IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20140109
	)	
Plaintiff/Appellee,	)	Criminal No. 30-2013-CR-01085
	)	
vs.	)	
	)	
Danny Birchfield,	)	
	)	
Defendant/Appellant.	)	

****

BRIEF OF PLAINTIFF/APPELLEE

****

Appeal from Criminal Judgment
dated March 20, 2014
Morton County District Court
South Central Judicial District
Honorable Bruce B. Haskell, Presiding District Judge

Justin M. Balzer, Id. No. 06687
Assistant Morton County State's Attorney
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Standard of Review

"Whether a statute is unconstitutional is a question of law, and a statute will be upheld unless its challenger demonstrates the statute is unconstitutional." Best Products Co., Inc. v. Spaeth, 461 N.W.2d 91, 96 (N.D.1990). "A legislative act is presumed to be constitutional, and any doubt about its constitutionality must, where possible, be resolved in favor of its validity." Southern Valley Grain Dealers Ass'n v. Board of County Comm'rs, 257 N.W.2d 425, 434 (N.D.1977). "A party raising a constitutional challenge must bring up the 'heavy artillery' or forego the attack entirely." Effertz v. North Dakota Workers' Comp. Bureau, 481 N.W.2d 218, 223 (N.D. 1992).

Statement of Facts

The following statement of facts is from the State's original brief filed on December 19, 2013. A. 16-17.

"On the 10th day of October, 2013, the defendant, Danny Ray Birchfield had driven off of Morton County Road 139 into the ditch. North Dakota Highway Trooper Tarek Chase arrived on the scene to observe the defendant in the ditch, attempting to drive out of the ditch. Trooper Chase initiated a motorist assist. When Trooper Chase approached the defendant, he could smell a strong odor of alcohol coming from the defendant and saw the defendant's eyes were bloodshot and watery. When Trooper Chase talked to the defendant, he noticed that the defendant's speech was slurred. Trooper Chase asked the defendant to come to his vehicle and the defendant was unsteady on his feet trying to get to the patrol car. All of these factors led Trooper Chase to believe that the defendant was intoxicated and at that point Trooper Chase asked if the defendant would be willing to submit to field sobriety testing.

The first test was the Horizontal Gaze Nystagmus (HGN) and the defendant failed that test showing all six clues. The second test was the alphabet test, the defendant pausing numerous times, making the test a fail. The third test was the backwards counting test and again the defendant paused numerous times and failed to stop where Trooper Chase requested. The fourth test was the finger count test where the defendant displayed poor finger dexterity and improper finger count.

At that point Trooper Chase read the defendant the implied consent advisory and requested a preliminary breath test. A breath alcohol sample was produced by the defendant and the results were .254. Trooper Chase placed the defendant under arrest for Driving Under the Influence, read the defendant his Miranda rights and then read the implied consent advisory a second time. The defendant made the affirmative statement that "I'm going to refuse." Trooper Chase took this as a refusal and then issued a criminal citation for refusal and the defendant was transported to Morton County Law Enforcement Center." A. 16-17.

Statement of the Case

The defendant was placed under arrest for Driving Under the Influence by refusing a chemical test on October 10, 2013. A. 4. The defendant filed a motion to dismiss the charge of Driving Under the Influence based off of the defendant's refusal to submit to a chemical test and to find the implied consent law unconstitutional on December 9, 2013. A. 5. The State filed a response brief on December 19, 2013. A. 16. The Attorney General filed an Amicus Brief in response to the unconstitutionality of the implied consent law on December 20. A. 26. The defendant filed a response to the State's brief on December 26, 2013, and filed a response to the Attorney General's

Amicus Brief on December 27, 2013. A. 56 and A. 58. The District Court entered an order denying the motion of the defendant on January 16, 2014. A. 61. The defendant entered into a conditional plea of guilty to the charge of Driving Under the Influence on March 20, 2014. A.70. The defendant filed a notice of appeal on March 27, 2014. A. 73.

Law and Argument

North Dakota Century Code § 39-08-01(1)(e)(2) states that "a person may not drive or be in actual control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if . . . that individual refuses to submit to a chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath or urine, at the direction of a law enforcement officer under Section 39-20-01."

North Dakota Century Code § 39-20-01 states that "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, subject to the provisions of this chapter, 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 North Dakota legislature has made it very clear, that if you drive in North Dakota, you have given your consent to a blood test should you be legally stopped and the officer places you under arrest for Driving Under the Influence (which would include a probable

cause determination by the officer), but officers are not allowed to stop whoever they feel like, whenever they feel like and demand a chemical test.

The North Dakota Supreme Court has previously dealt with the issue of whether the North Dakota Legislature can put regulations in place to control the rights and privileges of drivers in North Dakota. In State v. Timm, 110 N.W.2d 359 (N.D. 1961), the North Dakota Supreme Court noted:

> "The use of public highways is not an absolute right which everyone has, and of which a person cannot be deprived; it is a right or privilege which a person enjoys subject to the control of the State in the valid exercise of its police power. Therefore, in view of the State's power to regulate its highways, statutes may be enacted which declare that the use of the public highways by any person shall be deemed the equivalent of an affirmative consent to a chemical test or tests of the user's blood, breath, saliva or urine for determination of the alcoholic content of his blood, subject to the other provisions of the statute. This law does not compel the user to take such chemical tests."

See State v. Timm, 110 N.W.2d 359 (N.D. 1961) at 362,363. The court found that driving is not a right, but merely a privilege that can be regulated like any other privilege that the State creates.

The North Dakota Supreme Court, in State v. Murphy, 516 N.W.2d 285 (N.D. 1994), has ruled that the implied consent laws only take affect when a person is "arrested for Driving Under the Influence or being in actual physical control while intoxicated." The Court also goes on to say that "refusing to submit to the test is a legislatively granted

privilege, and, as such, it is clear that the legislature is able to limit the extent of that privilege." Id. At 287. Here the North Dakota Supreme Court followed the reasoning brought forth in Schmerber v. California, 384 U.S. 757 (1966) that "there is no Federal constitutional right to be entirely free of intoxication tests."

Murphy was decided before North Dakota criminalized the refusal of the blood test; however, it is clear that criminalization of the refusal still fits within the North Dakota Supreme Court's interpretation that the implied consent law "is consistent with the legislature's desire for suspects to choose to take the test." State v. Murphy, 516 N.W.2d 285 (N.D. 1994) at 287. The truth of the matter is that only after there is a finding of probable cause by the officer and the suspect is placed under arrest can the officer even ask if the suspect would submit to a blood test, and even then the suspect still has the ability to refuse to submit to the blood test. The North Dakota Supreme Court found in Murphy, that the refusal of a blood test could be used in court as evidence that a defendant committed a DUI. Id. Just that fact that a defendant refused a test was not enough to prove a DUI had actually occurred. There would also have to be evidence of a lawful stop and other factors that would allow an officer to make an arrest for Driving Under the Influence, like the failed field sobriety tests or bloodshot, watery eyes. Id. By making the refusal a crime under the same statute as Driving Under the Influence, the North Dakota Legislature is simply further controlling the legislative privilege that it created.

The defendant incorrectly relies on Missouri v. McNeely, 133 S.Ct. 1552 (2013), by misinterpreting its holding, where the Supreme Court decided that the natural metabolization of alcohol in the blood does not create an exigency that justifies an

exception to the Fourth Amendment's warrant requirement automatically in every case, but it must be examined in a case by case analysis to determine if an exigency exists. Id. McNeely does change the landscape when it comes to exigent circumstances and stands for the proposition that intrusions into the human body require a search warrant unless there is a clear exception to the warrant requirement. Id. McNeely also holds up implied consent laws as a valid exception to the warrant requirement. Id. at 1566.

In McNeely, the suspect was read the implied consent form at the hospital, refused to take a blood test, and then the officer compelled the blood test. Id. at 1554. The trial court found that the exigency exception to the warrant requirement was not met because apart from the alcohol dissipating, the officer did not face an emergency. Id. In the case on appeal, Mr. Birchfield was read the implied consent form and refused to take the blood test; the blood test was not forced upon him under exigent circumstances. Mr. Birchfield voluntarily refused to submit to the test after being read the consequences for the refusal.

The defendant misinterprets the McNeeley decision as it applies to the case before us. The U.S. Supreme Court emphasized that generally there are no per se exigent circumstances exceptions to the warrant requirement for a search of a person or body, but there are still valid exceptions to the warrant requirement. Id. at 1566.

The U.S. Supreme Court in McNeely acknowledged that States are well within their rights to create implied consent laws for blood tests, stating "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." Id. at 1566. Clearly the U.S. Supreme

Court has acknowledged that driving is not a necessity or a right, but merely a privilege created by the state, and all 50 States have the right to place restrictions on that privilege.

The current North Dakota implied consent law, N.D.C.C. § 39-20-01, took effect after the McNeely decision. The U.S. Supreme Court never addressed the issue of whether criminalization of a refusal is within the rights of each state when it comes to their implied consent laws, but it never ruled that the criminalization of a refusal was unconstitutional. In McNeely, the U.S. Supreme Court did discuss implied consent laws that allow for a refusal to be used as evidence at trial for Driving Under the Influence. Id. The Court did state in McNeely, when discussing implied consent laws that "such laws impose significant consequences when a motorist withdraws consent." Id. The Court views implied consent laws favorably, stating that implied consent laws are one of "a broad range of legal tools to enforce their drunk driving laws." Id.

The defendant takes the position that McNeely imposes a right on an individual to demand a warrant before there is a search of the body, while McNeely makes no such claim. McNeely stands for the proposition that a warrantless search of a person is unreasonable if there is no valid recognized exception to the warrant requirement. Id. However, McNeely especially realizes the state's need for people to submit to chemical tests when the chemical tests are properly requested. Id. at 1566. Mr. Birchfield incorrectly assumes that McNeely's holding will not allow any punishment for refusal, but as the facts of the case on appeal are remarkably different than McNeely. When Mr. Birchfield was asked to submit to a chemical test, he refused to do so, but the officer never forced a test on Mr. Birchfield as was the case with McNeely. The U.S. Supreme Court goes out of its way to acknowledge that forcing a chemical test without a warrant is

unconstitutional, but the Court found that when someone will not submit to a chemical test, there are other options that a state can impose, one of which is penalizing the refusal under an implied consent law. Id.

After McNeely was decided, Minnesota received a direct challenge to its implied consent statues. Minnesota Statute 169A.51 and Minnesota Statute 169A.20 criminalize the refusal of a blood test, when the officer has probable cause to believe that a suspect has been driving, operating, or in control of an automobile while intoxicated. The Minnesota statutes make it clear that a person is only giving implied consent when there is probable cause, or the person is placed under arrest for Driving Under the Influence.

The Minnesota Supreme Court has reviewed its own implied consent law according to the decision from the U.S. Supreme Court in McNeely and the repercussions that may stem from it. In State v. Brooks, 838 N.W.2d 563, (Minn. 2013), the defendant, Brooks, was arrested on three separate occasions for Driving Under the Influence, and he was read Minnesota's implied consent form for a chemical test to determine the presence of alcohol. Id. at 566. Brooks consented to the test on all three occasions. Brooks was convicted of Driving Under the Influence on all three charges, and then appealed the charges based on the McNeely decision. The Minnesota Supreme Court agreed with Brooks that the "warrantless searches of his blood and urine cannot be upheld solely because of the exigency created by the dissipation of alcohol in the body." Id. at 567.

The Minnesota Supreme Court first looked at if the consent Brooks gave was truly voluntary, given Minnesota's implied consent law. The court examined State v. Harris, 590 N.W.2d 90, 120 (Minn. 1999), which stated that "whether consent is voluntary is determined by examining the "totality of the circumstances,"" and State v.

Diede, 795 N.W.2d 836, 848 (Minn. 2011) which stated that "consent can be voluntary even if the circumstances of the encounter are uncomfortable for the person being questioned." The Court then determined that under the totality of the circumstances, the chemical tests were not unconstitutional searches under the Fourth Amendment. Secondly, the officers involved in all three stops all had probable cause to place Brooks under arrest for Driving Under the Influence, all three officers followed proper procedure when reading the implied consent form before asking Brooks if he would take the tests, and by doing so, made it clear that Brooks had a choice to take the test. State v. Brooks, 838 N.W.2d 563, 566 (Minn. 2013).

Brooks argued that even though he had given consent, the consent was coerced, which would make it invalid. The Minnesota Supreme Court addressed this issue by looking to the U.S. Supreme Court case of South Dakota v. Neville, 459 U.S. 553, 564 (1983), where the Supreme Court concluded that the "choice to submit or refuse to take the test may be a difficult one" but that alone is not an act of coercion by a police officer. Id. at 564. The Minnesota Supreme Court held that just because a penalty is attached to a refusal does not make an agreement to take the test an act of coercion. State v. Brooks, 838 N.W.2d 563, (Minn. 2013) The court also found that under the Minnesota implied consent law, if a driver will not take the chemical test, the police are not allowed to compel that a test be taken. Id. The court also held that while an individual may not know that he or she has a right to refuse a search, "the fact that someone submits to the search after being told he or she can say no to the search supports a finding of voluntariness." Id. at 572.

The Minnesota Supreme Court even makes it clear that the implied consent statute is not itself unconstitutional because of the U.S. Supreme Court's decision in McNeely. As discussed above the U.S. Supreme Court expressly addresses implied consent laws in McNeely and recognizes them as "legal tools" that a state can use to enforce its drunk-driving laws. The Minnesota Supreme Court recognizes if implied consent laws that criminalize a refusal were unconstitutional then other implied consent laws would be as well because even just revoking a driver's license would be "conditioning the privilege of driving on agreeing to a warrantless search." Id.

While Mr. Birchfield was told that a refusal of the blood test is a criminal offense, the choice to submit or refuse "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." State v. Brooks, 838 N.W.2d 563, (Minn. 2013). Mr. Birchfield made a voluntary choice, knowing that he was charged with a crime, and he would face a penalty, but still chose not to submit to a blood draw. Mr. Birchfield believes that Brooks does not apply to the case on appeal; however, the Brooks decision does directly apply. The Minnesota Supreme Court decided that there was no coercion by reading an implied consent advisory, and reasonably it should flow that if someone is not coerced by an implied consent advisory, then the actual penalty would not be unconstitutional.

After Brooks was decided by the Minnesota Supreme Court, the Minnesota Court of Appeals was presented with the issue of criminalization of a refusal. In State v. Bernard, 844 N.W.2d 41 (Minn. Ct. App. 2014), the Minnesota Court of Appeals was directly faced with the question if criminalization of a refusal is constitutional. In Bernard, the defendant was arrested for Driving Under the Influence and per the statutory

requirements in Minnesota, the defendant was read the implied consent advisory. Id. at 42. After being read the implied consent advisory, Bernard affirmatively refused to submit to a breath test. Id. Bernard incorrectly argued, as does the defendant in the case on appeal, that McNeely's holding makes any implied consent law unconstitutional. Id. at 45. However, the Minnesota Court of Appeals determined that the officer's request with the implied consent advisory was appropriate on other grounds. Id. The Court of Appeals found that "Because the officer indisputably had probable cause to believe that Bernard was driving while impaired . . . the officer also indisputably had the option to obtain a test of Bernard's blood by search warrant." Id. at 45.

The Court found that when Bernard was asked by the officer to submit to a chemical test, the officer had the option to lawfully ask a judge for a search warrant. Id. The Court held that while the officer had the lawful authority to require that Bernard submit to a chemical test because of a search warrant, the fact that "the officer chose one approach (the authority to make the request under the implied consent statute) rather than another (the authority to obtain a warrant under the impaired driving statute) does not make penalizing Bernard's decision unconstitutional because the consequent testing under either approach would have been constitutionally reasonable." Id. at 46.

The ruling established by the Minnesota Court of Appeals is "the state is not constitutionally precluded for criminalizing a suspected drunk driver's refusal to submit to a chemical test under circumstances in which the requesting officer had grounds to have obtained a constitutionally reasonable nonconsensual chemical test by securing and executing a warrant requiring the driver to submit to testing." Id. at 47. This ruling is clearly in line with this Court's own stance as found in State v. Murphy, 516 N.W.2d 285

(N.D. 1994) where the Court has ruled that the implied consent laws only take affect when a person is "arrested for Driving Under the Influence or being in actual physical control while intoxicated." The Court also goes on to say that "refusing to submit to the test is a legislatively granted privilege, and, as such, it is clear that the legislature is able to limit the extent of that privilege." Id. At 287. Here the North Dakota Supreme Court followed the reasoning brought forth in Schmerber v. California, 384 U.S. 757 (1966) that "there is no Federal constitutional right to be entirely free of intoxication tests." Id.

There is no indication from Mr. Birchfield that the officer did not have probable cause to arrest Mr. Birchfield for Driving Under the Influence. There was no suppression hearing held and the facts of the case are agreed upon by the parties. Mr. Birchfield does not contend that the officer would not have been able to secure a search warrant and the state contends that the officer found probable cause and would have been able to secure a search warrant at the time. If the officer would have been able to secure a search warrant lawfully, then the officer could have forced a chemical test on Mr. Birchfield. Instead the officer decided to give Mr. Birchfield a choice; either choose to submit to the chemical test or face the consequences for not submitting to the chemical test. But the officer is under an obligation from N.D.C.C. § 39-20-04, that if someone refuses to take a chemical test when one is lawfully requested then no test will be given. The officer gives up the ability to force a defendant to submit to a chemical test with a warrant when an officer simply requests that a defendant submit to a chemical test.

The State believes that the findings of the Minnesota Court of Appeals in Bernard are persuasive when looked in conjunction with the findings of this Court in Murphy. The request of Mr. Birchfield to submit to chemical testing was constitutionally

reasonable because the officer would have been able to secure a search warrant, but instead chose to give Mr. Birchfield the ability to refuse, but that refusal would not have been without consequences.

Mr. Birchfield relies heavily on Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967). In Camara, a building inspector was making his annual inspection for any violations of San Francisco's housing code. Id. at 526. The building inspector was alerted about the possibility that Camara was using his leasehold as a personal residence in violation of the housing code. Id. The building inspector requested that he be allowed to inspect the premises on three different occasions and each time Camara refused to allow an inspection. Id. Camara was charged with a violation of section 503 of the housing code for not allowing the building inspector to inspect the premises. Id. The Supreme Court ruled that Camara could not be charged with a crime for not allowing the building inspector to inspect the premises. Id. at 540. However, Camara is distinguished quite easily from the case on appeal. Unlike Camara, Mr. Birchfield was placed under arrest before he asked to consent to a search. Mr. Birchfield has not contended that there was no probable cause to place him under arrest for Driving Under the Influence. It is not disputed that the officer had the right to place Mr. Birchfield under arrest, unlike in Camara, where there was not probable cause for Camara to be placed under arrest. Id.

Mr. Birchfield also contends that "when jurisprudence adds Camara plus McNeely, the sum of the math is the proposition that search warrants are required for a search of a home and human body," Birchfield Brief at ¶ 26. This equation proposed by Mr. Birchfield just doesn't add up to what Mr. Birchfield would like it to be. McNeely

was a limited holding for when an officer forces a chemical test on a suspect after that suspect has already refused. Missouri v. McNeely, 133 S.Ct. 1552, 1565 (2013). The North Dakota Legislature does not allow for that type of conduct with N.D.C.C. § 39-20-04 specifically informing officers that if someone refuses a chemical test then they cannot compel a chemical test. Camara's holding is so far removed from McNeely that they cannot be combined as Mr. Birchfield would prefer. There was no implied consent law that Camara was obligated to follow, the building inspector did not have probable cause to ask to search, and there was not an immediate stop to the requests by the building inspector. See Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967). The State believes that the holding of State v. Bernard, 844 N.W.2d 41 (MN 2014) is persuasive to the case on appeal. There is no doubt that the officer would have been able to secure a warrant against Mr. Birchfield, but the officer made the choice to simply ask Mr. Birchfield to submit to a chemical test, effectively giving up any future opportunity to force Mr. Birchfield to submit to a chemical test.

Mr. Birchfield also cites directly from Ferguson v. City of Charleston, 532 U.S. 67 (2001) in an attempt to bolster his argument against the implied consent laws of North Dakota. In Ferguson, there was no probable cause or even reasonable suspicion for the urine tests that were done, and the patients that had urine tests done were not even aware that the urine that they provided was being drug screened. Id. at 75. The State believes that Mr. Birchfield overly relies on Ferguson when there is no correlation between Ferguson and the case on appeal. Mr. Birchfield was fully aware of what any chemical test that would have been done and what any chemical test would be used for. The State

maintains the officer had probable cause to ask for the chemical test in the first place, while according to the facts of Ferguson, there was no probable cause. Id.

Like Minnesota, California recently dealt with constitutional challenges to its implied consent law. Under California Vehicle Code § 23577, the California Legislature has penalized the refusal to submit to a chemical test in a somewhat different fashion than North Dakota. Under § 23577, if someone refuses to submit to a chemical test, then if they are found guilty of Driving Under the Influence, the penalties for Driving Under the Influence automatically increase because of the refusal. California Vehicle Code § 23577. The California Court of Appeals had to address the Fourth Amendment issues that come with the implied consent law. In People v. Harris, 225 Cal. App.4th Supp. 1 (Cal. Ct. App. 2014), the California Court of Appeals discussed California's implied consent law with regards to Fourth Amendment protections. In Harris, the Court of Appeals discussed that there would be no coercion to consent based on an implied consent advisory because the Legislature "has 'the authority . . . to impose a condition on the right to refuse.' and that the Legislature does have the authority here because, even though a fundamental liberty interest is affected, the refusal penalty statute meets strict scrutiny and so satisfies due process." Id. at 9. (citing Quintana v. Municipal Court, 192 Cal.App.3d 361, 367-369 (Cal. Ct. App. 1987)). In Harris, the issue was not a refusal, but if consent given by Harris was coerced because of the implied consent advisory and the subsequent penalties for refusal. Id. at 5. However, the State believes that this case does have a direct impact for refusal cases as well.

In Quintana v. Municipal Court, 192 Cal.App.3d 361, 368(Cal. Ct. App. 1987), the California Court of Appeals held that "The enhancement of the penalty for driving

under the influence where a test has been refused does not violate constitutional principles of substantive due process. The purpose of the implied consent statute is to fulfill the need for a fair, efficient and accurate system of detection and prevention of driving under the influence. (citing Kesler v. Department of Motor Vehicles (1969) 1 Cal.3d 74, 77, 81 Cal.Rptr. 348, 459 P.2d 900; See also Hernandez v. Department of Motor Vehicles, supra, 30 Cal.3d at p. 77, 177 Cal.Rptr. 566, 634 P.2d 917.) That purpose is obviously thwarted by the inebriated driver who refuses the test. He has forced the police officers to risk the possible violence of a forcible test or to forego the best evidence of intoxication. He has thus proven to be more dangerous to the public than the inebriated driver who has consented to a test." The State believes that the reasoning set forth by the California Court of Appeals is also persuasive for the case on appeal. As the North Dakota Supreme Court has applied in State v. Murphy in that "refusing to submit to the test is a legislatively granted privilege; it is clear that the legislature is able to limit the extent of that privilege." State v. Murphy, 516 N.W.2d 285 (ND 1994).

Mr. Birchfield also relies on Bumper v. North Carolina, 391 U.S. 543 (1968). However his reliance on Bumper is misplaced. In Bumper, the defendant's grandmother allowed police to search her home, where Bumper was staying, after the police informed the grandmother that they had a search warrant. Id. at 546. The police found a .22 caliber rifle that was later introduced at trial. Id. At the suppression hearing, the prosecutor relied only on the grandmother's apparent consent, not any actual warrant, and the court denied the motion to suppress the rifle and the defendant was found guilty. Id. at 547. The Supreme Court found that the consent that the grandmother gave was invalid because

she was only consenting because the officers told her that they had a search warrant. Id. at 549.

Mr. Birchfield makes the leap that Bumper stands for the proposition that drivers and homeowners alike "have a right to refuse testing until presented with a search warrant." Appealant Brief ¶ 25. Bumper does not yield the results that Mr. Birchfield would prefer. In Bumper, the grandmother was told that there was a search warrant, and was never given the option to refuse the search. Bumper v. North Carolina, 391 U.S. 543, 547 (1968). The officer never told Mr. Birchfield that he had a search warrant and the officer informed Mr. Birchfield of the implied consent advisory and at that point, Mr. Birchfield refused to take the test and under N.D.C.C. § 39-20-04, there was no test forced upon Mr. Birchfield. Bumper really stands for the proposition that if an officer seeks consent for a search and claims that they have a warrant; any consent given is coerced if there is no actual warrant. Id. at 549. Mr. Birchfield never actually gave the officer any consent for a chemical draw, he refused.

Conclusion

The State respectfully asks this Court to find that based on the reasons stated above, that the implied consent laws found in N.D.C.C. §§ 39-08-01(1)(e)(2) and 39-20-01 are constitutional and should not be struck down and that Mr. Birchfield's plea of guilty be affirmed in accordance with the order of the District Court.

Dated this 5 day of June, 2014.

Justin M. Balzer, Bar ID 06687
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Tel. 701-667-3350

STATE OF NORTH DAKOTA)
)SS.
COUNTY OF MORTON)

Karen A. Anderson, being first duly sworn, deposes and says that she is of legal age and on the 5th day of June, 2014, she served the attached **BRIEF OF PLAINTIFF/APPELLEE** upon the following by placing a true and correct copy thereof in an envelope addressed as follows:

Ken Sorenson
Assistant Attorney General
Office of Attorney General
600 East Blvd. Ave., Dept. 125
Bismarck, ND 58505-0040

Dan Herbel
Attorney at Law
3333 East Broadway Ave., Ste. 1205
Bismarck, ND 58501

To the best of my knowledge and belief, such address was the actual post office address of the party(ies) to be so served; that the documents were mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Karen A. Anderson

Subscribed and sworn to before me this 5th day of June, 2014.

BARBARA JO HARBACH
Notary Public
State of North Dakota
My Commission Expires [illegible] 11, 2017

Notary Public