ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20070275

Eric John Peterson, Appellee, v. Francis G. Ziegler, Director, North Dakota Department of Transportation, Appellant.	**Supreme Ct. No. 20070275** **Burleigh Co. No. 07-C-01081**

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE B. HASKELL

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Whether the district court was correct in granting Peterson's appeal by determining the Department failed to file a timely brief.

II. Whether the District Court had statutory grounds to reverse the Department's decision even if the Department's brief was untimely.

III. Whether or not a recitation of the implied consent advisory is necessary after arrest and is within the scope of a civil, administrative implied consent proceeding.

STATEMENT OF CASE

The Department of Transportation ("Department") appeals from the district court's judgment summarily reversing an administrative hearing officer's decision suspending the driving privileges of Eric John Peterson ("Peterson") for a period of 365 days. The Department seeks reversal of the district court's judgment and reinstatement of the suspension of Peterson's driving privileges.

Burleigh County Deputy Sheriff Steve Roehrich stopped Peterson's vehicle for a traffic violation. (Appendix ("A") 5). Peterson subsequently was arrested for driving under the influence of alcohol. (A 10). A blood sample was obtained and the test results indicated that Peterson's alcohol concentration was .09 percent by weight. (A 45).

Peterson requested an administrative hearing, which was held on May 18, 2007. (A 1). The hearing officer issued his findings of fact, conclusions of law, and decision suspending Peterson's driving privileges for a period of 365 days. (A 42). Peterson appealed the administrative decision to the district court. (A 50-51).

Judgment was entered by the district court on July 19, 2007, summarily reversing the administrative suspension of Peterson's driving privileges, based on the conclusion that the Department's brief was untimely. (A 52). The Department filed its Motion to Reconsider Order on July 20, 2007. (A 53-55).

Judge Haskell denied the Department's Motion on August 6, 2007. (A 56). Judgment on the denied Motion was filed on August 16, 2007. (A 58). Peterson served his Notice of Entry of Judgment on August 30, 2007. (A 60). The Department served its Notice of Appeal on September 13, 2007. (A 61). The Department asks this Court to reverse the judgment of the Burleigh County District Court and reinstate the hearing officer's decision suspending Peterson's driving privileges for 365 days.

STATEMENT OF FACTS

On March 22, 2007, at approximately 11:46 p.m., Deputy Roehrich observed that Peterson's vehicle did not have a functioning rear license plate light. (A 5). The officer stopped Peterson. Id.

Deputy Roehrich approached the vehicle and immediately smelled the strong odor of an alcoholic beverage. (A 6). Peterson admitted that he had consumed alcohol. Id.

Peterson agreed to submit to field sobriety testing. (A 6-7). Peterson failed the following sobriety tests: HGN, walk-and-turn, and the one-leg stand. (A 7-9). Deputy Roehrich recited the implied consent advisory before asking Peterson to submit to an onsite screening test. (A 9). The deputy administered the S-D2 onsite screening test and the device estimated Peterson's blood alcohol concentration at .10 percent by weight. (A 10).

Deputy Roehrich advised Peterson that he was under arrest for driving under the influence of alcohol. Id. Peterson agreed to submit to a blood test at St. Alexius Medical Center. (A 11). Though Deputy Roehrich testified he reminded Peterson of the implied consent law before asking Peterson to submit to a blood test, the videotape of the stop did not reflect this. (A 11, 20). A registered nurse obtained a sample of Peterson's blood. (A 45). The blood

sample was analyzed and found to have an alcohol concentration of .09 percent by weight. Id.

PROCEEDING ON APPEAL TO DISTRICT COURT

Judge Haskell's Order simply reversed the hearing officer's decision. (A 52). The Order in its entirety, stated "[t]he appellant's appeal is hereby GRANTED due to the failure of the State to file a brief within ten days of the service of the appellant's brief. The decision of the administrative hearing officer is reversed and the appellant's privilege to operate a motor vehicle in North Dakota is restored." (A 52). The Department submitted a Motion to Reconsider the Court's Order. (A 53-55). The Department's motion and brief in support of the motion argued that the Court's Order was premature because the Department had filed a timely brief. By Order dated August 6, 2007, Judge Haskell stated simply that "[t]he defendant's Motion to Reconsider is DENIED." (A 56).

STANDARD OF REVIEW

This Court has summarized the standard review that is applicable to administrative agency findings, as follows:

> "This Court exercises a limited review in appeals involving drivers' license suspensions or revocations." Henderson v. Director, N.D. Dep't of Transp., 2002 ND 44, ¶ 6, 640 N.W.2d 714. On appeal, we review the administrative agency's decision. Rist v. N.D. Dep't of Transp., 2003 ND 113, ¶ 6, 665 N.W.2d 45. We give deference to the administrative agency's findings and will not make independent findings or substitute our judgment for that of the agency. Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 7, 663 N.W.2d 161. We instead determine only whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record. Id. Our review also "'defers to the hearing officer's opportunity to hear the witnesses' testimony and to judge their credibility.'" Henderson, 2002 ND 44, ¶ 6, 640 N.W.2d 714 (quoting Houn v. N.D. Dep't of Transp., 2000 ND 131, ¶ 6, 613 N.W.2d 29).

Hanson v. Dir., N.D. Dep't of Transp., 2003 ND 175, ¶ 7, 671 N.W.2d 780.

This Court has also observed that "[w]hen more than one reasonable inference can be made from evidence, a reviewing court must accept the inference made by the trier of fact." Gieger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986).

LAW AND ARGUMENT

I. The Department timely served and filed its brief with the District Court.

Following appeal from the hearing officer's decision suspending Peterson's driving privileges for 365 days, the district court issued a briefing schedule on June 12, 2007. Peterson had until July 3, 2007, to file and serve his brief, and the Department had 10 days from the date of service to file a response brief. Peterson served his brief on July 2, 2007 and it was filed on July 3, 2007. The Department served its brief on July 18, 2007 and it was filed on July 19, 2007. The Court issued an Order on July 19, 2007, summarily dismissing the appeal and reinstating the driving privileges of Peterson without considering the merits of the appeal. The district court's Order should be reversed because the rationale for the Order is incorrect. The Department timely filed its brief.

Rule 6 of the North Dakota Rules of Civil Procedure states, in part, as follows:

> (a) **Computing time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute;
>
> 1) Exclude the day of the act, event, or default that begins the period;
>
> 2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days; . . . .

An additional three days is allotted if service is completed by mail. N.D.R.Civ.P. 6(e).

The facts in this case show that July 2nd was the date of service of Peterson's brief and, following N.D.R.Civ.P. 6(a), this day is excluded from the count. July 4, 2007, was a holiday and is excluded. Intermediate Saturdays and Sundays are excluded. Service of Peterson's brief was by mail, so an additional 3 days is added. Because the briefing schedule set a deadline of less than 11 days for submission of the Department's brief, the Department had until July 20, 2007, to serve and file its brief. The Department mailed its brief on July 18, 2007, and the clerk's record indicates the brief was filed on July 19, 2007. The Department's brief was timely served and filed.

II. The District Court lacked statutory grounds to reverse the Department's decision even if the Department's brief was untimely.

Even if the Court determines that the Department's brief was untimely, the district court did not have grounds to summarily reverse the hearing officer's decision. The Administrative Agencies Practice Act governs an appeal from an administrative hearing officer's decision suspending a license under N.D.C.C. Ch. 39-20. Whitecalfe v. North Dakota Dep't of Transp., 2007 ND 32, ¶ 7, 727 N.W.2d 779. A court must affirm an agency's order except in the event of any of the following:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46 (emphasis added).

Section 28-32-46 requires that a reviewing court "must" affirm the agency's Order except in the event of any of these eight circumstances. The statute does not permit the summary reversal of an agency's decision based solely on a district court's conclusion that the agency's brief was untimely. Rather, N.D.C.C. § 28-32-46 permits reversal of an agency's decision only if the district court concludes that the merits of the appellant's argument on any of the statute's eight points is compelling. In this case, the district court summarily reversed the Department's decision without regard to the merits of the appeal. Therefore, the district court's decision reversing the Department's decision was not in accordance with N.D.C.C. § 28-32-46. Simply put, Judge Haskell lacked grounds to reverse the hearing officer's decision. Judge Haskell did not point to any of the eight factors for reversal nor could he have, as none of them apply. Because Section 28-32-46 was not complied with, this court should reverse the District Court decision.

III. The implied consent advisory was recited before the blood test.

Because this Court reviews the hearing officer's decision, not the district court's decision, this Court may review Peterson's substantive arguments without remanding the appeal to the district court. Cf. McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996) (citing Peterson v. Dir., N.D. Dep't of Transp., 536 N.W.2d 367, 370 (N.D. 1995) (explaining that because this Court reviews the hearing

officer's decision, not the district court's decision, the district court's failure to consider an issue did not necessitate remand).

Peterson argued below that Deputy Roehrich did not recite the implied consent advisory a second time, after arrest, prior to administration of the blood test. As a result, Peterson maintained, the blood test results were improperly admitted into evidence by the hearing officer and improperly used to suspend Peterson's driving privileges. Peterson's argument is without merit.

N.D.C.C. § 39-20-01 provides, in part, that the "law enforcement officer shall also inform the person charged that refusal of the person to submit to the test determined appropriate will result in a revocation for up to four years of the person's driving privileges." Peterson argued that the implied consent advisory was not recited by Deputy Roehrich before the blood test was administered. Peterson's allegation is factually erroneous. Deputy Roehrich's testimony shows that the implied consent advisory was recited once prior to the blood test. Specifically, the implied consent advisory was recited prior to administration of the S-D2 onsite screening test. (Tr. p. 7, ll. 24-25.)

No case law required an officer to recite the implied consent advisory a second time before requesting a blood draw. Deputy Roehrich complied with N.D.C.C. § 39-20-01 by reciting the implied consent advisory during his interaction with Peterson. This Court should reject the argument that Peterson is entitled to reversal of his administrative suspension simply because Deputy Roehrich did not recite the advisory twice.

A. Whether or not Deputy Roehrich recited the implied consent advisory is not an issue within the scope of a civil, administrative implied consent proceeding.

This Court need not consider this argument if the Court accepts the Department's previous argument that the recitation of the implied consent

advisory before the arrest was sufficient. A reasoning mind reasonably could have concluded that Deputy Roehrich recited the implied consent advisory prior to the blood test. Even if this Court rejects that argument, the administrative suspension should be affirmed because the question of whether or not the implied consent advisory was recited is not within the scope of an implied consent proceeding.

This Court has observed that the "administrative hearing is designed solely to resolve the issues set forth in Section 39-20-05, N.D.C.C." Pladson v. Hjelle, 368 N.W.2d 508, 511 (N.D. 1985) (emphasis added). N.D.C.C. § 39-20-05(2) sets forth the issues for a hearing in which a person submits to a chemical test. It states, in part, that "[w]hether the person was informed that the privilege to drive might be suspended based on the results of the test is not an issue." (emphasis added). Peterson raises an issue that is explicitly irrelevant.

B. It is immaterial whether Deputy Roehrich recited the implied consent advisory because Peterson provided actual consent to submit to the test.

This Court need not consider this argument if this Court accepts either of the previous two arguments. In the alternative, if this Court does not accept either of the previous arguments, this Court should conclude that whether or not the implied consent advisory was recited is irrelevant because Peterson consented to submit to the blood test.

It would be erroneous to suggest that the only way to admit evidence of chemical test results in the administrative proceeding is under the provisions of N.D.C.C. ch. 39-20. Peterson's premise is fundamentally wrong.

Law enforcement officers are authorized to obtain a blood sample from a person pursuant to a search incident to arrest, regardless of the person's consent. Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908

(1996). The legislature in this state codified the Schmerber rule in N.D.C.C. § 39-20-01, which provides, in part, as follows:

> Any person who operates a motor vehicle on a highway or on public or private areas to which the public has a right to access for vehicular use in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, saliva, or urine for the purposes of determining the alcohol, other drug, or combination thereof, content of the blood.

Under N.D.C.C. § 39-20-01 a person impliedly agrees to submit to chemical testing by driving on a North Dakota highway. According to Schmerber and N.D.C.C. ch. 39-20, a law enforcement office may direct a driver to submit to chemical testing without obtaining the person's actual consent.

Although each person who drives a vehicle on a highway in North Dakota impliedly consents to chemical testing, the legislature has granted the driver arrested for DUI the right to withdraw the implied consent. State v. Mertz, 362 N.W.2d 410, 413-14 (N.D. 1985). The driver must affirmatively refuse to submit to testing in order to withdraw the implied consent. Id. at 414.

The legislature's objective in enacting the implied consent law was to determine the blood-alcohol content of each person suspected of operating a vehicle on a public highway while under the influence of alcohol. Timm v. State, 110 N.W.2d 359, 364 (N.D. 1961). To accomplish this objective, the legislature has imposed harsher penalties on persons who refuse to submit to chemical testing because the alcohol content of their blood cannot be ascertained. See N.D.C.C. § 39-20-04(1).

Aside from N.D.C.C. ch. 39-20 and the Schmerber holding, a law enforcement officer in North Dakota may subject a person to chemical testing if the person voluntarily consents to the test. See e.g. City of Bismarck v. Hoffner, 379 N.W.2d 797 (N.D. 1985); State v. Abrahamson, 328 N.W.2d 213 (N.D.

1982); Wanna v. Miller, 136 N.W.2d 563 (N.D. 1965). Chemical test results are admissible if the subject voluntarily consents to the test, even if the implied consent advisory is not recited. See Hoffner, 379 N.W.2d at 799 ("implied consent is unnecessary where actual consent is given"); Abrahamson, 328 N.W.2d at 215 ("trial judge correctly determined that this implied-consent statute was inapplicable because Abrahamson actually consented to the taking of the blood test"); Wanna, 136 N.W.2d at 569 ("As the record shows that Mr. Lund voluntarily consented to the extraction of a blood specimen for alcohol content purposes, the provisions of Chapter 39-20 of the North Dakota Century Code . . . do not apply"). Therefore, Peterson's blood test results were admissible because Peterson actually consented to submit to the blood test.

C. Peterson's blood test results were properly admitted into evidence because there is no applicable exclusionary rule.

This Court need not consider this argument if this court accepts any of the three preceding arguments. However, in the alternative, if this Court does not accept any of the previous three arguments, this Court should conclude that Peterson's blood test results were admissible whether or not the implied consent advisory was recited because there is no applicable exclusionary rule.

In Holte v. State Highway Comm'r, 436 N.W.2d 250 (N.D. 1989), the driver asked this Court to apply an exclusionary rule to exclude his Intoxilyzer test results from evidence because the arresting officer allegedly violated the driver's qualified statutory right to consult with an attorney before deciding whether or not to submit to a chemical test. Holte asked to call an attorney before the Intoxilyzer test. Id. at 251. Holte was told he could "call anybody you want once we get done." Id.

This Court noted that "Holte then submitted, without objection, to the administration of an Intoxilyzer test, which he has conceded was fairly administered." Id. The district court reversed Holte's administrative suspension, concluding that the "arresting officer violated Holte's statutory right to consult an attorney before deciding whether or not to submit to a chemical test." Id.

This Court, however, observed that "we agree with the rational of the Iowa Supreme Court in refusing to extend the exclusionary rule to civil proceedings as enunciated in Westerndorf v. Iowa Dep't of Transp., 400 N.W.2d 553, 557 (Iowa 1987)." Holte, 436 N.W.2d at 252 (emphasis added). This Court then quoted the Iowa Supreme Court with approval:

> 'The benefit of using reliable information of intoxication in license revocation proceedings, even when that evidence is inadmissible in criminal proceedings, outweighs the possible benefit of applying the exclusionary rule to deter unlawful conduct. Consequently, the exclusionary rule formulated under the fourth and fourteenth amendments was inapplicable in this license revocation proceeding.'

Holte, 436 N.W.2d at 252 (quoting Westendorf, 400 N.W.2d at 557 (emphasis added)). This Court thereupon reinstated the administrative suspension of Holte's driving privileges. Id.

This Court has reiterated the rule that the exclusionary rule is inapplicable in the civil administrative implied consent proceeding on several occasions. See Fasching v. Backes, 452 N.W.2d 324, 325 (N.D. 1990) ("This Court refused to extend the evidentiary exclusion rule to civil proceedings" in Holte); Evans v. Backes, 437 N.W.2d 848, 849, n.1 (N.D. 1989) ("the exclusionary rule does not apply to administrative license suspension proceedings"). Therefore, whether or not Deputy Roehrich recited the implied consent advisory is irrelevant in the context of this civil proceeding. No exclusionary rule is applicable.

CONCLUSION

The Department respectfully requests that this Court reverse the district court decision reversing the administrative hearing officer's decision suspending Peterson's driving privileges for 365 days.

Dated this 24th day of October, 2007

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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCT 24 2007
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Melissa Castillo states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 25th day of October, 2007, I served the attached **BRIEF OF APPELLANT** (corrected), upon Eric John Peterson, by and through his attorney Mandy R. Maxon, by placing a true and correct copy thereof in an envelope addressed as follows:

Mandy R. Maxon
Attorney at Law
P.O. Box 2097
Bismarck, ND 58502-2097

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Melissa Castillo

Subscribed and sworn to before me
this 25 day of October, 2007.

Notary Public

DONNA J. CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2009