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MARCH 7, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	Supreme Court No. 20180394
	)	
BRENT VIGEN,	)	
	)	Burleigh Co. No. 08-2018-CR-02104
Defendant/Appellant.	)	

REPLY BRIEF OF APPELLANT

Appeal from a Criminal Judgment

dated and filed October 23, 2018

and the adverse determination within the Order Denying Motion to Suppress

dated and filed October 15, 2018

following briefing and an evidentiary hearing

Burleigh County District Court, South Central Judicial District

The Honorable James S. Hill

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[¶2] <u>LAW AND ARGUMENT</u>

[¶3] The implied consent advisory in this case was not specific and complete; nor was it even substantively complete under the majority holding in *LeClair v. Sorel*, 2018 ND 255, 920 N.W.2d 306, as the State now argues.

[¶4] Under the "substantively complete" construct, it appears that the omission of an "a," "an," or "the" from the advisory would not render the advisory invalid.[1] But, under this construct, a law enforcement officer is not allowed to skip information with the aim of proclaiming: "Close enough."[2] For the advisory to be substantively complete, all components of the statute must be conveyed to the arrestee and any "loss of information conveyed" will render the advisory insufficient or substantively incomplete. *See LeClair,* at ¶12.

[¶5] To be sure, although a majority of the *LeClair* court said that officers need not read the advisory verbatim, the Court did express a desire for officers to use the exact language of N.D.C.C. § 39-20-01(3)(a) in advising drivers:

> "[T]he preferred approach is to use the language of subdivision 3(a)."

See LeClair, at ¶11. Presumably, this desire and preferred approach relates back to the *Schoon* instruction that <u>all information</u> of the advisory must be conveyed.

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[1] Counsel understands that this is not the view of the entire Court, as part of the Court is "unwilling to agree the omission of an "a," "an," or "the" would never render an advisory invalid." *See LeClair,* at fn.1.

[2] "By picking and choosing which words of the advisory are close enough to those in the statute we are deviating from this rule and instead are pursuing the legislature's intent at the expense of the words it used." *See LeClair v. Sorel*, 2018 ND 255, ¶25, 920 N.W.2d 306 (Crothers, J., and VandeWalle, C.J., dissenting).

[¶6] *Schoon* did not directly deliver a holding that the advisory be given verbatim. But, *Schoon* did say that "[s]ubdivision (b) strictly requires communicating all the information required by subdivision (a) before a test result is admissible." *See Schoon v. N.D. Dep't of Transportation*, 2018 ND 210, ¶12, 917 N.W.2d 199. The Court's strict "all information" thread has carried through to *LeClair*. In fact, the majority in *LeClair* reminded that "the strict requirements of N.D.C.C. § 39-20-01(3)(b)" still exist. *See LeClair,* at ¶14 ("The Legislature prescribed the advisory in terms of what the arresting officer "shall inform the individual"").

[¶7] All the information of the advisory must be conveyed to the driver. *See State v. Bohe*, 2018 ND 216, ¶13, 917 N.W.2d 497 (continuing the *Schoon* thread that Section 39-20-01(3), N.D.C.C., strictly "requires all of the information in subsection (a) to be communicated" to the arrestee). If there is a loss of information in the conveyance of the implied consent advisory, the advisory is incomplete. Partial advisories, snippets, or morsels that do not convey all of the information from the statute are not sufficient. All the information must be conveyed to the driver:

> "It is a necessary presumption of the advisory scheme that a driver understands each word in the statutory advisory."

See LeClair, at ¶13 (emphasis added).

[¶8] Under the "substantively complete" rationale, the failure of the officer to utter the word "punishable" is not fatal to the advisory, so long as the word "crime" is conveyed to the arrestee. *See LeClair*, 2018 ND 255, at ¶13. The *LeClair* majority ruled that by conveying the word "crime" to the driver, the officer is substantively informing

that "punishment may follow." *See id*. *LeClair* was limited to a narrow ruling that advising of the word "crime" covers the word "punishable."

[¶9] In *LeClair*, this Court found that advising of the word "crime" covers for the omission of the word "punishable." Therefore, the case-specific advisory in *LeClair* was substantively complete, per a majority of the Court (the Court did not say that the word "punishment" would cover for omitting the word "crime"). In our case, though, there was no information conveyed in the advisory to Vigen that would "cover" for omitting the advisory information that refusing to submit to a urine test is a crime that could also result in administrative consequences. Advising that refusing a breath test is a crime does not "cover" for omitting to advise that refusing a urine test is a crime.

[¶10] Indeed, the State does not even argue that any utterances within the advisory came "close enough" to giving a complete advisory. *See LeClair,* at ¶25 (Crothers, J., and VandeWalle, C.J., dissenting) ("[b]y picking and choosing which words of the advisory are close enough to those in the statute we are deviating from [the] rule"). Instead, the State merely argues that they do not have to convey that information; that the trooper, not the Legislature, is free to choose what information gets conveyed to the driver. This position fails under *LeClair*, and the continuing *Schoon* "strict requirements" thread.

[¶11] Under *LeClair*, law enforcement is not given a pass to disregard the statutory commands of the implied consent advisory. This Court never intended that disregard under the substantively complete construct. Although the construct does not dictate verbatim reading, it still dictates that "all information" be conveyed - not just the information the trooper desires to convey.

[¶12] By failing to convey to Vigen that refusing a urine test is a crime that could result in administrative consequences, not all of the statutory information was conveyed. Because that information was lost, and not conveyed, the trooper failed to issue a substantively complete advisory.[3] Under *Schoon* and *LeClair*, the trooper did not advise Vigen of a complete, nor a substantively complete, implied consent advisory. Accordingly, Vigen's chemical test evidence should have been declared inadmissible under N.D.C.C. § 39-20-01(3)(b), and should have been suppressed.

[¶13] In his initial brief to this Court, Vigen invited the State to answer the following question: Had the trooper requested a urine test from Vigen, instead of a breath test, would the State have argued that it is unnecessary to inform of the criminal consequences of refusing a request to submit to a urine test, despite the clear language of the statute? The State, very noticeably, took a pass on this question.

[¶14] Instead of answering the question, the State reverted back to its awkward "as applied" challenge. However, again:

> "<u>It is for a driver or defendant to claim a statute ... is unconstitutional as applied to his facts</u>," not the State.

See Schoon, 2018 ND 210, at ¶22. Vigen "did not challenge the statute's constitutionality at all, let alone as applied to him." *See id*. Therefore, the State's attempt to make some sort of quasi-"as applied" challenge is peculiar and misplaced.

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[3] Recently, a Stutsman County Judge ruled that an officer's implied consent advisory that fails to inform a driver of the consequences of refusing a urine test constitutes an incomplete advisory, even under *LeClair v. Sorel*, 2018 ND 255, 920 N.W.2d 306, with a resulting statutory remedy of suppression. *See State v. Steven Sedler*, Case No. 47-2018-CR-00618, Order Granting Motion to Suppress, Index # 41 (Honorable Cherie L. Clark, District Judge).

[¶15] The State also declares that this Court announced "constitutional holdings" in *Schoon*. *See* State's Brief, at ¶25, pp. 11-12. However, like the case at hand, the arguments in *Schoon* were purely statutory and there were no constitutional holdings in *Schoon*. *See Schoon*, at ¶24. In our case, like in *Schoon*, "[t]he State implicitly asks for an unusual reading of the Fourteenth Amendment in its "as applied" challenge ... We reject the argument that the State may deploy the Fourteenth Amendment as a sword to cut away inconvenient barriers to admitting its own evidence." *See id*. at ¶23.

[¶16] CONCLUSION

[¶17] For the foregoing reasons, and those advanced in his initial brief, Mr. Vigen requests relief from this Court.

Respectfully submitted
this 7th day of March, 2019.

/s/ *Dan Herbel*

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[¶18] CERTIFICATE OF SERVICE

[¶19] The undersigned hereby certifies that, on March 7, 2019, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Conor Kennelly, Assistant Burleigh County State's Attorney, at the following:

Electronic filing to: < bc08@nd.gov >

Conor Kennelly
Office of the Burleigh County State's Attorney

Dated this 7th day of March, 2019.

/s/ *Dan Herbel*

Dan Herbel