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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 17, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF
THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiffs/Appellee, vs. Dustin Allan Sackenreuter, Defendant/Appellant.	Supreme Court Case No.: 20200176 Ramsey County District Court No. 36-2019-CR-00777

BRIEF OF APPELLANT DUSTIN ALLAN SACKENREUTER

ON APPEAL FROM JUDGMENT ENTERED JULY 2, 2020 (DKT. NO. 46), THE ORDER DENYING APPELLANT'S MOTION TO DISMISS (DKT. NO. 29), AND THE ORDER DENYING APPELLANT'S SPECIAL JURY INSTRUCTIONS, IN THE DISTRICT COURT, COUNTY OF RAMSEY, CASE NO. 36-2019-CR-00777, BY THE HONORABLE DONOVAN FOUGHTY

Dated: August 16, 2020

BY: /s/ Chris Thompson
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STATEMENT OF ISSUES

[¶1] The District Court erred in determining the following:

1) that N.D.C.C. § 39-08-01(1)(f) is not void for vagueness
2) that Defendant, at the time of his arrest, was advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota
3) that Defendant's requests for special jury instructions should be denied.

STATEMENT OF THE CASE

[¶2] On November 10, 2019, Appellant, Dustin Sackenreuter (hereinafter "Sackenreuter"), was arrested for driving under the influence in Ramsey County, North Dakota, and thereafter refused to submit to a chemical test. Appellant's Appendix ("App.") at pp. 14-15.

[¶3] On January 27, 2020, in Ramsey County District Court, a hearing was held on Appellant's motion to dismiss any charge against him under 39-08-01(1)(e), and to enjoin the State of North Dakota from bringing any charge under the same at trial. App. at p. 2. The motion was brought on the grounds that N.D.C.C. 39-08-01(1)(f) is void for vagueness, or, in the alternative, that Appellant was not advised of the consequences of refusal, in accordance with N.D.C.C. 39-08-01(1)(f). (App. at pp. 5-12). Ramsey County District Court Judge Donovan Foughty subsequently denied Appellant's motion, finding that N.D.C.C. 39-08-01(1)(f) is neither vague nor ambiguous, and that law enforcement complied with the requirements of 39-08-01(1)(f). App., at pp. 22-24.

[¶4] Later, on June 4, 2020, Appellant submitted three special, proposed jury instructions, all of which were subsequently denied. App. at pp. 16-21. The first quoted the text of N.D.C.C. 39-08-01(1)(f) as follows: "The charge of DUI Refusal does not apply to an individual unless the individual has been advised of the consequences of refusing a chemical test consistent

with the Constitution of the United States and the Constitution of North Dakota." App. at pp. 17-21. Appellant's second special jury instruction quoted N.D.C.C. 39-08-01(5)(a-d), which includes most of the criminal consequences of refusing a chemical test. Id. The third special jury instruction modified North Dakota Pattern Jury Instruction L 21.10 by adding the language of N.D.C.C. 39-08-01(1)(f) as an essential element of the offense of DUI-Refusal (the current pattern jury instruction was adopted prior to the inclusion of N.D.C.C. 39-08-01(1)(f)). Id.

[¶5] As a result of the denial of Appellant's motion to dismiss and special jury instructions, on June 25, 2020, Appellant submitted a Conditional Plea of Guilty preserving his right to appeal the district court's denials. App., at p. 25. Appellant filed a Notice of Appeal, and corresponding documents, on July 7, 2020, and now appeals the district court's decisions to this Court. App., at pp. 28-30.

STATEMENT OF THE FACTS

[¶6] On November 10, 2019, Trooper Brett Mlynar (hereinafter "Mlynar"), of the North Dakota Highway Patrol, stopped Sackenreuter following an alleged traffic violation. App., at p. 14. After administering field sobriety tests, Sackenreuter was placed under arrest for driving under the influence, and escort to the Lake Region Corrections Center. Id. Mlynar read the following to Sackenreuter at the Corrections Center:

> MLYNAR: the law enforcement officer shall inform the individual 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 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.

App., at pp. 5-6.

[¶7] Mlynar then asked Sackenreuter if he would consent to an lntoxilyzer breath test, to which Sackenreuter replied in the negative. App., at p. 15. Mlynar subsequently advised Sackenreuter, "I should also inform you that refusal to take the chemical test I am requesting is a crime under ND law." Id. Mlynar again asked Sackenreuter if he would provide a breath test, and Sackenreuter refused. Id. Other than the exchange above, Sackenreuter was never informed of any criminal consequences for refusal of the chemical breath test. App., at p. 6.

STANDARD OF REVIEW

[¶8] Construction of a criminal statute is a question of law, fully reviewable on appeal. State v. Laib, 2002 ND 95, ¶13, 644 N.W.2d 878; State v. Norton, 2019 ND 174, ¶7, 930 N.W.2d 190. Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language. N.D.C.C. § 1-02-03. When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05. "We construe an ambiguous criminal statute against the government and in favor of the accused." See State v. Brossart, 1997 ND 119, ¶14, 565 N.W.2d 752.

LAW AND ARGUMENT

[¶9] In order to be convicted of DUI refusal, an individual must be "advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota." N.D.C.C. § 39-08-01(1)(f). What specific consequences, though, did the legislature intend one to be advised of? Obviously, since a DUI arrestee still must be read the North Dakota Implied Consent Advisory ("ICA") contained in N.D.C.C. § 39-20-01, the arrestee should be advised of the potential loss of

driving privileges, but, beyond that, few attorneys or law enforcement officials in this state can discern, or even agree on, what other specific consequences, if any, the legislature intended an individual to be advised of. Nevertheless, many law enforcement officers throughout North Dakota have been instructed that, in the event an individual refuses a chemical test, he should be advised, in addition to the current ICA, of the old language from N.D.C.C. § 39-20-01, namely that refusal is also a crime punishable in the same manner as DUI. This additional phrase is also what Mlynar read to Sackenreuter in this matter. This Court, however, should not accept that this additional language is what the legislature intended should be read under 39-08-01(1)(f). In addition, this Court should find that Appellant was not advised of the consequences of refusal, in accordance with N.D.C.C. § 39-08-01(1)(f).

A. Advising a Suspect that Refusal is a Crime Punishable in the Same Manner as DUI Does Not Satisfy the Requirements of N.D.C.C. § 39-08-01(1)(f)

[¶10] The fact that the legislature removed the prior language from N.D.C.C. § 39-20-01, which stated that refusal was a crime punishable in the same manner as DUI, is telling. Had the legislature wanted that language still read to DUI-Refusal suspects, then they probably would not have deleted it from the 2019 version. Indeed, when a legislature repeals language from an old law, there is a presumption that the court was looking for things to be done differently. Instead, Ramsey law enforcement is still giving the same advisories as before the 2019 amendments. In this regard, the 8th Circuit has commented, "[w]here a statute is amended, it will be presumed that the language was intentionally changed to effect a change in or a departure from the old law." Universal Underwriters Ins. Co. v. Wagner, 367 F.2d 866, 874 (8th Cir. 1966); *See also* Miller v. Dalton, No. 35163-7-

III, 2018 WL 4488317, at *16 (Wash. Ct. App. Sept. 18, 2018) ("[I]n construing a statute which reenacts a statute with certain changes in the wording, a change in legislative purpose must be presumed… In such instances, the legislature must have intended some significant change in the law.") Another court has opined that "[i]n construing statutes which reenact, with certain changes, or repeal other statutes, or which contain revisions or codification of earlier laws, resort to repealed and superseded statutes may be had, and is of great importance in ascertaining the intention of the legislature, *for, where a material change is made in the wording of a statute, a change in legislative purpose must be presumed*." In re Bale, 63 Wash. 2d 83, 89, 385 P.2d 545, 548 (1963); s*ee also* Fed. Ins. Co. v. Speight, 220 F. Supp. 90, 95 (E.D.S.C. 1963) (The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change); Hodges v. Cmty. Loan & Inv. Corp., 234 Ga. 427, 429, 216 S.E.2d 274, 276 (1975)(It is, of course, an established principle of construction of legislative intent that where a statute is amended by omitting words, it must be presumed that the words were intentionally omitted).

[¶11] Since the legislature deleted the old language referring to refusal as a crime punishable in the same manner as DUI, there is a presumption that they no longer wanted that read. Had they wanted it to still be read, there would have no need to delete it from the ICA. But even though the legislature specifically deleted the prior ICA language from the 2019 version, law enforcement throughout the state , and in Ramsey County specifically, are still reading that same deleted language once an individual refuses to consent to a chemical breath test. Instead of a departure from the old law, law enforcement has resurrected the old

law by still reading the old portion of the implied consent advisory that was purposefully deleted!

[¶12] It is widely understood that law enforcement has continued reading the deleted phrase (i.e. that crime is punishable in the same manner as DUI), since that is what they have divined as the legislature's intent from the vague NDCC 39-08-01(1)(f) (i.e. that an individual must be informed of the consequences of refusing a chemical test consistent with the US and ND constitutions). But while law enforcement should be congratulated in their efforts to decipher the enigmatic subdivision 39-08-01(1)(f), it simply could not have been the legislature's intention that language that was intentionally deleted from NDCC 39-20-01 in the last legislative session should satisfy the requirements of being advised of the consequences of refusal as mandated in the newly enacted 39-08-01(1)(f). This begs the questions, though: if the current approach by law enforcement does not satisfy the requirements of 39-08-01(1)(f), then what does? Does the officer only have to read the current version of NDCC 39-20-01(3)(a)? Probably not, since that section now only deals with administrative penalties, not criminal consequences. Then, perhaps the legislature wanted Defendants to be advised of the specific consequences of refusal contained in N.D.C.C. 39-08-01(5), such as the mandatory minimum penalty of a $500 fine and a chemical dependency evaluation with a maximum thirty days in jail and $1,500 fine for a first offense. If not that specificity is required, then perhaps, on the other end of the spectrum, the officer only needs only to inform the individual of the consequences by reference (i.e. "refusal to take a test may result in being charged as listed under NDCC 39-08-01").

[¶13] Unfortunately, no one knows what exactly the legislature wanted Defendants advised of when it drafted the current, vague wording of 39-08-01(1)(f). While the prior law

was overly specific and rigid on what advisories needed to be given, the legislative pendulum seems to have swung to the opposite direction to the point where, now, no one can deduce, with confidence, what advisories are supposed to be read to DUI-Refusal suspects. The only thing that can be assumed is that the legislature no longer wants suspects told that refusal is a crime punishable in the same manner as DUI, since they specifically deleted that phrase from the ICA.

B. N.D.C.C. § 39-08-01(1)(f) is Unconstitutionally Void for Vagueness

[¶14] "The due process clauses of the State and Federal Constitutions require … criminal statutes … give[ ] adequate warning of the conduct proscribed and mark[ ] boundaries sufficiently distinct for judges and juries to fairly administer the law." State v.Holbach, 2009 ND 37 (N.D. 2009) at ¶ 24 (quoting State v. Tweed, 491 N.W.2d 412 (N.D. 1992)). The North Dakota Supreme Court has identified two requirements a law must meet to survive a void-for-vagueness challenge "(1) the law must create minimum guidelines for the reasonable police officer, judge, or jury charged with enforcement of the statute; and (2) the law must provide a reasonable person with adequate and fair warning of the proscribed conduct." City of Belfield v. Kilkenny, 2007 ND 44, ¶ 10, 729 N.W.2d 120. These two dictates are assessed under a "reasonable person" standard, meaning the courts view the statute from the standpoint of the reasonable person who might be subject to its terms. State v. Eldred, 1997 ND 112, ¶ 24, 564 N.W.2d 283; State v. Mertz, 514 N.W.2d 662, 668 (N.D. 1994). "[T]he more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Kolender v. Lawson, 461 U.S. at 358, 103 S.Ct. 1855 (quoting Smith v. Goguen, 415 U.S. 566, 574, 94 S. Ct. 1242, 39 L.Ed.2d 605 (1974)).

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statues. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 309 U.S. 451, 453 (1939).

[¶15] As written, it is nearly impossible for any attorney to say with confidence what specific advisories are required by N.D.C.C. § 39-08-01(1)(f), nor are there minimal guidelines to govern law enforcement. With that kind of uncertainty, a police officer or juror cannot be expected to know what advisories are required by subsection (1)(f). As stated above, "the law must create minimum guidelines for the reasonable police officer, judge, or jury charged with enforcement of the statute." However, no reasonable judge, attorney, or juror in this state that can confidently say what consequences of refusal an individual is required to be advised of under (1)(f), and this Court should not be forced to divine what those advisories are. As the U.S. Supreme Court has noted, "[t]he vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula." United States v. Cardiff, 344 U.S. 174, 176, 73 S. Ct. 189, 190, 97 L. Ed. 200 (1952). N.D.C.C. § 39-08-01(1)(f) is unconstitutionally vague, and this court should rule accordingly.

C. N.D.C.C. § 39-08-01(1)(f) is Ambiguous, and Should Be Interpreted In Favor of Appellant

[¶16] If this Court finds that the (1)(f) is not unconstitutionally vague, then this Court should at least find the statute ambiguous. A statute is ambiguous if it is susceptible to meanings that are different, but rational. Harter v. N. Dakota Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677, 680. As laid out above, there are numerous different, but rational, interpretations of (1)(f), making it, therefore, ambiguous at best.

[¶17] If this Court finds (1)(f) to be ambiguous, then the Court should apply the rule of lenity. That rule requires ambiguous criminal statutes to be construed in a defendant's favor. Id. An interpretation of (1)(f) in Appellant's favor would be one that requires the officer to have informed Appellant of all the consequences of refusal, including the language of N.D.C.C. § 39-08-01(5), since he would have had more information, not less, upon which to make a more informed decision. This interpretation would result in Appellant being, under subsection (1)(f), immune from prosecution for DUI Refusal, since he was not advised of all the consequences of refusal.

[¶18] The Nebraska Supreme Court dealt with the ambiguity of a statute substantially similar to N.D.C.C. § 39-08-01(1)(f). In Smith v. State, Dept. of Motor Vehicles, the Defendant, Smith, had been arrested for DUI. Prior to administering the chemical breath test, law enforcement read Smith the following advisory:

> I must further advise you that if you refuse to take the test or tests as I direct, or if you submit to the test or tests, and the results disclose the presence of drugs or of alcohol in an illegal concentration, I am required to immediately impound your license, and your license will be automatically revoked in 30 days unless you file a petition within 10 days of your arrest and request a hearing.
> The penalty for refusal is the revocation of your license or driving privilege for one year.
> If you submit to the test or tests, and the results disclose the presence of drugs or alcohol in an illegal concentration, and your license has not been revoked within the last eight years, the penalty is the revocation of your license or driving privilege for 90 days. If your license has been revoked within the last eight years, the penalty is revocation of your license or driving privilege for one year.

Smith v. State, Dept. of Motor Vehicles, 535 N.W.2d 694 (Neb. 1995), at 365-6.

[¶19] Smith was further advised of some of the criminal penalties associated with a first, second, third, and fourth or subsequent convictions of driving while intoxicated and refusal to submit to the test. Id., at 366. However, the advisory omitted "more serious penalties including felonies which could result from a test which disclosed an illegal concentration of

drug or alcohol." Id., at 366-7. Smith subsequently failed the chemical breath test, and later had his driving privileges revoked. Id., at 362.

[¶20] At the time of Smith's arrest, the following Nebraska law was in effect:

> Pursuant to § 60-6,197, any peace officer who has reasonable grounds to believe that an arrestee was operating a motor vehicle while under the influence of alcohol can require the arrestee to submit to a chemical test of his breath, blood, or urine. Section 60-6,197(10) mandates that any person who is requested to submit to a chemical test **be advised of the consequences of refusing to submit to the test and the consequences of submitting to the test and failing it**.

Id.

[¶21] The Nebraska Supreme Court ultimately decided that, since Smith had not been advised of all the consequences of refusing a chemical test, law enforcement had not complied with the statutory requirements of § 60-6,197. Id., at 368. Similarly, in the case at hand, this Court should find that Appellant was not adequately advised of the consequences of refusal, because he was not told any of the consequences for first through fourth offenses, contained in N.D.C.C. § 39-08-01(5). Nor was Appellant informed about the additional consequences of refusal of a chemical test in the event a minor is in the car, when the driver has a seriously injured passenger, or when the driver has a commercial driver's license.

[¶22] An interpretation of N.D.C.C. § 39-08-01(1)(f) that requires a more specific and comprehensive listing of consequences is also one based on a plain reading of the statute. Importantly, subsection (1)(f) uses the article "the" before the plural noun "consequences". If the statute had been worded like "unless the individual has been advised of consequences of refusing a chemical test", then that would allow for an interpretation that permitted an officer to just pick and choose from the smorgasbord of consequences, as was done in this case. But because the legislature added the article "the" before the word "consequences", that meant

that an arrestee had to be advised of ALL the consequences of refusal. Take the following example.

[¶23] If a baker baked a dozen muffins, and asked his assistant to deliver muffins to the store, one would naturally interpret that to mean any number of muffins. If the baker, however, asked his assistant to take the muffins to the store, without some other modifier, one would naturally interpret that to mean all the muffins. In subsection (1)(f), the legislature mandated that an arrestee be advised of the consequences of refusal. Without some other modifier, that means all the consequences of refusal. In this case, Appellant was not advised of anything near all the consequences of refusal.

D. Appellant's Special Jury Instructions Should Not Have Been Denied

[¶24] Were Appellant to have a jury trial on his DUI charge, one of the main questions at trial would be whether or not he could be charged with DUI-refusal, since a person cannot be convicted of DUI refusal if he was not advised of the consequences of refusal (in accordance with subsection (1)(f)). Whether or not Appellant was advised of the consequences of refusal is a mixed question of law and fact. The jury would need an instruction on what specific consequences Appellant was advised of. Then, the juror could decide if Appellant was, in fact, advised of those consequences. Should the jury be instructed that being told that DUI is a crime punishable in the same manner as DUI, despite the legislature purposefully removing that language in the last session, is a sufficient advisory under (1)(f), or should the jury be told that (1)(f) requires more specific consequences (e.g. will the jury be instructed to decide whether or not Appellant was told that the mandatory minimum includes a $500 fine)? If a trial court cannot confidently instruct a jury on what the

consequences of refusal are, required by (1)(f), then the jury will not be able to decide if Appellant was, in fact, advised in accordance with N.D.C.C. § 39-08-01(1)(f).

[¶25] Appellant submitted a special jury instruction that was almost verbatim from subsection (1)(f). See ¶4 above. The trial court erred in denying this. Appellant also submitted a jury instruction that included verbatim the consequences of refusal as contained in N.D.C.C. § 39-08-01(5)(a-d). The trial court also erred in denying this. Whether or not Appellant was advised of the consequences of refusal is a question of fact. Questions of fact are the province of the jury. Yet, it is impossible for a jury to come to a factual conclusion on whether or not Appellant was advised of the consequences of refusal if the jury was never instructed what the consequences of refusal actually were! A jury instruction listing the actual consequences of refusal, therefore, is required, and should have been granted.

CONCLUSION

[¶26] For the reasons stated above, Appellant respectfully requests this Court find that N.D.C.C. 39-08-01(1)(f) is void for vagueness. If the court does not agree, then Defendant would ask that the Court find that Appellant was not advised of the consequences of refusal, in accordance with N.D.C.C. 39-08-01(1)(f), since he was not informed of any specific criminal consequences of test refusal. Under either holding, Defendant asks that this Court reverse the lower court's ruling denying Appellant's motion to dismiss any charge against him under 39-08-01(1)(e). In the alternative, Appellant requests that the trial court's decisions denying Appellant's special jury instructions be reversed.

Dated this 17th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

[¶27] The undersigned, as attorneys for the Appellant, Dustin Sackenreuter, in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of pages in the above brief totals 17.

Date: August 17, 2020

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IN THE SUPREME COURT OF
THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiffs/Appellee, vs. Dustin Allan Sackenreuter, Defendant/Appellant.	Supreme Court Case No.: 20200176 Cass County District Court No. 36-2019-CR-00777

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on the 17th day of August, 2020, the following documents:

1. Appellant's Brief;
2. Appendix to Appellant's Brief; and

were served, via electronic filing system, upon the following individual(s):

1. The Supreme Court of North Dakota
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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on the 19th day of August, 2020, the following documents:

1. Appellant's Brief;
2. Appendix to Appellant's Brief; and

were served, via electronic filing system, upon the following individual(s):

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