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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

City of West Fargo, Plaintiff and Appellant, v. Tyler Clark Williams, Defendant and Appellee.	Supreme Court No. 20180447 Cass County District Court No. 2018-CR-02455

Appeal from Order Granting Motion to Suppress Evidence
Dated November 29, 2018
Cass County District Court
East Central Judicial District
Honorable Thomas R. Olson, Presiding

BRIEF OF PLAINTIFF AND APPELLANT

Stephen R. Hanson II
ND ID No. 08585
West Fargo Assistant City Prosecutor
Attorney for Plaintiff/Appellant

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
West Fargo, ND 58078–0458
TEL (701) 282–3249
FAX (701) 282–0825
shanson@ohnstadlaw.com

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CASES

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STATEMENT OF THE ISSUES

[¶ 1] Did the district court err by suppressing evidence of the Defendant's refusal to submit to a chemical test for a supposed violation of N.D.C.C. § 39-20-02 when the plain language of the statute makes it inapplicable under circumstances where an arrestee refuses the chemical test?

STATEMENT OF THE CASE

[¶ 2] This is a pretrial prosecution appeal in which the City of West Fargo challenges the district court's order suppressing evidence. The Defendant was arrested for DUI and subsequently refused to submit to a chemical test requested by the arresting officer. The Defendant was charged with DUI─Refusal under West Fargo City Ordinance section 13–0203,[1] which is based on N.D.C.C. § 39-08-01. The Defendant moved to suppress evidence of his refusal, arguing that his right to an independent test under N.D.C.C. § 39-20-02 was violated. The district court granted the motion and suppressed evidence of the Defendant's refusal. The City appeals.

STATEMENT OF THE FACTS

[¶ 3] West Fargo Police Officer Michael Carlson conducted a traffic stop of the Defendant for having expired vehicle registration. (Squad Car Video DVD, Exhibit 1, Index #28, at 23:24:53; Transcript of November 13, 2018 Motion Hearing at 3–4.) While speaking with the Defendant, Officer Carlson observed signs that

[1]The ordinance can be found online at the following website: https://www.westfargond.gov/DocumentCenter/View/1014/Title-13–Traffic–PDF.

the Defendant had been consuming alcohol. (Tr. at 4.) The Defendant stated that he was coming from Three Lyons Pub and admitted that he "probably had one too many" and was trying to drive home. (Index #28 at 23:25:02, 23:25:34.) Officer Carlson asked the Defendant to perform field sobriety tests, which the Defendant consented to performing. (Tr. at 4–5.)

[¶ 4] Officer Carlson then read the implied consent advisory and requested the Defendant to submit to an onsite breath screening test. (Tr. at 5.) The Defendant stated that he would rather take a blood test. (Index #28 at 23:33:33.) Officer Carlson informed the Defendant that "a blood test is not available and we only have a breath screening test right now and that is the test that I'm requesting." (Index #28 at 23:33:37.) Officer Carlson then repeated the implied consent advisory and again asked the Defendant if he would consent to the breath screening test. (Index #28 at 23:33:41.) The Defendant consented. (Index #28 at 23:34:12.) Before the breath screening test was administered, the Defendant asked why he could not take a blood test. (Index #28 at 23:34:26.) Officer Carlson responded that he did not have a blood kit in his car. (Index # 28 at 23:34:30.) The Defendant blew a .125 on the breath screening test. (Index #28 at 23:35:00.)

[¶ 5] Officer Carlson placed the Defendant under arrest for DUI. (Index #28 at 23:35:03.) After being placed under arrest, the Defendant asked Officer Carlson why he "was not allowed to refuse that test." (Index #28 at 23:35:44.) Officer Carlson responded that the Defendant was allowed to refuse but that a blood test was not an option for the screening test. (Index #28 at 23:35:50.)

Officer Carlson told the Defendant that he could go to the hospital and get a blood test for himself. (Index #28 at 23:36:05.)

[¶ 6] Officer Carlson transported the Defendant to the jail. (Tr. at 8.) At the jail, Officer Carlson recited the implied consent advisory for a chemical breath test and asked the Defendant, "Do you consent to take the chemical breath test?" (Index #28 at 23:51:53.) The Defendant responded, "Uh, no." (Index #28 at 23:51:57.) Officer Carlson clarified, "You're refusing then?" (Index #28 at 23:51:59.) The Defendant replied with a yes and nodded his head. (Index #28 at 23:52:01.) The Defendant made no mention of a blood test at this time. (Id.) After the refusal, Officer Carlson again explained, "If you want to get a blood test, you can absolutely do that, but it's just something you got to do at the hospital, and it will be at your expense, okay?" (Ex. 1 at 23:52:07.) The Defendant replied, "Okay." (Index # 28 at 23:52:13.) The Defendant did not mention a blood test at any point after that. (Tr. at 12.) The Defendant never took the chemical test requested by Officer Carlson. (Tr. at 12.)

[¶ 7] The Defendant moved to suppress evidence of his refusal, arguing that his statutory right to an independent test was violated. (Index ## 15–16.) The district court held a hearing and heard evidence of the foregoing. The district court took the matter under advisement and subsequently issued an order granting the Defendant's motion to suppress evidence of his refusal. (App. at 4.) The district

court held that the Defendant had a right to an independent test under N.D.C.C. § 39–20–02 after consenting to the breath screening test and that the supposed right was violated. (App. at 7.) This appeal follows.

LAW AND ARGUMENT

I. The district court erred by suppressing evidence of the Defendant's refusal.

[¶ 8] "Under N.D.C.C. § 29-28-07(5), the [prosecution] is authorized to bring an appeal from an order granting suppression." State v. Kenner, 1997 ND 1, ¶ 7, 559 N.W.2d 538; see also City of Fargo v. Casper, 512 N.W.2d 668, 669 (N.D. 1994) (stating that a prosecuting city can appeal under N.D.C.C. § 29-28-07). This Court has stated, "We affirm a trial court's decision on a motion to suppress unless, after resolving conflicting evidence in favor of affirmance, we conclude there is insufficient competent evidence to support the decision, or unless we conclude the decision goes against the manifest weight of the evidence." Kenner, 1997 ND 1, ¶ 7, 559 N.W.2d 538. The Court defers to the district court's factual findings, but questions of law are fully reviewable. Id. "Statutory interpretation is a question of law, fully reviewable on appeal." State v. Bearrunner, 2019 ND 29, ¶ 5, 921 N.W.2d 894 (quotation omitted).

[¶ 9] The statute providing DUI arrestees with a limited right to an additional independent test states:

> The individual tested may have an individual of the individual's choosing, who is medically qualified to draw blood, administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer with all costs of an additional test or tests

> to be the sole responsibility of the individual charged. The failure or inability to obtain an additional test by an individual does not preclude the admission of the test or tests taken at the direction of a law enforcement officer.

N.D.C.C. § 39-20-02 (emphasis added). The plain language of this statute therefore contemplates that the arrestee only has a statutory right to an independent test if he has already taken the chemical test requested by law enforcement. The statute says that the "individual tested" may have an independent test "in addition to" the chemical test administered by law enforcement. It follows, then, that if the individual has not been tested—that is, if he has refused the chemical test requested by law enforcement—he may not have an "additional" independent test because there has been no test done in the first place.

[¶ 10] The Defendant here refused Officer Carlson's request for a chemical breath test. He was therefore not an "individual tested" and had no right under the statute to an "additional" test because no test had been administered.

[¶ 11] The district court specifically found that the Defendant refused the chemical breath test. (App. at 7.) But the district court determined that the Defendant was an "individual tested" under the statute because he took the screening test. (Id.) This is an incorrect interpretation of the statute. The statute states that an individual may have an independent "chemical test or tests in addition to any administered at the direction of a law enforcement officer." N.D.C.C. § 39-20-02. The district court seemed to have concluded that the term "any" in the statute encompassed the screening test. (App. at 7.) But the only logical reading of

the statute is that the term "any" means "any chemical test" since "chemical test" immediately precedes the term and because the statue deals with chemical tests. Screening tests are covered under a different statute, N.D.C.C. § 39-20-14.

[¶ 12] The statute also provides, "The failure or inability to obtain an additional test by an individual does not preclude the admission of the test or tests taken at the direction of a law enforcement officer." N.D.C.C. § 39-20-02. This further shows that the term "any" refers to chemical tests because a screening test is inadmissible regardless of whether an arrestee fails to obtain an additional test. State v. Rende, 2018 ND 33, ¶ 6, 905 N.W.2d 909 ("This Court has recognized that pursuant to N.D.C.C. § 39-20-14(3), the results of preliminary breath tests are to be excluded from evidence unless probable cause for the arrest is being challenged.").

[¶ 13] In addition to being contrary to the plain language of the statute, the district court's order fashioned a remedy that is not recognized for a violation of N.D.C.C. § 39-20-02. The district court suppressed evidence of the Defendant's refusal to submit to the chemical test to remedy the supposed statutory violation. (App. at 7.) This Court has held in both the criminal and administrative contexts that the proper remedy for a violation of N.D.C.C. § 39-20-02 is suppression of the chemical test results or dismissal of the charges. Lange v. N.D. Dep't of Transp., 2010 ND 201, ¶ 6, 790 N.W.2d 28 (citing City of Grand Forks v. Risser, 512 N.W.2d 462, 463 (N.D. 1994)). The fact that suppression of the chemical test results is the proper remedy for a violation of N.D.C.C. § 39-20-02 further demonstrates that the

statute does not apply when an arrestee refuses the chemical test. If there is no chemical test to suppress, there is no violation of the statute.

[¶ 14] Without analysis or explanation, the district court stated that "the North Dakota Supreme Court has clearly contemplated the independent test in the context of a test refusal in North Dakota Department of Transportation v. DuPaul." (App. at 7.) But the DuPaul case does not support the district court's decision. In North Dakota Department of Transportation v. DuPaul, the defendant responded with "I want a doctor, and I want a lawyer" when asked to consent to alcohol testing and was not tested. 487 N.W.2d 593, 595 (N.D. 1992). He was released from custody and obtained his own blood test several hours after being released. Id. This Court affirmed that DuPaul had refused the test, and the Court emphasized, "DuPaul was entitled to a reasonable opportunity for an *additional* test by a person of his own choosing. However, his 'independent' test at the hospital after release from the county jail does not cure DuPaul's refusal to be tested while in police custody." Id. at 597 (emphasis in original) (citation omitted). Although DuPaul is an administrative case that is not on point with this case, it appears from this passage that the Court recognized the plain language of N.D.C.C. § 39-20-02 and its requirement that the arrestee consent to the requested chemical test before being afforded an opportunity for an additional test.

[¶ 15] In addition to DuPaul, the district court relied another administrative case, Scott v. North Dakota Department of Transportation, in reaching its decision. 557 N.W.2d 385 (N.D. 1996). The district court's reliance on these administrative

cases was misplaced. Scott dealt with the question of whether a driver can cure his refusal of the onsite screening test with an independent chemical test. Id. at 386-87. Scott was not arrested after he refused the screening test and therefore was not given a chemical test by the officer. Id. The Scott opinion analyzed the screening test statute in the administrative context and has nothing to do with this case in which the Defendant was arrested and charged with a crime for refusing to submit to a chemical test. But this Court did mention in Scott that if Scott had been arrested and tested, then N.D.C.C. § 39-20-02 would come into play. Id. at 387 ("In that event, NDCC 39-20-02 also authorizes a person tested under NDCC 39-20-01 to obtain an independent test to rebut the officer's chosen test." (emphasis added)). This further supports the City's position that N.D.C.C. § 39-20-02 does not apply here when the Defendant refused the chemical test because N.D.C.C. § 39-20-01 deals with chemical tests.

CONCLUSION

[¶ 16] The plain language of N.D.C.C. § 39-20-02 demonstrates that the statute does not apply in this case where the Defendant refused the chemical test requested by Officer Carlson. The district court erred by suppressing evidence of the Defendant's refusal for a supposed violation of the statute. This Court should reverse the district court and remand the case for trial.

Dated: March 18, 2019.

/s/ *Stephen R. Hanson II*

Stephen R. Hanson II
ND ID No. 08585
West Fargo Assistant City Prosecutor
Attorney for Plaintiff/Appellant

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
West Fargo, ND 58078–0458
TEL (701) 282–3249
FAX (701) 282–0825
shanson@ohnstadlaw.com

IN THE SUPREME COURT OF NORTH DAKOTA

City of West Fargo, Plaintiff and Appellant, v. Tyler Clark Williams, Defendant and Appellee.	Supreme Court No. 20180447 Cass County District Court No. 2018-CR-02455 **CERTIFICATE OF COMPLIANCE**

[¶ 17] The undersigned hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 2,181 words (excluding words contained in **(1)** the table of contents, **(2)** the table of authorities, **(3)** the addendum, and **(4)** this certificate), which is within the limit of 8,000 words.

/s/ *Stephen R. Hanson II*
Stephen R. Hanson II
ND ID No. 08585
West Fargo Assistant City Prosecutor
Attorney for Plaintiff/Appellant

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
West Fargo, ND 58078–0458
TEL (701) 282–3249
FAX (701) 282–0825
shanson@ohnstadlaw.com

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

[¶ 18] I hereby certify that on March 18, 2019, I caused to be electronically filed the **1) Brief of Plaintiff and Appellant**, and **2) Appendix of Plaintiff/Appellant City of West Fargo** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same on Luke T. Heck by email as follows:

Email to Luke T. Heck at: lheck@vogellaw.com

Dated: March 18, 2019.

/s/ *Stephen R. Hanson II*

Stephen R. Hanson II
ND ID No. 08585
West Fargo Assistant City Prosecutor
Attorney for Plaintiff/Appellant

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
West Fargo, ND 58078–0458
TEL (701) 282–3249
FAX (701) 282–0825
shanson@ohnstadlaw.com