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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellant,	)	Supreme Court No. 20170036
vs.	)	District Ct. No. 09-2016-CR-01933
	)	
Steven Floyd Helm,	)	
	)	
Defendant and Appellee.	)	

APPELLEE'S BRIEF

Appeal from the January 9, 2017 Order Granting Defendant's Motion to Dismiss Count 2
East Central Judicial District
The Honorable Frank L. Racek, Presiding

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[¶ 3] STATEMENT OF ISSUE

[¶ 4] Whether the district court properly concluded that requiring a person to submit a urine sample under threat of criminal prosecution was not a constitutionally reasonable warrantless search incident to an arrest in an investigation of driving under the influence of drugs?

[¶ 5] STATEMENT OF CASE

[¶ 6] The State appealed from the district court's order dismissing the criminal charge of refusal to submit a urine sample for testing in a driving under the influence investigation. The district court properly concluded that requiring a person to submit a urine sample under threat of criminal prosecution was not a constitutionally reasonable warrantless search incident to an arrest in an investigation of driving under the influence of drugs. (App. 11-12) See N.D.C.C. §§ 39-20-01; 39-08-01(1)(e)(2).

[¶ 7] The state's argument relies almost entirely on its claim that requiring a person to provide a urine sample without a search warrant is reasonable if the arresting officer doesn't look at the person's genitals during the process. (Appellant's brief ¶ 53).

[¶ 8] STATEMENT OF FACTS

[¶ 9] Helm agrees with the state's statement of facts as far as it goes. Evidence of impairment is questionable in this case. Officers noted that Helm was stopped for driving a vehicle without headlights at about 1:30 a.m. and that he "appeared fidgety, repeatedly scratched his face, and

spoke rapidly." (App. 6; State's Response: Doc ID# 31; ¶ 3.) The officers also asserted he showed signs of impairment on field tests, including body tremors. (App. 6; State's Response: Doc ID# 31; ¶ 4)(The state relies on facts in a document which is in the record but is not part of the Appendix).

[¶ 10] The state did not explain in its brief that the officers administered three field sobriety tests. (App. 9). The HGN test showed no signs of impairment, there was no odor of alcohol, and no indication Helm had consumed alcohol. (Tr. 14; 1-10). Helm told the officers he had surgical screws in his ankle. (App. 9; The officer's field notes are part of Exhibit 2, Doc ID# 49, which the state did not include in its Appendix). He also told them he had lost a contact. (Tr. 16: 8-11). Two squad car videos of the stop and arrest were received in evidence. (Exhibit 1, Doc ID# 48). The field sobriety tests were not done in view of the camera, but brief audio of the last test can be heard. (Tr. 17; 17-20). Most significantly, you can watch Helm walk from his car to the squad car, and you can watch and hear Helm speaking in the back of the squad car. The officer's claim that Helm was fidgeting, scratching his face and talking rapidly are not readily observable. Helm explained to the officer that he was cold and he is a naturally high-strung person, when the officer insinuated he was high. (Exhibit 1, Doc ID# 48). There was a slight odor of marijuana in the car, and Helm stated that someone had smoked marijuana in the vehicle earlier. Helm consented to a search of the vehicle and no contraband was found, either in the vehicle or

on his person. (The officer's field notes are part of Exhibit 2, Doc ID# 49, which the state did not include in its Appendix). The officer placed Helm under arrest and transported him to the jail. The officer read the implied consent law to Helm, which informed him that if he refused to provide a urine sample, he would be charged with a crime. Helm refused. (Tr. 10: 1-25).

[¶ 11] The state stakes its argument almost entirely on the fine point that the officer in this case did not "look at the person's genitals" while collecting the urine sample. (Appellant's brief ¶ 53). However, the state does not fully explain what actually happened in this case. This officer had collected only two urine samples. (App. 7, ¶ 11). The officer goes into a tiny restroom with the person, which contains only a toilet and a sink. The officer stands right behind the person, "at a forty-five degree angle, such that I cannot see the arrestee's genitals." Id. The officer ensures that the person does not fill the container with water from the toilet or the sink. The officer does not allow the person to go in the restroom alone, or into a stall and shut the door. (Tr. 16: 12-25; 17: 1-10). Of course, Mr. Helm is male; the state has not explained how the procedure would work for a female arrestee; nor how a female would be able to urinate without exposing herself.

[¶ 12] Helm agrees that the officers believed he had been driving while impaired by drugs and that nothing suggested he had consumed any alcohol. (Tr. 14:6-23.) A breath test would have been useless. The officer concluded the only option was a urine test. (Tr. 14:11-23). The state does

not explain whether a blood test is an option to determine whether a person has ingested drugs.

[¶ 13] STANDARD OF REVIEW

[¶ 14] Helm agrees with the standard of review asserted by the state. Whether a category of searches qualifies for an exception to the warrant requirement involves constitutional interpretation, which is a question of law. See generally State v. Herrick, 1999 ND 1, ¶ 28, 588 N.W.2d 847 (applying de novo review of an issue involving constitutional interpretation); Thompson v. Jaeger, 2010 ND 174, ¶ 7, 788 N.W.2d 586 (indicating principles of construction apply to interpretation of state constitutional provisions). A question of law is fully reviewable. State v. Boehm, 2014 ND 154, ¶ 8, 849 N.W.2d 239; State v. Glaesman, 545 N.W.2d 178, 181 (N.D. 1996).

[¶ 15] ARGUMENT

[¶ 16] To establish an exception to the search warrant requirement, the court will balance two competing interests: (1) the degree to which a search intrudes on an individual's privacy, and (2) the degree to which the search is needed to promote a legitimate government interest. Maryland v. Buie, 494 U.S. 325, 331 (1990); Riley v. California, 134 S.Ct. 2473, 2484 (2014).

[¶ 17] Helm agrees that safeguarding public roadways is an important state interest. See Kobilansky v. Liffrig, 358 N.W.2d 781, 791 (N.D. 1984);

State v. Zimmerman, 539 N.W.2d 49, 55 (N.D. 1995); Martin v. North Dakota Dep't of Transp., 2009 ND 181, ¶ 7, 773 N.W.2d 190. The United States Supreme Court has described the government's interest in preserving safety on the highways as "paramount." Mackey v. Montrym, 443 U.S. 1, 17 (1979); Birchfield v. North Dakota, 136 S.Ct. 2160, 2178 (2016) (citing Mackey, at 17).

[¶ 18] The ability to obtain evidence in impaired driving cases through testing is important to furthering the State's "paramount" interest in highway safety. The issue is whether that evidence can be obtained without a search warrant.

[¶ 19] The United States Supreme Court recently analyzed breath and blood tests as searches incident to arrest of persons charged with impaired driving. The Court considered three factors involving the individual privacy portion of the balancing test. Birchfield v. North Dakota, 136 S.Ct. 2160, 2176-78 (2016). First, the extent of any physical intrusion was considered. Id. at 2176. The Court recognized that the physical intrusion is "almost negligible" for breath tests; they do not require piercing the skin and involve minimal inconvenience. Id. Blood tests were considered physically intrusive because they require piercing the skin and extraction of part of the arrestee's body. Id. at 2178.

[¶ 20] Urine tests do not require any physical intrusion. Like exhaled breath, urine is a natural product of an essential bodily function. See Id. at

2177.

[¶ 21] A second factor Birchfield considered in assessing individual privacy was whether the test could reveal more than the targeted information. Id. at 2177. The Court noted that with breath tests, the machine measures only alcohol content. Id. The Court recognized that with blood tests, a source of anxiety for persons tested is that law enforcement obtains a sample that could be preserved and from which information far beyond alcohol content can be obtained. Id. at 2178.

[¶ 22] Like blood, urine can reveal more than the existence of drugs. The United States Supreme Court has explained that, like blood, urine "can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989). The state concedes in its brief that "The capability of revealing nontargeted information is a factor that tips toward the Defendant." The state barely recognizes this critical factor. Birchfield held that breath samples do not require a search warrant, because blowing into a machine is not invasive or embarrassing, and no bodily fluids are retained by the government. Birchfield v. North Dakota, 136 S.Ct. 2160, 2176-78 (2016). In contrast, blood tests are invasive, and the government retains the blood, which contains a wide variety of information about a person, not the least of which is DNA. Id. The state minimizes the fact that urine tests are identical to blood tests in this regard, as held by the

Minnesota Supreme Court in State v. Thompson, 886 N.W.2d 224, 231 (2016).

[¶ 23] The third factor Birchfield considered in assessing individual privacy was whether participation in the test was "likely to cause any great enhancement in the embarrassment that is inherent in any arrest." Birchfield, 136 S. Ct. at 2177. The factor came from Skinner. Id. (citing Skinner, 489 U.S. at 625). The Court indicated that breath tests are not inherently embarrassing. Id. Blood tests, however, involve a process that many do not "relish." Id. at 2178.

[¶ 24] The state has relied almost exclusively on a very fine point in the administration of a urine test, that the person is supposedly "not required to expose their genitals." (State's brief at ¶ 53).

[¶ 25] Considering the constitutionality of a railway employee regulatory scheme in Skinner, the Supreme Court initially noted that urine tests "may in some cases" involve visual or aural observation of the urine collection process. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989). Citing National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), the Supreme Court recognized that urination is a very private activity "traditionally performed without public observation." Skinner, 489 U.S. at 617. The Court thus concluded that a urine test constitutes a search. Id.

[¶ 26] In Skinner the Court also analyzed the intrusiveness of the

searches by considering the manner in which the urine tests were conducted. Skinner, 489 U.S. at 626. "The regulations do not require that samples be furnished under the direct observation of a monitor," the Court noted. Id. That distinction, along with the fact that samples were collected in a medical environment, helped convince the Court that urine tests under the scheme did not unconstitutionally intrude on railway employees' privacy. Id. at 626-28.

[¶ 27] Like Skinner, Von Raab assessed intrusiveness by looking at the manner in which urine tests were administered. Von Raab, 816 F.2d at 174-77. At issue in Von Raab was a program requiring urine testing of certain Customs Service employees. Id. at 172. The tests were conducted by having the employee take off outer layers of clothing, receive a bottle to collect the urine sample, and enter a restroom stall. Id. at 174. An observer remained in the restroom to listen and receive the sample immediately after urination, "but the observer d[id] not visually observe the act of urination." Id. That lack of observation was a key distinction. Unlike the procedure used for screening firefighters in another case, the court emphasized that, "the tester does not watch the employee while the urine sample is being produced." Id. at 177 (distinguishing Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986)). The testing scheme ultimately was deemed reasonable. Von Raab, 816 F.2d at 180. Both of those cases are distinguishable from collection of urine samples in a law enforcement

investigation, and specifically in this case. In this case, the officer goes into a tiny restroom with the person, which contains only a toilet and a sink. The officer stands right behind the person, "at a forty-five degree angle, such that I cannot see the arrestee's genitals." The officer ensures that the person does not fill the container with water from the toilet or the sink. The officer does not allow the person to go in the restroom alone, or into a stall and shut the door. (Tr. 16: 12-25; 17: 1-10). Of course, Mr. Helm is male; the state has not explained how the procedure would work for a female arrestee; nor how a female would be able to urinate without exposing herself.

[¶ 28] In State v. Thompson, 886 N.W.2d 224 (2016), the Minnesota Supreme Court held that urine is the same as blood under Birchfield. The state attempts to distinguish Thompson because there was evidence of alcohol consumption in Thompson. Drivers can be impaired due to consumption of a combination of drugs and alcohol. In Thompson, the defendant was charged with refusal to submit a urine sample. Id. at 229.

[¶ 29] Thompson held that urine tests implicate significant privacy interests, regardless of how they are administered. Id. at 231. The court noted that the arrestee must urinate, on command, in full view of the arresting officer, who must witness the arrestee void directly into the bottle. Id. at 231-32. The arrestee is required to perform a personal and private bodily function in "full view before law enforcement." Id. at 232. Blood testing does not involve arrestees performing a private function "in front of

law enforcement." Id. Requiring arrestees to submit to urine tests "under the watchful eye of the government," significantly intruded on individual privacy. Id.

[¶ 30] The state argues that when assessing the intrusiveness of a urine testing program, the manner of administration is critical. The state also argues that intrusiveness can be reasonably minimized when testing is administered such that testers do not watch subjects urinating. This is far too fine a point. In this case, the officer would have stood directly behind Helm in a small bathroom. The officer stated he would stand at an angle so he could not see Helm's genitals. However, he would need to ensure that Helm was actually urinating in the container, and not filling it with something other than his own urine. (Tr. 16: 12-15; 17: 1-10). The state is making a distinction without a difference. A urine testing scheme which would allow the arrestee privacy would not be reliable; a valid testing procedure requires the officers to ensure there is no contamination. (See DOC ID # 33, Submission of Urine Sample form).

[¶ 31] Birchfield's third factor is whether participation is "likely to cause any great enhancement in the embarrassment that is inherent in any arrest." Birchfield, 136 S.Ct. at 2177 (emphasis added). The requirement to provide a urine sample in this case meets that standard. The District Court did not rule that law enforcement cannot collect a urine sample in impaired driving investigations. It decided under Birchfield that a person cannot be

prosecuted for refusing to provide a urine sample as a warrantless search incident to arrest. Id. The state has made no attempt to prove or explain why a warrant could not be obtained for a urine sample, just as for a blood sample. If fact, if the person cannot urinate, they are given something to drink and the officer will wait for who knows how long until the person is able to urinate to collect the sample. (App. 7: ¶ 13).

[¶ 32] CONCLUSION

[¶ 33] Providing a urine sample is not physically invasive compared to having blood drawn. However, the state minimizes the critical factor that collecting a urine sample is an invasion of privacy because the government retains a product of the person's body which reveals far more than the presence of drugs. Blood is virtually identical to urine in that regard. Finally, the state relies upon the fine distinction that the officer in this case would not look at Helm's genitals, at the same time he would stand right next to him in a small bathroom to ensure the sample is not contaminated. The state makes no attempt to apply its scheme to women. The district court properly concluded that requiring a person to submit a urine sample under threat of criminal prosecution was not a constitutionally reasonable warrantless search incident to an arrest in an investigation of driving under the influence of drugs. This Court should affirm the district court's order.

Dated this 9th day of May, 2017.

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IN RE State v. Helm
Supreme Court No. 20170036
Cass Co. No. 2016-CR-01933

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I, Monty G. Mertz, do hereby certify that, on the 9th day of May, 2017, I served the Appellee's Brief on the following:

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Dated this 9th day of May, 2017.

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CERTIFICATE OF SERVICE
N.D.R.App.P. 24

I, Monty G. Mertz, do hereby certify that, on the 9th day of May, 2017, a true copy of the **Appellee's Brief** was mailed to:

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To the best of my knowledge, this is the mailing address for Mr. Helm.

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