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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Tera Marie Sturre, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20150242 District Court Case No. 30-2015-CV-00238 **APPELLANT'S REPLY BRIEF** **APPEAL FROM THE JUDGMENT OF THE MORTON COUNTY DISTRICT COURT, THE HONORABLE BRUCE ROMANICK, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

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[¶3] **I. The Administrative Hearing Officer erred in denying Ms. Sturre's objections to jurisdiction because the report and notice form offered at the hearing lacked the necessary and mandatory statutory requirements pursuant to N.D.C.C. § 39-20-03.1, Subsection 4, by failing to state reasonable grounds to believe that Ms. Sturre had been driving or was in actual physical control.**

[¶4] Subsequent to Appellant's Brief being filed the opinion in Olson v. Levi, 2015 ND 250, ¶ 8, 870 N.W.2d 222, petition for reh'g filed, Oct. 27, 2015 was issued. The Department relies on Olson in great part to argue that "[t]he Report and Notice contained sufficient reasonable grounds information to authorize the Department to determine whether Sturre's driving privileges should be suspended." Appellee's Brief at ¶24. The North Dakota Supreme Court's statement in Olson, at paragraph 9, quoted by the Department in its brief, at paragraph 21, that "[o]ur case law does not impose a requirement that an officer provide a written statement detailing in actual physical control cases why the officer believed the arrestee was in actual physical control of a vehicle" only means that Olson is a case of first impression, not that the statute does not impose such a requirement.

[¶5] N.D.C.C. § 39-20-03.1, Subsection 4, states that "the report must show that the officer had reasonable grounds to believe the individual had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01, or equivalent ordinance . . .." Irrespective of the Department's interpretation of Olson, N.D.C.C. § 39-20-03.1, Subsection 4 requires that, in Ms. Sturre's case, the report and notice submitted to the Department must show that the officer had reasonable grounds to believe that Ms. Sturre had been driving or was in actual physical control of a motor vehicle. The report and notice in Ms. Sturre's case makes no such showing because it fails to ever actually state what the reasonable grounds were.

[¶6] The cases cited by the North Dakota Supreme Court on this issue in Olson were Brewer v. Ziegler, 2007 ND 207, 743 N.W.2d 391, Pokrzywinski v. Dir., N.D. Dep't of Transp., 2014 ND 131, 847 N.W.2d 776 and Maisey v. N.D. Dep't of Transp., 2009 ND 191, 775 N.W.2d 200 but those cases only addressed the mandatory requirement that an officer provide a written statement detailing why the officer believed the arrestee was under the influence and never addressed the issue raised in Olson, and by Ms. Sturre in her case, that an officer provide a written statement detailing in actual physical control cases why the officer believed the arrestee was in actual physical control of a vehicle.

[¶7] The requirements of N.D.C.C. § 39-20-03.1, Subsection 4 are necessary and mandatory. See Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 15, 682 N.W.2d 308. ("The Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute. The Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges."); Morrow v. Ziegler, 2013 ND 28, ¶ 8, 826 N.W.2d 912, 914. Because N.D.C.C. § 39-20-03.1, Subsection 4 requires specifically that "the report must show that the officer had reasonable grounds to believe the individual had been driving or was in actual physical control of a motor vehicle" and the report submitted to the Department does not show reasonable grounds the Department lacked jurisdiction to proceed against Ms. Sturre's driving privileges. Id.

[¶8] **II. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because Ms. Sturre did not have a choice of tests and it is a violation of equal protection to evaluate breath tests one way and blood tests another.**

[¶9] Ms. Sturre's argument is that because she does not have a choice of tests pursuant statute then it is an equal protection violation to evaluate breath tests one way and blood

tests another. If the two tests were evaluated the same way there would be no equal protection issue. Exhibit 1g offered at the hearing showed the ethanol concentration measurement uncertainty. The results range from 0.174 to 0.204 and the measurement uncertainty itself is set at plus or minus .015. This means the hearing officer could find, if she accepted the lower measurement, that Ms. Sturre's alcohol centration was under 0.18 but over .08 and suspend her license for 91 days instead of 180 days.

[¶10] Compare this blood test analysis with breath, in a breath test case the Department accepts the lowest reported result. See eg. Schock v. N. Dakota Dep't of Transp., 2012 ND 77, ¶ 2, 815 N.W.2d 255, 258 ("The lowest test result showed Schock had a blood-alcohol concentration of 0.184 percent by weight. As a result, the officer issued Schock a temporary operator's permit . . .."). In Ms. Sturre's case the Hearing Officer did not accept the lowest result as would be the case for a breath test and because Ms. Sturre did not have a choice of tests it was a violation of equal protection to evaluate breath tests one way and blood tests another. See N.D. Const. Art. I, Section 21.

[¶11] **III. The Administrative Hearing Officer erred because the Department failed to prove that law enforcement had probable cause to arrest Ms. Sturre.**

[¶12] The Administrative Hearing Officer erred because the Department failed to prove that Ms. Sturre voluntarily submitted to field sobriety testing and then the Department used the results of her field sobriety tests to establish probable cause for her arrest. Compare City of Wahpeton v. Skoog, 300 N.W.2d 243 (N.D. 1980)(noting that field sobriety tests are physical and real evidence); compare City of Devils Lake v. Grove, 2008 ND 155, ¶ 15, 755 N.W.2d 485("If an investigative detention lasts too long or its manner of execution unreasonably infringes an individual's Fourth Amendment interests, it may no longer be justified as an investigative stop and, as a full-fledged seizure . . ..").

[¶13] The Department argues that Ms. Sturre failed to present evidence on the issue of voluntariness but it is the Department that carries the burden and the Department failed to present any evidence on the issue of voluntariness. See Kobilansky v. Liffrig, 358 N.W.2d 781, 790 (N.D. 1984). Absent the results of the field sobriety tests law enforcement did not have probable cause to arrest Ms. Sturre. Law enforcement did not give Ms. Sturre a choice to perform field sobriety tests and therefore, under a totality of the circumstances, Ms. Sturre did not consent to the search and the results obtained therefrom should have been suppressed. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973) and Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968).

[¶14] **IV. The Administrative Hearing Officer erred in the conclusions of law because North Dakota's test refusal laws violate the constitutional prohibition against unreasonable searches and seizures, are unconstitutional for denying substantive due process and are unconstitutional for penalizing the exercise of a constitutional right.**

[¶15] "The power to create presumptions is not a means of escape from constitutional restrictions." Bailey v. State of Alabama, 219 U.S. 219, 239 (1911). It would be unconstitutional for the legislature to pass a law that directed law enforcement to bypass the warrant requirement and force a driver to submit to a chemical test. See N.D. Const. Art. I, Section 20. To avoid that obvious dilemma the legislature crafted North Dakota's implied consent laws to create a presumption of consent. In addition to the presumption known as "implied consent" the legislature also provided for civil and criminal penalties for an alleged driver's failure to provide consent. See N.D.C.C. § 39-20 and § 39-08. North Dakota's implied consent and refusal laws create the type of presumption forbidden by the United States Supreme Court in Bailey. But see Olson.

[¶16] On the same day the Olson opinion was issued the Minnesota Court of Appeals

issued State v. Trahan, 870 N.W.2d 396, 399 (Minn. Ct. App. 2015)("Because we conclude that conducting a warrantless blood test would have been unconstitutional, charging appellant with a crime based on his refusal to submit to the test implicates his fundamental right to be free from unconstitutional searches. And because the test-refusal statute as applied is not narrowly tailored to serve a compelling government interest, it fails strict scrutiny and violates appellant's right to due process under the United States and Minnesota Constitutions.") which determined that it is unconstitutional to criminalize a warrantless and exceptionless refusal to submit to a blood draw. Because Olson is a blood test case the reasoning in Trahan is relevant to the issues in Olson. Ms. Sturre argued previously that the criminalization of refusing a blood test abdicates her consent, the North Dakota Supreme Court responded to that argument in its opinion in Olson at paragraph 12 stating that "Olson's arguments do not convince us to revisit these issues." With the advent of Trahan however, if the law used to obtain consent is unconstitutional then that consent is invalid. Ms. Sturre therefore respectfully requests that the North Dakota Supreme Court consider the Minnesota Trahan opinion as its logic relates to the facts of her case as she submitted to a blood test.

[¶17] **CONCLUSION**

[¶18] "Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." State v. Halseth, 339 P.3d 368, 371 (Idaho 2014). The notion that a driver "consents" to a warrantless search in return for the privilege of driving would violate the doctrine of unconstitutional conditions, at least when the driver is unable to revoke that consent free of criminal penalty. But see Olson at ¶12. . "The "unconstitutional conditions doctrine vindicates the Constitution's enumerated rights by

preventing the government from coercing people into giving them up." Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013). Thus, the "'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right.'" Amelkin v. McClure, 330 F.3d 822, 827 (6th Cir. 2003) (quoting Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989)); see also Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 67 (1988) ("In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."). It would be a "palpable incongruity" to strike down a legislative act that expressly divests a person of rights guaranteed by the 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." Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926).

[¶19] Although the government may have a compelling interest to investigate drinking and driving scenarios North Dakota's current implied consent laws that condition the privilege to drive on the waiver of a constitutional right and further criminalize the exercise of that right are not the least restrictive means to accomplish that goal. The situation could be easily remedied by incorporation of a warrant requirement. Instead of trying to circumvent the warrant requirement North Dakota law should embrace it. See McNeely v. Missouri, 133, S.Ct. 1552, 1561 (2013)("In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the

Fourth Amendment mandates that they do so.").

[¶20] Accordingly, based on the foregoing arguments and law Ms. Sturre respectfully requests that the Department's decision be reversed.

Dated: November 23, 2015

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Tera Marie Sturre, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20150242 District Court Case No. 30-2015-CV-00238 **CERTIFICATE OF SERVICE FOR APPELLANT'S REPLY BRIEF** **APPEAL FROM THE JUDGMENT OF THE MORTON COUNTY DISTRICT COURT, THE HONORABLE BRUCE ROMANICK, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

[¶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 November 23, 2015 he electronically served the following on the Appellee:

APPELLANT'S REPLY BRIEF

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

Dated: November 23, 2015

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