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AUGUST 1, 2016
STATE OF NORTH DAKOTA

IN SUPREME COURT

STATE OF NORTH DAKOTA

Josue Castillo,	)	
	)	
Appellee,	)	
	)	Supreme Court No. 20160192
vs.	)	District Court No. 50-2015-CV-00367
	)	
Gant Levi, Director, North Dakota,	)	
Department of Transportation	)	
Appellant.	)	

APPEAL FROM THE DISTRICT COURT JUDGMENT DATED MAY 27, 2016
WALSH COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT
HONORABLE M. RICHARD GEIGER

RESPONSE BRIEF OF THE APPELLEE

Deanna F. Longtin, ND ID 06530
LONGTIN LAW OFFICE, PLLC
P.O. Box 11098
Williston, ND 58803
Telephone: 701-770-8805
Facsimile: 701-540-6465
Eservice:admin@longtinlawoffice.com
Email: deanna@longtinlawoffice.com

ATTORNEY FOR APPELLEE

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Statement of Issues Presented for Review

[¶1] Whether the DOT lacks authority to revoke an individual's license when the arresting officer failed to advise the individual that he had the ability to remedy his refusal of the on-site breath test if the individual takes a chemical test under N.D.C.C. 39-20-01.

Statement of the Facts

[¶2] On September 27, 2015 at approximately 2:15 a.m., Mr. Castillo was driving in the city of Grafton, North Dakota. Appendix of Appellant (App.) at 4:11-14. Officer Mortenson stopped Mr. Castillo and claimed during the administrative hearing that Mr. Castillo had failed to stop at a stop sign. Transcript (Tr.), App. at 4:16-18. Officer Mortenson testified he could smell alcohol emitting from inside the vehicle so he asked Mr. Castillo to step out of the vehicle and come back to his car. Tr. App. at 5-6. Officer Mortenson stated he observed Mr. Castillo "walk all right" on his way to the police car. Tr. App. at 6. Mr. Castillo testified he had three mixed drinks, one of which he had right before he left the bar. Tr. App. at 6. Officer Mortenson then asked if he would be willing to take some field sobriety tests and Mr. Castillo declined, asking what would happen to him if he refused. Tr. App. at 6. Officer Mortenson said he could not tell him to take them or not to take them and then immediately advised him of the North Dakota implied consent. Tr. App. at 6. Officer Mortenson read verbatim from his card,

> "As a condition of operating a motor vehicle on a highway, or on a public or private areas, to which the public has right of access to, you have consented to taking a test to determine whether you are under the influence of alcohol or drugs. I must inform you that: A) North Dakota law requires you take the breath screening test to determine if you are under the influence of alcohol; and B) North Dakota law requires you to submit to a chemical test to determine whether you are under the influence of alcohol or drugs. Refusal to take the test as directed by a law enforcement officer is a crime punishable in the same manner as a DUI, and includes being arrested. I must also inform you that refusal to take the test as directed by a law enforcement officer may result in a revocation of your driver's license for a minimum of 180 days and potentially up to three years. Do you understand these consequences? And do you consent to take the test that I am requesting?"

Tr. App. at 11.

[¶3] Mr. Castillo said he did not understand the implied consent and he did not know if he wanted to take the breathalyzer. Tr. App. at 8. Dialogue between Officer Mortenson and Mr. Castillo ensued as to whether or not he should take the test. Mr. Castillo asked to speak to a lawyer and was told he could use his phone to do so. Tr. App. at 8. Then Mr. Castillo stated that he would fail the test because he just had a mixed drink moments before he left the bar. Tr. App. at 8. Officer Mortenson then placed him under arrest for DUI based on the refusal. Tr. App. at 8.

[¶4] After securing the vehicle and confirming one of the passengers was sober to move the vehicle off the roadway, Officer Mortenson came back to the vehicle and asked Mr. Castillo for a blood draw. Mr. Castillo said he would take the blood draw. Tr. App. at 9. After travelling a ways, Mr. Castillo then declined the blood draw. Tr. App. at 9. During the administrative hearing Mr. Castillo testified that he "thought it would incriminate me more so I said no, because I had refused the first one. But at no point in time was…was it said that it would fix the first one. It was pretty much a yes or no answer." Tr. App. at 38.

[¶5] Officer Mortenson admitted his failure to inform Mr. Castillo that Mr. Castillo could cure or remedy his refusal by submitting to a chemical test pursuant to N.D.C.C. § 39-08-01(2)(b). Tr. App. at 41. Officer Mortenson testified he was not aware that he had to inform Mr. Castillo of the ability to cure or remedy. Tr. App. at 41. Officer Mortenson testified that he knew he failed to inform Mr. Castillo of the remedy because there was no language regarding the ability to cure on the document that Officer Mortenson read from regarding the implied consent. Tr. App. at 41. Officer Mortenson then took Mr. Castillo

to the Law Enforcement Center and issued citations for driving under the influence and the Report and Notice. Tr. App. at 12:13.

[¶6] After testimony by Officer Mortenson and Mr. Castillo's witness, his wife Ms. Castillo, Mr. Castillo moved for dismissal of the citation citing Throlson v. Backes, 466 N.W.2d 124, 126-127. The hearing officer stated he would "follow up with that research when I prepare the decision." Tr. App. at 28:12-13.

[¶7] The DOT issued its decision, citing Schwind v. Direct, N.D. Dep't. of Transp., 462 N.W.2d 147, 150 (N.D. 1990). Hearing Officer's Decision (Decision) App. at 48. The DOT then revoked Mr. Castillo's driving privilege for 180 days.

[¶8] Mr. Castillo appealed the DOT decision to the district court stating the following specification of errors:

a. The hearing officer's findings and conclusions are based on an erroneous interpretation of the law.
b. The hearing officer erred in concluding that the Petitioner was not prejudiced by the officer's failure to adhere to the statutory requirements of N.D.C.C. § 39-08-01(2)(b).
c. That pursuant to N.D.C.C. § 39-08-01(2)(b), "[u]pon the individual's refusal to submit to an onsite screening test, the police officer ***shall*** inform the individual that the individual may remedy the refusal if the individual takes a chemical test under section 39-20-01 or 39-06.2-10.2 for the same incident." (emphasis added).
d. That pursuant to N.D.C.C. § 39-08-01(2)(b), an individual is **not** subject to an offense for refusal to submit to an onsite screening test if the person submits to a chemical test under North Dakota law.
e. That during the administrative hearing on October 27, 2015, officer Corey Mortenson stated, under oath, he did **not** inform Mr. Castillo of his ability and right to remedy his first refusal as is required by N.D.C.C. § 39-08-01(2)(b).
f. That Officer Mortenson stated he was not aware that he was obligated to inform the Petitioner of his right and ability to remedy his on-site refusal.
g. That during the administrative hearing, Mr. Castillo stated that if he had known that the blood test would have remedied the first refusal, he would have taken the test. But since Mr. Castillo was already under arrest, he did not

see any reason to follow through with the blood test.

h. That the hearing officer erroneously relied on Schwind v. Director, N.D. Department of Transportation, 263 N.W.2d 147, 150 (ND 1990).
i. That North Dakota case law was presented to the hearing officer, specifically Throlson v. Backes, 466 N.W.2d 124, 126-127 (ND 1991), stating that "a driver has no obligation to submit to chemical testing until the officer makes a valid request for testing in compliance with the relevant statutory provisions."
j. In addition, Throlson states that where an officer does not inform a driver that he or she 'is or will be charged with' driving under the influence there has been no legally effective request for testing and the driver's failure to submit to testing is not a refusal for purposes of N.D.C.C. Ch. 39-20.
k. That Throlson is the ruling case in this matter, not Schwind.
l. That the hearing officer erred in failing to address the arguments raised by Petitioner.
m. That the uncontroverted evidence clearly showed that officer Mortenson failed to inform Mr. Castillo of his ability and right to remedy the on-site screening refusal.
n. That the hearing officer's findings of fact are not supported by the evidence.
o. That the hearing officer ignored or failed to comply with mandatory duties prescribed by N.D.C.C. § 28-32-31.
p. That the hearing officer erred by suggesting Mr. Castillo was required to show that he was prejudiced by the arresting officer's failure to follow the requirements of N.D.C.C. § 39-08-01(2)(b).
q. That Mr. Castillo was prejudiced by the officer's failure to inform him of N.D.C.C. § 39-08-01(2)(b) because Mr. Castillo would have taken the chemical test and he would not have been charge[d] with refusal to submit to a chemical test.
r. By refusing to follow clear precedent of the North Dakota Supreme Court, and by refusing to follow clear statutory commands, the hearing officer acted without substantial justification.
s. Consistent with N.D.C.C. § 28-32-50(1), Petitioner respectfully asks the court to enter an award of costs and attorney fees in his favor.
t. That Petitioner respectfully requests leave of the Court, granting him the privilege to add additional specifications of error after the transcript is provided by the Department of Transportation.

Notice of Appeal to District Court and Specifications of Error, App. at 50-53.

[¶9] Oral argument was held on February 18, 2016 before the Honorable M. Richard Geiger. Judge Geiger issued his Order Reversing Administrative Hearing Officer

Decision on March 22, 2016. The district court concluded "that by declining to recognize the necessity to provide the curative language of N.D.C.C. Section 39-08-01(2)(b) before Castillo was called upon to make his decision about taking a chemical test, the hearing officer's decision constituted an erroneous interpretation of the law." Order, App. at 58. The district court further concluded that reversal was appropriate because "the advisory given by the officer in this case was misleading and contributed to further confusion." Order, App. 59.

[¶10] The DOT is now appealing the district court decision by Judge Geiger.

Law and Argument

I. Failure to advise an individual that he has the ability to remedy his refusal of the on-site breath test if the individual takes a chemical test under 39-20-01 violates a basic and mandatory provision of the law, depriving the DOT of the authority to revoke the individual's license.

A. Standard of Review

[¶11] The North Dakota Century Code provides, in relevant part, that the district court should reverse an agency's decision when any of the following circumstances apply:

> 1. The order is not in accordance with the law.
>
> 2. The order is in violation of the appellant's constitutional rights.
>
> 3. Provisions of this chapter are not complied with in proceedings before the agency.
>
> 4. The agency's rules or procedures have not afforded the appellant a fair hearing.
>
> 5. The agency's findings of fact are not supported by a preponderance of the evidence.
>
> 6. The agency's conclusions of law and order 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.

[¶12] N.D.C.C. § 28-32-46; Gabel v. Dep't of Transp., 2006 ND 178, ¶7,720 N.W.2d 433.

[¶13] The DOT is appealing the judgment entered by Judge Geiger which reversed the DOT's administrative agency decision. If the district court finds the agency's decision is not in accordance with the law, the standard of review is de novo. Questions of law

presented in an administrative appeal are reviewed de novo. Gabel, 2006 ND 178 at ¶8 (internal citations omitted).

B. The district court properly concluded that the DOT failed to apply the plain language of N.D.C.C. § 39-08-01(2)(b) which therefore constituted an erroneous interpretation of the law.

[¶14] The district court's decision to reverse the DOT's revocation of Mr. Castillo's driving privileges was clearly and concisely articulated. Section 39-20-01 of the North Dakota Century Code, which governs implied consent, provides that:

> Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine.

N.D.C.C. § 39-20-01(1). The North Dakota Century Code sets forth certain consequences that law enforcement officers must explain to a motorist before requesting a chemical test. Specifically, N.D.C.C. § 39-20-01(3)(a) mandates that:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation of driving privileges for a minimum of one hundred and eighty days and up to three years.

[¶15] In addition, pursuant to N.D.C.C. § 39-08-01(2)(b), the officer is required to

inform the motorist that he may cure or remedy his on-site refusal with a chemical test.

> An individual is not subject to an offense under this section for refusal to submit to an onsite screening test under section 39-20-14 if the person submits to chemical test under section 39-20-01 or 39-06.2-10.2 for the same incident. Upon the individual's refusal to submit to an onsite screening test, the police officer ***shall*** inform the individual that the individual may remedy the refusal if the individual takes a chemical test under section 39-20-01 or 39-06.2-10.2 for the same incident. N.D.C.C. § 39-08-01(2)(b) (emphasis added). Furthermore, the Director may not revoke an individual's license based on a refusal to the screening test if the individual provides a chemical sample of breath, blood, or urine. N.D.C.C. § 39-20-14(4). (emphasis added).

[¶16] In Throlson v. Backes, the North Dakota Supreme Court found that "[i]t is axiomatic that before there can be a "refusal" to submit to testing under Section 39-20-01, there must be a valid request for testing under the statute." Throlson v. Backes, 446 N.W.2d 124, 126 (ND 1991). In that case, Throlson was arrested for driving under suspension. Id. at 125. After arriving at the jail, Throlson was read the implied consent advisory and asked to take a blood test, which Throlson refused. Id. An administrative hearing was held and the hearing officer found that Throlson had been arrested and refused the test in violation of N.D.C.C. § 39-20-01 and subsequently suspended Throlson's license for two years. Id. at 126. Throlson appealed to the district court, which reversed the hearing officer's decision finding that since Throlson was not advised of the charge for DUI, there had been no legally effective request for a test by the officer or refusal by Throlson. Id. The Director appealed to the Supreme Court, which affirmed the district court's decision concluding that "there

is no evidence that Throlson was advised that he was or would be charged with DUI, and, accordingly, his failure to submit to a chemical test was not a "refusal" under Chapter 39-20." Id. at 128. The Court went on to explain:

> "The underlying premise of our holding in Evans and Kuntz is that a driver has no obligation to submit to chemical testing until the officer makes a valid request for testing in compliance with the relevant statutory provisions."

Id. at 127 (citing Kuntz v. State Highway Com'r, 405 N.W.2d 284, 287 (N.D. 1987)).

[¶17] In the present case, the district court reversed the hearing officer's decision because it found that "the hearing officer's decision constituted an erroneous interpretation of the law." Order, App. at 58. The DOT failed to "recognize the necessity to provide the curative language of N.D.C.C. 39-08-01(2)(b)." Id. The district court further found that the "legislature has set out what an individual arrested for DUI must be aware of before his driving privileges may be revoked under N.D.C.C. Chapter 39-20." Order, App. at 58.

[¶18] The District Court continued with its analysis stating,

> "Not only is the officer required to provide that curative advisory under N.D.C.C. Section 39-08-01(2)(b), but N.D.C.C. Section 39-20-14(4) also clearly manifests the legislative intent to allow a citizen to avoid the consequences of such a refusal- the revocation of that citizen's driving privileges- by curing it. The individual cannot knowingly cure it without being aware of the remedy. The two statutes are not intended to be read in isolation. Rather, both advisories need to be considered together in their entirety to give meaning to the informed decision to be made by an individual."

Order, App. at 58.

[¶19] Recently, in State v. O'Connor, this Court held that "[w]ords of a statute are given

their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears." State v. O'Connor, 2016 ND 72, ¶8, 877 N.W.2d 312 (citing State v. Rufus, 2015 ND 212, ¶15, 868 N.W.2d 534). In O'Connor the officer failed to give him a complete implied consent advisory. The Court upheld the district court's decision to suppress the results of the Intoxilyzer test in a criminal proceeding. While the present case was an administrative hearing, it is clear that this Court's stance on plain language law is to be taken as written. That is exactly what the district court did in requiring the officer to follow the unambiguous language of 39-08-01(2)(b).

[¶20] The two statutes of N.D.C.C. § 39-08-01(2)(b) and 39-20 are meant to be read in concert, not in isolation. N.D.C.C. § 39-08-01(2)(b) is a predicate statute to 39-20 and as stated in Aamodt it is important to the Department that the provision be followed in regards to predicate statutes. Aamodt v. N.D. Dep't. of Transp., 2004 ND 134, ¶23, 682 N.W.2d 308. Failure to follow a basic and mandatory provision of the law deprives the DOT of authority to suspend a driver's license. Id.

[¶21] The duty of an officer to conduct an investigation of DUI is set forth in 39-08-01. Therefore, without 39-08-01, there is no purpose for 39-20. The District Court's analysis that an "individual cannot knowingly cure [a refusal] without being aware of the remedy" (Order, App. at 58) is the heart of the reason for the finding of an erroneous interpretation of the law. The DOT's argument that the statutes are to be read in isolation is clearly erroneous.

[¶22] This Court also stated in O'Connor that as in Fossum, at ¶12, "[a]s Hoffner and Abrahamson have recognized, the purpose of the implied consent law is to have a procedure in place when someone says no . . . ." State v. O'Connor, at ¶12 (citing

Fossum v. N.D. Department of Transportation, 2014 ND 47, 843 N.W.2d 282, City of Bismarck v. Hoffner, 379 N.W.2d 797 (N.D. 1985), and State v. Abrahamson, 328 N.W.2d 213 (N.D. 1982).

[¶23] Officer Mortenson did not dispute his failure to inform Mr. Castillo of his ability to remedy his on-site screening test refusal. Therefore, the district court properly found that before Mr. Castillo could make an informed decision regarding the implied consent law, Officer Mortenson had to follow the requirements of 39-08-01(2)(b) and he simply did not.

C. The district court properly concluded that the hearing officer incorrectly determined that Officer Mortenson's failure to follow the statute was inconsequential and not prejudicial to Mr. Castillo.

[¶24] The District Court found a second reason for reversing the DOT decision based on the "misleading" advisory that "contributed to further confusion" of Mr. Castillo. Order, App. at 59.

[¶25] The district court stated that "Castillo has been prejudiced because he lost his license for 180 days based upon the refusal to take the requested test, and was not advised of the statutory right to cure the refusal." Order, App. 59.

[¶26] In addition, the hearing officer erroneously went on to state that "the new language does not include a remedy to a drive should an officer forget to provide the new language." Decision, App. at 48.

[¶27] In Kuntz, the North Dakota Supreme Court held N.D.C.C. § 29-05-20 that because the statute in question did not provide a remedy for its violation , the Court could have pointed to the remedial void and presumed that the legislature did not

intend for there to be a remedy. However, the Court found that Kuntz's failure to take the test was not "a refusal upon which to revoke his license under Chapter 39-20, N.D.C.C." Id. at 290.

[¶28] Furthermore, this Court could infer that the remedy of 39-08-01(2)(b) is that there is **no offense** as the language clearly states that "[a]n individual is not subject to an offense under this section for refusal to submit to an onsite screening test under section 39-20-14 . . . ." Therefore, there is a remedy.

[¶29] The DOT cannot unilaterally pick and choose what laws it wants to follow, nor can they be allowed to change or twist the meaning of a law that is as clear and concise as 39-08-01(2)(b).

[¶30] Therefore, the DOT's interpretation of the law is erroneous as found by the District Court and its reversal of the hearing officer's decision should be affirmed.

Conclusion

[¶31] As per the foregoing law and argument, Mr. Castillo respectfully requests that this Court find the DOT failed to conclude that the officer must follow North Dakota law, that the officer's failure was prejudicial to Mr. Castillo, and affirm Judge Geiger's reversal of the hearing officer's revocation.

DATED this 1st day of August, 2016.

/s/ Deanna F. Longtin
Deanna F. Longtin, ND ID 06530
LONGTIN LAW OFFICE, PLLC
P.O. Box 11098
Williston, ND 58803
Telephone: 701-770-8805
Facsimile: 701-540-6465
Eservice:admin@longtinlawoffice.com
Email: deanna@longtinlawoffice.com
ATTORNEY FOR APPELLEE

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CERTIFICATE OF SERVICE BY EMAIL

DEANNA F. LONGTIN, attorney at law, certifies that on the 1st day of August, 2016, she emailed, a true and correct copy of the following documents filed in the above-entitled action:

[¶1.] Response Brief of Appellee

A true and correct copy of the same was addressed as follows:

Michael Trent Pitcher
Assistant Attorney General
mtpitcher@nd.gov

Dated this 1st day of August, 2016.

/s/ Deanna F. Longtin
Deanna F. Longtin, ID #06530
Attorney at Law
LONGTIN LAW OFFICE, PLLC
PO Box 11098
Williston, ND 58803
Telephone No.: (701) 770-8805
Fax No.: (701) 540-6465
ATTORNEY FOR APPELLEE
EService-admin@LongtinLawOffice.com
Email-Deanna@LongtinLawOffice.com