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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Phillip Galen Martinson,	)	
	)	
Appellant,	)	**Supreme Ct. No. 20170175**
	)	
v.	)	**District Ct. No. 51-2016-CV-01128**
	)	
Grant Levi, Director Department of Transportation,	)	
	)	
	)	
Appellee.	)	

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED MARCH 10, 2017
WARD COUNTY, NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT

HONORABLE STACY LOUSER

BRIEF OF APPELLEE

State of North Dakota
Wayne Stenehjem
Attorney General

By: Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellee.

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STATEMENT OF ISSUES

[¶1] Sgt. Ruelle's approach of Martinson's vehicle and subsequent contact with Martinson was not a seizure and Sgt. Ruelle had a reasonable and articulable suspicion of criminal activity to investigate Martinson for an alcohol related driving offense under N.D.C.C. § 39-08-01.

[¶2] Sgt. Ruelle had reasonable grounds to believe Martinson was in actual physical control of a vehicle while under the influence of intoxicating liquor.

STATEMENT OF CASE

[¶3] On May 27, 2016, Sergeant Tyler Ruelle (Sgt. Ruelle) of the Minot Police Department arrested Phillip Galen Martinson (Martinson) for the offense of being in Actual Physical Control of a vehicle while under the influence of intoxicating liquor. Appendix (App.) 1. A Report and Notice, including a temporary operator's permit, was issued to Martinson after a chemical Intoxilyzer test result indicated Martinson's alcohol concentration was .189 percent by weight. Id. The Report and Notice notified Martinson of the Department's intent to suspend his driving privileges. Id.

[¶4] In response to the Report and Notice, Martinson requested an administrative hearing in accordance with N.D.C.C. § 39-20-05. Transcript (Tr.) at Exhibit (Ex.) 1h. The hearing was held on June 29, 2016, at which time the hearing officer considered the following issues:

> (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; and

(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 eighteen one-hundredths of one percent by weight.

Tr. 1 Ex. 2.

[¶5] Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Martinson's driving privileges for a period of 180 days. App. 6-7; Tr. 43, l. 17 – Tr. 47, l. 11. Martinson requested judicial review of the hearing officer's decision.

STATEMENT OF FACTS

[¶6] On May 27, 2016 at approximately 1:29 a.m. Sgt. Ruelle made contact with Martinson. Tr. 4, ll. 11-14. Sgt. Ruelle had responded to a dispatch call of a possible intoxicated driver that came in at 1:19 a.m. from an anonymous reporter. Tr. 5, ll. 20-24. The reporter provided the license plate number and indicated the vehicle was unable to maintain its lane while traveling northbound in the area of Denny's and the 2700 block of South Broadway. Tr. 6, ll. 5-8. Sgt. Ruelle proceeded to the address of the license plate's registered owner. Tr. 6, ll. 8-13. Upon arriving at that address, Sgt. Ruelle observed a vehicle with the reported license plate number and matching the description provided by dispatch parked in the driveway. Tr. 6, ll. 20-24.

[¶7] Officer Dan Wheeler also responded to the dispatch call and arrived at Martinson's residence at the same time as Sgt. Ruelle. Tr. 7, ll. 10-13. Neither

Officer activated their patrol car emergency lights or sirens. Tr. 7, ll. 8-9, 22-24. Before parking his patrol car on the street just to the east of the driveway Sgt. Ruelle observed an individual inside the vehicle. Tr. 8, ll. 4-5. As Sgt. Ruelle exited his patrol car and walked around the back of it towards the driveway, the individual inside the vehicle exited and began walking towards the front door of the residence. Tr. 8, l. 21 – Tr. 9, l. 3. Sgt. Ruelle called out to the individual, later identified as Martinson, and asked if he could hold up for a second and if he would speak to Sgt. Ruelle. Tr. 9, ll. 12-16. Martinson responded something to the effect of yeah "what's going on" or "what's up" and started walking towards Sgt. Ruelle. Tr. 9, ll. 16-19. Sgt. Ruelle informed Martinson he had received a report of a possible intoxicated driver with a license plate matching Martinson's vehicle. Tr. 10, ll. 15-19. Martinson said he wasn't driving and he had just gone out to his vehicle to retrieve his wallet. Tr. 10, ll. 21-23. While conversing with Martinson Sgt. Ruelle observed an open can of Bud Light beer inside the vehicle. Tr. 11, ll. 13-16. Martinson said it was empty and Sgt. Ruelle did not verify whether that was true. Tr. 11, ll. 16-18. Martinson had slurred speech and was swaying while standing. Tr. 11, ll. 21-23. Martinson claimed he had not driven the vehicle for several hours. Tr. 11, ll. 11-12.

[¶8] Sgt. Ruelle asked Martinson if he would be willing to speak with him inside the patrol car, to which Martinson agreed. Tr. 12, ll. 4-6. Martinson had difficulty walking towards the patrol car and was observed by Sgt. Ruelle to be swaying. Tr. 12, ll. 8-9. Sgt. Ruelle conducted a pat down search on Martinson and felt keys in his front left pant pocket. Tr. 16, ll. 2-5. Martinson sat in the front

passenger side of the patrol car. Tr. 12, ll. 10-11. Sgt. Ruelle observed Martinson continuing to slur his speech, smelled the odor of an alcoholic beverage, and observed Martinson had bloodshot and watery eyes. Tr. 12, ll. 14-17. Martinson said he had consumed two cans of Bud Light beer at his residence. Tr. 12, l. 24 – Tr. 13, l. 1. Martinson indicated he had his first beer three hours prior and his last one an hour prior. Tr. 13, ll. 1-3. He further indicated he had arrived home from his place of employment two hours prior. Tr. 13, ll. 3-4.

[¶9] Sgt. Ruelle asked Martinson if he would submit to the horizontal gaze nystagmus test (HGN). Tr. 13, ll. 9-10. Sgt. Ruelle administered the HGN in accordance with his training and experience and observed six out of six possible clues indicating impairment. Tr. 14, 2-8. Sgt. Ruelle asked Martinson if he would submit to a preliminary breath test. Tr. 14, ll. 10-11. Martinson initially agreed to take the test, but upon further discussion revoked his consent. Tr. 14, ll. 12-17. Sgt. Ruelle informed Martinson he was being arrested for being in actual physical control of a motor vehicle. Tr. 14, ll. 19-21. Martinson was placed in handcuffs, searched, and then seated in the front seat of the patrol vehicle. Tr. 15, ll. 9-10. After arresting Martinson, Sgt. Ruelle read the North Dakota Implied Consent Advisory as written on the Report and Notice form and requested Martinson submit to a chemical blood test. Tr. 15, ll. 11-13; Tr. 30, ll. 15-18. Martinson consented to taking the chemical blood test. Tr. 15, l. 13. Sgt. Ruelle gave Martinson's cell phone, wallet, and vehicle keys to his wife. Tr. 15, ll. 20-24. Martinson was transported to Trinity hospital, where Sgt. Ruelle obtained a state

blood kit which was used to obtain a sample from Martinson with a result of .189 percent by weight. Tr. 16, l. 11 – Tr. 20, l. 17.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶10] Martinson requested judicial review of the Hearing Officer's Decision by the Ward County District Court in accordance with N.D.C.C. § 39-20-06. App. 8-13. Martinson presented three arguments on appeal. First, Martinson alleged he was unlawfully seized by law enforcement without reasonable suspicion of criminal activity. Second, Martinson alleged the hearing officer erred in finding Sgt. Ruelle had probable cause to arrest him for being in actual physical control of vehicle under N.D.C.C. § 39-08-01. Third, Martinson contended the chemical blood test was obtained in violation of his constitutional rights pursuant to Birchfield v. North Dakota, 579 U.S. __, 136 S.Ct. 2160 (2016).[1]

[¶11] With regard to Martinson's argument that he was improperly seized by law enforcement when Sgt. Ruelle approached and made contact with him in his driveway, Judge Stacy J. Louser found no violation of N.D.C.C. § 28-32-46 with regard to the hearing officer's conclusion that "Martinson's Fourth Amendment rights were not violated as a result of Sergeant Ruelle's initial contact with him." App. 22. To come to this conclusion the court recognized that not all interactions between law enforcement and citizens involve seizures that implicate Fourth Amendment Rights. App. 19. Judge Louser agreed with the Department's position that Sgt. Ruelle had not demanded or ordered Martinson to respond and

[1] The district court did not rule on Martinson's third issue as the parties stipulated to hold the issue in abeyance pending a decision from this Court in Beylund v. Levi, 2017 ND 30, 889 N.W.2d 907. In light of Beylund Martinson has abandoned this issue on appeal.

that Martinson consented to the conversation. App. 21. Judge Louser further found that at the point in time when Sgt. Ruelle asked Martinson to speak with him inside his patrol car, the officer had sufficient suspicion to investigate an alcohol related driving offense. App. 21-22.

[¶12] With respect to Martinson's argument that law enforcement lacked probable cause to believe he had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor, the district court held that "[i]t is clear to this Court that the hearing officer did not abuse his discretion when finding Martinson was in actual physical control, and therefore this Court will not overturn his findings." App. 28. The district court analyzed the hearing officer's findings in connection with the elements of actual physical control and found the elements satisfied. App. 22-28. The district court also considered Martinson's legal challenge that his vehicle was not located in an area within the purview of N.D.C.C. § 39-08-01 and discussed this Court's holdings determining that the actual physical control offense under N.D.C.C. § 39-08-01 applies to private property. App. 26.

[¶13] Judge Louser issued her Order Affirming Administrative Decision on January 12, 2017. App. 14-29. Judgment was entered on March 10, 2017. App. 30. The Department served Notice of Entry of Judgment on the same day. App. ii. Martinson appealed from the Judgment to this Court. App. 31-32. The Department asks this Court to affirm the judgment of the Ward County District Court and the administrative suspension of Martinson's driving privileges for 180 days.

STANDARD OF REVIEW

[¶14] The Administrative Agencies Practices Act governs an appeal from an administrative hearing officer's decision suspending a license. N.D.C.C. ch. 28-32; N.D.C.C. ch. 39-20. The appeal is civil in nature. Knoll v. N.D. Dep't of Transp., 2002 ND 84, ¶ 16, 644 N.W.2d 191. And it is separate and distinct from any criminal matter that may ensue. Id. The North Dakota Century Code provides, in relevant part, that a court must affirm an agency's order except in the event of any 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.

N.D.C.C. § 28-32-46.

[¶15] The hearing officer's findings of fact must be upheld if they are supported by a preponderance of the evidence. Kahl v. Dir., N.D. Dep't of Transp., 1997 ND 147,

¶ 10, 567 N.W.2d 197. A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). A reviewing court, rather, determines 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." Id. (citation omitted.)

LAW AND ARGUMENT

I. Sgt. Ruelle's approach of Martinson's vehicle in his private driveway did not violate Martinson's Fourth Amendment rights.

[¶16] "Unreasonable search and seizures are prohibited by the Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and by Article I, § 8 of the North Dakota Constitution." State v. Fasteen, 2007 ND 162, ¶ 6, 740 N.W.2d 60. "'[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.'" State v. Koskela, 329 N.W.2d 587, 589 (N.D. 1983) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

[¶17] "A person alleging a violation of Fourth Amendment rights has the initial burden of establishing a prima facie case of illegal seizure." City of Mandan v. Gerhardt, 2010 ND 112, ¶ 7, 783 N.W.2d 818. See, e.g., State v. Schneider, 2014 ND 198, ¶ 19, 855 N.W.2d 399 ("It is Schneider's burden to prove that an illegal seizure occurred. Schneider failed to present evidence 'a reasonable person would have believed that he was not free to leave.'") (citations omitted).

[¶18] "[N]ot all personal intercourse or communications between law enforcement officers and citizens involve seizures implicating Fourth Amendment rights." City of Jamestown v. Jerome, 2002 ND 34, ¶ 5, 639 N.W.2d 478. However, "a casual encounter can become a seizure if the officer acts in a manner that a reasonable person would view as threatening or offensive if done by another private citizen -- through an order, a threat, or display of a weapon." State v. Langseth, 492 N.W.2d 298, 300-01 (N.D. 1992).

[¶19] A Fourth Amendment seizure does not "occur[] whenever a law enforcement officer taps on a window of a parked motor vehicle." Richter v. N.D. Dep't of Transp., 2010 ND 150, ¶¶ 15, 17, 786 N.W.2d 716 ("[W]e conclude the hearing officer's determination the police officer did not stop Richter when he gestured to the passenger to roll down the window is supported by the record.") This Court has previously stated:

> "'[I]t is not a seizure for an officer to walk up to and talk to a person in a public place, including a person in a parked car. "[A] policeman's approach to a parked vehicle is not a seizure if the officer inquires of the occupant in a conversational manner, does not order the person to do something, and does not demand a response." State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992), citing Wibben v. North Dakota State Highway Comm'r, 413 N.W.2d 329, 334-35 (N.D. 1987) (VandeWalle, Justice, concurring).'"

Borowicz v. N.D. Dep't of Transp., 529 N.W.2d 186, 188 (N.D. 1995). See also State v. Gill, 2008 ND 152, ¶ 14, 755 N.W.2d 454 and Brewer v. Ziegler, 2007 ND 207, ¶ 19, 743 N.W.2d 391; City of Grand Forks v. Zejdlik, 551 N.W.2d 772, 774 (N.D. 1996).

[¶20] The "law distinguishes between the approach of an already stopped vehicle and the stop of a moving one." State v. Franklin, 524 N.W.2d 603, 604

(N.D. 1994). "It is not a Fourth Amendment seizure for a police officer to approach and talk with a person in a public place, including a stopped vehicle." State v. Leher, 2002 ND 171, ¶ 7, 653 N.W.2d 56. "[A] police officer's approach of a parked vehicle is not a seizure if the officer 'inquires of the occupant in a conversational manner, does not order the person to do something, and does not demand a response.'" Jerome, 2002 ND 34 at ¶ 5 (quoting Langseth, 492 N.W.2d at 300).

[¶21] "[A]n officer may learn something during a caretaking or casual encounter that leads to a reasonable suspicion and that reasonably justifies further investigation, a seizure, or even an arrest." Langseth, at 300. See, e.g., Engstrom v. N.D. Dep't of Transp., 2011 ND 235, ¶ 11, 807 N.W.2d 602 ("There was reasonable and articulable suspicion to seize Engstrom based on the hearing officer's findings of bloodshot eyes, slow speech, mush mouth, and admission of drinking" that the law enforcement officer observed during the initial casual encounter.); Abernathey v. Dep't of Transp., 2009 ND 122, ¶ 16, 768 N.W.2d 485 ("Assuming a seizure occurred the second time Keesler asked Abernathey to unlock the door and exit the pickup, Keesler had by then already observed enough to give him a reasonable and articulable suspicion of actual physical control," including the officer's observations of "Abernathey's bloodshot eyes, his 'confused' state, and his 'slurred' speech.").

[¶22] In this case, Martinson alleges an illegal seizure occurred when Sgt. Ruelle approached Martinson's driveway and vehicle. Appellant's Br. ¶ 19. Martinson further argues that because he was approached by both Sgt. Ruelle

and Officer Wheeler and because Sgt. Ruelle yelled at him to stop, a reasonable person in his position would have felt seized. Appellant's Br. ¶¶ 19-20.

[¶23] In contrast to Martinson's characterization of the initial contact, Sgt. Ruelle testified at the hearing he got Martinson's attention not by "yelling at him but towards him so he could ... could hear" him. Tr. 9, ll. 12-14. Sgt. Ruelle further stated he "asked" Martinson if he would hold up for a second and if Martinson was willing to talk to him. Tr. 9, ll. 14-16. Martinson responded "yeah" "what's going on" or "what's up?" Tr. 9, ll. 16-17. Further, Sgt. Ruelle stated that after the affirmative response Martinson started walking towards him, and he then started walking towards Martinson. Tr. 9, ll. 17-19. Sgt. Ruelle informed Martinson he had received a report of a possible intoxicated driver with a license plate matching Martinson's vehicle. Tr. 10, ll. 15-19. Martinson said he wasn't driving and he had just gone out to his vehicle to retrieve his wallet. Tr. 10, ll. 21-23. Upon speaking with Martinson, Sgt. Ruelle observed an open can of Bud Light beer inside the vehicle. Tr. 11, ll. 13-16. Martinson had slurred speech and was swaying while standing. Tr. 11, ll. 21-23.

[¶24] There is simply no evidence that Sgt. Ruelle demanded or ordered Martinson to respond to him. Further, there is no evidence that Martinson felt seized or unable to leave. The evidence actually suggests the opposite because Sgt. Ruelle testified that Martinson said "yeah" when asked if he was willing to talk. Further, after Martinson agreed to speak with Sgt. Ruelle he moved toward him, not away. Therefore, under Richter, a seizure did not occur when Sgt. Ruelle initially contacted Martinson outside of his vehicle in his driveway.

[¶25] It is at least arguable that a seizure occurred when Sgt. Ruelle asked Martinson to speak with him in his patrol car. Tr. 12, ll. 4-6. By the time Sgt. Ruelle asked this, he had already noticed Martinson swaying while standing, slurred speech, and observed an open container inside the vehicle. As such Sgt. Ruelle had grounds to expand the scope of his encounter with Martinson to investigate an alcohol related driving offense. And, only after observing the indicia of alcohol impairment did Sgt. Ruelle formulate an opinion that Martinson had been in actual physical control of his vehicle while under the influence of intoxicating liquor. Therefore, Martinson's Fourth Amendment rights were not violated as a result St. Ruelle's initial contact with him. The hearing officer agreed and stated:

> Officer Ruelle did not stop or seize Phillip Galen Martinson when he approached him and spoke with him in the driveway of Martinson's residence nor when he asked him to speak with him in the patrol vehicle. Even if Martinson was detained when he agreed to speak with Ruelle in the patrol vehicle, Ruelle had a reasonable and articulable basis to investigate further based upon his initial observations of Martinson.

App. 6; Tr. 46, ll. 2-9. A reasoning mind reasonably could have determined, as the hearing officer did, that Martinson was not seized at that time – the approach of the officers.

II. The hearing officer's finding of fact that Martinson was in actual physical control of his vehicle is supported by the preponderance of the evidence.

[¶26] This Court reviews the administrative hearing officer's ruling for an abuse of discretion. See Knudson v. Dir., N.D. Dept. of Transp., 530 N.W.2d 313, 316 (N.D. 1995). An abuse of discretion occurs when a hearing officer acts in an

arbitrary, unreasonable, or capricious manner or misinterprets or misapplies the law. Id. Hence, the broad question, properly framed, is whether the hearing officer abused his discretion in finding Sgt. Ruelle had reasonable grounds to believe Martinson was in actual physical control of his vehicle.

[¶27] N.D.C.C. § 39-20-05(2) provides, in part, that one of the issues at an implied consent hearing is whether the "arresting officer had reasonable grounds to believe the individual had been driving or was in actual physical control of a vehicle in violation of section 39-08-01." (Emphasis added.) "The term 'reasonable grounds' . . . is synonymous with the term 'probable cause.'" Zietz v. Hjelle, 395 N.W.2d 572, 574 (N.D. 1986).

[¶28] The hearing officer explicitly concluded "Officer Ruelle had reasonable grounds to believe Martinson had been driving or in actual physical control of a vehicle while under the influence in violation of N.D.C.C. § 39-08-01 or equivalent ordinance." App. 6; Tr. 46, ll. 9-12. The question then becomes whether the hearing officer's determination of reasonable grounds was supported by the evidence.

[¶29] "Probable cause is a minimal burden of proof." Interest of M.D.N., 493 N.W.2d 680, 684 (N.D. 1992). "Probable cause must be more than a mere suspicion but need not be the same standard of certainty necessary to convict a defendant." State v. Lind, 322 N.W.2d 826, 834 (N.D. 1982). This Court has explained:

> "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable

> and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

State v. Morrissey, 295 N.W.2d 307, 311 (N.D. 1980) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949) (internal citations omitted).

[¶30] "Probable cause to arrest exists when the facts and the 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." Seela v. Moore, 1999 ND 243, ¶ 6, 603 N.W.2d 480. This Court has cautioned that "[p]robable cause should not be evaluated from a 'remote vantage point of a library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of the arrest.'" State v. Mondo, 325 N.W.2d 201, 203 (N.D. 1982) (quoting Jackson v. United States, 302 F.2d 194, 196 (D.C. Cir. 1962)). Therefore, at the administrative hearing, the issue was whether, based on the facts and circumstances within Sgt. Ruelle's knowledge, it was probable that Martinson was in actual physical control of his vehicle.

[¶31] Section 39-08-01(1)(a), N.D.C.C., prohibits a person from being "in actual physical control [APC] of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if . . . [t]hat person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after . . . being in actual physical control of a vehicle." N.D.C.C. § 39-08-01(1)(a). "The essential elements of APC 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." State v. Haverluk, 2000 ND 178, ¶ 15, 617 N.W.2d 652.

A. Martinson was 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.

[¶32] Martinson argues he cannot be found to be in actual physical control of a motor vehicle while in his private driveway. Appellant's Br. ¶¶ 26-30. Martinson asserts that because Sgt. Ruelle did not personally observe him operating his motor vehicle and because the public does not have a right of access to his driveway or the ability to travel through it he cannot be found to be in actual physical control under N.D.C.C. § 39-08-01. Appellant's Br. ¶ 29. Martinson acknowledges the current state of the law does not support his position. Appellant's Br. ¶ 26. Instead, Martinson asks this Court to revisit its previous holdings in State v. Novak, 338 N.W.2d 637 (N.D. 1983) and Wiederholt v. Dir., N.D. Dep't of Transp., 462 N.W.2d 445 (N.D. 1990). Appellant's Br. ¶ 28.

[¶33] N.D.C.C. § 39-08-01 provides in pertinent part that a "person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state" if the person has an alcohol concentration of at least .08 percent within two hours after driving or being in actual physical control of a vehicle (emphasis added).

[¶34] Disputes concerning the underlying factual circumstances of Martinson's arrest present questions of fact, and the hearing officer's findings on those predicate facts will be overturned on appeal only if they are not supported by a

preponderance of the evidence. See Salter v. N.D. Dep't of Transp., 505 N.W.2d 111, 112 (N.D. 1993). However, the ultimate conclusion of whether those facts meet the legal standard under N.D.C.C. § 39-08-01 is a question of law which is fully reviewable on appeal. See Salter, 505 N.W. 2d at 112; see also State v. Erickson, 534 N.W.2d 804, 807 (N.D. 1995) ("The interpretation of a statute is a question of law fully reviewable on appeal.")

[¶35] In this case, therefore, the circumstances surrounding Martinson's vehicle present questions of fact, which are entitled to some degree of deference from a reviewing court. However, whether those facts meet the legal standard of a private area within the meaning of N.D.C.C. § 39-08-01 is a question of law, which is fully reviewable by this Court.

[¶36] The hearing officer made pertinent findings of fact as follows:

> "Minot Police Officer Tyler Ruelle was on patrol at about 1:19 a.m. on May 27, 2016, when dispatch relayed a report of an intoxicated driver from a caller who refused to be identified. A description of the subject vehicle, including its license plate number, was given. No description of the vehicle's operator was given. Ruelle obtained the address of the registered owner and headed there. When Ruelle arrived at the address about 10 minutes later, he saw a vehicle in the driveway of the residence. He also saw an individual was in the vehicle. As Ruelle exited and moved around the back of the patrol vehicle, he saw the individual was headed from the vehicle in the driveway to the residence.

Tr. 43, l. 17 – Tr. 44, l. 3. Martinson does not contest these facts but instead argues his vehicle was not in a private area within the purview of N.D.C.C. § 39-08-01. Martinson's arguments are meritless.

[¶37] In Novak, this Court concluded that a motorist parked on the edge of a field, just beyond the ditch, was within the purview of N.D.C.C. § 39-08-01. 338

N.W.2d at 640. The Supreme Court reached that conclusion after it "concluded that Sections 39-08-01 and 39-10-01[2] must be construed together as a prohibition against being in actual physical control of a vehicle while under the influence of alcohol on private property as well as the highways." Wiederholt, 462 N.W.2d at 448 (citing Novak, 338 N.W.2d at 640.

[¶38] This Court's decision in Novak was followed by State v. Thomas, 420 N.W.2d 747 (N.D. 1988). In Thomas, a motorist was sitting in his vehicle in the parking lot of a private gun club. Id. at 749. A police officer approached the vehicle and eventually arrested Thomas for being in actual physical control of a vehicle while under the influence of alcohol. Id. at 750. Thomas subsequently moved to dismiss the charge, asserting that the offense did not apply while Thomas was upon an area which the public had no right of access for vehicle use. Id.

[¶39] The trial court denied Thomas' motion and he appealed his subsequent conviction to the Supreme Court. Id. This Court observed in Thomas that the purpose of N.D.C.C. § 39-08-01 was "to protect the public against the real danger caused by drunken drivers whether on the highway, a parking lot or elsewhere within the state." Id. at 753-54. The Supreme Court reiterated that "elsewhere within the state" includes private property. Id. (citing Novak, 338

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[2] N.D.C.C. § 39-10-01(2) provides in pertinent part that the "provisions of this title . . . relating to . . . driving while under the influence of intoxicating liquor . . . apply upon highways and elsewhere (emphasis added). In Novak the Supreme Court was faced with the issue of whether or not the "elsewhere" language in N.D.C.C. § 39-10-01 extended the offense of actual physical control to private property. The Supreme Court concluded that it did. Novak, 338 N.W.2d at 640.

N.W.2d at 640). This Court affirmed Thomas' conviction and concluded that Thomas had parked in a private area to which the public had access. Id. at 754.

[¶40] Wiederholt was the next decision in this line of cases. In Wiederholt, the motorist was found passed out in his vehicle in his farmyard about 100 feet from the roadway. 462 N.W.2d at 446. Wiederholt was arrested for violating N.D.C.C. § 39-08-01 and the results of his chemical test indicated an alcohol concentration of .22 percent. Id. at 446-47

[¶41] Wiederholt asserted that the Thomas decision requires a finding that the vehicle was upon a highway or upon public or private areas to which the public has a right of access for vehicular use. Wiederholt, 462 N.W.2d at 450. More specifically, "Wiederholt contends that because, in Thomas, this Court made the determination that the vehicle was parked in an area to which the public had access, we must make this determination in every case." Id. The Supreme Court rejected Wiederholt's contention because "it ignores what we concluded in Thomas." Id.

[¶42] In Wiederholt, this Court explained that "[m]erely because we found that Thomas was parked in a private area to which the public had access does not mean we have abandoned the application of section 39-08-01, N.D.C.C., to private property in general." Id. at 451 (emphasis added). Our opinion in Thomas would be inconsistent in its parts if it were read to adopt our decision in Novak on one page, and then read to require a finding that the vehicle was located in an area where the public had a right to access on the next page." Id.

As a result, in Wiederholt, the Court "concluded that the offense (of being in actual physical control of a motor vehicle) does apply to private property." Id.

[¶43] Another decision in this line of cases was Fetzer v. Dir., N.D. Dep't Transp., 474 N.W.2d 71 (N.D. 1991). In Fetzer, a police officer found the motorist sleeping in his pickup, with the keys in the ignition and the engine off, parked on a hill in an undeveloped area within a city. Id. at 72. The motorist subsequently was arrested for being in actual physical control of a vehicle while under the influence of alcohol under N.D.C.C. § 39-08-01. Id.

[¶44] Fetzer's driving privileges were revoked after he refused to submit to a chemical test. Id. On appeal, the district court reversed the Department's decision, concluding that N.D.C.C. § 39-08-01 was inapplicable because Fetzer was found in his pickup in an area where the public did not have a right of access for vehicular use. Id. The Supreme Court reversed the district court's decision and reinstated the administrative revocation. Id. at 73.

[¶45] The special concurrence written by Justice Levine in Fetzer succinctly sums up the current state of the law. Specifically, Justice Levine observed as follows:

> I agree with the district court's interpretation and with its conclusion that section 39-08-01, N.D.C.C., does not apply to private property not accessible to the public, but a majority of this court does not. Wiederholt v. Department of Transportation, 462 N.W.2d 445 (N.D. 1990). I see no purpose in continuing to espouse my minority view and will henceforth meekly join ranks with the majority.

Id. at 73 (emphasis added). It is clear, as Justice Levine indicates, that the Supreme Court interprets N.D.C.C. § 39-08-01 to apply to private property not

accessible to the public. See also Brewer, 2007 ND 207 at ¶ 12 (holding that highway patrolman had jurisdiction to arrest a driver in a privately owned lot).

[¶46] Under these circumstances, regardless of how the facts are construed, Martinson falls within the purview of N.D.C.C. § 39-08-01. There was evidence suggesting that prior to the vehicle being found in Martinson's driveway it was actually being driven on the road. Tr. 5-8. (Sgt. Ruelle explaining how he came to be at the location of Martinson's vehicle); Tr. 11 (Sgt. Ruelle explaining that Martinson told him he had driven the vehicle a couple hours prior); Tr. 13 (Sgt. Ruelle stating that Martinson told him he had arrived home from his place of employment two hours prior.) No evidence was presented at the hearing from Martinson. As is the case in Wiederholt, Martinson does not contest the fact that he was under the influence of alcohol, just that he cannot be found to be in actual physical control in his own private driveway.

[¶47] Martinson argues that finding him in actual physical control of his vehicle while in his driveway would create an absurd result and be against public policy, because it would mean that any North Dakotan who is smoking outside a bar with their vehicle in the parking lot could be arrested for APC, or any homeowner who is drunk and forgot their wallet in a vehicle parked in their driveway could be arrested for APC. Appellant's Br. ¶ 33. However, this is simply not the case and the examples given by Martinson do not even apply to him. The record shows that Martinson's vehicle was on the road at least ten minutes prior to police contact. Further, upon law enforcement's arrival at his residence, Martinson was found inside the vehicle and no one else was around. Tr. 8, l. 21 – Tr. 9, l. 3.

The keys for the vehicle were found in Martinson's pocket. Tr. 16, ll. 1-2. Also there was an open can of beer in his vehicle in plain sight of the officers. Tr. 11, ll. 13-16. This was not the case of someone drinking while sitting in front of the television who remembers they left their wallet in their vehicle, and runs outside to grab it. It is also of note that Martinson did not testify at the hearing and did not contradict the testimony of Sgt. Ruelle.

[¶48] Under the current case law Martinson was in actual physical control of his vehicle and it was reasonable of the hearing officer to find as much. Even if the driveway was not accessible to the public, Martinson still falls within the purview of N.D.C.C. § 39-08-01 based upon the Supreme Court's interpretation of the statute.

B. Martinson was in actual physical control of a motor vehicle as he had the ability to manipulate the controls of his vehicle.

[¶49] "'The term 'physical control' is more comprehensive than either 'drive' or 'operate.'" State v. Huber, 555 N.W.2d 791, 795 (N.D. 1996) (quoting State v. Starfield, 481 N.W.2d 834, 836 (Minn. 1992)). "The primary factor in determining actual physical control is whether the defendant has the ability to manipulate the controls of the vehicle." Hawes v. N.D. Dep't of Transp., 2007 ND 177, ¶ 6, 741 N.W.2d 202. "A driver has 'actual physical control' of his car when he has real (not hypothetical), bodily restraining or directing influence over, or domination and regulation of, its movements of machinery." State v. Ghylin, 250 N.W.2d 252, 254 (N.D. 1977) (quoting Pennsylvania v. Kloch, 327 A.2d 375, 383 (Pa. Super. Ct. 1974)). The Supreme Court has "long construed the actual physical

control statute to broadly prohibit any exercise of dominion or control over a vehicle by an intoxicated person." Hawes, at ¶ 6.

[¶50] "The actual physical control statute is a preventive measure, enabling law enforcement to apprehend intoxicated drivers before they strike." City of Fargo v. Novotny, 1997 ND 73, ¶ 5, 562 N.W.2d 95. In Novotny the Court stated that "the actual physical control offense proscribes intoxicated individuals from exercising any dominion over a vehicle, even if the individual is not driving and has no intent to drive . . . ." Id. at ¶ 6 (emphasis added). The Supreme Court has "repeatedly recognized that the purpose of the actual-physical-control offense is to prevent an intoxicated person from getting behind the steering wheel of a motor vehicle because that person may set out on an inebriated journey at any moment and is a threat to the safety and welfare of the public." State v. Saul, 434 N.W.2d 572, 576-77 (N.D. 1989).

[¶51] The "inebriated journey" with which the Supreme Court has expressed its concern need only be for a "short distance." See Ghylin, 250 N.W.2d at 255 ("One who has been drinking intoxicating liquor should not be encouraged to test his driving ability on the highway, even for a short distance, where his life and the lives of others hang in the balance.") (emphasis added). By its express terms, section 39-08-01, N.D.C.C., prescribes no minimum distance over which a vehicle must travel before a person can be considered to have driven a vehicle while under the influence of intoxicating liquor. Cf. Bradam v. State, 235 S.W.2d 801, 802 (Tenn. 1950) ("[T]he fact that the car moved only a few feet does not justify a holding as a matter of law that the accused was not driving [while under

the influence].") (quoting 5 Am. Jur. § 771). See also People v. Cobb, 661 N.Y.S.2d 903, 904 (N.Y. App. Term 1997) ("[T]he fact that defendant's car moved only a few feet during the episode offers no defense to this otherwise viable reckless driving prosecution.").

[¶52] "This Court has said the presence of an ignition key or whether the vehicle is operable are not dispositive in deciding whether an individual committed the offense of actual physical control." State v. Pena Garcia, 2012 ND 11, ¶ 9, 812 N.W.2d 328, 331 (emphasis added). This Court has also "upheld numerous convictions in which the defendant was not able to instantaneously operate the vehicle, but was still deemed to have had actual physical control because *the temporary impediment could have been removed* and the defendant could again have attempted to drive." Vanlishout v. N.D. Dep't of Transp., 2011 ND 138, ¶ 17-18, 799 N.W.2d 397 (emphasis added) ("Vanlishout's friend testified he was on his way back to the scene with a pickup to pull the car out [of ditch]."). See also Salvaggio v. N.D. Dep't of Transp., 477 N.W.2d 195, 196 (N.D. 1991) ("Salvaggio was at the rear of the pickup attempting to put chains on the left rear tire" of vehicle that was stuck in a ditch); Ghylin, 250 N.W.2d at 255 ("At trial, Ghylin testified that he was attempting to get his vehicle out of the ditch, and that the vehicle almost broke free when Deputy Sheriff Genter arrived."); State v. Schuler, 243 N.W.2d 367, 369 (N.D. 1976) (law enforcement officer testified that the high-centered vehicle "could have been backed up by rocking it.").

[¶53] As the foregoing case law shows, this Court has emphasized the dangers linked to drinking and driving and has liberally interpreted the actual physical control statute.

[¶54] Additionally, the issue is *not* whether Martinson, in fact, was in actual physical control of his vehicle. Rather, the issue is *whether Sgt. Ruelle had reasonable grounds to believe* Martinson was in actual physical control of his vehicle. The evidence shows that Sgt. Ruelle had reasonable grounds to believe Martinson was in actual physical control of the vehicle. Sgt. Ruelle had observed Martinson inside his vehicle. Tr. 8, ll. 4-5. He also observed an open can of Bud Light beer in the vehicle. Tr. 11, ll. 13-16. Martinson's speech was slurred, and he was swaying while standing. Tr. 11, ll. 21-23. The keys to the vehicle were found in Martinson's front left pant pocket. Tr. 15, l. 23; 16, ll. 2-5. Sgt. Ruelle further observed the odor of an alcoholic beverage, and bloodshot watery eyes on Martinson. Tr. 12, ll. 14-17. Martinson admitted consuming two cans of Bud Light beer. Tr. 12, l. 24 – Tr. 13, l. 3. Martinson submitted to the HGN field sobriety test and exhibited all six possible clues. Tr. 14, ll. 2-8. Therefore, at the moment Sgt. Ruelle arrived on scene and observed Martinson inside his vehicle, Martinson had the ability to manipulate the controls of the vehicle and thus the potential to set out on an inebriated journey. This is what the actual physical control law was designed to prevent.

[¶55] The evidence in the record, construed in light of the preventative nature of the actual physical control offense and the Supreme Court's well-established liberal construction of the actual physical control offense, compel a conclusion

that Sgt. Ruelle had reasonable grounds to believe Martinson was in actual physical control of the vehicle. Furthermore, though Martinson tries to argue he was not the driver, no evidence was presented at the hearing that supports this argument, as he chose not to testify.

CONCLUSION

[¶56] The Department respectfully requests that this Court affirm the judgment of the Ward County District Court and the Department's decision suspending Martinson's driving privileges for a period of 180 days.

Dated this 14th day of July, 2017.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____
Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellee.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Phillip Galen Martinson, Appellant, v. Grant Levi, Director Department of Transportation, Appellee.	)	**Supreme Ct. No. 20170175** **District Ct. No. 51-2016-CV-01128** **CERTIFICATE OF SERVICE**

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

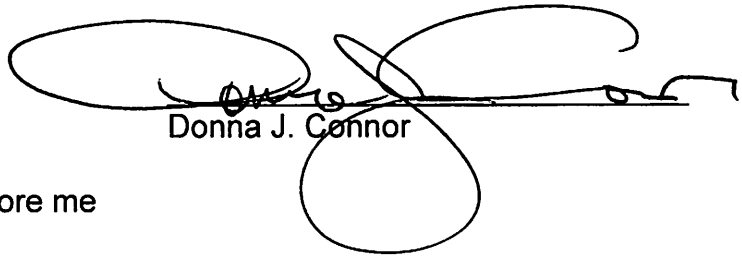
[¶1] Donna J. Connor states under oath as follows:

[¶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 14th day of July, 2017, I served the attached **BRIEF OF APPELLEE** upon Phillip Galen Martinson, by and through his attorney Luke T. Heck, by placing a true and correct copy thereof in an envelope addressed as follows:

Luke T. Heck
Attorney at Law
SEVERSON, WOGSLAND & LIEBL, PC
4627 44th Avenue South, Ste. 108
Fargo, North Dakota 58104

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 14th day of July, 2017.



Notary Public

