20140109
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 29, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, Plaintiff/Appellee, v. DANNY BIRCHFIELD, Defendant/Appellant.	)	Supreme Court No. 20140109 Morton Co. No. 30-2013-CR-01085

PETITION FOR REHEARING

Appeal from a Criminal Judgment

dated and filed March 20, 2014

and the adverse determination within the January 16, 2014, Order

denying the Defendant's Motion to Dismiss

Morton County District Court

South Central Judicial District

The Honorable Bruce B. Haskell

Dan Herbel
ND State Bar ID # 05769
Attorney for Appellant Danny Birchfield

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

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[¶2] PRIOR PROCEEDINGS

[¶3] On October 10, 2013, Danny Birchfield's vehicle was stopped in Morton County, North Dakota, and he was asked by a law enforcement officer to submit to a chemical test. The law enforcement officer did not have a search warrant and there was no exception to the warrant requirement in this case. Mr. Birchfield refused the officer's warrantless request for testing. Mr. Birchfield was arrested and charged with refusal to submit to a chemical test. (Appendix ("App.") at 4). On October 11, 2013, a Uniform Traffic Complaint and Summons was filed in the district court informing Mr. Birchfield that he was standing accused of refusal to submit to a chemical test. (App. 4).

[¶4] On December 9, 2013, Mr. Birchfield filed a Motion to Dismiss the refusal charge as it related to his particular prosecution and to also strike down the new refusal law that criminalizes a driver's refusal to submit to a warrantless chemical test at the direction of a law enforcement officer, because both violate the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. (App. 5-13). Mr. Birchfield served his Motion upon both the Morton County State's Attorney and the North Dakota Attorney General. (App. 14-15). On December 19, 2013, the Morton County State's Attorney filed a response brief opposing the Motion. (App. 16-25). On December 20, 2013, the North Dakota Attorney General filed an Amicus opposition brief. (App. 26-55). On December 26, 2013, Mr. Birchfield filed a reply brief to the Morton County State's Attorney, and on December 27, 2013, he filed a brief in response to the Attorney General. (App. 56-60).

[¶5] No evidentiary hearing was held and the trial court decided the Motion on briefs submitted by the parties. On January 16, 2014, the trial court denied Mr. Birchfield's Motion to Dismiss. (App. 61-66).

[¶6] On March 7, 2014, Mr. Birchfield entered a conditional plea of guilty to the charge of Refusal to Submit to a Chemical Test, pursuant to N.D.R.Crim.P. 11 (a)(2), specifically reserving the right to appeal the adverse ruling in the January 16, 2014, Order on Motion to Dismiss. (App. 67-69). On March 20, 2014, the Court approved the conditional plea of guilty and entered a Criminal Judgment. (App. 70-72).

[¶7] On March 27, 2014, Mr. Birchfield filed a Notice of Appeal to this Court. (App. 73-74). Birchfield appealed and argued that his prosecution, for refusal to submit to chemical testing when no exception to the warrant requirement existed, alleging that it was a crime for him to refuse an officer's warrantless request for testing, as well as the statute this matter is charged under, N.D.C.C. § 39-08-01(1)(e), are both unconstitutional under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. Mr. Birchfield asked this court to vacate the Criminal Judgment in this matter, reverse the district court's denial of his Motion to Dismiss, remand to the district court for withdrawal of Mr. Birchfield's conditional guilty plea, order N.D.C.C. § 39-08-01(1)(e) be struck down, and order that Mr. Birchfield's refusal charge in this case be dismissed.

[¶8] On January 15, 2015, this court affirmed the decision below, relying on a number of unpublished opinions from lower courts in different states. Mr. Birchfield now petitions for rehearing.

[¶9] LAW AND ARGUMENT

[¶10] The question presented to this court was: Whether a driver's refusal to submit to a warrantless request to search his body for evidence may constitute a separate criminal offense, in addition to the offense of DUI; or whether that offends the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. No post-*McNeely* state or federal court has upheld such a law.

[¶11] The unpublished lower court decisions from Minnesota, that this Court relied heavily upon, basically say that if there is probable cause, then law enforcement does not need to acquire a search warrant. This is precise what *McNeely* said an officer may not do. The *McNeely* court rejected the State's argument that "so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant." *See Missouri v. McNeely*, ___ U.S. ___, 133 S.Ct. 1552, 1560 (2013). McNeely was a DUI case where the defendant had a constitutional right to refuse. So, we know that the Fourth Amendment is not a nullity in the context of DUI cases like the lower Minnesota courts say.

[¶12] Yet, this Court has taken the position that the Fourth Amendment does not exist in the context of DUI cases. *See State v. Birchfield*, 2015 ND 6, at ¶15. A driver apparently impliedly consents to a search by driving and then always consents to testing searches with no right to limit the search or withdraw consent. No court, either before or after *McNeely*, has legitimized criminalizing the limiting of consent or the withdrawing of consent.

[¶13] Also, this Court takes the position that a warrantless search for evidence is to be presumed reasonable because of all the carnage on the roadways from DUIs. First, our precedent indicates that a warrantless search should be presumed unreasonable. Second, there is little or no citation to any cases that permit a police powers exception to the warrant requirement. *See Birchfield*, at ¶6.

[¶14] Indeed, this court employs the phrase "suspicionless searches" without articulating any special needs analysis. *See Birchfield*, at ¶15-16. Special needs was never brief or argued in this matter, here or below, and this Court informed the parties at oral argument that special needs is not an issue in this case. *See* audio of oral argument at approximately 44 minutes, 40 seconds. If this court is impliedly holding that special needs exist here, then Mr. Birchfield would like an opportunity to brief and argue special needs. "A court should notify the parties when it intends to rely on a legal doctrine or precedents other than those briefed and argued by the litigants." *See Jaste v. Gailfus*, 2004 ND 94, ¶12, 679 N.W.2d 257.

[¶15] Additionally, this Court relied on cases that viewed jurisprudence through a pre-*McNeely* lens, in that exigent circumstances always exist in DUI cases. *See Birchfield*, at ¶9 (citing *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1451 (9th Cir. 1986) and *State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009)). These cases have been abrogated by the holding in *McNeely*.

[¶16] Furthermore, this Court remarked that because "[c]riminal refusal statutes were in existence in some states at the time McNeely was decided" that they then were presumably approved as acceptable "legal tools" states may use. *See Birchfield*, at ¶17.

However, the *McNeely* court spoke of driver's license suspensions, but expressly left out approval of criminal refusal statutes.

[¶17] Finally, this Court pointed out, with seeming approval, the lower Minnesota court's reading of *Neville* to allow legal tools "including the constitutional use under the Fifth Amendment of a defendant's refusal to submit to chemical testing to show the defendant is guilty of drunk driving under South Dakota v. Neville, 459 U.S. 553 (1983);" and that "through Neville that a state can constitutionally use the driver's test refusal (that is, the driver's exercise of his Fourth Amendment right not to be tested without consent) as inferential evidence to convict the driver of a crime." *See Birchfield*, at ¶13 (emphasis in original). This is really a perverted reading of *Neville*.

[¶18] The *Neville* court said that a driver may refuse testing, but those words of refusal (Fifth Amendment) may be used against the driver in the instant case on the DUI charge. *Neville* did not condone bringing a separate and additional offense for the refusal to search (the Fourth Amendment action) without a warrant and without exigent circumstances, because *Camara* prohibits doing so. Plus, the *McNeely* holding itself, that an individual has a right to demand law enforcement acquire a warrant before a search of the body for evidence, establishes that a driver (like a homeowner) has a right under the Fourth Amendment to refuse a warrantless search without criminal reprisal. *See McNeely*, 133 S.Ct. 1552.

[¶19] This Court followed the *Neville* rationale in *State v. Beaton*, 516 N.W.2d 645 (N.D. 1994) (a driver may refuse, but proof of that refusal may be used against the driver under Section 39-20-08, N.D.C.C.). So, in North Dakota "criminal prosecutions for driving or being in actual physical control of a motor vehicle while under the

influence of intoxicating liquor in violation of 39-08-01, N.D.C.C., if the defendant was not given the Miranda warnings, 39-20-08, N.D.C.C., must be literally and narrowly construed to make only the fact of refusal, not the defendant's statements of refusal, admissible in evidence." *See Beaton*, 516 N.W.2d at 647. This is the scope of the Fifth Amendment *Neville* case. *Neville* does not say exercising a Fourth Amendment right may be criminalized.

[¶20] CONCLUSION AND RELIEF SOUGHT

[¶21] For the foregoing reasons, Mr. Birchfield asks that this Court reverse the decision of the district court, or place the matter on the Court's calendar for oral argument and resubmission, pursuant to Rule 40 of the North Dakota Rules of Appellate Procedure. *See* N.D.R.App.P. 40.

Respectfully submitted
this 29th day of January, 2015.

/s/ *Dan Herbel*

Dan Herbel
Attorney for Appellant Danny Birchfield
ND State Bar ID # 05769

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

[¶22] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 29, 2015, the PETITION FOR REHEARING was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Justin M. Balzer, Assistant Morton County State's Attorney, and Ken R. Sorenson, Assistant Attorney General, opposing counsel, at the following:

Electronic filing to: < justin.balzer@mortonnd.org >
Justin M. Balzer, Assistant Morton Co State's Attorney

Electronic filing to: < ksorenso@nd.gov >
Ken R. Sorenson, Assistant Attorney General

Dated this 29th day of January, 2015.

/s/ *Dan Herbel*
_____
Dan Herbel