

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

CITY OF JAMESTOWN,)	
)	
Plaintiff/Appellee,)	
)	
v.)	Supreme Court No. 20210049
)	
BONNIE LYNN NYGAARD,)	
)	Stutsman County No. 47-2020-CR-00126
Defendant/Appellant.)	

AMICUS CURIAE BRIEF OF
NORTH DAKOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF DEFENDANT/APPELLANT AND REVERSAL

Appeal from an Amended Criminal Judgment
filed February 16, 2021
Stutsman County District Court
Southeast Judicial District
The Honorable Troy J. LeFevre

For: North Dakota Association of Criminal Defense Lawyers:

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[¶1] TABLE OF AUTHORITIES

North Dakota Statutes

N.D.C.C. § 39-08-01 ¶¶4, 8, 10, 12-13, 15-17, 19, 23-24, fn.1
N.D.C.C. § 39-20-01 ¶¶16-17, 19, fn.1
N.D.C.C. § 39-20-08 ¶16

North Dakota cases

City of Jamestown v. Casarez, 2021 ND 71, 2021 WL 1540414 ¶¶16-17
State v. G.C.H., 2019 ND 256, 934 N.W.2d 857 ¶13
State v. Kordonowy, 2015 ND 197, 867 N.W.2d 690 ¶24
State v. Long, 2020 ND 216, 950 N.W.2d 178 ¶¶13, 16, 24, fn.1
State v. Rambousek, 479 N.W.2d 832, 835 (N.D. 1992) ¶23

North Dakota state district court cases

City of Dickinson v. Robert Blake Buxton,
Stark County Case No. 45-2020-CR-00719 ¶20
City of Fargo v. Courtney Keith Solberg,
Cass County Case No. 09-2020-CR-02596 ¶20
State v. Andrew Tyler Tate,
Stark County Case No. 45-2020-CR-00697 ¶20
State v. Madit Jol Makuei,
Burleigh County Case No. 08-2020-CR-03557 ¶20
State v. William Bert Joiner,
Stark County Case No. 45-2020-CR-00262 ¶20

Other courts

Funk v. O'Connor, 916 N.W.2d 319 (Minn. 2018) ¶22

Other sources

< <https://www.legis.nd.gov/assembly/66-2019/bill-video/bv1534.html> > ¶15

[¶2] AMICUS CURIAE STATEMENT OF IDENTITY AND INTEREST

[¶3] The North Dakota Association of Criminal Defense Lawyers ("NDACDL") is a non-profit corporation in good standing in North Dakota, formed to promote justice and due process for people accused of crimes within the State. NDACDL membership is comprised of both public and private criminal defense attorneys, and the non-profit has vital and inherent interests in the issues raised in this appeal.

[¶4] The NDACDL members and their clients have an intimate, direct, and continuous stake in the interpretation and application of N.D.C.C. § 39-08-01(f) (subdivision "f"), and whether the implied consent advisory, in a different section of the North Dakota Century Code, has any bearing on subdivision "f". NDACDL members have a substantial interest in formulating the purpose and intent of subdivision "f," and in advocating the clear and unambiguous purpose of the State's Attorney's lobby that proposed it, and the clear intent of the Legislature who passed it into law. Determining the meaning of a statute, whose plain verbiage appears to establish a predicate for prosecution, is of utmost importance to NDACDL members and their clients.

[¶5] STATEMENT OF AUTHORSHIP AND CONTRIBUTIONS

[¶6] Neither party's counsel authored any portion of this brief. No money was contributed by any party, nor any counsel to party, nor any person, toward the preparation or submission of this brief.

[¶7] INTRODUCTION

[¶8] The North Dakota Association of Criminal Defense Lawyers ("NDACDL"), an interested party, submits this amicus brief in opposition of the trial court's Order denying the Defendant's motion to dismiss. This amicus brief addresses N.D.C.C. § 39-08-01(f), how it is not part of the implied consent advisory, and how its plain reading establishes a prerequisite to criminal prosecution for refusing a chemical test.

[¶9] AMICUS CURIAE STATEMENT OF THE ISSUES

[¶10] A driver is not subject to criminal liability under N.D.C.C. § 39-08-01(1)(e) for refusing a chemical test unless she has been advised of the criminal consequences of refusing the chemical test as required by N.D.C.C. § 39-08-01(1)(f).

[¶11] LAW AND ARGUMENT

[¶12] Section 39-08-01(e), N.D.C.C., creates criminal liability for refusing a chemical test. However, subdivision "e" does not apply, and there is no criminal liability, if a driver is not advised of the consequences of refusing a chemical test:

"f. Subdivision e 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."

See N.D.C.C. § 39-08-01(1)(f).

[¶13] This Court has said "N.D.C.C. § 39-08-01(1)(f) is not ambiguous." *See State v. Long*, 2020 ND 216, ¶1, 950 N.W.2d 178. Subdivision "f" requires a driver to be informed of the criminal prosecution consequence of refusal as a prerequisite to criminal prosecution. Even though subdivision "f" is not ambiguous, "[o]ur interpretation of [N.D.C.C. § 39-08-01(1)(f)] is consistent with and confirmed by legislative history." *See State v. G.C.H.*, 2019 ND 256, ¶¶15-17, 934 N.W.2d 857 (finding a statute unambiguous, but still looking to legislative history to confirm the statutory construction).

[¶14] Subdivision "f" was added to ch. 39-08, N.D.C.C., through House Bill (HB) 1534 during the 2019 legislative session. The lobbyist for the North Dakota State's Attorney's Association, Aaron Birst, testified in support of HB 1534 and informed the Senate Judiciary Committee that advising a driver that it is a crime to refuse is a prerequisite to criminal prosecution:

"Subsection f was inserted as an amendment that says you cannot be charged with criminal refusal unless you have been advised that it's a crime to refuse ... we agree that you should never be charged with criminal refusal unless you've been told that's a crime ... The prosecutors agree you should never be charged with criminal refusal unless you're specifically told."

(Appendix of Appellant, at App. 19) (emphasis added).

[¶15] Following passage through the Judiciary Committee, HB 1534 went to the Senate floor for final passage and it was carried by Senator Dwyer. After Senator Dwyer tried to explain the bill, and subdivision "f," Senator Roers specifically asked Senator Dwyer which consequences must be conveyed to a driver under subdivision 'f':

Senator Roers: "I got a little lost on was ... when it says subdivision "e" does not apply unless they have been advised of the consequences ... so I kind of got lost on what are the actual consequences of refusing with this change."

...

Senator Dwyer: "Mr. President, the penalty for driving under the influence or actual physical control is a class B misdemeanor for the first offense, a class B misdemeanor for the second offense within seven years, and then a class A misdemeanor for the third offense. And, so, it is a class B misdemeanor. And, so, they have to advise them that the penalty for refusing the test is the same as if you had been convicted of DUI or actual physical control."

See < <https://www.legis.nd.gov/assembly/66-2019/bill-video/bv1534.html> >, at 2:28:45 p.m. So, it is clear that both the documentary history and the video history of HB 1534 require drivers to be informed that refusing a chemical test is a crime before criminal liability for refusal may attach. Therefore, Ms. Nygaard's interpretation of subdivision "f," that it requires a driver to be informed that refusal is a crime as a prerequisite to criminal prosecution, is confirmed by the legislative history.

[¶16] Recently in *Casarez*, this Court remarked, in dicta, that the statutory exclusionary remedy in 39-20-01(3)(b) was removed and "[i]n its place, N.D.C.C. § 39-08-01(f) was added to explain that proof of refusal, and the evidentiary use of refusal to take a chemical test, would be controlled by constitutional standards rather than by statutory exclusion." *See City of Jamestown v. Casarez*, 2021 ND 71, at ¶13. However, there is no need for subdivision "f" to explain "proof of refusal" and "evidentiary use of refusal to take a chemical test," because N.D.C.C. § 39-20-08, which was not amended, already controls that:

39-20-08. Proof of refusal admissible in any civil or criminal action or proceeding.

If the person under arrest refuses to submit to the test or tests, proof of refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof.

See N.D.C.C. § 39-20-08. Because "[a] statute is presumed to comply with the state and federal constitutions," (*State v. Long*, 2020 ND 216, at ¶13), N.D.C.C. § 39-20-08 already explains that proof of refusal and the evidentiary use of refusal to take a chemical test would be controlled by constitutional standards.

[¶17] The *Casarez* court also commented that the subdivision "f" modification "explains that claims of coercive implied consent advisories must be measured by constitutional standards rather than under the former statutory exclusionary rule." *See Casarez*, at ¶14. However, it should be noted that Ms. Nygaard is not arguing that she was not properly advised of the implied consent advisory under ch. 39-20, N.D.C.C., or that her consent was involuntary. Instead, Nygaard argues that she was not advised of the criminal consequences under ch. 39-08, N.D.C.C., (the criminal counterpart of administrative ch. 39-20) and particularly N.D.C.C. § 39-08-01(1)(f).¹ Because noncompliance with subdivision "f" creates a statutory bar to prosecution, Nygaard cannot be prosecuted for refusing a chemical test.

¹ Like Lobbyist Birst expressed to the Senate Judiciary Committee, the area of DUI is complicated, complex, and confusing. Indeed, in *State v. Long*, this Court stepped off track in discussing the DUI statutes: "The plain language of N.D.C.C. § 39-08-01(1)(f) requires a driver be advised of the consequences for refusing to submit to a chemical test before the individual's driving privileges are subject to restrictions under N.D.C.C. § 39-08-01(1)(e)." *See State v. Long*, 2020 ND 216, ¶10, 950 N.W.2d 178. However, driving privileges are not restricted under N.D.C.C. § 39-08-01(1)(e). Rather, subdivision "e" speaks to criminal prosecution consequences, while ch. 39-20, N.D.C.C., deals with administratively restricting driving privileges.

[¶18] Part of the misapprehension of the issue, below, is that the district court conflated this Court's coercion jurisprudence with refusal analysis. Coercion and refusal are not merely different pedigrees, they are different animals. Coercion (involuntary consent) and refusal are opposite things. Coercion case law applies when a chemical test is taken, or submitted to; refusal case law applies when no test is taken.

[¶19] Subdivision "f" has nothing to do with coercive implied consent advisories; indeed, subdivision "f" is not an implied consent advisory. Implied consent, and those advisories, fall under Ch. 39-20, N.D.C.C. Subdivision "f," which falls under Ch. 39-08, N.D.C.C., and which is rooted in due process principles, provides pre-clearance language that must be conveyed to a driver as a predicate to prosecution.

[¶20] A driver may be prosecuted for DUI with a faulty or flawed implied consent advisory. However, a driver may not be prosecuted for refusal, unless and until a driver has been informed that refusal is a crime. Indeed, that is the practice and understanding around the State, now. *See City of Dickinson v. Robert Blake Buxton*, Stark County Case No. 45-2020-CR-00719 (Index # 21); *State v. William Bert Joiner*, Stark County Case No. 45-2020-CR-00262 (Index # 18); *State v. Madit Jol Makuei*, Burleigh County Case No. 08-2020-CR-03557 (Index # 25); *City of Fargo v. Courtney Keith Solberg*, Cass County Case No. 09-2020-CR-02596 (Index # 42); and *State v. Andrew Tyler Tate*, Stark County Case No. 45-2020-CR-00697 (Index # 30, and Index # 28 - Motion to Dismiss, filed by Assistant Stark County State's Attorney Jim Hope: "The State agrees with the Defendant that in order to sustain a refusal charge, it is necessary for the officer to inform the Defendant that refusal is a crime.")

[¶21] The prosecution lobby wanted a driver to be informed of criminal "consequences" as a precursor to prosecution for refusing a chemical test. To not give meaning to "consequences" would render this unique word surplusage. Surely that cannot be the case.

[¶22] "[T]he canon against surplusage, ... requires us to give effect to each word and phrase of a statute." *See Funk v. O'Connor*, 916 N.W.2d 319, 322 (Minn. 2018). In accordance with the doctrine against surplusage, this Court should recognize meaning in the word "consequences," as intended by the prosecution lobby.

[¶23] To not give meaning to the clear purpose and intent of subdivision "f," as understood by prosecutors, defense attorneys, and two branches of Government, serves only to thwart the intent of the designers and drafters of subdivision "f." "[W]e need not resort to a canon of construction that would contradict the legislative intent articulated by the drafters themselves." *See State v. Rambousek*, 479 N.W.2d 832, 835 (N.D. 1992).

[¶24] Section 39-08-01(1)(f), N.D.C.C., unambiguously requires an officer "to inform drivers of the consequences of refusing a chemical test." *See State v. Long*, 2020 ND 216, ¶11, 950 N.W.2d 178. "[T]here are consequences for refusing to submit to testing" in that "N.D.C.C. § 39-08-01(1)(e) criminalizes the refusal." *See State v. Kordonowy*, 2015 ND 197, ¶19, 867 N.W.2d 690. Because Nygaard was not advised of the criminal consequences of refusing a chemical test, "[s]ubdivision e does not apply" and a refusal charge cannot stand. *See* N.D.C.C. § 39-08-01(1)(f). Accordingly, Nygaard's conviction for refusing a chemical test should be vacated.

[¶25] CONCLUSION

[¶26] Based on the foregoing, the North Dakota Association of Criminal Defense Lawyers respectfully requests that this Court reverse the decision below. Accordingly, this Court should vacate the Amended Criminal Judgment in this matter, reverse the district court's denial of her Motion to Dismiss the charge of refusing a chemical test, remand to the district court for withdrawal of Nygaard's conditional guilty plea, and order the refusal charge dismissed.

Dated this 7th day of May, 2021.

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[¶27] CERTIFICATE OF COMPLIANCE

[¶28] The undersigned hereby certifies that this document complies with the page limitation designated in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, and further certifies that this document contains twelve (12) pages.

Dated this 7th day of May, 2021.

/s/ Dan Herbel

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[¶29] CERTIFICATE OF SERVICE

[¶30] The undersigned hereby certifies that, on May 7, 2021, the AMICUS CURIAE BRIEF OF NORTH DAKOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT/APPELLANT AND REVERSAL was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to counsel of record, as follows:

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Dated this 7th day of May, 2021.

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