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OCTOBER 13, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

State of North Dakota

Plaintiff and **Appellee,**

v.

Shawn Montgomery

Defendant and **Appellant.**

Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Cynthia Feland

SUPREME COURT NO. 20170192
BURLEIGH COUNTY NO. 08-2016-CR-03162

****

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

ISSUE: **Montgomery was searched and seized in violation of the Fourth Amendment, applicable to the states through the Fourteenth amendment, as well as Article I, Section 8 of the North Dakota State Constitution without a search warrant, or an exception to the warrant requirement.**

STATEMENT OF THE CASE

Nature of the Case.

[¶ 1] This is an appeal of the a Criminal Judgment entered on April 25, 2017 (App. pp. 8-11; Doc. ID Nos.: 38-40), wherein Shawn Montgomery entered a conditional plea on April 19, 2017, to the charge of Driving Under the Influence of Alcohol and/or .16 or Greater, a Class B Misdemeanor, in violation of N.D.C.C. § 39-08-01. (App. p. 10; Doc ID. No.: 38).

Course of Proceedings/Disposition of the Court Below.

[¶ 2] On October 1, 2016, Montgomery was charged with Driving Under the Influence of Alcohol and/or .16 or Greater, a Class B Misdemeanor, in violation of N.D.C.C. § 39-08-01. (App. p. 4; Doc. ID No.: 1). Montgomery filed a Motion to Suppress Chemical Test Results on December 12, 2016, (Doc. ID Nos.: 11-13), and the State filed a Response on December 22, 2017. (Doc. ID No.: 15).

[¶ 3] An evidentiary hearing was held on January 30, 2017 (Tr.), and the Court issued an Order on February 1, 2017 denying the Motion. (App. pp. 5; Doc. ID No.: 20). On February 21, 2017, the parties stipulated to a conditional plea (App. p. 6, Doc. ID No.: 22) and the Court entered an Order consenting to the conditional plea. (App. p. 7, Doc. ID No.: 23). Montgomery entered a conditional plea on April 19, 2017, to the charge of Driving Under the Influence of Alcohol and/or .16 or Greater, a Class B Misdemeanor, in violation of N.D.C.C. § 39-08-01. (App. p. 10; Doc ID. No.: 38). The Court accepted the conditional

guilty plea on April 25, 2017, (App. p. 11, Doc. ID No.: 40), and Montgomery timely filed his Notice of Appeal on May 23, 2017. (App. p. 12, Doc. ID No.: 41).

STATEMENT OF FACTS

[¶ 4] On October 1, 2016, Burleigh Co. Deputy Sheriff Stoltz stopped a vehicle driven by Shawn Montgomery for speeding. (Tr. p. 3, lines 23-25; p. 4, lines 9-11). Deputy Stoltz subsequently began a DUI investigation and, after conducting some filed sobriety testing, read the Implied Consent Advisory and requested that Mr. Montgomery take a breath screening test, to which Mr. Montgomery agreed. (Tr. p. 5, lines 1-25). After Mr. Montgomery took the breath screening test, Deputy Stoltz placed Mr. Montgomery under arrest, advised him of his Miranda rights, and then read a second Implied Consent Advisory. (Tr. p. 6, lines 1-22).

[¶ 5] Deputy Stoltz testified that he read the following to Montgomery:

> As a condition of operating a motor vehicle on a highway or in a public or private area to which the public has right of access to, you have consented to taking a test to determine whether you are under the influence of alcohol or drugs.
>
> North Dakota law requires you to submit to a chemical test to determine whether you are under the influence of alcohol or drugs.
>
> Refusal to take the test as directed by a law enforcement officer is a crime punishable in the same manner as DUI, includes being arrested.
>
> Refusal to take the test as directed by a law enforcement officer may result in revocation of your driver's license for a minimum of 180 days and potentially up to three years.
>
> (Tr. p. 6, line 25 through p. 7, line 18).

[¶ 6] After Deputy Stoltz read the Implied Consent Advisory, Mr. Montgomery told Deputy Stoltz that he wanted blood or requested blood. (Tr. p. 8, lines 4-10). Mr. Montgomery testified that he was pretty intimidated and that he asked Deputy Stoltz if he had

done everything he was supposed to do. (Tr. p. 15, lines 20-25). Mr. Montgomery remembered Deputy Stoltz advising that it was a criminal act to not submit a test. (Tr. p. 23, lines 23-25; p. 24, line 1). Mr. Montgomery testified that, after asking if he had done everything he was supposed to do, he was under the impression that a chemical test was a blood test so he said that he would take a blood test. (Tr. p. 16, lines 9-12).

[¶ 7] Mr. Montgomery testified:

A. Yeah. I didn't want to do anything as far as committing a crime, I just wanted to do what I was supposed to do.

Q. Okay.

* * *

Q. Because what the Court wants to know, I'm assuming, is were you volunteering to take this blood test just out of the goodness of your heart or were you complying with his telling you you were going to be charged with a crime if you didn't do a test?

A. I was complying.

(Tr. p. 16, lines 15-25).

Q. So what if Deputy Stoltz would have told you that you actually don't have to take a blood test, it's not a crime to refuse a blood test?

A. Well, then I wouldn't have done it.

(Tr. p. 17, lines 1-4).

[¶ 8] The State cross-examined Mr. Montgomery:

Q. If [Deputy Stoltz] re-asked you to take a breath test that second time, would you have done it?

A. At any point in time if he told me it was a crime not to do it, then I would have done it.

(Tr. p. 17, lines 14-17).

STANDARD OF REVIEW

[¶ 9] This Court gives deference to the district court's findings of fact when reviewing a motion to suppress evidence, *State v. DeCoteau*, 1999 ND 77, ¶ 6, 592 N.W.2d 579, and a district court's findings of fact on a motion to suppress will not be reversed if there is sufficient competent evidence fairly capable of supporting the court's findings, and the decision is not contrary to the manifest weight of the evidence. *Id.* However, matters of law are fully reviewable by this Court on appeal. *Id.*

LAW AND ARGUMENT

ISSUE: **Montgomery was searched and seized in violation of the Fourth Amendment, applicable to the states through the Fourteenth amendment, as well as Article I, Section 8 of the North Dakota State Constitution without a search warrant, or an exception to the warrant requirement.**

State's Burden of Proof.

[¶ 10] A person alleging his rights have been violated under the Fourth Amendment has an initial burden of establishing a prima facie case of illegal seizure. *State v. Smith*, 1999 ND 9, 589 N.W.2d 546 (N.D.1999). However, after the defendant has made a prima facie case, the burden of persuasion is shifted to the State to justify its actions. *Id.* Thus, the prosecution must establish the validity of a warrantless search and seizure, *McDonald v. United States*, 335 U.S. 451, 456 (1948), and the State has the burden of showing that a warrantless search falls within an exception to the warrant requirement. *State v. Avila*, 566 N.W.2d 410 (N.D.1997).

Seizures.

[¶ 11] The Fourth Amendment to the United States Constitution and Article 1, Section 8, of the North Dakota Constitution protect individuals from unreasonable searches and

seizures. *State v. DeCoteau*, 1999 ND 77, 592 N.W.2d 579, ¶ 7. Subject to a few well-delineated exceptions, searches and seizures without a warrant are unreasonable under the Fourth Amendment. *Id.*

[¶ 12] "A search occurs when the government intrudes upon an individual's reasonable expectation of privacy." *State v. Winkler*, 552 N.W.2d 347, 351 (N.D.1996). Moreover, "[I]t is quite plain that the Fourth Amendment governs 'seizures' of the person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). "A seizure affects only the person's possessory interests; a search affects a person's privacy interests." *Segura v. United States*, 468 U.S. 796, 806 (1984). Generally, when an intrusion is into, rather than upon, a person's body, a search warrant is required. *Schmerber v. California*, 384 U.S. 757 (1966).

[¶ 13] In *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), the United States Supreme Court reviewed North Dakota's implied consent advisory and held that blood testing was unconstitutional without a search warrant. *Id.* It is well-settled that administration of a blood test to determine alcohol consumption is a search. *State v. Hawkins*, 2017 ND 172, ¶ 7, 898 N.W.2d 446.

Consent.

[¶ 14] Generally, warrantless searches are unreasonable unless they fall within a recognized exception to the warrant requirement. *Hawkins, supra* at ¶ 7. A consent search is an exception to both the warrant and probable cause requirements of the Fourth Amendment. *State v. Huether*, 453 N.W.2d 778, 782 (N.D.1990), *citing Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Consent is a recognized exception to the warrant requirement, but consent must be voluntary and the State has the burden of proof. *Hawkins, supra* at ¶ 7. It must be conducted according to the limitations placed upon an officer's right to search by the

consent or the search loses its validity. *Huether, supra* at 782. The government has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Florida v. Royer*, 460 U.S. 491, 497 (1983).

[¶ 15] "Consent is voluntary when it is the product of a free and unconstrained choice and not the product of duress or coercion...." *Hawkins, supra* at ¶8. The considerations for determining whether consent is voluntary include:

> (1) the characteristics and condition of the accused at the time of the consent, including age, sex, race, education level, physical or mental condition, and prior experience with police; and (2) the details of the setting in which the consent was obtained, including the duration and conditions of detention, police attitude toward the defendant, and the diverse pressures that sap the accused's powers of resistence or self control.
>
> *Hawkins, supra* at ¶ 8.

[¶ 16] In 2013, the State of North Dakota criminalized the refusal of a chemical test in DUI cases and mandated the reading of the implied consent advisory:

> The law enforcement officer shall inform the individual charged that *North Dakota law requires the individual to take the test* to determine whether the individual is under the influence of alcohol or drugs; *that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence...*
>
> N.D.C.C. § 39-20-01(3)(a)(emphasis added).

[¶ 17] In *Birchfield*, the United State Supreme Court held, "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." The Court also remanded the companion case of *Beylund v. Grant Levi, Director, NDDOT* back to this Court "to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory." *Id.* Subsequently, this Court, in *Beylund v. Levi*, 2017 ND 30, 989 N.W.2d 907,

held that, "for purposes of these appeals only, we assume both drivers' consent to a warrantless blood test is involuntary." *Id.* at ¶ 12[1].

[¶ 18] *State v. Hawkins* is instructive. In that case, this Court concluded that there was sufficient evidence to support the factual determination that Hawkins' consent was not voluntary, and affirmed the suppression of the blood test results. The facts of Hawkins are as follows:

> On January 30, 2016, an officer initiated a traffic stop on Hawkins after observing the vehicle driving erratically. The officer suspected Hawkins was driving under the influence and performed some field sobriety tests. After conducting field sobriety tests, the officer believed Hawkins to be under the influence of alcohol. The officer read Hawkins an implied consent advisory and asked him to submit to an on-site screening test. Hawkins refused the on-site screening test. After Hawkins refused, he was placed under arrest, handcuffed, and placed in the back of the patrol car. The officer secured Hawkins' vehicle. While the officer was gone, Hawkins said to himself that he would take a blood test. The officer returned to the patrol car and read Hawkins his Miranda rights. The officer then read an implied consent advisory a second time, but before the officer could complete the advisory, Hawkins said he would take a blood test. The officer told Hawkins he still needed to read him the advisory, read the implied consent advisory again, and asked if he would consent to a chemical test. The officer testified Hawkins said, "yes." The officer drove Hawkins to a local hospital where his blood was drawn for testing. Following the test, Hawkins was charged with driving under the influence of alcohol or drugs in violation of N.D.C.C. § 39–08–01. The district court found Hawkins' consent was not voluntary under the totality of the circumstances, and this Court affirmed.
>
> *Hawkins, supra* at 2.

[¶ 19] The facts in this case support a finding of involuntary consent far much more than the facts in *Hawkins*. While Mr. Hawkins stated he wanted to take the test before the deputy could even complete the implied consent advisory, Mr. Montgomery was read the entire implied consent. Mr. Montgomery had been arrested by Deputy Stoltz and placed in

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Wojahn testified at his administrative hearing he "felt obligated" and coerced to take the test and did not take it "freely and voluntarily." Beylund did not testify at his administrative hearing. *Beylund, supra* at ¶ 12.

handcuffs. He had also been Mirandized and then advised by Deputy Stoltz that, as a condition of operating a motor vehicle on a highway or in a public or private area to which the public has right of access to, he had consented to taking "a test" to determine whether he was under the influence of alcohol or drugs. He was also advised that North Dakota law required him to submit to a "chemical test" to determine whether he was under the influence of alcohol or drugs. He was also advised that refusal to take "the test" as directed by a law enforcement officer was "a crime punishable in the same manner as DUI" and included "being arrested." He was also advised that refusal to take "the test" as directed by a law enforcement officer may result in revocation of his driver's license for a minimum of 180 days and potentially up to three years. (Tr. p. 6, line 25 through p. 7, line 18).

[¶ 20] The State did not meet their burden of proving Mr. Montgomery's alleged consent to a blood test was voluntary. He was unlawfully advised that it was a crime to refuse a chemical test which was an inaccurate advisory of the law, since only refusal of a breath test was a crime while refusal of a blood test was not a crime, and never advised that it was only a crime to refuse a breath test.

[¶ 21] Based upon the totality of the circumstances, his alleged consent was not the product of a free and unconstrained choice, but instead was the product of duress or coercion. Such an alleged consent should not be deemed voluntary "on pain of committing a criminal offense." *Birchfield, supra* at 2186. When a refusal of a test results in criminal sanctions, consenting to the search cannot be construed as "freely and voluntarily" and is a violation of the Fourth Amendment. *State v. Netland*, 742 N.W.2d 207, 214 (Minn.App.2007). *See also State v. Mellett*, 642 N.W.2d 779, 785 (Minn.App.2002), where the court acknowledged that criminalizing refusal of a test is a "means of coercion." *Id.*

[¶22] Indeed, and presumably in response to *Birchfield*, the legislature amended the implied consent advisory. On August 1, 2017, the amended version of N.D.C.C. § 39-20-01(3)(a), came into effect, which states:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to submit to a test directed by the law enforcement officer may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years. In addition, the law enforcement officer shall inform the individual *refusal to take a breath or urine test is a crime* punishable in the same manner as driving under the influence. If the officer requests the individual to submit to a *blood test*, the officer may not inform the individual of any criminal penalties until the officer has first secured a search warrant.
>
> (emphasis added).

[¶23] Although the recently amended implied consent statute is not applicable to this case, the fact that the legislature recently mandated that an officer specify what test they are referring to lends strength to the argument that Mr. Montgomery did not consent to a blood test when he was advised that refusal to any "chemical test" would be considered a crime.

CONCLUSION AND PRAYER FOR RELIEF

[¶24] In this case, the blood test was not obtained with Montgomery's free and voluntary consent. He was threatened with an unlawful search and his alleged consent was the basis of the partial inaccuracy of the officer's advisory threatening him with a crime, without which he would not have submitted to a blood test.

[¶25] WHEREFORE, the Appellant, Shawn Alvah Montgomery, by and though his attorney, Chad R. McCabe, prays for this honorable Court to reverse the district court's denial of his motion to suppress the chemical test.

Dated this 13th day of October, 2017.

/s/ Chad R. McCabe
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CERTIFICATE OF SERVICE

[¶ 26] A true and correct copy of the foregoing document was sent by electronic transmission on this 13th day of October, 2017, to the following:

Derek K. Steiner
Asst. Burleigh Co. State's Attorney
bc08@nd.gov

/s/ Chad R. McCabe
CHAD R. MCCABE