IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

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

Respondent.

_____/

No. 71208

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

I. STATEMENT OF THE CASE

This is an appeal of the district court's grant of a motion to suppress in a felony Driving Under the Influence Case. After waiving preliminary hearing, the State filed an information charging Sample with felony Driving Under the Influence under Nevada's "once a felon, always a felon" statute, because he had a previous felony DUI conviction from 2009. State's Appendix, hereinafter "SA," 18-19. Sample filed a motion to suppress in the district court based on three grounds:

> Mr. Sample seeks to suppress on the following grounds: (1) that the results of the preliminary breath test ("PBT") administered by officers is inadmissible because the PBT device was not properly calibrated according to statute; (2) the PBT results must be suppressed as a non-consensual search in violation of the Fourth Amendment; (3) because the PBT results cannot be used as probable cause for Mr. Sample's

> arrest, there is insufficient evidence to support probable cause for the arrest and all evidence obtained from the illegal arrest must be suppressed.

SA, 122-123.

Much of Sample's suppression motion focused on allegations regarding calibration, but that argument was rejected by the district court: "evidence presented regarding the calibration of the PBT as a basis to invalidate the result was not adequately addressed and the Court rejects this argument." *Id.*, 128; 25-29. Sample also argued that the "preliminary breath test was the result of a warrantless nonconsensual search." *Id.*, 30. Because Sample "did not expressly consent to submit to the PBT but simply stated 'okay' " when instructed to blow, he reasoned that his consent to the PBT was not "freely and voluntarily" given, rendering Nevada's Implied Consent Law irrelevant. *Id.*, 32. He also argued that the holding in *Birchfield v. North Dakota*, 579 U.S. ___ (2016), rendered the PBT an unreasonable warrantless search. SA., 28. Sample urged that because the PBT results should not be used, all the fruits of the arrest, including blood drawn after obtaining a warrant, which revealed descending blood alcohol concentrations of .193, .185, and .170, should also be suppressed. *Id.*

Based on the deputy's expected testimony, the State argued that Sample's reliance on *Birchfield* was misplaced. SA, 39. It maintained that the PBT result was admissible, and that the presence of probable cause should be

determined based upon an objective standard, not a police officer's subjective analysis. *Id.* In the event that the district court disregarded the PBT result, the State maintained the deputy's other observations alone supported probable cause:

> ...a driving pattern which included speeding, failing to maintain lane, and failure to bring a vehicle to a stop abruptly. Second, Deputy Swanson observed the Defendant to have red watery eyes, a smell of an alcoholic beverage coming from his vehicle, and fumbling through his paperwork. Third, the Defendant was unable to respond to commands from Deputy Swanson; he did not stop drinking from a container when asked, and he did not get out of his vehicle when asked. Fourth, when speaking to the Defendant directly, an odor of an alcoholic beverage could be smelled. Fifth, the Defendant was observed to have an unsteady gait, and admitted to drinking "a couple beers." Lastly, the Defendant was unable to follow directions again when he stopped walking to the patrol vehicle, and when he walked away from the patrol vehicle.

SA, 41.

After the hearing, the district court granted the motion to suppress. *Id.*, 122-132. Specifically, it found that 1) Sample did not consent to the PBT; 2) the deputy relied on the PBT for probable cause for the arrest; and 3) the good faith exception to the exclusionary rule did not apply. *Id.* The State appealed the district court order. Pursuant to this Court's order, the State filed its brief in support of good cause on September 29, 2016. Sample responded that the appeal was not supported by good cause on October 26, 2016, but this Court ordered full briefing on January 12, 2017.

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II. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to NRS 177.015 (2). On September 6, 2016, the State filed a timely notice of appeal from the district court's order granting a motion to suppress. In its Order of January 12, 2017, this Court exercised its discretion to entertain this appeal pursuant to NRS 177.015 (2), and ordered full briefing.

III. ROUTING STATEMENT

This is an appeal of a pretrial order pursuant to NRS 177.015 (2). It regards a category B felony, Driving Under the Influence, a violation of NRS 484C.110 and NRS 484C.410. As such, it would be appropriately retained by the Nevada Supreme Court. NRAP 17 (b).

IV. STATEMENT OF FACTS

Sample waived preliminary hearing. *Id.*, 21. The record in this case is limited to the transcripts of the suppression hearing, search warrant application, and administrative hearing at the Department of Motor Vehicles.[1] The sole witness to testify with respect to all three events was Deputy Joshua Swanson. Deputy Swanson testified that he had been trained to investigate whether or not a driver was under the influence during a 2004 week-long training specifically dedicated to that subject. *Id.*,

[1] As Sample submitted the search warrant affidavit and DMV transcripts as exhibits to his motion to suppress, they are part of the record on appeal.

65. He further testified that just prior to transferring to a patrol assignment, he took the same week-long course a second time in early 2015. *Id.* When he pulled Sample over, Deputy Swanson had investigated 7 to 10 DUIs. *Id.*, 66.

At about 2:23 a.m. on August 30, 2015, Deputy Swanson was on patrol and driving northbound on Lemmon Valley Boulevard. *Id.*, 67. His attention was drawn to a vehicle in the number two, right-hand travel lane. *Id.* He observed the vehicle cross over the fog line, and then quickly accelerate. *Id.* The vehicle then crossed over the double yellow lines separating northbound and southbound traffic. *Id.*, 68. It then crossed into a southbound left-turn lane before veering back into the northbound travel lane. *Id.* Had a southbound vehicle been in that left-turn lane, disaster might have ensued. *Id.*, 69-70. In order to catch up to the vehicle, Deputy Swanson had to accelerate to speeds of approximately 70 miles per hour—twice the posted speed limit of 35 miles per hour. *Id.*, 68-69.

The deputy activated his overhead lights in an effort to initiate a traffic stop. *Id.*, 70. Although the vehicle slowed dramatically, it did not pull over, and continued to travel northbound on Lemmon Valley Boulevard, ignoring opportunities to stop. *Id.*, 70-71. It turned right onto Palace Road, but still did not yield. Deputy Swanson activated his siren.

The vehicle did not pull over but eventually made a left turn into a residential driveway. *Id.*

Deputy Swanson also pulled into the driveway, and approached the driver's side of the vehicle. Although the driver, later identified as Sample, only rolled the window partially down, the deputy immediately observed Sample's red watery eyes and the smell of alcohol emanating from the vehicle. *Id.*, 73. Sample was drinking a clear liquid from a plastic bottle, which he refused to put down despite being instructed to do so five separate times. *Id.*, 73-74. According to the deputy's training, Sample's appearance, odor of alcohol, and failure to comply with police commands were consistent with a person under the influence of alcohol. *Id.*, 74. Sample eventually admitted to drinking a "couple of beers." *Id.*, 74. His speech was slow and slurred. *Id.*, 75.

Deputy Swanson's partner, Deputy Van Der Wall, arrived on scene. Sample was instructed to exit his vehicle, but he would not comply. *Id.*, 76. Deputy Swanson eventually reached through the open window and opened the driver's side door from the inside. *Id.*, 76. At that point, Sample exited. He was unsteady on his feet. *Id.*, 76. The deputy had to direct Sample multiple times to walk to the front of his patrol vehicle before deputies finally grabbed Sample by the arm and escorted Sample. *Id.*, 77. As

Deputy Swanson gathered paperwork associated with the investigation, Sample attempted to walk toward the residence. *Id.*, 78. At that point, deputies restrained him and handcuffed him. *Id.*, 78-79.

Because Sample was uncooperative, Deputy Swanson felt that field sobriety tests could not be safely conducted. *Id.*, 79. The deputy testified on cross-examination that he did not even administer the horizontal gaze nystagmus test because he had been trained to only administer that test to a standing individual. *Id.*, 107. Based on all the information available to him, including 1) Sample's driving pattern; 2) Sample's uncooperative behavior; 3) Sample's slurred speech; 4) Sample's admission to drinking alcohol; 5) the smell of alcohol emanating from Sample's vehicle; 5) Sample's red watery eyes; and 6) Sample's unsteady gait, Deputy Swanson felt that Sample was "absolutely under the influence of an alcoholic substance." *Id.*, 79.

After handcuffing Sample, Deputy Swanson borrowed a preliminary breath test instrument from another officer and administered a preliminary breath test, telling Sample "blow into this." *Id.*, 81-82; 87. Swanson testified at the suppression hearing that the PBT was administered "to simply confirm what my own observations were with regards to my thoughts on him being under the influence of alcohol." *Id.*, 81. This

testimony varied from his testimony during the DMV hearing, wherein Deputy Swanson testified Sample was not under arrest prior to administering the PBT. *Id.*, 11.

In granting the motion to suppress, the district court found a warrant was required for the administration of the PBT, that the PBT was unlawfully administered, and that absent the PBT result, no probable cause existed. *Id.*, 126-127. The State appeals.

V. SUMMARY OF ARGUMENT

A. Where a suspect has been seized, restrained, and handcuffed prior to the administration of a preliminary breath test, is the road side test a permissible search incident to arrest within the meaning of *Birchfield v. North Dakota*?

B. Whether an officer's subjective belief, rather than an objective evaluation of the totality of circumstances, determines whether a suspect is under arrest?

C. Where Deputy Swanson observed Sample's erratic driving, initial failure to yield, red watery eyes, smell of alcohol, slurred speech, admission to drinking alcohol, and unsteady gait, whether probable cause existed to place Sample under arrest for DUI without the preliminary breath test?

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VI. SUMMARY OF ARGUMENT

For purposes of this appeal only, the State does not dispute the factual findings underlying the district court's order. Instead, it appeals the court's application of law to those facts. Although the district court correctly recited appropriate legal authorities concerning arrest and probable cause, it misapplied them. Relief was granted based on three erroneous premises: 1) that a warrant or formal arrest is required in order for a deputy to administer a preliminary breath test; 2) that a deputy's subjective evaluation as to whether he has sufficient evidence to support probable cause determines whether an arrest is Constitutionally valid; and 3) that an officer's subjective intent, rather than objective indicia of arrest, determine an individual's custody status. This Court should reverse the district court's suppression order.

VII. STANDARD OF REVIEW

On appeal of an order granting a motion to suppress, the Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

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VIII. ARGUMENT

A. Administration of the PBT Did Not Violate the Holding in *Birchfield*.

In granting the motion to suppress, the district court cited *Birchfield v. North Dakota*, __U.S. __, 136 S. Ct. 2160 (2016). Although reliance on that case was proper, the court's application of *Birchfield's* holding to the facts of Sample's case was not. Although the district court acknowledged that *Birchfield* permits a warrantless breath test incident to arrest, it held that because Sample was directed to blow into the preliminary PBT prior to being placed under arrest, the warrant exception did not apply. *Id.*, 127. The district court concluded:

> In this case, the evidence shows Mr. Sample was not given a choice to take a preliminary breath test. Instead he was handcuffed, placed in the rear of the patrol car, and directed to blow into the PBT device. Deputy Swanson testified Mr. Sample did not consent to the PBT. The Court concludes the PBT was the product of a nonconsensual search and must be suppressed.

Id., 127.

In *Birchfield*, the United States Supreme Court consolidated the appeals of three different drunk drivers: Birchfield, who refused an evidentiary blood draw and was charged with a crime for that refusal; Bernard, who refused to submit to an evidentiary breath test, and was charged with a crime for that refusal; and Beylund, who agreed to an

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evidentiary blood draw only after being informed that refusal to consent was a crime. *Birchfield*, 136 S. Ct. 2160, 2170-2173.

Birchfield drove his car off a North Dakota highway, and was trying to back the car out of a ditch when a trooper approached. *Id.*, 2170. The trooper noted Birchfield's eyes were bloodshot and watery. *Id.* Birchfield was unsteady on his feet, and his speech was slurred. He performed poorly on field sobriety tests. *Id.* The trooper then informed Birchfield of his obligation to submit to a roadside breath test under North Dakota's implied consent statute. *Id.* Like Nevada, North Dakota only uses such tests to support cause for further evidentiary testing. *Id.* The Court noted that "because the reliability of these preliminary or screening breath tests varies, many jurisdictions do not permit their numerical results to be admitted in a drunk-driving trial." *Id.*

It was only after Birchfield's "screening test estimated that his BAC was 0.254 %" that "the State trooper arrested Birchfield, gave the usual Miranda warnings, again advised him of his obligation under North Dakota law to undergo BAC testing and informed him…that refusing to take the test would expose him to criminal penalties." *Id.*, 2171. Ultimately, Birchfield refused to undergo the blood draw and appealed the statute

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criminalizing that refusal. *Id.* He did not challenge the preliminary breath test on the basis that it was administered prior to his formal arrest, and the *Birchfield* opinion did not find the timing of those two events to be significant to its analysis.

Beylund was arrested after he hit a stop sign, and taken to the hospital. *Id.*, 2172. The officer read North Dakota's implied consent law, the same law read to Birchfield. *Id.* Unlike Birchfield, Beylund agreed to have his blood drawn and analyzed. He later challenged his consent as coerced due to the statute criminalizing refusal of a blood test. *Id.*

Unlike the other appellants in *Birchfield*, Bernard's case involved an evidentiary breath test. Bernard was witnessed driving his truck in his underwear near a boat launch. *Id.*, 2171. When police arrived, he admitted to driving, exhibited bloodshot, watery eyes, and his breath smelled of alcohol. Bernard refused to perform field sobriety tests, and was arrested for driving while impaired. *Id.* At the police station, he was read Minnesota's implied consent law, which included criminal penalties for refusing an evidentiary breath test. *Id.* Bernard refused the breath test, and was charged with the refusal crime. *Id.*

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As applied to both Beylund and Birchfield, the United States Supreme Court found that statutes criminalizing the refusal of an evidentiary blood test are unconstitutional based upon the reasoning previously articulated in *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013). *Birchfield* at 2174. But when considering Bernard's refusal of an evidentiary breath test, the Court reached a different conclusion. Noting that breath tests do not implicate the same privacy concerns due to the minimal physical intrusion, and yield minimal personal information, it found that "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." *Id.*, 2184. The Court found that Bernard's breath test was a permissible search incident to arrest. *Id.* Like Bernard, Sample was under arrest at the time he blew into the PBT device, as discussed in the next section.

B. An Objective Evaluation of the Totality of the Circumstances, Not the Officer's Subjective Opinion, Determines Whether a Suspect Was Under Arrest.

The district court erred in finding that Sample was not under arrest at the time of the PBT, simply because the deputy testified at the DMV hearing that he was not sure about probable cause. The inherent flaw of the lower court's reasoning is its emphasis on the officer's subjective opinion about Sample's status, rather than an analysis of Sample's custodial status based on the circumstances. Whether or not someone is

under arrest is a matter of objective legal analysis, not an officer's subjective opinion. There is no bright-line rule for determining whether a detention crosses the line and becomes an arrest. *State v. McKellips*, 118 Nev. 465, 49 P.3d 665 (2002).

There has been an arrest if, under the circumstances, a reasonable person would feel that he was not free to leave after brief questioning. *Arterburn v. State*, 111 Nev. 1121, 901 P.2d 668 (1995). Here, an objective evaluation of Sample's circumstances demonstrates he was under arrest. Prior to the administration of the PBT, Sample was followed by a marked patrol vehicle utilizing its lights and siren. SA, 70-71. He was followed into a residential driveway. *Id.* After the deputy noticed signs and symptoms of intoxication, Sample was questioned about whether he had been drinking alcohol. *Id.*, 74. When he refused to leave his vehicle, Deputy Swanson reached through the partially opened vehicle window, and opened the door from the inside. *Id.*, 73-74. When Sample tried to walk into the residence on two occasions, police stopped him and physically seized him, putting him in a wrist lock. *Id.* He was handcuffed and placed in the back of a patrol vehicle prior to administration of the PBT. *Id.*, 9-10, 78. Regardless of Deputy Swanson's opinion as to whether Sample was under formal arrest, or whether the PBT was needed to ensure probable cause for the

arrest, Sample could not have reasonably felt he was free to leave. Sample's vehicle was seized by a police vehicle's takedown lights and siren. Police reached into his vehicle, opened his door, and physically prevented him from walking into the residence. They placed him in a wrist lock, then handcuffs, then the back of the police car. All that was missing to complete the picture of arrest was the phrase "you're under arrest," and no such talismanic phrase was required.

C. Even Without the Preliminary Breath Test Result, There Was Probable Cause to Arrest Sample.

The district court found that suppression was warranted because "Deputy Swanson relied on the PBT for probable cause for the arrest." *Id.*, 128. It acknowledged, however, that Sample's "eyes were red and watery, his speech was slurred, he smelled of alcohol, and he refused to cooperate with all of Deputy Swanson's instructions." *Id.* "When 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." *Bonamy v. Zenoff*, 77 Nev. 250, 362 P.2d 445 (1961). Probable cause to arrest exists when the police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that a crime has been committed. *McKellips, supra*, at 272 (*quoting Arterburn, supra).* Here, the facts leading up to administration

are not in dispute. Despite objective indicia of intoxication, the district court concluded that "…the facts and circumstances known to Deputy Swanson at the time reveal he did not possess probable cause to arrest Mr. Sample absent further confirmation in the form of FSTs, consent to a PBT, or refusal to take a PBT." SA, 129.

The district court's factual recitation recognized Sample's failure to yield, unsteady gait, admission to drinking, and observed driving pattern, which included swerving across double lines into a turning lane reserved for oncoming traffic. These are circumstances that would warrant a reasonable officer of reasonable caution to believe a crime has been committed, even without the preliminary breath test result. *See Dixon v. State*, 103 Nev. 272, 737 P.2d 1162 (1987) (probable cause to arrest, absent preliminary breath test, where defendant's vehicle was weaving and speeding, defendant exhibited bloodshot watery eyes, admitted to drinking, and swayed while standing).

IX. CONCLUSION

This is not a case where Sample's evidentiary test results of .193, .185, and .170, were obtained without a warrant. This is also not a case where probable cause to arrest was lacking. Instead, the district court based its decision to suppress all evidence gained from Sample's arrest on the timing

of the administration of a preliminary breath test that cannot even be admitted at trial. It erred in interpreting *Birchfield* as requiring a suspect to be placed under formal arrest in order for a breath test to be a permissible search incident to arrest. It erred in finding that bad driving, object indicia of intoxication, and admission to drinking do not constitute probable cause to believe a DUI has occurred. Its decision should be reversed.

DATED: February 13, 2017.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the transcript or appendix where

the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: February 13, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 13, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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