

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

**REPLY BRIEF OF PLAINTIFF AND APPELLANT,
CITY OF WEST FARGO**

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

TABLE OF CONTENTS

Paragraph [¶]

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES ii

LAW AND ARGUMENT 1

CONCLUSION 4

CERTIFICATE OF COMPLIANCE 5

CERTIFICATE OF SERVICE..... 6

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Paragraph [¶]

CASES

<u>Scott v. N.D. Dep't of Transp.</u> , 557 N.W.2d 385, 387 (N.D. 1996)	2
<u>State v. Messner</u> , 481 N.W.2d 236, 240 (N.D. 1992).....	2
<u>State v. Otto</u> , 2013 ND 239, ¶ 7, 840 N.W.2d 589.....	1
<u>Tkach v. American Sportsman, Inc.</u> , 316 N.W.2d 785, 787 (N.D. 1982).....	1

STATUTES

N.D.C.C. § 39-20-02	2
---------------------------	---

LAW AND ARGUMENT

[¶ 1] The Defendant argues, for the first time on appeal, that he had an “inherent right” to an independent test. The Defendant argued to the district court that his alleged statutory right was violated, not an alleged inherent right or due-process right. The Defendant stated that he brought the motion “on grounds that his statutory right to an independent blood test was violated.” (Index # 15 at ¶ 1.) (Emphasis added.) “An appellee for whom a favorable judgment was rendered by the trial court may, on appeal and without a cross-appeal, attempt to save the judgment by urging any ground asserted in the trial court.” Tkach v. American Sportsman, Inc., 316 N.W.2d 785, 787 (N.D. 1982) (emphasis added); see also State v. Otto, 2013 ND 239, ¶ 7, 840 N.W.2d 589 (“Although the district court upheld the search on the basis of a safety sweep, we may affirm the district court on any basis properly before it.” (emphasis added)). No inherent-right or due-process argument was ever asserted in the district court, and it is not a basis for this Court to affirm.

[¶ 2] Even if the argument were properly before this Court, the Defendant’s reliance on the cases from other jurisdictions in his brief is misplaced. None of those cases deal with a situation where a court suppressed evidence of a defendant’s refusal for a violation of the right to an independent test in a prosecution for refusal to submit to chemical testing. And this Court has never held that the statutory right to an additional independent test is anything other than a statutory right. In State v. Messner, the Court did not hold that the right was an “inherent right.” 481 N.W.2d 236, 240 (N.D. 1992). The court explained what the statutory right entails. Id.

(“[T]he 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 own efforts and at his own expense.” (emphasis added)). This Court has stated that N.D.C.C. § 39-20-02 authorizes a person tested to “obtain an independent test to rebut the officer’s chosen test.” Scott v. N.D. Dep’t of Transp., 557 N.W.2d 385, 387 (N.D. 1996). When there is no test to rebut, there is no violation of the right and therefore nothing to suppress.

[¶ 3] The Defendant’s analogy about a high school test makes no sense. The student in the analogy, like the Defendant here, is not an “individual tested” because he refused to be tested. The student in the analogy receives a failing grade not because he is tested and fails, but because he refused to be tested and so there is nothing to score. Here, the Defendant receives a criminal charge because he refused to be tested. Because he has not been tested, there is nothing to suppress under N.D.C.C. § 39-20-02.

CONCLUSION

[¶ 4] The Court should reverse the district court’s decision to suppress evidence of the Defendant’s refusal and remand the case for trial.

Dated: April 23, 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**

[¶ 5] The undersigned hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 554 words (excluding words contained in (1) the table of contents, (2) the table of authorities, (3) and this certificate), which is within the limit of 2,000 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

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

[¶ 6] I hereby certify that on April 23, 2019, I caused to be electronically filed the **1) Reply Brief of Plaintiff and 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 and Drew J. Hushka by email at lheck@vogellaw.com and dhushka@vogellaw.com.

/s/ Stephen R. Hanson II

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

- 5 -