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FEBRUARY 21, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20180394
Burleigh County No.: 08-2018-CR-02104

State of North Dakota,

Plaintiff and Appellee,

vs.

Brent Vigen,

Defendant and Appellant,

Appeal from a Criminal Judgment Dated October 23, 2018, and the Decision in the Order Denying Motion to Suppress Dated October 15, 2018, by the Honorable James S. Hill, Presiding

SOUTH CENTRAL JUDICIAL DISTRICT

BRIEF OF PLAINTIFF AND APPELLEE STATE OF NORTH DAKOTA

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[¶ 1] Whether an officer substantially complies with the requirements of N.D.C.C. § 39-20-01(3)(a) when he omits "or urine" from the North Dakota implied consent advisory.

STATEMENT OF THE CASE

[¶ 2] Brent Vigen was arrested for driving under the influence on June 10, 2018. Appendix ("App.") at 3. The State filed a criminal citation on July 10, 2018, charging him with the same. App. at 1, Index # 1.

[¶ 3] On August 27, 2018, Vigen filed a Motion to Suppress Evidence and corresponding Brief in support of his motion. App. at 2, Index # 11, #12; App. at 4-7. On September 7, 2018, the State filed its response. App. at 2, Index 15; App. at 9-14. Vigen replied on September 14, 2018. App. at 2, Index # 17; App. at 15-16.

[¶ 4] On September 17, 2018, the State filed a request to file a response to Vigen's reply because he relied on *Schoon v. N.D. Dep't of Transp.*, 2018 ND 210, 917 N.W.2d 199, which had been issued after the State's initial response, but before Vigen's reply. App. at 2, Index # 20; App at 18. The District Court granted the State's motion and the State filed its second response on September 20, 2018. App at. 2, Index # 23, # 24; App at. 19, 20-24.

[¶ 5] A hearing on the motion to suppress was held on October 9, 2018. Motion Hearing Transcript ("Tr.").

[¶ 6] On October 15, 2018, the District Court entered an Order denying Vigen's Motion to Suppress. App. at 2, Index # 25; App. at 25-31.

[¶ 7] On October 22, 2018, Vigen entered a conditional guilty plea, reserving his right to appeal the adverse decision in the District Court's Order denying the motion to suppress. App. at 2, Index # 28; 32-34. The District Court accepted the conditional guilty plea on October 23, 2018, and the judgment was entered the same day. App. at 2, Index # 31, # 32; App. at 35-37.

[¶ 8] On October 26, 2018, Vigen filed his notice of appeal. App. at 2, Index # 35; App. at 38-39.

STATEMENT OF THE FACTS

[¶ 9] Around 9:40 p.m. on June 10, 2018, North Dakota Highway Patrolman, Troy Roth (Trooper Roth), conducted a traffic stop on Brent Vigen's vehicle for speeding. Tr. at 7; App at 3. During the course of the investigation, Trooper Roth suspected Vigen of driving under the influence. Tr. at 7. After confirming his suspicion, he placed Vigen under arrest and transported him to the Burleigh Morton Detention Center. *Id.* Once there, Trooper Roth read Vigen North Dakota's implied consent advisory, specifically:

> I must inform you that North Dakota law requires you to take a chemical breath test to determine whether you are under the influence of alcohol or drugs. Refusal to take a chemical breath test may result in the revocation of your driving privileges for a minimum of 180 days, and up to three years. I must also inform you that refusal to take a chemical breath test is a crime punishable in the same manner as driving under the influence.

Id. at 8. Trooper Roth did not include reference to urine in his implied consent advisory. *Id.* Nor did he ever reference that he was requesting a urine test at any time during the stop. *Id.* Vigen submitted to the breath test.

STANDARD OF REVIEW

[¶ 10] The standard of review for this Court's review of a district court's decision on a motion to suppress is well established:

> We will defer to a trial court's findings of fact in the disposition of a motion to suppress. Conflicts in testimony will be resolved in favor of affirmance, as we recognize the trial court is in a superior position to assess credibility of witnesses and weigh the evidence. Generally, a trial court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the trial court's findings, and if its decision is not contrary to the manifest weight of the evidence.

State v. Genre, 2006 ND 77, ¶ 12, 712 N.W.2d 624 (quoting *State v. Tollefson*, 2003 ND 73, ¶ 9, 660 N.W.2d 575 (quoting in turn *State v. Heitzmann*, 2001 ND 136, ¶ 8, 632 N.W.2d 1). "Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law." *State v. Graf*, 2006 ND 196, ¶ 7, 721 N.W.2d 381. "Questions of law are reviewed under the de novo standard of review." *Genre*, 2006 ND 77 at ¶ 12.

ARGUMENT

I. Whether an Officer Substantially Complies with the Requirements of N.D.C.C. § 39-20-01(3)(a) When He Omits "or urine" From the North Dakota Implied Consent Advisory.

[¶ 11] Vigen argues that the District Court erred by denying his motion to suppress. Vigen specifically contends that, because Trooper Roth omitted the words "or urine" from his reading of the North Dakota implied consent advisory, Vigen was not informed of the criminal penalties pertaining to refusal of a urine test.

1. Trooper Roth's Reading of North Dakota's Implied Consent Advisory Substantially Complied with the Requirements of N.D.C.C. § 39-20-01(3)(a).

[¶ 12] Vigen contends the omission of "or urine" should have resulted in suppression of the chemical test, arguing law enforcement must give a verbatim

reading of N.D.C.C. § 39-20-01(3)(a). Vigen essentially asks this Court to hold officers to strict compliance with the North Dakota implied consent advisory. In light of *LeClair*, however, this argument fails. *See LeClair v. Sorel*, 2018 ND 255, ¶ 10-11, 920 N.W.2d 306 (holding law enforcement officers are not required to read the implied consent advisory at § 39-20-01(3)(a) word-for-word as long as the advisory is "substantively complete").

[¶ 13] Section 39-20-01(3)(a) of the North Dakota Century code provides:

> 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 and eighty days 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.

"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." *State v. O'Connor*, 2016 ND 72, ¶ 13, 877 N.W.2d 312. "To satisfy this requirement, a complete implied-consent advisory must be provided to the driver." *State v. Alaya*, 2017 ND 116, ¶ 6, 894 N.W.2d 865 (citing *State v. O'Connor*, 2016 ND 72, ¶ 8, 877 N.W.2d 312). When an officer fails to inform an individual of North Dakota's implied consent law before asking for a chemical test to determine whether a driver is under the influence of alcohol, the test results are inadmissible. N.D.C.C. § 39-20-01(3)(b); *Ayala*, 2017 ND 116, ¶ 6. This Court, however, has "never held that § 39-20-01(3)(a) must be read word-for-word — only that the substance must

be conveyed in a way 'reasonably calculated to be comprehensible to the driver.'" *LeClair*, 2018 ND 255 at ¶ 11 (quoting *Ayala*, 2017 ND 126 at ¶¶ 8-9.

[¶ 14] In making his argument, Vigen relies on *O'Connor*. The facts of this case, however, are distinguishable from *O'Connor*. In *O'Connor*, the defendant, Blaise O'Connor, was a subject of a driving under the influence investigation. *O'Connor*, 2016 ND 72, ¶ 2. O'Connor completed field sobriety tests and the officer read a complete implied consent advisory. *Id.* The State contended that the officer informed O'Connor that refusal to take the preliminary breath test "is a crime punishable in the same manner as driving under the influence." *Id.* (quoting N.D.C.C. § 39-20-01(3)(a)). The defense argued that the officer informed the defendant that refusal to take the preliminary breath test was a "crime". *Id.* (quoting N.D.C.C. § 39-20-14(3)). He consented to the preliminary test, which indicated his blood alcohol level was greater than the legal limit. *Id.* O'Connor was then placed under arrest and taken to the Cass County Jail. *Id.* at ¶ 3. While at the jail, the officer asked O'Connor if he remembered the previous implied consent advisory, to which O'Connor said he did. *Id.* It was undisputed that the officer did not inform O'Connor that refusal to submit to the chemical test at the jail "is a crime punishable in the same manner as driving under the influence", plainly an incomplete implied consent advisory. *Id.* (quoting N.D.C.C. § 39-20-01(3)(a)). The district court in *O'Connor* held that the incomplete advisory was inconsistent with the unambiguous language of section 39-20-01(3)(a) and the chemical test was therefore inadmissible pursuant to section 39-20-01(3)(b).

[¶ 15] This Court affirmed the District Court's holding, noting, "Although two advisories have been required under the [prior] implied consent laws, the Legislature now has dictated that the test 'is not admissible in any criminal or administrative

proceeding' if the officer fails to inform the 'individual charged' of the implied consent advisory before a chemical test." *O'Connor*, 2016 ND 72 at ¶ 1, ¶ 11 (quoting N.D.C.C. § 39-20-01(3)(b)). This Court held that a pre-arrest implied consent advisory does not "compensate for an incomplete advisory given after a defendant's arrest and before a chemical test is administered" under the plain language section 39-20-01(3) (2015). *Id.* at 11.

[¶ 16] This Court built off of its analysis in *O'Connor* in *LeClair*. In *LeClair*, the officer informed the driver that refusal to submit to the chemical test was "a crime in the same manner as driving under the influence", omitting the word "punishable" as stated in § 39-20-01(3)(a). 2018 ND 255 at ¶ 3. This Court held that omitting "punishable" from the implied consent advisory substantially complied with the requirements of § 39-20-01(3)(a) and therefore the chemical test was admissible under § 39-20-01(3)(b). *Id.* at ¶ 14. In arriving at this conclusion, the Court stated "[a]lthough the preferred approach is to use the language of subdivision 3(a), it is only for substantive omission that we have concluded an advisory was deficient." *Id.* at ¶ 11. In other words, Officers are not required to give a *verbatim* reading of section 39-20-01(3)(a) in order for the chemical test result to be admissible. *See LeClair*, 2018 ND 255 at ¶¶ 10-11. In distinguishing *O'Connor*, this Court stated that an advisory is insufficient when it lacks "is a crime punishable in the same manner as driving under the influence." *See id.* Both *Schoon v. N.D. Dep't of Transp.*, 2018 ND 210, 917 N.W.2d 199, and *State v. Bohe*, 2018 ND 216, 917 N.W.2d 497, deal with similar omissions by the officer. *See id.*

[¶ 17] Here, Trooper Roth read a substantially complete implied consent advisory, merely omitting reference to urine. Trooper Roth clearly and unambiguously

requested a chemical breath test, not a urine test. This is important, especially in light of section 39-20-01(2), which mandates, "The law enforcement officer shall determine which of the tests is to be used." In fact, section 39-20-01(3)(b) only requires that the implied consent advisory be presented in a way reasonably calculated to be comprehensible to the driver and law enforcement officers are not held to strict compliance with § 39-20-01(3)(a). *Ayala*, 2017 ND 116, ¶ 9 (reasonably calculated to be comprehensible); *LeClair*, 2018 ND 255 a ¶ 10-11 (substantial compliance). When, as here, an officer requests a breath test from the beginning, reading "or urine" would be superfluous and by omitting those words, Trooper Roth substantially complied with § 39-20-01(3)(a).

[¶ 18] In addition, Vigen also relies on both *Schoon* and *Bohe*, but similar to *O'Connor*, the officers in those cases omitted the entire relevant criminal penalties when requesting blood tests. In light of *LeClair*, *Schoon* and *Bohe* have little relevance to determining whether Trooper Roth substantially complied with the requirements of § 39-20-01(3)(a). As noted in *LeClair*, this Court has held only substantive omissions are deficient. *LeClair*, 2018 ND 255 at ¶ 11 (noting that the only substantive omissions considered by the Court were the omission of criminal penalties in *O'Connor*, *Schoon*, and *Bohe)*. While § 39-20-01(3)(a) reads in part, "the law enforcement officer shall inform the individual refusal to take a breath or urine test. . .", given the fact that Trooper Roth already informed Vigen exactly which test he requested, the omission of "or urine" is not a substantive omission. Trooper Roth correctly read the criminal penalties associated with the test to which he asked Vigen to submit. Therefore, Trooper Roth gave a substantively complete reading of North Dakota's implied consent advisory to Vigen.

2. *Under* State v. Helm, *Trooper Roth Was Not Required to Include "Or Urine" in His Reading of North Dakota's Implied Consent Advisory.*

[¶ 19] Regardless of this Court's determination above, because of this Court's decision in *State v. Helm*, Trooper Roth correctly omitted "or urine" from his implied consent advisory. Vigen argues that because this Court in *Schoon* held that *Birchfield v. North Dakota*, 136 S.Ct. 2160, did not abrogate an officer's responsibility to inform an individual of the criminal penalties under the 2015 implied consent law when an officer asked for a blood test, the same analysis should apply here.

[¶ 20] Vigen's reliance on *Schoon*, in the context of this case, misapplies the Court's analysis to the facts here. *Schoon* must be read in the context in which it occurred—with the post-arrest implied consent advisory in effect in 2015, before the statutory changes in 2017. The prior implied consent law read:

> a. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take **the test** to determine whether the individual is under the influence of alcohol or drugs; that refusal to take **the test** directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to **the test** directed by the law enforcement officer may result in revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges.

N.D.C.C. § 39-20-01(3)(a) (2015) (emphasis added). In *Schoon*, the State argued that the United States Supreme Court's holding in *Birchfield* implicitly held the 2015 N.D.C.C. § 39-20-01(3)(a) unconstitutional. 2018 ND 210 at ¶ 13. The Court rejected that argument, explaining that, "[i]f the U.S. Supreme Court intended to declare facially invalid the advisory given to Birchfield and Beylund, it made little sense to remand in *Beylund*." *Id.* at ¶ 15. The Court went on to explain, "Because the advisory statute has constitutional application to breath tests, we concluded *Birchfield* did not

implicitly hold that § 39-20-01(3)(a) was unconstitutional." *Id.* at ¶ 17. In other words, because the 2015 statute did not distinguish between breath, urine, and blood tests, it was facially constitutional (because it had constitutional application to breath tests). Accordingly, the State in *Schoon* could not bring an as-applied challenge to § 39-20-01(3)(a)'s requirement to read the criminal penalties, even when the officer requested a blood test because *Birchfield* did not overrule the 2015 implied consent advisory's application to blood tests.

[¶ 21] The same rationale, however, does not apply to the present case. The current implied consent advisory specifically differentiates between breath, urine, and blood tests in its requirements, reading:

> 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.

N.D.C.C. § 39-20-01(3)(a) (2017) (emphasis added). The 2015 law made no such distinctions between the types of tests. *Schoon* was decided on the fact that, post-*Birchfield*, the 2015 implied consent advisory was still facially constitutional insofar as it applied to breath and, at that time, urine tests. Here, however, North Dakota's implied consent advisory specifically distinguishes between breath, urine, and blood. Because the plain language of the statute is now divisible between the three tests, the challenge is to one portion of the statute, "or urine" as it relates to inclusion in the

implied consent advisory. In other words, in *Schoon*, because there was no differentiation to the statutory language, the challenge was necessarily an as-applied one. The plain language of § 39-20-01(3)(a) (2017) is now divided into the three forms of tests and therefore be subject to a facial challenge by the State.

[¶ 22] Under the 2017 version of § 39-20-01(3)(a), an officer should not be required to inform an individual of the criminal penalties pertaining to urine because the new implied consent advisory is at least implicitly unconstitutional as it pertains to urine under *State v. Helm*, 2017 ND 207, ¶ 16, 901 N.W.2d 57. In *Helm*, this Court held that warrantless urine tests are "not a reasonable search incident to a valid arrest of a suspected impaired driver and the driver cannot be prosecuted for refusing to submit to an unconstitutional warrantless urine test incident to arrest." *Id.* at ¶ 16. *Helm*, therefore, made it unconstitutional for the State to prosecute someone for refusing to submit to a warrantless urine test as a search incident to arrest. *Id.* It is difficult, then, to read the *Helm* decision without holding that it essentially renders the urine portion of section 39-20-01(3)(a) unconstitutional. Because, under *Helm*, law enforcement officers cannot inform individuals that refusal to take a warrantless urine test is a crime, because it is not a crime.

[¶ 23] *Schoon*, however, did not deal with the urine provision after the *Helm* decision. It dealt with a facially constitutional implied consent advisory because it did not differentiate between breath, urine, or blood. As such, reading the criminal penalties when asking for a blood test was merely inaccurate. The State has contended from the beginning[1] that here the urine portion of the implied consent statute, as it

[1] For reference, see State's Response Brief at ¶ 8, App. at 11; and State's Response to Defendant's Reply at ¶ 6, ¶ 7, App. at 22-23.

relates to urine tests, is implicitly unconstitutional under *Helm*. The appropriate remedy in situations such as this is to "enjoin only the unconstitutional applications." *Schoon*, 2018 ND 210, ¶ 16 ("If the claim is a facial challenge, we examine whether a statute has both constitutional and unconstitutional applications. Ordinarily, facial invalidation is unnecessary when the court can enjoin only the unconstitutional applications.") (citing *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329-331 (stating that 'we can restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it') (internal quotation omitted)).

[¶ 24] When Trooper Roth read the implied consent advisory to Vigen, he specifically omitted the words "or urine". By doing so, Trooper Roth complied with the constitutional holding articulated in *Helm* and gave a constitutionally accurate statement regarding the authority of the State to prosecute Vigen for refusing a warrantless urine test (that is, he did not say anything about the State's authority in such situations because it has no authority to prosecute those cases). Because this Court in *Helm* declared refusal of a warrantless urine test incident to arrest unconstitutional, Trooper Roth was correct to omit reference to urine when reading the implied consent advisory. *See Helm*, 2017 ND 207; *see also* N.D.C.C. § 1-02-38(1) (when a statute is enacted, compliance with both the North Dakota and United States constitutions is presumed).

[¶ 25] Additionally, Vigen argues, quoting *Schoon*, that "the admissibility requirement of § 39-20-01(3)(b) was not conditioned on an accurate advisory or a driver's obtaining an understanding of the consequences of the choices available. Section 39-20-01(3)(b) simply conditions admissibility on whether the officer informed the driver of the contents of (3)(a)." 2018 ND 210, ¶ 20. But this has to be

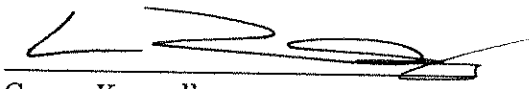
viewed in the larger context of the opinion. In fact, the crux of this paragraph, and the constitutional holdings of the opinion, are on the fact that the 2015 implied consent advisory, even post-*Birchfield*, was still facially constitutional. *See, e.g.*, *Schoon*, 2018 ND 210, ¶ 17 ("Because the [2015] advisory statute has constitutional application to breath tests, we conclude *Birchfield* did not implicitly hold that § 39-20-01(3)(a) was unconstitutional."); ¶ 20 ("The advisory was accurate when enacted as to all chemical tests, and remained accurate post-*Birchfield* where a breath test would be requested."). Here, however, § 39-20-01(3)(a) specifically mentions breath, urine, and blood, unlike the 2015 implied consent advisory which only referred generically to "chemical test". Because of this delineation, after this Court's decision in *Helm*, the unconstitutional parts can be struck from the statute, leaving the constitutional parts of the statute untouched and enforceable. *See Schoon*, 2018 ND 210, ¶ 16 ("If the claim is a facial challenge, we examine whether a statute has both constitutional and unconstitutional applications. Ordinarily, facial invalidation is unnecessary when the court can enjoin only the unconstitutional applications."). This is exactly what Trooper Roth did when he excluded "or urine" from the advisory and therefore, Trooper Roth gave a correct, and constitutionally accurate reading of North Dakota's implied consent advisory to Vigen.

[¶ 26] Accordingly, regardless of the Court's analysis on whether Trooper Roth substantially complied with N.D.C.C. § 39-20-01(3)(a), Trooper Roth was not required to include reference to urine when asking for a breath test due to this Court's decision in *Helm*.

CONCLUSION

[¶ 27] For the foregoing reasons, the State respectfully requests the Court affirm the Order of the District Court.

Dated this 21st day of February, 2019.



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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
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Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	
Brent Vigen,	)	Supreme Ct. No. 20180394
	)	
Defendant-Appellant,	)	District Ct. No. 08-2018-CR-02104

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Amanda Hastig, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 21 day of February, 2019, I served the following:

1. Brief of Plaintiff-Appellee
2. Affidavit of Service

on the following electronic transmission to the listed email address of:

Dan Herbel
Attorney at Law
herbellawfirm@yahoo.com

which address is the last known email address of the addressee.

Amanda Hastig
Amanda Hastig

Subscribed and sworn to before me this 21st day of February, 2019.

David M. Becker
Notary Public,
Burleigh County, North Dakota

DAVID M. BECKER
Notary Public
State of North Dakota
My Commission Expires November 4, 2020