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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellant, vs. John Williams Hawkins, Defendant and Appellee.	)	Supreme Court No. 20160354 District Court No. 27-2016-CR-00154

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM ORDER GRANTING MOTION TO SUPPRESS

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE DANIEL S. EL-DWEEK, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUE

[¶1] Whether the district court erred in finding that consent was not voluntary because of the giving of the North Dakota Implied Consent Advisory, thus necessitating reversal of the order to suppress?

STATEMENT OF THE CASE

[¶2] The State of North Dakota ("State") appeals from the district court's order granting the motion to suppress of John Hawkins ("Hawkins"). The State charged Hawkins by Uniform Citation filed on February 2nd, 2016, with Driving Under the Influence, a Class B misdemeanor. The State alleged Hawkins had committed these offenses on or about January 30th, 2016.

[¶3] On April 19, 2016, Hawkins timely moved to suppress the evidence giving rise to the charges against him; namely that the Chemical Test that was given should be suppressed. Hawkins argued that the deputy did not follow exactly the procedure outlined for the North Dakota Implied Consent, and thus the test was invalid. The State opposed the motion on the grounds that there was no overall violation of the North Dakota Implied Consent and therefore the test should be admitted.

[¶4] A hearing was held on May 11th, 2016. Deputy Christensen testified and the dash cam video was admitted into evidence. Judge El-Dweek reserved his ruling until he could issue a written decision. While awaiting Judge El-Dweek's written opinion, the United States Supreme Court issued Birchfield v. North Dakota --- U.S. ----, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). The Defendant filed a supplemental Motion to Suppress on July 1, 2016 arguing that after the Birchfield decision, the chemical test in this case, a blood draw, must be suppressed because there wasn't voluntary consent. The State filed a response to

the supplemental Motion to Suppress, arguing that the consent given in this case was voluntary and not a reason to suppress.

[¶5] A second hearing was held on August 31, 2016 in which Deputy Christensen again testified. The in-car video was admitted into evidence. Judge El-Dweek again reserved his ruling until he could issue a written decision. On September 29, 2016, Judge El-Dweek issued an order granting the motion to suppress. In that decision, Judge El-Dweek found that the consent to the chemical test was not voluntary because of the coercive nature of the Implied Consent Advisory given. Judge El-Dweek stated because the consent was involuntary, there was no reason to decide the issues from the first motion to suppress.

[¶6] The State filed a timely notice of appeal of the order granting motion to suppress, along with a prosecutor's statement accompanying notice of appeal. This appeal ensued.

STATEMENT OF THE FACTS

[¶7] On January 30th, 2016, Deputy David Christensen was on-duty with the McKenzie County Sheriff's Office. (5/13/2016 Tr. p. 4, l. 18-20). The Defendant was pulled over for a traffic stop and ran through field sobriety tests. (5/13/2016 Tr. p. 4, l. 21-25; p. 5, l. 1-4). Based upon the field sobriety tests, the deputy believed the Defendant was under the influence. (5/13/2016 Tr. p. 5, l. 5-7). Deputy Christensen read the Implied Consent Advisory prior to giving the On-Site Screening Test, which the Defendant refused. (5/13/2016 Tr. p. 5, l. 19-24). The deputy placed the Defendant under arrest, handcuffed him, and placed him in the back of his squad car. (5/13/2016 Tr. p. 6, l. 2-4). The deputy then secured the Defendant's vehicle and property while the Defendant was in the back of the squad car. (5/13/2016 Tr. p. 6, l. 5-6; 8/31/2016 Tr. p. 8, l. 18-23). While the Defendant was sitting alone in the back of the squad car, he said he would take a blood test. (8/31/2016 Tr. p. 9, l. 20-23). When the deputy returned to the squad car, he attempted to read the Implied Consent Advisory to the Defendant. (8/31/2016 Tr. p. 4, l. 18-24). Before the deputy could finish the Implied Consent, the Defendant stated he would take a blood test. (8/31/2016 Tr. p. 9, l. 24-25; p. 10, l. 1-3). The deputy finished the Implied Consent Advisory and confirmed the Defendant wanted to take a blood test. (5/13/2016 Tr. p. 6, l. 13-16). The deputy then took the Defendant to the McKenzie County Hospital where the Defendant acquiesced with a blood draw. (5/13/2016 Tr. p. 6, l. 17-22). The applicable

portions of both videos submitted run from 11:00 minute mark to 21:53 minute mark.

STANDARD OF REVIEW

[¶8] This court laid out the standard of review for a reviewing a motion to suppress on grounds of consent in State v. Nagel, 2014 ND 224, ¶ 5, 857 N.W.2d 374, as follows: "The applicable standard of review of a district court's decision to grant or deny a motion to suppress evidence is well established.

> When reviewing a district court's ruling on a motion to suppress, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We affirm the district court's decision unless we conclude there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence.
>
> Whether a finding of fact meets a legal standard is a question of law, which is fully reviewable on appeal. The existence of consent is a question of fact to be determined from the totality of the circumstances. Whether consent is voluntary is generally decided from the totality of the circumstances. Our standard of review for a claimed violation of a constitutional right is de novo.

Smith, 2014 ND 152, ¶ 4, 849 N.W.2d 599 (citations omitted) (quotation marks omitted)."

ARGUMENT

I. The district court erred in finding that consent was not voluntary because of the giving of the North Dakota Implied Consent Advisory, thus necessitating reversal of the order to suppress.

[¶9] The consent that the Defendant gave was voluntary, despite the partial inaccuracy of the Implied Consent Advisory given in this case. The analysis of this case comes from the United States Supreme Court's decision in Birchfield v. North Dakota, as accurately stated by this Court in State v. Timm:

> "In Birchfield v. North Dakota, ––– U.S. ––––, 136 S.Ct. 2160, 2172, 195 L.Ed.2d 560 (2016), the United States Supreme Court consolidated three cases to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their blood stream. See State v. Birchfield, 2015 ND 6, 858 N.W.2d 302; Beylund v. Levi, 2015 ND 18, 859 N.W.2d 403; and State v. Bernard, 859 N.W.2d 762 (Minn. 2015). The Supreme Court held the Fourth Amendment permits warrantless breath tests incident to a lawful arrest for drunk driving, but does not permit warrantless blood tests incident to a lawful arrest for drunk driving. 136 S.Ct. at 2184–85. The Supreme Court concluded that in Birchfield's prosecution for refusing a warrantless blood test incident to his arrest, the refused blood test was not justified as a search incident to his arrest and reversed his conviction because he was threatened with an unlawful search. Id. at 2186. The Supreme Court also concluded that in an administrative proceeding to suspend Beylund's license after he consented to a warrantless blood test, a remand to this Court for further proceedings was necessary to determine the voluntariness of Beylund's consent under the totality of the circumstances given the partial inaccuracy of a law enforcement officer's advisory of a driver's obligation to undergo chemical testing. Id."

State v. Timm, 2016 ND 241, ¶ 3.

[¶10] "Whether consent to search is voluntary is a question of fact. United States v. Larson, 978 F.2d 1021, 1023 (8th Cir.1992). A trial court must determine

whether, under the totality of the circumstances, the consent was voluntary. DeCoteau, 1999 ND 77, ¶ 9, 592 N.W.2d 579. The government has the burden to prove that consent was voluntarily given. United States v. McCaleb, 552 F.2d 717, 720 (6th Cir.1977). When consent is the product of a free and unconstrained choice and not the product of duress or coercion, it is voluntary. Larson, 978 F.2d at 1023. To determine voluntariness, we focus on two elements: (1) the characteristics and condition of the accused at the time of the consent, and (2) the details of the setting in which the consent was obtained, with no one factor being determinative. City of Fargo v. Ellison, 2001 ND 175, ¶ 13, 635 N.W.2d 151; see also State v. Guscette, 2004 ND 71, ¶ 11, 678 N.W.2d 126." State v. Mitzel, 2004 ND 157, ¶¶ 25-26, 685 N.W.2d 120, 127.

[¶11] The trial court in this case found that the partially inaccurate Implied Consent Advisory, along with the fact that the Defendant was in custody, made the Defendant's consent involuntary. First, the only inaccuracy in the Implied Consent Advisory given prior to the Defendant's statements in the squad car is that refusal to submit to a chemical test was an additional criminal charge. There was no mention of a blood draw, which post-Birchfield would now be inaccurate. This Court has also stated that the presence of armed law enforcement and the fact that the Defendant is in custody is not by itself determinative of whether consent is voluntary. State v. Schmidt, 2016 ND 187, ¶ 28, 885 N.W.2d 65, citing to State v. Lange, 255 N.W.2d 59, 64 (N.D.1977). It is

important to note that although the deputy states refusal to submit to a test would be an additional criminal charge, at the time of his arrest, all that was requested was an on-site screening of his breath. After that, and before the deputy could request a blood draw, the Defendant stated that he would take a blood draw. The Implied Consent Advisory given at the time the Defendant volunteered to take a blood draw, both when he was alone in the squad and while the deputy was reading the second Implied Consent Advisory, was simply in regards to this breath test. The trial court, and this Court, must still assess the totality of the circumstances in the case at hand.

[¶12] The totality of the circumstances actually shows that the Defendant voluntarily consented. He was offered a breath test, the on-site screening, which he refused. Birchfield did not abrogate the on-site screening test. Then, after his arrest, he was placed alone in the back of the squad car. The camera and microphone in the squad car were still recording during this time. While the Defendant was by himself in the back of the squad car, he clearly states that "I'll take a blood test." He says it twice in the span of 5 minutes. These were given without prompting or directly based off the Implied Consent Advisory for a blood test. At no time prior to the Defendant making these statements did the deputy state the chemical test would be a blood test. While the Defendant was in custody, he was not being questioned or coerced, or subject to repeated questioning as the Schmidt court was concerned about. These statements are a

clear indication of the state of his mind at the time. It confirms the choice that he made later when asked by law enforcement if he would consent to a blood draw. There was no impending threat of criminal charges for refusing a blood draw when he made these statements, as the second Implied Consent had yet been read.

[¶13] This would be an entirely different case if the initial consent for a blood draw was made contemporaneously with the Implied Consent Advisory. But it wasn't. Even before the deputy was able to get out the first sentence of the second Implied Consent, the Defendant states "I want a blood test." These were unprompted statements that show the Defendant's state of mind, that he wanted a blood test. It shows the consent to give blood was a product of free and unconstrained choice. The Implied Consent Advisory, even if partially inaccurate, cannot automatically render consent involuntary.

CONCLUSION

[¶14] The statements made by the Defendant in this case show that he voluntarily consented to the blood draw given.

[¶15] Dated this 9th day of January, 2017.

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I certify that a true and correct copy of the **Brief of Plaintiff-Appellant (corrected) and Appendix of Plaintiff-Appellant (corrected)** was emailed to the following parties via electronic mail and deposited in first-class United States mail on the 13th of January, 2017:

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