

SUPREME COURT NO. 20150069
Burleigh County No. 08-2014-CR-02566

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

AUG 21 2015

State of North Dakota,

STATE OF NORTH DAKOTA

Plaintiff and Appellee,

v.

Ruthie Mann,

Defendant and Appellant.

BRIEF OF APPELLEE

Appeal from the Order Denying Mann's Motion to Dismiss, entered December 17, 2014, and the Judgment, entered on March 2, 2015, after a jury verdict of guilty. The Honorable James S. Hill, presiding.

Submitted August 17, 2015.



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STATEMENT OF THE ISSUES

- [¶1] I. Whether N.D.C.C. § 39-08-01(1)(e) is constitutional.
- [¶2] II. Whether the trial court erred in denying Mann’s Motion to Enter Judgment to Conform with Jury Verdict and acquitting Mann of C Felony Refusal of Chemical Testing because Mann’s prior offenses were not listed as elements of the offense in the jury instructions.

STATEMENT OF THE CASE

[¶3] This is an appeal from the denial of Ruthie Mann’s (“Mann”) Motion to Dismiss, entered December 17, 2014, as well as the Judgment, entered on March 2, 2015, after a jury verdict of guilty. Appellant’s Appendix (“App.”) 72-85, 121.

[¶4] On August 18, 2014, Mann was charged with Driving Under the Influence (“DUI”) in violation of N.D.C.C. § 39-08-01. Doc. I.D. No. 1. The charges were later amended to Refusal to Submit to Chemical Testing (“Refusal”) under N.D.C.C. § 39-08-01(1)(e). App. 5. A first-time violation of N.D.C.C. § 39-08-01 is a Class B Misdemeanor. N.D.C.C. § 39-08-01(3). Three previous convictions under this section raise the level of offense to a Class C Felony. Id. Because Mann was alleged to have at least three prior convictions, the offense was charged as a Class C Felony. App. 5.

[¶5] On November 12, 2014, Mann moved to dismiss the charge, arguing Refusal as it appears in N.D.C.C. § 39-08-01(1)(e) is unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. App. 6-19. Both the State of North Dakota and the North Dakota Attorney General resisted these arguments and filed separate responses. App. 22-51, 52-61. The trial court denied Mann’s Motion to Dismiss, referencing case law contained in two other orders on similar motions at the trial court level. App. 72-92.

[¶6] On Sunday, February 8, 2015, three days before trial, Mann untimely filed Proposed Jury Instructions. App. 93-95. The State opposed Mann's request due to its untimely nature and because it did not accurately reflect the law as stated in N.D.C.C. § 39-08-01(1)(e). Doc. I.D. No. 62. The trial court denied Mann's Proposed Jury Instructions – a decision subsequently deemed correct by this Court. Doc. I.D. No. 64; see also State v. Kordonowy, 2015 ND 197, ¶¶ 26-27 (upholding a trial court's denial of the same requested jury instruction in the same context). Contrary to Mann's allegation, the State did not instruct the jury of anything, as it did not submit any requested jury instructions. Appellant's Br., ¶ 7.

[¶7] On February 11, 2015, a jury trial was held, and Mann was found guilty of Refusal. App. 121. Because the offense charged was alleged to be a fourth or greater offense in a lifetime, the State was required to prove Mann had at least three prior DUI convictions. App. 5. In chambers prior to trial, extensive discussions took place between Mann, the State, and the trial court. See generally Partial Transcript of Jury Trial ("Trial Transcript"), pp. 12-19. During these discussions, Mann refused to stipulate to her prior DUI convictions. Trial Transcript, p. 16, ll. 2-3. Contrary to Mann's allegation, the State never refused to allow Mann's prior convictions to be a sentencing factor. Trial Transcript, p. 13, ll. 16-20; see also Appellant's Br., ¶ 18. As a result, the State submitted certified copies of Mann's prior DUI convictions into evidence at trial. App. 96-106. These prior convictions, however, were not listed as elements of the offense in the jury instructions. App. 107-20. For this reason, after trial, Mann filed a Motion to Enter Judgment to Conform with Jury Verdict. App. 122, 126-28. Mann also argued one or two of the certified convictions offered by the State at trial were insufficient for

enhancement purposes, and the State agreed, but Mann does not argue this on appeal. Id. After several hearings, post-trial briefs, and lengthy discussions, the trial court denied these motions and sentenced Mann to an eighteen-month prison sentence. App. 137-42; see also App. 122-36.

[¶8] Mann now appeals the denial of her Motion to Dismiss, again arguing N.D.C.C. § 39-08-01(1)(e) is unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. Appellant's Br., ¶ 2. Additionally, Mann argues the trial court erred in denying her Motion to Enter Judgment to Conform with Jury Verdict and acquitting Mann of felony-level Refusal. Id.

STATEMENT OF THE FACTS

[¶9] On June 16, 2014, at 2:10 a.m., Bismarck Police Officer, David Stewart, approached Mann in her vehicle due to a reported noise complaint. Trial Transcript, p. 31, ll. 18-25, p. 32, ll. 1-4. Officer Stewart noticed an odor of alcohol coming from the vehicle, and Mann had bloodshot, glossy eyes and slightly slurred speech. Trial Transcript, p. 33, ll. 3-11. Mann also admitted to consuming alcohol. Trial Transcript, p. 34, ll. 5-10. Mann then failed the horizontal gaze nystagmus test. Trial Transcript, p. 34, l. 25. After failing this test, Mann was unable to listen to Officer Stewart or follow his instructions, and she did not attempt other field sobriety tests. Trial Transcript, p. 35, ll. 1-25. Mann was then arrested for DUI. Trial Transcript, p. 36, ll. 4-10. After being advised of both her Miranda rights and North Dakota's implied consent statute, Mann refused to perform a blood test. Trial Transcript, p. 36, ll. 14-25, p. 37, ll. 1-25, p. 39, ll. 2-8. Mann was ultimately charged with C Felony Refusal. App. 5.

[¶10] On November 12, 2014, Mann moved to dismiss the charge, arguing N.D.C.C. § 39-08-01(1)(e) is unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. App. 6, 7-19. Both the State of North Dakota and the North Dakota Attorney General resisted these arguments and filed separate responses. App. 22-51, 52-61. The trial court denied the motion, referencing case law contained in two other orders on similar motions at the trial court level. App. 72-92.

[¶11] On February 11, 2015, a jury trial was held, and Mann was found guilty of Refusal. App. 121. Because the offense charged was alleged to be a fourth or greater offense in a lifetime, the State was required to prove Mann had at least three prior DUI convictions. App. 5. In chambers prior to trial, extensive discussions took place between Mann, the State, and the trial court. See generally Trial Transcript, pp. 12-19. During these discussions, Mann refused to stipulate to her prior DUI convictions. Trial Transcript, p. 16, ll. 2-3. Contrary to Mann's allegation, the State never refused to allow Mann's prior convictions to be a sentencing factor. Trial Transcript, p. 13, ll. 16-20; see also Appellant's Brief, ¶ 18. As a result, the State submitted certified copies of Mann's prior DUI convictions into evidence at trial. App. 96-106. These prior convictions, however, were not listed as essential elements of the offense in the jury instructions. App. 107-20. For this reason, after trial, Mann filed a Motion to Enter Judgment to Conform with Jury Verdict. App. 122, 126-28. Mann also argued one or two exhibits offered by the State were insufficient for enhancement purposes, and the State agreed, but Mann does not argue this on appeal. Id. After several hearings, post-trial briefs, and

lengthy discussions, the trial court denied these motions and sentenced Mann to an eighteen-month prison sentence. App. 137-42; see also App. 122-36.

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LAW AND ARGUMENT

I. N.D.C.C. § 39-08-01(1)(e) is constitutional.

[¶13] Mann argues N.D.C.C. § 39-08-01(1)(e) is unconstitutional under both the state and federal constitution. This Court has consistently, repeatedly, and unanimously rejected Mann's argument. See State v. Birchfield, 2015 ND 6, ¶ 19, 858 N.W.2d 302; State v. Washburn, 2015 ND 8, ¶ 1, 861 N.W.2d 173; Beylund v. Levi, 2015 ND 18, ¶¶ 13-15, 859 N.W.2d 403; State v. Beylund, 2015 ND 27, ¶ 1, 861 N.W.2d 172; Wojahn v. Levi, 2015 ND 50, ¶ 1, 861 N.W.2d 173; Mesch v. Levi, 2015 ND 86, ¶ 1, 865 N.W.2d 124; State v. Morel, 2015 ND 198, ¶ 2 (holding criminal penalties for refusal of chemical testing do not violate a defendant's rights under the state or federal constitutions). See also State v. Baxter, 2015 ND 107, ¶ 12, 863 N.W.2d 208 (holding criminal penalties for *both* refusal of an on-site screening test and refusal of chemical testing do not violate a defendant's rights under the state or federal constitutions, nor do these criminal penalties violate the unconstitutional conditions doctrine).

[¶14] Mann also argues the Minnesota Supreme Court's decision in State v. Bernard, 859 N.W.2d 762 (Minn. 2015) renders this Court's holding in Birchfield "faulty."

Appellant's Br., ¶ 54. Again, this argument has specifically been addressed and unanimously rejected by this Court. This Court's decision in Birchfield "was not based solely on the Minnesota Court of Appeals decision in Bernard." Kordonowy, 2015 ND 197, ¶ 11. Mann makes the same argument as the appellant in Kordonowy, where this Court stated it was "not persuaded" Birchfield was wrongly decided and declined to overturn its previous decision. Id.

[¶15] For these reasons, N.D.C.C. § 39-08-01(1)(e) is constitutional, and the denial of Mann's Motion to Dismiss should be affirmed.

II. The trial court erred in denying Mann's Motion to Enter Judgment to Conform with Jury Verdict and acquitting Mann of C Felony Refusal of Chemical Testing because Mann's prior offenses were not listed as elements of the offense in the jury instructions.

[¶16] Mann argues she was denied her constitutional right to a trial by jury because her prior offenses were not submitted to the jury as an element of the offense of felony-level Refusal. Appellant's Br., ¶ 59. The State agrees. This Court's standard of review for constitutional violations is de novo. State v. Treis, 1999 ND 136, ¶ 11, 597 N.W.2d 664 (internal citations omitted).

[¶17] "The Sixth Amendment provides that those accused of a crime have the right to a trial by an impartial jury. This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013); see also State v. Olander, 1998 ND 50, ¶ 20, 575 N.W.2d 658 ("Under North Dakota law . . . the State must prove beyond a reasonable doubt each element of a charged offense . . ."). Prior convictions are elements of the offense charged when the prior convictions raise the level of offense.

State v. Edinger, 331 N.W.2d 553, 554-55 (N.D. 1983); State v. Gahner, 413 N.W.2d 359, 360 (N.D. 1987).

[¶18] Section 39-08-01, N.D.C.C., contains penalty provisions relating to repeat DUI offenders. A first offense under this section is a Class B Misdemeanor. N.D.C.C. § 39-08-01(3). Three prior convictions under this section, however, raise the offense level to a Class C Felony. Id. Mann was charged with Class C Felony Refusal because the offense was alleged to be at least a fourth offense under N.D.C.C. § 39-08-01. App. 5. Because Mann's prior convictions raise her charge from a Class B Misdemeanor to a Class C Felony, her prior convictions are elements of the Class C Felony offense, and the jury must find proof of these convictions beyond a reasonable doubt.

[¶19] The jury instructions provided at Mann's trial listed the essential elements of the offense charged. See App. 110-11. Although the jury instructions recited the specific language contained in the Information stating the offense was a fourth or subsequent offense, the essential elements of the offense did not contain any reference to Mann's prior convictions. Id. The jury instructions did not contain any other references to Mann's prior convictions. App. 107-20. The jury was instructed to find Mann guilty only if the State proved "all of the essential elements of the crime charged by proof beyond a reasonable doubt." App. 118. From a plain reading of the jury instructions, Mann's prior convictions were not elements of the offense charged, and the jury was not instructed to find proof of their existence beyond a reasonable doubt. Therefore, the jury did not find proof of all the essential elements of the offense beyond a reasonable doubt.

[¶20] After trial, the trial court asked the parties to submit post-trial brief relating to Mann's prior convictions. Mann argued her prior offenses should have been included as

essential elements of the offense charged. App. 127-28. The State's brief did not address this issue because its brief was submitted near-simultaneously with Mann's. App. 127-28, 129-34. After being served with Mann's Motion to Enter Judgment to Conform with Jury Verdict and accompanying brief, the State agreed with Mann. Appellant's Br., ¶¶ 25-34. The State again agrees. Mann's prior convictions, which are essential elements to the offense charged, were not proved to the jury beyond a reasonable doubt.

[¶21] For these reasons, the trial court should have granted Mann's Motion to Enter Judgment to Conform with Jury Verdict. Mann should be guilty of a Class B Misdemeanor violation of N.D.C.C. § 39-08-01, and she should be sentenced accordingly.

CONCLUSION

[¶22] For the reasons stated above, the denial of Mann's Motion to Dismiss should be affirmed. The denial of Mann's Motion to Enter Judgment to Conform with Jury Verdict, however, should be reversed.

Submitted August 17, 2015.



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