20200041
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 14, 2020
STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

No. 20200041

City of Fargo,

Plaintiff-Appellee,

v.

Simon J. Hofer,

Defendant-Appellant.

District Court file No. 09-2019-CR-1860
Appeal from Order Denying Appellant's Motion to Suppress,
Judgment dated January 13, 2020,
Cass County District Court, East Central Judicial District,
The Honorable Thomas R. Olson Presiding

BRIEF OF PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

William B. Wischer
ND ID 06946
Assistant City of Fargo Attorney
412 NP Avenue
Fargo, ND 58102
Tele: 701-241-8596
Fax: 701-476-4179
Email: Wwischer@fargond.gov
E-Service: prosecutor@fargond.gov
Attorney for Plaintiff-Appellee

TABLE OF CONTENTS

Paragraph No.

TABLE OF AUTHORITIES

Paragraph No.

Cases

Statutes

I. STATEMENT OF THE ISSUE

[¶1] Should a urine sample be supressed when a search warrant was validly obtained and served, but the implied consent warning was defective?

II. STATEMENT OF THE CASE

[¶2] This is an appeal from the Cass County District Court in which the District Court denied Simon Hofer's Motion to Suppress a urine test. Hofer entered into a conditional plea under North Dakota Rule of Criminal Procedure 11(a)(2). Notice of Appeal was filed February 14, 2020.

III. STATEMENT OF THE FACTS

[¶3] On April 20, 2019, around 12:30 a.m., Officer Fugleberg stopped Simon Hofer for improper lane usage. Appellant's Appendix ("App.") pg. 12. Officer Yancy arrived soon after the stop. Id. Both of the officers could smell alcohol in the vehicle. Id. The passenger, Jacqueline Evans, admitted to drinking and had a bottle of brown liquor in her possession. Id. Hofer denied drinking, but he had watery and red eyes. Id. Officer Yancy conducted three field sobriety tests on Hofer, all of which indicated impairment: Horizontal Gaze Nystagmus (clues: 4/6), Walk and Turn (5/8), and One Leg Stand (4/4). Id. at 12-13. When asked if he had any weapons on him, Hofer produced a suspected meth pipe and meth rocks, and admitted to using earlier that day. Id. at 13. Hofer was then arrested for DUI (N.D.C.C. § 39-08-01) and brought to the jail. Id.

[¶4] At the jail, Hofer was given an opportunity to contact an attorney. Id. After failing to reach an attorney, Officer Yancy recited the implied consent, asking for a breath test. Id. The Officer did not state the words "as directed by law enforcement." Tr. 2:21-22 and App. 16. Hofer took the intoxilyzer and blew 0.00% BAC. App. 14 and COF App. 5 (Doc. Id. #30: Intoxilyzer Report). Officer Korb then wrote a warrant for urine. App. 14

and COF App. 3-4 (Doc. Id. #29: DUI Search Warrant). Judge Frank Racek signed the warrant. App. 14 and COF App. 3-4 (Doc. Id. #29). Officer Yancy then served the warrant on Hofer. App. 14. Officer Yancy then read the implied consent again, this time for "urine." Id. The words "as directed by law enforcement" were again omitted. Tr. 2:21-22 and App. 15. Hofer provided a urine sample. App. 14. The urine sample was positive for drugs. Tr. 2:19-20.

[¶5] On September 27, 2019, Hofer filed Motion papers, requesting the Court suppress the urine results since the officer omitted the words "as directed by law enforcement." Docs. Id. #24-31. The City of Fargo filed a Response to the Motion on September 30, 2019, alleging (among other reasons), the implied consent is not needed if a search warrant is obtained. Doc. #35. A hearing occurred on October 28, 2019. Oral argument occurred between Attorney William B. Wischer (for the City of Fargo) and Attorney Jason Van Horn (for Hofer). The Motion to Suppress was denied by the Honorable Judge Olson. App. 6-8. Judge Olson said in part "I'm going to rule that the search warrant issued before the test is taken cures any defect in the implied consent reading, as if it never occurred." Tr.12:21-23 and App. 7.

IV. STANDARD OF REVIEW

[¶6] The standard of review of a district court's decision denying a motion to suppress is well established:

> "[T]his Court defers to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. This Court will affirm a district court decision regarding a motion to suppress if there is sufficient competent evidence fairly capable of supporting the district court's findings, and the decision is not contrary to the manifest weight of the evidence. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law."

State v. Bauer, 2015 ND 132, ¶ 4, 863 N.W.2d 534 (quoting State v. Morin, 2012 ND 75, ¶ 5, 815 N.W.2d 229).

V. LAW AND ARGUMENT

A. Vagts and the implied consent law on April 20, 2019.

[¶7] The implied consent has undergone revisions since this offense occurred. At the time of Hofer's arrest, the implied consent advisory in N.D.C.C. § 39-20-01(3)(a) stated:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to submit to a test directed by the law enforcement officer may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years. In addition, the law enforcement officer shall inform the individual refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence. If the 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.

[¶8] At the time of Hofer's arrest, N.D.C.C. § 39-20-01(3)(b) stated,

> A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a.

[¶9] At the time this motion was heard, City of Bismarck v. Vagts, 2019 ND 224, 932 and State of North Dakota v. Vigen, 2019 ND 134, 927 N.W.2d 430 dominated DUI cases. In City of Bismarck v. Vagts, the officer recited the implied consent to Vagts without using the words "directed by law enforcement." 2019 ND 224, ¶2, 932 N.W.2d 523. Vagts later took the intoxilyzer and tested over .08%. Id. This Court ruled that an officer does not substantively comply with the implied consent if they omit the words "directed by the law enforcement officer." Id. at ¶18. Therefore, failure of the officer to

state "directed by law enforcement officer" when reciting the implied consent means the breath test is inadmissible under North Dakota Century Code section 39-20-01(3)(b). Id. Here, the urine test would be inadmissible if no search warrant was obtained and served.

B. The implied consent is not needed if a search warrant is obtained.

[¶10] This Court should adopt a bright-line rule – If a search warrant is validly obtained and served on a person, the implied consent warning is not needed. This reasoning would set a clear and common-sense precedent for this case and cases in the future. Two related, but separate reasons, justify this rule: (1) the search warrant is a separate path from the implied consent; and (2) a search warrant supersedes the implied consent.

1. The implied consent and search warrant are separate paths.

[¶11] The implied consent advisory is a legislative creation that requires persons operating motor vehicles on state highways to have given their implied consent to test for impairment, when recitation thresholds have been met. Search warrants are a constitutional construct where persons are protected from searches by the government unless the government is able to show a judge that there is probable cause to believe the person has committed a crime. The search warrant is focused on the four corners of the warrant whereas the implied consent is grounded in the statute. Each path has specific requirements that are often not required for the other.

[¶12] The "two-path" concept makes logical sense. The implied consent path requires the officer to "…advise the person about implied consent and inform the person of the severe consequences of refusing to consent to testing, including that the refusal will result in a loss of the person's driving privileges." Brewer v. Ziegler, 2007 ND 207, ¶ 23, 743 N.W.2d 391. Consent is deemed implied, but the person can still withdraw that consent. State v. Mertz, 362 N.W.2d 410, 413-14 (N.D. 1985). Once the implied consent

is recited correctly, the requirement to take a test attaches. The person may still refuse the test under N.D.C.C. § 39-20-04(1), but now they are subject to DUI-Refusal.

[¶13] The search warrant gets to the same end-game, but takes a separate path. The police officer is required to make an application to a judge or magistrate who then reviews the application to determine if there is probable cause to believe the person has committed a crime, and thus conduct a search. The judge determines whether any sample collection is appropriate, and if so, the manner, scope, duration, etc. of the collection. Admissibility of a chemical test or charging a refusal attaches if the implied consent is recited correctly. Admissibility of a chemical test or refusal should also attach upon issuance/serving the search warrant.

[¶14] The language of the implied consent also implies the search warrant is a separate path. The implied consent says the test is "directed by the law enforcement officer." N.D.C.C. § 39-20-01(3)(a). However, once the search warrant is obtained, the urine sample is no longer being "directed by the law enforcement officer," rather, it is the court ordering/directing the person to provide a urine sample. It is no longer correct to state "directed by law enforcement" if the judge is doing the directing. The language conflicts. The only logical reconciliation is that the implied consent and search warrant are two distinct alternatives to obtain a urine sample.

[¶15] North Dakota has not decided how a search warrant impacts the reading of the implied consent. However, Minnesota has decided collecting a sample via search warrant is a different path compared to following the implied consent. In State v. Wood, officers obtained a search warrant for Wood's blood after Wood was arrested for DUI and suspected of being under the influence of meth. 922 N.W.2d 209, 212 (Minn. App. 2019)

review denied (Minn. Mar. 27, 2019). Officers did not read Wood the Minnesota implied consent advisory. Id. at 211. Wood refused to provide a blood sample after being served the search warrant, so officers physically restrained him and drew the blood. Id. at 212. Wood alleged that because of Minnesota Statute section 169A.52 subd. 1 (2014) ("If a person refuses to permit a test, then a test must not be given…") he could refuse the test, even if a search warrant was obtained. Id. at 211. The Minnesota Appellate Court disagreed with Wood and concluded "… the statute on which Wood relies does not apply in this case because the officers did not read Wood the implied-consent advisory, but, rather, sought and obtained a search warrant that authorized the taking of a blood sample." Id. at 211. Here, the same reasoning applies. The implied consent advisory is not relevant when the officers obtain a valid and legal search warrant that authorizes the taking of a urine sample.

ii. The search warrant supersedes the implied consent.

[¶16] The implied consent is also not needed for search warrant cases because of the additional protections a judge provides. The Fourth Amendment prohibits unreasonable searches and seizures, and the administration of urine tests are searches under that provision. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 613-17, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). The touchstone for a search under the Fourth Amendment is reasonableness and typically requires law enforcement to obtain a judicial warrant before conducting a search. Birchfield v. North Dakota, 136 S.Ct. 2160, 2173, 195 L. Ed. 2d 560 (2016). The United States Supreme Court explained that the importance of requiring authorization by a "'neutral and detached magistrate'" before allowing a law enforcement officer to "invade another's body in search of evidence of guilt…" Ibid.

(quoting Johnson v. United States, 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948)). In State of North Dakota v. Helm, this Court held that a search warrant is required to collect urine for DUI cases. 2017 ND 207, 901 N.W.2d 57.

[¶17] In State v. Poitra, 2010 ND 137, ¶ 26, this Court discussed why a search warrant trumps statutory provisions:

> Unlike cases where a juvenile must consent or refuse to take a chemical test, a juvenile does not have a choice whether to provide evidence when a search warrant has been issued. Interest of R.P., 2008 ND 39, 745 N.W.2d 642 (juvenile has a limited statutory right to consult with a parent before deciding whether to submit to chemical testing). A magistrate has already found probable cause exists for the warrant, which provides protection by review from a neutral and detached magistrate. An attorney is unlikely to advise a juvenile to refuse to submit to the search, and an attorney can do little at that time to further the juvenile's right to a fair trial. See State v. Moody, 208 Ariz. 424, 94 P.3d 1119, 1141-42 (Ariz. 2004) (evidence would be collected even if defendant spoke to attorney because it is unlikely an attorney would advise a defendant to defy a warrant and refuse to submit to the search); Brown v. State, 11 So.3d 866, 901 (Ala. Crim. App. 2007).

[¶18] Poitra involved right-to-counsel before a search warrant was executed, but the rationale this Court gave there, is applicable here. The search warrant (with a Judge) provides greater protections than the implied consent (with a police officer). A search warrant "cures all" because we have a neutral and detached Judge confirming probable cause, and overseeing the search warrant's reasonableness, scope, and duration.

C. The officer complied with the implied consent law and language.

[¶19] If this Court requires the implied consent in search warrant cases, the officer still satisfied North Dakota case-law and statutory language. First, this Court treats urine like blood in regards to DUI testing. In State of North Dakota v. Helm, this Court stated a warrantless search incident to arrest for urine was not acceptable. 2017 ND 207, ¶ 16, 901 N.W.2d 57. Therefore, a search warrant is required to obtain urine related to a DUI on constitutional grounds. Because of Helm, urine and blood are treated the same, even though

the word "urine" doesn't specifically appear in the last sentence of N.D.C.C. § 39-20-01(3)(a):

> …If the 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. N.D.C.C. § 39-20-01(3)(a)

[¶20] Second, the implied consent requires the person be advised of "criminal penalties" after a search warrant is obtained for search warrant cases.

> …In addition, the law enforcement officer shall inform the individual refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence**.** If the 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. N.D.C.C. § 39-20-01(3)(a).

[¶21] Here, the officer informed Hofer of criminal penalties after the search warrant was secured when he read the implied consent a second time and said "…refusal is a crime." Tr. 2:21-22 and App. 15. Saying "refusal is a crime" should be sufficient under the requirement of informing the individual of criminal penalties and thus comply with the implied consent when a search warrant is obtained.

[¶22] Supporting the theory that only "criminal penalties" is needed, is that the first part of implied consent language is inconsistent with the search warrant process. Once the search warrant is obtained, the court is ordering the production of urine, not law enforcement. So, it no longer makes sense for the investigating officer to state that the collection is "directed by the law enforcement officer."

[¶23] Since the omission of the words "directed by the law enforcement officer" was in the immaterial/unneeded part of the implied consent, the implied consent was not violated:

> **The law enforcement officer** shall inform the individual charged that North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to submit to a test **directed by the law enforcement** officer may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years… N.D.C.C. § 39-20-01(3)(a).

[¶24] Therefore, obtaining a search warrant for urine satisfies the constitutional requirements under Helm. Stating the words "punishable as a crime" satisfies the implied consent (statutory provisions) for search warrant cases. North Dakota case-law and the statutory language were satisfied by the officer.

VI. CONCLUSION

[¶25] The City of Fargo requests this Court affirm the district court's order

VII. REQUEST FOR ORAL ARGUMENT

[¶26] The City of Fargo requests the Court schedule oral argument in this case pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure. Oral argument would be helpful in this case since there is no North Dakota case law which has directly addressed the issue.

Dated: May 14, 2020.

/s/ William B. Wischer
William B. Wischer
ND ID 06946
Assistant City of Fargo Attorney
412 NP Avenue
Fargo ND 58102
Tele: 701-241-8596
Fax: 701-476-4179
Email: Wwischer@fargond.gov
E-Service: prosecutor@fargond.gov
Attorney for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to N.D.R.App.P. 32(a)(8)(a), the undersigned, as attorney for Appellee City of Fargo and as the author of this Brief, hereby certifies that the total number of pages of the above Brief, excluding this certificate of compliance and the following certificate of service, is 12 pages.

Dated: May 14, 2020.

/s/ William B. Wischer

William B. Wischer
ND ID 06946
Assistant City of Fargo Attorney
412 NP Avenue
Fargo ND 58102
Tele: 701-241-8596
Fax: 701-476-4179
Email: Wwischer@fargond.gov
E-Service: prosecutor@fargond.gov
Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

City of Fargo
v.
Simon Hofer
District Court No. 09-2019-CR-01860
Supreme Court No. 20200041

I hereby certify that on May 13, 2020, the following:

1. **BRIEF OF PLAINTIFF-APPELLEE; AND**
2. **APPENDIX OF PLAINTIFF-APPELLEE**

was filed electronically with the Clerk of the Supreme Court through the Supreme Court E-Filing Portal system for electronic service through the E-Filing Portal system upon the following:

Chris Thompson
Schwab, Thompson & Frisk
chris@stflawfirm.com

Dated: May 14, 2020.

/s/ William B. Wischer
William B. Wischer
ND ID 06946
Assistant City of Fargo Attorney
412 NP Avenue
Fargo ND 58102
Tele: 701-241-8596
Fax: 701-476-4179
Email: Wwischer@fargond.gov
E-Service: prosecutor@fargond.gov
Attorney for Plaintiff-Appellee