

**ORIGINAL**

20010037

IN THE SUPREME COURT

RECEIVED BY CLERK  
SUPREME COURT

JUL 2 '01

STATE OF NORTH DAKOTA

State of North Dakota, )

Appellee, )

vs. )

Rodney Lee Lynch, )

Appellant. )

Supreme Court No. 20010037

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUN 29 2001

STATE OF NORTH DAKOTA

---

APPEAL FROM THE WARD COUNTY DISTRICT COURT,  
NORTHWEST JUDICIAL DISTRICT  
BEFORE THE HON. GLENN DILL, III, DISTRICT JUDGE

---

---

APPELLEE'S BRIEF

---

Rozanna C. Larson 05294  
Assistant State's Attorney  
Ward County Courthouse  
Minot, ND 58701  
Telephone: 701-857-6480  
ATTORNEY FOR THE APPELLEE

Thomas K. Schoppert 03060  
Northland Professional Building  
600 22<sup>nd</sup> Ave. NW  
Minot, ND 58703  
Telephone: 701-852-1041  
ATTORNEY FOR THE APPELLANT

## TABLE ON CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
Cases .....	ii
Statutes, Rules or Other Authorities .....	ii
Issues .....	iii
Statement of the Case:	
A. Proceedings Below .....	iv
B. Statement of Facts .....	iv
Argument:	
I. THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE REPORT OF BLOOD TEST RESULTS..	1
II. THE JUDGEMENT OF CONVICTION SHOULD NOT BE REVERSED NOR SHOULD THE DEFENDANT BE GIVEN A NEW TRIAL.....	8
Conclusion .....	9
Affidavit of Mailing .....	10

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGES</u>
<u>Bowman v. Eppinger,</u> 44 NW 1000 (ND 1890).....	7
<u>City of West Fargo v. Hawkins,</u> 2000 ND 168, 616 NW2d 856 (ND 2000).....	3, 4
<u>City of Yuma v. Evans,</u> 336 P2d 135 (1959).....	7
<u>State v. Asbridge,</u> 555 NW2d 571, (ND 1996).....	2, 3, 4, 5
<u>State v. Helgeson,</u> 303 NW 2d 342 (ND 1981).....	7
<u>State v. Jordheim,</u> 508 NW2d 878, (ND 1993).....	2
<u>State v. McKinney,</u> 518 NW2d 696 (ND 1994).....	8
<u>State v. Osier,</u> 1999 ND 28, 590 NW2d 205 (ND 1999).....	5
<u>Tabert v. North Dakota Department of Transportation,</u> 1997 ND 39, 560 NW2d 883 (ND 1997).....	4

STATUTES, RULES OR OTHER AUTHORITIES:

NDCC 39-20-02.....	2, 3, 5, 6
NDCC 39-20-07.....	3, 4
McCormick on Evidence, 2 <sup>nd</sup> Edition, Edward W. Clearly, West Publishing Co., St. Paul, Minnesota, 1972.....	7

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

## ISSUES

### I. THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE REPORT OF BLOOD TEST RESULTS.

A. NDCC §39-20-07, governs the admissibility of blood test results.

B. Admission or exclusion of evidence on the basis that it lacks adequate foundation is a determination that lies within the sound discretion of the Trial Court.

### II. THE JUDGEMENT OF CONVICTION SHOULD NOT BE REVERSED NOR SHOULD THE DEFENDANT BE GIVEN A NEW TRIAL.

## STATEMENT OF THE CASE

### A. PROCEEDINGS BELOW

A jury trial was held on January 31, 2001. The jury returned a verdict of guilty on both prongs of the verdict form. Specifically that the defendant was driving under the influence of an intoxicating liquor and driving while he had an alcohol concentration of at least ten one-hundredths of one percent by weight.

### B. STATEMENT OF FACTS

On June 13, 2000 Trooper Knight [hereinafter "Knight"], came in contact with the defendant after he had observed him at an intersection without any headlights on. Knight had flashed his headlights in an effort to get the defendant to realize he had not turned his on. Subsequent to the stop Knight observed indications that the defendant had been drinking alcohol. Field sobriety tests were given, other observations were made, which Knight testified to, and a legal blood draw was taken.

## ARGUMENT

### I. THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE REPORT OF BLOOD TEST RESULTS.

The State offered three exhibits during the trial. States Exhibit 1 was the certification document from the State Toxicologist, Exhibit 2 was a photocopy of the Submission for Blood (Form 104), and Exhibit 3 was the portion of the forms contained in the blood kit which Knight completed and retained in his file. During the trial, the State's witness, Knight testified that he had taken the defendant to UniMed Hospital for purposes of obtaining a legal blood draw. (Tr. 27-29). Knight stated that when he arrived at the hospital he met Debra Swearson, a lab technician, who had the blood kit with her. (Tr. 29). He stated that he saw the kit, it was sealed and that he broke the seal. (Tr. 29-30). Knight further testified to all the contents in the kit. (Tr. 30). Knight stated that he completed the part of Form 104 which he was required to fill out. (Tr. 30) He also testified that he watched Debra Swearson draw the blood and complete the portion of Form 104 that she was required to fill out. (Tr. 30). Knight then testified that he took custody of the blood sample after it was drawn, sealed it and mailed it to the State Laboratory for analysis. (Tr. 31). Knight told the jury that he received the analysis back from the State Laboratory, along

with a certification from the State Toxicologist. (Tr. 31). He identified the reports which came back from the State Laboratory, which consisted of a photocopy of Form 104 and a copy of the Analytical Report. (Tr. 31). Knight then identified the portion of the forms which he retained in his files. (Tr. 32-33).

After Knight testified to the foundation of Exhibits one, two and three, the State offered all three. Counsel for the defendant objected for improper foundation, non-compliance with 39-20-02. (Tr. 33). There are four main foundational elements that must be either documented or demonstrated for the admission of the test report. State v. Asbridge, 555 NW2d 571, 573, (ND 1996), State v. Jordheim, 508 NW2d 878, 881 (ND 1993). The first is that the sample must be properly obtained. Id. The second is that the blood test was fairly administered. Id. The third is that the method and devices used to test the sample must be approved by the State Toxicologist. Id. Finally the State must show the blood test was performed by an authorized person or by one certified by the State Toxicologist as qualified to perform it. Id. All four foundational elements set by the Court for the admissibility of the blood analysis were met by the State through the testimony of its witness Knight and through the documentation and certification from the State Toxicologist. The Trial Court correctly over ruled the objection and the

Exhibits were received.

A. NDCC §39-20-07 governs the admissibility of blood test results.

The defendant incorrectly asserts that the blood test results should have been excluded from evidence due to improper foundation and non-compliance with NDCC §39-20-02. Specifically, it is alleged the State failed to provide a certified list of persons authorized to draw the blood. It is the State's position that NDCC §39-20-02 does not govern the admissibility of blood tests. NDCC §39-20-02 simply authorizes the State Toxicologist to determine the qualifications or credentials for being medically qualified to draw blood and directs that a list shall be issued. NDCC §39-20-02 does not mandate where the list shall be issued, nor does it mandate that it must be used for foundation on the admissibility of blood tests. It is the State's position the purpose of NDCC §39-20-02 is simply to give the State Toxicologist authority to determine the qualifications of persons drawing blood, and to give defendants the opportunity to have an independent sample taken.

The admissibility of blood tests are governed by NDCC §39-20-07. City of West Fargo v. Hawkins, 2000 ND 168, ¶15, 616 NW2d 856, 859 (ND 2000), State v. Asbridge, 555 NW2d 571, 574 (ND 1996). In light of the statutory scheme, the State



Toxicologist drafted Form 104, which contains directions and a checklist to ensure proper collection and submission of blood samples. City of West Fargo v. Hawkins, 2000 ND 168 ¶16, 616 NW2d 856, 859 (ND 2000). In this case State's Exhibit 2 contained the directions, checklist and identification of the person drawing the blood. (Tr. 30) State's Exhibit 1 certified that State's Exhibit 2, the photocopy of Form 104 and the Analytical Report, complied with the statutory requirements. (Tr. 31). This Court has previously found that the exact same certification procedure was sufficient to satisfy the certification requirements of NDCC §39-20-07 for admissibility of the blood test results. City of West Fargo, at ¶21, 616 NW2d at 860, Tabert v. North Dakota Department of Transportation, 1997 ND 39 ¶9, 560 NW2d 883, Sate v. Asbridge, 555 NW2d 571, 574 (ND 1996). The State met the certification requirements in this case and the blood test results were properly admitted.

**B. Admission or exclusion of evidence on the basis that it lacks adequate foundation is a determination that lies within the sound discretion of the Trial Court.**

Notwithstanding the above position that proper foundation for the blood test results were met, for the sake of argument, even if there had been a flaw in the foundation of State's Exhibit 2, the admissibility of the exhibit lies with the

sound discretion of the trial court and will not be overturned unless there was abuse of discretion. State v. Osier, 1999 ND 28, ¶5, 590 NW2d 205, 208. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process. Id. The trial court over ruled the defendant's first objection after the State reiterated that exhibits one, two and three were received from the State Laboratory, filled out by Knight or watched by Knight being completed. (Tr. 33) The second time the defendant renewed his objection based on NDCC §39-20-02, improper foundation, the court simply over ruled it again. (Tr. 35) Finally, after the Exhibits had been accepted by the trial court, and the State had rested its case, and the jury had been sent out of the courtroom, the defendant again renewed his objection, this time citing non-compliance with NDCC §39-20-02. The trial court asked counsel for the defendant to repeat the statute so that it could be reviewed.(Tr. 50-51) Counsel for the defendant then specifically stated, for the first time, that the foundation was improper for admission because the State failed to provide a certified list of persons qualified to draw blood, stating that it was a new and independent foundation requirement created by the Legislature after Asbridge, in 1999. (Tr. 51-52) The State rebutted that foundation was met by submitting the certification page, which

specifically states that the State Toxicologist reviewed Form 104, which included the portion completed and signed by the lab tech. The trial court, in making its ruling was very clear and precise, "What it gets down to it seems to me is, whether the certification by the State Toxicologist that the test results were correct indicates a statement by him that he has read and looked at the entire form and agrees that what was done was done correctly which would imply that he read on there that this test - this blood was extracted by someone who was a M.L.T.A.S.C.P. or D whatever that is and that he agrees that person is qualified to pull the blood sample. Now, I may be giving him credit for spending more time looking at this than he really does, but it seems to me that his signature on the certification implies that and based on that concept, I will specifically rule that it is not necessary for the State to place in evidence the list, assuming there is one on the file with the Clerk of District Court, of occupations designated by the State Toxicologist to extract blood." (Tr. 53-54) The trial court's decision to deny the motion to exclude the evidence was not arbitrary, unreasonable, unconscionable and was the product of a rational mental process. The trial court's decision to admit State's Exhibits one, two and three should not be overturned.

It is the State's position that the defendant's initial objections to the Exhibits based on NDCC §39-20-02, improper

foundation were too general and therefore also properly overruled. Objections must be specific enough for the judge to understand the question raised and give the adversary an opportunity to remedy the defect, if possible. City of Yuma v. Evans, 336 P2d 135(1959), *McCormick on Evidence*, 2<sup>nd</sup> Edition, Edward W. Clearly, West Publishing Co., St. Paul Minnesota, 1972, see also e.g. Bowman v. Eppinger, 44 NW 1000, 1001 (ND 1890), State v. Helgeson, 303 NW2d 342, 346 (ND 1981). The defendant's initial objections made before the jury were general by virtue that he simply stated a statute and articulated improper foundation. The vagueness and generality of the defendant's objection is exemplified by the fact the trial court had to ask the defendant for the statute again, and review it in order to understand the objection. (Tr. 50-51) The defendant did not state specifically what foundation was lacking. After the State had rested its case, the defendant specifically stated that a certified list of persons qualified to draw blood must be offered as evidence before the blood test results could be admitted. Notwithstanding the above position that such a list is not needed for foundation, had the defendant specifically stated those grounds the State would have had an opportunity to receive and submit the list to cure any objection the defendant had on foundation. The defendant chose to lie in

the weeds with the specifics of the objection until after the State rested so that it would not have that opportunity. The objection was properly overruled as it was too general.

II. THE JUDGEMENT OF CONVICTION SHOULD NOT BE REVERSED NOR SHOULD THE DEFENDANT BE GIVEN A NEW TRIAL.

The defendant requests the Court reverse the Criminal Conviction and grant the defendant a new trial, based on the fact the State failed to put into evidence a certified list of persons qualified to draw blood. Even if the Court finds that the list should have been submitted and therefore it was err to admit the blood test results, the verdict should not be reversed. The Defendant is ignoring the fact the jury convicted him on both prongs of the guilty verdict form. (Tr. 79-81). The jury was specifically polled for each prong, and the jury had unanimously found the defendant guilty of driving under the influence of an intoxication liquor, and driving while he had an alcohol concentration of at least ten one-hundredths of one percent by weight. A jury verdict will not be overturned unless, when viewed in the light most favorable to verdict, it permits no reasonable inference of guilt. State v. McKinney, 518 NW2d 696, 699-700 (ND 1994). The jury in this case found that there was sufficient evidence to find proof beyond a reasonable doubt that the defendant was driving under the influence of an intoxicating liquor. Therefore the verdict should stand and judgment be entered.

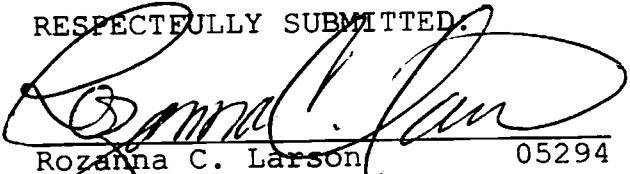
FILED  
IN THE OFFICE OF THE  
CLERK OF DISTRICT COURT

CONCLUSION

For the reasons stated above, the State respectfully requests the Court affirm the jury verdict and hold that the Conviction stands.

Dated this 28<sup>th</sup> day of June, 2001.

RESPECTFULLY SUBMITTED.



Rozanna C. Larson 05294  
Assistant State's Attorney  
Ward County Courthouse  
Minot, ND 58701  
Telephone 701-857-6480