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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. Jens Stephen Lee, Petitioner and Appellant.	)	Supreme Court No. 20110121 Cass County No. 09-2010-CR-03557

APPELLEE'S BRIEF

APPEAL FROM ORDER DENYING MOTION TO SUPPRESS OF MARCH 25, 2011
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN E. MCCULLOUGH, PRESIDING

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[¶3] **STATEMENT OF ISSUE**

I. [¶4] Whether an ambiguous statement about fighting a DUI charge at some later date constitutes an invocation of the limited statutory right to consult with counsel prior to the administration of a chemical test.

[¶5] **STATEMENT OF CASE**

[¶6] The Honorable Steven E. McCullough, East Central Judicial District, entered an Order Denying Motion to Suppress on March 25, 2011. (App. at 11-13.) Appellant Jens Stephen Lee (hereinafter "Lee") entered a conditional plea of guilty on March 28, 2011, reserving his right to appeal the Order Denying Motion to Suppress. (App. at 14.) On April 4, 2011, Judge McCullough entered a Criminal Judgment, finding Lee guilty of Driving Under the Influence. (App. at 14.)

[¶7] Lee now appeals the Order Denying Motion to Suppress, asserting that the Intoxilyzer test results should be suppressed because he was denied his limited statutory right to contact an attorney prior to the administration of the test. (App. at 15.)

[¶8] **STATEMENT OF FACTS**

[¶9] On October 7, 2010, Deputy Greg Smith of the Cass County Sheriff's Office conducted a traffic stop of Lee's motorcycle for traveling 85 miles per hour in a 55 mile per hour zone. (App. at 4, 5.) After Lee failed various field sobriety tests and submitted to a preliminary screening test, Deputy Smith arrested him for Driving Under the Influence. (App. at 2, Doc ID# 13, 15:25.) Lee was read the Implied Consent again and agreed to give another breath sample at the Cass County Jail. (App. at 2, Doc ID# 13, 26:30.) Lee and Deputy Smith then had a conversation about common acquaintances. (App. at 2, Doc ID# 13, 26:30-31:00.)

[¶10] Almost four minutes after Lee agreed to give the breath sample at the Cass County Jail, he made a remark referencing attorney Cash Aaland and indicating generally that he would fight the charge. Lee stated "I hope you understand I gotta have Cash give me a good try. What I do for a living is drive truck so." (App. at 2, Doc ID# 13, 30:00.) After making this remark, Lee and Deputy Smith continued conversing about various things including riding motorcycle. (App. at 2, Doc ID# 13, 30:00-33:00.) Lee submitted to an Intoxilyzer test, the result of which was .13. (App. at 5.) Lee was subsequently charged with Driving Under the Influence.

[¶11] **STANDARD OF REVIEW**

[¶12] The North Dakota Supreme Court applies a deferential standard of review when reviewing a district court's decision on a motion to suppress. City of

Mandan v. Gerhardt, 2010 ND 112, ¶ 7, 783 N.W.2d 818. The standard is as follows:

> [This Court] will defer to a trial court's findings of fact in the disposition of a motion to suppress. Conflicts in testimony will be resolved in favor of affirmance, as we recognize the trial court is in a superior position to assess credibility of witnesses and weigh the evidence. Generally, a trial court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the trial court's findings, and if its decision is not contrary to the manifest weight of the evidence.

State v. Olson, 2007 ND 40, ¶ 7, 729 N.W.2d 132 (quoting State v. Torkelsen, 2006 ND 152, ¶ 8, 718 N.W.2d 22). Questions of law are fully reviewable on appeal and "whether a finding of fact meets a legal standard is a question of law." State v. Loh, 2010 ND 66, ¶ 7, 780 N.W.2d 719.

[¶13] LAW AND ARGUMENT

[¶14] I. The East Central Judicial District Court correctly denied the Appellant's Motion to Suppress evidence of the results of his Intoxilyzer test, as the Appellant never made a demand to speak with counsel prior to submitting to the Intoxilyzer test but rather only indicated generally after having consented to take the test that he planned on retaining Cash Aaland as counsel to fight the charge.

[¶15] Lee argues that the East Central Judicial District Court erred when it denied his Motion to Suppress the evidence of his Intoxilyzer test because he was denied a reasonable opportunity to consult with an attorney prior to submitting to the Intoxilyzer test. An individual who has been arrested and asks to speak with an attorney prior to taking a chemical test must be granted a reasonable opportunity

to do so if it does not materially interfere with the administration of the test. State v. Berger, 2001 ND 44, ¶ 17, 623 N.W.2d 25. "The reasonableness of the opportunity objectively depends on the totality of the circumstances, rather than the subjective beliefs of the accused or police." Id. The accused individual's right to consult with an attorney prior to submitting to a chemical test is a statutory right, not a constitutional right. Id. Moreover, the statutory right is limited in that the "right of consultation must be balanced against the need for an accurate and timely chemical test." Id. This statutory right is also discussed by the North Dakota Supreme Court in Baillie v. Moore, 522 N.W.2d 748 (N.D. 1994). In Baillie, the Court stated:

> We refuse to indulge in a case-by-case search for magical words which must be uttered by an arrestee as a prerequisite to being given an opportunity to consult an attorney. Rather, we hold that 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. 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. Our intent is to set forth a "bright line" test to determine when an arrestee must be allowed a reasonable opportunity to consult with an attorney before deciding whether to take a chemical test. If the arrestee responds with any affirmative mention of a need for an attorney, law enforcement personnel must assume the arrestee is requesting an opportunity to consult with an attorney and must allow a reasonable opportunity to do so.

522 N.W.2d 748, 750 (N.D. 1994).

[¶16] In this case, Lee told Deputy Smith "I hope you understand that I gotta have Cash give me a good try." (App at 2, Doc ID# 13, 30:00.) He also told Deputy Smith that he drives truck for a living and needed to protect his livelihood. (Id.) Lee merely mentioned an attorney's name and indicated a general desire to fight the charge. The attorney's name was not mentioned in response to Lee's being asked to take a chemical test but was instead mentioned almost four minutes after Lee had agreed to submit to an Intoxilyzer test. Moreover, Deputy Smith and Lee were engaged in a seemingly friendly conversation about mutual acquaintances prior to Lee's statements about contesting the charge. After Lee mentioned Cash, he and Deputy Smith then began to discuss their mutual appreciation for motorcycles. At no point did Lee indicate a desire to contact an attorney prior to submitting to the Intoxilyzer test. His general statements of mentioning "Cash" to "give him a good try" to "protect his livelihood" do not constitute an invocation of his limited statutory right to consult with an attorney before the administration of a chemical test.

[¶17] Moreover, Lee's statements were ambiguous, and he should suffer the consequences of this ambiguity. See Kasowski v. Dir., North Dakota Dep't of Transp., 2011 ND 92, ¶ 14, 797 N.W.2d 40 (holding that defendant was not denied a reasonable opportunity to consult with an attorney prior to submitting to a chemical test.) The Kasowski Court reiterated the language of Lange, stating "[a]n arrestee cannot complain about a law enforcement officer's reasonable

interpretation of the arrestee's ambiguous statements." Id. (quoting Lange v. North Dakota Dep't of Transp., 2010 ND 201, ¶ 7, 790 N.W.2d 28). The Kasowski Court stated that a DUI arrestee making ambiguous statements suffers the consequences of that ambiguity and that the defendant's statements, which he argued were to invoke his right to contact an attorney, were ambiguous and he therefore could not rely on them to invoke his statutory right to consult an attorney). In this case, it is clear from Deputy Smith's testimony at the administrative hearing and his statements on the squad car video that he thought Lee was merely articulating a general desire to contest the charge and not specifically requesting to speak with an attorney prior to submitting to the Intoxilyzer test. (App. at 6-9, App. at 2, Doc ID# 13) In accordance with the Kasowski Court's reasoning, Lee should suffer the consequences from this ambiguity.

[¶18] **CONCLUSION**

[¶19] Based upon the above reasoning, the State respectfully requests that this Court affirm the East Central Judicial District Court's decision.

Respectfully submitted this 28th day of July, 2011.

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[¶20] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on the 28th day of July, 2011, to: Kyle Kemmet at kyle@aalandlaw.com

Tristan J. Van de Streek