a hospital for medical treatment and it was deemed necessary to "secure evidence of blood-alcohol content." *See id* at 770-71. Essentially, the *Schmerber* court indicated that consent doesn't matter and that the driver does not have the right to refuse the blood-alcohol test.

[¶31] In response, the North Dakota "Legislature has in effect modified the Schmerber holding by enacting an implied-consent statute that grants drivers in this State the right to refuse to submit to blood-alcohol tests." *See State v. Mertz*, 362 N.W.2d 410, 413 (N.D. 1985). Under North Dakota's modification of *Schmerber*, if the driver refuses the blood draw as requested by the officer, then under N.D.C.C. § 39-20-04 the government cannot perform a search of the driver's person to extract blood. "[O]ur Legislature in enacting Section 39-20-04 specified that if a "person refuses to submit to

testing under section 39-20-01 or 39-20-14, none shall be given." *See State v. Solberg*, 381 N.W.2d 197, 198 (N.D. 1986).

[¶32] 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 may not be tested against his will, and the Legislature has provided a procedure in N.D.C.C. § 39-20-04 for drivers to refuse testing." *See Grosgebauer v. N.D. Dept of Transportation*, 2008 ND 75, ¶8, 747 N.W.2d 510. "The statutory right to refuse testing exists to avoid violent confrontations between drivers and police officers." *See id*.

[¶33] "If the statutory requirements have been complied with, a person's consent to the chemical testing is implied and the person must affirmatively refuse to submit to the testing in order to withdraw the consent." *See State v. Salter*, 2008 ND 230, ¶7, 758 N.W.2d 702. "If the person affirmatively refuses to submit to testing under N.D.C.C. § 39-20-01, the test may not be administered." *See id*.

[¶34] In the case at hand, although it is unclear whether Ms. Bullinger consented to the blood draw in the intoxilyzer room, she subsequently refused blood testing upon learning that Officer Bolme wanted to take her to St. Alexius, her place of employment. Ms. Bullinger told Officer Bolme she "would provide a sample at Medcenter One," but that she "would not supply a sample at St. Alexius." (Tr. at 34, L. 8-12). This is the sort of affirmative refusal necessary to withdraw one's implied consent to testing.

[¶35] After Ms. Bullinger refused, Officer Bolme responded: "the next step is to get a blood test and we're doing that at St. Alexius." (Tr. at 34, L. 13-17). Therefore, after Ms. Bullinger withdrew her implied consent and affirmatively refused testing, "[t]he officer did not ask for [Bullinger's] consent; he made a statement of authority." *See State*

v. Mitzel, 2004 ND 157, ¶16, 685 N.W.2d 120. Accordingly, Ms. Bullinger felt compelled to submit to a blood draw.

[¶36] The fact that Ms. Bullinger did not fight and struggle with officers on the way to the hospital or during the blood draw after she affirmatively refused the chemical test is of no moment in the consent calculus. "[T]o sustain a finding of consent, the State must 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 State v. Avila*, 1997 ND 142, ¶17, 566 N.W.2d 410. "Mere acquiescence to police authority is insufficient to show consent." *See Mitzel*, 2004 ND 157 at ¶16.

[¶37] Ms. Bullinger's acquiescence to police authority, after affirmatively refusing, does not establish consent. Consent "must be definitive." *State v. Brockel*, 2008 ND 50, ¶11, 746 N.W.2d 423. The City had the burden to show affirmative conduct by Ms. Bullinger, after her affirmative refusal, that is consistent with the giving of consent. The City did not meet its burden.

[¶38] Because Ms. Bullinger told Officer Bolme that she would not supply a blood test at St. Alexius, no blood test should have been given pursuant to N.D.C.C. § 39-20-04. By operation of law then (N.D.C.C. § 39-20-04), Ms. Bullinger's blood test result should be suppressed and deemed not admissible. "[I]f a person refuses to submit to a blood alcohol test, but such a test is nevertheless conducted, the tests results are not admissible … because of the operation of NDCC § 39-20-04." *See State v. Kimball*, 361 N.W.2d 601, 604 at fn.4 (N.D. 1985).

[¶39] "[C]ompulsory administration of a blood test … plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment" and the right of people to be free from unreasonable searches and seizures. *See Schmerber v. California*, 384 U.S. at 767. Accordingly, the administration of a blood test must be reasonable. "[A] warrantless blood test, performed without consent, is presumptively unreasonable." *See Marshall v. Columbia Lea Regional Hosp*., 345 F.3d 1157, 1172 (10th Cir. 2003).

[¶40] Bismarck police, who had two invalid breath tests, were feeling crunched for time to acquire a valid test because they "were aware at that point there was somewhat more than a half hour left in the two-hour time period" to have a chemical test performed. (Tr. at 24, L. 12-14). That's why Officer Bolme "made the decision to have [Ms. Bullinger] transported to the hospital for a blood test." (Tr. at 24, L. 15-17). Their haste and desperation to obtain a valid chemical test caused Bismarck police to compel a blood test from Ms. Bullinger.

[¶41] When a person submits to a blood test "only after the police officer rejected his objection" and refusal of the test and the officer then directs a medical professional to proceed with the extraction of blood, "[t]he officer's direction to the [medical professional] to administer the test over petitioner's objection constitute[s] compulsion." *See Schmerber v. California*, 384 U.S. 757, 761 (1966). In our case, Officer Bolme rejected Ms. Bullinger's refusal of the blood test and thereafter directed a medical professional to administer the blood test over Ms. Bullinger's objection. This constitutes compulsion. Therefore, Ms. Bullinger's blood sample was obtained under compulsion

and in the face of her affirmative refusal to provide a blood sample at St. Alexius hospital.

[¶42] The compelled manner of the blood draw in this case was an unreasonable search for blood, in contravention of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. Because the search for blood violated both state and federal constitutions, the blood draw was unlawful and the result of the compelled chemical test should be suppressed.

[¶43] Additionally, "[i]t is axiomatic our state constitution may provide greater protections than its federal counterpart." *See State v. Herrick*, 1999 ND 1, ¶22, 588 N.W.2d 847. Ms. Bullinger argues that Article 1, Section 8, of the North Dakota Constitution provides greater protection than does the Fourth Amendment to the United States Constitution. In modifying *Schmerber* by passage of N.D.C.C. § 39-20-04, North Dakota's legislative assembly barred intrusion for search upon a driver's refusal to submit to blood testing. This legislative modification and limitation of the government's right to search, evidences that the intent of the people of North Dakota and their belief of the intent of the North Dakota Constitution was to place a heightened premium on privacy and dignity with respect to a compelled blood draw as compared to the federal constitution. "The North Dakota Legislative Assembly has provided greater protections in" other areas of "the Fourth Amendment." *See Herrick*, 1999 ND 1 at ¶8.

[¶44] "The integrity of an individual's person is a cherished value of our society." *See Schmerber v. California*, 384 U.S. 757, 772 (1966). "In light of our society's concern for the security of one's person, …it is obvious that this physical intrusion, penetrating

beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." *See Skinner v. Railway Lab. Execs. Ass'n*, 489 U.S. 602, 616 (1989). Here, the blood draw infringed upon Ms. Bullinger's reasonable expectation of privacy as it was a physical intrusion that was performed under compulsion and therefore was not done in a reasonable manner.

[¶45] Accordingly, Ms. Bullinger asks this Court to reverse and Order suppression of the blood test result because exclusion is mandated by operation of N.D.C.C. § 39-20-04. Ms. Bullinger also asks this Court for suppression because the search for blood was performed under compulsion and in an unreasonable manner.

[¶46] CONCLUSION

[¶47] For the foregoing reasons, Ms. Bullinger respectfully requests that this Court vacate the Criminal Judgment in this matter, reverse the district court's denial of her Motion to Suppress Evidence, remand to the district court for withdrawal of Ms. Bullinger's conditional guilty plea, and order the suppression of her blood test result.

Respectfully submitted
this 25th day of November, 2009.

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