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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Andrew John Gillmore, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20150321 District Court Case No. 45-2015-CV-00367 **REPLY BRIEF** **APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE WILLIAM HERAUF, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

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[¶3] **Because Mr. Gillmore's test result was within the margin of error of the machine to be below .08 the Hearing Officer erred in her findings of fact and conclusions of law.**

[¶4] The Department's argument that Mr. Gillmore failed to present evidence at the hearing regarding the margin of error is contradicted by hearing exhibit 9, the Certificate of Analysis. District Court Doc ID# 10. The Certificate of Analysis explains that the accuracy of the particular cylinder used for Mr. Gillmore's test was plus or minus "0.002 or 2% of BAC whichever is greater." The Certificate of Analysis also explains that "[a] proper result for the standard test using a cylinder of this lot number would be the range of 0.75 to 0.85" meaning a margin of error of plus or minus .005 which includes the margin of error of the cylinder plus the Intoxilyzer 8000. This means that using this particular cylinder on the Intoxilyzer 8000 the margin of error attributable to the cylinder is plus or minus .002 and therefore the margin of error attributable to the Intoxilyzer 8000 is plus or minus .003. The Department's argument focuses on a missing document but that document is not necessary for Mr. Gillmore's argument because the Certificate of Analysis provided the facts to support the margin of error calculation.

[¶5] The Department argues that the margin of error should be irrelevant because the North Dakota statute (N.D.C.C. § 39-20) only refers to "test result" and "not alcohol concentration." But compare Haynes v. State, Dep't of Pub. Safety, 865 P.2d 753, 754 (Alaska 1993) (Taking into consideration the margin of error despite that "Alaska Statute 28.15.165(c) provides that the Department of Public Safety may revoke a person's license if "a chemical test under AS 28.35.031(a) produced a result described in AS 28.35.030(a)(2)." AS 28.15.165(c)."). The Department's argument however ignores the plain language of N.D.C.C. § 39-20-04.1 Subsections a to e that explains the varying

levels of suspension based on "alcohol concentration" with no mention of "test result." The Department ignores N.D.C.C. § 39-20-05 Subsection 2 that states "[i]f the issue to be determined by the hearing concerns license suspension for operating a motor vehicle while having an alcohol concentration of at least eight one-hundredths of one percent by weight . . .." The Department ignores N.D.C.C. § 39-20-09 that states

> [t]his chapter does not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of intoxicating liquor, drugs, or a combination thereof, but, if the test results show an alcohol concentration of at least eight one-hundredths of one percent . . . the purpose of such evidence must be limited to the issues of probable cause, whether an arrest was made prior to the administering of the test, and the validity of the test results.

Mr. Gillmore is arguing the validity of the test results based on the margin of error and N.D.C.C. § 39-20-09 allows him to do so. The Department's argument to the contrary is based on a very selective reading of portions of N.D.C.C. § 39-20 that ignores the ultimate purpose of the statute is to suspend based on alcohol concentration not just a test result. Compare Haynes v. State, Dep't of Pub. Safety, 865 P.2d 753, 755-56 (Alaska 1993) (The legislature did not specifically approve the Department's use of the Intoximeter 3000 test, but rather authorized the Department to approve satisfactory techniques, methods, and standards of performing the analysis. AS 28.35.033(d) . . .. There is no indication that the legislature considered the .01 margin of error inherent to the Intoximeter 3000 in setting the legal limit at .10 grams per 210 liters of the person's breath.").

[¶6] The Department argues that some type of mathematical averaging can be applied to a margin of error to predict the likelihood of an outcome. There is no scientific evidence to support that argument and further not applying the margin of error in favor of

Mr. Gillmore could result in the deprivation of an important property interest where the actual alcohol concentration was below .08. See Haynes v. State, Dep't of Pub. Safety, 865 P.2d 753, 756 (Alaska 1993) ("Given the .01 margin of error inherent to the Intoximeter 3000, a test reading of .106 could equate to a .096 actual test result. If the .01 margin of error is not applied in Haynes' favor, the deprivation of an important property interest could result where the actual breath test result was below .10 grams.").

[¶7] **Mr. Gillmore proved at the hearing that he was not tested according to the approved method by being told to blow as hard as he could.**

[¶8] "[I]t is the burden of the Department to establish that the Intoxilyzer test was fairly administered. Ringsaker, at ¶ 11. If the Department wishes to rely on the eased requirements for admissibility under N.D.C.C. § 39-20-07, it must adhere to those requirements." Lee v. N. Dakota Dep't of Transp., 2004 ND 7, ¶ 17, 673 N.W.2d 245, 250. The Department argues now however that despite wanting to rely on the eased requirements for admissibility law enforcement should not have to follow the approved method if the subject of the test cannot scientifically establish that not following the approved method affects the test. The Department unfairly tries to shift the burden to Mr. Gillmore.

[¶9] The Hearing Officer erred in her conclusions of law and findings of fact because the facts at the hearing proved that the law enforcement officer did not follow the approved method in administering the breath test to Mr. Gillmore. The approved method does not instruct to tell the person taking the test to blow as hard as they can; despite that the officer instructed Mr. Gillmore to blow as hard as he could. That failure to follow the approved method invalidated the test. See N.D.C.C. § 39-20-07(5); compare Lee v. N. Dakota Dep't of Transp., 2004 ND 7, ¶ 16, 673 N.W.2d 245, 249-50 ("When the State

fails to establish compliance with the toxicologist's directions, which go to the scientific accuracy of the test, the State must prove fair administration through expert testimony.").

[¶10] When law enforcement does not follow the approved method expert testimony is necessary to demonstrate the scientific accuracy of the test the petitioner does not have the burden to demonstrate the scientific inaccuracy of the test. Id. In the present case, the arresting officer was the only person to testify at the hearing, and he was not established as an expert.

[¶11] **N.D.C.C. § 39-20-01, subsection 3 required the law enforcement officer to inform the person "charged" of the implied consent advisory.**

[¶12] The Department argues that Mr. Gillmore failed to prove that he was not read the implied consent advisory after his arrest. Mr. Gillmore's argument is based on the hearing officer's findings of fact. The hearing officer's findings of fact do not include that Mr. Gillmore was informed of the implied consent advisory after he was arrested. Law enforcement was required to inform Mr. Gillmore of the implied consent advisory after arrest, failure by law enforcement to do so means that Mr. Gillmore was not tested in accordance with N.D.C.C. § 39-20-01 and the Hearing Officer committed error by finding otherwise.

[¶13] **The Administrative Hearing Officer erred in the conclusions of law because North Dakota's test refusal laws illegally coerce a suspect to submit to a warrantless search, violate the constitutional prohibition against unreasonable searches and seizures, are unconstitutional for denying substantive due process are unconstitutional for penalizing the exercise of a constitutional right and violate the doctrine of unconstitutional conditions.**

[¶14] "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.

[¶15] On November 25, 2015 the Supreme Court of the State of Hawai'i released its opinion in State v. Won, 136 Haw. 292, 318, 361 P.3d 1195, 1221 (2015), as corrected (Dec. 9, 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 takes the opposite stance from Won and advances the concept 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. Of the two positions it appears that the opinion in Won is in accord with United States Supreme Court precedent on the issue of coerced consent. See New Jersey v. Portash, 440 U.S. 450, 459, 99 S. Ct. 1292, 1297, 59 L. Ed. 2d 501 (1979) ("Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or

psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled."). North Dakota should abandon it reliance on Brooks and follow the holding in Won because Won is in accord with United States Supreme Court precedent on the issue of coerced consent. 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.").

[¶16] Accordingly based on the foregoing arguments and law Mr. Gillmore respectfully requests that the Department's decision be reversed.

Dated: February 1, 2016

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CERTIFICATE OF SERVICE FOR REPLY BRIEF

[¶1] On February 1, 2016 a true and correct copy of the following was electronically served:

REPLY BRIEF

on the following:

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