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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellant,	)	Supreme Court No. 20150299
vs.	)	District Ct. No. 09-2015-CR-01743
	)	
Blaise Martin O'Connor,	)	
	)	
Defendant and Appellee.	)	

APPELLANT'S BRIEF

Appeal from the September 21, 2015 Memorandum Opinion and Order
East Central Judicial District
the Honorable Steven L. Marquart, Presiding

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[¶ 5] II. Whether the district court erred in deciding that the recent legislative change, i.e., N.D.C.C. § 39-20-01(3)(b)'s inadmissibility provision for "test[s] administered under this section," precluded voluntary consent as an independent ground for admission of the Defendant's chemical test.

[¶ 6] **STATEMENT OF CASE**

[¶ 7] The State appeals from the district court's order suppressing the results of the Defendant's chemical test. The district court found that the implied consent advisory Trooper Ware gave before the onsite screening test was insufficient for the later chemical test because (1) the onsite screening test statute (N.D.C.C. § 39-20-14(3)) provides that an officer must advise a driver only that refusal is a crime – not that it is punishable in the same manner as a DUI as the chemical test statute (N.D.C.C. § 39-20-01(3)(a)) requires, and (2) an advisory preceding a chemical test must be given in full after arrest. The district court also concluded that because of the new inadmissibility provision (N.D.C.C. § 39-20-01(3)(b)) in the implied consent statute, voluntary consent was not a valid ground, independent of implied consent procedures, for admission of the chemical test result.

[¶ 8] The State argues that two independent grounds support reversal. First, the district court erred in deciding that the implied consent advisory given to the Defendant before the onsite screening test could not help establish sufficient warning for the chemical test. Although Trooper Ware was not statutorily required to advise the Defendant before the onsite screening test that refusal was a crime punishable in the same manner as a DUI, Trooper Ware actually did so advise the Defendant. The district court's finding that Trooper Ware did not is contrary to the manifest weight of the evidence. Further, the district court erred as a matter of law in concluding that the chemical test advisory must be given in full

after arrest – especially when the officer ensures that the arrestee recalls the prior full advisory.

[¶ 9] Second, even if the advisory actually given before the onsite screening test and later referenced had been insufficient for the chemical test, the district court erred as a matter of law in concluding that because of the enactment of N.D.C.C. § 39-20-01(3)(b), providing that tests administered under that section are inadmissible if the officer fails to give the advisory, voluntary consent could not serve as an independent ground for admission of the chemical test result. The State seeks reversal of the district court's order suppressing the Defendant's chemical test result.

[¶ 10] **STATEMENT OF FACTS**

[¶ 11] On May 24, 2015, Trooper Mason Ware saw a vehicle travelling with a defective taillight. (Mot. Hr'g Tr. 5:13-15, Sept. 8, 2015.) Trooper Ware turned on his squad car's emergency lights, and the vehicle pulled over. (Tr. 5:16-17.) The Defendant, the driver of the vehicle, had slurred speech and bloodshot, watery eyes. (Tr. 18-20.) The Defendant admitted that he had drunk "a couple beers." (Exhibit 1 at 8:20-8:25, Oct. 1, 2015.)

[¶ 12] A. The Initial Implied Consent Advisory & Arrest.

[¶ 13] After the Defendant performed field tests, Trooper Ware explained that he was going to read the DUI implied consent advisory. (Exhibit 1 at 17:30-17:32.) Holding up the advisory card to the glass in the squad car, Trooper Ware added that the Defendant could follow along. (Exhibit 1 at 17:32-17:35; Tr. 10:16-11:7.) Trooper Ware then recited the advisory, which indicated that as a condition of operating a vehicle, the Defendant had consented to taking a test to determine if he was under the influence of alcohol or drugs (Exhibit 1 at 17:36-17:46); that the Defendant was required by law to submit to a breath screening test to determine if he was under the influence of alcohol (Exhibit 1 at 17:48-17:52); that refusal to take the test as directed by an officer is a crime "punishable in the same manner as a DUI" (Exhibit 1 at 17:53-17:59); and that refusal could result in revocation of his driver's license for a minimum of 180 days and up to three years (Exhibit 1 at 18:00-18:08). When asked if he understood the consequences, the Defendant indicated he did. (Exhibit 1 at 18:09-18:12.)

[¶ 14] Before submitting to the onsite screening test, the Defendant inquired into how much "latitude" Trooper Ware had. (Exhibit 1 at 19:26-19:29.) Trooper Ware replied that he did not have much discretion. (Exhibit 1 at 19:30-19-32.) After submitting to the screening test and hearing the results, the Defendant asked if there was any way they could "step back" from the process. (Exhibit 1 at 22:41-22:47.) Trooper Ware apologized, reiterated that he could not exercise discretion, and arrested the Defendant for DUI. (Exhibit 1 at 22:50-22:58.)

[¶ 15] B. The Drive to the Defendant's Home & Jail.

[¶ 16] The Defendant's wife, who was a passenger in the Defendant's vehicle, appeared too impaired to drive. (Exhibit 1 at 26:18-26-20.) Trooper Ware volunteered to drive the Defendant's wife to her home (Exhibit 1 at 26:06-26:20) and allowed the Defendant and his wife to talk about the situation (Exhibit 1 at 29:57-32:00). The Defendant then again alluded to whether Trooper Ware might stop the DUI arrest process, asking if they were "committed" to the situation. (Exhibit 1 at 32:00-32:08.) Confirming that he would continue with the arrest process (Exhibit 1 at 32:07-32:11), Trooper Ware drove, with both the Defendant and the Defendant's wife in the squad car, to the Defendant's home. (Exhibit 1 at 38:08-57:08.)

[¶ 17] After dropping off the Defendant's wife but before driving the Defendant to the jail, Trooper Ware moved the Defendant's handcuffs to the front of his body (Exhibit 1 at 57:22-59:15) and advised the Defendant of his Miranda rights (Exhibit 1 at 1:01:17-1:01:32). Noting that he had not heeded the

Defendant's wife's request to park the Defendant's pickup in another location, Trooper Ware apologized. (Exhibit 1 at 1:02:01-1:02:11). At times during the drive, the Defendant and Trooper Ware chatted about various topics, including the rpm's at which the squad car's engine was functioning (1:14:27-1:1:14:56) and the potential causes of malfunctioning lights on the Defendant's pickup (1:18:52-1:20:04). At one point, the Defendant chuckled and suggested that Trooper Ware could just drop the Defendant off and "call this whole thing good." (Exhibit 1 at 1:05:11-1:05:19.) Trooper Ware apologized and continued driving. (Exhibit 1 at 1:05:19-1:05:22.)

[¶ 18] C. The Referencing of the Initial Advisory and the Shortened Second Advisory.

[¶ 19] At the jail, Trooper Ware asked if the Defendant remembered the implied consent advisory that Trooper Ware previously read. (Exhibit 1 at 1:31:56-1:32:00; Tr. 7:3-8.) The Defendant confirmed that he did, replying, "Yeah, I think so." (Exhibit 1 at 1:32:00-1:32:03.) Trooper Ware then read "section b" of the advisory, which indicated that North Dakota law required the Defendant to take a chemical test to determine if the Defendant was under the influence of alcohol or drugs and that refusal could result in revocation of his license for a minimum of 180 days and up to 3 years. (Exhibit 1 at 1:32:05-1:32:22.) Trooper Ware asked the Defendant if he would submit to a chemical test using the Intoxilyzer. (Exhibit 1 at 1:32:22-1:32:28.) The Defendant said he

would. (Exhibit 1 at 1:32:28-1:32:29.) Moments later, the Defendant submitted to the chemical test.

[¶ 20] D. The Defendant's Suppression Motion & the Hearing.

[¶ 21] After appearing in court on the DUI charge, the Defendant moved to suppress the result of his chemical test. (Motion to Suppress Evidence, July 1, 2015.) Emphasizing that N.D.C.C. § 39-20-01(3)(a) required an officer to inform "the individual charged" of the implied consent advisory, the Defendant argued that a complete advisory was required after arrest. (Brief in Support of Motion to Suppress Evidence at ¶¶ 3, 7-9, July 1, 2015.)

[¶ 22] The State responded, arguing that this Court's reasoning in State v. Salter, 2008 ND 230, 758 N.W.2d 702 established that an advisory does not have to be re-read after arrest when a defendant indicates he recalls an initial advisory given before arrest. (State's Response to Defendant's Motion to Suppress Evidence at ¶¶ 8-12, July 14, 2015.) The State alternatively argued that voluntary consent was an admissibility ground independent of N.D.C.C. § 39-20-01 as this Court had for decades declared that the statutory requirements were inapplicable when voluntary consent existed. (State's Response to Defendant's Motion to Suppress Evidence at ¶¶ 13-15, July 14, 2015.)

[¶ 23] At the hearing on the Defendant's motion, Trooper Ware testified about the circumstances surrounding the Defendant's arrest – including the initial implied consent advisory and the second advisory. (Tr. 4:24-20:15.) A squad video capturing the circumstances was also admitted into evidence. (Tr. 12:12-13:1.)

[¶ 24] E. The District Court's Decision.

[¶ 25] In its September 21, 2015 Memorandum Opinion and Order, the district court rejected the State's argument that sufficient warning for the chemical test existed because Trooper Ware gave a full advisory before the onsite screening test and confirmed that the Defendant recalled that advisory before the chemical test. (App. at 6.) At the outset, the court found that Trooper Ware gave an advisory before the onsite screening test that tracked with N.D.C.C. § 39-20-14, i.e., that only warned the Defendant that refusal was a crime – not that it was punishable in the same manner as a DUI. (App. at 4.) Related to that finding, the court made three legal conclusions. First, the advisory "must be conducted only after arrest, as stated by N.D. Cent. Code § 39-20-01(2) as well as the use of the language 'individual charged' in subsection 3(a)." (App. at 5.) Second, this Court's decision in State v. Salter, 2008 ND 230, 758 N.W.2d 702 (explaining that "the statutory procedures for implied consent were complied with" when the officer "had advised [the defendant] what implied consent was prior to his arrest, [the defendant] was told implied consent applied to the blood test, and [the defendant] indicated he understood") "is no longer controlling[.]" (App. at 6-7.) The court reasoned that Salter was inapplicable because of statutory implied consent changes – namely, that refusal is now a crime and the current language in the onsite screening statute (N.D.C.C. § 39-20-14) requires an officer to advise a driver only that refusal is a crime while the current language in the chemical test statute (N.D.C.C. § 39-20-01(3)(a)) requires an officer to advise a driver that

refusal is a crime punishable in the same manner as a DUI. (App. 6-7.) Third, N.D.C.C. § 39-20-14(5)'s indication that "[n]o provisions of this section may supersede any provisions of chapter 39-20[,]" precludes use of an advisory given before an onsite screening test to help establish sufficient warning for a later chemical test. (App. at 6-7.)

[¶ 26] The district court also rejected the State's alternative argument that voluntary consent, independent of statutory implied consent, was a valid basis for admission of the Defendant's chemical test result. (App. at 7.) The court concluded that "[a]s all of the cases cited by the State are based on constitutional exclusion and were decided prior to the April 15, 2015 enactment of the statutory exclusion of chemical test for failure to abide by the provisions of 39-20-01, they are neither controlling nor persuasive." (App. at 7.) Further, "whether the Defendant provided voluntary consent does not cure Trooper Ware's failure to provide a complete and proper implied consent advisory under 39-20-01." (App. at 7.)

[¶ 27] **STANDARD OF REVIEW**

[¶ 28] The standard of review applicable to a district court's order granting a motion to suppress depends on whether factual or legal questions are at issue. Findings of fact will be not be overturned if, after any conflicts are resolved in favor of affirmance, "there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence." State v. Boehm, 2014 ND 154, ¶¶ 8-9, 849 N.W.2d 239 (citation omitted). Legal conclusions are subject to de novo review. Id.

[¶ 29] LAW AND ARGUMENT

[¶ 30] The State argues that the district court erred in two primary ways: (1) determining that the implied consent advisory actually given to the Defendant before the onsite screening test and his confirmed recollection of the advisory could not help establish sufficient warning for the chemical test, and (2) deciding that the recent legislative change, i.e., N.D.C.C. § 39-20-01(3)(b)'s inadmissibility provision for "test[s] administered under this section," precluded voluntary consent as an independent ground for admission of the chemical test. Either error is a sufficient ground for reversal.

[¶ 31] I. The district court erred in deciding that the implied consent advisory Trooper Ware actually gave to the Defendant before the onsite screening test, and later confirmed the Defendant recalled, could not help establish sufficient warning for the chemical test.

[¶ 32] Review of the district court's decision about the advisory given involves two distinct parts: (1) the district court's factual finding that Trooper Ware's initial advisory did not warn the Defendant that refusal was a crime punishable in the same manner as a DUI, and (2) the district court's legal conclusion that an implied consent advisory for a chemical test must always be fully recited after arrest.

[¶ 33] It's important to note that the district court's decision turned largely upon a difference, relating to the extent of the warning about the criminal penalty, between the onsite screening test statute and the chemical test statute. The warning for the chemical test requires additional specificity not needed for an

onsite screening test. In particular, an officer satisfies the criminal penalty warning for the onsite screening statute (N.D.C.C. § 39-20-14(3)) by advising the driver that refusal to take the screening test is "a crime"; to satisfy the chemical test statute (N.D.C.C. § 39-20-01(3)(a)), the officer must advise the driver that refusal is "a crime punishable in the same manner as driving under the influence."

[¶ 34] A. The district court's finding that Trooper Ware did not initially advise the Defendant that refusal was a crime punishable in the same manner as a DUI is contrary to the manifest weight of the evidence.

[¶ 35] The manifest weight of the evidence showed that Trooper Ware did initially advise the Defendant that refusal was a crime punishable in the same manner as a DUI. When cross-examined, Trooper Ware was asked if the advisory he gave before the onsite screening test was "as required by Section 39-20-14" and he responded, "Yes." (Tr. 8:24-9:5.) The district court appeared to jump from that response to comparing the language in N.D.C.C. § 39-20-14 to that in N.D.C.C. § 39-20-01 and in turn, find that Trooper Ware did not advise the Defendant that refusal was a crime punishable in the same manner as a DUI. But that finding ignores Trooper Ware's full testimony. Indeed, Trooper Ware later explained that the advisory he gave before the onsite screening test included a warning that refusal was a crime punishable in the same manner as a DUI. (Tr. 19:7-20:15.) And more importantly, other evidence – the squad car recording capturing what Trooper Ware actually said – establishes that Trooper Ware warned the Defendant that refusal was a crime punishable in the same manner as a

DUI. (Exhibit 1 at 17:53-17:59.) Simply put, the district court's finding is contrary to what the testimony and squad car recording established.

[¶ 36] B. The district court erred in concluding that the implied consent advisory for a chemical test must be fully recited after arrest.

[¶ 37] The district court's conclusion that the advisory must always be fully recited after arrest is based on incorrect premise: that an officer cannot satisfy the substantive statutory requirement for an onsite screening test through a warning that also satisfies the substantive statutory requirement for a chemical test. Overlooked in that premise is the fact that refusal of a screening test and refusal of a chemical test carry identical criminal penalties. See N.D.C.C. § 39-08-01(1)(e)(2)-(3) (setting out the prohibited acts of refusing a chemical test and refusing an onsite screening test); N.D.C.C. § 39-08-01(3)&(5) (designating the offense level and mandatory penalties for violations of the section – without regard to subdivision). In fact, each is punishable in the same manner as a DUI. See N.D.C.C. § 39-08-01(3) & (5). So an officer can simultaneously satisfy the screening test statute's substantive requirement and the chemical test statute's substantive requirement; the officer can simply use the more detailed warning, i.e., that refusal is a crime punishable in the same manner as a DUI. See N.D.C.C. § 39-20-14(3); N.D.C.C. § 39-20-01(3)(a).

[¶ 38] By overlooking the ability of an officer to simultaneously satisfy the substantive requirements of the onsite screening and chemical test statutes, the district court erroneously concluded that this Court's holding in State v. Salter,

2008 ND 230, 758 N.W.2d 702 could no longer apply. Closer analysis, in fact, shows that Salter's holding does still apply.

[¶ 39] In Salter, this Court concluded that "statutory procedures for implied consent were complied with" when the officer gave the advisory before arrest and later confirmed that the defendant knew the advisory applied to the post-arrest chemical test. State v. Salter, 2008 ND 230, ¶ 10, 758 N.W.2d 702. The Court rejected the defendant's argument that the advisory must be read after arrest, even though the chemical test statute then, as it does now, required the officer to give the advisory to the one "charged." Compare N.D.C.C. § 39-20-01 (2005) (providing that the officer "shall inform the person charged") with N.D.C.C. § 39-20-01(3)(a) (2015) (providing that officer "shall inform the individual charged") (emphasis added).

[¶ 40] As in Salter, the Defendant was provided a complete advisory (one that indicated refusal was a crime punishable in the same manner as a DUI) before the onsite screening test (Exhibit 1 at 17:53-17:59); was asked, after arrest and before the chemical test, to recall the complete advisory (Exhibit 1 at 1:31:56-1:32:00; Tr. 7:3-8); and confirmed that he understood (Exhibit 1 at 1:32:00-1:32:03). The fact that Trooper Ware before the onsite screening test provided a more detailed advisory than was statutorily required cannot logically defeat its later reference before the chemical test. See generally Mertz v. City of Elgin, Grant County, 2011 ND 148, ¶ 7, 800 N.W.2d 710 ("This Court construes statutes to avoid absurd or illogical results") (internal quotations and citation omitted).

Nor does N.D.C.C. § 39-20-14(5)'s indication that "no provisions of this section may supersede any provisions of chapter 39-20" impact the actual advisory given. Contrary to the district court's suggestion, Trooper Ware's referencing of the prior complete advisory did not result in the superseding of any statute; it merely incorporated notice that in fact satisfied the statutory requirements of N.D.C.C. § 39-20-01(3)(a).

[¶ 41] All told, the district court erred as a matter of law in concluding that (1) an officer cannot simultaneously satisfy the substantive statutory requirements for an onsite screening test and a chemical test, and (2) an advisory preceding a chemical test must be recited in full after arrest. Salter is still good law and applies here.

[¶ 42] II. **The district court erred in deciding that the recent legislative change, i.e., N.D.C.C. § 39-20-01(3)(b)'s inadmissibility provision for "test[s] administered under this section," precluded voluntary consent as an independent ground for admission of the Defendant's chemical test.**

[¶ 43] The district court's conclusion regarding voluntary consent failed to harmonize this Court's precedent, legislative intent, and the precise language used in the inadmissibility provision.

[¶ 44] A. **Voluntary consent is a long-established ground separate and distinct from implied consent, and the provisions of N.D.C.C. § 39-20-01 are inapplicable when voluntary consent is relied upon for admission of chemical test results**.

[¶ 45] This Court has established that the statutory implied consent provisions do not apply to situations where actual or voluntary consent is relied

upon. See State v. Abrahamson, 328 N.W.2d 213, 215 (N.D. 1982); City of Bismarck v. Hoffner, 379 N.W.2d 797, 798-99 (N.D. 1985); Fossum v. North Dakota Dep't of Transp., 2014 ND 47, ¶¶ 1, 11-12, 843 N.W.2d 282. Reviewing the underpinnings of voluntary consent, the Court noted that "[t]he concept of consent… is longstanding and pervasive within our system of jurisprudence." Hoffner, at 799. Further, "[i]t has been a part of our legal heritage from the time in which society recognized the existence of free will and individual rights. Id. The Court accordingly concluded that voluntary consent is an independent ground for admission of chemical test results: "It appears axiomatic that implied consent is unnecessary where actual consent is given." Id.

[¶ 46] The availability of voluntary consent as a ground for admission of a chemical test result – even when implied consent procedures are initiated – is important to note. Indeed, in Abrahamson, Hoffner, and Fossum, voluntary consent supported admission of the test result, despite an officer's use of implied consent procedures. See Abrahamson, 328 N.W.2d at 215 ("Officer Hoffer told Abrahamson he would lose his driver's license if he refused to submit to the test"); Hoffner, 379 N.W.2d at 798 ("The officer … informed him that if he refused the blood test 'he would probably lose his driver's license for a year'"); Fossum, 2014 ND 47, ¶ 3, 843 N.W.2d 282 ("Officer Bohn testified … he read Fossum the 'North Dakota Implied Consent' advisory … and "Fossum was [later] read the North Dakota Implied Consent a second time").

[¶ 47] Also noteworthy was the Court's explanation that if it had erred in interpreting the implied consent statute as inapplicable to situations where voluntary consent is relied upon, it presumed the Legislature would act to correct the error. Hoffner, 379 N.W.2d at 799. Further, to abolish voluntary consent as an independent basis for admission of chemical test results, the Legislature would have to restrict "the ability of an individual to [voluntarily] consent to the taking of a [chemical] test." Id. In doing so, the Legislature must include very "specific language" showing it "intended to restrict the right of the individual to voluntarily consent[.]" Id. at 799 n.3. This Court even provided an example of the exacting language the Legislature must use to restrict voluntary consent: N.D.C.C. § 39-20-04's provision that "if a person refuses to submit to testing under Section 39-20-01 or 39-20-14, none shall be given[.]" Importantly, the last phrase of the provision included no limitation to testing under the specific statutes. Thus the person's refusal must be accepted, and the officer has no other means (such as a search warrant) to obtain a test. In other words, the Legislature expressly precluded grounds, independent of N.D.C.C. §§ 39-20-01 and 39-20-14, for obtaining a test.

[¶ 48] B. **The statutory words of limitation and legislative history show that the admissibility ground of voluntary consent in a criminal case was not abolished by the enactment of N.D.C.C. § 39-20-01(3)(b)**.

[¶ 49] In enacting the inadmissibility provision, the Legislature chose to limit its reach to those tests administered under N.D.C.C. § 39-20-01. Legislative

history shows that the concern was not with the independent inadmissibility ground of voluntary consent, but instead with ensuring that drivers are advised of the consequences of refusing because refusal had become a crime: "But now that we have criminalized the refusal[,] the interim committee heard testimony and agreed that it should be mandated that law enforcement has to read the implied consent statute[.]" Hearing on S.B. 2052 Before the Judiciary Committee, at 3 (Jan. 20, 2015) (statement of Sen. Armstrong). Indeed, the implied consent advisory warns solely about the risks of not complying with (i.e., refusing) an officer's request to submit to a chemical test. See N.D.C.C. § 39-20-01(3)(a). What's more is that the Defendant's allegation that the Legislature was "[f]ed up with repeated non-compliance with mandatory implied consent advisories" (Defendant's Brief in Support of Motion to Suppress Evidence at ¶ 5) is not accurate. The Legislature noted just the opposite: "According to the testimony, law enforcement has been diligent in reading implied consent warnings to offenders." Background on S.B. 2052, at 4 (Jan. 20, 2015) (Provision by Vonette Richter, Legis. Council). The Legislature thus was not motivated by past police misconduct to curb admission of chemical test results. See id. Moreover, nowhere in the history, did the Legislature criticize, or even discuss, this Court's decisions in Abrahamson, Hoffner, and Fossum. In short, nothing in the legislative history suggests a goal of abolishing voluntary consent – a decades-long independent basis for admission of a chemical test result.

[¶ 50] Nor does the express language in the provision impact an individual's ability to voluntarily consent to a chemical test. Scrutiny of the words of limitation ("administered under this section") shows why. It's important to recall this Court's example of the "specific language" that the Legislature must use if intending to restrict voluntary consent: N.D.C.C. § 39-20-04's preclusion of any testing – not just those under enumerated statutes - when a driver refuses. Unlike with N.D.C.C. § 39-20-04, the Legislature in N.D.C.C. § 39-20-01(3)(b) limited its reach to those tests "administered under this section[.]" A test in which the provisions of N.D.C.C. § 39-20-01 are not applicable, i.e., one in which voluntary consent is the sole basis of admissibility, is not one administered under N.D.C.C. § 39-20-01. The words of limitation would be superfluous if the Legislature had intended to preclude the admissibility of all tests not preceded by the implied consent advisory. If the words of limitation are taken out – such that the provision reads, "[a] test is not admissible … if the law enforcement officer fails to inform the individual…" - then voluntary consent would be precluded. But the Legislature's words of limitation cannot be ignored; rules of construction require that they have effect. State v. Laib, 2002 ND 95, ¶ 13, 644 N.W.2d 878 ("We interpret statutes to give meaning and effect to every word, phrase, and sentence, and do not adopt a construction which would render part of the statute mere surplusage"). The effect must be determined by harmonizing the words of limitation with the language in related statutes. See Marhula v. Grand Forks Curling Club, Inc., 2015 ND 130, ¶ 5, 863 N.W.2d 503 ("We construe statutes as a

whole and harmonize them to give meaning to related provisions, and interpret them in context to give meaning and effect to each word, phrase, and sentence").

[¶ 51] That effect is direct in the administrative realm. Administrative action under N.D.C.C. §§ 39-20-03.1 and 39-20-03.2 is conditioned upon a person "submit[ting] to a test under section 39-20-01[.]" Further, one of the issues for the administrative hearing officer is "whether the individual was tested in accordance with section 39-20-01[.]" N.D.C.C. § 39-20-05(2). In other words, the language in the administrative statutes aligns with the language in the inadmissibility provision of N.D.C.C. § 39-20-01(3)(b). Thus a chemical test not preceded by the proper implied consent advisory is inadmissible in administrative proceedings under N.D.C.C. ch. 39-20.

[¶ 52] In contrast, nothing in the DUI statute aligns with the language in the inadmissibility provision of N.D.C.C. § 39-20-01(3)(b). Under N.D.C.C. § 39-08-01(1)(a), a person is guilty of DUI if he "has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control." Unlike in the administrative context, nowhere in N.D.C.C. § 39-08-01 did the Legislature require that the test be under, or in accordance with, N.D.C.C. § 39-20-01. Thus a chemical test not preceded by a complete implied consent advisory may still be admitted in a criminal case under grounds independent of N.D.C.C. § 39-20-01, such as the long-standing principle of voluntary consent.

[¶ 53] Preserving the long-standing principle of voluntary consent as grounds for admission of chemical tests in DUI cases is reasonable. An example helps illustrate why: A driver is stopped for speeding. The driver is very cooperative, performing (and failing) field tests and admitting that he has had too much to drink. Immediately after arrest, the driver volunteers to submit to a blood test. The driver then, in fact, rides with the officer to a hospital and submits to a blood test. Suppressing the blood test result because the implied consent advisory was not recited would be illogical. The same is true where a partial advisory is given; it is necessarily harmless when a portion of the advisory is left out. Indeed, the complete advisory sets out the penalties for refusing to submit and is silent on penalties that could result from submitting to the test. So a driver who actually submitted to a test cannot logically claim that if he had been advised of an additional negative consequence of refusing to submit to the test, then he would have chosen to refuse to submit. And more importantly, this Court's precedent establishes that voluntary consent can constitute a ground independent of implied consent and under which implied consent provisions "do not apply" – even when implied consent procedures were initiated.[1]

[1] This Court's precedent thus establishes two tracks for admission of chemical tests: (1) voluntary consent – independent of N.D.C.C. § 39-20-01, and (2) implied consent administered in accordance with N.C.C.C. § 39-20-01. The latter category would also need to be voluntary to be constitutional. See McCoy v. North Dakota Dep't of Transp., 2014 ND 119, ¶¶ 9-14, 848 N.W.2d 659 (concluding the consent exception to the warrant requirement can defeat a driver's claim that the implied consent-based chemical test was an unconstitutional search). The inadmissibility provision though would remain meaningful in both the civil and criminal context; those tests not administered in accordance with N.D.C.C. § 39-20-01(3) could not be admitted under N.D.C.C. §§ 39-

[¶ 54] While the inadmissibility provision of N.D.C.C. § 39-20-01(3)(b) thus does not preclude admission of a chemical test based on the independent ground of voluntary consent in a criminal case, it would have a meaningful impact. The State – when relying merely on voluntary consent – could not use the benefits of tests administered under N.D.C.C. § 39-20-01. For instance, the State could not use N.D.R.Ev. 707's notice-and-demand procedure, indicating it planned to introduce the analytical report from a chemical test at trial and notifying the defendant he needed to timely (at least 45 days before trial) assert his right to confront those who made testimonial statements in the report; in the DUI context, Rule 707 only applies to tests under N.D.C.C. ch. 39-20.

[¶ 55] In sum, this Court decades ago established voluntary consent as a ground for admission of a chemical test – independent of N.D.C.C. § 39-20-01. When the Legislature recently enacted the inadmissibility provision in N.D.C.C. § 39-20-01(3)(b), it limited the reach of the provision to tests "administered under [N.D.C.C. § 39-20-01]" and thus did not impact the long-standing independent ground of voluntary consent.

20-03.1, 39-20-03.2, and 39-20-05(2)) or with a notice-and-demand procedure under N.D.R.Ev. 707.

[¶ 56] **CONCLUSION**

[¶ 57] In its order granting the Defendant's motion to suppress the results of his chemical test, the district court erred in two independent ways: (1) determining that the implied consent advisory actually given to the Defendant before the onsite screening test and his confirmed recollection of the advisory could not help establish sufficient warning for the chemical test, and (2) deciding that N.D.C.C. § 39-20-01(3)(b)'s inadmissibility provision for tests administered under that section precluded voluntary consent as an independent ground for admission of the Defendant's chemical test. The State requests that this Court reverse the district court's suppression order and remand the case for further proceedings.

Respectfully submitted this 13th day of November, 2015.

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[¶58] **CERTIFICATE OF SERVICE**

[¶59] A true and correct copy of the foregoing document was sent by e-mail on the 13th day of November, 2015, to: mfriese@vogellaw.com

Reid A. Brady