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FILED
IN THE OFFICE OF THE
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MARCH 11, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ewer N. Alvarado,	)	
	)	
Appellee,	)	**Supreme Ct. No. 20190032**
	)	
v.	)	
	)	**District Ct. No. 13-2018-CV-00106**
North Dakota Department	)	
of Transportation,	)	**ORAL ARGUMENT REQUESTED**
	)	
Appellant.	)	

APPEAL FROM THE JANUARY 11, 2019,
JUDGMENT OF THE DISTRICT COURT
DUNN COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE JAMES D. GION

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph(s)

Cases

Statutes

Other Authorities

STATEMENT OF ISSUE

[¶1] Whether the District Court erred in granting Alvarado's appeal and reversing the Hearing Officer's Decision when it determined that the law enforcement officer's omission of the criminal penalties for refusing a chemical test from the implied consent advisory was an issue in this administrative proceeding due to the fact Alvarado refused the chemical test.

STATEMENT OF CASE

[¶2] Dunn County Sheriff's Deputy Nicky Barnhard ("Deputy Barnhard") arrested Alvarado on May 26, 2018, for the offense of driving while under the influence of intoxicating liquor. Appendix to Brief of Appellant ("Dep't App.") at 7. After the conclusion of the July 9, 2018, administrative hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Alvarado's driving privileges for a period of 180 days. Id. at 8.

[¶3] Alvarado submitted a Petition for Reconsideration, which the hearing officer denied. Register of Actions ("R.") at Index ## 11 & 12. Alvarado requested judicial review of the hearing officer's decision. Dep't App. at 9-10. The District Court reversed the Hearing Officer's Decision. Id. at 11-17. The Department has appealed the District Court's Judgment. Id. at 21-22.

REQUEST FOR ORAL ARGUMENT

[¶4] The Department requests the Court schedule oral argument in this case under N.D. R. App. P. 28(h). This matter involves the statutory interpretation of North Dakota's implied consent law under N.D.C.C. § 39-20-01(3) and oral argument would be helpful in the Court's de novo review of the District Court's

decision and the Hearing Officer's decision.

STATEMENT OF FACTS

[¶5] On May 26, 2018, Deputy Barnhard stopped a vehicle that was being driven by Alvarado after he observed it travelling at a "speed of 90 miles per hour in a 55 mile per hour zone." Transcript ("Tr.") at 3, l. 21 – 4, l. 14. After observing indicia of Alvarado's intoxication and administering field sobriety tests, which indicated Alvarado was impaired, Deputy Barnhard placed Alvarado under arrest for driving under the influence of alcohol. Id. at 5, l. 18 – 11, l. 11.

[¶6] Deputy Barnhard testified he transported Alvarado to the Dunn County Sheriff's Office where he advised him of the implied consent advisory and "asked him to give two breath samples on the Intoxilyzer 8000," to which "Alvarado said no." Id. at 11, l. 20 – 12, l. 1. Deputy Barnhard explained "I told him I needed a yes or no answer and he said no." Id. at 12, ll. 11-12.

[¶7] Deputy Barnhard testified he informed Alvarado of the implied consent advisory which he had saved on his phone as:

> As a condition of operating a motor vehicle on a highway, or on a public or private area, to which the public has right of access to, you have consented to taking a test to determine whether you are under the influence of alcohol or drugs.
>
> I must inform you that North Dakota law requires you take the breath chemical test to determine whether you are under the influence of alcohol or drugs. Refusal to take a breath screening test may result in a revocation of your driver's license for a minimum of 180 days or up to three years.

Id. at 26, l. 20 – 27, l. 11. When asked whether he told Alvarado "it was a crime to refuse the test when you read the implied consent advisory," Deputy Barnhard responded "I don't think there was a piece in there saying it was a crime. I'd have

to look at it again" and then "[i]t doesn't say anything about a crime in there, no." Id. at 29, ll. 6-13. When further asked whether he told Alvarado "it was a crime to refuse the … and it was in the same manner as driving under the influence," Deputy Barnhard responded "I did not." Id. at 29, ll. 14-17.

STATEMENT OF ADMINISTRATIVE PROCEEDING

[¶8] At the hearing, Alvarado objected to the introduction of Exhibit 1 on the basis "this should not be considered a refusal without the proper implied consent reading under 39-20-01." Id. at 29, l. 21 – 30, l. 2. Alvarado submitted a Post-Hearing Brief in which he argued:

> [¶7] . . . . [T]he officer simply read the administrative sanctions without reading any criminal sanctions for refusing a chemical test.
>
> [¶8] Because N.D.C.C. § 39-20-01(3)(a) was not complied, there was not a "valid request for testing under the statute." Without that required valid request for testing under the statute, there can be no "refusal" to submit to testing under Section 39-20-01.

R. at Index # 10 (citations omitted).

[¶9] The hearing officer determined:

> Deputy Barnhard read a partial implied consent advisory, informing Mr. Alvarado that the law required him to take a chemical test and that refusal to take the test could result in the revocation of his driving privileges. Deputy Barnhard did not inform Mr. Alvarado that refusal of the chemical breath test was a crime punishable in the same manner as a DUI. Mr. Alvarado refused to take the requested test. The temporary operators permit was properly issued. The report and notice form was properly sent to the NDDOT.

Dep't App. at 6. The hearing officer concluded "Mr. Alvarado was placed under arrest. Mr. Alvarado refused to submit to the test or tests." Id. The hearing officer revoked Alvarado's driving privileges for a period of 180 days. Id.

[¶10] Alvarado submitted a Petition for Reconsideration, which the hearing officer

denied. R. at Index ## 11 & 12. Alvarado requested judicial review of the Hearing Officer's Decision alleging:

> 1) There was no valid request for the chemical test under N.D.C.C. § 39-20-01 and as a result, there was no "refusal" to submit to testing. In this case, the officer did not read the full implied consent advisory required under N.D.C.C. ¶ 39-20-01(3) before requesting testing. In *Throlson v. Backes*, 466 N.W.2d 124 (N.D.1991), the Supreme Court held, "[I[t is axiomatic that before there can be a "refusal" to submit to testing under Section 39-20-01, *there must be a valid request for testing under the statute." Id.* at 127. (emphasis added).
>
> 2) In order to proceed to a chemical test, the officer must read the implied consent advisory. Prior to the amendments to N.D.C.C. § 39-20-05, which covers the issues in this proceeding, the failure to read the implied consent advisory was not an issue to be addressed at the hearing. However, in 2015, the legislature removed that prohibiting language from the statute, thereby making the issue of the reading of the implied consent advisory mandatory and an issue to be addressed at the administrative hearing.
>
> 3) In this case, the Department did not establish a full and proper reading of the North Dakota Implied Consent Advisory to Mr. Alvarado. That required reading of N.D.C.C. § 39-20-01(3)(a), which requires that, "In addition, the law enforcement officer shall inform the individual refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence." was not read to Mr. Alvarado. Instead, the officer simply read the administrative sanctions without reading any criminal sanctions for refusing a chemical test. Because N.D.C.C. § 39-20-01(3)(a) was not complied, there was no "valid request for testing under the statute." *Throlson v. Backes, supra.* Without that required valid request for testing under the statute, there can be no "refusal" to submit to testing under Section 39-20-01. *Throlson v. Backes, supra* at 127.

Dep't App. at 9-10.

[¶11] The District Court issued its Memorandum Opinion and Order Reversing the Hearing Officer's Decision in which the Court granted Alvarado's appeal by stating:

[6] . . . . For a refusal of a chemical test to be valid, it must be preceded by a valid request. "It is axiomatic that before there can be a 'refusal' to submit to testing under Section 39-29-01, there must be a valid request for testing under the statute." Throlson v. Backes, 466 N.W.2d 124, 126 (N.D. 1991).

[7] It is undisputed that Deputy Barnhard failed to read the complete implied consent advisory. The Department argues that since Alvarado was informed of the civil sanctions for refusing a chemical test, administrative proceedings are appropriate. Alvarado argues that since he was not given a complete implied consent advisory, his refusal was not valid.

[8] Section 39-20-01(3) (a) requires that the arresting officer warn individuals of the potential civil and criminal sanctions for refusing a chemical test. The language used by the legislature in the statute is compulsory and therefore neither the arresting officer nor the Department of Transportation have the authority to change the requirements. The Department's contention that Alvarado only needed to be informed of the consequences of the administrative proceedings contradicts the plain meaning of the statute and may result in a dangerous precedent. Since the legislature has created specific warnings that must be read, officers do not have the authority to choose what type of sanctions an individual may receive based upon the part of the warning they decide to read.

[9] The court recognizes that there may be circumstances when it is not possible for an arresting officer to read a complete implied consent advisory, but there is nothing in the record to indicate that such circumstances were present in this case. Alvarado's conduct did not prevent Deputy Barnhard from reading a complete implied consent advisory after he arrested Alvarado. Rather, Deputy Barnhard had an incomplete warning saved on his phone which he read to Alvarado. Furthermore, although the hearing officer recognized that an incomplete warning was read to Alvarado in her finding of facts, she did not address the incomplete warning in her conclusion. Based on current law, a reasonable person would have found that Alvarado's refusal was invalid since Deputy Barnhard failed to read a complete implied consent advisory.

[12] Thus, for the reasons stated above, it is the ORDER of this Court that the decision of the hearing officer suspending Mr. Alvarado's driving privileges for 180 days is hereby REVERSED and Mr. Alvarado's license shall be reinstated immediately.

Id. at 15-17.

[¶12] Judgment was entered on January 11, 2019. Id. at 19. The Department appealed the Judgment to the North Dakota Supreme Court. Id. at 21-22. The Department claims:

> [T]he District Court erred in granting Alvarado's appeal and reversing the Hearing Officer's Decision when it determined that the law enforcement officer's omission from the implied consent advisory of the phrase that "refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence" was an issue in this administrative proceeding due to the fact Alvarado refused the chemical test.

Id. The Department requests this Court reverse the Judgment of the Dunn County District Court and affirm the Hearing Officer's Decision revoking Alvarado's driving privileges for a period of 180 days.

STANDARD OF REVIEW

[¶13] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to revoke driving privileges." Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶14] "In an appeal from a district court's review of an administrative agency's decision, [the Court] review[s] the agency's decision." Haynes, 2014 ND 161, ¶ 6, 851 N.W.2d 172. 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.

[¶15] "Statutory interpretation is a question of law, which is fully reviewable on appeal." Zajac v. Traill Cty. Water Res. Dist., 2016 ND 134, ¶ 6, 881 N.W.2d 666 (citing Nelson v. Johnson, 2010 ND 23, ¶ 12, 778 N.W.2d 773). "The primary purpose of statutory interpretation is to determine the intention of the legislation." Id. (citing In re Estate of Elken, 2007 ND 107, ¶ 7, 735 N.W.2d 842). "Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears." Id. (citing N.D.C.C. § 1-02-02). "Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language." N.D.C.C. § 1-02-03, see also In re F.F., 2006 ND 47, ¶ 13, 711 N.W.2d 144 ("The legislature adheres to commonly accepted grammatical rules.").

[¶16] "If the language of a statute is clear and unambiguous, 'the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.'" Zajac, 2016 ND 134, ¶ 6, 881 N.W.2d 666 (citing N.D.C.C. § 1-02-05) (alteration added in Zajac). "If the language of the statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute." Id. (citing N.D.C.C. § 1-02-39).

[¶17] "Further, [the Court] 'construe[s] statutes to avoid absurd or illogical results.'" State v. Stegall, 2013 ND 49, ¶ 16, 828 N.W.2d 526 ((quoting Mertz v. City of Elgin, Grant Cty., 2011 ND 148, ¶ 7, 800 N.W.2d 710) (citing N.D.C.C. § 1-02-38 ("In enacting a statute, it is presumed that: ... [a] just and reasonable result is intended.")). "Extrinsic aids may be used to interpret a statute to avoid an absurd result and to determine whether the interpretation is consonant with legislative intent." Id. (internal and external citations omitted).

LAW AND ARGUMENT

The District Court erred in granting Alvarado's appeal and reversing the Hearing Officer's Decision when it determined that the law enforcement officer's omission of the criminal penalties for refusing a chemical test from the implied consent advisory was an issue in this administrative proceeding due to the fact Alvarado refused the chemical test.

[¶18] "'Section 39-20-01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general.'" State v. O'Connor, 2016 ND 72, ¶ 7, 877 N.W.2d 312 (quoting State v. Bauer, 2015 ND 132, ¶ 7, 863 N.W.2d 534 (quoting State v. Birchfield, 2015 ND 6, ¶ 7, 858 N.W.2d 302)). At the time Bauer was arrested in February 2014, section 39-20-01(3), N.D.C.C., provided:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a

> crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges. . . .

N.D.C.C. § 39-20-01(3) (2013) (2013 N.D. Sess. Laws ch. 301, § 11). The Bauer Court cited the judicially created remedy of Throlson v. Backes, that, as the consequence for failing to inform the individual of the implied consent advisory, "it is axiomatic that before there can be a 'refusal' to submit to testing under Section 39-20-01, there must be a valid request for testing under the statute." Bauer, 2015 ND 132, ¶ 7, 863 N.W.2d 534 (quoting Throlson, 466 N.W.2d 124, 126 (N.D. 1991)).

[¶19] "Section 39-20-01(3), N.D.C.C., was amended by the Legislature in 2015 to add subdivision b." O'Connor, 2016 ND 72, ¶ 7, 877 N.W.2d 312. Subdivision b "attached specific consequences to an officer's failure to give the advisory *after* the defendant's arrest and before submitting to a chemical test." Id. at ¶ 11 (emphasis added in original) (citing 2015 N.D. Sess. Laws ch. 268, § 9 (Senate Bill No. 2052)). Section 39-20-1(3), as further amended by the 2017 Legislature, currently provides:

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

> *b. A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a.*

N.D.C.C. § 39-20-01(emphasis added). "Under N.D.C.C. § 39-20-01(3)(b), a breath test is not admissible in an administrative proceeding if the arresting officer fails to inform the individual as required under N.D.C.C. § 39-20-01(3)(a)." LeClair v. Sorel, 2018 ND 255, ¶ 8, 920 N.W.2d 306.

[¶20] "The implied consent statute directs that specific information must be communicated by law enforcement to an individual arrested for driving under the influence." Id. (citing N.D.C.C. § 39-20-01(3)(a); O'Connor, 2016 ND 72, ¶¶ 8, 11, 877 N.W.2d 312; O'Connor, at ¶ 18 (VandeWalle, C.J., concurring specially) ("the Legislature has established a bright line and the statutes leave no room for this Court to engage in a determination of legislative intent or whether or not a person was disadvantaged by an incorrect or incomplete advisory")). "Unless all substantive information in N.D.C.C. § 39-20-01(3)(a) is communicated to the driver, chemical test results are not admissible." Id. (citing N.D.C.C. § 39-20-01(3)(b)). "The consequence of an officer's failure to convey the required information is exclusion of the test results." Id. (citing O'Connor, at ¶ 14; State v. Bohe, 2018 ND 216, ¶ 16, 917 N.W.2d 497; Schoon v. N.D. Dep't of Transp., 2018 ND 210, ¶ 19, 917 N.W.2d 199).

[¶21] "Where a statute creates a right and provides a special remedy, that remedy is exclusive." McQueary v. Colvin, CIVIL ACTION NO. 3:15-CV-00068-CHL, 2017 WL 63034, at *4 (W.D. Ky. Jan. 4, 2017) (citing United States v. Babcock, 250 U.S.

328, 331 (1919) ("These general rules are well settled: (1) That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts. (2) That where a statute creates a right and provides a special remedy, that remedy is exclusive") (internal citations omitted)).

[¶22] Section 39-20-03 creates a right to be informed that "refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence," and provides a special remedy. When the Legislature amended section 39-20-01(3)(b) in 2015, the only remedy provided for the failure to advise an individual of the implied consent advisory was the exclusion of the test results. Whether by intention or omission, the Legislature did not provide a remedy to address the admissibility of proof of an individual's refusal to submit to a test in "any civil or criminal action" under N.D.C.C. § 39-20-08 in the event the individual was not informed as required under N.D.C.C. § 39-20-01(3)(a).

[¶23] The 2015 Legislature should have been aware of any perceived need for including such a corresponding remedy when, as part of the same legislation within Senate Bill No. 2052 that added N.D.C.C. § 39-20-01(3)(b), the Legislature amended N.D.C.C. § 39-20-05(2) and (3) to remove those provisions which specifically excluded from consideration at the administrative hearing "[w]hether the individual was informed that the privilege to drive might be suspended based on the results of the test," and "[w]hether the person was informed that the privilege to drive would be revoked or denied for refusal to submit to the test or tests." 2015 N.D. Sess. Laws ch. 268, § 11 (Senate Bill No. 2052).

[¶24] "When engaging in statutory interpretation, this Court has consistently

recognized that it must be presumed the legislature intended all that it said, said all that it intended to say, and meant what it has plainly expressed." Estate of Christeson v. Gilstad, 2013 ND 50, ¶ 12, 829 N.W.2d 453 (citing Bornsen v. Pragotrade, LLC, 2011 ND 183, ¶ 14, 804 N.W.2d 55; State v. Dennis, 2007 ND 87, ¶ 12, 733 N.W.2d 241). The Court "must further presume that the legislature made no mistake in expressing its purpose and intent." Id. at ¶ 14 (citing Public Serv. Comm'n v. Wimbledon Grain, 2003 ND 104, ¶ 28, 663 N.W.2d 186; Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993)).

[¶25] "Consequently, we will not correct an alleged legislative 'oversight' by rewriting unambiguous statutes to cover the situation at hand." Id. (quoting Wimbledon Grain, 2003 ND 104, ¶ 28, 663 N.W.2d 186; citing Van Klootwyk v. Baptist Home, Inc., 2003 ND 112, ¶ 19, 665 N.W.2d 679; N.D.C.C. § 1-02-05 ("When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.")). "This Court is not free to 'amend' or 'clarify' the clear language of the statute, and 'if changes are to be made in the statute, we leave that matter to the legislature, as "it is for the legislature to determine policy, not for the courts."'" Id. (quoting Doyle v. Sprynczynatyk, 2001 ND 8, ¶ 14, 621 N.W.2d 353 (quoting Treiber v. Citizens State Bank, 1999 ND 130, ¶ 16, 598 N.W.2d 96); citing Bornsen, 2011 ND 183, ¶ 14, 804 N.W.2d 55).

[¶26] Section 39-20-1(3)(b) provides the exclusive remedy in the event "the law enforcement officer fails to inform the individual charged as required under subdivision a." N.D.C.C. § 39-20-1(3)(b). "The consequence of an officer's failure

to convey the required information is exclusion of the test results." LeClair, 2018 ND 255, ¶ 9, 920 N.W.2d 306. The plain language of section 39-20-1(3)(b) does not provide for the exclusion of proof of an individual's refusal to submit to a test in "any civil or criminal action" under N.D.C.C. § 39-20-08.

[¶27] The District Court erred in granting Alvarado's appeal and reversing the Hearing Officer's Decision when it determined that the law enforcement officer's omission of the criminal penalties for refusing a chemical test from the implied consent advisory was an issue in this administrative proceeding due to the fact Alvarado refused the chemical test.

CONCLUSION

[¶28] The Department requests this Court reverse the January 11, 2019, Judgment of the Dunn County District Court and affirm the Hearing Officer's Decision revoking Alvarado's driving privileges for a period of 180 days.

Dated this 11th day of March, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ewer N. Alvarado,	)	
	)	**CERTIFICATE OF COMPLIANCE**
Appellee,	)	
	)	
v.	)	**Supreme Ct. No. 20190032**
	)	
North Dakota Department of Transportation,	)	**District Ct. No. 13-2018-CV-00106**
	)	
Appellant.	)	

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Brief of Appellant contains 18 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2017 word processing software in Arial 12 point font.

Dated this 11th day of March, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ewer N. Alvarado,	)	
	)	**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**
Appellee,	)	
	)	
v.	)	**Supreme Ct. No. 20190032**
	)	
North Dakota Department of Transportation,	)	**District Ct. No. 13-2018-CV-00106**
	)	
Appellant.	)	

[¶1] I hereby certify that on March 11, 2019, the following documents: **BRIEF OF APPELLANT, CERTIFICATE OF COMPLIANCE, and APPENDIX TO BRIEF OF APPELLANT** where filed electronically with the Clerk of Supreme Court. Service is being accomplished upon Ewer N. Alvarado, by and through his attorney, Chad R. McCabe at crmccabe@midconetwork.com

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