

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ronald Dale McCoy,

Appellant,

v.

Grant Levi, Director of the
North Dakota Department of
Transportation,

Appellee.

Supreme Court Case No. 20130300
District Court Case No. 45-2013-CV-00349

APPELLANT'S REPLY 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**

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[¶3] ISSUES ADDRESSED IN REPLY BRIEF

I. Does the exclusionary rule apply in civil implied consent hearings?

II. Is North Dakota's implied consent law a valid exception to the warrant requirement?

[¶4] LAW AND ARGUMENT

[¶5] Analysis

I. N.D.C.C. § 28-32-24(3) and § 28-32-46 provide for the exclusion of illegally obtained evidence in civil implied consent proceedings.

[¶6] Section 28-32-24(3), N.D.C.C., states:

Upon 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.

The hearing officer erroneously concluded he did not have the authority to exclude evidence and did not make any findings of fact regarding whether evidence should be excluded because the wardens illegally detained Richter. Under N.D.C.C. § 28-32-46, if we do not affirm the order of the agency, the order "must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court." We therefore reverse under N.D.C.C. § 28-32-46(7) and remand for the hearing officer to make findings of fact that sufficiently address the evidence presented to the agency by the appellant.

In determining whether the evidence should be excluded, the hearing officer should determine whether a valid citizen's arrest occurred or whether Richter was illegally seized by the wardens. If the evidence was the result of an illegal seizure, the hearing officer has the authority to exclude the evidence obtained from that illegal seizure

Richter v. North Dakota Department of Transportation, 2008 ND 105, ¶19-20, 750

N.W.2d 430. Therefore, as explained in Richter, the exclusionary rule does apply in civil implied consent proceedings to illegally seized evidence.

[¶7] Further, because N.D.C.C. § 28-32-46 requires that upon review the court must affirm an agency decision unless “[t]he order is in violation of the constitutional rights of the appellant” the exclusionary rule does apply in civil implied consent proceedings.

[¶8] **Analysis**

II. North Dakota’s implied consent law is not a valid exception to the warrant requirement.

[¶9] Counsel is aware of no published decision that allows the North Dakota legislature or a North Dakota agency to draft a law or rule to validly circumvent the warrant requirement. In fact it appears that North Dakota’s Constitution would forbid the same. 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.

[¶10] The Department argues that the United States Supreme Court in Missouri v. McNeely, 569 U.S. ___, 133 S.Ct. 1552 (2013) “expressly recognized the continued viability of implied consent laws as a recognized exception to the warrant requirement in the absence of demonstrated exigent circumstances.”

Appellees Brief page 11. However, if that is the case then why wasn't the search in McNeely valid as an exception to the warrant requirement pursuant to the State of Missouri's implied consent law? The answer is the Department is misreading McNeely. McNeely is a clarification of Schmerber v. California, 384 U.S. 757 (1966) that defines exigent circumstances. McNeely does not expressly recognize implied consent laws as an exception to the warrant requirement in the absence of demonstrated exigent circumstances.

[¶11] Article I Section 24 of the Constitution of the State of North Dakota states that “[t]he provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise.” Thus Article I Section 8 is mandatory and prohibitory. The Department however argues that because a driver can consent to a search it is legal for the State to require that consent in order to obtain the privilege to drive. The Department's argument however conflicts with the doctrine of unconstitutional conditions articulated by the United States Supreme Court in Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593-94 (1926) where the Supreme Court stated 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.

[¶12] Because North Dakota's implied consent law requires that a driver

relinquish their Article I Section 8 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.

¶13] **CONCLUSION**

¶14] Based on the foregoing arguments and law Mr. McCoy respectfully requests that the decision to suspend his North Dakota driving privileges for 180 days be reversed.

Dated: December 30, 2012

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**CERTIFICATE OF ELECTRONIC
SERVICE OF APPELLANT'S BRIEF
AND APPENDIX**

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[¶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 December 30, 2013 he electronically served the following on Michael Pitcher, Assistant North Dakota Attorney General representing the North Dakota Department of Transportation:

APPELLANT'S REPLY BRIEF

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

Dated: December 30, 2013

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