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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Burt Justin Keltner, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee.	Supreme Court Case No. 20130380 District Court Case No. 45-2013-CV-00568 **APPELLANT'S REPLY BRIEF** **APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE WILLIAM HERAUF, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

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[¶3] **LAW AND ARGUMENT**

I. North Dakota's implied consent law violates the doctrine of unconstitutional conditions and is not a valid exception to the warrant requirement.

[¶4] 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 and North Dakota's Constitution appears to 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.

[¶5] The Department argues that the United States Supreme Court in Missouri v. McNeely, 569 U.S. ___, 133 (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." Appellee's Brief page 9. 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 defined exigent circumstances. McNeely does not expressly recognize implied consent laws as an exception to the warrant requirement in the absence of demonstrated

exigent circumstances.

[¶6] The Department cites numerous cases it claims support its argument that North Dakota's implied consent law can operate as an exception to the warrant requirement. However, the cases cited by the Department to support its claim all appear to misread the ruling in Schmerber to be that the search incident to arrest exigent circumstances exception applies to all arrests for DUI as a per se exigency. The United States Supreme Court in McNeely clarified that there is no such per se exigency. Therefore, in light of the United States Supreme Court's ruling in McNeely that law enforcement needed a search warrant despite Missouri's implied consent law, implied consent laws do not represent a valid exception to the warrant requirement.

[¶7] To the extent that the Department would argue that the out of state decisions it cites support the proposition that those implied consent laws are exceptions to the warrant requirement that argument was abrogated by the United States Supreme Court in McNeely when it required the State to get a warrant to search the driver despite the invocation of Missouri's implied consent law.

[¶8] The Department relies on the Minnesota case of State v. Brooks, 838 N.W.2d 563 (Minn. 2013) to argue that implied consent laws are not coercive. The analysis in the Brooks opinion, that implied consent laws are not coercive, is flawed. The Brooks majority based its decision on Minnesota cases decided before the decision in McNeely at a time when Minnesota operated under a misreading of Schmurber that was clarified in McNeely.

[¶9] As explained in the concurring opinion in Brooks the majority disregarded valid Minnesota precedent that implied consent laws are coercive to reach its conclusory decision that they are not. See Prideaux v. State Department of Public Safety, 247 N.W.2d 385, 388 (Minn. 1976)("The obvious and intended effect of the implied-consent law is to coerce the driver suspected of driving under the influence into 'consenting' to chemical testing, thereby allowing scientific evidence of his blood-alcohol content to be used against him in a subsequent prosecution for that offense.").

[¶10] The North Dakota Supreme Court has stated that the "purpose of the implied consent law is to discourage individuals from driving an automobile while under the influence of intoxicants; to revoke the driving privileges of those persons who do drive while intoxicated; and to provide an efficient means of gathering reliable evidence of intoxication or nonintoxication." Asbridge v. North Dakota State Highway Commissioner, 291 N.W.2d 739, 750 (N.D. 1980). Implied consent laws gather evidence by coercing drivers to consent to a search. See Rodewald v. Kan. Dep't of Revenue, 297 P.3d 281, 287 (Kan. 2013)("the purpose of the implied consent law is to coerce a driver's submission to chemical testing through the threat of statutory penalties, including license revocation for refusing the test"); People v. Superior Court (Hawkins), 493 P.2d 1145, 1149 (Cal. 1972)("the Legislature devised an additional or alternative method of compelling a person arrested for drunk driving to submit to a test for intoxication, by providing that such person will lose his automobile driver's license for a period of six

months if he refuses to submit to a test for intoxication."). That type of coercion is unconstitutional. See Garrity v. State of New Jersey, 385 U.S. 493 (1967)("The choice imposed . . . was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under Chambers v. State of Florida, 309 U.S. 227 . . . can be 'mental as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' Blackburn v. State of Alabama, 361 U.S. 199, 206. Subtle pressures (Leyra v. Denno, 347 U.S. 556.; Haynes v. State of Washington, 373 U.S. 503.) may be as telling as coarse and vulgar ones.") (parallel citations omitted).

[¶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 appears to argue 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] In response to the Department's reliance on Council of Indep. Tobacco Mfrs. of Am. v. State, 713 N.W.2d 300, 306 (Minn. 2006), the statute in question (North Dakota's implied consent law) does deny the potential driver the benefit (driving privilege) by having the driver give up a constitutional right when but for the surrender of that right there is no other way to obtain the benefit (privilege to drive). Thus, Mr. Keltner has met the threshold requirement to establish that the doctrine of unconstitutional conditions applies because North Dakota's implied consent law denies him the benefit of driving unless he gives up a constitutional right. See Frost.

[¶14] At page 11 of its brief the Department goes on to argue that Mr. "Keltner failed to demonstrate an unconstitutional search [and therefore] the Supreme Court does not need to analyze [Mr.] Keltner's argument under the unconstitutional conditions doctrine." The Department cites no authority for its conclusion and Mr. Keltner argues the Department's conclusion is incorrect and that he has met the threshold burden articulated in Council of Indep. Tobacco Mfrs. of Am. and cited by the Department.

[¶15] **LAW AND ARGUMENT**

II. Mr. Keltner did not waive his argument that the Department lacked subject matter jurisdiction to suspend his driving privileges by failing to identify the issue in his Notice of Appeal and Specifications of Error.

[¶16] Mr. Keltner argued before the Department to the Hearing Officer that the Department lacked jurisdiction to suspend his driving privileges because the Report and Notice form (Exhibit 1b, Appendix 4) submitted to the Department indicated that law enforcement did not advise Mr. Keltner as required by statute and as indicated on the form itself. T. 42:11-43:22. Mr. Keltner's argument is that in DUI cases there are two classes of cases; those where law enforcement invokes the implied consent laws to obtain evidence and those where law enforcement does not.

[¶17] Mr. Keltner's argument is that the Department lacked subject matter jurisdiction because the Report and Notice from sent to the Department indicated that the case was one in the class where law enforcement did not use the implied consent law to obtain evidence.

[¶18] According to the North Dakota Supreme Court "[i]ssues involving subject matter jurisdiction cannot be waived and can be raised sua sponte at any time." Earnest v. Garcia, 1999 ND 196, ¶ 7, 601 N.W.2d 260. Therefore Mr. Keltner did not waive the issue of subject matter jurisdiction because the issue of subject matter jurisdiction cannot be waived and can be raised at any time. See id.

[¶19] **LAW AND ARGUMENT**

III. The Department lacked subject matter jurisdiction to suspend Mr. Keltner's driving privileges because the certified report required by N.D.C.C. § 39-20-03.2(3) failed to indicate "that the individual was tested for alcohol concentration under this chapter" by failing to indicate that Mr. Keltner was advised pursuant to N.D.C.C. § 39-20-01.

[¶20] As argued above, Mr. Keltner's position is that the Report and Notice form submitted to the Department in his case indicated that his case was in a class of cases where law enforcement did not use the implied consent law to obtain evidence. Upon reviewing the Report and Notice form the Department should have realized it did not have subject matter jurisdiction to suspend Mr. Keltner's driving privileges.

[¶21] The Department's authority to suspend Mr. Keltner's driving privileges is statutorily derived and the statute specifically required that the Report and Notice sent to the Department of Transportation contain information that the officer complied with N.D.C.C. § 39-20-03.2(3) and advised Mr. Keltner as required by N.D.C.C. § 39-20-01. Because law enforcement failed to inform the Department it was using the implied consent law to obtain evidence the Department did not have subject matter jurisdiction to go forward with a hearing or suspend Mr. Keltner's driving privileges.

[¶22] The Report and Notice form (Exhibit 1b, Appendix 4) submitted to the Department indicated that law enforcement did not advise Mr. Keltner as required by statute and as indicated on the form itself. N.D.C.C. § 39-20-01 indicates that

"[t]he law enforcement officer shall inform the individual . . ." and by using the term shall made the provision basic and mandatory. See Aamodt v. North Dakota Dept. of Transp., 2004 ND 134, 682 N.W.2d 308 (articulated the concept of whether certain statutory provisions are basic and mandatory provisions that require compliance before the Department is authorized to suspend a person's driving privileges). Because the Report and Notice form failed to fulfill a basic and mandatory provision that grants the Department subject matter jurisdiction the Department had no authority to suspend Mr. Keltner's driving privileges. See Morrow v. Ziegler, 2013 ND 28, ¶16, 826 N.W.2d 912 (Justice Kapsner concurring. "I concur because the form was filled out by the patrol officer in a manner that would have indicated that the Department had no authority to suspend Morrow's driving privileges.").

[¶23] **CONCLUSION**

[¶24] Based on the foregoing arguments and law Mr. Keltner respectfully requests that the decision to suspend his North Dakota driving privileges for 91 days be reversed.

Dated: February 20, 2014

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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 February 20, 2014 he electronically served the following on Douglas Anderson, Assistant North Dakota Attorney General representing the North Dakota Department of Transportation:

APPELLANT'S AMENDED REPLY BRIEF

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

Dated: February 20, 2014

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