20160141
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 14, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jesse Scott Koehly, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20160141 District Court Case No. 45-2015-CV-00832 **REPLY BRIEF** **APPEAL FROM THE JUDGMENT OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE JAMES GION, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

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[¶3] **I. Law enforcement violated Mr. Koehly's limited right to counsel in an implied consent refusal context by recording his telephone conversations.**

[¶4] Mr. Koehly asked to consult with a lawyer before making a decision to take the chemical test. T. 32:13-20; Exhibit 17 at approx. 9:23. The Department agrees that the entire time Mr. Koehly was given time to consult with an attorney his conversations were recorded. Appellee Brief ¶26. The Department relies on City of Grand Forks v. Soli, 479 N.W.2d 872, 874 (N.D. 1992) to argue that despite recording Mr. Koehly's conversations after he requested an opportunity to consult with an attorney the act of recording Mr. Koehly's conversations doesn't matter. In Soli however the North Dakota Supreme Court explained that

> [a]lthough police officers are required to keep suspects under surveillance to protect the integrity of the testing process, this does not mean they are entitled to seek excuses to deny confidentiality to conversations between arrested persons and their attorneys. As we recognized in State v. Red Paint, 311 N.W.2d 182, 185 (N.D.1981), "there is a legitimate public interest in protecting confidential communications between an attorney and his client made for the purpose of facilitating the rendition of professional legal services." That public interest ought not be undercut by unwarranted denial of an opportunity for an arrested person to have a confidential conversation with an attorney.

Id. at 874.

[¶5] Unlike the situation in Soli, where the conversation took place in a hospital setting, Mr. Koehly was in a jail so there was no need for law enforcement to maintain the same level of close contact with Mr. Koehly as law enforcement did in Soli. The Department argues that Mr. Koehly did not contact an attorney however even if that is true, because Mr. Koehly did ask to consult with an attorney and because he was never provided an opportunity to have an unrecorded conversation with an attorney Mr. Koehly's limited right to consult with an attorney in an implied consent context was

violated. See Bickler v. N. Dakota State Highway Com'r, 423 N.W.2d 146, 147 (N.D. 1988)("When an arrestee consults with counsel, he must be allowed to do so in a meaningful way. A consultation would be meaningless if relevant information could not be communicated without being overheard. There is a right to privacy inherent in the right to consult with counsel."); See generally Lies v. Dir., N. Dakota Dep't of Transp., 2008 ND 30, ¶ 10, 744 N.W.2d 783, 786-87 ("This Court has repeatedly held that defendants must be afforded a reasonable opportunity to consult with counsel before deciding whether to submit to a chemical test.")

[¶6] Because law enforcement had no need to record Mr. Koehly and had the ability to provide Mr. Koehly an unrecorded opportunity to consult with an attorney but failed to do so the Department is prevented from revoking Mr. Koehly's driving privileges. See Lies at ¶10; See also Bickler at 148.

[¶7] **II. Mr. Koehly cured his refusal by agreeing to take the chemical test after he initially refused to take the test, was in continual police custody and a test sequence was conducted without his presence while he was locked in an interview room.**

[¶8] The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because Mr. Koehly cured his refusal by agreeing to take the chemical test after he initially refused to take the test, was in continual police custody and a test sequence was conducted without his presence while he was locked in an interview room. See State v. Nagel, 2014 ND 224, ¶ 11, 857 N.W.2d 374, 379 ("We have repeatedly recognized that a driver, who has previously refused a chemical test, can change his mind and cure the prior refusal, by consenting.").

[¶9] The Department's argument ignores that Mr. Koehly agreed to take the breath chemical test at the approximate time stamp of 32:24 and again at 46:02 on Exhibit 17

(recording of Mr. Koehly in interview room) and that law enforcement actually ran the chemical test without Mr. Koehly in the room. T. 15:7-8 ("I went ahead and I did start the machine, which I let it run through the . . . test two full times and it came insufficient answer . . . or def . . . deficient sample since he never gave a sample."). By running a test sequence but leaving Mr. Koehly in the locked interview room law enforcement effectively prevented Mr. Koehly from curing his refusal.

[¶10] **III. North Dakota's test refusal law (N.D.C.C. § 39-08-01 Subsection 1(e)) and implied consent law (N.D.C.C. § 39-20) 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 the constitutional right to withhold consent to a warrantless search or withdraw consent once given and violate the doctrine of unconstitutional conditions. North Dakota's test refusal and implied consent laws conflict with Article I § 20 of the North Dakota Constitution which prevents the legislature from drafting a law to except the provisions of Article I § 8 and the right to refuse a warrantless search or to withdraw consent once given.**

[¶11] Based on Birchfield v. N. Dakota, 579 U.S. ___ (2016)(finding an exception to the fourth amendment warrant requirement for breath tests as a search incident to arrest) the Department now argues that law enforcement does not need a warrant to request a breath test pursuant to the fourth amendment. In Birchfield the United States Supreme Court has determined that a breath test is a search incident to arrest and therefore any consent argument would be irrelevant. In North Dakota however for a search incident to arrest to be valid under Article I §8 that search must be conducted substantially contemporaneous to the arrest. See State v. Smith, 2005 ND 21, ¶ 29, 691 N.W.2d 203, 212 ("A search incident to arrest exception applies if: (1) the arresting officer had probable cause to arrest the defendant before searching him; and (2) the arrest was substantially contemporaneous to the search. State v. Overby, 1999 ND 47, ¶ 9, 590 N.W.2d 703."); Compare State v. Kunkel, 455 N.W.2d 208, 210 (N.D. 1990)("Although

a search of a vehicle, incident to a valid arrest, may be conducted without a warrant, there are limits on the authority of police to conduct such a search. The search must, in fact, be incident to the arrest, judged by the standard of contemporaneousness. The exception to the warrant requirement does not apply if the search is removed in time or place from the arrest.")(citations omitted).

[¶12] It appears that the Department is for the first time arguing a search incident to arrest of Mr. Koehly when he was asked to take a chemical breath test after his arrest while in a locked interview room at the law enforcement center. Because the proposed search of Mr. Koehly's breath was attempted a substantial amount of time after his arrest, at a location far removed from his arrest, and there was no reason law enforcement could not have applied for a search warrant, the search incident to arrest exception to the warrant requirement does not apply and Mr. Koehly had a North Dakota Constitutional right to refuse to submit to a warrantless request to be searched. See State v. Odom, 2006 ND 209, ¶15, 722 N.W.2d 370 ("At no time before or during Olson's search did Odom withdraw or limit his consent to search the hotel room. Odom could have prevented Olson from searching the safe by indicating to Olson consent did not extend to the safe."); see also United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005) (stating that "[o]nce given, consent to search may be withdrawn").

[¶13] In light of the Department's argument based on Birchfield it needs to be noted that the Department also revoked Mr. Koehly's driving privileges for refusing the pre-arrest screening breath test and not just refusing the post arrest chemical breath test. The Department's brief does not address the revocation based on a refusal of the pre arrest screening test. This same issue was on a hold petition for a writ of certiorari to the

United States Supreme Court in State v. Baxter, 2015 ND 107, ¶ 1, 863 N.W.2d 208, 210, reh'g denied (May 27, 2015), cert. granted, judgment vacated, No. 15-243, 2016 WL 3496660 (U.S. June 28, 2016). The Baxter case has been remanded to the North Dakota Supreme Court.[1] Although the Department did not address the issue of the revocation for refusing a pre arrest screening breath test, in light of Birchfield Mr. Koehly argues that the search incident to arrest exception to the warrant requirement does not apply in a refusal scenario to a pre arrest request to take a screening breath test because the subject of the proposed search is not under arrest and in a refusal scenario no search is conducted. Note that cases analyzing a search incident to arrest prior to arrest require an immediate arrest subsequent to the search. See Rawlings v. Kentucky, 448 U.S. 98, 111, 100 S. Ct. 2556, 2564, 65 L. Ed. 2d 633 (1980)("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."). Mr. Koehly argues that he has a right to refuse a warrantless request to be searched prior to being formally arrested.

[¶14] **CONCLUSION**

[¶15] "A slow and steady erosion of the ability of victims of unconstitutional searches and seizures to obtain a remedy for the invasion of their rights saps the constitutional guarantee of its life just as surely as would a substantive limitation." Rawlings v. Kentucky, 448 U.S. 98, 121, 100 S. Ct. 2556, 2569, 65 L. Ed. 2d 633 (1980)(Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.).

[¶16] Although the United States Supreme Court with the advent of Birchfield now

[1] Counsel for Appellant Mr. Koehly is also appellant counsel for the Appellant in Baxter.

considers a breath test a search incident to arrest the circumstances of submitting to a breath test are still relevant. A valid breath test requires the subject to provide law enforcement a specific breath sample by blowing at a certain pressure for a certain amount of time and North Dakota law compels the subject to do so. North Dakota law therefore compels the subject to provide the breath sample according to parameters determined by law enforcement. In Boyd v. United States, 116 U.S. 616 (1886) the United States Supreme Court struck down a law that compelled the subject of an investigation to produce evidence to be used against the subject. The Boyd Court stated that "[w]e think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings." Id. at 638.

[¶17] As in Boyd Mr. Koehly was compelled by North Dakota law to offer evidence against himself specifically by being compelled to provide law enforcement a sample of his breath as directed by law enforcement. The manner used by law enforcement to collect a breath sample from Mr. Koehly offends due process by compelling the subject of the test to offer evidence against himself or herself. Id. at 633-34 ("We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.").

[¶18] Accordingly based on the foregoing arguments and law Mr. Koehly respectfully requests the hearing officer's decision to revoke his driving privileges be reversed.

Dated: July 14, 2016

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CERTIFICATE OF SERVICE FOR REPLY BRIEF

[¶1] On July 14, 2016 a true and correct copy of the following was electronically served:

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