

20170192

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

NOV -9 2017

Supreme Court No. 20170192  
Burleigh County No. 08-2016-CR-03162

STATE OF NORTH DAKOTA

State of North Dakota,	)
	)
Plaintiff and Appellee,	)
	)
vs.	)
	)
Shawn Montgomery,	)
	)
Defendant and Appellant.	)

APPEAL FROM ORDER DENYING APPELLANT'S MOTION TO  
SUPPRESS ENTERED ON FEBRUARY 1, 2017.

SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE CYNTHIA FELAND, PRESIDING

**BRIEF OF APPELLEE  
STATE OF NORTH DAKOTA**

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**ISSUE PRESENTED FOR REVIEW**

[¶ 1] Whether the district court correctly found Shawn Montgomery voluntarily requested and consented to a blood test.

## **STATEMENT OF THE CASE**

[¶ 2] This case comes to this Court from an appeal brought after the district court denied Shawn Montgomery's Motion to Suppress on February 1, 2017. Appellant's Appendix at page 5 (hereinafter "App. 5"). Montgomery appeals the district court's decision to deny his Motion to Suppress. App. 12.

[¶ 3] Montgomery was charged with Driving Under the Influence of Alcohol with a blood alcohol content in excess of 0.16, on October 20, 2016. App 2, 4. On December 12, 2016, Montgomery filed a Motion to Suppress, alleging that he did not voluntarily consent to taking a blood test. App. 2. On December 22, 2016, the State filed its Response to Defendant's Motion to Suppress, arguing that Montgomery voluntarily offered and consented to take a blood test. App. 2. On January 30, 2017, the district court held a motion hearing on the Motion to Suppress. App. 2. At the motion hearing, the Court listened to the audio from the in-car video and heard testimony from Sergeant Michael Stoltz, of the Burleigh County Sheriff's Department, and Montgomery. On February 1, 2017, the district court denied Montgomery's Motion to Suppress for the reasons it stated on the record at the hearing. App. 5. On April 25, 2017, the district court accepted a conditional plea agreement brought forward by the parties. App. 11. On May 23, 2017, Montgomery filed a Notice of Appeal. App. 12.

## **STATEMENT OF THE FACTS**

[¶ 4] On October 1, 2016, at approximately 12:40 a.m., Sergeant Stoltz observed a vehicle traveling 70 miles per hour in a 45 miles per hour zone. Transcript at 4 (hereinafter Tr. at 4). Sergeant Stoltz initiated a traffic stop and identified the driver of the vehicle as Shawn Montgomery. Tr. at 4. The traffic stop turned into a driving under the influence of alcohol investigation when Sergeant Stoltz noticed signs of impairment.

Tr. at 4. Sergeant Stoltz had Montgomery conduct some field sobriety tests. Tr. at 5.

After the field sobriety tests, Sergeant Stoltz read Montgomery the North Dakota Implied

Consent Advisory. Sergeant Stoltz read the implied consent advisory as follows:

As a condition of operating a motor vehicle, on a highway or in a public or private area to which the public has a right of access to, you have consented to taking a test to determine whether you are under the influence of alcohol or drugs. I must inform you that North Dakota law requires you to take the breath screening test to determine if you are under the influence of alcohol.

Tr. at 5. After reading the implied consent, Sergeant Stoltz asked and Montgomery

consented to taking the breath screening test. Tr. at 5. After the breath screening test,

Sergeant Stoltz placed Montgomery under arrest and advised Montgomery of his

Miranda warnings. Tr. at 6. Montgomery asked Sergeant Stoltz for some clarification of

his Miranda warnings, and Sergeant Stoltz re-read Montgomery his Miranda warnings.

Tr. at 24.

[¶ 5] After re-reading Montgomery his Miranda warnings, Sergeant Stoltz read the

North Dakota Implied Compelled Advisory to Montgomery for a second time. Tr. at 6-7.

This time, Sergeant Stoltz read the implied consent advisory as follows:

As a condition of operating a motor vehicle, on a highway or in a public or private area to which the public has a 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 as directed by a law enforcement officer is a crime punishable in the same manner as DUI and includes being arrested... I must also inform you that 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. at 6-7. Sergeant Stoltz did not get the chance to request a specific chemical test or to

clarify the implied consent advisory because directly after the implied consent reading

Montgomery asked if he refused the previous test. Tr. at 21. Sergeant Stoltz informed Montgomery that he did not refuse the previous test. Tr. at 21. Immediately after Sergeant Stoltz informed Montgomery that he did not refuse; Montgomery, on his own, voluntarily requested a blood test. Tr. at 8. A blood test was subsequently obtained from Montgomery. Throughout this entire encounter, Sergeant Stoltz never mentioned taking a blood test until Montgomery specifically requested to take a blood test.

## **ARGUMENT**

### **I. Standard of review**

[¶ 6] The North Dakota Supreme Court reviews a district court’s decision on a motion to suppress as follows:

In reviewing a district court’s decision on a motion to suppress evidence, we defer to the district court’s findings of fact and resolve conflicts in testimony in favor of affirmance. We will affirm a district court’s decision on a motion to suppress if there is sufficient competent evidence fairly capable of supporting the trial court’s findings, and the decision is not contrary to the manifest weight of evidence. Our standard of review recognized the important of the district court’s opportunity to observe the witnesses and assess their credibility. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law.

State v. Hawkins, 2017 ND 172, ¶ 6, 898 N.W.2d 446 (internal citation and quotation omitted). “Because the district court is in a superior position to judge credibility and weight, we show great deference to the court’s determination of voluntariness.” Id. at ¶ 8 (internal citation and quotation omitted).

### **II. The district court correctly denied Montgomery’s Motion to Suppress.**

[¶ 7] The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. The taking of a blood sample is a search within the meaning of the Fourth

Amendment. Birchfield v. North Dakota, 136 S. Ct. 2160, 2173; State v. Hawkins, 2017 ND 172, ¶ 7. The touchstone of the Fourth Amendment is reasonableness and typically requires law enforcement to obtain a judicial warrant before conducting a search. State v. Helm, 2017 ND 207, ¶ 6, 901 N.W.2d 57 (citing Birchfield, 136 S. Ct. 2160, 2173). Searches conducted without a warrant are per se unreasonable subject only to a few explicitly stated and well delineated exceptions to the warrant requirement. Id. (citing Katz v. United States, 389 U.S. 347, 357 (1967)).

[¶ 8] Consent is one of the well delineated exceptions to the warrant requirement, but consent must be voluntary and the State has the burden of proof. State v. Hawkins, 2017 ND 172, ¶ 7; State v. Schmidt, 2016 ND 187, ¶ 23, 855 N.W.2d 65. Voluntariness is determined by examining the totality of the circumstances, and no one factor is determinative. Id. There are, however, two main considerations for determining whether consent is voluntary. Hawkins, 2017 ND 172, ¶ 7. First, 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. Id. Second, the details of the setting in which the consent was obtained, including the duration and conditions of detention, police attitude towards the defendant, and diverse pressures that sap the accused's powers of resistance or self-control. Id. "Consent is voluntary when it is the product of a free and unconstrained choice and not the product of duress or coercion." Id. at ¶ 8 (internal citation and quotation omitted).

[¶ 9] The Supreme Court of the United States has analyzed searches of a person's breath, blood, and urine under different constitutional provisions. See Missouri v. McNeely, 569 U.S. 141, (2013) (analyzing whether the taking of a warrantless blood



sample was reasonable under the exigency exception to the warrant requirement); see Birchfield, 136 S. Ct. 2160 (analyzing whether the taking of warrantless blood and breath samples were reasonable under the search incident to arrest exception to the warrant requirement). However, the Supreme Court of the United States has not address the issue of whether a person can voluntary consent to a warrantless blood test. See Birchfield, 136 S. Ct. 2160, 2186 (remanding the issue of whether the individual’s consent to a blood test was voluntary).

[¶ 10] In this case, we are looking at the consent exception to the warrant requirement to determine whether the warrantless blood test was reasonable. Recently, in Hawkins, this Court reviewed whether a district court properly determined that an individual’s consent to a blood test was involuntary. 2017 ND 172. In that case, this Court upheld the district court’s findings that the individual’s consent was involuntary. Id. However, the facts and circumstances leading to the Hawkins decision are distinguishable from the facts of this case. First, in Hawkins, that individual was arrested after he refused the breath screening test. Id. at ¶ 2. Second, in Hawkins, the district court found that the individual’s consent was involuntary. Id. at ¶ 14.

[¶ 11] The circumstances surrounding this encounter show that Montgomery’s consent was voluntary. Montgomery consented to the breath screening test, and voluntarily requested a blood test. The district court found that Sergeant Stoltz and Montgomery had a “very good dialog”, and that Montgomery asked for clarification when he needed. Tr. at 24-25. Additionally, in this case, the district court found that Montgomery’s consent was voluntary. In fact, the district court found that this was not even a consent issue because Montgomery volunteered to take the blood test. Tr. at 27. There are clear distinctions

between the facts in this case and the facts in the Hawkins case. However, just as in Hawkins, the district court properly addressed the issue under the totality of the circumstances, so its order should also be affirmed.

[¶ 12] The district court heard testimony from both Sergeant Stoltz and Montgomery about this encounter. The district court also listened to the audio recording from the police vehicle from this encounter. The district court was able to determine whose testimony carried more credibility and weight based upon how the testimony matched up with each other and the audio recording. After hearing all the evidence, the district court analyzed the situation, taking into account the totality of the circumstances, and found that Montgomery freely volunteered to take the test so he was not coerced into taking the blood test.

[¶ 13] The district court made specific findings, on the record, to support its decision. The district court stated “it doesn’t appear to this Court, based on the testimony and in listening to the portions of Exhibit 1, that there was confusion.” Tr. at 24. The district court considered Montgomery’s prior experience or lack thereof with law enforcement, and whether Montgomery was confused during this encounter. Tr. at 24-25. Further, the district court found that “there was actually very good dialog between the two, and that any confusion was resolved when the officer went through [the Miranda warnings] again.” Tr. at 24-25. Finally, the court found “[a]s the Court listened to the recitation between the parties surrounding both the reading of the Implied Consent Advisory for submission to a chemical test and your client’s responses, I don’t see anything in there that equates to a challenge to consent... your client could have asked questions before he

automatically volunteered to take the blood test.” Tr. at 25. The district court correctly analyzed the consent issue and supported its conclusion with appropriate findings.

[¶ 14] Montgomery testified, and argues in his brief, that he was under the impression that a chemical test was a blood test, and that’s why he said that he would take a blood test. Tr. at 16. Sergeant Stoltz did not mention that refusal of a blood test was a crime, only that refusal to take a chemical test was a crime. Sergeant Stoltz never mentioned what type of test he was requesting, and in fact, he never even stated the words “blood test” until after Montgomery specifically requested a blood test. Montgomery was the person who initially brought up that he wanted to take a blood test. In fact, Sergeant Stoltz testified that he was going to request a breath test. Tr. at 8. Therefore, Montgomery had no reason to believe that the chemical test that Sergeant Stoltz was going to request was a going to be a blood test.

[¶ 15] Montgomery claims that his consent was involuntary; however, his assertion is contrary to this Court’s precedent. This Court has previously held, on multiple occasions, that individuals’ consents are not rendered involuntary merely by an officer’s reading of the implied consent advisory. See State v. Smith, 2014 ND 152, 849 N.W.2d 599 (holding that a driver’s consent to chemical testing is not coerced simply because a criminal penalty has been attached to refusing the test or that law enforcement advises the driver of that law); See State v. Fetch, 2014 ND 195, ¶ 9 (holding that consent to a chemical test is not coercive 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 criminal penalties, and presents the arrestee with a choice); See Beylund v. Levi, 2015 ND 18, ¶ 15, 859 N.W.2d 403 (holding that because

Beylund did not allege any other coercive circumstances, other than the penalties under N.D.C.C. § 39-20, he voluntarily consented to the blood test). The reading of the implied consent advisory is not per se coercive; it is merely one factor to be considered in the district court's totality of the circumstances analysis. Here, the district court properly looked at the totality of the circumstances, as discussed above, and concluded that Montgomery's request to take a blood test was voluntary.

### CONCLUSION

[¶ 16] The district court correctly denied Montgomery's Motion to Suppress. The district court heard testimony from Sergeant Stoltz, Montgomery, and it heard the audio recording from the encounter. After hearing the evidence, the district court weighed and analyzed the evidence taking into account the totality of the circumstances. The district court found that there was not a consent issue and that Montgomery volunteered to take the blood test. The district court analyzed the issue under the right standard and came to the correct conclusion; therefore, the State respectfully requests that this Court affirm the district court's Order denying Montgomery's Motion to Suppress.

RESPECTFULLY SUBMITTED:

Dated this 9<sup>th</sup> day of November, 2017.



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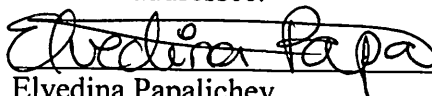
I, Elvedina Papalichev, being first duly sworn, depose and say that I am a Legal Resident over 21 years old, and on the 9 day of Novemebr, 2017, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

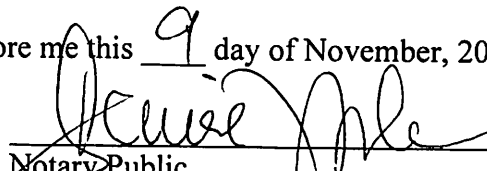
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Chad Rory McCabe  
Attorney at Law  
McCabe Law Firm  
402 E. Main Ave., Ste. 100  
Bismarck, ND 58501

which address is the last known address of the addressee.

  
Elvedina Papalichev

Subscribed and sworn to before me this 9 day of November, 2017.

  
Notary Public  
Burleigh County, North Dakota

