

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No.
)	20220165
vs.)	
)	
Joshua Paul Bowen,)	Stutsman County Case No.
)	47-2021-CR-00560
Defendant/Appellant.)	
)	

ON APPEAL FROM A CRIMINAL JUDGMENT ENTERED MAY 5, 2022 FROM THE DISTRICT COURT FOR THE SOUTHEAST JUDICIAL DISTRICT, STUTSMAN COUNTY, NORTH DAKOTA, THE HONORABLE TROY LAFEVRE, PRESIDING.

**REPLY BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED**

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ARGUMENT

[¶1] **I. There is insufficient competent evidence to support the district court's finding that Mr. Bowen did not request an independent chemical test and the district court's decision was contrary to the manifest weight of the evidence.**

[¶2] The State claims that “Bowen mistakenly argues his claim he requested an independent test went ‘uncontradicted.’” Appellee’s Br. at ¶ 29. The State also asserts that Mr. Bowen’s argument is “incorrectly dismissive” with respect to the fact that Kelly was not present when Mr. Bowen made his independent test request. Id. at ¶ 30. A thorough review of the evidence shows both that Mr. Bowen clearly requested an independent test and that the other witnesses statements did not contradict Mr. Bowen’s request.

[¶3] Throughout their brief, the State attempts to discredit Mr. Bowen’s Declaration several times. Appellee’s Br. at ¶¶ 19, 29, 39. “A party applying to the court for an order must do so by motion.” N.D.R.Cr.P. 47(a). “The moving party **must** serve any supporting declaration with the motion.” N.D.R.Cr.P. 47(c)(emphasis added). Supporting affidavits or other evidence are permissive, but not required. State v. Canfield, 2013 ND 236, ¶ 7, 840 N.W.2d 620. “[A]n unsworn declaration meeting the requirements of this chapter has the same effect as a sworn declaration.” N.D.C.C. § 31-15-03(1). An unsworn declaration is given under the penalty of perjury. N.D.C.C. § 31-15-05.

[¶4] In this case, Mr. Bowen provided the district court with a Declaration that was given under the penalty of perjury. R44. The Declaration unequivocally states that “While at the Stutsman County Law Enforcement Center, I spoke with a female corrections officer. I clearly and unambiguously requested my own blood test.” R44:1:¶4. The

Declaration also states that at no time was Mr. Bowen provided with a phone or phonebook to make arrangements for his independent test. Id. at ¶ 5. The Declaration further asserts that Mr. Bowen was not taken to a hospital or local testing facility after his request. Id. at ¶ 5. Instead, Mr. Bowen was held at the Stutsman County Law Enforcement Center until he bonded out and was not permitted to make any arrangements for the independent test he lawfully requested. Id. at ¶ 7.

[¶5] To support its position, the State relies upon the testimony of Kelly and McDowell. For Kelly, the State attempts to argue that the fact Kelly did not hear Mr. Bowen make a request is indicative that no request was made. Appellee's Br. at ¶ 30. The State also asserts that Kelly's testimony covers a substantial time segment. Id. A close review of the transcript indicates that Kelly was not likely present during the request:

Q. Now, you said that you did not hear Mr. Bowen request an independent test while you were at the Law Enforcement Center?

A. No.

Q. And after you completed the paperwork in this case, you turned Mr. Bowen over to jail staff, right?

A. I turned him over to jail staff. He was upstairs in the booking area of the jail while I completed paperwork in the office downstairs.

Q. And then you left shortly after that?

A. Yes. I completed the paperwork. I took the paperwork up to him, issued it to him in the booking area, and then left the jail.

R.117:25. Kelly's responses clearly indicates that he turned Mr. Bowen over to jail staff, which included McDowell, proceeded downstairs to complete paperwork, brought the paperwork to Mr. Bowen, and then left the jail. Based on this recollection of events,

Kelly was not present during the vast majority of the time that Mr. Bowen was with McDowell and/or being booked into jail. Based on Kelly's testimony and Mr. Bowen's Declaration, it is apparent that Kelly was not present when Mr. Bowen made his request for an independent test.

[¶6] Additionally, even if Kelly was present for some of the encounter between Mr. Bowen and McDowell, it does not indicate that a request for an independent test was not made. In Mr. Bowen's Declaration he clearly stated that his request was to a female correctional officer; not to Kelly. R44:4. Using the State's ideology, the absence of recollection of Kelly being present in Mr. Bowen's Declaration is evidence that Kelly was not present during the request for an independent test. *See* Appellee's Br, at ¶ 34 ("McDowell's absence of a recollection of an extraordinary situation is admissible evidence no such event occurred.").

[¶7] Lastly, the State attempted to rely upon McDowell's forgetfulness and lack of memory to try and support their position that an independent test was not requested. Appellee's Br. at ¶ 34. The State attempts to classify McDowell's testimony as an absence of recollection. However, this is not simply the absence of recollection. Instead, it is the complete inability to remember the entire encounter. Here, McDowell testified "I honestly don't even recall this whole incident." R117:33-34. McDowell affirmed this statement more than once:

Q. Correctional Officer McDowell, you said you don't recall this whole incident; correct?

A. Correct.

Q. So you don't remember if Mr. Bowen made a request for an independent test; correct?

A. Correct.

R.117:34. Despite the States' contention, this is not an ordinary vs. extraordinary argument. Instead, the evidence clearly indicates that McDowell remembered nothing from the day in question. As such, her testimony does not contradict Mr. Bowen's Declaration.

[¶8] The State has failed to present any evidence to invalidate Mr. Bowen's Declaration. Instead, they ask the Court to rely upon absent witnesses and witness statements like "I honestly don't even recall this whole incident" to support their position. R117:33-34. The overwhelming evidence presented at the Motion Hearing indicates that Mr. Bowen made a clear and unambiguous request for an independent test and was denied his statutory right.

[¶9] II. The District Court erred in admitting the chemical breath test results without requiring the State to produce the State Toxicologist at trial as required by Rule 707 of the North Dakota Rules of Evidence and the United States Constitution.

[¶10] In State v. Lutz, 2012 ND 156, ¶ 5, 820 N.W.2d 111 this Court analyzed Melendez-Diaz v. Massachusetts, 557 U.S. 305, (2009). In Melendez-Diaz, "The Court concluded the certificates constituted affidavits and therefore were testimonial because they were solemn declarations or affirmations made for the purpose of establishing or proving some fact." Lutz, 2012 ND at ¶ 9 (internal quotations omitted). "Additionally, the certificates were made under circumstances which would lead an objective, reasonable witness to believe the certificates would later be used at trial, and under Massachusetts law the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight of the analyzed substance.'" Id.

[¶11] In the present case, the Exhibits offered by the State constituted affidavits and certifications, which were testimonial because their sole purpose was to establish or prove that the chemical breath testing machine was working properly, was accurate, and was reliable. *See State v. Keller*, 2013 ND 122, ¶ 8, 833 N.W.2d 486 (If the State fails to establish compliance with those directions for sample collection which go to the scientific accuracy and reliability of the test, the State must prove fair administration of the test through expert testimony). The only document Kelly assisted with was the Intoxilyzer result print out. Kelly had no first hand knowledge of any of the other exhibits required for the admission of the chemical breath test. Additionally, Charles Eder or his designee would believe that the certificates they prepared would later be used at trial to support the admission of a chemical breath test. Thus, Charles Eder, or his designee, were required to be present in order for the chemical breath test to be admitted into evidence.

[¶12] In addition, the State attempts to argue that Mr. Bowen failed to object to the introduction of these testimonial documents, which bars his appeal. However, Mr. Bowen objected to the chemical test, and the supporting documents, multiple times. First, Mr. Bowen asserted his objection when he timely filed his objection to the introduction of the analytical report as required by N.D.R.Ev 707. R118:14:16-22. Next, Mr. Bowen renewed his motion when he brought a motion in limine objecting to the introduction of the chemical test during the pretrial conference. Further, Mr. Bowen also renewed his objection during trial when the State sought to admit the chemical test results into evidence. R118:94:24-25. Mr. Bowen's objections were timely, and duplicitous.

[¶13] CONCLUSION

[¶14] Mr. Bowen clearly and unambiguously requested a chemical breath test. The district court erred in finding that Mr. Bowen did not clearly and unambiguously request a chemical test. Additionally, the district court abused its discretion when it denied Mr. Bowen's motion in limine after the State failed to produce the State toxicologist.

[¶15] Therefore, Mr. Bowen respectfully requests this Court **REVERSE** the District Court's Order denying his Motion to Suppress and/or the order denying his Motion in Limine and **REMAND** the case with instructions.

[¶16] Dated this 10th day of November, 2022.

/s/ Adam Justinger

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[¶17] **CERTIFICATE OF COMPLIANCE**

[¶18] The undersigned, as attorney representing Defendant/Appellant Joshua Paul Bowen, and author of the Reply Brief of Appellant, hereby certifies that said reply brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the number of pages from cover page to conclusion totals 9 pages and does not exceed 12 pages. This count is automatically calculated by electronic document.

[¶19] Dated this 10th day of November, 2022.

/s/ Adam Justinger

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CERTIFICATE OF SERVICE

¶1 I, Adam Justinger, an attorney licensed in the State of North Dakota, hereby certify that on **November 10, 2022**, the following documents were filed with the North Dakota Supreme Clerk of Court:

- 1. Reply Brief of Apellant; and**
- 2. Certificate of Service.**

¶2 Copies of these documents were served electronically on all separately represented parties at the e-mail addresses listed below:

Frederick Fremgen
attorney@stutsmancounty.gov

¶3 Dated: November 10, 2022.

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