
IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20190303
)	
Plaintiff and Appellee,)	Grand Forks County No.
)	18-2018-CR-02783
)	
v.)	
)	
)	
Saha Bahadur Darji,)	APPELLANT’S BRIEF
)	
Defendant and Appellant.)	

**Appeal from the criminal judgment in Grand Forks
County district court, northeast central judicial district,
North Dakota, the Honorable Lolita G. Hartl Romanick,
presiding.**

APPELLANT’S BRIEF
ORAL ARGUMENT REQUESTED

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

Transcript References:

The Jury Trial was held on August 6, 7, and 8, 2019. The transcript of that trial is referred to as [Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Saha Darji, timely appealed the district court's final criminal judgment. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

- [¶ 2] I. Whether there was insufficient evidence to convict Mr. Darji of fleeing.
- II. Whether there was insufficient evidence to convict Mr. Darji of reckless endangerment.
- III. Whether Mr. Darji was unconstitutionally convicted of refusal to submit to a chemical test.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from northeast central judicial district, Grand Forks County Criminal Judgment. This case was before the district court in *State v. Saha Bahadur Darji*, 18-2018-CR-02783. The criminal information was filed with the court on December 26, 2018. Mr. Darji was charged with fleeing a peace officer in a vehicle, in violation of N.D.C.C § 39-10-71(1), reckless endangerment - extreme indifference in violation of N.D.C.C § 12.1-17-03, A DUI with a minor, a third offense in seven years, in violation of N.D.C.C § 39-08-01.4, and refusal to submit to chemical test, a third offense in seven years in violation of N.D.C.C § 39-08-1(2)(a).

[¶ 4] On December 26, 2018 Attorney Gorham was assigned to represent Mr. Darji. Law Student, Pietro Aiello represented Mr. Darji pursuant to the filed limited practice papers on January 28, 2019. A preliminary hearing was waived on February 11, 2019 and Mr. Darji was arraigned the same day.

[¶ 5] Mr. Darji entered not guilty pleas to all four counts and proceeded to trial. A jury trial was held on August 6, 7, and 8, 2019. The jury ultimately found Mr. Darji guilty of all four (4) counts. Mr. Darji was sentenced on September 9, 2019. Mr. Darji was sentenced to 24 months, with 18 months suspended, and two years of supervised probation for counts one and two. Counts three and four Mr. Darji was sentenced to 360 days with 150

days suspended. All four counts were counts ran concurrently. Mr. Darji timely filed a notice to appeal.

STATEMENT OF FACTS

[¶ 6] On December 22, 2018 Mr. Morrow was driving in Grand Forks, ND near 40th and Walnut Street. Tr. p. 253. Mr. Morrow noticed a vehicle serving to the left and then the right and making intermittent stops. Tr. p. 254. Mr. Morrow testified that the vehicle was driving and a speed of roughly 10 to 15 miles per hour and the speed limit was between 30 and 25 in the area. Tr. pp. 254-255. Mr. Morrow suspected the vehicle's driver was "drunk." Tr. p. 256. Mr. Morrow called 911 and remained on the phone with them until an officer arrived.

[¶ 7] Mr. Morrow puller over and the Vehicle eventually stopped ahead of him. Tr. pp. 257, 260. Mr. Morrow testified he saw individual came out of the car and began stumbling around the back of the car. Tr. p. 261. He also testified that two children got in the vehicle and then the driver got back in the vehicle, later identified as Mr. Darji. Tr. p. 263.

[¶ 8] Officer Black arrived and saw Mr. Darji stop in the middle of an intersection and the officer activated his lights and siren to pull Mr. Darji over. Tr. p342. Mr. Darji did not stop. Officer Brown in his patrol vehicle came to assist with stopping the vehicle. Tr. p. 347. Officer Black testified that Mr. Darji was driving between eighteen miles an hour to forty miles an hour. Tr. p. 349. Officer Black asked if it was safe to be driving at those

speeds and he responded, “18 is fine but 40 can get a little slick.” Tr. p. 349, ln 8.

[¶ 9] Officer Black noticed that Mr. Darji had made numerous traffic violations while driving northbound on South Washington. Tr. p. 350. Officer Younggren in his patrol car joined the other two officers. *Id.* Officer Black testified that Mr. Darji traveled through a red light at approximately 25 miles an hour. *Id.*

[¶ 10] Eventually the three officers in their patrol cars boxed in Mr. Darji’s car and gradually reduced their speed, this is called channeling. Tr. pp. 352-354. Mr. Darji came to a stop. Tr. p. 355. Officer Black testified that Mr. Darji stopped roughly 18 blocks from where the initial pursuit started, and it lasted under ten minutes. Tr. p 358.

[¶ 11] Officers suspected Mr. Darji was under the influence of alcohol but also realized there was a language barrier. They attempted to get an interpreter. Tr. p. 366. Officer Black began driving to the hospital and testified that Mr. Darji was saying either the word diabetes or med kit. Officer Black made the decision to bring him to the hospital to get checked out. Tr. p. 369.

[¶ 12] At the hospital Mr. Darji’s blood was drawn against his will. He was read implied consent. Tr. p. 401. At the hospital through an interpreter. Forty minutes later he was given the PBT but did not provide enough of a sample. Officer Black testified that implied consent requests a “chemical,

urine, or breath test. It's implied consent that you will consent to that and this is an advisory saying that you will consent to it and if you don't it can lead to criminal action." Tr. p. 402 ln 3-7. At the Grand Forks jail Corporal Wadlow administered the intoxilyzer test. Tr. p. 414. Officer Black testified that at the jail Mr. Darji refused to blow into the intoxilyzer or blow adequately to get a reading. Tr. p. 416. At the jury trial on this matter Ms. Gorham made a motion for acquittal which was denied by the court. Tr. pp. 580-581.

LAW AND ARGUMENT

I. Whether there was insufficient evidence to convict Mr. Darji of fleeing.

Standard of Review

[¶ 13] After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. N.D.R.Crim.P. 29(a). When considering a motion for a judgment of acquittal under N.D.R.Crim.P. 29, "the trial court, upon reviewing the evidence most favorable to the prosecution, must deny the motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *State v. Herzig*, 2012 ND 247, ¶ 12, 825 N.W.2d 235. The essential elements of N.D.C.C. § 39-10-71(c) that must be proved beyond a reasonable doubt are:

[¶ 14] A driver of a motor vehicle who **willfully fails or refuses** to bring the vehicle to a stop, or who otherwise flees or attempts to elude, in any manner, a pursuing police vehicle or peace officer, when given a visual or audible signal to bring the vehicle to a stop, is guilty of a:

Class C felony if, at any time during the flight or pursuit, the driver **willfully operates the vehicle** in a manner constituting an inherent **risk of death or serious bodily injury to a third person.**

[¶ 15] There was no evidence presented that Mr. Darji's driving endangered the life of his minor children, which was alleged in the information. Index #115. He was traveling at relatively low speeds, for roughly eighteen blocks. Officer Black's specific response to whether Mr. Darji was driving too fast stated, "18 is fine but 40 can get a little slick." Tr. p. 349, ln 8. His testimony that it was very dangerous to run a red light does not prove beyond a reasonable doubt that anyone was at risk of death or serious bodily. Everyone who runs a red light, or a stop sign, would be guilty of a felony rather than a traffic citation if this were the case. Additionally, at the time Mr. Darji ran the red light three patrol cars with flashing lights and sirens were directly next to him. The low visibility Officer Black mentioned was not a factor. Therefore, the trial court should have found the State did not meet its burden of proof with regard to Mr. Darji risking death or serious bodily injury to a third person.

II. Whether there was insufficient evidence to convict Mr. Darji of reckless endangerment.

[¶ 16] When considering a motion for a judgment of acquittal under N.D.R.Crim.P. 29, “the trial court, upon reviewing the evidence most favorable to the prosecution, must deny the motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt.” *State v. Herzig*, 2012 ND 247, ¶ 12, 825 N.W.2d 235. The essential elements that must be proved beyond a reasonable doubt are:

[¶ 17] A person is guilty if he creates a **substantial** risk of serious bodily injury or death to another. The offense is a class C felony if the circumstances manifest his extreme indifference to the value of human life. The information specifically alleges the circumstances manifesting extreme indifference to the value of human life were driving erratically and intoxicated, while fleeing from the police in poor driving conditions with two juveniles in the car. The State is using the same factual information for count two that they used for count one. There was no evidence that Mr. Darji’s driving created a **substantial** risk of serious bodily injury or death to his children. The legislature specifically looked at the crime of driving under the influence with a minor and determined it was a class A misdemeanor.

[¶ 18] Although North Dakota does not have a specific statute limiting charging multiple counts for the same conduct, Justice Maring’s dissent in *State v. Salveson*, 2006 ND 169, 719 N.W.2d 747 (N.D. 2006), is instructive on the purpose the legislature had when creating punishments and the limiting nature of the merger statute for certain criminal, misdemeanor

conduct. By the time the jury got to determining count three in the information, a class A misdemeanor, they had convicted Mr. Darji of the same, misdemeanor, criminal conduct three times. The only information that was present in counts one and two that were not present in count three was that he was fleeing from the police, although testimony said his speed was not substantially dangerous and the weather was poor. This simply is not enough evidence to demonstrate that Mr. Darji created a **substantial** risk of serious bodily injury or death.

III. Whether Mr. Darji was unconstitutionally convicted of refusal to submit to a chemical test.

[¶ 19] Unreasonable searches and seizures are prohibited under U.S. Const. amend. IV and N.D. Const. art. I, § 8. It is well-settled that administration of a chemical test to determine alcohol consumption is a search. Warrantless searches are unreasonable unless they fall within one of the recognized exceptions to the warrant requirement. Consent is one exception to the warrant requirement. However, consent must be voluntarily given under the totality of the circumstances and must not be coerced by explicit or implicit means or by implied threat or covert force. *McCoy v. N.D. Dep't of Transp.*, 2014 ND 119, ¶ 10, 848 N.W.2d 659. This Court reviews constitutional questions de novo.

[¶ 20] In *State v. Helm*, the Court held urine is treated like blood for DUI purposes and an individual cannot be prosecuted for refusing to submit to a warrantless urine test. Therefore, N.D.C.C. § 39-08-01(1)(e) is facially

unconstitutional because its language is misleading considering the holding in *Birchfield v. North Dakota* and *State v. Helm*. See *Birchfield*, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); *Helm*, 2017 ND 207, 901 N.W.2d 57. At the time Mr. Darji was given implied consent Section 39-08-01(1)(e)(2), N.D.C.C., made it a crime for an individual to refuse to submit to “[a] chemical test, or tests, of the individual’s blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual’s blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01.”

[¶ 21] N.D.C.C. § 39-20-01(b) reads: “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.” Mr. Darji had to have been read an unconstitutional statute for the State to charge refusal, however the implied consent is coercive and misleading. Mr. Darji was informed that refusing to submit to a warrantless urine test is a crime. The statute requiring this unconstitutional information be given to Mr. Daji, to submit to an illegal search or face criminal prosecution, is coercive and therefore unconstitutional. Mr. Darji was convicted of a facially unconstitutional crime, refusal, and this Court should vacate the conviction and judgment of the trial court.

CONCLUSION

[¶ 22] WHEREFORE the Defendant respectfully requests the Court to reverse the judgment of the trial court and Mr. Darji's conviction with respect to counts one (1), two (2) and four (4).

Dated this 10th day of February, 2020

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[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: February 10, 2020.

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[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

 Appellant’s Brief with Certificate of Compliance
 Appellant’s Appendix

 And that said copies were served upon:

 Sarah Gereszek, Assistant State’s Attorney, sasupportstaff@gfcounty.org

by electronically filing said documents via email. Also served upon:

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by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: February 10, 2020.

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