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JUNE 10, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)
	)
Plaintiff/Appellee,	) Supreme Court No. 20200033
v.	)
	) District Ct. No. 09-2019-CR-01312
Christopher Lee Devine,	)
	)
Defendant/Appellant.	)

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

Appeal from Amended Criminal Judgment dated March 4, 2020,
in Cass County District Court, East Central Judicial District,
the Honorable Susan Bailey, Presiding

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Paragraph No.

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[¶3] **STATEMENT OF ISSUES**

[¶4] Did the district court properly deny the Defendant's motion to suppress because in cases where a DUI arrestee's condition makes it uncertain the officer could inform the arrestee of the advisory in N.D.C.C. § 39-20-01(3)(a) (2017), a search warrant alone is a valid method for obtaining evidence?

[¶5] Did the district court properly deny the Defendant's motion to suppress because in cases involving death or serious bodily injury, N.D.C.C. § 39-20-01.1 provides a separate statutory scheme for compelling a blood test by search warrant?

[¶6] **STATEMENT OF CASE**

[¶7] The Defendant appeals from a judgment entered after his conditional guilty plea to Criminal Vehicular Homicide and two counts of Criminal Vehicular Injury. He challenges the district court's denial of his motion to suppress the results of his blood test. The Defendant contends that, because Officer Nelson did not recite a complete implied consent advisory under N.D.C.C. § 39-20-01(3)(a) (2017), the results of the blood test are inadmissible. (Appellant's Br. ¶ 10.)

[¶8] The State argues that the district court properly denied the Defendant's motion to suppress. Two independent bases support the district court's decision. First, in cases where a DUI arrestee's condition makes it uncertain the officer could inform the arrestee of the advisory in N.D.C.C. § 39-20-01(3)(a) (2017), a search warrant alone is a valid method for obtaining evidence. Second, in cases involving death or serious bodily injury, N.D.C.C. § 39-20-01.1 provides a separate statutory scheme for compelling a blood test by search warrant. The State requests this Court affirm the district court's decision.

[¶9] **STATEMENT OF FACTS**

[¶10] On Saturday, March 23, 2019, at approximately 7:30 p.m., Fargo Police officers responded to a severe motor vehicle collision in the 1300 block of South University Drive in Fargo. (Index # 3; Appellant's Br. ¶ 15.) The Defendant had been driving a vehicle at approximately seventy-four mph (Index # 3) before losing control, travelling into the oncoming traffic, and striking an oncoming vehicle

(Index # 3; Appellant's Br. ¶ 15). The Defendant's passengers included his seven-year-old son, his five-year-old son, and his adult friend. (Index # 3.) The Defendant's seven-year-old son was killed in the crash, his five-year-old son was left unconscious in critical condition, and his adult friend suffered severe head and lower body injuries. (Index # 3.) The Defendant was transported to a hospital for treatment. (Appellant's Br. ¶ 16.)

[¶11] Based on evidence that the Defendant had been drinking alcohol, a search warrant was obtained for a blood sample from him. (Index # 3; Appellant's Br. ¶ 16.) The Defendant was arrested but not taken into custody because of his serious injuries and need for ongoing medical attention. (Index # 3.) After reciting the Miranda rights, Officer Nelson read an implied consent advisory omitting the portion indicating that refusal to submit to a urine or breath test is a crime punishable in the same manner as driving under the influence. When asked if he consented to a blood test, the Defendant did not answer, and someone told him to open his eyes. (Appellant's Br. 17; Index # 46.)

[¶12] Officer Nelson then attempted to inform the Defendant of the advisory in portions. (Appellant's Br. ¶ 17; Index # 46.) Officer Nelson told the Defendant he needed "to stay awake this time." (Appellant's Br. ¶ 17; Index # 46.) Despite that, multiple persons had to tell the Defendant to open his eyes during the second attempt at the advisory. (Appellant's Br. ¶ 17; Index # 46.) When asked if he understood portions, the Defendant said "umhuh" or nothing audible. (Appellant's

Br. ¶ 17; Index # 46.) When asked if he consented, the Defendant said "umhuh." (Appellant's Br. ¶ 17; Index # 46.) The search warrant was executed, and the Defendant's blood sample was obtained. (Appellant's Br. ¶ 18.)

[¶13] **STANDARD OF REVIEW**

[¶14] On appeal, the North Dakota Supreme Court will "affirm a district court's decision on a motion to suppress if there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence." State v. Vigen, 2019 ND 134, ¶ 5, 927 N.W.2d 430. Deference is given to the district court's findings of fact, and matters of law, are fully reviewable on appeal. State v. Morales, 2015 ND 230, ¶ 7, 869 N.W.2d 417. The Court "will not disturb a correct result merely because the district court assigned an incorrect reason, if the result is the same under the correct law and reasoning." Roth v. State, 2007 ND 112, ¶ 17, 735 N.W.2d 882.

[¶15] **LAW AND ARGUMENT**

[¶16] The Defendant contends that the district court erred by not suppressing his blood test. In support, the Defendant relies upon N.D.C.C. § 39-20-01(3)(b) (2017), which provided that "[a] test administered under this section is not admissible… if the law enforcement officer fails to inform the individual charged as required under subdivision a." Subdivision (a) of N.D.C.C. § 39-20-01(3) (2017), in turn, provided:

> 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.

[¶17] The district court properly concluded that N.D.C.C. § 39-20-01(3)(a) (2017) was inapplicable and the blood test result obtained by search warrant was admissible.

> [¶18] **I. In cases where a DUI arrestee's condition makes it uncertain the officer could inform the arrestee of the advisory in N.D.C.C. § 39-20-01(3)(a) (2017), a search warrant alone is a valid method for obtaining evidence**.

[¶19] The Fourth Amendment to the United States Constitution provides that ". . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Supreme Court of the United States has articulated that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment." Katz v. U.S., 389 U.S. 347, 357 (1967).

[¶20] Under N.D.C.C. § 39-20-01(3)(a) (2017), an arresting officer could "request[]" an individual to submit to a blood test to determine alcohol

concentration. Under N.D.C.C. § 39-20-01(1) "any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state is deemed to have given consent, and shall consent subject to the provisions of this chapter. . ." to chemical testing.

[¶21] In Birchfield, the Supreme Court addressed a case involving three defendants charged with offenses under implied consent laws. 136 S.Ct at 2186. The court characterized tests conducted under implied consent statutes as "warrantless searches" 136 S.Ct. at 2172, and further declined to extend the search incident to arrest doctrine to permit warrantless blood draws, instead requiring a warrant in these circumstances Id. at 2185. The court further described implied consent laws as "requiring motorists, as a condition of operating a motor vehicle within the state, to consent to BAC testing if arrested or otherwise detained on suspicion of a drunk driving offense." Id. at 2169.

[¶22] In DeForest v. North Dakota Department of Transportation, the officer omitted the second sentence of the above advisory, "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." 2018 ND 224, ¶ 7, 918 N.W.2d 43. The defendant attempted to argue that the statute should be interpreted as rendering a blood test inadmissible unless a search warrant had been obtained prior to reading the implied consent advisory and ordering the blood test, but the North Dakota Supreme Court refused to adopt this argument. Id. In

giving words in a statute their "plain, ordinary, and commonly understood meaning", "construing the statute as a whole . . ." and interpreting the statute to "avoid absurd or illogical results", the court stated that "it is plain that these statutes . . . did not intend to require a search warrant prior to reading the implied consent advisory and requesting a blood test." Id. at ¶ 8, ¶ 10. Further, no search warrant was requested or available in this case.

[¶23] In addition to DeForest, the North Dakota Supreme Court has addressed the issue of omissions or deviations from the implied consent advisory under N.D.C.C. § 39-20-01(3)(a) several times. State v. O'Connor involved an officer who did not inform the defendant that "refusal to take a chemical test is a crime punishable in the same manner as driving under the influence." 2016 ND 72, ¶ 3, 877 N.W.2d 312. The court held the results of the test inadmissible because the officer did not provide the defendant with a complete implied consent advisory. Id. at ¶ 14. No search warrant was requested or available in this case. In Schoon v. North Dakota Department of Transportation, the officer omitted the same provision at issue in O'Connor from his advisory, and the court similarly held that he was required to inform the defendant of this provision. 2018 ND 210, ¶ 11, 917 N.W.2d 199. However, no search warrant was requested or available in this case either. State v. Bohe involved the same omission as O'Connor and Schoon, and the court held the test results to be inadmissible. 2018 ND 216, ¶ 7, ¶ 16, 917 N.W.2d 497. Like both O'Connor and Schoon, no search warrant was requested or available. In

State v. Vigen an officer omitted the reference to refusal of urine testing "being a crime punishable in the same manner as driving under the influence." 2019 ND 134, ¶ 11, 927 N.W.2d 430. The court held that this was a substantive omission and the test results were inadmissible as a result. Id. at ¶ 17. Like all of the aforementioned cases, there was also no search warrant requested or available in Vigen.

[¶24] The omission by Officer Nelson in his reading of the implied consent advisory (Brief in Support of Motion to Supp. A11-12) is not fatal to the admissibility of the blood test results taken because the existence of a valid, independently issued search warrant (State's Return to Def's. Motion for Cont.) for the Defendant's blood rendered the implied consent advisory superfluous. This is a case of first impression for the Supreme Court of North Dakota, given that the precedent regarding implied consent under N.D.C.C. § 39-20-01 does not address the necessity for an implied consent advisory when an officer possesses a valid search warrant issued independently of N.D.C.C. § 39-20-01.

[¶25] Unlike this case, Vigen, Schoon, O'Connor, Bohe, and DeForest each involved tests requested under the implied consent statute and no search warrant was obtained. Perhaps more importantly, none involved an arrestee in such poor condition that it was uncertain the officer could "inform" the arrestee of the advisory under N.D.C.C. § 39-20-01(3)(a) (2017). Officer Nelson attempted to inform the Defendant of information in N.D.C.C. § 39-20-01(3)(a) (2017), albeit without regard to criminal penalties for refusing to submit to breath or urine tests. But the

Defendant appeared to fall asleep, answered incoherently to some questions about whether he understood, and managed meager "I'm sorry," and "umhuh" upon being asked if he consented to a blood test. (Appellant's Brief ¶ 17, Index # 46.) Communicating information to the Defendant was simply not a reliable option.

[¶26] Because Officer Nelson could not "inform" the Defendant of the information in N.D.C.C. § 39-20-01(3)(a) (2017), the test could not have been administered under N.D.C.C. § 39-20-01. Nothing in N.D.C.C. § 39-20-01. precluded an officer from obtaining evidence by search warrant when it was not possible to administer a test under the statute. Moreover, that interpretation prevents the absurd result of a driver being shielded from chemical testing when he is so injured or impaired that he cannot be informed of the implied consent. The blood sample was properly obtained by search warrant. Under the unique circumstances, the exclusionary provision in N.D.C.C. § 39-20-01(3)(b) (2017) for "a test administered under this section" was not applicable**.**

[¶27] **II. <u>In cases involving death or serious bodily injury, N.D.C.C. § 39-20-01.1 provides a separate statutory scheme for compelling a blood test by search warrant.</u>**

[¶28] Section 39-20-01.1, N.D.C.C., sets out a procedure for obtaining a blood sample in the most extraordinary cases, those involving death or serious bodily injury. The legislature precluded drivers from refusing chemical testing in such cases. When a driver is involved in a crash resulting in the death or serious bodily injury to another, probable cause exists to believe the driver has committed

a DUI, and a chemical test is not obtainable via consent or exigent circumstances, the officer "shall request a search warrant to compel the driver to submit to a chemical test[.]" N.D.C.C. § 39-20-01.1(3). This Court has explained, "[W]e have no doubt that the intent of Section 39-20-01.1 was to withdraw from a driver involved in an accident resulting in death or serious bodily injury the right to refuse the chemical test. State v. Hansen, 444 N.W.2d 330, 333 (N.D. 1989).

[¶29] The crash in this case resulted in the death of a child and serious injuries to the other occupants (Appellant's Br. ¶ 16; Index # 3) placing it under the purview of N.D.C.C. § 39-20-01.1. The Defendant himself acknowledges applicability of N.D.C.C. § 39-20-01.1. (Appellant's Br. ¶ 28.) The Defendant could not have refused the chemical test. See State v. Hansen, 444 N.W.2d 330, 333 (N.D. 1989). The implied consent advisory and the inadmissibility provision in N.D.C.C. § 39-20-01(3)(a) & (b) (2017) were inapplicable.

[¶30] **CONCLUSION**

[¶31] For the foregoing reasons, the district court properly denied the Defendant's motion to suppress, and the State requests this Court affirm the district court's judgment.

[¶32] **ORAL ARGUMENT REQUEST**

[¶33] The State requests oral argument to emphasize and clarify the unique circumstances of the case and the written argument.

Respectfully submitted this 10th day of June, 2020.

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[¶34] **CERTIFICATE OF COMPLIANCE**

[¶35] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8). The page count, including this certificate, is fifteen pages.

Dated this 10th day of June, 2020.

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[¶36] **CERTIFICATE OF SERVICE**

[¶37] A true and correct copy of the foregoing document was sent by email on the 10th day of June, to: Ashley Schell (fargopublicdefender@nd.gov)

Reid A. Brady, NDID# 05696

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)
Christopher Lee Devine,)
)
Defendant/Appellant.)

CERTIFICATE OF ELECTRONIC SERVICE

Supreme Court No. 20200033

[¶1] I, Trina A Hiemer, hereby certify that on June 11, 2020, the following documents:

Supreme Court Appellee Brief, Supreme Court No. 20200033

[¶2] Were emailed to the following:

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Dated this 11th day of June, 2020.

Trina A Hiemer

Subscribed and sworn to before me this dated this 11th day of June, 2020.

HANNAH ANDERSEN
Notary Public
State of North Dakota
My Commission Expires Nov. 20, 2023

Notary Public