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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF
THE STATE OF NORTH DAKOTA

City of Fargo, Plaintiffs/Appellee, vs. Simon J. Hofer, Defendant/Appellant.	Supreme Court Case No.: 20200041 Cass County District Court No. 09-2019-cr-01860

BRIEF OF APPELLANT SIMON J. HOFER

ON APPEAL FROM JUDGMENT ENTERED JANUARY 13, 2020 (DKT. NO. 48) AND THE ORDER DENYING APPELLANT'S MOTION TO SUPPRESS (DKT. NO. 41) IN THE DISTRICT COURT, COUNTY OF CASS, CASE NO.: 09-2019-CR-01860, BY THE HONORABLE TOM OLSON

Dated: April 20, 2020

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STATEMENT OF ISSUES

¶1 The District Court erred in determining that suppression of a chemical test for improper reading of the implied consent advisory is not mandatory in the event that a search warrant was obtained prior to administration of the chemical test.

STATEMENT OF THE CASE

¶ 2 On October 28, 2019, in Cass County District Court, a hearing was held on Appellant's, Simon Hofer (hereinafter "Hofer"), motion to exclude the test results of the urine test on the grounds that no legally valid request for testing was made by the arresting officer. Appellant's argument relies on a string of implied consent advisory cases issued by this Court. Appellant's Appendix, at p. 3. At the hearing, Cass County District Court Judge Tom Olson denied Appellant's motion on the grounds that a search warrant cures an officer's substantively incomplete advisory. Appellant's Appendix, at pp. 4-6.

¶ 3 On January 13, 2020, Hofer submitted a Conditional Plea of Guilty preserving his right to appeal the district court's denial of his motion to suppress. Appellant's Appendix, at p. 7. Hofer filed a Notice of Appeal, and corresponding documents, on February 14, 2020, and now appeals the district court's decision to this Court. Appellant's Appendix, at p. 9.

STATEMENT OF THE FACTS

¶ 4 On April 20, 2019, in the City of Fargo, County of Cass, Officer Fugelberg (hereinafter "Fugelberg") executed a traffic stop on Hofer. Appellant's Appendix, at p. 10. Subsequently, Officer Austin Yancy (hereinafter "Yancy") arrived to assist Fugelberg in the administration of standard field sobriety testing. Id. At the completion of sobriety testing, Yancy arrested Hofer on suspicion of driving under the influence. Id. Post-arrest, Yancy recited a substantively incomplete North Dakota Implied Consent Advisory before requesting Hofer submit to a chemical breath test. Id; Appellant's Appendix, at pp. 13-14. Specifically, Yancy read the

advisory verbatim from a department issued reference card that omitted the phrase "directed by a law enforcement officer." Appellant's Appendix, at p. 10.

¶ 5 Hofer submitted to the chemical breath test, which provided a blood alcohol concentration result of 0.00%. Appellant's Appendix, at pp. 14. Officer Caleb Korb (hereinafter "Korb"), who was assisting Yancy in the administration of chemical breath testing, then applied for a search warrant in an effort to obtain a chemical urine sample from Hofer. Appellant's Appendix, at p. 12. After receiving said warrant, Yancy read the chemical "blood/urine" portion of the department issued reference card, which, as with the chemical "breath" portion of the reference card, omitted the phrase "directed by a law enforcement officer", resulting in a second substantively incomplete advisory. Id; Appellant's Appendix, at p. 13. Hofer complied with the request, and subsequently filed a motion to suppress the results. Appellant's Appendix, at p. 12.

STANDARD OF REVIEW

¶ 6 The standard of review governing this Court's review of a district court's decision on a motion to suppress evidence is as follows:

> A trial court's disposition of a motion to suppress will not be reversed if, after conflicts in the testimony are resolved in favor of affirmance, 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. Questions of law are fully reviewable.

State v. Ballard, 2016 ND 8, ¶ 6, 874 N.W.2d 61 (internal quotations and citations omitted). "[Q]uestions of law are reviewed under the de novo standard of review." Id. "Statutory interpretation is a question of law, fully reviewable on appeal." Teigen v. State, 2008 ND 88, ¶ 19, 749 N.W.2d 505.

LAW AND ARGUMENT

A. Chemical Test Results Are Inadmissible Following a Substantively Incomplete Implied Consent Advisory

¶ 7 At the time of Hofer's arrest, section 39-20-01(3)(a), N.D.C.C., stated that "[t]he law enforcement officer shall inform the individual charged that ... refusal of the individual to submit to a test **directed by a law enforcement officer** may result in a revocation of the individual's driving privileges." (emphasis added). In addition, section 39-20-01(3)(b), N.D.C.C., stated "[a] test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a." Thus, at the time of Hofer's arrest, an incorrect reading of the implied consent advisory resulted in suppression of a post-arrest chemical test.

¶ 8 In State v. Vigen, this Court analyzed the very statutory directives at issue in the present case. See State v. Vigen, 2019 ND 134, 927 N.W.2d 430 (modified implied consent advisories that omit information regarding urine testing is substantively deficient, requiring exclusion of subsequent breath-test results). In Vigen, the arresting officer read a modified implied consent advisory that omitted the word "urine" from the statutory mandate contained in section 39-20-01(3)(a), N.D.C.C. Id at ¶ 3. This Court noted it has "recognized N.D.C.C. § 39-20-01(3)(a), requires specific information be communicated by law enforcement when requesting an individual arrested for driving under the influence submit to chemical testing." Id at ¶ 7 (citing LeClair v. Sorel, 2018 ND 255, ¶ 9, 920 N.W.2d 306). "Law enforcement is required to read the 'complete implied consent advisory before administering' a chemical test." Id (quoting State v. O'Connor, 2016 ND 72, ¶ 1, 877 N.W.2d 312)). "For an advisory to be considered 'complete,' all substantive information in the statute must be communicated to the individual."

Id. This Court applied the unambiguous wording provided by 39-20-01(3)(a)-(b) holding "the informed consent advisory given to Vigen did not comply with N.D.C.C. § 39-20-01(3)(a), and the breath test is therefore inadmissible under N.D.C.C. § 39-20-01(3)(b)." Id at ¶ 17.

¶ 9 Shortly thereafter, this Court echoed the above sentiment in City of Bismarck v. Vagts. See City of Bismarck v. Vagts, 2019 ND 224, 932 N.W.2d 523 (holding a modified implied consent advisory which fails to include the phrase "directed by a law enforcement officer" does not substantively comply with the statutory requirements for the implied consent advisory). In support of its holding this Court provided the following:

> We conclude that the advisory given in this case did not substantively comply with the statutory requirement that the individual charged must take a chemical test "directed by the law enforcement officer" and that the result of a subsequent breath test is inadmissible under the applicable language of N.D.C.C. § 39-20-01(3)(b).

City of Bismarck v. Vagts, 2019 ND 224, ¶ 18, 932 N.w.2d 523. Ultimately, this Court concluded "the implied consent advisory given to Vagts did not substantively comply with N.D.C.C. § 39-20-01(3)(a) and the result of [the] breath test was held inadmissible under N.D.C.C. § 39-20-01(3)(b)." Id at ¶ 20.

¶ 10 Under the law at the time of Hofer's arrest, even when a driver has voluntarily consented to a chemical test, the statutory advisory requirements of section 39-20-01(3)(a) must be fulfilled. See State v. O'Connor, 2016 ND 72, 877 N.W.2d 312. This Court stated "the implied consent law currently applie[s] equally to people who consent and say 'yes' because only after consent is there a test that is inadmissible." Id at ¶ 12. Section 39-20-01(3)(a) explicitly mandates officers inform drivers of the implied consent advisory to substantive completeness. If a deficient advisory is ruled to be cured upon a driver's consent to a chemical test section 39-20-01(3)(b) would be rendered entirely useless. The legislature explicitly stated "[a] test

administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a." See N.D.C.C. § 39-08-01(3)(b). "The legislature has directed that a specific warning be provided to an arrested defendant before the results of a chemical test can be admitted in a criminal or administrative proceeding." O'Connor at ¶ 13. "'[This Court] give[s] special deference to the Legislature when a[n implied consent] statute governing admissibility of evidence is part of a legislative design that essentially authorizes and creates the item of disputed evidence.'" Id (quoting City of Fargo v. Ruether, 490 N.W.2d 481, 484 (N.D. 1992)). "Adopting the State's arguments [that voluntary consent cures a deficient advisory] would eviscerate the 2015 amendment to N.D.C.C. § 39-20-01(1)(3)." Id. Applying the law to the facts, Ofc. Yancy's omission of the phrase "directed by a law enforcement officer" rendered Hofer's urine test inadmissible at trial. The trial court, though, found that Yancy's obtaining a search warrant prevented any suppression of the urine test for improper recitation of the implied consent advisory.

B. A Search Warrant Does Not Cure an Officer's Substantively Incomplete Advisory

¶ 11 "Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears." Zajac v. Traill Cty. Water Res. Dist., 2016 ND 134, ¶ 6, 881 N.W.2d 666; See also N.D.C.C. § 1-02-02. When a statute is clear and unambiguous it is improper for the courts to attempt to construe the provision so as to legislate that which the words of the statute do not themselves provide. Haider v. Montgomery, 423 N.W.2d 494, 495 (N.D. 1988); Ralston v. Ralston, 2003 ND 160, ¶ 7, 670 N.W.2d 334, 335 (When a statute is clear and unambiguous, it will not be "interpret[ed] ... as though language not present should have been added); and State ex rel. Clayburgh v. American

West Community Promotion, Inc., 2002 ND 98, ¶ 14, 645 N.W.2d 196 ("If the language of the statute is clear and unambiguous we cannot ignore that language under the pretext or pursuing its spirit because the legislative intent is presumed clear from the face of the statute.").

¶ 12 The former language of 39-20-01(3)(b), N.D.C.C. is clear and unambiguous. If an implied consent advisory is read incorrectly, the subsequent chemical test is inadmissible. There is no exception in the case of search warrants. By adding that exception, the trial court added language to the statute that did not previously exist. This should not stand.

¶ 13 In the wake of Birchfield v. North Dakota, the legislature added language addressing the implied consent advisory and officers' obtaining a search warrant for blood and urine testing to comply with the United States Constitution. If the Legislature intended for a search warrant to negate the requirement that officers read a valid implied consent advisory the Legislature could have included such language. However, to the contrary, the Legislature specifically instructed to officers to refrain only from reading the criminal penalties of refusing a chemical blood test until after securing a search warrant. Why would the legislature require the criminal language of the advisory to only be read after securing a warrant if the implied consent is not even necessary after securing a warrant? That would be an absured result, and this Court has repeatedly "construe[d] statutes to avoid absurd or illogical results." State v. Stegall, 2013 ND 49, ¶ 16, 828 N.W.2d 526 (quoting Mertz v. City of Elgin, 2011 ND 148, ¶ 7, 800 N.W.2d 710).

¶ 14 The only affect a search warrant serves in the context of DUI/Implied Consent is to ensure compliance with the Fourth Amendment of the United States Constitution. The Legislature specifically addressed this concern in the wake of Birchfield in the context of criminal proceedings. The obligation of a driver to provide a chemical test is in place whether an officer obtains a search warrant or not. It is the officer's responsibility to comply with the

clear and unambiguous legislative directives contained in section 39-20-01(3). Without a valid request, section 39-20-01(3)(b) mandates exclusion of the test results from criminal and administrative hearings alike.

CONCLUSION

¶15 For the reasons set forth above, the district court erred in denying Hofer's motion to suppress the results of a chemical test contrary to the clear and unambiguous language contained in section 39-20-01(3)(b), N.D.C.C. Consequently, Hofer respectfully asks that the district court order denying suppression of the chemical test be reversed and the remanded for further proceedings.

Dated this 21st day of April, 2020.

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CERTIFICATE OF COMPLIANCE

¶16 The undersigned, as attorneys for the Appellant, Simon Hofer in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of pages in the above brief totals 11.

Date: April 21, 2020

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STATE OF NORTH DAKOTA COUNTY OF CASS	IN JUVENILE COURT EAST CENTRAL JUDICIAL DISTRICT

City of Fargo	)	
	)	
PETITIONER/APPELLEE,	)	
	)	District Ct. Case No.: 09-2019-CR-01860
VS.	)	
	)	
Simon J. Hofer	)	Supreme Ct. Case No.: 20200041
	)	
RESPONDENT/APPELLANT.	)	

CERTIFICATE OF SERVICE

[¶#1] I hereby certify that on the 21st day of April, 2020, the following documents:

1. Appellant's Brief;
2. Appendix to Appellant's Brief; and

were served, via electronic filing system, upon the following individual(s):

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