IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Appellee-Plaintiff,	)	
	)	
-vs-	)	
	)	
James Nagel,	)	Supreme Ct. No. 20140179
	)	
Defendant- Appellant,	)	District Ct. No. 08-2014-CR-55
.....	)	

BRIEF OF APPELLEE- PLAINTIFF

APPEAL FROM ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS AND STRIKE PER SE OFFENSE ENTERED ON MAY 9, 2014, ORDER ACCEPTING CONDITOINAL GUILTY PLEA DATED MAY 13, 2014, AND AMENDED ORDER ACCEPTING CONDITIONAL GUILTY PLEA DATED JUNE 24, 2014

Burleigh County District Court
South Central Judicial District
The Honorable Cynthia Feland, Presiding

Lea Wilson
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STATEMENT OF THE ISSUE

Was Mr. James Nagel searched and seized in violation of the Fourth Amendment, applicable to the States through the Fourteenth amendment and Article I, Section 8 of the North Dakota State Constitution without a search warrant, or an exception to the warrant requirement?

STATEMENT OF THE CASE

The State concurs with Mr. Nagel's statement of the case regarding the hearings and rulings that took place in district court.

STATEMENT OF FACTS

The State concurs with Mr. Nagel's statement of the facts in this case.

LAW AND ARGUMENT

Issue: Was Mr. James Nagel searched and seized in violation of the Fourth Amendment, applicable to the States through the Fourteenth amendment, as well as Article I, Section 8 of the North Dakota State Constitution without a search warrant, or an exception to the warrant requirement.

Consent

Mr. Nagel argues that he was subjected to an illegal search and seizure without any exception to the warrant requirement when he submitted to a breath test. Specifically, Mr. Nagel argues that his consent to the intoxilyzer breath test was not valid due to the coercive and threatening nature of the North Dakota Implied Consent law contained in N.D.C.C. section 39-20-01 and the criminalization of refusal to submit to such a chemical test contained in N.D.C.C. section 39-20-01(3). It is the State's position that Mr. Nagel freely and voluntarily consented to the chemical breath test after being informed of his options. Consent is a valid exception to the warrant requirement, thus no warrant was needed.

The State agrees with Mr. Nagel's statement of the law regarding the administration of a breath or blood test being considered a search, and thus governed by the Fourth Amendment right to be free from unreasonable searches and seizures without a warrant. Consent is a well-recognized

exception to the warrant requirement. This matter has recently been reviewed and decided by the Supreme Court of Minnesota in *State v. Brooks*, 838 N.W. 2d 563 (Minn. 2013). It was held that in order for a search to fall under the consent exception the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented. To determine if consent is voluntarily the Court looks to a "totality of the circumstances" test. *Brooks, supra at* 568. The Court further states that consent can be voluntary even if the circumstances of the encounter are uncomfortable for the person being questioned. *Brooks, supra*, at 569. The facts in *Brooks, supra* are identical to the case pending before this Court. The defendant was read the Minnesota implied consent law, which makes it a crime to refuse to take the chemical test; the defendant consented to the test after being informed of the options and consequences. The Court held that the consent was voluntary and thus the search was consensual and no warrant was needed. The Court stated that "whether *Brooks* consented is assessed by examining all of the relevant circumstances . . . including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Brooks supra at* 569 (citing *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)). As seen in *Brooks, supra*, the facts presented in the case at hand involve a routine traffic investigation whereby probable cause for the arrest of driving under the influence was established. Based on this determination the Officer simply read Mr. Nagel the North Dakota implied consent law as it is written in a polite and cordial way. The Defendant in *Brooks* made the same argument

that Mr. Nagel is making in the case at hand; that his consent was coerced and invalid because he truly did not have a choice because if he refused he would be committing a separate crime. The Minnesota Supreme Court disagreed with this suggestion.

The Supreme Court of Minnesota applied the reasoning from *Neville,* quoting "the State did not directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing." *Id.; South Dakota v. Neville*, 459 U.S. 553, 562 (1983). The Minnesota Supreme Court had this to say regarding the decision in *Neville:*

> *Neville* and *McDonnell* examine the issue of coercion within the context of the Fifth Amendment privilege against self-incrimination. But the question in both cases was whether the existence of a consequence for refusing to take a chemical test rendered the driver's choice involuntary. We address the same question in the context presented here when we examine whether Brooks' consent was voluntary, as the State argues, or whether it was coerced, as Brooks argues. Based on the analysis in *Neville* and *McDonnell*, a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test.

Brooks, 13. The Court goes on to state that:

> The Minnesota Legislature has given those who drive on Minnesota roads a right to refuse the chemical test. If a driver refuses the test, the police are required to honor that refusal and not perform the test. Although refusing the test comes with criminal penalties in Minnesota, the Supreme Court has made clear that while the choice to submit or refuse to take a chemical test 'will not be an easy or pleasant one for a suspect to make,' the criminal process 'often requires suspects and defendants to make difficult choices.'

Id. at 13-14. The Minnesota Supreme Court followed the reasoning in *Neville* to hold that Brooks's consent was voluntary.

This direct issue has been recently reviewed and decided by this Court in *State v. Smith*, 2014 ND 152, No. 20130398 (N.D. 2014). The Smith case involved a typical traffic stop where the officer's observations led him to request a chemical test, implied consent was read, and the defendant consented to the chemical test. The defendant then moved to suppress the chemical test stating his consent to the chemical test was not voluntary given the "threatening" nature of the North Dakota Implied Consent law. This Court agreed with the holding in *Brooks, supra*, and held that "an individual's consent is not coerced simply because a criminal penalty has been attached to refusing the test or that law enforcement advised the driver of the law." *State v. Smith,* 2014 ND 152, ¶21 (citing *Brooks, supra*, at 570-72).

Other courts that have addressed the issue have ruled criminalization of refusal to submit to chemical testing does not amount to coerced consent in violation of due process. *See McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991); *see also South Dakota v. Neville*, 459 U.S. 553, 563-64 (1983). The court in *Deering v. Brown*, 839 F.2d 539, 544 (9th Cir. 1988), again relying on *Neville,* rejected the coerced consent argument when it said the state "does not compel a defendant to testify against himself when it allows him the choice of either producing evidence or facing criminal charges ... for withholding it." *Deering*, at 542-543. The Court went on to point out that criminalization increases the compulsion to submit to testing, rather than the compulsion to refuse. *Id.* There can be no coerced consent because a driver does not have a lawful right to refuse to submit to testing.

As the North Dakota statute criminalizing refusal is new, there is not a lot of case law addressing the issue from this jurisdiction. However, several other states have similar statutes with established case law supporting them, and the legal analysis from these cases can be applied in the context of the North Dakota statute. Other states have also criminalized refusal, or have sentencing enhancements imposing jail time for refusal to submit to chemical testing including Alaska, California, Florida, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and Vermont. Alaska Stat. § 28.35.032; Cal Veh. Code § 23577(a); Fla. Stat. Ann. §§ 316 1932, 775.082; Haw. Rev. Stat. § 291e-68; Kans. Stat. Ann. § 8-1001; Ky. Rev. Stat. Ann. §§ 189A.010(1), 189A.010(5)(a)-(e); La. Rev. Stat. Ann. § 14:98.2(B)(1); Me. Rev. Stat. Ann. Tit. § 29-A, § 2411(5)(A), (B), (C), (D); Md. Code Ann., Transp. § 27-101(x)(3); Minn. Stat. Ann. § 169A.20 subd, 2; Miss. Code. Ann. §§ 63-11-21, 63-11-30(2); Neb. Rev. Stat. §§ 60-6, 197, 60-6, 197.03; Ohio Rev. Code Ann. §§ 4511.19, 2929.24; 75 Pa. Cons. Stat. Ann. § 3804(c); R.I. Gen. Laws Ann. § 31-27-2.1(b); Tenn. Code Ann. § 55-10-406; Va. Code Ann. §§ 18.2-11, 18.2-268.3; Vt. Stat. Ann. tit. 23 §§ 1201(b), 102(d)(6), 1210(b). Furthermore, the federal government has made a first-time refusal to submit to chemical testing within the boundaries of a national park a misdemeanor punishable by up to six months in federal prison. 36 C.F.R. § 4.23(c)(2).

Many of these states have addressed issues similar to the issues raised by Mr. Nagel in the case at bar, and these states have each reached the same conclusion as the District Court made in the case at bar. Among them are Indiana (*Abney v. State*, 811 N.E.2d 415 (Ind. 2004)), Iowa (*State v. Madison*, 785 N.W.2d 706 (Iowa 2010)), Florida (*State v. Geiss*, 70 So.3d 642 (Fla. App. 2011)), Kansas (*State v. Johnson*, 301 P.3d 287 (Kan. 2013)), Arizona (*State v. Aleman*, 109 P.3d 571 (Ariz. App. 2005)), Oregon (*State v. Jude Silbernagel*, 215 P.3d 876 (Or. App. 2005)), Pennsylvania (*Com. v. Riedel*, 651 A.2d 135 (Penn. 1994)). Of the approximately 25 states that have criminalized refusal to submit to testing, none has declared the same unconstitutional. Alaska's Court of Appeals rejected constitutional challenges to that state's criminal refusal law in *Svedlund v. Anchorage*, 671 P.2d 378 (Alaska App. 1983), *Jensen v. State*, 667 P.2d 188 (Alaska App. 1983), and *Coleman v. State*, 658 P.2d 1364 (Alaska App. 1983).

In another case, the Ninth Circuit again upheld the law, relying on *Neville* for the position that refusal to submit to chemical testing is not an act coerced by police and is thus not protected by the privilege against self-incrimination. *Deering v. Brown*, 839 F.2d 539, 544 (9th Cir. 1988). The court specifically held that, "just as the imposition of *criminal* contempt penalties does not transform the refusal to obey a court order regarding nontestimonial evidence into a testimonial communication with respect to the contempt charge, . . . neither does the imposition by the [state] of a criminal penalty for refusal to provide the state with the physical evidence of a

breathalyzer test . . . qualitatively transform the refusal into testimony." *Id.* at 542. The Court further explained that the defendant's refusal in the case "was neither testimonial nor compelled. . . . As our discussion shows, that conclusion is not altered by the imposition of criminal penalties upon the choice of refusal." *Id.* at 544. Virginia courts have also upheld the implied consent statute against a Fourth Amendment challenge, stating that, "We also find no Fourth Amendment violation in punishing a DUI suspect for refusing to provide a breath sample under code § 18.2-268.3." *Rowley v. Commonwealth*, 629 S.E.2d 188, 191 (Va. App. 2006). "The act of driving constitutes an irrevocable, albeit implied, consent to the officer's demand for a breath sample." *Id.* Ohio has also ruled that a defendant "has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication," and it also ruled that the Ohio's refusal statute does not violate the Fourth Amendment. *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, 916 N.E.2d 1056, 1061, 1062 (2009), *cert. denied, Hoover v. Ohio*, 559 U.S. 1093 (2010).

In this case, Mr. Nagel did not refuse the chemical testing and was not charged with a refusal, but he still challenges the statute because he claims he was coerced due to what he perceived to be a threat of further prosecution if he were to refuse. The District Court's ruling rejecting this notion is supported by all the above cited case law. The mere reading of the implied consent advisory law to Mr. Nagel cannot be perceived as a threat or attempt at coercion. Mr. Nagel's only allegation of coercion revolves around the

language of the implied consent advisory itself, which advises him that refusal to submit to a chemical test is a crime. The facts of this case and the relevant case law lead to the conclusion that Mr. Nagel's consent to the breath test was voluntary.

Mr. Nagel further argues there should be a distinction drawn between the pre-arrest breath test and the post-arrest breath test. The State rejects this notion for two reasons. First this issue was not argued before the District Court in the original motion or hearing. The issue in District Court was limited to the voluntariness of the consent to the breath test and was not broken down between the two separate tests. The Supreme Court's review is limited to issues raised before the District Court. *State v. Zink*, 2010 ND 230, ¶ 6, 791 N.W.2d 161. Second, the implied consent advisory and the consequence of refusing to consent are the same for both tests. When implied consent is read the first time to request the preliminary breath test the Defendant is told he will be arrested for a crime of refusing if he does not consent. When implied consent is read the second time to request the chemical test he is again told that he will be arrested for the crime of refusing if he fails to consent. The language is the exact same and so is the penalty. The only difference is that when the chemical test is requested the defendant is already in custody. The fact that the defendant is in custody, having just been arrested for DUI, has been held to not determine the voluntariness of his consent to the chemical test. Although this Court has held that "circumstances should be viewed as more suspect when the subject it in custody," the fact that

a defendant is under arrest is not dispositive on the issue of voluntariness. *Smith, supra* at ¶ 19, (citing *State v. Lange*, 255 N.W.2d 59, 64 (N.D. 1982)). Mr. Nagel was arrested and immediately read the implied consent advisory once by the officer requesting the chemical test. His consent was not given after repeated requests from the officer and hours in custody.

CONCLUSION

Based upon the foregoing, the State requests that the ruling of the District Court be upheld in its entirety.

Dated this 21 day of August, 2014.

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STATE OF NORTH DAKOTA

State of North Dakota, Appellee-Plaintiff, -vs- James Nagel, Defendant-Appellant,	)	Supreme Ct. No. 20140179 District Ct. No. 08-2014-CR-55
STATE OF NORTH DAKOTA COUNTY OF BURLEIGH	) ss	

Stacey Baskerville, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 21st day of August, 2014, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Daniel J. Borgen (Bar ID# 06007)
Borgen Law LLC
Attorney for Defendant/Appellant
1110 College Drive, Suite 211
Bismarck, ND 58501
(701) 258-0250; Fax: (701) 224-0695

which address is the last known address of the addressee.

Stacey Baskerville
Stacey Baskerville

Subscribed and sworn to before me this 21 day of August, 2014.

MEGAN KLYM
Notary Public
State of North Dakota
My Commission Expires August 26, 2019

Megan Klym, Notary Public
Burleigh County, North Dakota
My Commission Expires: 08/26/2019.

MEGAN RUNG
Notary Public
State of North Dakota
My Commission Expires August 26, 2019