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MARCH 7, 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

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

Dan Herbel
ND State Bar ID # 05769
Attorney for Appellant Christian Von Ruden

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

TABLE OF CONTENTS

[¶1] TABLE OF AUTHORITIES

United States Supreme Court cases

Other sources

[¶2] STATEMENT OF THE ISSUES

I. The Intoxilyzer tests were not administered in accordance with the approved method and therefore should be excluded from evidence

II. Von Ruden was deprived of his statutory right to consult with counsel

III. Because the officer did not advise Von Ruden of his *Miranda* rights prior to interrogating Von Ruden, while Von Ruden was in custody, the questioning and the unwarned responses from Von Ruden should be suppressed

[¶3] STATEMENT OF THE CASE

[¶4] On March 15, 2016, Christian Von Ruden was arrested for driving a motor vehicle while under the influence of an intoxicating liquor in Mercer County, North Dakota. (Appendix ("App.") at 4). On March 16, 2016, a Uniform Traffic Complaint and Summons was filed in Mercer County District Court informing Von Ruden that he was standing accused of the charge of DUI. (App. 4).

[¶5] On May 12, 2016, Von Ruden filed a Motion to Suppress Evidence, requested an evidentiary hearing, and asked the trial court to suppress the Intoxilyzer breath test records and checklists because he was deprived of his statutory right to consult with counsel and because the approved method was not followed in the administration of the Intoxilyzer breath test. (App. 5-38). Von Ruden also moved for suppression of all statements made in response to custodial interrogation, without the benefit of *Miranda* warnings. (App. 5-38).

[¶6] On May 27, 2016, the State filed a response brief opposing suppression. (App. 39-47). In the response, the State argued that Von Ruden had waived his right to consult with an attorney (App. 42), without citation to any case law, but did not argue

that consultation would materially interfere with the test. The State did not respond to Von Ruden's *Miranda* argument. (App. 39-46).

[¶7] On June 8, 2016, the Court scheduled an evidentiary hearing. (App. 48). The hearing was set for July 12, 2016. (App. 48).

[¶8] On June 10, 2016, Von Ruden submitted a Reply Brief arguing again that the first breath test was invalid because the approved method was not followed, as per *Keller v. N.D. Dep't of Transportation*, 2015 ND 81, 861 N.W.2d 768, when the officer aborted the first test sequence. Von Ruden also argued that the second test sequence was invalid because the officer did not observe a 20-minute deprivation period after breath alcohol entered the Intoxilyzer machine during the first test sequence, before the officer manually aborted the first test sequence. (App. 49-51).

[¶9] On July 12, 2016, the parties waived the evidentiary hearing and agreed to have the district court rule on the Motion on a stipulated record "consisting of all offered exhibits by both parties." (App. 52). The parties agreed that "all offered exhibits are admitted and received into evidence" for the Court to consider. (App. 52) (the stipulation referenced a belief that the defendant had offered exhibits A-F; in actuality, the defendant has offered exhibits A-G). On July 21, 2016, the district court approved the Stipulation and admitted all exhibits offered at the time. (App. 53).

[¶10] On July 21, 2016, the day before trial, the district court issued an order suppressing the evidence (App. 54-56), ruling that "[b]y requesting to speak with counsel, Von Ruden essentially withdrew his consent to the test." (App. 56). The Court also found that the State made "no showing that allowing" Von Ruden to consult with counsel

"would have materially interfered with the administration of the test." (App. 56). Indeed, the State did not even make that argument.

[¶11] On the same day of the ruling, which was the day before trial, the State filed a Request for Reconsideration, asking the Court reconsider its ruling. (App. 57-59). Again, the State did not argue that allowing Von Ruden to consult with counsel would materially interfere with the administration of the test. (App. 57-59). The case was taken off the trial calendar.

[¶12] On July 25, 2016, Von Ruden filed a Reply to the State's Request for Reconsideration, arguing that reconsideration is unnecessary. (App. 60-61). Then, before the district court could rule, the State submitted a second request to reconsider, arguing for the first time that Von Ruden had to affirmatively refuse the test, i.e. commit a crime, before he would be allowed to consult with counsel. (App. 62-63). Also in the second request to reconsider, the State argued for the first time that allowing Von Ruden to consult with counsel would have materially interfered with the administration of the test, even though the officer is the one who aborted the first test sequence. (App. 63).

[¶13] In addition to making new arguments after the record closed, the State also submitted an additional exhibit, Exhibit 2 - the Approved Method from 2012, with the second request to reconsider. (App. 66-75). The State did not present any expert testimony on whether the officer's premature termination of the testing sequence affected the test results (*Keller v. N.D. Dep't of Transportation*, 2015 ND 81, 861 N.W.2d 768), whether the aborted test sequence constituted an invalid test, or whether a 20-minute deprivation period is required before a second test sequence, after the test operator aborts the first test sequence.

[¶14] Von Ruden filed a reply (App. 76-77) to the State's second request to reconsider and asked that the State stop filing requests to reconsider. (App. 76). Von Ruden also reminded the State that the right to consult with counsel is a bright-line rule. (App. 76).

[¶15] Nevertheless, the district court ruled that it was not necessary for the officer to ascertain a 20-minute deprivation period prior to the second test. (App. 80). The district court also ruled, without citation to case law, that allowing Von Ruden to consult with counsel would have materially interfered with the administration of the test. (App. 81). Even though the officer aborted the first test sequence, at a time when he had one deficient, but valid, sample, the district court did not comment on what role the officer's intentional abortion had on the administration of the test, or whether the officer intentionally interfered with the administration of the test. The district court did not rule on Von Ruden's *Miranda* argument.

[¶16] On December 7, 2016, Von Ruden entered a conditional plea of guilty to the charge of DUI, pursuant to N.D.R.Crim.P. 11 (a)(2), specifically reserving the right to appeal the adverse ruling in the Order on Motion for Reconsideration, dated August 31, 2016, and filed on September 1, 2016. (App. 83-86). On December 13, 2016, the Court approved the conditional plea of guilty. (App. 87). On December 14, 2016, the Mercer County Clerk prepared a judgment that was not adequate for a conditional plea. (App. 88-89).

[¶17] On December 23, 2016, Von Ruden filed a Motion to Amend Judgment. (App. 90-92). The State did not oppose the Motion. (App. 93). On December 28, 2016,

the district court signed an Amended Criminal Judgment (App. 94-95), which was filed on December 29, 2016. (App. 3).

[¶18] On January 11, 2017, Von Ruden filed a Notice of Appeal to this Court. (App. 96-100). Von Ruden appeals and argues that the Intoxilyzer tests were not administered in accordance with the approved method, that Von Ruden was deprived of his statutory right to consult with counsel, and that Von Ruden's unwarned responses to custodial interrogation should be excluded. Von Ruden asks this court to vacate the Amended Criminal Judgment in this matter, reverse the district court's Order on Motion for Reconsideration, remand to the district court for withdrawal of Von Ruden's conditional guilty plea, and order suppression of the Intoxilyzer test evidence and all custodial statements made by Von Ruden in response to interrogation, without the benefit of *Miranda* warnings.

[¶19] STATEMENT OF THE FACTS

[¶20] On March 15, 2016, Beulah police officer Newman made a traffic stop on Mr. Von Ruden's vehicle and ultimately arrested Von Ruden for DUI. Following the arrest, the officer transported Von Ruden to the detention center in Stanton, ND, for a breath test.

[¶21] At the detention center, the officer began the first test sequence at 9:22 p.m. (App. 26) (first Intoxilyzer Test Record and Checklist). The first test sequence contained two deficient samples, one at 9:32 p.m., and the other at 9:40 p.m. (App. 26). 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.

[¶22] After the officer decided to abort the first test sequence, he did not wait twenty (20) minutes before initiating the second test sequence. Instead, the officer began the second test sequence at 9:41 p.m. - one minute after the first sequence. (App. 31) (second Intoxilyzer Test Record and Checklist).

[¶23] Additionally, Von Ruden requested to speak with an attorney. The officer testified that "in between the first test and the second test, [Von Ruden] asked if he -- he -- well, ... [h]e said -- said something about "I want my phone call, I want to call my attorney," or something like that." (App. 29) (Tr. at L. 17-21). The officer "told him that he was more than afforded that right and after we were done with our test." (App. 29) (Tr. at L. 21-23). The officer never explained what benefit consultation would confer after testing was already completed. The officer testified at the driver's license hearing that Von Ruden "was not given an opportunity to contact his attorney after the first test but before the second one" and that "we didn't stop so that he could make a phone call." (App. 29-30) (Tr. at 23, L. 24 - 24, L. 5). Breath-testing was performed, without allowing any consultation with counsel.

[¶24] STANDARD OF REVIEW

[¶25] "In reviewing a district court's decision on a motion to suppress evidence," this Court will "defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance." *See State v. Graf*, 2006 ND 196, ¶7, 721 N.W.2d 381. This Court "will affirm a district court's decision on a motion to suppress if 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." *See id.* "Questions of law are fully reviewable on appeal." *See State v. Thompson*, 2011 ND 11, ¶7, 793 N.W.2d 185; *see also State v. Smith*, 2005 ND 21, ¶11, 691 N.W.2d 203. "A trial court's conclusions of law are fully reviewable by this Court." *See City of Mandan v. Jewett*, 517 N.W.2d 640, 641 (N.D. 1994).

[¶26] LAW AND ARGUMENT

I. The Intoxilyzer tests were not administered in accordance with the approved method and therefore should have been excluded from evidence

A. First test sequence

[¶27] In our case, like in *Keller v. N.D. Dep't of Transportation*, the officer obtained a reading on the Intoxilyzer machine for the first sample in the sequence, but then aborted the test sequence before the second sample. *See Keller v. N.D. Dep't of Transportation*, 2015 ND 81, 861 N.W.2d 768. The *Keller* court determined that this protocol was not in accord with "the approved method for administering an Intoxilyzer

test." *See id*. at ¶1. Although there was no expert testimony presented here, presumably, if a test result is obtained in violation of the approved method, the test result is invalid.

[¶28] Indeed, the officer did not count the first test sequence as a valid test and he "chose to not give the second portion of the first test." (App. 27) (Tr. at L. 9-16). Although it is unknown how to denote the aborted second sample on the first testing sequence ("deficient" or "invalid"), it is understandable that the officer believed the first test sequence was invalid, because the officer training manual issued to law enforcement by the state crime lab and the state toxicologist, issued after the last version of the approved method, to assist in intoxilyzer breath-testing, indicates that a "[t]est is invalid because both subject tests are deficient samples." *See* "Chemical Test Training, Student Manual, Fall 2013 - Spring 2014, Crime Laboratory Division, Toxicology, at: http://www.ag.nd.gov/CrimeLab/LawEnforcementTraining/ChemTestOperTraining/ChemTestOperManuals/index.htm (App. 51) (Exhibit G, below, p. 67, #5).

[¶29] By aborting the first test sequence, the officer effectively denied Von Ruden an opportunity to provide a second sample on the first test sequence. Because the first test sequence was an invalid test and was not performed in accordance with the approved method (*See Keller*, 2015 ND 81), it should have been excluded from evidence.

B. Second test sequence

[¶30] After the first invalid, aborted test sequence, the officer had Von Ruden submit to a second test sequence. The officer did not wait twenty (20) minutes before initiating the second test sequence. Instead, the officer began the second test sequence almost immediately. (App. 31) (second Intoxilyzer Test Record and Checklist).

[¶31] "In North Dakota, a 20-minute deprivation period is required." *See* excerpts from Chemical Test Operator Manual, Office of the Attorney General, Crime Laboratory Division, Fall 2013 - Spring 2014, at page 50 (App. 34) (Exhibit D, below). When there is an invalid test sample on the first test sequence, the approved method of the state toxicologist requires that the test operator "observe the subject for at least 20 minutes before beginning another analysis." *See id* at p. 21 (App. 32). The purpose of the 20-minute observation/deprivation period is to ensure that no foreign objects or residual mouth alcohol corrupts the result of the subsequent test. Indeed, the DOT, as well as prosecutors, find breath test samples to be invalid when there is non-compliance with the 20-minute deprivation period. (App. 35-36).

[¶32] In the case at hand, the Intoxilyzer test records clearly show that the officer did not wait 20 minutes between test sequences. (App. 26 and App. 31) (exhibits A and C, below). Consequently, the officer did not follow the approved method in performing the second test sequence. Because the officer did not follow the approved method on the second sequence, that test sequence is invalid and the test record and results should have been excluded as well.

II. Von Ruden was deprived of his statutory right to consult with counsel

[¶33] This Court "has repeatedly held that defendants must be afforded a reasonable opportunity to consult with counsel before deciding whether to submit to a chemical test." *See State v. Pace*, 2006 ND 98, ¶6, 713 N.W.2d 535. "[A] person arrested for driving under the influence of intoxicating liquor has a qualified statutory right to consult with an attorney before deciding whether or not to submit to a chemical

test." *See Kuntz v. State Highway Commissioner,* 405 N.W.2d 285, 286 (N.D. 1987). "[T]his right of an arrested person to have a reasonable opportunity to consult with an attorney before taking a chemical test is a statutory right based on N.D.C.C. § 29-05-20." *See City of Mandan v. Leno*, 2000 ND 184, ¶9, 618 N.W.2d 161.

[¶34] The right to consult with an attorney "is a basic and fundamental" right "underscored by constitutional due process principles." *See Kuntz v. State Highway Commissioner,* 405 N.W.2d 285, 288 (N.D. 1987). Years ago, this Court remarked on the right to consult with counsel, stating:

> "Most persons are confused about the many laws that exist. What the public usually understands, and indeed expects, is that if one is in trouble, the first thing to do is consult with a lawyer. That right is so basic, so fundamental, and secured over so many centuries of struggle with tyranny as to become sacred."

See Kuntz, 405 N.W.2d at 288.

[¶35] In the case at bar, Von Ruden told the officer, "in between the first test and the second test," that he wanted to speak with an attorney before deciding whether to continue with the testing process. (App. 29) (Tr. at L. 12-21: "I want my phone call, I want to call my attorney"). Instead of allowing Von Ruden to consult with counsel about whether to submit to chemical testing, the officer "told him that he was more than afforded that right and after we were done with our test." (App. 29) (Tr. at L. 21-23). Consultation after testing defeats the whole purpose of consultation. This clearly violated Von Ruden's right to consult with counsel.

[¶36] Section "29-05-20, N.D.C.C., entitles an arrested individual to have a reasonable opportunity to consult with an attorney before deciding to take a chemical test." *See Kuntz v. State Highway Commissioner*, 405 N.W.2d 285, 289 (N.D. 1987)

(emphasis added). The purpose of consultation is to serve an arrested individual *before* any further testing is done. Informing an arrestee that consultation will be permitted only *after* testing, is a clear deviation of acceptable testing protocol and a clear violation of North Dakota law. Accordingly, Von Ruden was not afforded a reasonable opportunity to consult with counsel before deciding whether to submit to the chemical test.

[¶37] North Dakota law clearly provides a bright-line rule on the right to consult with counsel:

> "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."

See Baillie v. Moore, 522 N.W.2d 748, 750 (N.D. 1994). "Our purpose in adopting a bright-line rule was to avoid the need to engage in case-by-case consideration of the circumstances surrounding a request to consult with counsel." *See Washburn v. Levi*, 2015 ND 299, ¶16, 872 N.W.2d 605.

[¶38] Here, the State is engaging in a subjective case-by-case consideration of the circumstances surrounding Von Ruden's request to consult with counsel in an attempt circumvent the bright-line rule. The State appears to argue that the circumstances are so unique, here, that it would be okay to deny Von Ruden the right to consult, and to abandon the bright-line rule and decades of case law. However, there is really no good reason to abandon stare decisis.

[¶39] Furthermore, the State's argument has shifted, between written submissions, showing weakness in the State's argument. First the State argued, without citation to any authority, that because testing was underway, Von Ruden therefore waived

his right to consult with counsel, even though he clearly requested consultation. However, Von Ruden is unaware of any case from this Court that says an arrestee waives his right to consult after he has started the testing process.

[¶40] Indeed, such a waiver rule would not make sense, and would not allow attorney consultation where a chemical test operator has subjected an arrestee to a dozen breath tests, for example, or subjected an arrestee to harassing behavior or a peculiar or dysfunctional testing protocol. For example, the State's proposed rule would not allow consultation where, as here, the chemical test operator improperly aborts the first test sequence - conduct not in accordance with the approved method.

[¶41] The State then abandoned the authority-starved waiver argument and argued for the first time, in its second request for reconsideration, that allowing attorney consultation would materially interfere with the administration of the test. In addition to waiving that argument below, the State has made no such showing.

[¶42] Even though there was no proper showing of material interference, the district court latched on to this argument in the second request for reconsideration, and reversed its earlier suppression order. Apparently believing the first test sequence was "invalid," the district court remarked: "Stopping the test at that point would have materially interfered with the administration of the test and resulted in a second invalid test." (App. 81). The district court did not take into account the fact that the officer had a valid first test sequence before choosing to abort the sequence, and that the officer's intentional termination of the test sequence caused delay. Thereafter, the officer was not delayed by a 20-minute deprivation period, which he chose to not obey.

[¶43] "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. Because Mr. Von Ruden was not permitted to consult with an attorney, after he expressed a desire to speak with counsel about whether to take the breath test, his right to consult was violated. Consequently, the appropriate remedy is to suppress the results of the Intoxilyzer tests.

III. Because the officer did not advise Von Ruden of his *Miranda* rights prior to interrogating Von Ruden, while Von Ruden was in custody, the questioning and the unwarned responses from Von Ruden should be suppressed

[¶44] In the district court, Von Ruden also 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. (App. 39-46). The district court did not rule on Von Ruden's *Miranda* argument.

[¶45] This Court has urged "trial courts to decide" an issue "when the issue is raised." *See State v. Thompson*, 2011 ND 11, ¶14, 793 N.W.2d 185 (VandeWalle, C.J., concurring). However, there are instances and circumstances where this Court can decide an issue, based upon the record below, when the lower court did not address an issue raised. *See Herrman v. N.D. Dep't of Transportation*, 2014 ND 129, ¶13, 847 N.W.2d 768. Von Ruden believes the record is clear and this Court can decide the *Miranda* issue without resorting to remand.

[¶46] "[T]he prosecution may not use statements … stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966). "As for the procedural safeguards to be employed, … the following measures are required:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

See id. These advisories delineated in *Miranda* are now what have become known as the "*Miranda* warnings." *See generally id.* "[T]he (*Miranda*) warnings have become part of our national culture." *See Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326 (2000). More importantly, though, the *Miranda* warnings are required by the Fifth Amendment "and serve[ ] to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *See Miranda*, 384 U.S. at 467 (emphasis added).

[¶47] "When a person is in custody and being interrogated by law enforcement, the individual must be apprised, or warned, of his or her rights." *See Red Paint v. State*, 2002 ND 27, ¶10, 639 N.W.2d 503. "If the police take someone into custody and question that person without warning about this basic constitutional right [against self-incrimination], the responses cannot be used as evidence to establish guilt" and the unwarned statements are subject to exclusion. *See State v. Fasching*, 453 N.W.2d 761, 763 (N.D. 1990) (suppressing pre-arrest response to officer questioning of whether Fasching had consumed alcohol, because the circumstances were custodial in nature).

[¶48] "'Custodial interrogation" under Miranda does not require an arrest, but includes circumstances in which a reasonable person would not feel free to leave and thus would feel the "restraint on freedom of movement of the degree associated with a formal arrest.'" *See State v. Golden*, 2009 ND 108, ¶11, 766 N.W.2d 473. "In determining whether a person is subject to custodial interrogation, we examine all circumstances surrounding the interrogation and consider how a reasonable man in the suspect's position would have understood the situation." *See id* at ¶9.

[¶49] 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*.

[¶50] Because Von Ruden's statements to the officer were compelled by interrogation while he was in custody, without *Miranda* warnings, 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. Accordingly, Von Ruden's responses cannot be used as evidence to establish guilt and they must be suppressed.

[¶51] CONCLUSION

[¶52] For the foregoing reasons, Mr. Von Ruden respectfully requests that this Court vacate the Amended Criminal Judgment in this matter, reverse the district court's Order on Motion for Reconsideration, remand to the district court for withdrawal of Von Ruden's conditional guilty plea, and order suppression of the intoxilyzer test evidence and all custodial statements made by Von Ruden in response to interrogation, without the benefit of *Miranda* warnings.

Respectfully submitted
this 7th day of March, 2017.

/s/ *Dan Herbel*

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Dan Herbel
Attorney for Appellant Christian Von Ruden
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

[¶53] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 7, 2017, the BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Jessica Binder, Mercer County State's Attorney, at the following:

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

Dated this 7th day of March, 2017.

/s/ *Dan Herbel*

_____

Dan Herbel