IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jonathan J. Daniels,	)	
	)	Supreme Court No: 20130044
Appellee,	)	
	)	Dickey County File No: 11-2012-CV-0068
v.	)	
	)	
Francis Ziegler, Director,	)	
Department of Transportation,	)	
	)	
Appellant.	)	

APPEAL FROM AN ORDER OF THE DISTRICT COURT REVERSING AN ADMINISTRATIVE HEARING OFFICER'S DECISION

DICKEY COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT

THE HONORABLE DANIEL D. NARUM

BRIEF OF APPELLEE

VOGEL LAW FIRM

By: Mark A. Friese, ID # 05646
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107-1389
Telephone (701) 237-6983
Facsimile (701) 237-0847
Attorneys for Appellee

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

North Dakota Cases

Other Cases

Statutes

Rules

Other sources

STATEMENT OF ISSUES

I. The district court properly concluded the Department lacked jurisdiction.

A. The Report and Notice form, showing a test result of eight ten thousandths of one percent, fails to comply with N.D.C.C. § 39-20-03.1.

B. The Report and Notice form does not designate an "alcohol concentration" as required by N.D.C.C. § 39-20-03.1.

C. The test result on the Report and Notice form is inconsistent with the State Toxicologist's reported alcohol concentration.

D. Failure to designate a proper test result by weight deprives the Department of jurisdiction

II. The district court's Order should be affirmed.

A. Foundation for admission of the chemical test was not established.

B. The seizure of Mr. Daniels was unlawful.

C. The Department failed to establish reasonable grounds for Mr. Daniels' arrest.

D. The arresting officer's unlawful invocation of North Dakota implied consent law requires dismissal.

E. Prophylactic reversal of the hearing officer's decision is warranted.

F. "Prejudice" is inapplicable.

III. The Department's mischaracterization of the record, and the Department's inclusion of materials not in the record, warrants sanction.

STATEMENT OF FACTS

On March 7, 2012, Dickey County Sheriff's Deputy Brian Sorum ("Dep. Sorum") responded to investigate a report of a vehicle in the ditch. See App. at 4, line(s) ("l.") 9-17; see also Hearing Officer's Decision, App. at 50-51. When Dep. Sorum arrived, Mr. Daniels was sleeping in the vehicle. App. at 17, l. 19-20. Sorum knocked on the window, waking Mr. Daniels. App. at 17, l. 21-24. There were absolutely no indications that Mr. Daniels was in distress or need of assistance. App. at 17, l. 24; App. at 18, l. 1-3. Sorum simply woke Mr. Daniels "to find out what was going on." App. at 4, l. 4-5. Sorum observed one open alcohol container in the vehicle, but did not look for others. App. at 21, l. 7-10. Sorum learned the vehicle became stuck in the ditch at 11 p.m. the night before. App. at 21, l. 4-6. Mr. Daniels' vehicle was stuck and inoperable. App. at 22, l. 19-22. Sorum did nothing to investigate the vehicle's operability. App. at 21, l. 20-22. After observing indications of alcohol consumption, following field tests, and following administration of a preliminary breath test, Dep. Sorum arrested Mr. Daniels for being in actual physical control. App. at 12, l. 10.

An administrative hearing was held on May 3, 2012. At the hearing, Dep. Sorum testified that he completed a specimen submitter's checklist, but the checklist was not offered as an exhibit, and the deputy did not have a copy with him. App. at 23, l. 10-17. Sorum testified to completing most, but not all of the procedures required by the State Toxicologist. See App. at 12-14; 24-25. Sorum completed a "report and notice form," including a "test result" of ".08%," even

though the present test result was .084 gms/100ml. App. at 29, l. 13-17. Mr. Daniels objected to the Department's assertion of jurisdiction, noting noncompliance with N.D.C.C. § 39-20-03.1. App. at 32, l. 23-25, App. at 33-34. The hearing officer overruled the jurisdictional objection. App. at 34, l. 10-11.

Mr. Daniels timely appealed to the district court by filing a Notice of Appeal and specifications of Error. App. at i, Doc. ID#1; App. at 52-53. On December 10, 2012, the district court entered an Order reversing the hearing officer's decision. App. at i, Doc. ID#21; App. at 55-66. The district court reversed the Department's decision on jurisdictional grounds, noting Mr. Daniels' additional arguments were not addressed by the District Court. App. at 60. On February 8, 2013, the Department appealed to this Court. App. at ii, Doc. ID#28; App. at 64.

STANDARD OF REVIEW

In administrative hearings, the burden of proof rests with the Department of Transportation. See Kobilansky v. Liffrig, 358 N.W.2d 781, 790 (N.D. 1984). The Administrative Agencies Practice Act, N.D.C.C. Ch. 28-32 governs. Rudolph v. North Dakota Dep't of Transp., 539 N.W.2d 63, 65 (N.D. 1995). The reviewing Court must look to the record compiled before the hearing officer. Zietz v. Hjelle, 395 N.W.2d 572, 574 (N.D. 1986) (citations omitted). On appeal, the decision of the Department will be reversed if:

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.

Martin v. North Dakota Dept. of Transp., 2009 ND 181, ¶ 33, 773 N.W.2d 190 (citing N.D.C.C. § 28-32-46).

LAW AND ARGUMENT

I. The district court properly concluded the Department lacked jurisdiction.

The district court properly concluded the hearing officer's decision was not in accordance with the law. N.D.C.C. § 28-32-46(1). According to N.D.C.C. § 39-20-03.1, following testing, the law enforcement officer must submit a certified written report showing, among other things, "that the individual was tested for alcohol concentration under this chapter, and that the results of the test show that the individual had an alcohol concentration of at least eight one-hundredths of one

percent by weight." N.D.C.C. § 39-20-03.1(4) (emphasis added). The present Report and Notice form did not meet this statutory command. The district court properly concluded that this case is controlled by Jorgensen v. North Dakota Dep't of Transp., 2005 ND 80, 695 N.W.2d 212 and Aamodt v. North Dakota Dep't of Transp., 2004 ND 134, 682 N.W.2d 308, and the court properly concluded the Department lacked jurisdiction.

A. The Report and Notice form, showing a test result of eight ten thousandths of one percent, fails to comply with N.D.C.C. § 39-20-03.1

The arresting officer issued a Report and Notice form which indicated Mr. Daniels had "test results" of "0.08%." App. at 46. The Department falsely asserts "the arresting officer wrote .084% on the designated test result line." See Appellant Brief at i., and 1; but see App. at 46 (designating the test results as "0.08%"). Further, the Department confuses "test results" with "alcohol concentration," and fails to recognize denoting the test results as "0.08" versus "0.08%" creates enormous and legally significant differences. A numerical designation of "0.08%" is the equivalent of 0.0008, or alternatively, eight ten thousandths of one percent. See State v. Bringham, 694 So. 2d 793, 800 (Fl. 2d DCA 1997) (noting the term "percent" means "a part of a hundred" or "one one-hundredth part" (citation omitted); Sales v. State, 714 N.E.2d 1121, 1128 (Ind.App. 1999) (noting the term "percent" means "out of each hundred; per hundred") (citing The American Heritage Dictionary of the English Language 1343 (3d ed. 1992)).

B. The Report and Notice form does not designate an "alcohol concentration" as required by N.D.C.C. § 39-20-03.1.

The Department's Report and Notice Form facially fails to denote any alcohol concentration, even though N.D.C.C. § 39-20-03.1 requires that the certified written report shows "that the individual had an alcohol concentration of at least eight one-hundredths of one percent by weight." (emphasis added). More directly, the Department's present argument juxtaposes the shorthand "test results" for the statutorily required "alcohol concentration." According to N.D.C.C. § 39-20-07(4), alcohol concentration "is based upon grams of alcohol per one hundred milliliters of blood." The present form, denoting "Test Results 0.08%" wholly fails to comply with the statutory command of N.D.C.C. § 39-20-03.1, requiring "that the results of the test show that the individual had an alcohol concentration of at least eight one-hundredths of one percent by weight."

C. The test result on the Report and Notice form is inconsistent with the State Toxicologist's reported alcohol concentration.

The Report and Notice form issued to Mr. Daniels is even more confusing when considered in conjunction with the analytical report. The State Toxicologist's analytical report purports to establish that Mr. Daniels' alcohol concentration was "0.084 g/100mL." See App. at 48. Notwithstanding, the Report and Notice form designates "Test Results" as "0.08%." At the administrative hearing, the issuing officer testified that he chose to include an incorrect alcohol concentration on the form:

> Mr. Friese: Did you call to explain to [Mr. Daniels] that you intended 0.08 percent to refer to a blood alcohol concentration?
>
> Deputy Sorum: I would guess that that's probably fairly obvious what I was talking about.
>
> Mr. Friese: Well, you're guessing again. You didn't take the time to write blood alcohol concentration. Did you?
>
> Deputy Sorum: No, I never have.
>
> Mr. Friese: What would be fairly obvious is what you wrote is different then what is contained on the State Toxicologist's record, correct?
>
> Deputy Sorum: Um, it just uh . . . it's just a rounded a . . . it's just a rounded down number.

App. at 31, l. 10-21. Neither on appeal to the district court nor here has the Department offered authority for the proposition that issuing officers may round down, or otherwise alter the scientific results reported by the State Toxicologist. "The Department does not contest that including the driver's test result on the Report and Notice [form] is a jurisdictional requirement." Appellant's Brief at 12 (citation omitted). Mr. Daniels agrees. The present Report and Notice form does not contain Mr. Daniel's actual test result, and as the Department concedes, that defect is jurisdictional.

D. Failure to designate a proper test result by weight deprives the Department of jurisdiction.

The Report and Notice form in this case is four-fold flawed. First, it fails to designate an alcohol concentration. Secondly, it reports a result of eight ten thousandths of one percent. Third, written test results are different than the

reported alcohol concentration. Fourth, the form does not designate that the results are "by weight" as required by N.D.C.C. § 39-20-03.1. The Department essentially ignores the first three flaws. The district court's informed decision is consistent with the legislative mandate of N.D.C.C. § 39-20-03.1 and this Court's bright-line rule. See App. at 59 (recognizing the bright line rule requiring specification of the proper test result). This Court's decisions in Jorgensen v. N.D. Dep't of Transp., 2005 ND 80, 695 N.W.2d 212, Aamodt v. North Dakota Dep't of Transp., 2004 ND 134, 682 N.W.2d 308, and Morrow v. Ziegler, 2013 ND 28 control.

In Aamodt, the certified report failed to list "reasonable grounds" for the driver's arrest, and this Court concluded the absence of explicit grounds is a basic and mandatory provision; based on non-compliance with that provision, the Department had no authority to suspend the driver's privilege. 2004 ND 134, ¶¶ 1, 26. This Court held, "The Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute." Id. at ¶ 15. Even though the certified report in Aamodt did contain comments noting the driver had an "odor of alcoholic beverage," that statement was incomplete, and was insufficient to establish reasonable grounds as required by statute. Id. Subsequent testimony at an administrative hearing cannot be used to establish reasonable grounds. Id. at ¶ 26. Aamodt recognized the certified report—not later testimony—must establish reasonable grounds. In Morrow v. Ziegler, 2013 ND 28, ¶ 12, this Court reiterated that a properly completed report is essential to

the Department's jurisdiction. In Morrow, this Court rejected the Department's request to rely upon inferences or implications to overcome the defective report. Id. at ¶ 12 ("Allowing the Department to infer elements that are basic and mandatory without any factual basis on the report to support the inference slants the law too much toward the Department's convenience.").

In Jorgensen, a certified written report was submitted; the form did not contain any writing in the blank provided for documentation of the test results. 2005 ND 80, ¶ 3. Notwithstanding, each the driver and the Department had received a copy of the analytical report, which contained the test results. Id. This Court determined the absence of a test result on the report deprived the Department of jurisdiction:

> In one sentence in N.D.C.C. § 39-20-03.1(3), the legislature has required a law enforcement officer to show in the report sent to the Department (1) "reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01, or equivalent ordinance"; (2) "the person was lawfully arrested"; (3) "the person was tested for alcohol concentration"; and (4) "the results of the test." A properly completed report meeting "the basic and mandatory provisions of the statute," Aamodt, 2004 ND 134, ¶ 15, 682 N.W.2d 308, along with the other matters required by the statute, is intended to give the Department the authority to suspend a driver's license and to provide a driver the means "to know what the officer was relying on," id. at ¶ 25.

Id. at ¶ 12.

In this case, like the insufficient partial statement of probable cause in Aamodt, and like the omitted test result in Jorgensen, the certified report fails to comply with unequivocal command of N.D.C.C. § 39-20-03.1, requiring a test

result showing an "alcohol concentration of at least eight one-hundredths of one percent by weight." The term "alcohol concentration" has legal significance. See N.D.C.C. § 39-20-07(4) (noting alcohol concentration is based on particular and alternate formulas for blood, breath, or urine specimens); see also State v. Meyer, 494 N.W.2d 364, 365 (N.D. 1992) (recognizing critical legal and technical distinction between an "alcohol concentration" versus "blood alcohol concentration"). In this case, the certified written report does not designate an alcohol concentration, nor does the form designate that the test results are determined by weight. The failure to specify an alcohol concentration, and the failure to specify that the results are determined by weight, would readily confuse a person who is "unacquainted" with the reporting documents. See Jorgensen, 2005 ND 80 at ¶ 13.

The fact that actual chemical testing records were attached to the certified report compounds the confusion, but is of no legal significance. In Jorgensen, this Court said:

> Thus, in determining whether to request a hearing, it is important that a driver facing the loss of driving privileges be able to quickly, conveniently, and certainly know what the officer is relying on. That information will be more quickly, conveniently, and certainly conveyed to the driver by inserting in the appropriate blank space on the report and notice form the results of the test than by giving the driver a copy of the analytical report of the analysis of the blood sample tested, which may well be confusing to one unacquainted with such documents. The legislature's intent will be best fulfilled by a bright-line requirement that the report and notice form contain the test result, as specified in N.D.C.C. § 39-20-03.1(3). We conclude that inclusion of the test result in the officer's certified report to the Department is a basic and mandatory provision of the statute,

> without which the Department may not suspend a person's driving privileges.

2005 ND 80 at ¶ 13 (emphasis added). The district court correctly determined that inclusion of the test results, in the form and manner required by N.D.C.C. § 39-20-03.1(3), is jurisdictional.

In Jorgensen, 2005 ND 80, Aamodt, 2004 ND 134, and Morrow, 2013 ND 28, this Court has recognized the importance of strict compliance with the legislature's express statutory mandates regarding submission of a properly completed written report. The North Dakota Legislature has also underscored the critical importance of strict compliance with N.D.C.C. § 39-20-03.1, enacting N.D.C.C. § 39-07-10, entitled "Officer violating provisions for arrest and notice of hearing to defendant may be removed from office." The statute says, "Any officer violating sections . . . 39-20-03.1, or 39-20-03.2 is guilty of misconduct in office . . . ." N.D.C.C. § 39-07-10. By simply adding "alcohol concentration" and "by weight" to its form, and by training officers to include a complete and accurate result, the legislative command will be met. See e.g., Morrow v. Ziegler, 2013 ND 28, ¶ 11 (noting "the Department could avoid confusion by providing a [proper] form").

II. The district court's Order should be affirmed.

This Court will not reverse if the district court ascribed the wrong reason for the result it reached, "if the result is the same under the correct law and reasoning." Huber v. Farmers Union Service Ass'n of North Dakota, 2010 ND

151, ¶ 17, 787 N.W.2d 268 (citations omitted). While the district court did not analyze any of Mr. Daniels' alternative specifications of error, alternative error equally establishes the district court's Order was proper. See App. at 60 ("Because this matter is reversed on jurisdictional grounds the remaining arguments" were not addressed).

A. Foundation for admission of the chemical test was not established.

The Department failed to establish foundation for admission of the chemical test results. Mr. Daniels alleges and incorporates by reference all previous argument submitted to the district court. See Appellant's Brief (district court), Doc ID#10 at 4-7.

B. The seizure of Mr. Daniels was unlawful.

Investigating officers did not have articulable suspicion to justify the warrantless seizure of Mr. Daniels. Mr. Daniels alleges and incorporates by reference all previous argument submitted to the district court. See Appellant's Brief (district court), Doc ID#10 at 13-17.

C. The Department failed to establish reasonable grounds for Mr. Daniels' arrest.

The record does not establish reasonable grounds to believe Mr. Daniels was in violation of N.D.C.C. § 39-08-01. Mr. Daniels alleges and incorporates by reference all previous argument submitted to the district court. See Appellant's Brief (district court), Doc ID#10 at 18-21, and attachment, Doc ID#11.

D. The arresting officer's unlawful invocation of North Dakota implied consent law requires dismissal.

The arresting officer's unlawful invocation of implied consent law violates North Dakota law, offends due process, and requires dismissal. Mr. Daniels alleges and incorporates by reference all previous argument submitted to the district court. See Appellant's Brief (district court), Doc ID#10 at 21-26.

E. Prophylactic reversal of the hearing officer's decision is warranted.

The record establishes systematic non-compliance with North Dakota law, and prophylactic reversal of the hearing officer's decision is warranted. Mr. Daniels alleges and incorporates by reference all previous argument submitted to the district court. See Appellant's Brief (district court), Doc ID#10 at 11-13.

F. "Prejudice" is inapplicable

The Department attempts to obfuscate its non-compliance with the law by claiming Mr. Daniels has neither alleged nor demonstrated prejudice. Appellant Brief at 7, 17. Contrary to the Department's claim, Mr. Daniels alleged substantial prejudice, but the Department opposed Mr. Daniels' request for this Court to permit a limited remand to develop a record of the prejudice. See Daniels v. Ziegler, Supreme Court No. 20130044, Doc ID#7. This Court denied the remand request. Id. at Doc ID#13. Moreover, "prejudice" is beyond the scope of the underlying hearing. See N.D.C.C. § 39-20-05 (limiting the issues to be determined at an administrative hearing). The absence of jurisdiction is a predicate and determinative question, and this Court should not address the

Department's claim that Mr. Daniels is required to allege and prove prejudice in an underlying proceeding in which the issue of prejudice cannot be addressed.

In cases in which the Department has failed to comply with the explicit requirements of N.D.C.C. § 39-20-03.1, this Court has declined to adopt the Department's argument that the affected driver has not established prejudice. See Brief of the Appellee, Jorgensen v. North Dakota Dept. of Transp., available at http://www.ndcourts.gov/_court/briefs/20040338.aeb.htm (outlining the Department's "absence of prejudice" argument). In Schock v. North Dakota Dept. of Transp., 2012 ND 77, ¶ 35, 815 N.W.2d 255, this Court noted that the Department's failure to comply with statutory directives that are "predicates to suspending a person's driving privileges" deprives the Department of jurisdiction irrespective of whether the driver demonstrates prejudice. Id. (citing Jorgenson, 2005 ND 80; Aamodt, 2004 ND 134; and Bosch v. Moore, 517 N.W.2d 412 (N.D. 1994)). Schock implicitly recognizes that jurisdiction is a predicate question: the Department and officers issuing a certified written report must comply with those explicit requirements of N.D.C.C. § 39-20-03.1 which are "predicates to suspending," including a written report that shows "that the individual had an alcohol concentration of at least eight one-hundredths of one percent by weight." 2012 ND 77 at ¶ 35; N.D.C.C. § 39-20-03.1(4). This Court's analysis is consistent with the concomitant obligation of N.D.C.C. § 39-07-10, which holds an officer who fails to comply with the requirements of N.D.C.C. § 39-20-03.1 is guilty of misconduct.

III. The Department's mischaracterization of the record, and the Department's inclusion of materials not in the record, warrants sanction.

Inexcusably, the Department claims that the report and notice form indicated a test result of ".084%" when in fact, the form indicates a test result of ""0.08%." See Appellant Brief at i, and 1; see also App. at 46. Moreover, the Department falsely states the form "included the appropriate test result." Appellant Brief at 8. Without notice or motion, and without leave of Court, the Department includes an Addendum, containing materials not in the record. See Appellant Brief Addendum. The Department further, and without legal authority or record support urges this Court to surmise "common knowledge" of "[o]rdinary citizens" to conclude drivers "do not understand the scientific basis" of chemical testing. See Appellant Brief at 17.

This Court is rightfully intolerant of inappropriate attempts to supplement the record on appeal. See VanDyke v. VanDyke, 538 N.W.2d 197, 203 (N.D. 1995). Supplemental materials may be provided in an addendum, consistent with N.D.R.App.P. 28(g). The rule permits inclusion of statutes, rules, or regulations essential to the Court's determination of the issues. The rule does not permit inclusion of record items from unrelated cases. Supplemental materials may also be included in an appendix, but N.D.R.App.P. 30(a)(1) specifically limits appendix materials to items in the record. This Court has properly sanctioned parties for improper inclusion of non-record items in their briefs. See e.g., Bublitz v. Tsang, 2000 ND 100, ¶ 4, 617 N.W.2d 131 (imposing a sanction for

including materials in a brief that were not part of the district court record). Consistent with N.D.R.App.P. 13, Mr. Daniels respectfully requests that this Court Order the Appellant's addendum stricken, and such other relief as the Court deems appropriate.

CONCLUSION

For the foregoing reasons, Mr. Daniels respectfully requests that this Court affirm the district court's decision, and remand this matter to the district court for entry of attorney fees as ordered by the district court, to include attorney fees and costs on appeal.

Respectfully submitted this 8th day of April, 2013.

VOGEL LAW FIRM

By _____

Mark A. Friese (ID #05646)
218 NP Avenue
Box 1389
Fargo, ND 58107
701-237-6983
Attorneys for Appellee

RE: **Jonathan J. Daniels v. Francis Ziegler, Director, NDDOT**
CASE NO.: **20130044**

STATE OF NORTH DAKOTA)
) SS **AFFIDAVIT OF SERVICE BY MAIL**
COUNTY OF CASS)

Jessicca Bye, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter.

On April 8, 2013, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following document:

APPELLEE'S BRIEF

A copy of the foregoing was securely enclosed in an envelope with postage duly prepaid and addressed as follows:

MICHAEL PITCHER
OFFICE OF ATTORNEY GENERAL
500 N. 9TH ST.
BISMARCK, ND 58501-4509

To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above document was duly mailed in accordance with the provisions of the Rules of Civil Procedure.

Jessicca Bye

Subscribed and sworn to before me this 8th day of April, 2013.

KATHY M. SUMPTION
Notary Public
State of North Dakota
My Commission Expires Jan. 5, 2018

Notary Public, Cass County, North Dakota

1613560.1