IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joseph P. Herrman, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee.	**Supreme Ct. No. 20130338** **District Ct. No. 45-2013-CV-00560**

APPEAL FROM THE DISTRICT COURT
STARK COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE WILLIAM HERAUF

BRIEF OF APPELLEE

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II. Whether North Dakota's implied consent laws represent a valid exception to the Fourth Amendment's search warrant requirement and/or impose a coerced or unconstitutional condition on drivers in exchange for receiving driving privileges.

III. Whether Herrman was denied his statutory right to consult with an attorney before deciding whether to submit to the chemical test.

STATEMENT OF CASE

Stark County Deputy Sheriff Shane Holtz ("Deputy Holtz") arrested Joseph P. Herrman ("Herrman") on May 30, 2013, for the offense of driving a vehicle while under the influence of intoxicating liquor. Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Herrman's driving privileges for a period of one year. (Appellant's Appendix ("Appellant's App.") 17-21.)

STATEMENT OF FACTS

On May 30, 2013, at approximately 8:13 p.m., Deputy Holtz stopped a vehicle that was being driven by Herrman after he observed it "having a tough time maintaining its lane" and cross the center line. (Tr. 7, ll. 17-21; 10, l. 6 – 14, l. 3; 41, ll. 15-19.) Deputy Holtz testified that based on his observations:

> I felt I already had enough articulable suspicion to believe he was under the influence, just how he was maintain [sic] his lane from where I saw it, over that sweeping curve being over the dotted line. But after crossing the double white line I didn't need the suspicion anymore, I had probable cause from a traffic violation to pull him over at that time.

(Id. at 14, ll. 1-9.)

While speaking with Herrman, Deputy Holtz "could smell the odor of alcohol beverage emitting from him" and "observed he had watery bloodshot eyes." (Id. at 16, ll. 2-5.) Deputy Holtz "asked [Herrman] if he could step out of the vehicle so I could do some tests to make sure he was safe to drive." (Id. at 16, ll. 14-18.) Upon exiting his vehicle "[H]errman seemed to have a hard time balancing" and "[h]e was wobbly and just struggling to balance as he was walking." (Id. at 17, ll. 4-9.) Herrman admitted "he had four beers while he was in Glenn Ullin." (Id. at 18, ll. 4-11.)

Deputy Holtz attempted to administer the horizontal gaze nystagmus test, the walk-and-turn test, and the one-legged stand test. (Id. at 18, l. 24 – 19, l. 3.) Herrman displayed six clues on the HGN test and failed the test indicating to Deputy Holtz that Herrman "ha[d] an alcohol concentration of more than .08 percent." (Id. at 24, ll. 12-25.) Due to Herrman's inability to maintain his balance, Deputy Holtz stopped his administration of the walk-and-turn test and the one-legged stand test. (Id. at 26, l. 3 – 28, l. 23.) Deputy Holtz testified that with the one-legged stand test, "[he] applied all four clues because he couldn't complete it." (Id. at 28, l. 24 – 29, l. 5.)

Deputy Holtz informed Herrman of the implied consent advisory and requested he submit to the Intoximeter Alco-Sensor FST onsite screening test.

(Id. at 29, ll. 6-10.) Herrman produced a result of .196 on the screening test. (Id. at 31, ll. 12-17.)

Deputy Holtz placed Herrman under arrest at 8:21 p.m., for "driving with an alcohol concentration of .08 or greater" and transported him to the Stark County Law Enforcement Center (Id. at 31, ll. 18-20; 33, ll. 3-8; 41, l. 20 – 42, l. 1; 43, l. 8, 17-18.) Deputy Holtz testified that at the Law Enforcement Center he "walked [Herrman] over to the interview room" where "[he] explained to him there's a phone and phone book, if he needs to make any calls, call his attorney, or call whoever he wanted to." (Id. at 34, ll. 5-8.) Deputy Holtz explained Herrman was having difficulties using the phone "[s]o I showed him [the sticker on the phone to first dial nine] and he pushed nine and then he was able to get through, he contacted to [sic] his attorney." (Id. at 35, ll. 4-11.)

Deputy Holtz testified "it appeared he was done with his phone call so I went back to the interview room to verify that he had contacted his attorney. And he said he had." (Id. at 35, ll. 17-20.) Deputy Holtz explained that after Herrman had spoken to his attorney and before he requested Herrman submit to the Intoxilyzer test, he informed Herrman of the implied consent advisory. (Id. at 35, l. 23 – 36, l. 15.) Deputy Holtz testified "I remember him saying he's waiting for his attorney to call back. . . . I said, I need to know if ... basically people ... try to get past that two hour point?" (Id. at 50, ll. 19-23.) Deputy Holtz stated "[Herrman] didn't know when he was going to be called back" by his attorney. (Id. at 51, ll. 9-13.)

Deputy Holtz stated he then "asked him if he was going to do the breath test? And he stated he wasn't going to do any more tests." (Id. at 35, ll. 20-22.) Deputy Holtz explained to Herrman 'if you don't submit to the test it's considered a refusal" to which Herrman stated "well, I'm not going to do any more tests." (Id. at 50, l. 24 – 51, l. 5.) Deputy Holtz explained that at that point "[he] was still within the two hours" for requesting a test. (Id. at 51, ll. 14-16.) Deputy Holtz then escorted Herrman to the jail before going to his patrol car to prepare the Report and Notice. (Id. at 36, l. 19 – 37, l. 4.)

Deputy Holtz further testified that as he "returned to dispatch" he was informed there was a call for him from Herrman's attorney – a "Mr. Murtha." (Id. at 46, ll. 2-23.) Deputy Holtz explained "they stated that I am speaking for my client and we will submit to a blood test with a warrant." (Id. at 46, ll. 24-25.) Deputy Holtz stated "[h]e said the only way we'd do a test is if you have a warrant." (Tr. 51, ll. 21-25.) Deputy Holtz testified "he referred to the fact that we, speaking for his client, will not submit to a test without a warrant." (Id. at 52, ll. 7-8.) Deputy Holtz advised the attorney "in a DUI it's considered exigent circumstances because our evidence is the alcohol content which diminishes over time, therefore, it's an exception to the warrant rule." (Id. at 47, ll. 9-13.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Herrman requested judicial review of the administrative decision by the Stark County District Court pursuant to N.D.C.C. § 39-20-06. (Appellant's App. 5-6.) On appeal, among other matters, Herrman alleged:

> [¶3] The Administrative Hearing Officer erred in the Conclusions of Law because the breath test taken by law enforcement

was a warrantless search and the department failed to establish an exception to the warrant requirement. . . . See N.D.C.C. § 28-32-46(1) and Missouri v. McNeely, ___ U.S. ___ (2013).

[¶4] The Administrative Hearing Officer erred in the Conclusions of Law because the unconstitutional conditions doctrine articulated in Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) applies to North Dakota's implied consent law making it unconstitutional when a test is sought without a valid search warrant. . . .

. . .

[¶6] The Administrative Hearing Officer erred in the Conclusions of Law because Mr. Herrman was denied his qualified statutory right to consult with an attorney before deciding whether to submit to testing.

(Id.)

Judge William Herauf issued a Memorandum Opinion on August 20, 2013, in which he affirmed the hearing officer's decision. (Id. at 7-16.) Judge Herauf ruled "[t]his Court does not find Appellant's reliance on Missouri v. McNeely, 133 S.Ct. 155[2] (2013) and Frost v. RR Comm'n of Cal., 271 U.S. 583 (1926) pervasive." (Id. at 13-16.)

Judge Herauf ruled:

[¶15] . . . Supreme Court Justice Sotomayor addressed implied consent laws specifically in the McNeely opinion as follows:

> As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow

> the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.
>
> Missouri v. McNeely, 133 S.Ct. 1551, 1566 (U.S. 2013). The above comment was made in the Court's analysis as it weighed the necessity of a per se exigency rule. The Court's inclusion of this statement suggests the fact that States have implied consent laws and other mechanisms in place is one of the reasons a per se exigency rule was not necessary. As such, Appellant's argument that the McNeely decision renders North Dakota's Implied Consent Advisory unconstitutional is not persuasive.
> . . .
>
> [¶17] The Frost case describes the limitations on states to impose conditions on constitutionally protected rights. . . . Here, the privilege to a driver's license is not essential to one's constitutional right to be free from warrantless searches. Thus, Appellant's reliance on Frost is not persuasive.

(Id. at 13-16.) Judge Herauf did not address Herrman's argument that he was denied his qualified statutory right to consult with an attorney before deciding whether to submit to testing.

Judgment was entered on August 27, 2013. (Id. at 18-19.) Herrman appealed the Judgment to the North Dakota Supreme Court. (Id. at 21.) On appeal, the Department requests this Court affirm the Judgment of the Stark County District Court and the Department's decision revoking Herrman's driving privileges for a period of one year.

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. The Court reviews "the agency's findings and decisions, and not those of the district court, though the district court's analysis is entitled to respect if its reasoning is sound." Hawes v. N.D. Dep't of Transp., 2007 ND 177, ¶ 13, 741 N.W.2d 202.

Section 28-32-46, N.D.C.C., provides 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.

N.D.C.C. § 28-32-46.

"When reviewing the agency's factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that [of the] 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, at ¶ 5. "When an 'appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency's order unless it finds the agency's order is not in accordance with the law.'" Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646 N.W.2d 704). The "interpretation of a statute is a question of law fully reviewable on appeal." State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

LAW AND ARGUMENT

I. Deputy Holtz had probable cause to arrest Herrman even without the need for consideration of the onsite screening test rendering it unnecessary to decide Herrman's Fourth Amendment arguments with respect to N.D.C.C. § 39-20-14.

"'Questions, the answers to which are not necessary to the determination of an appeal, need not be considered.'" State v. Waters, 542 N.W.2d 742, 745 (N.D. 1996) (quoting City of Fargo v. Ness, 529 N.W.2d 572, 577 (N.D. 1995)). "What is more, courts should 'refrain from deciding constitutional questions if they can decide a dispute on other grounds.'" Id. (quoting Little v. Graff, 507 N.W.2d 55, 59 (N.D. 1993)).

Herrman alleges the result of his onsite screening test was the product of an unconstitutional warrantless search and, therefore, "the result of that test should have been suppressed." Appellant's Br. ¶ 18. "Absent an exception to the warrant requirement, the exclusionary rule requires suppression of evidence obtained in violation of the Fourth Amendment's protections against warrantless searches or seizures." State v. Nickel, 2013 ND 155, ¶ 22, 836 N.W.2d 405.

Because Deputy Holtz had probable cause to arrest Herrman even without the need for consideration of the onsite screening test, it is unnecessary to decide Herrman's Fourth Amendment arguments with respect N.D.C.C. § 39-20-14.

"An arrest is a seizure and must be supported by probable cause." City of Jamestown v. Jerome, 2002 ND 34, ¶ 5, 639 N.W.2d 478. "Probable cause to arrest a driver for driving under the influence exists if the police officer (1) observes some signs of physical or mental impairment, and (2) has reason to believe the driver's impairment is caused by alcohol." Sayler v. N.D. Dep't of Transp., 2007 ND 165, ¶ 19, 740 N.W.2d 94. "Both elements - impairment and indication of alcohol consumption - are necessary to establish probable cause to arrest for driving under the influence." Moran v. N.D. Dep't of Transp., 543 N.W.2d 767, 770 (N.D. 1996).

"[P]robable cause exists when the facts and circumstances within a police officer's knowledge and of which he had reasonable trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." Zietz v. Hjelle, 395 N.W.2d 572, 574 (N.D. 1986). "When determining whether probable cause exists to arrest . . . the officer need not possess knowledge or facts sufficient to establish guilt." Moran, 543 N.W.2d at 770. "'The validity of the arrest does not depend on whether the suspect actually committed a crime. . . .'" State v. Smith, 452 N.W.2d 86, 88 (N.D. 1990) (quoting Mich. v. DeFillippo, 433 U.S. 31, 36 (1979)). "A valid arrest based upon then-existing probable cause is not vitiated if the suspect is later found innocent." Criss v. City of Kent, 867 F.2d 259, 262 (6th Cir. 1988).

"Probable cause must be more than a mere suspicion but need not be the same standard of certainty necessary to convict a defendant." State v. Lind, 322 N.W.2d 826, 834 (N.D. 1982). "'[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists.'" State v. Doohen, 2006 ND 239, ¶ 11, 724 N.W.2d 158 (quoting Ornelas v. U.S., 517 U.S. 690, 700 (1996)).

"In making a determination of probable cause each case must turn on the particular facts and circumstances apparent to the officer involved at the time of the arrest." Vogel v. Dir., N.D. Dep't of Transp., 462 N.W.2d 129, 131 (N.D. 1990) (citing Witte v. Hjelle, 234 N.W.2d 16, 20 (N.D. 1975)). "When making a probable cause determination, [the Court] consider[s] the totality of the circumstances." Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 17, 663 N.W.2d 161. While none of the relevant facts may be sufficient, standing alone, the court looks at the sufficiency of their cumulative effect. Moran, 543 N.W.2d at 770. As with the reasonable suspicion standard for stops, the probable standard for an arrest "does not require an officer to rule out every possible innocent excuse for the behavior in question." State v. Decoteau, 2004 ND 139, ¶ 14, 681 N.W.2d 803. See also State v. Maxwell, 624 A.2d 926, 930 (Del. 1993) ("The possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest.").

"Detection of the odor of alcohol, observation of signs of impairment, and failure of field sobriety tests are relevant factors in determining probable cause to

arrest a driver for driving under the influence of alcohol." City of Devils Lake v. Grove, 2008 ND 155, ¶ 11, 755 N.W.2d 485. A "police officer's detection of an alcohol odor and observation of glassy, red, watery, and bloodshot eyes [are] relevant factors." Baer v. Dir., N.D. Dep't of Transp., 1997 ND 222, ¶ 12, 571 N.W.2d 829. See also State v. Kier, 678 N.W.2d 672, 678 (Minn. Ct. App. 2004) ("Common indicia of intoxication include an odor of alcohol, bloodshot and watery eyes, slurred speech, and an uncooperative attitude.").

The absence of field sobriety tests does not "fatally flaw the probable cause determination." City of Missoula v. Forest, 769 P.2d 699, 701 (Mont. 1989). See Seela v. Moore, 1999 ND 243, ¶ 10, 603 N.W.2d 480 ("Although more sophisticated screening or field sobriety tests, which Kadrmas was not certified to administer, were given by Dellwo, the results of those tests are not necessary to establish probable cause to arrest for driving while under the influence.).

The North Dakota Supreme Court in State v. Salhus, 220 N.W.2d 852, 855 (N.D. 1974), found probable cause existed based upon the following observations even without consideration of the screening tests: "[f]ailed to stop when the arresting officer was following him with his red light blinking; [s]taggered when he got out of the truck; [s]teadied himself by putting his hand on the truck after he got out; and [h]ad difficulty finding his driver's license."

In this case, Deputy Holtz stopped the vehicle that was being driven by Herrman after he observed it having difficulty maintaining its lane of traffic and cross the center line. While speaking with him, Deputy Holtz detected the odor of

alcohol beverage coming from Herrman and observed Herrman had watery and bloodshot eyes. Deputy Holtz observed that Herrman had a difficult time maintaining his balance while walking. Herrman admitted he had consumed four beers. Herrman displayed six clues on the HGN test and failed the test. Due to Herrman's inability to maintain his balance, Deputy Holtz stopped his administration of the walk-and-turn test and the one-legged stand test. Herrman produced a result of .196 on the onsite screening test.

In closing argument, Herrman did not allege Deputy Holtz lacked probable cause to arrest him. Instead, Herrman claimed:

> . . . Whatever dispute we have over field sobriety tests and the age of Mr. Herrman, bottom line is Mr. Herrman was asked to take a field sobriety test. . . . Law Enforcement obtained that test from the field sobriety test, the FST, portable breath test we're talking about. Did not have a warrant and invoked the implied consent advisory to obtain it.

(Tr. 59, ll. 2-10.) Herrman also did not challenge the hearing officer's probable cause determination on appeal to the district court.

Even without the need for consideration of the onsite screening test, sufficient indicia of intoxication existed for Deputy Holtz to arrest Herrman for the offense of driving a vehicle while under the influence of intoxicating liquor. Herrman's inability to maintain his lane of traffic while driving, his inability to maintain his balance while walking, and his failure of the HGN test were undeniable signs of his physical and/or mental impairment. The odor of alcohol coming from Herrman, his watery and bloodshot eyes, and his admission to having consumed alcohol lead to the reasonable conclusion that, absent any

other logical explanation, Herrman's impairment was caused by his alcohol consumption.

Deputy Holtz had probable cause to arrest Herrman even without the need for consideration of the onsite screening test rendering it unnecessary to decide Herrman's Fourth Amendment arguments with respect to N.D.C.C. § 39-20-14.

II. North Dakota's implied consent laws represent a valid exception to the Fourth Amendment's search warrant requirement and do not impose a coerced or unconstitutional condition on drivers in exchange for receiving driving privileges.

"Unreasonable search and seizures are prohibited by the Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and by Article I, § 8 of the North Dakota Constitution." Fasteen, at ¶ 6. "When a search or seizure is within the protection of the Fourth Amendment, a warrant generally must be obtained." State v. Huber, 2011 ND 23, ¶ 12, 793 N.W.2d 781. "Searches and seizures without a warrant are not unreasonable under the Fourth Amendment if the government can show the search or seizure falls under one of the well-delineated exceptions to the search warrant requirement." State v. Matthews, 2003 ND 108, ¶ 10, 665 N.W.2d 28.

"Consent and exigent circumstances are exceptions to the warrant requirement." Hoover v. Dir., N.D. Dep't of Transp., 2008 ND 87, ¶ 15, 748 N.W.2d 730. Section 39-20-01, N.D.C.C., as in effect on the date of Herrman's arrest on May 30, 2013, provided for the consent to the chemical test, as follows

> Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state is deemed to have given consent, and

> shall consent . . . to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine. . . . The law enforcement officer shall also inform the individual charged that refusal of the individual to submit to the test determined appropriate will result in a revocation for up to four years of the individual's driving privileges.

N.D.C.C. § 39-20-01 (2011). Section 39-20-14 provided for the consent to the onsite screening test as follows:

> Any individual who operates a motor vehicle upon the public highways of this state is deemed to have given consent to submit to an onsite screening test or tests of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath . . . . The officer shall inform the individual that refusal of the individual to submit to a screening test will result in a revocation for up to four years of that individual's driving privileges.

N.D.C.C. § 39-20-14 (2011).

The Supreme Court has held that "[t]he essence of our implied consent laws is that the driver of a vehicle in North Dakota is deemed to have consented to submit to a chemical test if arrested for driving, or being in actual physical control while intoxicated." State v. Murphy, 516 N.W.2d 285, 287 (N.D. 1994). "The fact that North Dakota drivers are able to refuse testing is a matter of legislative grace." Id.; see also Grosgebauer v. N.D. Dep't of Transp., 2008 ND 75, ¶ 11, 747 N.W.2d 510 ("Section 39-20-01, N.D.C.C., establishes that consent to testing is presumed. This presumption is tempered by legislative grace allowing a driver to opt out of testing.").

"There is no Federal constitutional right to be entirely free of intoxication tests." Murphy, 516 N.W.2d at 286, n. 1 (citing Schmerber v. Cal., 384 U.S. 757 (1966), for the proposition that "blood test taken against defendant's will did not

violate due process under the Fourteenth Amendment, right against self-incrimination under Fifth Amendment, right to counsel under Sixth Amendment, and right from unlawful search and seizures under Fourth Amendment"). See also N.D. Dep't of Transp. v. DuPaul, 487 N.W.2d 593, 598 (N.D. 1992) (although license is "important privilege," it is not "constitutionally guaranteed"); State v. Mische, 448 N.W.2d 412, 413 (N.D. 1989) ("It is well established that individuals do not have a natural right to drive a motor vehicle on a public highway ...."); State v. Larson, 419 N.W.2d 897, 898 (N.D. 1988) (driver's license not unconstitutional "title of nobility"); State v. Kouba, 319 N.W.2d 161, 163 (N.D. 1982) (driving is "a privilege which a person enjoys subject to the control of the State in its valid exercise of its police power").

Implied consent laws such as sections 39-20-01 and 39-20-14 represent exceptions to the Fourth Amendment's warrant requirement. See, e.g., State v. Geiss, 70 So.3d 642, 647 (Fla. Ct. App. 2011) ("Florida cases have held that the implied consent statute imposes greater restrictions on obtaining blood samples without a warrant than federal and state constitutional search and seizure protections."); State v. Madison, 785 N.W.2d 706, 708 (Iowa 2010) ("A driver's consent under Iowa's implied-consent procedure is analyzed using the 'voluntary consent' exception to the warrant requirement of the Fourth Amendment."); State v. Aleman, 109 P.3d 571, 575 (Ariz. Ct. App. 2005) ("Under Arizona law, absent express consent, police may obtain a DUI suspect's blood sample only pursuant to a valid search warrant, Arizona's implied consent law or the medical blood draw exception.") (internal citation omitted). Consent obtained under implied

consent laws eliminates the need for the State to establish exigent circumstances. See State v. Johnson, 301 P.3d 287, 298 (Kan. 2013) ("[H]aving established the recognized warrantless search exception of consent, the State was not required to also establish probable cause plus exigent circumstances.").

On appeal, Herrman abandons his prior reliance before the district court on the United States Supreme Court's decision in Mo. v. McNeely, ___ U.S. ___, 133 S.Ct. 1552 (2013). (Appellant's App. 5.) In McNeely, "[r]eading from a standard implied consent form, the officer explained to McNeely that under state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution." Id. at 1557. After McNeely refused the test, "[t]he officer then directed a hospital lab technician to take a blood sample." Id. The Supreme Court rejected the position that "the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." Id. at 1556.

The Supreme Court expressly recognized the continued viability of implied consent laws as a recognized exception to the warrant requirement in the absence of demonstrated exigent circumstances. The Supreme Court stated:

> As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws

> consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

Id. at 1566 (internal citations omitted).

Herrman further argues his consent was not voluntarily given because he was coerced into giving consent by the reading of the implied consent advisory. Appellant's Br. ¶¶ 20-21. In State v. Brooks, 838 N.W.2d 563, 571 (Minn. 2013), the Minnesota Supreme Court addressed the impact of McNeely on whether the defendant's consent under Minnesota's implied consent law to blood and urine tests following arrests for driving while impaired was free and voluntarily given.

"Brooks argue[d] that he did not truly have a choice of whether to submit to the tests because police told him that if he did not do so, he would be committing a crime, and he contends that the fact that police advised him that it is a crime to refuse the chemical tests renders any consent illegally coerced." Id. at 570. The Minnesota Supreme Court, however, disagreed stating:

> The Supreme Court and our court have addressed the issue of coercion within the context of implied consent statutes. In South Dakota v. Neville, 459 U.S. 553, 564 (1983), the Supreme Court held that a driver is not coerced into testifying against himself in violation of the Fifth Amendment when the State introduces his refusal to submit to chemical tests into evidence in a criminal trial for driving under the influence. The Court concluded that "the State did not directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing." While the "choice to submit or refuse to take" the test may be a "difficult" one, the Court held that the decision was "not an act coerced by the officer." We followed the analysis in Neville when we held that Minnesota's implied consent law, even though it makes it

> a crime to refuse testing, also does not coerce a driver into testifying against himself.

Id. at 570-71 (internal citations omitted). The court ruled "a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." Id.

As with Herrman, Brooks also claimed the United States Supreme Court's decision in Bumper v. N.C., 391 U.S. 543 (1968), required the conclusion that he did not consent to the search. Id. at 571. In responding to the argument, the Minnesota Supreme Court stated:

> Unlike Bumper, the Minnesota Legislature has given those who drive on Minnesota roads a right to refuse the chemical test. If a driver refuses the test, the police are required to honor that refusal and not perform the test. Although refusing the test comes with criminal penalties in Minnesota, the Supreme Court has made clear that while the choice to submit or refuse to take a chemical test "will not be an easy or pleasant one for a suspect to make," the criminal process "often requires suspects and defendants to make difficult choices." Bumper therefore does not support Brooks's argument that the State unlawfully coerced his consent.

Id. (internal citations omitted).

Relying on the United States Supreme Court's decision in Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583 (1926), Herrman next alleges that North Dakota's implied consent laws impose an unconstitutional condition by requiring drivers surrender the right to be free from unreasonable searches in exchange for receiving driving privileges. Appellant's Br. ¶¶ 26-29. In Frost, the Supreme Court stated that the government may not grant a privilege on condition that the recipient forfeits a constitutional right:

> [A]s a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to

> impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Id. at 593-94.

"[T]o invoke this 'unconstitutional conditions' doctrine, [a party] must first show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their [constitutional] rights." Council of Indep. Tobacco Mfrs. of Am. v. State, 713 N.W.2d 300, 306 (Minn. 2006). Because Herrman failed to demonstrate an unconstitutional search, the Supreme Court does not need to analyze Herrman's argument under the unconstitutional conditions doctrine.

Neither Bumper nor Frost support Herrman's arguments that Deputy Holtz's requests he submit to either the onsite screening test or the Intoxilyzer test were warrantless, coerced, or otherwise unconstitutional searches. North Dakota's implied consent laws represent valid exceptions to the Fourth Amendment's search warrant requirement and do not impose a coerced or unconstitutional condition on drivers in exchange for receiving driving privileges.

III. Herrman was not denied his statutory right to consult with an attorney before deciding whether to submit to the chemical test.

"[A] person arrested for driving under the influence of intoxicating liquor has a qualified statutory right to consult with an attorney before deciding whether to submit to a chemical test." Baillie v. Moore, 522 N.W.2d 748, 750 (N.D. 1994) (citing Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 290 (N.D. 1987)). The "right of an arrested person to have a reasonable opportunity to consult with an

attorney before taking a chemical test is a statutory right based on N.D.C.C. § 29-05-20." City of Mandan v. Leno, 2000 ND 184, ¶ 9, 618 N.W.2d 161 (citing Kuntz, 405 N.W.2d at 287).

"[I]f an arrested person asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test." Kuntz, 405 N.W.2d at 290. "If he is not given a reasonable opportunity to do so under the circumstances, his failure to take the test is not a refusal upon which to revoke his license under Chapter 39-20, N.D.C.C." Id.

"There are no bright line rules for determining whether a 'reasonable opportunity' to consult with an attorney has been afforded; rather, the determination of whether a reasonable opportunity has been provided turns on an objective review of the totality of the circumstances." Lies v. Dir., N.D. Dep't of Transp., 2008 ND 30, ¶ 10, 744 N.W.2d 783 (citing State v. Pace, 2006 ND 98, ¶¶ 6-7, 713 N.W.2d 535). "Whether a person has been afforded a reasonable opportunity to consult with an attorney is a mixed question of law and fact." Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 10, 622 N.W.2d 180 (citing Groe v. Comm'r of Pub. Safety, 615 N.W.2d 837, 841 (Minn. Ct. App. 2000)). The North Dakota Supreme Court "review[s] mixed questions of law and fact under the de novo standard of review." Id. (citing State v. Torgerson, 2000 ND 105, ¶ 3, 611 N.W.2d 182).

In this case, the evidence established that Herrman spoke to his attorney before deciding whether to submit to the chemical test. Deputy Holtz explained

Herrman was having difficulties using the phone "[s]o I showed him [the sticker on the phone to first dial nine] and he pushed nine and then he was able to get through, he contacted to [sic] his attorney." (Tr. 35, ll. 4-11.) Deputy Holtz testified "it appeared he was done with his phone call so I went back to the interview room to verify that he had contacted his attorney. And he said he had." (Id. at 35, ll. 17-20.)

Herrman did not testify at the hearing that he did not speak to his attorney before deciding whether to submit to the chemical test nor does he make that argument on appeal leading to the reasonable inference that he was able to contact his attorney. See Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986) ("[f]ailure of a party to testify permits an unfavorable inference in a civil proceeding" and "the hearing officer could also consider the lack of contrary evidence"). Instead, Herrman alleges "[he] should have been allowed to wait a reasonable amount of time for his attorney to call him back for the consultation or have been allowed to contact another attorney." Appellant's Br. ¶ 36.

With respect to the latter issue, there was no evidence presented that Herrman wanted to consult another attorney. The law does not provide for multiple opportunities to consult an attorney after one has been contacted. Furthermore, the evidence does not support Herrman's claim his attorney intended to call him back "for the consultation." In fact, the attorney never requested he be allowed to speak with Herrman when he contacted the law enforcement center. Instead, the evidence establishes the attorney intended to

inform Deputy Holtz that "speaking for his client, [Herrman] will not submit to a test without a warrant." (Id. at 52, ll. 7-8.)

In light of the facts that Herrman was afforded the right to consult an attorney. Herrman was not denied his statutory right to consult with an attorney before deciding whether to submit to the chemical test.

CONCLUSION

The Department respectfully requests this Court affirm the judgment of the Stark County District Court and the Department's decision revoking Joseph P. Herrman's driving privileges for a period of one year.

Dated this 6th day of January, 2014.

State of North Dakota
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joseph P. Herrman, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee.	**Supreme Ct. No. 20130338** **District Ct. No. 45-2013-CV-00560** **AFFIDAVIT OF SERVICE BY MAIL**

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

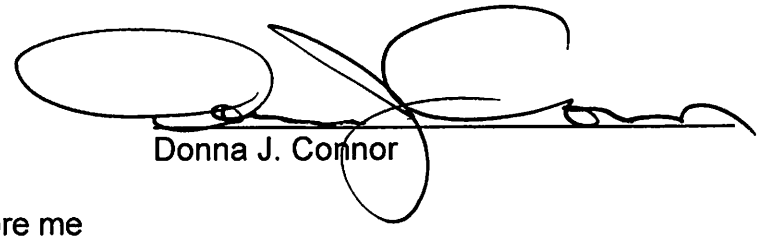
Donna J. Connor states under oath as follows:

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 6th day of January, 2014, I served the attached **BRIEF OF APPELLEE** upon the appellant by placing a true and correct copy thereof in an envelope addressed as follows:

Thomas F. Murtha, IV
Attorney at Law
P.O. Box 1111
Dickinson, ND 58602-1111

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



Donna J. Connor

Subscribed and sworn to before me
this 6th day of January, 2014.

Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2019