20160141

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jesse Scott Koehly, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20160141** **District Ct. No. 45-2015-CV-00565** 00832

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED FEBRUARY 16, 2016
STARK COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE JAMES GION

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[¶1] Whether Koehly was denied his limited right to counsel in the implied consent context by law enforcement recording his telephone conversations?

[¶2] Whether Koehly was provided a reasonable opportunity to cure his refusal of the Intoxilyzer test?

[¶3] Whether Koehly's challenges to the constitutionality of the State's implied consent and test refusal laws are without merit under the controlling precedent of Birchfield v. North Dakota, Nos. 14-1468, 14-1470, 14-1507, 2016 WL 3434398 (U.S. June 23, 2016)?

STATEMENT OF CASE

[¶4] On May 14, 2015, Officer Lauren Asheim (Officer Asheim) of the Grand Forks Police Department arrested Koehly for the offense of driving a vehicle while under the influence of intoxicating liquor (DUI). Transcript (Tr.) at Exhibit (Ex.) 1b. A Report and Notice, including a temporary operator's permit, was issued to Koehly after Koehly refused to submit to a chemical Intoxilyzer test requested by the officer. Id. The Report and Notice notified Koehly of the Department's intent to revoke his driving privileges. Id.

[¶5] In response to the Report and Notice, Koehly requested an administrative hearing. Tr. Ex. 1c. The hearing was held on August 4, 2015. Tr. 1. At the hearing the hearing officer considered two sets of issues as law enforcement alleged Koehly refused to submit to requests for an onsite screening test and a chemical test. In accordance with N.D.C.C. 39-20-05(3) the hearing officer

considered the following issues regarding Koehly'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 the person refused to submit to the onsite screening test.

Tr. Ex. 2. The hearing officer also considered the following issues in regards to Koehly's refusal of the alcohol concentration Intoxilyzer 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. 2.

[¶6] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Koehly's driving privileges for a period of 180 days. Appendix (App.) 4. Koehly requested judicial review of the hearing officer's decision. App. 26-29.

STATEMENT OF FACTS

[¶7] Officer Asheim observed a vehicle driving erratically, and through a red light. Tr. Ex. 1b, Tr. 6, ll. 17-18. Officer Asheim initiated a traffic stop. Tr. 6, l. 18. As soon as she approached the vehicle Officer Asheim could smell the odor

of alcohol coming from the vehicle. Tr. 7, ll. 5-8. The driver, later identified as Koehly, was looking straight ahead and did not want to speak. Tr. 7, ll. 11-12. A passenger was responding to the initial questions put forth to Koehly. Tr. 7, ll. 12-13. Officer Asheim asked the passenger not to talk so she could speak to Koehly. Tr. 7, ll. 13-14. After speaking with Koehly he admitted to having a few beers. Tr. 7, ll. 15-16.

[¶8] Officer Asheim asked Koehly to step out of his vehicle as she wanted to do a few field sobriety tests to see if he was okay to be driving. Tr. 7, ll. 18-22. Koehly did not complete the alphabet test as instructed indicating impairment. Tr. 8, l. 22 – Tr. 9, l. 23. Koehly also did not complete the backward number count test as instructed indicating impairment. Tr. 9, l. 24 – Tr. 10, l. 5. Koehly then performed the horizontal gaze nystagmus (HGN) test exhibiting all six of the possible clues. Tr. 10, l. 6 – Tr. 11, l. 3. Following the HGN test Officer Asheim read the implied consent advisory and requested Koehly submit to an onsite screening test and Koehly agreed. Tr. 11, ll. 5-10. Koehly attempted to take the onsite screening test eight times but on each attempt failed to register any result. Tr. 11, ll. 9-17. Officer Asheim observed Koehly sucking in air rather than blowing air into the device. Tr. 11, l. 23 – Tr. 12, l. 4.

[¶9] Officer Asheim placed Koehly under arrest for driving under the influence (DUI). Tr. 12, ll. 8-18. Koehly was then transported to the law enforcement center and placed in an interview room. Tr. 12, ll. 24-25. Officer Asheim recited the implied consent advisory and requested Koehly take an Intoxilyzer breath test. Tr. 13, ll. 4-5. Koehly indicated he needed some time to think about it and

asked to make some phone calls. Tr. 13, ll. 6-7. Koehly was given access to his cell phone and charger and a phone book and was told he could contact anyone including an attorney. Tr. 13, ll. 7-13; Tr. 24, l. 16 – Tr. 25, l. 4. Koehly made several phone calls to family and friends, but not to an attorney. Tr. 13, ll. 17-18.

[¶10] After giving Koehly approximately 23 minutes to make calls to whomever he wished Officer Asheim informed him he needed to make a decision about taking the Intoxilyzer test. Tr. 13, l. 20 – Tr. 14, l. 3; Tr. Ex. 17, Disc 2.[1] Koehly stated he was going to refuse the test. Tr. 14, ll. 3-4; Tr. Ex. 17, Disc 2. Officer Asheim left the interview room and a short time later Koehly knocked on the door and asked Officer Asheim if it would be an automatic suspension for 180 days if he refused. Tr. 14, ll. 6-8; Tr. 27, ll. 21-25; Tr. Ex. 17, Disc 2. Officer Asheim read the implied consent advisory again and explained that she could not provide him with legal advice. Tr. 14, ll. 8-10; Tr. 27, l. 25 – Tr. 28, l. 2; Tr. Ex. 17, Disc 2. Koehly was still on his cell phone at this time and was discussing the word "may" in the advisory with the person on the other end of the line. Tr. 14, ll. 11-16; Tr. Ex. 17, Disc 2. Officer Asheim informed Koehly she needed an answer as to whether he was going to take the Intoxilyzer test, but Koehly would not respond. Tr. 14, ll. 13-16; Tr. 28, ll. 5-8. Koehly was also informed that a non-response would be considered a refusal. Tr. 14, ll. 14-16. Koehly continued to seek advice from the individual on the phone and ignored Officer Asheim. Tr. 14, ll. 17-18; Tr. Ex. 17, Disc 2 at approx. 27 minutes.

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[1] Exhibit 17 - the DVD recording - unfortunately does not have a working time counter. References to Exhibit 17 in the Appellee's brief are approximations based on tracking the recording with a standard clock.

[¶11] Koehly argued with Officer Asheim about whether or not he was entitled to choose which test to take. Tr. 27, ll. 3-5; Tr. Ex. 17, Disc 2 at approx. 28 minutes. Due to Koehly's arguing and failure to respond to her test request, Officer Asheim told Koehly she was deeming his conduct to be a refusal. Tr. Ex. 17, Disc 2 at approx. 30 minutes. About a minute later Koehly again knocked on the interview room door and a different law enforcement officer responded. Tr. Ex. 17, Disc 2 at approx. 31 minutes. Koehly informed the officer he would take a breath test, but only if it would be put in writing that Officer Asheim was refusing to give him a blood test. Tr. Ex. 17, Disc 2 at approx. 32 minutes. Koehly continued to argue with law enforcement about his right to have a blood test, and his right to expend the full two hours before making a decision. Tr. Ex. 17, Disc 2 at approx. 32 minutes – 36 minutes. Officer Asheim completed the Report and Notice, noting Koehly's refusal and issued it to Koehly. Tr. 14, ll. 19-22. In doing so Officer Asheim explained the Report and Notice to Koehly and Koehly made no mention of wanting to cure his refusal. Tr. Ex. 17, Disc 2 at approx. 49 minutes.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶12] Koehly 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 Koehly alleged three errors: (1) law enforcement violated his limited right to counsel by recording his telephone conversations; (2) that he should have been found to have cured his refusal of the chemical test by later agreeing

to take the test; and (3) North Dakota's implied consent and test refusal laws violate his constitutional rights.

[¶13] With respect to Koehly's argument that he was denied his limited statutory right to an attorney under the law because his telephone calls were recorded in the interview room, Judge Gion found that there was contradictory testimony as to whether Koehly even requested to speak to an attorney. App. 38. Although the hearing officer did not make a finding of fact on that issue, the court noted the hearing officer's findings did support that Koehly was placed in an interview room with a landline telephone, his cell phone, a charger for his cell phone, and a phonebook; that Officer Asheim left the room and Koehly made phone calls to his mother and a friend; that it was undisputed that Koehly never called an attorney; and that Koehly was being recorded in the interview room. Under those facts, the court concluded a preponderance of the evidence showed Koehly had an opportunity to consult with counsel in a meaningful way. In making this ruling the court stated:

> [Koehly] never testified that he was aware he was being recorded at the time he made the phone calls. Additionally, Koehly did not testify that the fact he was being recorded had any effect on his decision not to contact an attorney. There is also no indication Koehly requested to be moved to a room where he was not being recorded.

Id.

[¶14] In regards to Koehly's argument that he cured his refusal of the Intoxilyzer test, the hearing officer found as follows:

> Mr. Koehly was placed in an interview room and given access to a phone and a phone book and cell phone charger. Mr. Koehly made several phone calls. Mr. Koehly stated that he was going to refuse

> the test. He then knocked on the door and asked Officer Asheim if he refused if it was 180 days suspended? Officer Asheim read the implied consent advisory once more. Mr. Koehly was still on the phone and discussing the word "may." He then stated, if I refuse and then go to the hospital and get a blood test, and fight it. Mr. Koehly continued to seek advice from the individual on the phone and ignored Officer Asheim initially and then argued with Officer Asheim about whether or not he was entitled to choose which test to take. Officer Asheim then stated that his non answer would be considered a refusal. Mr. Koehly informed Officer Asheim that he wanted to take a breath test, but only if they would put in writing the fact that they were refusing [sic] give him a blood test. Mr. Koehly then argued with the officers about his right to have a blood test, and his right to expend the full two hours before making a decision. When Officer Asheim was explaining the report and notice, Mr. Koehly made no mention of a test.

App. 4. Relying on this Court's decisions in N.D. Dep't of Transp. v. DuPaul, 487 N.W.2d 593 (N.D. 1992) and Maisey v. N.D. Dep't of Transp., 2009 ND 191, 775 N.W.2d 200, Judge Gion determined that "Koehly's constricted request to take the Intoxilyzer test did not effectively cure his initial refusal of the test" and therefore, the evidence supported the hearing officer's decision. App. 41-42.

[¶15] Judge Gion also rejected Koehly's various arguments claiming North Dakota's implied consent and test refusal laws were unconstitutional. App. 13-18.

[¶16] The district court issued its Memorandum Opinion and Order Affirming the Hearing Officer's Decision on February 10, 2016. App. 2, 43. Judgment was entered on February 16, 2016. App. 45. Koehly appealed the Judgment to this Court. App. 48-51. On appeal the Department requests this Court affirm the Judgment of the Stark County District Court and the Hearing Officer's Decision revoking Koehly's driving privileges for a period of 180 days.

STANDARD OF REVIEW

[¶17] The Administrative Agencies Practices Act governs an appeal from an administrative hearing officer's decision suspending a license. N.D.C.C. ch. 28-32; N.D.C.C. ch. 39-20. The appeal is civil in nature. Knoll v. N.D. Dep't of Transp., 2002 ND 84, ¶ 16, 644 N.W.2d 191. And it is separate and distinct from any criminal matter that may ensue. Id. The North Dakota Century Code provides, in relevant part, that a court must affirm an agency's order except in the event of any of the following:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶18] The hearing officer's findings of fact must be upheld if they are supported by a preponderance of the evidence. Kahl v. Dir., N.D. Dep't of Transp., 1997 ND 147,

¶ 10, 567 N.W.2d 197. 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). A reviewing court, rather, 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.)

LAW AND ARGUMENT

I. Koehly was not denied a right to consult with an attorney before deciding whether to submit to the chemical Intoxilyzer test.

[¶19] "[A] person arrested for driving under the influence of intoxicating liquor has a qualified statutory right to consult with an attorney before deciding whether to submit to a chemical test." City of Mandan v. Leno, 2000 ND 184, ¶ 8, 618 N.W.2d 161 (citing Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 290 (N.D. 1987)). The "right of an arrested person to have a reasonable opportunity to consult with an attorney before taking a chemical test is a statutory right based on N.D.C.C. § 29-05-20." Leno, at ¶ 9 (citing Kuntz, 405 N.W.2d at 287).

[¶20] "[I]f an arrested person asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test." Kuntz, 405 N.W.2d at 290. "If he is not given a reasonable opportunity to do so under the circumstances, his failure to take the test is not a refusal upon which to revoke his license under Chapter 39-20, N.D.C.C." Id.

[¶21] The issue of whether a reasonable opportunity to consult an attorney has been provided to an arrestee properly arises in those circumstances in which the request has been made in direct response to the person having been asked to

submit to a chemical test, rather than in the investigative setting preceding that request. See Baillie v. Moore, 522 N.W.2d 748, 749 (N.D. 1994). In Baillie after being "asked . . . to submit to an Intoxilyzer examination . . . . Baillie responded that he would not take the test without an attorney." This Court held "if a DUI arrestee, upon being asked to submit to a chemical test, responds with any mention of a need for an attorney - to see one, to talk to one, to have one, etc. - the failure to allow the arrestee a reasonable opportunity to contact an attorney prevents the revocation of his license for refusal to take the test." Id. at 750 (emphasis added). "A refusal to take the test under these conditions is not the affirmative refusal necessary to revoke a license under § 39-20-04, N.D.C.C." Id. (emphasis added). See also Lies v. Dir., N.D. Dep't of Transp., 2008 ND 30, ¶ 3, 744 N.W.2d 783 ("Lies stated he would not submit to testing until he spoke with his lawyer," after "Officer Roehrich recited to Lies the implied-consent advisory and asked Lies if he would submit to a blood test."); State v. Pace, 2006 ND 98, ¶ 2, 713 N.W.2d 535 ("Officer Hagel asked Pace for consent to a blood draw" . . . . Pace responded, 'I don't know how to answer that' and asked if he could speak to his attorney."); Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 2, 622 N.W.2d 180 ("Following the arrest, Officer Sullivan recited the implied consent advisory and asked Wetzel to submit to a blood-alcohol concentration test. . . . Officer Sullivan again asked Wetzel if he would submit to a blood test. Wetzel said he wanted to talk to an attorney."); Ehrlich v. Backes, 477 N.W.2d 211, 212 (N.D. 1991) (law enforcement officer "asked [Ehrlich] to take a chemical test of her blood to determine its blood-alcohol content. Ehrlich said that she would not take

the test unless an attorney was present."); Kuntz, 405 N.W.2d at 286 (Kuntz requested an opportunity to consult his attorney after being requested to submit to an Intoxilyzer test). But cf. State v. Lee, 2012 ND 97, ¶10, 816 N.W.2d 782 ("The district court found Lee did not ask to speak with counsel either when he agreed to the test or afterward. Rather, during a subsequent conversation with the officer, Lee made only a passing reference to having 'Cash give me a good try.'"); Leno at ¶¶ 4-5 (when "asked if he would consent to an on-site pre-breathalyzer screening test. . . . Leno asked if he could speak to his attorney . . ." . . . . When "asked if he would submit to a blood test at the Law Enforcement Center . . . . [t]he officer testified Leno did not again ask to speak to his attorney at this point.").

[¶22] This Court has stated that "an arrestee making an ambiguous statement suffers the consequence of that ambiguity." Kasowski v. Dir., N.D. Dep't of Transp., 2011 ND 92, ¶ 14, 797 N.W.2d 40 (citing Lange v. N.D. Dep't of Transp., 2010 ND 201, ¶ 7, 790 N.W.2d 28 (discussing ambiguity regarding a request to take an independent chemical test for intoxication); Maisey v. N.D. Dep't of Transp., 2009 ND 191, ¶ 20, 775 N.W.2d 200 (discussing ambiguity concerning a refusal to take a chemical test for intoxication)). "'An arrestee cannot complain about a law enforcement officer's reasonable interpretation of the arrestee's ambiguous statements.'" Id. (quoting Lange, at ¶ 7). "An officer who deems a request to be ambiguous should attempt to clarify the matter with the driver." City of Grand Forks v. Risser, 512 N.W.2d 462, 464 (N.D. 1994).

[¶23] "There are no bright line rules for determining whether a 'reasonable opportunity' to consult with an attorney has been afforded; rather, the determination of whether a reasonable opportunity has been provided turns on an objective review of the totality of the circumstances." Lies, ¶ 10, 744 N.W.2d 783 (citing State v. Pace, 2006 ND 98, ¶¶ 6-7, 713 N.W.2d 535). "Whether a person has been afforded a reasonable opportunity to consult with an attorney is a mixed question of law and fact." Wetzel at ¶ 10 (citing Groe v. Comm'r of Pub. Safety, 615 N.W.2d 837, 841 (Minn. Ct. App. 2000)).

[¶24] In this case, Koehly alleges his limited right to counsel was violated because law enforcement recorded his telephone conversations. Appellant's Br. ¶ 17. Koehly relies on Bickler v. N.D. State Highway Comm'r, in which, after arriving at the jail, Bickler's attorney "requested to confer with Bickler 'in a private setting.'" 423 N.W.2d 146, 146-47 (N.D. 1988). After the "the arresting officer . . . refused to allow a conference out of his view, [the attorney] left the jail without asking Bickler any questions." Id. at 147. The Court stated "when an arrested person asks to consult with counsel before electing to take a chemical test he must be given the opportunity to do so out of police hearing, and law enforcement must establish that such opportunity was provided." Id. at 148.

[¶25] By contrast, in City of Grand Forks v. Soli, after being arrested for driving under the influence, Soli was transported to a hospital where "[he] was permitted to telephone his attorney from a hospital examining room." 479 N.W.2d 872, 873 (N.D. 1992). "The police officers remained in the room and could hear Soli's part of the conversation with his attorney." Id. This Court found "[t]here is no

evidence in the record showing that Soli requested an 'out-of-earshot consultation' with his attorney" and "Soli did not request that either the officers or the hospital personnel present leave the room and did not object to their presence." Id. at 874. The Court determined "[h]ere, unlike Bickler, there was no evidence that the officers' presence within earshot of Soli's telephone conversation with his attorney had any effect on his decision to submit to the blood test. Id.

[¶26] In this case, the undisputed evidence established that after having been provided approximately 45 minutes to make phone calls to whomever he wished, Koehly made ***no*** effort to contact an attorney. See Ex. 17, Disc 2. Instead, Koehly chose to use this opportunity to speak to non-attorneys – family or friends. Because Koehly did not attempt to contact an attorney while in Officer Asheim's presence, his argument is moot. Furthermore, as in Soli, there is no evidence in the record showing that Koehly requested an "out-of-earshot consultation" with an attorney or, more particularly, that his phone conversations not be recorded. Additionally, there is no evidence that Officer Asheim was listening to Koehly's phone conversations while they were occurring. While it is uncontested that Koehly was under camera surveillance while in the room and that the camera was recording, there simply is no showing that Officer Asheim was aware of Koehly's conversations. Simply put, there was no evidence that the recording of Koehly's phone conversations had any effect on Koehly's decision to refuse the Intoxilyzer test. Koehly was not denied a reasonable

opportunity to consult with an attorney before deciding whether to submit to the breath test.

[¶27] Further, and most importantly, "[t]he police are not required to guarantee an accused's conversations with counsel are not overheard." City of Mandan v. Jewett, 517 N.W.2d 640, 642 (N.D. 1994) (citing City of Grand Forks v. Soli, 479 N.W.2d 872, 874 (N.D. 1992) (the police did not violate accused's right to counsel when they remained in the accused's hospital room while the accused talked by telephone with his lawyer)). "The accused's right to privacy is not absolute." Jewett, at 642. ***Moreover, the driver's right to privacy is based upon an actual communication with an attorney, and not merely an attempt to contact an attorney.*** Here, Koehly never actually talked to or even attempted to contact an attorney. See Ex. 17, Disc 2. As such there was no attorney-client consultation that was overheard by Officer Asheim and, therefore, Koehly's argument is without merit.

II. Koehly was provided a reasonable opportunity to cure his refusal of the Intoxilyzer test.

[¶28] [A] driver is able to cure a prior refusal if he changes his mind and requests the test." Grosgebauer v. N.D. Dep't of Transp., 2008 ND 75, ¶ 13, 747 N.W.2d 510 (citing Lund v. Hjelle, 224 N.W.2d 552, 557 (N.D. 1974)). In Lund, the Court stated:

> [W]e hold that where, as here, one who is arrested for driving while under the influence of intoxicating liquor first refuses to submit to a chemical test to determine the alcoholic content of his blood and later changes his mind and requests a chemical blood test, the subsequent consent to take the test cures the prior first refusal when the request to take the test is made within a reasonable time after the prior first refusal; when such a test administered upon the subsequent consent would still be accurate; when testing

> equipment or facilities are still readily available; when honoring a request for a test, following a prior first refusal, will result in no substantial inconvenience or expense to the police; and when the individual requesting the test has been in police custody and under observation for the whole time since his arrest.

224 N.W.2d at 557. "To cure a prior refusal, the criteria in Lund 'must be strictly and rigidly adhered to.'" Grosgebauer, at ¶ 14 (quoting Asbridge v. N.D. State Highway Comm'r, 291 N.W.2d 739, 750 (N.D. 1980)).

[¶29] In addition, the sincerity and the credibility of a driver's purported attempt to cure a refusal are yet additional factors that must be considered. In Snyder v. State, Dep't of Pub. Safety, Div. of Motor Vehicles, the Alaska Supreme Court -- quoting the lower court's decision -- determined "both the arresting officer and the finder of fact must be able at some point to conclude that an arrestee's consent is insincere without actually giving the arrestee a chance to prove his sincerity by taking the test: 'If a defendant's credibility in offering to cure a prior refusal could not be considered, a disingenuous suspect would always prevail ... [u]nless the arresting officer went through the pointless exercise of repeatedly offering such a defendant another breath test for the full four hours [during which breath tests may be administered under the statute].'" 31 P.3d 770, 772 (AK 2001). See also State v. Benware, 686 A.2d 478, 480 (Vt. 1996) (Where driver argued his refusal was "cured" by subsequent consent, the Vermont Supreme Court determined "[t]he evidence supported the inference that defendant's stated change of mind was not genuine. As the trial judge stated, 'Defendant's professed change of heart came too late and the officer reasonably concluded that he had no basis upon which to believe the [d]efendant was being sincere.'").

[¶30] In this case, Koehly did not cure his initial refusal by later agreeing to take the test as he alleges. See Appellant's Br. ¶¶ 20-21. After reviewing Exhibit 17 - the video - the hearing officer found as follows:

> Mr. Koehly was placed in an interview room and given access to a phone and a phone book and cell phone charger. Mr. Koehly made several phone calls. Mr. Koehly stated that he was going to refuse the test. He then knocked on the door and asked Officer Asheim if he refused if it was 180 days suspended? Officer Asheim read the implied consent advisory once more. Mr. Koehly was still on the phone and discussing the word "may". He then stated, if I refuse and then go to the hospital and get a blood test, and fight it. Mr. Koehly continued to seek advice from the individual on the phone and ignored Officer Asheim initially and then argued with Officer Asheim about whether or not he was entitled to choose which test to take. Officer Asheim then stated that his non answer would be considered a refusal. Mr. Koehly informed Officer Asheim that he wanted to take a breath test, but only if they would put in writing the fact that they were refusing to give him a blood test. Mr. Koehly then argued with the officers about his right to have a blood test, and his right to expend the full two hours before making a decision. When Officer Asheim was explaining the report and notice, Mr. Koehly made no mention of a test.

Tr. 41, l. 18 – Tr. 42, l. 12. This information is accurate according to the video of the incident. See Ex. 17, Disc 2.

[¶31] Koehly was provided his phone and phone charger and had access to phone books and was allowed to make calls. Tr. Ex. 17, Disc 2. After approximately 23 minutes of being on the phone Officer Asheim informed Koehly he needed to make a decision about taking the Intoxilyzer test, and Koehly responded, "I'm going to refuse." Id. While it is true that after Koehly had been in the interview room for approximately 32 minutes he indicated he would take the Intoxilyzer test his statement was not unequivocal. In fact, his consent came with conditions – that law enforcement sign a form indicating they refused him a

blood test. Id. Further, Koehly's statements were not made to Officer Asheim directly but to a different officer. Id. And when Officer Asheim joined the conversation, Koehly again argued that he wanted a blood test and that it was his right to select which test was offered by law enforcement. Id. at approx. 35 minutes to 36 minutes.

[¶32] This Court has held that a "constricted consent" -- a consent based upon the driver's specific demands regarding the test -- is "an effective refusal." Jorgenson v. N.D. Dep't of Transp., 498 N.W.2d 167, 169 (N.D. 1993); see also N.D. Dep't of Transp. v. DuPaul, 487 N.W.2d 593, 597 (N.D. 1992) ("Even if DuPaul was willing to consent to a test by a doctor, as he now claims, such a constricted consent is an effective refusal to take the test 'administered at the direction of [the] law enforcement officer'"); Wetsch v. N.D. Dep't of Transp., 2004 ND 93, 679 N.W.2d 282 ("When a medically qualified person is available and the record shows no other evidence of a justifiable reason to refuse a blood test, the demand to be taken to a hospital [rather than having the same drawn at the law enforcement center], as a condition for the draw constitutes a refusal under N.D.C.C. ch. 39-20"). Similarly, the Nebraska Supreme Court has observed that, "notwithstanding an arrested motorist's expressed consent or agreement to take a breath test . . . , the motorist's subsequent conduct may be the basis for an inference that the motorist has withdrawn or revoked the previous consent to such test or has feigned consent to the test and, therefore, has refused to submit to the statutorily authorized breath test." State v. Clark, 425 N.W.2d 347, 351 (Neb. 1988).

[¶33] Under the totality of the circumstances including Koehly's behavior, Officer Asheim was under no obligation to repeatedly offer Koehly the opportunity to submit to the Intoxilyzer test until the expiration of the two-hour testing period. Koehly was provided a reasonable opportunity to cure his refusal of the Intoxilyzer test and he did not do so.

III. Koehly's challenges to the constitutionality of the State's implied consent and test refusal statutes are without merit under the controlling precedent of Birchfield v. North Dakota, Nos. 14-1468, 14-1470, 14-1507, 2016 WL 3434398 (U.S. June 23, 2016).

[¶34] The majority of Koehly's brief is devoted to his request to reverse North Dakota precedent from a line of cases beginning with McCoy v. N.D. Dep't of Transp., 2014 ND 119, 848 N.W.2d 659. Appellant's Br. ¶ 24. This Court has repeatedly rejected similar constitutional challenges to the State's implied consent statute as follows:

> In State v. Smith, 2014 ND 152, ¶ 16, 849 N.W.2d 599 and McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 21, 848 N.W.2d 659, we held consent to a chemical test is not coerced and is not rendered involuntary merely by a law enforcement officer's reading of the implied consent advisory that accurately informs the arrestee of the consequences for refusal, including the administrative and criminal penalties, and presents the arrestee with a choice. See also Wall v. Stanek, 794 F.3d 890 (8th Cir. 2015) (applying Minnesota law). In State v. Birchfield, 2015 ND 6, ¶ 19, 858 N.W.2d 302, we held the criminal refusal statute is not unconstitutional under the Fourth Amendment or N.D. Const. art. I, § 8. In Beylund v. Levi, 2015 ND 18, ¶¶ 30-31, 859 N.W.2d 403, we held the implied consent law does not violate the doctrine of unconstitutional conditions. In State v. Baxter, 2015 ND 107, ¶¶ 13-17, 863 N.W.2d 208, we held the criminal refusal statutes do not violate a defendant's due process rights. Recently, in State v. Kordonowy, 2015 ND 197, ¶¶ 15-19, we held the criminal refusal statutes are not unconstitutionally vague. Olson's arguments do not convince us to revisit these issues.

Olson v. Levi, 2015 ND 250, ¶ 12, 870 N.W.2d 222.

[¶35] Yet, as this Court is aware, the United States Supreme Court granted Petitions for certiorari in Birchfield, petition for cert. granted, No. 14-1468, 136 S. Ct. 614 (U.S. Dec. 11, 2015), and Beylund, petition for cert. granted, No. 14-1507, 136 S. Ct. 614 (U.S. Dec. 11, 2015) to consider that constitutionality of the State's implied consent and test refusal laws. The United States Supreme Court has now issued a decision in those cases holding that "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving," and no warrant is needed in that situation. Birchfield, 2016 WL 3434398 at *26. The Court further stated, "[a]ccordingly, the Fourth Amendment [does] not require officers to obtain a warrant prior to demanding the [breath] test, and [the driver] ha[s] no right to refuse it." Id. at *27.

[¶36] Here, Koehly was lawfully arrested for driving under the influence and asked to submit to a chemical Intoxilyzer "breath" test. Because Koehly had no right to refuse the requested breath test as determined by Birchfield, his constitutional rights were not violated and the Department was authorized to revoke his driving privileges.

CONCLUSION

[¶37] The Department respectfully requests that this Court affirm the judgment of the Stark County District Court and the Department's decision revoking Koehly's driving privileges for a period of 180 days.

Dated this 30th day of June, 2016.

State of North Dakota
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By: _____

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jesse Scott Koehly, Appellee, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellant.	)	**Supreme Ct. No. 20160141** **District Ct. No. 45-2015-CV-00565**

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

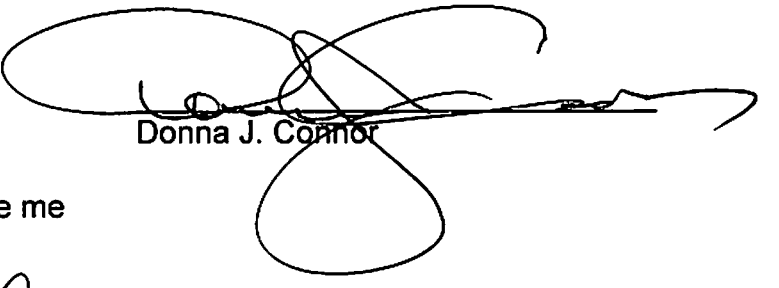
[¶1] Donna J. Connor states under oath as follows:

[¶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 30th day of June, 2016, I served the attached **BRIEF OF APPELLEE** upon Jesse Scott Koehly, by and through his attorney Thomas F. Murtha, IV, by placing a true and correct copy thereof in an envelope addressed as follows:

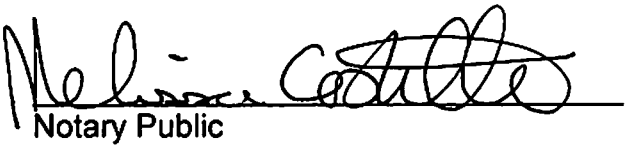
Thomas F. Murtha, IV
Attorney at Law
PO Box 1111
Dickinson, ND 58602

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 30th day of June, 2016.



Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2019