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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Corey Culver, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20140195 District Court Case No. 45-2014-CV-00042 **APPELLANT'S REPLY 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] **LAW AND ARGUMENT**

[¶4] **I. North Dakota's implied consent law is not a valid exception to the warrant requirement.**

[¶5] The Department argues N.D.C.C. § 39-20-01 represents an exception to the Fourth Amendment's warrant requirement. Department's Brief ¶18 and 20. However, if "implied consent" was valid "consent" for fourth amendment purposes, then Missouri v. McNeely, 133 SCt. 1552 (2013) would have been decided in favor of the search by law enforcement. The language of the North Dakota law demonstrates that it creates a *presumption* of consent in the event an individual operates a motor vehicle when it states in § 39-20-01(1) that an individual "is deemed to have given consent, and shall consent" and § 39-20-14(1) that an individual "is deemed to have given consent . . .." See Grosgebauer v. N.D. Dep't of Transp., 2008 ND 75, ¶11, 747 N.W.2d 510 ("consent to testing is presumed" by statute). The United States Supreme Court in Speiser v. Randall Prince v. City and County of San Francisco, California, 357 U.S. 513, 526 (1958) reiterated that "[i]t is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." The concept of "implied consent" as articulated in North Dakota's DUI laws is that very type of statutory presumption that has been prohibited by Speiser.

[¶6] Article I, Section 20 of the North Dakota Constitution states that "we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." Therefore Article I Section 8 and the search warrant

requirement cannot be excepted by North Dakota's implied consent law. McNeely makes it clear that a driver has a constitutional right to refuse to consent to a warrantless request to submit to a chemical test and that request by law enforcement falls under the purview of Article I, Section 20 which would disallow consent to be presumed by statute and the warrant requirement of Article I, Section 8 to be excepted.

[¶7] The Department cites numerous cases to support its argument that North Dakota's implied consent law can operate as an exception to the warrant requirement. However, the cases cited by the Department all appear to misread the ruling in Schmerber v. California, 384 U.S. 757 (1966) to be that the search incident to arrest exigent circumstances exception applies to all arrests for DUI as a per se exigency. McNeely clarified that there is no such per se exigency. Therefore, implied consent laws do not represent a valid exception to the warrant requirement.

[¶8] The Department relies on State v. Murphy, 516 N.W.2d 287 (N.D. 1994) to support its argument that North Dakota's implied consent law operates as an exception to the warrant requirement. Murphy addressed the defense argument "that the instruction allowing the jury to consider evidence of refusal in determining guilt contradicts the statutory right to refuse testing." Id. at 286-287. Mr. Culver however is arguing that the right to refuse testing is not just statutory but is of a constitutional dimension and an integral part of his fourth amendment and article 1 section 8 rights. Murphy did not address Mr. Culver's argument nor did it give any indication that North Dakota implied consent laws are a valid exception to the warrant requirement.

[¶9] At ¶23 of its brief the Department relies on State v. Brooks, 838 N.W.2d 563 (Minn. 2013) to distinguish Bumper v. North Carolina, 391 U.S. 543 (1968). What

Brooks failed to note from Bumper however was that whereas the standard to review consent in most circumstances is a totality of the circumstances, "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Bumper at 548-549. Like the search warrant in Bumper North Dakota's implied consent advisory is the claim of lawful authority and acquiescence to that claim is not valid consent to except a warrant.

[¶10] **II. North Dakota's implied consent law is coercive and imposes an unconstitutional condition on drivers in exchange for driving privileges by compelling the exchange of the constitutional right to refuse to submit to a chemical test for the mere privilege to drive.**

[¶11] The Department relies on a flawed analysis in Brooks to argue that implied consent laws are not coercive. The Brooks majority based its decision on cases decided before McNeely at a time when Minnesota operated under a misreading of Schmerber. The Brooks majority disregarded precedent that implied consent laws are coercive to reach its conclusory decision that they are not. See Prideaux v. State Department of Public Safety, 247 N.W.2d 385, 388 (Minn. 1976)("The obvious and intended effect of the implied-consent law is to coerce the driver suspected of driving under the influence into 'consenting' to chemical testing . . .").

[¶12] Griffin v. State of California, 380 U.S. 609 (1965) explained, in response to a challenge to a rule that would allow a prosecutor to comment on a criminal defendant's refusal to testify, that

> comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts

down on the privilege by making its assertion costly.

Just like the rule that allowed a prosecutor to comment on a criminal defendant's refusal to testify, North Dakota's implied consent laws impose a penalty for the exercise of a constitutional right and cut down on that right by making its assertion costly.

[¶13] Article I Section 24 of North Dakota's Constitution states "[t]he provisions of this constitution are mandatory and prohibitory . . .." Thus Article I Section 8 is mandatory and prohibitory. Yet the Department argues that because a driver can consent to a search it is legal for the State to require that consent in order to obtain the privilege to drive. The Department's argument conflicts with the doctrine of unconstitutional conditions articulated in Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593-94 (1926) that

> as 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.

[¶14] Because North Dakota's implied consent laws require that a driver relinquish their Article I Section 8 rights by consenting to a search in return for the privilege to drive, thereby forcing the exchange of a mere privilege for a constitutional right North Dakota's implied consent laws are unconstitutional. Frost at 593 ("It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to

withhold."); Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir. 2004)("The City may contend that the searches are permissible because they are entirely voluntary. No protestors are compelled to submit to searches; they must do so only if they choose to participate in the protest . . .. This is a classic "unconstitutional condition," in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right."); Hillcrest Prop., LLP v. Pasco Cnty., CASE NO.: 8:10-cv-819-T-23TBM (M.D. Fla. 2013)("A government is generally prohibited from enforcing an "unconstitutional condition," that is, from conditioning a governmental accommodation on a citizen's relinquishing a constitutional right. For example, the Fourth Amendment prevents a state's conditioning the issuance of a driver's license on a citizen's waiving the prohibition against unreasonable search and seizure . . .").

[¶15] In response to the Department's reliance on Council of Indep. Tobacco Mfrs. of Am. v. State, 713 N.W.2d 300, 306 (Minn. 2006), North Dakota's implied consent laws do deny the potential driver the benefit (driving privilege) by having the driver give up a constitutional right when but for the surrender of that right there is no other way to obtain the benefit. Thus, Mr. Culver has met the threshold requirement to establish that the doctrine of unconstitutional conditions applies because North Dakota's implied consent law denies him the benefit of driving unless he gives up a constitutional right.

[¶16] The Department relies on Stevens v. Commissioner of Public Safety, 850 N.W.2d 717 (Minn. App. 2014) to counter Mr. Culver's argument that North Dakota's implied consent laws violate the doctrine of unconstitutional conditions. Mr. Culver argues that Stevens is fatally flawed.

[¶17] To begin, the doctrine of unconstitutional conditions is the premise that the

legislature cannot draft legislation that grants a mere privilege in exchange for a constitutional right. Frost did not limit application of the doctrine to only certain constitutional rights but applied it to all. 271 U.S. 593-94. If the Department's interpretation of the Stevens court's interpretation of the doctrine of unconstitutional conditions is accurate, then the fourth amendment could be eliminated by statute. In North Dakota, Article I, Section 20 of North Dakota's constitution would prevent that from happening to Article I, Section 8 rights.

[¶18] The second point from Stevens the Department uses at ¶31 of its brief is the fallacy that it must be shown that the statute authorizes an unconstitutional search for the doctrine to apply and because the statute doesn't authorize any search the doctrine doesn't apply. Mr. Culver's argument is not that the statute authorizes a search but rather that the statute makes it a condition of granting the privilege that Mr. Culver authorize the search without law enforcement having to obtain a warrant. Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 525-534 (1967) made it clear that the government can't do that.

[¶19] The third point by the Department in ¶34 of its brief, that the statute does not authorize an unconstitutional search, dovetails into the argument by Mr. Culver above. Camara made it clear that it is unconstitutional to require consent to search by imposing criminal sanctions for refusal and it is a violation of the fourth amendment to do so, the Stevens court ignores Camara and makes only passing mention of the case in a footnote that acknowledges the case invalidated some warrantless searches authorized by regulatory schemes.

[¶20] The fourth point articulated by the Department at ¶39 of its brief, that the statute

must be shown to be coercive, appears to be made up by the Stevens court based on a very selective reading of a small number of cases. Going back to Frost the concept is the exchange of the grant of a privilege for the surrender of a constitutional right. North Dakota's implied consent and refusal law give no other options to obtain the privilege but to consent to a warrantless search. The Stevens court misreads commentary and other case law to make a reach and connect it to a finding that the implied consent law is not coercive for consent to search in a fourth amendment context. The Stevens court ignores the simple fact that the only way to obtain the privilege is to surrender the right and thus the doctrine applies.

Dated: September 11, 2014

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[¶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 September 11, 2014 he electronically served the following on Michael Pitcher, Assistant North Dakota Attorney General representing the North Dakota Department of Transportation:

APPELLANT'S REPLY BRIEF

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

Dated: September 11, 2014

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