IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Matthew John Marman, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee.	**Supreme Ct. No. 20160217** **District Ct. No. 04-2016-CV-00003**

APPEAL FROM THE MARCH 31, 2016,
JUDGMENT OF THE DISTRICT COURT
BILLINGS COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE RHONDA R. ELLIS

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[¶1] Whether the Department's authority to administratively revoke Marman's driving privileges for refusing to submit to an onsite screening test is dependent upon Marman having been advised of an opportunity to remedy that refusal by submitting to a chemical test for intoxication.

[¶2] Whether the hearing officer erred in admitting Trooper Nuenthal's testimony regarding the sufficiency of Deputy Thomas' reasonable and articulable suspicion that Marman was driving under the influence of alcohol to request an onsite screening test.

[¶3] Whether Deputy Thomas' request that Marman submit to an onsite screening test prior to his formal arrest was a permissible search incident to an arrest under the Rawlings rationale.

[¶4] Whether North Dakota's implied consent laws and test refusal laws, as they pertain to onsite screening tests, violated Marman's substantive due process rights or imposed an unconstitutional condition on him.

STATEMENT OF CASE

[¶5] Marman was placed under arrest on September 17, 2015, for the offense of refusing to submit to an onsite screening test. (Appellant's App. ("App.") 4.) At the conclusion of the October 14, 2015, administrative hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Marman's driving privileges for a period of 180 days. (Id.) Marman submitted a Petition for Reconsideration which the hearing officer denied. (Id. at 6-24.) Marman requested judicial review of the hearing officer's decision. (Id. at 25-28.)

STATEMENT OF FACTS

[¶6] At approximately 1:00 a.m., on September 17, 2015, North Dakota Highway Patrol Trooper Cody Nuenthal ("Trooper Nuenthal") responded to a request for assistance in investigating a single-vehicle collision in which Marman was involved as the driver. (Transcript ("Tr.") at 4, ll. 2-13; 5, ll. 6-13.) Trooper Nuenthal testified that when he arrived at the location, "I observed that there was a single vehicle truck on the out slope of the south side of the interstate that did show heavy damage on it. It was bent on the chassis and I observed signs of a single vehicle crash on that out slope." (Id. at 5, ll. 14-19.)

[¶7] Trooper Nuenthal testified he was advised by Billings County Deputy Sheriff Shawn Thomas ("Deputy Thomas") "that he had Matthew in the back of his squad vehicle and that he already placed Matthew under arrest before I had arrived on scene." (Id. at 6, ll. 5-16.) Trooper Nuenthal explained Deputy Thomas had placed Marman under arrest for refusing to submit to an onsite screening test. (Id. at 6, l. 17 – 7, l. 18.)

[¶8] Trooper Nuenthal testified "Deputy Thomas informed me that he believed Mr. Marman to be heavily intoxicated. He observed an odor of alcohol coming from both Mr. Marman and the truck. He observed multiple cans of alcoholic beverage inside the truck and outside the truck." (Id. at 8, l. 25 – 9, l. 4.) Trooper Nuenthal stated "he also informed me that Mr. Marman was lethargic, slow to respond and overall had difficulty responding to Mr. Thomas' questions." (Id. at 9, ll. 4-6.)

[¶9] Trooper Nuenthal testified "I observed that Mr. Marman was lethargic. I also observed an odor of alcoholic beverage coming from his person. I, myself, did observe the cans of alcoholic beverage within and around Mr. Marman's vehicle as well and detected an odor of respirated alcohol within the vehicle." (Id. at 9, ll. 10-16.) Trooper Nuenthal stated "when I spoke with Mr. Marman he was slow to respond. His voice was slightly slurred and his words were not a casual conversation. The words were uttered very slowly." (Id. at 9, 19-24.)

[¶10] Trooper Nuenthal testified that "[f]ollowing taking custody of Matthew Marman I informed Mr. Marman that he was being placed under arrest, under my custody, for refusal, under the same circumstance." (Id. at 8, ll. 2-5.) Trooper Nuenthal transported Marman to the Dickinson law enforcement center where he informed Marman of the implied consent advisory. (Id. at 10, ll. 2-9.) Trooper Nuenthal testified Marman stated "he was going to maintain his refusal and would not provide a breath test." (Id. at 10, ll. 10-18.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶11] Marman requested judicial review of the Hearing Officer's Decision by the Billings County District Court pursuant to N.D.C.C. § 39-20-06. (App. 25-28.) On appeal, Marman challenged North Dakota's implied consent laws as being unconstitutional. (Id.) Marman also alleged:

> [¶4] The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement failed to advise Mr. Marman that he may remedy his refusal of the screening test. . . .
>
> [¶5] The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement did

> not have reasonable suspicion that Mr. Marman was under the influence. . . .

(Id. at 26.)

[¶12] The district court issued its Memorandum Opinion and Order Affirming the Hearing Officer's Decision on March 30, 2016, in which the court affirmed the Hearing Officer's Decision. (Id. at 29-38.) Judgment was entered on March 31, 2016. (Id. at 41.) Marman appealed the Judgment to the North Dakota Supreme Court. (Id. at 43-45.) On appeal, the Department requests this Court affirm the Judgment of the Billings County District Court and the Hearing Officer's Decision revoking Marman's driving privileges for a period of 180 days.

STANDARD OF REVIEW

[¶13] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to revoke driving privileges." Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

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.

[¶14] "In an appeal from a district court's review of an administrative agency's decision, [the Court] review[s] the agency's decision." Haynes, at ¶ 6. The Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id.

[¶15] "A hearing officer's evidentiary rulings are reviewed under the abuse of discretion standard." Filkowski v. Dir., N.D. Dep't of Transp., 2015 ND 104, ¶ 6, 862 N.W.2d 785 (citing Potratz v. N.D. Dep't of Transp., 2014 ND 48, ¶ 7, 843 N.W.2d 305). "'A hearing officer abuses her discretion when she acts in an arbitrary, unreasonable, or capricious manner or misapplies or misinterprets the law.'" Id. (quoting Dawson v. N.D. Dep't of Transp., 2013 ND 62, ¶ 12, 830 N.W.2d 221).

[¶16] "When an 'appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency's order unless it finds the agency's order is not in accordance with the law.'" Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646

N.W.2d 704). The "[i]nterpretation of a statute is a question of law fully reviewable on appeal." State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

[¶17] The Supreme Court's "'standard of review for a claimed violation of a constitutional right is de novo.'" McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 8, 848 N.W.2d 659 (quoting Martin v. N.D. Dep't of Transp., 2009 ND 181, ¶ 5, 773 N.W.2d 190 (citation omitted)).

LAW AND ARGUMENT

I. The Department's authority to administratively revoke Marman's driving privileges for refusing to submit to an onsite screening test is not dependent upon Marman having been advised of an opportunity to remedy that refusal by submitting to a chemical test for intoxication.

[¶18] Section 39-08-01(2)(a), N.D.C.C., provides "[a]n individual who operates a motor vehicle on a highway . . . who refuses to submit to a chemical test, or tests, required under section . . . 39-20-14, *is guilty of an offense under this section.*" N.D.C.C. § 39-08-01(2)(a) (emphasis added). However, "[a]n individual is not subject to an offense under [section 39-08-01] for refusal to submit to an onsite screening test under section 39-20-14 if the person submits to a chemical test under section 39-20-01 . . . for the same incident." N.D.C.C. § 39-08-01(2)(b). *Within the criminal context*, section 39-08-01(2)(b) provides that "[u]pon the individual's refusal to submit to an onsite screening test, the police officer shall inform the individual that the individual may remedy the refusal if the individual takes a chemical test under section 39-20-01 . . . for the same incident." Id.

[¶19] In this case, Marman argues the Department lacked the authority to revoke his driving privileges because there was no evidence presented that he was informed he could remedy his refusal to submit to the onsite screening test

by taking a chemical test. Section 39-20-14(3), N.D.C.C., however, limits the admonition that must be provided to an individual before that individual's driving privileges may be administratively revoked under N.D.C.C. ch. 39-20 for refusing to submit to an onsite screening test. The plain language of the statute contains no requirement that an individual be advised of an opportunity to remedy a refusal.

[¶20] Section 39-20-14(3) provides "[t]he officer shall inform 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 that individual's driving privileges." N.D.C.C. § 39-20-14(3). "If such individual refuses to submit to such screening test or tests, none may be given, but such refusal is sufficient cause to revoke such individual's license or permit to drive in the same manner as provided in section 39-20-04 . . ." Id.

[¶21] At the time the North Dakota Legislature amended section 39-08-01(2)(b) to add the statutory language upon which Marman relies, it could have added similar curative language to section 39-20-14(3), however, it did not do so. "Generally, the law is what the Legislature says, not what is unsaid." Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993). "It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say." Id. (quoting City of Dickinson v. Thress, 69 N.D. 748, 755, 290 N.W. 653, 657

(1940)). "'Where the language of a statute is plain and unambiguous, the 'court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.'" Id. (citations omitted).

[¶22] In addition, "[t]he courts cannot legislate, regardless of how much we might desire to do so. . . . Our power is limited to passing on laws enacted by the Legislature, and, if the Legislature fails to act, we cannot change the law by judicial decision." Fetzer v. Minot Park Dist., 138 N.W.2d 601, 604 (N.D. 1965).

[¶23] Furthermore, the Court has observed there are rights that can be asserted in a criminal proceeding that are inapplicable in the administrative proceeding. "License suspension proceedings are an exercise of the police power for the protection of the public and not for punishment, and, generally the wide range of constitutional protections afforded in a criminal proceeding are not applicable to those civil proceedings." Holen v. Hjelle, 396 N.W.2d 290, 294 (N.D. 1986) (internal citation omitted). "Although the loss of a license for one year is a serious sanction, that sanction is regulatory rather than punitive and does not support the characterization of the proceeding as criminal." Id. (internal citation omitted). See also Fasching v. Backes, 452 N.W.2d 324, 325 (N.D. 1990) ("[T]his Court recognized that constitutional protections afforded in criminal proceedings are not applicable in administrative license-suspension proceedings."); Pladson v. Hjelle, 368 N.W.2d 508, 511 (N.D. 1985) ("The rights

that the licensee may assert in a criminal proceeding are not applicable in implied-consent hearings under Chapter 39-20, N.D.C.C.").

[¶24] Section 39-20-14(3) limits the admonition that must be provided before an individual's driving privileges may be administratively revoked under N.D.C.C. ch. 39-20 for refusing to submit to an onsite screening test. The plain language of the statute contains no requirement that an individual be advised of the opportunity to remedy that refusal. The Department's authority to administratively revoke Marman's driving privileges for refusing to submit to an onsite screening test is not dependent upon Marman having been advised of an opportunity to remedy his refusal by submitting to a chemical test for intoxication.

II. The hearing officer did not err in admitting Trooper Nuenthal's testimony regarding the sufficiency of Deputy Thomas' reasonable and articulable suspicion Marman was driving under the influence of alcohol to request an onsite screening test.

[¶25] In this case, Marman argues the hearing officer erred in admitting Trooper Nuenthal's testimony regarding the communications he received from Deputy Thomas concerning the deputy's observations of Marman's indicia of intoxication and Marman's refusal to submit to the screening test.

[¶26] Section 39-20-14(1), N.D.C.C., provides:

> 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.

N.D.C.C. § 39-20-14(1). "When law enforcement has reason to believe a moving violation has occurred, along with information to form an opinion that the driver's body contains alcohol, the officer has a reasonable and articulable suspicion the person was driving under the influence of alcohol sufficient to request an onsite screening test . . . ." State v. Baxter, 2015 ND 107, ¶ 9, 863 N.W.2d 208, cert. granted, judgment vacated on other grounds, 136 S.Ct. 2539 (2016).

[¶27] At the administrative hearing, Trooper Nuenthal testified based upon his personal observations, that Marman was involved in a single-vehicle collision crash. Trooper Nuenthal also testified regarding the communications he received from Deputy Thomas concerning the deputy's observations of Marman's indicia of intoxication in conjunction with his request that Marman submit to an onsite screening test and Marman's refusal to submit to the screening test.

[¶28] Trooper Nuenthal explained "Deputy Thomas informed me that he believed Mr. Marman to be heavily intoxicated. He observed an odor of alcohol coming from both Mr. Marman and the truck. He observed multiple cans of alcoholic beverage inside the truck and outside the truck." (Tr. at 8, l. 25 – 9, l. 4.) Trooper Nuenthal stated "he also informed me that Mr. Marman was lethargic, slow to respond and overall had difficulty responding to Mr. Thomas' questions." (Id. at 9, ll. 4-6.) Trooper Nuenthal explained that Deputy Thomas had placed Marman under arrest for refusing to submit to an onsite screening test. (Id. at 6, l. 17 – 7, l. 18.)

[¶29] The Supreme Court has recognized the principle of imputed knowledge and that even in the absence of the original declarant's testimony, "officer to

officer communications are presumptively reliable." City of Minot v. Keller, 2008 ND 38, ¶ 13, 745 N.W.2d 638 ("[O]bservations made by one officer may be communicated to a second officer who, after observing additional conduct, can combine the communicated observations with his own to thereafter have reasonable articulable suspicion to stop."); see also Osaba v. N.D. Dep't of Transp., 2012 ND 36, 812 N.W.2d 440 (non-testifying officer's observations of the security video, which were imputed to arresting officer, demonstrated Osaba's operation of a vehicle). The Osaba Court noted that such testimony is admissible in the absence of the declarant when offered to establish an arresting officer's knowledge and observations at the time of an arrest, rather than when offered to prove the person had been driving under the influence. Id. at ¶ 12.

[¶30] The information provided to Trooper Nuenthal by Deputy Thomas was presumptively reliable as an officer-to-officer communication. That information regarding Marman's indicia of intoxication, combined with the fact Marman had been involved in a traffic accident, provided Deputy Thomas with sufficient reasonable and articulable suspicion to request Marman submit to the onsite screening test.

[¶31] The hearing officer did not err in admitting Trooper Nuenthal's testimony regarding the sufficiency of Deputy Thomas' reasonable and articulable suspicion Marman was driving under the influence of alcohol to request an onsite screening test.

III. Deputy Thomas' request that Marman submit to an onsite screening test prior to his formal arrest was a permissible search incident to an arrest under the Rawlings rationale.

[¶32] "A valid arrest based upon probable cause clearly justifies a warrantless search of the arrestee, but as the name of this exception implies, lawful arrest typically precedes the search." State v. Overby, 1999 ND 47, ¶ 8, 590 N.W.2d 703. "[S]o long as probable cause to arrest exists before the search, and the arrest is substantially contemporaneous, a warrantless search preceding arrest is reasonable under the Fourth Amendment." State v. Mercier, 2016 ND 160, ¶ 21 (citing Rawlings v. Kentucky, 448 U.S. 98, 111, 111 n.6 (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," so long as the fruits of the search were "not necessary to support probable cause to arrest.")).

[¶33] "When a search incident to an arrest has been conducted prior to the formal arrest, we 'closely examine the facts prior to the search to determine if probable cause to arrest is present without regard to any evidence which might be discovered during the search preceding the arrest.'" State v. Haverluk, 2000 ND 178, ¶¶ 13, 19, 617 N.W.2d 652 (quoting Overby, at ¶ 17 (VandeWalle, C.J., specially concurring)) (Where "a careful examination of the facts establishes that the officers had probable cause to arrest Haverluk prior to the search of the vehicle . . . . officer's search of Haverluk's car [before he was formally arrested] was valid as a search incident to arrest, and the vehicle key was not essential for the probable cause to arrest.")

[¶34] In Birchfield v. North Dakota, the United States Supreme Court upheld Bernard's criminal prosecution for refusing a warrantless breath test because "[t]hat test was a permissible search incident to [Bernard's] arrest for drunk driving" and "[a]ccordingly, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it." 136 S.Ct. 2160, 2186 (2016). Consequently, under the Rawlings search incident to arrest rationale, an onsite screening test may be a permissible search incident to an arrest, *even if that test is refused*, if probable cause to arrest is present without regard to any evidence which might be discovered through the screening test.

[¶35] "Probable cause to arrest for DUI requires the law enforcement officer to observe some signs of impairment and have some reason to believe the impairment is caused by alcohol consumption." Pokrzywinski v. Dir., N.D. Dep't of Transp., 2014 ND 131, ¶ 11, 847 N.W.2d 776 (citing Moran v. N.D. Dep't of Transp., 543 N.W.2d 767, 770 (N.D. 1996)). Furthermore, "[p]robable cause may still exist for a closely related offense, even if that offense was not invoked by the arresting officer, as long as it involves the same conduct for which the suspect was arrested." Gasho v. United States, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994) (citing United States v. Rambo, 789 F.2d 1289, 1294 (8th Cir. 1986)). "It is immaterial that the officer did not have in mind the specific charge upon which the arrest can be justified." Id.

[¶36] In State v. Bartelson, the Supreme Court stated:

> . . . . [A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is

> to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."

2005 ND 172, ¶ 25, 704 N.W.2d 824 (quoting Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (citations omitted in original) (quoting Whren v. United States, 517 U.S. 806, 813 (1996) (quotation omitted))).

[¶37] In this case, Deputy Thomas' request that Marman submit to the onsite screening test should be considered a lawful search incident to arrest despite the fact Marman was formally arrested for refusing the test rather than for driving while under the influence. Deputy Thomas' observations, including the odor of alcohol coming from Marman, the multiple cans of alcoholic beverage, and Marman's lethargic behavior, combined with the traffic accident, would have provided the deputy with -- not only a reasonable suspicion to request the onsite screening test -- but also probable cause to arrest Marman even without the screening test. The circumstances also support the reasonable inference that Marman's arrest was substantially contemporaneous with the request he submit to the screening test.

[¶38] Deputy Thomas' request that Marman submit to an onsite screening test prior to his formal arrest was a permissible search incident to an arrest under the Rawlings rationale.

IV. North Dakota's implied consent laws and test refusal laws, as they pertain to onsite screening tests, did not violate Marman's substantive due process rights or impose an unconstitutional condition on him.

[¶39] The Fourth Amendment of the United States Constitution and its state counterpart, N.D. Const. art. I, § 8, provide for "[t]he right of the people to be secure in their persons, . . . against unreasonable searches and seizures." U.S. Const. amend. IV; N.D. Const. art. I, § 8 (emphasis added). In Birchfield, the United States Supreme Court held 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 . . . may be administered as a search incident to a lawful arrest for drunk driving." 136 S.Ct. at 2185. "As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation." Id.

[¶40] As argued above, under the Rawlings rationale, an onsite screening test is not *per se* unlawful, but is subject to consideration as a search incident to arrest depending on the factual circumstances of the case. In this case, a warrant was not required to request Marman submit to the screening test.

[¶41] Because Marman had no constitutional right to refuse the test, North Dakota's implied consent laws and test refusal laws, as they pertain to onsite screening tests, did not violate Marman's substantive due process rights or impose an unconstitutional condition on him.

CONCLUSION

[¶42] The Department requests this Court affirm the Judgment of the Billings County District Court and the Hearing Officer's Decision revoking Marman's driving privileges for a period of 180 days.

Dated this 26th day of August, 2016.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Matthew John Marman, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20160217** **District Ct. No. 04-2016-CV-00003** **AFFIDAVIT OF SERVICE BY MAIL**

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

[¶1] Melissa Castillo 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 26th day of August, 2016, I served the attached **BRIEF OF APPELLEE** upon the appellant by placing a true and correct copies thereof in an envelope addressed as follows:

Thomas F. Murtha, IV
Attorney at Law
P.O. Box 1111
Dickinson, ND 58602-1111

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Melissa Castillo

Subscribed and sworn to before me
this 26th day of August, 2016.

Notary Public

LISA A. JOHNSON
Notary Public
State of North Dakota
My Commission Expires Jan 1, 2022