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JUNE 19, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF
THE STATE OF NORTH DAKOTA

Jim Benjamin DeForest,	)	
	)	
Appellee,	)	Supreme Court No.: 20180140
	)	District Ct. No.: 08-2018-CV-00079
vs.	)	
	)	
North Dakota Department Of Transportation,	)	
	)	
Appellant.	)	

APPEAL FROM THE DISTRICT COURT,
SOUTH CENTRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA.
HONORABLE BRUCE A. HASKELL, PRESIDING.

RESPONSE BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

CASES

STATUTORY MATERIALS AND RULES

STATEMENT OF THE ISSUE

[¶1] Whether the plain language of N.D.C.C. § 39-20-01(3)(a) requires law enforcement to recite the entire implied consent advisory prior to asking an arrested person to submit to chemical testing for intoxication.

STATEMENT OF THE CASE

[¶2] The North Dakota Department of Transportation ("DOT") appeals from a district court judgment reversing the administrative suspension of Jim DeForest's ("Mr. DeForest") driving privileges due to law enforcement's failure to render the implied consent advisory as directed by statute.

[¶3] Administrative proceedings against Mr. DeForest's driving privileges followed the issuance of a report and notice form following its mailing on or about December 1, 2017. (Appellant's App. at 5.) Mr. DeForest requested an administrative hearing prior to any attempted suspension of his driving privileges. (Appellant's App. at 1, Index #5.) The DOT held an administrative hearing in this matter on March 15, 2017 (Tr. at 1.)

[¶4] Following the hearing, Mr. DeForest submitted a brief further outlining his position. (Appellee's App. at 1.) The hearing officer issued a decision to suspend Mr. DeForest's driving privileges for a period of ninety-one days. (Appellant's App. at 7.)

[¶5] Mr. DeForest submitted a notice of appeal and specification of error to the district court. (Id. at 8.) The parties submitted briefs to the district court supporting their positions. (Appellee's App. at 7; 14; 20.) The district court issued an order reversing the hearing officer's decision, followed by a civil judgment. (Appellant's App. at 9; 19.) The DOT appealed from the district court's judgment. (Id. at 21.)

STATEMENT OF THE FACTS

[¶6] Burleigh County Sheriff's Deputy Jared Lemieux mailed a Report and Notice Form to Jim DeForest on or about December 1, 2017. (Appellant's App. at 5.) Mr. DeForest requested an administrative hearing prior to any attempted suspension of his driving privileges. (Appellant's App. at 1, Index #5.) The Department of Transportation ("DOT") held an administrative hearing in this matter on March 15, 2017. (Tr. at 1.)

[¶7] During the hearing, Corporal Lemieux explained that he stopped a motor vehicle driven by Jim DeForest for speeding at approximately 11:55 p.m. on November 21, 2017. (Id. at 4.) The deputy then conducted field sobriety testing and arrested Mr. DeForest for driving under the influence. (Id. at 7-10.)

[¶8] After arresting Mr. DeForest, Corporal Lemieux read part of the North Dakota implied consent advisory from a card and requested a blood test. (Id. at 11.) Corporal Lemieux testified regarding the exact wording of the part of the North Dakota implied consent advisory that he recited:

> [A]s a condition of operating a motor vehicle on a highway, or on 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 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 19.) The deputy did not mention any criminal penalties for refusing a chemical test. (Id.)

STANDARD OF REVIEW

[¶9] The N.D. Century Code provides, in relevant part, that the district court should reverse an agency's decision when any of the following circumstances apply:

1. The order is not in accordance with the law.
2. The order is in violation of the appellant's constitutional rights.
3. Provisions of this chapter are not complied with in proceedings before the agency.
4. The agency's rules or procedures have not afforded the appellant a fair hearing.
5. The agency's findings of fact are not supported by a preponderance of the evidence.
6. The agency's conclusions of law and order 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; Gabel v. Dep't of Transp., 2006 ND 178, ¶7, 720 N.W.2d 433. Questions of law presented in an administrative appeal are reviewed de novo. Gabel, 2006 ND 178 at ¶8 (internal citations omitted).

ARGUMENT

I. The law explicitly states the procedure for requesting chemical tests, and deviation from that procedure requires suppression of test results.

[¶10] The North Dakota Century Code states what a law enforcement officer must tell a DUI arrestee before requesting a post-arrest chemical test for intoxication. The statute governing this procedure is explicit, employing mandatory language to

support its directive:

> 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 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. 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); see, e.g., Homer Township v. Zimney, 490 N.W.2d 256, 259 (N.D. 1992) ("[t]he word 'shall in a statute ordinarily creates a mandatory duty").

[¶11] The statute directs that the officer "shall inform" the arrested individual that refusal to submit to breath or urine testing "is a crime punishable in the same manner as driving under the influence." N.D.C.C. § 39-20-01(3)(a). In this case, the deputy should have so advised Mr. DeForest, including the language regarding the criminal penalty for refusal of a chemical breath test.

[¶12] Failure to so advise the arrested individual effectively suppresses the test results: "A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a." N.D.C.C. § 39-20-01(3)(b); State v. O'Connor, 2016 ND 72, 877 N.W.2d 312.

[¶13] The deputy did not render the implied consent advisory as set forth by statute. Because of this, the hearing officer should not have admitted Mr. DeForest's chemical test results into evidence during the administrative driver's license proceeding.

a. The language regarding breath testing is mandatory.

[¶14] The statute at issue previously required law enforcement to advise DUI arrestees that refusal of any chemical test was an offense. "The 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." N.D.C.C. § 39-20-01 (2013) (2013 N.D. Sess. Laws. Ch. 301, § 11).

[¶15] The Legislature amended the statute in 2017, following the United States Supreme Court's decision in Birchfield v. North Dakota, 579 U.S. ---, 136 S.Ct. 2160 (2016). The law needed to be changed, because "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." Birchfield, 579 U.S. ---, 136 S.Ct. 2160, 2186.

[¶16] In reaching its decision, the Supreme Court determined that blood tests are significantly more intrusive than breath tests. Id. at 2178. Blood tests are significant bodily intrusions beneath a person's skin and into his or her veins, resulting in the extraction of part of the subject's body. Id.

[¶17] Further, the respondents in Birchfield "offered no satisfactory justification for demanding the more intrusive alternative [of a blood test] without a warrant." Id. 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." Id. While blood tests may be administered to a person who is unconscious or otherwise unable to submit to a breath test, the Supreme Court "had no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant

if need be." Id. at 2184-85.

[¶18] The Supreme Court spoke clearly. The statute governing the implied consent advisory in North Dakota needed to be changed. The mandatory language for all chemical testing now excludes blood testing, and a search-warrant provision has been added: "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).

[¶19] This change is in line with the Supreme Court's reasoning. The statute requires a law enforcement officer to recite the entire implied consent advisory to a DUI arrestee prior to requesting a breath or urine test. An officer may choose to conduct blood testing as an alternative, if he or she is granted a search warrant.

[¶20] In this case, the deputy did not seek a search warrant, nor did he identify any exigent circumstances justifying deviation from the statute. Mr. DeForest's statements do not change the analysis. Immediately prior to his arrest, Mr. DeForest submitted to and failed a preliminary breath test. (Tr. at 10-11.) The deputy testified that Mr. DeForest was confused and believed the preliminary breath test to be the final chemical test. (Tr. at 20.) Under these circumstances, Mr. DeForest's statements regarding a blood test could be construed as a request for an independent blood test, an additional chemical test, or a particular type of chemical test.

[¶21] An individual's request for a particular type of test is not an issue here. "The law enforcement officer shall determine which of the tests is to be used." N.D.C.C. § 39-20-01(2). A DUI arrestee may request a blood test, but that request is subject to a completely different analysis. See, e.g., State v. Dressler, 433 N.W.2d 549 (N.D. Ct.

App. 1988) (a DUI arrestee has a statutory right to a chemical test independent of the one requested by the officer, and the officer cannot hinder the arrestee's efforts to obtain such a test).

b. Any invalid language relating to urine testing is severed.

[¶22] The North Dakota Supreme Court's decision to disallow criminal prosecutions for refusal to submit to urinalyses following DUI arrests does not affect the analysis in this case. In State v. Helm, 2017 ND 207, 901 N.W.2d 57, the North Dakota Supreme Court held that "a warrantless urine test is not a reasonable search incident to a valid arrest of a suspected impaired driver and the driver cannot be prosecuted for refusing to submit to an unconstitutional warrantless urine test incident to arrest." Helm, 2017 ND 207 at ¶ 16.

[¶23] This decision conflicts with the portion of the statute requiring officers to advise DUI arrestees of the criminal penalty associated with refusal of a urine test. The severability principle of statutory construction ensures that the mandatory provision regarding refusal of breath testing survives:

> In the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment has been rendered.

N.D.C.C. § 1-02-20.

[¶24] While the North Dakota Supreme Court has not directly held the urinalysis-refusal portion of section 39-20-01(3)(a) unconstitutional, its validity is in doubt. The same cannot be said for the portion of that statute dealing with refusal of breath testing. That provision remains in effect, and it remains mandatory. It was not

followed here, so the result of the test should be suppressed.

CONCLUSION

[¶25] Based on the foregoing, Mr. DeForest respectfully requests that this Court affirm the district court's decision in this matter.

Dated June 19, 2018.

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CERTIFICATE OF SERVICE

[¶26] A true and correct copy of the foregoing Response Brief of the Appellee and Appendix to Response Brief of Appellee were sent by e-mail on June 19, 2018, to be delivered upon:

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