IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Douglas Dale Wojahn, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee.	**Supreme Ct. No. 20140315** **District Ct. No. 04-2014-CV-00008**

APPEAL FROM THE DISTRICT COURT
BILLINGS COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE ZANE ANDERSON

BRIEF OF APPELLEE

State of North Dakota
Wayne Stenehjem
Attorney General

By: Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email dbanders@nd.gov

Attorneys for Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Paragraph(s)**

Statutes and Other Authorities

STATEMENT OF ISSUES

[¶1] Whether Wojahn freely and voluntarily consented to the onsite screening test and the Intoxilyzer test.

[¶2] Whether North Dakota's implied consent laws impose an unconstitutional condition upon persons in exchange for receiving driving privileges.

STATEMENT OF CASE

[¶3] North Dakota Highway Patrol Trooper Jasmin Teigen ("Trooper Teigen") arrested Douglas Dale Wojahn ("Wojahn") on December 7, 2013, for the offense of driving a vehicle while under the influence of intoxicating liquor. (Appellant's App. ("Wojahn's App.") 4.) Following the January 17, 2014, administrative hearing, the hearing officer issued her Hearing Officer's Decision suspending Wojahn's driving privileges for a period of 91 days. (Id.) Wojahn filed a Petition for Reconsideration, which the hearing officer denied. (Id. at 5-14.) Wojahn requested judicial review of the Hearing Officer's Decision. (Id. at 15-16.)

STATEMENT OF FACTS

[¶4] On December 7, 2013, Trooper Teigen stopped a vehicle being driven by Wojahn after he observed Wojahn commit a moving traffic violation. (Transcript ("Tr.") 6, l. 3 - 7, l. 3.) After observing indicia of Wojahn's intoxication and administering the horizontal gaze nystagmus test and the lack of convergence test, Trooper Teigen informed Wojahn of the implied consent advisory and requested Wojahn submit to an onsite screening test. (Id. at 15, l. 7 – 15, l. 18.) Wojahn "said yes, he would provide a sample." (Id. at 15, ll. 23-24.)

[¶5] Trooper Teigen "placed [Wojahn] under arrest for driving under the influence of alcohol of .08 or greater." (Id. at 18, ll. 23-24.) After being informed of the implied consent advisory, Wojahn consented to Trooper Teigen's request he submit to a blood test. (Id. at 21, ll. 9-12.) The results of the blood test established Wojahn had a blood alcohol concentration of 0.126% by weight. (Wojahn App. 4.)

[¶6] At the administrative hearing, Wojahn was questioned:

Mr. Murtha: After you were arrested and law enforcement read you motor vehicle implied consent advisory, did they tell you that if you didn't take the test it was going to be a crime? Do you remember that?

Mr. Wojahn: They tell me that?

Mr. Murtha: Do you remember that?

Mr. Wojahn: Yes.

Mr. Murtha: Now, why did you agree to take that test?

Mr. Wojahn: I felt obligated.

Mr. Murtha: Why?

Mr. Wojahn: I guess, because of the situation I was in at the moment.

Mr. Murtha: Did you take that test freely and voluntarily?

MR. Wojahn: No.

Mr. Murtha: Why not?

Mr. Wojahn: Because I just feel I had to.

Mr. Murtha: Explain.

Mr. Wojahn: I guess, it just sounds to me like that I should do it or I might get in more trouble or further trouble.

Mr. Murtha: Okay. Do you think you had a choice?

Mr. Wojahn: No.

Mr. Murtha: Did law enforcement tell you you had a choice?

Mr. Wojahn: I don't recall, no.

Mr. Murtha: Okay. Do you feel coerced into taking the test?

Mr. Wojahn: Yes.

(Tr. 35, l. 5 -- 36, l. 4.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶7] Wojahn requested judicial review of the Hearing Officer's Decision by the Billings County District Court pursuant to N.D.C.C. § 39-20-06. (Wojahn's App. 15-16.) On appeal, Wojahn alleged:

> [¶3] The Administrative Hearing Officer erred in the Conclusions of Law because the blood test taken by law enforcement was a warrantless search and the department failed to establish an exception to the warrant requirement . . . .
>
> [¶4] The facts of this case demonstrate that Mr. Wojahn was coerced into giving his consent by the reading of the Implied Consent Advisory which included the threat of criminal charges. . . .
>
> [¶5] The Administrative Hearing Officer erred in the Conclusions of Law because the unconstitutional conditions doctrine articulated in Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) applies to North Dakota's implied consent law making it unconstitutional when a test is sought without a valid search warrant. . . .

(Id.)

[¶8] The district court issued its Memorandum Opinion and Order on July 9, 2014, in which it rejected the constitutional arguments raised by Wojahn and affirmed the Hearing Officer's Decision. (Id. at 17-26.) Judgment was entered

on July 11, 2014. (Id. at 27.) Wojahn appealed the Judgment to the North Dakota Supreme Court. (Id. at 29.) On appeal, the Department requests this Court affirm the Judgment of the Billings County District Court and the Department's decision suspending Wojahn's driving privileges for a period of 91 days.

STANDARD OF REVIEW

[¶9] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to revoke driving privileges." Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

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.

[¶10] "In an appeal from a district court's review of an administrative agency's decision, [the Court] reviews the agency's decision." Haynes, at ¶ 6. The Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id.

[¶11] "When an 'appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency's order unless it finds the agency's order is not in accordance with the law.'" Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646 N.W.2d 704). The "[i]nterpretation of a statute is a question of law fully reviewable on appeal." State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

[¶12] The Supreme Court's "'standard of review for a claimed violation of a constitutional right is de novo.'" McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 8, 848 N.W.2d 659 (quoting Martin v. N.D. Dep't of Transp., 2009 ND 181, ¶ 5, 773 N.W.2d 190 (citation omitted)).

[¶13] "This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision." Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993)). "However, the district court's analysis is entitled to respect if its reasoning is sound." Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

LAW AND ARGUMENT

I. Wojahn freely and voluntarily consented to the onsite screening test and the Intoxilyzer test.

[¶14] In this case, Wojahn argues "[t]he facts of this case demonstrate that Mr. Wojahn was coerced into giving his consent by the reading of the Implied Consent Advisory which included the threat of criminal charges." (Appellant's Br. ¶ 25.) The premise of Wojahn's argument is that the Supreme Court should overturn its decision in McCoy v. North Dakota Department of Transportation, 2014 ND 119, 848 N.W.2d 659.

[¶15] In McCoy, the Court "reject[ed] McCoy's argument that his consent was coerced and not free and voluntary merely by the deputy's reading of the implied consent advisory, accurately informing McCoy that refusal would subject him to losing his driving privileges and presenting him with a choice." Id. at ¶ 21. The Court determined the "proper analysis" in evaluating whether a person has been coerced into submitting to a chemical test "is whether the Department met its burden of establishing McCoy voluntarily consented to the chemical test based on the totality of the circumstances surrounding McCoy's actual consent." Id. at ¶ 23.

[¶16] Wojahn argues "[t]he McCoy decision is not in alignment with either [Bumper v. North Carolina, 391 U.S. 543 (1968)] or [United States v. Biswell, 406 U.S. 311 (1972)]." (Appellant's Br. ¶ 29.) Wojahn further argues the "Court should abandon its reliance on the majority decision in [State v. Brooks, 838 N.W.2d 563 (Minn. 2013), cert denied, 134 S.Ct. 1799 (2014)] as that decision is not constitutionally sound" and that the "Court's reliance on the decision in State

v. Moore, 318 P.3d 1133 (Or. 2013) is misplaced." (Id. at ¶¶ 30-31.)

[¶17] The same arguments advanced by Wojahn in support of the reversal of McCoy, however, were raised by McCoy in his request for rehearing, but denied by the Court. See Appellant's Pet. for Reh'g (Supreme Court Doc. Entry 24) ¶ 11 (The "Court's reliance on the decision in State v. Moore . . . is misplaced . . ."); ¶ 14 ("The McCoy decision is not in alignment with Biswell . . ."); ¶ 15 ("The . . . Court's reliance on . . . Brooks . . . is misplaced . . ."). Wojahn presents *no intervening legal authority* that would warrant overturning McCoy. Accordingly, McCoy provides the proper analysis to evaluate whether a person has been coerced into submitting to a chemical test.

[¶18] In this case, Wojahn agreed to submit to the onsite screening test and the Intoxilyzer test after being informed of the implied consent advisory by Trooper Teigen. As with the driver in McCoy, Wojahn presented no evidence to rebut Trooper Teigen's testimony that he merely read the implied consent advisory to Wojahn and asked him to take the tests. Under the totality of the circumstances, Wojahn freely and voluntarily consented to the onsite screening test and the Intoxilyzer test.

II. North Dakota's implied consent laws do not impose an unconstitutional condition upon persons in exchange for receiving driving privileges.

[¶19] Wojahn further alleges North Dakota's implied consent law violates the unconstitutional conditions doctrine "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 test without a

warrant." (Appellant's Br. ¶ 39.) Wojahn claims "[he] had a constitutional right to refuse consent to a warrantless request to take a breath test." (Id. at ¶ 41.)

[¶20] In Frost v. Railroad Commission of State of California, the United States Supreme Court summarized what has been referred to as the "unconstitutional conditions doctrine" stating "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." 271 U.S. 583, 593. "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." Id. at 593-94. "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." Id. at 594. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." Id.

[¶21] "[T]o invoke this 'unconstitutional conditions' doctrine, [a party] must *first* show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their [constitutional] rights." Council of Indep. Tobacco Mfrs. of Am. v. State, 713 N.W.2d 300, 306 (Minn. 2006) (emphasis added). "[I]f a seizure of evidence is constitutionally valid, there is no need to reach the constitutionality question or analyze the unconstitutional-conditions doctrine." Peppin v. Comm'r of Pub. Safety, No. A12-0164, 2012 WL 5990267, at *3 (Minn. Ct. App. Dec. 3, 2012) (unpublished opinion).

[¶22] Even the existence of a constitutional right sought to be surrendered is not *solely* determinative of whether a statute violates the unconstitutional conditions

doctrine. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right-here the right to receive just compensation when property is taken for a public use-in exchange for a discretionary benefit conferred by the government *where the benefit sought has little or no relationship to the property.*" Dolan v. City of Tigard, 512 U.S. 374, 385-86 (1994) (emphasis added).

[¶23] Therefore, "[i]n evaluating [an unconstitutional conditions] claim, [the court] must first determine whether the '*essential nexus*' exists between the 'legitimate state interest' and the [challenged government regulation]." Id. at 386 (emphasis added) ("If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.") (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)). See also Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right.").

[¶24] For example, the Supreme Court in Frost stated "[i]t is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved." 271 U.S. at 591.

[¶25] Stated otherwise, "[n]ot all conditions are prohibited, however; if a condition is germane -- that is, if the condition is sufficiently related to the benefit -- then it may validly be imposed." Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 747 (1st Cir. 1995). "In the final analysis, 'the legitimacy of a government proposal depends on the degree of relatedness between the condition on a benefit and the reasons why government may withhold the benefit altogether.'" Id. (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 103 Harv. L. Rev. 1413, 1457 (1989)). "'The more germane a condition to a benefit, the more deferential the review; nongermane conditions, in contrast, are suspect.'" Id. (quoting Sullivan, supra, at 1457).

[¶26] Applying a similar reasoning to a constitutional challenge to Minnesota's implied consent laws, the Minnesota Court of Appeals has stated "[t]he unconstitutional conditions doctrine looks to the purpose of the challenged condition, and it invalidates only those laws whose challenged condition bears no significant relevance to the governmental objective of the privilege that the government is conditionally conferring." State v. Chasingbear, No. A14–0301, 2014 WL 3802616, at *6 (Minn. Ct. App. Aug. 4, 2014) (unpublished opinion). The court of appeals determined "[u]nlike those cases in which the Supreme Court has invalidated laws under the unconstitutional conditions doctrine, the condition imposed here tightly relates to the privilege conferred." Id. at *7. The statutory condition that every arrested, apparently drunk, driver agrees to submit to a chemical test or be penalized for refusing the test directly and *only* furthers the state's interest in the sober use of public highways." Id. (original emphasis).

[¶27] The Minnesota Court of Appeals also rejected an unconstitutional-conditions argument brought by a driver against Minnesota's implied consent law in Stevens v. Commissioner of Public Safety, 850 N.W.2d 717 (Minn. Ct. App. 2014). In Stevens, the court determined the unconstitutional-conditions argument brought by the driver failed for four reasons: (1) there is no legal support for applying the unconstitutional-conditions doctrine to a Fourth Amendment constitutional challenge; (2) the implied consent law "does not authorize any search," because no chemical test is given if a person does not consent; (3) even if the law "authorizes a search of a driver's blood, breath, or urine, such a search would not violate the Fourth Amendment" because it would be constitutionally reasonable; and (4) the implied consent law is not sufficiently coercive to violate the unconstitutional-conditions doctrine. Id. at 724-31.

[¶28] Within the third prong of this analysis, the court stated "caselaw suggests that the unconstitutional-conditions doctrine does not invalidate state laws that authorize warrantless searches as a reasonable means of exercising control over a highly regulated activity." Id. at 730. "[Minnesota's] strong interest in ensuring the safety of its roads and highways outweighs a driver's diminished privacy interests in avoiding a search following an arrest for DWI. Thus, if we assume that the implied-consent statute authorizes a search of a driver's blood, breath, or urine, such a search would not violate the Fourth Amendment." Id.

[¶29] In this case, the evidence established Wojahn freely and voluntarily consented to the onsite screening test and the Intoxilyzer test. The seizures of Wojahn's breath samples were constitutionally valid under the consent exception

to the Fourth Amendment's search warrant requirement. Therefore, this Court need not analyze Wojahn's unconstitutional conditions claim. Cf. Nippa v. Comm'r of Pub. Safety, No. A13-1723, 2014 WL 3799945 at *3 (Minn. Ct. App. Aug. 4, 2013) ("It is unclear whether the unconstitutional-conditions doctrine applies in this particular context, in which a driver has validly consented to a breath test.").

[¶30] Even if the Court were to consider Wojahn's unconstitutional conditions argument, the conditions imposed by the implied consent statutes are sufficiently related to the benefits derived so as to be reasonable and to justify the relinquishment of any rights. "Driving is a privilege, not a constitutional right and, therefore, subject to reasonable control of the State under its police power." State v. Smith, 2014 ND 152, ¶ 8, 849 N.W.2d 599. See also N.D. Dep't of Transp. v. DuPaul, 487 N.W.2d 593, 598 (N.D. 1992) (although license is "important privilege," it is not "constitutionally guaranteed"); State v. Mische, 448 N.W.2d 412, 413 (N.D. 1989) ("It is well established that individuals do not have a natural right to drive a motor vehicle on a public highway ...."); State v. Larson, 419 N.W.2d 897, 898 (N.D. 1988) (driver's license not unconstitutional "title of nobility"); State v. Kouba, 319 N.W.2d 161, 163 (N.D. 1982) (driving is "a privilege which a person enjoys subject to the control of the State in its valid exercise of its police power").

[¶31] "There is no Federal constitutional right to be entirely free of intoxication tests." State v. Murphy, 516 N.W.2d 285, 286, n. 1 (N.D. 1994). Instead, "[t]he essence of our implied consent laws is that the driver of a vehicle in North

Dakota is deemed to have consented to submit to a chemical test if arrested for driving, or being in actual physical control while intoxicated." Id. at 287. "*The fact that North Dakota drivers are able to refuse testing is a matter of legislative grace.*" Id. (emphasis added) see also Grosgebauer v. N.D. Dep't of Transp., 2008 ND 75, ¶ 11, 747 N.W.2d 510 ("Section 39-20-01, N.D.C.C., establishes that consent to testing is presumed. This presumption is tempered by legislative grace allowing a driver to opt out of testing.").

[¶32] This Court also has stated "North Dakota, like other states, has continued to increase penalties and enact tougher laws in response to the carnage on our nation's highways." State v. Smith, 2014 ND 152, ¶ 8, 849 N.W.2d 599. See also State v. Zimmerman, 539 N.W.2d 49, 51 (N.D. 1995) ("State legislatures and the Congress have enacted increasingly tougher laws in response to the carnage on our nation's highways."); Kobilansky v. Liffrig, 358 N.W.2d 781, 791 (N.D. 1984) ("We may also take judicial notice of the carnage caused by the drunk driver."); South Dakota v. Neville, 459 U.S. 553, 558-59 (1983) ("The carnage caused by drunk drivers is well documented and needs no detailed recitation here.").

[¶33] The conditions imposed by the North Dakota's implied consent statutes are sufficiently related to the benefits derived so as to be reasonable and to justify the relinquishment of any rights. North Dakota's implied consent laws do not impose an unconstitutional condition upon persons in exchange for receiving driving privileges.

CONCLUSION

[¶34] The Department requests this Court affirm the Judgment of the Billings County District Court and the Department's decision suspending Wojahn's driving privileges for a period of 91 days.

Dated this 24th day of November, 2014.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____
Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email dbanders@nd.gov

Attorneys for Appellee.

e \douga\dot-implied-consent\2014\wojahn-douglas-dale-2104\appellee's brief\brief of appellee.docx