20130310
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NOVEMBER 12, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Scott Fossum,	)	
	)	
Appellee,	)	**Supreme Ct. No. 20130310**
	)	
v.	)	**District Ct. No. 08-2013-CV-00415**
	)	
North Dakota Department of Transportation,	)	
	)	
Appellant.	)	

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

HONORABLE BRUCE ROMANICK

BRIEF OF APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

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

Attorneys for Appellant.

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STATEMENT OF ISSUE

Whether an arresting officer must inform an individual less than twenty-one years of age who has been detained under the zero tolerance law that they also are or will be charged with the offense of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor before a chemical test can be administered?

STATEMENT OF CASE

Officer Colt Bohn (Officer Bohn) of the Bismarck Police Department administered an Intoxilyzer test to Scott Fossum (Fossum), a person under 21 years of age, on January 12, 2013. Appendix (App.) 31. A Report and Notice, including a temporary operator's permit, was issued to Fossum after the Intoxilyzer tests results indicated that Fossum had an alcohol concentration of .085 percent by weight. Id. The Report and Notice notified Fossum of the North Dakota Department of Transportation's (Department) intent to suspend his driving privileges. Id.

In response to the Report and Notice, Fossum requested an administrative hearing. Transcript (Tr.) Exhibit (Ex.) 1e. The hearing was held on January 30, 2013. App. 1. In accordance with N.D.C.C. § 39-20-05(2) the hearing officer considered the following issues regarding Fossum's alcohol concentration test:

> (1) [w]hether a law enforcement officer had reasonable grounds to believe, with respect to a person under twenty-one years of age, the person had been driving or was in actual physical control of a vehicle while having an alcohol concentration of at least two one-hundredths of one percent by weight;
>
> (2) [w]hether [Fossum] was tested in accordance with N.D.C.C. section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and

(3) [w]hether the test results show [Fossum] had an alcohol concentration of at least two one-hundredths of one percent by weight.

App. 1; Tr. Ex. 2.

At the close of the hearing, the hearing officer issued her findings of fact, conclusions of law and decision suspending Fossum's driving privileges for 91 days. App. 29-30. Fossum requested judicial review of the hearing officer's decision. App. 34-35.

STATEMENT OF FACTS

On January 12, 2013, at approximately 2:02 a.m. Officer Bohn initiated a traffic stop of Fossum's vehicle for speeding. App. 4. Officer Bohn approached the vehicle and identified Fossum by his driver's license and detected the odor of an alcoholic beverage from the vehicle. App. 5-6. Fossum's identification showed he was born on January 20, 1992, making Fossum 20 years old. App. 9, 31. Fossum admitted consuming alcohol. App. 5.

Fossum agreed to submit to field sobriety testing as requested by the officer. App. 6. Officer Bohn administered the horizontal gaze nystagmus (HGN) test and observed four of the six possible clues in Fossum's eyes. App. 7.

The hearing officer did not consider the results of the S-D5 onsite screening test because the evidence was unclear whether the onsite screening test was performed before or after Fossum was formally detained under the zero tolerance law. App. 30. Officer Bohn originally testified that following the administration of the HGN field test he recited the implied consent advisory and requested Fossum submit to an S-D5 onsite screening test. App. 7. Fossum submitted to the test and results showed an alcohol concentration of .079 percent

by weight. App. 8. Officer Bohn testified he then placed Fossum under arrest for "DUI, minor zero tolerance." Id. The hearing officer referred Officer Bohn to the Report and Notice on which he marked the box indicating that Fossum "[w]as lawfully detained and officer has probable cause to believe that the driver was under twenty-one (21) years of age, while having alcohol in his or her system." The hearing officer again questioned whether Officer Bohn had arrested Fossum for DUI. Id. Officer Bohn said he did arrest Fossum for DUI and detained him under the zero tolerance law. Id.

On cross examination, Officer Bohn was asked when he placed Fossum in handcuffs. App. 15. Office Bohn could not recall specifically and reference to his incident report did not refresh his recollection. Id. Officer Bohn acknowledged it was possible he may have placed Fossum in handcuffs immediately after conducting the HGN test but prior to the onsite screening test. Id. Fossum's counsel referred Officer Bohn to his incident report, which read, "It should be noted that I performed the S-D5 test after reading Scott his Miranda rights and while getting the S-D5 ready." App. 16. Officer Bohn believed his incident report statement to be incorrect doubting the events occurred in that sequence. App. 16-17. However, Officer Bohn acknowledged the sequence could have happened that way, because he could not specifically remember. App. 18. Officer Bohn was confident that when he arrested Fossum he used the words "minor zero tolerance," but was unsure whether he used the words "DUI." Id.

Fossum testified at the hearing and corroborated the officer's testimony of events until the administration of the HGN test. App. 20-22. According to

Fossum, Officer Bohn performed the eye test and then placed him under arrest. App. 22-23. Fossum testified Officer Bohn placed him in handcuffs, and told him he was under arrest but did not tell him what he was being arrested for. App. 23. Fossum said the S-D5 onsite screening test was administered thereafter. App. 24. According to Fossum as he was being transported to the police station he asked Officer Bohn what he was being arrested for, and Officer Bohn said something about "minor" but the officer was mumbling it and Fossum could not hear him. App. 24-25. Fossum subsequently consented to a chemical Intoxilyzer test, done in accordance with the approved method, with the results showing Fossum's alcohol concentration was 0.085 percent by weight. App. 10, 31.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

In his Order reversing the hearing officer's decision, Judge Romanick stated:

> The evidence before this Court indicates that there was some discrepancy as to when and whether or not Fossum was ever informed he was being arrested or detained for driving under the influence. It appears that Officer Bohn informed Fossum that he was being detained for minor zero tolerance, but whether or not Fossum was ever told he was under arrest for driving under the influence remains a question. Due to this discrepancy, Administrative Law Judge Mary Ellen Varvel did not consider the results of the SD-5.
>
> Even though ALJ Varvel found that "the evidence presented did not establish that Officer Bohn also arrested Mr. Fossum for a violation of NDCC 39-08-01 or equivalent ordinance," she considered the results of the Intoxilyzer test, which showed Fossum's Bohn alcohol concentration exceeded the .02% for a person under twenty-one years of age. *See* Tr. at 30. However, North Dakota Century Code section 39-20-01 states that "[t]he test or tests must be administered at the direction of a law enforcement officer only after

> placing the person . . . 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. . . ." N.D.C.C. § 39-20-01. ALJ Varvel's Findings of Fact and Conclusions of law directly contradict the evidence presented to her and the wording of North Dakota Century Code section 39-20-01. The evidence demonstrates that the results of Fossum's Intoxilyzer results should not have been considered and without this evidence ALJ Varvel would have been unable to determine Fossum's Bohn alcohol content exceeded .02%. See N.D.C.C. 39-20-05(2).

App. 37-38.

Judgment was entered on June 12, 2013. App. 40. Notice of Entry of Judgment was filed August 9, 2013. App. 41. The Department appealed the Judgment to this Court. App. 42. The Department requests this Court reverse the Judgment of the Burleigh County District Court and reinstate the administrative suspension of Fossum's driving privileges for a period of 91 days.

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

Statutory grounds do not exist to reverse the hearing officer's decision suspending Fossum's driving privileges for 91 days.

The North Dakota Supreme Court has held that "[t]he Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute. The Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges." Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 15, 682 N.W.2d 308 (emphasis added).

A showing of prejudice is an essential requirement to establish that a claimed deficiency in the compliance with the relevant statutory procedure is basic and mandatory to the Department's authority to suspend or revoke a person's driving privileges. See, e.g., Ike v. Dir., N.D. Dep't of Transp., 2008 ND 85, ¶ 10, 748 N.W.2d 692 ("Although the officer failed to follow the technical requirements of N.D.C.C. § 39-20-03.1, Ike failed to establish that the officer's error was basic and mandatory to the Department's authority to proceed against

him. Nor did he show he was prejudiced by the officer's failure to strictly comply with the statute."); Samdahl v. N.D. Dep't of Transp., 518 N.W.2d 714, 716-17 (N.D. 1994) ("Although the unexplained delay of more than one month between the testing of the blood and the giving of notice of intention to suspend driving privileges does not strictly comply with 'the letter of the law,' we seek to avoid absurd results. It would be an absurd result if, in the absence of any showing of harm or prejudice to Samdahl, we were to hold the officer's failure to strictly comply with the statute resulted in Samdahl retaining his driving privileges."); Sabinash v. Dir. of Dep't of Transp., 509 N.W.2d 61, 64 (N.D. 1993) ("[A]lthough Sabinash's permit may have been facially incomplete, his permit was valid, and, having suffered no adverse consequences from the oversight, Sabinash was deprived of no rights granted by NDCC § 39-20-03.1(1)."); Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147, 149-51 (N.D. 1990) ("Schwind had full notice and knowledge of the administrative proceedings and has not been shown to have been prejudiced by the alleged failure to submit the license."). Cf. Jorgensen v. N.D. Dep't of Transp., 2005 ND 80, ¶ 13, 695 N.W.2d 212 (deficiency in not completing blood test result on Report and Notice found to be jurisdictional due to fact 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."); Aamodt, ¶ 25 (deficiency in not completing probable cause on Report and Notice found to be jurisdictional due to fact that "Aamodt was entitled to know what the officer was relying on.").

A. The statutory requirement for the arresting officer to inform Fossum he was being arrested was met.

At the time of Fossum's encounter with Officer Bohn N.D.C.C. § 39-20-01 stated, in part, as follows:

> 1. Any individual 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, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath or urine. . . .
>
> 2. The test or tests must be administered at the direction of a law enforcement officer only after placing the individual . . . under arrest and informing that individual that the individual 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 combination thereof. For the purposes of this chapter, the taking into custody of a child under section 27-20-13 or an individual under twenty-one years of age satisfies the requirement of an arrest.

(emphasis added).

N.D.C.C. § 27-20-13(1)(b) states that "[a] child may be taken into custody: [p]ursuant to the laws of arrest." N.D.C.C. § 27-20-13(2) states that the "taking of a child into custody is not an arrest, except for the purpose of determining its validity under the Constitution of North Dakota or the Constitution of the United States."

Under North Dakota law an arrest is made by actual restraint of the person of the defendant or by his submission to the custody of the person making the arrest. N.D.C.C. § 29-06-09. In implied consent cases, this Court has indicated that there is nothing magical about the words of arrest – rather the question is whether or not the defendant would reasonably have known the reason for the

arrest. Asbridge v. North Dakota State Highway Comm'r, 291 N.W.2d 739 (N.D. 1980).

Fossum alleges the implied consent law requires the individual arrested be informed he or she is being charged with a violation of the state's Driving Under the Influence (DUI) or Actual Physical Control (APC) laws, before a chemical test can be properly requested. App. i, at Doc. 9; App. 34. This same argument was presented in Asbridge.

There the Court stated:

> The circumstances of the arrest provided Asbridge with reasonable notice of the cause for the arrest. Furthermore, he could have questioned the officer as to the cause of his arrest if he were in doubt, which apparently he did not do. If the circumstances of an arrest can provide a criminal defendant with sufficient notice for the cause thereof in a double-murder case or in an armed robbery situation, such as existed in State v. Iverson and State v. Arntz, respectively, then the surrounding circumstances can certainly provide sufficient notice to one suspected of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor. Asbridge does not deny that he was placed under arrest. He merely contends that he was not properly informed of the cause for his arrest.

Asbridge, 291 N.W.2d at 747.

The Court in Asbridge appeared to frame the question in terms of whether or not the defendant had sufficient notice of the circumstances surrounding the arrest to put a reasonable person in the defendant's position on notice as to the cause of the arrest. Here, Fossum does not deny that he was detained under the "zero tolerance" law. App. i, at Doc. 9, ¶¶ 8, 12. What was known by Fossum was that he had been stopped by Officer Bohn for speeding, that Officer Bohn detected the odor of an alcoholic beverage coming from him, and the officer had

him perform the horizontal gaze nystagmus (HGN) field sobriety test, and that he was being charged with “minor zero tolerance”. If Fossum had questions about what exactly “minor zero tolerance” meant, he reasonably should have been expected to make further inquiry. He did not. Under this circumstance, even if Fossum’s argument was correct, he waived any defect by failing to make a reasonable inquiry at the time of the chemical test.

It is axiomatic that if the taking into custody of an individual under twenty-one years of age in accordance with N.D.C.C. § 27-20-13 satisfies the requirement of arrest, a chemical test can be administered to such an individual after informing that person that they are being taken into custody in accordance with N.D.C.C. § 27-20-13. In other words, the Department is not contesting that law enforcement does not need to inform an individual of why they are being taken into custody. However, it follows from the plain language of the statute that if taking into custody of a person under 21 satisfies the requirements for arrest, law enforcement only need inform the person of the reason for that custody prior to requesting a chemical test.

Officer Bohn informed Fossum he was being detained under the zero tolerance law. App. 8, 18. By informing Fossum he was being detained under the zero tolerance law, Officer Bohn complied with the statutory requirements of section 39-20-01, N.D.C.C.

B. The validity of Fossum's arrest is not an issue in this administrative proceeding and therefore cannot be jurisdictional.

Even if this Court does not agree with the preceding argument it should still affirm the hearing officer's decision suspending Fossum's driving privileges because whether Fossum was arrested and informed of the nature of his arrest is not an issue at an implied consent hearing.

An administrative hearing for a violation of the zero tolerance law does not require an arrest for driving under the influence. In fact, an "administrative hearing is designed solely to resolve the issues set forth in Section 39-20-05, N.D.C.C." Pladson v. Hjelle, 368 N.W.2d 508, 511 (N.D. 1985).

N.D.C.C. § 39-20-05(2) states, in part, as follows:

> If the issue to be determined by the hearing concerns license suspension for operating a motor vehicle while having an alcohol concentration of at least eight one-hundredths of one percent by weight or, with respect to an individual under twenty-one years of age, an alcohol concentration of at least two one-hundredths of one percent by weight, the hearing must be before a hearing officer assigned by the director and at a time and place designated by the director. The hearing must be recorded and its scope may cover only the issues of whether the arresting officer had reasonable grounds to believe the individual had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance or, with respect to an individual under twenty-one years of age, the person had been driving or was in actual physical control of a vehicle while having an alcohol concentration of at least two one-hundredths of one percent by weight; whether the individual was placed under arrest, unless the individual was under twenty-one years of age and the alcohol concentration was less than eight one-hundredths of one percent by weight, then arrest is not required and is not an issue under any provision of this chapter; whether the individual was tested in accordance with section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and whether the test results show the person had an alcohol concentration of at least eight one-hundredths of one percent by weight or, with respect to an individual under twenty-one years of

> age, an alcohol concentration of at least two one-hundredths of one percent by weight.

(emphasis added). Thus, the statute plainly states that for a person under the age of twenty-one taken into custody under the "zero tolerance" law, there is no requirement that the state prove the driver was arrested.

This is confirmed by legislative history. The "zero tolerance" law was introduced into the 1997 Legislative Assembly by Representatives Martinson, Carlisle and DeKrey and Senators Andrist, Kringstad and Nalewaja as HB 1111 at the request of the North Dakota Department of Transportation. At the hearing on HB 1111 Keith C. Magnusson, Driver and Vehicle Services Director of the North Dakota Department of Transportation testified as follows:

> Because we are dealing only with the administrative implied consent process, some of the amendments in this bill clarify that we are not concerned during the hearing with arrest or possible violation of the DUI law. The bill also clarifies that taking the driver into custody, rather than making an arrest, would be sufficient to perform any tests necessary. Because it does not involve a criminal action, there will not be an actual arrest for this particular conduct, although there could be one for some other violation of law.

Leg. History, Ch. 334, S.L. 1997 Testimony of Keith C. Magnusson, (minutes of hearing Jan. 17, 1997). Thus, both the legislative history and the statute itself make plain that there is no "arrest requirement" under the zero tolerance law before a chemical test can be obtained.

In a related matter under the implied consent law, this Court recently determined a hearing officer does not have an affirmative duty to consider whether a police officer complied with the implied consent advisory requirement

of N.D.C.C § 39-20-01. See Gardner v. N.D. Dep't of Transp., 2012 ND 223, 822 N.W.2d 55. In its holding, this Court reasoned as follows:

> When requesting a chemical test of blood, urine, breath or saliva to determine blood alcohol content, law enforcement is required to "inform the person charged that refusal of the person to submit to the test . . . will result in a revocation for up to four years of the person's driving privileges." N.D.C.C. § 39-20-01. Gardner argues if this requirement is not met, there is no valid request for testing and there can be no refusal. However, N.D.C.C. § 39-20-05(3) limits the scope of an administrative hearing for refusal to three issues:
>
> > Whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance . . . whether the person was placed under arrest; and whether that person refused to submit to the test or tests.
>
> Significantly, section 39-20-05(3) specifically 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." The purpose of this provision is to "[prohibit] a driver from raising the issue of ignorance of the law." Olson v. N.D. Dep't of Transp., 523 N.W.2d 258, 261 (N.D. 1994).

Id. at ¶ 9.

As in Gardner, here N.D.C.C. § 39-20-05(2) also excludes from consideration at the hearing the issue of whether the individual was placed under arrest if the individual is under twenty-one years of age. Because the issue of whether the person was arrested is properly excluded from consideration at the hearing for an individual under twenty-one years of age, there can be no jurisdictional requirement as Fossum argues.

C. The requirement under N.D.C.C. § 39-20-01 for the arresting officer to inform the individual that he or she is or will be charged with driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor is not a basic and mandatory provision which deprives the Department of jurisdiction to suspend a person's license.

This Court need not consider this alternative argument if this Court accepts the Department's preceding arguments. However, if this Court concludes that an individual under the age of twenty-one must be told that he or she is being arrested for driving under the influence or being in actual physical control, the suspension of Fossum's driving privileges should still be affirmed.

No provision in N.D.C.C. ch. 39-20 sets forth the ramifications for an officer's failure to explain the reason for the arrest. And, this Court has never considered the specific question of whether chemical test results are inadmissible if a DUI arrestee is not told the reason for the arrest. However, in Throlson v. Backes, 466 N.W.2d 124 (N.D. 1991), this Court concluded as follows:

> [W]here an officer does not inform a driver that he or she 'is or will be charged with' driving under the influence or actual physical control as required by Section 39-20-01, there has been no legally effective request for testing and the driver's failure to submit to testing is not a 'refusal' for purposes of Chapter 39-20, N.D.C.C.

Id. at 127.

It is apparent from a review of a pair of other decisions by this Court, however, that the holding in Throlson, where the driver refused to submit to the chemical test, is not authority for the proposition that chemical test results are inadmissible if a driver who is not told the reason for the arrest goes ahead and submits to the chemical test.

This Court specifically stated the underpinning of the Throlson holding was the analysis in Kuntz v. State Highway Com'r, 405 N.W.2d 285 (N.D. 1987), which was adopted in Throlson by analogy. Throlson, 466 N.W.2d at 126-27. In Kuntz, the Supreme Court held as follows:

> [A] driver's failure to submit to testing, after being denied the statutory right to a reasonable opportunity to consult with an attorney before deciding whether to submit to the test, does not constitute a 'refusal' for purposes of revoking the person's license under Chapter 39-20.

Throlson, 466 N.W.2d at 126 (citing Kuntz, 405 N.W.2d at 285-286) (external citation omitted). Neither Throlson nor Kuntz involved the suppression of chemical test results. Rather, this Court concluded in both cases that, as a matter of law, in light of the law enforcement officers' failure to comply with statutory provisions, the drivers' failure to submit to testing did not constitute a "refusal" for purposes of revoking the drivers' privileges to drive.

At first glance, it might be argued the Court's analysis in Throlson and Kuntz, by analogy, would extend to suppress the chemical test results of a DUI arrestee who is not told the reason for the arrest. However, the argument would be meritless in view of the Court's decision in Holte v. State Highway Com'r, 436 N.W.2d 250 (N.D. 1989). Holte, like Kuntz, involved an undisputed violation of an arrestee's statutory right to consult with an attorney before deciding whether to submit to a chemical test. Holte, 436 N.W.2d at 251.

However, whereas Kuntz declined to submit to the chemical test, Holte proceeded to agree to submit to the chemical test. Id. On appeal, the district court reversed the hearing officer's suspension of Holte's driving privileges after it

concluded the Supreme Court's analysis in Kuntz should extend to suppress chemical test results obtained after an arrestee's statutory right to counsel was violated. Id.

On appeal, however, this Court emphasized the distinction between the facts presented in Kuntz and Holte. Specifically, this Court observed as follows:

> Kuntz involved the narrow issue of what constitutes a refusal and did not involve the suppression of evidence in an administrative hearing. The majority opinion specifically noted that '[w]e do not exclude any evidence.' [Kuntz, 405 N.W.2d at 286, n.1].

Holte, 436 N.W.2d at 251 (emphasis added.) On the other hand, in Holte, the arrestee submitted to the chemical test and then sought to suppress the chemical test results. Holte, 436 N.W.2d at 251.

In its decision in Holte, this Court found the Kuntz analysis inapplicable because Holte had not refused to submit to the chemical test. This Court in Holte declined to apply an exclusionary rule to suppress evidence even though it was undisputed that the statutory right to counsel had been violated. Specifically, this Court noted with approval the analysis of the Iowa Supreme Court, as follows:

> 'The benefit of using reliable information of intoxication in license revocation proceedings, even when that evidence is inadmissible in criminal proceedings outweighs the possible benefit of applying the exclusionary rule to deter unlawful conduct. Consequently, the exclusionary rule formulated under the fourth and fourteenth amendments was inapplicable in this license revocation proceeding.'

Holte, 436 N.W.2d at 252 (quoting Westendorf v. Iowa Dep't of Transp., 400 N.W.2d 553, 557 (Iowa 1987)). As a result, the Supreme Court reinstated the administrative suspension of Holte's driving privileges, stating as follows:

> We conclude that the district court erred in reversing the administrative suspension of Holte's driving privileges because of the arresting officer's failure to allow Holte to consult an attorney before he submitted to the administration of a chemical test to determine the alcoholic content of his blood.

Holte, 436 N.W.2d at 252.

It is apparent from this Court's decision in Throlson that if Officer Bohn failed to tell Fossum the reason for his arrest, and if Fossum then had declined to submit to the chemical test, the Department would not have had grounds to revoke his driving privileges. However, whether or not Fossum was told the reason for his arrest, it is undisputed that, unlike Throlson, Fossum submitted to the chemical test.

This case is governed by Holte and not Kuntz and Throlson. Holte provides the analysis applicable when an arrestee goes ahead and submits to a chemical test after not explicitly being told the reason for the arrest. Therefore, under Holte even if Officer Bohn did not explicitly tell Fossum the reason for his arrest, the exclusionary rule is not applicable and the suspension of Fossum's driving privileges must be affirmed.

CONCLUSION

The Department respectfully requests that this Court reverse the judgment of the Burleigh County District Court and affirm the Department's decision suspending Fossum's driving privileges for 91 days.

Dated this ___ day of November, 2013.

State of North Dakota
Wayne Stenehjem
Attorney General

By:_____

Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
mtpitcher@nd.gov
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

Scott Fossum,	)	
	)	
Appellee,	)	**Supreme Ct. No. 20130310**
	)	
v.	)	**District Ct. No. 08-2013-CV-00415**
	)	
North Dakota Department of Transportation,	)	
	)	
	)	
Appellant.	)	

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 12th day of November, 2013, I served the attached **BRIEF OF APPELLANT and APPENDIX OF APPELLANT** upon Scott Fossum, by and through his attorney Justin Vinje, by placing a true and correct copy thereof in an envelope addressed as follows:

Justin Vinje
Attorney at Law
120 North 3rd St., Suite 210
Bismarck, ND 58501

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 _____ day of November, 2013.

_____
Notary Public

CIVIL LITIGATION
500 NORTH 9TH STREET
BISMARCK, ND 58501-4509
(701) 328-3640 FAX (701) 328-4300

November 12, 2013

HAND DELIVERED

Penny L. Miller
Clerk of the Supreme Court
State Capitol
Judicial Wing, 1st Floor
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: Scott Fossum v. North Dakota Department of Transportation;
Supreme Ct. No. 20130310
District Ct. No. 08-2013-CV-00415

Dear Ms. Miller:

Enclosed for filing are the original and seven copies of the Brief of Appellant, Appendix of Appellant and an Affidavit of Service by Mail in the above-referenced matter. The Brief of Appellant will be electronically mailed to your office today.

Thank you.

Sincerely,

Michael Pitcher
Assistant Attorney General

mcc
Enclosures
cc: Justin Vinje (w/encs.)