

**STATE OF NORTH DAKOTA
 IN THE SUPREME COURT
 SUPREME COURT NO. 20160223**

City of Gwinner,)
)
Appellee,)
)
vs.)
)
Paul D. Vincent,)
)
Appellant.)
_____)

**BRIEF OF APPELLEE
 CITY OF GWINNER**

**On Appeal from Order and Judgment of the District Court
 Southeast Judicial District
 Sargent County, North Dakota
 Sargent County Criminal No. 41-2015-CR-00127
 The Honorable Bradley A. Cruff
 The Honorable Daniel D. Narum**

**Jeffrey K. Leadbetter
 LEADBETTER LAW OFFICE
 7 4th Ave W P.O. Box 511
 Lisbon, ND 58054-0511
 Telephone: (701) 683-5510
 Fax: (701) 683-5511
 Email: ellaw@drtel.net
 ID# 04278
 Attorney for Appellee**

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
	<u>Paragraph No.</u>
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
LAW AND ARGUMENT	3
CONCLUSION.....	7

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph No.</u>
Baillie v. Moore, 522 N.W. 2d 748(1994)	3
Eriksmoen v. Director, N.D. Department of Transportation, 2005 ND 206, ¶12, 706 N.W.2d 610	5
State v. Pace, 2006 ND 98, 713 N.W.2d 535 (N.D. 2006)	5, 6
<u>Statutes and Regulations</u>	
Sec. 39-20-04, N.D.C.C	3

STATEMENT OF ISSUES

1. The District Court did not error in denying the Defendant's Motion to Suppress as the Defendant was granted a reasonable opportunity to consult with an attorney.

STATEMENT OF THE CASE

2. The Defendant Paul Daniel Vincent (Defendant) was arrested on November 6, 2015 for driving under the influence of an alcoholic beverage. While in the Officer's car, the Defendant requested the Officer "talk to my attorney". The Defendant gave the Officer a phone number and asked the Officer to talk to his attorney. The telephone number was purportedly a number of Defendant's still unidentified attorney. The Officer called the number and received no answer. The conversation between the Officer and the Defendant solely revolved around the Defendant's request for the Officer to contact his attorney and not for the Defendant to personally speak with an attorney. The Officer complied with the direction of the Defendant and the Defendant thereafter made no further request for the Officer to speak with his attorney as it appears the Officer met with the expectations of the Defendant.

LAW AND ARGUMENT

3. The North Dakota Supreme Court in the case of Baillie v. Moore, 522 N.W. 2d 748(1994) decided a bright line test was necessary to determine whether a Defendant uttered the magical words to consult with an attorney by stating:

“We refuse to indulge in a case-by-case search for magical words which must be uttered by an arrestee as a prerequisite to being given an opportunity to consult an attorney. Rather, we hold that if a DUI arrestee, upon being asked to submit to a chemical test, responds with any mention of a need for an attorney--to see one, to talk to one, to have one, etc.--the failure to allow the arrestee a reasonable opportunity to contact an attorney prevents the revocation of his license for refusal to take the test. A refusal to take the test under these conditions is not the affirmative refusal necessary to revoke a license under Sec. 39-20-04, N.D.C.C. Our intent is to set forth a "bright line" test to determine when an arrestee must be allowed a reasonable opportunity to consult with an attorney before deciding whether to take a chemical test. If the arrestee responds with any affirmative mention of a need for an attorney, law enforcement personnel must assume the arrestee is requesting an opportunity to consult with an attorney and must allow a reasonable opportunity to do so.” Baillie v. Moore, 522 N.W.2d 748 (1994).

4. Thus, the question in this case as presented by the appellant is whether or not the Defendant was allowed a reasonable opportunity to contact an attorney. The City of Gwinner (hereinafter City) maintains that the Defendant did have a reasonable opportunity through the actions of the Officer by attempting to contact the attorney on the Officer’s cell phone at the request of the Defendant. App 13-14.
5. In State v. Pace, 2006 ND 98, 713 N.W.2d 535 (N.D. 2006), the Court reviewed a similar case to the one presented here. In Pace, the Court

reviewed a situation where the Officer contacted his dispatch for the phone number of a law firm, the Officer called the law firm that reached an answering machine. Id ¶3-4, 535-536. The Court found: "The situation presented here is not factually similar to any cases previously addressed by this Court; however, the "totality-of-the-circumstances" analysis employed in our previous holdings remains controlling. Eriksmoen v. Director, N.D. Department of Transportation, 2005 ND 206, ¶12, 706 N.W.2d 610. Taking into account that Hagel assisted Pace in attempting to contact his attorney and Pace made no further requests for an attorney, we cannot conclude that Pace was denied a reasonable opportunity to consult with counsel." State v. Pace, 2006 ND 98, 713 N.W.2d 535 (N.D. 2006). As in Pace, the Officer attempted to contact the Defendant's attorney at his request but received no answer. App 13-14. The Court found the Officer's actions in Pace provided a reasonable opportunity for the Defendant to consult with counsel. Id ¶9. Similarly in this case, the Defendant was provided a reasonable opportunity to consult with counsel.

6. Additionally, the Defendant did not make any further request to contact an attorney after the Officer attempted to call the number given to him by the Defendant. Pace, likewise, made no further comment to the Officer requesting to speak with an attorney after the initial attempt. Id ¶9. The Court concluded that Pace was not denied a reasonable opportunity to consult with counsel and in this case the Defendant was also not denied a reasonable opportunity to consult with counsel as no further requests were made by the Defendant to speak with counsel. Id ¶9.

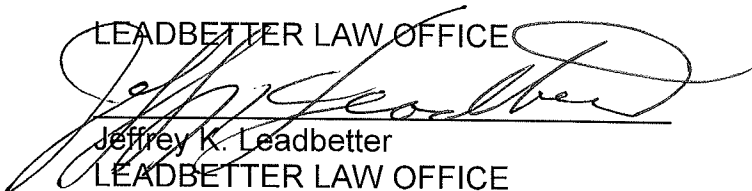
CONCLUSION

7. The Defendant requested the Officer to contact his attorney and did provide to the Officer a phone number to call. The Officer called the number given to him by the Defendant and received no answer. Applying the Courts "bright line" test the Defendant made a request for the Officer to contact his attorney. The question presented was whether the actions

of the Officer provided a reasonable opportunity for the Defendant to contact an attorney. The City contends that the Defendant did receive a reasonable opportunity to consult with an attorney. Therefore the Appellee City respectfully requests this Court to uphold the order denying the Defendant's Motion to Suppress Evidence and find that the judgment of the District Court is affirmed.

Dated this 11 day of Oct, 2016

LEADBETTER LAW OFFICE



Jeffrey K. Leadbetter

LEADBETTER LAW OFFICE

7 4th Ave W P.O. Box 511

Lisbon, ND 58054-0511

Telephone: (701) 683-5510

Fax: (701) 683-5511

Email: ellaw@drtel.net

ID# 04278

Attorney for Appellee

**STATE OF NORTH DAKOTA
IN THE SUPREME COURT
SUPREME COURT NO. 20160223**

City of Gwinner,)
)
Appellee,)
)
vs.)
)
Paul D. Vincent,)
)
Appellant.)
_____)

**PROOF OF SERVICE
CITY OF GWINNER**

**On Appeal from Order and Judgment of the District Court
Southeast Judicial District
Sargent County, North Dakota
Sargent County Criminal No. 41-2015-CR-00127
The Honorable Bradley A. Cruff
The Honorable Daniel D. Narum**

**Jeffrey K. Leadbetter
LEADBETTER LAW OFFICE
7 4th Ave W P.O. Box 511
Lisbon, ND 58054-0511
Telephone: (701) 683-5510
Fax: (701) 683-5511
Attorney for Appellee**

STATE OF NORTH DAKOTA)
)
COUNTY OF RANSOM)

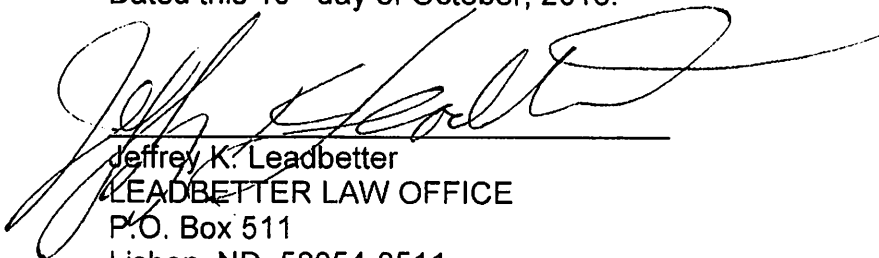
PROOF OF SERVICE BY E-MAIL

Jeffrey K. Leadbetter, providing proof of service by e-mail on October 10, 2016, he served the Appellee's Brief, by e-mail to the below mentioned persons by e-mailing it to:

North Dakota Supreme Court Clerk of Court
e-mail address: supclerkofcourt@ndcourts.gov

Luke T. Heck, Severson, Wogsland & Liebl, PC
e-mail address: luke.heck@swlattorneys.com

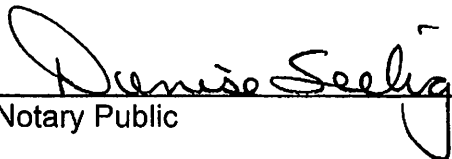
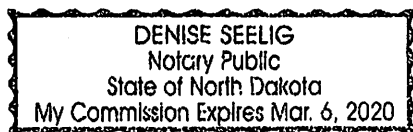
Dated this 10th day of October, 2016.



Jeffrey K. Leadbetter
LEADBETTER LAW OFFICE
P.O. Box 511
Lisbon, ND 58054-0511
Telephone: (701) 683-5510
Fax: (701) 683-5511
Attorney for Appellee
ID# 04278

Subscribed and Sworn to before me
this 10 day of October, 2016.

(SEAL)



Notary Public

STATE OF NORTH DAKOTA
IN THE SUPREME COURT
SUPREME COURT NO. 20160223

City of Gwinner,)
)
Appellee,)
)
vs.)
)
Paul D. Vincent,)
)
Appellant.)
_____)

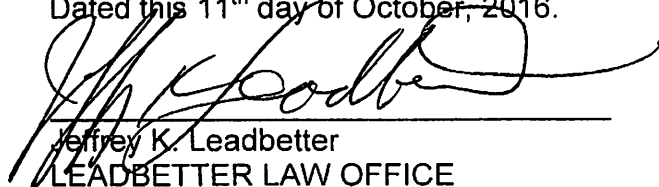
PROOF OF SERVICE

Jeffrey K. Leadbetter, providing proof of service by e-mail on October 11, 2016, he served the Appellee's Brief, by e-mail to the below mentioned persons by e-mailing it to:

North Dakota Supreme Court Clerk of Court
e-mail address: supclerkofcourt@ndcourts.gov

Luke T. Heck, Severson, Wogsland & Liebl, PC
e-mail address: luke.heck@swlattorneys.com

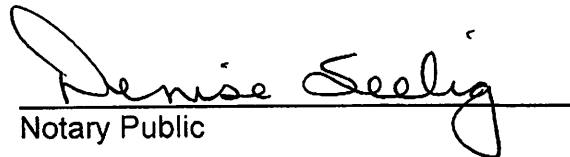
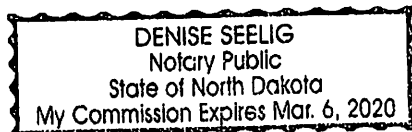
Dated this 11th day of October, 2016.



Jeffrey K. Leadbetter
LEADBETTER LAW OFFICE
7 4th Ave W P.O. Box 511
Lisbon, ND 58054-0511
Telephone: (701) 683-5510
Fax: (701) 683-5511
Email: ellaw@drtel.net
ID# 04278
Attorney for Appellee

Subscribed and Sworn to before me
this 11 day of October, 2016.

(SEAL)



Notary Public