20140315
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 11, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Douglas Dale Wojahn, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20140315 District Court Case No. 04-2014-CV-00008 **APPELLANT'S REPLY BRIEF** **APPEAL FROM THE JUDGMENT OF THE BILLINGS COUNTY DISTRICT COURT, THE HONORABLE ZANE ANDERSON, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

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[¶1] **TABLE OF CONTENTS**

By paragraph

[¶2] **TABLE OF AUTHORITIES**

UNITED STATES SUPREME COURT

NORTH DAKOTA SUPREME COURT

UNITED STATES ELEVENTH CIRCUIT

UNITED STATES DISTRICT COURT, FLORIDA

UNITED STATES DISTRICT COURT, GEORGIA

MINNESOTA

OREGON

UNITED STATES CONSTITUTION

NORTH DAKOTA CONSTITUTION

[¶3] **LAW AND ARGUMENT**

[¶4] **I. The decision in McCoy v. North Dakota Department of Transportation should be overturned based on the reasoning of the Eleventh Circuit's decision in Lebron v. Florida.**

[¶5] The Department argues that Mr. Wojahn has presented no intervening legal authority that would warrant overturning McCoy v. North Dakota Department of Transportation, 2014 ND 119, 848 N.W. 2d 659. Mr. Wojahn has argued in his initial brief that the McCoy decision is not constitutionally sound because it relies on the Minnesota Supreme Court decision in State v. Brooks, 838 N.W.2d 563 (Minn. 2013) and the Oregon Supreme Court in State v. Moore, 318 P.3d 1133 (Or. 2013).

[¶6] On December 3, 2014 the United States Court of Appeals for the Eleventh Circuit decided the case of Lebron v. Florida, No. 14-10322, D.C. Docket No. 6:11-cv-01473-MSS-DAB. Lebron addressed the issue of the constitutionality of a Florida statute that required suspicionless drug testing in order to obtain Temporary Assistance for Needy Families Benefits. The Florida statute required an applicant to consent to a search or be denied the benefit. Lebron explains that consent is not valid for fourth amendment purposes when it is conditioned on the receipt of a government benefit. Id. at 46-54.

[¶7] Mr. Wojahn argues that just like the consent that was required under the Florida statute, the consent required under North Dakota's implied consent law that is conditioned on the grant of the privilege to drive is not valid consent for fourth amendment purposes. See also Am. Fed'n of State, Cnty. & Mut. Employees Counsel 79 v. Scott, 717 F.3d 851, 873-74 (11th Cir. 2013)("we do not agree that employees' submission to drug testing, on pain of termination, constitutes consent under governing Supreme Court case law. See Lebron, 710 F.3d at 1214–15. Although a "search

conducted pursuant to a valid consent is constitutionally permissible," Schneckloth v. Bustamonte, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), consent must be "in fact voluntarily given, and not the result of duress or coercion, express or implied." Id. at 248, 93 S.Ct. 2041;see also Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); Johnson v. United States, 333 U.S. 10, 13, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (consent invalid when "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right"). Employees who must submit to a drug test or be fired are hardly acting voluntarily, free of either express or implied duress and coercion. See Bostic v. McClendon, 650 F.Supp. 245, 249 (N.D.Ga.1986); cf. Garrity v. New Jersey, 385 U.S. 493, 497–98, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (holding that the government cannot require its employees to relinquish their Fifth Amendment rights on pain of termination because "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination" was "the antithesis of free choice").").

[¶8] **II. North Dakota's implied consent law is coercive and imposes an unconstitutional condition on drivers in exchange for driving privileges by compelling the exchange of the constitutional right to refuse to submit to a chemical test for the mere privilege to drive.**

[¶9] Griffin v. State of California, 380 U.S. 609 (1965) explained, in response to a challenge to a rule that would allow a prosecutor to comment on a criminal defendant's refusal to testify, that

> comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

Just like the rule that allowed a prosecutor to comment on a criminal defendant's refusal

to testify, North Dakota's implied consent laws impose a penalty for the exercise of a constitutional right and cut down on that right by making its assertion costly.

[¶10] Article I Section 24 of North Dakota's Constitution states "[t]he provisions of this constitution are mandatory and prohibitory . . .." Thus Article I Section 8 is mandatory and prohibitory. Yet the Department argues 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 conflicts with the doctrine of unconstitutional conditions articulated in Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593-94 (1926) 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.

[¶11] Because North Dakota's implied consent laws require 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 laws are unconstitutional. Frost at 593 ("It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."); Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir. 2004)("The City may contend that the searches are permissible because they are entirely voluntary. No

protestors are compelled to submit to searches; they must do so only if they choose to participate in the protest . . .. This is a classic "unconstitutional condition," in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right."); Hillcrest Prop., LLP v. Pasco Cnty., CASE NO.: 8:10-cv-819-T-23TBM (M.D. Fla. 2013)("A government is generally prohibited from enforcing an "unconstitutional condition," that is, from conditioning a governmental accommodation on a citizen's relinquishing a constitutional right. For example, the Fourth Amendment prevents a state's conditioning the issuance of a driver's license on a citizen's waiving the prohibition against unreasonable search and seizure . . .").

[¶12] 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), North Dakota's implied consent laws do 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. Thus, Mr. Wojahn 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.

[¶13] The Department relies on Stevens v. Commissioner of Public Safety, 850 N.W.2d 717 (Minn. App. 2014) to counter Mr. Wojahn's argument that North Dakota's implied consent laws violate the doctrine of unconstitutional conditions. Mr. Wojahn argues that Stevens is fatally flawed.

[¶14] To begin, the doctrine of unconstitutional conditions is the premise that the legislature cannot draft legislation that grants a mere privilege in exchange for a constitutional right. Frost did not limit application of the doctrine to only certain

constitutional rights but applied it to all. 271 U.S. 593-94. If the Department's interpretation of the Stevens court's interpretation of the doctrine of unconstitutional conditions is accurate, then the fourth amendment could be eliminated by statute. In North Dakota, Article I, Section 20 of North Dakota's constitution would prevent that from happening to Article I, Section 8 rights.

[¶15] The Department argues at ¶27 of its brief that Stevens requires that it must be shown that the statute authorizes an unconstitutional search for the doctrine of unconstitutional conditions to apply and because the statute doesn't authorize any search the doctrine doesn't apply. Mr. Wojahn' argument is not that the statute authorizes a search but rather that the statute makes it a condition of granting the privilege that Mr. Wojahn authorize the search without law enforcement having to obtain a warrant. Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 525-534 (1967) made it clear that the government can't do that i.e. penalize the assertion of a fundamental right.

[¶16] The Department's argument, that the statute does not authorize an unconstitutional search, dovetails into the argument by Mr. Wojahn above. Again, Camara made it clear that it is unconstitutional to require consent to search by imposing criminal sanctions for refusal and it is a violation of the fourth amendment to do so, the Stevens court ignores Camara and makes only passing mention of the case in a footnote that acknowledges that Camara invalidated some warrantless searches authorized by regulatory schemes.

[¶17] The Department's argument taken from Stevens that the statute must be shown to be coercive, appears to be made up by the Stevens court based on a very selective reading of a small number of cases. Going back to Frost the concept is the exchange of the grant

of a privilege for the surrender of a constitutional right. North Dakota's implied consent and refusal law give no other options to obtain the privilege but to consent to a warrantless search. The Stevens court misreads commentary and other case law to make a reach and connect it to a finding that the implied consent law is not coercive for consent to search in a fourth amendment context. The Stevens court ignores the simple fact that the only way to obtain the privilege is to surrender the right and thus the doctrine applies.

[¶18] The Department confuses the standards of review for determining the constitutionality of a statute that addresses fundamental rights. The Department argues at ¶33 of its brief that "[t]he conditions imposed by the North Dakota implied consent statutes are sufficiently related to the benefits derived so as to be reasonable and to justify the relinquishment of any rights." However, the issue challenged is not a suspicionless search scenario but a warrant consent issue analysis under the fourth amendment. See State v. Leppert, 2003 N.D. 15, ¶22, 656 N.W.2d 718 (Justice Maring concurring). Therefore, the balancing tests articulated in Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989) and Ferguson v. City of Charleston, 532 U.S. 67 (2001) are inapplicable.

[¶19] Mr. Wojahn is making a direct challenge to laws that criminalize and penalize the exercise of his fourth amendment and article one section eight right to refuse a warrantless search when he is suspected of committing a crime. Under such challenges the courts do not engage in a strict scrutiny analysis or a special needs balancing test because

> [i]n assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which

> in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Camara at 533 citing Schmerber. Because the Department is seeking to justify a consent exception to the warrant requirement under a scheme that requires consent in return for a privilege the standard of review is as stated in Camara, that being will the burden of obtaining a warrant likely frustrate the government purpose behind the search. The Department has offered no evidence that law enforcement needs this type of consent exception because it is unable to obtain warrants.

Dated: December 11, 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 December 11, 2014 he electronically served the following on Douglas Anderson, Assistant North Dakota Attorney General representing the North Dakota Department of Transportation:

APPELLANT'S REPLY BRIEF

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

Dated: December 11, 2014

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