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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of West Fargo, Appellant, vs. Tyler Clark Williams, Appellee.	**SUPREME COURT NO. 20180447** District Court No. 2018-CR-02455

ON APPEAL FROM ORDER GRANTING MOTION TO
SUPRESS EVIDENCE DATED NOVEMBER 29, 2018
THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
HONORABLE THOMAS R. OLSON PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether the district court correctly found denying a motorist a reasonable opportunity to seek an independent test forecloses prosecution for refusing a chemical test.

STATEMENT OF THE CASE

[¶2] West Fargo Police Officer Michael Carlson ("Carlson") arrested Appellee, Tyler Clark Williams ("Mr. Williams"), for suspicion of driving while under the influence of alcohol, and requested a chemical breath test. See generally Tr. of Proceedings, at 4-11. Mr. Williams refused to submit to Carlson's chemical breath test, but requested an independent blood test. Id. Carlson advised Mr. Williams he could not seek an independent test until he was released from custody. Id. The City charged Mr. Williams with DUI-Refusal. App'x of Pl./Appellant City of West Fargo, at 3. Mr. Williams moved to suppress evidence, and the district court granted his motion. App'x of Pl./Appellant City of West Fargo, at 4. The City now appeals. Id. at 8.

STATEMENT OF THE FACTS

[¶3] On May 7, 2018, Carlson stopped a vehicle driven by Mr. Williams. Tr. of Proceedings, at 4:15-21. Carlson requested that Mr. Williams performed field sobriety testing, and Mr. Williams complied. Id. at 4:25-5:2. Based on his performance on the field sobriety testing, Carlson read Mr. Williams the implied consent warning to request an on-site screening test. Id. at 5:3-7. Mr. Williams indicated he did not want to take the test, but would instead take a blood test. Id. at 5:8-10. Carlson advised him a blood test was unavailable, and that Mr. Williams could only take the on-site breath test. Id. at 5:11-13. Mr. Williams then submitted to the on-site breath screening test. Id. at 5:14-17. Based on the result, Carlson arrested Mr. Williams for DUI. Id. at 5:-20-22.

[¶4] After his arrest, Mr. Williams again requested a blood test, and Carlson again denied the request. Id. at 7:25-8:3. Carlson brought Mr. Williams to the Cass County Jail. Id. at 8:7-9. At the jail, Carlson read Mr. Williams the North Dakota chemical implied consent warning. Id. at 8:10-14. Mr. Williams refused to submit a chemical test sample. Id. at 8:15-16. Carlson then told Mr. Williams he could not secure an independent test until after he was released from custody. Id. at 9:-8-18.

LAW AND ARGUMENT

[¶5] This Court's standard of review of a district court's suppression motion decision is well established:

> This Court defers to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. This Court will affirm a district court decision regarding a motion to suppress if there is sufficient competent evidence fairly capable of supporting the district court's findings, and the decision is not contrary to the manifest weight of the evidence. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law.

City of Gwinner v. Vincent, 2017 ND 82, ¶ 6, 892 N.W.2d 598 (quoting State v. Morin, 2012 ND 75, ¶ 5, 815 N.W.2d 229).

[¶6] Abandoning prior argument, the City does not argue the district court incorrectly found Mr. Williams requested an independent test, or that Carlson failed to afford Mr. Williams a reasonable opportunity to secure an independent test. Instead, the City only argues Mr. Williams lacked the right to seek an independent test because he did not provide law enforcement with its requested chemical breath sample. See Br. of Pl. & Appellant, at ¶¶ 9-10. The City's argument lacks support in case law and statute. Because Mr. Williams enjoyed the right to seek an independent test, and because Carlson denied Mr. Williams a reasonable opportunity to seek an independent test, the Court should affirm the district court's decision.

I. Mr. Williams Enjoyed The Right To Seek An Independent Test

A. Mr. Williams enjoyed an inherent right to seek an independent test

[¶7] The City argues North Dakota law—Section 39-20-02—only allows a motorist to seek an independent test if the motorist first completes chemical testing at the request of law enforcement. See Br. of Pl. & Appellant, at ¶¶ 9-10 (citing N.D.C.C. § 39-20-02). The City's argument misconstrues the source of the right to an independent test. As explained by this Court in State v. Messner, 481 N.W.2d 236 (N.D. 1992), Section 39-20-02 does not create the right to independent testing, Section 39-20-02 merely recognizes the inherent right to be free from law enforcement interfering in securing relevant evidence at a motorist's own expense. See 481 N.W.2d at 240 ("the statutory right to an independent test is actually an arrested motorist's right to be free of police interference when obtaining another test by his or her own efforts and at his own expense." (citations omitted)). In other words, Mr. Williams enjoyed a right to seek an independent test wholly apart from Section 39-20-02.

[¶8] This Court's recognition of the inherent right to seek independent testing is confirmed by other jurisdictions. In Smith v. Cada, 562 P.2d 390 (Ariz. Ct. App. 1977), law enforcement arrested a motorist for DUI. Id. at 511. Law enforcement requested a chemical breath test, and the motorist refused. Id. The motorist requested to bail out of jail to secure an independent blood test, possessing sufficient cash to post bond according to established bail schedule. Id. Law enforcement refused to allow the motorist to bail out, or to make a call to secure an independent test. Id. The trial court dismissed the case, determining law enforcement deprived the motorist of his right to a fair trial by refusing to allow him to make a phone call or bail out to secure an independent test following his arrest. Id. The State appealed. Id.

[¶9] On appeal, the state argued Arizona statute—substantively identical to Section 39-20-02—required a motorist to submit to law enforcement chemical testing as "a condition precedent to the entitlement of an independent chemical or blood test." 562 P.2d at 512 (citing Ariz. Rev. Stat. § 28-692(F)). The Arizona Court of Appeals rejected the state's reading of the statute, reasoning that if the state's interpretation "was correct, the logical conclusion would be that the police could affirmatively prohibit every driver who refused a breathalyzer test from obtaining independent evidence of his sobriety, in essence suppressing evidence favorable to the defendant. Such a result would be violative of due process of law." Id. Therefore, the court held:

> the interpretation of [the statute] urged by the appellants would result in an unconstitutional restrain on the right of a criminal accused to attempt to obtain independent evidence of his innocence and operate to deprive the accused of due process of law. We therefore reject this interpretation.

Id. at 513.

[¶10] The Montana Supreme Court reached a similar conclusion in State v. Swanson, 722 P.2d 1155 (Mont. 1986). There, law enforcement arrested a motorist for DUI. Id. at 358-59. Law enforcement requested a chemical breath test from the motorist, and the motorist refused. Id. at 359. The motorist requested a chemical blood test, and law enforcement allowed the motorist to take the test, at his expense. Id. After the test, however, law enforcement destroyed the sample's evidentiary value while the motorist remained in custody by failing to refrigerate the sample while in law enforcement's possession. Id. The motorist moved to dismiss the DUI charge based on law enforcement's handling of the sample. Id. at 359-60.

[¶11] On appeal, the state argued the destruction of the sample was inconsequential because the motorist enjoyed no right to an independent test. Id. at 360. The Montana

Supreme Court rejected the argument, holding a motorist's right to due process grants the right to an independent test regardless of whether the motorist submitted to law enforcement testing. Id. at 361 ("We . . . hold that one accused of a crime involving intoxication has a right to obtain an independent blood test to establish his sobriety regardless of whether he submits to a police designated test."). This right to independent testing existed separate from any a statutory right to independent testing provided by statute substantively identical to Section 39-20-02. See 722 P.2d at 360 (citing Mont. Code Ann. § 61-8-405(2)). Following Swanson, Montana courts have repeatedly upheld this inherent due process right to independent testing. See, e.g., State v. Minkoff, 42 P.3d 223, 224 (Mont. 2002) ("It also is undisputed that, when the charged offense is DUI, the accused has a right to obtain a test of the amount of alcohol in his or her blood independent of the test offered by the arresting officer, without regarding to whether the accused has taken or rejected the offered test." (emphasis added) (citation omitted)); cf. also State v. Choate, 667 S.W.2d 111 (Tenn. Crim. App. 1983) (law enforcement would violate a motorist's right to due process if they refuse to allow a motorist an opportunity to call for his own doctor or other qualified person to take an independent test).

[¶12] The right to independent testing exists separate from Section 39-20-02—Section 39-20-02 merely recognizes due process requires the ability of a motorist to seek independent testing. Because Mr. Williams possessed the right to seek an independent test irrespective of Section 39-20-02, the district court correctly concluded Mr. Williams enjoyed the right to seek an independent test.

B. Section 39-20-02 provided Mr. Williams the right to seek an independent test

[¶13] Even if Section 39-20-02 solely provides the right to seek an independent test, the City incorrectly argues Section 39-20-02 requires submission to law enforcement's chemical test before independent testing may be sought. Cf. State v. Bearrunner, 2019 ND 29, ¶ 5, 921 N.W.2d 894 ("'Statutory interpretation is a question of law, fully reviewable on appeal.'" (citation omitted)). Section 39-20-02, in relevant part, reads:

> 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.

N.D.C.C. § 39-20-02.[1] The City argues use of the words "individual tested" and "in addition" in Section 39-20-02 requires a motorist to provide a chemical test sample to law enforcement prior to seeking an independent test. See Br. of Pl. & Appellant, at ¶¶ 9-10. The City's reading of Section 39-20-02 is mistakenly narrow. Consider the following analogy: a high school class is administered a one-hour test. A student is provided the test, and told he must complete the test, but refuses to answer any question of the test. At the end of the hour, the blank test is graded as a zero. Within the plain meaning of the word, the student is still "tested"—the student simply receives a zero on the test by refusing to perform the test. Likewise, if law enforcement informs a motorist he or she is required to take a chemical test, and the motorist refuses to complete the chemical test,

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[1] While this case is a criminal case, not an administrative case, criminal law incorporates the parameters of an administrative refusal into the criminal code. See 39-08-01(e)(2) (A motorist commits the crime of DUI-Refusal for refusing a chemical test "of a law enforcement officer under section 39-20-01."). Accordingly, to the extent an administrative refusal is cured, a charge of DUI-Refusal is foreclosed.

the motorist is "tested"—the motorist simply fails the test by refusing to perform. In other words, a motorist is tested—and may request an additional independent test—regardless of whether the motorist finishes law enforcement's test.

[¶14] This Court's precedent confirms an individual may seek independent testing without providing a chemical test sample to law enforcement. In North Dakota Dep't of Transp. v. DuPaul, 487 N.W.2d 593 (N.D. 1992), law enforcement arrested a motorist for DUI, and transported him to the police station. Id. at 594-95. At the station, law enforcement repeatedly requested the motorist's submission to chemical testing, and the motorist would only respond "'I want a doctor, and I want a lawyer.'" Id. at 595. The motorist never completed a chemical test, and law enforcement charged the motorist with DUI. Id. A couple hours later, the motorist bonded out, and secured an independent blood alcohol test on his own at the local hospital. Id. At the subsequent administrative hearing, the motorist argued his independent test "cured" his earlier refusal. Id. While this Court found the motorist enjoyed the right to a test in addition to the test requested by law enforcement, id. at 597 ("DuPaul was entitled to a reasonable opportunity for an additional test by a person of his own choosing." (emphasis omitted)), the Court ultimately rejected the cure argument. The Court reasoned the independent test obtained by the motorist failed to cure the refusal because it was not obtained while in the custody of law enforcement. Id. ("[H]is 'independent' test at the hospital after release from the county jail does not cure DuPaul's refusal to be tested while in police custody." (citing Asbridge v. North Dakota State Highway Comm'r, 291 N.W.2d 739 (N.D. 1980) (refusal to submit to chemical test cannot be cured after driver leaves police custody))).

[¶15] This Court reached a similar conclusion in Scott v. North Dakota Dep't of Transp., 557 N.W.2d 385 (N.D. 1996). In Scott, law enforcement requested a motorist submit to an onsite alcohol screening test. Id. at 386. The requesting officer informed the motorist he was failing him for failing to provide an adequate sample—believing the motorist was blocking the sensor with his tongue. Id. Because the officer did not believe he had sufficient evidence to arrest the motorist for DUI, he released the motorist. Id. At the subsequent license revocation hearing, the motorist sought to have admitted into evidence a blood test showing he did not have alcohol in his system within two hours after his traffic violation. Id. The hearing officer admitted the test, but still revoked the motorist's license, finding "refusal of an on-site screening test 'cannot be cured by submitting to a chemical test which was not requested by the officer[.]'" Id. at 387. On appeal, this Court denied any legal significance to the motorist's independent test, reasoning "an independent test cannot cure someone's refusal to be tested unless that person has been in continuous police custody." Id. at 388 (emphasis added) (citation omitted). The Court's holding necessarily implies an independent test can cure a test refusal so long as the motorist remains in police custody. Because an independent test can cure a test refusal so long as the motorist remains in custody, motorists must be able to seek and secure independent testing to cure the refusal. In other words, a motorist does not need to complete law enforcement's requested chemical test to seek independent testing.

[¶16] This Court's precedents are clear, motorists can cure refusals through independent testing if, and only if, the motorist remains in custody while the independent test is obtained. Necessarily, therefore, motorists do not need to submit to chemical testing

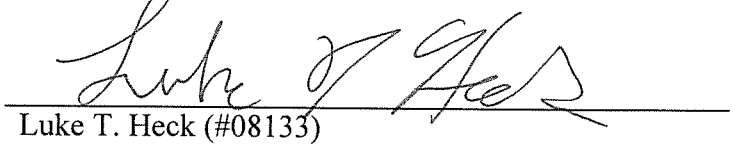
prior to seeking independent testing. Mr. Williams enjoyed the right to seek an independent test despite refusing Carlson chemical breath request.

CONCLUSION

[¶17] Mr. Williams enjoyed an inherent right to an independent test, and Section 39-20-02 did not otherwise require Mr. Williams to submit to law enforcement testing prior to being allowed to seek independent testing. Because the City does not dispute Mr. Williams requested an independent test, or that Carlson failed to provide Mr. Williams a reasonable opportunity to secure the requested independent test, Mr. Williams respectfully requests this Court affirm the district court's informed opinion.

Respectfully submitted this 9th day of April, 2019.

VOGEL LAW FIRM

By: 

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CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I hereby certify that on April 9, 2019, the following documents:

BRIEF OF APPELLEE

Were e-mailed to the address below and is the actual email address of the party intended to be served and said party has consented to service by email:

Stephen R. Hanson II
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Dated this 9th day of April, 2019.

VOGEL LAW FIRM

By: */s/ Luke T. Heck*

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