20130082
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 24, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

Glen Lee YellowBird

Appellant,

v.

North Dakota Department of Transportation

Appellee.

Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable David E. Reich

SUPREME COURT NO. 20130082
BURLEIGH COUNTY NO. 08-2012-CV-01901

****

BRIEF OF APPELLANT

****

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ISSUE: **Because the officer requesting the screening device and giving the implied consent advisory was not certified, the request and advisory was unauthorized and Yellowbird's rejection could not constitute a refusal for purposes of automatic license revocation.**

3. STATEMENT OF THE CASE

NATURE OF CASE

4. The case on appeal is a civil case wherein Glen Lee YellowBird's driving privileges were revoked for a period of one (1) year.

COURSE OF PROCEEDINGS

5. YellowBird was issued a Report and Notice on August 23, 2012, regarding the possible revocation of his driving privileges. (Exhibit 1(b), App. p. 4). YellowBird timely requested a hearing (App. p. 5) which was held on September 11, 2012. (App. p. 6; also see Hearing Transcript of September 11, 2012).

6. At the administrative hearing and in post-hearing briefing permitted by the hearing officer, YellowBird argued that there was a lack of probable cause for the arrest and that the revocation for the refusal after the arrest should be dismissed. (Tr. p. 45, line 19 through p. 47, line 8). He further argued that Officer Jessica Helgeson had no authority to request SD-5 testing because she was not certified to administer the test. (Tr. p. 45, line 19 through p. 47, line 8).

7. The Department ruled that the proposed revocation for refusal to submit to an alcohol concentration test after the arrest must be dismissed, but also ruled that YellowBird refused to submit to the on-site screening device and revoked his driving privileges for one year. (Tr. p. 48, line 19 through p. 50, line 10; Hearing Officer's Decision, App. p. 6).

8. YellowBird timely filed his Notice of Appeal and Specifications of Error with the Burleigh Co. District Court on September 24, 2012. (App. pp. 7-8).

DISPOSITION IN THE COURT BELOW

9. On January 7, 2013, the Hon. David E. Reich issued an Order affirming the hearing officer's decision. (App. pp. 9-13). Order for Judgment was entered on January 8, 2013, (App. p. 14), and Judgment was entered on January 9, 2013. (App. p. 15). Notice of Entry of Judgment was sent on January 16, 2013. (App. p. 16). YellowBird timely filed his Notice of Appeal on March 15, 2013. (App. p. 17).

10. STATEMENT OF FACTS

11. On August 23, 2012, Officer Jessica Helgeson stopped YellowBird for making a wide turn in his vehicle. (Hearing Officer's Decision). Helgeson smelled an odor of an alcoholic beverage and YellowBird admitted to drinking. *Id.* Helgeson was not trained to administer, nor certified to administer the SD-5 screening device. (Tr. p. 32, lines 3-4, 16-17). Helgeson asked YellowBird to submit to the screening device and also gave YellowBird the implied consent warning. (Tr. p. 12, lines 13-19; p. 32, lines 10-15). Officer Lindelow or Officer Allerdings would have conducted the test (Tr. p. 32, lines 8-9), but YellowBird told Helgeson "No". (Tr. p. 12, lines 20-21; p. 32, lines 19-20).

12. STANDARD OF REVIEW

13. This Court's review of an administrative revocation of a driver's license is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. *Lange v. North Dakota Dept. of Transp.*, 2010 ND 201, ¶ 5, 790 N.W.2d 28. This Court reviews that 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). However, "[I]f sound, the district court's analysis is entitled to respect." *Aamodt v. North Dakota Dept. Of Transp.*, 2004 ND 134, 682 N.W.2d 308, ¶12.

14. This Court exercises a limited review in appeals involving driver's license suspensions or revocations, and affirms the agency's decision unless:

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.

Lange, supra at ¶ 5 (citing N.D.C.C. § 28-32-46).

15. "[T]he ultimate conclusion of whether [the] facts meet the legal standard, rising to the level of a reasonable and articulable suspicion, is a question of law which is fully reviewable on appeal." *Salter v. North Dakota Dept. of Transp.*, 505 N.W.2d 111, 112 (N.D.1993).

16. LAW AND ARGUMENT

ISSUE: **Because the officer requesting the screening device and giving the implied consent advisory was not certified, the request and advisory was unauthorized and Yellowbird's rejection could not constitute a refusal for purposes of automatic license revocation.**

Screening Devices.

17. N.D.C.C. § 39-20-14 reads, in part:

> 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.
>
> *Id.* (emphasis added).

Statutory Construction.

18. "Words used in any statute are to be understood in their ordinary sense, unless a

contrary intention plainly appears, but any words explained in this code are to be understood as thus explained." *State v. Dennis*, ¶ 12, 2007 ND 87, 733 N.W.2d 241, citing N.D.C.C. ¶ 1-02-02. "When the wording of a statute is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Dennis*, at ¶ 12, citing N.D.C.C. § 1-02-05. "[I]t is presumed that...[t]he entire statute intended to be effective." *Dennis*, at ¶ 12, citing N.D.C.C. § 1-02-38(2). "It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed." *Dennis,* at ¶ 12.

19. N.D.C.C. § 39-20-14 is not ambiguous and is very clear. The screening test or tests must be performed by *an enforcement officer certified as a chemical test operator*, and *that same [certified] 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. In other words, without certification, the officer has no authority to request submission to the test or give the implied consent advisory.

20. "The statutory scheme requires communication between the officer and the driver in which the officer requests submission to the test." *Grosgebauer v. North Dakota Department of Transportation*, 2008 ND 75, ¶ 11, 747 N.W.2d 510. "Without the potential penalty of losing an operator's license for refusing the screening test, it my be doubtful whether a police officer would have the power to compel a driver to submit to a roadside screening test for alcohol." *City of Fargo v. Ruether*, 490 N.W.2d 481, 483 (N.D.1992).

21. In *Neset v. North Dakota State Highway Commissioner*, 388 N.W.2d 860 (N.D.1986), this Court interpreted N.D.C.C. § 39-20-01, which governs the implied consent advisory for chemical testing after arrest. That statute differs significantly from the screening device statute at issue here, in that the officer need not be certified as a chemical test operator. Rather, that statute on post arrest only requires that the test "be administered at the direction of a law enforcement officer only after placing the person...under arrest."

22. Under N.D.C.C. § 39-20-01, Neset argued that only the arresting officer could make the request and give the implied consent advisory. This Court rejected this argument, holding:

> There 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. 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. at 863.

23. Neset also argued that, under N.D.C.C. § 39-20-01, the implied consent advisory may only be given by the arresting officer. This Court concluded:

> 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. *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. (emphasis added).

24. In other contexts, this Court concluded that a state police officer did not have authority under N.D.C.C. § 39-20-01 to ask the arrestee to take a chemical test off the reservation. *Davis v. Dir. N.D.Dep't of Transp.*, 467 N.W.2d 420, 423 (N.D.1991), Because the officer was outside his jurisdiction when he requested the arrestee to

submit to testing, the request was unauthorized and the arrestee's rejection could not constitute a refusal for purposes of automatic license suspension. *Id.* Also see *State v. Hester*, 796 N.W.2d 328, 336 (Minn.2011)(indian community police officer did not have the correct liability insurance limits at the time, he lacked the authority to ask the defendant to take a chemical test); *Forste v. Benton*, 792 S.W.2d 910 (Mo.App.S.D.1990)(a noncertified reserve police offer had no power to request to submit to a chemical test of her breath, and therefore the Director was without authority to revoke Forste's motor vehicle operator's license).

25. In this case, it is clear that under N.D.C.C. § 39-20-14, the request and implied consent advisory must be performed by an enforcement officer certified as a chemical test operator. That procedure did not occur in this case, the request and advisory was therefore unauthorized, and Yellowbird's rejection could not constitute a refusal for purposes of automatic license revocation.

26. The Department cited the recent case of *Gardner v. North Dakota Department of Transportation*, 2012 ND 223, 822 N.W.2d 55, which forecloses this Court from consideration of authority to give the implied consent advisory. In *Gardner*, this Court found the issue of giving the implied consent advisory statutorily barred from consideration. *Id.* at ¶ 9-¶ 13. Significantly, this Court looked to N.D.C.C. § 39-20-05(3), which states "[w]hether the person was informed that the privilege to drive would be revoked or denied for refusal to submit to the test or tests is not an issue." *Id.* at ¶ 9." Clearly, to this issue, Yellowbird must concede to the holding of *Gardner*.

27. However, Yellowbird also argued and raised an issued not foreclosed by *Gardner*,

that being that Officer Jessica Helgeson had no authority to request SD-5 testing because she was not certified to administer the test. Even the *Gardner* Court recognized that, "It is axiomatic that before there can be a 'refusal' to submit to testing under Section 39-20-01, *there must be a valid request for testing under the statute*." *Id.* at ¶ 8(emphasis added), *quoting Throlson v. Backes*, 466 N.W.2d 124, 126 (N.D.1991). Therefore, regardless of whether the implied consent warning was given with authority, a finding of "refusal" by the Department still requires a *valid request for testing* under the statute.

28. In this case, it is clear that under N.D.C.C. § 39-20-14, the request must be performed by an enforcement officer certified as a chemical test operator. Without that certification, the officer has no authority to request submission to the test. *Also see Davis v. Dir. N.D.Dep't of Transp.*, 467 N.W.2d 420, 423 (N.D.1991)(Because the officer was outside his jurisdiction when he requested the arrestee to submit to testing, the request was unauthorized and the arrestee's rejection could not constitute a refusal for purposes of automatic license suspension). The request for chemical testing was unauthorized in this case, and Yellowbird's rejection could not constitute a refusal for purposes of automatic license revocation.

29. CONCLUSION AND PRAYER FOR RELIEF

30. WHEREFORE, the Appellant, Glen Lee YellowBird, by and through his attorney, Chad R. McCabe, respectfully prays that this Court will reverse the judgment affirming the administrative revocation of his driving privileges.

31. Dated this 24th day of April, 2013.

/s/ Chad R. McCabe
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32. CERTIFICATE OF SERVICE

33. A true and correct copy of the foregoing document was sent by electronic transmission on this 24th day of April, 2013, to the following:

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/s/ Chad R. McCabe
CHAD R. MCCABE