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DECEMBER 11, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20170276

STATE OF NORTH DAKOTA,

Plaintiff/Appellant,

v.

TYLER FLECKENSTEIN,

Defendant/Appellee.

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

BRIEF OF APPELLEE

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1. WHETHER THE LOWER COURT ERRED BY SUPPRESSING THE BLOOD TESTING AND RULING THAT MR. FLECKENSTEIN'S CONSENT WAS COERCED, AND THE SUBSEQUENT BLOOD TEST WAS AN UNLAWFUL SEARCH?

STATEMENT OF THE CASE

[1] On June 2, 2017, Tyler Fleckenstein ("Mr. Fleckenstein") filed a Motion to Suppress with the Court on the grounds that he was coerced into taking a chemical test. The State filed a Response on June 16, 2017, and a hearing was held on the Motion on July 17, 2017. An Order Granting Motion to Suppress was filed on July 18, 2017.

[2] The State has petitioned this Court on appeal to review the Order Granting Motion to Suppress dated July 18, 2017, by Judge Bruce A. Romanick, in Burleigh County District Court. The State appeals pursuant to N.D.C.C. § 29-28-07(5) and N.D.R.App.P. 4(b)(2).

STATEMENT OF THE FACTS

[3] On March 17, 2017, Deputy Braun was near the intersection of South 12th Street and Burleigh Avenue in Burleigh County. See, Transcript ("Tr.")[1] at pg. 5:6-10. Deputy Braun observed a vehicle that was parked at the intersection of South 12th Street and Burleigh Avenue, had turned west onto Burleigh Avenue. Id. at pg. 5:14-16. He also observed a traffic violation where the vehicle touched the center line, and Deputy Braun initiated a traffic stop. See, Tr. at pg. 5:16-18; Appendix ("App.") at 007. The driver of the vehicle was identified as Mr. Fleckenstein. See, Tr. at pg. 5:22-23.

[4] Upon speaking with Mr. Fleckenstein, Deputy Braun observed bloodshot eyes and Mr. Fleckenstein admitted to consuming a few beers. Id. at pg. 6:2-3. Deputy Braun ran Mr. Fleckenstein through a few field sobriety tests such as the Horizontal Gaze Nystagmus test, the Walk and Turn, and the One-Leg Stand. Id. at pg. 6:10-12. After that, Deputy Braun read him the implied consent advisory which advised he had consented to taking a test to determine whether he is under the influence, that North Dakota law requires him to take a breath-screening test, and refusal to take the test may result in revocation of his driver's license. See, Tr. at pg. 7:2-15; App. at 007. Mr. Fleckenstein then submitted to a preliminary breath test and was placed under arrest for driving under the influence. See, Tr. at pg. 7:16-22; App. at 007. Deputy Braun then read Mr. Fleckenstein the implied consent advisory for the second time which advised he had consented to taking a test to determine whether he is under the influence, that North Dakota law requires him to take a chemical test,

[1]References the Motion Hearing transcript held on July 17, 2017.

and refusal may result in revocation of his driver's license. See, Tr. at pg. 8:2-18; App. at 007. Deputy Braun requested that Mr. Fleckenstein submit to a blood test. See, Tr. at pg. 8:19-21; App. at 007. Deputy Braun re-read a portion of the implied consent advisory for a third time which advised Mr. Fleckenstein that he had consented to taking a chemical test to determine if he is under the influence and he was asking him to take a blood test at the Sheriff's Department. See, App. at 014. Deputy Braun clearly advised Mr. Fleckenstein that North Dakota law requires him to submit to a chemical test, and then he requested that Mr. Fleckenstein submit to a blood test. See, Tr. at pg. 12:4-8. Mr. Fleckenstein was coerced into taking a blood test. See, App. at 004-012, 020-024.

[5] Defense counsel filed a Motion to Suppress on June 2, 2017, asking the Court to suppress the blood test on the grounds that he was coerced into taking a chemical test. Id. at 004-012. The State filed their Response on June 16, 2017. Id. at 013-019. On July 17, 2017, a Motion to Suppress Hearing was held at the Burleigh County Courthouse with the Honorable Bruce Romanick presiding.

[6] On July 18, 2017, Judge Romanick issued an Order Granting the Defendant's Motion to Suppress suppressing the blood test and ruling that Mr. Fleckenstein's consent was coerced, and the subsequent blood test was unlawful search. Id. at 020-024. On July 25, 2017, the State filed a Notice of Appeal and Statement of Prosecuting Attorney. Id. at 025, 030.

ARGUMENT

[7] This Court applies a de novo review standard when reviewing a district court's decision on a Motion to Suppress evidence.

> 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 the evidence. Our standard of review recognizes the importance 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 (citing, State v. Odom, 2006 ND 209, ¶ 8, 722 N.W.2d 370 (quoting, State v. Graf, 2006 ND 196, ¶ 7, 721 N.W.2d 381)). Mr. Fleckenstein argues there are no conflicts in testimony which exist, and the district court's decision must be affirmed.

[8] This Court has established that stopping a motor vehicle constitutes a seizure worthy of Fourth Amendment protection. See, State v. Wetzel, 456 N.W.2d 115, 117-18 (N.D. 1990) (citing, Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979). The facts are not contested that Mr. Fleckenstein was seized.

A. THE DISTRICT COURT DID NOT ERR IN DETERMINING MR. FLECKENSTEIN WAS COERCED INTO TAKING A BLOOD TEST

[9] Mr. Fleckenstein argues he was coerced into submitting to a warrantless blood test. The normal dissipation of alcohol in the human body does not present a *per se* exigency excusing a warrant. Missouri v. McNeely, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). A consent search is an exception to both the warrant and probable cause

requirements of the Fourth Amendment. State v. Huether, 453 N.W.2d 778 (N.D. 1990) (citing, Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); see, State v. Gronlund, 6 N.W.2d 144 (N.D. 1984)). It must be conducted according to the limitations placed upon an officer's right to search by the consent or the search loses its validity. Id. (citing, United States v. McBean, 861 F.2d 1570 (11th Cir. 1988)). Thus, the government has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of unlawful authority. Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Likewise, in Netland, the Court held that for consent to be valid it must be given "freely and voluntarily." State v. Netland, 742 N.W.2d 207, 214 (Minn.App. 2007). When a refusal of a test results in criminal sanctions, consenting to the search cannot be construed as "freely and voluntarily" and is a violation of the Fourth Amendment. Id. (see also, State v. Mellett, 642 N.W.2d 779, 785 (Minn.App. 2002) (holding, where the court acknowledged that criminalizing refusal of a test is a "means of coercion.")). Under this context, Mr. Fleckenstein submitted to a blood test after he was read the implied consent advisory. The advisory indicated he was required by law to submit to a chemical test—in this case a blood test was required. An ordinary citizen being informed by law enforcement that the law requires them to do something, will infer they would be breaking the law and subsequently charged with a crime for not complying. As such, Mr. Fleckenstein's submission to the blood test was obtained by means of coercion (i.e. "ND law requires you to take a chemical test) to take a chemical test that cannot be conducted without consent, a

warrant, or an exigency; accordingly, it was not given freely and voluntarily.

[10] In Birchfield, the United States Supreme Court reviewed North Dakota's implied consent advisory, held that chemical testing was unconstitutional without a search warrant, and found that "Birchfield was threatened with an unlawful search." Birchfield v. North Dakota, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). Based upon this, the Supreme Court remanded the companion case of Beylund v. Grant Levi, Directr, NDDOT back to the North Dakota Supreme Court "to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory." Id. In the present case, Mr. Fleckenstein's chemical test was not obtained with his free and voluntary consent. Mr. Fleckenstein was informed that North Dakota law required him to take the test; therefore, making it an unlawful search and his consent was the basis of the partial inaccuracy of the officer's advisory, without which he would not have submitted to a chemical test.

[11] Consent is a recognized exception to the warrant requirement, but consent must be voluntary and the State has the burden of proof. Hawkins, at ¶ 7 (citing, State v. Schmidt, 2016 ND 187, ¶ 23, 885 N.W.2d 65). "A district court must determine whether the consent was voluntary under the totality of the circumstances." Hawkins, at ¶ 7 (internal quotations and citations omitted). "Whether an officer has consent is a question of fact." Hawkins, at ¶ 7 (citing, State v. Albaugh, 2007 ND 86, ¶ 21, 732 N.W.2d 712). A district 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." Hawkins, at ¶ 7 (citing, Schmidt, at ¶ 23 (quoting, State v. Mitzel, 2004 ND 157, ¶ 10, 685 N.W.2d 120)). "Consent is voluntary when it is the product of a free and unconstrained choice and not the product of duress or coercion . . . ." Hawkins, at ¶ 8 (citing, Schmidt, at ¶ 24 (quoting, State v. Torkelsen, 2008 ND 141, ¶ 21, 752 N.W.2d 640)). The considerations for determining whether consent is voluntary include:

> (1) 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; and
> (2) the details of the setting in which the consent was obtained, including the duration and conditions of detention, police attitude toward the defendant, and the diverse pressures that sap the accused's powers of resistence or self control.

Hawkins, at ¶ 7 (citing, Schmidt, at ¶ 24 (quoting, Torkelsen, at ¶ 21)). "Because the district court is in a superior position to judge credibility and weight, we show great deference to the court's determination of voluntariness." Hawkins, at ¶ 7 (citing, Schmidt, at ¶ 24).

[12] The district court's decision to suppress the blood test was based, in part upon a finding that Mr. Fleckenstein did not voluntarily consent to the blood test. The district court had the opportunity to observe Deputy Braun's testimony and evaluate his credibility at the motion hearing. The district court also had the opportunity to review Deputy Braun's in-car video which detailed the stop, the demeanor, and entire encounter between Mr. Fleckenstein and Deputy Braun on the night of Mr. Fleckenstein's arrest. Argument was made to the district court by Mr. Fleckenstein, that the comparison is the same as being charged for a crime for a refusal. When an average citizen is informed by law enforcement that North Dakota law requires them to submit to a chemical test, and the officer subsequently requests

only a blood test, they feel like they are not allowed to refuse or else they are committing a crime; therefore, they are being coerced into complying and submitting to the test.

[13] Under the totality of the circumstances, the district court determined Mr. Fleckenstein did not voluntarily consent to the blood test under the circumstances presented. Because the district court is in a superior position to judge credibility and weight, this Court must show great deference to the district court's determination of voluntariness. See, Hawkins, at ¶ 10 (citing, Schmidt, at ¶ 24). Just like the Supreme Court upheld the district courts determination that consent was not voluntarily given for a blood test in Hawkins, this Court should affirm the district court's decision in Mr. Fleckenstein's case as well.

B. THE DISTRICT COURT DID NOT ERR IN ORDERING THE WARRANTLESS BLOOD TEST WAS AN UNLAWFUL SEARCH

[14] The State indicates in their brief, that the district court suppressed the blood test solely based on the issue of consent. That is not true. The district court also indicated the warrantless blood test was an unlawful search. See, App. at 020-021. "It is well-settled that administration of a blood test to determine alcohol consumption is a search." Hawkins, at ¶ 7 (citing, State v. Boehm, 2014 ND 154, ¶ 18, 849 N.W.2d 239). Generally, warrantless searches are unreasonable unless they fall within a recognized exception to the warrant requirement. Hawkins, at ¶ 7 (citing, Torkelsen, at ¶ 21). Mr. Fleckenstein argues he should be afforded even greater protection under the North Dakota Constitution regarding the protection against unreasonable searches and seizures. The Supreme Court has stated that "[t]he North Dakota Constitution may afford broader individual rights than those granted under the United States Constitution." State v. Rydberg, 519 N.W.2d 306, 310 (N.D. 1994)

(see also, State v. Nordquist, 309 N.W.2d 109, 113 (N.D. 1981); State v. Stockert, 245 N.W.2d 266, 271 (N.D. 1976); State v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974)). Article I, Section 8 of the North Dakota Constitution reads:

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

Id. In Klodt, the Court stated:

> It is within the power of this court to apply higher constitutional standards than are required of the States by the Federal Constitution.

State v. Klodt, 298 N.W.2d 783 (N.D. 1980). More importantly, the Court stated:

> We agree that Article I, section 8, N.D. Constitution, may afford individuals greater protection against unreasonable searches and seizures than that which the Fourth Amendment provides.

Id. As such, Mr. Fleckenstein is awarded even greater protections under the North Dakota Constitution. Mr. Fleckenstein also argues the consent exception to the warrant requirement in not applicable, as his consent was coerced and involuntary as argued above.

i. Blood tests have a greater impact on privacy interests than breath tests.

[15] The United States Supreme Court has said that breath tests do not implicate significant privacy concerns. Birchfield, at 2176 (citing, Skinner v. Railway Labor Executives, 489 U.S. 602, 626, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)). The physical intrusion is negligible, and breathe tests do not require piercing the skin and entail a minimum of inconvenience. Birchfield, at 2176 (citing, Skinner, at 625). Blood tests are a different matter as they require piercing the skin and extracting a part of the subject's body.

Birchfield, at 2178 (citing, Skinner, *supra*, at 625; see also, McNeely, at 141 (opinion of the Court) (blood draws are "a compelled physical intrusion beneath [the defendant's] skin and into his veins"); McNeely, at 174 (opinion of Roberts, C. J.) (blood draws are "significant bodily intrusions")). And while humans exhale air from their lungs many times per minute, humans do not continually shed blood. It is true, of course, that people voluntarily submit to the taking of blood samples as part of a physical examination, and the process involves little pain or risk. Birchfield, at 2178 (citing, McNeely, at 144-45 (plurality opinion) (citing, Schmerber v. California, 384 U. S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966))). Nevertheless, for many, the process is not one they relish. Birchfield, at 2178. It is significantly more intrusive than blowing into a tube. Birchfield, at 2178. Perhaps that is why many States' implied consent laws, including Minnesota's, specifically prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests or give motorists a measure of choice over which test to take. Birchfield, at 2178. In addition, a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Birchfield, at 2178. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested. Birchfield, at 2178.

[16] It would have been less of an intrusion to Mr. Fleckenstein if he would have been allowed to submit to a breath test, such as the Intoxilyzer, or given them option to choose between the varying types of chemical tests at their disposal. Having to submit to a blood

test, and not being given another option, is a significant intrusion upon Mr. Fleckenstein's privacy.

ii. A warrant must be obtained to justify a search via blood test; however, a breath test is a valid warrantless search.

[17] Having assessed the effect of BAC tests on privacy interests and the need for such tests, the U.S. Supreme Court concludes that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. Birchfield, at 2184. The impact of breath tests on privacy is slight, and the need for BAC testing is great. Birchfield, at 2184. A different conclusion was reached with respect to blood tests. Birchfield, at 2184. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Birchfield, at 2184. The State has offered no satisfactory justification for demanding the more intrusive alternative without a warrant. Birchfield, at 2184. One advantage of blood tests is their ability to detect not just alcohol but also other substances that can impair a driver's ability to operate a car safely. Birchfield, at 2184. A breath test cannot do this, but police have other measures at their disposal when they have reason to believe that a motorist may be under the influence of some other substance (for example, if a breath test indicates that a clearly impaired motorist has little if any alcohol in his blood). Birchfield, at 2184. Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not. Birchfield, at 2184. (citing, McNeely, at 156). In Mr.

Fleckenstein's case, if law enforcement wanted a blood test there was sufficient time to obtain a warrant.

[18] Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. Birchfield, at 2185. Therefore, a search incident to arrest does not justify the warrantless taking of a blood sample. Birchfield, at 2185. Since Mr. Fleckenstein's consent was coerced and involuntary, a warrant was required. Law enforcement failed to secure a warrant to obtain a blood sample from Mr. Fleckenstein; therefore, the warrantless blood test of Mr. Fleckenstein was an unlawful search. Under the totality of the circumstances, the district court determined the blood test was an unlawful search. Because the district court is in a superior position to judge credibility and weight, this Court must show great deference to the district court's determination. See, Hawkins, at ¶ 10 (citing, Schmidt, at ¶ 24). As such, this Court should affirm the district court's decision that Mr. Fleckenstein's consent was coerced and involuntary, and the warrantless blood test was an unlawful search.

CONCLUSION

[19] Ultimately Mr. Fleckenstein was instructed that North Dakota law requires you to submit to a chemical test, and was then asked to submit to a blood test. The average person is aware that if you do something against the law, there is a consequence for doing so. Officer Braun could have asked Mr. Fleckenstein for another type of less invasive chemical test, but chose not to. Officer Braun could have also chosen to obtain a warrant but chose not

to. As a result, Mr. Fleckenstein had no other choice but to take the blood test as he was erroneously told he was "required." Mr. Fleckenstein had to undergo a blood test which was an invasion upon his privacy; therefore, he was coerced into taking the test. The State is upset that the district court's oral comments at the motion hearing did not coincide with its written order. "When there is a discrepancy between a district court's oral and written orders, the written order controls and supersedes the ruling made from the bench." City of Fargo, v. White, 2013 ND 200, ¶ 3, 839 N.W.2d 829 (citing, Wetzel v. Schlenvogt, 2005 ND 190, ¶ 26, 705 N.W.2d 836). As such, the initial thoughts of the district court after the motion hearing, are irrelevant. It was clear at the motion hearing the district court did not have a chance to review the officer's in-car camera (Tr. at pg. 2:22-25; 3:1-2) and upon reviewing it after the hearing, and taking that into consideration with the remainder of the information; the district court issued an order based on the totality of the circumstances in Mr. Fleckenstein's specific case.

[20] "Evidence obtained in violation of the Fourth Amendment's protections against unreasonable searches must be suppressed as inadmissible under the exclusionary rule." State v. Blumler, 458 N.W.2d 300 (N.D. 1990) (citing, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); State v. Handtmann, 437 N.W.2d 830, 837 (N.D. 1989); State v. Johnson, 301 N.W.2d 625 (N.D. 1981)). As a direct result of the coercion to take a blood test, Mr. Fleckenstein's consent was not free and voluntary and law enforcement did not obtain a search warrant; therefore, the district court had to suppress the blood test and this Court should affirm.

[21] For the aforementioned reasons, the Appellee's Motion to Suppress was correctly granted by the district court. Under the totality of the circumstances, the district court determined Mr. Fleckenstein did not voluntarily consent to the blood test under the circumstances presented, and the subsequent warrantless blood test was an unlawful search. Because the district court is in a superior position to judge credibility and weight, this Court must show great deference to the district court's determination of voluntariness. See, Hawkins, at ¶ 10 (citing, Schmidt, at ¶ 24). Mr. Fleckenstein prays this Court affirm the district court's decision.

Dated this 11th day of December, 2017.

Respectfully submitted:

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellant, vs. Tyler Fleckenstein, Defendant/Appellee.	Supreme Court No. 20170276 **Certificate of Service**

The undersigned, being of legal age, being first duly sworn deposes and says that on the 11th day of December, 2017, he served true copies of the following documents:

1. Brief of Appellee; and
2. Appendix of Appellee.

The aforementioned documents were served, via email, upon the following individuals:

Derek Steiner
Burleigh Co. Assistant State's Attorney
bc08@nd.gov

Supreme Clerk of Court
SupClerkofCourt@ndcourts.gov

Dated this 11th day of December, 2017.

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