

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Matthew John Marman,

Appellant/Petitioner,

v.

Grant Levi, Director of the
North Dakota Department of
Transportation,

Appellee/Respondent.

Supreme Court Case No. 20160217
District Court Case No. 04-2016-CV-00003

APPELLANT'S PETITION FOR REHEARING

**APPEAL FROM THE JUDGMENT OF THE
BILLINGS COUNTY DISTRICT COURT,
THE HONORABLE RHONDA R. EHLIS,
AFFIRMING AN ADMINISTRATIVE
DECISION OF THE NORTH DAKOTA
DEPARTMENT OF TRANSPORTATION**

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[¶1] TABLE OF CONTENTS

By paragraph

TABLE OF AUTHORITIES2

LAW AND ARGUMENT3

The North Dakota Supreme Court should reconsider this matter because the Appellant, Mathew John Marman did rebut the prima facie evidence of the Report and Notice.4

CONCLUSION.....11

[¶2] TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Bell v. Burson,
402 U.S. 535 (1971).....6

Birchfield v. N. Dakota,
136 S. Ct. 2160 (2016).....14

Daniels v. Williams,
474 U.S. 327 (1986).....6

Dixon v. Love,
431 U.S. 105 (1977).....6, 12

Murray’s Lessee v. Hoboken Land & Improvement Co.,
59 U.S. 272 (1856).....6

NORTH DAKOTA SUPREME COURT

Barrios-Flores v. Levi,
2017 ND 117, 894 N.W.2d. 88813

Marman v. Levi,
2017 ND 133, -- N.W.2d --5, 7

State v. Baxter,
2015 ND 107, 863 N.W.2d 208, 213, reh'g denied (May 27, 2015), cert. granted,
judgment vacated, 136 S. Ct. 2539, 195 L. Ed. 2d 863 (2016), and vacated, 2016 ND 181,
¶ 11, 885 N.W.2d 6413

UNITED STATES FIFTH CIRCUIT

John Corp. v. City of Houston,
214 F.3d 573 (5th Cir. 2000)6

UNITED STATES CONSTITUTION

Fourteenth Amendment6

[¶3] **LAW AND ARGUMENT**

[¶4] The North Dakota Supreme Court should reconsider this matter because the Appellant, Mathew John Marman did rebut the prima facie evidence of the Report and Notice.

[¶5] The North Dakota Department of Transportation revoked Mr. Marman's driving privileges for refusing to submit to a screening test and that revocation has been affirmed. Marman v. Levi, 2017 ND 133, -- N.W.2d --.

[¶6] According to the United States Supreme Court the continued possession of a driver's license may become essential to earning a livelihood; as such, it is an entitlement which cannot be taken without the due process mandated by the Fourteenth Amendment. See Dixon v. Love, 431 U.S. 105 (1977); Bell v. Burson, 402 U.S. 535 (1971).

Individuals may look to several constitutional provisions for protection against state action that results in a deprivation of their property. The Fourteenth Amendment guarantees that individuals are not to be deprived of their property without due process of law, a protection that has been viewed as guaranteeing procedural due process and substantive due process. Procedural due process promotes fairness in government decisions “[b]y requiring the government to follow appropriate procedures when its agents decide to ‘deprive any person of life, liberty, or property.’ ” Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Substantive due process, “by barring certain government actions regardless of the fairness of the procedures used to implement them, [] serves to prevent governmental power from being ‘used for purposes of oppression.’ ” Id. (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 15 L.Ed. 372 (1856)).

John Corp. v. City of Houston, 214 F.3d 573, 577 (5th Cir. 2000).

[¶7] In its opinion in this case the North Dakota Supreme Court wrote “[b]ecause Marman failed to rebut the prima facie evidence of the Report and Notice, we affirm.”

Marman v. Levi, 2017 ND 133, ¶ 1, -- N.W.2d --. The opinion appears to indicate that because Mr. Marman did not object to the Report and Notice on hearsay grounds he did not rebut the Report and Notice where the box is checked indicating that Mr. Marman had refused to submit to a screening test.

[¶8] The transcript from the hearing before the North Dakota Department of Transportation however demonstrates that Mr. Marman did rebut the Report and Notice as prima facie evidence that he refused to submit to a screening test. Trooper Nuenthel was the author of the Report and Notice and signed the Report and Notice. Hearing Exhibit 1b; Transcript, page 16, lines 21-23 (T. 16:21-23). Trooper Nuenthel testified at the hearing that he did not observe Mr. Marman refuse to take a screening test. T. 16:18-20.

[¶9] The opinion in Marman indicates that the issue of the admissibility of hearsay was not reached because Mr. Marman did not rebut the Report and Notice. Marman at ¶ 10 (“We need not address whether the district court erred in admitting Officer Nuenthel's testimony. The Department's Report and Notice form was admitted without an objection on hearsay grounds and provides sufficient evidence to support the request for an onsite screening test.”). Irrespective of the Report and Notice providing sufficient evidence for an onsite screening test Trooper Nuenthel testified he did not observe Mr. Marman refuse an onsite screening test.

[¶10] Because the North Dakota Department of Transportation revoked Mr. Marman's driving privileges for refusing an onsite screening test, and the Trooper testified he did not observe Mr. Marman refuse an onsite screening test, thus rebutting the prima facie evidence of the Report and Notice, this Court should grant this petition and consider the admissibility of hearsay to support the revocation of Mr. Marman's driving privileges.

[¶11] **CONCLUSION**

[¶12] Absent the Report and Notice the Department is left with hearsay to prove Mr. Marman refused an onsite screening test. This Court should as a matter of due process address the issue of the admissibility of hearsay in this matter. See Dixon.

[¶13] This Court should also reconsider its reliance on Barrios-Flores v. Levi, 2017 ND 117, 894 N.W.2d 888, reh'g denied (June 7, 2017) and its reliance on State v. Baxter, 2015 ND 107, 863 N.W.2d 208, reh'g denied (May 27, 2015), cert. granted, judgment vacated, 136 S. Ct. 2539, 195 L. Ed. 2d 863 (2016), and vacated, 2016 ND 181, 885 N.W.2d 64 because the judgment in Baxter was vacated by the United States Supreme Court.

[¶14] Whether or not a refusal to submit to a prearrest test is used to convict for a crime or revoke driving privileges should not matter. The United States Supreme Court in Birchfield v. N. Dakota, 136 S. Ct. 2160 (2016) addressed Mr. Beylund's consent irrespective of the proceeding being criminal or civil, the North Dakota Supreme Court should do the same in addressing Mr. Marman's refusal to submit to a pre arrest screening test. Because it is a violation of due process to use an unconstitutional law to deprive a person of an important property interest and based on the forgoing arguments and law Mr. Marman respectfully requests that this petition for rehearing be granted.

Dated: June 21, 2017

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**CERTIFICATE OF SERVICE
FOR APPELLANT'S PETITION FOR
REHEARING**

[¶1] On June 21, 2017 a true and correct copy of the following was electronically served:

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