20180394
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 22, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

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

Dan Herbel
ND State Bar ID # 05769
Attorney for Appellant Brent Vigen

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

TABLE OF CONTENTS

Table of Authorities ……...…….…… ¶1

Statement of the Issues ……...…….…… ¶2

Statement of the Case ……...…….…….. ¶3

Statement of the Facts ……...…….……. ¶10

Standard of Review ……...…….…… ¶24

Law and Argument ……...…….…… ¶26

Conclusion ……...…….……. ¶43

Certificate of Service ……...…….……. ¶45

[¶1] TABLE OF AUTHORITIES

Constitutional provisions

U.S. CONST. amend. XIV. ..... ¶19

North Dakota statutes

N.D.C.C. § 39-20-01 ..... ¶¶2, 9, 22, 26-29, 31-32, 37-38, 40-41, fn.2

Rules

N.D.R.Crim.P. 11(a)(2) ..... ¶8

North Dakota cases

Asbridge v. North Dakota State Highway Commissioner,
291 N.W.2d 739 (N.D. 1980) ..... ¶¶22-23

Beckstrand v. Beckstrand, 2017 ND 20, 890 N.W.2d 213 ..... fn.3

DeForest v. N.D. Dep't of Transportation, 2018 ND 224, 918 N.W.2d 43 ..... ¶¶32-33

Gillmore v. Levi, 2016 ND 77, 877 N.W.2d 801 ..... ¶22

N.D. Legislative Assembly v. Burgum, 2018 ND 189, 916 N.W.2d 83 ..... ¶35

Painte v. Dep't of Transportation, 2013 ND 95, 832 N.W.2d 319 ..... fn.3

Schoon v. N.D. Dep't of Transportation,
2018 ND 210, 917 N.W.2d 199 ..... ¶¶19, 21-22, 31, 34, 37-38, 40

State v. Bohe, 2018 ND 216, 917 N.W.2d 497 ..... ¶¶31, 40

State v. Dodson, 2003 ND 187, 671 N.W.2d 825 ..... ¶34

State v. Graf, 2006 ND 196, 721 N.W.2d 381 ..... ¶25

State v. Helm, 2017 ND 207, 901 N.W.2d 57 ..... ¶¶18, 20, 31, 33

State v. O'Connor, 2016 ND 72, 877 N.W.2d 312 ... ¶¶2, 22-23, 25-27, 29-30, 32, 41-42

State v. Salter, 2008 ND 230, 758 N.W.2d 702 ..... ¶¶22-23

State Supreme Court cases; other jurisdictions

Bennett v. Napolitano, 81 P.3d 311 (Ariz. 2003) ……..... ¶36

Limmer v. Swanson, 806 N.W.2d 838 (Minn. 2011) ……..... ¶36

United States Supreme Court cases

Birchfield v. North Dakota, 579 U. S. ___ , 136 S.Ct. 2160 (2016) …..... ¶¶31, 33, 37-38

King v. Burwell, 576 U.S. ___, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015) ……..... ¶35

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) ..... ¶35

[¶2] STATEMENT OF THE ISSUES

A. The trooper did not inform Vigen of a complete and specific implied consent advisory under N.D.C.C. § 39-20-01(3)(a). Therefore, the chemical test evidence should have been declared inadmissible and suppressed, according to N.D.C.C. § 39-20-01(3)(b), *State v. O'Connor*, 2016 ND 72, 877 N.W.2d 312, and its progeny

[¶3] STATEMENT OF THE CASE

[¶4] On June 10, 2018, Brent Vigen was arrested for driving under the influence of an intoxicating liquor in Burleigh County, North Dakota. (Appendix ("App.") at 3). On July 10, 2018, a Uniform Traffic Complaint and Summons was filed in the district court informing Mr. Vigen that he was standing accused of the charge of DUI. (App. 1 and 3).

[¶5] On August 27, 2018, Vigen filed a Motion to Suppress Evidence, and asked the trial court to suppress the results of his chemical breath test, because the trooper did not comply with statutory law related to the implied consent advisory. (App. 4-8). On September 7, 2018, the State filed a response brief opposing suppression. (App. 9-14). On September 14, 2018, Vigen filed a reply brief in answer to the State's response. (App. 15-16).

[¶6] On September 17, 2018, the State made a request to the trial court to file a second response to Vigen's motion. (App. 18). The trial court immediately granted the State's request to file a second response. (App. 19). On September 20, 2018, the State filed a second response. (App. 20-24).

[¶7] An evidentiary hearing was held on October 9, 2018, and the trial court took the matter under advisement. (App. 17). On October 15, 2018, the trial court denied Vigen's Motion to Suppress Evidence, relying in part on case law that has been abrogated. (App. 25-31).

[¶8] On October 19, 2018, Vigen entered a conditional plea of guilty to the charge of DUI, pursuant to N.D.R.Crim.P. 11 (a)(2), specifically reserving the right to appeal the adverse ruling in the October 15, 2018, Order denying the motion to suppress evidence. (App. 32-34). On October 23, 2018, the Court approved the conditional plea of guilty (App. 35), and entered a Criminal Judgment. (App. 36-37).

[¶9] On October 26, 2018, Mr. Vigen filed a Notice of Appeal to this Court, and requested a transcript of the evidentiary hearing. (App. 38-44). Vigen appeals and argues that the chemical test evidence is inadmissible under N.D.C.C. § 39-20-01(3)(b), because the trooper failed to follow the bright-line advisory requirement under N.D.C.C. § 39-20-01(3)(a), when he failed to inform Vigen of a complete and specific implied consent advisory. Vigen asks this court to vacate the Criminal Judgment in this matter, reverse the district court's denial of his Motion to Suppress Evidence, remand to the district court for withdrawal of Mr. Vigen's conditional guilty plea, and order the suppression of the chemical breath test evidence.

[¶10] STATEMENT OF THE FACTS

[¶11] On June 10, 2018, Trooper Roth of the North Dakota Highway Patrol made a traffic stop of Mr. Vigen's motorcycle for speeding. (Motion Hearing transcript ("Tr.") at 7, lines ("L.") 6-9). After arresting Vigen on suspicion of DUI (Tr. at 7, L. 10-19), the trooper read Vigen a modified version of North Dakota's implied consent advisory, which compares with the statutory language as follows:

> "3. a. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical **[breath]** test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to **submit [take]** to a **[chemical breath]** 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 **[chemical]** breath **or urine** test is a crime punishable in the same manner as driving under the influence."

(App. 8; DVD of traffic stop, at time stamp 22:17:10). The underlined bold language is the language the trooper failed to advise Vigen. The bracketed bold language is the extra language the trooper advised, beyond the implied consent statute.

[¶12] As part of the advisory, the trooper left out language that testing is to be done at the direction of law enforcement. The trooper advised Vigen that refusal to submit to a breath test is a crime punishable in the same manner as DUI. The trooper did not advise Vigen that refusal to submit to a urine test is a crime punishable in the same manner as DUI, and did not mention urine in his advisory.

[¶13] Vigen submitted to a breath test.

[¶14] At the evidentiary hearing, the trooper testified he "did not tell Mr. Vigen that refusing a urine test is a crime punishable in the same manner as DUI" before the

breath test and made "[n]o mention of urine" to Vigen. (Tr. at 11, L. 15-20). The trooper also testified that he does not "profess familiarity with" the implied consent statute and that he "probably" read the statute "a long time ago." (Tr. at 11, L. 21-25).

[¶15] The trooper testified that he did not mention urine in his advisory to Vigen because he subjectively does not "believe that it's lawful to read this [advisory] with urine in there because I cannot legally take urine from him without a warrant," because of a Supreme Court ruling. (Tr. at 8, L. 13-24). When asked which Supreme Court case he was referring to, the trooper answered: "I don't remember the -- what the case is." (Tr. at 10, L. 2-3). The trooper further testified that he "never read the case," he doesn't "know the name of the case," and that he does not "know the holding in the case." (Tr. at 10, L. 4-21).

[¶16] The trooper additionally testified that he read the advisory from "the Report and Notice" form "on the night in question." (Tr. at 9, L. 11-16). The trooper testified that the advisory is "printed on the back of the Report and Notice form and presented to highway patrol" from DOT. (Tr. at 10, L. 22 - 11, L. 2). The trooper testified that he "also carr[ies] a card with [him] with the advisory" and that "[s]omeone within the highway patrol" had "prepared that card." (Tr. at 12, L. 1-11). The trooper agreed that "both the Report and Notice form and the card [he] carried directed [him] to advise of urine." (Tr. at 12, L. 12-17) [the statute directs that as well].

[¶17] The trooper testified that, despite the clear directives given to him on the Report and Notice form and the card he was provided by Highway Patrol to advise on urine, he "left out ... urine." (Tr. at 9, L. 18). The trooper testified that he was not "directed to leave that [urine] out," it was just "something [he] chose to do on [his] own."

(Tr. at 9, L. 19-22). When asked the impact of following the law and advising on urine, the trooper testified as follows:

> "Q. So advising of urine would not have affected your breath test, right?
>
> A. No."

(Tr. at 13, L. 2-4).

[¶18] At the conclusion of the motion hearing, the State informed the trial court for the first time that since "the legislature hasn't taken up to amend the law" after *State v. Helm*, 2017 ND 207, 901 N.W.2d 57, the State would now bring a jurisprudentially peculiar constitutional facial challenge on N.D.C.C. § 39-20-01(3) during oral argument. (Tr. at 15, L. 19-25). The State informed the trial court of its intentions, without notice, after briefing and the taking of testimony:

> "We're not asking the Court to declare the whole implied consent advisory unconstitutional ... [just] ... the "or urine" in cases like this is at least impliedly unconstitutional under the *Helm*, if not explicitly unconstitutional in *Helm*." ... He [trooper] merely omitted what is a facially -- now facially unconstitutional portion of the implied consent advisory. ... [i]t is absolutely important for the Court to consider that this is facially unconstitutional at this point under the *Helm* decision."

(Tr. at 16, L. 3 - 17, L. 7).

[¶19] The defense then informed the trial court: "This is the first time that I've been informed that the State is intending to have a portion of the statute declared unconstitutional." (Tr. at 17, L. 16-18). The defense argued to the trial court that the State's attempted eleventh-hour challenge was not proper under *Schoon*. *See Schoon v. N.D. Dep't of Transportation*, 2018 ND 210, ¶¶22-23, 917 N.W.2d 199 ("We are aware of no other case in which the State has similarly persuaded a court to void on

constitutional grounds a barrier to admissibility of evidence to be used in support of the State's case. It is for a driver or defendant to claim a statute, although valid in some circumstances, is unconstitutional as applied to his facts. Schoon did not challenge the statute's constitutionality at all, let alone as applied to him. ... 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").

[¶20] The trial court seemed to latch onto the State's awkward "as applied" argument, in denying Vigen's Motion to Suppress, although the court's Order is not plain. In one part of the Order, the trial court excuses the trooper's failure to give a complete and specific advisory because of the *Helm* decision. (App. 28-29, at ¶11). This evidences approval of the State's "as applied" challenge - otherwise, why compose that paragraph?

[¶21] "It is for a driver or defendant to claim a statute ... is unconstitutional as applied to his facts," 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, any reliance on the State's "as applied" argument is misplaced.

[¶22] In another part of the trial court's Order denying suppression, the court explained that *State v. O'Connor*, 2016 ND 72, 877 N.W.2d 312, and *Schoon* are not applicable to Vigen's argument. (App. 28-30). Instead of relying upon N.D.C.C. § 39-20-01(3) statutory exclusion cases like *O'Connor* and *Schoon*, the trial court inexplicable relied upon cases that were decided well before the current N.D.C.C. § 39-20-01(3) was enacted. Indeed, the rationale in *Asbridge v. North Dakota State Highway Commissioner*, 291 N.W.2d 739 (N.D. 1980) and *State v. Salter*, 2008 ND 230, 758 N.W.2d 702, upon

which the trial court hung its hat, has been abrogated by passage of the current N.D.C.C. § 39-20-01(3). *See O'Connor*, 2016 ND 72, at ¶11 ("The statute has changed since Salter was decided ... the Salter rationale ... has been abrogated by the plain language of the 2015 amendment to N.D.C.C. § 39-20-01(3)"); *see also Gillmore v. Levi*, 2016 ND 77, ¶12, 877 N.W.2d 801 (Salter has been "abrogated by statute [N.D.C.C. § 39-20-01(3)] as stated in O'Connor").

[¶23] Despite the obvious abrogation, the trial court proclaimed: "The North Dakota Supreme Court in *O'Connor*, however, did not abrogate its prior rulings in *Asbridge* or *Salter*." (App. 28, at ¶10). This proclamation carries no support in law or fact.

[¶24] STANDARD OF REVIEW

[¶25] "In reviewing a district court's decision on a motion to suppress evidence," this Court will "defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance." *See State v. Graf*, 2006 ND 196, ¶7, 721 N.W.2d 381. This 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." *See id.* "Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law." *See O'Connor*, 2016 ND 72, at ¶6.

[¶26] LAW AND ARGUMENT

A. The trooper did not inform Vigen of a complete and specific implied consent advisory under N.D.C.C. § 39-20-01(3)(a). Therefore, the chemical test evidence should have been declared inadmissible and suppressed, according to N.D.C.C. § 39-20-01(3)(b), *State v. O'Connor*, 2016 ND 72, 877 N.W.2d 312, and its progeny

[¶27] "Section 39-20-01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general." *See State v. O'Connor*, 2016 ND 72, ¶7, 877 N.W.2d 312. Under N.D.C.C. § 39-20-01(3)(a), the officer is required to advise a driver of the following non-bracketed language:[1]

> "3. a. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical **[breath]** test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to **submit** **[take]** to a **[chemical breath]** 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 **[chemical]** breath **or urine** test is a crime punishable in the same manner as driving under the influence."

See N.D.C.C. § 39-20-01(3)(a) (emphasis added). The plain language of the statute requires the officer to inform an arrestee that North Dakota law requires an individual to "submit" to testing, and to inform that testing is to be done only at the direction of law enforcement ("directed by a law enforcement officer") and that only a refusal of a law enforcement directed-test is a crime. The plain language of the statute also requires the officer to inform that refusing a urine test is a crime punishable in the same manner as DUI.

[1] The underlined bold language is the language the trooper failed to advise. The bracketed bold language is the extra language the trooper advised, beyond the implied consent statute.

[¶28] If the officer does not advise the driver as the statute commands, the chemical test is not admissible, as N.D.C.C. § 39-20-01(3)(b) clearly provides:

> "b. A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 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. § 39-20-01(3)(b).

[¶29] An officer is required to read the "complete implied consent advisory before administering" a chemical test. *See O'Connor*, 2016 ND 72, at ¶1. If the officer does not advise of a specific and complete implied consent advisory, then "under the plain terms of N.D.C.C. § 39-20-01(3)(b), the ... test result is inadmissible in a criminal proceeding." *See id.* at ¶8.

[¶30] "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." *See O'Connor*, 2016 ND 72, at ¶13 (emphasis added). Is this odd? Maybe. Is this the law? Indeed. Whether the law "seems odd, if not absurd," is of no moment. *See id.* at ¶18 (VandeWalle, C.J., concurring). "We give 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." *See id.* at ¶13.

[¶31] This Court found that even after *Birchfield*, the deputy was still required to inform Schoon of the criminal consequences of refusing a blood test, because the plain language of N.D.C.C. § 39-20-01(3) commanded such. *See Schoon v. N.D. Dep't of Transportation*, 2018 ND 210, 917 N.W.2d 199; *see also State v. Bohe*, 2018 ND 216,

917 N.W.2d 497 (deputy was still required to advise of criminal consequences of refusing blood test, post-*Birchfield*, even when requesting a blood test). Surely, if an officer is required to advise, post-*Birchfield*, of the criminal consequences of refusing blood because of the plain wording of the statute, he would then certainly be required to advise, post-*Helm*, of the criminal consequences of refusing urine, because of the plain wording of the statute, unless or until the statute is amended again. The *Schoon* and *Bohe* courts found N.D.C.C. § 39-20-01(3)(b) unambiguous and determined that a full and complete advisory must be given, regardless of whether it is accurate:

> "the admissibility requirement in § 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)."

See Schoon, 2018 ND 210, at ¶20 (emphasis added).

[¶32] "Section 39-20-01(3), N.D.C.C., was amended after O'Connor and before [Vigen's] arrest." *See DeForest v. N.D. Dep't of Transportation*, 2018 ND 224, ¶6, 918 N.W.2d 43. The Legislature cordoned off blood tests, only, within the implied consent statute, and "[a]s of August 2017, and at all times relevant here, it states:

> a. 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."

See id. (emphasis added).

[¶33] After the 2017 amendment, a law enforcement officer may no longer (is no longer required to) threaten criminal consequences for refusal, before requesting a blood test, as there is no other way for an officer to comply with the implied consent statute. *See DeForest*, 2018 ND 224, at ¶10 (otherwise, "there would be no way to read the entire implied consent warning ... and then request a blood test"). This legislatively-crafted exception applies only to blood tests, which have been spun off and moved to a different part of the statute. It was the intent of the North Dakota Legislature to only spin off blood tests. Unlike urine, the plain language of the statute shows that "the Legislative Assembly logically excepted warrantless blood tests from the warnings about criminal penalties," in reaction to *Birchfield*. *See DeForest*, at ¶12. The plain language of the statute shows that, to date, there has been no legislative reaction to *State v. Helm*, 2017 ND 207, 901 N.W.2d 57.

[¶34] Presented differently: 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 urine, despite the clear language of the statute? Or, would that be a conundrum; just that, and not more. *See generally Schoon*, at ¶32 (Crothers, J., specially concurring). Certainly, the current statute does not spin off urine and position it with blood at the "if" caboose of the statute. So then, do we leave the content of the advisory to the subjective belief and "hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime[?]" *See State v. Dodson*, 2003 ND 187, ¶27, 671 N.W.2d 825. Leaving that wide discretion with the executive branch to amend the statute on the fly during an investigation, hardly seems an alternative.

[¶35] So, does the Legislature amend the statute, or do the Courts? "The power to make a law is legislative." *See N.D. Legislative Assembly v. Burgum*, 2018 ND 189, ¶51, 916 N.W.2d 83. "In a democracy, the power to make the law rests with those chosen by the people." *See King v. Burwell*, 576 U.S. ___, 135 S.Ct. 2480, 2496, 192 L.Ed.2d 483 (2015). The *King* court reaffirmed the Courts' role:

> "Our role is more confined—"to say what the law is."" That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done."

See id. (citing *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)).

[¶36] Here, the executive branch (State prosecutor) takes exception with the legislative branch and its plainly-worded statute and asks this Court, a separate branch, to help circumvent the legislative process and resolve its purported problem by reading language out of a plainly-worded statute. However, "we ought not prematurely enter the political arena [to] referee ... the assertions of the power of the executive and legislative branches." *See Bennett v. Napolitano*, 81 P.3d 311, 319 (Ariz. 2003). "[T]here are times when we must pause a bit, stand back, carefully view the landscape, and unless mandated by the law or compelled by our own solemn obligations or duty, we are to stand down so that the other two branches—the executive and the legislative—can attempt to resolve a particular issue." *See Limmer v. Swanson*, 806 N.W.2d 838, 841 (Minn. 2011) (Anderson, J., concurring).

[¶37] The legislative and executive branches should resolve this matter on their own. Unless and until then,[2] we are guided by the principles of *Schoon*. In *Schoon*, this

[2] What if the North Dakota Legislature does not amend N.D.C.C. § 39-20-01(3)(a), and re-position urine tests with blood tests?

Court stated that *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) actually approved and "expressly preserved such evidentiary consequences" found in N.D.C.C. § 39-20-01(3)(b):

> "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and *evidentiary consequences* on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and *nothing we say here should be read to cast doubt on them*.

See Schoon, at ¶19 (citing *Birchfield*, 136 S. Ct. at 2185) (emphasis in original).

[¶38] The *Schoon* court ruled that "*Birchfield* did not abrogate the admissibility requirements of N.D.C.C. § 39-20-01(3)." *See Schoon*, at ¶11. "Subdivision (b) strictly requires communicating all the information required by subdivision (a) before a test result is admissible." *See id*. at 12 (emphasis added). If the officer fails to inform of all the information in subdivision (a), the test is inadmissible under subdivision (b). In a concurring opinion, Justice Crothers wrote:

> "Certainly, these results present[ ] law enforcement with a conundrum. But it was just that and not more; law enforcement still could read the statutorily required advisory and request a chemical breath test."

See Schoon, at ¶32 (Crothers, J., specially concurring). Advising on breath and urine, as the statute commands, and then requesting a breath test, would pose no problems. This leaves a path for law enforcement to comply with the statute, if they choose to comply. Indeed, the trooper in our case admitted that "advising of urine would not have affected [his] breath test." (Tr. at 13, L. 2-4).

[¶39] Here, the trooper did not comply with the statute. The trooper did not advise Vigen that a driver is required to "submit" to testing, did not inform Vigen that

North Dakota law required chemical testing to be done as "directed by a law enforcement officer,"[3] and did not advise Vigen that refusing a urine test is a crime punishable in the same manner as DUI, as the law requires. (App. 8, at time stamp 22:17:10). These are mandatory advisories under the implied consent statute. Leaving out those advisories, here, means that Vigen was not given a complete advisory.

[¶40] "For chemical test results to be admissible, N.D.C.C. § 39-20-01(3)(b) requires all of the information in subsection (a) to be communicated" to the arrestee. *See Bohe*, 2018 ND 216, at ¶13. "[T]he admissibility requirement in § 39-20-01(3)(b) was not conditioned on an accurate advisory ... Section 39-20-01(3)(b) simply conditions admissibility on whether the officer informed the driver of the contents of (3)(a)." *See Schoon*, 2018 ND 210, at ¶20.

[¶41] Because the trooper did not communicate all the information of the statute, he failed to issue Vigen a complete implied consent advisory, the "specific warning" required by the Legislature. *See O'Connor*, 2016 ND 72, at ¶13 ("The Legislature has directed that a specific warning be provided to an arrested defendant"). Under the plain

---

[3] Vigen argued, below, that the trooper's implied consent advisory was not complete and specific because Vigen was not advised of the criminal consequences of refusing a request to submit to a urine test. Vigen did not argue, below, that the advisory was defective because the trooper did not advise that a driver is required to "submit" to testing and did not argue that the trooper failed to inform Vigen that North Dakota law required chemical testing to be done as "directed by a law enforcement officer." Because the trooper in this matter did not advise on either, this court could reverse on that basis. *See Beckstrand v. Beckstrand*, 2017 ND 20, ¶18, 890 N.W.2d 213 (Crothers, J., concurring and dissenting) ("I agree we must reverse, but for a far different reason"); *see also Painte v. Dep't of Transportation*, 2013 ND 95, ¶30, 832 N.W.2d 319 (VandeWalle, C.J., concurring and dissenting) ("I would conclude the district court did not err in reversing the hearing officer's decision, albeit for a different reason"). Otherwise, these issues have been preserved in other cases that have been noticed for appeal to this Court.

terms of N.D.C.C. § 39-20-01(3)(b), Vigen's chemical test evidence and result "is inadmissible" in this criminal proceeding.

[¶42] "[T]he Legislature has established a bright line and the statutes leave no room for this Court to engage in a determination of legislative intent or whether or not a person was disadvantaged by an incorrect or incomplete advisory." *See O'Connor*, at ¶18 (VandeWalle, C.J., concurring). Because the trooper failed to follow the bright line rule laid down by the Legislature, Vigen's chemical test evidence should have been declared inadmissible and suppressed.

[¶43] CONCLUSION

[¶44] For the foregoing reasons, Mr. Vigen respectfully requests that this Court vacate the Criminal Judgment in this matter, reverse the district court's denial of his Motion to Suppress Evidence, remand to the district court for withdrawal of Vigen's conditional guilty plea, and order the suppression of the results of the chemical test.

Respectfully submitted
this 22nd day of January, 2019.

/s/ *Dan Herbel*

Dan Herbel
Attorney for Appellant Brent Vigen
ND State Bar ID # 05769

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

[¶45] CERTIFICATE OF SERVICE

[¶46] The undersigned hereby certifies that, on January 22, 2019, the BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were 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 22nd day of January, 2019.

/s/ *Dan Herbel*
_____
Dan Herbel