

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Kelly Leno,

Appellant,

v.

Supreme Court No. 20150091

Director, North Dakota Department
of Transportation,

Appellee.

* * * * *

BRIEF OF APPELLANT & ADDENDUM

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Appeal from Judgment

Burleigh County District Court
South Central Judicial District
Civil No. 08-2014-CV-02091

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STATEMENT OF THE ISSUE

ISSUE FOR REVIEW

Leno's hearing was not conducted in a fair and impartial manner in violation of N.D.C.C. § 28-32-31(3), in that the hearing officer used Exhibit 7 to lead the arresting officer to give testimony to show compliance with a completed Specimen Submitter checklist, which in fact was not submitted by the arresting officer to the Director and which was not in evidence.

[¶1] STATEMENT OF THE CASE

[¶2] James Kelly Leno, Appellant, appeals from a district court judgment affirming an administrative suspension of his driving privileges for a period of 91 days (A. 37, 39).

[¶3] STATEMENT OF THE FACTS

[¶4] The arresting officer did not submit to the Director a completed Specimen Submitter checklist (see Exhibit 7, A. 27-28). The arresting officer's filled-out Specimen Submitter checklist was "in a folder back in the office, which I didn't bring." (See A. 18-19).

[¶5] ARGUMENT

[¶6] Issue for Review

[¶7] Leno's hearing was not conducted in a fair and impartial manner in violation of N.D.C.C. § 28-32-31(3), in that the hearing officer used Exhibit 7 to lead the arresting officer to give testimony to show compliance with a completed Specimen Submitter checklist, which in fact was not submitted by the arresting officer to the Director and which was not in evidence.

[¶8] The hearing officer began the questioning of the arresting officer in regard to proving fair administration of the blood test by the specimen submitter, see Exhibit 7 (A. 27-28), and Schlosser v. N.D. Dep't of Transportation, 2009 ND 173, 775 N.W.2d 695, in the following manner:

MS. HUBER: Who opened the kit?

DEPUTY KOMROSKY: I did.

MS. HUBER: Did you inventory the kit?

DEPUTY KOMROSKY: Yes, I did.

(A. 17, lines 12-15).

[¶9] Appellant objected to leading, and the objection was overruled (A. 17, lines 16-17).

[¶10] The arresting officer did not testify that he used an “intact kit”, see Exhibit 7 (A. 28), but the nurse did certify that an ‘intact kit’ was used, see Exhibit 1d (Doc ID# 5).

[¶11] The arresting officer then testified that “I placed the tube seal that comes with it over the tube.” (A. 18, lines 1-2). He did not testify that he “affixed completed specimen label/seal over the the top and down the sides of the blood tube” (see Exhibit 7, A. 28). This was a failure of evidence. Schlosser, at ¶ 13.

[¶12] The arresting officer then testified that “I put it in the baggy that comes with it.” (A. 18, line 4). He did not testify that he “placed the blood tube inside the blood tube protector and then placed it in the plastic bag provided “(see Exhibit 7, A. 28). This was a failure of evidence. Schlosser, at ¶ 13.

[¶13] The arresting officer did not testify at this stage of the proceeding that he did “not remove liquid absorbing sheet” (See Exhibit 7, A. 28). This, too, was a failure of proof. Schlosser, at ¶ 13.

[¶14] The arresting officer testified that he “sealed the box” (A. 18, line 8), but he did not testify that he “affixed tamper-evident kit box shipping seal” on the kit box (see Exhibit 7, A. 28). This was also a failure of proof. Schlosser, at ¶ 13.

[¶15] The arresting officer testified that he “can’t think of every single” step on the specimen submitter checklist (A. 19, line 11).

[¶16] The hearing officer then showed the arresting officer the blank specimen submitter checklist in Exhibit 7 to “refresh” his memory “as to the steps you took” (A. 19, lines 12-25). Leno objected (A. 20, lines 8-12).

[¶17] This was not a proper use of a writing to refresh a witness’s memory. The arresting officer’s completed Specimen Submitter checklist would have been the proper writing. This is what is contemplated by Rule 612, N.D.R.Ev. (Add. 2). This is what was necessary for proper cross-examination and a right to a fair hearing. Rule 612; Community Homes of Bismarck, Inc. v. Main, 2011 ND 27, 794 N.W.2d 204.

[¶18] Showing the blank form to the arresting officer was simply an invitation to have the witness confirm that he complied with the proper steps and was not a substitute for the actual contents of the completed form. This in fact denied Leno proper cross-examination and a fair hearing. Leno was entitled to a fair hearing. N.D.C.C. § 28-32-31(3)(Add. 1).

[¶19] Over objections to leading and denial of a fair hearing, the hearing officer then asked the arresting officer, “Did you leave the absorbent kit in it? The arresting officer answered yes. (A. 20, line 19, through 21, line 1). This filled one of the gaps of evidence as to the proper steps for fair

administration, but not all gaps. There remained insufficiencies in the evidence as to the proper steps.

[¶20] Leno was denied a fair hearing by improper refreshing of the memory of a witness. Going further, there remained insufficient evidence of the proper steps to prove fair administration of the blood draw. The completed Specimen Submitter checklist was not submitted to the Director and was not in evidence, and the testimony of the arresting officer was insufficient to prove fair administration. Schlosser v. N.D. Dep't of Transportation; see Filkowski v. Director, N.D. Dep't of Transportation, 2015 ND 104, at ¶¶ 11-18.

[¶21] CONCLUSION

[¶22] WHEREFORE, Leno requests the Supreme Court of North Dakota to reverse the judgment of the district court, and order the Director to reinstate his driving privileges.

[¶23] Respectfully submitted May 4, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing
Brief of Appellant and accompanying Appendix of Appellant, by email, on
May 4, 2015, on:

Michael T. Pitcher @ mtpitcher@nd.gov
Douglas B. Anderson @ dbanders@nd.gov

/s/Michael R. Hoffman
Michael R. Hoffman

ADDENDUM

Source: S.L. 2001, ch. 293, § 12.

Default Hearing.

Where physician had an opportunity to attend and present evidence at administrative hearing but chose not to attend or have

his attorney attend, the hearing held in physician's absence was not a default hearing as defined in subsection (1). *Larsen v. Commission on Med. Competency*, 1998 ND 193, 585 N.W.2d 801 (1998).

28-32-31. Duties of hearing officers. All hearing officers shall:

1. Assure that proper notice has been given as required by law.
2. Conduct only hearings and related proceedings for which proper notice has been given.
3. Assure that all hearings and related proceedings are conducted in a fair and impartial manner.
4. Make recommended findings of fact and conclusions of law and issue a recommended order, when appropriate.
5. Conduct the hearing only and perform such other functions of the proceeding as requested, when an agency requests a hearing officer to preside only as a procedural hearing officer. If the hearing officer is presiding only as a procedural hearing officer, the agency head must be present at the hearing and the agency head shall make findings of fact and conclusions of law and issue a final order. The agency shall give proper notice as required by law. The procedural hearing officer may issue orders in regard to the conduct of the hearing pursuant to statute or rule and to otherwise effect an orderly and prompt disposition of the proceedings.
6. Make findings of fact and conclusions of law and issue a final order, if required by statute or requested by an agency.
7. Function only as a procedural hearing officer, when an agency requests a hearing officer to preside for a rulemaking hearing. The agency head need not be present. The agency shall give proper notice as required by law.
8. Perform any and all other functions required by law, assigned by the director of administrative hearings, or delegated to the hearing officer by the agency.

Source: S.L. 2001, ch. 293, § 12.

Finality of Decisions.

Administrative law judge's (ALJ) decision that plaintiff was unable to return to his pre-injury employment would be deemed a recommendation, where record did not show

that workers compensation bureau's request for ALJ to preside over proceeding asked ALJ to issue final order. *Blanchard v. North Dakota Workers Comp. Bureau*, 1997 ND 118, 565 N.W.2d 485 (1997).

28-32-32. Emergency adjudicative proceedings. An administrative agency may use an emergency adjudicative proceeding, in its discretion, in an emergency situation involving imminent peril to the public health, safety, or welfare.

1. In an emergency, the administrative agency may take action pursuant to a specific statute as is necessary to prevent or avoid imminent peril to the public health, safety, or welfare.

Rule 612. Writing or object used to refresh a witness's memory.

(a) **Scope.** This rule gives an adverse party certain options when a witness uses a writing or object to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) **Adverse party's options; Deleting unrelated matter.** An adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. But if production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If the producing party claims that a writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) **Failure to produce or deliver the writing or object.** If a writing or object is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or, if justice so requires, declare a mistrial.

EXPLANATORY NOTE

Rule 612 was amended, effective March 1, 1990; March 1, 2014.

Rule 612 is identical to Rule 612 of the Uniform Rules of Evidence, (1974). The rule varies from its federal counterpart in that it applies to objects as well as to writings. It was felt that objects used to refresh the memory of a witness, such as a recording tape, should be subject to production. This rule also departs from the federal rule by explicitly providing for inspection of writing or object at its location if production of the writing or object at trial is impracticable.

Subdivisions (a) and (b) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 612 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes of April 26-27, 2012, page 26; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 3. Fed.R.Ev. 612; Rule 612, Uniform Rules of Evidence (1974); Rule 612, SBAND proposal.

Cross Reference: N.D.R.Crim.P. 16 (Discovery and Inspection).

Criminal Proceeding.

Trial court should have allowed criminal defendant to see the notes which state's witness used to refresh his memory prior to testimony. *State v. Knoefler*, 325 N.W.2d 192 (N.D. 1982).

Disclosure of Documents.

Documents specifically referred to during testimony are subject to disclosure, even if previously privileged. *Farm Credit Bank v. Huether*, 454 N.W.2d 710 (N.D. 1990).

Error Not Found.

Trial court did not err in refusing to strike the testimony of witnesses in an eviction action because even though the usual requirements

for refreshing a witness's memory were not initially followed, the trial court exercised control over the procedure under N.D.R.Ev. 612(c) to ensure fairness when the tenant raised the issue; the tenant was provided an opportunity to review each document and to cross-examine both witnesses about their testimony and the documents. *Cnty. Homes of Bismarck, Inc. v. Main*, 2011 ND 27, 794 N.W.2d 204, 2011 N.D. LEXIS 34 (Feb. 8, 2011).

Collateral References.

Admissibility of hypnotically refreshed or enhanced testimony, 77 A.L.R.4th 927.

Rule 613. Witness's prior statement.

(a) **Showing or disclosing the statement during examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.