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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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Scott Allen Piatz,

Appellant/Appellant,

STATE OF NORTH DAKOTA

v.

Supreme Court No. 20010232

Director, North Dakota Department
of Transportation,

Appellee/Appellee.

BRIEF OF APPELLANT

Appeal from Judgment

Burleigh County District Court
South Central Judicial District

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STATEMENT OF THE ISSUES

ISSUE FOR REVIEW

Did the hearing officer err in concluding that the arresting officer had reasonable grounds to believe that Piatz had been operating a motor vehicle in violation of NDCC 39-08-01 or equivalent ordinance, and thereby concluding in effect that Piatz was legally arrested for DUI upon probable cause?

STATEMENT OF THE CASE

Scott Piatz appeals from a district court judgment affirming an administrative hearing officer's decision suspending his driving privileges.

Piatz was driving his motorcycle northbound on Highway 83 leaving Bismarck when he was stopped by the arresting officer in this case for speeding (Tr. 4-5). Upon contact, the officer "did detect an odor of an alcohol beverage" on Piatz, but made no other observation of Piatz' physical condition (Tr. 5-6). Piatz produced his driver's license and registration without problem (Tr. 6).

The officer asked Piatz if he could recite the ABC's without singing them. Piatz stated he would try. Piatz then recited the alphabet from A-S appropriately, and then "messed up". Piatz stopped, and stated that he had difficulty saying the ABC's without singing them. (Tr. 7). The hearing officer did not ask, and the arresting officer gave no testimony, about the arresting officer's conclusions on this test. There was no evidence or testimony that this test was a fail or that it was unsatisfactory.

The arresting officer next did the HGN test. The officer was trained in the HGN test in 1992 (Tr. 7). He testified that he ran the HGN test in this case according to his training (Tr. 8). He testified that he did all three phases of the HGN test first with the left eye, and then all three phases of the HGN test with the right eye (Tr. 8). Piatz objected to this HGN test based upon the current NHTSA manual, which indicates that the HGN test is properly conducted if you do the first phase of the test twice with the left eye and then twice with the right eye, the second phase of the test twice with the left eye and then twice with the right eye, and then finally the third phase of the HGN test twice with the left eye and then twice with the right eye (Tr. 8-

9). Piatz offered relevant pages from the current manual as Exhibit 15, but the hearing officer refused to receive Exhibit 15. The hearing officer did agree to include Exhibit 15 for record purposes, but the DOT failed to include Exhibit 15 in the record of this case. (Tr. 11). The arresting officer also testified that he had no follow-up training on the HGN test since the time of his initial training in 1992 (Tr. 10). Piatz then objected on due process grounds as well (Tr. 11). Piatz is aware of no HGN training which indicates that the test is conducted in the manner testified to by the arresting officer. In fact, Piatz believes that HGN training in 1992 is the same as the training for the HGN test today, and that the arresting officer testified falsely when he testified that he conducted the HGN test according to his training.

The arresting officer next did the S-D2 test. The relevant facts regarding the S-D2 test are as follows. The arresting officer initially observed Piatz driving his motorcycle at 2:15 a.m. (Tr. 4, 14). After the stop, the officer asked Piatz if he had been drinking. Piatz informed him that he “had just consumed a rum and coke.” The hearing officer then asked, “So within the past couple or three minutes he’d had an alcoholic beverage?” The arresting officer answered, “That is correct.” (Tr. 6).

The time of arrest was 2:27 a.m., twelve minutes after the initial observation of Piatz driving. The S-D2 test was conducted within that twelve-minute period, and the arresting officer admitted that it was possible that Piatz consumed the rum and coke within the twenty minutes prior to the administration of the S-D2 test (Tr. 13). Piatz objected to the S-D2 results based upon Exhibit 16 (App. 51-52), a portion of the Intoxilyzer S-D2 operator’s manual, which provides for a twenty-minute waiting period before administering the S-D2 test (Tr. 13-14). The hearing officer overruled

the objection based upon the State Toxicologist's approved method for conducting the S-D2 test, which does not provide for a twenty-minute waiting period. Piatz expanded his objection to include a due process violation based upon the facts of this case and based upon the fact that the operator's manual does provide for a twenty-minute waiting period (Tr. 15). That objection was also overruled, and the arresting officer was allowed to testify that Piatz failed the S-D2 test (Tr. 15).

SUMMARY

This case is about a fair, honest and truthful determination of probable cause.

ARGUMENT

ISSUE FOR REVIEW

Did the hearing officer err in concluding that the arresting officer had reasonable grounds to believe that Piatz had been operating a motor vehicle in violation of NDCC 39-08-01 or equivalent ordinance, and thereby concluding in effect that Piatz was legally arrested for DUI upon probable cause?

I. The Alphabet Test

In the Findings of Fact of the Hearing Officer's Decision, the hearing officer found, "tests run were alphabet, horizontal gaze nystagmus, and S-D2; results were unsatisfactory or failing on all test (sic) done." The hearing officer's finding that the alphabet test was "unsatisfactory or failing" is unsupported by the record evidence in this case.

The record evidence in this case does not contain any testimony by the arresting officer as to his conclusions of the alphabet test. In fact, the hearing officer never asked the arresting officer his conclusions of this alphabet test. Piatz finds this significant. The hearing officer is both the prosecutor and decider of the evidence. The hearing officer could have easily asked, as a hearing officer usually does, for the

arresting officer's conclusions as to this test. The arresting officer gave no testimony indicating that this test was somehow an indicator of being under the influence of intoxicating liquor. This test should in no way be included in a determination of probable cause for arrest.

II. The HGN Test

The hearing officer found that, "Horizontal gaze nystagmus testing was done in accordance with officer Kilde's training."

Piatz believes that he adequately showed at the hearing that the arresting officer did not do the HGN test according to his training. Therefore, there does not exist in this case the required showing that the HGN test was properly conducted or administered. City of Fargo v. McLaughlin, 512 NW2d 700 (N.D. 1994).

However, Piatz went one step further to prove that the arresting officer testified falsely in this regard (App. 6-14). Neither the hearing officer, nor the district court, however, allowed Piatz to further prove that the arresting officer testified falsely. Regardless, the HGN test also should have been excluded from a determination of probable cause.

III. The S-D2 Test

The hearing officer found that, "S-D2 testing was done in accordance with the state toxicologist's approved method." And the hearing officer concluded, "When S-D2 testing is done in accordance with the state toxicologist's approved method its results can and should be considered."

Piatz does not dispute the finding that the S-D2 testing was done in accordance with the State Toxicologist's approved method, but does contend under the facts of this case that the results should not have been considered.

The State Toxicologist's approved method for conducting the S-D2 test does not provide for a twenty-minute waiting period. The operator's manual for the Intoxilyzer S-D2, however, does provide for a twenty-minute waiting period before administering the S-D2 test when there is the possibility of recent consumption of alcohol. It is undisputed that Piatz had an alcoholic beverage within the twenty-minute waiting period, and due process demands, under the facts of this case, that the Intoxilyzer S-D2 operator's manual should control over the State Toxicologist's approved method.

As an analogy, Piatz cites Schense v. Hjelle, 386 NW2d 888 (N.D. 1986). In that case, the Supreme Court held that the simulator, as an auxiliary device, does not have to be individually approved and certified under NDCC 39-20-07(5) and (6). The Court wrote, however;

“Upon a proper record, we might be persuaded that an auxiliary device used in the testing sequence is of such a nature that, absent specific approval and certification of the device by the State Toxicologist, the test results would be so fraught with the possibility of error that the test could not be considered to be ‘fairly administered’ within the meaning of the statute.”

386 NW2d at 891.

This reasoning also applies here. Under the facts of this case, a twenty-minute waiting period should have been observed given the Intoxilyzer S-D2 operator's manual even when the State Toxicologist's approved method did not so provide. See, NDCC 39-20-14.

Under the facts of this case, the S-D2 test and its results should not have been considered in the determination of probable cause.

IV. Concluding Argument

The National Highway and Traffic Safety Administration provides for three “standardized” tests, those being the HGN test, the one-leg stand test, and the walk and turn test. Neither the one-leg stand nor the walk and turn test were done in this case. The HGN test was done but it was not properly conducted or administered according to the National Highway and Traffic Safety Administration manual which is used for training in the State of North Dakota.

The S-D2 test was conducted in this case, but contrary to the operator’s manual of the machine, and in this case contrary to fair administration and due process even in the face of the State Toxicologist’s approved method.

Finally, the record evidence of the alphabet test does not support any finding or conclusion that the arresting officer used that test as a basis for determining probable cause to arrest.

Probable cause to arrest for DUI did not exist in this case.

CONCLUSION

WHEREFORE, Scott Allen Piatz requests the Supreme Court of North Dakota to reverse the judgment appealed from, and for such other relief to which Piatz may be entitled.

Respectfully submitted this 28th day of November, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing document by mail,
on this 28 day of November, 2001 on:

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