

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jesse Raye Keller,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	
North Dakota Department of)	Supreme Court No. 20140238
Transportation,)	
)	
Defendant/Appellee.)	Mercer County No. 29-2014-CV-00020

BRIEF OF APPELLANT

Appeal from Judgment, filed May 16, 2014

Entered Upon Memorandum and Order Affirming Hearing Officer's Decision

dated May 14, 2014, and filed May 15, 2014

Mercer County District Court

South Central Judicial District

The Honorable Cynthia M. Feland

Dan Herbel
ND State Bar ID # 05769
Attorney for Appellant Jesse Raye Keller

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

TABLE OF CONTENTS

Table of Authorities	¶1
Statement of the Issues	¶2
Statement of the Case	¶3
Statement of the Facts	¶7
Standard of Review	¶12
Law and Argument	¶14
Conclusion	¶24
Certificate of Service	¶26

[¶1] TABLE OF AUTHORITIES

North Dakota statutes

Chapter 28-32, N.D.C.C.	¶13
N.D.C.C. § 28-32-46	¶13
N.D.C.C. § 39-20-03.1(3)	¶¶15, 23
N.D.C.C. § 39-20-03.1(4)	¶¶15, 21, 23

North Dakota cases

<i>Bosch v. Moore</i> , 517 N.W.2d 412 (N.D. 1994)	¶¶2, 10-11, 14-16, 18, 20-23
<i>Dworshak v. Moore</i> , 1998 ND 172, 583 N.W.2d 799	¶13
<i>Landsiedel v. Director, North Dakota Department of Transportation</i> , 2009 ND 196, 774 N.W.2d 645	¶13
<i>Lee v. N.D. Dept of Transportation</i> , 2004 ND 7, 673 N.W.2d 245	¶13
<i>Olson v. ND Dept. Of Transport Director</i> , 523 N.W.2d 258 (N.D. 1994)	¶13
<i>Schwind v. Director, ND Department of Transportation</i> , 462 N.W.2d 147 (N.D. 1990)	¶22

[¶2] STATEMENT OF THE ISSUES

- I. The arresting officer failed to forward all test records to the Department of Transportation (DOT); and because the officer failed to perform a basic and mandatory requirement of the statute, the DOT does not have jurisdiction to suspend Mr. Keller's driving privileges, pursuant to *Bosch v. Moore*, 517 N.W.2d 412 (N.D. 1994)

[¶3] STATEMENT OF THE CASE

[¶4] On December 6, 2013, Jesse Keller was arrested for Driving Under the Influence. (DOT Administrative Hearing Transcript (“Tr.”) at 10, lines (“L.”) 5-6). Mr. Keller was issued a temporary operator’s permit. (Exhibit 1b, Transcript of DOT Hearing). Mr. Keller timely requested an administrative hearing and, on January 16, 2014, the Department of Transportation (“Department” and “DOT”) held a hearing where Mr. Keller argued that the DOT had no jurisdiction to suspend because the arresting officer did not forward all test records to the DOT; a basic and mandatory requirement of law. The hearing officer issued a decision to suspend without even addressing Keller’s sole argument; which is a practice becoming systemically commonplace for this new hearing officer and chronically worrisome for due process. (Appendix (“App.”) at 4). The hearing officer suspended Mr. Keller’s driving privileges for a period of one hundred eighty (180) days. (App. 4).

[¶5] On January 27, 2014, Mr. Keller filed a Notice of Appeal and Specifications of Error with the District Court alleging numerous errors in the DOT administrative proceedings. (App. 5-6). After both Petitioner and Respondent submitted written arguments to the district court, the court issued its Order affirming the decision of the hearing officer. (App. 17-23).

[¶6] On May 16, 2014, the Department filed an Order for Judgment, Judgment, and a Notice of Entry of Judgment in this matter. (App. 24-26). On July 2, 2014, Keller filed a Notice of Appeal to this Court seeking relief. (App. 27-28). Keller asks this court to reverse the decision of the district court and to reinstate his driving privileges.

[¶7] STATEMENT OF THE FACTS

[¶8] December 6, 2013, Beulah Police Officer Dustin Pekas had contact with Jesse Keller. (Tr. at 4, L. 15-22). The officer ultimately arrested Keller for DUI and had Keller submit to a blood draw. (Tr. at 10, L. 5-6). The officer sent the blood sample to the State lab and “directed the state lab ... to do a separate test record for a drug screen.” (Tr. at 22, L. 15-17) (incorrectly transcribed as “to not to do”). So, in addition to requesting an analytical report for alcohol concentration, the officer also requested a test record to screen for drugs. (Tr. at 22, L. 24 – 23, L. 2).

[¶9] At the administrative hearing, the police officer testified that he forwarded the analytical report for blood alcohol concentration to the DOT, but he “can’t tell [us] if the drug [analytical test record] one was sent or not.” (Tr. at 23, L. 7-11). The officer testified that it is possible that he “did not forward the analytical test record for the drug screen to the Department of Transportation.” (Tr. at 24, L. 19-22). The hearing officer/DOT prosecutor stipulated to the fact that the officer did not forward the analytical test record for the drug screen to the DOT, as “[t]he drug screen results are not part of Exhibit 1.” (Tr. at 26, L. 1-2).

[¶10] Mr. Keller was allowed to supplement the administrative hearing record with Exhibit 16, the analytical test record for drugs that was not submitted to the DOT.

(Exhibit 16). Mr. Keller was also allowed to submit a written argument to the hearing officer by email, along with Exhibit 16, which briefly stated:

“Attached is the 2nd analytical test record in Keller. It was reported to Officer Pekas of the Beulah PD on December 18, 2013 (see page 2). This test record was not forwarded to the DOT. Because the officer did not forward all test records to the DOT, the DOT does not have jurisdiction to suspend Mr. Keller's driving privileges, pursuant to *Bosch v. Moore*, 517 N.W.2d 412 (N.D. 1994). http://www.ndcourts.gov/_court/opinions/940021.htm

Accordingly, this matter should be dismissed.”

See January 16, 2014 email; part of the administrative record.

[¶11] The hearing officer issued a decision that did not even address the *Bosch* argument. It is becoming very routine for this hearing officer to not address issues raised by petitioners.

[¶12] STANDARD OF REVIEW

[¶13] “The Administrative Agencies Practice Act, N.D.C.C. ch 28-32, governs review of an administrative decision to suspend or revoke a driver's license.” See *Dworshak v. Moore*, 1998 ND 172, ¶6, 583 N.W.2d 799. “This Court will affirm 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.

N.D.C.C. § 28-32-46.” *See Lee v. NDDOT*, 2004 ND 7, ¶8, 673 N.W.2d 245. “An agency's decisions on questions of law are fully reviewable.” *See Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶6, 774 N.W.2d 645. This Court “will reverse an agency decision that is not in accordance with the law.” *See Olson v. ND Dept. Of Transportation Director*, 523 N.W.2d 258, 259 (N.D. 1994).

[¶14] LAW AND ARGUMENT

- I. The arresting officer failed to forward all test records to the Department of Transportation (DOT); and because the officer failed to perform a basic and mandatory requirement of the statute, the DOT does not have jurisdiction to suspend Mr. Keller's driving privileges, pursuant to *Bosch v. Moore*, 517 N.W.2d 412 (N.D. 1994)

[¶15] The very simple issue in this matter is whether the Department acquired jurisdiction to suspend Mr. Keller’s driving privileges. Jurisdiction is a matter to be resolved before ever reaching the merits of the matter. “Section 39-20-03.1(3) [currently, N.D.C.C. § 39-20-03.1(4)], establishes the prerequisite for the exercise of DOT's jurisdiction.” *See Bosch v. Moore*, 517 N.W.2d 412, 413 (N.D. 1994). For the DOT to acquire jurisdiction under N.D.C.C. § 39-20-03.1(4), “the law enforcement officer shall forward to the director a certified copy of the operational checklist and test records of a

breath test and a copy of the certified copy of the analytical report for a blood or urine test for all tests administered at the direction of the officer." *See* N.D.C.C. § 39-20-03.1(4) (emphasis added).

[¶16] In *Bosch v. Moore*, 517 N.W.2d 412 (N.D. 1994), the arresting officer required Bosch to submit to both a breath test and a urine test, but only forwarded to the Department of Transportation the analytical report from the urine test. The North Dakota Supreme Court held that in order for the Department of Transportation to acquire jurisdiction over a matter, a prerequisite is that the officer forward to the DOT all analytical test results. *See Bosch*, 517 N.W.2d at 413. The *Bosch* court found that the "officer's failure to submit the Intoxilyzer test records deprived the DOT of authority to suspend Bosch's driving privileges." *See id.* The Court found that the forwarding of all analytical test results was mandatory and that the officer had no discretion in the matter. *See id.*

[¶17] In our case, the arresting officer only forwarded to the DOT the analytical test record and results from Mr. Keller's blood alcohol test. (Exhibit 1e). The officer did not forward to the Department the separate analytical test record and results from the drug screen which was reported to Officer Pekas on December 18, 2013, by a different analyst. (Exhibit 16). The officer testified that he did not forward the analytical test record and result from the drug screen and the hearing officer stipulated to that fact.

[¶18] Although the hearing officer avoided making Conclusions of Law on the issue, she seemed to agree, in her Findings of Fact, that the police officer violated *Bosch*, but that was somehow excusable because "Officer Pekas had not received the results from this analysis [drug analysis] at the time he sent the required documents to driver's

license division.” (App. 4). However, *Bosch* makes no such exception. *Bosch* mandates that all analytical test records and results must be forwarded to the DOT or else the DOT does not acquire jurisdiction. Because the officer did not forward to the DOT the analytical test result from the drug screen, the DOT is deprived of jurisdiction in this case.

[¶19] The officer here could have simply waited for the drug analytical test result before sending off the Report and Notice form; or he could have simply supplemented the DOT record with the drug analytical test result. He chose to do neither. Choosing to do neither deprived the DOT of authority to act here.

[¶20] In the district court, the Department almost completely ignored the issue of jurisdiction in its response brief and argued extensively about what issues will be covered at the administrative hearing. However, the issue of jurisdiction deals with the Department’s authority in the first place, before getting to the issues covered during the course of the hearing. The hearing officer knew this and found that the officer could not comply with *Bosch* because of timing issues. (App. 4). Yet, *Bosch* never carved out a “timing issue” exception. *See Bosch v. Moore*, 517 N.W.2d 412 (N.D. 1994).

[¶21] Essentially, the DOT argued that the officer could use discretion and not comply with *Bosch* when he feels the test records are invalid or irrelevant. However, Section 39-20-03.1(4) “requires the officer to forward the test records for “all tests” conducted at the officer's direction, regardless of whether the officer judges the results to be invalid.” *See Bosch*, 517 N.W.2d at 413 (emphasis added).

[¶22] It is not entirely clear what the district court relied upon to circumvent the bright-line rule in *Bosch*, as a number of disjointed reasons were set forth. (App. 17-23).

The district court did, however, rely upon *Schwind v. Director, ND Department of Transportation*, 462 N.W.2d 147 (N.D. 1990), a case that neither party relied upon. In *Schwind*, this Court held that the DOT's jurisdiction is not destroyed because the driver's license was not forwarded to the DOT. That is a very different issue than our case. See *Schwind*, 462 N.W.2d 147. Our case is controlled by *Bosch*.

[¶23] The arresting officer failed to forward all test records to the Department. Because the officer failed to perform a basic and mandatory requirement of the statute [in *Bosch*, N.D.C.C. § 39-20-03.1(3); currently, N.D.C.C. § 39-20-03.1(4)], the DOT did not have jurisdiction to suspend Mr. Keller's driving privileges, pursuant to *Bosch v. Moore*, 517 N.W.2d 412 (N.D. 1994). Therefore, the order is not in accordance with the law, the agency's decision should be reversed, and Mr. Keller's driving privileges should be restored.

[¶24] CONCLUSION

[¶25] For the foregoing reasons, Jesse Keller respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted
this 11th day of August, 2014.

/s/ *Dan Herbel*

Dan Herbel
Attorney for Appellant Jesse Raye Keller
ND State Bar ID # 05769

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123
herbellawfirm@yahoo.com

[¶26] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 11, 2014, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Michael Pitcher, counsel for Appellee, at the following:

Electronic filing TO: “Michael Pitcher” < mtpitcher@nd.gov >

Date this 11th day of August, 2014.

/s/ *Dan Herbel*

Dan Herbel