IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Tyler Dale Ell, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20160068** **District Ct. No. 28-2015-CV-00173**

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED JANUARY 22, 2016
MCLEAN COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE JOHN GRINSTEINER

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[¶1] Whether the hearing officer abused her discretion in admitting Deputy Janisch's testimony regarding Corporal Meadows' seizure of Ell that led to Deputy Janisch's investigation and arrest of Ell for driving while under the influence of intoxicating liquor when Corporal Meadows did not testify at the administrative hearing?

[¶2] Whether law enforcement unlawfully expanded the scope of the investigative detention after the initial traffic stop?

[¶3] Whether the proper foundation for the admission of Ell's chemical Intoxilyzer 8000 test for intoxication was established?

STATEMENT OF CASE

[¶4] On September 5, 2015 Deputy William Janisch (Deputy Janisch of the McLean County Sheriff's Department arrested Tyler Dale Ell (Ell) for the offense of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor. Tr. Ex. 1b. A Report and Notice, including a temporary operator's permit, was issued to Ell after chemical Intoxilyzer test results showed he had an alcohol concentration of 0.158 percent by weight. The Report and Notice notified Ell of the Department's intent to suspend his driving privileges. Id.

[¶5] In response to the Report and Notice, Ell requested an administrative hearing. Tr. Exs. 1e-g. The hearing was held on October 1, 2015. In accordance with N.D.C.C. 39-20-05 the hearing officer considered four broad issues, as follows:

(1) Whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;

(2) Whether the person was placed under arrest;

(3) Whether the person 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

(4) Whether the test results show the person had an alcohol concentration of at least eight one-hundredths of one percent but less than eighteen one-hundredths of one percent by weight.

Tr. Ex. 2.

[¶6] At the close of the hearing, the hearing officer issued her findings of fact, conclusions of law and decision suspending Ell's driving privileges for 91 days. App. 18. Ell appealed that decision to the McLean County District Court. App. 3-5.

STATEMENT OF FACTS

[¶7] On September 5, 2015, Deputy Janisch was on patrol when McLean County Corporal Cody Meadows (Cpl. Meadows) requested his assistance on a traffic stop to conduct a DUI investigation. Tr. 5, l. 12 – Tr. 7, l. 14. Cpl. Meadows stopped a vehicle for speeding on Highway 200 outside Riverdale, and at the time of the request for assistance, Deputy Janisch was on patrol approximately twenty miles southeast of Riverdale, in Washburn. Tr. 11, ll. 12-21.

[¶8] Upon arrival, Cpl. Meadows informed Deputy Janisch he stopped the vehicle for a speeding violation. Tr. 14, ll. 4-9. Cpl. Meadows also indicated he smelled the odor of alcohol coming from within the vehicle and he indicated the driver admitted to consuming alcohol. Tr. 14, ll. 10-13. When Deputy Janisch made contact with the driver and sole occupant of the vehicle, later identified as Ell, Deputy Janisch asked Ell to step out of the vehicle to conduct field sobriety tests. Tr. 10, l. 11 – Tr. 11, l. 2; Tr. 13, ll. 13-14. Deputy Janisch observed Ell

had poor balance when he exited the vehicle and continued to smell the odor of alcohol from Ell after he exited the vehicle. Tr. 15, ll. 5-10.

[¶9] Deputy Janisch conducted field sobriety tests on Ell, including the HGN, walk and turn test, and the one-legged stand test. Tr. 16, ll. 8-9. Prior to the HGN test, Ell disclosed he had a lazy eye and the results of that test were not considered by the hearing officer. Tr. 17, ll. 5-10; Tr. 36, ll. 13-14. Ell displayed four out of eight clues on the walk and turn test, indicating impairment. Tr. 21, l. 7 – Tr. 22, l. 9. Ell also displayed two out of four clues on the one-legged stand test, indicating impairment. Tr. 22, ll. 10-24. Ell agreed to take an onsite screening test and the results of the Alco Sensor FST indicated Ell had an alcohol concentration of 0.144. Tr. 23, l. 4 – Tr. 27, l. 1. Deputy Janisch placed Ell under arrest for driving under the influence and read Ell the implied consent advisory. Tr. 27, ll. 7-16. Ell agreed to take a chemical test and the results of the Intoxilyzer 8000 indicated Ell had an alcohol concentration of 0.158. Tr. 27, l. 18 – Tr. 28, l. 1; Tr. Ex. 1c.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶10] Ell requested judicial review of the hearing officer's decision by the McLean County District Court in accordance with N.D.C.C. § 39-20-06. App. 3-5. With respect to Ell's argument that there was no admissible evidence regarding the basis for the stop of his vehicle, Judge Grinsteiner determined the hearing officer did not abuse her discretion in admitting the statements from Cpl. Meadows to Deputy Janisch into evidence. App. 4. Judge Grinsteiner

determined that statements were permitted under the present sense impression exception to the hearsay rule. App. 4-5.

[¶11] Next, regarding Ell's argument that he was illegally seized due to a protracted stop, the court found the traffic violation was not concluded before Cpl. Meadows had smelled the odor of alcohol coming from Ell and learned that he had consumed alcohol that evening providing sufficient suspicion to extend the scope of the stop to conduct a DUI investigation. App. 11.

[¶12] Judge Grinsteiner also rejected Ell's argument that the chemical test was not fairly administered. App. 11. Specifically, the court determined the hearing officer's decision was supported by the weight of the evidence because the documents introduced at the hearing including the Approved Method to Conduct Breath Tests with the Intoxilyzer 8000, and the List of Approved Chemical Testing Devices showed Ell's Intoxilyzer 8000 device was properly inspected prior to use. App. 12.

[¶13] The district court issued its Order affirming the hearing officer's decision on January 20, 2016. App. 6-13. Judgment was entered on January 22, 2016. App. 15. Ell appealed the Judgment to this Court. App. 16. On appeal, the Department requests this Court affirm the Judgment of the McLean County District Court and the Hearing Officer's Decision suspending Ell's driving privileges for a period of 91 days.

STANDARD OF REVIEW

[¶14] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to revoke driving privileges." Haynes v. Dir., Dep't of

Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

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.

[¶15] "In an appeal from a district court's review of an administrative agency's decision, [the Court] reviews the agency's decision." Haynes, at ¶ 6. The Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id.

[¶16] Instead, the reviewing court "determine[s] 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." Johnson v. N.D. Dep't of Transp., 530 N.W.2d 359, 361 (N.D. 1995). "This standard defers to the hearing officer's opportunity to hear the witnesses' testimony and to judge their credibility and [the court] will not disturb the agency's findings unless they are against the greater weight of the evidence." Id. "The mere fact that the appellate court might have viewed the facts differently had it been the initial trier of the case does not entitle it to reverse the lower court." Herb Hill Ins., Inc. v. Radtke, 380 N.W.2d 651, 653 (N.D. 1986).

[¶17] "Evidentiary rulings in administrative hearings are reviewed under the abuse of discretion standard." Osaba v. N.D. Dep't of Transp., 2012 ND 36, ¶ 8, 812 N.W.2d 440 (citing Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 9, 663 N.W.2d 161). "An abuse of discretion occurs if a hearing officer acts in an arbitrary, unreasonable, or capricious manner or if the hearing officer misinterprets or misapplies the law." Id. (quoting Sonsthagen, at ¶ 9).

LAW AND ARGUMENT

I. The testimony that formed the basis for Deputy Janisch's seizure of Ell for driving under the influence was admissible into evidence.

[¶18] "[I]t has been recognized that hearing officers have discretion to control procedural matters such as . . . [the] admission of evidence." Berger v. N.D. Dep't of Transp., 2011 ND 55, ¶ 7, 795 N.W.2d 707. Section 28-32-24(3), N.D.C.C., provides that "[u]pon proper objection, evidence that is . . . excludable

on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded." N.D.C.C. § 28-32-24(3).

[¶19] "The admissibility of evidence in administrative hearings is determined in accordance with the North Dakota Rules of Evidence." Osaba, at ¶ 8, (citing N.D.C.C. § 28-32-24(1)). "Evidentiary rulings in administrative hearings are reviewed under the abuse of discretion standard." Id. (citing Sonsthagen, at ¶ 9). "An abuse of discretion occurs if a hearing officer acts in an arbitrary, unreasonable, or capricious manner or if the hearing officer misinterprets or misapplies the law." Id. (quoting Sonsthagen, at ¶ 9). See also Knudson v. Dir., N.D. Dep't of Transp., 530 N.W.2d 313, 316 (N.D. 1995). The hearing officer did not abuse her discretion in admitting Deputy Janisch's testimony regarding Cpl. Meadows' stop of Ell's vehicle that led to Deputy Janisch's investigation and arrest of Ell for driving under the influence of intoxicating liquor when Cpl. Meadows did not testify at the administrative hearing.

A. Officer to Officer Communication is presumptively reliable and the hearing officer properly admitted the testimony for its legal significance in establishing probable cause.

[¶20] This Court has recognized the principle of imputed knowledge and that even in the absence of the original declarant's testimony, "officer to officer communications are presumptively reliable." City of Minot v. Keller, 2008 ND 38, ¶ 13, 745 N.W.2d 638. "Therefore, observations made by one officer may be communicated to a second officer who, after observing additional conduct, can combine the communicated observations with his own to thereafter have reasonable articulable suspicion to stop." Id. at ¶ 13. See also Osaba, at ¶ 12

(non-testifying officer's observations of the security video, which were imputed to arresting officer, demonstrated Osaba's operation of a vehicle). The Osaba court noted that such testimony is admissible in the absence of the declarant *when offered to establish an arresting officer's knowledge and observations at the time of an arrest, rather than when offered to prove the person had been driving under the influence.* Id. ("Brocker's observations of the security video, which were imputed to Sass, demonstrated Osaba's operation of a vehicle.").

[¶21] In State v. Cotton, the appellant claimed that certain officer-to-officer statements, "largely furnishing the probable cause to arrest, were inadmissible hearsay at the motion to suppress because the [communicating officers] did not testify." No. 111,610, 2015 WL 4716284, at *6 (Kan. Ct. App. July 31, 2015) (table -- unpublished opinion). Similar to this Court's decision in Osaba, the Kansas court of appeals stated "[t]he statements were not hearsay when offered to show the officer's probable cause." Id.

[¶22] The court determined the statements of the non-testifying declarants "were not offered for the truth of what was said, which would make them hearsay . . . but because they had independent legal significance in establishing probable cause." Id. (internal citation omitted). "When a statement has such significance, it may be offered for that purpose free of hearsay constraints." Id. (citing State v. Reynolds, 639 P.2d 461 (Kan. 1982) (oral consent to search had independent legal significance to demonstrate consent and could be admitted for that purpose through person who heard statement); State v. Littles, 68 So.3d 976, 978 (Fla. Ct. App. 2011) (hearsay bar inapplicable to statements offered to show

information officer relied on to make probable cause determination); People v. Louisville, 609 N.E.2d 682 (Ill. Ct App. 1992) ("A police officer may testify to the contents of police radio communications where such testimony is offered to show that the police officer had probable cause to arrest based on the communication."); State v. Ege, 420 N.W.2d 305 (Neb. 1988) (A law enforcement officer may testify to a citizen's statements regarding a driver's apparent intoxication to explain the reasonable suspicion for justifying a traffic stop; for that purpose, the statements were not hearsay.)). The court determined the officer-to-officer communications "were properly admitted for their legal significance in establishing probable cause. They would not have been admissible . . . to show Cotton's guilt at trial." Id.

[¶23] In this case, Deputy Janisch's testimony regarding the statements made to him by Cpl. Meadows – as in Osaba – were offered to establish Deputy Janisch's knowledge and observations as to why he detained Ell to investigate whether he had been driving while under the influence. The statements were not offered to prove Ell had been driving under the influence. As such, Deputy Janisch's testimony did not represent inadmissible hearsay.

[¶24] The hearing officer did not abuse her discretion in admitting Deputy Janisch's testimony regarding Cpl. Meadows' seizure of Ell that led to Deputy Janisch's investigation and arrest of Ell for driving his vehicle while under the influence of intoxicating liquor when Cpl. Meadows did not testify at the administrative hearing.

B. Cpl. Meadows' statements to Deputy Janisch regarding the basis for his stop of Ell's vehicle were admissible under the present sense exception to the hearsay rule.

[¶25] Even if this Court disagrees with the Department's argument in subsection A, it should still affirm the hearing officer's decision because Deputy Janisch's testimony regarding Cpl. Meadows' statements regarding the basis for his stop of Ell's vehicle were admissible under the present sense impression exception to the hearsay rule.

[¶26] Rule 803, N.D.R.Ev., provides exceptions to the hearsay rule. Rule 803(1), N.D.R.Ev., excludes from the hearsay rule, "[a] statement describing or explaining an event or condition made while immediately after the declarant perceived the event or condition." This Court has stated:

> . . . The Federal Advisory Committee Note to Rule 803 of the Federal Rules of Evidence states as follows:
>
> > "The underlying theory of Exception . . . (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. . . ."
>
> Accordingly, the present sense impression exception is limited to statements made while an event or condition is perceived or immediately thereafter. Rule 803(1), N.D.R.Ev. Furthermore, the theory supporting the present sense impression exception is that substantial contemporaneity of the event and the statement negate the likelihood of memory deficiencies and deliberate misstatements.

State v. Jensen, 418 N.W.2d 776, 779-80 (N.D. 1988). "In addition to contemporaneity of the event and the statement, the circumstances surrounding the statement should demonstrate that it is trustworthy and hence, consistent with the rationale of the exception." Knudson at 317.

[¶27] "There is no per se rule indicating what interval is too long between a person's perception of an event and the person's subsequent statement describing that event." Id. "The proper inquiry is 'whether sufficient time elapsed to have permitted reflective thought.'" Id. (quoting 2 McCormick on Evidence, Practitioner Treatise Series § 271, at 214 (4th ed. 1992)). "Ordinarily, whether a statement is substantially contemporaneous with an event is a fact question." Id. "However, when the evidence is such that reasonable minds can draw but one conclusion, the issue becomes one of law." Id.

[¶28] In this case, Deputy Janisch received a call for assistance on a traffic stop from Cpl. Meadows at 5:57 p.m. Tr. 5, l, 12 – Tr. 6, l. 10. Cpl. Meadows informed Deputy Janisch that he had stopped a vehicle driven by Ell for speeding, smelled the odor of alcohol, and that Ell admitted to drinking. Tr. 14, ll. 4-13. Cpl. Meadows requested Deputy Janisch conduct a DUI investigation and perform field sobriety tests on Ell. Tr. 9, ll. 1-6; Tr. 10, ll. 1-6.

[¶29] Deputy Janisch went to the scene of the stop and observed Ell's vehicle stopped with Ell sitting in the driver's seat. Tr. 8, ll. 3-4. Cpl. Meadows' patrol car was behind Ell's vehicle, slightly offset and further into the roadway, with its emergency lights activated. Tr. 8, ll. 7-12. Deputy Janisch spoke with Cpl. Meadows. Tr. 8, ll. 17-25.

[¶30] After speaking with Cpl. Meadows Deputy Janisch approached Ell and "noticed that [Ell] smelled like alcohol", saw his eyes were glossy, and that his balance was poor while exiting the vehicle. Tr. 15, ll. 5-6. Ell admitted to Deputy Janisch that he drank approximately three Keystone Light beers. Tr. 13, ll. 5-10.

Ell submitted to field sobriety tests, from which Deputy Janisch noticed indicia of impairment. These observations in combination with the information provide by Cpl. Meadows provided Deputy Janisch with probable cause to arrest Ell for driving under the influence. The information provided by Cpl. Meadows was properly imputed to Deputy Janisch.

[¶31] It is apparent that Cpl. Meadows was not finished with his traffic stop at the time he requested Deputy Janisch's assistance for a DUI investigation. Therefore, no more than a few minutes of time passed from the time Cpl. Meadows observed Ell speeding and his conversation regarding the stop with Deputy Janisch. As such the statements received by Deputy Janisch from Cpl. Meadows, *within* a few short minutes after the call for assistance meets the "substantial contemporaneity" requirement of the present sense impression exception to the hearsay rule. See, e.g., United States v. Blakey, 607 F.2d 779, 785-86 (7th Cir. 1979) (23 minutes between the event and the statement is within the scope of the "substantially contemporaneous" standard).

[¶32] In addition to the substantial contemporaneity, the reliability of the source of the statements made to Deputy Janisch further demonstrates its trustworthiness consistent with the rationale of the present sense impression exception. Deputy Janisch received statements directly from a Cpl. Meadows, a fellow officer in the same law enforcement department. This Court has found that "officer to officer communication is presumptively reliable." Keller, at ¶ 13. Further, the underlying rationale for the reliability of tips from known informants is that [u]nlike the anonymous tipster, a witness who directly approaches a police

officer can also be held accountable for false statements. Anderson v. Dir., N.D. Dep't of Transp., 2005 ND 97, ¶ 17, 696 N.W.2d 918; Accord; United States v. Christmas, 222 F.3d 141, 144 (4th Cir. 2000); Illinois v. Gates, 462 U.S. 213, 233-34 (1983); Adams v. Williams, 407 U.S. 143, 147 (1972).

[¶33] Ell did not present any evidence at the administrative hearing that would contradict the statements upon which Deputy Janisch relied in formulating his opinion that Ell had been driving while under the influence of intoxicating liquor, thereby, allowing an unfavorable inference with respect to the basis for the seizure and arrest. The hearing officer properly exercised her discretion in admitting the evidence relating to the stop of Ell's vehicle under the present sense impression exception to the hearsay rule.

II. Law Enforcement had reasonable and articulable suspicion to continue the detention of Ell to conduct an investigation for driving under the influence of intoxicating liquor.

[¶34] On appeal Ell alleges that law enforcement lacked a reasonable and articulable suspicion to continue his detention to conduct an investigation for driving while under the influence of intoxicating liquor. Appellant's Br. ¶¶ 39, 48. Ell's argument is without merit.

[¶35] This Court has held that "[o]nce the purposes of the initial traffic stop are completed, a continued seizure of a traffic violator violates the Fourth Amendment unless the officer has a reasonable suspicion for believing that criminal activity is afoot." State v. Fields, 2003 ND 81, ¶ 10, 662 N.W.2d 242 (citing United States v. Jones, 269 F.3d 919, 925 (8th Cir. 2001). In Jones, the federal circuit court of appeals ruled:

> Generally, an investigative detention must remain within the scope of the traffic stop to be reasonable. . . ."However, if the response of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions." . . . Only when an officer develops a reasonable, articulable suspicion that criminal activity is afoot does he have "'justification for a greater intrusion unrelated to the traffic offense.'" . . . This requires that the officer's suspicion be based upon "'particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant [ ] suspicion that a crime [is] being committed.'" . . In evaluating whether a set of facts would give rise to reasonable suspicion, this court must look at the totality of the circumstances and not just each independent fact standing alone. . . . Furthermore, the court may consider any added meaning that certain conduct might suggest to experienced officers in the field, trained in the observation of criminal activity. . . . The officer's reasonable suspicion cannot be, however, just a mere hunch or based on circumstances which "describe a very large category of presumably innocent travelers.'" . . .

269 F.3d at 926-927 (internal citations omitted).

[¶36] The odor of alcohol -- alone – observed in conjunction with the investigation of a separate traffic offense has expressly been held to provide a reasonable and articulable suspicion sufficient to justify a greater intrusion unrelated to the initial traffic offense. In State v. Lopez, 631 N.W.2d 810, 812 (Minn. Ct. App. 2001), a law enforcement officer initiated a traffic stop of a vehicle after observing the absence of license plates on vehicle. Approaching the vehicle, the officer observed a sticker in the rear window that indicated the vehicle "was properly licensed and registered." Id. While explaining the basis for the stop to the driver, the law enforcement officer "smelled a faint odor of alcohol coming from the car's interior." Id. A search of the vehicle revealed the presence of open containers of beer and the preliminary blood test of a minor

occupant of the vehicle resulted in a charge against Lopez for providing alcohol to a minor. Id.

[¶37] The charge against Lopez was dismissed by the trial court on the basis the law enforcement officer "should have terminated the stop as soon as she saw the 'drive-out' sticker in the car's rear window," and therefore, "the continued detention was illegal and all evidence obtained thereafter [was] suppressed as the fruit of the illegal stop." Lopez, 631 N.W.2d at 812-13. The Minnesota Court of Appeals reversed the district court's decision and ruled:

> In the process of the lawful act of approaching the car, Hill detected the odor of alcohol coming from the interior. The district court held that the odor of alcohol alone was insufficient to provide Hill with probable cause to search the vehicle. However, Officer Hill did not move directly from the odor of alcohol to the search. Instead, she relied upon the odor of alcohol to continue or recommence the detention. The legal test for continuing detention is the same as that for the initial stop. 'A brief investigatory stop requires only reasonable suspicion of criminal activity, rather than probable cause.' . . . 'The factual basis required to support a stop is minimal, and an actual violation is not necessary.' . . .
>
> Because the odor of alcohol provided Officer Hill with reasonable suspicion of criminal activity, i.e., an open bottle in the car, she had a lawful basis to continue the detention and conduct an investigation.

Lopez, 631 N.W.2d at 814 (emphasis added).

[¶38] In State v. Kolendar, 786 P.2d 199, 200 (Or. Ct. App. 1990) (rev. denied 790 P.2d 1141 (Or. 1990)), a law enforcement officer stopped a vehicle that "had only one functioning headlight." "While talking with defendant, [the law enforcement officer] smelled the odor of alcohol on [the driver's] breath." Id. The defendant moved to suppress all evidence obtained after the stop on the basis that the law enforcement officer "lacked a reasonable suspicion to stop him or,

having stopped him for another reason, to expand the investigation to include DUI." Id. The trial court held:

> But that once the defendant gave him his driver's license and absent anything other than the odor of alcohol as described by the officer, that the scope of the inquiry had to be restricted to the purpose of the stop, that being the one headlight. That there was nothing in addition to justify the expansion of this investigation into a driving-under-the-influence-of-intoxicants investigation, given that the officer noted absolutely no other indicia of any problem relating to the operation of the vehicle and the consumption of alcohol.

Id. at 200-201. The Oregon Court of Appeals disagreed with the trial court and, in reversing the decision of the lower court, stated "[t]he odor of alcohol on a person's breath is an objective, observable fact that permits an officer reasonably to suspect intoxication." Id. at 201. See also Miller v. Harget, 458 F.3d 1251, 1259 (11th Cir. 2006) ("when Officer Harget smelled alcohol coming from the vehicle Mr. Miller had been driving, he had reasonable suspicion to detain Mr. Miller in order to investigate"); Nickelson v. Kan. Dep't of Revenue, 102 P.3d 490, 496 (Kan. Ct. App. 2004) (Deputy had grounds to detain Nickelson for further investigation after lawful public safety stop when Deputy "immediately smelled a strong odor of alcohol upon approaching Nickelson's vehicle"); State v. Gordon, 854 A.2d 74, 79 (Conn. Ct. App. 2004) (detection of odor of alcohol on the defendant's breath provided law enforcement officer "a reasonable and articulable suspicion that the defendant had been operating his motor vehicle while under the influence of intoxicating liquor, which warranted an extension of the initial investigatory stop."); Howard v. State, 595 S.E.2d 660, 662 (Ga. Ct. App. 2004) ("After making a valid stop to check the driver's identity, the officer's detection of the strong odor of alcohol made it reasonable for him to continue the

detention to ask Howard if he had been drinking"); State v. Bissegger, 76 P.3d 178, 183 (Utah Ct. App. 2003) (continuation of the detention to conduct field sobriety test was justified when, after the purpose for the initial traffic stop was concluded, law enforcement officer smelled alcohol on defendant); State v. Butler, 577 S.E.2d 498, 501 (S.C. Ct. App. 2003) (law enforcement officer justified in extending the scope and duration of the traffic stop based on his suspicion of open containers of alcohol from observation of smell of alcohol coming from the van).

[¶39] This Court has recognized the significance of the odor of alcohol as an indication of alcohol consumption in stating "[w]hen an officer detects an odor of alcohol emanating from a vehicle, having a driver exit the vehicle and asking whether he has been drinking constitutes a common sense investigation . . ." In re Z.C.B., 2003 ND 151, ¶ 9, 669 N.W.2d 478 (N.D. 2003).

[¶40] In this case, Cpl. Meadows made a lawful investigatory stop of Ell's vehicle for exceeding the speed limit. Tr. 14, ll. 4-9. See State v. Loh, 2000 ND 188, ¶ 7, 618 N.W.2d 477 ("It is well settled that even minor traffic violations provide officers with the requisite grounds for conducting investigatory vehicle stops."). The traffic violation was not concluded by the time Cpl. Meadows had smelled the odor of an alcoholic beverage coming from Ell and had learned from Ell that he had been consuming alcohol that evening. Tr. 14, ll. 12-13. This information gave rise to a reasonable, articulable suspicion that Ell may have been driving under the influence of alcohol. Due to these indicators Cpl. Meadows contacted Deputy Janisch to come and conduct a DUI investigation.

Tr. 6, ll. 4-5; Tr. 10, ll. 4-6. Deputy Janisch was authorized to expand the scope of the stop to determine whether there was probable cause to arrest Ell for driving under the influence by requesting field sobriety tests. And it was not until after Ell performed the field tests that Deputy Janisch arrested him for Driving under the influence.

[¶41] In accordance with the case law cited above regarding the same issue, including that of this Court that such an observation requires a "common sense investigation," the law enforcement officers' observation of the odor of alcohol on Ell provided a reasonable suspicion for believing that criminal activity -- in the form of driving while under the influence of intoxicating liquor -- was afoot so as to justify the continued seizure of Ell beyond the investigation for his traffic violation. Thus, Deputy Janisch had a reasonable and articulable suspicion to continue the detention of Ell to conduct an investigation for driving while under the influence of intoxicating liquor.

III. The hearing officer did not abuse her discretion in admitting Ell's chemical test records into evidence.

[¶42] Ell argues there was insufficient evidence for the hearing officer to determine that his Intoxilyzer test was fairly administered. More specifically, Ell alleges the hearing officer erred in admitting the Intoxilyzer test results into evidence because the evidence in the record does not establish the Intoxilyzer at the McLean County Sheriff's Department had been installed by a field inspector prior to use.

[¶43] The List of Approved Chemical Testing Devices shows that the Intoxilyzer used to perform Ell's breath test (SN 80-004956) at the McLean County Sheriff's

Department was inspected at the Office of Attorney General, Crime Lab Division. Tr. Ex. 6. The document also states "[t]his roster is current and shall be in effect until a new roster is issued or until June 30, 2016, whichever is earlier." Id. It should be presumed that due to the fact a new roster has not been issued, the inspection of the Intoxilyzer at the Crime Lab is sufficient for compliance with the Approved Method and that the relocation of the device to the McLean County Sheriff's Department did not adversely impact Ell's Intoxilyzer test. In fact, the List of Approved Chemical Testing Devices indicates where each Intoxilyzer was located at the time it was certified to be in good working order. Following the list of approved devices, a footnote indicates, "the location of the device at the time of inspection . . . does not restrict its use at other locations." Tr. Ex. 6 (emphasis added.)

[¶44] The proper foundation for the admissibility of the Intoxilyzer Test Record and Checklist was established.

CONCLUSION

[¶45] The Department respectfully requests this Court affirm judgment of the McLean County District Court and affirm the hearing officer's decision suspending Ell's driving privileges for 91 days.

Dated this 29th day of April, 2016.

State of North Dakota
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Attorney General

By: _____

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Tyler Dale Ell,	)	
	)	
Appellant,	)	**Supreme Ct. No. 20160068**
	)	
v.	)	**District Ct. No. 28-2015-CV-00173**
	)	
Director, North Dakota Department of Transportation,	)	
	)	
	)	
Appellee.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

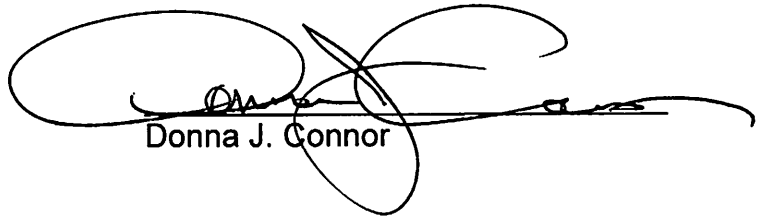
[¶1] Donna J. Connor states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 29th day of April, 2016, I served the attached **BRIEF OF APPELLEE** upon Tyler Dale Ell, by and through his attorney, Tom Tuntland, by placing a true and correct copy thereof in an envelope addressed as follows:

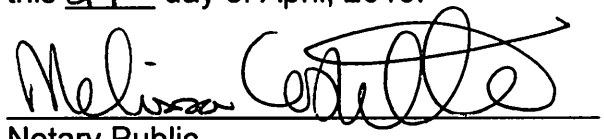
Tom Tuntland
Attorney at Law
210 Collins Ave, P.O. Box 1315
Mandan, ND 58554

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 29th day of April, 2016.



Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2019