STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-06

Date issued: February 10, 1998

Requested by: Honorable Pam Gulleson, State Representative

- QUESTIONS PRESENTED -

I.

Under what circumstances may a law enforcement officer seeking to apply the provisions of House Bill 1111 adopted by the 1997 Legislative Assembly and popularly known as the zero tolerance law ask a driver under the age of 21 years to submit to a chemical test under N.D.C.C. § 39-20-01, the implied consent law?

II.

For the purposes of N.D.C.C. ch. 39-20, does N.D.C.C. § 39-20-01 authorize a law enforcement officer to arrest or take into custody an operator of a motor vehicle under the age of 21 years who the officer has probable cause to believe committed an alcohol-related offense other than driving while under the influence or actual physical control?

- ATTORNEY GENERAL'S OPINIONS -

I.

Unless the operator of a motor vehicle under the age of 21 years has given a voluntary consent to chemical testing, the operator must be placed under arrest, or the law enforcement officer must have probable cause to believe that the operator has committed 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. Whether a voluntary consent to chemical testing, absent an arrest or probable cause to believe the operator committed the enumerated offenses, will be sufficient to authorize adverse operator license proceedings by the commissioner of the Department of Transportation may be dependent upon the particular facts and circumstances involved and may be resolved by further opinion or by court decision.

II.

For the purposes of N.D.C.C. ch. 39-20, N.D.C.C. § 39-20-01 does not authorize a law enforcement officer to arrest or take into custody an operator of a motor vehicle under the age of 21 years who the officer has probable cause to believe committed an alcohol-related offense other than driving while under the influence or actual physical control.

- ANALYSES -

I.

House Bill 1111, as adopted by the 1997 Legislative Assembly, and commonly known as the zero tolerance law, established a lower threshold for the invocation of administrative license proceedings against operators of motor vehicles who are under the age of 21 years and who have an alcohol concentration of at least .02 percent by weight.

If a law enforcement officer has determined that the alcohol concentration of a motor vehicle operator under the age of 21 years is at least .02 percent, the same procedures will be followed by that officer for reporting the alcohol concentration to the commissioner of the Department of Transportation as if the operator had an alcohol concentration of .10 percent or above. The issues confronting law enforcement relate not to what those officials must do after a test is obtained but, rather, the procedures allowed and requirements which must be met to obtain that test, especially as those procedures and requirements relate to the arrest and taking into custody of a motor vehicle operator.

N.D.C.C. § 39-20-01, the implied consent statute, is used to assist in determining the alcohol concentration in operators of motor vehicles. An operator of a motor vehicle in this state gives his or her implied consent to perform chemical tests upon compliance with the provisions of N.D.C.C. § 39-20-01 but is given an opportunity to refuse such tests. If consent is given, a chemical test will be performed. If no consent is obtained, no test will be given but adverse license action, which includes suspension or revocation of driving privileges, may occur.

The administrative proceedings and authority to take adverse action against an operator's driving privileges in N.D.C.C. ch. 39-20 are closely tied to compliance with N.D.C.C. § 39-20-01. Although all

the requirements of N.D.C.C. § 39-20-01 may not apply to chemical tests obtained pursuant to N.D.C.C. §§ 39-20-01.1 (test of driver in serious bodily injury or fatal crash) or 39-20-03 (consent of dead or unconscious person), statutory provisions which establish procedures for, and imposition of, administrative actions against an operator's driving privileges are based upon chemical tests given pursuant to the provisions of N.D.C.C. § 39-20-01. See N.D.C.C. § 39-20-03.1 ("If a person submits to a test under section 39-20-01, 39-20-02, or 39-20-03. . ."); N.D.C.C. § 39-20-03.1(2) ("If a test administered under section 39-20-01 or 39-20-03 was by saliva or urine sample or by drawing blood as provided in section 39-20-02. . ."); N.D.C.C. § 39-20-03.2 ("If a person licensed in another state refuses in this state to submit to a test provided under section 39-20-01 or 39-20-14, or who submits to a test under section 39-20-01, 39-20-02, or 39-20-03. . ."); N.D.C.C. § 39-20-04(1) ("If a person refuses to submit to testing under section 39-20-01 or 39-20-14, none may be given, . . ."); N.D.C.C. § 39-20-05, making specific reference to testing in accordance with, or under, N.D.C.C. §§ 39-20-01, 39-20-03, or 39-20-14.

It is my understanding that the primary concern which underlies the opinion request is the House Bill 1111 language which amended N.D.C.C. § 39-20-01. N.D.C.C. § 39-20-01, as amended by the 1997 Legislative Assembly in House Bill 1111, provides:

> Any person 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, saliva, or urine for the purpose of determining the alcohol, other drug, or combination thereof, content of the blood. As used in this chapter the word "drug" means any drug or substance or combination of drugs or substances which renders a person incapable of safely driving, and the words "chemical test" or "chemical analysis" mean any test to determine the alcohol, or other drug, or combination thereof, content of the blood, breath, saliva, or urine, approved by the state toxicologist under this chapter. The test or tests must be administered at the direction of a law enforcement officer only after placing the person, except persons mentioned in section 39-20-03, under arrest and informing that person that the person 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. For the purposes of this chapter, the taking into custody of a child under section 27-20-13 or a person under twenty-one years of age satisfies the requirement of an arrest. The law enforcement officer shall also inform the person charged that refusal of the person to submit to the test determined appropriate will result in a revocation for up to three years of the person's driving privileges. The law enforcement officer shall determine which of the tests is to be used. When a person under the age of eighteen years is taken into custody for violating section 39-08-01 or an equivalent ordinance, the law enforcement officer shall attempt to contact the person's parent or legal guardian to explain the cause for the custody. Neither the law enforcement officer's efforts to contact, nor any consultation with, a parent or legal guardian may be permitted to interfere with the administration of chemical testing requirements under this chapter. The law enforcement officer shall mail a notice to the parent or legal guardian of the minor within ten days after the test results are received or within ten days after the minor is taken into custody if the minor refuses to submit to testing. The notice must contain a statement of the test performed and the results of that test; or if the minor refuses to submit to the testing, a statement notifying of that fact. The attempt to contact or the contacting or notification of a parent or legal guardian is not a precondition to the admissibility of chemical test results or the finding of a consent to, or refusal of, chemical testing by the person in custody.

The underscored portion of N.D.C.C. § 39-20-01 as set forth above is the amendment to this section by House Bill 1111. The language which may cause the most difficulty is:

> For the purposes of this chapter, the taking into custody of a child under section 27-20-13 or a person under twenty-one years of age satisfies the requirement of an arrest.

It is also my understanding that the issue has been raised that this amendatory language has removed any requirement that there be compliance with the laws of arrest when a person under the age of 21 is taken into custody to invoke the provisions of N.D.C.C. § 39-20-01.

An arrest or probable cause to believe a person has committed the driving or actual physical control while under the influence offense has been required before invoking the provisions of N.D.C.C. §§ 39-20-01, 39-20-01.1, and 39-20-03, respectively. State v. Hansen, 444 N.W.2d 330, 331-34 (N.D. 1989). Probable cause to believe that an incapacitated driver was under the influence of alcohol, rather than an arrest, is required if a test is taken pursuant to N.D.C.C. § 39-20-03. Wilhelmi v. Director of Department of Transportation, 498 N.W.2d 150, 154 (N.D. 1993). A lawful arrest is required under N.D.C.C. § 39-20-01. Asbridge v. North Dakota State Highway Commissioner, 291 N.W.2d 739 (N.D. 1980). A driver may not lose his license for refusing to take a blood test unless the driver has been placed under arrest and informed that he is or will be charged with the offense of driving while under the influence of alcohol. State v. Abrahamson, 328 N.W.2d 213 (N.D. 1982).

In State v. Hansen, the Court specifically noted that an arrest may be not only a statutory requirement for implied consent laws but, also, a constitutional requirement. State v. Hansen at 332.

The extraction of bodily fluid, including the drawing of blood, is a search. Schmerber v. California, 384 U.S. 757 (1966); State v. Anderson, 336 N.W.2d 634 (N.D. 1983). In Schmerber, the Court concluded that drawing of blood for the purpose of chemical testing is constitutionally permissible under the Fourth Amendment to the United States Constitution if the operator is first placed under arrest and administration of the blood test is justified in the circumstances and is performed in a reasonable manner. Id. at 770-71.

Any search based upon a mere suspicion that some law has been violated is prohibited and general exploratory searches are forbidden. State v. Gagnon, 207 N.W.2d 260 (N.D. 1973). To justify the extraction of a blood sample, law enforcement officials must have a search warrant, obtain a voluntary consent from the person from whom the blood will be drawn, or must point to an exception to the requirement of a search warrant. State v. Kimball, 361 N.W.2d 601 (N.D. 1985). Schmerber v. California authorized the drawing of blood under the search incident to an arrest exception to the search warrant requirement. However, before the blood test could be performed, there would have had to have been a clear indication that in fact evidence would be found to justify an immediate warrantless search and, second, that the blood test be performed in a reasonable manner. Id. at 770-71.

Under North Dakota law, even if a sample of blood could be taken pursuant to the incident-to-arrest exception, upon a refusal to be tested no test will be given. N.D.C.C. § 39-20-04; State v. Kimball; City of Bismarck v. Hoffner, 379 N.W.2d 797 (N.D. 1985).

The testing of an operator and the taking into custody of that operator for the purpose of testing involve not only statutory but, also, constitutional rights and issues. House Bill 1111 also amended N.D.C.C. § 39-20-05(2) relating to the issues to be determined at the administrative hearing. These issues include:

> whether the person was placed under arrest, unless the person was under twenty-one years of age and the alcohol concentration was less than ten one-hundredths of one percent by weight, then arrest is not required and is not an issue under any provision of this chapter;

Whether an arrest is required may not be an issue at the administrative hearing, but it certainly will be an issue to the law enforcement officer at the scene of a traffic stop faced with the decision as to whether that officer has constitutional authority to detain and take into custody an operator of a motor vehicle.

An arrest is a seizure of a person subject to the Fourth Amendment to the United States Constitution. An arrest occurs when an officer stops an individual and restrains that person's freedom. State v. Gilberts, 497 N.W.2d 93 (N.D. 1993). The North Dakota Legislature has also recognized that custody equals arrest. N.D.C.C. § 29-06-01 provides:

> An arrest is the taking of a person into custody in the manner authorized by law to answer for the commission of an offense.

N.D.C.C. § 29-06-09 similarly provides:

> An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the person making the arrest.

A lawful arrest is based upon an officer's probable cause to believe that an offense has been committed. State v. Halfmann, 518 N.W.2d 729 (N.D. 1994). A law enforcement official who imposes an illegal custody or restraint upon an individual may be subject to liability for a constitutional rights deprivation.

No problem exists if that officer has probable cause to arrest a motor vehicle operator for driving or being in actual physical control of a vehicle upon a public highway while under the influence of intoxicating liquor, drugs, or a combination thereof, regardless of the age of the operator. The problems facing the officer involve situations in which an operator under the age of 21 years has an alcohol concentration of less than .10 percent and the officer has no probable cause to believe that the operator is under the influence of intoxicating liquor, drugs, or a combination thereof.

The House Bill 1111 amendment to N.D.C.C. § 39-20-01 which appears, on its face, to do away with any requirement of any arrest for a person under the age of 21 years under the implied consent law may also compound an officer's concern.

A literal reading of the N.D.C.C. § 39-20-01 amendatory language will raise significant constitutional issues beyond those presented by the Fourth Amendment.

Prior to its amendment, N.D.C.C. § 39-20-01 specifically provided that "the taking into custody of a child under section 27-20-13 satisfies the requirement of an arrest." N.D.C.C. § 27-20-13 is a portion of the Uniform Juvenile Court Act. That section provides:

1. A child may be taken into custody:

   a. Pursuant to an order of the court under this chapter;

   b. Pursuant to the laws of arrest;

   c. By a law enforcement officer or a juvenile supervisor if there are reasonable grounds to believe (1) that the child is suffering from illness or injury or is in immediate danger from his surroundings, and that his removal is necessary, or (2) that the child has run away from his parents, guardian, or other custodian; or

   d. By order of the juvenile supervisor made pursuant to subdivision h of subsection 1 of section 27-20-06.

2. The taking of a child into custody is not an arrest, except for the purpose of determining its validity

> under the Constitution of North Dakota or the Constitution of the United States.

Since juvenile offenders who have not been transferred to adult court do not commit criminal offenses but, rather, delinquent acts, N.D.C.C. ch. 27-20 makes reference to the taking of such offenders into custody rather than arresting the offenders. Alcohol-related driving offenses continue to be within the jurisdiction of the juvenile court. N.D.C.C. § 27-20-02(9). A person under the age of 18 years, who is subject to jurisdiction of the juvenile court under N.D.C.C. ch. 27-20, may be taken into "custody" in one of four ways as set out in N.D.C.C. § 27-20-13 above.

Although N.D.C.C. § 27-20-13(2) does not label custody as an arrest, it is clear that the person under the age of 18 years still has the protections of the Constitutions of North Dakota and the United States to ensure compliance with the laws of arrest. I find no intent in N.D.C.C. § 27-20-13 that an operator of a motor vehicle who is under the age of 18 years possesses any less constitutional right under the laws of arrest than a person over the age of 18 or 21. House Bill 1111 did not amend N.D.C.C. § 27-20-13 to exclude a child under the age of 18 from possessing the protections of the United States and North Dakota Constitutions when taken into custody under N.D.C.C. § 39-20-01.

The zero tolerance law has no impact upon operators of motor vehicles who are 21 years of age or older. The condition precedents to acquiring a chemical test under N.D.C.C. § 39-20-01 remain unchanged. The laws of arrest will apply to operators of motor vehicles who are 21 years of age or older.

Applying a literal reading to the House Bill 1111 amendment to N.D.C.C. § 39-20-01 to operators of motor vehicles who are 18, 19, and 20 years of age could lead to the conclusion that those operators can be taken into "custody" without complying with the laws of arrest. N.D.C.C. § 27-20-13 has no application to a motor vehicle operator 18 years of age or older. Applying the laws of arrest, a motor vehicle operator under the age of 18 could not be taken into custody unless a law enforcement officer had probable cause to believe that the youthful operator drove or was in actual physical control of a motor vehicle on a public highway while under the influence of intoxicating liquor, drugs, or a combination thereof. If the operator was 21 years of age or older, the law enforcement officer would also need the same probable cause to effect an arrest.

To say that the same probable cause and laws of arrest do not apply to operators of a motor vehicle who are 18, 19, or 20 years of age leads to an absurd result which should be avoided. It is presumed that the Legislative Assembly intended that the statute comply with the Constitutions of this state and of the United States, that the entire statute be effective, that a just and reasonable result occur, and that there be a result feasible of execution. N.D.C.C. § 1-02-38. To conclude that the laws of arrest need not apply to offenders between the ages of 18 and 21 before they are taken into custody would raise not only significant Fourth Amendment issues but, also, likely equal protection and due process claims under the Fifth and Fourteenth Amendments to the United States Constitution. To ensure that the entire statute be effective, it is my opinion that the same laws of arrest will apply to an operator of a motor vehicle regardless of that person's age.

Absent a voluntary consent, an arrest is required under N.D.C.C. §§ 39-20-01 and 39-20-01.1 or probable cause to believe that the operator is under the influence of intoxicating liquor under N.D.C.C. § 39-20-03. If a voluntary consent has been obtained, there is no Fourth Amendment constitutional issue presented to the law enforcement officer. However, the question of whether the voluntary consent may support an N.D.C.C. ch. 39-20 administrative license proceeding without a chemical test performed pursuant to N.D.C.C. § 39-20-01 may arise.

If the alcohol concentration of the operator is at least .10 percent, the results of that chemical test will be sent to the Department of Transportation regardless of the age of the motor vehicle operator. If, however, the operator is less than 21 years of age and the alcohol concentration of that operator is less than .10 percent but at least .02 percent, House Bill 1111 evidences a clear legislative intent that the operator be subjected to administrative licensing proceedings before the Department of Transportation commissioner. If a voluntary consent has been obtained from the operator, the chemical test results may be submitted to the commissioner as though the under 21 years of age operator had an alcohol concentration of .10 percent or above. The issue regarding the scope of the N.D.C.C. § 39-20-01 requirements and the authority of the commissioner to take adverse license action in these specific cases may well depend on the particular facts and circumstances involved and may be resolved by the courts or by further opinion from this office.

II.

N.D.C.C. § 39-20-01 specifically requires that the motor vehicle operator be placed under arrest, or taken into custody (for those operators under twenty-one years of age), for 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. House Bill 1111 did not amend N.D.C.C. § 39-20-01 to include other alcohol-related offenses, such as open container or minor in possession, as offenses which would subject an operator of a motor vehicle under the age of 21 years to the implied consent provisions.

The 1997 Legislature could easily have made such amendments to extend the application of N.D.C.C. § 39-20-01 to operators of a motor vehicle who, although they may not be under the influence of intoxicating liquor, are under the age of 21 years and have, or are, committing an alcohol-related offense within that vehicle. An operator of a motor vehicle has no obligation to submit to chemical testing until a law enforcement officer makes a valid request for testing in accordance with the relevant statutory provisions, including N.D.C.C. § 39-20-01. Throlson v. Backes, 466 N.W.2d 124 (N.D. 1991). N.D.C.C. § 39-20-01 is limited to the specifically enumerated offenses.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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