IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20170276
Burleigh County No. 08-2017-CR-01067

State of North Dakota,)
)
Plaintiff and Appellant,)
)
vs.)
)
Tyler Fleckenstein,)
)
Defendant and Appellee.)

APPEAL FROM ORDER GRANTING APPELLEE'S MOTION TO SUPRESS ENTERED ON JULY 18, 2017

SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE A. ROMANICK, PRESIDING

BRIEF OF APPELLANT STATE OF NORTH DAKOTA

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ISSUE PRESENTED FOR REVIEW

[¶ 1] Whether the district court committed reversible error in granting Tyler Fleckenstein's Motion to Suppress by finding that his consent to a blood test was coerced solely by the officer's reading of the North Dakota Implied Consent Advisory without mentioning criminal penalties when no other coercive circumstances were alleged.

STATEMENT OF THE CASE

[¶ 2] This case comes to this Court from an appeal brought after the district court granted Tyler Fleckenstein's Motion to Suppress on July 18, 2017. Appellant's Appendix at page 45 (hereinafter "App. 45"). The State appeals the district court's decision to grant Fleckenstein's Motion to Suppress. App. 45.

[¶ 3] Fleckenstein was charged with Driving Under the Influence of Alcohol – 3rd Offense, a Class A Misdemeanor, on April 11, 2017. App. 1. On June 2, 2017, Fleckenstein filed a Motion to Suppress, alleging that Fleckenstein was coerced into taking a blood test. App. 6. On June 16, 2017, the State filed its Response to Defendant's Motion to Suppress, arguing, in part, that the Deputy Dustin Braun's reading of the North Dakota Implied Consent Advisory was not coercive. App. 12-17. On July 17, 2017, a motion hearing was held on the Motion to Suppress. App. 1-2. On July 18, 2017, the District Court issued its Order Granting Fleckenstein's Motion to Suppress, which adopted a previous district court's order as an exhibit. App. 40-44. On July 25, 2017, the State timely filed a Notice of Appeal, Statement of Prosecuting Attorney, and Order for Transcript. App. 45-48.

STATEMENT OF THE FACTS

[¶ 4] On March 17, 2017, at approximately 1:00 a.m., Deputy Braun of the Burleigh County Sheriff's Department observed a traffic violation where a vehicle had touched the center line. App. 23. Deputy Braun initiated a traffic stop on the vehicle for the traffic violation. App. 23. Deputy Braun identified the driver of the vehicle as Tyler Fleckenstein. App. 23. During the course of the stop, Deputy Braun observed that Fleckenstein was showing signs of impairment. App. 23-24. Deputy Braun had Fleckenstein conduct multiple field sobriety tests including the Horizontal Gaze

Nystagmus test, the Walk and Turn test, and the One-Leg Stand test. App. 24. During the course of the stop, Fleckenstein also admitted to having consumed a few beers earlier that evening. App. 24.

[¶ 5] After completing the field sobriety tests, Deputy Braun asked Fleckenstein to take a breath screening test. App. 24. Before the breath screening test, Deputy Braun read Fleckenstein the North Dakota Implied Consent Advisory. The advisory was stated as follows:

> [a]s a condition of operating a motor vehicle on a highway or a public or private area to which the public has a right of access to, you have consented to taking a test to determine whether you are under the influence of alcohol or drugs, I must inform you that North Dakota law requires you to take a breath screening test to determine if you are under the influence of alcohol, refusal to take the test as directed by a law enforcement officer may result in revocation of your driver's license for a minimum of one hundred and eighty days and potentially up to three years.

App. 24-25. After the advisory, Fleckenstein consented to taking the breath screening test, which showed that his blood alcohol content was above the legal limit. App. 25.

[¶ 6] After the breath screening test, Deputy Braun arrested Fleckenstein. App. 25. Deputy Braun read Fleckenstein his Miranda warnings and re-read the North Dakota Implied Consent Advisory. App. 25-26. This time, Deputy Braun read the advisory as follows:

> as a condition of operating a motor vehicle on a highway or a public or private area to which the public has a right of access to, you have consented to taking a test to determine whether you are under the influence of alcohol or drugs, I must inform you that North Dakota law requires you to submit to a chemical test to determine if you are under the influence of alcohol, refusal to take the test as directed by law enforcement officer may result in revocation of your driver's license for a minimum of one hundred and eighty days and potentially up to three years.

App. 26. Fleckenstein stated he understood the Implied Consent Advisory. App. 13. Deputy Braun asked Fleckenstein if he has any questions, and Fleckenstein stated that he did not have any questions. App. 13.

[¶ 7] Deputy Braun then re-read a portion of the Implied Consent Advisory before requesting a chemical test; this portion was stated as follows:

> as a condition of operating a motor vehicle on a highway to which the public has a right of access to, you have consented to take a test to determine if you are under the influence of alcohol, now what I am asking, is would you be willing to submit to a blood test at the Sheriff's Department.

App. 29. Fleckenstein consented to taking a blood test. App. 26. Fleckenstein was subsequently charged with Driving Under the Influence – 3rd Offense. App. 1, 3.

ARGUMENT

I. Standard of review

[¶ 8] The North Dakota Supreme Court reviews a district court's decision on a motion to suppress as follows:

> In reviewing a district court's decision on a motion to suppress evidence, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We 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 evidence. Our standard of review recognized the important of the district court's opportunity to observe the witnesses and assess their credibility. 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. Hawkins, 2017 ND 172, ¶ 6, 898 N.W.2d 446 (internal citation and quotation omitted).

II. The district court erred in granting Fleckenstein's Motion to Suppress.

[¶ 9] The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. The touchstone of the Fourth Amendment is reasonableness and typically requires law enforcement to obtain a judicial warrant before conducting a search. State v. Helm, 2017 ND 207, ¶ 6, 901 N.W.2d 57 (citing Birchfield v. North Dakota, 136 S. Ct. 2160, 2173). Searches conducted without a warrant are per se unreasonable subject only to a few explicitly stated and well delineated excepts to the warrant requirement. Id. (citing Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507).

A. Fleckenstein voluntarily consented to a blood test.

[¶ 10] Consent is one of the well delineated exceptions to the warrant requirement, but consent must be voluntary and the State has the burden of proof. State v. Hawkins, 2017 ND 172, ¶ 7; State v. Schmidt, 2016 ND 187, ¶ 23, 855 N.W.2d 65. Voluntariness is generally determined by examining the totality of the circumstances, and no one factor is determinative of voluntariness Id.

[¶ 11] There are, however, two main considerations for determining whether consent is voluntary. Hawkins, 2017 ND 172, ¶ 7. First, the characteristics and condition of the accused at the time of the consent, including age, sex, race, education level, physical or mental condition, and prior experience with police. Id. Second, the details of the setting in which the consent was obtained, including the duration and conditions of detention, police attitude towards the defendant, and diverse pressures that sap the accused's powers of resistance or self-control. Id. "Consent is voluntary when it is the product of a free and unconstrained choice and not the product of duress or coercion. Id. at ¶ 8 (internal citation and quotation omitted).

[¶ 12] The Supreme Court of the United States has analyzed searches of a person's breath, blood, and urine under different constitutional provisions. See Missouri v. McNeely, 569 U.S. 141, 133 S. Ct. 1552 (2013) (analyzing whether the taking of a warrantless blood sample was reasonable under the exigency exception to the warrant requirement); see Birchfield, 136 S. Ct. 2160 (analyzing whether the taking of warrantless blood and breath samples were reasonable under the search incident to arrest exception to the warrant requirement). However, the Supreme Court of the United States did not address the issue of whether a person can voluntary consent to a warrantless blood test. See Birchfield, 136 S. Ct. 2160 (remanding the issue of whether the individual's consent to a blood test was voluntary).

[¶ 13] The taking of a blood sample is a search within the meaning of the Fourth Amendment. Birchfield, 136 S. Ct. at 2173; State v. Hawkins, 2017 ND 172, ¶ 7. The question here, as it was in Birchfield, is whether the warrantless search of an individual's blood was reasonable. Id. The Birchfield Court held that warrantless blood tests may not be administered as a search incident to a lawful arrest for drunk driving. Id. at 2184. In this case, however, we are looking at a different exception to the warrant requirement, namely the consent exception, to determine whether the warrantless blood test was reasonable.

[¶ 14] Whether an individual's consent to a blood test is voluntary when a law enforcement officer reads the implied consent advisory without the mentioning criminal penalties has not been decided by this Court since the Birchfield decision. However, this Court previously addressed this issue before the Birchfield decision. See McCoy v. North Dakota Dept. of Transp., 2014 ND 119, 848 N.W.2d 659 (holding that the consent

exception applied to a warrantless test and that a driver's agreement to chemical testing to determine alcohol consumption was not coerced simply because an administrative penalty has been attached to refusing the test or because the penalty has been recited to the driver). This Court has, also, recently addressed a similar issue in State v. Hawkins, 2017 ND 172. In Hawkins, the encounter took place prior to the Birchfield decision, therefore, the law enforcement officer read the old implied consent advisory which informed the individual that refusal of a blood test was a crime. Id. In this case, however, the encounter took place subsequent to the Birchfield decision, therefore, Deputy Braun read the implied consent advisory mentioning only the administrative penalties, similarly to the officer's reading of the implied consent advisory in the McCoy case. 2014 ND 119.

[¶ 15] Under the Birchfield and Helm decisions, law enforcement cannot conduct a blood or urine chemical test as a search incident to arrest for Driving Under the Influence. However, those decisions do not state that an individual cannot voluntarily consent to a chemical test, of blood or urine, after being informed that there are negative administrative penalties for refusing the test. See Birchfield, S. Ct. at 2160; See Helm, 2017 ND 207.

[¶ 16] Fleckenstein claims that his consent was not voluntary; however, his assertion is contrary to this Court's precedent. This Court has previously held, on multiple occasions, that individuals' consents are voluntary in similar cases. See McCoy v. North Dakota Dept. of Transp., 2014 ND 119, 848 N.W.2d 659 (see previous parenthetical in paragraph fourteen); See State v. Smith, 2014 ND 152, 849 N.W.2d 599 (holding that a driver's consent to chemical testing is not coerced simply because a criminal penalty has been attached to refusing the test or that law enforcement advises the driver of that law); See

State v. Fetch, 2014 ND 195, ¶ 9 (holding that consent to a chemical test is not coercive and is not rendered involuntary merely by a law enforcement officer's reading of the implied consent advisory that accurately informs the arrestee of the consequences for refusal, including criminal penalties, and presents the arrestee with a choice); See Beylund v. Levi, 2015 ND 18, ¶ 15, 859 N.W.2d 403 (holding that because Beylund did not allege any other coercive circumstances, other than the penalties under N.D.C.C. § 39-20, so he voluntarily consented to the blood test).

[¶ 17] Fleckenstein was not coerced into taking a blood test. Deputy Braun merely asked if he would submit to the test after being informed that there may be administrative penalties if he refused the test. Fleckenstein only alleged that Deputy Braun's reading of the implied consent advisory rendered his consent involuntary, no other coercive circumstances were alleged. An individual may, and often does, voluntarily consent to a chemical test to avoid administrative penalties. It is an individual's free and voluntary choice to take a chemical test knowing that if they choose to refuse the test that there will be penalties. See Fetch, 2014 ND 195; see McCoy, 2014 ND 119; see Smith, 2014 ND 152; see Beylund, 2015 ND 18. The district court's Order goes directly against this Court's clear precedent in determining when an individual's consent is voluntary.

[¶ 18] Differentiating this case from Hawkins, it is clear that the Hawkins decision does not have as wide of implications as this case. In Hawkins, the officer read the implied consent advisory which mentioned that there were criminal penalties for refusing a blood test. 2017 ND 172. However, since the Birchfield decision, law enforcement officers no longer read that there are criminal penalties when asking for a blood test. See N.D.C.C. 39-20-01(3)(a). If this Court upholds the district court's Order, moving forward, every

individual's consent to a blood test would be coerced even though law enforcement officers are reading the implied consent advisory the way the legislature intended, by mentioning only the administrative penalties. This would greatly increase the concern of the dissent in Hawkins. 2017 ND 172, ¶ 13 (J. McEvers, dissenting) (showing concern that individuals could not voluntarily consent to a blood test).

[¶ 19] Taking into account the totality of the circumstances, Fleckenstein freely and voluntary consented to the blood test. Overall, this incident was a fairly common Driving Under the Influence encounter. Fleckenstein committed a traffic violation and was pulled over. Deputy Braun noticed that Fleckenstein was showing signs of alcohol impairment. Fleckenstein admitted to drinking a few beers. Deputy Braun then conducted a few field sobriety tests. After the tests, Deputy Braun read the North Dakota Implied Consent Advisory mentioning only the administrative penalties, and asked Fleckenstein to take a breath screening test. Fleckenstein consented and took the breath screening test. Following the breath screening test, Fleckenstein was arrested, read his Miranda warnings, and re-read the implied consent advisory which once again only mentioned administrative penalties. Deputy Braun asked Fleckenstein to submit to a blood test, and Fleckenstein consented to take the test. Deputy Braun never threatened, coerced, or deceived Fleckenstein into taking a blood test. Rather, Deputy Braun accurately informed Fleckenstein what North Dakota law requires, specifically: that a person consents to taking a blood test by driving on roads in this state, and that if Fleckenstein chose to refuse the test that he would face administrative penalties.

[¶ 20] Just as in the cases prior to the Birchfield decision, Fleckenstein was not coerced into taking a blood test merely by Deputy Braun accurately informing him what the

possible penalties were if he refused the test. See Fetch, 2014 ND 195; see McCoy, 2014 ND 119; see Smith, 2014 ND 152; see Beylund, 2015 ND 18.

B. Fleckenstein was deemed to have consented to a blood test under North Dakota's Implied Consent Statute.

[¶ 21] The State believes its analysis in the preceding section should decide the issue presented in this case. However, since Smith was partially abrogated by the Birchfield decision, the State believes it is appropriate to address that an individual can still be deemed to have consented to a blood test under North Dakota's Implied Consent Advisory. See Birchfield, 136 S. Ct. 2160; See Smith, 2014 ND 152. Fleckenstein's main argument is that Deputy Braun informed him that North Dakota law "requires" you to take a chemical test.

[¶ 22] However, the Birchfield decision is clear that the Smith decision was only abrogated to the extent that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense. Birchfield, 136 S. Ct. 2160, 2186. The plain text of the Birchfield decision makes it clear that the United States Supreme Court's "prior opinions have referred approving to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." 136 S. Ct. at 2185 (citing McNeely, 569 U.S. 141 (2013); and South Dakota v. Neville, 459 U.S. 553 (1983)). Further, the Supreme Court stated that "nothing we say here should be read to cast doubt on [implied consent laws that impose civil and administrative penalties]." Id. Therefore, the Supreme Court differentiated between a State insisting on a blood test and imposing criminal penalties on a refusal, and a State insisting on a blood test without their being criminal penalties on a refusal. Id.

[¶ 23] The Supreme Court reasoned that "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." Id. That limit was made clear; "motorist cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." Id. at 2186. North Dakota's law; however, stands on the other side of that limit because North Dakota's law no longer deems motorists to have consented to blood tests on the pain of committing criminal offenses. N.D.C.C. 39-20-01(3)(a).

[¶ 24] After the Birchfield decision, the North Dakota's legislature and law enforcement officers took notice of this decision. The North Dakota Legislature updated the implied consent statute. Before the Birchfield decision, the implied consent statute read as follows:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred and eighty days and up to three years of the individual's driving privileges.

N.D.C.C. § 39-20-01(3)(a) (shown as before the 2017 update). After the Birchfield decision, the legislature changed the implied consent statute to read as follows:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs and the refusal of the individual to submit to a test directed by the law enforcement officer will result in a revocation of the individual's driving privileges for a minimum of one hundred and eighty days and up to three years. In addition, the law enforcement officer shall inform the individual refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence. If the officer requests the individual to submit to a blood

> test, the officer may not inform the individual of any criminal penalties until the officer has first secured a search warrant.

N.D.C.C. § 39-20-01(3)(a) (shown as after the 2017 update).

[¶ 25] After this Court's decision in State v. Helm, which was decided subsequent to the legislative update, the urine portion of this statute might need to be updated again, but that is not relevant for this appeal. 2017 ND 207. The updated implied consent statue makes clear that the legislature thought about how it wanted law enforcement officers to read implied consent when requesting a blood sample. Deputy Braun informed Fleckenstein of the implied consent statute the way the legislature wanted it read subsequent to the Birchfield decision. Thus, Deputy Braun's reading of the implied consent advisory was the appropriate way to read the implied consent statute after Birchfield to obtain voluntary consent from an individual to take a blood test.

[¶ 26] Specifically, Deputy Braun did not request that Fleckenstein submit to a blood test on the pain of committing a criminal offense. Fleckenstein was only facing administrative penalties if he refused the blood test, and nothing in the Birchfield decision should be read to cast doubt on this implied consent advisory that imposed only administrative penalties for refusal of a blood test. See Id. at 2185. Since the Birchfield Court was clear that implied consent laws that impose only civil penalties are constitutional, it is clear that Fleckenstein was required, under North Dakota's Implied Consent Law, to take a blood test or face administrative penalties.

[¶ 27] Fleckenstein still, however, claims that because the officer informed him that he was "required" to take a chemical test that he was coerced into taking a blood test, and in turn his consent was not freely and voluntarily given. Fleckenstein's reasoning does not hold merit, because Birchfield states only that motorists cannot be deemed to have

consented to a blood test on the pain of committing a criminal offense. However, since the Birchfield decision was announced, this is no longer the case in North Dakota. This is reflected by the legislative update to the implied consent law. See N.D.C.C. § 39-20-01(3)(a). It is also reflected by the fact that Deputy Braun only stated that there are only administrative penalties if Fleckenstein refused to take a blood test.

[¶ 28] Fleckenstein was never threatened with the pain of a criminal offense, so he can be deemed to have consented to a blood test under North Dakota's implied consent statue. Since, Fleckenstein was deemed to have consented to taking a blood test by driving on a public road; Deputy Braun accurately informed Fleckenstein that he was required to submit to a blood test under North Dakota law, or he would face administrative penalties. Thus, for the reasons mentioned in the preceding section, Fleckenstein's consent to the blood test was voluntary.

C. The district court committed reversible error in its finding and analysis.

[¶ 29] The district court erred in its factual findings and legal analysis contained in its order. The district courts are finding per se coercion whenever law enforcement officers read the implied consent advisory and then ask for a blood test, even when the officers are not mentioning criminal penalties. The district courts are finding that reading the implied consent advisory is coercive even when there is no other evidence of coercion. The district court's order which makes the implied consent advisory per se coercive goes directly against the totality of the circumstances test.

[¶ 30] In this case, the district court clearly erred in its factual findings. The district court's findings from the hearing do not support its written order. At the motion, hearing the district court stated:

> You know, the Court's concerned, obviously, as I see Judge Schneider's reasoning, but Birchfield's dealing with advised consent [as] it will be charged with refusal. This one just says you could lose your civil license. We're swinging the pendulum the other way not, which I'm not necessary sure is correct.

App. 36. It is clear, from the district court's oral findings, that the district court agreed with the State's reasoning. However, once the hearing was concluded, the district court erroneously adopted the findings of a previous district court's order (hereinafter "Cahoon Order") as an exhibit. The State did agree that the implied consent advisory in the Cahoon case was read in a similar way; however, the State did not agree to the district court adopting the Cahoon Order's findings. In its brief and at the hearing, the State argued that the issue of the voluntariness of an individual's consent must be decided based upon the totality of the circumstances. The State also argued that the Cahoon court was incorrect in its reasoning because of the argument brought forward by the State in this case. However, the district court, in its order and by adopting the Cahoon Order, found per se coercion when law enforcement officers read the implied consent advisory even without any other evidence of coercion.

[¶ 31] The district court also erred in its legal analysis. In the portion of the order written by the district court, it cites the Birchfield decision after stating that the defendant's consent could not be freely or voluntarily given, so the subsequent search of the defendant, by a blood test, was an unlawful search as it was coerced. The Birchfield Court never decided that issue; rather, the Court remanded the issue of whether the individual voluntarily consented or was coerced into taking to a blood test to the lower courts. See Birchfield, 136 S. Ct. at 2186 (remanding the issue to the state court to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory). As

far as the State is aware, the voluntary consent issue remanded in Beylund was never decided. See Beylund v. Levi, 2017 ND 30, ¶¶ 1, 12, 889 N.W.2d 907 (assuming that for purposes of only those appeals, the Court assumed the drivers' consent to the warrantless blood test was involuntary). The Supreme Court's decision to remand the issue for a finding on the voluntariness of consent clearly shows that reading the implied consent advisory is not per se coercion. Therefore, the district court erred by citing Birchfield to support its conclusion that the blood test was an unlawful search as it was coerced because the Birchfield decision never addressed that issue.

[¶ 32] It was not until recently in Hawkins, that this Court addressed the issue remanded in the Birchfield case, namely whether an individual's consent was voluntary given the partial inaccuracy stated in the implied consent advisory. 2017 ND 172. In Hawkins, this Court upheld the trial court because "[t]he district court considered the totality of the circumstances in reaching its factual determination that Hawkins' consent was not voluntary." Id. at ¶ 10. Conversely, the district court in this case, found a per se violation without considering the totality of the circumstances.

[¶ 33] Additionally, the Cahoon Order erred in its reasoning. In the Cahoon Order, the court reasoned that the Deputy should have simply asked the Defendant for a blood test without reading the implied consent advisory, and that would have allowed the Defendant to have voluntarily consented to the blood test. The district court's reasoning presents two major concerns. First, for the reasons stated in the preceding sections, the Birchfield decision did not make consent in these circumstances per se involuntary, so the district court's reasoning is incorrect. Second, if the officer simply asked for a blood test without reading the implied consent advisory, as the district courts suggest, the chemical test

would have been inadmissible under the statutory framework. See N.D.C.C. 39-20-01(3)(b). The district court, in this case, even found that that would be true. In its oral findings the district court stated:

> Might mean nobody knows what's going on in which - - the officers, but the problem the Court has then if you don't read them their implied consent, then you're not following the statutory requirements under the DUI law. So that's how it is.

App. 36. The district courts are essentially finding that, after Birchfield, law enforcement officers can never obtain an admissible blood test without a warrant. First, the district courts are finding that reading the implied consent advisory with mentioning only the administrative penalties, as required by statute, is per se coercive and therefore inadmissible. Second, if the officer chooses to not read the implied consent advisory, as suggested by the district courts, then the test is inadmissible because the officer did not follow the statutory framework. See N.D.C.C. § 39-20-01(3)(b). Either way, the State is unable to use the blood test at a subsequent trial. The district courts are making the State obtain a warrant for any blood test, which goes against the plain language of the Birchfield decision and this Court's clear precedent.

[¶ 34] Therefore, the district court erred in both its factual finding and legal analysis. The district court's oral findings do not coincide with its written order. The district court found, without mentioning any other coercive factors, that reading the implied consent advisory when mentioning only administrative penalties is per se coercive. The district court merely adopted the Cahoon Order, which is not the appropriate way to determine an issue which must be based upon the totality of the circumstances. Finding that reading the implied consent advisory is per se coercion is contrary to the holding of the Birchfield decision and this Court's prior precedent addressing the voluntariness of consent.

CONCLUSION

[¶ 35] The Birchfield decision has a relatively limited two part holding. First, it held that a blood test is not a reasonable search under the search incident to arrest doctrine, but that a breath test is a reasonable search under that doctrine. Birchfield, 136 S. Ct. at 2185. Second, it held under implied consent laws that a motorist cannot be deemed to have consented to submit to a blood test on the pain of committing a criminal offense. Birchfield, 136 S. Ct. at 2186. The Birchfied decision, however, supported the fact that motorists can be deemed to have consented to a blood test when the laws only impose civil and evidentiary penalties. Birchfield, 136 S. Ct. at 2185 (stating that the Court's prior opinions have referred approvingly to the concept of implied consent law with civil penalties). Birchfield was a decision which was based upon the search incident to arrest exception and implied consent law based upon the pain of criminal penalties. However, in the time since Birchfield was decided, the holdings of the case have somehow been transformed and misconstrued into a decision where it is being cited for whether a person voluntarily consented to a search without the pain of criminal penalties, which is a completely different issue. The Birchfield decision is not a sweeping decision that somehow took all simple requests by officers to take a blood test rather than a breath test, after reading the implied consent advisory without mentioning criminal penalties, into the realm of making an individual's consent involuntary and coerced.

[¶ 36] The district court erred in granting Fleckenstein's Motion to Suppress. Therefore, the State respectfully requests that this Court reverse the district court's Order Granting Motion to Suppress.

RESPECTFULLY SUBMITTED:

Dated this 19th day of October, 2017.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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Plaintiff-Appellant,	)	
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-vs-	)	
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Tyler Fleckenstein,	)	Supreme Ct. No. 20170276
	)	
Defendant-Appellee,	)	District Ct. No. 08-2017-CR-01067
	)	

I, Elvedina Papalichev, being first duly sworn, depose and say that I am a Legal Resident over 21 years old, and on the 19 day of October, 2017, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Appellant's Appendix
3. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Robert N. Quick
Attorney at Law
Robert Quick Law, P.L.L.C.
102 N. 3rd St., Ste. 100
Bismarck, ND 58501

which address is the last known address of the addressee.

Elvedina Papalichev

Subscribed and sworn to before me this 19 day of October, 2017.

Notary Public
Burleigh County, North Dakota

STACEY BASKERVILLE
Notary Public
State of North Dakota
My Commission Expires September 26, 2018