

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF WARD

NORTHWEST JUDICIAL DISTRICT

State of North Dakota,)
)
 Plaintiff,)
)
 vs.)
)
 Steve Jay Miller,)
)
 Defendant.)

ORDER

Case No. 51-2013-CR-1910

[¶1] The Defendant, Steve Jay Miller, by and through his attorney Eric Baumann, has filed a *Motion to Dismiss Due to Multiplicity and/or Double Jeopardy, Motion to Hold Invalid, Motion to Suppress Based on Stop*, and a *Motion to Dismiss and/or Suppress Due to Unconstitutionality of Statute Criminalizing Refusal*. The State has filed response briefs for each of the motions filed by the Defendant, and the North Dakota Attorney General has filed an *Amicus Brief in Opposition to Motions to Dismiss and to Suppress Evidence*. The motions have been consolidated into this **ORDER**, and each issue is discussed below.

Facts

[¶2] On August 9, 2013, at approximately 12:19 a.m. the Defendant was stopped by Ward County Sheriff's Deputy Ann Millerbernd (Deputy Millerbernd) for disregarding a traffic-control light west of Minot at the junction of the Highway 2/52 and Highway 83 bypasses. Upon making contact with the Defendant, Deputy Millerbernd detected an odor of alcohol.

[¶3] Deputy Millerbernd asked the Defendant if he would submit to field sobriety screening, and the Defendant complied. The Defendant failed the Horizontal Gaze Nystagmus test with six out of six clues. The Defendant also failed the finger dexterity test. Deputy Millerbernd read the

Defendant the North Dakota Implied Consent Advisory and asked the Defendant to submit to a breath test, but the Defendant refused. Deputy Millerbernd then read the North Dakota Implied Consent Advisory and asked to obtain a blood sample at Trinity Hospital, but the Defendant refused the blood test as well.

[¶]4 The Defendant was charged with Driving Under the Influence, under N.D.C.C. § 39-08-01(1)(b). He was also charged with refusing to submit to a chemical test, under N.D.C.C. § 39-08-01(1)(e)(3). North Dakota Century Code §§ 39-08-01(1)(b) and (e) state:

1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:

a. That person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being actual physical control of a vehicle. . . .

e. That individual refuses to submit to any of the following:

(1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or

(2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; or

(3) An onsite screening test, or tests, of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer under section 39-20-14.

The fact that any person charged with violating this section is or has been legally entitled to use alcohol or other drugs or substances is not a defense against any charge for violating this section, unless a drug which predominately caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to that person.

N.D.C.C. § 39-08-01.

[¶5] The Defendant is challenging his arrest and charges on four different grounds. The Defendant claims: (1) One of the charges against him should be dismissed because of multiplicity or double jeopardy issues; (2) The prior convictions of the Defendant should be invalidated because there was not a valid waiver of rights; (3) The Court should suppress all evidence obtained as a result of the stop because the stop of the vehicle was not supported by “reasonable and articulable suspicion”; and (4) the statute criminalizing refusal is unconstitutional.

Law and Analysis

I. Double Jeopardy

[¶6] The Defendant contends the Court must dismiss one of the charges against him due to multiplicity and/or the Double Jeopardy Clause contained in the Fifth Amendment of the United States Constitution and/or Article I, § 12 of the North Dakota Constitution. The Defendant alleges prosecution under N.D.C.C. § 38-08-01(1)(b) and N.D.C.C. § 38-08-01(1)(e) for the two offenses constitutes double jeopardy.

[¶7] The United States’ Supreme Court set out its test in Blockburger v. United States, 284 U.S. 299 (1932) to determine double jeopardy violations. If each offense contains an element not contained in the other, they are separate offenses and are thus not barred by double jeopardy. Blockburger 284 U.S. 299, 304 (1932). The Defendant claims the two charges against him constitute the same singular offense. However, this claim fails. The offense of driving under the influence in violation of N.D.C.C. § 39-08-01(1)(b) requires proof of driving while being under the influence of intoxicating liquor, and the offense of refusal to submit to a chemical test in

violation of N.D.C.C. § 39-08-01(1)(e) requires proof of driving and refusing to submit to a chemical test. There are separate elements to each offense, and therefore, there is not a Blockburger or Double Jeopardy Clause violation.

[¶8] In Kurth Ranch, the United States Supreme Court conducted a double jeopardy analysis to see if a tax violated the constitutional prohibition against successive punishments for the same offense. Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994). At the time, Montana had a statute requiring a tax on the possession of marijuana, and after a defendant was criminally charged, the state could collect tax, interest, and penalties regarding the drug operation. Id. at 770. The defendant in Kurth Ranch was convicted for possession of marijuana with intent to sell, and later the Montana Department of Revenue sought additional taxes, interest, and penalties for the possession of the marijuana. Id. at 772-73. The court found the tax rate and amount to be collected so high it constituted a form of additional punishment subject to double jeopardy analysis. Id. at 783. Because of this, the court held a second punishment arose from the same conduct as the defendant's criminal charge. Id. at 784.

[¶9] This Court believes the position taken by the Defendant is akin to that of the defendant in Kurth Ranch. The Defendant in the case at hand makes a similar argument that the refusal is a second punishment arising from the same conduct. However, unlike Kurth Ranch, the statutes in question have different elements requiring different conduct. The Defendant took the extra step of refusing, and thus it is distinguishable from Kurth Ranch's holding.

[¶10] Additionally, the Defendant argues the charges arise from the same conduct, and as such, legislative intent should guide the court's decision regarding multiple statutory offenses. The United States Supreme Court has stated: "Where the same conduct violates more than one

statutory provision, the first step in the double jeopardy analysis is to determine whether the legislature . . . intended that each violation be a separate offense.” Garrett v. United States, 471 U.S. 773, 778. That being said, this claim also fails for two reasons. First, the Defendant did not demonstrate the same conduct violated more than one statutory provision, and secondly, he did not provide the Court evidence of legislative intent regarding each violation as a separate offense.

[¶11] This Court finds there are no double jeopardy or multiplicity violations.

II. Hold Invalid Prior Convictions

[¶12] The Defendant moves this court to hold his previous two convictions invalid for the purposes of enhancing his charges. The Defendant has two previous convictions for driving under the influence, one in District Court on July 6, 2010, and the other in Minot Municipal Court on July 31, 2013. In pleading guilty in District Court in 2010, the Defendant executed an acknowledgment of rights form which included an advisory of his right to counsel. In pleading guilty in municipal court in 2013, defendant was given a similar acknowledgment and a waiver of right to counsel.

[¶13] However, the Defendant contends the 2013 municipal court acknowledgment did not indicate a proper waiver of rights. The Court has reviewed the acknowledgments and it does appear the Defendant made changes to his answers on the acknowledgment form and did not sign one of the documents waiving his rights. The North Dakota Supreme Court has stated that “absent a valid waiver of the right to counsel the resulting conviction cannot, under art. I, § 12 N.D. Const., be used to enhance a term of imprisonment for a subsequent offense.” State v. Orr, 375 N.W.2d 171, 178-79 (N.D. 1985). The State countered that a ruling on the issue of enhancement is premature and it is an issue to be proven at trial.

[¶14] This Court agrees with the State. Enhancement is an issue for trial, and a ruling at this time would be premature.

III. Probable Cause to Stop

[¶15] The Defendant contends Deputy Millerbernd did not have a reasonable and articulable suspicion the Defendant was impaired or otherwise violating traffic laws, and as a result, any evidence obtained from the stop should be suppressed. This Court disagrees.

[¶16] Deputy Millerbernd testified she was sitting in her patrol car at a red light at the intersection of Highway 2/52 and Highway 83 bypasses facing east when she first saw the Defendant's vehicle. The Defendant approached the stoplight traveling north. Deputy Millerbernd testified she could see two of the four traffic lights at the intersection, hers and the Defendant's, and both lights were red. The Defendant then proceeded through the red traffic light and made a left turn.

[¶17] The Defendant further contends the lights were not in working order due to construction near the intersection. However, Deputy Millerbernd testified the lights were cycling, and not malfunctioning, at the time of the violation. In order to conduct an investigatory stop, an officer needs to have reasonable and articulable suspicion that a driver may be violating the law, not probable cause. McNamara v. N.D. Dept. of Transp., 500 N.W.2d 585, 587 (N.D. 1993). The severity of the violation is not relevant and even minor violations "constitute prohibited conduct which provide officers with requisite suspicion for conducting investigatory stops." Zimmerman v. N.D. Dept. of Transp., 543 N.W.2d 479, 482 (N.D. 1996).

[¶18] Deputy Millerbernd testified the light was red at the time the Defendant passed through the intersection. Furthermore, the Court has reviewed the August 9, 2013 video footage from

Deputy Millerbernd's patrol car, and this video corroborates the testimony of Deputy Millerbernd. Deputy Millerbernd had a reasonable and articulable suspicion the Defendant had engaged in unlawful activity. Therefore, the motion to suppress based on lack of probable cause must be denied.

IV. Constitutionality

[¶19] The Defendant contends criminalizing a refusal under N.D.C.C. § 39-08-01(1)(e) unconstitutionally violates and/or infringes upon the prohibition against unreasonable searches and seizures, the privilege against self-incrimination, and the due process clause. This Court disagrees.

[¶20] North Dakota recently enacted N.D.C.C. § 39-08-01(1)(e). This statute makes a person guilty of an offense for refusing to submit to chemical testing. North Dakota Century Code § 1-02-38(1) states: "In enacting a statute, it is presumed that: (1) Compliance with the constitutions of the state and of the United States is intended." N.D.C.C. § 1-02-38(1). "The presumption is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution." In re M.D., 1999 ND 160, ¶ 25, 598 N.W.2d 799.

[¶21] The constitutionality of a statute is a question of law and will be upheld unless its challenger has demonstrated the statute's constitutional infirmity. Best Products Co., Inc. V. Spaeth, 461 N.W.2d 91, 96 (N.D. 1990). To adequately raise a constitutional issue, a party must submit more than bare assertions - he must also provide persuasive authority and reasoning. Riemers v. O'Halloran, 2004 ND 79, ¶ 6, 678 N.W.2d 547. A party asserting a constitutional claim must bring up the heavy artillery or forgo the claim. Id.

[¶22] The Defendant cites the recent United State Supreme Court case of Missouri v. McNeely,

569 U.S. ___, 133 S.Ct. 1552 (2013) as binding precedent that creates new authority to overturn N.D.C.C. § 39-08-01(1)(e). (Defendant's Unconstitutionality Brief, Page 3). However, the Defendant mischaracterizes the holding in McNeely. The question before the McNeely court was "whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." McNeely, 133 S.Ct. at 1556. The Supreme Court held: "We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." Id. at 1568.

[¶23] The McNeely holding is narrow, and McNeely has no weight in the current proceeding because it only looked at the constitutionality of a nonconsensual blood draw and not a refusal. The Supreme Court was silent on the issue of the criminalization of refusal in McNeely, and McNeely did not overrule Schmerber or any of its progeny.

[¶24] Furthermore, "[t]here is no Federal constitutional right to be entirely free of intoxication tests." State v. Murphy, 516 N.W.2d 285, 286, n.1 (N.D. 1994). "Allowing drivers to refuse testing is a matter of legislative grace." State v. Murphy, 527 N.W.2d 254, 255-56 (N.D. 1995) (citing South Dakota v. Neville, 459 U.S. 553, 559-60 (1983)). "A state may, therefore, attach penalties to a driver's choice to refuse testing." Id. at 256.

A. Privilege Against Self-Incrimination

[¶25] The Defendant contends the criminalization of refusal in effect criminalizes the exercise of constitutionally guaranteed privilege against self-incrimination. This Court disagrees.

[¶26] In Schmerber, the United States Supreme Court discussed blood draws and the privilege

against self-incrimination. Schmerber v. California, 384 U.S. 757 (1966). The Schmerber court addressed whether an arresting officer may force a blood draw without a warrant after an arrest and refusal to submit to a chemical test. Id. at 760. The Court held blood draws do not violate the Fifth Amendment. Id. at 765.

[¶27] In regard to the relationship between a refusal and the Fifth Amendment, the United States Supreme Court noted that: “[T]he values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him.” South Dakota v. Neville, 459 U.S. 553, 563 (1983). The Neville court concluded “that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.” Id. at 564.

[¶28] The Fifth Amendment does not bar criminalizing a refusal, and the Defendant has not provided specific and persuasive authority that would meet the high burden of determining a statute is unconstitutional.

B. Unreasonable Search and Seizure

[¶29] The Defendant looks to McNeely as authority indicating N.D.C.C. § 39-08-01(1)(e) criminalizes a refusal that may otherwise require a warrant. (Defendant’s Unconstitutionality Brief, Page 3). However, as discussed above, McNeely should not and does apply to the facts at hand. McNeely concerns the forcing of a DUI suspect to submit to a blood draw, not a right to refusal law. McNeely does not impact North Dakota’s implied consent law because there was no non-consensual and warrantless search of the Defendant.

[¶30] The Fourth Amendment prohibits unreasonable searches and seizures in the absence of a

warrant, but the Fourth Amendment has exceptions to the warrant requirement. "Consent and exigent circumstances are exceptions to the warrant requirement." Hoover v. Dir., N.D. Dep't of Transp., 2008 ND 87, ¶ 15, 748 N.W.2d 730. The implied consent set forth in N.D.C.C. § 39-20-01 qualifies as an exception to the warrant requirement. North Dakota Century Code § 39-20-01(1) states:

Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine.

N.D.C.C. § 39-20-01(1). Other states have ruled implied consent laws represent an exception to the Fourth Amendment's warrant requirement. See State v. Aleman, 109 P.3d 571 (Ariz. Ct. App. 2005); State v. Geiss, 70 So.3 642 (Fla. Dist. Ct. App. 2011); Abney v. State, 811 N.E.2d 415 (Ind. 2004); State v. Madison 785 N.W.2d 706 (Iowa 2010); State v. Johnson, 301 p.3d 287 (Kan. 2013); State v. Jude Silbernagel, 215 P.3d 876 (Or. Ct. App. 2005); and Com. v. Riedel, 651 A.2d 135 (Pa. 1994). This Court finds North Dakota's implied consent statute creates a valid exception to the Fourth Amendment.

[¶31] Many states have also looked into the constitutionality of criminalizing refusal to submit to chemical testing statutes and those states have ruled there is no Fourth Amendment right to refuse. See Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986); State v. Wiseman, 816 N.W.2d 689 (Minn. Ct. App. 2012); State v. Hoover, 916 N.E.2d 1056 (Ohio 2009); Rowley v. Commonwealth, 629 S.E.2d 188 (Va. Ct. App. 2006). This Court finds these cases persuasive and the Defendant points to no authority that would contradict a similar

conclusion.

[¶32] Therefore, the Fourth Amendment does not bar criminalizing a refusal, and the Defendant has not provided specific and persuasive authority that would meet the high burden of determining a statute is unconstitutional.

C. Due Process

[¶33] Lastly, the Defendant contends his Due Process rights were violated as a result of criminalizing refusal under N.D.C.C. § 39-08-01. (Defendants, Unconstitutionality Brief, Page 4). The Defendant specifically states: “Section 39-08-01 coerces citizens, not merely through withholding a privilege, but, in some cases such as potentially this case, by mandatory incarceration to surrender federally protected constitutional rights.” *Id.* This Court disagrees.

[¶34] In Frost, the Supreme Court stated the government may not grant a privilege on condition that the recipient forfeits a constitutional right:

[A]s a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost v. R.R. Comm’n of Cal., 271 U.S. 583, 593-94. The Supreme Court cautions that constitutional rights may not be taken away upon conditions set by a state.

[¶35] As discussed above, North Dakota does not violate any constitutional rights by criminalizing refusal. The right to refuse to submit to alcohol test is a matter of legislative grace. It is not a constitutional right. Neville, 459 U.S. at 559-60. There was no violation of the

Fourth or Fifth Amendment in this case, and subsequently, there is no due process violation in this case. Since there is no requirement to surrender constitutional rights, the refusal law does not violate due process.

[¶36] By criminalizing refusal, North Dakota acted within the boundaries of North Dakota and Federal constitutional law. This Court holds the Defendant has not met his burden to prove N.D.C.C. § 39-08-01(1)(e) is unconstitutional under North Dakota or federal law.

Conclusion

[¶37] **IT IS, THEREFORE, ADJUDGED, ORDERED, AND DECREED** that:

Defendant's *Motion to Dismiss Due to Multiplicity and/or Double Jeopardy* is **DENIED**;

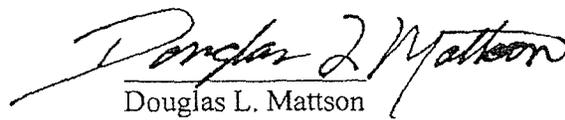
Defendant's *Motion to Hold Invalid* is premature and shall be determined at trial;

Defendant's *Motion to Suppress Based on Stop* is **DENIED**; and

Motion to Dismiss and/or Suppress Due to Unconstitutionality of Statute Criminalizing Refusal is **DENIED**.

[¶38] Dated in Minot, North Dakota, this 15 day of November, 2013.

BY THE COURT:


Douglas L. Mattson
District Court Judge