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FILED
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DECEMBER 22, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,

Plaintiff/Appellee,

v. Supreme Court No. 20170321

JOSHUA TAYLOR,

Richland Co. No. 2017-CR-00064

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from a Criminal Judgment dated and filed July 27, 2017 and the adverse determination within the April 24, 2017, order denying the Defendant's Motion to Dismiss and denying defendant's purposed jury instructions.

Richland County District Court

South East Judicial District

The Honorable Bradley A. Cruff

Joshua Taylor
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North Dakota Statutes
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United States Supreme Court Cases
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[¶2]STATEMENT OF THE ISSUES

1. The district court erred in denying defense's requested jury instruction on N.D.C.C. 39-20-14(1). The court alleged that defense was being prosecuted on 39-08-01(1)(e)(2) and the court felt 39-20-14(1) was not inclusive enough as that statue only refers to breathe and not blood or urine. Defense contends this was an error two prong. Prong one, defense argues that 39-20-14(1) is more legislative in nature, as an instruction stating the requirement of a moving violation for law enforcement to initiate a stop for suspected DUI. Prong two, that at no point in this case was blood or urine an alleged issue by either party. This case involved solely the refusal to submit to PBT, and subsequently the intoxilyzer at the Sheriff's department.
2. Defense alleges the district court erred in denying defense's motion to dismiss on Aril 24, 2017 and repeated motion to dismiss at the conclusion of trail before jury deliberations during the July 27, 2017 trail, citing a lack of evidence after prosecution failed to recover audio and video evidence from the deputies patrol vehicle and body microphone. This failure to recover the evidence by the prosecution when a timely request was made by the defendant... is a violation of the Brady rule arising from Brady v. Maryland, 373 U.S. 83.

[¶3]STATEMENT OF FACTS & LEGAL ARGUMENT

[¶4]On February 16, 2017, Joshua Taylor's vehicle was stopped in Richland County, North Dakota, by a Richland County Sheriff's deputy. While Mr. Taylor was facing his passenger removing his driver's license from his wallet, the deputy approached the driver's window and stated that he had witnessed Mr. Taylor run the stop sign he just came from and he smelled a strong odor of alcohol. Mr. Taylor noted to his

passenger how the “observations” seemed rather scripted as he had not spoken in the deputy’s direction yet, as well as he disputed the alleged running of the stop sign. The deputy then asked Mr. Taylor if he had consumed any alcoholic beverages in the last 24 hours, to which Mr. Taylor answered yes, at about 7 to 8 hours prior he had a beer and part of a “mixed drink”. The deputy began to request a field sobriety test, to which Mr. Taylor informed him that he had recently had leg surgery and would not be able to perform most of the field sobriety test. The deputy agreed and asked Mr. Taylor to step out and back to his patrol car.

[¶5]Mr. Taylor exited the vehicle and after a pat down by the sheriff’s deputy, proceeded to the deputy’s patrol car. The deputy then said that following running the stop sign and what he perceived to be the smell of alcohol was going to read Mr. Taylor the implied consent law. After reading implied consent, Mr. Taylor reiterated that he did not run the stop sign and thus the deputy has no basis for his stop, nor the prerequisite of a moving violation to request a chemical test, and therefor would not be submitting to one as the statues require a moving violation. The deputy then informed Mr. Taylor that he would then be placed under arrest for refusal to submit to chemical testing, equivalent to a DUI under the state law. Mr. Taylor complied and the deputy proceeded with the arrest.

[¶6]Mr. Taylor was handcuffed and placed under arrest for refusal to submit to chemical testing at the scene. Mr. Taylor was transported to the Richland county Jail, where the deputy asked him twice more if he would like to remedy the refusal by submitting to a breathalyzer at the jail. Mr. Taylor continued to assert the patrol vehicle video evidence would show that the stop sign was stopped at and thus the deputy had no legal basis to ask for a chemical test. Mr. Taylor refused both chemical test at the jail, and was booked into the jail, and bailed out that night.

[¶7]Mr. Taylor’s witness, Keri Taylor, testified at trial that at the time of the stop, as well as after that night Mr. Taylor asserted he stopped at the stop sign, and was confident the video would prove so.

[¶8]Mr. Taylor went to the state attorney’s office on March 2, 2017 to request all discovery materials. Mr. Taylor was informed that the audio and video evidence was not generated automatically, that it had to be requested. Mr. Taylor then requested those remaining materials on March 2, and was informed the deputy was on vacation but the request would be forwarded to the Sheriff’s department, that possibly someone else could retrieve the evidence.

[¶9]The initial Appearance was held on March 13, 2017. At this hearing, the state claimed it was still waiting on the audio and video evidence from the Sheriff's department, so a Misdemeanor Dispositional Conference was scheduled April 24, 2017, to give the state time to produce remaining discovery material to the defense.

[¶10]Approximately a week before the Misdemeanor Dispositional Conference, Mr. Taylor contacted the State Attorney's office to check on the status of the remaining discovery. The office administrators for the State attorney's office informed Mr. Taylor that the audio and video from the stop was unrecoverable as was the video from the jail booking room. Two day prior to the submission of this brief, on December 20, 2017, Mr. Taylor was given copies of at least partial communication between the State Attorney's office and the Sheriff's department, indicating that too much time had passed to retrieve them. These emails are dated May 3, 2017. Some of the language of these email suggest that it was about this time in May that the requests for the evidence were submitted to the Sheriff's office. An about full 2 months after defense had made their rule 16 discovery request including for the now lost evidence, material to the defense, and known to the State.

[¶11]A Misdemeanor Dispositional Conference was held on April 24, 2017, and the court asked if discovery had been satisfied. The state concluded it had, and Mr. Taylor stated that he had been informed the remaining discovery materials had been unrecoverable. Mr. Taylor motioned the court to dismiss the case, citing a lack of evidence.

[¶12]The court denied Mr. Taylor's motion to dismiss stating defense would have the opportunity to depose the state's witness'. Defense argues the district court erred in this ruling per the Brady rule, Brady v. Maryland 373, U.S. 83(1963). In the Brady holding the Supreme Court of the United States held in part, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." [87, paragraph 2]. Defense argues that the video from the patrol car would be material to guilt, as it would show Mr. Taylor did in fact stop at the stop sign, giving the deputy no probable cause for a stop and thus Mr. Taylor was not required to submit to chemical testing, per implied consent laws. In this part of the Brady holding, the Supreme Court lays out that even if the prosecution in good faith attempted to retrieve exculpatory evidence and does not, still violates the defendant's due process right to a fair trial. Defense has alleged from the beginning of this process that the video would be exculpatory in that it would have shown that

Mr. Taylor did not run the stop sign as the deputy claimed. The state made no argument against the lost evidence being exculpatory during arguments for dismissal at the Misdemeanor Dispositional Conference of April 24, 2017, only that the deputy's testimony should be considered evidence.

[¶13]In this court's published opinion in the case of State v. Goulet (1999, ND 80) at ¶15,

> "To establish a Brady discovery violation, a defendant must show (1)the government possessed evidence favorable to the defendant; (2)the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3)the prosecution suppressed the evidence; and (4)a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed"

The first prong where it relates to 'the government possessing evidence' is satisfied where the state admits there was audio and video from the patrol car and deputy body microphone. The first prong as it relates to 'favorable to the defendant' is satisfied by the requirement for a probable cause moving violation being necessary to initiate a stop, is answered in the deputy's testimony on page 47 lines 17 through 23 of the July 27, 2017 transcription, that the deputy was facing a southwestern direction, which would have been facing the stop sign, and that he was there specifically "To watch for stop sign violators". -The second prong, is self-evident; the evidence in question are property of the Sheriff's department audio and video camera recorders until requested as a part of discovery materials. That request was made March 2, 2017 when defense requested all discovery materials from the State Attorney's office. The Third prong of the test is passed with the fact that audio and video footage existed but was unable to be retrieved. The last prong of the test, defense refers to the deputy's testimony on page 47 lines 17 through 23 of the July 27, 2017 transcription, as noted above, This testimony gives way to at very least a reasonable probability that had the video evidence been secured by the prosecution, it would have been overwhelming that the deputy did not have probable cause to initiate a stop. Thus, having no probable cause to ask for a chemical test, ultimately showing it was not a crime to refuse an unreasonable request to submit under implied consent.

[¶14]To further add support that the lost evidence from the patrol car's audio/video system would in fact be exculpatory, as well as lend to the probability that it could and in fact would have changed the outcome of this case, defense points to transcription of the july 27,

2017 trial, page 47 starting at line 17 through line 23, where the Q & A leads to the deputy testifying that he was facing the stop sign, he was there specifically to watch for stop sign violators, and thus his squad car camera system would in fact be material. To further support the direction of the vehicle, defense points to the same transcription, page 69 starting at line 7 through 14, the deputy testifies that he couldn't have radar the 210 bypass because he "…does not have a rear radar in his car". This testimony put's the deputy testifying that his rear of the car was facing the bypass and the front facing the stop sign and that the stop sign and violators were his purpose for that location and position that night.

[¶15]Defense holds in regard to the Brady rule, as it applies to this case, that the video and audio from the deputy's patrol car would be exculpatory in that it could definitively show that Mr. Taylor indeed stopped at the stop sign as required. Due to the fact that evidence is permanently lost, defense requests that this court should find the lower court erred in denying defense's motion to dismiss. Thus in this finding, remand the case back to district court with an order to vacate the current judgement and order this case be dismissed.

[¶16]Defense requested in his pretrial memorandum a jury instruction on N.D.C.C. 39-20-14(1). On page 1, line 10 of the transcription of the July 27 trial, the court address that request, denying it based on the language saying because it doesn't include blood or urine it may confuse the jury. Defense argued to the point that as part of the state's evidence Mr. Taylor refused a on scene PBT, and 39-20-14(1) is the state legislative requirement for a traffic stop, as this court has found to be true as well in State v Birchfield. Regardless of the citation being 39-08-01(1)(e)(2), doesn't negate the legislative requirement for that traffic stop. The jury should have been given that instruction due to the defense's assertion that Mr. Taylor did not run the stop sign.

[¶17]Defense was told at the end of arguments, that the court would consider a change in instruction depending on what comes out at trail for final instructions, but for the time being the courts selected instruction would stand.

[¶18]Defense again requested the final jury instruction include 39-20-14(1) statue reading, as testimony was given from both the deputy himself as to the alleged moving violation as well as from defense's witness Keri Taylor as the deputy's only probable cause for a stop.

[¶19]The lower court erred in its failure at the very least in final jury instructions to include defense's requested jury instruction, as

it is a vital part of requesting chemical testing. If the jury had been instructed on the requirement of the state legislature for an officer to have a traffic stop, then smell an odor of alcohol, to legally request a chemical test and thus a suspect be guilty of refusal to submit per implied consent, the defense believes this could have changed the jury's belief in reasonable doubt.

[¶20]At trail on July 27, 2017, during examination by the State, the deputy was asked to read the implied consent advisory he read to the defendant that night, in the transcription this is located on Page 41 starting at line 17 and continues onto page 42 until line 4. The advisory, on page 41 lines 21 and 22 read, "I must inform you that North Dakota law requires you to take the breath screening test to determine whether you are under the influence of alcohol." This advisory as well as the statue for implied consent is located in chapter 39-20 of the North Dakota Century Code. Thus, N.D.C.C. 39-20-14(1) is in fact completely relative to a charge of refusal to submit to chemical testing, regardless of which statue the state chooses to use to charge a defendant, the implied consent law is located in this chapter, and a provision of this chapter in 39-20-14(1) entitled "Screening tests." States,

> "Any individual who operates a motor vehicle upon the public highways of this state is deemed to have given consent to submit to an onsite screening test or tests of the individual's breath upon the request of *a law enforcement officer who has reason to believe that the individual committed a moving traffic violation* or was involved in a traffic accident as a driver, and in conjunction with the violation or the accident the officer has, through the officer's observations, formulated an opinion that the individual's body contains alcohol."

This section of chapter 39-20 makes it clear that the officer must have probable cause of a moving violation, to then initiate a stop, and then from observations of the officer formulate the opinion that there is reason to believe the driver's body contains alcohol. Because of this requirement per the state statues, the lower court should have approved defense's requested jury instruction. The jury should have been instructed to clarity that a moving violation is in fact central for a law enforcement officer to invoke implied consent and request a chemical test of a driver. Before a refusal, a law enforcement officer is required under N.D.C.C. 39-20-01, to inform a driver that "North Dakota law requires the individual to take the test", as this requirement from 39-20-01 is valid even when the charged statue is 39-08-01(1)(e)(2), so is the requirement of 39-20-14(1).

[¶21]Without the purposed jury instruction 39-20-14(1), all the jury is to consider as a matter of law, is did the officer request chemical testing and did he refuse. However this court even, as mentioned earlier has alluded to the fact that the law does in fact require a traffic stop in the Birchfield oral arguments. Defense had some trouble finding similar cases argued for this type of case. However, defense believes the statues themselves speak to the validity of N.D.C.C. 39-20-14(1) and it's requirement for a moving violation, and thus this court will agree that the statue should have been admitted to the jury instructions both preliminary instructions as well as final instructions.

[¶22]CONCLUSION

[¶23]For the foregoing reasons, Mr. Taylor asks this court find under issue 1, that the lower court did in fact err in denying his jury instruction under N.D.C.C. 39-20-14(1), that it adversely affected the outcome of the verdict, order the court to vacate the criminal judgement in this case and remand this case back to the district court ordering a new trial.

[¶24]For the foregoing reasons, Mr. Taylor asks this court find under issue 2, a Brady violation occurred when the state lost exculpatory evidence that was material to the accused's belief he was not required to submit to chemical testing under implied consent without a valid moving violation, to which did not occur. In this finding Mr. Taylor asks this court to vacate the Criminal Judgement in this matter, and order that Mr. Taylor's refusal charge in this case be dismissed with prejudice.

Respectfully submitted
this 22nd day of December, 2017
/s/ Joshua Taylor
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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No. 2017321
Plaintiff,	)	Case No.: 39-2017-CR-00064
	)	
Vs.	)	
	)	**CERTIFICATE OF SERVICE**
	)	
Joshua Ryan Taylor,	)	
	)	
Defendant	)	

Joshua Ryan Taylor, hereby certifies that on December 26, 2017, the following documents:

1. Appellant's Brief

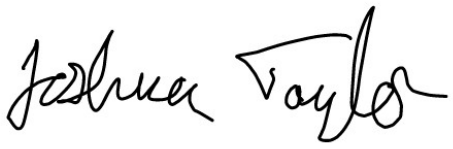
2. Appellant's Appendix

Have been served upon:

Megan E. Plummer

Richlandco_SA@co.richland.nd.us

Which were filled with the Supreme Court on December 22, 2017. By serving a true and correct copy to the email address identified above.



Joshua Taylor