20130338
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 4, 2013
STATE OF NORTH DAKOTA

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 Court Case No. 20130338
District Court Case No. 45-2013-CV-00560

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE WILLIAM HERAUF, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

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[¶3] **JURISDICTIONAL STATEMENT**

[¶4] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI § 8, N.D.C.C. § 27-05-06(4) and N.D.C.C. § 39-20-06. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 28-27-01 and N.D.C.C. § 28-27-02. This appeal is timely under N.D.R.App.P. 4(a)(1).

[¶5] **STATEMENT OF THE ISSUES ON APPEAL**

I. Did the Administrative Hearing Officer err 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 and therefore, the Hearing Officer's decision violated Mr. Herrman's Constitutional rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the Constitution of the State of North Dakota? See N.D.C.C. § 28-32-24(3) and § 28-32-46(2).

II. Did the Administrative Hearing Officer err 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?

III. Did the Administrative Hearing Officer err 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?

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Joseph P. Herrman, appeals from the North Dakota Department of Transportation's June 21, 2013 decision revoking his North Dakota driving privileges for 1 year, and the District Court's August 20, 2013 Memorandum and August 27, 2013 Judgment affirming that decision. Appendix.

[¶8] The Appellant, Mr. Herrman, argues that the Department erred when it revoked his driving privileges based on the results of a warrantless search, his

refusal to submit to a warrantless search and the denial of his limited right to consult with an attorney.

[¶9] **STATEMENT OF THE FACTS**

[¶10] On May 30, 2013, law enforcement stopped the vehicle being driven by Mr. Herrman. Transcript page 7, line 17 -21, page 14, line 2 (T. 7:7-21; 14:2). Law enforcement invoked the implied consent advisory, asked Mr. Herrman to perform a breath test and Mr. Herrman provided an adequate sample. T. 29:7-12. Mr. Herrman was then arrested. T. 31:19-21. Mr. Herrman was transported to the law enforcement center. T. 33:4-8.

[¶11] At the law enforcement center Mr. Herrman was placed in a room, provided a telephone book, a phone and told he could call his attorney or whoever he wanted to. T. 34:5-13. Law enforcement observed Mr. Herrman use the phone to contact an attorney. T. 35:10-11. After observing Mr. Hermann contact his attorney law enforcement asked Mr. Hermann to take a breath test and Mr. Herrman said he was waiting for his attorney to call him back. T. 35:18-22; 49:3 to 50:20. Law enforcement told Mr. Herrman that if he did not submit to a test it is considered a refusal and Mr. Herrman indicated he was not going to do any more tests. T. 51:1-5. After placing Mr. Herrman with corrections but before issuing the report and notice the arresting officer received a call from an attorney for Mr. Herrman but did not allow Mr. Herrman to speak to the attorney. T. 46:2-20.

[¶12] **LAW AND ARGUMENT**

[¶13] **Standard of Review**

[¶14] "The [North Dakota Department of Transportation's] authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. Schaaf v. N.D. Dep't of Transp., 2009 ND 145, ¶ 9, 771 N.W.2d 237." Landsiedel v. Director Dept. of Transp., 2009 ND 196 ¶6, 774 N.W.2d 645, 647.

[¶15] "[R]eview of an administrative agency's suspension of a driver's license is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28–32." Richter v. N.D. Dep't of Transp., 2010 ND 150, ¶ 6, 786 N.W.2d 716.

[¶16] The North Dakota Supreme Court exercises

> limited review of the administrative revocation of driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 9, 622 N.W.2d 180. [The North Dakota Supreme Court's] standard of review is the same standard applied by the district court. N.D.C.C. § 28-32-49. [The court] must affirm the administrative agency's decision unless:
>
> 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.

Bell v. North Dakota Dep't of Transp., 2012 ND 102 ¶8, 816 N.W.2d 786.

[¶17] **Analysis**

I. The Administrative Hearing Officer erred in the Conclusions of Law because the breath test (onsite screening test) taken by law enforcement was a warrantless search and the department failed to establish an exception to the warrant requirement and therefore, the Hearing Officer's failure to exclude the result of that test violated the Mr. Herrman's constitutional rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the Constitution of the State of North Dakota.

[¶18] "[E]ver since Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), evidence obtained by search and seizure violative of the Fourth Amendment is, by virtue of the Due Process Clause of the Fourteenth Amendment, inadmissible in State courts. State v. Manning, 134 N.W.2d 91 (N.D. 1965)." State v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974). Because Mr. Herrman's breath test result was obtained without a warrant and in the absence of any valid exception to the warrant requirement of the Fourth Amendment to the United States Constitution or Article I Section 8 of the Constitution of the State of North Dakota the result of that test should have been suppressed. N.D.C.C. § 28-32-24(3).

[¶19] "[I]t is well-settled that administration of a breath test to determine alcohol consumption is a search. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); Burnett v.

Municipality of Anchorage, 806 F.2d 1447, 1449 (9th Cir.1986); Blank v. State, 3 P.3d 359, 366 (Alaska Ct.App. 2000); Blair v. Commonwealth, 115 Pa. Cmwlth. 293, 539 A.2d 958, 960 (1988); State v. Locke, 418 A.2d 843, 846-47 (R.I. 1980); 1 Wayne R. LaFave, Search and Seizure § 2.6(a) (1996)." City of Fargo v. Wonder, 2002 N.D. 142, ¶19, 651 N.W.2d 665, 670. Because the taking of a breath sample is a search, law enforcement must obtain a search warrant or meet an exception to the search warrant requirement. See Matthews.

[¶20] One of the exceptions to the warrant requirement is that the person consented to the search. State v. Swenningson, 297 N.W.2d 405 (N.D. 1974). The Fourth Amendment requires that consent to a search be voluntary. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Page, 277 N.W.2d 112 (N.D. 1979). To determine what constitutes "voluntary consent" the court considers the totality of the circumstances at the time that consent was given. State v. Metzner, 244 N.W.2d 215 (N.D. 1976). Consent must be the product of an essentially free and unconstrained choice; it cannot be the product of coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

[¶21] The facts of this case demonstrate that Mr. Herrman was coerced into giving his consent by the reading of the Implied Consent Advisory. Essentially, Mr. Herrman was allowed the privilege to drive in return for the surrender of his rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the North Dakota Constitution. Mr. Herrman was not presented a free

and unconstrained choice.

[¶22] Consent is voluntary if it is "the product of an essentially free and unconstrained choice by its maker, rather than the product of duress or coercion, express or implied." Schneckloth, 412 U.S. at 222. Consent is involuntary if it results from circumstances that overbear the consenting party's will and impairs his or her capacity for self-determination. Id. at 233.

[¶23] The State cannot prove consent simply by showing an individual acquiesced to a claim of lawful authority or submitted to a show of force. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Fourth Amendment consent does not lie where the police claim to have a right to the result. Bumper at 550. In Bumper, the police showed up at the defendant's home with a search warrant, and upon showing it to the defendant's grandmother, she consented to allow them to search the defendant's home. The Court in Bumper said:

> One is not held to have consented to the search of his premises where it is accomplished pursuant to an apparently valid search warrant. On the contrary, the legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant rather than an invitation to search.
>
> One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law …. The presentation of a search warrant to those in charge at the place to be searched, by one authorized to serve it, is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law. (Citations omitted).

Bumper at 549, fn. 14.

[¶24] Under these rules, the State has the burden to prove that consent was freely and voluntarily given. Bumper, 391 U.S. at 548. To do so, the State must prove that Mr. Herrman's performance of the test was not the product of submission to the officer's legal authority. Id. To make that determination, the court must examine the totality of circumstances that led to Mr. Herrman performing the test. Schneckloth, 412 U.S. at 224-27.

[¶25] Under these circumstances, the State cannot prove that Mr. Herrman freely and voluntarily consented to what would otherwise be an unconstitutional warrantless search. North Dakota's implied consent law cannot substitute for consent necessary for an exception to the warrant requirement. See State v. Hayes, 2012 ND 9, ¶39, 809 N.W.2d 309 ("Hayes had two choices when confronted by the officers asking whether they could search her residence: consent to a warrantless search or violate her release conditions and be subject to an arrest warrant for failing to comply with the district court's order. Consent based upon duress or coercion is not voluntary. Id. Under the circumstances, Hayes did not provide voluntary consent to search 210 Adams Street.").

[¶26] The United States Supreme Court in Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) explained the rationale behind the doctrine of unconstitutional conditions. They wrote:

> [A]s a general rule, the state, having the 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 * * * may thus be manipulated out of existence.

Id. Because the doctrine of unconstitutional conditions applies in North Dakota, Mr. Herrman should not have to relinquish a Constitutional Right in order to obtain a privilege. But North Dakota's implied consent law does just that by conditioning the grant of the privilege to drive upon a driver's surrender of his Constitutional right to be secure against unreasonable searches by requiring that the driver submit to a test without a warrant.

[¶27] In Schneckloth v. Bustamonte, 412 U.S. 218, 228-229 (1973), the United States Supreme Court warned us about the consequences of attempting to bypass constitutional commands by creating or relying on a legal fiction when it wrote that

> the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746:
>
> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and

> property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'

Id.

[¶28] North Dakota's "implied consent" law cannot substitute for the consent necessary for a valid exception to the warrant requirement. Article I, Section 20 of the North Dakota Constitution specifically states that "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this Article [Article I] is excepted out of the general powers of government and shall forever remain inviolate." Therefore, the legislature cannot dispense with the warrant and reasonableness requirements of Article I, Section 8 in favor of the Department's expeditions regulation of driving privileges.

[¶29] The United States Supreme Court has established that a State-created privilege "cannot be made to depend upon the surrender of a right created and guaranteed by the federal Constitution." Frost v. R.R. Comm'n, 271 U.S. 583, 596, 46 S. Ct. 605, 608, 70 L. Ed. 1101 (1926). Because chemical testing under North Dakota's implied-consent law constitutes a "search" within the meaning of the Fourth Amendment, any consent to be searched that is obtained "must be received, not extracted." State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994); see also In re Welfare of J.W.K., 583 N.W.2d 752, 755 (Minn. 1998) (applying Fourth Amendment protections to physical act of drawing blood and medical data

obtained from subsequent chemical analysis).

[¶30] **Analysis**

IV. 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.

[¶31] After his arrest Mr. Herrman was read the implied consent advisory and was asked to take a breath test. Mr. Herrman refused. Mr. Herrman's attorney contacted law enforcement and indicated that Mr. Herrman would take a test if law enforcement had a search warrant. Law enforcement did not attempt to obtain a search warrant.

[¶32] Mr. Herrman argues that by invoking the implied consent advisory and requesting a test he is forced to surrender his privilege to drive if he refuses to give his consent to the search. Law enforcement is using the implied consent law to circumvent the warrant requirement. It is unconstitutional for Mr. Herrman to lose his driving privileges because he refused to consent to an otherwise illegal search. See Frost.

[¶33] **Analysis**

III. 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.

[¶34] After being read the implied consent advisory and being asked to take a breath test Mr. Herrman responded to the law enforcement officer that he was waiting for his attorney to call back. The law enforcement officer did not wait for

the attorney to call back and made Mr. Herrman decide immediately whether or not he was going to take a test. Mr. Herrman refused to take a test. Mr. Herrman's attorney called back but Mr. Herrman did not get to consult with him and was considered a refusal.

[¶35] "The failure to allow a DUI arrestee a reasonable opportunity to consult with a lawyer after the arrestee has made such a request prevents the revocation of his driver's license for refusal to take a chemical test." Lies v. Director, ND Dept. of Transp., 2008 ND 30, ¶ 10, 744 N.W.2d 783 (citation omitted). The Hearing Officer did not make a specific finding that Mr. Herrman was afforded a reasonable opportunity to consult a lawyer.

> [T]he question of whether a person has been given a reasonable opportunity to consult with an attorney is not purely a question of fact; instead, it is one of both law and fact. Id. at ¶ 10 (citing Groe v. Comm'r of Pub. Safety, 615 N.W.2d 837, 841 (Minn.Ct.App. 2000)). Mixed questions of law and fact are reviewed under a de novo standard. Id. (citing State v. Torgerson, 2000 ND 105, ¶ 3, 611 N.W.2d 182).

Id. at ¶9.

[¶36] Mr. Herrman 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. Because Mr. Herrman's attorney did call back before Mr. Herrman was issued the report and notice and Mr. Herrman was not given the phone call the actions by law enforcement were unreasonable and as such the Department should be prevented from revoking Mr. Herrman's driving privileges for refusal to take a chemical test.

[¶37] **CONCLUSION**

[¶38] It was an error for the Hearing Officer to not suppress the results of the onsite test because it was a warrantless search, there was no valid exception to the warrant requirement and the consent was coerced.

[¶39] North Dakota's implied consent law creates an unconstitutional condition by coercing drivers to submit to a warrantless search.

[¶40] Law enforcement was unreasonable in not allowing Mr. Herrman to wait for his attorney to call back when in fact his attorney did call back before Mr. Herrman was issued the report and notice. Because Mr. Herrman was not afforded a reasonable opportunity to consult with an attorney the decision to revoke his driving privileges should be reversed.

[¶41] Based on the foregoing arguments and law Mr. Herrman respectfully requests that the decision to revoke his driving privileges be reversed.

Dated: December 4, 2012

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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 Court Case No. 20130338 District Court Case No. 45-2013-CV-00560 **CERTIFICATE OF ELECTRONIC SERVICE OF APPELLANT'S BRIEF AND APPENDIX** **APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE WILLIAM HERAUF, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

[¶1] Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984 and states that on December 4, 2013 he electronically served the following on Doug Anderson, Assistant North Dakota Attorney General representing the North Dakota Department of Transportation:

APPELLANT'S BRIEF
APPELLANT'S APPENDIX

by sending an electronic copy to the email address dbanders@nd.gov.

Dated: December 4, 2013

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