

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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City of Lincoln,  Plaintiff/Appellee,  vs.  Larry Wayne McCorkell,  Defendant/Appellant.	Supreme Court No. 20200319  District Court No. 08-2020-CR-00533  <b>APPELLANT'S BRIEF</b>  <b>ORAL ARGUMENT REQUESTED</b>
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**APPEAL FROM CRIMINAL JUDGMENT ENTERED NOVEMBER  
18, 2020, AND PRECEDING ORDER ON MOTION TO SUPPRESS  
DATED OCTOBER 16, 2020**

**BURLEIGH COUNTY DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
THE HONORABLE DAVID E. REICH, PRESIDING**

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**[¶ 3] STATEMENT OF THE ISSUES**

[¶ 4] 1. Whether N.D.C.C. § 39-10-08 requires use of a turn signal upon entering or exiting a rotary traffic island when the automobile does not change lanes or direction of travel.

[¶ 5] 2. Whether McCorkell's rights under the Fourth Amendment to the United States Constitution and Art. I, § 8 of the North Dakota Constitution to be free from seizure of his person without a warrant were violated when he was stopped and detained, thus requiring all evidence obtained as a result of that stop to be suppressed as fruit of the poisonous tree.

[¶ 6] 3. Whether the remaining evidence was insufficient to support the judgment.

**[¶ 7] STATEMENT OF THE CASE**

[¶ 8] On November 4, 2019, a vehicle driven by Larry Wayne McCorkell ("McCorkell") was stopped by Sargent Richard Hoffer ("Hoffer") of the Lincoln Police Department for failure to use a turn signal when exiting a roundabout. (Transcript ("Tr.") at p. 9, ln. 19-25 and p. 10, ln. 1-2). Hoffer's subsequent investigation revealed McCorkell's driving privileges were suspended, and thus McCorkell was arrested and charged by citation with Driving Under Suspension, and issued a warning for neglect of turn signal. (Docket ("D") at 1), (Tr. at p. 10, ln. 6-19).

[¶ 9] McCorkell filed a motion to suppress challenging the constitutionality of the stop. (D. at 18-20). A hearing was held October 9, 2020, and following the submission of briefs by the parties supplementing and summarizing their arguments, the trial court denied the motion in an order issued on October 16, 2020. (D. at 47-52). McCorkell entered into a Conditional Plea Agreement on November 10, 2020, which was accepted by the Court and Judgment entered on November 18, 2020. (D. at 57-63).

[¶ 10] McCorkell filed a Notice of Appeal to this Court on November 25, 2020. (D. at 64). McCorkell appeals and argues that state law does not require the use of a turn signal upon entering or exiting a rotary traffic island when an automobile does not change lanes or its direction of travel, that such being the basis for the warrantless seizure of his person, his rights under the Fourth Amendment to the United States Constitution and Art. I, § 8 of the North Dakota Constitution were violated when he was stopped and detained, thus requiring all evidence obtained as a result of that stop to be suppressed as fruit of the poisonous tree, and the remaining evidence against him is insufficient to support the Judgment. McCorkell now asks this honorable Court to vacate the Judgment in this matter, reverse the District Court's denial of his Motion to Suppress, remand to the District Court for withdrawal of his conditional guilty plea, and order that the evidence obtained as a result of the stop be suppressed and the charge against him be dismissed.

## [¶ 11] STATEMENT OF FACTS

[¶ 12] At about 8:49 p.m. on November 4, 2019, four vehicles, travelling in succession, were headed south on 66th Street Southeast, went through the intersection with Lincoln Road, and continued south on 66th Street Southeast. (Tr. at p. 9, ln. 5-23, and p. 14, ln. 18-23). The intersection of 66th Street Southeast and Lincoln Road is a small, one-lane roundabout, on the northeast side of Lincoln, North Dakota. (Tr. at p. 9, ln. 12-16, and p. 12, ln. 5-16). The fourth vehicle was a patrol cruiser driven by Sargent Richard Hoffer (“Hoffer”) of the Lincoln Police Department. Of the three vehicles ahead of Hoffer’s, none signaled a turn upon entering the roundabout, and upon exit, only the second of the three vehicles signaled a right-hand turn. (Tr. at p. 15, ln. 15-16). Hoffer, after the lead vehicle signaled and made a left-hand turn, initiated a traffic stop. (Tr. at p. 15, ln. 17-24). Hoffer initiated the stop because the vehicle did not use its turn signal when exiting the roundabout, on his opinion, that in doing so the vehicle changed lanes. (Tr. at p. 9, ln. 20-25, p. 10, ln. 1-13, and p. 16, ln. 7-11). The driver of the lead vehicle, it was later discovered, was Larry Wayne McCorkell (“McCorkell”). (Tr. at p. 10, ln. 15-16). Hoffer’s subsequent investigation revealed McCorkell’s driving privileges were suspended, and thus McCorkell was charged with Driving Under Suspension. (D. at 1), (Tr. at p. 11, ln. 6-7, 11-15).

## [¶ 13] ARGUMENT

[¶ 14] **Standard of Review.** The North Dakota Supreme Court applies a de novo review standard in reviewing a District Court’s decision on a motion to

suppress evidence. The Court will defer to the District Court’s findings of fact and will resolve conflicts in testimony in favor of affirmance. State v. Dowdy, 2019 ND 50, ¶ 4, 923 N.W.2d 109. A District Court’s decision will be affirmed unless there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence. State v. Selzler, 2020 ND 123, ¶ 7, 943 N.W.2d 762. Questions of law, however, are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law. State v. Hawkins, 2017 ND 172, ¶ 6, 898 N.W.2d 446.

**[¶ 15] I. N.D.C.C. § 39-10-08 does not require use of a turn signal upon entering or exiting a rotary traffic island when the automobile does not change lanes or its direction of travel.**

[¶ 16] Use of a turn signal is governed by N.D.C.C. § 39-10-38. State v. Hirsch Korn, 2016 ND 117, ¶ 7, 881 N.W.2d 244; State v. Fasteen, 2007 ND 162, ¶ 7, 740 N.W.2d 60. The pertinent portions of the statute provide as follows:

No person may turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety without giving an appropriate signal in the manner hereinafter provided.

A signal of intention to turn or move right or left when required must be given continuously during not less than the last one hundred feet [30.48 meters] traveled by the vehicle before turning.

N.D.C.C. § 39-10-08(1)-(2). Nowhere within the Century Code does it state that a driver is required to use a turn signal when navigating a “traffic island,” “traffic circle,” “rotary,” or “roundabout,” as they are known. The only reference to a



roundabout, is found in N.D.C.C. § 39-10-16(3), which requires vehicles passing around one to be driven to the right.

[¶ 17] This Court, to date, has not addressed the applicability of N.D.C.C. § 39-10-08 to the navigation of a roundabout. However, Courts of four different states, each having similar, if not the exact same language, in their respective statutes concerning the use of a turn signal, have addressed this very issue and held that use of a turn signal is not required in navigating a roundabout. People v. McBride, 2020 COA 111, ¶¶ 3-4 (Colo. Ct. App. 5th Div. July 23, 2020); State v. Davis, 143 N.E.3d 343, 345 (Ind. Ct. App. 2020); Noble v. State, 357 P.3d 1201, 1206-1207 (Alaska Ct. App. 2015); Harris v. State, 2009 VT 73, ¶¶ 7-8, 980 A.2d 785, 788-89.

[¶ 18] The Alaska Court of Appeals specifically found that Alaska's turn signal statute, which is extremely similar to N.D.C.C. § 39-10-08, does not apply to roundabouts. Noble v. State, 357 P.3d 1201, 1206-1207 (Alaska Ct. App. 2015). The Indiana Court of Appeals specifically found that when one enters a roundabout, they are simply following the roadway and continuing along the natural flow of the road, similar to when coming upon a curve in the road." State v. Davis, 143 N.E.3d 343, 347 (Ind. Ct. App. 2020). The Indiana court further found "it would be nonsensical to read the current turn signal statute as requiring motorists to activate their right-turn signals when entering a roundabout, especially if they simply mean to travel in a continuous lane and move through the roundabout." Id. Moreover, the court indicated that while a driver deviates from the curvature of the roundabout

in exiting, the action is a “veering to the right,” while a turn requires something more. Id. at 348 (citing United States v. Smith, 668 F.3d, 427, 431 (7th Cir. 2012)). That precisely describes what the vehicles driven by McCorkell and other drivers did in this matter.

[¶ 19] The Fifth Division of the Colorado Court of Appeals also ruled that Colorado’s similar turn signal statute does not require the use of a turn signal when entering or exiting a roundabout. People v. McBride, 2020 COA 111, ¶¶ 26-40 (Colo. Ct. App. 5th Div. July 23, 2020). The Colorado court’s decision was based heavily on the reasoning found in Noble and Davis, and addressed the driving of an individual who navigated a roundabout and continued in the same direction on the same road without using a turn signal. McBride, 2020 COA 111, ¶¶ 3-4. Under the exact situation and circumstances as McCorkell, the Colorado court agreed with Indiana and Alaska, finding a turn signal is not required when one navigates a roundabout and continues in the same direction of travel.

[¶ 20] **II. McCorkell’s rights under the Fourth Amendment to the United States Constitution and Art. I, § 8 of the North Dakota Constitution to be free from seizure of his person without a warrant were violated when he was stopped and detained, thus requiring all evidence obtained as a result of that stop to be suppressed as fruit of the poisonous tree.**

[¶ 21] The Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, as well as Article I, Section 8 of the North Dakota Constitution, protect individuals from unreasonable searches and seizures. State v. Segien, 2005 ND 124, ¶ 7, 700 N.W.2d 702 (quoting State v. Wanzek, 1999 ND 163, ¶ 7, 598 N.W.2d 811). For a seizure to withstand

constitutional scrutiny, it must be “justified by some objective manifestation” that the person was “engaged in criminal activity.” Salter v. N.D. Dep’t of Transp., 505 N.W.2d 111, 114 (N.D. 1993); see also Barrios-Flores v. Levi, 2017 ND 117, ¶ 43, 894 N.W.2d 888. This Court expanded this rationale to note that traffic violations provide reasonable suspicion to justify a seizure. Kahl v. N.D. Dep’t of Transp., 1997 ND 147, ¶ 14, 567 N.W.2d 197 (citing Whren v. United States, 517 U.S. 806 (1996)).

[¶ 22] The stop and seizure of McCorkell in this matter was based entirely upon his exiting the roundabout without using his turn signal. No other basis or justification for the stop was provided by Hoffer. A traffic stop has long been considered a temporary seizure within the meaning of the Fourth Amendment, and is viewed similarly to an investigative “stop and frisk.” State v. Smith, 2005 ND 21, ¶ 12, 691 N.W.2d 203. Thus, absent a reasonable and articulable suspicion of criminal activity, McCorkell’s seizure by Hoffer was unconstitutional.

[¶ 23] Reasonable suspicion cannot be summarized to a neat set of legal rules, but it requires more than a “mere hunch.” State v. Kenner, 1997 ND 1, ¶ 8, 559 N.W.2d 538. Reasonable suspicion must be determined objectively, considering the totality of the circumstances. State v. Higgins, 2004 ND 115, ¶ 7, 680 N.W.2d 645; see also State v. Parizek, 2004 ND 78, ¶ 9, 678 N.W.2d 154. This includes the quantity, or the content, and quality, or degree of reliability. Alabama v. White, 496 U.S. 325, 330 (1990). As a general rule, the lesser the quality or reliability of the tip, the greater the quantity of information required to raise a

reasonable suspicion. Id. ““The question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity.” Higgins, at ¶ 7 (quoting Parizek, at ¶ 9) (emphasis added); see also Terry v. Ohio, 392 U.S. 1, 21 (1968).

[¶ 24] The seizure here was made without legal authority or justification under North Dakota law. As discussed above, North Dakota’s turn signal statute does not require use of a turn signal in navigating a roundabout. The decision to make the stop, by Hoffer’s own admission, was solely based on his opinion that use of a turn signal was required because a lane was changed, which he formed based on a manual issued by the North Dakota Department of Transportation. (Tr. at p. 16, ln. 7-11).

[¶ 25] While the law does allow for a stop in the absence of a traffic violation where the officer makes an “objectively reasonable mistake” of fact or law, the inquiry requires the Court first focus on the plain language of the statute and whether or not it is ambiguous. Heien v. North Carolina, 574 U.S. 54, 70 (2014) (Kagan, J., concurring). “If the statute is genuinely ambiguous, such that overturning the officer’s judgment requires hard interpretive work, then then officer has made a reasonable mistake. But if not, not.” Id. Moreover, an “officer’s reliance on ‘an incorrect memo or training program’ . . . makes no difference to the analysis.” Id. at 69. The inquiry as to the objective reasonableness of the mistake is not to be as

forgiving as that employed in deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation. Id. at 66-67.

[¶ 26] Where there is an ambiguity, a finding that a mistaken interpretation was objectionably reasonable is possible. United States v. Martin, 411 F.3d 998, 1001-02 (8th Cir. 2005) (ambiguity in tribal ordinance concerning “stop” or brake lights). However, where a statute is unambiguous, a mistaken interpretation is not objectively reasonable: when the plain meaning of a statute does not lead to an absurd result, judicial inquiry is at an end and the statute must be enforced as written. United States v. Jungers, 702 F.3d 1066, 1069 (8th Cir. 2013) (internal citations omitted). Moreover, the concept of an objectively reasonable mistake of law cannot be unmoored from actual legal authority and, as such, an officer’s errant past practices or individual interpretation not grounded in actual law cannot justify a stop. United States v. Washington, 455 F.3d 824, 827-28 (8th Cir. 2006) (citing Martin, 411 F.3d 998, 1001-02). See also United States v. Mota, 155 F. Supp. 3d 461, 473-75 (S.D.N.Y. 2016) (citing Heien, 547 U.S. 54 (2014); United States v. Santos, 541 F.3d 63, 67 (2d Cir. 2008)) (unambiguous statute, despite government’s effort to read ambiguity into statute, meant that stop based on number and character of tail lights was not an objectively reasonable mistake); United States v. Black, 104 F. Supp. 3d 997, 1005-08 (W.D. Mo. 2015) (internal citations omitted) (stop based on officers’ own beliefs about air fresheners violating “obstruction” ordinance not objectionably reasonable).

[¶ 27] As addressed above, multiple courts have addressed the issue of applicability of turn signal statutes worded very similarly to North Dakota's and specifically held that a vehicle, continuing in the same direction of travel they were heading upon entering the roundabout is not changing a lane or direction of travel and therefore not required to use a turn signal. North Dakota's statute as to when use of a turn signal is required is not ambiguous. Accordingly, the stop of McCorkell's vehicle was not the product of an objectively reasonable mistake and, thus, the resulting seizure was in violation of his rights under the Fourth Amendment.

[¶ 28] Absent an exception to the warrant requirement, the exclusionary rule requires suppression of evidence obtained in violation of the Fourth Amendment's protections against warrantless searches or seizures. See State v. Haibeck, 2004 ND 163, ¶ 9, 685 N.W.2d 512; see also State v. Zwicke, 2009 ND 129, ¶ 7, 767 N.W.2d 869. As such, evidence must be suppressed as derivative "fruit" of the illegal seizure. See Nardone v. United States, 308 U.S. 338, 341 (1939) (noting that unless it comes from an independent source, evidence derived from a Fourth Amendment violation is also protected by the exclusionary rule). Suppression of McCorkell's identification, which was obtained in response to Hoffer's actions after an illegal seizure, along with any statements made by McCorkell, or observations and other information acquired by Hoffer during the seizure, is the only action the Court can take sufficient to deter future illegal traffic stops and Fourth Amendment violations.

**[¶ 29] III. The remaining evidence is insufficient to support the Judgment.**

[¶ 30] This case differs from other similar suppression cases in that all the evidence supporting the charge here was obtained during the illegal stop. See, e.g., State v. Thorarson, 440 N.W.2d 510, 512-13 (N.D. 1989) (discussing inevitable discovery and independent source exceptions to the exclusionary rule). That is, without the illegal stop and demand for identification and further communication, Hoffer likely would never have discovered McCorkell was driving while his privilege to do so was suspended or revoked. In other words, in this case, all inculpatory evidence was obtained as a result of an illegal stop. Typically, an officer can determine the registered owner of an automobile by checking the license plate number. Obviously, an officer can do that at any time, before or after a traffic stop. If the owner's name comes back as suspended or revoked, and the driver generally matches the description of the registered owner, the officer may have a reasonable and articulable suspicion of illegal activity. That did not occur here. The sole reason, by Hoffer's own testimony, for making this stop was that McCorkell failed to use his turn signal coming through the roundabout while continuing in the same direction of travel as when he entered.

[¶ 31] This entire matter rests upon evidence obtained after McCorkell was seized. As such, the remaining evidence, if that discovered as a result of the illegal seizure is suppressed, is insufficient to support the Judgment and requires its reversal, as well as dismissal of the charge against McCorkell.

[¶ 32] **CONCLUSION AND ORAL ARGUMENT REQUEST**

[¶ 33] For the reasons set forth above, Larry Wayne McCorkell respectfully requests this honorable Court vacate the Judgment in this matter, reverse the District Court's denial of his Motion to Suppress, remand this matter to the District Court for withdrawal of his conditional guilty plea, and order that the evidence obtained as a result of the stop be suppressed and the charge against him be dismissed.

[¶ 34] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, the Appellant requests that this Court schedule oral argument. Appellants contend that oral argument would be appropriate in light of the fact the analysis of the particular statute and its application to roundabouts is a matter of first impression in North Dakota.

Dated this 9th day of March, 2021.

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**[¶ 35] CERTIFICATE OF COMPLIANCE**

[¶ 36] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief was prepared with Times New Roman, size 13-point font, proportional typeface and that the total number of pages is 18 and does not exceed 38 pages.

Dated this 9th day of March, 2021.

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[¶ 37] **CERTIFICATE OF SERVICE**

[¶ 38] I hereby certify a true and correct copy of the foregoing **Appellant's Brief and Appellant's Appendix** on the date below was emailed to the following:

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