20170015
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 6, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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| STATE OF NORTH DAKOTA,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>CHRISTIAN VON RUDEN,<br><br>Defendant/Appellant. | ) Supreme Court No. 20170015<br>)<br>) Mercer Co. 2016-CR-00059<br>)<br>)<br>)<br>)<br>)<br>) |

# BRIEF OF APPELLEE

ON APPEAL FROM THE
DISTRICT COURT OF NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

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## STATEMENT OF ISSUES

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2. The trial court was correct in finding Defendant was not denied of his right to consult with an attorney before commencement of the test.
3. There is no evidence to support that Defendant was improperly interrogated while in custody.

## STATEMENT OF THE CASE

[1] Christian Von Ruden was charged with Driving Under the Influence on March 15, 2016. On May 12, 2016, Defendant filed a motion to suppress (A. 5), to which the State responded on May 27, 2016 (A. 39). In its response, the State referenced Exhibit 1 (A. 47), a video from the Mercer County Jail during administration of the Intoxilyzer test, which was filed on May 31, 2016, as noted in the Register of Actions (A. 2). Defendant filed his response to the State's reply on June 10, 2016. A. 49.

[2] On July 12, 2016, the parties stipulated to waiver of the scheduled evidentiary hearing and requested the lower court review the pending suppression motion on the filings. A. 52. On July 21, 2016, the lower court adopted the parties' stipulation. A. 21. Additionally, on July 21, 2016, which was the day before the trial was scheduled to be held, the lower court issued its order granting Defendant's motion. A. 54. The lower court incorrectly noted in its Order that the State had not submitted the video. A. 54. As such, the State filed a motion for reconsideration on the same day directing the court's attention to the docketing of the video and requesting the court reconsider its decision upon review of the properly filed video. A. 57. The State's motion was served upon Defendant on the same day. A. 3, Docket Entry #38. The trial scheduled for July 22, 2016, was cancelled by the court. A. 3.

[3] Defendant filed a response to the State's motion for reconsideration on July 25, 2016. A. 60. The State filed a supplemental brief to its original motion for reconsideration on July 28, 2016. A. 62. The defendant then filed a reply brief on August 7, 2016. A. 62. The lower court then entered its order granting the State's request for reconsideration, and, in doing so, also reversed its prior decision and denied the Defendant's suppression motion. A. 78.

[4] The parties' plea agreement was filed on December 9, 2016, (A. 83), and Criminal Judgment was entered on December 13, 2016 (A. 88). To correct the conditional nature of Defendant's plea, Amended Criminal Judgment was entered on December 29, 2016. A. 94. Defendant then noticed his appeal on January 12, 2017. A. 96.

## STATEMENT OF THE FACTS

[5] The lower court noted the undisputed facts in its Order on Motion for Reconsideration:

> … On March 15, 2016, at approximately 8:28 p.m. Beulah officer Ben Newman made a traffic stop of Von Ruden's vehicle. Officer Newman read the implied consent advisory to Von Ruden and administered a preliminary breath test. Von Ruden was subsequently arrested for DUI and transported to the detention center in Stanton, ND. Von Ruden was again read the implied consent advisory. Although Officer Newman had to ask Von Ruden a number of times whether he would submit to a chemical test, Von Ruden eventually gave an affirmative reply.
>
> The first test sequence was begun at 9:22 p.m. Von Ruden provided a[sic] deficient sample and Officer Newman decided to not give the second portion of the test. After halting the first test, Officer Newman began a second testing procedure at 9:41 p.m. In between the first and second blows on the second testing sequence, Von Ruden stated that he wanted his phone to call an attorney. Officer Newman told him that he could call an attorney after the test was completed. The test was completed and indicated Von Ruden had a BAC of .198. A. 80-81.

## LAW AND ARGUMENT

[6] Defendant challenges the trial court's decision to deny Defendant's Motion to Suppress. As it relates to such decisions, this Court has put forth the following applicable standard of review as follows:

> "The applicable standard of review of a district court's decision to grant or deny a motion to suppress is well established.
>
> "A trial court's findings of fact in preliminary proceedings of a criminal case will not be reversed if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. We do not conduct a de novo review. We evaluate the evidence presented to see, based on the standard of review, if it supports the finding of fact.
>
> "Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law."

State v. O'Connor, 2016 ND 72, ¶5-6, citing State v. Boehm, 2014 ND 154, ¶8 (citations omitted). As discussed below, there is ample evidence to support the lower court's findings, and its decision was not contrary to the manifest weight of the evidence.

### 1. The trial court was correct in finding the acceptable breath result obtained in this case was administered in accordance with the approved method.

[7] Two tests were initiated on the night in question: the first at 9:22 p.m. (A. 26), and the second at 9:41 p.m. (A. 31). For the first test, the video evidence submitted shows Defendant was incredibly uncooperative throughout the first sample being taken and continued to make assertions

that he was unable to provide a sample. Approximately 10:34 minutes into the video, Officer Newman can be heard saying “deficient sample.” The Intoxilyzer Test Record and Checklist notes the result of that sample as “*Subject Test 0.203*”. It is undisputed that the officer then aborted the testing after the first sample. The video, at approximately 11:16 minutes, shows Officer Newman telling Defendant “we’re gonna have to do it all over again,” and advising that if Defendant did not provide two samples then he would be charged with Refusal. At the administrative hearing, the officer testified, “So I chose to not give the second portion of the first test because he gave me an insufficient sample on the first.” A. 27. Accordingly, the Intoxilyzer Test Record and Checklist shows the second breath sample as “*Subject Test 0.000*. A. 26. The asterisk on both samples is then cross-referenced below noting “*Deficient Sample – Value Printed was Highest Obtained.” A. 26.

[8] Because no sufficient sample was obtained during the first test, the State does not dispute that the results are inadmissible. Indeed, the Court also appears to have entirely disregarded the first test, as no mention is even made to its results in either its Order on Motion to Suppress Evidence (A. 78) or its Order on Motion for Reconsideration (A. 78). First, on its face, the breath alcohol result for the first test was not acceptable, as no sufficient sample was obtained. Where such a result is achieved, the following is the instructions from the Approved Method to Conduct Breath Tests:

INTERPRETATION OF TEST:

…

B. If any breath sample is determined to be deficient, meaning the subject did not provide a breath sample or did not provide an adequate breath sample, the instrument will print "*Subject Test" followed by "#.###*" with the highest alcohol concentration obtained during the first test. The asterisk (*) cross-references a message printed below on the test record.

1. If any one of the two breath samples rendered by the subject is deficient or the subject does not provide one of the two samples, the single test obtained shall constitute a valid test and the three digits for the test will be reported as the breath alcohol concentration.

2. If both breath samples rendered by the subject are deficient, the test is still valid, but with deficient breath samples. The subject either refused or could not provide a sample. This is not an acceptable breath alcohol result.

a. If the operator can determine the deficient breath samples are not because the subject refused to provide samples, but are because of the inability of the subject to provide the samples, an alternative test for the subject needs to be obtained for evidentiary purposes.

A. 26. 40 citing Approved Method to Conduct Breath Tests, Toxicology Section/Breath Program, Office of the Attorney General Crime Laboratory Division, Version 0.0 (2012) (https://www.ag.nd.gov/CrimeLab/BreathAlcoholProgram/ApprovedMethods/Intox8000ApprovedMethodBreathTests/04-19-12.pdf) , p. 7-8.

Here only one breath sample was given by Defendant and it was a deficient sample. As such, subsection (1) above could obviously not be applicable, and the results could not be acceptable. As both results are denoted as deficient, on its face then, the results of the first test are inadmissible per subsection (2).

[9] Now, the State acknowledges subsection (2) contemplates two samples be obtained from an individual. That was obviously not the case here, as the second sample was rendered deficient because the officer aborted the test prior to a second sample being given by the Defendant. While that would certainly invalidate the result if the first sample was sufficient (See Keller v. N.D. Dep't of Transp., 2015 ND 81, ¶10, 861 N.W.2d 768, 772), it does not work to invalidate the results of the second test given by the officer. As this Court noted in Keller, "the approved method is silent regarding a premature abortion of the testing sequence." Id. at ¶10. Not only should the results of the second test be considered on their own, which the lower court did, it also complies with the approved method in proceeding with a second test where no sufficient results were obtained during the first test as noted in subsection (2) above. As no sufficient result was achieved on the first test, the officer did in fact administer a second test, which was conducted pursuant to the approved method.

[10] Throughout the pleadings, Defendant incorrectly argues the first test was "invalid," requiring an additional 20-minute wait period prior to commencement of the second test. While that word may be liberally construed in saying generally that the first test results were unacceptable, faulty, or improper, it has a very specific meaning as it relates to administration of the test and each breath sample given. Defendant cites to the "Intoxilyzer 8000 Troubleshooting" sheet (A. 32) in support of his argument that a 20-minute waiting period was necessary after the first

sample, but entirely disregards the definition of an invalid sample. An "invalid sample" occurs where "residual mouth alcohol was detected in the subject's breath sample." A. 32. As such, a 20-minute waiting period is required for residual mouth alcohol to be absorbed through normal body processes. A. 32. Where an "invalid sample" is obtained "the instrument aborts the mode sequence and prints "Invalid Sample X.XXX" followed by **Invalid Test – Mouth Alcohol." A. 32. This was not the case here.

[11] It is very clear a deficient sample was obtained from Defendant, not an invalid one. Not only was the very first breath sample denoted as a deficient one on the Test Record and Checklist (A. 26), but also Officer Newman can be heard saying "deficient sample" approximately 10:34 minutes into the video. The Test Record and Checklist clearly denotes the first breath sample as a deficient sample, and the lower court correctly concluded that a 20-minute waiting period following such a sample is not required. A. 80. Accordingly, Defendant's insistence that a 20-minute waiting period must be observed between the first breath sample and commencement of the second breath test is misplaced.

[12] Now, the State acknowledges that a 20-minute waiting period is required prior to the commencement of any test, and submits that was observed here. The Test Record and Checklist for the second test indicates the officer waited (A. 31). Furthermore, as the officer complied with the waiting period prior to the commencement of the first test, as noted on the Test Record and Checklist (A. 26), certainly he complied having started the

second test immediately after having aborted the first. With no other arguments raised then, it is clear that the second test was administered pursuant to the approved method and is admissible.

**2. The trial court was correct in finding Defendant was not denied of his right to consult with an attorney before commencement of the test.**

[13] Defendant did not ask to speak with an attorney prior to submitting to either Intoxilyzer test. "If an arrested person asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test." Kuntz v. State Highway Commissioner, 405 N.W.2d 285 (ND 1987); also see State v. Pace, 2006 ND 98, ¶6, 713 N.W.2d 53; City of Mandan v. Leno, 2000 ND 184, ¶9, 618 N.W.2d 161. It is clear and unequivocal that a person has a right to consult with an attorney **before** submitting to a chemical test. Defendant fails to cite any authority to support his argument that a person has a right to consult with an attorney **while** submitting to a chemical test. As the trial court noted, "[Defendant] asked to contact his attorney while the test was in progress. The reference to an attorney occurs approximately 27:27 into the booking video. [Defendant] requested the opportunity to speak to an attorney between the first and second 'blows' of the second testing sequence." Clearly there was sufficient evidence to support the trial court's findings, and its decision in this regard should be upheld.

### 3. There is no evidence to support that Defendant was improperly interrogated while in custody.

[14] There are no facts in the record to support Defendant's argument that he was improperly interrogated while in custody, and as such the trial court was correct in not addressing that issue. In all the filings before the lower court, the only time Miranda was mentioned, from a factual standpoint, was in Defendant's brief filed in support of his motion. A. 6, 20. No other mention of Miranda exists in the record, nor does any evidence exist of any interrogation or statements made by the Defendant, not even in Defendant's affidavit filed in support of his motion. A. 37. As there was not sufficient evidence, the trial court was correct in not ruling on that issue.

[15] The officer is allowed to pose some questions to the Defendant without triggering a Miranda violation. This Court has noted the following in this regard:

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not considered custodial interrogation. An officer arriving at the scene of an accident, therefore, may ask a person apparently involved in the accident a moderate number of questions to determine whether he should be issued a traffic citation, whether there is probable cause to arrest him, or whether he should be free to leave after the necessary documentation has been exchanged.

State v. Martin, 543 N.W.2d 224, 225 (ND 1996). Accordingly then, asking questions relating to an open container found in the vehicle, which could

result in a traffic ticket, was not improper and did not elicit responses to be suppressed.

## CONCLUSION

[16] For the reasons stated above, the State requests that the Court affirm the trial court's order denying the defendant's motion to suppress.

Dated this 6th day of April, 2017.

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## CERTIFICATE OF SERVICE

Service on the Defendant-Appellant was made by serving a true and correct copy of the **Brief of Appellee** to the following via email as required in N.D.S.Ct. Admin. Order 14(D)(1):

Dan Herbel
Attorney for Defendant-Appellant
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Dated this 6th$^{th}$ day of April, 2017.

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