

20110201

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cecil H. Bell,

Petitioner/Appellant,

v.

Director, North Dakota Department
of Transportation,

Respondent/Appellee.

Supreme Ct. No. 20110201

District Ct. No. 18-2010-CV-01999

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STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT
GRAND FORKS COUNTY, NORTH DAKOTA
NORTHEAST CENTRAL JUDICIAL DISTRICT

HONORABLE LAWRENCE E. JAHNKE

BRIEF OF APPELLEE

State of North Dakota
Wayne Stenehjem
Attorney General

By: Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellee.

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Statement of Issues.....	1
I. An arrested person who asks to speak with an attorney before taking a chemical test must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test. Bell requested an attorney and was provided a phone and phone book. Less than 20 minutes remained in the 2 hour testing period. Bell delayed using the telephone, called a friend, and did not contact an attorney. Bell refused to submit to an Intoxilyzer test stating he would not take the test without an attorney. Was Bell denied a reasonable opportunity to contact an attorney?	1
II. The hearing officer's finding that Bell refused to submit to a request for an Intoxilyzer test is not against the greater weight of the evidence.....	1
Statement of Case.....	1
Statement of Facts	2
Proceedings on Appeal to District Court	6
Standard of Review	10
Law and Argument	11
I. Bell was not denied a reasonable opportunity to contact an attorney after he was arrested for driving under the influence	11
II. The hearing officer's finding that Bell refused to submit to a request for an Intoxilyzer test is not against the greater weight of the evidence.....	16
Conclusion.....	22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Baillie v. Moore,</u> 522 N.W.2d 748 (N.D. 1994)	11
<u>Bickler v. N.D. State Highway Comm'r,</u> 423 N.W.2d 146 (N.D. 1988)	11
<u>Boyce v. Backes,</u> 488 N.W.2d 45 (N.D. 1992)	16
<u>Bryl v. Backes,</u> 477 N.W.2d 809 (N.D. 1991).....	11
<u>City of Mandan v. Jewett,</u> 517 N.W.2d 640 (N.D. 1994)	9, 11, 12
<u>Ehrlich v. Backes,</u> 477 N.W.2d 211 (N.D. 1991)	14
<u>Erickson v. Dir., N.D. Dep't of Transp.,</u> 507 N.W.2d 537 (N.D. 1993)	10
<u>Holte v. N.D. State Highway Comm'r,</u> 436 N.W.2d 250 (N.D. 1989)	17
<u>In re Boschee,</u> 347 N.W.2d 331 (N.D. 1984).....	11
<u>Krabseth v. Moore,</u> 1997 ND 224, 571 N.W.2d 146.....	16
<u>Kraft v. State Bd. of Nursing,</u> 2001 ND 131, 631 N.W.2d 572.....	10
<u>Krehlik v. Moore,</u> 542 N.W.2d 443 (N.D. 1996)	16
<u>Kuntz v. State Highway Commissioner,</u> 405 N.W.2d 285 (N.D. 1987)	11
<u>Lamb v. Moore,</u> 539 N.W.2d 862 (N.D. 1995)	10

<u>Lies v. Dir., N.D. Dep't of Transp.,</u> 2008 ND 30, 744 N.W.2d 783	17-18
<u>Mayo v. Moore,</u> 527 N.W.2d 257 (N.D. 1995)	16
<u>McPeak v. Moore,</u> 545 N.W.2d 761 (N.D. 1996)	10
<u>N.D. Dep't of Transp. v. DuPaul,</u> 487 N.W.2d 593 (N.D. 1992)	13-14, 15
<u>Obrigewitch v. Dir., N.D. Dep't of Transp.,</u> 2002 ND 177, 653 N.W.2d 73	16
<u>State v. Sadek,</u> 522 N.W.2d 71 (N.D. 1996)	9, 11
<u>Wetzel v. N.D. Dep't of Transp.,</u> 2001 ND 35, 622 N.W.2d 180	12
<u>Zimmerman v. N.D. Dep't of Transp. Dir.,</u> 543 N.W.2d 479 (N.D. 1996)	10
 <u>Statutes and Other Authorities</u>	
N.D.C.C. ch. 28-32	10
N.D.C.C. ch. 39-20	11
N.D.C.C. § 39-08-01.....	2
N.D.C.C. § 39-20-01	16, 17
N.D.C.C. § 39-20-04	17
N.D.C.C. § 39-20-04(1).....	16
N.D.C.C. § 39-20-05(3).....	1

STATEMENT OF ISSUES

- I. An arrested person who asks to speak with an attorney before taking a chemical test must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test. Bell requested an attorney and was provided a phone and phone book. Less than 20 minutes remained in the 2 hour testing period. Bell delayed using the telephone, called a friend, and did not contact an attorney. Bell refused to submit to an Intoxilyzer test stating he would not take the test without an attorney. Was Bell denied a reasonable opportunity to contact an attorney?
- II. The hearing officer's finding that Bell refused to submit to a request for an Intoxilyzer test is not against the greater weight of the evidence.

STATEMENT OF CASE

On October 2, 2010, Adam Dvorak of the North Dakota Highway Patrol (Trooper Dvorak) arrested Cecil H. Bell (Bell) for the offense of driving a vehicle while under the influence of intoxicating liquor (DUI). Transcript ("Tr.") at Exhibit ("Ex.") 1b. A Report and Notice, including a temporary operator's permit, was issued to Bell after Bell refused to submit to a chemical Intoxilyzer test requested by the officer. Id. The Report and Notice notified Bell of the North Dakota Department of Transportation's (Department) intent to revoke his driving privileges. Id.

The hearing officer considered two sets of issues as law enforcement alleged that Bell refused to submit to requests for an onsite screening test and a chemical Intoxilyzer 8000 test. In accordance with N.D.C.C. § 39-20-05(3) the hearing officer considered the following issues regarding Bell's refusal of the on-site screening test:

- (1) [w]hether a law enforcement officer had reason to believe [Bell] committed a moving traffic violation or was involved in a traffic accident as a driver;
- (2) [w]hether in conjunction with the accident or violation, the officer has, through the officer's observations, formulated an opinion that [Bell's] body contains alcohol; and
- (3) [w]hether [Bell] refused to submit to the on-site screening test.

Tr. Ex. 2. The hearing officer also considered the following issues in regards to Bell's refusal of the alcohol concentration test:

- (1) [w]hether a law enforcement officer had reasonable grounds to believe [Bell] 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 [Bell] was placed under arrest; and
- (3) [w]hether [Bell] refused to submit to the test or tests.

Tr. Ex. 2.

At the close of the hearing, the hearing officer issued his findings of fact, conclusions of law and decision revoking Bell's driving privileges for one year. Tr. 15-16. Bell appealed that decision to this Court. See Notice of Appeal and Specifications of Error. Bell has not challenged his refusal of the onsite screening test. Therefore, regardless of the outcome of this appeal, the Department has grounds to revoke Bell's driving privileges for refusing to submit to the onsite screening test.

STATEMENT OF FACTS

On October 2, 2010, at approximately 6:17 p.m., North Dakota Sergeant Dolf Oldenburg (Sgt. Oldenburg) heard a state radio dispatch report regarding a

light brown, motor home pulling an aluminum trailer traveling south on Interstate 29 near Manvel, North Dakota that was "swerving all over the road." Tr. 9-10, 25. Sgt. Oldenburg responded, driving north on I-29 to a crossover about one mile north of Grand Forks and waited. Tr. 10. He observed a motor home pulling a trailer matching the caller's description and followed it approximately one mile. Tr. 10, 28. The motor home drifted to the right over the fog line three or four times. Tr. 10, 33-34. At 6:27 p.m. Sgt. Oldenburg initiated a traffic stop for Care Required due to the lane violations. Tr. 11, 37.

Sgt. Oldenburg approached the driver's side window and identified the driver as Cecil H. Bell (Bell) by his driver's license. Tr. 14. Sgt. Oldenburg detected a strong odor of an alcoholic beverage from within the vehicle and noticed that Bell's speech was slurred. Id. Sgt. Oldenburg requested Bell exit his vehicle and accompany him back to the patrol car. Tr. 15.

Once inside the patrol car, Sgt. Oldenburg could smell the odor of an alcoholic beverage coming from Bell. Tr. 15. Bell's eyes were glassy, his speech slow and slurred, and he kept repeating himself and had a hard time concentrating on what he was saying. Tr. 15-16, 41. When asked why the motor home was drifting over the fog line, Bell explained he was on his cell phone with his fiancée. Tr. 16, 40-41. Bell kept repeating himself, was fidgety, and opened the glove box of the patrol car which Sgt. Oldenburg thought was odd. Tr. 44. Sgt. Oldenburg requested assistance from Trooper Dvorak to investigate Bell for possible DUI. Tr. 16, 60.

When Trooper Dvorak arrived, Sgt. Oldenburg briefed him in regard to the basis for the stop and informed Trooper Dvorak that he had detected the odor of an alcoholic beverage coming from Bell. Tr. 17, 61. Trooper Dvorak took Bell to his patrol car. Tr. 63. Trooper Dvorak smelled the odor of an alcoholic beverage coming from Bell and noticed his eyes were red and watery and his speech slurred. Tr. 65. Bell said he drank three non-alcoholic beers and one Mike's hard lemonade. Tr. 68. Bell also said he took two Tramadol pills for a neck injury. Id. Bell had been hunting in Canada and was having an argument with his fiancée on his cell phone. Tr. 16, 69. Trooper Dvorak described Bell's demeanor as "talking in circles." Tr. 69-70. Bell kept redirecting the conversation away from Trooper Dvorak's investigation toward his personal problems. Tr. 72. It was hard to get Bell to focus on anything. Tr. 119.

Trooper Dvorak had Bell perform several field sobriety tests. Tr. 70. Bell told Trooper Dvorak he was stressed out and nervous and although he consented to testing he was reluctant to perform them. Tr. 70, 72. Bell passed the alphabet test, but failed the horizontal gaze nystagmus (HGN), backward count and finger count tests. Tr. 73-78. Trooper Dvorak provided the implied consent advisory and asked Bell to submit to an S-D5 onsite screening test. Tr. 79. Bell was argumentative and repetitive and Trooper Dvorak had to request help from Sgt. Oldenburg. Tr. 80-81. Bell refused several requests to take the onsite screening test. Tr. 79-81. Bell indicated he would take other tests just not the onsite screening test. Tr. 82. Trooper Dvorak took Bell outside to perform the other standardized field sobriety tests. Id. Trooper Dvorak began

instructions for the one-leg-stand test but Bell again interrupted him and changed the conversation. Tr. 82. Trooper Dvorak told Bell that to perform the test he would need to lift his foot six inches off the ground, but Bell claimed he did not know what six inches was, and accused Trooper Dvorak of trying to trick him on the measurement. Tr. 83. Trooper Dvorak did not think Bell was being sincere and discontinued the testing. Id.

At 7:27 p.m. Trooper Dvorak placed Bell under arrest for Driving Under the Influence of alcohol or drugs and placed him the back seat of his patrol car. Tr. 83, 85-86, 121, 127. Trooper Quentin McCart (Trooper McCart) arrived to assist. Tr. 88, 137. Trooper McCart went to stay with Bell in the patrol car while Trooper Dvorak and Sgt. Oldenburg secured Bell's motor home. Tr. 88, 139. The officers asked Bell what he wanted done with the motor home and his two dogs. Tr. 20, 88. According to Sgt. Oldenburg, at this time Bell was not uncooperative, but he gave no directions as to what he wanted done with the vehicle or his dogs. Tr. 20. Sgt. Oldenburg explained that he and Trooper Dvorak had to keep repeating questions and were not getting through to Bell. Tr. 46. The officers allowed Bell's dogs a chance to get outside the motor home and relieve themselves before locking up the vehicle. Tr. 21-22. Bell complained about the police dog in Trooper Dvorak's vehicle, so he was transferred to Trooper McCart's patrol car and then transported to the Grand Forks County Correctional Center at 7:58 p.m. Tr. 91-92, 122, 127.

While en route to the Correctional Center Bell complained of pain from the handcuffs. Tr. 93, 145. Trooper McCart explained the situation to Trooper

Dvorak who did not want to stop because they were only a few minutes away from the correctional center and time was of the essence to get Bell's chemical test done. Tr. 93, 128, 145. However, due to Bell's repeated complaints Trooper McCart stopped on the side of the road and moved Bell's handcuffs to the front. Tr. 145-146. Bell was uncooperative in getting his handcuffs adjusted. Tr. 146. Trooper Dvorak instructed Trooper McCart to provide the implied consent advisory to Bell and request he submit to an Intoxilyzer test. Tr. 94, 146. At 8:06 p.m., Trooper McCart read the implied consent advisory to Bell from the Report and Notice form and asked Bell to take the Intoxilyzer test. Tr. 146, 167. Bell talked over Trooper McCart, continually interrupting him, and did not provide an answer. Tr. 147, 164.

Arriving at the Correctional Center at 8:09 p.m., Trooper Dvorak asked Bell to submit to the Intoxilyzer test. Tr. 95. Bell said he would not take the Intoxilyzer test without first speaking with an attorney. Tr. 95. Bell was provided a phone and phone book. Tr. 95, 130, 147-148. Rather than attempt a call, Bell kept talking in circles, claiming he was being treated like a terrorist, and asked for a drink of water. Tr. 148, 150. Bell claimed he could not read the phone book. Tr. 95. Bell asked for his cell phone which was provided. Tr. 95. Bell looked up a number, wrote it down, and then used the Correctional Center phone to make a call. Tr. 96. At 8:23 p.m., Bell spoke to a friend and reported that his friend would be bringing an attorney to the correctional center. Tr. 96-97, 130. Trooper Dvorak then had a prolonged conversation with Bell about whether he was or was not going to take the Intoxilyzer test. Tr. 98. Bell said he would not take the

test without an attorney present. Id. Bell was informed of the implied consent and the consequences for refusing. Tr. 99.

At 8:27 p.m., the two hour period for conducting a chemical test expired and Trooper Dvorak filled out the Report and Notice form, marking Bell as having refused both the onsite screening test and the Intoxilyzer test, and issued the form to him. Tr. 100; Tr. Ex. 1b.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Bell appealed the administrative decision to the Grand Forks County District Court. App. 19. In the Appellant's Notice of Appeal and Specifications of Error, Bell identified eight issues on appeal, which included the following:

5. That the hearing officer failed to address the fact that the unequivocal testimony by the officers was that Mr. Bell was never advised, at any point prior to Officer Dvorak noting a "refusal to test" at 8:27 p.m. that there even was a time limit within which Bell had to decide – regardless of whether or not he had talked to an attorney – whether to take a chemical test. The Hearing Officer erred in reporting that Trooper Dvorak had given Mr. Bell the Implied Consent Advisory, as it is believed that the recorded testimony will establish that Officer Dvorak asked Officer McCart to give the Advisory while McCart was driving Mr. Bell to the Correction Center, and that McCart testified this was given at that time: essentially giving it from memory rather than reading it, so it is unknown what form of the Advisory was actually given.
7. That where the Hearing Officer recited in his decision that Mr. Bell was: "distracted" .. [sic] repeating himself" . . . "fidgety" . . . "talking in circles" . . . anxious about the dog [in a cage] in the car [that he was locked in the back seat with] . . . "complaining of pain" from the too-tight handcuffs" . . . distraught from being on the phone with his fiancée . . . "having taken two Tramadol pills [as prescribed for him] for a neck injury" . . . "asking for an attorney" . . . it then defies logic for the Hearing Officer to conclude that:

Mr. Bell's behavior at the scene of the traffic stop, during transport, and at the Correctional Center could reasonably be interpreted as intended to delay the investigation.

This conclusion is not "reasonable" and would appear to be, at best, impermissible speculation regarding 'facts' OTHER than the ones in evidence or, alternately, simply an artifice to excuse the police actions in [a] denying Mr. Bell his limited statutory right to consult with Counsel before taking a chemical test, and [b] playing a police version of "Gotcha", where there is a secret time limit, known only to the police, within which a citizen may act – and the deadline is concealed until after it has passed.

App. 22, 23.

With respect to Bell's contention that his limited statutory right to counsel was denied and that he did not refuse the requested Intoxilyzer test, the hearing officer found:

Trooper Dvorak instructed Trooper McCart to provide the implied consent advisory and ask Mr. Bell to take an Intoxilyzer 8000 chemical breath test during transit because time was of the essence to complete the test within the two hour limit. At 8:06 PM, Trooper McCart provided the implied consent advisory to Mr. Bell and asked him to take a breath test. Mr. Bell did not consent to the test, instead repeatedly interrupting Trooper McCart during the process. . . . At the Correctional Center, Mr. Bell said he would not take the Intoxilyzer test without first speaking to an attorney. Mr. Bell was provided a telephone book and a telephone at approximately 8:09 PM. Rather than attempt a call, Mr. Bell kept talking in circles and asked for a drink of water. . . . At approximately 8:23 PM, Mr. Bell spoke to a friend and reported that an attorney was on the way to the Correctional Center. Trooper Dvorak asked Mr. Bell if he was going to take the breath test or not. Mr. Bell refused to take the test without an attorney present.

App. 3. The hearing officer concluded, "Mr. Bell was arrested for DUI and refused to submit to the Intoxilyzer 8000 chemical breath test." Id.

Judge Jahnke affirmed the hearing officer's decision revoking Bell's driving privileges for one year. App. 5-13. As to the issue of the hearing officer failing to address what Bell believed was "the unequivocal testimony by the officers that Mr [sic] Bell was never advised, at any point prior to Officer Dvorak noting a 'refusal to test' at 8:27 pm, that there even was a time limit within which Bell had to decide . . . whether to take a chemical test", Judge Jahnke stated:

Respondent North Dakota Department of Transportation (NDDOT) correctly responds that there is no procedural or statutory requirement that an individual suspected of DUI must be advised of the statutory two hour testing window. What Mr. Bell was advised of, on at least three separate occasions, were the administrative consequences which result from a refusal to test when requested. It matters not which of the troopers gave the advisories, and there has been no showing that Mr. Bell was not advised properly on each of those occasions.

App. 9.

In regards to the issue of whether Bell was denied his limited statutory right to counsel Judge Jahnke ruled:

NDDOT responds by directing the court's attention to the North Dakota Supreme Court determination in State v. Sadek: "[A]n arrested person who asks to speak with an attorney before taking a chemical test must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test." Sadek, 552 N.W.2d 71, 72-73 (N.D. 1996). Therefore, the record of this case must be examined to determine whether (1) Mr. Bell was afforded a reasonable opportunity to speak with an attorney after he requested one prior to testing, and (2) did his belated request materially interfere with the effort to obtain a chemical test from him.

The reasonableness of the opportunity for Mr. Bell to consult with legal counsel must be tested objectively, focusing on the totality of the circumstances. See, City of Mandan, 517 N.W.2d 640, 642 (N.D. 1994). After a review of the entire hearing record, this court concludes that, based upon the totality of the circumstances as reflected in that record, Mr. Bell was given a reasonable opportunity

to contact an attorney when he finally requested one. The fact that he delayed his attempt to initiate such contact for a period of time after finally arriving at the Correctional Center was done at his own peril. The "4 minute window" complained of was of his own doing.

App. 10.

Judgment was entered on May 5, 2011. App. 14. Bell appealed the Judgment to this Court. App. 15. The Department requests this Court affirm the judgment of the Grand Forks County District Court and the administrative revocation of Bell's driving privileges for a period of one year.

STANDARD OF REVIEW

"An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C." McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). "This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision." Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993)). "However, the district court's analysis is entitled to respect if its reasoning is sound." Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

This Court's review "is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency's decision is supported by the conclusions of law." McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep't of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder's decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." Id. (citation omitted).

LAW AND ARGUMENT

I. Bell was not denied a reasonable opportunity to contact an attorney after he was arrested for driving under the influence.

The law with respect to the limited statutory right to counsel is rather straightforward. "[A]n arrested person who asks to speak with an attorney before taking a chemical test must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test." State v. Sadek, 552 N.W.2d 71, 72-73 (N.D. 1996). Specifically, this Court has observed as follows:

In Kuntz v. State Highway Commissioner, 405 N.W.2d 285, 290 (N.D. 1987), we held that an arrested person has a limited statutory right under N.D.C.C. ch. 39-20 to consult with counsel before deciding whether to submit to a chemical test. However, if an arrestee is unsuccessful in contacting an attorney by telephone within a reasonable amount of time, the arrestee must nevertheless make an election to take or refuse the chemical test. Bickler v. N.D. State Highway Comm'r, 423 N.W.2d 146, 147 (N.D. 1988). The arrestee's right to consult privately with counsel must be balanced against society's strong interest in obtaining important evidence. State v. Sadek, 552 N.W.2d 71, 73 (N.D. 1996); City of Mandan v. Jewett, 517 N.W.2d 640, 642 (N.D. 1994). If a person arrested for driving under the influence is asked to submit to a chemical test and responds with any affirmative mention of a need for an attorney, the failure to allow the arrested person a reasonable opportunity to contact an attorney prevents the revocation of his or her license for refusal to take the test. Baillie v. Moore, 522 N.W.2d 748, 750 (N.D. 1994). The reasonableness of

the opportunity to consult with counsel is tested objectively, focusing on the totality of the circumstances. Jewett, at 642.

Wetzel v. N.D. Dep't of Transp., 2001 ND 35 ¶ 12, 622 N.W.2d 180.

The totality of the circumstances are such that Bell clearly was given a reasonable opportunity to contact an attorney. At 8:06 p.m., while en route to the Correctional Center, Trooper McCart, as instructed by Trooper Dvorak, recited the implied consent advisory to Bell and asked Bell to submit to an Intoxilyzer chemical breath test. Tr. 146. Bell did not give an answer whether he would take the test. In fact, rather than responding to Trooper McCart's request, Bell repeatedly interrupted the trooper by speaking over him and changing the subject. Tr. 147, 164. Bell arrived at the Correctional Center at 8:09 p.m., and Trooper Dvorak again recited the implied consent advisory and requested Bell take an Intoxilyzer test. Tr. 95. Bell said he would not take the test without first speaking with an attorney. Id.

Bell was given a phone and phone book at 8:10 p.m. and informed he could call an attorney. Tr. 95, 130, 147-148. Bell did not immediately start making phone calls, but instead asked for a drink of water and continued to talk about other matters. Tr. 148, 150. Bell even claimed he did not know how to use a phone book. Tr. 95. Bell then asked to use his cell phone. Id. Rather than making calls from his cell phone, Bell looked up a number, wrote it down, and then inexplicably used the jail phone to make the call. Tr. 96. Apparently, Bell's call was not to a lawyer but to a friend as Bell told Trooper Dvorak his friend would be bringing an attorney to the jail. Tr. 97. This telephone conversation

occurred at 8:23 p.m. Id. Thus, for approximately 13 minutes Bell had failed to make any calls after being provided a phone and phone book.

Bell alleges he was only given four minutes to locate and contact an attorney. Bell Br. 9; Tr. 131. The four minutes Bell is referring to is the period from 8:23 p.m., when Bell made his single phone call to his friend, until 8:27 p.m. when the two hour statutory period expired for Bell to complete a chemical test. Bell omits any mention of the key fact that approximately 13 minutes elapsed after Bell was provided with a phone and phone book before he made any attempt to call anyone.

After Bell told Trooper Dvorak that his friend would be bringing an attorney to the jail, Trooper Dvorak again conversed with Bell about the Intoxilyzer test. Trooper Dvorak described this discussion as a "prolonged conversation" about whether Bell was going to take the test or not. Tr. 98. While it is true Trooper Dvorak did not tell Bell about the two hour deadline, he did tell Bell that his driving privileges would be revoked if he refused to take the Intoxilyzer test. Tr. 98-99. Instead of giving a simple yes-no answer, Bell said that he would not submit to the Intoxilyzer test without an attorney present. Id. Trooper Dvorak waited for the two hour time limit to pass, filled out the Report and Notice, marked Bell as a refusal, and issued the form to him. Tr. 100.

While the totality of the circumstances in any two cases admittedly never will be exactly the same, the material facts in this case and in N.D. Dep't of Transp. v. DuPaul, 487 N.W.2d 593 (N.D. 1992) are sufficiently similar to make this Court's analysis in DuPaul instructive. When arrested for DUI for striking a

viaduct in Minot, North Dakota, Michael DuPaul was taken to the police station where he demanded to see a doctor and a lawyer. Id. at 595. A phone and phone book were given to DuPaul for calling an attorney, but DuPaul did not make any calls. Id. The arresting officer asked several times for DuPaul to consent to alcohol testing and DuPaul only responded, "I want a doctor, and I want a lawyer." Id. DuPaul was read the implied consent advisory which explained the consequences for refusing to consent to the test. Id. He was also read his Miranda rights and was charged with preventing arrest and driving under the influence. Id. The arresting officer then gave DuPaul another opportunity to consent to testing and DuPaul did not affirmatively respond. Id. DuPaul was subsequently issued his temporary operator's permit and transported to the Ward County jail. Id.

At DuPaul's administrative hearing the Department found that DuPaul had "the opportunity to contact an attorney and to make telephone calls, and failed to do so." Id. at 596-97. On review, this Court agreed with that finding. Id. In that regard the Court stated:

When arrested for driving under the influence and before consent to alcohol testing, an accused does have a limited and personal right to contact and to consult an attorney of his choice, unless that consultation unreasonably interferes with testing. Ehrlich v. Backes, 477 N.W.2d 211. . . . DuPaul had a reasonable opportunity to consult with an attorney, and chose not to exercise that opportunity. He has not shown that his opportunity to contact an attorney by telephone was impeded or delayed in any way.

Id. at 597.

Here, similarly, Bell was given access to a phone and a phone book in order to contact an attorney and he chose not to use that opportunity. This

opportunity was not impeded or delayed in any way by Trooper Dvorak. Eventually Bell did make one phone call to a friend who apparently told Bell that he would be bringing an attorney to the Correctional Center. The record is silent regarding whether an attorney ever came to the Correctional Center. Trooper Dvorak testified he left the Correctional Center at 9:02 p.m. Tr. 126-127. Apparently, no attorney had arrived to speak with Bell by that point in time.

After being told by Bell that his friend was bringing an attorney, Trooper Dvorak again gave Bell another chance to submit to the Intoxilyzer test. Trooper Dvorak testified he believed the understanding was that Bell would have to decide right then whether he was going to take the test. Tr. 99. Bell responded that he would not take the test without his attorney present. Tr. 98. Under the reasoning in DuPaul, this constitutes a refusal and is not a denial of the limited statutory right to counsel.

Bell alleges his right to counsel was denied because Trooper Dvorak did not tell Bell about the two hour time deadline to submit to the test. Bell Br. 8-11. However, there is no legal requirement, statutory or otherwise, for an arrestee to be notified of the two hour time limit. Bell did not testify at the hearing. Thus, as a factual matter there is no evidence that Bell would have submitted to the Intoxilyzer test had he been told about the two hour time limit. What is clear is that Bell was asked to make a yes or no decision whether he would or would not take the Intoxilyzer test after telling Trooper Dvorak an attorney would be coming to the jail. Bell refused to do so by indicating he would not take the test without

an attorney present. Thus, it cannot be said that Bell was denied his limited statutory right to counsel.

II. The hearing officer's finding that Bell refused to submit to a request for an Intoxilyzer test is not against the greater weight of the evidence.

North Dakota law is specific and requires all motor vehicle operators who have been arrested for driving under the influence of intoxicating liquor to consent to a chemical test to determine their blood-alcohol concentration. Krabseth v. Moore, 1997 ND 224, ¶ 7, 571 N.W.2d 146; N.D.C.C. § 39-20-01. If the driver refuses, then the driver faces revocation of the privilege to drive. N.D.C.C. § 39-20-04(1). The driver's license is revoked for a time period set forth in the statute. This Court has held that "the failure to submit to a test, whether by stubborn silence or by a negative answer, can be a refusal." Mayo v. Moore, 527 N.W.2d 257, 260 (N.D. 1995). The Court has further held that "a driver is not permitted to 'unduly delay and extend the booking, observation, and testing processes.'" Krehlik v. Moore, 542 N.W.2d 443, 447 (N.D. 1996) (quoting Boyce v. Backes, 488 N.W.2d 45, 47 (N.D. 1992)). Whether a driver refuses to take a test is a question of fact. Obrigewitch v. Dir., N.D. Dep't of Transp., 2002 ND 177, ¶ 14, 653 N.W.2d 73. The hearing officer resolved that question of fact in this case by making a finding that Bell refused the chemical Intoxilyzer test. Specifically the hearing officer's finding reads:

At the correctional center, Mr. Bell said he would not take the Intoxilyzer test without first speaking to an attorney. Mr. Bell was provided a telephone book and a telephone at approximately 8:09 p.m. Rather than attempt a call, Mr. Bell kept talking in circles and asked for a drink of water. Both Trooper Dvorak and Trooper McCart are certified to administer the Intoxilyzer 8000 test. At

approximately 8:23 p.m., Mr. Bell spoke to a friend and reported that an attorney was on the way to the correctional center. Trooper Dvorak asked Mr. Bell if he was going to take the breath test or not. Mr. Bell refused to take the test without an attorney present. At 8:27 p.m., the two hour period for conducting a chemical test expired, and Trooper Dvorak wrote up the Report and Notice, indicating a refusal of the on-site screening test and a breath test. The driver's copy was issued to Mr. Bell, and the original was mailed to NDDOT within five days of issuance. Thereafter, Trooper Dvorak interviewed the identified caller. Mr. Bell's behavior at the scene of the traffic stop, during transport and at the correctional center could reasonably be interpreted as intended to delay the investigation.

Tr. 205, ll. 4-24.

Bell implicitly argues that an "affirmative refusal" by a DUI arrestee to a request for a chemical test is a prerequisite to the Department revoking the arrestee's driving privileges. Sure enough, this Court has stated "we have construed the language of § 39-20-04 to require an affirmative refusal to take the [chemical] test to effectively withdraw the implied consent given the State as provided in § 39-20-01." Holte v. N.D. State Highway Comm'r, 436 N.W.2d 250, 252 (N.D. 1989) (emphasis added) (citations omitted.) Of course, an "affirmative refusal" occurs when an arrestee explicitly states that the arrestee will not take the test. However, Bell fails to acknowledge that it is readily apparent from this Court's jurisprudence that an "affirmative refusal" also occurs when the arrestee effectively communicates through words or actions either an unwillingness to submit to a test or a constricted consent.

In Lies v. Dir., N.D. Dep't of Transp., 2008 ND 30, 744 N.W.2d 783 in the context of an arrestee asking to contact a particular attorney, and an unsuccessful call being made to that attorney's office in the middle of the night,

and the arrestee not suggesting another avenue for reaching the attorney, and not asking to contact a different attorney, this Court observed as follows:

[W]hen an arrestee is presented with an 'ultimatum,' which requires the arrestee to give a 'yes or no' answer regarding submitting to a chemical test after attempts to contact a particular attorney have failed, an arrestee's right to a reasonable opportunity to consult with counsel has not necessarily been violated.

Lies, 2008 ND 30, at ¶ 12. (External citation omitted.) Implicit in the Court's analysis is that, if in these circumstances, the arrestee already has been provided with a reasonable opportunity to contact his attorney and again asks to speak with his attorney in response to an ultimatum, the failure to give a simple "yes or no" answer can properly be deemed an affirmative refusal to submit to the request for a chemical test. Indeed, it is apparent from this Court's recitation of the facts in Lies that, under these circumstances, the arresting officer deemed another request to speak with an attorney to be a refusal. Id. at ¶ 4.

Resolution of the refusal issue, thus, is tied inextricably to resolution of the issue of whether Bell was given a reasonable opportunity to contact his attorney. The Department submits that Bell was given a reasonable opportunity to contact his attorney. If this Court agrees, it follows under Lies that Trooper Dvorak lawfully was permitted to give Bell an ultimatum for a "yes or no" answer to the question of whether he would submit to the Intoxilyzer test. When Bell responded by again stating he would not take the test without his attorney present, a reasoning mind reasonably could have concluded, as the hearing officer did, that Bell's response was a refusal that authorized the Department to revoke Bell's driving privileges.

Further, Bell's response to the ultimatum cannot be read in a vacuum. Bell's actions and behaviors throughout the incident with the police should be considered when determining whether he refused the test and whether his limited right to counsel was denied.

During the stop and DUI investigation, Bell was talking in circles, kept changing the subject, and was generally uncooperative. Tr. 69-70, 146. While he was not aggressive with the officers, Bell would not answer their questions. Tr. 46, 80-82. Bell was originally advised of the implied consent law before being asked to submit to an S-D5 onsite screening test. Tr. 79. It is undisputed that Bell refused the test. Id. Bell however, indicated he would perform other field sobriety tests, but his actions and statements during the one-leg-stand test called into question his sincerity and willingness to comply with the officer's directives. Tr. 82. It appears Bell was attempting to hamper Trooper Dvorak's investigation. Trooper Dvorak began his instructions for the test but Bell again interrupted by talking in circles and changing the conversation. Id. Trooper Dvorak told Bell to relax and explained that to perform the test Bell would need to lift his foot six inches off the ground. Tr. 83. Bell said, "[H]ow do I know what six inches is." Id. Bell then accused Trooper Dvorak of trying to trick him on the measurement. Id. Trooper Dvorak testified Bell was not being sincere so he discontinued the test. Id. Bell was subsequently arrested.

Following arrest, but prior to arriving at the Correctional Center, Bell's delay tactics continued. Bell complained about Trooper Dvorak's police dog. Tr. 91-92, 121-122. He also provided no assistance to the officers who were

seeking direction from him in regards to what he wanted done with his motor home and two dogs. Tr. 20, 88. Then, while being transported to the Correctional Center, Bell complained that the handcuffs were causing him pain. Tr. 93, 145. When Trooper McCart stopped to adjust the handcuffs Bell did not cooperate with the trooper's attempts to do so. Tr. 146. Trooper McCart recited the implied consent advisory to Bell and asked Bell to submit to an Intoxilyzer chemical breath test. Tr. 146. Bell did not give an answer whether he would take the test. In fact, rather than responding to Trooper McCart's request, Bell repeatedly interrupted the trooper by speaking over him and changing the subject. Tr. 147, 164.

After arriving at the Correctional Center Trooper Dvorak again requested Bell take an Intoxilyzer test. Tr. 95. Bell said he would not take the test without first speaking with an attorney. Id. Bell was given a phone and phone book at 8:10 p.m. and informed he could call an attorney. Tr. 95, 130, 147-148. Bell did not immediately start making phone calls, but instead asked for a drink of water and continued to talk about other matters. Tr. 148, 150. Bell even claimed he did not know how to use a phone book. Tr. 95. Bell then asked to use his cell phone, which was provided. Id. Rather than making calls from his cell phone, Bell looked up a number, wrote it down, and then inexplicably used the jail phone to make the call. Tr. 96. Bell's call occurred at 8:23 p.m. and was to a friend. Tr. 97. Bell told Trooper Dvorak that his friend would be bringing an attorney to the jail. Tr. 97.

After Bell told Trooper Dvorak that his friend would be bringing an attorney to the jail, Trooper Dvorak again conversed with Bell about the Intoxilyzer test. This was a “prolonged conversation” about whether Bell was going to take the test or not. Tr. 98. Trooper Dvorak told Bell of the consequences for refusing. Tr. 98-99. Instead of giving a simple yes-no answer, Bell said that he would not submit to the Intoxilyzer test without an attorney present. Id. Trooper Dvorak waited for the two hour time limit to pass, filled out the Report and Notice, marked Bell as a refusal, and issued the form to Bell. Tr. 100.

At no time did Bell seek clarification about the impact of refusing or appear to misunderstand what was being asked of him. And, in regards to the requested Intoxilyzer test Bell did not unambiguously cure his refusal by telling Trooper Dvorak he would take the Intoxilyzer test or even ask the trooper about the consequences of refusing. Neither did he ask if he could attempt to blow into the Intoxilyzer machine. Additionally, Bell knew Trooper Dvorak had marked him down as refusing the Intoxilyzer test, and Bell did not contradict Trooper Dvorak or seek to cure what Bell knew had been deemed a refusal.


Since there is evidence in the record from which a reasoning mind reasonably could have concluded that Bell did refuse to submit to the Intoxilyzer test, grounds do not exist for an appellate court to overturn the hearing officer’s factual determination.

CONCLUSION

The Department respectfully requests that this Court affirm judgment of the Grand Forks County District Court and affirm the hearing officer's decision revoking Bell's driving privileges for one year.

Dated this 28th day of November, 2011.

State of North Dakota
Wayne Stenehjem
Attorney General

By: 
Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellant.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cecil H. Bell,)	
)	
Petitioner/Appellant,)	Supreme Ct. No. 20110201
)	
v.)	District Ct. No. 18-2010-CV-01999
)	
Director, North Dakota Department)	
of Transportation,)	
)	
Respondent/Appellee.)	

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

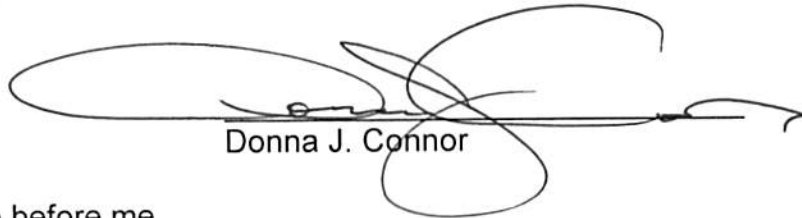
Donna J. Connor states under oath as follows:

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 28th day of November, 2011, I served the attached **BRIEF OF APPELLEE** upon Cecil H. Bell, by and through his attorney Henry H. Howe, by placing a true and correct copy thereof in an envelope addressed as follows:


Henry H. Howe
Howe & Seaworth, Attorneys at Law
421 DeMers Avenue
Grand Forks, ND 58201

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



Donna J. Connor

Subscribed and sworn to before me
this 28th day of November, 2011.



Notary Public

