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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Benjamin Suelzle, Appellant, v. North Dakota Department of Transportation, Appellee.	STATE OF NORTH DAKOTA **Supreme Ct. No. 20080030** **District Ct. No. 07-C-00621**

APPEAL FROM THE DISTRICT COURT
STARK COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE ZANE ANDERSON

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

STATEMENT OF ISSUES

I. Whether the hearing officer's exclusion of evidence regarding the SD-2 and HGN tests did not warrant the exclusion of the law enforcement officer's remaining testimony.

II. Whether the law enforcement officer had probable cause to arrest Suelzle.

STATEMENT OF CASE

Watford City Police Officer Casey Smith arrested Benjamin Suelzle ("Suelzle") on August 26, 2007, for the offense of driving a vehicle while under the influence of intoxicating liquor. (Appendix to Appellant's Brief[1] ("Suelzle App.") A30, ll. 1-3; A35, ll. 1-3.) Suelzle requested a hearing on August 30, 2007, in accordance with N.D.C.C. § 39-20-05. (Suelzle App. A62.)

The administrative hearing was held September 25, 2007. (Suelzle App. A95.) The hearing officer, in accordance with N.D.C.C. § 39-20-05, considered the following issues:

> (1) [w]hether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug or substance in violation of N.D.C.C. section 39-08-01, or equivalent ordinance;
>
> (2) [w]hether the person was placed under arrest; and
>
> (3) [w]hether the person refused to submit to the test or tests.

(Suelzle App. A65.)

[1]Suelzle's appendix contains the following document, which was not part of the administrative record: North Dakota Uniform Complaint and Summons (Suelzle App. A3.)

Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision dated September 25, 2007, revoking Suelzle's driving privileges for a period of three years. (Suelzle App. A95.)

STATEMENT OF FACTS

On August 26, 2007, at approximately 1:34 a.m., Watford City Police Officer Casey Smith ("Officer Smith") observed a vehicle, which the officer described as traveling at a "high rate of speed," fail to stop at a posted stop sign at the intersection of County Road 36 and Highway 23 within the city limits of Watford City. (Suelzle App. A30, ll. 9-12, 23-25; A31, ll. 1-2; A38, ll. 16-21.) Officer Smith noted on the Report and Notice that Suelzle's vehicle "jumped approach onto highway," and checked the boxes that the reasonable suspicion to stop was "erratic driving" and "traffic violation." (Suelzle App. A54, ll. 17-19; A61.) Officer Smith explained Suelzle's vehicle "was airborne halfway across the highway" when it crossed Highway 23 from County Road 36 at a high rate of speed. (Suelzle App. A54, ll. 22-25; A55, ll. 1-4.) Officer Smith activated the emergency lights on his patrol car and stopped the vehicle. (Suelzle App. A30, ll. 11-13.)

Officer Smith detected the strong odor of alcohol on the driver, identified as Suelzle, and observed Suelzle had bloodshot eyes and slurred speech. (Suelzle App. A30, ll. 13-16; A39, ll. 10-12.) When Officer Smith requested his driver's license, vehicle's registration, and proof of insurance, Suelzle displayed poor coordination, "was fumbling," appeared to lose his concentration while looking for the information, and asked Officer Smith multiple times what documents he requested. (Suelzle App. A31, ll. 4-5; A33, ll. 7-25; A39, ll. 13-19; A53, ll. 3-5.) Officer Smith observed Suelzle was "swaying a little bit" when he was outside his vehicle. (Suelzle App. A33, ll. 7-11.) Suelzle admitted to having

consumed alcoholic beverages. (Suelzle App. A53, ll. 20-25; Appendix to Appellee's Brief[2] ("DOT App.") 1, ll. 1-2.)

Suelzle agreed to Officer Smith's request he submit to a series of field sobriety tests. (Suelzle App. A31, ll. 11-12.) Officer Smith administered the horizontal gaze nystagmus ("HGN") test and the S-D2 onsite screening test; however, the hearing officer admitted but did not give weight to the result of the HGN test in reaching his decision and excluded the S-D2 test result. (Suelzle App. A95.) Officer Smith testified he "didn't feel [Suelzle's] balance was good enough to conduct the one-legged stand or the walk-and-turn," and no additional field sobriety tests were administered. (Suelzle App. A33, ll. 4-5; A43, ll. 20-22.)

Officer Smith placed Suelzle under arrest at 1:41 a.m., for driving while under the influence of intoxicating liquor. (Suelzle App. A35, ll. 1-3; A36, ll. 15-16; A47, ll. 24-25; A48, l. 1.) Officer Smith informed Suelzle of the implied consent advisory and requested he submit to a blood test to determine his blood alcohol concentration. (Suelzle App. A35, ll. 9, 19-25.) Suelzle refused to submit to the chemical test for intoxication. (Suelzle App. A35, ll. 9-18; DOT App. 1, l. 11; 2, ll. 12-13.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Suelzle appealed the administrative decision to the Stark County District Court. (Suelzle App. A2, Action 16.) In his Notice of Appeal and Specification of Error, Suelzle identified his argument as "the Hearing Officer incorrectly

[2]The Department's appendix consists of pages 27 and 28 of the Transcript of Testimony of Administrative Hearing, which were omitted from Suelzle's appendix.

determined the arresting officer had reasonable suspicion to stop Defendant and, subsequently, probable cause to make an arrest for DUI." (Suelzle App. A19.)[3]

Judge Zane Anderson issued a Memorandum Opinion on December 27, 2007, affirming the hearing officer's decision. (Suelzle App. A4-A12.) Judge Anderson ruled:

> This Court cannot say that traveling at a high rate of speed, failing to stop at a stop sign, and jumping an approach and becoming airborne is not sufficient evidence such that a reasoning mind could rely on to find erratic driving. Combined with the observation of a lack of concentration and poor coordination when asked for his driver's license, registration and insurance as well as swaying and poor balance, this Court is not willing to conclude that after assessing such evidence, a reasoning mind could not find from this evidence that the officer did not observe some signs of impairment, physical or mental.
>
> The odor of alcohol, bloodshot eyes and slurred speech combined with Suelzle's admission to having consumed alcoholic beverages also make it impossible for this Court to find that there is insufficient evidence for the hearing officer to find that it was reasonable to believe that Suelzle's impairment was due to alcohol consumption.

(Suelzle App. A9.) Judgment was entered on January 9, 2008. (Suelzle App. A16.) Suelzle appealed the Judgment to the North Dakota Supreme Court. (Suelzle App. A17.) The Department requests this Court affirm the judgment of the Stark County District Court and the administrative revocation of Suelzle's driving privileges for a period of three years.

STANDARD OF REVIEW

"The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of administrative license suspensions." Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. "On appeal from a district court's review of an administrative agency's decision, [the North Dakota Supreme Court]

[3] Suelzle concedes on appeal "the Officer had reasonable and articulable suspicion to conduct a traffic stop on Suelzle." (Br. for Appellant ¶ 11.)

review[s] the agency decision." Elshaug v. Workforce Safety & Ins., 2003 ND 177, ¶ 12, 671 N.W.2d 784. The Court reviews "the agency's findings and decisions, and not those of the district court, though the district court's analysis is entitled to respect if its reasoning is sound." Hawes v. N.D. Dep't of Transp., 2007 ND 177, ¶ 13, 741 N.W.2d 202.

Section 28-32-46, N.D.C.C., provides that the Court must affirm an administrative agency's order unless one of the following is present:

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 the 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.

"When reviewing the agency's factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that agency, but determine[s] only whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence from the entire record." Ringsaker, 1999 ND 127, ¶ 5, 596 N.W.2d 328. "However, the ultimate conclusion of whether the facts meet the legal standard, rising to the level of

probable cause, is a question of law, fully reviewable on appeal." Wheeling v. Dir. of N.D. Dep't of Transp., 1997 ND 193, ¶ 5, 569 N.W.2d 273.

LAW AND ARGUMENT

I. The hearing officer's exclusion of evidence regarding the SD-2 and HGN tests did not warrant the exclusion of the law enforcement officer's remaining testimony.

In this case, Suelzle presents his first issue as: "The SD-2 and HGN tests were properly excluded from the Hearing Officer's decision." (Br. for Appellant ¶ 8.) The Department did not cross-appeal the hearing officer's decision with respect to his consideration of the field sobriety tests and the argument, as phrased by Suelzle, is moot.

Suelzle's argument, however, as ferreted by the district court, "seems to be that having excluded the HGN and SD-2 tests it was reversible error for the hearing officer to give any credibility to the arresting officer's remaining testimony." (Suelzle App. A10.) The district court ruled:

> While a permissible view of the evidence may have been to discount the officer's testimony in other respects because of his inconsistencies in regard to the HGN and S-D2 tests, it is not up to this Court to make independent findings or substitute its judgment for that of the administrative agency. McNamara v. Director Dept. of Transportation, 500 N.W.2d 585, 587 (ND 1993). So long as there is evidence supporting the hearing officer's findings and they are not against the greater weight of the evidence a choice between two permissible views of the evidence is up to the hearing officer and the agency and it is not proper for this Court to disturb such findings on appeal.

(Suelzle App. A10-A11.)

Suelzle fails to sufficiently articulate his argument and cites no caselaw to support the position the law enforcement officer's remaining testimony should have been excluded. Rather, "[d]etermining the credibility of witnesses and the weight to be given their testimony is the exclusive province of the hearing officer." Huff v. N.D. State Bd. of Med. Exam'rs - Investigative Panel B, 2004 ND 225,

¶ 14, 690 N.W.2d 221; see also Houn v. N.D. Dep't of Transp., 2000 ND 131, ¶ 11, 613 N.W.2d 29 ("the hearing officer, not this Court, determines the credibility of witnesses and the weight to be given their testimony").

In this case, the hearing officer concluded the testimony of Officer Smith affected the weight given the results of the HGN test and warranted the exclusion of the S-D2 test result. However, it remained within the exclusive province of the hearing officer to weigh the credibility of Officer Smith's remaining testimony. The hearing officer's exclusion of evidence regarding the SD-2 and HGN tests, in and of itself, did not warrant the exclusion of Officer Smith's remaining testimony.

II. The law enforcement officer had probable cause to arrest Suelzle.

"[P]robable cause exists when the facts and circumstances within a police officer's knowledge and of which he has reasonable trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." Zietz v. Hjelle, 395 N.W.2d 572, 574 (N.D. 1986). "In making a determination of probable cause each case must turn on the particular facts and circumstances apparent to the officer involved at the time of the arrest." Vogel v. Dir., N.D. Dep't of Transp., 462 N.W.2d 129, 131 (N.D. 1990) (citing Witte v. Hjelle, 234 N.W.2d 16 (N.D. 1975)).

The Supreme Court has stated "[i]n determining whether there is probable cause to make an arrest, it is not necessary that an officer possess knowledge of facts sufficient to establish guilt." State v. Prigge, 437 N.W.2d 520, 521 (N.D. 1989). "'The validity of the arrest does not depend on whether the suspect actually committed a crime. . . .'" State v. Smith, 452 N.W.2d 86, 88 (N.D. 1990) (quoting Michigan v. DeFillippo, 433 U.S. 31, 36 (1979)). See State v. Lind, 322 N.W.2d 826, 834 (N.D. 1982) ("Probable cause must be more than a mere

suspicion but need not be the same standard of certainty necessary to convict a defendant.").

The Supreme Court explained:

> 'In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> ' . . . Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.
>
> 'These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.'

State v. Salhus, 220 N.W.2d 852, 855 (N.D. 1974) (quoting State v. Chaussee, 138 N.W.2d 788, 792 (N.D. 1965) (emphasis added) (citations omitted)). "When making a probable cause determination, [the Court] consider[s] the totality of the circumstances." Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 17, 663 N.W.2d 161 (emphasis added); see also Moran v. N.D. Dep't of Transp., 543 N.W.2d 767, 770 (N.D. 1996) (finding that "[w]hile none of [the] relevant factors may be sufficient individually for probable cause, their cumulative effect [was] sufficient."); State v. Doohen, 2006 ND 239, ¶ 13, 724 N.W.2d 158 (ruling that, within the context of probable cause to search, "[w]hen determining whether

there is probable cause, the evidence should not be considered individually, but as a collective whole.").

In Moran, the Supreme Court summarized the probable cause test for DUI cases as follows:

> In order to arrest a driver for driving under the influence, the law enforcement officer first must observe some signs of impairment, physical or mental. See State v. Salhus, 220 N.W.2d 852 (N.D. 1974). Further, the law enforcement officer must have reason to believe the driver's impairment is caused by alcohol. See id.; see also Keane v. Com'r of Public Safety, 360 N.W.2d 357 (Minn.Ct.App. 1984). Both elements–impairment and indication of alcohol consumption–are necessary to establish probable cause to arrest for driving under the influence.

543 N.W.2d at 770. Probable cause is a two-prong test requiring evidence of impairment and evidence of alcohol consumption.

In this case, the hearing officer, based upon his findings of fact, concluded:

> . . . I conclude the officer had reasonable grounds to arrest Suelzle for DUI. I base this on the uncommonly erratic driving, bloodshot eyes, slurred speech, mental confusion, strong odor of alcoholic beverage, poor balance and swaying. There was a day before blood and breath tests when people were found to be under the influence beyond a reasonable doubt by applying commonsense to observable behavior. The applicable standard in this case is a lesser one, whether there were reasonable grounds to believe Suelzle was under the influence. To paraphrase an old adage, if it looks, walks, talks, and acts like a duck, it is probably a duck. I conclude that even in the absence of the HGN and SD-2 test results, the officer was justified in arresting Suelzle for DUI.

(Suelzle App. A95.)

Suelzle attempts to challenge the hearing officer's decision through a piecemeal analysis of each relevant factor in isolation, rather than considering the totality of the circumstances. For each factor considered by the hearing officer in his determination of the existence of probable cause, Suelzle suggests an alternative explanation or a semantic distinction for Officer Smith's observations.

Suelzle claims the traffic violations he committed – exceeding the speed limit and failing to stop at a stop sign – cannot properly be characterized as "uncommonly erratic driving." Suelzle suggests "erratic driving" requires behavior such as crossing the center line numerous times. See, e.g., Moran, 543 N.W.2d at 770 ("Moran crossed over the center line four times within three miles before the stop. . . . The frequency of the veering may also be characterized as erratic driving."). In Nicholas v. State, 857 So.2d 980, 982 (Fla. Dist. Ct. App. 2003), the Florida District Court of Appeals held "there is no statutory definition of erratic driving and it is necessarily determined on a case by case basis." See also Commonwealth v. Howard, 762 A.2d 360, 362-63 (Pa. Super. Ct. 2000) ("determining what constitutes sufficient reasonable suspicion to warrant a traffic stop based on previous case law presents a challenge given the ill-defined concept of 'erratic driving.'"). The North Dakota Century Code, similarly, does not define "erratic driving," with the only reference to the term "erratic" being descriptive of a traffic lane change constituting "reckless driving." See N.D.C.C. § 39-06.2-02(24)(b).

Suelzle does not dispute the fact that in committing the traffic violations, his vehicle became "airborne halfway across the highway." (Suelzle App. A30, ll. 2-4.) As a result, Suelzle had no control over his vehicle. Under the circumstances, a reasoning mind reasonably could have characterized such irresponsible conduct as "uncommonly erratic driving."

Suelzle contests the hearing officer's characterization of his poor coordination in locating his driver's license, vehicle's registration, and proof of insurance as amounting to "mental confusion." (Br. for Appellant ¶ 10.) In State v. Raulston, 475 N.W.2d 127, 128 (N.D. 1991), the Supreme Court noted the presence of "mental confusion" where the intoxicated driver "was not thinking

functionally." In this case, the law enforcement officer testified Suelzle displayed poor coordination, "was fumbling," appeared to lose his concentration while looking for the requested information, and asked the officer multiple times what documents he had requested. (Suelzle App. A31, ll. 4-5; A33 ll. 7-25; A39, ll. 13-19; A53, ll. 3-5.) Again, under the circumstances, a reasoning mind reasonably could have characterized Suelzle's undisputed behavior as "mental confusion."

Suelzle speculates the results of the HGN test, which were objected to by Suelzle and were not taken into consideration by the hearing officer, suggest he "was suffering from some medical condition" that "could easily explain some of the other observations the Officer witnessed that night." (Br. for Appellant ¶¶ 14, 20.) Suelzle also suggests his bloodshot eyes might have been attributable to his cigarette smoke or being tired, and that nervousness or normal mannerisms were plausible explanations for his difficulty in locating his driver's license, vehicle's registration, and proof of insurance. Although Suelzle had the full opportunity to present evidence at the administrative hearing regarding these signs of impairment to which he now only sets forth mere speculation, Suelzle failed to take advantage of that opportunity, thereby allowing an unfavorable inference to be drawn. See Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986) ("[f]ailure of a party to testify permits an unfavorable inference in a civil proceeding" and "the hearing officer could also consider the lack of contrary evidence"). The hearing officer's findings of fact as to the consumption of alcohol being the causation of Suelzle's impairment are entitled to deference.

Suelzle argues that without evidence derived from field sobriety tests, probable cause did not exist to place him under arrest for driving while under the influence of intoxicating liquor. Suelzle acknowledges the Supreme Court's ruling in Seela v. Moore, 1999 ND 243, ¶ 10, 603 N.W.2d 480, that screening or

field sobriety tests "are not necessary to establish probable cause to arrest for driving while under the influence." The absence of field sobriety tests continues not to be considered an impediment to a determination of the existence of probable cause. See e.g., Kellogg v. State, 653 S.E.2d 841, 845 (Ga. Ct. App. 2007), cert. denied, Feb. 25, 2008 (quoting State v. Sledge, 591 S.E.2d 479, 481 (Ga. Ct. App. 2003) ("'even in the absence of the field sobriety tests, *the officer's observation that a suspect had bloodshot, watery eyes and exuded an odor of alcohol was sufficient to show probable cause to arrest him for driving under the influence.*'"); Howdeshell v. Dir. of Revenue, 184 S.W.3d 193, 198 (Mo. Ct. App. 2006) (quoting Edmisten v. Dir. of Revenue, 92 S.W.3d 270, 274 (Mo. Ct. App. 2002)) ("We begin by noting that '[i]t is not essential that field sobriety tests be performed in order to show reasonable grounds.'").

In this case, the hearing officer's findings of fact regarding Suelzle's "uncommonly erratic driving, bloodshot eyes, slurred speech, mental confusion, strong odor of alcoholic beverage, poor balance and swaying" were proven by the weight of the evidence from the entire record. (Suelzle App. A95.) The hearing officer's findings support his determination Suelzle was operating his vehicle while impaired, his impairment was caused by alcohol, and probable cause existed to place Suelzle under arrest for driving while under the influence of intoxicating liquor.

CONCLUSION

The Department respectfully requests that this Court affirm the judgment of the Stark County District Court and the Department's decision revoking Benjamin Suelzle's driving privileges for a period of three years.

Dated this 28th day of March, 2008.

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