20190245

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 31, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gregory John Schwindt,	)	
	)	
Appellant,	)	**Supreme Ct. No. 20190245**
	)	
v.	)	
	)	**District Ct. No. 45-2019-CV-00180**
Thomas Sorel, Director of the North Dakota Department of Transportation,	)	
	)	**ORAL ARGUMENT REQUESTED**
Appellee.	)	

APPEAL FROM THE JUNE 12, 2019,
JUDGMENT OF THE DISTRICT COURT
STARK COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE DANN GREENWOOD

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[¶1] Whether North Dakota's implied consent and refusal laws violate a person's constitutional rights under the Fourth Amendment and N.D. Const. Art. I, § 8, the rights of substantive due process, or the unconstitutional conditions doctrine.

[¶2] Whether Trooper Steenstrup had probable cause to arrest Schwindt for driving his vehicle while under the influence of alcohol based on the totality of the circumstances, including the horizontal gaze nystagmus test and the onsite screening test.

[¶3] Whether Schwindt refused Trooper Steenstrup's request he submit to the chemical test.

STATEMENT OF CASE

[¶4] North Dakota Highway Patrol Trooper Thomas Steenstrup ("Trooper Steenstrup") arrested Gregory John Schwindt ("Schwindt") on December 14, 2018, for the offense of driving while under the influence of intoxicating liquor. Appellant's Appendix ("Schwindt App.") at 6. After the conclusion of the January 10, 2019, administrative hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Schwindt's driving privileges for a period of 180 days. Id. On January 25, 2019, Schwindt filed a Petition for Reconsideration under N.D.C.C. § 28-32-40, which the hearing officer denied. Id. at 8-25; Appendix to Brief of Appellee ("Dep't App.") at 4.

[¶5] Schwindt requested judicial review of the hearing officer's decision by the District Court. Schwindt App. at 26-31. The District Court affirmed the Hearing Officer's Decision. Id. at 32-46. Schwindt has appealed the District Court's

Judgment. Id. at 50-51.

STATEMENT OF FACTS

[¶6] On December 14, 2018, at approximately 5:30 a.m., Trooper Steenstrup responded to what he described as an "injury crash" on Interstate 94. Transcript ("Tr.") at 4, ll. 10-23. Trooper Steenstrup testified the incident "involved an older model white pickup and a semi-truck," in which "the semi-truck rear ended the left corner of the older pickup" and Schwindt appeared to have suffered "minor injuries at best." Id. at 4, l. 23 – 5, l. 1.

[¶7] Trooper Steenstrup stated "[t]he ambulance crew had arrived already and put him in the ambulance." Id. at 5, 9-10. Trooper Steenstrup spoke to Schwindt in the ambulance and observed the odor of alcohol. Id. at 5, ll. 8-12. When questioned by the law enforcement officer, Schwindt admitted to having consumed alcoholic beverages. Id. at 7, ll. 7-8. Trooper Steenstrup testified "[Schwindt] said he was going down the interstate. . . . He had been having troubles with his pickup, and he got rear ended by this truck." Id. at 7, ll. 12-20. Trooper Steenstrup observed Schwindt's "eyes were bloodshot and watery." Id. at 7, ll. 21-25.

[¶8] Trooper Steenstrup administered the horizontal gaze nystagmus test upon which Schwindt displayed six out of six possible clues indicating to the law enforcement officer that Schwindt was impaired. Id. at 8, l. 20 – 9, l. 15. Trooper Steenstrup informed Schwindt of the implied consent advisory and requested he submit to an onsite screening test. Id. at 9, ll. 20-24. Schwindt produced a result of .115 on the screening test. Id. at 10, ll. 7-8. Because Schwindt was in the ambulance at that time, Trooper Steenstrup did not perform any further sobriety

tests. Id. at 8, ll. 3-6; 17, ll. 5-7.

[¶9] Trooper Steenstrup advised Schwindt that he was placing him under arrest for driving under the influence of alcohol and "read him the implied consent for a chemical blood test." Id. at 10, ll. 19-24. Schwindt then consented to the blood test. Id. at 11, l. 2. Trooper Steenstrup testified that while following the ambulance carrying Schwindt to Dickinson, he remembered:

> *I needed to obtain a search warrant for blood, I called or I had state radio notify a supervisor who then contacted me. And in talking with that supervisor, he talked to his supervisor who told him to relay the message to me to read the implied consent for blood, and then inform the individual that he would not be charged criminally for a refusal at the hospital*. . . .

Id. at 11, ll. 2-13 (emphasis added). Trooper Steenstrup explained "we've been told we need a search warrant to get somebody's blood." Id. at 24, ll. 20-23.

[¶10] Trooper Steenstrup testified "when we got to the hospital I re-read the implied consent for … to Mr. Schwindt, per my supervisor's orders." Id. at 11, ll. 13-15. Trooper Steenstrup explained that he read the advisory to Schwindt *both* at the scene and at the hospital in a manner *similar* to the advisory shown on the Report and Notice:

> I must inform you that North Dakota law requires you to take a chemical blood test to determine whether you are under the … whether you are under the influence of alcohol or drugs. Refusal to take a chemical blood test may result in the revocation of your driving privileges for at least, for a minimum of 180 days and up to three years. Do you consent to take the chemical blood test that I am requesting?

Id. at 13, l. 15 – 14, l. 2; 23, ll. 10-20; Dep't App. at 3.[1] [2] In other words, the advisory Trooper Steenstrup provided to Schwindt did not inform him that he would be charged with a crime for refusing a blood test, but only that he would have his driving privileges revoked for a refusal. Id. at 24, l. 24 – 25, l. 3.

[¶11] Trooper Steenstrup testified "the second time after I read him that, I said a refusal would not be charged criminally." Id. at 14, ll. 3-4. Trooper Steenstrup further explained "I read it a second time and then afterwards, I just reiterated a refusal will not be charged criminally." Id. at 25, ll. 17-19. Schwindt responded "oh, okay then no." Id. at 25, l. 24 – 26, l. 1. Trooper Steenstrup testified Schwindt refused "after I read him the implied consent again and informed him that a refusal would not be charged criminally." Id. at 11, ll. 17-21. No search warrant was sought after Schwindt refused the blood test. Id. at 14, ll. 7-9.

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[1]Trooper Steenstrup explained that the advisory he read was not from the Report and Notice. Instead, the advisory was from another form, but "I believe it was the same thing if I remember correctly. The form that I have is another one that was given to me to read." Id. at 23, ll. 10-16. Trooper Steenstrup stated "I don't have that with me because I was given a new form to read. I've been given a new form to read since then." Id. at 23, ll. 17-20.

[2]The audio-video recording establishes that while at the scene, Trooper Steenstrup requested Schwindt submit to a chemical blood test and then advised him:

> I must inform you that North Dakota law requires you to take a chemical blood test to determine whether you are under the influence of alcohol or drugs. Refusal to take a chemical blood test may result in the revocation of your driving privileges for a minimum of 180 days and up to three years. Do you consent to take the chemical blood test that I am requesting?

DVD at 28:15, et seq.

STATEMENT OF ADMINISTRATIVE PROCEEDING

[¶12] At the hearing, Schwindt objected to the introduction of Exhibit 1 into evidence on the basis that allegedly "the Report and Notice form combined with the application of North Dakota 39-20-01 and a violation of the doctrine of unconstitutional conditions, and due process because it forces the exchange of the privilege to drive for the right to be secure against an unreasonable search as articulated in the Fourth Amendment of the United States Constitution and Article One Section Eight of the North Dakota Constitution." Id. at 14, ll. 14-22.

[¶13] Schwindt next objected to validity "of the horizontal gaze nystagmus test for the purposes of determining probable cause to arrest" based upon the possibility that a head injury might affect the test. Id. at 17, l. 23 – 18, l. 3. Schwindt further objected "to the Report and Notice form exhibit as far as 5:30 a.m. being the time of driving" on the basis "[t]hat was the time of the call and not the time of driving." Id. at 21, ll. 18-20. The hearing officer overruled Schwindt's three objections. Id. at 21, l. 21 – 22, l. 1; 27, ll. 11-14. Despite his questioning of the law enforcement officer regarding the implied consent advisory, Schwindt did not raise any objection to the evidence of his refusal based on the substance of the advisory at the hearing.

[¶14] At the conclusion of the hearing, Schwindt stated his intention to submit his closing argument in the form of a written statement, along with the squad car video of the incident, to the hearing officer by 12:00 p.m., on the following day. Id. at 28, l. 21 – 30, l. 23. The hearing officer issued her decision on January 10, 2019, in which she began by stating:

> An Administrative Hearing was held in this case on January 9, 2019. At the close of the hearing, counsel requested that he be able to submit the closing argument in writing. The undersigned agreed to leave the record open until January 10, 2019 at noon for the submission o[f] the squad video and closing argument. Having not received any submissions by January 10, 2019 at noon, the undersigned now takes the case under advisement.

Schwindt App. at 6.

[¶15] The Hearing Officer's Decision included the findings that

> Mr. Schwindt participated in field sobriety testing, the results of the HGN (6/6) test indicating impairment. Trooper Steenstrup recited the Implied Consent Advisory for a screening test and requested that Mr. Schwindt take an Alco-Sensor test. Mr. Schwindt consented to the test, which was administered in accordance with the State Toxicologist's Approved Method. Mr. Schwindt failed the Alco-Sensor test with a .115 test result.
>
> Trooper Steenstrup arrested Mr. Schwindt for DUI, recited the Implied Consent Advisory for a chemical test, informing Mr. Schwindt of the administrative consequences of refusal but not referencing any criminal penalties of refusal given he was requesting a blood test. Mr. Schwindt initially consented to the test. Mr. Schwindt was transported to the hospital via ambulance, where Trooper Steenstrup met him there. Once at the hospital, Trooper Steenstrup once again recited the Implied Consent Advisory for a chemical test but also added that Mr. Schwindt would not be charged criminally for refusing the blood test. Mr. Schwindt changed his mind and refused the blood test. Petitioner's counsel consented to the delivery of his copy of the decision via email with Mr. Schwindt's copy to be via mail and email.

Id. The hearing officer revoked Schwindt's driving privileges for a period of 180 days. Id.

[¶16] On January 25, 2019, Schwindt submitted a Petition for Reconsideration under N.D.C.C. § 28-32-40 in which he argued:

> (1) "The Department's consideration of the results of the screening test obtained pursuant to N.D.C.C. § 39-20-14 is a violation of due process and should be reconsidered;"

(2) "The Department should disregard the horizontal gaze nystagmus test;"

(3) "Lack of probable cause to arrest for driving under the influence;"

(4) "Mr. Schwindt did not refuse a request to take a chemical test;" and

(5) "North Dakota's implied consent and refusal laws are unconstitutional facially and as applied."

Id. at 8-25. Schwindt also submitted the audio-visual recording with his Petition for Reconsideration noting "technical difficulties" his counsel had in providing the audio-visual recording to the hearing officer prior to the close of the hearing on January 10, 2019. Id. at 8.

[¶17] With respect to his claim he did not refuse a chemical test, Schwindt argued:

> [¶28] A review of the complete audio visual recording reveals that Mr. Schwindt did not refuse a chemical test. At approximately DVD 6:01 after reading Miranda law enforcement reads the advisory for a chemical blood test and Mr. Schwindt agrees to take the test. At DVD 06:18 the law enforcement officer is heard saying Mr. Schwindt agreed to do a blood draw. At DVD 06:21 to 6:26 law enforcement is heard discussing a plan to read the advisory again and not having to worry about a blood kit if he refuses.
>
> [¶29] Once Mr. Schwindt agreed to take the blood test it would be inappropriate and a violation of due process to read the advisory again and prompt Mr. Schwindt to refuse by emphasizing there would be no criminal charges to refuse. *A review of the recording however finds no such thing occurred. There is no recording of the advisory being reread or of Mr. Schwindt refusing to submit to a chemical test. Accordingly the Hearing Officer should reconsider her decision and find Mr. Schwindt did not refuse the chemical test.*

Id. at 21 (emphasis added).

[¶18] The hearing officer denied Schwindt's Petition stating:

> The undersigned reviewed the Petition for Reconsideration, as well as the squad video. In doing so, the undersigned was not persuaded by the arguments or video evidence. Thus the Petition for Reconsideration is denied, and the Findings of Fact, Conclusions of Law and Decision dated January 10, 2019, remain in effect as issued.

Dep't App. at 4.

[¶19] Schwindt requested judicial review of the Hearing Officer's Decision and the Hearing Officer's Disposition of Petition for Reconsideration once again alleging:

> (1) "The Department's consideration of the results of the screening test obtained pursuant to N.D.C.C. § 39-20-14 is a violation of due process and should be reconsidered;"
>
> (2) "The Department should disregard the horizontal gaze nystagmus test;"
>
> (3) "Lack of probable cause to arrest for driving under the influence;"
>
> (4) "Mr. Schwindt did not refuse a request to take a chemical test;" and
>
> (5) "North Dakota's implied consent and refusal laws are unconstitutional facially and as applied."

Schwindt App. at 26-31. Once again, Schwindt's claim he did not refuse a chemical test was based on his factual argument that the audio visual recording did not show "the advisory being reread or of Mr. Schwindt refusing to submit to a chemical test." Id. at 29, ¶ 14.

[¶20] The District Court issued its Memorandum Opinion in which the Court affirmed the Hearing Officer's Decision. Id. at 32-46. Among other matters, the District Court determined:

> [¶26] *Another issue raised by Schwindt which involves factual issues was Schwindt's argument that Schwindt did not actually refuse to take the breath test. Schwindt argues he did agree to take*

> *the chemical breath test, identifying the point on the videotape where he did so.*
>
> [¶27] Officer Steenstrup testified that at his supervisor's direction he re-read the implied consent advisory to Schwindt again and advised Schwindt that Schwindt would not be charged criminally if he refused the test. Trooper Steenstrup testified that Schwindt then refused to take the chemical breath test. *Schwindt argues that, notwithstanding that Trooper Steenstrup testified that Schwindt did refuse the test, the videotape of the encounter does not reflect that fact.*
>
> [¶28] The hearing officer, in the Hearing Officer's Disposition of Petition for Reconsideration, indicates that she reviewed the patrol video. Consequently, the Court must presume that the hearing officer had the opportunity to consider the presence or absence of such refusal on the video tape against the testimony of Trooper Steenstrup to the effect that Schwindt did refuse to take the chemical breath test following his second reading of the implied consent advisory and information that he would not be charged criminally if he refused to take the test.

Id. at 42-43 (emphasis added).

[¶21] Judgment was entered on June 12, 2019. Id. at 48. Schwindt appealed the Judgment to the North Dakota Supreme Court. Id. at 50-51. The Department requests this Court affirm the Judgment of the Stark County District Court and affirm the Hearing Officer's Decision revoking Schwindt's driving privileges for a period of 180 days.

STANDARD OF REVIEW

[¶22] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to revoke driving privileges." Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶23] "In an appeal from a district court's review of an administrative agency's decision, [the Court] review[s] the agency's decision." Haynes, 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id.

[¶24] "This Court 'reviews constitutional rights violations under the de novo standard of review.'" Bridgeford v. Sorel, 2019 ND 153, ¶ 5, 930 N.W.2d 136 (quoting State v. Williams, 2015 ND 103, ¶ 5, 862 N.W.2d 831).

LAW AND ARGUMENT

I. North Dakota's implied consent and refusal laws do not violate a person's constitutional rights under the Fourth Amendment and N.D. Const. Art. I, § 8, the rights of substantive due process, or the unconstitutional conditions doctrine.

[¶25] On appeal, Schwindt claims the results of his onsite screening test should not have been taken into consideration because "North Dakota's test refusal law (N.D.C.C. § 39-20-14) violates the constitutional prohibition against unreasonable searches and seizures, is unconstitutional for denying substantive due process and is unconstitutional for penalizing the exercise of a constitutional right." Appellant's Br. at Argument 1, ¶ 22. Schwindt also "argues that the North Dakota refusal and implied consent laws are unconstitutional as applied to him because the facts of the case demonstrate that law enforcement did not have a search warrant to search him at the time they asked to search him nor did law enforcement ever apply for a search warrant." Id. at Argument 5, ¶ 48.

[¶26] This Court has rejected Schwindt's constitutional challenges in prior decisions. In Garcia v. Levi, the appellant argued "North Dakota's test refusal statute, N.D.C.C. § 39-08-01(1)(e), and implied consent law, N.D.C.C. ch. 39-20, violate the constitutional prohibition against unreasonable searches and seizures, are unconstitutional for denying substantive due process, and are unconstitutional for penalizing the exercise of a constitutional right and penalizing the constitutional right to withhold consent to a warrantless search or withdraw consent once given." 2016 ND 174, ¶ 19, 883 N.W.2d 901. Garcia further argued "North Dakota's test refusal and implied consent laws are unenforceable and unconstitutional under the doctrine of unconstitutional conditions and conflict with N.D. Const. art. I, § 20." Id.

[¶27] In Marman v. Levi, the appellant also claimed "North Dakota's implied consent and refusal statutes are unconstitutional because they allow unreasonable searches and seizures, deny substantive due process, and penalize the exercise of a constitutional right." 2017 ND 133, ¶ 5, 896 N.W.2d 241. The Marman Court stated that "[it] has addressed and rejected all of Marman's constitutional challenges in prior decisions. Id. at ¶ 16. The Court stated:

> All of Marman's constitutional claims were raised in Garcia v. Levi, 2016 ND 174, 883 N.W.2d 901. In Garcia, we noted this Court had previously rejected such arguments, but again analyzed them in light of the recent Supreme Court decision in Birchfield v. North Dakota, —— U.S. ——, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). 2016 ND 174, ¶¶ 20-22, 883 N.W.2d 901. We determined, under Birchfield, "our implied consent and test refusal laws are constitutional as applied to a warrantless breath test incident to arrest for being in actual physical control of a motor vehicle while under the influence of alcohol," and held "Garcia's constitutional rights were not violated and his arguments on appeal [were] without merit." Id. at ¶ 22.
>
> Additionally, in Koehly v. Levi, we specifically addressed Marman's "unconstitutional conditions" argument. 2016 ND 202, 886 N.W.2d 689. Koehly argued North Dakota's implied-consent law was an "unconstitutional condition" and violated both the United States Constitution and the North Dakota Constitution. Id. at ¶ 10. We dismissed Koehly's argument as to the United States Constitution, noting that in Birchfield, the Supreme Court had the opportunity to adopt the "unconstitutional conditions" doctrine, but declined to do so. Id. We further refused to apply the doctrine to North Dakota's Constitution as the issue was not adequately briefed because Koehly failed to show how art. I, § 20 of North Dakota's Constitution provided greater "protection than the Fourth Amendment of the federal constitution." Id. at ¶ 11.
>
> Because Marman has failed to show how North Dakota's Constitution provides greater protection than the Fourth Amendment, we do not revisit those constitutional claims.

Id. at ¶¶ 16-18.

[¶28] Schwindt does not explain why the Supreme Court's precedent concerning

the constitutionality of North Dakota's implied consent and refusal laws should be disregarded. The laws do not violate a person's constitutional rights under the Fourth Amendment and N.D. Const. Art. I, § 8, the rights of substantive due process, or the unconstitutional conditions doctrine. As a consequence, the Department's consideration of the results of the screening test obtained pursuant to N.D.C.C. § 39-20-14 was not a violation of due process.

II. Trooper Steenstrup had probable cause to arrest Schwindt for driving his vehicle while under the influence of alcohol based on the totality of the circumstances, including the horizontal gaze nystagmus test and the onsite screening test.

[¶29] "An officer may arrest a person without a warrant '[o]n a charge, made upon reasonable cause, of driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages.'" City of Bismarck v. Weisz, 2018 ND 49, ¶ 6, 907 N.W.2d 409 (quoting N.D.C.C. § 29-06-15(1)(f)). "Reasonable cause is synonymous with probable cause." Id. (citing State v. Hensel, 417 N.W.2d 849, 852 (N.D. 1988)). "To establish probable cause, it is not necessary that the officer possess knowledge of facts sufficient to establish guilt; all that is necessary is knowledge that would furnish a prudent person with reasonable grounds for believing a violation has occurred." Id. (quoting Hensel, 417 N.W.2d at 852). "In evaluating whether an officer had probable cause to arrest, [the Court] use[s] a totality of the circumstances approach." Id. (citing State v. Waltz, 2003 ND 197, ¶ 10, 672 N.W.2d 457).

[¶30] "The existence of probable cause to arrest is a question of law." State v. Boehm, 2014 ND 154, ¶ 8, 849 N.W.2d 239 (quoting Moran v. N.D. Dep't of Transp., 543 N.W.2d 767, 769 (N.D. 1996)). "In Moran, [the] Court explained the

two-part test an officer must meet in order to have probable cause to arrest a person for driving under the influence.

> In order to arrest a driver for driving under the influence, the law enforcement officer first must observe some signs of impairment, physical or mental. Further, the law enforcement officer must have reason to believe the driver's impairment is caused by alcohol. Both elements--impairment and indication of alcohol consumption--are necessary to establish probable cause to arrest for driving under the influence."

Id. at ¶ 12 (quoting Moran, 543 N.W.2d at 770; citing City of Devils Lake v. Grove, 2008 ND 155, ¶ 11, 755 N.W.2d 485).

[¶31] "Relevant factors in determining probable cause to arrest a person for DUI include the detection of the odor of alcohol, observation of signs of impairment, the person's own words, and failure of one or more field sobriety tests." Boehm, 2014 ND 154, ¶ 13, 849 N.W.2d 239 (citing Grove, 2008 ND 155, ¶ 11, 755 N.W.2d 485; Kahl v. Dir., N.D. Dep't of Transp., 1997 ND 147, ¶ 17, 567 N.W.2d 197). The Court also "[has] previously found probable cause to arrest for driving under the influence where there has been an accident coupled with other evidence of alcohol consumption." Presteng v. Dir., N.D. Dep't of Transp., 1998 ND 114, ¶ 8, 579 N.W.2d 212 (citing Wilhelmi v. Dir. of Dep't of Transp., 498 N.W.2d 150, 156 (N.D. 1993); Moser v. N.D. State Highway Comm'r, 369 N.W.2d 650, 653 (N.D. 1985)). "The fact an accident occurred is at least suggestive of impairment even though there may be other factors which are relevant to the actual cause of the accident." Id.

[¶32] In this case, Trooper Steenstrup's reasonable belief he had probable cause to arrest Schwindt is supported by the facts that (1) Schwindt was involved in a

vehicular accident; (2) Schwindt admitted to having consumed alcoholic beverages; (3) Trooper Steenstrup observed the odor of alcohol coming from Schwindt; (4) Trooper Steenstrup observed Schwindt's eyes were bloodshot and watery; (5) Schwindt failed the horizontal gaze nystagmus test; and (6) Schwindt produced a result above the legal limit on the onsite screening test.

[¶33] Schwindt, however, argues "[t]he Department's consideration of the results of the screening test obtained pursuant to N.D.C.C. § 39-20-14 is a violation of due process" and "[t]he Department should have disregarded the horizontal gaze nystagmus test." Appellant's Br. at Argument I, ¶ 19 & Argument II, ¶ 38. Consequently, Schwindt claims that "[a]bsent the results of the screening test and the horizontal gaze nystagmus test law enforcement did not have probable cause to arrest Mr. Schwindt for driving under the influence." Id. at Argument III, ¶ 42.

[¶34] As the Department has argued in Section I, supra, North Dakota's implied consent and refusal laws do not violate a person's constitutional rights under the Fourth Amendment and N.D. Const. Art. I, § 8, the rights of substantive due process, or the unconstitutional conditions doctrine. As a consequence, the Department's consideration of the results of the screening test obtained pursuant to N.D.C.C. § 39-20-14 was not a violation of due process.

[¶35] Schwindt's challenge to the admissibility of the results of his horizontal gaze nystagmus test is based on his citation to the Kansas Supreme Court's ruling in State v. Witte, 836 P.2d 1110, 1120 (Kan. 1992), and his argument that nystagmus can be caused by a variety of physiological problems and other conditions. Appellant's Br. at ¶ 39. With respect to this argument, Schwindt cites to the facts

he was involved in a rollover accident for which he was taken to the hospital and that he has high blood pressure and glaucoma. Id. at ¶ 40.

[¶36] In City of Fargo v. McLaughlin, the Supreme Court declined to accept the position taken by holdings of other courts and authorities, such as the Kansas court in Witte, that the HGN test is "inadmissible without scientific proof in each case." 512 N.W.2d 700, 706 (N.D. 1994). The McLaughlin Court stated "[i]t is generally accepted that a person will show a greater degree of nystagmus at higher levels of intoxication, and that a properly conducted HGN test can identify nystagmus. We take notice of these physiological facts, and conclude that it is unnecessary to require expert testimony of these widely accepted principles." Id. (citations omitted). The Court held that the "factors allegedly showing the unreliability of the test," including "possible physiological causes for nystagmus . . . . can be shown through cross-examination or expert testimony, and therefore they go to the *weight* of the evidence, rather than its admissibility." Id. at 707 (emphasis in original).

[¶37] In weighing the evidence, consideration should be given to whether the individual has met the burden of proving by competent medical evidence that his or her medical condition may have affected the ability to perform a sobriety test. In State v. Coppa, the New Jersey appellate court stated "[w]e have held that a driver bears the burden to prove a physical impairment preventing performance of a chemical breath test; that is because, in part, a driver has greater access to relevant proofs about his or her condition." DOCKET NO. A-3971-15T4, 2017 WL 6398901, at *2 (N.J. Super. Ct. App. Div. Dec. 14, 2017) (unpublished opinion) (citing State v. Monaco, 134 A.3d 997, 1004 (N.J. Super. Ct. App. Div. 2016), cert.

denied, 157 A.3d 834 (N.J. 2016)). "It is reasonable to apply the same rule to a claimed physical impairment that allegedly interfered with a person's ability to perform a field sobriety test . . . ." Id. See also Hollis v. State ex rel. Dep't of Pub. Safety, 2008 OK 31, ¶ 16, 183 P.3d 996 (requiring defendant "provide sufficient credible evidence that he was mentally incapable of giving a knowing and conscious refusal"); Cunningham v. Bechtold, 413 S.E.2d 129, 135-36 (W. Va. Ct. App. 1991) (individual failed to meet his burden to show he was physically unable to take breath test due to fractured nose); Dep't of Transp. v. Kelly, 335 A.2d 882, 885 (Pa. Commw. Ct. 1975) (individual must provide sufficient evidence "to sustain his burden of proving physical incapacity" to perform breath test).

[¶38] At the administrative hearing, Schwindt questioned Trooper Steenstrup concerning "[t]he possibility he had a head injury" as a result of the rollover accident and whether that is a factor in the evaluation of the horizontal gaze nystagmus test. Tr. at 16, l. 7 – 17, l. 2. Trooper Steenstrup testified:

> It does. I asked him if he had any head injuries and he said that *he might have hit his head in the crash* and I took it … I took that into consideration, but being this was in an ambulance I … I was limited to the tests that I could perform on him.

Id. at 17, ll. 3-7 (emphasis added). Trooper Steenstrup explained "I am not a doctor on the matter, but I've just been told that if they have a possible head injury it just can … I[t] can affect the test as well." Id. at 17; ll. 21-24. Trooper Steenstrup continued "I was just trying to do any test that I could on him that … you know, that I could do since I was so limited." Id. at 19, ll. 5-11.

[¶39] Schwindt, however, did not provide any medical evidence at the hearing -- whether through his own testimony, the testimony of his treating physicians, or his

medical records -- that he did in fact suffer a head injury in the accident (as opposed to "a possible head injury") and that any such injury -- if in fact it did exist -- would have adversely impacted his performance of the horizontal gaze nystagmus test.

[¶40] In addition, Schwindt did not question Trooper Steenstrup at the administrative hearing regarding whether the law enforcement officer believed his high blood pressure or his glaucoma might have affected his performance on the horizontal gaze nystagmus test. In fact, Schwindt's arguments regarding these medical conditions were only first raised in his Petition for Reconsideration and based on the audio-video recording – both of which he submitted fifteen days after the close of evidence and the issuance of the Hearing Officer's Decision. See Appellant's Br. at ¶ 40 ("According to the audio at 05:42:03 the Trooper learned that Mr. Schwindt was on blood pressure medication and at 05:42:03, has high blood pressure and was at the hospital that day for high blood pressure. Law enforcement further learned from Mr. Schwindt that he has glaucoma. DVD 05:47."). Consequently, Trooper Steenstrup was not provided the opportunity to be questioned regarding the potential effect of any such conditions on the field sobriety test.

[¶41] In the absence of competent medical evidence to support Schwindt's challenges to the admissibility of the horizontal gaze nystagmus test, it was proper for the hearing officer to find that "Mr. Schwindt participated in field sobriety testing, the results of the HGN (6/6) test indicating impairment." Schwindt App. at 6. In addition, the hearing officer considered Schwindt's performance on the onsite

screening test. Accordingly, the hearing officer properly determined Trooper Steenstrup had probable cause to arrest Schwindt for driving his vehicle while under the influence of alcohol based on the totality of the circumstances.

III. Schwindt refused Trooper Steenstrup's request he submit to the chemical test.

[¶42] *For the first time on appeal to this Court* and citing Alvarado v. North Dakota Department of Transportation, 2019 ND 231, 932 N.W.2d 911, Schwindt argues he did not refuse the chemical test because "[t]he advisory read to Mr. Schwindt . . . was modified to exclude the language advising that 'refusal of the individual to submit to a test directed by the law enforcement officer may result in revocation' and instead advised that 'refusal to take a chemical blood test may result in revocation.'" Appellant's Br. at ¶ 44. Schwindt's current claim follows (1) his failure to raise any objection to the substance of the implied consent advisory at the administrative hearing and (2) his subsequent decision to limit his argument in his Petition for Reconsideration to the hearing officer and then in his specifications of error on appeal to the District Court to a claim that the audio visual recording did not support a factual finding of "the advisory being reread or of Mr. Schwindt refusing to submit to a chemical test." Schwindt App. at 21 & 29.

[¶43] "Appellate review of alleged errors in the admission of evidence is governed by N.D.R.Ev. 103." Gonzalez v. Tounjian, 2003 ND 121, ¶ 30, 665 N.W.2d 705. Rule 103(a)(1) provides in part:

> **(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context;

[¶44] "Under Rule 103, one of the requirements for an effective appeal based upon erroneous admission of evidence is that the matter has been properly raised in the trial court so the court can intelligently rule on it." Gonzalez, 2003 ND 121, ¶ 31, 665 N.W.2d 705 (citing In re P.A., 1997 ND 146, ¶ 13, 566 N.W.2d 422). "As [the Court] explained in Piatz v. Austin Mut. Ins. Co., 2002 ND 115, ¶ 7, 646 N.W.2d 681 (citations omitted):

> A touchstone for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so the trial court could effectively rule on it. To take advantage of irregularities during trial, a party must object at the time they occur, so that the trial court may take appropriate action if possible to remedy any prejudice that may have resulted. A party's failure to object to an irregularity at trial acts as a waiver."

Id. The Court has "noted that it is 'fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.'" Gonzalez, 2003 ND 121, ¶ 32, 665 N.W.2d 705 (quoting Messer v. Bender, 1997 ND 103, ¶ 10, 564 N.W.2d 291 (quoting 5 Am. Jur. 2d Appellate Review § 690 (1995)); citing Roise v. Kurtz, 1998 ND 228, ¶ 9, 587 N.W.2d 573). "The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories." Id. (quoting Roise, at ¶ 9; Mahoney v. Mahoney, 1997 ND 149, ¶ 13, 567 N.W.2d 206).

[¶45] "Rule 103 requires an objection on a specific ground unless the reason for the objection is apparent from the context." Id. at ¶ 32 (citing Scientific Application, Inc. v. Delkamp, 303 N.W.2d 71, 77 (N.D. 1981)). "Again, the reason for requiring

a specific objection is to give the trial court an opportunity to rule upon the objection:

> If the administration of the exclusionary rules of evidence is to be fair and workable the judge must be informed promptly of contentions that evidence should be rejected, and the reasons therefor. The initiative is placed on the party, not on the judge. The general approach, accordingly, is that a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver upon appeal of any ground of complaint against its admission."

Id. (quoting City of Fargo v. Erickson, 1999 ND 145, ¶ 22, 598 N.W.2d 787 (Sandstrom, J., concurring specially) (quoting Charles McCormick, McCormick on Evidence § 52, at 200-01 (4th ed. 1992)) (emphasis omitted in original)).

[¶46] Furthermore, "[t]his Court has repeatedly declined to decide issues raised for the first time on appeal:

> A party may not raise an issue or contention that was not previously raised or considered in the lower court for the first time on appeal. 'If a party fails to properly raise an issue or argument before the trial court, the party is precluded from raising that issue or argument on appeal.'"

In Interest of F.M.G., 2017 ND 123, ¶ 14, 894 N.W.2d 850 (quoting Schiele v. Schiele, 2015 ND 169, ¶ 16, 865 N.W.2d 433 (quoting S.H.B. v. T.A.H., 2010 ND 149, ¶ 12, 786 N.W.2d 706) (citations omitted in original)). "'Issues or contentions not adequately developed and presented at trial are not properly before this Court. The purpose of an appeal is to review the actions of the trial court, not to grant the appellant the opportunity to develop new theories of the case.'" Id. (quoting Niles v. Eldridge, 2013 ND 52, ¶ 7, 828 N.W.2d 521 (quoting In Interest of A.G., 506 N.W.2d 402, 403 (N.D. 1993))).

[¶47] In addition, "'[a] change in the law amounts to sufficient cause for failing to

object only if the change is so novel that its legal basis was not reasonably available or foreseeable at the time of trial,' United States v. Shaid, 937 F.2d 228, 231 n. 5 (5th Cir. 1991), and the 'mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default,' Murray v. Carrier, 477 U.S. 478, 486-87 (1986)." Belle v. United States, 142 F.3d 431, at *5 (6th Cir. 1998).

[¶48] Schwindt's new claim on appeal regarding the language of the implied consent advisory is an apparent reference to City of Bismarck v. Vagts, in which this Court held that "[t]he omission of the phrase 'directed by the law enforcement officer' does not accurately inform the individual charged that the law enforcement officer determines which chemical test shall be taken" and "did not substantively comply with [N.D.C.C. § 39-20-01(3)(a)]." 2019 ND 224, ¶ 18, 932 N.W.2d 523. The Vagt decision was issued on August 22, 2019 – i.e., following the August 12, 2019, date on which Schwindt filed his Notice of Appeal with this Court.

[¶49] However, in Vagts, this Court noted the line of cases in which it has "considered issues involving compliance with the implied consent advisory language in N.D.C.C. § 39-20-01(3)." 2019 ND 224, ¶ 14, 932 N.W.2d 523 (citing State v. Vigen, 2019 ND 134, 927 N.W.2d 430; State v. Dowdy, 2019 ND 50, 923 N.W.2d 109; City of Grand Forks v. Barendt, 2018 ND 272, 920 N.W.2d 735; LeClair v. Sorel, 2018 ND 255, 920 N.W.2d 306; Korb v. N.D. Dep't of Transp., 2018 ND 226, 918 N.W.2d 49; State v. Bohe, 2018 ND 216, 917 N.W.2d 497; Schoon v. N.D. Dep't of Transp., 2018 ND 210, 917 N.W.2d 199; State v. O'Connor, 2016 ND 72, 877 N.W.2d 312). In addition, six of the cited decisions

had been issued prior to the January 9, 2019, date of Schwindt's administrative hearing.

[¶50] *Compliance with the implied consent advisory language was not so novel that its legal basis was not reasonably available or foreseeable at the time of Schwindt's administrative hearing*. Schwindt should not be excused from failing to raise any issue in a timely manner regarding the modification of the statutory language advising that "refusal of the individual to submit to a test directed by the law enforcement officer may result in revocation" until his appeal to this Court.

[¶51] Beginning with his Petition for Reconsideration and continuing with his specifications of error to the District Court and now his Appellant's Brief, Schwindt also has made the single statement that "[o]nce Mr. Schwindt agreed to take the blood test it would be inappropriate and a violation of due process to read the advisory again and prompt Mr. Schwindt to refuse by emphasizing there would be no criminal charges to refuse." Schwindt App. at 21 & 29; Appellant's Br. at ¶ 45. In each of these filings, Schwindt has qualified whether he truly is raising a due process issue by subsequently stating "[a] review of the recording however finds no such thing occurred. There is no recording of the advisory being reread or of Mr. Schwindt refusing to submit to a chemical test." Schwindt App. at 21 & 29; Appellant's Br. at ¶ 45.

[¶52] Consequently, the District Court reasonably understood Schwindt's allegation that he did not refuse the chemical test to involve purely "fact issues." Schwindt App. at 42. Applying the deferential standard of review, the District Court then concluded:

> [A] reasoning mind reasonably could have concluded that any finding that Schwindt did refuse to take the chemical breath test following Trooper Steenstrup's second reading of the implied consent advisory and information that he would not be charged criminally if he refused to take the test was supported by the weight of the evidence from the entire record.

Id. at 43.

[¶53] Assuming for the sake of argument *only* that, in a single sentence, Schwindt raises a due process violation argument regarding his refusal, the argument lacks merit. "Generally, there is no right to redress if a party cannot show prejudice resulting from an allegedly defective notice." Morrell v. N.D. Dep't of Transp., 1999 ND 140, ¶ 11, 598 N.W.2d 111 (citing Wahl v. Morton Cty. Social Servs., 1998 ND 48, ¶ 8, 574 N.W.2d 859). Schwindt was advised that a refusal to take a chemical blood test may result in the revocation of his driving privileges for a minimum of 180 days and up to three years and he suffered that consequence. Schwindt failed to present any evidence that he suffered any harm or prejudice due to Trooper Steenstrup's statement that he would not be charged criminally for that same refusal.

[¶54] Schwindt refused Trooper Steenstrup's request he submit to the chemical test.

REQUEST FOR ORAL ARGUMENT

[¶55] The Department requests the Court schedule oral argument in this case under N.D. R. App. P. 28(h). This matter involves a factual and legal questions regarding the implied consent advisory that was provided to Schwindt, and in conjunction with that advisory, whether Schwindt refused to submit to the chemical test. Oral argument would be helpful in the Court's review of the District Court's

decision and the Hearing Officer's decision.

CONCLUSION

[¶56] The Department requests this Court affirm the Judgment of the Stark County District Court and affirm the Hearing Officer's Decision revoking Schwindt's driving privileges for a period of 180 days.

Dated this 31st day of October, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gregory John Schwindt, Appellee, v. Thomas Sorel, Director of the North Dakota Department of Transportation, Appellant.	))))))))))	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20190245** **District Ct. No. 45-2019-CV-00180**

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Brief of Appellee contains 32 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Arial 12 point font.

Dated this 31st day of October, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gregory John Schwindt, Appellee, v. William T. Panos, Director of the North Dakota Department of Transportation, Appellant.	))))))))))	**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL** **Supreme Ct. No. 20190245** **District Ct. No. 45-2019-CV-00180**

[¶1] I hereby certify that on October 31, 2019, the following documents: **BRIEF OF APPELLEE, CERTIFICATE OF COMPLIANCE, and APPENDIX TO BRIEF OF APPELLEE** were filed electronically with the Clerk of Supreme Court. Service is being accomplished upon Gregory John Schwindt, by and through his attorney, to Thomas F. Murtha IV at murthalawoffice@gmail.com.

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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 1, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gregory John Schwindt,	)	
	)	**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**
Appellee,	)	
	)	
v.	)	**Supreme Ct. No. 20190245**
	)	
Thomas Sorel, Director of the North Dakota Department of Transportation,	)	**District Ct. No. 45-2019-CV-00180**
	)	
Appellant.	)	

[¶1] I hereby certify that on November 1, 2019, the following documents: **corrected BRIEF OF APPELLEE, CERTIFICATE OF COMPLIANCE, and APPENDIX TO BRIEF OF APPELLEE** were filed electronically with the Clerk of Supreme Court. Service is being accomplished upon Gregory John Schwindt, by and through his attorney, to Thomas F. Murtha IV at murthalawoffice@gmail.com.

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