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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20150149

Casey Jerald Washburn,

Appellee/Cross-Appellant,

vs.

Grant Levi, Director
Department of
Transportation,

Appellant/Cross-Appellee.

BRIEF OF APPELLEE/CROSS-APPELLANT CASEY JERALD WASHBURN

On Appeal from the District Court
Southeast Judicial District
Stutsman County, North Dakota
Stutsman County Civil No. 47-2014-CV-00703
The Honorable John E. Greenwood

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STATEMENT OF THE ISSUES

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1. Whether Washburn was afforded a reasonable opportunity to speak with an attorney prior to deciding whether or not to submit to a chemical test for intoxication?

2. Whether the hearing officer erred in finding that Officer Staska had reasonable grounds to arrest Washburn for being in actual physical control of a vehicle pursuant to N.D.C.C. § 39-08-01?

STATEMENT OF THE CASE

[¶2] On November 22, 2014, Appellee/Cross-Appellant Casey Jerald Washburn ("Washburn") was arrested by Officer Andrew Staska ("Officer Staska") of the Jamestown Police Department for allegedly being in actual physical control ("APC") of a motor vehicle while intoxicated. App. 76. After receiving notice that that the North Dakota Department of Transportation ("DOT") was attempting to revoke his driving privileges for a period of 180 days, Washburn timely requested an administrative hearing pursuant to N.D.C.C. § 39-20-05. See app. at Exhibit 1c.

[¶3] On December 19, 2014, an administrative hearing was held regarding the revocation of Washburn's driving privileges. See App. 77-78. On December 22, 2014, the hearing officer issued his findings of fact, conclusions of law, and decision, concluding that Washburn's driving privileges should be revoked for a period of 180 days. Id. Washburn timely filed his Notice of Appeal, Specification of Errors, and Request for Attorney Fees in Stutsman County District Court on December 29, 2014. App. 79-81.

[¶4] On March 25, 2015, after an oral argument on the administrative appeal, the Honorable John E. Greenwood, Judge of Stutsman County District Court, reversed the

revocation of Washburn's driving privileges. App. 82-83. Specifically, the district court reversed the hearing officer's decision on grounds that the arresting officer did not have probable cause to arrest based on Washburn's ability to operate his motor vehicle at the time of arrest. Id. Furthermore, the district court reversed the decision pursuant to N.D.C.C. § 28-32-46(7), holding that the findings of fact made by the hearing officer did not sufficiently address the evidence presented to the agency by Washburn. Id.

[¶5] On May 26, 2015, the DOT, through it's director, Grant Levi, filed a Notice Appeal with this Court, appealing the March 25, 2015, Order and Judgment reversing the administrative hearing officer's decision to revoke Washburn's driving privileges for 180 days. App. 86-87. Washburn then filed his Notice of Cross-Appeal on June 9, 2015, appealing the March 25, 2015, Order and Judgment. Appellee/Cross-Appellant's App. 1-2. Specifically, Washburn appealed the district court's decision to affirm the hearing officer's decision that determined Washburn was afforded a reasonable opportunity to consult with an attorney prior to submitting to a chemical test. Id.

[¶6] This is Washburn's Appellee/Cross-Appellant Brief.

STATEMENT OF THE FACTS

[¶7] On the morning of November 22, 2014, Officer Staska was following another vehicle northbound on 3rd Avenue Northeast in Jamestown, North Dakota. App. 5, l. 1-9. As he began approaching a hill, the vehicle he was following, as well as himself, had go around a door that was open on a vehicle parked legally on the side of the road. Id. at l. 9-12; App. 6, l. 1-2. When he drove by the vehicle, which was not running and had its headlights off, Officer Staska slowed down and tried to look inside the vehicle to see if anybody was inside. Id. at l. 12-14; app. 6, l. 11-13. When Officer Staska drove by the

vehicle, he did not see any occupants, so he went around the block and drove by the vehicle a second time. Id. at l. 17-18. Once again, he looked inside the vehicle and did not observe anything inside. Id. at l. 18-19. At that point, Officer Staska turned his vehicle around to face the vehicle he was investigating. Id. at l. 19-20. Officer Staska got out of his patrol car and observed a male reclined in the front seat. Id. at l. 20-23.

[¶8] Once he approached the vehicle, Officer Staska claimed to have smelled an odor of alcohol coming from inside the vehicle, and also heard the occupant snoring. App. 8, l. 13-15. Officer Staska began speaking to the occupant in an attempt to wake him, but after this failed, he began shaking the occupant until he woke up. App. 8, l. 15-25; App. 9, l. 1-8. Officer Staska then began engaging the male, later identified as Washburn, in conversation. App. 9, l. 21-25; App. 10, l. 1-25; App. 11, l. 1-5. After preliminarily discussing the matter with Washburn, Officer Staska ordered him out of his vehicle and asked him to perform Field Sobriety Tests ("FSTs"). App. 11, l. 6, 12-16. Washburn declined to take FSTs and began walking towards his home. Id. at l. 18-19. Officer Staska then yelled at Washburn to stop and stated that he was not free to leave. Id. at l. 19-21; App. 26, l. 13-18.

[¶9] At that point, an argument ensued because Officer Staska would not allow Washburn to go inside of his home and Washburn would not take FSTs. App. 11, l. 22-25; App. 12, l. 1-10. Officer Staska then commanded Washburn to put his hands behind his back because he was under arrest for Driving Under the Influence/Actual Physical Control. App. 12, l. 10-12. Washburn was unwilling to place his hands behind his back, so Officer Staska slammed Washburn into his cement garage wall and then swept Washburn to the ground and placed him in handcuffs. Id. at l. 13-25. During this

occurrence, Washburn's mother, Tammy Washburn ("Ms. Washburn"), came outside of the house and questioned what was going on. App. 13, l. 3-4. A backup officer also arrived at the location. App. 14, l. 5-6.

[¶10] Officer Staska escorted Washburn to his squad car, and as he was walking towards the vehicle with Washburn, Ms. Washburn asked Washburn where his keys were. App. 29, l. 12-15; App. 57, l. 1-10; App. 58, l. 9-12. Washburn responded "thanks mom, they are going to search me now." App. 58, l. 16-20. Ms. Washburn was unable to find Washburn's car keys after searching the vehicle that evening. App. 57, l. 13-25; App. 58, l. 1-8; App. 59, l. 11-18. Additionally, Washburn was not in possession of the keys at the time he was arrested, and Washburn was searched by Officer Staska once Ms. Washburn asked where his keys were. App. 58, l. 19-25; App. 59, l. 1-2. At no point during this incident were Washburn and Ms. Washburn close enough to each other to exchange the car keys. App. 28, l. 23-25; App. 58, l. 16-17.

[¶11] Officer Staska then drove Washburn to the Jamestown Law Enforcement Center ("LEC"). App. 15, l. 23-25. At the LEC, Officer Staska read Washburn the implied consent law three times for a preliminary breath test, and three times for a chemical test. App. 19, l. 1-9. Every time that Officer Staska read Washburn the implied consent law, Washburn informed Officer Staska that he did not understand. Id. at l. 12-14, 20-23. Based on this, Officer Staska informed Washburn that he was interpreting his failure to comprehend the information, along with Washburn talking during the readings, as a refusal. Id. at 23-25; App. 42, 2-9. Washburn never verbally refused to take a chemical test, and when Officer Staska asked if he was refusing, Washburn stated that he **never** said he was refusing. App. 32, l. 4-12; App. 41, l. 24.

[¶12] After finishing the reading of the implied consent law, and after Officer Staska informed Washburn that he was considering his actions as a refusal, Washburn clearly stated that he wanted to speak with an attorney. App. 33, l. 13-23. Additionally, after Officer Staska questioned him about this statement, Washburn also stated that he wanted to talk to his dad. Id. No opportunity was given to Washburn to speak with an attorney after invoking his statutory right to speak with one. App. 33, l. 24-25; App. 34, l. 1-2; App. 35, l. 4-6. However, Officer Staska did go to try and get him a telephone book and was going to bring Washburn downstairs into an interview room to allow Washburn to speak with an attorney, but corrections would not allow him to. App. 34, l. 3-21.

[¶13] Officer Staska testified that at the time of arrest, the only observation that he noted for signs of impairment in his police report and on the Report and Notice form was the odor of alcohol. App. 23, l. 19-25; App. 24, l. 1-8; App. 27, l. 16-19. Officer Staska also testified at the administrative hearing that someone having the odor of alcohol on their breath alone does not justify an arrest. App. 24, l. 9-14. Furthermore, Officer Staska testified that he never actually observed Ms. Washburn with the keys, and that in fact Ms. Washburn would be the best one to testify about whether or not she had the car keys. App. 30, l. 3-15; App. 37, l. 16-24.

[¶14] Moreover, in regards to providing Washburn an opportunity to speak with an attorney after he requested one, Officer Staska testified that he felt he needed to give Washburn a reasonable opportunity and amount of time to consult with an attorney, but corrections would not allow him to do so. App. 53, l. 1-7. Furthermore, Officer Staska had other opportunities, including when he spoke with him in the jail cell, to afford

Washburn with the opportunity to consult with an attorney, but he did not. App. 49, l. 6-16.

[¶15] Additionally, Ms. Washburn testified at the administrative hearing that Washburn's vehicle was parked in the same exact spot all evening as where it was when the incident occurred, and Washburn did not drive the vehicle when he left that evening. App. 62, l. 24-25; App. 63, l. 1-4. Ms. Washburn also testified that she did not find Washburn's car keys inside of his vehicle after searching throughout the car, that they were not in the ignition, and that she observed Washburn's car keys on his dresser immediately after the police placed him in the squad car and left the scene. App. 57, l. 13-25; App. 58, l. 1-8; App. 59, l. 11-18; App. 60, l. 1-11, 19- 23. Ms. Washburn stated that after she got off work at noon, the same day as the incident, her husband uttered, "you know, we need to lock his door and roll up his window, it's open." App. 62, l. 2-4. She then returned to the house and took the keys from the exact location that they were when she noticed them after the arrest and locked Washburn's vehicle. Id. at l. 5-23.

[¶16] Finally, Washburn himself testified at the hearing that he has one set of keys to the vehicle. App. 66, l. 19-23. Furthermore, Washburn testified that when the key is not in the ignition, he is unable to put the vehicle in gear. App. 67, l. 8-17. He stated that the key needs to be in the ignition and the vehicle has to be turned to at least accessory for the vehicle to go into neutral or any kind of gear to move the vehicle out of park. Id.

LAW AND ARGUMENT

1. Standard of Review.

[¶17] In administrative hearings, the burden of proof rests with the Department of Transportation. See Kobilanksy v. Liffrig, 358 N.W.2d 781, 790 (N.D. 1984). The

Administrative Agencies Practice Act, N.D.C.C. § 28-32, governs administrative hearings and administrative appeals. See Ruldoph v. N.D. Dep't of Transp., 539 N.W.2d 63, 65 (N.D. 1995); see N.D.C.C. §28-32. The reviewing Court must look to the record compiled before the hearing officer. See Zietz v. Hjelle, 395 N.W.2d 572, 574 (N.D. 1986). N.D.C.C. §28-32-46 states that a decision of the Department of Transportation will be reversed if the Court finds one of the following:

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.

See N.D.C.C. § 28-32-46.

[¶18] This Court gives deference to the administrative agency's findings of fact and does not substitute its judgment for that of the agency. Lies v. Dir., N.D. Dep't of Transp., 2008 ND 30, ¶ 9, 744 N.W.2d 783 (citing Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 9, 622 N.W.2d 180). This Court instead determines "only whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the

evidence from the entire record." Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 12, 682 N.W.2d 308 (citing Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 7, 663 N.W.2d 161). "If sound, the district court's analysis is entitled to respect." Id. at ¶ 12 (citing Dettler v. Sprynczynatyk, 2004 ND 54, ¶ 10, 676 N.W.2d 799). Questions of law and mixed questions of law and fact are reviewed de novo. Id. (citing Dettler, at ¶ 10); Lies, at ¶ 9 (citing Wetzel, at ¶ 10).

2. Washburn was not afforded a reasonable opportunity to speak with an attorney prior to deciding whether or not to submit to a chemical test for intoxication after invoking his right to the same.

[¶19] The hearing officer's decision was not in accordance with the law and is not supported by a preponderance of the evidence. See N.D.C.C. § 28-32-46(1); see N.D.C.C. § 28-32-46(5). The hearing officer concluded: "Washburn was arrested for DUI/APC and refused to submit to an alcohol test pursuant to NDCC section 39-20-01 after having been read the implied consent advisory. There was no violation of Washburn's limited right to consult with an attorney for the purposes of deciding whether to take the chemical test." See App. 77-78. This conclusion was contradictory to the evidence presented the administrative hearing, and is contrary to North Dakota law established by this Court.

a. Washburn affirmatively requested to consult with an attorney to decide whether or not to submit to a chemical test and was not given a reasonable opportunity to do so.

[¶20] "[A] person arrested for driving under the influence of intoxicating liquor has a qualified statutory right to consult with an attorney before deciding whether to submit to a chemical test." Baillie v. Moore, 522 N.W.2d 748, 750 (N.D.1994) (citing Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 290 (N.D.1987)). The "right of an arrested

person to have a reasonable opportunity to consult with an attorney before taking a chemical test is a statutory right based on N.D.C.C. § 29-05-20." City of Mandan v. Leno, 2000 ND 184, ¶ 9, 618 N.W.2d 161 (citing Kuntz, 405 N.W.2d at 287). "We hold that if an arrested person asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test. If he is not given a reasonable opportunity to do so under the circumstances, his failure to take the test is not a refusal upon which to revoke his license under Chapter 39–20, N.D.C.C." Kuntz, 405 N.W.2d 285 at 290; see Herrman v. Director, N. Dakota Dep't of Transp., 2014 ND 129, ¶ 14, 847 N.W.2d 768, 775, reh'g denied (July 17, 2014).

[¶21] "In Baillie v. Moore, this Court adopted a self-described bright-line rule for determining whether an arrestee has invoked the right to consult with an attorney before submitting to a chemical test, thereby triggering the officer's duty to provide a reasonable opportunity for the arrestee to do so:

> "We refuse to indulge in a case-by-case search for magical words which must be uttered by an arrestee as a prerequisite to being given an opportunity to consult an attorney. Rather, we hold that if a DUI arrestee, upon being asked to submit to a chemical test, responds with any mention of a need for an attorney—to see one, to talk to one, to have one, etc.—the failure to allow the arrestee a reasonable opportunity to contact an attorney prevents the revocation of his license for refusal to take the test.... Our intent is to set forth a 'bright line' test to determine when an arrestee must be allowed a reasonable opportunity to consult with an attorney before deciding whether to take a chemical test. If the arrestee responds with any affirmative mention of a need for an attorney, law enforcement personnel **must assume** the arrestee is requesting an opportunity to consult with an attorney and **must allow** a reasonable opportunity to do so.""

[¶22] State v. Lee, 2012 ND 97, ¶ 6, 816 N.W.2d 782, 784 (quoting Baillie, 522 N.W.2d at 750) (emphasis added). "Our purpose in adopting a bright-line rule was to

avoid the need to engage in case-by-case consideration of the surrounding circumstances, such as the timing of the request, the alleged "casual" nature of the conversation or whether specific "magical words" were used." Id. at ¶ 9. "To that end, our directive in Baillie is clear: If a DUI arrestee who has been asked to take a chemical test makes "any mention of a need for an attorney," the officer "must assume the arrestee is requesting an opportunity to consult with an attorney and must allow a reasonable opportunity to do so." Id.

[¶23] In this case, Washburn affirmatively mentioned that he wanted to speak to an attorney. App. 33, l. 13-23. The evidence is uncontradicted that Washburn, shortly after being read the implied consent statute to submit to a chemical test, stated that 1) he didn't say that he was refusing to submit to the test, and 2) that he wanted to speak to an attorney. As cited above in Lee and Baillie, this Court has made it clear that if an arrestee, after being read implied consent, makes any affirmative mention of desire to speak to an attorney, law enforcement personnel **must** allow them a reasonable opportunity to do so. Unfortunately, Washburn was not afforded a reasonable time to speak with an attorney in this case. App. 33, l. 24-25; App. 34, l. 1-2; App. 35, l. 4-6.

i. Washburn's request to consult with an attorney was made prior to refusal and was made in respect to the request that he submit to a chemical test.

[¶24] First, the DOT argues that Washburn's request to consult with an attorney was not made in respect to any request he submit to a chemical test for intoxication. This argument is quite contrary to the facts of this case. The DOT alleges that "undisputed" evidence established that Washburn's attorney request was made after he had already

refused the chemical test and while he was being booked into jail. This statement overlooks crucial details established by the testimony of Officer Staska.

[¶25] In summation, Officer Staska testified to the following: 1) that he read Washburn the implied consent statute three times for the chemical breath test; 2) that Washburn was talking through the readings and stated multiple times that he did not understand the statute; 3) that Officer Staska informed Washburn that he was taking his failure to understand and cooperate with the readings as a refusal; 4) that Washburn stated that he did not say that he was refusing to submit to the chemical test; 5) that Officer Staska began having corrections book Washburn in to jail, with the booking area being in the same location as where Officer Staska was reading Washburn the implied consent statute and where he asked Washburn to take the chemical test; 6) that within two minutes of reading Washburn the implied consent statute and Washburn saying that he wasn't refusing, Washburn made the affirmative mention that he wanted to speak with an attorney; 7) that Officer Staska felt that he needed to give Washburn a reasonable opportunity to consult with an attorney; and 8) Washburn was not afforded an opportunity whatsoever to consult with an attorney because corrections would not allow Officer Staska to take Washburn to a phone or provide him with one.

[¶26] Based on that sequence of events, it is clear that Washburn was requesting to consult with an attorney to determine whether or not to submit to a chemical test, and the same was clear to Officer Staska as well based on his testimony that felt he needed to provide Washburn with an opportunity to consult with an attorney. He had been read the implied consent statute within two minutes of his request, and during the reading of the implied consent statute he noted several times that he did not understand the law. It is

obvious that he was unsure of the law and needed further assistance in comprehending the same. Furthermore, his request came shortly after he was informed by Officer Staska that his actions were being taken as a refusal, and Washburn stating that he never said he was refusing. Coupling those facts together, it is evident that his request to consult with an attorney was to determine whether or not to submit the chemical test.

[¶27] Furthermore, the DOT argues that there is no evidence in the record showing whether Washburn did or did not make any calls after the booking process, and in doing so cite to Officer Staska's testimony that he was not notified that Washburn had changed his mind and was willing to submit to a chemical test. The reason Washburn never notified Officer Staska that he had changed his mind is because he was never afforded an opportunity to speak with an attorney after being booked in. In fact, Officer Staska himself had another opportunity to provide Washburn a chance to consult with an attorney when he brought him the Report and Notice form, but failed to do so at that time as well, stating that he never gave Washburn an opportunity to speak to an attorney when he visited him in his cell. See App. 49, l. 6-25; App. 50, l. 1-4.

[¶28] The DOT is attempting to spin this factual basis as if it was Washburn's problem for not remaining persistent in his request to speak to an attorney after he was booked. However, in reality, correction's refusal to provide Washburn an opportunity whatsoever to speak with an attorney, and in doing so denying Officer Staska's desire to do the same, is their issue, and Washburn is not required to continue to plead to speak to an attorney after being booked. Washburn affirmatively mentioned the request to speak with an attorney, and that opportunity was never provided to him. Officer Staska and corrections were on notice of that request and still failed to provide Washburn with a reasonable

opportunity to do so. The failure to provide Washburn a reasonable opportunity to speak with an attorney was not Washburn's problem, it was law enforcements, and the DOT is unpersuasive in attempting to shift the burden to speak with an attorney onto Washburn.

ii. Washburn's request to speak with an attorney was not ambiguous, and even if it was, Baillie clearly directs that once an individual makes an affirmative mention to speak to an attorney, law enforcement must assume the arrestee is requesting an opportunity to consult with an attorney.

[¶29] Second, the DOT argues that Washburn's request for an attorney was ambiguous, and that Washburn withdrew his request to speak with an attorney. This argument is based off of Officer Staska asking Washburn if he wanted to speak to an attorney, after Washburn had already affirmatively mentioned that he wanted to speak with one, and Washburn stating that he wanted to speak to his dad as well. See App. 33, l. 13-23. In making this argument, the DOT cites Kasowski v. Dir., N.D. Dep't of Transp., a case where the Appellant initially made an affirmative mention to speak to an attorney prior to his DUI arrest, and later post-arrest was asked by the officer if he still wanted to speak with an attorney and stated that he would not be able to get ahold of an attorney at that time of the night, effectively withdrawing his request to speak with an attorney. See generally Kasowski v. Dir., N.D. Dep't of Transp., 2011 ND 92, 797 N.W.2d 40.

[¶30] The DOT attempts to parallel this case to Kasowki when suggesting that Washburn made an ambiguous statement and thereby withdrew his request to speak with an attorney. However, this matter is materially different than Kasowski, because Washburn was **never** given a reasonable opportunity to speak with an attorney. While in Kasowski the officer who arrested him offered him an opportunity to speak with an

attorney, but the Appellant declined, Washburn affirmatively mentioned a desire to consult with an attorney, but never received such an opportunity.

[¶31] Furthermore, Washburn never withdrew or changed his request to speak with an attorney. Washburn never indicated that he no longer wished to speak with an attorney. Rather, he wanted to speak with an attorney, and also stated he wanted to speak to his dad. The fact that he also requested to speak to his father does not mean that he was withdrawing his request to consult with an attorney. Rather, he requested to speak to both an attorney and his father. Therefore, he never withdrew or changed his request to speak to an attorney, but instead added an additional person that he wanted to speak to.

[¶32] Moreover, the DOT's argument goes directly against this Court's directive in Baillie, which in plain language states "If the arrestee responds with any affirmative mention of a need for an attorney, law enforcement personnel **must assume** the arrestee is requesting an opportunity to consult with an attorney." See Baillie, 522 N.W.2d at 750 (emphasis added). Here, it is uncontradicted that Washburn's initial statement that he wanted to speak with an attorney was an affirmative mention to consult with an attorney. Based on that and pursuant to Baillie, Officer Staska was required to assume that Washburn was requesting an opportunity to consult with an attorney, and therefore needed to provide him a reasonable opportunity to do so.

[¶33] To support this proposition, Officer Staska himself even testified that he was uncertain to whether or not his father was an attorney, and based on that he wanted to give Washburn the benefit of the doubt, but corrections would not allow him to. See App. 51, l. 7-22. That is why the assumption laid out by this Court in Baillie is in place, to avoid case-by-case issues such as this and to establish a bright-line rule that officer's

need not indulge in second guessing and further questioning, but rather assume the arrestee is requesting to speak to an attorney to determine whether to submit to a chemical test.

b. Even if Washburn requested to speak to an attorney after he was found to have refused by his actions, failure to provide Washburn an opportunity to do so inhibited his ability to decide to cure his refusal within the appropriate timeframe.

[¶34] Even if this Court were to find that Washburn's request to speak to an attorney was after he had already refused by his actions, this Court should still find that Washburn's statutory right to speak with an attorney was violated because correction's failure to provide Washburn an opportunity to speak with an attorney obstructed a legitimate and necessary chance for Washburn to decide whether to cure his test refusal.

[¶35] This Court has held that "[a]n arrestee who refuses to submit to a chemical test may cure that refusal by consenting to a test within a reasonable time after the prior refusal if the subsequent test would still be accurate, testing equipment or facilities are still available, the subject has been in police custody and under observation for the whole time since arrest, and the subsequent test will result in no substantial inconvenience or expense to law enforcement." Houn v. North Dakota Dep't of Transp., 2000 ND 131, ¶ 9, 613 N.W.2d 29, 32 (citing Lund v. Hjelle, 224 N.W.2d 552 (N.D. 1974)). The two-hour limitation for taking a blood-alcohol test in N.D.C.C. § 39-20-04.1 narrows the reasonable time within which arrestees may attempt to cure a prior refusal, but does not refute the underlying rationale of Lund, which recognizes a preference for a chemical test within a reasonable time. Id. (citing Krehlik v. Moore, 542 N.W.2d 445 (N.D. 1996)).

[¶36] Washburn was arrested for APC slightly before 4:00 a.m., and Washburn's request for an attorney came at approximately 5:00 a.m. See App. 50, l. 6-19. Based on

that, Washburn still had approximately an hour to still provide a breath sample within the two-hour limitation window. See N.D.C.C. § 39-20-04.1. Additionally, Washburn was still located in the booking area, which was extremely close, if not right next to, the chemical testing device. See App. 48, 1-21. Furthermore, Washburn was in police custody and under observation the entire time after he was arrested. To add to that, Officer Staska testified that he typically gives individuals roughly thirty minutes to speak with an attorney if they have requested one. See App. 45, l. 13-17. Thus, even if there was approximately one hour left in the two-hour limitation window to obtain a chemical test, and Washburn spent thirty minutes on the phone with an attorney, Officer Staska would have still had approximately thirty minutes to administer the chemical breath test, which is more than enough time.

[¶37] Therefore, Washburn would have met all the necessary factors in order to be able to cure his refusal at that time pursuant to Houn. Based on that, even if this Court were to adopt the belief that Washburn had already refused to submit to the chemical test, he still should have been afforded a reasonable opportunity to consult with an attorney because Washburn still had an ample amount of time to effectively cure his refusal. Washburn's opportunity to speak to an attorney should not be limited to just the period of time after the initial request to submit to a chemical test, but should extend to any post-refusal timeframe so long as the administration of the chemical test would not be hampered by the delay.

[¶38] For these reasons, the hearing officer's decision was not in accordance with the law, and not supported by a preponderance of the evidence, and this Court should reverse the March 25, 2015, Judgment and Order affirming the hearing officer's decision

determining that there was no violation of Washburn's limited right to consult with an attorney for the purposes of deciding whether to take the chemical test.

3. **The hearing officer erred in finding that Officer Staska had reasonable grounds to arrest Washburn for being in actual physical control of a vehicle pursuant to N.D.C.C. § 39-08-01.**

[¶39] The hearing officer's decision was not in accordance with the law and is not supported by a preponderance of the evidence. See N.D.C.C. § 28-32-46(1); see N.D.C.C. § 28-32-46(5). Furthermore, the findings of fact made by the hearing officer do not sufficiently address the evidence presented to the agency by Washburn. See N.D.C.C. § 28-32-46(7). The hearing officer concluded: "Staska had reasonable grounds to believe that Washburn had been in actual physical control of a motor vehicle in violation of NDCC section 39-08-01 or an equivalent ordinance based upon his observations and Washburn's behavior." See app. 77-78. This conclusion was based upon non-credible testimony that was clearly rebutted through additional testimony presented by Washburn at the administrative hearing.

a. **Officer Staska did not have probable cause to arrest Washburn for being in actual physical control of a motor vehicle pursuant to N.D.C.C. § 39-08-01.**

[¶40] The Fourth Amendment, which applies to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures. City of Devils Lake v. Grove, 2008 ND 155, ¶ 8, 755 N.W.2d 485, 489-90 (citing Dunaway v. New York, 442 U.S. 200, 207, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)). Under the Fourth Amendment, a seizure occurs "whenever an officer stops an individual and restrains his freedom" Id. at ¶ 9. A "person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id.

[¶41] An arrest is a seizure under the Fourth Amendment. Id. at ¶ 10 (citing City of Jamestown v. Jerome, 2002 ND 34, ¶ 5, 639 N.W.2d 478). An arrest occurs when circumstances exist that would cause a reasonable person to conclude he was under arrest and not free to leave. Id. (citing State v. Anderson, 2006 ND 44, ¶ 22, 710 N.W.2d 392). The existence of an arrest is a question of law. Id. "An arrest is made by an actual restraint of the person of the defendant or by defendant's submission to the custody of the person making the arrest." N.D.C.C. § 29–06–09; see id.

[¶42] "Probable cause to arrest ... exists when the facts and circumstances within a police officer's knowledge and of which he had reasonable trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." Moran v. North Dakota Dep't of Transp., 543 N.W.2d 767, 768 (N.D. 1996). "When making a probable cause determination, [the Court] consider[s] the totality of the circumstances." Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 17, 663 N.W.2d 161.

i. Officer Staska lacked probable cause to arrest based on a lack of observations and indications of impairment and alcohol consumption.

[¶43] In order to arrest a driver for driving under the influence, the law enforcement officer first must observe some signs of impairment, physical or mental. See Moran at 770. Further, the law enforcement officer must have reason to believe the driver's impairment is caused by alcohol. Id. Both elements, impairment and indication of alcohol consumption, are necessary to establish probable cause to arrest for driving under the influence. Id. Relevant factors in determining probable cause to arrest a person for DUI include the detection of the odor of alcohol, observation of signs of impairment, the person's own words, and failure of one or more field sobriety tests. See State v. Boehm,

2014 ND 154, ¶ 13, 849 N.W.2d 239, 245; see also Grove, 2008 ND 155, ¶ 11, 755 N.W.2d 485.

[¶44] In this instance, Officer Staska did not have probable cause to arrest Washburn for APC based on signs of impairment or indications of alcohol consumption. At the time that Washburn was arrested, Officer Staska, based on the totality of the circumstance and the evidence presented at the hearing, only observed the odor of alcohol emanating from Washburn. Additionally, Washburn never admitted to consuming alcohol, nor did he submit to field sobriety tests, which he had no obligation to do.

[¶45] In an attempt to persuade this Court, the DOT lists information that "was available" to Officer Staska at the time he arrested Washburn. However, those observations either 1) do not show any sign of impairment or 2) came after the time that Officer Staska arrested Washburn. In fact, Officer Staska agreed that at the time that he arrested Washburn, the only legitimate sign of impairment or indication of alcohol that he noted and observed was the odor of alcohol on Washburn, and that his memory at the time he prepared his police report and the Report and Notice was better than at the time of the administrative hearing. App. 22-27.

[¶46] More than just the detection of the odor of alcohol is required for probable cause to arrest for APC based on impairment. Therefore, based on the totality of the circumstances, Officer Staska simply did not have, at the time of the arrest of Washburn, the necessary observations of impairment and the indication of alcohol consumption necessary to establish probable cause to arrest Washburn for APC.

ii. Officer Staska lacked probable cause due to Washburn's inability to manipulate the controls of the vehicle.

[¶47] The essential elements of actual physical control, for the purpose of the offense of actual physical control of a vehicle while under the influence of intoxicating liquor, are 1) the defendant is in actual physical control of a motor vehicle on a highway or upon public or private areas to which the public has a right of access; and 2) the defendant was under the influence of intoxicating liquor, drugs, or other substances. See Rist v. N.D. Dep't of Transp., 2003 ND 113, ¶ 14, 665 N.W.2d 45; see N.D.C.C. § 39-08-01.

[¶48] The key factor in determining "actual physical control" of vehicle, for purposes of the offense of actual physical control of vehicle while under influence of intoxicating liquor, is whether defendant is able to manipulate vehicle's controls; such control exists when defendant has real and not hypothetical bodily restraining or directing influence over vehicle's movements of machinery. See City of Fargo v. Novotny, 1997 ND 73, ¶ 7, 562 N.W.2d 95, 96. Actual physical control, for purposes of the charge of APC of motor vehicle while under influence of intoxicating substance, does not solely depend on location of ignition key; location of key is one factor among others to consider. See State v. Haverluk, 2000 ND 178, ¶ 18, 617 N.W.2d 652, 656. The vehicle keys are "not necessary to support probable cause to arrest." Id.

[¶49] Based on the totality of the circumstances, Officer Staska lacked probable cause to arrest Washburn based on Washburn's inability to manipulate the controls of the vehicle. Simply put, when reviewing all of the testimony provided at the administrative hearing, a reasonable person, based on all of the facts at the time of the arrest, would not conclude that there were reasonable grounds to believe that Washburn was able to

manipulate the controls of his vehicle, nor that Washburn had real bodily restraining or directing influence over the vehicle's movements.

[¶50] While only one factor, Washburn's keys were not in the vehicle. Officer Staska's testimony that the keys were in the ignition lacks credibility based off of the countless times that he contradicted himself regarding the location of the vehicle's keys. See App. 14, 19-25 (Officer Staska stating he saw Ms. Washburn grab the keys from the vehicle); App. 30, l. 14-20 (Officer Staska stating that he didn't know whether or not he saw Ms. Washburn with the keys); App. 31, l. 9-11 (Officer Staska testifying that he can't say that Ms. Washburn ever grabbed keys from the vehicle); App. 37, l. 16-18 (Officer Staska stating that before he left the scene Ms. Washburn had grabbed the keys). In fact, Officer Staska inevitably testified that Ms. Washburn would be the best one to testify about whether or not she ever had the vehicle's keys. App. 37, l. 21-24.

[¶51] Whereas, Ms. Washburn testified at the hearing that she never found the keys in the vehicle whatsoever that day and that she in fact found the keys, the same keys she used to roll up the vehicle's windows later that day, on Washburn's dresser. App. 57, l. 13-25; App. 58, l. 1-8; App. 59, l. 11-18; App. 60, l. 1-11, 19- 23. Additionally, there was an abundance of testimony that established that Washburn never took any keys out of the vehicle. See App. 58, l. 19-25; App. 59, l. 1-2.

[¶52] While this Court has stated that the ignition keys are not necessary for probable cause to arrest for APC, they certainly should be considered a relevant and crucial factor regarding whether or not Officer Staska had reasonable grounds to believe Washburn was in APC of his vehicle in this instance, because the keys are the most important factor

regarding whether or not Washburn's vehicle was operable based on Washburn's testimony.

[¶53] Washburn testified that 1) he only has one set of keys for the vehicle and 2) he is unable to place the vehicle into any gear or manipulate the vehicle to get it out of park without the key being in the ignition and at least turned to accessory. App. 66, l. 19-23; App. 67, l. 8-17. Therefore Washburn, at the time of the arrest without his keys, was completely unable to manipulate the vehicle's controls, and did not have a real bodily restraining or directing influence over the vehicle. While Officer Staska at the time of the incident may not have known for certain that the vehicle was inoperable without the keys, a reasonable person could very easily conclude that the vehicle would be unable to operate without them.

[¶54] The DOT, on the other hand, argues that the fact that Washburn and Ms. Washburn contested the location of the vehicle keys at the administrative hearing was not dispositive because the information regarding the location of the vehicle keys was not available to Officer Staska at the time of arrest, and Officer Staska was not put on notice that Washburn was contesting that he did not have his keys or that they were in his bedroom. See Appellant/Cross-Appellee's Brief, ¶ 34-35. Certainly, where the vehicle keys were at the time of the incident is relevant information, and the testimony of Ms. Washburn was relevant, because Officer Staska alleged to have observed the keys in the ignition. Ms. Washburn's testimony rebutted Officer Staska's assertion, and based on that, her testimony was absolutely relevant.

[¶55] Furthermore, even if for some reason Officer Staska would have needed to be "put on notice" that the key location was a point of contention, he already was when Ms.

Washburn, at the time of arrest, addressed the issue with Washburn and himself when she asked where the keys were after she looked in the vehicle. Clearly, the issue was raised at the time of the occurrence. Additionally, the DOT states, "at no time did Ms. Washburn tell Officer Staska that the ignition key was found in Washburn's bedroom." See Appellant/Cross-Appellee Brief, ¶ 35. This argument is misguided and irrelevant. The issue isn't where the keys were found; the issue is that the keys weren't found in or around the vehicle.

[¶56] Second, the DOT argues that even if the ignition key was in Washburn's bedroom, getting the key would only have been a temporary impediment to the vehicle's operability, and much less substantial of an impediment than others deemed temporary by the North Dakota Supreme Court. See Appellant/Cross-Appellee Brief, ¶ 36. This argument creates an absurd result by standing for the proposition that at any time when an individual is drinking, so long as he has access to his car keys and access to his vehicle, he could be charged with APC because he could at any time remove the temporary impediment of either not having his keys or not being in his vehicle and then could "continue on his inebriated journey." If this Court were to be compelled to adopt this rationale, it would open up a plethora of issues that would be directly against public policy.

[¶57] That is why the district court reversed the hearing officer's decision. See App. 82-83. The court determined that the hearing officer left out valuable evidence in his findings of fact regarding the location of the keys that was presented at the hearing through the testimony of Ms. Washburn. The court found, in it's oral findings, that Officer Staska testified that Ms. Washburn would be better suited to testify regarding the

location of the keys than himself, that Ms. Washburn testified that the keys weren't in the vehicle and instead on Washburn's dresser, and that Washburn was unable to operate the vehicle without the keys. Based on that, the court found that the hearing officer's findings of fact were deficient pursuant to N.D.C.C. § 28-32-46(7) and reversed the decision. While this appeal is to be determined based on the hearing officer's decision, this Court has previously held that the district court's analysis is entitled to respect if sound, which it is in this case. See Aamodt, 2004 ND 134, at ¶ 12.

[¶58] Therefore, this Court should find that, based on the testimony and evidence in this matter, Washburn's keys were not in the vehicle, and therefore he was unable to manipulate the controls of the vehicle. Additionally, this Court should find that based on the totality of the circumstances, the lack of indications and observations of impairment coupled with Washburn's inability to operate the vehicle, the hearing officer erred in finding that Officer Staska had reasonable grounds to believe that Washburn was in APC of his vehicle.

[¶59] For these reasons, Washburn respectfully requests that this Court find that the hearing officer's decision was not in accordance with the law, and was not supported by a preponderance of the evidence. Furthermore, Washburn requests that this Court find that the hearing officer's findings of fact did not sufficiently address the evidence presented to the agency by Washburn because the findings of fact omitted all of the evidence presented to the agency through Ms. Washburn's testimony, and also omitted Officer Staska's testimony that Ms. Washburn would be the best person to testify regarding the location of the vehicle's keys. In making these findings, Washburn respectfully requests

that this Court affirm the March 25, 2015, Order and Judgment reversing the revocation of Washburn's license for a period of 180 days.

4. Attorney fees and costs should be awarded to Washburn.

[¶60] "In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, the court must award the party not an administrative agency reasonable attorney's fees and costs if the court finds in favor of that party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification." N.D.C.C. §28-32-50(1).

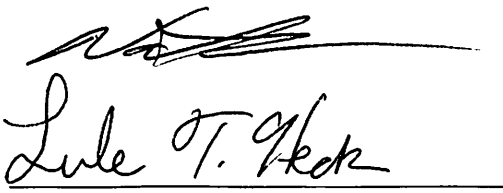
[¶61] The DOT, through its hearing officer, acted without substantial justification by finding that Washburn's statutory right to consult with an attorney prior to deciding whether or not to submit to a chemical test was not violated. Specifically, the hearing officer failed to provide any reasonable grounds or North Dakota law to reinforce his position that Washburn's statutory right was not violated, based his findings on the erroneous belief that Washburn's request was not for the purpose of deciding whether or not to submit to a chemical test, and inappropriately shifted the burden of proof to Washburn to prove that he couldn't speak to an attorney after he was booked into jail. For these reasons, attorneys fees and costs should be awarded to Washburn.

CONCLUSION

[¶62] For the reasons stated above, Washburn respectfully requests that this Court **AFFIRM** the March 25, 2015, Order and Judgment reversing the hearing officer's finding that Officer Staska had probable cause to arrest Washburn. Furthermore, Washburn respectfully requests that this Court **REVERSE** the March 25, 2015, Order and Judgment

affirming the hearing officer's finding that Washburn was afforded a reasonable opportunity to consult with an attorney prior to submitting to a chemical test.

Dated this 3rd day of August, 2015.



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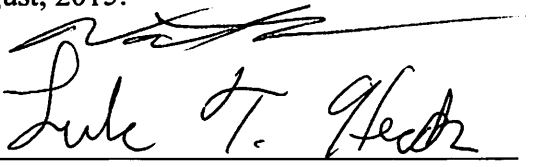
CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee/Cross-Appellant, Casey Jerald Washburn, and the author the Brief of Appellee/Cross-Appellant Casey Jerald Washburn, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 7,963 words from the portion of the brief entitled "Statement of the Case" through the signature line. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 3rd day of August, 2015.



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20150149

Casey Jerald Washburn, Appellee/Cross-Appellant, vs. Grant Levi, Director Department of Transportation, Appellant/Cross-Appellee.	)	**AFFIDAVIT OF SERVICE**

Tara L. Hutchinson, being sworn says that she is of legal age, a resident of Fargo, Cass County, North Dakota, not a party to nor interested in the action, and that she served the attached:

1. **Appellee/Cross-Appellant's Appendix; and**
2. **Brief of Appellee/Cross-Appellant.**

upon the following person:

Penny Miller
Clerk of the Supreme Court
SupClerkofCourt@ndcourts.gov

Michael Pitcher
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via electronic means on the 3rd day of August 2015, by e-mailing the same to the person above-named at the above-referenced e-mail address and by depositing in the United States Post Office at Fargo, North Dakota, on the 3rd day of August 2015, at 4:30 p.m., a correct copy thereof, enclosed in a separate sealed envelope, with postage prepaid for first class mail, addressed to the person above named at the above address.

That she knows the person served to be the person named in the papers served and the person intended to be served.

Dated this 3rd day of August 2015.

Tara L. Hutchinson

SUBSCRIBED AND SWORN TO before me this 3rd day of August 2015.

RACHEL MESKE
Notary Public
State of North Dakota
My Commission Expires Dec. 6, 2017

Notary Public