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OCTOBER 4, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	**Supreme Court No. 20210213**
Plaintiff/Appellee,	)	
	)	**Case No. 12-2020-CR-00077**
	)	
vs.	)	
	)	
	)	
Charles Spencer Mayland,	)	
	)	
Defendant/Appellant.	)	

BRIEF OF DEFENDANT-APPELLANT

Appeal from Memorandum and Order entered on June 10, 2021
In District Court, Divide County, State of North Dakota
The Honorable Daniel S. El-Dweek, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUE

I. Whether the trial court erred in denying Appellant's Motion to Suppress the Intoxilyzer results.

STATEMENT OF THE CASE

[¶ 1] Charles Spencer Mayland (hereinafter "Mayland") arrested and charged with being in Actual Physical Control of a Motor Vehicle on September 3, 2020. (See Appellant's App. p. 3). On December 16, 2020 Mayland waived his Preliminary Hearing and entered a not guilty plea. (See Appellant's App. p. 4). Mayland filed a 3.2 Notice of Motion to Suppress, Motion to Suppress, and Brief in Support of Motion to Suppression on December 20, 2020, requesting the District Court issue an order suppressing the Intoxilyzer Test and its results. (See Appellant's App. pp. 4, 6-10). On January 14, 2021, Mayland filed a Motion to Grant Motion to Suppress due to the State's failure to respond to the original Motion to Suppress. (See Appellant's App. pp. 4, 11-12). The State filed a Response to Motion to Suppress on January 14, 2021. (See Appellant's App. p. 4, 13-14). A hearing was held on Mayland's Motion to Suppress on April 9, 2021. (See Appellant's App. p. 4; See Transcript of Hearing on Motion to Suppress pp. 1-20). On June 10, 2021, the District Court issued a Memorandum and Order denying Mayland's Motion to Suppress. (See Appellant's App. pp. 5, 15-19).

[¶ 2] On July 21, 2021, a Hearing on Change of Plea and Sentencing was held. (See Appellant's App. p. 5, See Transcript of Hearing on Change of Plea and Sentencing pp. 1-24). Mayland entered a Condition Plea of Guilty to the charge of Actual Physical Control of a Motor Vehicle, with Mayland, the State, and the District Court agreeing that Mayland had the right and ability to appeal the District Court's Memorandum and Order denying

Mayland's Motion to Suppress. Id. Mayland and the State stipulated to the sentence imposed being stayed pending an appeal, and the District Court ordered the sentence imposed stayed pending an appeal. Id. On August 18, 2021, a Notice and Consent to Enter Conditional Plea was filed and signed by Mayland, counsel for Mayland, the State, and the District Court. (See Appellant's App. pp. 5, 20-21).

[¶ 3] Mayland filed a timely Notice of Appeal on July 27, 2021. (See Appellant's App. pp. 5, 22).

STATEMENT OF THE FACTS

[¶ 4] On September 3, 2020, the Divide County Sheriff's Office received a report that an individual was passed out in the parking lot of the Bypass business in Crosby, North Dakota. (See Transcript of Hearing on Motion to Suppress pp. 4-5). Sergeant Michael Dehn responded to the Bypass parking lot and was directed to a blue Chevy Tahoe. Id. at 5. Sgt. Dehn approached the vehicle and observed Mayland in the driver's seat looking at his phone. Id. at 5-6. Sgt. Dehn inquired if Mayland had consumed any alcohol, and Mayland indicated that he had earlier in the day. Id. at 6. Sgt. Dehn requested Mayland submit to field sobrienty testing and Mayland declined to do so. Id. Sgt. Dehn then read the North Dakota Implied Consent Advisory to Mayland and requested a preliminary breath test. Id. Mayland submitted to the preliminary breath test and the results showed Mayland's BAC was in excess of .08%. Id. at 6-7. Sgt. Dehn, without informing Mayland he was under arrest for violation of N.D.C.C. 39-08-01 and without advising Mayland of Miranda, read Mayland the North Dakota Implied Consent Advisory and requested Mayland submit to the Intoxilyzer 8000 at the Divide County Sheriff's Office. Id. at 7-8, 14. Mayland submitted to the Intoxilyzer 8000 and the results showed Mayland's BAC

was in excess of .08%. Id. at 8, 13. Mayland was subsequently charged with being in Actual Physical Control of a Motor Vehicle.

[¶ 5] On December 20, 2020, Mayland filed a 3.2 Notice of Motion to Suppress, Motion to Suppress, and Brief in Support of Motion to Suppression, requesting the District Court issue an order suppressing the Intoxilyzer Test and its results. (See Appellant's App. pp. 4, 6-10). On January 14, 2021, Mayland filed a Motion to Grant Motion to Suppress due to the State's failure to respond to the original Motion to Suppress. (See Appellant's App. pp. 4, 11-12). The State filed a Response to Motion to Suppress on January 14, 2021. (See Appellant's App. p. 4, 13-14). A hearing was held on Mayland's Motion to Suppress on April 9, 2021. (See Appellant's App. p. 4; See Transcript of Hearing on Motion to Suppress pp. 1-20). On June 10, 2021, the District Court issued a Memorandum and Order denying Mayland's Motion to Suppress. (See Appellant's App. pp. 5, 15-19).

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LAW AND ARGUMENT

I. Whether the trial court erred in denying Appellant's Motion to Suppress the Intoxilyzer results.

A. Standard of Review.

[¶ 8] "The trial court's disposition of a motion to suppress will not be reversed if, after conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. That standard of review recognizes the importance of the trial court's opportunity to observe the witnesses and assess their credibility, and we 'accord great deference to its decision in suppression matters.'" State v. Garrett, 1998 ND 173, ¶ 11, 584 N.W.2d 502 (quoting State v. Sabinash, 1998 ND 32, ¶ 8, 574 N.W.2d 827).

B. The trial court erred in denying Appellant's motion to suppress the Intoxilyzer results.

[¶ 9] "The implied consent requirements for chemical testing of a motor vehicle driver to determine alcohol concentration are set forth in N.D.C.C. § 39-20-01. The statutory directives relating to a law enforcement officer's administration of a chemical test are contained in N.D.C.C. § 39-20-01(2) and (3)." City of Grand Forks v. Barendt, 2018 ND 272, ¶ 12, 920 N.W.2d 735.

[¶ 10] "The test or tests must be administered at the direction of a law enforcement officer only after placing the individual under arrest for violation of section 39-08-01 or

an equivalent offense. […] The law enforcement officer shall determine which of the tests is to be used." N.D.C.C. § 39-20-01(2).

[¶ 11] "Reading together N.D.C.C. § 39-20-01(2) and (3), the 'individual charged' in N.D.C.C. § 39-20-01(3) refers to the individual in N.D.C.C. § 39-20-01(2) who is arrested and informed 'that the individual is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof.'" City of Grand Forks v. Barendt, 2018 ND 272, ¶ 14, 920 N.W.2d 735.

[¶ 12] "[W]e conclude that under the plain language of N.D.C.C. § 39-20-01(2) and (3), the legislature intended that an officer read the implied consent advisory to the individual charged after placing the individual under arrest. And, "the implied consent advisory under N.D.C.C. § 39-20-01(3) must be read after placing an individual under arrest and before administering a chemical test to determine alcohol concentration or the presence of other drugs." City of Grand Forks v. Barendt, 2018 ND 272, ¶¶ 14, 17, 920 N.W.2d 735.

[¶ 13] "This Court recognized N.D.C.C. § 39-20-01(3)(b) created a statutory rule for the exclusion of evidence when a law enforcement officer fails to follow the procedure provided within N.D.C.C. § 39-20-01(3)(a)." State v. Pouliot, 2020 ND 144, ¶ 9, 945 N.W.2d 246 (citing State v. O'Connor, 2016 ND 72, ¶ 11, 877 N.W.2d 312). "In O'Connor, we concluded that under the 2015 version of N.D.C.C. § 39-20-01(3)(b), if an officer failed to provide a driver with the implied consent advisory before administering the chemical test, the chemical test was not admissible in a criminal or administrative proceeding." Id.

[¶ 14] "In 2019, the Legislature once again amended N.D.C.C. § 39-20-01(3)(b), which became effective August 1, 2019, to read as follows: b. If an individual refuses to submit to testing under this section, proof of the refusal is not admissible in any administrative proceeding under this chapter if the law enforcement officer fails to inform the individual as required under subdivision a." State v. Pouliot, 2020 ND 144, ¶ 10, 945 N.W.2d 246. "The 2019 amendment significantly limits the scope of the exclusion of evidence to 'proof of the refusal' in an 'administrative proceeding.'" Id. at ¶ 11. "The legislature's amendment of N.D.C.C. § 39-20-01(3)(b) unambiguously limits the scope of the exclusionary remedy. The exclusion of evidence for a violation of N.D.C.C. § 39-20-01(3)(a) is now limited to administrative proceedings where a driver refused to take the chemical test." Id.

[¶ 15] "The Fourth Amendment provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'" Birchfield v. North Dakota, 579 U.S. 438, 575, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). The Fourth Amendment thus prohibits 'unreasonable searches,' and our cases establish that the taking of a blood sample or the administration of a breath test is a search." Id. "'The text of the Fourth Amendment does not specify when a search warrant must be obtained.'" Id. (*quoting* Kentucky v. King, 563 U.S. 452, 459, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011)). "But 'this Court has inferred that a warrant must [usually] be secured.'" Id. "This usual requirement, however, is subject to a number of exceptions." Id. "While emphasizing that the exigent-circumstances

exception must be applied on a case-by-case basis, the McNeely Court noted that other exceptions to the warrant requirement 'apply categorically' rather than in a 'case-specific' fashion. One of these […] is the long-established rule that a warrantless search may be conducted incident to a lawful arrest." Birchfield v. North Dakota, 579 U.S. 438, 576, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016) (*quoting* Missouri v. McNeely, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696).

[¶ 16] "'A breath test does not 'implicate significant privacy concerns.'" Birchfield v. North Dakota, 579 U.S. 438, 580, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016) (*quoting* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)). "[T]he Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." Birchfield v. North Dakota, 579 U.S. 438, 587, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). "[A] breath test […] may be administered as a search incident to a lawful arrest for drunk driving." Id. at 588.

[¶ 17] The testimony received at the Hearing on the Motion to Suppress established that Sgt. Dehn failed to advise Mayland that he was under arrest for a violation of section 39-08-01 prior to the reading of the North Dakota Implied Consent Advisory and prior to requesting Mayland submit to the Intoxilyzer 8000. (See Appellant's App. pp. 15-16; See Transcript of Hearing on Motion to Suppress pp. 13-14). The sole argument of the State in opposition to Mayland's Motion to Suppress was that Mayland had been placed under arrest. (See Appellant's App. pp. 13-14; See Transcript of Hearing on Motion to Suppress pp. 14-15).

[¶ 18] The District Court reasoned that, "In this case, it is clear that the officer read the implied consent advisories prior to the arrest. However, after the 2019 amendments to

N.D.C.C. 39-20-01(3)(b), the exclusionary rule was limited to evidence of refusals in administrative proceedings. […] Truly, the encounter in this matter was irregular. It is uncommon that the implied consent advisory would be read before placing someone under arrest. It could certainly lead to confusion on the part of the suspect. However, this irregularity and the confusion that it may have caused does not prove fatal to the State's use of the test result in this case." (See Appellant's App. p. 18). The District Court ordered Mayland's Motion to Suppress was denied. Id. at 19.

[¶ 19] Under the 2015 version of N.D.C.C. § 39-20-01(3)(b), if an officer failed to advise an individual that he/she was being placed under arrest for a violation of 39-08-01 prior to providing the individual with the implied consent advisory, the chemical test was not admissible in a criminal or administrative proceeding. Not only did the 2015 version of N.D.C.C. § 39-20-01(3)(b) create a statutory rule for the exclusion of evidence when a law enforcement officer failed to follow the procedure provided within N.D.C.C. § 39-20-01(3)(a), it also reflected that requiring breath tests through implied consent laws was constitutional so long as the breath test was being requested/enforced under the search incident to arrest exception to the warrant requirement.

[¶ 20] Upon the Legislature amending N.D.C.C. § 39-20-01(3)(b) to read "If an individual refuses to submit to testing under this section, proof of the refusal is not admissible in any administrative proceeding under this chapter if the law enforcement officer fails to inform the individual as required under subdivision a," the scope of the statutorily created exclusionary remedy was limited to administrative proceedings where a driver refused to take the chemical test. However, the Legislature did not and could not expand the scope of an exception to the Fourth Amendment warrant requirement.

Regardless of how the North Dakota State Legislature altered N.D.C.C. § 39-20-01(3)(b)'s statutory language, no search of Mayland's person for his breath could have been conducted unless a search warrant was obtained or an exception to the Fourth Amendment warrant requirement existed. Mayland was not placed under arrest prior to the implied consent advisory being read and prior to Mayland being told that he either had to provide his breath or face criminal consequences.

[¶ 21] The District Court found that Mayland had not been placed under arrest. (See Appellant's App. p. 16). However, the District Court considered the Legislatures amendment of N.D.C.C. § 39-20-01(3)(b)'s statutory language and determined that the statutorily created exclusionary rule no longer applied, and found that there was no remedy for Mayland even though Sgt. Dehn gathered evidence in violation of North Dakota State Law. The District Court wrote, "Truly, the encounter in this matter was irregular. It is uncommon that the implied consent advisory would be read before placing someone under arrest." (See Appellant's App. p. 18). It is irregular and it is uncommon because an individual must be arrested for the Search Incident to Arrest exception to the Fourth Amendment to apply and an individual's breath to be obtained without a search warrant.

[¶ 22] As stated, Sgt. Dehn obtained evidence in violation of N.D.C.C. § 39-20-01(2). Furthermore, Mayland was not arrested prior to being told he must provide a breath sample or face criminal consequences. If Mayland was not arrested, no search incident to arrest could have occurred and the Intoxilyzer 8000 results would have been obtained in violation the Fourth Amendment. "Evidence seized as a result of an unlawful search in violation of the Fourth Amendment must be suppressed under the exclusionary rule."

State v. Holly, 213 ND 94, ¶ 17, 833 N.W.2d 15 (*citing* State v. Handtmann, 437 N.W.2d 830, 836-37 (N.D. 1989)). "'The exclusionary rule acts to deter police misconduct in making unreasonable searches and seizures, and to bolster judicial integrity by not allowing convictions based on unconstitutionally obtained evidence." State v. Holly, 213 ND 94, ¶ 17, 833 N.W.2d 15 (*citing* State v. Wahl, 450 N.W.2d 710, 714 (N.D. 1990)).

[¶ 23] In the event this Court finds that Mayland did not raise the issue of a violation of his Fourth Amendment right against illegal search and seizure in the District Court, Mayland would respectfully request this Court consider the issue as "[a] court may consider an issue raised for the first time on appeal where there is a strong possibility of reoccurrence or the issue is one of public policy or of broad concern." State v. Whitman, 2013 ND 183, ¶ 15, 838 N.W.2d 401. If there is no consequence for law enforcement failing to follow the requirements of N.D.C.C. § 39-20-01(2) at this time, there is no incentive for law enforcement to follow the requirements of N.D.C.C. § 39-20-01(2) in the future, and there is a strong possibility of reoccurrence of the issue at hand.

Conclusion

[¶ 24] The Memorandum and Order denying Mayland's Motion to Suppress the results of the Intoxilyzer 8000 is contrary to the manifest weight of the evidence. As such, the Memorandum and Order denying Mayland's Motion to Suppress the results of the Intoxilyzer 8000 should be reversed and remanded.

Dated this 4th day of October, 2021.

__//s Marie A. Miller_____
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IN THE SUPREME COURT, STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	**Supreme Court No. 20210213**
Plaintiff/Appellee,	)	**District Court No. 12-2020-CR-00077**
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Charles Spencer Mayland,	)	
	)	
Defendant/Appellant.	)	

[¶1] I, Marie A. Miller, hereby certify that on October 4, 2021, the following documents, **BRIEF OF DEFENDANT-APPELLANT and APPENDIX OF DEFENDANT-APPELLANT**, were filed with the Supreme Court Clerk of Court. A copy of these documents were served electronically on all separately represented parties at the e-mail addresses pursuant to N.D.R.Ct. 3.5 to the party below:

Seymour R. Jordan
Attorney for Appellee/Plaintiff
dividesa@nd.gov

[¶2] A copy of these documents was also deposited into the U.S. Mail, addressed to the Defendant/Appellant Charles Spencer Mayland at his last known address, 406 1st Street SW, Crosby, ND 58730.

[¶3] This service was made under N.D.R.Ct. 3.5; N.D.R.Crim.P. 49; and N.D.R.Civ.P. 5(b).

[¶4] Dated this 4th day of October, 2021.

//s// Marie A. Miller
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