20140179

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	
	)	
vs.	)	Supreme Court No. 20140179
	)	Burleigh County District Court
James Nagel,	)	Case No.08-2014-CR-00055
	)	
Defendant and Appellant.	)	

Appeal from the

Order Denying Motion to Suppress and Strike Per Se Offense dated May 9, 2014,
Order Accepting Conditional Guilty Plea dated May 13, 2014; and
Amended Order Accepting Conditional Guilty Plea dated June 24, 2014.

District Court, Burleigh County, North Dakota
The Honorable Cynthia Feland, Presiding

BRIEF OF APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did Mr. Nagel voluntarily consent to a preliminary breath test or the intoxilyzer test when he was advised pre-arrest that he would be committing a crime if he did not submit to chemical testing, therefore, a warrantless search was performed without an exception to the search warrant requirement, in violation of the Fourth Amendment to the United States Constitution, and Article I, Section 8 of the North Dakota Constitution?

NATURE OF THE CASE AND PROCEDURAL HISTORY

¶1 On December 22, 2013, Mr. Nagel was arrested and charged with Driving Under the Influence of alcohol in Burleigh County ND. [App. 3]. The defendant was issued a citation. [App. 3]. On January 7, 2014 the charge was registered in Burleigh County court. [App. 1].

¶2 On April 3, 2014, Mr. Nagel filed a motion to suppress evidence based on the fact that the submission to the chemical tests were not truly consensual and therefore should be suppressed. [App. 5 – 11]. On April 9, 2014, the State filed a response brief arguing that Mr. Nagel has consented to the chemical tests and therefore the evidence should not be suppressed. [App. 12 – 14].

¶3 A hearing was held on the motion on April 30, 2014. At the hearing Mr. Nagel asked the court to suppress the results from the chemical test results, specifically addressing the pre-arrest screening device, because he was forced to consent. [Transcript (herein after Tr.) 13 – 18]. The District Court denied Mr. Nagel's motion and issued an order denying motion on May 9, 2014. [App 15].

¶4 On May 12, 2014 Mr. Nagel entered a conditional guilty plea. [App. 17-18]. The Court entered an order accepting the conditional guilty plea on May 13, 2014. [App 16]. Mr. Nagel filed a Notice of appeal on May 19, 2014. [App. 19]. On June 24, 2014, the court entered an amended order accepting conditional guilty plea, which specified the issue on appeal. [App. 20].

STATEMENT OF FACTS

¶5 On December 22, 2013, Sergeant Ray Dingeman of the Burleigh County Sheriff's Department was requested to assist with a traffic accident investigation of a vehicle striking a road sign in the city of Bismarck. [Tr. 4, Lines 5-7]. Sergeant Dingeman responded to the address of the registered owner of the vehicle. [Tr. 4, Lines 20 – 5; Line 3].

¶6 Upon arriving at the residence Sergeant Dingeman knocked on the door and made contact with Mr. Nagel. Sergeant Dingeman told Mr. Nagel why he was there and asked to see the vehicle. Mr. Nagel took Sergeant Dingeman to the garage where he was able to see the vehicle. [Tr. 5, Lines 5-14].

¶7 Sergeant Dingeman looked at the vehicle and noticed damage that would be consistent with the accident that had been reported. Sergeant Dingeman testified that he notice a strong odor of alcoholic beverage and some slurred speech. [Tr. 5, Lines 16 – 25].

¶8 Sergeant Dingeman asked Mr. Nagel if he would conduct tests to determine if he was under the influence of alcohol. [Tr.6, Lines 10 – 11]. Mr. Nagel indicated he did not want to do any tests. [Tr.6, Line 16; Tr. 10, Lines 11-13]. Mr. Nagel was then advised of the implied consent, and explained it was a crime to refuse a preliminary

breath test. After Mr. Nagel was told it was illegal to refuse the preliminary breath test, he provided a sample. [Tr. 10, Lines 14 – 25]. After Mr. Nagel provided a preliminary breath test he was placed under arrest for driving under the influence. After he was in custody, he was again read the implied consent and asked to submit to an Intoxilyzer test. [Tr. 8, Lines 1-15].

JURISDICTIONAL STATEMENT

¶9 Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted §§ 29-28-03 and 29-28-06 which provide as follows:

> § 29-28-03. "*Appeals as a matter of right.* An appeal to the supreme court provided for in this chapter may be taken as a matter of right."
>
> § 29-28-06. "*From what defendant may appeal.* An appeal may be taken by the defendant from:
> 1. A verdict of guilty;
> 2. A final judgment of conviction;
> 3. An order refusing a motion in arrest of judgment;
> 4. An order denying a motion for new trial; or
> 5. An order made after judgment affecting any substantial right of the party."

State v. Lewis, 291 N.W.2d 735 (N.D. 1980).

¶10 The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. Mr. Nagel's appeal was timely under N.D.R.App.P. 4(b). This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06(1).

STANDARD OF REVIEW

¶11 "The applicable standard of review of a district court's decision to grant or deny a motion to suppress evidence is well established.

> 'When reviewing a district court's ruling on a motion to suppress, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We affirm the district court's decision unless we conclude there is

insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence.'"

State v. Smith, 2014 ND 152 ¶ 4, ___ N.W. 2d ___ (subject to rehearing) citing State v. Zink, 2010 ND 230, ¶ 5, 791 N.W.2d 161 (quoting State v. Mohl, 2010 ND 120, ¶ 5, 784 N.W.2d 128).

¶12 "Whether a finding of fact meets a legal standard is a question of law," which is fully reviewable on appeal. State v. Mitzel, 2004 ND 157, ¶ 10, 685 N.W.2d 120. "The existence of consent is a question of fact to be determined from the totality of the circumstances." Id. at ¶ 13. Whether consent is voluntary is generally decided from the totality of the circumstances. McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 14. "Our standard of review for a claimed violation of a constitutional right is de novo." Id. at ¶ 8.

LAW AND ARGUMENT

I. Mr. Nagel did not voluntarily consent to a preliminary breath test or the Intoxilyzer test when he was advised pre-arrest that he would be committing a crime if he did not submit to chemical testing, therefore, a warrantless search was performed without an exception to the search warrant requirement, in violation of the Fourth Amendment to the United States Constitution, and Article I, Section 8 of the North Dakota Constitution.

¶13 The Fourth and Fourteenth Amendments to the United States Constitution and the North Dakota Constitution prohibit unreasonable searches and seizures, and provide, "[t]he rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated...." N.D.Const. Article I, Section 8. "The Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, protects individuals from

unreasonable searches and seizures" State v. Guscette, 2004 ND 71, 7, 678 N.W.2d 126 (citing State v. Tognotti, 2003 ND 99, 663 N.W.2d 642). Generally, evidence illegally seized in violation of the Fourth Amendment must be suppressed under the exclusionary rule. See State v. Utvick, 2004, ND 36, 675 N.W. 2d 387.

¶14 In State v. Smith, 2014 ND 152, ___ N.W. 2d ___ (subject to rehearing) and State v. Boehm, 2014 ND 154, ___ N.W. 2d ___ (subject to rehearing) this court addressed the situation in which a person is already under arrest for driving under the influence, is then advised of the implied consent law, and then submits to a chemical test. In Smith, the sole issue on appeal was the consent issue for taking the Intoxilyzer 8000 test, post arrest. Smith, ¶6. In Boehm, the preliminary breath test was at issue, however the analysis was of the Court was limited to if the officer needed probable cause to request a preliminary breath test or only need a reasonable suspicion. Id. ¶10. Boehm analysis on the consent issue was limited to discussion on the blood test, post arrest.

¶15 This Court ruled that in cases in which the consent to take a chemical test is at issue, the court must look at the totality of the circumstance. In deciding if a test is voluntary the court looks to two factors:

> To determine voluntariness, we focus on two elements: (1) the characteristics and condition of the accused at the time of the consent, and (2) the details of the setting in which the consent was obtained, with no one factor being determinative. We will show great deference on appeal to the trial court's determination of voluntariness by refusing to reverse its decision unless it is contrary to the manifest weight of the evidence.

Boehm, 2014 ND 154, ¶ 19; Smith, 2014 ND 152, ¶ 12.

¶16 In the case at hand, the "consent" was not voluntary under the totality of the circumstance and a distinction must be draw from a pre-arrest chemical test, and a post-arrest chemical test. In order for an officer to request a pre-arrest chemical test, the

officer needs only to have a reasonable suspicion that the driver is under the influence of alcohol. Boehm, 2014 ND 154, ¶10. A pre-arrest chemical test is a screening device. [Tr. 12, Lines 4-5]. A screening device is used to establish probable case.

¶17 The defense would concede that the officer had a reasonable suspicion to request a pre-arrest chemical test. The deputy noted that he could smell an odor of alcohol and noted slight slurring of speech, and was investigating a possible traffic accident. That would amount to a reasonable suspicion, but fall short of probable cause. Probable Cause only existed after Mr. Nagel was given the pre-arrest chemical test.

¶18 The court should look at a pre-arrest implied consent differently than a post arrest implied consent. In a pre-arrest situation, Mr. Nagel is not left with a choice. Mr. Nagel told the deputy he did not want to do any tests. The deputy then informed him that if he didn't submit to a chemical test he would be arrested. Only after the threat of arrest did Mr. Nagel submit to the test. In sum Mr. Nagel's "choice" was to give the officer a warrantless search, or be arrested for not submitting to the search.

¶19 It is important to remember that the pre-arrest screening device is a tool to establish probable cause. The pre-arrest screening device is not evidence of a violation of N.D.C.C. 39-08-01, but rather only used to establish probable cause. N.D.C.C. 39-20-14(3). This court has long held that the results of the screening test are not admissible at trial. City of Fargo v. Ruether, 490 N.W.2d 481 (ND 1992).

¶20 A post arrest search is entirely different. In a post arrest implied consent situation, the defendant is already under arrest for driving under the influence. The defendant is under arrest for a violation under N.D.C.C. 39-08-01. N.D.C.C 39-08-01 is the same statute for driving under the influence (N.D.C.C. 39-08-01(1)(b)) and refusal

(N.D.C.C. 39-08-01(1)(e)). The defendant does not face an addition charge, but rather a different subjection of the same charge.

¶21 When analyzing this with the case at hand, Mr. Nagel had clearly indicated to the deputy that he did not want to take any tests. The officer, looking to gain probable cause, informed Mr. Nagel that if he did not submit to a pre-arrest chemical test he would be arrested for refusing. Only after being threatened with arrest did Mr. Nagel "consent."

¶22 Presumably the State will argue that although the choice to consent may have been a difficult one, Mr. Nagel nonetheless consented. This argument should fail. "To be voluntary, the consent must not be coerced by explicit or implicit means or by implied threat or covert force." State v. Pederson, 2011 ND 155, 801 N.W.2d 723 quoting State v. Avila, 1997 ND 142, ¶ 16, 566 N.W.2d 410.

¶23 In Pederson, police responded to a hotel room where Kyle Pederson was staying. Mr. Pederson was a suspect in an armed robbery in the city of Grand Forks. When the officers arrived at the hotel room they had their weapons drawn and ordered Mr. Pederson out of the bathroom of his hotel room. With weapons drawn police asked permission to enter Mr. Pederson's hotel room and "consent" was given. This court held that Mr. Pederson's consent was not voluntary. Id. ¶13.

¶24 Certainly the concept behind Pederson was not that the defendant believe he would be shot if he didn't consent but rather that he did not have a choice but to "consent" because police left him no choice but to enter. As applied to this case, the concept is the same. The deputy allowed Mr. Nagel two choices, submit to this test so I can gain probable cause, or I am going to arrest to you for not acquiescing.

¶25 Because under the totality of the circumstances the probable cause gained for arrest is tainted, all evidence seized after the arrest should be excluded as fruits of the poisonous tree. Any evidence obtained as a result of illegally acquired evidence must [also] be suppressed as 'fruit of the poisonous tree'. . . ." State v. Torkelsen, 2008 ND 141, 752 N.W.2d 640 quoting State v. Gregg, 2000 ND 154, ¶ 39, 615 N.W.2d 515.

CONCLUSION

¶26 Based on the totality of the circumstance, Mr. Nagel did not voluntarily consent to the pre-arrest chemical test. Because Mr. Nagel did not consent, and the test was used to gain probable cause to arrest Mr. Nagel, all evidence obtained after the illegal search must be suppressed.

Dated this 28th day of July 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and the Appendix was hand-delivered on the 28th day of July 2014, to Patricia Wilson, Asst. State's Attorney, 514 East Thayer Ave, Bismarck, ND 58501.

/s/ Daniel J. Borgen
Daniel J. Borgen