

IN THE SUPREME COURT
 STATE OF NORTH DAKOTA

Neil Christopher Bayles,)	
)	
Appellee,)	
)	
v.)	Supreme Court No. 20150200
)	
North Dakota Department of)	
Transportation,)	
)	Burleigh Co. No. 08-2014-CV-02606
Appellant.)	

BRIEF OF APPELLEE

Appeal from Judgment, filed June 10, 2015

Burleigh County District Court

South Central Judicial District

The Honorable Bruce B. Haskell

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[¶1] TABLE OF AUTHORITIES

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[¶2] STANDARD OF REVIEW

[¶3] A district court is not required to summarily reverse a decision suspending a driver's license for failure to comply the N.D.C.C. § 39-20-06 transcript mandate. *See May v. Sprynczynatyk*, 2005 ND 76, 695 N.W.2d 196. However, the district court has discretion to reverse for non-compliance with the law. *See id.*

[¶4] A district court "abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination." *See Ritter, Laber and Associates, Inc. v. Koch Oil, Inc.*, 2004 ND 117, ¶34, 680 N.W.2d 634. Just as "refusal to grant default judgment is not an abuse of discretion," so too is not an abuse of discretion to grant default relief for institutional non-compliance with the law. *See Gamboa v. State*, 2005 ND 48, ¶6, 693 N.W.2d 21.

[¶5] LAW AND ARGUMENT

[¶6] The Department of Transportation argues that non-compliance with the mandate in N.D.C.C. § 39-20-06, that within twenty days of the Notice of Appeal the director or the hearing officer "shall file" a certified transcript of the testimony, does not require automatic reversal. Mr. Bayles agrees. But, that does not mean the district court has no authority to reverse because of extraordinary delay, unfairness, prejudice, a pattern of non-compliance, a violation of due process, or upon a determination that DOT received the Notice of Appeal, as stated in the Certificate of Service. The Court still has a right to weigh-in, and the district court, here, had the authority to grant relief.

[¶7] Indeed, “[r]eversal ... may be warranted as a sanction for institutional noncompliance and systemic disregard of the law if the conduct is commonplace.” *See May v. Sprynczynatyk*, 2005 ND 76, ¶17, 695 N.W.2d 196. This is not the first time DOT has failed to comply with the N.D.C.C. § 39-20-06 transcript mandate. In fact, the Department has previously been warned about the failure to timely file a transcript. In *May v. Sprynczynatyk*, the North Dakota Supreme Court warned the Department that it must comply with N.D.C.C. § 39-20-06, but failed to sanction the Department because it was only “a single violation.” *See May v. Sprynczynatyk*, 2005 ND 76, ¶18, 695 N.W.2d 196 (filing the transcript a few days late). In our case, the delay was more than a few days - the delay was 70 days.

[¶8] Also, in *Rudolph v. ND Dept. Of Transportation Director*, the Department filed a transcript within the 20-day period, but omitted 4 pages. *See Rudolph v. ND Dept. Of Transportation Director*, 539 N.W.2d 63 (N.D. 1995). Those pages were supplemented outside of the 20-day window and this Court found no prejudice and no pattern of non-compliance. *See id.*

[¶9] In *Dworshak v. Moore*, this Court found itself grappling with litigation involving delay in issuing the Report and Notice form. *See Dworshak v. Moore*, 1998 ND 172, 583 N.W.2d 799. The *Dworshak* court reiterated its requirement that the driver show prejudice or harm from the violation, but warned:

“We note here the "immediacy" language of N.D.C.C. §§ 39-20-03.1 and -04(1) has now twice been litigated on appeal due to a law enforcement officer's delay in issuing a temporary operator's permit. In the future, we strongly encourage the Department to "enforce the immediacy requirement of the[se] statute[s] to ensure diligent conduct of law enforcement and to avoid 'systematic [sic] disregard of law.'”

See Dworshak v. Moore, 1998 ND 172 at ¶15, fn.1 (emphasis added).

[¶10] The *Dworshak* delay issue was twice litigated on appeal. This Court gave a *Madison* warning the second time the *Dworshak* issue reached this Court. Counting DOT's appeal here, DOT's non-compliance with the N.D.C.C. § 39-20-06 transcript mandate has been litigated at least five times. *Dworshak's* Madison warning echoes louder and louder.

[¶11] Our case is at least the fifth case of non-compliance with the N.D.C.C. § 39-20-06 transcript mandate to reach this Court (along with *May* and *Rudolph*, *see also Baesler v. N.D. Department of Transportation*, 2012 ND 39, 812 N.W.2d 434 and *Sayler v. N.D. Department of Transportation*, 2007 ND 165, 740 N.W.2d 94). *Rudolph* omitted 4 pages within the 20-day window, and the *May* transcript was only a few days late. In our case, there was no transcript within the 20-day window and no transcript until 70 days after the Notice of Appeal. Mr. Bayles virtually served his suspension by the time DOT submitted a transcript. The Bayles transcript delay is much more persistent and systemic than the *Dworshak* delay, where this Court warned DOT that *Madison* consequences were around the corner.

[¶12] In *Madison v. ND Department of Transportation*, this Court was troubled that “the Department obviously has misread or ignored the amended statute,” that the Rules of Evidence apply unless waived, and that “[t]he hearing officer perpetuated the institutional non-compliance” by refusing to enforce the directives of the statute. *See Madison v. ND Department of Transportation*, 503 N.W.2d 243, 246 (N.D. 1993). The *Madison* court was “concerned about this systemic disregard of law” and “warned that conduct which is “potentially prejudicial” to the accused, if “commonplace,” may warrant reversal.” *See id.* at 246-47. The Court “conclude[d] that the interests of justice require a

reversal, not only to resolve for the Department the statute's meaning and effect, but more importantly, to ensure that the Department acts consistently and predictably in accordance with the law.” *See id* at 247.

[¶13] In our case, like in *Madison*, there was a clear statutory violation - the transcript was not filed within 20 days of the Notice of Appeal. Like *Madison*, ruling in favor of Bayles was appropriate here in order to address a systemic disregard of law. Judge Haskell had the authority to rule as he did and Judge Haskell knows the Department's history on this issue. Indeed, this is at least the fifth time this issue has been before this Court. “[M]ore importantly,” Judge Haskell's ruling was necessary “to ensure that the Department acts consistently and predictably in accordance with the law.” *See Madison*, 503 N.W.2d at 247.

[¶14] Judge Haskell decided to give meaning to the words “[w]ithin twenty days ... shall file.” Judge Haskell was aware that reversal was not required by the continued failings of the Department to comply with the N.D.C.C. § 39-20-06 transcript mandate. If the Department is concerned that Judge Haskell felt he had no choice but to reverse due to another institutional and systemic failing by DOT, then one would think the Department would request remand to Judge Haskell for further comment on the matter. The Department did not make this request.

[¶15] The Department also believes that their claim of not receiving the Notice of Appeal automatically resolves the matter in their favor. Judge Haskell was aware of Mr. Bayles' Certificate of Service and DOT's claim of non-receipt, and he resolved that issue of fact against DOT.

[¶16] CONCLUSION

[¶17] For the foregoing reasons, Neil Bayles respectfully requests that this Court affirm Judge Haskell's Order reversing the decision of the hearing officer and reinstating his driving privileges.

Respectfully submitted
this 1st day of October, 2015.

/s/ Dan Herbel

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[¶18] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 1, 2015, the BRIEF OF APPELLEE was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Douglas B. Anderson, Assistant Attorney General, at the following:

Electronic filing to: "Douglas B. Anderson" < dbanders@nd.gov >

/s/ Dan Herbel

Dan Herbel