

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20160155

State of North Dakota,

Plaintiff and Appellee

-vs-

Jacob Colby Webster,

Defendant and Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
NORTH WEST JUDICIAL DISTRICT
MCKENZIE COUNTY CR. NO. 27-2014-CR-01196
THE HONORABLE ROBIN SCHMIDT PRESIDING

BRIEF

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AUGUST 9, 2016

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ABBREVIATIONS

Transcript - Tr
Page - P
Line - L
Appendix - App

STATEMENT OF THE ISSUES

[¶1] ISSUES:

I. Did the trial judge err when he instructed the jury that they could convict Mr. Webster of driving under the influence if they found that he had refused a blood test?

II. Did the trial judge err when he refused to give an instruction the defense requested about when an officer may request an onsite screening test?

NATURE OF THE CASE

[¶2] On July 2, 2014 Jacob Colby Webster was charged with driving while under the influence in McKenzie County, North Dakota.

[¶3] That the first trial on Driving While Under the Influence charge was held on January 14, 2016.

[¶4] That jury trial ended with a hung jury.

[¶5] The second jury trial on the Driving While Under the Influence charge was held on April 8, 2016.

[¶6] That jury trial ended with a guilty verdict.

[¶7] The Jury Verdict and Criminal Judgment was entered on April 8, 2016.

[¶8] The Notice of Appeal and Order for Transcript were filed on April 28, 2016.

[¶9] The Notice of Appeal was misfiled with the District Court on April 28, 2016.

[¶10] On April 29, 2016 the Notice of Filing the Notice of Appeal was filed.

[¶11] The Clerk's Certificate of Appeal was filed on May 23, 2016.

[¶12] The Clerk's Supplemental Certificate of Appeal and the Clerk's Certificate of Appeal were filed on May 24, 2016.

[¶13] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶14] The above-entitled matter began on July 18, 2014 at about 11:30 p.m. when North Dakota Highway Patrol Trooper, Christopher Allen (Trooper Allen) pulled over a vehicle that was driven by Defendant, Jacob Colby Webster (Mr. Webster) on highway 85 at mile post 17th in the Indian Hills area north of Alexander but south of Williston, North Dakota.

[¶15] Prior to begin pulled over by Trooper Allen, Mr. Webster had been at a barbecue with his father, mother, other relatives and his pregnant girlfriend , Elecia Strutton. Alcoholic beverages were serve at this barbecue, but none were consumed by Mr. Webster because he had to go to work later that evening and drive a water truck for GRH.

[¶16] Mr. Webster and Elecia Strutton got into an argument. Because of this argument Ms. Strutton decided to leave the party. When she left she took a vehicle that belonged to Mr. Webster's employer, GRN. Mr. Webster was concerned because Ms. Strutton took one of his company's vehicles and because of her pregnancy she was very emotional. So he decided to and did get another vehicle and went after Ms. Strutton. Mr. Webster hoped he would be able to get Ms. Strutton to pull over and then get her calmed down.

[¶17] Trooper Allens involvement in this case began when he was north bound on highway 85 and saw a south bound vehicle on highway 85 that was following another vehicle too closely. In order to find out why the vehicle was following so close behind another vehicle, he decided to turn his patrol car around and stop the vehicle that was following too closely behind another vehicle. When he got the close following vehicle stopped he asked the driver for identification. The driver gave him a Missouri drivers license and from that license he learned the driver was named Jacob Colby Webster.

[¶18] Initially Trooper Allen didn't detect any odor of an alcoholic beverage coming form Mr. Webster but before his investigation ended he thought he did detect the odor of an alcoholic beverage coming from Mr. Webster.

[¶19] When Mr. Webster first got in Trooper Allen's patrol car, Trooper Allen

doesn't recall anything Mr. Webster did or said that would indicate he was impaired.

[¶20] In this case during the course of Trooper Allen's investigation he had Mr. Webster perform three standard sobriety tests:

1. The horizontal gaze nystagmus test;
2. The walk and turn; and
3. The one legged stand.

According to Trooper Allen, Mr. Webster failed the horizontal gaze nystagmus test (gaze test) and the walk and turn test but he passed the one legged stand test.

[¶21] Trooper Allen was cross-examined about his decisions to fail Mr. Webster on the walk and turn test and the gaze test. Trooper Allen had scored 3 failures on the walk and turn test. During cross examination about the walk and turn test he decided one of the failures could be wrong but that only 2 failures on the walk and turn test are needed to score a failure on that test. As to the gaze test, Trooper Allen admitted there might be some procedural problems but he stood by the gaze test and his decision to fail Mr. Webster.

[¶22] Trooper Allen also gave Mr. Webster three non-standard tests:

1. Alphabet;
2. Count backwards; and
3. Finger test

Mr. Webster passed the alphabet test and failed the count backwards test and the finger test.

[¶23] The State offered one exhibit during the trial. That exhibit is described on page 36 of Tr. L.23-25,P.37, L.1-3 as the back portion of the back sheet of the drivers

portion of report and notice. That part of the report and notice contains the DUI Implied Consent Advisory and is read to any North Dakota Defendant who refuses to take a chemical test and/or an onsite screening test. In this case Trooper Allen says Mr. Webster refused to take the blood test or onsite screening test and after these refusals he read the DUI Implied Consent Advisory to Mr. Webster. Mr. Webster's response was he didn't understand the DUI implied consent advisory

[¶24] In this case the Defense offered one exhibit. That exhibit was marked Exhibit #A. It is an audio video tape that Trooper Allen made of the arrest scene. It is about 90 minutes long. The defense used Exhibit #A during the trial to show the jury how Mr. Webster acted and talked at the arrest scene on highway 85 and claimed that these actions and talk all show that Mr. Webster wasn't under the influence.

[¶25] There were two trials of this case. The first trial was on January 14, 2016 and ended with a hung jury. The second jury trial was on April 8, 2016 and ended with a guilty verdict. At the first trial the jury during the deliberations sent out two questions. The first question and the judge's response are found in the App P. 7 and it is listed as document 61 in the Register of Actions.

[¶26] The following is the first question the jury asked and the trial judge's response:

We need to know if reading the "implied consent" card to defendant properly is considered "direction of a law enforcement" officer? In reference to essential elements part b.

You must rely on the evidence presented at trial and the jury instructions as provided to you.

[¶27] The second question the jury asked and the judge's responses is found in App. P. 8 and is listed as document 62 in the Register of Actions.

[¶28] The following is the second jury's question and the trial judge's response:

Can we please get the verbiage of the implied consent card?

You must rely on the evidence that has been presented at trial.

[¶29] From the above questions during the first trial it is apparent that the jury was having difficulty understanding implied consent and needed a jury instruction that would help them understand implied consent.

[¶30] In the second trial on April 8, 2016 the defendants attorney requested a jury instruction that would help the jury to better understand implied consent. That request is found at Tr. 73, L.11-19.

MS. GULKE: I have a case, the State v. Boehm, B-o-e-h-m, 2014 ND 154, 849 N.W.2d 239. And the statement of the law as pursuant to NDCC 39-20-14(1), a law enforcement officer may request an onsite screening test of an individual's breath . . . if there is reason to believe, (1) a traffic violation has occurred - - which we are not arguing. And (2) in conjunction with the violation, the officer based on observation formulates an opinion the driver's body contains alcohol.

[¶31] The trial judges denial of that request is found in the Tr. P. 73, L. 20 to p. 74, L2.

THE COURT: I am not giving that instruction for a couple of reasons. I think that that's not a question for a jury. I think that's a question for a pretrial motion judge issue, if it were to be raised. Which it wasn't. And I don't think there's adequate evidence to support the instruction that I have here. And I think what I have here is the law. So, I am not giving that instruction. But, your objection has been noted.

[¶32] The following is the question that the second jury sent out during

deliberation:

Is it legal for law enforcement to ask someone to submit to a breathalyzer under any circumstances?

[¶33] This question is found in the App P. 37 and is listed as entry 92 in the Register of Actions.

[¶34] The trial judges response is found in the Tr.P.108, L.1-6.

[¶35] From the above question it is apparent that at the second trial the jury was having a similar problem to the one the jurors in the first trial had with implied consent. What the trial judge did with that question and what the prosecution and defense attorneys said about it is found in the Tr. P.107, L.10 to P. 108. L.9.

THE COURT: We are going to open the record. We are outside the presence of the jury. The jury has a question, and I have provided the lawyers a copy of it. And I will note for the record that the Defendant is here, as well. Attorney Rodenbiker, any thoughts on what we should respond?

MR. RODENBIKER: A few. It occurs to me it's a question that might have been answered by the instruction that Ms. Gulke had requested. But, that ship has sailed and I think you are going to have to direct the jury to rely on the instructions that have been given them, I believe.

THE COURT: Attorney Gulke?

MS. GULKE: I think the answer is no. Is it legal for law enforcement to ask someone to submit to a breathalyser under any circumstances? I mean, I guess just rely on - -

THE DEFENDANT: What about the Fourth Amendment?

THE COURT: I think that this is what I am going to respond, which is what I respond to everything, pretty much, some variation of this. You must rely on the instructions that have been provided you. Because those are the instructions that they have been given and that's what they need to use to consider the case. Any last works?

MR. RODENBIKER: Not from the State.

THE COURT: Attorney Gulke?

MS. GULKE: No.

ARGUMENT

[¶36] ISSUE I. Did the trial judge err when he instructed the jury that they could convict Mr. Webster of driving under the influence if they found that he had refused a blood test?

[¶37] In this case the trial judge gave the following jury instruction: Tr. P. 92, L.25 to P. 93, L.9.

Essential Elements of Driving Under the Influence.

The State's burden of proof is satisfied if the evidence shows, beyond a reasonable doubt, the following essential elements: 1) On or about July 18, 2014, in McKenzie County, North Dakota; 2) The Defendant, Jacob Webster; 3) Drove a vehicle on a highway, street, or on a public or private area to which the public has a right of access for vehicular use; and 4) Any one of the following:

- a. was under the influence of intoxicating liquor; or
- b. refused to submit to a chemical test, or test, of his blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine at the direction of a law enforcement officer only after

placing the individual under arrest and informing that individual that the individual is or will be charged with the offense of driving, or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof; and informed the individual that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by a law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges; or

c. refused to submit to an onsite screening test, or tests, of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer and the officer informed the individual that North Dakota law requires the individual to take the screening test to determine whether the individual is under the influence of alcohol, that refusal to take the screening test is a crime, and that refusal of the individual to submit to a screening test may result in a revocation for at least one hundred eighty days and up to three years of the individual's driving privileges.

[¶38] The above jury instruction on Essential Elements of Driving Under the Influence was made possible because of NDCC 39-20-01(1)(3).

39-20-01. Implied consent to determine alcohol concentration and presence of drugs.

1. Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in

this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine. . .

3. a. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individuals driving privileges.

[¶39] The constitutionality of NDCC 39-20-01(1)(3) was recently decided in *Birchfield v. North Dakota* 579 U.S. ____ (2016). According to *Birchfield* because of the Fourth Amendment to the United State Constitution NDCC 39-20-01(1)(3) is unconstitutional when it is applied to blood tests. The reasons why NDCC 39-20-01(1)(3) is unconstitutional are:

1. That the Fourth Amendment prevents warrantless search and the search incident to arrest doctrine does not justify the warrantless taking of a blood sample.
2. That reasonableness has always been the touchstone of the Fourth Amendment and applying that standard motorist cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.
3. That motorists can 't be criminally prosecuted for refusing a warrantless blood draw.

[¶40] In this case Mr. Webster because of the jury instructions could have been

found guilty by a jury if they found any one or more of the following:

1. Mr. Webster was under the influence;
2. Mr. Webster refused a blood test;
3. Mr. Webster refused the onsite screening test.

[¶41] In Mr. Webster's case the jury verdict reads as follows: Tr. P. 109, L.1-4. Verdict. We the jury duly empaneled and sworn in the above entitled action, do make the following findings regarding the Defendant, Mr. Jacob Webster. Driving Under the Influence, Guilty. Dated at Watford City, McKenzie County. App. P.23

[¶42] The above verdict only allows the jury to find Mr. Webster guilty of driving under the influence. Such a verdict ignores the Essential Elements of Driving Under the Influence instruction. Tr. P.92, L5 to P. 93, L21 which allows three separate reasons for finding Mr. Webster guilty:

[¶43] Therefore the jury verdict should have been written so the jury could find Mr. Webster guilty of driving under the influence or refusing to submit to a blood test or refusing to submit to an onsite screening test. The way Mr. Websters verdict is written there is no way of knowing which of the three possibilities for connecting Mr. Webster was the one used by the jury to convict him.

[¶44] This was the second trial for Mr. Webster on the charge of driving under the influence. From the jury deliberation questions in both cases it is very unlikely that the jury found Mr. Webster guilty of driving under the influence. It is much more likely that the jury found him guilty of refusing to take either the blood test or the onsite screening test or both tests. Because of the verdict form used there is no way to determine from that verdict form why the jury found Mr. Webster guilty of driving under the influence.

NDR of Evidence 606(b) doesn't allow an affidavit of a juror to impeach a verdict. Therefore a jurors affidavit can't be used to explain the guilty jury verdict in Mr. Webster's case.

[¶45] In this case there is a real possibility that Mr. Webster was convicted because of an unconditional statute that allowed him to be found guilty because he refused a blood test. The fact that this possibility exists prevents Mr. Webster's second trial from being fair. The interests of justice requires that Mr. Webster get a fair trial at which there is no instruction the jury can convict him for refusing a blood test. The only way Mr. Webster will ever have a fair trial is if he is granted a new trial.

[¶46] On the above issue the standard of review is difficult to determine. The reason for this is that Mr. Webster's case involves an unconstitutional statute and therefore a constitutional question is involved in this case. When a constitutional question is involved the standard of review is de novo. But in this case the facts are such that the standard of review could be Rule 52(b) because there was no objection made by the defendant to the jury instruction that allowed him to be convicted for driving under the influence because he refused a blood test. If the standard of review is under Rule 52(b) the following language in Kraft is the standard of review:

Rule 52 of the North Dakota Rules of Criminal Procedure provides:

“(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

“(b) Obvious Error. Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

Even though the general rule is that an issue will not be noticed unless raised at trial, an error that infringes upon substantial rights of the defendant is noticeable notwithstanding lack of an objection or, as in this case, in the absence of a request for an instruction. See

Rule 52(b), supra; see also State v. Miller, 388 N.W.2d 522, 522 (N.D. 1986) (obvious error is an exception to the general rule that issues not raised at trial will not be addressed on appeal).

[¶47] ISSUE II. Did the trial judge err when he refused to give an instruction the defense requested about when an officer may request an onsite screening test?

[¶48] In this case the Defendant's attorneys request for a jury question about when law enforcement officers may request an onsite screening test is found in the Tr.P.73, L.11 -17. The trial judge's response to the defendant's attorneys request for a screening test is found in the Tr. P.73, L.20 to P.74, L3. The language in the Defendants attorneys request for a jury instruction and the judge's denial of that request is sufficient to make the standard of review of the Defendant's second issue fully reviewable.

[¶49] The statute that the Defendant's attorney relied on when she requested the instruction about what is required before a law enforcement officer may request an onsite screening test is found in NDCC 39-20-14(1).

39-20-14. Screening tests.

1. Any individual who operates a motor vehicle upon the public highways of this state is deemed to have given consent to submit to an onsite screening test or tests of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer who has reason to believe that the individual committed a moving traffic violation or was involved in a traffic accident as a driver and in conjunction with the violation or the accident the officer has, through the officer's observations, formulated an opinion that the individual's body contains alcohol.

[¶50] In this case the Defendant's attorney believes that the audio videotape, exhibit A, which was made by Trooper Allen at the scene of the traffic stop and arrest when watched by a jury that is given her requested instruction on onsite screening test will

be convinced that jury that Trooper Allen didn't have reason to believe that Mr. Webster's body contained alcohol.

[¶51] According to *State v. Kraft* 413 NW2d 303 (ND 1987):

Rule 30 of the North Dakota rules of Criminal Procedure 2 provides when and upon what the jury is to be instructed, and

[413 N.W.2d 306]

the methods of doing so. It is the duty of the court to instruct the jury upon questions of law applicable to the case. Rule 30(a), N.D.R.Crim.P.; see also *State v. Reich*, 298 N.W.2d 468, 471 (N.D. 1980) (duty of court to correctly advise the jury on the law of the case); *Dranow v. United States*, 307 F.2d 545, 568 (8th Cir. 1962) (duty of trial court to instruct the jury on general principles of law applicable to the facts of the case). Although the judge is initially responsible to present jury instructions concerning the issues, attorneys may request specific instructions on points of law in order that the jury may be fully informed as to all the law governing the case. Rule 30(b), supra; see also *State v. Allery*, 322 N.W.2d 228, 232 n.3 (N.D. 1982) (“While the judge is initially responsible to correctly instruct the jury ... the attorneys have the professional responsibility to request or object to specific instructions of points of law resulting from testimony or on developments during trial . . .”).

[¶52] In this case because the jury at the first trial during deliberation sent out two questions asking for an explanation about implied consent, the trial judge knew from the first trial that the jury in the second trial would have a problem deciding how to deal with implied consent. To avoid this problem the trial judge should have but didn't draft a jury instruction explaining implied consent.

[¶53] The Defendant's attorney was the only one who submitted a jury instruction explaining what information law enforcement officers must have before they can ask a person to take an onsite screening test. The need for that instruction became apparent at the second jury trial when the jury during deliberation sent out the following question:

Is it legal for law enforcement to ask someone to submit to a Breathalyzer under

any circumstances?

[¶54] The above question can be found in App.P.37. The following statement was made by the prosecutor when the above question was discussed out of the hearing of the jury: Tr. P.107, L.15-19.

MR. RODENBIKER: A few. It occurs to me it's a question that might have been answered by the instruction that Ms. Gulke had requested. But, that ship has sailed and I think you are going to have to direct the jury to rely on the instructions that have been given them, I believe.

[¶55] The following language in Kraft indicates that a Defendant is entitled to have given jury instructions that are related to her theory of defense:

In Tatum v. United States, 190 F2d 612, 615 (D.C. Cir. 1951), cert. denied, 356 U.S. 943, 78 S.Ct. 788, 2 L.Ed2d 818 (1958), quoting Kreiner v. United States, 11 F2d 722, 731 (2d Cir. 1926), the District of Columbia Court of Appeals stated that the “[f]ailure on the part of a trial court in a criminal case to ‘instruct on all essential questions of law involved in the case, whether requested or not’” would clearly affect substantial rights within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure.6 It was further stated that “in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility.” Tatum, supra, at 617 (citing 53 Am.Jur., Trial § 580); State v. Thiel, 411 N.W.2d 66 (N.D. 1987); see also 75 Am. Jur. 2d, Trial §§ 575, 652 (1974).

[¶56] According to the above language in Kraft:

1. Mr. Webster was entitled to have the instruction he requested on onsite screening tests given because it was a part of his defense theory.
2. The trial judges denial of Mr. Webster's onsite screening test instructions was error.

CONCLUSION

[¶57] For the above and foregoing reasons Mr. Webster is entitled to a new trial

and this case should be remanded to the District Court with an order requiring the District Court to give him a new trial.

Dated this 9th day of August, 2016.

/s/ Benjamin C. Pulkrabek
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CERTIFICATE OF SERVICE

[¶58] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on August 9th, 2016, she served, by e-mail and/or mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Jacob Rodenbiker
McKenzie County State's Attorney
Jrodenbiker@co.mckenzie.nd.us

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jacobwebster400@gmail.com

The undersigned further certifies that on August 9th, 2016, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX and BRIEF.

/s/Sharon Renfrow
Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office