20150252
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 30, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lynh Hong Musick, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20150252 District Court Case No. 2015-CV-00240 **APPELLANT'S REPLY BRIEF** **APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE ZANE ANDERSON, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

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[¶3] **I. The Administrative Hearing Officer erred in the conclusions of law because North Dakota's implied consent and 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.**

[¶4] "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 v. Levi, 2015 ND 250, 870 N.W.2d 222.

[¶5] 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. Ms. Musick argued

previously that the criminalization of refusing a chemical 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. Musick 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 refused a chemical test and it should be unconstitutional to criminalize such a refusal.

[¶6] On November 25, 2015 the Supreme Court of the State of Hawai'i released its opinion in State v. Won, No. SCWC-12-0000858, 2015 WL 7574360 at *21 (Haw. Nov. 25, 2015, Nakayama dissenting)("The Majority holds that the criminal sanctions for refusing to submit to a breath or blood alcohol test provided by Hawai'i Revised Statutes (HRS) § 291E–68 (Supp. 2012) are inherently coercive, thus rendering Defendant Yong Shik Won's (Won) otherwise voluntary consent invalid."). Previously the North Dakota Supreme Court has followed the Minnesota decision in State v. Brooks, 838 N.W.2d 563 (Minn. 2013) regarding the issue of consent. Brooks explained that standing alone being informed of the consequences of refusal does not amount to coercion even if those consequences include a loss of driving privileges and being charged with a crime. Ms. Musick argues that the majority decision in Brooks is not constitutionally sound and should not be followed by any State.

[¶7] Prior to the Brooks decision, before the law that made refusal a crime in Minnesota, the Minnesota Supreme Court in Prideaux v. State Department of Public Safety, 247 N.W.2d 385, 388 (Minn. 1976) determined that "[t]he obvious and intended

effect of the implied-consent law is to coerce the driver suspected of driving under the influence into 'consenting' to chemical testing." The Minnesota Supreme Court in Brooks did not explain its decision to find now after Prideaux that Minnesota's implied consent law does not coerce the driver despite a scathing concurrence in Brooks from Justice Stras. Brooks at 574 ("I cannot join the court's opinion because the particular theory of consent advanced by the court cannot withstand constitutional scrutiny.").

[¶8] Ms. Musick is arguing to overturn precedent set by the North Dakota Supreme Court in its consideration of Brooks and find that consent itself is not valid for fourth amendment purposes when it is conditioned on the receipt of a government benefit and therefore it is unconstitutional to criminalize a refusal. In doing so the Court would adopt the analysis of the United States Court of Appeals for the Eleventh Circuit in Lebron v. Florida, 772 F.3d 1352 (11th Cir. 2014). Lebron explains that consent is not valid for fourth amendment purposes when it is conditioned on the receipt of a government benefit. Id. at opinion pages 46-54.

[¶9] What the Minnesota Supreme Court has done in Brooks is create a new categorical exception to the warrant requirement under the fourth amendment however a plurality of the United States Supreme Court in McNeely v. Missouri, 133, S.Ct. 1552 (2013) refused such an approach writing that "the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." Id. at opinion page 19. In its majority opinion the United States Supreme Court wrote that regarding McNeely "the State based its case on an insistence that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to

a nonconsensual blood test without any precondition for a warrant. That is incorrect." Id. at opinion page 26.

[¶10] It seems axiomatic that if it is constitutional to criminalize a refusal to consent to a warrantless search then the fourth amendment warrant requirement is not an inalienable right and is otherwise meaningless, being subject to the whim of any legislative endeavor to make its assertion a crime. As the Eleventh Circuit explained in Lebron

> [t]he State says that deposition testimony from Lebron indicates that he freely signed the consent form and knew he could refuse the drug test, albeit at the expense of his TANF eligibility. This fact does not affect the result because "[s]urrendering to drug testing in order to remain eligible for a government benefit such as employment or welfare, whatever else it is, is not the type of consent that automatically renders a search reasonable as a matter of law."

Id. at opinion pages 47-48, quoting Am. Fed'n of State, Cnty. & Mut. Employees Counsel 79 v. Scott, 717 F.3d 851, 873 (11th Cir. 2013). Ms. Musick argues that the consent analysis in Won, Lebron and the concurring opinion in Brooks by Justice Stras are far superior to the conclusory assertions of the majority opinion in Brooks and that North Dakota should abandon its reliance on Brooks regarding consent and find instead that penalizing and criminalizing a refusal to consent renders that consent invalid for fourth amendment purposes. Compare State v. Hayes, 2012 ND 9, ¶39, 809 N.W.2d 309 ("Hayes had two choices when confronted by the officers asking whether they could search her residence: consent to a warrantless search or violate her release conditions and be subject to an arrest warrant for failing to comply with the district court's order. Consent based upon duress or coercion is not voluntary. Id. Under the circumstances, Hayes did not provide voluntary consent to search 210 Adams Street.").

[¶11] **II. The Administrative Hearing Officer erred because Ms. Musick should have been granted the opportunity at the hearing to cure her refusal, not doing so**

denied Ms. Musick equal protection.

[¶12] This issue appears to be a case of first impression in North Dakota. Ms. Musick argues that N.D.C.C. § 39-20-04(2) unconstitutionally permits the creation of a class of people that do not have the ability to cure their refusal in violation of Article I, Section 21 of the North Dakota Constitution. The Administrative Hearing Officer erred because Ms. Musick should have been permitted to cure her refusal at the hearing. Not providing Ms. Musick that opportunity denied her equal protection rights because she had not been charged with DUI at the time of her hearing (classification) and could only plead to refusal whereas if she had been charged with DUI at the time of her hearing (classification) she could have cured her refusal.

[¶13] By not allowing Ms. Musick to cure, the law to allow the cure is arbitrarily provided only to those individuals that have the opportunity before the deadline to plead guilty to DUI. Therefore all persons charged with refusal are not treated equally because some have the opportunity to cure that refusal and others do not based on factors controlled by the State. Compare Gableman v. Hjelle, 224 N.W.2d 379, 384 (N.D. 1974)("[A]ll persons who refuse to submit to a chemical test are treated in the same manner, and revocation of such persons' operator's licenses is mandatory, not discretionary, and is not unreasonable, capricious, or arbitrary."). Because there is no basis for the classification between those who refuse and are charged with DUI and those who refuse and are charged with DUI after the deadline to cure, Ms. Musick's equal protection rights were violated. See Crawford v. Board of Education of City of Los Angeles, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982)(A facially neutral statute may violate equal protection in its application or effect.).

[¶14] **CONCLUSION**

[¶15] "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).

[¶16] 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.").

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

Dated: November 30, 2015

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lynh Hong Musick, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20150252 District Court Case No. 2015-CV-00240 **CERTIFICATE OF SERVICE FOR APPELLANT'S REPLY BRIEF** **APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE ZANE ANDERSON, 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 30, 2015 he electronically served the following on the Appellee:

REPLY BRIEF

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

Dated: November 30, 2015

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