

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

|                                      |   |  |
|--------------------------------------|---|--|
| Damon Prescott Butterfield,          | ) |  |
|                                      | ) |  |
| Appellant,                           | ) | <b>Supreme Ct. No. 20150249</b>          |
|                                      | ) |  |
| v.                                   | ) | <b>District Ct. No. 45-2015-CV-00190</b> |
|                                      | ) |  |
| Grant Levi, Director of the North    | ) |  |
| Dakota Department of Transportation, | ) |  |
|                                      | ) |  |
| Appellee.                            | ) |  |

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**APPEAL FROM THE DISTRICT COURT  
JUDGMENT DATED JUNE 25, 2015  
STARK COUNTY, NORTH DAKOTA  
SOUTHWEST JUDICIAL DISTRICT**

**HONORABLE WILLIAM HERAUF**

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**BRIEF OF APPELLEE**

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## STATEMENT OF ISSUES

- [¶1] Whether Butterfield's arguments that North Dakota's implied consent and test refusal laws are unconstitutional have been rejected by this Court?
- [¶2] Whether Butterfield's argument that North Dakota's implied consent and test refusal laws impose an unconstitutional condition have been rejected by this Court?

## STATEMENT OF CASE

[¶3] Officer Justin White (Officer White) of the Dickinson Police Department arrested Damon Prescott Butterfield (Butterfield) for the offense of driving a vehicle while under the influence of intoxicating liquor. Transcript (Tr.) Exhibit (Ex.) 1b. A Report and Notice, including a temporary operator's permit, was issued to Butterfield after Butterfield refused to submit to a chemical test requested by Officer White. The Report and Notice notified Butterfield of the Department's intent to revoke his driving privileges.

[¶4] Butterfield requested a hearing in accordance with N.D.C.C. § 39-20-05. Tr. Ex. 1c. The administrative hearing was held on December 29, 2014, at which time the hearing officer considered two sets of issues as law enforcement alleged Butterfield refused to submit to requests for an onsite screening test and a chemical Intoxilyzer test. In accordance with N.D.C.C. 39-20-05(3) the hearing officer considered the following issues regarding Butterfield's refusal of the on-site screening test:

- (1) Whether a law enforcement officer had reason to believe the person committed a moving traffic violation or was involved in a traffic accident as a driver;
- (2) Whether in conjunction with the accident or violation, the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol; and

- (3) Whether [Butterfield] refused to submit to the onsite screening test.

Tr. Ex. 2B. The hearing officer also considered the following issues in regards to Butterfield's refusal of the alcohol concentration test:

- (1) Whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug or substance in violation of N.D.C.C. section 39-08-01, or equivalent ordinance;
- (2) Whether the person was placed under arrest; and
- (3) Whether the person refused to submit to the test or tests.

Tr. Ex. 2B.

[¶5] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Butterfield's driving privileges for a period of 180 days. Appendix (App.) 4. Butterfield petitioned for reconsideration. App. 5-24. On February 19, 2015 the hearing officer denied Butterfield's prayer for relief as requested in his petition for reconsideration. App. 25. Butterfield thereafter requested judicial review of the hearing officer's decision. App. 26-29.

### **STATEMENT OF FACTS**

[¶6] On November 29, 2014, at approximately 11:31 p.m., Officer White observed a vehicle being operated with no working headlights or taillights, and initiated a traffic stop. Tr. 4, ll. 5-21. The driver of the vehicle was identified as Butterfield. Tr. 5, ll. 5-25. Officer White detected the strong odor of alcohol coming from Butterfield. Tr. 6, ll. 5-6.

[¶7] While speaking with Butterfield, Officer White noticed that Butterfield had glossy eyes and was slurring his speech. Tr. 6, ll. 6-7. The officer also noted he had to twice ask Butterfield for his registration and proof of insurance. Tr. 6, ll. 7-8. At first Butterfield denied consuming any alcoholic beverages, but when Officer White told him he could smell an odor of alcohol and detected Butterfield's slurred speech, Butterfield acknowledged having a few beers. Tr. 6, ll. 15-23.

[¶8] Officer White asked Butterfield if he would submit to field sobriety tests and Butterfield consented. Tr. 7, ll. 7-13. Butterfield displayed six out of six possible clues on the horizontal gaze nystagmus test, indicating impairment. Tr.9, ll. 5-23. Butterfield did not complete the forward number count test correctly. Tr. 10, ll. 7-11. Butterfield failed the one leg stand test displaying 3 of 4 clues. Tr. 10, l. 12 – Tr. 11, l. 3.

[¶9] Officer White asked Butterfield if he would consent to an onsite screening test, to which Butterfield responded that he did not think it was a good idea because he had a commercial driver's license. Tr. 11, ll. 7-13. Officer White attempted to explain the difference between refusing and driving under the influence. Tr. 19, ll. 6-8; Tr. 21, ll. 12-25. Officer White then read the implied consent advisory and again requested the onsite screening test and Butterfield refused. Tr. 11, ll. 12-13.

[¶10] Officer White told Butterfield he was being arrested for driving under the influence. Tr. 11, ll. 24-25. Officer White transported Butterfield to the Stark County Law Enforcement Center where Butterfield was given access to a phone



and phone book. Tr. 12, ll. 3-9. Officer Brandon Stocki read the implied consent advisory to Butterfield and requested a chemical Intoxilyzer test. Tr. 12, l. 12 – Tr. 13, l. 23. Butterfield refused to take the Intoxilyzer test. Tr. 13, ll. 20-21.

### **PROCEEDINGS ON APPEAL TO DISTRICT COURT**

[¶11] Butterfield requested judicial review of the Hearing Officer’s Decision by the Stark County District Court in accordance with N.D.C.C. § 39-20-06. App. 26-29. On appeal, Butterfield raised various arguments claiming North Dakota’s implied consent laws are unconstitutional. Id.

[¶12] The district court issued its Memorandum Opinion and Order Affirming the Hearing Officer’s Decision on June 22, 2015. App. 30-35. Judgment was entered on June 25, 2015. App. 37. Butterfield appealed the Judgment to this Court. App. 40-43. On appeal, the Department requests this Court affirm the Judgment of the Stark County District Court and the Hearing Officer’s Decision revoking Butterfield’s driving privileges for a period of 180 days.

### **STANDARD OF REVIEW**

[¶13] “An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C.” McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). “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.

[¶14] This Court’s review “is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency’s decision is supported by the conclusions of law.” McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep’t of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

[¶15] Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder’s decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only “whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” Id. (citation omitted).

[¶16] “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.

## LAW AND ARGUMENT

### I. North Dakota's implied consent and criminal refusal laws do not violate Butterfield's rights under the Fourth Amendment and the due process clause.

[¶17] Butterfield unnecessarily raises various *lengthy* constitutional challenges to North Dakota's implied consent and test refusal laws. The Department asserts these arguments are in direct opposition to and completely ignore controlling decisions of this Court. See, e.g., State v. Baxter, 2015 ND 107, 863 N.W.2d 208, *pet. for cert. filed*, (U.S. Aug. 26, 2015)(No. 15-243); State v. Washburn, 2015 ND 8, 861 N.W.2d 173, *pet. for cert. filed*, (U.S. June 16, 2015)(No. 14-1469); Beylund v. Levi, 2015 ND 18, 859 N.W.2d 403, *pet. for cert. filed*, (U.S. June 23, 2015)(No. 14-1507); State v. Birchfield, 2015 ND 6, 858 N.W.2d 302 *pet. for cert. filed*, (U.S. June 16, 2015)(No. 14-1468); State v. Smith, 2014 ND 152, 849 N.W.2d 599 ; Herrman v. N.D. Dep't of Transp., 2014 ND 129, 847 N.W.2d 768; McCoy v. N.D. Dep't of Transp., 2014 ND 119, 848 N.W.2d 659. In fact, based upon this existing precedent, the Court most recently summarily affirmed judgments without discussion of similar challenges by Butterfield's counsel. See, e.g., Mesch v. Levi, 2015 ND 86, 865 N.W.2d 124 Wojahn v. Levi, 2015 ND 50, 861 N.W.2d 173, *pet. for cert. filed*, (U.S. July 28, 2015)(No. 15-129), Culver v. Levi, 2015 ND 26, 861 N.W.2d 172, *pet. for cert. filed*, (U.S. June 23, 2015)(No. 14-1508). Therefore, the Department asserts that responses to each and every point asserted by Butterfield are unnecessary as having previously been rejected by this Court.

[¶18] For example, in Birchfield, at ¶ 19, this Court “conclude[d] the criminal refusal statute is not unconstitutional under the Fourth Amendment or N.D. Const. art. I, § 8.” In reaching its decision, this Court again emphasized the United States Supreme Court recognition in Missouri v. McNeely, -- U.S. --, 133 S.Ct. 1552, 1568 (2013) (plurality decision), of implied consent statutes as being “acceptable ‘legal tools’ with ‘significant consequences’ for refusing to submit to testing which are available to the states as alternatives to warrantless, nonconsensual blood draws . . .” Birchfield, at ¶ 13. The Court also recognized the *growing number* of post-McNeely decisions from other jurisdictions in which “criminal refusal statutes have continued to withstand Fourth Amendment challenges.” Id. at ¶ 12; see, e.g., State v. Brooks, 838 N.W.2d 563, 572 (Minn. 2013), cert. denied, 134 S. Ct. 1799 (2014); State v. Yong Shik Won, 332 P.3d 661, 681-82 (Haw. Ct. App. 2014), cert. granted, 2014 WL 2881259 (Haw. June 24, 2014), Hoover v. Ohio, 549 F. Appx. 355, 356-57 (6<sup>th</sup> Cir. 2013) (per curiam); United States v. Muir, No. 8:13-mj-03005-TMD, 2015 WL 2165570, at \*11 (D. Md. May 7, 2015).

[¶19] In reaching its decision in Birchfield, at ¶¶ 13-16, the Court also differentiated that line of warrantless, suspicionless search cases, which Butterfield would argue support his position such as Camara v. Municipal Court of City & County of San Francisco, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541, 546 (1967); and Lebron v. Secretary of Florida Department of Children and Families, 772 F.3d 1352, 1378 (11<sup>th</sup> Cir. 2014). For example, the Court stated “[u]nlike the regulation in Camara which allowed for suspicionless

searches of private property, implied consent laws, like North Dakota law, do not authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge.” Birchfield at ¶ 15. “Unlike the regulation in Camara, the test refusal statute criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search.” Id. “Furthermore, reliance on Camara ‘overlooks the apparent difference between the way the Supreme Court treats cases in which the Fourth Amendment affects searching individuals by testing in the drunk-driving context and those where it affects a home search in any context.” Id. (quoting State v. Chasingbear, No. A14-0301, 2014 WL 3802616, at \*14 (Minn. Ct. App. Aug. 4, 2014) (unpublished opinion)).

[¶20] With respect to cases such as See and Lebron, the Court stated “[b]ecause none of these cases were decided in the context of drunk-driving prosecutions where an officer had probable cause to search a defendant's body, we do not believe they are helpful in determining whether criminalizing a defendant’s refusal to submit to a chemical test when an officer has probable cause to believe the defendant is under the influence of alcohol violates a defendant’s Fourth Amendment rights.” Id. at ¶ 16. The Court continued “[i]ndeed, the Supreme Court has said ‘the Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.’” Id. (quoting Jenkins v. Anderson, 447 U.S. 231, 236 (1980) (citation omitted)).

[¶21] Similarly, in Baxter this Court rejected a driver's challenge to North Dakota's test refusal law on substantive due process grounds. 2015 ND 107, 863 N.W.2d 208, *pet. for cert. filed*, (U.S. Aug. 26, 2015)(No. 15-243). The Court found Baxter had not cited to any authority holding refusal of an onsite screening test or chemical test implicated a fundamental right. Id. at ¶ 15. Further, the Court stated, "[b]ut even if the right of refusal implicates a fundamental right, we have recently held, '[i]t is clear that the State has a compelling state interest in regulating intoxicated drivers,' Beylund, 2015 ND 18, ¶ 27, 859 N.W.2d 403, and the often-state reason for this conclusion need not be restated here." Id. at ¶ 16 (citations omitted). Butterfield's identical argument, therefore, fails for the same reasons.

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

[¶22] "Generally speaking, the doctrine [of unconstitutional conditions] provides the government ordinarily may not grant a benefit conditioned on the surrender of a constitutional right, even if the government may withhold the benefit altogether." Beylund, 2015 ND 18 at ¶ 18 (citing 16A Am. Jur. 2d Const. Law § 411 (2009 & Supp. 2014)). "However, under the doctrine, the government may lawfully impose conditions, including the surrender of a constitutional right, provided the conditions are reasonable." Id. "Therefore, even if the unconstitutional conditions doctrine applies to the Fourth Amendment, it does not necessarily mean a constitutional violation occurred." Id.

[¶23] After conducting a comprehensive review of the caselaw – including that unrelated caselaw provided by Butterfield on appeal in this matter – this Court stated “we are not convinced the implied consent law is invalid under the unconstitutional conditions doctrine.” Id. at ¶ 30. The Court “conclude[d] North Dakota’s implied consent law as challenged, either on its face or as applied, does not violate the Fourth Amendment of the United States Constitution applying either general Fourth Amendment principles or under the doctrine of unconstitutional conditions.” Id. at ¶ 31.

### **CONCLUSION**

[¶24] The Department respectfully requests this Court affirm judgment of the Stark County District Court and affirm the hearing officer’s decision revoking Butterfield’s driving privileges for 180 days.

Dated this \_\_\_\_ day of November, 2015.

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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| Damon Prescott Butterfield,          | ) |  |
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| Appellant,                           | ) | <b>Supreme Ct. No. 20150249</b>          |
|                                      | ) |  |
| v.                                   | ) | <b>District Ct. No. 45-2015-CV-00190</b> |
|                                      | ) |  |
| Grand Levi, Director of the North    | ) |  |
| Dakota Department of Transportation, | ) |  |
|                                      | ) |  |
| Appellee.                            | ) |  |

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STATE OF NORTH DAKOTA    )  
  ) ss.  
COUNTY OF BURLEIGH    )

[¶1] Donna J. Connor states under oath as follows:

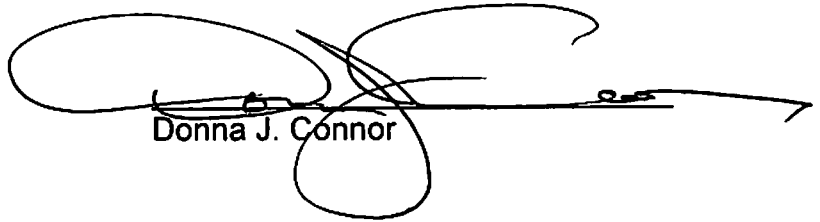
[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 5<sup>th</sup> day of November, 2015, I served the attached **BRIEF OF APPELLEE** upon Damon Prescott Butterfield, by and through his attorney, Thomas F. Murtha IV, by placing a true and correct copy thereof in an envelope addressed as follows:

Thomas F. Murtha, IV  
Attorney at Law  
P.O. Box 1111  
Dickinson, ND 58602-1111



and depositing the same, with postage prepaid, in the United States mail at Bismarck,  
North Dakota.



Donna J. Connor

Subscribed and sworn to before me  
this 5<sup>th</sup> day of November, 2015.



Notary Public

