IN THE SUPREME COURT

STATE OF NORTH DAKOTA

| | | |
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| Jim Benjamin DeForest,<br><br>Appellee,<br><br>v.<br><br>North Dakota Department of Transportation,<br><br>Appellant. | ) | **STATE OF NORTH DAKOTA**<br><br>**Supreme Ct. No. 20180140**<br><br>**District Ct. No. 08-2018-CV-00079** |

**APPEAL FROM THE MARCH 26, 2018 JUDGMENT OF THE DISTRICT COURT BURLEIGH COUNTY, NORTH DAKOTA SOUTH CENTRAL JUDICIAL DISTRICT**

**HONORABLE BRUCE B. HASKELL**

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# BRIEF OF APPELLANT

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## STATEMENT OF ISSUE

[¶1] Whether the implied consent advisory in N.D.C.C. § 39-20-01(3)(a) requires law enforcement inform the individual of the criminal consequences of refusing to take a breath or urine test in the event the officer requests the individual submit to a blood test

## STATEMENT OF CASE

[¶2] Burleigh County Sheriff's Deputy Jared Lemieux ("Deputy Lemieux") arrested DeForest on November 22, 2017, for the offense of driving while under the influence of intoxicating liquor. Appendix to Brief of Appellant ("App.") at 5, 7. After the conclusion of the December 27, 2017, administrative hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending DeForest's driving privileges for a period of 91 days. Id. at 7. DeForest requested judicial review of the hearing officer's decision. Id. at 8.

## STATEMENT OF FACTS

[¶3] On November 21, 2017, Deputy Lemieux stopped a vehicle that was being driven by DeForest after he observed the "vehicle going northbound on River Road in a 35 mile per hour zone the vehicle was locked on radar as 45 miles per hour." Tr. at 5, ll. 3-6. After observing indicia of DeForest's intoxication and administering a series of field sobriety tests, Deputy Lemieux placed DeForest under arrest for driving under the influence of alcohol. Id. at 6, l. 7 – 11, l. 5.

[¶4] Deputy Lemieux testified he informed DeForest of the "North Dakota implied consent" and requested he submit to a blood test. Id. at 11, ll. 8-15. Deputy Lemieux stated he read the advisory off a "post-arrest card" as follows:

> [A]s a condition of operating a motor vehicle on a highway, or on a public or private area, to which the public has 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 whether you are under the influence of alcohol or drugs.
>
> I must also inform you that refusal to take the test ... refusal to take the test as directed by a law enforcement officer may result in a revocation of your driver's license for a minimum of 180 days and potentially up to three years."

Id. at 18, l. 17 -- 19, l. 13. Deputy Lemieux explained "[t]hen I asked him again if ... if he understands those consequences and then I asked for a chemical blood test." Id. at 19, ll. 14-15.

[¶5] Deputy Lemieux testified DeForest was not advised he could be punished criminally for refusing a blood draw. Id. at 19, ll. 19-25. Deputy Lemieux testified that "once [DeForest] was placed under arrest and read the ... before I even read the implied consent he asked to go do the blood test right away. So then I read that and asked him for the blood. He consented to it." Id. at 20, ll. 8-12. The results of the blood test established DeForest had a blood alcohol concentration of 0.124% by weight. App. at 6.

## STATEMENT OF PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶6] At the hearing, DeForest objected to the admission of the results of his blood test "on statutory grounds" citing State v. O'Connor, 2016 ND 72, 877 N.W.2d 312. Tr. at 22, ll. 4-11. DeForest submitted a Post-Hearing Brief in further support of his objection claiming the language of N.D.C.C. § 39-20-01(3)(a) is mandatory in that law enforcement should have advised him of the criminal penalty

for refusal of a breath test despite being requested to a submit to a blood test. App. at 1, Index # 17.

[¶7] Based on the evidence, the hearing officer determined:

> Deputy Lemieux read the Miranda warnings and the implied consent advisory pertaining to a chemical blood test. Mr. Deforest had previously asked for a chemical blood test. Mr. Deforest agreed to a chemical blood test.

Id. at 7. The hearing officer issued her decision suspending DeForest's driving privileges for a period of 91 days. Id.

[¶8] DeForest sought judicial review of the hearing officer's decision alleging:

> The arresting officer did not render the implied consent advisory as required by statute, warranting exclusion of any chemical test results and dismissal of the administrative driver's license suspension proceedings.

Id. at 8.

[¶9] The District Court issued its Order on Appeal on March 21, 2018, in which the Court reversed the Hearing Officer's Decision. Id. at 9-17. The District Court ruled:

> First, under the plain language of N.D.C.C. § 39-20-01(3)(a), law enforcement officer "shall" inform the individual charged that (1) North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs; (2) that refusal of the individual to submit to a test directed by the law enforcement officer may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years; and (3) refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence.
>
> Second, N.D.C.C. § 39-20-01(3)(a) does not specify that this language is only to be read when requesting a breath or urine test. It states law enforcement "shall" inform the individual charged. The only time the statute ties certain language to a specific test is related to a blood test and criminal penalties (See, N.D.C.C. § 39-20-

> 01(3)(a) advising "[i]f 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.") This strengthens the fact that the breath or urine portion of the advisory is mandatory regardless of the test being requested since the breath or urine test portion of the advisory [is] not specific to test type.
>
> Finally statutes are construed as a whole and are harmonized to give meaning to related provisions. Requiring an officer to inform an individual charged that "refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence" does not affect an individual's ability to either refuse or consent to any chemical test, including breath, urine, or blood.

Id. at 16. The District Court concluded that "[b]ased on the plain language of N.D.C.C. § 39-20-01(3)(a), the hearing officer erred in admitting the chemical test results." Id. at 17.

[¶10] Judgment was entered on March 26, 2018. Id. at 19. The Department appealed the Judgment to the North Dakota Supreme Court asserting:

> [T]he District Court erred in granting DeForest's appeal and reversing the Hearing Officer's Decision when it determined that the law enforcement officer's exclusion from N.D.C.C. § 39-20-01(3)(a)'s implied consent advisory of the admonition that refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence when requesting a blood test warranted the exclusion of the test results under N.D.C.C. § 39-20-01(3)(b).

Id. at 21-22. The Department requests this Court reverse the Judgment of the Burleigh County District Court and reinstate the Hearing Officer's Decision suspending DeForest's driving privileges for a period of 91 days.

## STANDARD OF REVIEW

[¶11] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to [suspend] driving privileges." Haynes v. Dir., Dep't of

Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of [this chapter] have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶12] "In an appeal from a district court's review of an administrative agency's decision, [the Court] review[s] the agency's decision." Haynes, 2014 ND 161, at ¶ 6. The Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id.

[¶13] "Statutory interpretation is a question of law, which is fully reviewable on appeal." Zajac v. Traill Cty. Water Res. Dist., 2016 ND 134, ¶ 6, 881 N.W.2d 666 (citing Nelson v. Johnson, 2010 ND 23, ¶ 12, 778 N.W.2d 773). "The primary purpose of statutory interpretation is to determine the intention of the legislation." Id. (citing In re Estate of Elken, 2007 ND 107, ¶ 7, 735 N.W.2d 842). "Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears." Id. (citing N.D.C.C. § 1-02-02). "Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language." N.D.C.C. § 1-02-03, see also In re F.F., 2006 ND 47, ¶ 13, 711 N.W.2d 144 ("The legislature adheres to commonly accepted grammatical rules.").

[¶14] "Statutory language must be interpreted in context, with the goal of giving meaning and effect to every word, phrase, and sentence." State ex rel. Dep't of Human Servs. v. N.D. Ins. Reserve Fund, 2012 ND 216, ¶ 9, 822 N.W.2d 38 (citations omitted). "Statutes are construed as a whole and are harmonized to give meaning to related provisions." Id.

[¶15] "If the language of a statute is clear and unambiguous, 'the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.'" Zajac, 2016 ND 134, at ¶ 6 (citing N.D.C.C. § 1-02-05) (alteration added in Zajac). "If the language of the statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute." Id. (citing N.D.C.C. § 1-02-39).

[¶16] "Further, [the Court] 'construe[s] statutes to avoid absurd or illogical results.'" State v. Stegall, 2013 ND 49, ¶ 16, 828 N.W.2d 526 ((quoting Mertz v.

City of Elgin, Grant Cty., 2011 ND 148, ¶ 7, 800 N.W.2d 710) (citing N.D.C.C. § 1-02-38 ("In enacting a statute, it is presumed that: ... [a] just and reasonable result is intended.")). "Extrinsic aids may be used to interpret a statute to avoid an absurd result and to determine whether the interpretation is consonant with legislative intent." Id. (internal and external citations omitted).

## LAW AND ARGUMENT

**The implied consent advisory in N.D.C.C. § 39-20-01(3)(a) does not require law enforcement inform the individual of the criminal consequences of refusing to take a breath or urine test in the event the officer requests the individual submit to a blood test.**

[¶17] "'Section 39-20-01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general.'" State v. O'Connor, 2016 ND 72, ¶ 7, 877 N.W.2d 312 (citing State v. Bauer, 2015 ND 132, ¶ 7, 863 N.W.2d 534 (quoting State v. Birchfield, 2015 ND 6, ¶ 7, 858 N.W.2d 302)). At the time of Birchfield's arrest on October 13, 2013, section 39-20-01(3) provided:

> 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 eighty days and up to three years of the individual's driving privileges. . . .

N.D.C.C. § 39-20-01 (2013) (2013 N.D. Sess. Laws ch. 301, § 11) (emphasis added).

[¶18] "In Birchfield v. North Dakota, —— U.S. ——, 136 S.Ct. 2160, 2184-85, 195 L.Ed.2d 560 (2016), the United States Supreme Court held the Fourth Amendment permits warrantless breath tests incident to a lawful arrest for drunk driving, but

absent another exception to the warrant requirement, does not permit warrantless blood tests incident to a lawful arrest for drunk driving." State v. Birchfield, 2016 ND 182, ¶ 3, 885 N.W.2d 62. "The United States Supreme Court concluded that in Birchfield's prosecution for refusing a warrantless blood test incident to his arrest, the refused blood test was not justified as a search incident to his arrest and reversed his conviction because he was threatened with an unlawful search." Id. (citing Birchfield, 136 S.Ct. at 2186).

[¶19] Within the context of addressing the consolidated administrative license suspension of Beylund v. Levi, 2015 ND 18, 859 N.W.2d 403, the United States Supreme Court "remanded to [the North Dakota Supreme] Court for further proceedings to reevaluate the voluntariness of his consent under the totality of all the circumstances given *the partial inaccuracy of the officer's advisory about a driver's obligation to undergo chemical testing.*" Beylund v. Levi, 2017 ND 30, ¶ 4, 889 N.W.2d 907 (citing Birchfield, 136 S.Ct. at 2186-87). The advisory was considered to be partially inaccurate insofar as it conveyed the impression that withholding consent to a warrantless blood test is a crime.

[¶20] In O'Connor, "O'Connor moved to suppress the result of the Intoxilyzer chemical test because the officer failed to provide him with the complete implied consent advisory after he was arrested and before he submitted to the chemical test." 2016 ND 72, at ¶ 4. At the time of O'Connor's arrest on May 24, 2015, the same implied consent advisory was in effect as was in Birchfield and similarly provided "[t]he law enforcement officer shall inform the individual charged . . . 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." Cf. 2015 N.D. Sess. Laws ch. 268, § 9; 2013 N.D. Sess. Laws ch. 301, § 11.

[¶21] In O'Connor, "[i]t [was] undisputed that before O'Connor submitted to the Intoxilyzer chemical test the officer provided him with a partial implied consent advisory which failed to inform him that refusal to take a chemical test 'is a crime punishable in the same manner as driving under the influence.'" 2016 ND 72, at ¶ 3 (citing N.D.C.C. § 39-20-01(3)(a) (2015)). The Court stated "[t]he Legislature has directed that a specific warning be provided to an arrested defendant before the results of a chemical test can be admitted in a criminal or administrative proceeding." Id. at ¶ 13.

[¶22] The Court determined "[t]he officer did not provide O'Connor a complete chemical test implied consent advisory after his arrest and before submission to the Intoxilyzer test." Id. at ¶ 14. The Court concluded "[t]herefore, under N.D.C.C. § 39-20-01(3)(b), the Intoxilyzer test result is inadmissible in this criminal proceeding." Id. See also State v. Ayala, 2017 ND 116, ¶ 6, 894 N.W.2d 865 ("When a law enforcement officer requests a chemical test to determine if a driver has alcohol in his system, the test results are not admissible 'if the law enforcement officer fails to inform the individual' of the implied-consent law.") (citing N.D.C.C. § 39-20-01(3)(b) (2015)).

[¶23] In the first substantive revision to section 39-20-01(3)(a), N.D.C.C., following the United States Supreme Court's decision in Birchfield, 136 S.Ct. 2160, the Legislature amended the implied consent statute effective August 1, 2017, to provide:

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

2017 N.D. Sess. Laws ch. 268, § 4.

[¶24] The amendment corrected the previously "partially inaccurate" implied consent advisory by providing alternative advisories in consecutive sentences dependent upon whether a breath test or a blood test is requested. In the event a breath test is requested, the plain language of the advisory now provides "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."[1] N.D.C.C. § 39-20-01(3)(a).

[¶25] The following sentence – prefaced by the *conditional clause* "***[i]f*** the officer requests the individual to submit to a blood test" – removes any partial inaccuracy of concern in Birchfield from the advisory in the event a blood test is requested.

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[1]The Court's holding in State v. Helm, 2017 ND 207, ¶ 16, 901 N.W.2d 57, that a warrantless urine test of a suspected impaired driver is not reasonable search incident to arrest and the driver cannot be prosecuted for refusing to submit to an unconstitutional warrantless urine test arguably creates yet another partial inaccuracy.

Id. See United States v. Flores, 664 F. App'x. 395, 399 (5th Cir. 2016) ("Grammatically, 'if' is widely understood to introduce a conditional clause, which is a clause that 'state[s] a condition or action necessary for the truth or occurrence of the main statement of a sentence.'") (citing Porter G. Perrin, Writer's Guide and Index to English 500 (rev. ed. 1950); see Condition, Black's Law Dictionary (10th ed. 2014) (using the word "if" to describe examples of conditions); Bryan A. Garner, Garner's Modern American Usage 436 (3d ed. 2009) ("Use if for a conditional idea...."). (emphasis omitted)).

[¶26] That conditional "if" clause is followed by the requirement with respect to blood tests that "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) (emphasis added). The word "any" means "one or another without restriction or exception." American Heritage Dictionary 118 (2d ed. 1991). In other words, the plain language of the statute prohibits the officer from informing the individual of any criminal penalties, including those penalties relating to the refusal of the breath or urine tests.

[¶27] Logically, this requirement can only be met if the officer excludes the portion of the advisory that reads "refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence." In other words, it would be contrary to the statutory language if the officer informed the individual of ***any*** criminal penalties when requesting a blood test.

[¶28] The implied consent advisory in N.D.C.C. § 39-20-01(3)(a) does not require law enforcement inform the individual of the criminal consequences of refusing to

take a breath or urine test in the event the officer requests the individual submit to a blood test.

## CONCLUSION

[¶29] The Department requests this Court reverse the Judgment of the Burleigh County District Court and affirm the Hearing Officer's Decision suspending DeForest's driving privileges for a period of 91 days.

Dated this 21st day of May, 2018.

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| Jim Benjamin DeForest,<br><br>Appellee,<br><br>vs.<br><br>North Dakota Department of Transportation,<br><br>Appellant. | ) | **CERTIFICATE OF COMPLIANCE**<br><br>**Supreme Ct. No. 20180140**<br><br>**District Ct. No. 08-2018-CV-00079** |

[¶1] The undersigned certifies pursuant to N.D.R.App.P. § 32(a)(8)(A) that the text of Brief of Appellant (excluding the table of contents and table of authorities) contains 3,354 words.

[¶2] This Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 word processing software in Arial 12 point font.

Dated this 21st day of May, 2018.

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STATE OF NORTH DAKOTA )
) ss.
COUNTY OF BURLEIGH )

[¶1] Karen Roberts states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 21st day of May, 2018, I served the attached **BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT** upon Jim Benjamin DeForest, by and through his attorney Justin Vinje, by electronic email as follows:

Justin Vinje
Attorney at Law
justin@vinjelaw.com

Karen Roberts

Subscribed and sworn to before me
this 21st day of May, 2018.

Notary Public

DONNA J CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2021