20190245

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 23, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gregory John Schwindt,

Appellant/Petitioner,

v.

Thomas Sorel, Director of the North Dakota Department of Transportation,

Appellee/Respondent.

Supreme Court Case No. 20190245
District Court Case No. 45-2019-CV-00180

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE DANN GREENWOOD, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

ORAL ARGUMENT REQUESTED

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[¶3] **JURISDICTIONAL STATEMENT**

[¶4] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI § 8, N.D.C.C. § 27-05-06(4) and N.D.C.C. § 39-20-06. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 28-27-01 and N.D.C.C. § 28-27-02. This appeal is timely under N.D.R.App.P. 4(a)(1).

[¶5] **STATEMENT OF THE ISSUES ON APPEAL**

I. Did the Administrative Hearing Officer err by finding that "Mr. Woodbury refused to submit to the test by action?"

II. Did the Administrative Hearing Officer err as a matter of fact because Mr. Woodbury did not refuse to submit to a chemical test?

III. Did the Administrative Hearing Officer err because Mr. Woodbury asked to take the test again, which cured any perceived refusal, after being informed that the machine recorded a deficient sample and that it was being considered a refusal?

IV. Did the Administrative Hearing Officer err in the Findings of Fact and Conclusions of Law because law enforcement failed to inform Mr. Woodbury as required pursuant to N.D.C.C. § 39-20-01(3)(a)?

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Gregory John Schwindt, appeals to the Supreme Court of North Dakota from the decision of the North Dakota Department of Transportation issued by Hearing Officer Alyson Bring, dated January 10, 2019, and mailed January 10, 2019 revoking his North Dakota driving privileges for 180 days and the Hearing Officer's Disposition of Petition for Reconsideration denying Mr. Schwindt's prayer for relief and the Memorandum Opinion and Judgment of the District Court filed by District Court Judge Dann Greenwood affirming the decision of the North Dakota Department of Transportation

[¶8] **STATEMENT OF THE FACTS**

[¶9] On December 14, 2018 law enforcement made contact with Mr. Schwindt when

dispatched to the scene of a crash on the interstate. Transcript page 4, lines 16-22 (T. 4:16-22). Upon arrival at the scene law enforcement learned that the vehicle Mr. Schwindt was driving had been rear ended by a semi and Mr. Schwindt's vehicle was upside down in the south ditch of the interstate. T. 4:21-25; 16:3-11.

[¶10] Law enforcement interviewed Mr. Schwindt while he was in an ambulance and noticed the odor of alcohol. T. 5:8-12. Mr. Schwindt admitted to consuming alcohol. T. 6:4-5. Law enforcement noticed Mr. Schwindt's eyes were bloodshot and watery. T. 7:24-25. Law enforcement performed a horizontal gaze nystagmus test on Mr. Schwindt that indicated impairment. T. 7:25-8:2; 9:13-15. Law enforcement read the implied consent advisory for a screening test to Mr. Schwindt and Mr. Schwindt submitted to a screening test with a result of .115. T. 9:21-10:8.

[¶11] Law enforcement arrested Mr. Schwindt and read him the implied consent advisory for a chemical blood test. T. 10:19-24. Mr. Schwindt consented to a blood test. T. 11:2. Mr. Schwindt was transported to the hospital by ambulance and once at the hospital law enforcement testified that the implied consent advisory for a blood test was again read and that Mr. Schwindt was informed that he would not be charged criminally if he refused to consent to the test, and Mr. Schwindt refused the blood test. T. 11:6-14:4. The recording of the encounter (Exhibit 16) however is silent when law enforcement alleged the implied consent advisory was read a second time and Mr. Schwimdt refused.

[¶12] Law enforcement did not determine a time of driving. T. 22:5-8.

[¶13] **LAW AND ARGUMENT**

[¶14] **Standard of Review**

[¶15] "[R]eview of an administrative agency's suspension of a driver's license is

governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28–32." Richter v. N.D. Dep't of Transp., 2010 ND 150, ¶ 6, 786 N.W.2d 716.

[¶16] N.D.C.C. § 28-32-46 states the standard of review for this matter.

> A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:
>
> 1. The order is not in accordance with the law.
> 2. The order is in violation of the constitutional rights of the appellant.
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.
>
> If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

[¶17] N.D.C.C. § 28-32-24(3) states that

> [u]pon proper objection, evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded. In the absence of proper objection, the agency, or any person conducting a proceeding for it, may exclude objectionable evidence.

See Richter v. North Dakota Department of Transportation, 2008 ND 105, ¶9 (N.D. 2008), 750 N.W.2d 430.

[¶18] "An agency's decisions on questions of law are fully reviewable." Kiecker v. North Dakota Dep't of Transp., 2005 ND 23, ¶ 8, 691 N.W.2d 266 (citations omitted). "Whether a finding of fact meets a legal standard is a question of law," which is fully reviewable on appeal. State v. Mitzel, 2004 ND 157, ¶ 10, 685 N.W.2d 120. "The existence of consent is a question of fact to be determined from the totality of the circumstances." Id. at ¶ 13. Whether consent is voluntary is generally decided from the totality of the circumstances. McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 14. The "standard of review for a claimed violation of a constitutional right is de novo." Id. at ¶ 8.

[¶19] **I. The Department's consideration of the results of the screening test obtained pursuant to N.D.C.C. § 39-20-14 is a violation of due process.**

[¶20] North Dakota's implied consent and refusal laws violate the doctrine of unconstitutional conditions, due process, the fourth amendment (U.S. Const.), the takings clause (U.S. and N.D. Const.), the fourteenth amendment (U.S. Const.), and article 1, sections 8, 20 and 24 (N.D. Const.) because the law requires a driver to consent to a warrantless request to take a chemical test and or screening test in return for the privilege to drive.

[¶21] Drivers have a constitutional right to refuse to consent to a warrantless request to take a screening test. See Baxter v. North Dakota, 136 S. Ct. 2539, 195 L. Ed. 2d 863 (2016) (United States Supreme Court vacated and remanded the North Dakota Supreme Court decision that concluded, regarding a pre arrest screening test, that the North Dakota driver's rights under the Fourth Amendment and N.D. Const. art. I, § 8, and the unconstitutional conditions doctrine, were not violated.). Mr. Schwindt has a constitutional right to refuse to submit to a prearrest warrantless request to take a screening test, coercing

Mr. Schwindt to submit to such a test by threatening to revoke his driving privileges is a violation of his due process rights and the doctrine of unconstitutional conditions.

[¶22] North Dakota's test refusal law (N.D.C.C. § 39-20-14) violates the constitutional prohibition against unreasonable searches and seizures, is unconstitutional for denying substantive due process and is unconstitutional for penalizing the exercise of a constitutional right. The United States Constitution's Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV, the North Dakota Constitution contains a parallel provision. N.D. Const. art. I, § 8. As a matter of black letter law it is unconstitutional to punish an individual for simply refusing to consent to a warrantless search. The United States Supreme Court has already held that an individual cannot be criminally punished for merely exercising their right to refuse to consent to a warrantless search and seizure. City of Los Angeles, Calif. v. Patel, 135 S. Ct. 2443 (2015)(Law criminalizing warrantless refusal to give access to hotel registry found unconstitutional under the Fourth Amendment); Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 540 (1967)("we therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection."); See v. City of Seattle, 387 US 541, 546 ("Therefore, appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse."). Under Patel, Camera and See, if agents of the State seek to execute a warrantless search, it is unconstitutional to attempt to criminally punish an individual who does nothing more than withhold his Fourth Amendment and Article One Section Eight

consent. See State v. Won, 136 Haw. 292, 318, 361 P.3d 1195, 1221 (2015), as corrected (Dec. 9, 2015) (Nakayama dissenting)("The Majority holds that the criminal sanctions for refusing to submit to a breath or blood alcohol test provided by Hawai'i Revised Statutes (HRS) § 291E–68 (Supp. 2012) are inherently coercive, thus rendering Defendant Yong Shik Won's (Won) otherwise voluntary consent invalid.").

[¶23] The submission to a prearrest screening test by Mr. Schwindt was unequivocally a search conducted by law enforcement as defined by the Fourth Amendment and Article One Section Eight, and is entitled to the same protections as any other probable cause search. A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation of privacy. California v. Ciraolo, 476 U.S. 207, 211 (1986). When it comes to expectations of privacy, both the United States Supreme Court and the North Dakota Supreme Court have recognized that breath alcohol concentration tests are, in fact, "searches" as that term is defined by our Constitution, and are therefore protected by the Fourth Amendment. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616–17 (1989) ("Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis implicates similar concerns about bodily integrity and, like the blood alcohol test we considered in Schmerber should also be deemed a search."); City of Fargo v. Wonder, 2002 N.D. 142, ¶19, 651 N.W.2d 665, 670.

[¶24] The logic behind finding that all three of these types of DWI searches are, in fact, governed by the Fourth Amendment is well established. Prior jurisprudence makes it clear that the definition of a "search" does not depend on a "mechanical interpretation of the Fourth Amendment." Kyllo v. United States, 533 U.S. 27, 35 (2001). In Kyllo, the Court rejected the State's argument that the use of thermal imaging did not constitute a search

because it detected "only heat radiating from the external surface of the house." Id. at 35. The Court then announced that the definition of a "search" under the Fourth Amendment included "obtaining by sense-enhancing technology any information regarding the interior of the home *that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area*." Id. at 34 (emphasis added).

[¶25] Kyllo's basic holding - that using less-intrusive means of executing a search does nothing to reduce privacy expectations or constitutional protections - was hardly earth shattering news. Decades earlier, in Katz v. United States, 389 U.S. 347, 352 (1967), the Court rejected the State's argument that an electronic listening device it had placed on the outside of a public telephone booth did not constitute a warrantless search because it "involved no physical penetration of the telephone booth." Instead, the Court aptly held that, "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Id. at 353.

[¶26] The Fourth Amendment provides just as much protection to a person's body (Wonder) as to a public telephone booth (Katz). In this light, there can be no dispute that the repeated and unanimous conclusions of our higher courts that breath tests are, in fact, protected by the Fourth Amendment and Article One Section Eight as "searches" which require warrants. A breath test is nothing more than using different technology (infrared spectrometry) to execute a search that "could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area," (like a blood test). Kyllo, 533 U.S. at 34. Conversely, a breath test is not somehow "less" of a search than a blood test merely because it "involved no physical penetration." Katz, 389 U.S. at 352.

[¶27] North Dakota's test refusal law for prearrest screening tests penalizes the

constitutional right to withhold consent to a warrantless search, rendering the law unconstitutional. North Dakota's implied consent law provides that drivers consent to have their blood, breath or urine chemically tested for the presence of alcohol and that a police officer may require a driver to submit to a screening test if the officer has reason to believe that the individual committed a moving traffic violation, or was involved in a traffic accident as a driver and in conjunction with the violation or accident the officer has formulated an opinion that the individual's body contains alcohol. A person who refuses to submit to a properly requested screening test is subject to civil license revocation. The legislature, therefore, penalizes one's constitutional right to withhold consent to a search prior to being arrested - violating the constitutional prohibition against unreasonable searches and seizures.

[¶28] Typically, "consent to search" is a well-established - and important - exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218. And this is the exception involved in the test refusal statute. The issue of whether the consent exception validates a warrantless search must be evaluated in light of the particular and total circumstances of each individual case unless law enforcement has made a claim of lawful authority to search. See Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); Florida v. Royer, 460 U.S. 491 (1983). The State may be entitled to collect evidence, either pursuant to a warrant or an exception to the warrant requirement. But that does not mean a citizen can be compelled to "voluntarily" participate in the accuser's investigation, or punished for his or her refusal to do so. With the refusal to test statute, the North Dakota Legislature has penalized an individual's assertion of the right to be secure against unreasonable searches and seizures by revoking the driving privileges of those who refuse

to submit to a pre arrest screening test. In other words, the statute has eliminated what has been recognized as the constitutionally protected right to say "no." See State v. Odom, 2006 ND 209, ¶15, 722 N.W.2d 370 ("At no time before or during Olson's search did Odom withdraw or limit his consent to search the hotel room. Odom could have prevented Olson from searching the safe by indicating to Olson consent did not extend to the safe."); see also United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005) (stating that "[o]nce given, consent to search may be withdrawn").

[¶29] The doctrine of unconstitutional conditions renders North Dakota's test refusal law unenforceable and unconstitutional. The United States Supreme Court in Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926), declared that "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution . . . may thus be manipulated out of existence." Id. at 594. This logic is the premise behind the common-sense conclusion that legislatures cannot compel, coerce, or prevent individuals from exercising rights enshrined in the Constitution. North Dakota has also enshrined that principle in its own constitution in Article I § 20 by stating that "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." Thus Article I § 20 prevents the legislature from drafting a law to circumvent Article I § 8 and the right to refuse a warrantless search or to even withdraw consent once given. See Odom at ¶15.

[¶30] For example, the Minnesota Supreme Court has previously struck down a provision of the impaired driving code in Minnesota that relied on the argument that a driver must

waive the constitutional right to be secure against unreasonable searches and seizures as a condition of licensor. State v. Henning, 666 N.W.2d 379 (Minn. 2003). In Henning, the Minnesota Supreme Court analyzed Minnesota's "whiskey plate" law, Minn. Stat. § 168.0422, which provides that a vehicle displaying special series license plates issued to repeat DWI offenders and their families may be stopped by police officers without suspicion of particular wrongdoing. Id. at 383.

[¶31] The State of Minnesota argued in Henning that the legislature has the authority to make it a condition of issuing these license plates that every driver in a repeat offender's family waive the right to be free from suspicion less stops. Id. at 383-84. The Minnesota Supreme Court rejected the argument that such an implied waiver was a constitutionally permissible means of protecting the public. Id. at 384-85. In doing so, the Minnesota Supreme Court noted that "the police should not be allowed to define the reasonableness of their own conduct. * * * Neither is the legislature empowered to redefine the constitutional parameters of police conduct." Id. at 385 (citation omitted). N.D.C.C. § 39-20-14 however does just that by requiring a search of the driver involved in an accident if the officer has reason to believe the driver's body contains alcohol. The statute is unconstitutional and the Department's reliance on the results of the screening test in an administrative hearing violates due process and goes contrary to the doctrine of unconstitutional conditions. The Department therefore should disregard the results of the screening test.

[¶32] The government may attack drunk drivers, but in doing so, it may not attack fundamental liberties. This is precisely what the doctrine of unconstitutional conditions forbids. The United States Supreme Court has repeatedly stated that

> this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . ..

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[¶33] Essentially, North Dakota's test refusal law denies Mr. Schwindt substantive due process because it penalizes the exercise of a constitutional right, specifically the right to refuse a warrantless request to search. Mr. Schwindt argues that implied consent is not valid consent for fourth amendment consent purposes and that the rule established in Camara is not made inapplicable by North Dakota's implied consent law. If "implied consent" was valid "consent" for fourth amendment purposes then Missouri v. McNeely, 133 SCt. 1552 (2013) would have been decided in favor of the search by law enforcement. Compare State v. Fierro, 2014 S.D. 62, ¶23 (S.D. 2014)("South Dakota's implied consent law "by itself, does not provide an exception to the search warrant requirement . . . and any argument to the contrary cannot be reconciled with the United States Supreme Court and this Court's Fourth Amendment warrant requirement jurisprudence."). In McNeely the driver refused the warrantless request to search him and was searched anyway, as we know the United States Supreme Court upheld the Missouri State Supreme Court's decision to suppress the evidence obtained subsequent to that warrantless search. The Department should do the same in Mr. Schwindt's case on due process grounds.

[¶34] The United States Supreme Court in Speiser v. Randall Prince v. City and County of San Francisco, California, 357 U.S. 513, 526 (1958) reiterated that "'[i]t is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create

presumptions is not a means of escape from constitutional restrictions.' Bailey v. State of Alabama, 219 U.S. 219, 239, 31 S.Ct. 145, 151, 55 L.Ed. 191." The concept of "implied consent" as articulated in North Dakota's DUI laws is that very type of statutory presumption that has been prohibited by the United States Supreme Court and it should be apparent that it cannot be used to transgress Mr. Schwindt's constitutional right to refuse a warrantless request by law enforcement to search him. Compare State v. Hayes, 2012 ND 9, ¶39, 809 N.W.2d 309 ("Hayes had two choices when confronted by the officers asking whether they could search her residence: consent to a warrantless search or violate her release conditions and be subject to an arrest warrant for failing to comply with the district court's order. Consent based upon duress or coercion is not voluntary. Id. Under the circumstances, Hayes did not provide voluntary consent to search 210 Adams Street.").

[¶35] Article I, Section 20 of North Dakota's Constitution states that "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." This concept embedded in our State Constitution is basically the doctrine of unconstitutional conditions that was articulated by the United States Supreme Court in Frost, at 596, previously quoted above. In North Dakota therefore the doctrine of unconstitutional conditions applies not only as applied through the fourteenth amendment of the U.S. Constitution but also as a mandate of the State Constitution. As such the search warrant requirement found in the Fourth Amendment and Article I Section 8 and the right to refuse a warrantless search cannot be excepted by North Dakota's implied consent law that conditions the privilege to drive on the surrender of the right to refuse a warrantless search. See also State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996) ("Unlike the United

States Constitution, which "is an instrument of grants of authority" to enact legislation (see Art. I, § 8, U.S. Const.), our North Dakota Constitution "is an instrument of limitations of authority" to enact legislation (see Art. IV, § 13, N.D. Const.). State v. Anderson, 427 N.W.2d 316, 318 (N.D.), cert. denied, 488 U.S. 965 (1988). "The North Dakota Legislature thus has plenary powers except as limited by the state constitution, federal constitution, and congressional acts, [ ], and treaties of the United States." Id.").

[¶36] Because North Dakota's implied consent law requires that a driver relinquish their Article I Section 8 and Fourth Amendment rights by consenting to a search in return for the privilege to drive, thereby forcing the exchange of a mere privilege for a constitutional right, North Dakota's implied consent law is unconstitutional. See Frost at 593 ("It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."); Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir., 2004)("The City may contend that the searches are permissible because they are entirely voluntary. No protestors are compelled to submit to searches; they must do so only if they choose to participate in the protest . . .. This is a classic "unconstitutional condition," in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right."); Hillcrest Prop., LLP v. Pasco Cnty., 939 F.Supp.2d 1240, 1255 (M.D. Fla. 2013)("A government is generally prohibited from enforcing an "unconstitutional condition," that is, from conditioning a governmental accommodation on a citizen's relinquishing a constitutional right. For example, the Fourth Amendment

prevents a state's conditioning the issuance of a driver's license on a citizen's waiving the prohibition against unreasonable search and seizure of the citizen's automobile."). The United States Supreme Court

> has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . ..

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[¶37] It is well settled that the unconstitutional conditions doctrine provides that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .." Perry at 597. If it could, the "exercise of those [interests] would in effect be penalized and inhibited." Id. An example of a comparative application of the doctrine of unconstitutional conditions to rights under the fourth amendment can be found in Dearmore v. City of Garland, 400 F. Supp. 2d 894 (N.D. Tex. 2005). In Dearmore, the City of Garland, Texas, imposed an ordinance that provided that owners of residential property must obtain a license in order to rent the property. Id. As a condition of the license, owners were to consent to an inspection of the property from the City of Garland once a year, and failure to do so was an offense. Id. The ordinance, however, also provided authorization for the City of Garland to obtain a search warrant if consent to the inspection was refused or could not be obtained. Id. The court stated:

> [T]he property owner is being penalized for his failure to consent in advance to a warrantless search of unoccupied property. The property owner's consent thus is not voluntary at all. A valid consent involves a waiver of constitutional rights and must be voluntary and uncoerced. The alternatives presented to the property owner are to consent in advance to a warrantless inspection, or to face criminal penalties; thus consent is involuntary. On the other hand, if the owner does not consent to the warrantless search, he does

> not receive a permit. The whole purpose of receiving a permit is to rent the property for commercial purposes. Without a permit, the owner cannot engage in lawful commercial activity. The owner is thus faced with equally unavailing situations.

Id. at 902-03 (internal citations omitted). Subsequently, the district court enjoined the City of Garland from enforcing any provision of the ordinance that required a person renting property to allow inspection of the property as a condition of issuing a permit, or penalized a person for refusing an inspection. Id. at 906. The City subsequently amended the ordinance, removing the provisions related to consent and clarifying the circumstances under which the City of Garland may seek a warrant. Dearmore v. City of Garland, 519 F.3d 517, 520 (5th Cir. 2008). As in Dearmore just as an owner's failure to consent was penalized a driver's failure to consent in North Dakota is penalized making the application of the law unconstitutional as it violates the doctrine of unconstitutional conditions.

[¶38] **II. The Department should have disregarded the horizontal gaze nystagmus test.**

[¶39] The results of the horizontal gaze nystagmus test are unreliable and should not be considered by the department. See State v. Witte, 251 Kan. 313, 328, 836 P.2d 1110, 1120 (1992)(" "Nystagmus can be caused by problems in an individual's inner ear labyrinth. In fact, irrigating the ears with warm or cold water, not a far-fetched scenario under particular weather conditions, is a source of error. Physiological problems such as certain kinds of diseases may also result in gaze nystagmus. Influenza, streptococcus infections, vertigo, measles, syphilis, arteriosclerosis, muscular dystrophy, multiple sclerosis, Korsakoff's Syndrome, brain hemorrhage, epilepsy, and other psychogenic disorders all have been shown to cause nystagmus. Furthermore, conditions such as hypertension, motion sickness,

sunstroke, eyestrain, eye muscle fatigue, glaucoma, and changes in atmospheric pressure may result in gaze nystagmus. The consumption of common substances such as caffeine, nicotine, or aspirin also lead to nystagmus almost identical to that caused by alcohol consumption." Pangman, 2 DWI Journal at 3. See Rouleau, 4 Am.Jur. Proof of Facts 3d 439 § 9. Temporary nystagmus can occur when lighting conditions are poor. Rouleau, 4 Am.Jur. Proof of Facts 3d 439 § 9, p. 456.").

[¶40] Mr. Schwindt was the driver of a vehicle that was stuck in the rear by a semi so hard that his vehicle spun off the road and turned upside down. A review of the audio visual recording shows Mr. Schwindt's vehicle upside down in the ditch. DVD 05:40:00. According to the audio at 05:42:03 the Trooper learned that Mr. Schwindt was on blood pressure medication and at 05:42:03, has high blood pressure and was at the hospital that day for high blood pressure. Law enforcement further learned from Mr. Schwindt that he has glaucoma. DVD 05:47.

[¶41] **III. Law enforcement lacked probable cause to arrest Mr. Schwindt for driving under the influence.**

[¶42] Absent the results of the screening test and the horizontal gaze nystagmus test law enforcement did not have probable cause to arrest Mr. Schwindt for driving under the influence.

[¶43] **IV. Mr. Schwindt did not refuse a request to take a chemical test.**

[¶44] A review of the complete audio visual recording reveals that Mr. Schwindt did not refuse a chemical test. At approximately DVD 6:01 (Exhibit 16) after reading Miranda law enforcement reads an advisory for a chemical blood test and Mr. Schwindt agrees to take the blood test requested. The advisory read to Mr. Schwindt however was modified

to exclude the language advising that "refusal of the individual to submit to a test directed by the law enforcement officer may result in revocation" and instead advised that "refusal to take a chemical blood test may result in revocation." Because the request for a blood test given to Mr. Schwindt was preceded by an incomplete or inaccurate advisory the request by law enforcement to Mr. Schwindt was not a request "to submit to a test under section 39-20-01" and therefore Mr. Schwindt cannot be considered to have refused a request for a chemical blood test for purposes of license revocation. See Alvarado v. N. Dakota Dep't of Transportation, 2019 ND 231, ¶ 1 ("A request for testing preceded by an incomplete or inaccurate advisory is not a request "to submit to a test under section 39-20-01."").

[¶45] At DVD 06:18 the law enforcement officer is heard saying Mr. Schwindt agreed to do a blood draw. At DVD 06:21 to 6:26 law enforcement is heard discussing a plan to read the advisory again and not having to worry about a blood kit if he refuses. Once Mr. Schwindt agreed to take the blood test it would be inappropriate and a violation of due process to read the same incomplete or inaccurate advisory again and prompt Mr. Schwindt to refuse by emphasizing there would be no criminal charges to refuse. A review of the recording however finds no such thing occurred. There is no recording of the advisory being reread or of Mr. Schwindt refusing to submit to a chemical test.

[¶46] The law enforcement officer however testified that he did "re-read the implied consent" advisory to Mr. Schwindt at the hospital. T. 11:13-16. Although there is no recording of the advisory read at the hospital the law enforcement officer testified that the advisory read at the hospital was that same advisory on the report an notice form and the law enforcement officer read the advisory into the record. T. 13:15-22. As with the first

advisory the second advisory was also incomplete or inaccurate and therefore Mr. Schwindt cannot be considered to have refused a request for a chemical blood test for purposes of license revocation. See Alvarado v. N. Dakota Dep't of Transportation, 2019 ND 231, ¶ 1 ("A request for testing preceded by an incomplete or inaccurate advisory is not a request "to submit to a test under section 39-20-01."").

[¶47] **ARGUMENT 5: North Dakota's implied consent and refusal laws are unconstitutional facially and as applied.**

[¶48] Mr. Schwindt argues that the North Dakota refusal and implied consent laws are unconstitutional as applied to him because the facts of the case demonstrate that law enforcement did not have a search warrant to search him at the time they asked to search him nor did law enforcement ever apply for a search warrant. The North Dakota law penalizing a refusal to consent to a warrantless search of a person's blood is unconstitutional facially and as applied to the circumstances and facts of this case. See Camara, at 540 ("we therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection."); See also McNeely at 1561 ("In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.").

[¶49] Mr. Schwindt is arguing that the right to refuse blood testing is not just statutory but is of a constitutional dimension and an integral part of his fourth amendment, article 1 section 8 and substantive due process rights. South Dakota addressed the issue in Fierro, 2014 S.D. 62, ¶23 ("our precedent is clear that the Legislature cannot enact a statute that

would preempt a citizen's constitutional right, such as a citizen's Fourth Amendment right") finding that an individual has a constitutional right to refuse testing despite South Dakota's implied consent law, and it is generally accepted in other jurisdictions that individuals have a constitutional right to refuse a warrantless search. See People v. Pollard, 2013 COA 31, ¶26 (Colo. App. 2013)("In prohibiting unreasonable searches and seizures, the Fourth Amendment to the United States Constitution necessarily grants to individuals the right to refuse warrantless entries and searches. See Ramet v. State, 209 P.3d 268, 269 (Nev. 2009); see also United States v. Prescott, 581 F.2d 1343, 1351 (9th Cir. 1978) ("The [Fourth] Amendment gives [a defendant] a constitutional right to refuse to consent to entry and search.")"); Longshore v. State, 924 A.2d 1129, 1159 (Md. 2007) ("A person has a constitutional right to refuse to consent to a warrantless search . . .."); People v. Stephens, 349 N.W.2d 162, 163-64 (Mich. Ct. App. 1984) (the Fourth Amendment gives the defendant the constitutional right to refuse to consent to a search).

[¶50] The United States Supreme Court explained in Camara, the "appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." Id. at 540. In Schneckloth, the United States Supreme Court warned us about the consequences of attempting to bypass constitutional commands by creating or relying on a legal fiction when it wrote that

> the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746:

> 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'

Schneckloth v. Bustamonte, 412 U.S. at 228 – 29. North Dakota's Constitution forbids the North Dakota legislature or a North Dakota agency to draft a law or rule to circumvent the warrant requirement found in Article I Section 8. Article I, Section 20 explicitly states that "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." As such Article I Section 8 cannot be excepted by the Department and the search warrant requirement cannot be excepted by North Dakota's implied consent law.

[¶51] Mr. Schwindt argues that he has a constitutional right to refuse to consent to a warrantless search of his blood and that the statutory scheme used by the Department to obtain his consent to search his blood violates the doctrine of unconstitutional conditions. This is so because the State of North Dakota made it a condition of granting the privilege to drive to Mr. Schwindt that he surrender his constitutional right to refuse to submit to a warrantless search of his blood. This exchange of a constitutional right for a mere privilege is a violation of due process. See Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593–94, 46 S. Ct. 605, 607, 70 L. Ed. 1101 (1926)("It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip

the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

[¶52] As explained above Mr. Schwindt argues that North Dakota's implied consent laws are designed to circumvent the warrant requirement and coerce a driver to provide consent to a warrantless blood search. To pursue its purpose, to compel drivers to consent to a blood test the North Dakota legislature has violated the doctrine of unconstitutional conditions.

[¶53] **CONCLUSION**

[¶54] According to the United States Supreme Court the continued possession of a driver's license may become essential to earning a livelihood; as such, it is an entitlement which cannot be taken without the due process mandated by the Fourteenth Amendment. See Dixon v. Love, 431 U.S. 105 (1977); Bell v. Burson, 402 U.S. 535 (1971).

> Individuals may look to several constitutional provisions for protection against state action that results in a deprivation of their property. The Fourteenth Amendment guarantees that individuals are not to be deprived of their property without due process of law, a protection that has been viewed as guaranteeing procedural due process and substantive due process. Procedural due process promotes fairness in government decisions "[b]y

> requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.' " Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Substantive due process, "by barring certain government actions regardless of the fairness of the procedures used to implement them, [ ] serves to prevent governmental power from being 'used for purposes of oppression.' " Id. (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 15 L.Ed. 372 (1856)).

John Corp. v. City of Houston, 214 F.3d 573, 577 (5th Cir. 2000). Because, absent an exception to the warrant requirement, Mr. Schwindt has a constitutional right to refuse to submit to a warrantless search it is a violation of due process to deprive him of his driving privileges (an important property interest) for exercising a constitutional right. Further, the Department lacks jurisdiction to take action against Mr. Schwindt's driving privileges because Mr. Schwindt did not refuse testing pursuant to N.D.C.C. § 39-20-04 and because law enforcement failed to give Mr. Schwindt the complete advisory required by N.D.C.C. § 39-20-01.

[¶55] Based on the foregoing arguments and law Mr. Schwindt respectfully requests that the hearing officer's decision be reversed.

[¶56] **REQUEST FOR ORAL ARGUMENT**

[¶57] Mr. Schwindt respectfully requests that the North Dakota Supreme Court schedule oral argument for this case as permitted pursuant to N.D.R.App. 28(h). This matter involves the statutory interpretation of N.D.C.C. § 39-20-01(3)(a) and N.D.C.C. § 39-20-04. Oral argument would be helpful to the Court and allow the parties to answer any questions the Justices may have concerning the issues presented in this appeal.

Dated: September 23, 2019

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gregory John Schwindt,

Appellant/Petitioner,

v.

Thomas Sorel, Director of the North Dakota Department of Transportation,

Appellee/Respondent.

Supreme Court Case No. 20190245
District Court Case No. 45-2019-CV-00180

CERTIFICATE OF COMPLIANCE

[¶58] The undersigned certifies that pursuant to ND.R.App.P. 32(a)(8)(A), that the Brief of Appellant contains 30 pages.

[¶59] This brief has been prepared in a proportionally spaced typeface (Times New Roman 12 point font) using the software program Microsoft Office Word.

Dated: September 23

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CERTIFICATE OF SERVICE

[¶1] Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on September 23, 2019 he electronically served the following on the North Dakota Attorney General:

APPELLANT'S BRIEF
APPELLANT'S APPENDIX

by sending an electronic copy to the email address dbanders@nd.gov.

Dated: September 23, 2019

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CERTIFICATE OF SERVICE

[¶60] Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on September 23, 2019 he electronically served the following on the Clerk of the North Dakota Supreme Court, and the North Dakota Attorney General:

APPELLANT'S BRIEF
APPELLANT'S APPENDIX

through the North Dakota Supreme Court's E-filing Portal, and on September 26, 2019 he electronically served the following on the Clerk of the North Dakota Supreme Court, and the North Dakota Attorney General:

APPELLANT'S BRIEF (corrected)
APPELLANT'S APPENDIX (corrected)

through the North Dakota Supreme Court's E-filing Portal.

Dated: September 26, 2019

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