20170425
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 26, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Courtney Thomas Krueger, Appellant, vs. Grant Levi, Director Department of Transportation, Appellee.	**SUPREME COURT NO. 20170425** District Court No. 49-2017-CV-00092

ON APPEAL FROM AN ORDER AFFIRMING AN
ADMINISTRATIVE HEARING OFFICER'S DECISION,
ENTERED NOVEMBER 1, 2017
TRAILL COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
THE HONORABLE SUSAN L. BAILEY, PRESIDING

REPLY BRIEF

Drew J. Hushka (#08230)
dhushka@vogellaw.com
Mark A. Friese (#05646)
mfriese@vogellaw.com
VOGEL LAW FIRM
Attorneys for Appellant
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

North Dakota Cases

Cases From Other Jurisdictions

Statutes

Other Authorities

LAW AND ARGUMENT

I. The Extra-Jurisdictional Arrest or Mr. Krueger Requires Reversal of the License Suspension

A. Deputy Klegstad Exceeded Legislative Jurisdictional Limits

1. The Hearing Officer Found Deputy Klegstad Arrested Mr. Krueger Beyond 1,500 Feet of Traill County

[¶1] County law enforcement can act up to 1,500 feet outside its county. N.D.C.C. § 11-15-33(1). The hearing officer specifically found law enforcement arrested Mr. Krueger "approximately 1/2 mile north of mile marker 139." App., at 49, lns. 17-18. Evidence supports this finding. Id. at 10, lns. 6-8. No additional findings regarding location were made. See generally id. at 49-51 lns. 7-16. The Department cannot define "approximately 1/2 mile north of mile marker 139" as a "quarter mile" into Grand Forks County when the hearing officer implicitly rejected the finding. Compare id. at 8, lns. 5-6 (testimony Mr. Krueger was seized "about a quarter mile north into Grand Forks County"), with id. at 49, lns. 17-18 (finding Mr. Krueger was seized "approximately 1/2 mile north of mile marker 139"). By refusing to conclude the arrest complied with Section 11-15-33(1), the hearing officer necessarily found the arrest occurred beyond 1,500 feet of Traill County. Cf. Maher v. North Dakota Dep't of Transp., 510 N.W.2d 601, 603 n.1 (N.D. 1994) (hearing officer necessarily found delay permitting escape existed by concluding "hot-pursuit" authority existed). The Department cannot amend the hearing officer's supported findings to ratify its own predetermined result. Id.

2. Deputy Klegstad Exceeded Legislative Hot-Pursuit Authority

[¶2] County law enforcement may arrest outside its county if in fresh pursuit,[1] and if necessary to prevent escape. N.D.C.C. § 11-15-33(2). A reasoning mind could not find Mr. Krueger would have escaped without Deputy Klegstad's arrest. Cf. Kraft v. North Dakota Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572 (factual findings review limited to whether "a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence").

[¶3] The hearing officer did not explicitly find Mr. Krueger would have escaped without Deputy Klegstad's arrest. See generally App., at 49-51 lns. 7-16. The hearing officer found Mr. Krueger cooperated fully. Id. at 49-50, lns. 18-7. The Department fails to articulate how cooperation posed a risk of "escape." Cf. Black's Law Dictionary 623 (Bryan A. Garner ed., 9th 2009) (defining "escape" as "[t]he act or instance of breaking free from confinement, restraint, or an obligation" or "[a]n unlawful departure from legal custody without the use of force").

[¶4] Instead, the Department argues Mr. Krueger risked escaping punishment. Appellant's Br., ¶¶ 44-46. The Department argues, because "[t]he Grand Forks County deputy had no personal knowledge[,]" the deputy could not arrest Mr. Krueger. Id. at ¶ 44. Even under the Department's creative theory, the collective knowledge doctrine establishes probable cause, fully negating the Department's claim. See City of Minot v. Keller, 2008 ND 38, ¶ 10, 745 N.W.2d 638. It is impossible to prevent escape under the Department's theory if the physical presence of law enforcement with jurisdiction—ready and able to arrest—does not prevent a suspect's escape.

[1] Mr. Krueger does not contest fresh pursuit.

B. Exceeding Legislative Jurisdictional Limits Requires Reversal

[¶5] The Department argues the Court should not enforce legislative limits on jurisdiction. See generally Appellee's Br., ¶¶ 47-62. No compelling reason exists to disregard precedent. In Kroschel v. Levi, 2015 ND 185, 866 N.W.2d 109, this Court reversed a license suspension when law enforcement arrested without jurisdiction. See generally id. at ¶¶ 7-37. The Department argues Kroschel does not control because, there, law enforcement acted without "authority from the beginning." Appellee's Br., ¶ 59. This Court's Kroschel holding placed no weight on the origin of the investigation—the holding relied on the lack of jurisdiction to arrest. See 2015 ND 185, ¶ 36. The same controls here: the Legislature did not grant Deputy Klegstad authority to arrest Mr. Krueger, and his license cannot be suspended from the invalid arrest.

[¶6] In State v. Demars, 2007 ND 145, 738 N.W.2d 486, this Court reversed a motorist's conviction for driving under the influence when the State failed to establish law enforcement's jurisdiction to arrest. Id. at ¶¶ 8-21. In Davis v. Director, North Dakota Dep't of Transp., 467 N.W.2d 420 (N.D. 1991), this Court held licenses cannot be suspended for refusing a chemical test when law enforcement lacked authority to request the test. Id. at 423. Even if Deputy Klegstad could arrest as an ordinary citizen, he lacked authority to request a chemical test. Id. It defies logic to acknowledge Deputy Klegstad could not lawfully arrest or request a chemical test, but to allow use of the resulting illegally obtained results. See also Sec. II(B), infra (samples must be properly obtained to be useable).

[¶7] The Department cites out-of-state decisions to argue an invalid arrest provides no remedy. See Appellee's Br., ¶¶ 49-56. Other jurisdictions confirm invalid arrests foreclose punishment. See Forste v. Benton, 792 S.W.2d 910, 915 (Mo. Ct. App. 1990);

Love v. State, 687 S.W.2d 469, 477 (Tex. App. 1989), overruled on other grounds, Angel v. State, 70 S.W2d 727 (Tex. Crim. App. 1987). No reason exists to depart from precedent. Kroschel, 2015 ND 185, ¶ 36; Demars, 2007 ND 145, ¶ 21; Davis, 467 N.W.2d at 423.

[¶8] The Department's authority derives from statute. Aamdt v. North Daokta Dep't of Transp., 2004 ND 134, ¶ 15, 682 N.W.2d 308. Because Deputy Klegstad exceeded authority granted by the Legislature, the Department lacks authority to suspend. Cf. also State v. Jordheim, 508 N.W.2d 878, 882 (N.D. 1993) (evidence use requires a "test [that] was the result of a valid arrest").

II. Statute Forbids Use of Mr. Krueger's Successive Test Results

A. Deputy Klegstad Subjected Mr. Krueger to Unreasonable Search

[¶9] A motorist can refuse successive testing when a "properly administered" test yields a readable result. Broeckel v. Moore, 498 N.W.2d 170, 173 (N.D. 1993). Because Mr. Krueger submitted to a properly administered chemical test yielding a readable result, coerced subsequent testing was unreasonable.

[¶10] The Department argues Mr. Krueger admits the invalidity of the initial test. See Appellee's Br., ¶ 65 (quoting Appellant's Br., ¶ 22)). From the outset, Mr. Krueger argued the validity of the initial test. See App., at 48, lns. 5-12 (arguing Mr. Krueger had the right to refuse additional testing after the initial valid test); see also Appellant's Br., ¶ 22 ("The initial valid results, therefore, were inadmissible at any criminal or administrative proceeding." (emphasis added)). "Properly administered" is a term of art requiring law enforcement's scrupulous compliance with the State Toxicologist's testing methods. See Johnson v. North Dakota Dep't of Transp., 2004 ND 59, ¶ 12, 676 N.W.2d

807. The Department agrees the initial test complied with the State Toxicologist's methods. See App., at 56-65; Appellee's Br., ¶¶ 63-66. Broeckel, therefore, applies.

[¶11] The Department, nevertheless, argues successive testing is permissible. Appellee's Br., ¶ 64 (citing State v. Storbakken, 552 N.W.2d 78 (N.D. 1996)). In Storbakken, a motorist arrested for driving under the influence underwent repeated testing when the Intoxilyzer malfunctioned. Id. at 80. This Court distinguished Broeckel because "the first test record was defective and the test was aborted before [the motorist] could provide breath samples." Id. at 82 (emphasis added). Storbakken does not apply to here because the initial sample yielded a readable result. Mr. Krueger, therefore, possessed the right to refuse subsequent testing. Broeckel, 498 N.W.2d at 173. Deputy Klegstad improperly coerced Mr. Krueger into successive testing by threatening him with criminal charges if he permissibly exercised his rights.

B. Improperly Obtained Evidence Cannot be Used.

[¶12] In Beylund v. Levi, 2017 ND 30, 889 N.W.2d 907, this Court held evidence obtained in violation of the Fourth Amendment may be used in administrative hearings. Id. at ¶ 28. This Court reasoned the illegal search, not the use of the evidence, constitutes the violation. Id. at ¶ 26 (citing omitted). Instead, this Court held admissibility of evidence is strictly a statutory issue. Id. at ¶ 25 (citing N.D.C.C. § 39-20-07(5)).

[¶13] Chemical test evidence must be considered if:

> the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee.

N.D.C.C. § 39-20-07(5) (emphasis added). Statutory words are afforded their ordinary meaning. N.D.C.C. § 1-02-02; State v. Thill, 468 N.W.2d 643, 646 (N.D. 1991). Use of the word "and" is conjunctive, meaning "in addition to." State v. Martin, 2011 ND 6, ¶ 7, 793 N.W.2d 188 (citation omitted). Statutory interpretation affords meaning to every word, avoiding surplusage. State v. Laib, 2002 ND 95, ¶ 13, 644 N.W.2d 878. Test results are admissible, therefore, if: (1) the sample was properly obtained; and (2) the test was fairly administered; and (3) the methods of the State Toxicologist were complied with; and (4) the test administrator was properly qualified. State, ex rel. Roseland v. Herauf, 2012 ND 151, ¶ 12, 819 N.W.2d 546 (citing N.D.C.C. § 39-20-07(5)).

[¶14] While this Court has found compliance with established methods can satisfy Section 39-20-07(5), use of the conjunctive "and" requires that test samples are also "properly obtained" and that tests are also "fairly administered." N.D.C.C. § 39-20-07(5). Indeed, in State v. Schneider, 270 N.W.2d 787 (N.D. 1978), this Court recognized compliance with established methods alone does not necessarily satisfy Section 39-20-07(5). Id. at 791. Likewise, in Jordheim, this Court recognized an invalid arrest or precondition issues can bar evidence use. Id. 508 N.W.2d at 882.

[¶15] By incorrectly threatening Mr. Krueger with criminal charges, Deputy Klegstad failed to properly obtain the sample. Broeckel v. Moore, 498 N.W.2d at 173. Evidence obtained in contravention to a motorist's rights is not "properly" obtained. Cf. Merriam-Webster's Online Dictionary (providing a legal definition of "proper" as "marked by fitness or correctness" or "being in accordance with established procedure, law, jurisdiction, or standards of care, fairness, and justice"), available at https://www.merriam-webster.com/dictionary/properly (last visited Feb. 26, 2018). A

sample is not "properly obtained" if a motorist's rights are violated. See Fasching v. Backes, 452 N.W.2d 324, 326 (N.D. 1990) (Levine, J., dissenting). Because Deputy Klegstad exceeded jurisdiction and subjected Mr. Krueger to an unreasonable search via successive testing, the improperly obtained test results cannot be used.

III. Mr. Krueger is Entitled to Fees and Costs

[¶16] Mr. Krueger is entitled to attorney fees and costs if he prevails and the Department acted without substantial justification. See N.D.C.C. § 28-32-50(1). A decision is substantially justified if "a reasonable person could think that it has a reasonable basis in law and fact." Lamplighter Lounge, Inc. v. State ex rel. Heitkamp, 523 N.W.2d 73, 75 (N.D. 1994) (citations and internal quotations omitted). The Department argues "substantial justification" because the hearing officer's decision was upheld by the district court. Appellee's Br., ¶ 69. The Department acted without substantial justification because it fails to provide any justification for why law enforcement acted beyond the jurisdictional limits established by the Legislature, or contrary to this Court's precedent. See Kroschel, 2015 ND 185, ¶ 36; Demars, 2007 ND 145, ¶ 21; Davis, 467 N.W.2d at 423; Broeckel, 498 N.W.2d at 173.

CONCLUSION

[¶17] The Legislature and this Court have spoken—the Legislature establishes law enforcement's jurisdiction, and punishment cannot stem from extra-jurisdictional arrests. Kroschel, 2015 ND 185, ¶ 36; Demars, 2007 ND 145, ¶ 21; Davis, 467 N.W.2d at 423. The Department offers no compelling reason to either redefine jurisdiction by judicial fiat, or to ignore binding precedent. Furthermore, this Court established an individual's constitutional right to refuse successive chemical testing. Broeckel, 498 N.W.2d at 173. The Department offers no compelling reason to reduce a motorist's constitutional rights,

or to permit use of improperly obtained evidence. The Court should reverse Mr. Krueger's license suspension, awarding costs and fees in his favor.

Respectfully submitted February 26, 2018.

VOGEL LAW FIRM

By: */s/ Drew J. Hushka*

Drew J. Hushka (#08230)
Mark A. Friese (#05646)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983
ATTORNEYS FOR APPELLANT

IN SUPREME COURT
STATE OF NORTH DAKOTA

Courtney Thomas Krueger, Appellant, vs. Grant Levi, Director, Department of Transportation , Appellee.	**SUPREME COURT NO. 20170425** District Court No. 49-2017-CV-00092 **CERTIFICATE OF ELECTRONIC SERVICE**

[¶1] I hereby certify that on February 26, 2018, the following document:

APPELLANT'S REPLY BRIEF
(REVISED PER SUPREME COURT CLERK'S EMAIL DATED 02.26.18)

was e-mailed to the address below and are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail:

DOUGLAS ANDERSON
DBANDERS@ND.GOV

Dated: February 26, 2018

/s/ Drew J. Hushka

Drew J. Hushka (#08230)
Mark A. Friese (#05646)
VOGEL LAW FIRM
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983
E-mail: dhushka@vogellaw.com
mfriese@vogellaw.com
ATTORNEYS FOR APPELLANT