IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Courtney Thomas Krueger, Appellant, v. Thomas Sorel, Director, Department of Transportation, Appellee.	**STATE OF NORTH DAKOTA** **Supreme Ct. No. 20170425** **District Ct. No. 49-2017-CV-00092**

APPEAL FROM THE NOVEMBER 1, 2017,
JUDGMENT OF THE DISTRICT COURT
TRAILL COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

HONORABLE SUSAN L. BAILEY

BRIEF OF APPELLEE

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[¶2] Whether the results of Krueger's Intoxilyzer test were admissible in this civil proceeding regardless of whether Deputy Klegstad may have acted outside his jurisdictional limits when he arrested Krueger in Grand Forks County.

[¶3] Whether Deputy Klegstad's request that Krueger submit to an additional Intoxilyzer test was reasonable due to the fact that results of Krueger's first test were inadmissible in this civil proceeding under N.D.C.C. § 39-20-01(3)(b).

[¶4] Whether Krueger is entitled to an award of attorney fees and costs under N.D.C.C. § 28-32-50(1) in the event the hearing officer's decision is not affirmed by the Supreme Court.

STATEMENT OF CASE[1]

[¶5] Traill County Deputy Sheriff Deputy Andrew Klegstad ("Deputy Klegstad") arrested Krueger on June 3, 2017, for the offense of driving while under the influence of intoxicating liquor. Appendix to Brief of Appellant ("Krueger App.") at 55. After the conclusion of the June 29, 2017, administrative hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Krueger's driving privileges for a period of two years. Id. at 66-67.

[1]Thomas Sorel is substituted for Grant Levi as the Director of the North Dakota Department of Transportation as of August 7, 2017, pursuant to N.D.R.Civ.P. 25(d).

Krueger requested judicial review of the hearing officer's decision. Appendix to Brief of Appellee ("Dep't App.) at 1-4.

STATEMENT OF FACTS

[¶6] On June 3, 2017, at approximately 2:03 a.m., Deputy Klegstad observed a vehicle that was being driven by Krueger make what the law enforcement officer described as being a wide left-hand turn from Seventh Street onto Highway 18 within the city of Hatton and then appear to cross over the fog line located on the far right-hand side of the road. Krueger App. at 5, ll. 1-24. Deputy Klegstad testified that after he caught up with Krueger's vehicle, "I observed him weaving erratically within his lane. And during ... while I'm following him, he hit the fog line and then proceeded to travel within the northbound lane weaving erratically which is consistent with impaired driving or distracted driving." Id. at 6, ll. 16-24.

[¶7] Deputy Klegstad noted his observations on the Report and Notice that Krueger "drove over fog line, weaving within lane of travel multiple time." Id. at 55. Deputy Klegstad testified "[t]he weaving was going from fog line to centerline." Id. at 7, ll. 2-3. Deputy Klegstad explained the weaving lasted "[a]pproximately a mile, a mile and a half," at which point he activated his emergency lights. Id. at 7, ll. 6-20.

[¶8] Deputy Klegstad stated that after he activated his lights, "[i]t slowly slowed down. It took approximately a minute to slow down. At that point, we were ... I activated my lights right before the Traill County/Grand Forks County line. He eventually stopped, and was probably, approximately, about a quarter mile north into Grand Forks County." Id. at 7, l. 25 -- 8, l. 6. Deputy Klegstad testified the

location of the stop "was Highway 18, mile marker 139 north of that approximately half a mile." Id. at 10, ll. 6-8. Deputy Klegstad stated "I believe it was a quarter mile to an approach." Id. at 35, ll. 20-23.

[¶9] While Krueger remained his vehicle, Deputy Klegstad observed "he had slurred speech and . . . blood shot, watery eyes." Id. at 11, ll. 5-7. Deputy Klegstad also "detect[ed] an odor of alcoholic beverage," and when asked about the odor, "[Krueger] stated that a friend had spilled a beer on him earlier that night and that he had not been drinking that night." Id. at 11, ll. 12-17. Deputy Klegstad stated "[a]t that point, I had him step out of the vehicle to submit to field sobriety tests." Id. at 11, ll. 18-20.

[¶10] Deputy Klegstad testified it was at the time when he asked Krueger to step out of his vehicle that a Grand Forks County deputy sheriff arrived at the scene. Id. at 9, l. 25 – 10, l. 2. Deputy Klegstad explained he did not contact other law enforcement agencies, but, instead, he speculated the Grand Forks County deputy may have "pick[ed] it up," because "they scan our frequency." Id. at 8, l. 24 – 9, l. 15. Deputy Klegstad testified that the deputy's limited involvement in the investigation was that "[h]e looked through the vehicle when we searched it to look for any alcoholic beverages after he ... after [Krueger] was arrested." Id. at 9, ll. 16-20.

[¶11] Deputy Klegstad testified he believed he was acting within his jurisdiction "[b]eing that the violation of him hitting the fog line ... it ... it had happened in Traill County, and the violations happened in that county" and that he activated his emergency lights while Krueger was still in Traill County. Id. at 8, ll. 9-14.

When questioned about his authority to make an arrest in Grand Forks County, Deputy Klegstad stated "[a]t that point, I was not thinking about that, being that the violation was in Traill County. And I'd ... I activated my emergency lights before the county line and he proceeded into ... into Grand Forks County." Id. at 37, ll. 11-16.

[¶12] After administering a series of field sobriety tests on which Krueger displayed signs of impairment, Deputy Klegstad informed Krueger of the implied consent advisory and requested he submit to an onsite screening test. Id. at 12, l. 5 – 15, l. 25. Kreuger produced a result of .147 on the screening test. Id. at 16, ll. 6-7.

[¶13] Deputy Klegstad arrested Krueger for driving under the influence of alcohol at 2:23 a.m. Id. at 16, ll. 12-15. Deputy Klegstad handcuffed Krueger behind his back, put him in the backseat of the patrol car, and then transported him to "the Traill County Sheriff's Office to get the Intoxilyzer 8000 test." Id. at 16, l. 20 – 17, l. 12.

[¶14] Deputy Klegstad administered an Intoxilyzer test on which Krueger produced a result showing a blood alcohol concentration of 0.146% by weight. Id. at 17, ll. 17-20; Dep't App. at 5. However, after the results of the Intoxilyzer test were printed, Deputy Klegstad realized he had not first informed Krueger of the implied consent advisory before requesting the test. Krueger App. at 17, l. 18 – 18, l. 2; 23, ll. 6-8.

[¶15] Deputy Klegstad testified he did not believe the test was administered in accordance with the approved method because "[Krueger] was not read the

implied consent." Id. at 21, ll. 6-14. Deputy Klegstad stated he informed the field training officer that "I had forgot to read implied consent, and he said to read implied consent and see if he would submit to the chemical test." Id. at 42, ll. 6-10.

[¶16] Deputy Klegstad informed Krueger of the implied consent advisory and requested he submit to a second Intoxilyzer test. Id. at 19, l. 10 – 20, l. 5. Deputy Klegstad testified "[r]ight away, he didn't want to. And I asked him ... all right, and that ... that's your final answer? He said 'No' right way, and then he changed his mind a few minutes later." Id. at 20, ll. 6-12. During the administration of the second Intoxilyzer test, "the machine detected a RFI reading." Id. at 21, ll. 21-25; Dep't App. at 6. Deputy Klegstad explained the radio frequency interference reading may have been triggered by the use of the dispatch radio. Krueger App. at 22, ll. 1-4. The second test was then terminated. Id. at 22, ll. 12-13.

[¶17] Deputy Klegstad stated that "once that RFI printed off, I asked if he consented to the ... to the third test which he did, and administrated [sic] two breath samples to the Intoxilyzer 8000." Id. at 23, ll. 11-15. Deputy Klegstad obtained a valid test result on the third test at 3:57 a.m., which showed Krueger had a blood alcohol concentration of 0.141% by weight. Id. at 24, ll. 20-22; 31, ll. 22-24; Dep't App. at 7.

STATEMENT OF PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶18] In his administrative decision, the hearing officer stated "Krueger argued that, although Deputy Klegstad had authority to follow the vehicle into Grand

Forks and make a stop, he did not have authority to make a DUI arrest because a Grand Forks deputy arrived on scene as Mr. Krueger was exiting his vehicle." Krueger App. at 66. Citing N.D.C.C. § 11-15-33, the hearing officer determined "Deputy Klegstad was a witness to the vehicle behavior supporting the stop and was qualified to make the arrest under North Dakota law. When the vehicle did not stop immediately, Deputy Klegstad was justified in making the stop himself. The statute allows him to then complete the arrest." Id. at 66-67.

[¶19] The hearing officer stated "Krueger also argues that the Director cannot consider the results of the third Intoxilyzer 8000 test, citing Broeckel v. State Highway Commissioner, 498 N.W.2d 170 (N.D. 1993) for the position that 'Once a motorist is in police custody and a chemical test has been properly administered yielding a readable result, the motorist has a right to refuse any subsequent chemical tests used for determining his or her blood alcohol content.'" Id. at 67. The hearing officer determined that "[g]iven the circumstances in this case, administering the three tests was reasonable. Mr. Krueger offered no evidence of prejudice." Id.

[¶20] The District Court issued its Findings of Fact, Conclusions of Law, and Order for Judgment in which the Court affirmed the Hearing Officer's Decision suspending Krueger's driving privileges for a period of two years. Id. at 68-72. The District Court determined:

> [¶7] Deputy Klegstad had reasonable suspicion to believe that Krueger may have committed a traffic violation or was driving under the influence of alcohol. Given that Krueger did not heed Deputy Klegstad's signal to pull over, Deputy Klegstad's continued pursuit of Krueger was necessary to prevent escape. If Deputy Klegstad had not continued to pursue Krueger after he entered Grand Forks

> County, this would have caused an unreasonable delay likely permitting Krueger to escape. Grand Forks County law enforcement, who scan the radio frequency of the Traill County Sheriff's Office and were aware of the situation, arrived on the scene after Krueger had stopped, exited his vehicle, and the DUI investigation was underway.
>
> [¶8] N.D.C.C. § 11-15-33 states that county law enforcement "in fresh pursuit may enter another county and may continue within that county in fresh pursuit to make an arrest." Therefore, because Deputy Klegstad had authority to pursue Krueger into Grand Forks County, he also had the authority to conduct the DUI investigation and subsequently complete the arrest.

Id. at 70-71.

[¶21] The District Court also ruled:

> [¶9] Regarding the administration of the chemical breath test, Deputy Klegstad properly administered the third chemical breath test to Krueger. He administered a first test without reading the North Dakota implied consent advisory beforehand. Under N.D.C.C. § 39-20-01(3)(b), failure to read the North Dakota implied consent advisory renders a chemical test inadmissible. The law, however, does not prohibit a law enforcement officer from remedying this omission. The law does not prohibit law enforcement from administering multiple chemical tests. Indeed, N.D.C.C. § 39-20-01 specifically refers to "test or tests." . . .
>
> [¶10] . . . The [Broeckel] Court's use of the phrase "properly administered yielding a readable result" indicates that proper administration entails more than simply a readable result. Deputy Klegstad properly requested and administered the third, valid test to Kruger.

Id. at 71-72.

[¶22] Judgment was entered on November 1, 2017. Id. at 74. Krueger appealed the Judgment to the North Dakota Supreme Court. Id. at 76-77. The Department requests this Court affirm the Judgment of the Traill County District Court and affirm the Hearing Officer's Decision suspending Krueger's driving privileges for a period of two years.

STANDARD OF REVIEW

[¶23] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to [suspend] 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.

[¶24] "In an appeal from a district court's review of an administrative agency's decision, [the Court] review[s] 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.

[¶25] The Supreme Court "reviews constitutional rights violations under the de novo standard of review." State v. Williams, 2015 ND 103, ¶ 5, 862 N.W.2d 831. "The interpretation and application of a statute is a question of law, which [the Court] review[s] de novo." Wingerter v. N.D. Dep't of Transp., 530 N.W.2d 362, 364 (N.D. 1995) (citing Olson v. N.D. Dep't of Transp. Dir., 523 N.W.2d 258 (N.D. 1994)).

[¶26] As applicable to administrative decisions, the Supreme Court "will not set aside a correct result merely because the district court's reasoning is incorrect if the result is the same under the correct law and reasoning." Sanders v. Gravel Prod., Inc., 2008 ND 161, ¶ 9, 755 N.W.2d 826 (quoting Hanson v. Boeder, 2007 ND 20, ¶ 21, 727 N.W.2d 280).

LAW AND ARGUMENT

I. The preponderance of the evidence supports the hearing officer's finding that Deputy Klegstad acted within his jurisdictional limits under N.D.C.C. § 11-15-33 when he arrested Krueger in Grand Forks County.

A. General.

[¶27] "This Court has recognized that as a general rule a police officer acting outside his jurisdiction is without official capacity and without official power to arrest." Kroschel v. Levi, 2015 ND 185, ¶ 7, 866 N.W.2d 109 (quoting Johnson v. N.D. Dep't of Transp., 2004 ND 148, ¶ 10, 683 N.W.2d 886 (citing State v. Littlewind, 417 N.W.2d 361, 363 (N.D.1987))). A county law enforcement officer's jurisdiction is provided by N.D.C.C. § 11-15-33, which, in part, states:

1. A county law enforcement officer employed by a county has jurisdiction within that county *and up to one thousand five hundred feet [457.2 meters] outside the county.*

2. A county law enforcement officer in fresh pursuit may enter another county and may continue within that county in fresh pursuit to make an arrest, in compliance with a warrant or without a warrant under the conditions of section 29-06-15, *if obtaining the aid of law enforcement officers having jurisdiction in that county would cause a delay permitting escape.* As used in this section, "fresh pursuit" means fresh pursuit as defined in section 29-06-07.

. . .

N.D.C.C. § 11-15-33 (emphasis added).

[¶28] "[T]he term 'fresh pursuit' shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed or who is reasonably suspected of having committed a felony, misdemeanor, or traffic violation." N.D.C.C. § 29-06-07. The term "shall include the pursuit of a person suspected of having committed a supposed felony, misdemeanor, or traffic violation, though no felony, misdemeanor, or traffic violation has been actually committed, if there is reasonable ground for believing that a felony, misdemeanor, or traffic violation has been committed." Id.

[¶29] In Maher v. North Dakota Department of Transportation, a Bismarck police officer followed Maher's vehicle into Morton County after observing it swerve and narrowly miss a guardrail, and then "change[] driving lanes approximately five times in the course of eight-tenths of a mile on Expressway Avenue . . . without signaling." 510 N.W.2d 601, 602 (N.D. 1994). "While crossing the bridge, Maher's vehicle swerved to the right to avoid hitting a median." Id. "The officer observed the vehicle change driving lanes approximately three more times while

on the bridge; twice the officer observed Maher drive very close to the north barrier of the bridge." Id.

[¶30] "Maher stopped his vehicle in Morton County, at a point approximately 1.2 miles past the point on the bridge where the officer had activated his lights." Id. "The officer placed Maher under arrest and transported him to the Bismarck police department." Id. at 603. "An intoxilizer test was performed, indicating an alcohol concentration in excess of .10 percent by weight." Id.

[¶31] "Maher contend[ed] that the arrest, which was made within the jurisdictional limits of Morton County, was not within the jurisdiction of the Bismarck city police officer." Id. at 603. "Maher argue[d] that, although the doctrine of 'hot pursuit' may extend the jurisdiction of an arresting officer, there was no evidence upon which the hearing officer could have concluded that the officer in this instance was in 'hot pursuit' of Maher." Id.

[¶32] Comparable to the jurisdictional provisions of N.D.C.C. § 11-15-33, "[s]ection 40-20-05, N.D.C.C., provide[d] that the jurisdiction of a municipal police officer extends for a distance of one and one-half miles in all directions beyond the city limits." Id. "Jurisdiction may extend beyond the one and one-half mile limit when an officer is in 'hot pursuit', i.e., when the officer is in 'immediate pursuit of a person who is endeavoring to avoid arrest.'" Id. (quoting N.D.C.C. § 40-20-05(2)). "The hearing officer found that Maher had endeavored to avoid arrest and that the Bismarck police officer therefore acted within his authority when he pursued and arrested Maher in Morton County." Id.

[¶33] The Court "conclude[d] that a reasoning mind could reasonably determine that Maher had attempted to evade arrest by failing to stop his vehicle at an earlier point." Id. at 604. The Court stated "[b]ecause the evidence presented at the administrative hearing supports the hearing officer's finding that the Bismarck police officer was in 'hot pursuit' of Maher, we need not consider whether the arrest was made within one and one-half miles of the Bismarck city limits." Id.

[¶34] The Court noted the additional "hot pursuit" requirement that "[s]ection 40-20-05(2), N.D.C.C., restricts the 'hot-pursuit' authority of the police officer to 'whenever obtaining the aid of peace officers having jurisdiction' beyond the jurisdictional limits of the city '*would cause a delay permitting escape.*'" Id. at 603, n.1 (emphasis added). The Court stated "[t]he hearing officer, by finding that the arrest was pursuant to section 40-20-05(2), *necessarily* found that obtaining the aid of Morton County or Mandan police officers, as the case may be, would cause delay permitting an escape." Id. (emphasis added).

[¶35] The Court determined that "[i]In view of the fact that *a charge of Driving Under the Influence requires identification and direct observance or testing of the individual driving the motor vehicle within two hours after driving*, see N.D.C.C. § 39-08-01(1), we believe there is sufficient evidence to sustain the finding that obtaining assistance would have permitted escape." Id. (emphasis added).

[¶36] Although not challenged in that case, the law enforcement officer's transport of Maher from Morton County back to Bismarck for the chemical test would have been justified by the same rationale for the subsequent decision in Johnson, that "[N.D.C.C. § 39-20-02] does not require the blood test either be

offered or administered within the jurisdiction where the arrest took place." 2004 ND 148, ¶ 10.

B. Jurisdiction under N.D.C.C. § 11-15-33(1).

[¶37] In this case, the hearing officer relied on the fresh pursuit provisions of N.D.C.C. § 11-15-33(2) in determining that Deputy Klegstad was authorized to arrest Kreuger. However, as a permissible alternative to the law and reasoning relied upon by the hearing officer, Deputy Kreuger's authority to stop and arrest Krueger is equally justified under N.D.C.C. § 11-15-33(1).

[¶38] Deputy Klegstad testified Krueger stopped his vehicle "approximately, about a quarter mile north into Grand Forks County." Krueger App. at 7, l. 25 -- 8, l. 6. Krueger presented no evidence at the hearing to contradict Deputy Klegstad's estimation of the "quarter mile" distance of the stop into Grand Forks County. Based on this estimation, the evidence would support a determination that the stop made within the "quarter mile" distance – i.e., 1320 feet – was made within the "one thousand five hundred feet" jurisdictional limit of N.D.C.C. § 11-15-33(1).

[¶39] Deputy Klegstad testified the location of the stop "was Highway 18, mile marker 139 north of that approximately half a mile." Id. at 10, ll. 6-8. Krueger, however, presented no evidence at the hearing regarding the distance by feet that this location would have been into Grand Forks County. Rather than introduce evidence at the administrative hearing regarding this location, Krueger now requests the Court disregard Deputy Kelgstad's testimony by taking judicial

notice by reference to "state and county maps" and to suggest the stop occurred 2,112 feet into Grand Forks County. Appellant's Br. at ¶ 17.

[¶40] *At most*, Krueger presents a possible conflict in the evidence regarding the distance of the stop by feet into Grand Forks County and a factual question that should have been resolved by the hearing officer, rather than by the Supreme Court. "N.D.C.C. § 28-32-24(2) . . . provides, in part: 'No information or evidence except that which has been offered, admitted, and made a part of the official record of the proceeding shall be considered by the administrative agency.'" Schock v. N.D. Dep't of Transp., 2012 ND 77, ¶ 15, 815 N.W.2d 255.

[¶41] Deputy Klegstad's testimony regarding the "quarter mile" distance of the stop into Grand Forks County, coupled with Krueger's failure to dispute the law enforcement officer's approximation at the hearing, permits the reasonable inference to be made that the stop occurred within "one thousand five hundred feet [457.2 meters] outside the county" and within Deputy Klegstad's jurisdiction under N.D.C.C. § 11-15-33(1).

C. Jurisdiction under N.D.C.C. § 11-15-33(2).

[¶42] As in Maher, at 603, n.1, the hearing officer's finding regarding the fresh pursuit of Krueger, *necessarily* included the finding that obtaining the aid of Grand Forks County law enforcement would have "cause[d] a delay permitting escape." Like the case in Maher, the hearing officer's finding requires consideration of Deputy Klegstad's "identification and direct observance [and] testing of [Kreuger] . . . within two hours after driving." Id.

[¶43] The unrequested appearance of the Grand Forks County deputy *after the stop had already occurred* does not disprove the likely fact that if Deputy Klegstad had chosen to first request the assistance of local law enforcement before making the traffic stop, Krueger would have continued to drive and been able to avoid apprehension. Krueger presented no evidence to suggest local law enforcement would have arrived in time to prevent his escape, but for Deputy Klegstad's actions.

[¶44] By the time Grand Forks County deputy arrived at the scene, Deputy Klegstad was already investigating the elements of "a charge of Driving Under the Influence [including] identification and direct observance or testing of the individual driving the motor vehicle within two hours after driving." Maher, at 603, n.1. Deputy Klegstad had established the reasonable suspicion to stop Krueger. The Grand Forks County deputy had no personal knowledge concerning basis for the stop.

[¶45] By then Deputy Klegstad also had established elements of probable cause to arrest Krueger. Furthermore, Deputy Klegstad was aware of the need to meet the two-hour limitation for testing, including his knowledge of the time of Krueger's driving and the availability of testing equipment in Traill County. Krueger presented no evidence that the chemical test would have been conducted within the two-hour timeframe had the test been administered by law enforcement in Grand Forks County.

[¶46] There was sufficient evidence in this case to sustain the hearing officer's finding that obtaining assistance of local law enforcement would have permitted

Krueger's escape, whether through avoidance of apprehension in the first instance or through the avoidance of prosecution, which, in this case, would likely have had to rely on the officer-to-officer communications. The preponderance of the evidence supports the hearing officer's finding that Deputy Klegstad acted within his jurisdictional limits under N.D.C.C. § 11-15-33(2) when he arrested Krueger in Grand Forks County.

II. The results of Krueger's Intoxilyzer test were admissible in this civil proceeding regardless of whether Deputy Klegstad may have acted outside his jurisdictional limits when he arrested Krueger in Grand Forks County.

[¶47] "The exclusionary rule is a judicially fashioned remedy aimed at deterring constitutional violations, the application of which is appropriate when the Constitution or a statute requires it." United States v. Abdi, 463 F.3d 547, 555 (6th Cir. 2006). "Although exclusion is the proper remedy for some violations of the Fourth Amendment, there is no exclusionary rule generally applicable to statutory violations." Id. at 556. "Rather, the exclusionary rule is an appropriate sanction for a statutory violation only where the statute specifically provides for suppression as a remedy or the statutory violation implicates underlying constitutional rights such as the right to be free from unreasonable search and seizure." Id.

[¶48] "In the statutory context, suppression is a creature of the statute, and its availability depends on the statutory text: 'The availability of the suppression remedy for ... statutory, as opposed to constitutional, violations ... turns on the provisions of [the statute] rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights.'" United States v.

Clenney, 631 F.3d 658, 667 (4th Cir. 2011) (quoting United States v. Donovan, 429 U.S. 413, 432, n.22 (1977) (alterations in Clenney).

[¶49] Courts of other jurisdictions have refused to apply the exclusionary rule to situations involving statutorily invalid arrests, as opposed to constitutionally invalid arrests. For example, in People v. Hamilton, the Michigan Supreme Court addressed the question of statutory interpretation as to "whether the Legislature intended that a violation of [a statute governing the authority of peace officers outside of their geographical boundaries] should result in exclusion of evidence obtained as a result of the arrest." 638 N.W.2d 92, 95 (Mich. 2002), abrogated on other grounds by, Bright v. Ailshie, 641 N.W.2d 587 (Mich. 2002).

[¶50] The Michigan Supreme Court stated "we find no indication in the language of [the statute] that the Legislature intended to impose the drastic sanction of suppression of evidence when an officer acts outside the officer's jurisdiction." Id. at 97. The court stated "we believe that the language supports the analysis of several Court of Appeals decisions that *the statute was intended, not to create a new right of criminal defendants to exclusion of evidence, but rather to 'protect the rights and autonomy of local governments' in the area of law enforcement.*" Id. at 97-98 (emphasis added) (citing People v. Clark, 450 N.W.2d 75, 77 (Mich. Ct. App. 1989); People v. McCrady, 540 N.W.2d 718, 721 (Mich. Ct. App. 1995)).

[¶51] The Ohio Supreme Court has ruled that "[w]here a law enforcement officer, acting outside the officer's statutory territorial jurisdiction, stops and detains a motorist for an offense committed and observed outside the officer's jurisdiction, the seizure of the motorist by the officer is not unreasonable per se

under the Fourth Amendment." State v. Weideman, 764 N.E.2d 997, 1002 (Ohio 2002). "Therefore, the officer's statutory violation does not require suppression of all evidence flowing from the stop." Id.

[¶52] In reaching its determination that the law enforcement officer's statutory violation "[did] not rise to the level of a constitutional violation," the Ohio court relied on the factors that the law enforcement officer had probable cause to stop and detain Weideman, and that "*[t]he state's interest in protecting the public from a person who drives an automobile in a manner that endangers other drivers outweighs Weideman's right to drive unhindered.*" Id. at 1001 (emphasis added).

[¶53] In State v. Bickham, 404 So.2d 929, 932 (La. 1981), the "Defendant contend[ed] that the evidence [relating to his arrest for armed robbery] must be suppressed because the officers were beyond their territorial jurisdiction at the time of the initial stop." The Louisiana court determined that "[a]lthough the officer initiated his pursuit of defendant's vehicle within the city limits (his territorial jurisdiction), he did not actually initiate the stop until he was outside his territorial jurisdiction." Id.

[¶54] The court stated that "[e]ven if it is assumed that the officer . . . acted outside of his territorial jurisdiction, *the officer's conduct amounts to nothing more than a good faith statutory violation of a rule designed, not for the purpose of preventing unreasonable invasions of privacy, but for the delineation of the territorial zones of responsibility of various law enforcement agencies.*" Id. at 933 (emphasis added). "Exclusion of reliable evidence obtained in an otherwise legal and good faith seizure would *not serve the administration of justice or the*

purpose of the legislative directive of territorial responsibility." Id. (emphasis added).

[¶55] In State v. Keith, the Wisconsin Court of Appeals rejected Keith's argument that the results of his chemical test for intoxication "obtained pursuant to an investigatory stop by a police officer should have been suppressed because the stop occurred outside the officer's jurisdiction and the officer had no authority to conduct the stop." 2003 WI App 47, ¶ 1, 659 N.W.2d 403. The court stated "[s]uppression of evidence is 'only required when evidence has been obtained in violation of a defendant's constitutional rights, or if a statute specifically provides for the suppression remedy.'" Id. at ¶ 8 (quoting State v. Raflik, 2001 WI 129, ¶ 15, 636 N.W.2d 690) (citations omitted in original).

[¶56] The court noted that "Keith has failed to allege the violation of a constitutional right or the violation of a statute requiring suppression as a remedy." Id. at ¶ 7. See also People v. Ray, 109 P.3d 996, 999 (Colo. Ct. App. 2004) ("An arrest in violation of [statute concerning fresh pursuit by peace officer beyond officer's territorial limit] does not . . . mandate suppression of evidence obtained therefrom unless the statutory violation is either willful or so egregious as to violate the defendant's constitutional rights."); State v. Gadsden, 697 A.2d 187, 194 (N.J. Super. Ct. App. Div. 1997) ("We conclude that technical violation of a procedural law [concerning the jurisdictional limits of law enforcement] does not automatically render a search and seizure unreasonable and does not require the exclusion of evidence. However, violations of procedural rules which

assume constitutional dimensions may require the exclusion of evidence which has been seized as a result.").

[¶57] In this case, Krueger relies on Deputy Klegstad's alleged statutory noncompliance with the jurisdiction limitations under N.D.C.C. § 11-15-33 to invalidate his arrest and, consequently, to suppress his chemical test results. Krueger does not claim Deputy Klegstad's alleged statutory violation implicates any underlying constitutional rights. Krueger also does not claim the plain language of N.D.C.C. § 11-15-33 provides for suppression as a remedy. Cf. State v. O'Connor, 2016 ND 72, ¶ 8, 877 N.W.2d 312 (holding that "under the plain terms of N.D.C.C. § 39-20-01(3)(b), the Intoxilyzer test result is inadmissible in a criminal proceeding for driving under the influence" if the law enforcement officer provides "an incomplete advisory before administering the chemical test.").

[¶58] In Beylund v. Levi, the Court "adhere[d] to [its] decision in [Holte v. N.D. State Highway Comm'r, 436 N.W.2d 250, 252 (N.D. 1989)] and conclude[d] the exclusionary rule does not require exclusion of the results of the blood tests in these civil administrative license suspension proceedings." 2017 ND 30, ¶ 23, 889 N.W.2d 907. In reaching its determination, the Court stated "[t]he significant societal costs for drunk driving were extensively chronicled in Birchfield v. North Dakota, [--- U.S. ---, 136 S.Ct. 2160, 2166-70 (2016)]." Id. "There is minimal deterrence to law enforcement officers in applying the exclusionary rule to administrative proceedings because the criminal justice system already provides significant deterrence to law enforcement officers by excluding evidence in criminal prosecutions." Id.

[¶59] The pre-Beylund decision of the Court in Kroschel is distinguishable. In Kroschel, "[a]t no time during [the] incident was the officer or Kroschel on NDSU property." 2015 ND 185, ¶ 2. The NDSU law enforcement officer had no authority from the beginning. In this case, both Deputy Klegstad and Krueger began the pursuit in Traill County. Unlike with this case, the Department did not have Beylund under consideration and did not present an argument that the exclusionary rule did not apply to the specific facts of that administrative license suspension proceeding.

[¶60] The decision of the Court in Davis v. Director, North Dakota Department of Transportation, 467 N.W.2d 420 (N.D. 1991), is also distinguishable. Davis involved issues pertaining to the law enforcement officer's authority with respect to the Turtle Mountain Indian Reservation boundary, rather than the a county boundary, and Davis refused, rather than submitted to, a chemical test.

[¶61] As with the statute in Hamilton, section 11-15-33 "*was intended, not to create a new right of criminal defendants to exclusion of evidence, but rather to 'protect the rights and autonomy of local governments' in the area of law enforcement.*" 638 N.W.2d. at 97-98 (emphasis added). In addition, comparable to the reasoning in Weideman, "[*t]he state's interest in protecting the public from a person who drives an automobile in a manner that endangers other drivers outweighs [Krueger's] right to drive unhindered.*" 764 N.E.2d at 1001 (emphasis added).

[¶62] The exclusionary rule does not require exclusion of the results of Krueger's chemical test under the *specific facts* of this civil administrative license

suspension proceeding. The results of Krueger's Intoxilyzer test were admissible in this civil proceeding regardless of whether Deputy Klegstad may have acted outside his jurisdictional limits when he arrested Krueger in Grand Forks County.

III. Deputy Klegstad's request that Krueger submit to an additional Intoxilyzer test was reasonable due to the fact that results of Krueger's first test were inadmissible in this civil proceeding under N.D.C.C. § 39-20-01(3)(b).

[¶63] The Supreme Court has ruled that "[o]nce a motorist is in police custody and a chemical test has been *properly administered* yielding a readable result, the motorist has a right to refuse any subsequent chemical tests used for determining his or her blood alcohol content." Broeckel v. Moore, 498 N.W.2d 170, 173 (N.D. 1993) (emphasis added). The Court stated "[t]his prevents law enforcement officials not only from attempting a 'shopping spree' through the motorist's bodily fluids in search of evidence which would indicate a BAC of more than .10% . . . , but also prevents them from violating a motorist's Fourth, Fifth, and Fourteenth Amendment rights under the United States Constitution." Id. (internal citation omitted).

[¶64] Depending on the circumstances, "[a] motorist may be required to submit to a reasonable request for a second test. State v. Storbakken, 552 N.W.2d 78, 82 (N.D. 1996) (citing Geiger v. Hjelle, 396 N.W.2d 302 (N.D. 1986)). "Only unreasonable searches and seizures are prohibited" by the Fourth Amendment. Dorgan v. Gasser, 274 N.W.2d 173, 174 (N.D. 1978). For example, in Storbakken, the Court determined the law enforcement officer was justified in requesting Storbakken submit to a second breath test after the first test was

aborted "before Storbakken had the opportunity to give a breath sample." Id. at 80, 82.

[¶65] In this case, Krueger admits that because "[he] was not read the implied consent warning prior to this initial testing . . . [t]he initial invalid results . . . were inadmissible at any criminal or administrative proceeding." Appellant's Br. at ¶ 22. Krueger claims that as a consequence of having completed that test – *albeit*, the test admittedly being invalid and inadmissible in this proceeding – he had an absolute right to refuse further testing. Id. at ¶ 23. *Krueger seeks an absurd result* through his misrepresentation of Broeckel.

[¶66] The Broeckel Court recognized that challenges to the proper administration of a chemical test may take the form of "the *procedural or substantive validity of the blood test* taken at the direction of the law enforcement officer." 498 N.W.2d at 173. (emphasis added). Deputy Klegstad's failure to first inform Krueger of the implied consent advisory – as Krueger readily admits – affected the procedural validity of the initial test under N.D.C.C. § 39-20-01(3)(b).

[¶67] N.D.C.C. § 39-20-01(1) provides that "[a]ny individual who operates a motor vehicle on a highway . . . is deemed to have given consent, and *shall consent . . . to a chemical test, or tests*, of the . . . breath . . . for the purpose of determining the alcohol concentration . . . in the individual's . . .breath." N.D.C.C. § 39-20-01(1) (emphasis added). Under the circumstances of this case, Krueger was required to submit to Deputy Kelgstad's reasonable request for a second test.

IV. Krueger is not entitled to an award of attorney fees and costs under N.D.C.C. § 28-32-50(1) in the event the hearing officer's decision is not affirmed by the Supreme Court.

[¶68] "[Section 28-32-50, N.D.C.C.,] sets forth a two-part test which must be met in order to properly award attorney fees: first, the nonadministrative party must prevail, and second, the agency must have acted without 'substantial justification.'" Kroschel, at ¶ 35 (quoting Lamplighter Lounge, Inc. v. State, 523 N.W.2d 73, 75 (N.D. 1994) (alteration in Kroschel). As "summarized in Lamplighter Lounge, Inc. v. State:

> . . . The second requirement is shaped by our definition of substantial justification. In defining this term we have been guided by the United States Supreme Court's definition of the term 'substantially justified.' There it was said that substantially justified means 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person. A position may be justified, despite being incorrect, so long as a reasonable person could think that it has a reasonable basis in law and fact. Substantial justification represents a middle ground between the automatic award of fees to the prevailing party on one side, and awarding fees only when a position is frivolous or completely without merit on the other."

Id. (quoting Lamplighter Lounge, at 75 (original internal citations and quotation marks omitted in Kroschel). "Merely because an administrative agency's actions are not upheld by a court does not mean that the agency's action was not substantially justified." Id. (quoting Tedford v. Workforce Safety & Ins., 2007 ND 142, ¶ 25, 738 N.W.2d 29).

[¶69] In this case, Krueger did not prevail before either the hearing officer or the District Court and, therefore, the first requirement of section 28-32-50, has not been satisfied. Both the hearing officer and District Court believed a reasonable basis in law and fact existed to suspend Kreuger's driving privileges. Krueger is

not entitled to an award of attorney fees and costs under N.D.C.C. § 28-32-50(1) in the event the hearing officer's decision is not affirmed by the Supreme Court.

CONCLUSION

[¶70] The Department requests this Court affirm the Judgment of the Traill County District Court and affirm the Hearing Officer's Decision suspending Krueger's driving privileges for a period of two years.

Dated this 9th day of February, 2018.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Courtney Thomas Krueger, Appellant, v. Thomas Sorel, Director, Department of Transportation, Appellee.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20170425** **District Ct. No. 49-2017-CV-00092**

[¶1] The undersigned certifies pursuant to N.D.R. App. P. § 32(a)(8)(A), that the text of Appellee's Brief (excluding the table of contents and table of authorities) contains 6,603 words.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 word processing software in Arial 12 point font.

Dated this 9th day of February, 2018.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Courtney Thomas Krueger, Appellant, v. Thomas Sorel, Director, Department of Transportation, Appellee.	**AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL** **Supreme Ct. No. 20170425** **District Ct. No. 49-2017-CV-00092**

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

[¶1] Karen Roberts 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 9th day of February, 2018, I served the attached **BRIEF OF APPELLEE and APPENDIX TO BRIEF OF APPELLEE** upon Courtney Thomas Krueger, by and through her attorneys Mark R. Friese and Drew J. Hushka, by electronic mail as follows:

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Karen Roberts

Subscribed and sworn to before me
this 9th day of February, 2018.

Notary Public

DONNA J CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2021