20170321
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 8, 2018
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,

Defendant/Appellant.

Richland Co. No. 2017-CR-00064

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
Pro se litigant
604 8th Ave. S #201
Wahpeton, ND. 58075
Phone:(701)403-3509
taylor.jr1986@gmail.com

[¶1]TABLE OF AUTHORITIES

North Dakota Statutes
N.D.C.C. 39-08-01(1)(e)(2)
N.D.C.C. 39-20-01
N.D.C.C. 39-20-14(1)
N.D.C.C. 39-20-14(3)

North Dakota Cases
State v. Eldred, 1997 ND 112, 33, 564 N.W.2d 283
State v. Webster, 2017 ND 75, 891 N.W.2d 769
City of Bismarck v. Baurer, 409 N.W.2d 90 (1987)

United States Supreme Court Cases
Brady v. Maryland 37 U.S. 83

United States Constitution
Amendment V

[¶2]ARGUMENT

[¶3]In reply to Appellee's assertion on P. 7 ¶8, quoting State v. Eldred, defense points to the end of that same paragraph in the stated opinion of this court, "On appeal, we will reverse if an instruction 'is erroneous, relates to a central subject in the case, and affects a substantial right of the accused.'". State v. Eldred, 1997 ND 112, 33, 564 N.W.2d 283. Defense argues that even when considered as a whole, the instructions for the charge of "Refusal to submit to chemical test" being central to the case, on p. 15 of the Appellant's appendix, under "REFUSAL TO SUBMIT TO CHEMICAL TEST", paragraph 2, is the district courts chosen instruction of the charge. The court chose to use a partial extract from N.D.C.C. 39-20-01 in paragraph, which in part says, "...is deemed to have given consent, and shall consent, subject to provisions of this chapter...". Defense points to the verb "subject" in the aforementioned section of the 39-20-01. Implied consent is derived from chapter 39-20, and 39-20-01 makes clear that a driver has been deemed to give their consent by driving on a public road... subject to the law prescribed in the chapter, including 39-20-14(1). This part of the code is directly a provision on how law

enforcement is allowed to request a PBT for the purpose of obtaining probable cause for arrest and further testing.

[¶4]Going back to the lower courts holding that the defendant is not charged under 39-20-14(1), 39-20-14(3) gives power from chapter 39-20 for "implied consent" to 39-08-01 for the purpose of a criminal charge for refusal. To further support this argument, we look to the charge as the state charged it, N.D.C.C. 39-08-01(1)(e)(2) which holds at the end of the subdivision, "...at the direction of a law enforcement officer under section 39-20-01.". As already stated 39-20-01 then directs that you consent subject to the provisions of the chapter.

[¶5]39-08-01(1)(e)(2) circles to chapter 39-20 to pull authority of implied consent laws within the chapter, at 39-20-01. 39-20-01 lays out the basic premise of "implied consent" subject to the chapter provisions, which in the end at 39-20-14(3) circle back to giving authority directly to 39-08-01 for the purpose of refusal.

[¶6]After connecting how 39-20-14(1) is directly connected to 39-08-01, defense respectfully disagrees with this courts ruling in State v. Webster, 2017 ND 75, 891 N.W.2d 769. Defense argues that while in allot of circumstances "probable cause" is a question of law and not fact, it is not always the case.

[¶7]In this case, defense has held from the night of the stop that the defendant was aware of the fact the officer needed a traffic stop to initiate a stop and contended with certainty that he did not commit a traffic violation. The defense argues that in this particular case, the probable cause here is directly a matter of defense, as a person who knows his rights correctly may invoke them as a matter of constitutional right, grounded in at least the fifth amendment.

[¶8]In relevance of this case, the defense is arguing that the instruction on 39-20-14(1) would have provided a Factual question of the law for the jury to consider. Because the state failed to recover the audio/video evidence of the encounter, the jury is left as the fact finder to reconcile what they believe happened from testimony of the states witness, in this case the arresting deputy. In defenses case, his own witness that was present in the car and opening and closing information, as well as defenses cross examination of the state's deputy, calling into question his accurate memory of the event for purposes of proving beyond a reasonable doubt the defendant committed a crime.

[¶9]39-20-01 says "... and shall consent, subject to the provisions of this chapter", a provision of chapter 39-20 is that the

officer may request a PBT for the purpose of determining if further testing is needed.

[¶10]Lastly, defense offers the hypothetical case of where probable cause can in fact, be both a matter of law but also a matter of fact, determinable by a fact finder such as a jury:

> Assume Person A is walking down a sidewalk along a road with a posted speed limit of 25 MPH. Person B drives past exceptionally fast. Person A calls the speeder in to law enforcement immediately, stating a man driving a vehicle at least 50 MPH in a 25 MPH zone, on street "x". Persona A gives a plate number and description. The vehicle is stopped shortly after, the officer detects the odor of alcohol and other indications of DUI, and begins to go through the motions of that stop. The probable cause in this scenario is the phone call by the concerned citizen. Person A's estimation of the speed is not fact rather it's conjecture... however his phone call is fact. It can be proven with testimony and phone records... and yet it is also the probable cause the officer legally had to initiate a traffic stop on Person B.

[¶11]In reply to the appellee's argument on P. 15 ¶31 of the appellee's brief citing City of Bismarck v. Baurer, 409 N.W.2d 90 (1987), in Bauer the defendant failed to seek the security of the video evidence for appeal knowing there would be one filed. In this case, the defendant within a reasonable and diligent manner and amount of time, went to the States Attorney's office to request all discovery materials in person. When they were handed to the defendant, and there was no audio/video evidence handed over, the defendant inquired and was informed it must be requested first, that it's not automatically generated. The defendant made such request and email requests were sent off for both audio/video from the deputy's car and the jail house video of the booking room encounter.

[¶12]When the Initial Appearance was held, and the court ask about discovery, the court was informed there were still materials to be delivered to the defense. A dispositional conference was scheduled and held. At the dispositional conference the state simply stated discovery was completed and the defendant notified the court that he was notified the evidence was unrecoverable. During this conference, the state makes the claim is was inoperable. However defense has illustrated in it's brief how it believes the record offer's the likelihood that it was but the state or it's agent's did not act timely to recover said evidence.

[¶13]In response to the state knowing or having reason to know, is satisfied by simply the timely request of the defense that the evidence is something it seeks to include in it's defense preparation.

[¶14]CONCLUSION

[¶15]For the foregoing reasons, the defense respectfully requests this court reconsider some previous holding and/or view points as pointed out by the State, at least in case by case regard to this case. Defense would also respectfully request, if it please the court, the court hold Oral Argument's. Request made pursuant to N.D.R.App.P. Rule 34(a)(1).

Respectfully submitted
this 2nd day of February, 2018
/s/ Joshua Taylor
Joshua Taylor
Pro Se Litigant
604 8th Ave. S. #201
Wahpeton, ND. 58075
Phone:(701)403-3509
taylor.jr1986@gmail.com

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 February 8, 2018, the following documents:

1. Appellant's Reply Brief

Have been served upon:

Megan E. Plummer

Richlandco_SA@co.richland.nd.us

Which were filled with the Supreme Court on February 8, 2018. By serving a true and correct copy to the email address identified above.

Joshua Taylor