20170036
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 13, 2017
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.	)	

APPELLANT'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

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696
Assistant State's Attorneys
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorneys for Plaintiff/Appellant

[¶ 1] **TABLE OF CONTENTS**

Paragraph No.

[¶ 2] **TABLE OF AUTHORITIES**

Other Federal Court Cases:

Statutes

[¶ 3] **STATEMENT OF ISSUES**

[¶ 4] I. Whether the district court erred in failing to categorize, as reasonable searches incident to arrest for drug-based DUIs, urine tests that require no exposure of arrestees' genitals and are integral to promoting the State's paramount interest in highway safety.

[¶ 5] STATEMENT OF CASE

[¶ 6] The State appeals from the district court's order dismissing the criminal charge of refusal to submit to chemical testing. The district court erred in concluding that requesting a urine test – which would be administered without requiring any exposure of the arrestee's genitals – was not constitutionally reasonable as a search incident to arrest for a drug-based DUI. In reaching its conclusion, the district court applied too broad a test to properly assess constitutional reasonableness.

[¶ 7] Emphasizing the categorical nature of the search incident to arrest exception and citing the United States Supreme Court's decision in Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989), the district court reasoned that urine tests are susceptible to considerably more embarrassment than breath tests. (App. 12.) But just because the exception is categorical does not mean the constitutional analysis may ignore a simple criterion critical for assessing reasonableness. Indeed, criteria critical for assessing reasonableness must be used for searches incident to arrest in other contexts. See Arizona v. Gant, 556 U.S. 332, 351 (2009) (establishing that the test for a search of a vehicle incident to an occupant's arrest depends on whether "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest"); Maryland v. Buie, 494 U.S. 325, 325 (1990) (establishing a fact-specific criterion for analyzing a protective sweep of nonadjoining areas of a house incident to

arrest: officers must have a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene").

[¶ 8] For a chemical test, a critical criterion is manner of administration. Analyzing whether participation in a chemical test is "likely to cause any great enhancement in the embarrassment that is inherent in any arrest," Birchfield examined the manner in which the chemical tests were administered. Birchfield v. North Dakota, 136 S.Ct. 2160, 2177 (2016). No significant variations existed in administration of the types of tests involved (breath and blood). Thus there were no grounds to distinguish between reasonable and unreasonable categories within either test type. Id. at 2177-78.

[¶ 9] With urine tests, significant variations do exist in administration. In fact, both Skinner (a case emphasized by the district court) and Von Raab (a case emphasized in Skinner) distinguished employee urine testing programs based on manner of administration. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. at 626; National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177 (5th Cir. 1987). Those programs not requiring a subject to urinate while a tester watched were deemed reasonable. See Skinner, at 633-34; Von Raab, at 173.

[¶ 10] The district court failed to recognize that key distinction. Thus it failed to properly categorize urine tests conducted without requiring exposure of arrestees' genitals as reasonable under the search incident to arrest exception. The State asks this Court to reverse the district court's dismissal order.

[¶ 11] STATEMENT OF FACTS

[¶ 12] In May 2016, the Defendant was charged with multiple driving-related offenses, including refusal to submit to chemical testing, a class C felony. (App. 4-5.) Five months later, the Defendant moved to dismiss the refusal charge, contending it violated his rights under the Fourth Amendment. (Motion to Dismiss Count 2, Brief in Support of Motion to Dismiss Count 2, Nov. 23, 2016.)

[¶ 13] The State filed a brief opposing the motion, emphasizing that the manner of administration would not have required exposure of the Defendant's genitals. (State's Response to Defendant's Motion to Dismiss Count 2, Dec. 6, 2016 "State's Response".) The State included Fargo Police Officer Caleb Korb's affidavit. (App. 6-8.) Through the affidavit, Officer Korb confirmed that the Defendant was stopped for driving a vehicle without headlights during early morning hours and that the Defendant appeared fidgety, repeatedly scratched his face, and spoke rapidly. (App. 6; State's Response ¶ 3.) Further, the Defendant showed signs of impairment on field tests, including body tremors. (App. 6; State's Response ¶ 4.) Officer Korb believed that the Defendant had been driving while under the influence of drugs and arrested him. (App. 6; State's Response ¶ 4.)

[¶ 14] Through the affidavit, Officer Korb also explained what happened after the Defendant's arrest. Officer Korb recited the implied consent advisory and requested that the Defendant submit to a urine test. (App. 6; State's Response ¶ 5.) The Defendant refused. (App. 6; State's Response ¶ 5.) The requested urine

test would not have required the Defendant to expose his genitals to anyone. (App. 7.) The test instead would have been administered with Officer Korb standing behind the Defendant such that he could not see the Defendant's genitals. (App. 7.) Korb also cited statistics about drug impaired driving – including a 2010 report that approximately 18% of motor vehicle driver deaths involve drugs other than alcohol and a 2013 report indicating nearly ten million Americans drove while under the influence of illicit drugs. (App. 6-7.)

[¶ 15] At a hearing on the Defendant's motion to dismiss, Officer Korb was the only witness called by either party. (Tr. of Motion Hearing "Tr." at Index, Jan. 3, 2017.) Korb confirmed that he believed the Defendant had been driving while impaired by drugs and that nothing suggested the Defendant had drunk any alcohol. (Tr. 14:6-23.) So a breath test, Korb indicated, would have been useless. (Tr. 14:11-13.) Korb noted that he had consulted with other drug recognition experts about the administration of urine tests and that each expert administered urine tests in the same manner as Officer Korb, i.e., without requiring arrestees to expose their genitals. (Tr. 5:15-6:7.)

[¶ 16] In its order dismissing the refusal charge, the district court recognized the general test for establishing an exception to the search warrant requirement: assessing the degree to which the search intrudes upon an individual's privacy, and the degree to which it is needed for the promotion of legitimate government interests. (App. 11.) Citing Birchfield, the court alluded to three factors underlying the assessment of the intrusion upon the individual's

privacy: (1) the extent of any physical invasion caused by the search, (2) the search's capability of revealing personal information about the arrestee, and (3) whether participation is likely to cause great enhancement in the embarrassment beyond that inherent in the underlying arrest. (App. 11.)

[¶ 17] The court concluded that the first factor weighed in favor of a lawful search: urine tests involve a physical intrusion that is negligible. (App. 12.) The second factor weighed against a lawful search: "urine contains large amounts of personal health and genetic information about a person" and can be stored for future use. (App. 12.) And the third factor weighed against a lawful search: "as alluded to by the Supreme Court, urine tests are susceptible to considerably more embarrassment for arrestees than breath tests." (App. 12.)

[¶ 18] In reaching that third conclusion, the court relied upon Skinner and noted Skinner's reliance upon Von Raab. (App. 11-12.) Based on its second and third conclusions, the court reasoned that the Defendant had been threatened with an unlawful search and could not be prosecuted for refusing to relinquish his Fourth Amendment rights. (App. 13.)

[¶ 19] STANDARD OF REVIEW

[¶ 20] 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).

[¶ 21] LAW AND ARGUMENT

[¶ 22] I. The district court erred in failing to categorize, as reasonable searches incident to arrest for drug-based DUIs, urine tests that require no exposure of arrestees' genitals and are integral to promoting the State's paramount interest in highway safety.

[¶ 23] Determining whether to exempt a category of searches from the warrant requirement, i.e., fits the search incident to arrest exception, requires a court to "balance" or "assess" 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).

[¶ 24] **A. Government's paramount interest in highway safety.**

[¶ 25] Considering the second interest in the balancing test, safeguarding public roadways is an important state interest this Court has recognized for decades. 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 State Supreme Court likewise 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).

[¶ 26] Seeking to preserve highway safety, our Legislature included urine testing in its implied consent scheme. See N.D.C.C. § 39-20-01(1). The scheme specifically serves to deter impaired driving. See State v. Zimmerman, 539 N.W.2d 49, 51 (N.D. 1995); Birchfield v. North Dakota, 136 S.Ct. 2160, 2179 (2016). Although alcohol-impaired drivers cause the most destruction and are greatest in number, drug-impaired drivers also wreak havoc and are plentiful; a study indicated that approximately 18% of motor vehicle driver deaths in 2010 involved drugs other than alcohol, and according to a 2013 report, nearly ten million Americans drove while under the influence of illicit drugs. (App. 6-7.)

[¶ 27] Urine testing is the least intrusive means for detecting drug-impaired drivers. Breath testing only measures alcohol. Birchfield, 136 S.Ct. at 2177; (Tr. 14:11-13.) And blood testing is too invasive. Birchfield, at 2178. Officer Korb thus indicated that no test less invasive than a urine test exists to determine the presence of drugs in the body. (App. 7.) Officer Korb also explained that the urine testing procedures used minimize the intrusion – not just in terms of privacy, but in time. Tests take just a few minutes. (App. 7.) Further, time is not wasted; if arrestees initially are unable to urinate, they are given water or Gatorade and allowed to proceed with the forty to sixty minute booking process until they are ready. (App. 7.)

[¶ 28] While the State has never asserted that a urine test is reasonable solely because it is the least invasive test to detect drugs, that fact is appropriate to

consider in assessing constitutional reasonableness. See Birchfield, 136 S.Ct. at 2184. Indeed, it bears directly on one of the two items to be balanced: "the degree to which [the searches are] needed for the promotion of legitimate governmental interests." See id. at 2176 (citation omitted).

[¶ 29] Put simply, urine testing is integral to deterring drug-impaired driving. Thus it is also integral to furthering the State's paramount interest in highway safety.

[¶ 30] **B. Birchfield's general principles for assessing individual privacy.**

[¶ 31] While analyzing breath and blood tests as searches incident to arrest of persons charged with DUI, the United States Supreme Court recently considered three factors involving the individual privacy portion of the balancing test. Id. at 2176-78. 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 of the skin and entail minimal inconvenience. Id. Blood tests, on the other hand, were considered physically intrusive because they require piercing of the skin and extraction of part of the arrestee's body. Id. at 2178.

[¶ 32] Urine tests do not require any physical intrusion. Like exhaled breath, urine is a natural product of an essential bodily function. And people have not been known to assert possessory interests or emotional attachment to their urine. Thus, as with breath testing, the physical intrusion factor for urine testing

weighs in the State's favor; the lack of intrusion supports a conclusion that significant privacy concerns are not implicated. See id. at 2177.

[¶ 33] A second factor Birchfield considered in assessing individual privacy was the capability of the test to reveal more than the targeted information. Id. at 2177. For breath tests, the Court noted that the searches are necessarily limited to the BAC readings on the machine. Id. With blood tests though, the Court identified a possible source of anxiety for persons tested: law enforcement obtains samples that could be preserved and from which it is possible to get information beyond the BAC readings. Id. at 2178.

[¶ 34] Urine tests have the capability of revealing more than the existence of impairment-causing drugs in an arrestee's body. Skinner 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 capability of revealing nontargeted information is a factor that tips toward the Defendant. This lone factor, though, should not overcome the first and third factors.

[¶ 35] 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." Id. at 2177. The factor stemmed from Skinner. Id. (citing Skinner, 489 U.S. at 625). The Court indicated that breath tests are not inherently embarrassing. Id. Blood tests, the Court contrasted, involve a process that many do not "relish." Id. at 2178.

[¶ 36] For urine tests, applying the third factor requires greater analysis of Birchfield, Skinner, and Von Raab (the case relied upon in Skinner). The district court appropriately turned to those cases; it simply did not reasonably apply them.

[¶ 37] C. Emphasis on manner of urine test administration in assessing reasonableness.

[¶ 38] Part of Birchfield's consideration of the third individual privacy factor involved how the test was administered. Id. at 2177. In particular, the Court looked at how breath tests were "normally administered." Id. Blowing into a straw was not considered inherently embarrassing. Id. Nor would any of the multiple potential breath test locations – a police station, patrol car, or mobile facility – greatly enhance embarrassment. Id. And no other manners of administration were identified by the Court. Id. So breath tests, the Court concluded, are not "administered in a manner that causes embarrassment." Id.

[¶ 39] The importance of the manner of administration of a chemical test – and specifically, a urine test – has roots beyond Birchfield. Assessing 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." Id. The Court thus concluded that a urine test constitutes a search.

Id.

[¶ 40] But the analysis in Skinner did not end there. The Court also analyzed the intrusiveness of the searches by considering the manner in which the urine tests were conducted under the scheme. Id. at 626. "The regulations do not require that samples be furnished under the direct observation of a monitor," the Court noted. Id. That distinction, which was bolstered by 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.

[¶ 41] 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 meanwhile 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 helped create 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. Id. at 180.

[¶ 42] Thompson, a Minnesota appellate court case citing Skinner and relied upon by the Defendant at the district court, shows that the manner of administration is critical to the Fourth Amendment analysis. State v. Thompson, 886 N.W.2d 224 (2016). At the outset, a significant difference should be noted in the underlying facts: Thompson involved an arrest for an alcohol-based DUI; this case involves an arrest for a drug-based DUI. Id. at 226-27. Thus in Thompson, breath testing was the least invasive testing available to promote the government's interest in highway safety.

[¶ 43] The court in Thompson initially noted that urine tests implicate significant privacy interests, regardless of how they are administered. Id. at 231. Yet the court proceeded to scrutinize the manner of administration under the Minnesota implied consent scheme: "the [DUI] 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. Reemphasizing the manner of administration, the court summarized the scheme as requiring arrestees to "perform[] a personal and private bodily function 'in full view' before law enforcement[.]" Id. at 232. The court then contrasted the Minnesota scheme with the administration of blood testing, which does not involve arrestees performing a private function "in front of law enforcement." Id. Criticizing the Minnesota scheme as requiring arrestees to submit to urine tests "under the watchful eye of the government," the court reasoned that it significantly intruded on individual privacy. Id. By scrutinizing the manner of administration, Thompson does not

undercut Skinner and Von Raab's emphasis on that critical criterion. Nor could Thompson do so under the supremacy clause. See U.S. Const. Art VI, cl. 2.

[¶ 44] Two important principles stem from Birchfield, Skinner, and Von Raab. First, when assessing the intrusiveness of a urine testing program, the manner of administration is critical. Second, intrusiveness can be reasonably minimized when testing is administered such that testers do not watch subjects urinating. In other words, whether subjects are required to expose their genitals during urine testing is a critical criterion in assessing constitutional reasonableness.

[¶ 45] D. The exposure distinction as a reasonable, easy-to-follow categorical rule.

[¶ 46] As a categorical rule, the search incident to arrest exception avoids case-by-case adjudication about the reasonableness of a search. See Missouri v. McNeely, 133 S.Ct. 1552, 1559 n.3 (2013) (indicating the search incident to arrest exception is categorical); U.S. v. Robinson, 414 U.S. 218, 235 (1973) (recognizing the exception avoids case-by-case adjudication of reasonableness). While protecting officer safety and preserving evidence are foundations for the exception, categorizing types of searches as reasonable provides guidance to officers. Chimel v. California, 395 U.S. 752, 764 (1969) (explaining the basis for the exception); Robinson, at 235 (providing that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not

require to be broken down in each instance into an analysis of each step in the search").

[¶ 47] The exposure distinction, i.e., differentiating between urine tests administered without requiring exposure of arrestees' genitals and those tests that do require exposure, provides reasonable, easy-to-follow guidance. The distinction is simple and broadly applicable. Exposure of the genitals sets forth a single criterion for officers administering tests and law enforcement agencies implementing testing programs. Under the exposure distinction, there appropriately would be no need for "an analysis of each step in the search." See Robinson, at 235. Moreover, as discussed, the United States Supreme Court and the Firth Circuit noted the distinction when reviewing the drug testing schemes in Skinner and Von Raab.

[¶ 48] The distinction also avoids an absurd result – an outcome this Court guards against. See Thompson v. Jaeger, 2010 ND 174, ¶ 7, 788 N.W.2d 586 (explaining that the Court "presume[s] the people do not intend absurd or ludicrous results in adopting constitutional provisions, and [] therefore construe[s] such provisions to avoid those results"). Under the categorization by the district court, no urine test scheme incident to arrest would ever be reasonable. The district court's sweeping standard would strike down even a testing scheme with the most mundane manner of administration. Indeed, a program patterned after a physician's procedure for patients, e.g., arrestees producing urine samples while alone in a room without any water source, would be unreasonable. Yet

Birchfield's third factor sets forth a much different standard: 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 district court did not apply that standard.

[¶ 49] Most arrestees have experienced significant embarrassment before a urine test is requested. They often have been pulled over in a public place by an officer who used a squad car's flashing emergency lights, asked to do field sobriety tests, patted down, handcuffed, placed in the back of a squad car, transported to jail, searched more thoroughly, booked in, and detained in a place visible by numerous others. Requesting arrestees to provide a urine sample - without exposing their genitals to anyone – should not greatly enhance the already-existing embarrassment.

[¶ 50] In fact, the requested act is similar to one that occurs routinely in public restrooms. While a man stands using a urinal, others stand beside him using adjacent urinals. Still others stand behind him waiting their turn. As with others in public restrooms, Officer Korb would have stood behind the Defendant, such that he could not have seen the Defendant's genitals. Of course, the urinal analogy would not apply to a female arrestee. But that impacts only how law enforcement implements the testing scheme; it does not make the act (urinating without exposure of the genitals) more likely to greatly enhance embarrassment.

[¶ 51] In sum, a urine testing program in which arrestees are not required to expose their genitals to anyone is not one likely to cause any great enhancement in

the embarrassment that is inherent in an arrest. It creates a reasonable, easy-to-apply category of chemical tests that should be permitted under the search incident to arrest exception.

[¶ 52] CONCLUSION

[¶ 53] Balancing the competing interests shows that urine tests under schemes in which arrestees are not required to expose their genitals are reasonable as searches incident to arrest for drug-based DUIs. Urine testing is integral to deterring drug-impaired driving and thus promoting the State's paramount interest in highway safety. Individual privacy concerns are reasonably reduced by urine testing in which the exposure of subjects' genitals is not required. Although the exposure distinction was recognized in Skinner and Von Raab, the district court failed to apply it. By failing to apply a criterion critical for assessing reasonableness, the district court erroneously categorized all urine tests as violating the Fourth Amendment. The State asks this Court to reverse the district court's dismissal order.

Respectfully submitted this 13th day of April, 2017.

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696
Assistant State's Attorneys
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorneys for Plaintiff-Appellant

[¶ 54] CERTIFICATE OF SERVICE

[¶ 55] A true and correct copy of the foregoing document was sent by e-mail to Monty Mertz on the 13th day of April, 2017 to Monty G. Mertz at fargopublicdefender@nd.gov.

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

State of North Dakota)
)
Plaintiff,)
)
vs.)
)
Steven Floyd Helm,)
)
Defendant.)

CERTIFICATE OF ELECTRONIC SERVICE

Supreme Court No. 20170036
District Ct. No. 09-2016-CR-01933

[¶1] I, Amanda Ross, hereby certify that on April 13th, 2017, the following documents:

Appellant's Appendix

[¶2] Were filed electronically with the Clerk of Court through Odyssey® system for electronic service through Odyssey® on the following:

Monty G. Mertz
fargopublicdefender@nd.gov

Dated this 13th day of April, 2017.

Amanda Ross

Subscribed and sworn to before me this dated this 13th day of April, 2017.

Notary Public

SARAH MIRALDI
Notary Public
State of North Dakota
My Commission Expires Aug. 31, 2022