

FILED
IN THE OFFICE OF THE
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

MAY 24 2013

Glen Lee YellowBird,

Appellant,

v.

North Dakota Department
of Transportation,

Appellee.

STATE OF NORTH DAKOTA

Supreme Ct. No. 20130082

District Ct. No. 08-2012-CV-01901

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE DAVID E. REICH

BRIEF OF APPELLEE

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STATEMENT OF ISSUE

Whether N.D.C.C. § 39-20-14 requires that the request for submission to the screening test and the reading of the implied consent advisory must be performed by a law enforcement officer certified as a chemical test operator.

STATEMENT OF CASE

Bismarck Police Officer Jessica Helgeson ("Officer Helgeson") arrested Glenn Lee YellowBird ("YellowBird") on August 23, 2012, for the offense of driving a vehicle while under the influence of intoxicating liquor. (Appendix of Appellant ("App.") 4.) Yellowbird requested a hearing in accordance with N.D.C.C. § 39-20-05. (Id. at 5.) Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking YellowBird's driving privileges for a period of one year. (Id. at 6.) YellowBird requested judicial review of the hearing officer's decision. (Id. at 7-8.)

STATEMENT OF FACTS

On August 23, 2012, at approximately 12:02 a.m., Officer Helgeson stopped a vehicle driven by YellowBird after she observed it cross the centerline while making two wide right turns and then make "a brief swerve across the centerline." (Tr. 3, I. 23 – 8, I. 17.) After YellowBird rolled down his window, Officer Helgeson "could immediately smell alcohol emitting from the vehicle as well as on his breath and person." (Tr. 9, II. 13-16.) Officer Helgeson further explained "[i]t was a very strong odor of alcohol coming from the vehicle and on him." (Tr. 19, I. 23 – 20, I. 2.) Officer Helgeson also observed YellowBird had

“very glossy” eyes which were “red and glossy and watery.” (Tr. 9, ll. 19-20; 21, ll. 5-12.) YellowBird admitted he had been drinking. (Tr. 9, l. 21 – 10, l. 2.)

Officer Helgeson requested YellowBird submit to a series of field sobriety tests to which YellowBird consented. (Tr. 10, ll. 3-10.) Officer Helgeson administered the horizontal gaze nystagmus test, however, the hearing officer found the test “was not done in accordance with standard testing procedures” and did not take the results into consideration. (Tr. 10, l. 19 – 12, l. 2; App. 6.) Officer Helgeson did not request YellowBird attempt the physical dexterity tests due to the fact YellowBird advised the officer he recently had surgery on his knees. (Tr. 12, ll. 3-11.) Officer Helgeson read YellowBird the implied consent advisory and requested he submit to an “on-site breath test,” however, YellowBird refused to submit to the S-D5 screening test. (Tr. 12, ll. 12-21.)

Officer Helgeson testified that “due to [her] observation and the smell of an alcoholic beverage on his body, and him failing the HGN test, [she] placed [YellowBird] under arrest for driving under the influence.” (Tr. 13, ll. 2-5.) Officer Helgeson transported YellowBird to the Bismarck Police Department where she informed him of the implied consent advisory for the purpose of administering an Intoxilyzer test. (Tr. 13, ll. 6-12.) YellowBird, however, refused to submit to the Intoxilyzer test. (Tr. 13, l. 13 – 14, l. 5.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

At the administrative hearing, Officer Helgeson testified she is a “recruit officer” and has “a pre/post Peace Officer license,” which gives her the authority to stop and arrest. (Tr. 16, l. 21 – 17, l. 6.) Officer Helgeson explained she was

accompanied by her field training officer, Lieutenant Noah Lindelow. (Tr. 1, ll. 5-10; 17, ll. 11-12.) Officer Helgeson stated Officer Lance Allerdings also was present at the time of the stop. (Tr. 25, ll. 13-16.) Officer Helgeson testified she had not been trained or certified to administer the S-D5 test and that either Officer Lindelow or Officer Allerdings would have conducted the screening test. (Tr. 32, ll. 1-17; 37, l. 25 – 38, l. 2.)

In closing, YellowBird argued:

. . . . [T]he way the statute reads, it says, the screening test or tests must be performed by an enforcement officer certified as a chemical test operator. We know from the record that the officer is not certified, and my understanding in the reading of the statute would be then she shouldn't be conducting the test in any fashion. She shouldn't be reading the implied consent. She shouldn't be even beginning the test. That test should be handled by an officer certified, so if ... if I'm right on that, which I don't know if I am or not, but if I am, then ... then the screening device request was invalid. We should not be counting the refusal.

(Tr. 45, l. 19 – 46, l. 7.) YellowBird claimed “the real fundamental issue here is . . . whether or not the screening device refusal can be considered. Because if there's an illegal arrest, then we don't consider the next implied consent.” (Tr. 46, l. 25 – 47, l. 3.)

The hearing officer determined:

. . . . Mr. Yellow Bird refused to submit to the on-site screening test. Based on that refusal, Mr. Yellow Bird's North Dakota driving privileges are subject to revocation.

The evidence presented was insufficient to establish that the arresting officer had reasonable grounds to believe that Mr. Yellow Bird had been driving while under the influence of intoxicating liquor in violation of NDCC 39-08-01 or equivalent ordinance. The matter of the proposed revocation for refusal to submit to an alcohol concentration test after the arrest must therefore be dismissed.

(App. 6.)

YellowBird appealed the administrative decision to the Burleigh County District Court. (Id. at 7.) YellowBird alleged:

- 1) The hearing officer erred in concluding that YellowBird refused to submit to the onsite screening test.
- 2) N.D.C.C. § 39-20-14 requires that the request for submission to the screening device, along with the subsequent implied consent advisory, must be performed by an enforcement officer “certified as a chemical test operator.”
- 3) Because the officer requesting submission to the screening device and giving the implied consent advisory was not certified as a chemical test operator, the request and advisory was unauthorized, and YellowBird’s rejection could not constitute a refusal for purposes of automatic license revocation.

(Id.) Judge David Reich issued an Order on January 7, 2013, in which he affirmed the hearing officer’s decision. (Id. at 9-13.) Reich ruled:

YellowBird contends that Officer Helgeson was not a certified chemical test operator and did not have the authority to request he submit to the onsite chemical screening test and therefore, he could not refuse the same. As YellowBird states, North Dakota Century Code section 39-20-14 is clear and unambiguous and accordingly the words in the statute must be understood in their ordinary sense. ***State v. Dennis***, 2007 ND 87, ¶ 12, 733 N.W.2d 241, 245; see also Petitioner/Appellant Brief at 2 (discussing the clarity of North Dakota Century Code section 39-20-14). Although the statute mandates that the onsite screening test be administered by a law enforcement officer who is a certified chemical test operator, there is absolutely no provision in the statute that the law enforcement officer requesting submission to the onsite chemical screening test be a certified chemical test operator. The statute only requires “[t]he screening test or tests [] be performed by an enforcement officer certified as a chemical test operator. . . .” N.D.C.C. § 39-20-14. It is apparent that in the writing of this statute the “Legislature has impliedly recognized that not all law enforcement officers in this state will be certified to administer the chemical tests authorized under Chapter 39-20, N.D.C.C.” ***Neset v. North Dakota State Highway Comm’r***, 388 N.W.2d 860, 863 (N.D. 1986).

YellowBird has failed to present any legal support for his interpretation of North Dakota Century Code section 39-20-14. Presented with these circumstances, this Court declines to construe the statute to require that the law enforcement officer requesting submission to the onsite screening test be a certified chemical test operator.

(Id. 12-13.)

Judgment was entered on January 9, 2013. (Id. at 15-16.) YellowBird appealed the Judgment to the North Dakota Supreme Court. (Id. at 17.) On appeal, the Department requests this Court affirm the judgment of the Burleigh County District Court and the administrative revocation of YellowBird's driving privileges for a period of one year.

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 & 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.

N.D.C.C. § 28-32-46.

"When an 'appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency's order unless it finds the agency's order is not in accordance with the law.'" Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646 N.W.2d 704). The "interpretation of a statute is a question of law fully reviewable on appeal." State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

LAW AND ARGUMENT

N.D.C.C. § 39-20-14 does not require that the request for submission to the screening test and the reading of the implied consent advisory must be performed by a law enforcement officer certified as a chemical test operator.

On appeal, YellowBird argues that the plain language of section 39-20-14, N.D.C.C., requires that the law enforcement officer who either requests a person submit to a screening test or reads the implied consent advisory to the person must be certified as a chemical test operator. Section 39-20-14, in relevant part, requires:

Any individual who operates a motor vehicle upon the public highways of this state is deemed to have given consent to submit to an onsite screening test or tests of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath ***upon the request of a law enforcement officer*** who has reason to believe that the individual committed a moving traffic violation or was involved in a traffic accident as a driver, and in conjunction with the violation or the accident the officer has, through the officer's observations, formulated an opinion that the individual's body contains alcohol. . . . The screening test or tests must be performed ***by an enforcement officer certified as a chemical test operator*** by the director of the state crime laboratory or the director's designee and according to methods and with devices approved by the director of the state crime laboratory or the director's designee. . . . The ***officer shall inform the individual*** that refusal of the individual to submit to a screening test will result in a revocation for up to four years of that individual's driving privileges. . . .

N.D.C.C. § 39-20-14 (emphasis added). YellowBird claims that because Officer Helgeson was not trained or certified to administer the S-D5 test she lacked the statutory authority, in a manner comparable to an officer acting outside her territorial jurisdiction as in Davis v. Dir., N.D. Dep't of Transp., 467 N.W.2d 420

(N.D. 1991), to request YellowBird submit to the screening test, as well as to inform him of the implied consent advisory.

In Neset v. N.D. State Highway Comm'r, 388 N.W.2d 860 (N.D. 1986), the Supreme Court considered the statutory language of section 39-20-01, N.D.C.C., as it pertains to a law enforcement officer's authority in regard to chemical tests for intoxication. In relevant part, section 39-20-01 provided:

Any person who operates a motor vehicle on a highway ... in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, saliva, or urine for the purpose of determining the alcoholic, other drug, or combination thereof, content of the blood.... The test or tests must be administered at the direction of a law enforcement officer only after placing the person, except persons mentioned in section 39-20-03, under arrest and informing that person that the person is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof. The arresting officer shall also inform the person charged that refusal of the person to submit to the test determined appropriate will result in a revocation for up to three years of the person's driving privileges....

Neset, 388 N.W.2d at 863 (quoting N.D.C.C. § 39-20-01).

Neset claimed that under section 39-20-01, “only the arresting officer can make the request” for an Intoxilyzer test. Id. The Court, however, ruled “[t]here is no provision in the statute that the arresting officer is the **only** law enforcement official who can request that the arrested person submit to the test.” Id. (emphasis added). “The statute requires only that the test ‘be administered at the direction of a law enforcement officer only after placing the person ... under arrest.’” Id. (quoting N.D.C.C. § 39-20-01).

The Court also rejected Neset's argument "that the implied consent advisory may be given only by the arresting officer." Id. The Court ruled:

We do not construe the statute so literally. The Legislature has impliedly recognized that not all law enforcement officers in this state will be certified to administer the chemical tests authorized under Chapter 39–20, N.D.C.C. If another officer administers the test, it may be more appropriate for that officer to give the implied consent advisory if the refusal is communicated to him.

Id. (citation omitted) (emphasis added).

By its express terms, section 39-20-14 requires the law enforcement officer who administers a screening test must be "certified as a chemical test operator by the director of the state crime laboratory or the director's designee." N.D.C.C. § 39-20-14. Section 39-20-14 also expressly requires the law enforcement officer who requests the person submit to an onsite screening test must be the officer who "ha[d] reason to believe that the individual committed a moving traffic violation or was involved in a traffic accident as a driver, and in conjunction with the violation or the accident the officer ha[d], through the officer's observations, formulated an opinion that the individual's body contains alcohol." N.D.C.C. § 39-20-14. The wording of the statute, however, imposes *no* express requirement that the law enforcement officer who either requests the person submit to an onsite screening test or informs the person of the implied consent advisory must be certified as a chemical test operator.

The statutory requirement that the officer who administers the screening test be certified as a chemical test operator is intended to ensure that the screening test is conducted in accordance with the methodology and the devices approved by the State Toxicologist. On the other hand, requiring the law

enforcement officer who either requests a person submit to a screening test or reads the implied consent advisory to the person be certified as a chemical test operator would not serve such a legitimate purpose.

The request for the screening test is intended for evidence gathering purposes as a means “to assist a law enforcement officer in deciding whether there are reasonable grounds to arrest an individual.” Nichols v. Backes, 461 N.W.2d 113, 114 (N.D. 1990). See also N.D.C.C. § 39-20-14 (“The results of such screening test must be used only for determining whether or not a further test shall be given under the provisions of section 39-20-01.”). “The [implied consent] advisory is meant to inform a person of the severe consequences of refusing to take a screening test.” Brewer v. Ziegler, 2007 ND 207, ¶ 23, 743 N.W.2d 391. YellowBird does not explain how either of these purposes would be furthered by requiring the law enforcement officer be certified as a chemical test operator. See N.D.C.C. § 31-11-05(23) (“The law neither does nor requires idle acts.”).

N.D.C.C. § 39-20-14 does not require that either the request for submission to the screening test or the reading of the implied consent advisory must be performed by a law enforcement officer certified as a chemical test operator. In addition, the Supreme Court has ruled “[s]ection 39-20-05(3) by its terms specifically excludes from consideration at the administrative hearing whether or not the driver was informed of the consequences of refusal.” Gardner v. N.D. Dep’t of Transp., 2012 ND 223, ¶ 14, 822 N.W.2d 55. Whether the law enforcement officer who informed the person of the implied consent advisory was

certified as a chemical test operator is equally immaterial at the administrative hearing.

In this case, Officer Helgeson requested YellowBird submit to the onsite screening test after she observed him commit a moving traffic violation and, through her observations, formulated an opinion that YellowBird's body contained alcohol. Officer Helgeson then informed YellowBird of the implied consent advisory. Although Officer Helgeson was not trained or certified to administer the S-D5 test, either Officer Lindelow or Officer Allerdings, who were present at the scene at the time, would have conducted the screening test. (Tr. 32, ll. 1-17; 37, l. 25 – 38, l. 2.). As acknowledged in Neset, the Legislature has impliedly recognized that not all law enforcement officers, as occurred in this situation, will be certified to administer the onsite screening test. See Scott v. N.D. Dep't of Transp., 557 N.W.2d 385, 386 (N.D. 1996) ("[Officer] Holte believed that Scott's body contained alcohol, and requested an on-site chemical screening test. Officer Joseph P. Johnson, a certified chemical test operator, arrived with an ALERT device. Johnson tried to administer the ALERT test . . ."). Officer Helgeson had the authority, in her capacity as a law enforcement officer, to request YellowBird submit to the onsite screening test, as well as to inform him of the implied consent advisory.

CONCLUSION

The Department respectfully requests this Court affirm the judgment of the Burleigh County District Court and the Department's decision revoking Glen Lee YellowBird's driving privileges for a period of one year.

Dated this 24th day of May, 2013.

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STATE OF NORTH DAKOTA

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v.)	District Ct. No. 08-2012-CV-01901
)	
Director, North Dakota Department)	AFFIDAVIT OF SERVICE BY MAIL
of Transportation,)	
)	
Appellee.)	
)	

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

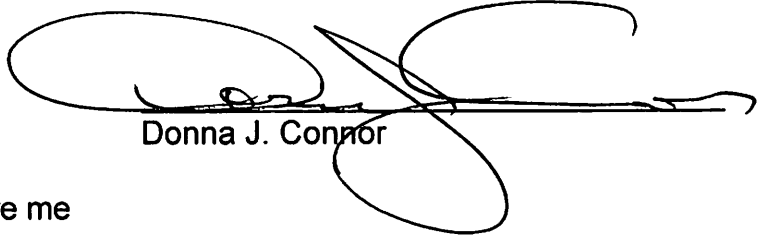
Donna J. Connor states under oath as follows:

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 24th day of May, 2013, I served the attached **BRIEF OF APPELLEE** upon the appellant by placing true and correct copies thereof in an envelope addressed as follows:

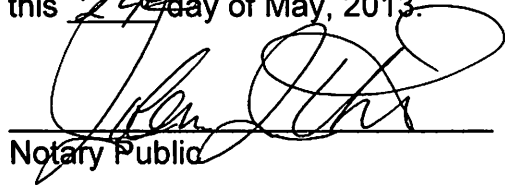
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and depositing the same, with postage prepaid, in the United States mail at
Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 29th day of May, 2013.



Notary Public

