

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB - 2 2017

Alan Lee Jessop,)	STATE OF NORTH DAKOTA
)	
Appellant,)	Supreme Ct. No. 20160387
)	
v.)	District Ct. No. 13-2016-CV-00041
)	
Grant Levi, Director of the North)	
Dakota Department of Transportation,)	
)	
Appellee.)	

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED FEBRUARY 16, 2016
DUNN COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE WILLIAM A. HERAUF

BRIEF OF APPELLEE

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STATEMENT OF ISSUE

[¶1] Whether Jessop's challenges to the constitutionality of the State's implied consent and test refusal laws are without merit under the controlling precedent of Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016)?

STATEMENT OF CASE

[¶2] On January 14, 2016, Trooper Robert Cummings (Trooper Cummings) of the North Dakota Highway Patrol arrested Alan Lee Jessop (Jessop) for the offense of driving a vehicle while under the influence of intoxicating liquor. Transcript (Tr.) at Exhibit (Ex.) 1b. A Report and Notice, including a temporary operator's permit, was issued to Jessop after Jessop refused to submit to a chemical blood test requested by Trooper Cummings. Id. The Report and Notice notified Jessop of the Department's intent to revoke his driving privileges. Id.

[¶3] In response to the Report and Notice, Jessop requested an administrative hearing in accordance with N.D.C.C. § 39-20-05. Tr. Ex. 1c. The hearing was held on February 10, 2016, at which time the hearing officer considered the following issues:

- (1) Whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug or substance in violation of N.D.C.C. section 39-08-01, or equivalent ordinance;
- (2) Whether the person was placed under arrest; and
- (3) Whether the person refused to submit to the test or tests.

Tr. 1; Tr. Ex. 2.

[¶4] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Jessop's driving privileges for a period

of 180 days. Tr. 28-29. Jessop petitioned for reconsideration on March 7, 2016. Docket ID# (Doc) 7. On April 4, 2016, the hearing officer by letter granted Jessop's petition for reconsideration, but affirmed the decision to suspend. Doc. 8. Jessop requested judicial review of the hearing officer's decision. Doc. 1.

STATEMENT OF FACTS

[¶5] Trooper Cummings observed a vehicle fail to stop at a stop sign and initiated a traffic stop. Tr. 4, ll. 6-7. The driver of the vehicle was identified as Jessop. Tr. 4, ll. 21-22. Trooper Cummings detected an odor of alcoholic beverages coming from Jessop as he was talking. Tr. 5, ll. 3-4. Jessop had difficulty retrieving the requested documents and difficulty understanding instructions. Tr. 5, ll. 5-10. Jessop has bloodshot watery eyes. Tr. 5, l. 13. Jessop told Trooper Cummings he had consumed a few beers during lunch a couple of hours before. Tr. 6, ll. 22-25.

[¶6] Jessop submitted to field sobriety tests. Tr. 7, ll. 1-6. Jessop displayed 4 of 6 clues on the Horizontal Gaze Nystagmus test indicating impairment. Tr. 8, l. 6 – Tr. 12, l. 20. Jessop was unable to complete the alphabet test as instructed. Tr. 13, ll. 2-15. Jessop was unable to complete the backwards count test as instructed. Tr. 13, ll. 16-25. Jessop displayed 5 of 8 clues on the walk-and-turn test, indicating impairment. Tr. 14, l. 4 – Tr. 15, l. 24.

[¶7] Trooper Cummings arrested Jessop for driving under the influence of alcohol. Tr. 17, ll. 5-10. Trooper Cummings read the Miranda warnings and the implied consent advisory. Tr. 17, ll. 13-18. Jessop adamantly and verbally refused to take the requested chemical blood test. Tr. 17, ll. 20-23. Trooper

Cummings explained the consequences of refusing to Jessop and how he could remedy the refusal. Tr. 17, l. 25 – Tr. 18, l. 6. Jessop still refused the chemical test. Tr. 18, ll. 8-10.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶8] Jessop requested judicial review of the Hearing Officer's Decision by the Dunn County District Court in accordance with N.D.C.C. § 39-20-06. App. 15-16. On appeal Jessop argued that the hearing officer erred by revoking his driving privileges for refusing to submit to a chemical blood test requested by law enforcement. App. 1, Doc. ID# 12. Jessop contended that law enforcement asked him to submit to a warrantless search, with no valid exception to the warrant requirement. Id. As such, Jessop alleged that revoking his driving privileges for his refusal to submit to such a search violated his Fourth Amendment right against unreasonable searches and seizures. Id. Jessop also argued the North Dakota implied consent statute violated the unconstitutional conditions doctrine. Id.; App. 16.

[¶9] Judge Herauf noted that the hearing officer's decision and Jessop's notice of appeal and specifications of error were filed prior to United States Supreme Court's issuance of its decision in Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016) but that the briefing of the parties occurred after the release of Birchfield. App. 19. The district court, therefore, analyzed Jessop's appeal in light of the Birchfield decision. Id.

[¶10] In doing so, Judge Herauf noted the United States Supreme Court held that a driver cannot face criminal penalties for refusing to submit to a blood test

following a driving under the influence arrest. App. 22-23. Judge Herauf also noted, however, that "Birchfield did not invalidate administrative penalties, such as the suspension of driving privileges, for refusal to submit to a blood test, but rather the Court in Birchfield acknowledged that it was not casting doubt on the constitutionality of [implied consent] laws." App. 23-24. Judge Herauf, thereafter concluded as follows:

Accordingly, this Court concludes, based on its reading of the Birchfield decision, that the United States Supreme Court did not invalidate North Dakota's implied consent laws to the extent that they impose administrative penalties, such as the suspension of driving privileges, on a driver who withdraws his consent to take a chemical test, including a blood test.

App. 25. For this reason the Court rejected Jessop's argument that his refusal to submit to a blood test violated his Fourth Amendment right against unreasonable searches and seizures. App. 27. The district court also rejected Jessop's argument that unconstitutional conditions doctrine was violated. Id.

[¶11] The district court issued its Memorandum Opinion and Order Affirming the Hearing Officer's Decision on September 20, 2016. App. 1, 27. Judgment was entered on September 21, 2016. App. 30. Jessop appealed the Judgment to this Court. App. 32-33. On appeal the Department requests this Court affirm the Judgment of the Dunn County District Court and the Hearing Officer's Decision revoking Jessop's driving privileges for a period of 180 days.

STANDARD OF REVIEW

[¶12] The Administrative Agencies Practices Act governs an appeal from an administrative hearing officer's decision suspending a license. N.D.C.C. ch. 28-32; N.D.C.C. ch. 39-20. The appeal is civil in nature. Knoll v. N.D. Dep't of Transp.,

2002 ND 84, ¶ 16, 644 N.W.2d 191. And it is separate and distinct from any criminal matter that may ensue. Id. The North Dakota Century Code provides, in relevant part, that a court must affirm an agency's order except in the event of any of the following:

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.

[¶13] The hearing officer's findings of fact must be upheld if they are supported by a preponderance of the evidence. Kahl v. Dir., N.D. Dep't of Transp., 1997 ND 147, ¶ 10, 567 N.W.2d 197. A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). A reviewing court, rather, determines only "whether a reasoning mind

reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” Id. (citation omitted.)

LAW AND ARGUMENT

Jessop’s challenges to the constitutionality of the State’s implied consent and test refusal laws are without merit under the controlling precedent of Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016).

[¶14] Jessop argues that the administrative hearing officer erred in her conclusions of law because North Dakota’s test refusal law violates the constitutional prohibition against unreasonable searches and seizures; is unconstitutional for penalizing the exercise of a constitutional right; that North Dakota’s test refusal law penalizes the constitutional right to withhold consent to a warrantless search, rendering the law unconstitutional; that the doctrine of unconstitutional conditions and N.D. Const. art. I, § 20, render North Dakota’s test refusal law unconstitutional; that North Dakota’s refusal and implied consent laws are unconstitutional as applied because the facts of the case demonstrate that law enforcement did not have a search warrant; and that the right to refuse testing is of a constitutional dimension.

[¶15] This Court has previously rejected similar arguments that North Dakota’s implied consent and test refusal laws are unconstitutional and have also rejected arguments based on the doctrine of unconstitutional conditions and N.D. Const. art. I, § 20. For example this Court stated as follows:

In State v. Smith, 2014 ND 152, ¶ 16, 849 N.W.2d 599 and McCoy v. N.D. Dep’t of Transp., 2014 ND 119, ¶ 21, 848 N.W.2d 659, we held consent to a chemical test is not coerced and is not rendered involuntary merely by a law enforcement officer’s reading of the implied consent advisory that accurately informs the arrestee of the

consequences for refusal, including the administrative and criminal penalties, and presents the arrestee with a choice. See also Wall v. Stanek, 794 F.3d 890 (8th Cir. 2015) (applying Minnesota law). In State v. Birchfield, 2015 ND 6, ¶ 19, 858 N.W.2d 302, we held the criminal refusal statute is not unconstitutional under the Fourth Amendment or N.D. Const. art. I, § 8. In Beylund v. Levi, 2015 ND 18, ¶¶ 30-31, 859 N.W.2d 403, we held the implied consent law does not violate the doctrine of unconstitutional conditions. In State v. Baxter, 2015 ND 107, ¶¶ 13-17, 863 N.W.2d 208, we held the criminal refusal statutes do not violate a defendant's due process rights. Recently, in State v. Kordonowy, 2015 ND 197, ¶¶ 15-19, we held the criminal refusal statutes are not unconstitutionally vague. Olson's arguments do not convince us to revisit these issues.

Olson v. Levi, 2015 ND 250, ¶ 12, 870 N.W.2d 222.

[¶16] Yet, as this Court is aware, Olson and its progeny were decided prior to the United States Supreme Court's decision in Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016). In light of Birchfield, Jessop again raises these arguments before the Court. However, Jessop's understanding of Birchfield and its holdings is misplaced. Birchfield does not support Jessop's arguments.

[¶17] In Birchfield the United States Supreme Court held the Fourth Amendment permits warrantless breath tests incident to a lawful arrest for drunk driving, but absent another exception to the warrant requirement, does not permit warrantless blood tests incident to a lawful arrest for drunk driving. Id. at 2184-2185. The 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.

[¶18] Yet, Jessop argues that by both criminalizing and also administratively penalizing the refusal of a chemical test, the North Dakota Legislature has

unconstitutionally authorized a warrantless search. Appellant's Br. ¶¶ 22-23, 30. Jessop's argument, however, goes too far. While Jessop's argument is valid in the criminal law setting of a refusal of a blood test, his interpretation of the United States Supreme Court's opinion as it applies to administrative law cases is wrong.

[¶19] This Court has stated: "The legislature has enacted civil proceedings to protect the traveling public by temporarily removing drunk drivers from the highways." State v. Zimmerman, 539 N.W.2d 49, 51 (1995). "A license suspension proceeding under 39-20-05, N.D.C.C., 'is an exercise of the police power for the protection of the public.'" Williams v. N.D. State Highway Comm'r, 417 N.W.2d 359, 360 (N.D. 1987), quoting Asbridge v. N.D. State Highway Comm'r, 291 N.W.2d 739 (N.D. 1980). The purpose of administrative driver's license suspension procedures is to quickly remove drunk drivers from the road to protect the traveling public. "The obvious state interest served by the implied consent statute is to deprive the drunk driver the privilege of continuing to drive for the public safety." Kobilansky v. Liffrig, 358 N.W.2d 781, 791 (N.D. 1984). "The summary suspension scheme serves the rational remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from the roads." State v. Strong, 605 A.2d 510, 513 (VT 1992). "[T]he state's compelling interest in highway safety justifies the administrative suspension procedures used by the Commissioner." Kobilansky, 358 N.W.2d at 791." Zimmerman, 539 N.W.2d at 55.

[¶20] The United States Supreme Court in Birchfield supports the current case law in North Dakota when they stated:

Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. See, e.g., McNeely, supra, at —, 133 S.Ct., at 1565–1566 (plurality opinion); Neville, supra, at 560, 103 S.Ct. 916. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.

It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Birchfield, 579 U.S. ___, 136 S.Ct. 2160 (2016). While Birchfield did hold North Dakota's Implied Consent law as it relates to the criminal penalties of refusal to take a blood test unconstitutional the Court did not find the administrative sanctions unconstitutional, even in a blood test context. In fact, the Birchfield Court spoke at length of the States and Federal Government's "paramount interest ... in preserving the safety of ... public highways." Id. at 2178 (quoting Mackey v. Montrym, 443 U.S. 1, 17 (1979)). And the Court found state implied consent laws, with attached administrative consequences, to be reasonable means to effectuate that purpose. Id. at 2169, 2179, and 2185. While the criminal charges against Jessop for refusing to submit to the chemical blood test need to be dismissed in light of Birchfield as a violation of his constitutional rights, the administrative sanctions are permissible as a valid exercise of police power for the protection of the public. In other words, Birchfield only stands for the proposition that an individual cannot be charged criminally with refusing to

submit to a chemical blood test, but it is not unconstitutional for the Department to take remedial action against a person's driving privileges for such a refusal. Therefore, Birchfield does not support Jessop's argument for reversing the hearing officer's decision in revoking his driving privileges. Jessop conveniently forgets this is an appeal on an administrative hearing officer's decision in relation to administrative consequences for his refusal to submit to a chemical blood test. His argument falls flat in this instance.

CONCLUSION

[¶21] The Department respectfully requests that this Court affirm the judgment of the Dunn County District Court and the Department's decision revoking Jessop's driving privileges for a period of 180 days.

Dated this 2nd day of February, 2017.

State of North Dakota
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CERTIFICATE OF SERVICE

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

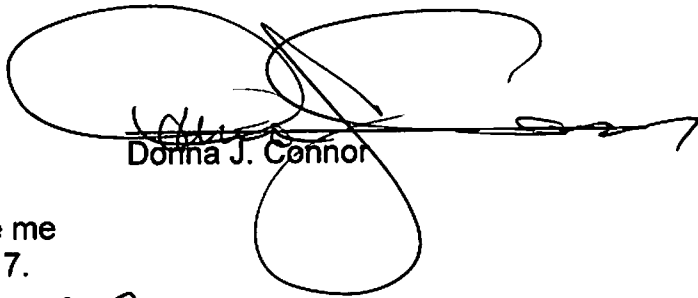
[¶1] Donna J. Connor states under oath as follows:

[¶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 2nd day of February, 2017, I served the attached **BRIEF OF APPELLEE** upon Alan Lee Jessop, by and through his attorney Thomas F. Murtha, IV, by placing a true and correct copy thereof in an envelope addressed as follows:


Thomas F. Murtha, IV
Attorney at Law
PO Box 1111
Dickinson, ND 58602

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

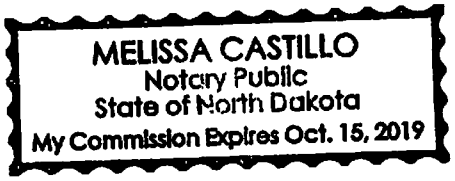


Donna J. Connor

Subscribed and sworn to before me
this 2nd day of February, 2017.



Notary Public



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

Lisa Johnson

Subscribed and sworn to before me
this _____ day of February, 2017.

Notary Public