IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, No. 71208

Appellant,

v.

FRANK ALLEN SAMPLE, also known as GREGORY F.A. SAMPLE,

Respondent.

_____/

RESPONSE TO BRIEF IN SUPPORT OF GOOD CAUSE FOR APPEAL

1. **Name of party:** Gregory F.A. Sample

2. **Name of law firm:** Larry K. Dunn & Associates, 1188 California Avenue, Reno NV 89509 (775) 322-5656.

3. **Name of law firm if different from trial counsel:** Not applicable

4. **Proceedings raising same issues:** Not applicable.

5. **Procedural history:** The fast track statement is satisfactory.

6. **Statement of facts:**

Respondent has no additional exhibits from those in the State's Appendix, hereafter SA, although not consulted or contacted by Appellant to compile a joint appendix. In the district court's Order Granting Motion to Suppress, Findings of Fact, the court found that the deputy testified under oath in support of the telephonic search warrant that he had pursued Respondent's vehicle traveling

"between 55 and 65 miles per hour". SA, 123. The district court found that the deputy testified at the Motion to Suppress hearing that he reached speeds of 70 miles per hour. *Id.,* 123. The district court found that the deputy testified in support of the telephonic Search Warrant that Respondent consented to the preliminary breath test (PBT), however, the deputy conceded at the Motion to Suppress hearing "that Mr. Sample did not consent and instead submitted to Deputy Swanson's directive to blow into the PBT device." *Id.,* 124. The district court found that the deputy's testimony at the suppression hearing, stating that he was prepared to make an arrest before the PBT, differed from the deputy's testimony at the DMV hearing. *Id.,* 124. The district court found that "Further the Deputy admitted he was changing his testimony from prior testimony and Mr. Sample did not consent to the PBT". *Id.,* 125. In its conclusions of law, the district court found, "that the record belies Deputy Swanson's assertion that he was prepared to arrest Mr. Sample prior to administration of the PBT." *Id.,* 129. Finally, the district court stated, "Further, Deputy Swanson's testimony at the evidentiary hearing regarding his training as to the Implied Consent Law was inconsistent." *Id.,* 131.

7. Issues on appeal.

A. The issue raised by Appellant as to whether a preliminary breath test (PBT) is a permissible search incident to arrest within the meaning of *Birchfield v. North Dakota,* ___ U.S. ___, 136 S. Ct. 2160 (2016) was not raised, preserved or mentioned in the lower court proceeding. As such, the record is devoid of any factual findings, legal briefings or arguments addressing whether the PBT administered in the present case, was a search incident to arrest.

B. The issue raised by Appellant as to whether an officer's subjective belief, rather than an objective evaluation of the totality of the circumstances determines

whether a suspect is under arrest is not applicable to this case. The district court expressly applied the appropriate objective evaluation of the totality of the circumstances in making the determination that probable cause for an arrest did not exist.

C. Where the facts are in dispute, the issue raised by Appellant as to whether the deputy's observations, without considering the PBT results provided probable cause for an arrest is a factual determination left to the district court.

8. Legal argument.

A. In the district court, Appellant argued that Respondent's reliance on *Birchfield* was misplaced because the Supreme Court considered the "administration of an evidentiary breath test administered incident to arrest –**not a preliminary breath test** conducted **prior to arrest**." SA., 039 (emphasis added). Secondly, Appellant argued, unlike a blood draw considered in *Missouri v. McNeely,* 569 U.S. __, 133 S. Ct. 1552 (2013), a "warrantless **evidentiary breath test** may be reasonably conducted as a search incident to arrest." SA., 039. (emphasis added).

In its Order Granting Motion to Suppress, the district court stated:

> Case law establishes the "administration of a breath test is a search" under the Fourth Amendment. Birchfield v. N. Dakota,, 136 S. Ct. 2160, 2173 (2016). . . In Birchfield v. N. Dakota, the Court concluded "the Fourth Amendment permits warrantless breath tests **incident to arrests** for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great." 136 S. Ct. 2160, 2184 (2016) (emphasis added). It is clear the Birchfield Court did not, however, extend this exception to searches *prior to arrest*. Accordingly, as set forth above, a valid exception or consent is necessary to justify a warrantless search. (emphasis in original).
> SA., 126-129.

Contrary to Appellant's arguments made in the district court in an effort to distinguish *Birchfield's* applicability to a preliminary breath test, Appellant for the first time on appeal propounds that that *Birchfield* allows for the admissibility of a preliminary breath test incident to arrest. In examining the facts and legal argument within the scope proffered by Appellant, the district court made its findings of facts and conclusions of law. The district court found that *Birchfield, Id.* at 2173, established that the administration of a breath test is a search under the Fourth Amendment. SA., 126. The district court noted that the Nevada Legislature has specifically limited the admissibility of the results of a preliminary breath test to show "reasonable grounds to make an arrest." NRS 484C.150(3). SA., 127. The district court concluded that *Birchfield* did not extend to searches *"prior to arrest"*. SA., 127 (emphasis in original). Concluding that the preliminary breath test was a nonconsensual search conducted prior to arrest, the district court granted the Motion to Suppress disallowing the results to show reasonable grounds to make an arrest. SA., 128.

The district court was never presented with the theory that the preliminary breath test was administered incident to the arrest. The fact that the preliminary breath test can only be used to show that there were reasonable grounds to make an arrest contradicts the notion that the test was administered after the arrest had occurred. NRS 484C.150(3). At the district court, Appellant specifically acknowledged that the preliminary breath test was "conducted prior to arrest". SA., 039.

This court generally does not consider issues raised for the first time on appeal. *Herman v. State,* 122 Nev. 199, 204, 128 P.3d 469, 472 (2006). An appellate court is not the appropriate forum in which to resolve disputed questions of fact. *Liu v. Christopher Homes, L.L.C.,*130 Nev. Adv. Op. 17, 321 P.3d 875, 881

(2014). Significantly, the district court was never presented with facts supporting a theory that an arrest had occurred prior to the administration of the preliminary breath test. Significantly, the district court did not hear the legal argument, presented here for the first time on appeal, that the arrest had occurred prior to the administration of the preliminary breath test, and Appellant's citations to *State v. McKellips,* 118 Nev. 465, 49 P.3d 665 (2002) and *Arterburn v. State,* 111 Nev. 1121, 901 P.2d 668 (1995). (Appellant's Brief p. 11-12). Given the district court's examination of disputed facts at the evidentiary hearing assessing the credibility of the deputy and subsequent conclusions of law lead to a finding that the deputy did not have probable cause for an arrest absent consideration of the preliminary breath test results, it is likely had the district court been presented with the argument, Appellant's argument would not have been successful.

B. Appellant raises the question as to whether an officer's subjective belief, rather than an objective evaluation of the totality of circumstances determines whether a suspect is under arrest. (Appellant's Brief p. 3). Respondent agrees that an objective evaluation of the totality of circumstances is the proper standard. However, the district court expressly applied an objective assessment of the totality of the circumstances:

> Probable cause for arrest exists "if the facts and circumstances **known to the officer at the time** of the arrest would lead a prudent person to believe that a felony was committed by the defendant." Franklin v. State, 96 Nev. 417, 420 610 P.2d 732 (1980) (emphasis added). This Court examines the facts through an "objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." Maryland v. Macon, 472 U.S. 463, 470-71, 105 S. Ct. 2778, 2783 (1985). SA., 128.

The district court specifically listed the indicia of intoxication identified by the deputy. SA., 128. The district court went on to note, "However, field sobriety

tests or a preliminary breath test are usually administered to confirm an officer's suspicions. NRS 484C.150; see also Rincon, 122 Nev. at 1172, 147 P. 3d at 235; Byars, 130 Nev. Adv. Op. 85, 336 P.3d at 942." SA., 128-129. In support of the district court's conclusion, NRS 484C.150(1) states in relevant part, that a person is deemed to have consented to a preliminary breath test at the direction of a police officer, "if the officer has reasonable grounds to believe that the person was: (a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance." Hence, the district court's interpretation that an officer's suspicions are normally subject to confirmation is mirrored by the legislative precondition that an officer already harbors a reasonable suspicion that the person is under the influence prior to requiring submission to a preliminary breath test. Consequently, the district court applied an objective assessment of the facts known to the officer at the time.

C. While Appellant correctly acknowledges where the facts relating to the existence of probable cause are not in dispute, it becomes a question of law whether such facts constitute probable cause citing to *Bonamy v. Zanoff,* 77 Nev. 250, 362 P.2d 445 (1961). (Appellant's Brief p. 13). Appellant incorrectly asserts that the facts leading to the administration of the preliminary breath test are not in dispute. *Id.* "We emphasize that the district court is in the best position to adjudge the credibility of the witnesses and the evidence, and unless this court is left with the definite and firm conviction that a mistake has been committed, this court will not second-guess the trier of fact." *State v. Rincon,* 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (internal citations omitted).

The district court's Order Granting Motion to Suppress is replete with instances in which the evidence was disputed and ultimately resolved by the district court's objective assessment of the deputy's testimony and credibility at the

evidentiary hearing. SA., 122. Appellant's basic premise that the facts are undisputed is erroneous. "A district court's findings of fact in a suppression hearing are reviewed for clear error. *State v. Lisenbee,* 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000). Under this standard of review, "factual determinations . . . are given deference on appeal if they are supported by substantial evidence." *Goudge v. State,* 128 Nev. ___, ___, 287 P.3d 301, 304 (2012). This a lenient standard: "Substantial evidence is 'evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Thompson v. State,* 125 Nev. 807, 816, 221 P.3d 708, 715 (2009) (quoting *Brust v. State,* 108 Nev. 872, 974-75, 839 P.2d 1300, 1301 (1992))." *State v. Cantsee,* 130 Nev. Adv. Op. 24, 287 P.3d 301, 304 (2014).

Appellant cites to *Dixon v. State,* 103 Nev. 272, 737 P.2d 1162 (1987), for the proposition that probable cause to arrest may be established absent a preliminary breath test. Appellant notes in *Dixon*, the defendant's vehicle was weaving and speeding, the defendant exhibited bloodshot watery eyes, admitted to drinking, and swayed while standing. (Appellant's Brief p.14).

Appellant failed to note in *Dixon*, the defendant's vehicle almost struck the trooper's patrol car, which was parked off the roadway with its overhead lights on; the truck was weaving within both traffic lanes; the defendant almost fell when exiting his vehicle; the defendant appeared to walk as if he were on a tightrope; and, the defendant appeared confused. *Id.,* at 273. Additionally, Appellant failed to note in *Dixon,* even with the undisputed voluminous indicia of intoxication, the trooper administered a field sobriety test to confirm his suspicions. *Id.* In *Dixon* the court noted that an officer is not required to make an arrest based upon indicia of intoxication alone because an officer may be uncertain as to whether probable cause to arrest exists. *Id.,* fn. 1.

The present case is factually distinguishable from *Dixon* as Respondent's vehicle did not almost strike a police vehicle parked off the roadway with its overhead lights activated; Respondent did not almost fall when exiting the vehicle or walk like he was on a tightrope; No field sobriety tests were administered; and the deputy improperly administered a preliminary breath test in an attempt to confirm his suspicions. In the present case, unlike *Dixon,* the facts leading up to the arrest are disputed. As concluded by the district court in the present case, "In hindsight, the facts and circumstances may appear sufficient; however, this Court is tasked with an examination of the totality of the circumstances at the time the officer observed them. In this case, the chronology of the events is pivotal and the Court concludes the facts and circumstances confronted by Deputy Swanson at the time of Mr. Sample's investigatory detention are insufficient to support a finding of probable cause for the arrest absent further confirmation." SA., 129.

While Appellant invites this court to make an independent evaluation of the facts, the district court, in reaching its conclusion, applied the correct standard in objectively evaluating the facts and circumstances at the evidentiary hearing in which the district court objectively judged the credibility of the witness and sufficiency of the evidence.

9. Preservation of issues.

Conspicuously absent from Appellant's brief, is any reference to preserving the issues raised on appeal. While Appellant filed an Opposition to Motion to Suppress/Dismiss in the district court, there was no factual or legal argument asserting that the preliminary breath test was admissible as a search incident to an arrest. SA., 034. As a predicate for asserting that the preliminary breath test is admissible as a search incident to the arrest, for the first time on appeal, Appellant

asserts that the preliminary breath test was administered after Respondent had been placed under arrest. Appellant's assertion on appeal is the opposite as that expressed in the Opposition to Motion to Suppress/Dismiss in district court. As such, the district court made no factual findings as to whether there was a de facto arrest prior to the administration of the preliminary breath test. As such, the district court made no conclusions of law as to whether there was a de facto arrest prior to the administration of the preliminary breath test. As such, the district court was not afforded the opportunity to address the issue now raised by Appellant. As such the issue should not be considered by this Court. *Herman*, id.

Appellant's conclusion that the district erred in considering the timing of the preliminary breath test was not raised in the district court. While statutorily not admissible at trial, the preliminary breath test is expressly limited to support probable cause for an arrest. NRS 484C.150(3). A finding that there was insufficient evidence to support probable cause absent consideration of the preliminary breath test was a proper inquiry by the district court. Appellant's conclusion that the district court erred in finding that *Birchfield* required a "formal arrest" in order for a breath test to be a permissible search incident to arrest was an issue not raised in the district court. Appellant's only contentions in the district court were that *Birchfield* did not apply to a preliminary breath test conducted prior to an arrest and only applied to the admissibility of an evidentiary test conducted incident to an arrest. SA., 039. Lastly, Appellant's conclusion that the district court's factual determination was based on undisputed facts was not raised in the district court. The Order Granting Motion To Suppress is replete with factual findings from disputed facts. SA., 122.

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4) the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(A)(6) because:

   This fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 14 font using Times New Roman.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is:

   Proportionately spaced, has a typeface of 14 points or more and contains 2917 words and does not exceed 11 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellant counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 25th day of October, 2016.

Larry K. Dunn

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25th day of October, 2016. Electronic Service of the foregoing documents shall be made in accordance with the Master Service List as follows:

Washoe County District Attorney's Office

Tammy Latimer

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Larry K. Dunn & Associates