20220119
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 3, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert Martinie Goff, Appellant, vs. William Panos, Director Department of Transportation, Appellee.	**SUPREME COURT NO. 20220119** Civil No. 09-2022-CV-00248 ORAL ARGUMENT REQUESTED

ON APPEAL FROM APRIL 6, 2022,
JUDGMENT OF THE DISTRICT COURT
COUNTY OF CASS
EAST CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
HONORABLE STEVEN L. MARQUART PRESIDING

BRIEF OF APPELLANT

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

TABLE OF CONTENTS

Paragraph(s)

TABLE OF AUTHORITIES

Paragraph(s)

Cases

Statutes

Other

STATEMENT OF ISSUES PRESENTED FOR APPEAL

[¶1] First, North Dakota law prohibits an individual under the influence of alcohol from being in actual physical control of a vehicle upon a private area if the public has a right to access the area for vehicular use. Fargo municipal law prohibits the public from driving or parking on private property if the property is marked as private. Here, law enforcement found Appellant parked in his vehicle in Fargo, in a marked private parking lot. Did the hearing officer err in finding the public had a right to access for vehicular use the location where Appellant was found?

[¶2] Second, the United States and North Dakota Constitutions prohibit unreasonable seizures. Community caretaking functions are not "seizures." An officer acts as a community caretaker if his or her actions are entirely divorced from the detection, investigation, or acquisition of evidence relating to a potential crime. Here, the evidentiary record contains no evidence of law enforcement's purpose for seizing Appellant. Did the hearing officer err in concluding no unreasonable seizure occurred?

REQUEST FOR ORAL ARGUMENT

[¶3] Appellant requests oral argument under Rule 28(h) of the North Dakota Rules of Appellate Procedure. The legal interplay between a statutory prohibition on public access for vehicular use, and the actual physical control statute, is an issue of first impression for this Court. Oral argument would aid the Court.

STATEMENT OF THE CASE

[¶4] Following an administrative hearing, the Department suspended the driving privileges of Appellant, Robert Martinie Goff ("Mr. Goff"), for ninety-one (91) days. *See* Doc. #20. Mr. Goff timely appealed the decision to the district court. *See* Doc. #1. The district court affirmed the Department's decision. *See* Doc. #33. Mr. Goff timely appealed to this Court.

STATEMENT OF THE FACTS

[¶5] Police arrested Mr. Goff in his private vehicle, in a private parking lot, outside his private residence, located at 1514 21st Avenue South, Fargo, North Dakota ("1514"). 1514 is the center building of a three-building apartment complex, designed and built in 1968. Doc. #9, at 41:15-43:2; *see also* Doc. #24. Mr. Goff's father, John Goff ("Attorney Goff"), is the current owner of 1514, and his family has owned the property since its construction. Doc. #9, at 41:15-43:2. He is deeply familiar with 1514 based on: his parents' ownership of it, his ownership of it, and having lived there. *Id.*; *id.* at 43:6-20.

[¶6] 1514 contains twenty-four residential units throughout three floors. *Id.* at 44:14-17. On the south side of the building are individual garage units arranged in an "L" shape, as well as a parking lot with individual parking spaces (the "Parking Lot"). *Id.* at 43:21-44:5; *see also* Doc. #24. A tenant of 1514 is assigned a garage, and one parking space in the Parking Lot. Doc. #9, at 47:14-48:2.

[¶7] The Parking Lot is only accessible by a private drive on the east side of 1514. *Id.* at 47:14-48:2; *see also* Doc. #24. Partway up the private drive is a fence running perpendicular to the private drive. Doc. #9, at 47:14-48:2. The purpose of this design

is "to tell people[] that it's private property. It's not for your use unless you are a tenant or have business with a tenant. But even then you're not to park there, you're to park in the street." *Id.* at 59:17-20. To supplement this design choice, posted signs denote the Parking Lot as "private property, private drive." *Id.* at 48:20-25. A sign persons must drive pass to access the Parking Lot. *Id.*; *see also* Doc. #24. The design and signage have proved successful—visitors, guests, and even delivery drivers do not use the Parking Lot, and instead park on the street and use the sidewalk to access 1514. Doc. #9, at 49:18-50:4; *id.* at 54:19-55:8.

[¶8] On December 28, 2021, Fargo Police Department Officer Blake Omberg ("Officer Omberg") responded to a report of an unresponsive motorist in a truck in the Parking Lot. *Id.* at 4:13-23. Fargo Police Department Officer Ty Hiedeman ("Officer Hiedeman") and emergency personnel were already on scene when Officer Omberg arrived. *Id.* at 5:17-6:7. The truck in question was parked rear-first in a parking spot (i.e., the truck had "backed in"). *Id.* at 34:1-35:2. Officer Hiedeman parked in front of the truck so that the truck could not pull forward, or to its left or right. *Id.* The truck also could not drive in reverse. *Id.* Officer Hiedeman did not testify, and the evidentiary record is silent on what was known to Officer Hiedeman, or his thought process in blocking Mr. Goff's vehicle.

[¶9] Firefighters accessed the truck. *Id.* at 7:15-8:9. Once opened, law enforcement woke the occupant—Mr. Goff. *Id.* at 8:10-12. Law enforcement then subjected Mr. Goff to field sobriety testing, ultimately arresting him for suspicion of being in actual physical control. *See* Doc. #20, at 1.

LAW AND ARGUMENT

[¶10] The Administrative Agencies Practice Act governs this appeal. *Rudolph v. N.D. Dep't of Transp.*, 539 N.W.2d 63, 65 (N.D. 1995). This Court reviews the record compiled by the hearing officer, *Zietz v. Hjelle*, 395 N.W.2d 572, 574 (N.D. 1986), generally deferring to the hearing officer's factual determinations, but reviewing legal conclusions de novo. *Crawford v. Dir., N.D. Dep't of Transp.*, 2017 ND 103, ¶ 4, 893 N.W.2d 770. Nevertheless, a reviewing court must reverse a decision if "[t]he findings of fact made by the [Department] are not supported by a preponderance of the evidence[,]" or "[t]he order is not in accordance with the law." N.D.C.C. § 28-32-46. In this case, the hearing officer's factual finding that the public had the right to access the Parking Lot is not supported by a preponderance of the evidence, and the Department's decision is not in accordance with the law because law enforcement seized Mr. Goff without reasonable suspicion. Due to these errors, and because the Department lacked substantial justification for suspending Mr. Goff's driving privileges, this Court should reverse, awarding Mr. Goff his costs and fees incurred in pursuing this appeal.

I. The hearing officer erred in finding the public had the right to access the Parking Lot for vehicular use.

[¶11] "A person may not drive or be in actual physical control of any vehicle . . . upon . . . private areas to which the public has a right of access for vehicular use in this state . . . ." N.D.C.C. § 39-08-01. Whether private property is a private area to which the public has a right to access is generally a question of fact, "determined by . . . factors [including] signs, gates, barriers, whether or not there is routine use by the public not

specifically invited to use the property, or the location of the vehicle on the property." *State v. Mayland*, 2017 ND 244, ¶ 14, 902 N.W.2d 762. Typically, this Court reverses a decision based on a finding of fact when a reasoning mind could not reasonably have concluded the finding was "supported by the weight of the evidence from the entire record." *Dettler v. Sprynczynatyk*, 2004 ND 54, ¶ 10, 676 N.W.2d 799. However, this Court does not grant a hearing officer's finding such deference when it arises from a misapplication of the law. *See, e.g.*, *Suelzle v. North Dakota Dep't of Transp.*, 2020 ND 206, ¶ 17, 949 N.W.2d 862 (reversing hearing officer's finding location was private property to which the public had a right to access for vehicular use when "[t]he hearing officer's finding is based on a misapplication of law"). Likewise, this Court reverses a hearing officer's finding when the hearing officer misapplies the factors outlined in *Mayland*. *See, e.g.*, *id.* Here, the hearing officer misapplied the law, and the relevant factors, in finding the public had a right to access the Parking Lot for vehicular use.

A. The hearing officer's misapplication of Fargo municipal law created a fundamental defect in his finding that the public had a right to access the Parking Lot for vehicular use.

[¶12] At the administrative hearing, Mr. Goff argued the public did not have a right to access the Parking Lot for vehicular use. Mr. Goff specifically identified, and the hearing officer judicially noticed, Section 8-1011 of the Fargo Municipal Code, an ordinance limiting the public right to access private property by vehicle without written permission:

> It shall be unlawful to trespass upon by driving or parking a motor vehicle or trailer of any kind upon private property within the city limits where there is displayed upon said property a sign containing the words "Private Property" or "Private Parking", without first obtaining permission in writing from the owner or lessee thereof.

Fargo Municipal Code § 8-1011. Below, the hearing officer found the public had a right to access the Parking Lot for vehicular use by misinterpreting Section 8-1011 as only prohibiting the public from parking in the Parking Lot. *See* Doc. #2, at 2 ("Goff pointed out that the City of Fargo has ordinances that make it a crime to park in a tenant parking only area . . . . Those same people would not be in violation of those ordinances unless they parked."). As a matter of law, the hearing officer wrongly interpreted Section 8-1011, causing a fundamental defect in his finding the public had a right to access the Parking Lot for vehicular use.

[¶13] Interpretation of a statute, including municipal ordinances, is a question of law, reviewable de novo. *See, e.g.*, *Wampler v. N.D. Dep't of Transp.*, 2014 ND 24, ¶ 6, 842 N.W.2d 877. When interpreting a statute, courts "apply the rules of statutory construction and look at the language of the . . . statute to determine its meaning." *State v. Kopperud*, 2015 ND 124, ¶ 4, 863 N.W.2d 852. "Words of a statue are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears." *State v. Wetzel*, 2008 ND 186, ¶ 4, 756 N.W.2d 775 (citing N.D.C.C. § 1-02-02). "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.'" *Id.* (quoting N.D.C.C. 1-02-05).

[¶14] Section 8-1011 is unambiguous, and flatly prohibits the public from accessing the Parking Lot for vehicular use. Signs denoted the Parking Lot as private property. *See* Doc. #9, at 48:20-25. Therefore, the prohibitions created by Section 8-1011 applied to the Parking Lot, prohibiting the public from "driving or parking" in the Parking Lot absent written permission. *See* Fargo Municipal Code § 8-1011. Because—as a matter

of law—the plain language of Section 8-1011 prohibits the public from accessing the Parking Lot for vehicular use, no reasoning mind could reasonably have concluded the Parking Lot was a private area in which the public had a right of access for vehicular use. This Court should reverse.

B. The totality of the circumstances does not allow a reasonable person to conclude the public had a right to access the Parking Lot for vehicular use.

[¶15] The hearing officer factually erred in finding the public had a right to access the Parking Lot for vehicular use. As used in Section 39-08-01, statute defines neither "public," nor "right." Accordingly, the terms are afforded their ordinarily understood meanings. *See, e.g.*, *City of Fargo v. White*, 2013 ND 200, ¶ 6, 839 N.W.2d 829 ("In statutory interpretation, this Court's primary objective is to ascertain the intent of the legislature by looking at the language of the statute itself and giving it its plain, ordinary, and commonly understood meaning." (citation and internal quotation omitted)). The ordinary meaning of "public" is "[t]he people of a . . . community as a whole . . . ." *Black's Law Dictionary* 1348 (9th ed. 2009). In other words, as used in Section 39-08-01, "public" means the people of Fargo as a whole. The ordinary meaning of "right" is "[a] power, privilege, or immunity secured to a person by law . . . ." *Id.* at 1436. Therefore, as a whole, Section 39-08-01 is properly read to mean "the whole community of Fargo has a legal privilege of access for vehicular use." The hearing officer erred in finding the whole community of Fargo had the legal privilege to access the Parking Lot for vehicular use.

[¶16] The hearing officer considered several factors when considering the public's right to access the Parking Lot. First, the hearing officer found the Parking Lot was

part of an apartment complex with multiple tenants. *See* Doc. #20, at 1 ("[T]he vehicle was parked in a parking lot of an apartment building that had multiple tenants."). The evidentiary record confirms this finding. *See* Doc. #9, at 14-17. But the finding is irrelevant because the other tenants of 1514 are not "the public"—other tenants are only a highly limited subset of the whole community of Fargo. Accordingly, that the Parking Lot is accessible by other tenants is irrelevant to the question of whether the whole community of Fargo had the power or privilege to access the Parking Lot for vehicular use.

[¶17] The hearing officer next found the apartment complex "had one way in and one way out." Doc. #20, at 1. This understates the record. The Parking Lot not only had one way in and one way out, but adopted this design from its very inception to deter the public for accessing the Parking Lot—

> it was designed to be clear that the fence coming out and the sign right there as you drive into that beginning of the driveway, the first sidewalk was to tell people that's private property. It's not for your use unless you are a tenant or have business with a tenant. But even then you're not to park there, you're to park in the street.

Doc. #9, at 59:15-20. A specific design to deter public use is contrary to the public's right to access the Parking Lot for vehicular use.

[¶18] The hearing officer also found "[t]here were signs that indicated that only tenants were allowed to park in the parking lot." Doc. #20, at 1. The hearing officer correctly found signs were displayed on the property. *See* Doc. #9, at 48:20-25. But his finding again misrepresents the record. The signs more than indicated only tenants were allowed to park in the Parking Lot; the signs affirmatively advised the Parking Lot was "private property, private drive." *Id.* Designating the Parking Lot as "private"

is contrary to finding the whole community of Fargo had the legal privilege to access the Parking Lot for vehicular use. *Cf. Black's Law Dictionary* 1315 (9th ed. 2009) (defining "private" as "[r]elating or belonging to an individual, as opposed to the public or the government" (emphasis added)).

[¶19] The hearing officer next found gates or physical barriers did not limit access to the Parking Lot. Doc. #20, at 1 ("The [P]arking [L]ot was not blocked off by any gates or other barriers. The [P]arking [L]ot was not controlled access in any way."). While physical barriers to the Parking Lot would further limit public access to the Parking Lot, the absence of such barriers is not evidence the whole community of Fargo had the legal privilege to access the Parking Lot unless the law assumes a legal right to access private property absent physical restraint. Because Mr. Goff is unaware of such legal authority, the lack of physical barrier, is not—itself—evidence the whole community of Fargo had the legal privilege to access the Parking Lot for vehicular use.

[¶20] While not found in the findings of fact section of his decision, the hearing officer also found "[t]he [P]arking [L]ot is in the rear of the building, not in the front like a driveway." *Id.* at 2. In other words, the hearing officer found the Parking Lot was not visible to the public, and was not accessible to the public unless a vehicle traversed a private road. *Cf. id.* ("The parking lot is accessible by a road just off the road."). This finding is contrary to the finding the whole community of Fargo had the legal privilege to access the Parking Lot for vehicular use.

[¶21] The hearing officer found "[v]isitors and delivery people are able to access the road [sic] if they want to, either to drop off items or turn around." *Id.* at 2. This finding is unsupported. Attorney Goff testified delivery persons do not use or park in the

Parking Lot. *See* Doc. #9, at 49:18-50:4. Attorney Goff confirmed that while no physical barriers prevented a delivery driver or guest from entering the Parking Lot, that they were not permitted to use the Parking Lot. *Id.* at 54:19-55:8. The record is contrary to the finding that visitors and delivery persons are authorized to use the Parking Lot.

[¶22] The hearing officer also found—correctly—that emergency personnel accessed the Parking Lot to respond to the dispatch regarding Mr. Goff. *See* Doc. #20, at 2. Again, emergency personnel are a subset of the community, not the public. Indeed, the law recognizes emergency personnel are legally able to access areas not accessible to the public. *Cf.* N.D.C.C. § 12.1-20-03(6) (criminal trespass "does not apply to a peace officer in the course of discharging the peace officer's official duties[]"). Emergency personnel's access to the Parking Lot is irrelevant to the question of the privilege of the public to access the Parking Lot for vehicular use.

[¶23] The hearing officer found the Parking Lot was "designed for driving on and parking, unlike a front lawn, field, ditch, or farmstead's grassy area." Doc. #20, at 2. While true, this factor is again irrelevant to public access to the Parking Lot for vehicular use. Private racetracks are designed for vehicular use. But such design does not confer a right to the public to access a private racetrack for vehicular use. Design for vehicular use is separate from the question of the public's right to avail itself of the designed use. Accordingly, this finding is irrelevant to the question of whether the whole community of Fargo had the legal privilege to access the Parking Lot for vehicular use.

[¶24] All findings by the hearing officer were either irrelevant to the ultimately finding, or disprove the ultimate finding. Accordingly, no reasoning mind could reasonably conclude the public had a right to access the Parking Lot for vehicular use based on the entire record.

II. The Department's suspension is not in accordance with the law because the evidentiary record provides no evidence that Officer Hiedeman possessed reasonable suspicion at the time he seized Mr. Goff.

[¶25] "Unreasonable . . . seizures are prohibited by the Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and by Article 1, § 8 of the North Dakota Constitution." *State v. Fasteen*, 2007 ND 162, ¶ 6, 740 N.W.2d 60. While the United States and North Dakota Constitutions prohibit unreasonable seizures, law enforcement officers often serve as community caretakers. *Lapp v. N.D. Dep't of Transp.*, 2001 ND 140, ¶ 14, 632 N.W.2d 419. Community caretaking allows law enforcement contact with citizens, including stops, without an officer's reasonable suspicion of criminal conduct. *State v. Glaesman*, 545 N.W.2d 178, 181 (N.D. 1996). But the community caretaking exception is inapplicable where law enforcement officers take actions consistent with law enforcement, such as when blocking a vehicle's exit, and issuing commands to the occupants. *See State v. Boyd*, 2002 ND 203, ¶ 10, 654 N.W.2d 392 (community caretaker exception inapplicable where law enforcement officer blocked vehicle's exit and issued orders to occupants).

[¶26] In this case, the hearing officer concluded Mr. Goff failed to establish an unreasonable seizure when he did not testify. *See* Doc. #20, at 2 ("There was not sufficient evidence to show that an improper seizure took place. Goff did not testify.").

This, in itself, was a reversible error because Mr. Goff did not bear the burden to prove a constitutional violation. *Lies v. N.D. Dep't of Transp.*, 2019 ND 83, ¶ 7, 924 N.W.2d 448. The record contains a prima facie showing of an unreasonable seizure: Officer Omberg testified Officer Hiedeman blocked Mr. Goff. *See* Doc. #9, at 34:1-35:2. The blocking of Mr. Goff's vehicle was a seizure. *Boyd*, 2002 ND 203, ¶ 10. Warrantless seizures are presumptively unreasonable. *State v. Karna*, 2016 ND 232, ¶ 7, 887 N.W.2d 549.

[¶27] Because the record establishes a warrantless seizure—a presumptively unreasonable seizure—the burden fell on the Department to overcome the presumption of unreasonableness. *Cf. Lies*, 2019 ND 83, ¶ 6 ("Once the facts are established, their significance [on search and seizure issues] presents a question of law, which this Court reviews de novo." (citation omitted)). The Department did not offer evidence to overcome this presumption. The record fails to establish Officer Hiedeman's reasoning, or the facts known to him, at the time he seized Mr. Goff. *See id.* at 35:3-5 (Q: "You don't know or maybe you do know why Officer Hiedeman block [sic] his vehicle like that?" A: "I'm not sure."). Because the Department failed to overcome the presumption of unreasonableness, the Department's suspension of Mr. Goff's driving privileges is not in accordance with the law, requiring reversal. *Lies*, 2019 ND 83, ¶ 12.

III. The Department's lack of substantial justification for its decision entitles Mr. Goff to payment of his costs and fees.

[¶28] When a motorist successfully appeals a decision of the Department, the reviewing court must award costs and attorneys' fees if the Department acted without substantial justification. N.D.C.C. § 28-32-50(1) (emphasis added). The Department

lacks substantial justification if a reasonable person would find no reasonable basis in law and fact for the decision. *Tedford v. Workforce Safety & Ins.*, 2007 ND 142, ¶ 25, 738 N.W.2d 29.

[¶29] The Department acted without substantial justification. The hearing officer's finding that the public had the right to access the Parking Lot for vehicular use relied on an unreasonable misapplication of the law, and was unsupported by the factual record. Additionally, law enforcement seized Mr. Goff, without indicia creating reasonable suspicion at the time of the seizure. In other words, the Department lacked substantial justification for its suspension of Mr. Goff's driving privileges. Accordingly, as the Legislature commands, the Department must reimburse Mr. Goff for the expenses he unnecessarily incurred.

CONCLUSION

[¶30] "It is the duty of those who enforce the law to follow it, and ignorance thereof can no more excuse the conduct of officers and judges that it would excuse the conduct of a defendant." *State v. Kelley*, 210 S.W.3d 93, 99 (Ark. 2005). Indeed, "[i]f anything, a higher duty of compliance rests on those whose responsibility it is to enforce the law than on the general populace." *Id.* (citations omitted). Despite this "higher duty" to know and follow the law, the Department ignored the law, finding the public had a right to access the Parking Lot for vehicular use despite the plain language of Section 8-1011.

[¶31] Further, "[t]he word 'automobile' is not a talisman, in whose presence the Fourth Amendment warrant requirement fades away." *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971). Simply because Officer Hiedeman found Mr. Goff in his

automobile does not absolve the Department of its burden of establishing reasonableness—from its burden to establish Officer Hiedeman seized Mr. Goff under an exception to the warrant requirement. But the Department treated Mr. Goff's automobile as a talisman, assuming a community caretaker function despite offering no evidence that Officer Hiedeman acted as a community caretaker while seizing Mr. Goff. Accordingly, Mr. Goff respectfully requests the Court reverse the hearing officer's decision, awarding him costs and attorneys' fees.

Respectfully submitted May 3, 2022.

VOGEL LAW FIRM

/s/ Drew J. Hushka

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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(d) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 19 pages.

Dated this 3rd day of May, 2022.

VOGEL LAW FIRM

/s/ Drew J. Hushka

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

4742944.1

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert Martinie Goff, Appellant, V. William Panos, Director, North Dakota Department Of Transportation, Appellee.	**SUPREME COURT NO. 20220119** Civil No. 09-2022-CV-00248

CERTIFICATE OF SERVICE

I hereby certify that on May 3rd, 2022, the following document:

Brief of Appellant

was served via electronic mail on the following:

Michael Pitcher
mtpitcher@nd.gov

Dated this 3rd day of May, 2022.

VOGEL LAW FIRM

/s/ Drew J. Hushka

BY: Drew J. Hushka (#08230)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: dhushka@vogellaw.com
ATTORNEYS FOR DEFENDANT