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STATE OF NORTH DAKOTA

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 PETITION FOR REHEARING** **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] **LAW AND ARGUMENT**

[¶4] **I. The North Dakota Supreme Court's reliance on the decision in State v. Moore, 318 P.3d 1133 (Or. 2013) is misplaced because the penalty imposed by the State of North Dakota is constitutionally impermissible.**

[¶5] The quote from Moore, at 1139 ("[I]t is difficult to see why the disclosure of accurate information about a particular penalty that may be imposed—if it is permissible for the state to impose that penalty—could be unconstitutionally coercive."), used to support the opinion in McCoy v. North Dakota Department of Transportation, 2014, ¶18 ND 119 reveals a fatal flaw in applying the Oregon Supreme Court's reasoning to the facts of McCoy to determine that Mr. McCoy's consent was free and voluntary. As Mr. McCoy argued previously it is constitutionally impermissible to penalize the exercise of a constitutional right. North Dakota law however does just that by penalizing the refusal to consent to a warrantless request to submit to a chemical test thereby penalizing a refusal to consent to a warrantless search. Because it is not permissible for the State to impose a penalty for a refusal to consent to a warrantless search (See Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 540 (1967); See v. City of Seattle, 387 U.S. 541, 546 (1967)) the reasoning in Moore would actually dictate a result in favor of finding that Mr. McCoy did not freely and voluntarily consent to a warrantless search.

[¶6] In United States v. Biswell, 406 U.S. 311, 314-315 (1972) the United States Supreme Court found that when a statute authorizes a search the legality of the

search does not depend on consent because the consent is only the lawful submission to authority and it is the legality of the statute that determines the legality of the search. The McCoy decision is not in alignment with Biswell and the North Dakota Supreme Court should rehear its decision in McCoy and find that Mr. McCoy had a constitutional right to refuse a warrantless request to consent to a chemical test and that it was unlawful to compel his consent to waive the exercise of a constitutional right by the threat of administrative penalties against him and the loss of the privilege to drive.

[¶7] **II. The North Dakota Supreme Court's reliance on the Minnesota Supreme Court's decision in State v. Brooks, 838 N.W.2d 563 (Minn. 2013) is misplaced because Brooks relies on a reading of South Dakota v. Neville, 459 U.S. 553 (1983) that has been abrogated by Missouri v. McNeely, 133 S. Ct. 1552 (2013).**

[¶8] Brooks is a fourth amendment consent case that relies on Neville, a fifth amendment consent case, to determine if consent is coerced when one of the choices is penalized. Brooks dramatically misreads Neville which only concluded that the act of refusal was not coerced under the fifth amendment and did not address fourth amendment issues. Further, Neville at 559 actually states that "Schmerber, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." In light of McNeely however it appears that the reasoning in Neville has been abrogated as the United States Supreme Court appears to read Schmerber v. California, 384 U.S. 757 (1966) to mean that a driver does have a constitutional right to refuse a warrantless request to submit to a chemical test and Neville plainly states the driver has no such right.

Neville at 560 ("Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections."). Therefore in light of the Brooks decision relying on Neville which states a legal position that has been abrogated by McNeely the North Dakota Supreme Court should rehear its decision in McCoy and rely instead on decisions that have not been abrogated. It is logically inconsistent to claim consent is free and voluntary when one of the choices is penalized and the purpose behind the law penalizing the choice is to compel the decision to obtain consent. Such a finding is a legal fiction the United States Supreme Court warned of in Boyd v. United States, 116 U.S. 616, 635 (1886) when the Court wrote:

> 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.

[¶9] **III. The North Dakota Supreme Court should grant the parties an opportunity to submit supplemental briefs and additional argument on the issue of unconstitutional conditions.**

[¶10] In McCoy, at ¶28, the Court refused to decide the issue raised by appellant that the North Dakota implied consent law violated the doctrine of unconstitutional conditions because "the constitutionality of implied consent laws as an unconstitutional condition has not been briefed or argued by either party in

any meaningful way." This assertion by the Court is unfair to the appellant because the argument made was clearly understood by the Court when it wrote at paragraph 25 that "McCoy argues North Dakota's implied consent law conditions the privilege of driving on a driver's surrender of the right to be free from unreasonable searches, presenting an "unconstitutional condition" under Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926)."

[¶11] Appellant's argument was no a bare assertion. Appellant succinctly stated his argument and supported the same with valid legal authority. Appellant argued that driving is a privilege, and that North Dakota law conditions that privilege on the concept of implied consent. Appellant then quoted Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) where the United States Supreme Court stated that

> as a general rule, the state, having the 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 * * * may thus be manipulated out of existence.

Appellant's argument applied well known facts to well-known law and argued an obvious conclusion. Appellant should not be penalized because his argument is brief and easily understood.

[¶12] It appears that the Court in McCoy has determined that driving is a privilege and the law itself tells us that it conditions the privilege to drive on the giving of consent. Therefore all that is left to decide then is whether the giving of

that consent is the surrender of a constitutional right? The appellant argues the answer is obvious because his consent is being used to justify a warrantless search and therefore the law must be requiring the surrender of a constitutional right in exchange for a mere privilege. Therefore the appellant respectfully requests that the Supreme Court rehear this matter.

[¶13] The appellant further requests that in light of the Court's admonition in McCoy at ¶ 28 that "the constitutionality of implied consent laws as an unconstitutional condition has not been briefed or argued by either party in any meaningful way," the Supreme Court grant the appellant's petition to rehear the matter and afford the parties the opportunity to brief and argue the argument surrounding the application of implied consent laws to the doctrine of unconstitutional conditions in a meaningful way.

[¶14] **CONCLUSION**

[¶15] Based on the foregoing arguments and law Mr. McCoy respectfully requests that the North Dakota Supreme Court grant this petition for rehearing.

Dated: July 8, 2014

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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 **CERTIFICATE OF ELECTRONIC SERVICE OF APPELLANT'S PETITION FOR REHEARING** **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**

[¶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 July 8, 2014 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: July 8, 2014

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