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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 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] **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 ISSUE ON APPEAL**

Did the Administrative Hearing Officer err in the Conclusions of Law because the breath test taken by law enforcement was a warrantless search and the department failed to establish an exception to the warrant requirement and therefore, the Hearing Officer's decision violated the Appellant's Constitutional rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the Constitution of the State of North Dakota? See N.D.C.C. § 28-32-24(3) and § 28-32-46(2).

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Ronald Dale McCoy, appeals from the North Dakota Department of Transportation's April 18, 2013 decision suspending his North Dakota driving privileges for 180 days, and the District Court's July 11, 2013 Memorandum and August 1, 2013 Judgment affirming that decision. Appendix 4, 8, 19.

[¶8] The Appellant, Mr. McCoy, argues that the Department erred when it suspended his driving privileges based on the results of a warrantless search. Because the Department failed to establish an exception to the warrant requirement its decision to suspend Mr. McCoy's North Dakota driving privileges for 180 days should be reversed.

[¶9] **STATEMENT OF THE FACTS**

[¶10] On March 24, 2013, law enforcement stopped the vehicle being driven by Mr. McCoy. Transcript page 4, line 3 to page 5 line 2 (T. 4:3 to 5:2). After conducting field sobriety tests law enforcement arrested Mr. McCoy for DUI. T. 14:8-11). After being arrested, placed in handcuffs and then transported to the law enforcement center, law enforcement read the North Dakota implied consent advisory to Mr. McCoy and asked him to take a breath test. T. 14:10-20. Mr. McCoy agreed to take the test offered. T. 14:20; 33:22 to 34:1.

[¶11] Law enforcement made no attempt to obtain a search warrant. T. 34:4-7.

[¶12] **LAW AND ARGUMENT**

[¶13] **Standard of Review**

[¶14] "The [North Dakota Department of Transportation's] authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. Schaaf v. N.D. Dep't of Transp., 2009 ND 145, ¶ 9, 771 N.W.2d 237." Landsiedel v. Director Dept. of Transp., 2009 ND 196 ¶6, 774 N.W.2d 645, 647.

[¶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] The North Dakota Supreme Court exercises

> limited review of the administrative revocation of driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 9, 622 N.W.2d 180.

> [The North Dakota Supreme Court's] standard of review is the same standard applied by the district court. N.D.C.C. § 28-32-49. [The court] must affirm the administrative agency's decision unless:
>
> 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. N.D.C.C. § 28-32-46.

Bell v. North Dakota Dep't of Transp., 2012 ND 102 ¶8, 816 N.W.2d 786.

[¶17] **Analysis**

The Administrative Hearing Officer erred in the Conclusions of Law because the breath test taken by law enforcement was a warrantless search and the department failed to establish an exception to the warrant requirement and therefore, the Hearing Officer's decision violated the Appellant's constitutional rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the Constitution of the State of North Dakota.

[¶18] "[E]ver since Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), evidence obtained by search and seizure violative of the Fourth Amendment is, by virtue of the Due Process Clause of the Fourteenth Amendment, inadmissible in State courts. State v. Manning, 134 N.W.2d 91

(N.D. 1965)." State v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974). Because Mr. McCoy's breath test result was obtained without a warrant and in the absence of any valid exception to the warrant requirement of the Fourth Amendment to the United States Constitution or Article I Section 8 of the Constitution of the State of North Dakota the order suspending Mr. McCoy's driving privileges that relies on that breath test result violates Mr. McCoy's constitutional rights and should be rescinded. See N.D.C.C. § 28-32-46; but see Timm v. State, 110 N.W.2d 359, 362 (N.D. 1961)("[S]tatutes may be enacted which declare that the use of the public highways by any person shall be deemed the equivalent of an affirmative consent to a chemical test . . . subject to the other provisions of the statute.").

[¶19] "[I]t is well-settled that administration of a breath test to determine alcohol consumption is a search. See, e.g., Skinner v. Railway Labor Executive' Ass'n, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1449 (9th Cir.1986); Blank v. State, 3 P.3d 359, 366 (Alaska Ct. App. 2000); Blair v. Commonwealth, 115 Pa. Cmwlth. 293, 539 A.2d 958, 960 (1988); State v. Locke, 418 A.2d 843, 846-47 (R.I. 1980); 1 Wayne R. LaFave, Search and Seizure § 2.6(a) (1996)." City of Fargo v. Wonder, 2002 N.D. 142, ¶19, 651 N.W.2d 665, 670. Because the taking of a breath sample is a search, law enforcement must obtain a search warrant or meet an exception to the search warrant requirement. See Matthews at 99.

[¶20] One of the exceptions to the warrant requirement is that the person consented to the search. State v. Swenningson, 297 N.W.2d 405 (N.D. 1974).

The Fourth Amendment requires that consent to a search be voluntary. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Page, 277 N.W.2d 112 (N.D. 1979). To determine what constitutes "voluntary consent" the court considers the totality of the circumstances at the time that consent was given. State v. Metzner, 244 N.W.2d 215 (N.D. 1976). Consent must be the product of an essentially free and unconstrained choice; it cannot be the product of coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

[¶21] The facts of this case demonstrate that Mr. McCoy was coerced into giving his consent by the reading of the Implied Consent Advisory. Essentially, Mr. McCoy was allowed the privilege to drive in return for the surrender of his rights under the Fourth Amendment of the United States Constitution and Article I Section 8 of the North Dakota Constitution. Consent is voluntary if it is "the product of an essentially free and unconstrained choice by its maker, rather than the product of duress or coercion, express or implied." Schneckloth, 412 U.S. at 222. Mr. McCoy was not presented a free and unconstrained choice when he was threatened with the loss of his driving privileges if he refused to consent to a warrantless search.

[¶22] The State cannot prove consent simply by showing an individual acquiesced to a claim of lawful authority or submitted to a show of force. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Fourth Amendment consent does not lie where the police claim to have a right to the result. Bumper at 550. In

Bumper, the police showed up at the defendant's home with a search warrant, and upon showing it to the defendant's grandmother, she consented to allow them to search the defendant's home. The Court in Bumper said:

> [¶23] One is not held to have consented to the search of his premises where it is accomplished pursuant to an apparently valid search warrant. On the contrary, the legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant rather than an invitation to search.
>
> One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law . . .. The presentation of a search warrant to those in charge at the place to be searched, by one authorized to serve it, is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law. (Citations omitted).

Bumper at 549, fn. 14.

[¶24] Under these rules, the State has the burden to prove that consent was freely and voluntarily given. Bumper, 391 U.S. at 548. To do so, the State must prove that Mr. McCoy's performance of the test was not the product of submission to the officer's legal authority. Id. To make that determination, the court must examine the totality of circumstances that led to Mr. McCoy performing the test. Schneckloth, 412 U.S. at 224-27. Under these circumstances, the State cannot prove that Mr. McCoy freely and voluntarily consented to what would otherwise be an unconstitutional warrantless search. Consent under the threat of losing your driving privileges is not free and voluntary consent.

[¶25] 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.

[¶26] North Dakota's "implied consent" law cannot substitute for the consent necessary for a valid exception to the warrant requirement. Article I, Section 20 of the North Dakota Constitution specifically states that "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this Article [Article I] is excepted out of the general powers of government and shall forever remain inviolate." Therefore, the legislature cannot

dispense with the warrant and reasonableness requirements of Article I, Section 8 in favor of the department's expeditions regulation of driving privileges.

[¶27] For an analogous example take the case of State v. Hayes, 2012 ND 9, ¶39, 809 N.W.2d 309. In that case

> 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.

At the time of Mr. McCoy's arrest refusal to test was not a crime. However Mr. McCoy was faced with a similar circumstance; that being consent to a warrantless search or lose the privilege to drive. As in Hayes Mr. McCoy did not provide voluntary consent to search.

[¶28] The United States Supreme Court has established that a State-created privilege "cannot be made to depend upon the surrender of a right created and guaranteed by the federal Constitution." Frost v. R.R. Comm'n, 271 U.S. 583, 596, 46 S. Ct. 605, 608, 70 L. Ed. 1101 (1926). Because chemical testing under North Dakota's implied-consent law constitutes a "search" within the meaning of the Fourth Amendment, any consent to be searched that is obtained "must be received, not extracted." State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994); see also In re Welfare of J.W.K., 583 N.W.2d 752, 755 (Minn. 1998) (applying Fourth Amendment protections to physical act of drawing blood and medical data obtained from subsequent chemical analysis).

[¶29] The Frost Court had long ago written the rationale behind this doctrine of unconstitutional conditions. They wrote:

> [A]s 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.

Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926).

[¶30] The doctrine of unconstitutional conditions applies as well in North Dakota and therefore Mr. McCoy should not have to relinquish a Constitutional Right in order to obtain the privilege to drive. But North Dakota's implied consent law does just that by conditioning the grant of the privilege to drive upon a driver's surrender of his Constitutional right to be secure against unreasonable searches by requiring that the driver submit to a chemical test without a warrant.

[¶31] **CONCLUSION**

[¶32] Mr. McCoy's test result was obtained in violation of the Fourth Amendment of the United States Constitution and Article I Section 8 of the Constitution of the State of North Dakota because it was obtained without a warrant and without an exception to the warrant requirement. Absent a valid exception to the warrant requirement the Department's reliance on that test result would make its order unconstitutional and therefore that order should be rescinded. See N.D.C.C. § 28-32-24(3) and § 28-32-46(2)("[T]he court must

affirm the order of the agency unless it finds that . . . [t]he order is in violation of the constitutional rights of the appellant.").

[¶33] Based on the foregoing arguments and law Mr. McCoy respectfully requests that the District Court reverse the Department's suspension of his North Dakota driving privileges for 180 days.

Dated: November 12, 2012

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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 **CERTIFICATE OF ELECTRONIC SERVICE OF APPELLANT'S BRIEF AND APPENDIX** **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 November 12, 2013 he electronically served the following on Michael Pitcher, Assistant North Dakota Attorney General representing the North Dakota Department of Transportation:

APPELLANT'S BRIEF
APPELLANT'S APPENDIX

by sending a pdf copy to the email address mtpitcher@nd.gov.

Dated: November 12, 2013

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