20190411

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 25, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| Brandon James Jorgenson,<br><br>Appellee,<br><br>v.<br><br>Thomas Sorel, Director of the North Dakota Department of Transportation,<br><br>Appellant. | **Supreme Ct. No. 20190411**<br><br>**District Ct. No. 45-2019-CV-00612**<br><br>**ORAL ARGUMENT REQUESTED** |

**APPEAL FROM THE OCTOBER 29, 2019,**
**JUDGMENT OF THE DISTRICT COURT**
**STARK COUNTY, NORTH DAKOTA**
**SOUTHWEST JUDICIAL DISTRICT**

**HONORABLE WILLIAM HERAUF**

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# REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

**Page**

Table of Authorities ..... 3

**Paragraph**

Statement of proceedings before the Supreme Court ..... 1

Law and Argument ..... 7

Jorgenson failed to show a clear deviation from an applicable legal rule under the law that was current at the time of the Hearing Officer's Decision ..... 7

Conclusion ..... 13

## TABLE OF AUTHORITIES

**Paragraph(s)**

**Cases**


City of Bismarck v. Vagts,
2019 ND 224, 932 N.W.2d 523 ..... 11

LeClair v. Sorel,
2018 ND 255, 920 N.W.2d 306 ..... 11

Moore ex rel. Estate of Grady v. Tuelja,
546 F.3d 423 (7th Cir. 2008) ..... 8

Phillips v. Hillcrest Med. Ctr.,
244 F.3d 790 (10th Cir. 2001) ..... 8

Quigley v. Rosenthal,
327 F.3d 1044 (10th Cir. 2003) ..... 8

State v. Desjarlais,
2008 ND 13, 744 N.W.2d 529 ..... 10

State v. Lee,
2004 ND 176, 687 N.W.2d 237 ..... 10

State v. Lott,
2019 ND 18, 921 N.W.2d 428 ..... 9

State v. Majetic,
2017 ND 205, 901 N.W.2d 356 ..... 10

State v. Miller,
2001 ND 132, 631 N.W.2d 587 ..... 10

State v. Tresenriter,
2012 ND 240, 823 N.W.2d 774 ..... 9, 10

State v. Vigen,
2019 ND 134, 927 N.W.2d 430 ..... 11

State v. Weaver,
2002 ND 4, 638 N.W.2d 30 ..... 10

Stringel v. Methodist Hosp. of Ind., Inc.,
89 F.3d 415 (7th Cir. 1996) ..... 8

**Statutes and Rules**

N.D.C.C. § 39-20-01(3)(a) ..... 5, 12

N.D.R.Ev. 103(e) ..... 7

## STATEMENT OF PROCEEDINGS BEFORE THE SUPREME COURT

[¶1] Brandon James Jorgenson appealed a Hearing Officer's Decision suspending his driving privileges for a period of 180 days based upon an alcohol-related traffic offense to the District Court. Appendix to Brief of Appellant ("App.") at 18-19. Jorgenson alleged:

> The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement failed to inform Mr. Jorgenson as required pursuant to N.D.C.C. § 39-20-01(3)(a). Because law enforcement did not follow the requirements of N.D.C.C. § 39-20-01(3)(a) the chemical test is inadmissible pursuant to N.D.C.C. § 39-20-01(3)(b).

App. at 19.

[¶2] The Department argued "Jorgenson waived any argument he might have had regarding the absence of the wording 'directed by a law enforcement officer' from the implied consent advisory by failing to raise a proper objection at the administrative hearing." Register of Actions at Index # 21 – Appellee's Brief at ¶ 2. Jorgenson replied that "[he] did not waive an argument," and that "[t]he error claimed by Mr. Jorgenson affects a substantial right." Register of Actions at Index # 23 – Reply Brief at ¶¶ 6, 8.

[¶3] The District Court issued its Memorandum Opinion and Order Reversing the Hearing Officer's Decision. App. at 20-27. The Court determined that "[t]he hearing officer stated in the findings of fact that Deputy Trout read the implied consent advisory in 'its entirety,' so the Court may review the language read by Deputy Trout, regardless of whether or not Jorgenson raised the issue at the hearing." Id. at 24.

[¶4] The Department appealed the Judgment to the North Dakota Supreme Court. Id. at 31-32. The Department argues:

> The District Court erred in granting Jorgenson's appeal and reversing the Hearing Officer's Decision when it determined that, regardless of whether or not Jorgenson raised a proper objection at the administrative hearing regarding the omission of the phrase "directed by the law enforcement officer" from the implied consent advisory, the Court may reverse the decision of the agency if a hearing officer's findings of fact are not supported by the preponderance of evidence.

Br. of Appellant at ¶¶ 19-39.

[¶5] In response, Jorgenson claims:

> I. The District Court was correct in reversing the Administrative Hearing Officer's decision because the Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement failed to inform Mr. Jorgenson as required pursuant to N.D.C.C. § 39-20-01(3)(a).
>
> II. The Department's Statement of the Case has an inaccuracy.
>
> III. Mr. Jorgenson did not waive an argument.
>
> IV. The error claimed by Mr. Jorgenson affects a substantial right.

Appellee's Br.

[¶6] The Department addressed Arguments I and III in its opening Brief of Appellant. Argument II is immaterial to the disposition of this matter. Consequently, the Department limits the substance of its Reply Brief to Jorgenson's Argument IV.

## LAW AND ARGUMENT

**Jorgenson failed to show a clear deviation from an applicable legal rule under the law that was current at the time of the Hearing Officer's Decision.**

[¶7] "A court may take notice of an error affecting a substantial right, even if the

claim of error was not properly preserved." N.D.R.Ev. 103(e). "Subdivision (e) is a statement of the doctrine of plain error, but omits the word 'plain.' The omission was meant to signify that errors affecting substantial rights should be corrected whether or not they are 'plain' or 'obvious.'" Id. at Explanatory Note.

[¶8] "While the plain error doctrine is often applied in criminal cases; it is rarely applied in civil cases." Moore ex rel. Estate of Grady v. Tuelja, 546 F.3d 423, 430 (7th Cir. 2008) (citing Stringel v. Methodist Hosp. of Ind., Inc., 89 F.3d 415, 421 (7th Cir. 1996)). See also Quigley v. Rosenthal, 327 F.3d 1044, 1063 (10th Cir. 2003) ("'The plain error exception in civil cases has been limited to errors which seriously affect the fairness, integrity or public reputation of judicial proceedings.' Indeed, we have stated that '[i]t is an extraordinary, nearly insurmountable burden.'") (quoting Phillips v. Hillcrest Med. Ctr., 244 F.3d 790, 802 (10th Cir. 2001)) (internal quotations omitted in original).

[¶9] Within the criminal context, "[the] Court's obvious error standard is well established:

> To establish obvious error, the defendant has the burden to demonstrate plain error which affected his substantial rights. To constitute obvious error, the error must be a clear deviation from an applicable legal rule under current law. There is no obvious error when an applicable rule of law is not clearly established.

State v. Lott, 2019 ND 18, ¶ 8, 921 N.W.2d 428 (quoting State v. Tresenriter, 2012 ND 240, ¶ 12, 823 N.W.2d 774) (citations omitted in original).

[¶10] "A plain or obvious error requires a clear deviation from an applicable legal rule under current law." State v. Majetic, 2017 ND 205, ¶ 16, 901 N.W.2d 356 (citing Tresenriter, 2012 ND 240, ¶¶ 12-13, 823 N.W.2d 774) (concluding

admission of DNA test results, if erroneous, was not clear deviation from applicable legal rule under current law); State v. Desjarlais, 2008 ND 13, ¶ 10, 744 N.W.2d 529 (concluding no obvious error when rule of law for charging multiple counts is not clearly established); State v. Lee, 2004 ND 176, ¶¶ 14-17, 687 N.W.2d 237 (concluding error, if any, in admitting 911 tape as excited utterance was not clear deviation from applicable legal rule under current law); State v. Weaver, 2002 ND 4, ¶ 20, 638 N.W.2d 30 (concluding instruction mirroring statutory definition of knowingly was not deviation from applicable legal rule under current law); State v. Miller, 2001 ND 132, ¶ 28, 631 N.W.2d 587 (concluding defendant failed to establish courtroom configuration for examination of minor victim of gross sexual imposition constituted clear deviation from applicable legal rule under current law)).

[¶11] The law in effect on the date of Jorgenson's June 4, 2019, administrative hearing, provided that "[the Supreme Court] has allowed law enforcement to deviate from a verbatim reading of the statutory language of N.D.C.C. § 39-20-01(3)(a), as long as the advisory communicates all the substantive information of the statute." State v. Vigen, 2019 ND 134, ¶ 15, 927 N.W.2d 430 (citing LeClair v. Sorel, 2018 ND 255, ¶ 7, 920 N.W.2d 306)). Only on August 22, 2019 – i.e., following the date of Jorgenson's hearing – did the Court first issue a decision that "[t]he omission of the phrase 'directed by the law enforcement officer' does not accurately inform the individual charged that the law enforcement officer determines which chemical test shall be taken," and consequently, "the result of a subsequent breath test is inadmissible under the applicable language of N.D.C.C. § 39-20-01(3)(b)." City of Bismarck v. Vagts, 2019 ND 224, ¶ 18, 932 N.W.2d 523.

[¶12] At the time of Jorgenson's administrative hearing, there was no applicable legal rule under current law that the omission of the phrase "directed by the law enforcement officer" was a deviation from a verbatim reading of the statutory language of N.D.C.C. § 39-20-01(3)(a), that did not communicate all the substantive information of the statute. Jorgenson failed to show a clear deviation from an applicable legal rule under the law that was current at the time of the Hearing Officer's Decision.

## CONCLUSION

[¶13] The Department requests this Court reverse the Judgment of the Stark County District Court and affirm the Hearing Officer's Decision suspending Jorgenson's driving privileges for a period of 180 days.

Dated this 25th day of March, 2020.

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| Brandon James Jorgenson,<br>Appellee,<br>v.<br>Thomas Sorel, Director of the North Dakota Department of Transportation,<br>Appellant. | **CERTIFICATE OF COMPLIANCE**<br>**Supreme Ct. No. 20190411**<br>**District Ct. No. 45-2019-CV-00612** |

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Reply Brief of Appellant contains 9 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Arial 12 point font.

Dated this 25th day of March, 2020.

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| Brandon James Jorgenson,<br><br>Appellee,<br><br>v.<br><br>Thomas Sorel, Director of the North Dakota Department of Transportation,<br><br>Appellant. | **CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**<br><br>**Supreme Ct. No. 20190411**<br><br>**District Ct. No. 45-2019-CV-00612** |

[¶1] I hereby certify that on March 25, 2020, the following documents: **REPLY BRIEF OF APPELLANT and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court. Service is being accomplished upon Brandon James Jorgenson, by and through his attorney, Thomas F. Murtha IV at murthalawoffice@gmail.com.

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