20100232

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jonathan Thomas Kasowski, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20100232** **District Ct. No. 09-2010-CV-00958**

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

HONORABLE STEVEN L. MARQUART

BRIEF OF APPELLEE

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STATEMENT OF ISSUE

Whether Kasowski was denied a reasonable opportunity to consult an attorney prior to refusing to submit to the chemical test for intoxication.

STATEMENT OF CASE

West Fargo Police Officer Tyler Williams arrested Jonathan Thomas Kasowski ("Kasowski") on February 18, 2010, for the offense of driving a vehicle while under the influence of intoxicating liquor. (Kasowski Appendix ("App.") 4.) Kasowski requested a hearing in accordance with N.D.C.C. § 39-20-05.

The administrative hearing was held on March 19, 2010, at which time the hearing officer considered the following issues pertaining to Kasowski's refusal to submit to an alcohol concentration test under N.D.C.C. § 39-20-01:

> (1) whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle . . . in violation of section 39-08-01, or equivalent ordinance;
>
> (2) whether the person was placed under arrest; and
>
> (3) whether the person refused to submit to the test or tests.

(T. at p. 1, ll. 17-25.)

Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision dated March 19, 2010, revoking Kasowski's driving privileges for a period of four years. (App. 4-5.)

STATEMENT OF FACTS

On February 18, 2010, at approximately 12:40 a.m., West Fargo Police Officer Tyler Williams ("Officer Williams") observed a vehicle traveling approximately 150 yards in front of his patrol car that "seemed to have a hard

time maintaining the constant speed." (T. at p. 4, ll. 13-21; p. 5, ll. 6-25; p. 6, ll. 1-14.) Officer Williams testified "[he] had to continually brake, and then, speed up to maintain the same distance." (T. at p. 6, ll. 15-18.)

Officer Williams testified:

> Once the vehicle got onto the interstate, I noticed that somehow he was having difficulty maintaining his lane. Went way over into the passing lane, on one occasion totally in the passing lane, on ... on one occasion, and then brought the vehicle back over into and then, nearly, fully once again, and then brought it back into his lane, one more time, and that's when I activated my overhead lights.

(T. at p. 7, ll. 1-7.) Officer Williams explained "the entire vehicle" went into the passing lane and changed lanes without using its blinker. (T. at p. 8, ll. 13-20.) Officer Williams testified the vehicle remained in the passing lane for approximately one second and returned to the driving lane without using its blinker. (T. at p. 8, ll. 21-25.) The vehicle again "drifted into the passing lane with almost his entire vehicle," and "crossed over the centerline going into the passing lane" again without using a blinker. (T. at p. 9, ll. 1-9.) Officer Williams described the vehicle's movement as "It's kind of an in between [a slow drift and a quick jerk]. It wasn't really a ... it wasn't a, you know, quick jerk where, you know, a rabbit jumped out at ... jumped out. But it wasn't a just slow gradual ... it wasn't a slow, gradual process either. It was just a kind of a ... almost ... almost the ... the speed at ... at which you would pass a car at, I suppose." (T. at p. 9, ll. 19-25; p. 10, ll. 1-2.)

Officer Williams testified that after he initiated his lights "the vehicle continued going [eastbound] for some time" and "eventually pulled off into the

emergency lane near 45th Street into Fargo." (T. at p. 10, ll. 8-19.) Officer Williams approached the vehicle on the passenger side. (T. at p. 10, ll. 20-24.) Officer Williams testified that in speaking to the driver, who was identified as Kasowski, he noticed that Kasowski had some slow mannerisms. (T. at p. 11, ll. 2-9.) Officer Williams testified:

> When I asked for his driver's license he was very slow in getting his driver's license out. When I ... when I initially spoke with him, and I asked for his driver's license and proof of insurance, in ... he slowly gave me his driver's license. Then I had to again, remind him for the proof of insurance. When I asked him for the proof of insurance, he opened up the center console and just kind of looked into it as if it was just going to magically appear, and then just really didn't ... didn't do anything. And I asked him if he had been drinking, and he stated, no, he hadn't. Initially, I couldn't smell any alcohol, but there was a pretty good south wind that was ... would have been blowing away from me. So then, I made my way around to the driver's side of the vehicle, and then I ... at that time I could detect quite a strong odor of alcohol ... alcoholic beverage coming from within the vehicle.

(T. at p. 11, ll. 9-23.) Officer Williams also testified "[Kasowski's] eyes were glossy, he had slurred speech." (T. at p. 12, l. 1.) Kasowski denied he had been drinking. (T. at p. 21, ll. 17-20.)

Officer Williams requested Kasowski exit his vehicle and come back to his patrol car. (T. at p. 12, ll. 2-4; p. 21, ll. 22-24.) Officer Williams testified that after Kasowski exited his vehicle he observed the following:

> Just that the definite odor of alcoholic beverage coming from him. More the prominent slurred speech, when walking back to my vehicle from his vehicle, I noticed that he was having a difficult time walking. And when I was doing a pat down search for weapons outside my patrol vehicle, he was having a hard time simply standing next to my ... my patrol vehicle and was kind of swaying back and forth ....

(T. at p. 12, ll. 12-18.) After conducting a pat down search, Officer Williams placed Kasowski in the backseat of his patrol car where Kasowski was not able to get out without Officer Williams' assistance. (T. at p. 22, ll. 6-25; p. 23, l. 1.)

Officer Williams testified "I asked [Kasowski] when we got into the car, if … if he had been drinking at all, and he stated that he wanted to talk to his … his attorney about that." (T. at p. 13, ll. 15-17; p. 14, ll. 16-20; p. 23, ll. 22-24.) Officer Williams advised Kasowski not to lie about drinking. (T. at p. 23, ll. 17-21.) Officer Williams testified that he did not provide Kasowski an opportunity to speak to an attorney in response to his request, and instead, "[he] just went right into advising him of the North Dakota implied consent law" for purposes of the S-D5 onsite breath screening test. (T. at p. 13, ll. 22-25; p. 14, ll. 1-7.) Officer Williams testified he did not inform Kasowski he was not going to allow him to speak to an attorney and "[he] didn't offer him a response for that." (T. at p. 14, ll. 21-24.) Kasowski refused to submit to the S-D5 onsite screening test after being read the implied consent advisory. (T. at p. 14, l. 25; p 15, ll. 1-9; p. 24, ll. 9-11.)

Officer Williams testified "I asked [Kasowski] if he'd be willing to do any tests for me, and which he stated that he wanted, you know … no." (T. at p. 13, ll. 12-14.) Officer Williams testified he did not ask Kasowski to perform other field sobriety tests like the walk-and-turn test or the horizontal gaze nystagmus test, because "[he] just … assumed that he wasn't going to perform the other tests after … he wanted to talk to an attorney." (T. at p. 14, ll. 9-15; p. 24, ll. 12-13.)

Officer Williams had Kasowski "get out of the vehicle, placed handcuffs on him, and advised him that he was being placed under arrest for driving under the influence of alcohol." (T. at p. 15, ll. 10-14; p. 24, ll. 14-15.) Officer Williams transported Kasowski to the Cass County jail for the purpose of administering an Intoxilyzer test. (T. at p. 15, ll. 15-19.)

When Officer Williams pulled into the sally port, Kasowski brought up contacting a lawyer again. (T. at p. 19, ll. 7-9; p. 24, ll. 16-22.) Officer Williams testified:

> Once we got to the jail, I did again advise him of the North Dakota implied consent law, and asked him if he'd be willing to submit to an Intoxilyzer. I advised him that we would have ... that he could ... he would be able to make a phone call to contact his attorney, and he just told me that there ... he wouldn't be able to get a hold of him this time of night.

(T. at p. 16, ll. 1-11; p. 24, ll. 23-25; p. 25, l. 1.) Kasowski was not given access to a phone or a phone book. (T. at p. 25, ll. 5-7.) After being read the implied consent advisory, Kasowski refused to submit to the chemical test. (T. at p. 16, ll. 12-14.) Officer Williams testified there was no indication at anytime that Kasowski changed his mind about either attempting to contact an attorney, or about taking the Intoxilyzer test. (T. at p. 16, ll. 15-21.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Kasowski argued in closing that Officer Williams on two occasions denied him the opportunity to consult an attorney – first, when he was in the patrol car following what Kasowski argued constituted a de facto arrest by virtue of the

manner in which Officer Williams conducted his investigation and then when Kasowski and Officer Williams arrived at the Cass County jail. (T. at pp. 26-29.)

The administrative hearing officer found:

> Officer Williams asked Mr. Kasowski to accompany him back to his patrol vehicle. Officer Williams observed that Mr. Kasowski had a difficult time walking back to the patrol vehicle. Before getting into the back of the patrol vehicle, Officer Williams conducted a pat down search. Mr. Kasowski was then placed in the back of the patrol vehicle, which he would not be able to get out without somebody opening the door from the outside. While in the patrol vehicle, Officer Williams asked Mr. Kasowski if he had consumed any alcohol once again. At that time, Mr. Kasowski said that he wanted to speak to an attorney. No opportunity to speak to an attorney was allowed at that time. Officer Williams read the implied consent advisory to Mr. Kasowski to take the S-D5 onsite screening test. Mr. Kasowski refused by saying "no." Officer Williams did not conduct any further field sobriety tests because he believed that Mr. Kasowski would refuse to perform any of the tests. Mr. Kasowski was then arrested for DUI. Mr. Kasowski was brought to the jail where the subject of speaking to an attorney was brought up again. At the time, Mr. Kasowski was handcuffed and still sitting in the back of the patrol vehicle. Mr. Kasowski told Officer Williams something to the effect that he would not be able to get a hold of an attorney any way because of the time of day. Officer Williams took that information to be that the Petitioner no longer wanted to speak to an attorney. There was no other request to speak to an attorney after that. Mr. Kasowski was then informed of the implied consent advisory for taking an intoxilyzer test. Mr. Kasowski refused to submit to a chemical test of this breath.

(App. 4.) The hearing officer held:

> Petitioner made two arguments. The first was that the Petitioner was "de facto" arrested when Officer Williams patted him down and placed him in the back seat of the patrol vehicle. I do not find that an arrest took place at that time. From the evidence, the officer was conducting a DUI investigation. Petitioner also argued that he was not provided an opportunity to speak to an attorney. Prior to arrest, the Petitioner has no right to speak to an attorney before submitting to a chemical test. The facts show there was a conversation, after arrest, about speaking to an attorney before submitting to a chemical test. However, the facts are clear through

> the conversation between Petitioner and Officer Williams, Petitioner decided against speaking to an attorney before deciding to refuse the chemical test. From the conversation, Officer Williams understood that Petitioner no longer wanted to speak to an attorney because it was too late and he would not be able to get a hold of an attorney any way. The issue of an attorney never came up again. At no time did Petitioner request to use a telephone nor did he request a phone book to contact an attorney. Once Officer Williams learned that Mr. Kasowski no longer wanted to speak to an attorney, he has no obligation to bring the matter up again.

(App. 4.)

Kasowski appealed the administrative decision to the Cass County District Court. (App. 6-7.) Kasowski identified the issue on appeal to the district court as follows:

> [T]he hearing officer erred in revoking Petitioner as Petitioner was denied his statutory right to consult with an attorney prior to submitting to a chemical test.

(App. 6.)

Judge Steven L. Marquart issued a Memorandum Opinion and Order on June 22, 2010, affirming the hearing officer's decision. (App. 8-12.) Judge Marquart ruled:

> In the instant case, Kasowski had made a request for a lawyer only a short time after he had been placed in the patrol car. Granted, he was placed in the backseat with the door locked, but he was only there long enough for the officer to ask him if he was drinking, and also stating that he should not lie to him. The Court concludes that at this particular time when the request for a lawyer was made, the invasion of Kasowski's Fourth Amendment interest "is so minimally intrusive as to be justifiable on reasonable suspicion." Therefore, when Kasowski made the request for a lawyer, he was not under arrest and was not entitled to statutory right to a lawyer.
>
> Kasowski also challenges the Hearing Officer's determination regarding his request for a lawyer, and his statement that he wouldn't be able to get a hold of an attorney at that time of night.

> The Hearing Officer concluded that Kasowski's later statement that he wouldn't be able to get a hold of a lawyer was an abandonment of his prior request to consult a lawyer. The Hearing Officer concluded that "through the conversation between petitioner and Officer Williams, Petitioner decided against speaking to an attorney before deciding to refuse the chemical test." This is a finding of fact, which is not fully reviewable by this Court. Rather, if a reasoning mind reasonably could have determined this factual conclusion was proved by the weight of the evidence from the entire record, this Court must affirm the finding. The Court concludes that the Hearing Officer, from the evidence, was allowed to draw this inference that Kasowski had abandoned his request for a lawyer at the jail when he made the statement that he would not be able to get a hold of a lawyer.

(App. 11-12.) Judgment was entered on June 30, 2010. (App. 15.) Kasowski appealed the Judgment to the North Dakota Supreme Court. (App. 16.) The Department requests this Court affirm the judgment of the Cass County District Court and the administrative revocation of Kasowski's driving privileges for a period of four 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] review[s] the agency decision." Elshaug v. Workforce Safety and 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 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, ¶ 5.

LAW AND ARGUMENT

Kasowski was not denied a reasonable opportunity to consult an attorney prior to refusing to submit to the chemical test for intoxication.

"[A] person arrested for driving under the influence of intoxicating liquor has a qualified statutory right to consult with an attorney before deciding whether to submit to a chemical test." Baillie v. Moore, 522 N.W.2d 748, 750 (N.D. 1994) (citing Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 290 (N.D. 1987)). "[I]f an arrested person asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test." Kuntz, 405 N.W.2d at 290. "If he is not given a reasonable opportunity to do so under the circumstances, his failure to take the test is not a refusal upon which to revoke his license under Chapter 39-20, N.D.C.C." Id.

"There are no bright line rules for determining whether a 'reasonable opportunity' to consult with an attorney has been afforded; rather, the determination of whether a reasonable opportunity has been provided turns on an objective review of the totality of the circumstances." Lies v. Dir., N.D. Dep't of Transp., 2008 ND 30, ¶ 10, 744 N.W.2d 783 (citing State v. Pace, 2006 ND 98, ¶¶ 6-7, 713 N.W.2d 535). "Whether a person has been afforded a reasonable opportunity to consult with an attorney is a mixed question of law and fact." Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 10, 622 N.W.2d 180 (citing Groe v. Comm'r of Pub. Safety, 615 N.W.2d 837, 841 (Minn. Ct. App. 2000)). The North Dakota Supreme Court "review[s] mixed questions of law and fact

under the de novo standard of review." Id. (citing State v. Torgerson, 2000 ND 105, ¶ 3, 611 N.W.2d 182).

The "right of an arrested person to have a reasonable opportunity to consult with an attorney before taking a chemical test is a statutory right based on N.D.C.C. § 29-05-20." City of Mandan v. Leno, 2000 ND 184, ¶ 9, 618 N.W.2d 161 (citing Kuntz, 405 N.W.2d at 287). "[T]he limited statutory right for a reasonable opportunity to consult with an attorney attaches only after arrest." Id. at ¶ 1 (emphasis added) (citing N.D.C.C. § 29-05-20).

The issue of whether a reasonable opportunity to consult an attorney has been provided to an arrestee properly arises in those circumstances in which the request has been made in direct response to the person having been asked to submit to a chemical test and for purposes of deciding whether to take the chemical test, rather than in the investigative setting preceding that request. In Baillie, 522 N.W.2d at 749, after being "asked . . . to submit to an intoxilyzer examination . . . . Baillie responded that he would not take the test without an attorney." The Supreme Court held "if a DUI arrestee, upon being asked to submit to a chemical test, responds with any mention of a need for an attorney - to see one, to talk to one, to have one, etc. - the failure to allow the arrestee a reasonable opportunity to contact an attorney prevents the revocation of his license for refusal to take the test." Id. at 750 (emphasis added). "A refusal to take the test under these conditions is not the affirmative refusal necessary to revoke a license under § 39-20-04, N.D.C.C." Id. (emphasis added). See also Lies, ¶ 3 ("Lies stated he would not submit to testing until he spoke with his

lawyer," after "Officer Roehrich recited to Lies the implied-consent advisory and asked Lies if he would submit to a blood test."); Pace, ¶ 2 ("Officer Hagel asked Pace for consent to a blood draw" . . . . Pace responded, 'I don't know how to answer that' and asked if he could speak to his attorney."); Wetzel, ¶ 2 ("Following the arrest, Officer Sullivan recited the implied consent advisory and asked Wetzel to submit to a blood-alcohol concentration test. . . . Officer Sullivan again asked Wetzel if he would submit to a blood test. Wetzel said he wanted to talk to an attorney."); Ehrlich v. Backes, 477 N.W.2d 211, 212 (N.D. 1991) (law enforcement officer "asked [Ehrlich] to take a chemical test of her blood to determine its blood-alcohol content. Ehrlich said that she would not take the test unless an attorney was present."); Kuntz, 405 N.W.2d at 286 (Kuntz requested an opportunity to consult his attorney after being requested to submit to an Intoxilyzer test). But cf. Leno, ¶¶ 4-5 (when "asked if he would consent to an on-site pre-breathalyzer screening test. . . . Leno asked if he could speak to his attorney . . ." . . . . When "asked if he would submit to a blood test at the Law Enforcement Center . . . . [t]he officer testified Leno did not again ask to speak to his attorney at this point.").

In this case, Kasowski first alleges the manner in which Officer Williams conducted the investigative detention was tantamount to a de facto arrest, and as the result of Officer Williams' denial of his request to consult an attorney while in the patrol car, his failure to submit to the Intoxilyzer test was not a refusal upon which to revoke his license. Officer Williams, however, testified he informed Kasowski of the implied consent advisory and requested Kasowski submit to the

Intoxilyzer test when they arrived at the Cass County jail. (T. at p. 16, ll. 1-11.) Prior to that point, Kasowski was not faced with the decision of whether to submit to a chemical test and whether, in making that specific decision, he desired to consult an attorney. Because Kasowski's request to consult an attorney while in the patrol car was made before Officer Williams formally placed him under arrest and asked he submit to the chemical test, it is the Department's position Kasowski's de facto arrest argument is not material to this appeal.

Even for the sake of argument that the possible existence of de facto arrest warrants consideration on appeal, the manner in which Officer Williams conducted the investigative detention of Kasowski was the least intrusive means to determine whether Kasowski was driving while under the influence of intoxicating liquor. "An arrest is made by an actual restraint of the person of the defendant or by the defendant's submission to the custody of the person making the arrest." N.D.C.C. § 29-06-09. An arrest occurs when "circumstances existed that would have caused a reasonable person to conclude he was under arrest and not free to leave." State v. Linghor, 2004 ND 224, ¶ 14, 690 N.W.2d 201. "The existence of an arrest is a question of law, fully reviewable on appeal." State v. Anderson, 2006 ND 44, ¶ 23, 710 N.W.2d 392.

"[A]n arrest is defined using an objective standard: whether 'the suspect's freedom of action is curtailed to a degree associated with formal arrest.'" U.S. v. Elston, 479 F.3d 314, 319 (4th Cir. 2007). In City of Devils Lake v. Grove, 2008 ND 155, ¶¶ 14-15, 755 N.W.2d 485, the North Dakota Supreme Court stated:

> An investigative detention may continue as long as reasonably necessary to conduct duties resulting from a traffic stop and to issue a warning or citation. Those duties may include:
>
> > [R]equesting the driver's license and registration, requesting that the driver step out of the vehicle, requesting that the driver wait in the patrol car, conducting computer inquiries to determine the validity of the license and registration, conducting computer searches to investigate the driver's criminal history and to determine if the driver has outstanding warrants, and making inquiries as to the motorist's destination and purpose.
>
> If an investigative detention lasts too long or its manner of execution unreasonably infringes an individual's Fourth Amendment interests, it may no longer be justified as an investigative stop and, as a full-fledged seizure, must be supported by probable cause. To determine whether an investigative detention has become a de facto arrest, this Court considers whether the invasion of an individual's Fourth Amendment interests is so minimally intrusive as to be justifiable on reasonable suspicion. This Court also considers the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. There is no bright line rule for determining when a seizure becomes a de facto arrest.

(Citations omitted). Under Grove, a law enforcement officer "[is] obliged to limit the investigative methods employed during the stop to 'the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.'" Id. at ¶ 20 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)).

To support his argument regarding an alleged de facto arrest, Kasowski relies on the facts that "by the time [he] first mentioned an attorney he had already been interrogated, accused of lying about his alcohol use, pat searched, and detained in the backseat of a patrol car that could not be opened from the inside." (Brief of Appellant ¶ 23.) In accordance with the permissible

investigative procedures recognized in Grove, Officer Williams requested Kasowski produce his driver's license and vehicle registration, exit his vehicle, and be seated in the patrol car. Officer Williams' challenge to Kasowski's veracity in responding to the inquiry regarding his alcohol consumption did not exceed the reasonable limits of the investigation. Only if a "person has become impliedly accused of committing a crime because the questions of the police have become sustained and coercive, such that they are no longer reasonably designed briefly to confirm or dispel their reasonable suspicion" would such a person possibly be considered to be "in custody. State v. Ketchum, 34 P.3d 1006, 1025 (Haw. 2001). Officer Williams' statement was not coercive or accusatory. The statement was made to determine whether Kasowski had in fact been consuming intoxicating beverages and conveyed to Kasowski the message that, based upon his observations of Kasowski's indicia of intoxication, Officer Williams was aware of the fact Kasowski was not being truthful in his response.

The fact that Kasowski was placed in the back seat of the patrol car without the ability to exit on his own also did not elevate the encounter into a de facto arrest. "The right to make an investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it, and the test of reasonableness under the Fourth amendment requires careful attention to the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting the seizure or attempting to evade the seizure by flight." State v. Heitzmann, 2001 ND 136, ¶ 18, 632 N.W.2d 1. The placement of suspects in

caged rear seats of police car may be a reasonable mode of detention that does not necessarily convert a stop into an arrest. See U.S. v. Moore, 638 F.2d 1171, 1174-75 (9th Cir. 1980). See also Haynie v. County of Los Angeles, 339 F.3d 1071, 1077 (9th Cir. 2003) ("placing a person in a patrol car is not necessarily an arrest" (citation omitted)); U.S. v. Jones, 269 F.3d 919, 924 (8th Cir. 2001) ("request that the driver wait in the patrol car" within reasonable scope of investigatory detention); Grove, at ¶ 27 (distinction that "[t]he increment of intrusion into a driver's personal liberty when he is ordered into a patrol car is a far lesser intrusion than the intrusion into a driver's personal liberty when he is transported away from the site of a traffic stop."); Morrissette v. State, 494 S.E.2d 8, 11 (Ga. Ct. App. 1997) (temporary detention of DUI suspect in back of patrol car with "no apparent way of leaving" is "not the equivalent of a formal arrest.").

Kasowski does not claim the pat down search Officer Williams conducted for weapons was not warranted or unlawful, but rather he claims it contributed to making the investigative detention a de facto arrest. As a safety precaution, the pat down search was a reasonable measure incidental to the detention.

The manner in which Officer Williams conducted the investigative detention of Kasowski was not tantamount to a de facto arrest. As a result, the limited statutory right for a reasonable opportunity to consult with an attorney did not attach at the time Kasowski made his request in the patrol car and Officer Williams' denial of that request did not preclude the revocation of Kasowski's driving privileges.

Kasowski alleges that even if the manner in which Officer Williams conducted the investigative detention was not equivalent to a de facto arrest, the request to consult an attorney he made while in the patrol car remained a viable request to which Officer Williams should have responded "just after" formally placing him under arrest. (Brief of Appellant ¶ 24.) As previously stated, the statutory right to consult with an attorney arises in conjunction with a decision as to whether to submit to a chemical test. See Baillie, 522 N.W.2d at 750; Kuntz, 405 N.W.2d at 290. Officer Williams did not request Kasowski submit to a chemical test until they arrived at the Cass County jail and Kasowski was not faced with the decision as to whether to submit to the chemical test until such time. Officer Williams was under no legal obligation to raise the issue due to the mere fact he placed Kasowski under arrest.

Although Kasowski contends a dispute of fact exists as whether it was Officer Williams or he who again raised the issue of consulting an attorney upon arrival at the Cass County jail, that issue is not material to Kasowski's appeal. What is material and is undisputed is Officer Williams' testimony he informed Kasowski at the jail "he would be able to make a phone call to contact his attorney, and he just told me that there ... he wouldn't be able to get a hold of him this time of night.' (T. at p. 16, ll. 3-6.) It also is undisputed there was no indication at anytime that Kasowski changed his mind about either attempting to contact an attorney, or about taking the Intoxilyzer test. (T. at p. 16, ll. 15-21.)

Based upon this evidence, the hearing officer found:

> Mr. Kasowski told Officer Williams something to the effect that he would not be able to get a hold of an attorney any way because of the time of day. Officer Williams took that information to be that the Petitioner no longer wanted to speak to an attorney.

(App. 4.) The hearing officer held:

> . . . [T]he facts are clear through the conversation between Petitioner and Officer Williams, Petitioner decided against speaking to an attorney before deciding to refuse the chemical test. From the conversation, Officer Williams understood that Petitioner no longer wanted to speak to an attorney because it was too late and he would not be able to get a hold of an attorney any way.

(App. 4.)

On appeal Kasowski disputes the reasonableness of the inference the hearing officer drew from the evidence. Kasowski relies on the circumstances preceding Officer Williams' request he submit to a chemical test and on the fact he never expressly informed "Williams that he changed his mind regarding his prior requests for an attorney." (Brief of Appellant ¶ 27.) Kasowski, however, does not address the significance of the undisputed facts that Officer Williams informed him at the jail "he would be able to make a phone call to contact his attorney" and he in turn responded "he wouldn't be able to get a hold of him this time of night." (T. at p. 16, ll. 3-6.)

The North Dakota Supreme Court has stated "[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." Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986). "The mere fact that the appellate court might have viewed the facts differently had it been the initial trier of the case does not entitle it to reverse the lower court" Herb Hill Ins., Inc. v. Radtke, 380 N.W.2d 651, 653 (N.D. 1986).

The Supreme Court also has stated the "[f]ailure of a party to testify permits an unfavorable inference in a civil proceeding." Geiger, 396 N.W.2d at 303.

In making the inference Kasowski had decided not to contact an attorney because of the time of day, the hearing officer relied on the events that transpired prior to arriving at the jail, the undisputed statements made while at the jail, and Officer Williams' understanding of those statements. The hearing officer also was permitted to consider the lack of any contrary testimony by Kasowski. The inference made by the hearing officer regarding Kasowski's decision not to attempt to contact an attorney due to the time of day was reasonable. Because Kasowski ultimately chose not to attempt to contact an attorney, he was not denied a reasonable opportunity to contact an attorney.

CONCLUSION

The Department respectfully requests that this Court affirm the judgment of the Cass County District Court and the Department's decision revoking Jonathan Thomas Kasowski's driving privileges for a period of four years.

Dated this 24th day of September, 2010.

State of North Dakota
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jonathan Thomas Kasowski, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20100232** **District Ct. No. 09-2010-CV-00958** **AFFIDAVIT OF SERVICE BY ELECTRONIC AND REGULAR MAIL**

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 24th day of September, 2010, I served the attached **BRIEF OF APPELLEE** upon the appellant by electronic mail and by placing true and correct copies thereof in an envelope addressed as follows:

Jesse N. Lange
Aaland Law Office, Ltd.
P.O. Box 1817
Fargo, ND 58107
jesse@aalandlaw.com

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 24th day of September, 2010.

Notary Public

DONNA J. CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2015