

IN THE SUPREME COURT
 STATE OF NORTH DAKOTA

Aaron James Johnson,)	
)	
Appellee,)	Supreme Ct. No. 20030339
)	
v.)	District Ct. No. 03-C-00264
)	
North Dakota Department of)	
Transportation,)	
)	
Appellant.)	

**APPEAL FROM THE DISTRICT COURT
 STUTSMAN COUNTY, NORTH DAKOTA
 SOUTHEAST JUDICIAL DISTRICT**

HONORABLE MIKAL SIMONSON

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

Whether the hearing officer reasonably found the twenty-minute waiting period provision of the approved method had been followed.

STATEMENT OF CASE

The North Dakota Department of Transportation ("Department") appeals from a district court judgment reversing the administrative hearing officer's decision suspending the driving privileges of Aaron James Johnson ("Johnson") for 91 days. The Department seeks reversal of the district court's judgment and reinstatement of the administrative suspension.

Jamestown Police Officer Ronald Dietz arrested Johnson for DUI on May 7, 2003. (Appendix ("A.") at 6, lines ("ll.") 17-23.) After an Intoxilyzer test indicated Johnson's alcohol concentration had been above the legal limit, Officer Dietz issued a Report and Notice to Johnson, which indicated the Department intended to suspend Johnson's driving privileges. (A. at 39.) Johnson requested a hearing.

A hearing took place on June 2, 2003. (A. at 1, ll. 4-6.) The hearing officer issued a decision suspending Johnson's driving privileges for 91 days. (A. at 45.) Johnson appealed from the hearing officer's decision to district court. On November 10, 2003, the district court entered judgment reversing the hearing officer's decision. (A. at 53.) The Department appeals to this Court. (A. at 54.)

STATEMENT OF FACTS

At about 1:11 a.m. on May 7, 2003, Officer Dietz stopped a vehicle for crossing the center line of a road. (A. at 3, ll. 2-9; A. at 39.) Johnson, the driver of the vehicle, had an odor of alcohol about him and failed some field sobriety tests. (A. at 3, ll. 23-25; A. at 4, ll. 14-19.)

Officer Dietz asked Johnson to submit to an S-D2 onsite screening test. (A. at 6, ll. 11-16; A. at 30, ll. 16-19.) Johnson failed the S-D2 onsite screening test. (A. at 6, ll. 8-10.) Then, at 1:32 a.m., Officer Dietz arrested Johnson for DUI and

handcuffed Johnson's hands behind the back. (A. at 6, ll. 17-25; A. at 7, ll. 1-5; A. at 32, ll. 18-19; A. at 39.)

Officer Dietz drove Johnson to the law enforcement center. (A. at 7, ll. 8-10.) Johnson submitted to an Intoxilyzer test, giving a first breath sample at 1:51 a.m. (A. at 44.) The test result showed Johnson's alcohol concentration was .16 percent. (A. at 44.) Johnson was issued a Report and Notice which indicated the Department intended to suspend his driving privileges. (A. at 39.)

Officer Dietz was the only person who testified at the administrative hearing. (A. at 1-38.) Officer Dietz testified he followed the approved method in conducting the Intoxilyzer test and he ascertained the twenty-minute waiting period using the clock at the law enforcement center. (A. at 7, ll. 22-25; A. at 8, ll. 1-14; A. at 32-33.) Officer Dietz also testified: prior to the S-D2 onsite screening test, he checked Johnson's mouth to confirm there was nothing in it and ensured there was a five-minute waiting period before that test and after the S-D2 test, he arrested and handcuffed Johnson. (A. at 30, ll. 17-19; A. at 6, ll. 17-25; A. at 7, ll. 1-5.)

The hearing officer found the twenty-minute waiting period provision was followed. (A. at 45.) The hearing officer issued a decision to suspend Johnson's driving privileges for 91 days. (A. at 45.) The district court reversed the suspension, reasoning that time before and during the onsite screening test could not be used in calculating the twenty-minute waiting period. (A. at 48-49.)

STANDARD OF REVIEW

The issue of whether the state toxicologist's approved method was followed is a question of fact. See McPeak v. Moore, 545 N.W.2d 761, 764 (N.D. 1996) (concluding the hearing officer's finding the approved method was followed was supported by a preponderance of the evidence). A reviewing court must give "great deference" to the Department's findings of fact and may not make

independent findings or substitute its judgment for that of the Department. Henderson v. Director, North Dakota Dep't of Transp., 2002 ND 44, ¶ 6, 640 N.W.2d 714. A reviewing court must determine only "whether a reasoning mind reasonably could have concluded the Department's findings were supported by the weight of the evidence from the entire record." Id.

LAW AND ARGUMENT

The hearing officer reasonably found the twenty-minute waiting period provision of the approved method had been followed.

Johnson contends the twenty-minute waiting period provision of the approved method was not followed. The state toxicologist's approved method for operating the Intoxilyzer provides the operator "must ascertain that the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample." (A. at 41.)

"[I]t is clear that an operator's observation that a subject did not eat, drink, or smoke in the twenty minutes prior to the [Intoxilyzer] test satisfies the approved method." Buchholz v. North Dakota Dep't of Transp., 2002 ND 23, ¶ 11, 639 N.W.2d 490. When the evidence establishes an officer continuously observed a subject for twenty minutes prior to administering the Intoxilyzer test, during which time the subject had nothing to eat, drink, or smoke, a reviewing court should conclude the hearing officer reasonably determined the twenty-minute waiting provision was followed. See id. at ¶ 12. No part of the approved method suggests the waiting period must start after the time of arrest. (A. at 40-43); see generally State v. Puhr, 316 N.W.2d 75 (N.D. 1982) (noting a subject was under observation for a maximum of 18 minutes when the Breathalyzer test was administered at 1:38 and law enforcement first encountered the subject driving his vehicle at 1:20).

This Court's decision in State v. Chihanski, 540 N.W.2d 621 (N.D. 1995) is consistent with the time of observation, rather than the time of arrest, being the dispositive factor in determining the twenty-minute waiting period. Chihanski was arrested for DUI. Id. at 623. At the time of arrest, an officer handcuffed Chihanski and checked her mouth. Id. This Court reviewed whether the twenty-minute waiting period had been ascertained. Id. The time of arrest was significant only because the officer had checked Chihanski's mouth at that time, and there was no evidence indicating the officer had determined Chihanski had nothing in her mouth prior to that time. Id.

In this matter, the evidence shows the hearing officer reasonably found the twenty-minute waiting period was ascertained. Officer Dietz said he used the clock at the law enforcement center to determine the twenty-minute waiting period and he arrived at the law enforcement center at approximately 1:35 a.m., 16 minutes prior to the first breath test. However, Officer Dietz's complete testimony reveals he ensured, through his actions, there was a twenty-minute waiting period immediately prior to the Intoxilyzer test during which Johnson had nothing to eat, drink, or smoke.

Officer Dietz's uncontroverted testimony indicates he ensured there were at least twenty-four minutes prior to the Intoxilyzer test during which Johnson had nothing to eat, drink, or smoke. Officer Dietz testified he checked Johnson's mouth before the S-D2 onsite screening test and he observed a five-minute waiting period prior to the start of the S-D2 test. Immediately after Johnson failed the S-D2 test, Officer Dietz arrested Johnson, handcuffed Johnson's hands behind the back, and brought Johnson to the law enforcement center for the Intoxilyzer test. Officer Dietz thus ensured Johnson had nothing to eat, drink, or

smoke from the start of five-minute waiting period for the S-D2 test until the Intoxilyzer test.

There were twenty-four minutes, at a minimum, between the start of the five-minute waiting period for the S-D2 test until the Intoxilyzer test. The time of arrest was 1:32 a.m. The S-D2 test occurred just before the arrest. The five-minute waiting period prior to the S-D2 test thus began by 1:27 a.m., at the latest. The Intoxilyzer test began at 1:51 a.m. There thus was a period of at least twenty-four minutes before the Intoxilyzer test during which Johnson had nothing to eat, drink, or smoke.

Moreover, Exhibit 11 includes Officer Dietz's certification the approved method and, specifically, the twenty-minute waiting period, were followed. As a regularly kept record of the Department under N.D.C.C. § 39-20-05(4), Exhibit 11 "establish[es] prima facie [its] contents without further foundation."

Officer Dietz's apparent misstatement regarding computing the time after arrest does not negate the fact that, through his conduct, he ensured there were more than twenty-minutes immediately prior to the Intoxilyzer test during which Johnson had nothing to eat, drink, or smoke. Concluding the misstatement precludes a suspension would be inconsistent with precedent indicating a deviation from the state toxicologist's directions which could not have substantially affected test results does not warrant reversal of a suspension. See Heinrich v. North Dakota State Highway Com'r, 449 N.W.2d 587, 589 (N.D. 1989).

Officer Dietz's observation that Johnson did not eat, drink, or smoke in the twenty minutes prior to the Intoxilyzer test satisfies the approved method. Considering Exhibit 11 and Officer Dietz's complete and uncontroverted

testimony, the hearing officer reasonably found the twenty-minute waiting period provision was followed.

CONCLUSION

The Department respectfully requests this Court reverse the district court judgment and reinstate the administrative suspension of Johnson's driving privileges.

Dated this 16th day of December, 2003.

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