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APRIL 20, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, Plaintiff/Appellee, v. CHRISTIAN VON RUDEN, Defendant/Appellant.	)))))))))	Supreme Court No. 20170015 Mercer Co. No. 29-2016-CR-00059

REPLY BRIEF OF APPELLANT

Appeal from an Amended Criminal Judgment

dated and signed December 28, 2016, and filed December 29, 2016

and the adverse determination within the Order on Motion for Reconsideration

dated August 31, 2016, and filed on September 1, 2016

which reversed the Court's prior Order granting suppression

Mercer County District Court, South Central Judicial District

The Honorable David E. Reich

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[¶3] The State "acknowledges" that the approved method "contemplates two samples be obtained from an individual," and does not contemplate a scenario where "the officer abort[s] the test prior to a second sample being given by the Defendant." *See* Brief of Appellee at page 11, ¶9. Indeed, "the approved method is silent regarding a premature abortion of the testing sequence," and there is nothing in the approved method that informs how to "interpret" an aborted test sequence. *See Keller v. N.D. Dep't of Transportation*, 2015 ND 81, ¶10, 861 N.W.2d 768 (the approved method's "Interpretation of Test" does not address tests aborted by the test operator).

[¶4] However, it seems logical to assert that if a test result is obtained in violation of the approved method, the test result is invalid.[1] Here, "the approved method for administering an Intoxilyzer test was not followed," when the officer aborted the first test sequence before that sequence's second sample, and presumably the first test sequence would be invalid. *See Keller*, 2015 ND 81, at ¶1.

[¶5] It seems odd for the State to contend that the second sample on the first sequence was "deficient," when Von Ruden was not even allowed an opportunity to blow

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[1] The officer considered the first test sequence "invalid," and he testified accordingly at the driver's license hearing:

> "the very first test that I gave him, and he gave me an insufficient sample. So the way the intoxilyzer works is, if you get an insufficient sample on the first try, it doesn't matter what you do on the second one because it won't count as a valid test. So I chose to not give the second portion of the first test because he gave me an insufficient sample on the first."

(App. 27) (excerpt from DOT Administrative Hearing transcript ("Tr."), lines 9-16). Therefore, the 9:40 p.m., sample never actually occurred, because the officer intentionally aborted the test.

a second sample. There was nothing deficient about the blow - there was no blow. The officer made sure there was no second sample by aborting the test.

[¶6] It seems the State agrees, on the one hand, with the *Keller* ruling that "the approved method is silent regarding a premature abortion of the testing sequence." *See Keller*, 2015 ND 81, at ¶10. Even though the State agrees the approved method is silent, the State nevertheless pulls the word "deficient" from the approved method and contends, on the other hand, it is somehow applicable to a scenario where the officer intentional aborts and interferes with a test sequence. This is not consonant with *Keller*.

[¶7] The State apparently agrees that if the first test sequence is considered invalid, then a 20-minute deprivation period is required before a second test sequence can begin. Because the first test sequence was not performed according to the approved method, the first test sequence was invalid. Because no 20-minute deprivation period was observed before the second test sequence, the second test sequence was also invalid.

[¶8] Next, the State argues that an arrestee's right to consult with counsel extinguishes once the testing process begins. Not surprisingly, the State offers no authority for this proposed proposition of law. Under this unique proposal, if the test operator begins the breath test then intentional and mistakenly (he did not have to abort the test) aborts the breath test on his misunderstanding of the approved method, the arrestee has no right to consult with counsel during this faulty protocol.

[¶9] In our case, the test operator believed that "the way the intoxilyzer works is, if you get an insufficient sample on the first try, it doesn't matter what you do on the second one because it won't count as a valid test." (App. 27) (excerpt from DOT Administrative Hearing transcript ("Tr."), lines 9-16). The operator's belief, however, is

inconsistent with the approved method. A deficient sample on the first blow does not necessarily render the test invalid. Rather, it depends on what happens on the second blow, assuming the operator does not abort the test and materially interfere with the test. Here, however, the operator did abort and invalidate the test.

[¶10] After Von Ruden requested to consult with counsel, the officer told Von Ruden he could consult "after we were done with our test." (App. 29) (Tr. at L. 21-23). Consultation after testing defeats the whole purpose of consultation. Von Ruden was deprived of his statutory right to consult with counsel. "Suppression of the results of the Intoxilyzer test is the appropriate remedy for the officers' violation of" a driver's "limited right to consult" with an attorney. *See Interest of R.P.*, 2008 ND 39, ¶25, 745 N.W.2d 642; *see also State v. Berger*, 2001 ND 44, ¶¶14-15, 623 N.W.2d 25.

[¶11] Finally, this is the first time the State has bothered to respond to Von Ruden's *Miranda* argument. In the district court, Von Ruden moved for suppression of all statements made in response to custodial interrogation without the benefit of *Miranda* warnings. (App. 5-38). The State did not respond to Von Ruden's *Miranda* argument and has waived response. (App. 39-46).

[¶12] The State now argues that the facts in the record are not sufficient to establish a *Miranda* violation. However, this Court has previously used the factual assertions from a party's brief below as record facts, when no evidentiary hearing was held and when the opposing party does not dispute the factual assertions. *See State v. Birchfield*, 2015 ND 6, 858 N.W.2d 302 (adopting, in whole, the factual assertions of the government as record facts).

[¶13] In Von Ruden's brief below, he argued:

> "In the present case, Officer Newman never advised Von Ruden of his rights under *Miranda*. After Von Ruden was formally placed under arrest, handcuffed, and placed in the backseat of a locked and marked police vehicle, Officer Newman questioned Von Ruden about an open container in the vehicle. Without *Miranda* warnings, Von Ruden told the officer that the open container belonged to him. Von Ruden's unwarned statements were made in an environment of custodial interrogation under *Miranda*."

(App. 25) (¶61). The State did not dispute these facts and the State did not lodge an argument in opposition of Von Ruden's *Miranda* argument.

[¶14] This Court could decide, like in *Birchfield*, that the facts from the brief below constitute the record facts, and that Von Ruden's statements to the officer were compelled by interrogation while he was in custody, without *Miranda* warnings. Accordingly, those statements were acquired in violation of the Fifth Amendment to the United States Constitution and Article I, Section 12 of the North Dakota Constitution, and they must be suppressed.

[¶15] This Court could also decide to remand the *Miranda* issue to the district court, since that Court did not pass on the issue. Although this Court has urged "trial courts to decide" an issue "when the issue is raised," *State v. Thompson*, 2011 ND 11, ¶14, 793 N.W.2d 185 (VandeWalle, C.J., concurring), this Court has also declined to address the issue in the first instance. *See id* at ¶11. A remand for further proceedings on the *Miranda* issue only, might also be reasonable and appropriate.

[¶16] CONCLUSION

[¶17] For the foregoing reasons, Mr. Von Ruden respectfully requests relief.

Respectfully submitted
this 20th day of April, 2017.

/s/ *Dan Herbel*

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[¶18] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 20, 2017, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Jessica Binder, Mercer County State's Attorney, at the following:

Electronic filing TO: "Jessica Binder" < mirenner@nd.gov >

Dated this 20th day of April, 2017.

/s/ *Dan Herbel*

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Dan Herbel