20170380

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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STATE OF NORTH DAKOTA

Supreme Court No. 20170380
Burleigh County No. 08-2017-CV-01341

Brandon Morel,	)
	)
Petitioner and Appellant,	)
	)
vs.	)
	)
State of North Dakota,	)
	)
Respondent and Appellee.	)

APPEAL FROM JUDGMENT DENYING APPELLANT'S REQUEST FOR POST-CONVCTION RELIEF ENTERED ON OCTOBER 17, 2017.

SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE DAVID REICH, PRESIDING

**BRIEF OF APPELLEE
STATE OF NORTH DAKOTA**

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ISSUE PRESENTED FOR REVIEW

[¶ 1] Whether the decision in Birchfield v. North Dakota, 136 S.Ct. 2160 (2016), announced a federal rule of criminal procedure or a new substantive rule of constitutional law, requiring retroactive application.

[¶ 2] If Morel's conviction is vacated, whether he is entitled to a refund of the fees he paid related to the underlying criminal conviction.

STATEMENT OF THE CASE

[¶ 3] On May 8, 2017, Morel filed an Application for Post-Conviction Relief. Appellant's Appendix at pages 1, 3-4 (hereinafter "App. 1, 3-4"). On June 2, 2017, the State filed its Answer in Response to the Application for Post-Convection Relief. App. 1, 5-9. On August 8, 2017, a Post-Conviction Relief hearing was held. App. 1. On October 13, 2017, the district court filed its Order Denying the Application for Post-Conviction Relief. App. 1, 11-15. On October 17, 2017, the district court entered its Judgment Denying the Petition for Post-Conviction Relief. App. 1, 16.

[¶ 4] On October 27, 2017, Morel filed a Notice of Appeal. App. 1, 18. Morel appeals the district court's Order and Judgement denying his Application for Post-Conviction Relief. App. 18.

STATEMENT OF THE FACTS

[¶ 5] On April 16, 2014, Morel was charged with Driving Under the Influence (2nd Offense) and Refusal to Submit to a Chemical Test (2nd Offense). App. 25. During the pre-trial phase of the case, the State dismissed the Driving Under the Influence offense and proceeded to trial on the Refusal to Submit to a Chemical Test offense. App. 52-53. On November 19, 2014, following a jury trial, Morel was convicted of Refusal to Submit to a Chemical Test (2nd Offense). App. 25, 27.

[¶ 6] On December 19, 2014, Morel filed a Notice to Appeal his conviction arguing that the refusal statute was unconstitutional. App. 27, 64. On August 11, 2015, this Court summarily affirmed Morel's conviction holding that the criminal refusal statute was not unconstitutional. App. 64. On June 23, 2016, the Supreme Court of the United States issued its decision in Birchfield v. North Dakota. 136 S. Ct. 2160. On May 8, 2017, Morel filed an Application for Post-Conviction Relief requesting that the district court

vacate his criminal conviction for Refusal to Submit to a Chemical test. App. 1, 3-5. On June 2, 2017, the State filed its Response to the Application for Post-Conviction Relief arguing that Morel's conviction should not be vacated. App. 5-9. After a hearing, the district court issued a written order finding that the Birchfield rule is procedural, so it does not retroactively apply to vacate his conviction. App. 11-15.

LAW AND ARGUMENT

I. Standard of review

[¶ 7] Post-conviction relief proceedings are civil in nature and are governed by the Rule of Civil Procedure. Parshall v. State, 2018 ND 69, ¶ 5. This Court's standard of review for denial of an application for post-conviction relief is well-established:

> In post-conviction relief proceedings, a district court's findings of fact will not be disturbed unless they are clearly erroneous under N.D.R.Civ.P. 52(a). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by the evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made. Questions of law are fully reviewable on appeal of a post-conviction proceeding.

Id. (internal citation and quotation omitted).

II. Standard of Analysis.

[¶ 8] "A new rule will apply retroactively to a final conviction only under very limited circumstances." Parshall v. State, 2018 ND 69, ¶ 21 (quoting Schriro v. Summerlin, 542 U.S. 348, 351 (2004)) (J. Jensen, dissenting). The Supreme Court of the United States has implemented a three-prong test for determining whether a right applies retroactively. See Id. (quoting Beard v. Banks, 542 U.S. 406, 411 (2004). First, the court must determine whether the defendant's conviction was final when the rule was announced. Id. Second,

the court must determine whether the rule is actually "new." Id. Third, the court must determine whether the rule falls into one of the two exceptions to nonretroactivity. Id.

[¶ 9] Under Teague, new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within one of two exceptions to the general rule. Teague v. Lane, 489 U.S. 288, 310-311 (1989). First, "a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Id. at 311. Second, "watershed rules of criminal procedure" apply retroactively. Id.

[¶ 10] The United States Supreme Court in Montgomery v. Louisiana clarifies the Teague exceptions. 136 S.Ct. 718, 728 (2016). The first exception, is if the decision is a substantive rule of constitutional law. Id. Substantive rules include rules forbidding criminal punishment for certain primary conduct, as well as rules forbidding a certain category of punishment for a class of defendants because of their status or offense." Id. (internal citation and quotation omitted). The second exception, for watershed rules of criminal procedure, is if the rule implicates the fundamental fairness and accuracy of the criminal proceeding. Id.

[¶ 11] The Supreme Court of the United States, in Schriro v. Summerlin, concluded that substantive rules generally apply retroactively. 542 U.S. 348, 351-352 (2004). Substantive rules include decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Id. The Schriro Court reasoned that "[s]uch rules apply retroactively because they necessarily

carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." Id. at 352.

[¶ 12] The Schriro Court also concluded that new rules of criminal procedure generally do not apply retroactively because they do not produce a class of persons convicted of conduct that the law does not make criminal, but merely raise the possibility that someone convicted with use of invalidated procedures that might have been acquitted otherwise. Id. The Court concluded that a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. Id. In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural. Id.

[¶ 13] Morel does not dispute that his underlying conviction was final prior to the Birchfield decision. The State does not contest that the Birchfield rule is "new." Morel, also, does not argue that the Birchfield rule is a watershed rule of criminal procedure. Therefore, the only issue which needs to be determined, for this appeal, is whether the Birchfield rule meets the first Teague exception. The State contends that the Birchfield rule does not meet the first Teague exception.

III. The Birchfield rule does not retroactively apply to final convictions.

[¶ 14] The Birchfield decision stated a federal rule of criminal procedure, not a substantive rule. Since the Birchfield decision stated a federal rule of criminal procedure, it does not retroactively apply to final convictions.

[¶ 15] In Schmerber v. California, the Supreme Court of the United States upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol. 384 U.S. 757 (1966). The test was upheld because the officer might have reasonably

believed that he was confronted with an emergency, and the delay necessary to obtain a warrant, would have threatened the destruction of evidence. Id. Subsequently, in Missouri v. McNeely, the Supreme Court of the United States clarified Schmerber, holding that the natural metabolization of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all driving under the influence cases. 569 U.S. 141 (2013). Rather, the Court held that exigency must be determined on a case by case basis by analyzing the totality of the circumstances. Id. Finally, in Birchfield v. North Dakota, the United States Supreme Court held that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample[.]" Birchfield, S. Ct. at 2185. The Supreme Court of the United States, however, left open the possibility of a warrantless blood test in other situations:

> North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search. Unable to see any other basis on which to justify a warrantless test of Birchfield's blood, we conclude that Birchfield was threatened with an unlawful search[.]

Birchfield, 136 S.Ct. at 2186. (internal citation to McNeely omitted).

[¶ 16] Taking these three cases together, the Supreme Court has explained that a warrantless blood test after being arrested for driving under the influence cannot be conducted under the search incident to arrest exception and cannot per se be conducted under the exigency exception to the Fourth Amendment of the United States Constitution. These three cases, however, still allow for warrantless blood testing under the right circumstances. For example, if a person arrested for driving under the influence is unable to conduct a breath test and there is not time to secure a warrant, the Supreme Court's

opinions still allow for a warrantless blood tests in those circumstances. See State v. Sauter, 2018 ND 75. Additionally, the North Dakota's Legislature made changes to 39-20-01(3)(a) following the Birchfield decision to state: "[i]f an 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." Thus, the State can still prosecute an individual for refusal to submit to a blood test after a warrant has been secured. Because there are still avenues to obtain a valid refusal of a blood test conviction, the Birchfield rule cannot be a rule of federal substantive law and must be a federal rule of criminal procedure.

[¶ 17] A decision that modifies the elements of an offense is normally substantive rather than procedural because new elements alter the range of conduct the state punishes. Schriro v. Summerlin, 542 U.S. at 354. The essential elements of the crime of refusal to submit to a blood test have not changed since the Birchfield decision. The essential elements of the refusal instruction to the jury, in this case, stated: "[t]he defendant refused to submit to a chemical test." Nothing in the Birchfield decision changed the essential elements of a refusal offense. The dissent in Parshall states:

> The Birchfield decision held unconstitutional the imposition of criminal responsibility for refusing to submit to a warrantless blood test as provided in N.D.C.C. § 39-20-01(3)(a). This altered the range of conduct that the law punished and satisfies the third prong of the test for retroactive application.

Parshall, 2018 ND69, ¶ 24. (J. Jensen, dissenting) (internal citation omitted). The State, however, respectfully disagrees with this reasoning. N.D.C.C. § 39-20-01(3)(a) only provides the procedure to getting the essential elements of a refusal offense.

[¶ 18] The elements of refusal to submit to a blood test under N.D.C.C. § 39-08-01(e)(2) has not textually changed since the Birchfield decision. This Court has even recently held that the requirements for an officer to request a chemical test under N.D.C.C. § 39-20 constitute a legal issue for determination before trial and are not essential elements to the crime of refusal. See State v. Webster, 2017 ND 75, ¶ 22-23, 891, N.W.2d 769. While this Court has determined that refusal to submit to a blood test incident to arrest is not a cognizable offense; refusal of a blood test under different circumstances is a cognizable offense. See Id. n.1.

[¶ 19] Since the legal requirements of N.D.C.C. § 39-20 constitute a legal issue to be determined before trial and are not essential elements, the State believes that Morel's conviction should be upheld. The State contends that if the officers knew what they do now that they would have obtained a warrant before seeking a blood test, and Morel could have still refused the blood test after the State obtained the warrant. Under those circumstances, we would still get to the essential elements of the refusal offense under a valid procedure.

[¶ 20] The text of Birchfield also leaves open the possibility of having valid warrantless blood testing under the right circumstances. See Birchfield, 136 S.Ct. at 2186. The Birchfield decision did not alter the range of conduct that the law punishes (refusal of a blood test), but only requires a determination of whether there are sufficient exigent circumstances before a warrantless blood test is conducted. If there are sufficient exigent circumstances, nothing in the Supreme Court's precedent bars the State from prosecuting refusal to submit to a blood test. See State v. Sauter, 2018 ND 75 (concluding that a warrantless blood test was authorized under the exigent circumstances exception to the

warrant requirement). There was not a determination, in this case, of whether there were sufficient exigent circumstances to support the warrantless blood.

[¶ 21] It is now clear that law enforcement officers need to either obtain consent, have exigent circumstances, or secure a search warrant before conducting a blood test. The procedures set forth in N.D.C.C. § 39-20-01 to obtain chemical tests, however, are not essential elements of criminal refusal. Therefore, if there are sufficient exigent circumstances or a search warrant is obtained and an individual still refuses a blood test; that individual's conduct of refusing the blood test still meets the essential elements of N.D.C.C. § 39-08-01(e). Having valid procedures to obtain a refusal offense supports the State's contention that the Birchfield rule is a rule of criminal procedure.

[¶ 22] The reasoning provided by the State, in the previous paragraphs, is in accordance with the reasoning and holding in Minnesota cases addressing whether a rule is substantive or procedural. See O'Connell v. State, 585 N.W.2d 161, 166 (Minn. Ct. App. 2015) (holding that the rule announced in Missouri v. McNeely is clearly procedural as it modifies the process law enforcement must follow before administering a blood test); See Johnson v. State, 906 N.W.2d, 861, 866-867 (holding that Birchfield modified the procedure that law enforcement must follow before administering a chemical test, and that the decision did not prohibit all prosecutions for test refusal).

[¶ 23] The Parshall dissent cites Welch v. United States 136 S.Ct. 1257 (2016) to support its position that the Birchfield rule is substantive. Parshall, 2018 ND 69, ¶¶ 25-27 (J. Jensen, dissenting). The Welch case is substantially different than this case, in which the Supreme Court was determining whether to retroactively apply the rule decided in Johnson v. United States, 135 S.Ct. 2551 (2015). In Johnson, the Supreme Court struck

down a clause of the Armed Career Criminal Act which altered the range of conduct that the act punished. See Welch v. United States, 136 S.Ct. 1257, 2165 (2016). In Welch, the Supreme Court of the United States determined that the definition of "violent felony" which was found to be unconstitutionally vague in Johnson, retroactively applied because it was a substantive rule. Id. The Supreme Court determined that is was substantive because "Johnson affected the reach of the underlying statue rather than the judicial procedures by which the statute is applied." Id. In doing so, the Supreme Court stated the clause at issue could "no longer mandate or authorize any sentence." Id. In Birchfield, alternatively, the Supreme Court only took away the search incident to arrest exception to obtain a blood test, it did not mandate that any conviction was barred under N.D.C.C. § 39-08-01(e) under other circumstances (namely the exigency exception and by obtaining a search warrant). See Birchfield, 136 S.Ct. 2160, 2186. Overall, the Johnson decision altered the substance of that law because the wording of the actual statute was found to be unconstitutional; however, the text of the relevant refusal statute, in this case, remains the same subsequent to the Birchfield decision.

[¶ 24] The Birchfield rule is a rule of criminal procedure because it does not narrow the scope of the refusal statue or alter the range of conduct that the law punishes. The Birchfield rule only modified the procedures necessary to obtain a blood test to determine the defendant's culpability for driving under the influence. For the above reasons, the State respectfully requests this Court to conclude that the Birchfield rule is a rule of criminal procedure that does not retroactively apply to final convictions.

IV. If Morel's conviction is vacated he is entitled to a refund of his fees.

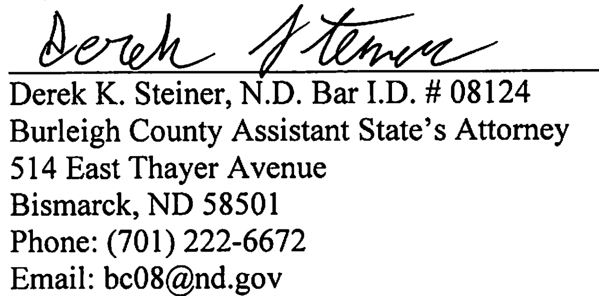
[¶ 25] The State does not contest that Morel would be entitled to return of this fees if this Court vacated his conviction. See Nelson v. Colorado, 137 S.Ct. 1249.

CONCLUSION

[¶ 26] The district court was correct in denying Morel's request for post-conviction relief by finding that the Birchfield rule was a rule of criminal procedure, therefore, the State respectfully requests that this Court affirm the district court's order and judgement.

RESPECTFULLY SUBMITTED:

Dated this 10th day of April, 2018.



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Respondent and Appellee,	)	District Ct. No. 08-2017-CV-01341
	)	

I, Elvedina Papalichev, being first duly sworn, depose and say that I am a Legal Resident over 21 years old, and on the 11 day of April, 2018, 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:

Dan Herbel
Attorney at Law
Herbel Law Firm
3333 E. Broadway Ave., Ste. 1205
Bismarck, ND 58501

which address is the last known address of the addressee.

Elvedina Papalichev
Elvedina Papalichev

Subscribed and sworn to before me this 11 day of April, 2018.

Mandy M Pitcher
Notary Public
Burleigh County, North Dakota