

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

Alexander Brent Nelson

Petitioner and Appellant,

v.

North Dakota Department of Transportation

Respondent and Appellee.

**Appeal from Judgment entered on October 11, 2022
Southwest Judicial District
Stark County, North Dakota
The Honorable Dann Greenwood**

**SUPREME COURT NO. 20220355
STARK COUNTY NO. 2022-CV-00502**

**BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED**

**Chad R. McCabe
McCabe Law Firm
Attorney for Appellant
419 Riverwood Dr., Suite 104
Bismarck, ND 58504
(701) 222-2500
ND State Bar ID No. 05474**

TABLE OF CONTENTS

	<u>PAR. NO.</u>
TABLE OF AUTHORITIES	1
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	5
STANDARD OF REVIEW	9
LAW AND ARGUMENT	11
CONCLUSION AND PRAYER FOR RELIEF	22
REQUEST FOR ORAL ARGUMENT	24
CERTIFICATE OF PAGE COMPLIANCE.....	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

PAR. NO.

COURT CASES:

<i>Alvarado v. N.D. Dep't of Transp.</i> , 2019 N.D. 231, 932 N.W.2d 911	17-22
<i>City of Bismarck v. Melanie Jean Vagts</i> , 2019 ND 224, 932 N.W.2d 523	17
<i>Johnson v. Department of Transp.</i> , 2004 ND 148, 683 N.W.2d 886	9
<i>Morrell v. North Dakota Dept. of Transp.</i> , 1999 ND 140, 598 N.W.2d 111	11
<i>Schlosser v. N. Dakota Dep't of Transp.</i> , 2009 ND 173, 775 N.W.2d 695	10
<i>Schoon v. N. Dakota Dep't of Transp.</i> , 2018 ND 210, 917 N.W.2d 199	10
<i>State v. Boushee</i> , 459 N.W.2d 552 (N.D.1990)	15
<i>State v. Schumacher</i> , 452 N.W.2d 345, 348 (N.D.1990)	15
<i>State v. Schwietzer, Jr.</i> , 510 N.W.2d 612 (N.D.1994)	15
<i>Throlson v. Backes</i> , 466 N.W.2d 124 (N.D. 1991).	16, 20

NORTH DAKOTA CENTURY CODE:

N.D.C.C. § 28-32-46.	9
N.D.C.C. § 39-20-01.	16, 18, 19, 22
N.D.C.C. § 39-20-01(3)(a)	20
N.D.C.C. § 39-20-05.	19
N.D.C.C. § 39-20-14	13, 20, 21
N.D.C.C. § 39-20-14(3)	12, 13, 15, 20, 21

STATEMENT OF THE ISSUE

ISSUE: **There was no valid request to submit to a screening test in accordance with N.D.C.C. § 39-20-14(3) to support a determination of refusal to submit to testing under N.D.C.C. § 39-20-14.**

STATEMENT OF THE CASE

Nature of the Case.

[¶ 1] This is an appeal of the Judgment entered on October 11, 2022 (R20), affirming the hearing officer's decision of July 27, 2022 (R7), wherein Nelson's driving privileges were revoked by the North Dakota Department of Transportation for two years. (R7).

Course of Proceedings/Disposition of the Court Below.

[¶ 2] Nelson was issued a Report and Notice on June 27, 2022 regarding the possible revocation of his driving privileges. (R4:2). Nelson timely requested a hearing on July 5, 2022, (R4:3), which was then held on July 20, 2022. (R4)

[¶ 3] The hearing officer issued a decision revoking Nelson's driving privileges for two years on July 27, 2022. (R7). Nelson timely filed his Notice of Appeal and Specifications of Error with the Stark Co. District Court on July 29, 2022 (R1).

[¶ 4] On October 11, 2022, the Hon. Dann Greenwood issued a Memorandum Decision affirming the hearing officer's decision. (R15). Order for Judgment was entered on October 11, 2022, (R19), and Judgment was entered on October 11, 2022. (R20). Notice of Entry of Judgment was entered on October 13, 2022. (R21). Nelson timely filed his Notice of Appeal on December 9, 2022. (R23).

STATEMENT OF FACTS

[¶ 5] Trooper Skogen gave the following advisory for both the on-site screening test and the chemical test:

Refusal to submit to an on-site screening or chemical test requested by a law enforcement officer could result in revocation of your driving privileges for up to three years.

(R7; R3:31).

[¶ 6] In addition, a copy of Trooper Skogen's in-car video was admitted into evidence. (R3:35; R3). The video establishes at count 22:34, Trooper Skogen advised Nelson on the screening test:

Refusal to submit to an on-site screening or chemical test requested by a law enforcement officer could result in revocation of your driving privileges for up to three years. Do you understand? Will you take the test?

[¶ 7] At the administrative hearing, Nelson objected to Exhibit 1, arguing the implied consent was not properly read in full for either test requested. (R3:35). The hearing officer overruled the objection and admitted Exhibit 1 into evidence. (R3:35). Nelson filed a copy of the video and a post-hearing brief with the hearing officer. (R3; R9). The hearing officer determined, "Mr. Nelson was not informed of the complete advisory under N.D.C.C. section 39-20-01," and dismissed the administrative action regarding refusing a chemical test, pursuant to the statutory remedy in N.D.C.C. § 39-20-01(3)(b):

If an individual refused to submit to testing under this section, proof of the refusal is not admissible in any administrative proceeding under this chapter if the law enforcement officer fails to inform the individual as required under subdivision a.

(R7).

[¶ 8] However, the hearing officer concluded the refusal of the screening test was admissible under N.D.C.C. § 39-20-14 and revoked Nelson's driving privileges for two (2) year. (R7).

STANDARD OF REVIEW

[¶ 9] The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs this Court's review of an administrative suspension of a driver's license. *Johnson v. Department of Transp.*, 2004 ND 148, 683 N.W.2d 886, ¶ 5. This Court exercises a limited review in appeals involving driver's license suspensions or revocations, and affirms the agency's decision unless:

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.

Johnson, supra, at ¶ 5, citing N.D.C.C. § 28-32-46.

[¶ 10] On appeal from the district court's review of the administrative agency, this Court reviews the administrative agency's decision. *Schlosser v. N. Dakota Dep't of Transp.*, 2009 ND 173, ¶ 7, 775 N.W.2d 695. This Court reviews only the record that was submitted to the district court and does not make independent findings of fact or substitute its judgment for the agency's. *Id.* However, "Once the facts are established, their significance presents a question of law, which [this Court reviews] de novo," *Schoon v. N. Dakota Dep't of Transp.*, 2018 ND 210, ¶ 7, 917 N.W.2d 199.

LAW AND ARGUMENT

ISSUE: There was no valid request to submit to a screening test in accordance with N.D.C.C. § 39-20-14(3) to support a determination of refusal to submit to testing under N.D.C.C. § 39-20-14.

[¶ 11] It is well-settled that the moving party, here the Department, has the burden of proof in an administrative hearing. *Morrell v. North Dakota Dept. of Transp.*, 1999 ND 140, ¶ 14, 598 N.W.2d 111. Here is undisputed that Skogen did not advise Nelson that North Dakota law requires the individual to take a screening test to determine whether the individual is under the influence of alcohol, and it is also undisputed that Skogen only advised Nelson his driving privileges may result in revocation for up to three years and did not advise Nelson his driving privileges may result in revocation for at least one hundred eighty days.

[¶ 12] N.D.C.C. § 39-20-14(3) provides, in part:

The officer shall inform the individual that North Dakota law requires the individual to take the screening test to determine whether the individual is under the influence of alcohol and that refusal of the individual to submit to a screening test may result in a revocation for at least one hundred eighty days and up to three years of that individual's driving privileges.

[¶ 13] While the hearing officer determined, “Mr. Nelson was not informed of the complete advisory,” but found no available remedy under N.D.C.C. § 39-20-14, the district court instead determined the implied consent advisory given was “substantively complete.” However, Nelson argues that the implied consent advisory given was not substantively complete and twice failed the statutory requirements of N.D.C.C. § 39-20-14(3).

[¶ 14] First, Skogen did not advise Nelson that North Dakota law requires the individual to take a screening test to determine whether the individual is under the influence of alcohol. At no time was Nelson ever advised that taking a screening test was required under North Dakota law. At best, in a different discussion, Skogen told Nelson, “I need to advise you of the implied consent law here in North Dakota, which when you sign your driver’s license here, you sign your consent.” (R15:6), but telling someone “you sign your consent” is not the same as advising them North Dakota requires them to take the test.

[¶ 15] Second, Skogen did not advise Nelson his driving privileges may result in revocation for at least one hundred eighty days. Again, at no time was Nelson ever told the minimum consequences of a 180 day revocation for refusing the screening test. This Court, in *State v. Schumacher*, 452 N.W.2d 345, 348 (N.D.1990), concluded in a different context, “the failure to advise the defendant of mandatory minimum sentence,” was “more than a technical, harmless error and demonstrates a manifestation of injustice” that require the defendant be allowed to withdraw his plea of guilty. *Also see State v. Schwietzer, Jr.*, 510 N.W.2d 612 (N.D.1994) and *State v. Boushee*, 459 N.W.2d 552 (N.D.1990), both reversing and remanding to allow for withdrawal of plea for trial court’s failure to inform defendant of the “mandatory minimum.” The similar failures in this case do not substantively comply

with the statutory requirements of N.D.C.C. § 39-20-14(3), are more than a technical, harmless error and likewise demonstrate a manifestation of injustice.

[¶ 16] This Court has held a prerequisite to a determination that there was a test administered under N.D.C.C. § 39-20-01 is finding that the request for testing was made under N.D.C.C. § 39-20-01. *See Throlson v. Backes*, 466 N.W.2d 124, 127 (N.D.1991)(“[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.*”)(emphasis added).

[¶ 17] In *Alvarado v. N.D. Dep't of Transp.*, 2019 ND 231, ¶ 2, 932 N.W.2d 911, following his arrest, Alvarado was read a partial implied consent advisory. The partial advisory failed to inform him that refusing to take a chemical test could be treated as a crime. *Compare City of Bismarck v. Melanie Jean Vagts*, 2019 ND 224, ¶ 17, 932 N.W.2d 523 (officer’s omission of the phrase “directed by the law enforcement officer” was a substantive omission and did not comply with the statutory requirements for the implied consent advisory.”)

[¶ 18] Alvarado refused to submit to a chemical test. At issue was whether Alvarado’s refusal could be determined to have been a refusal to submit to testing under N.D.C.C. § 39-20-01 when he was not provided with the complete implied consent advisory as provided by N.D.C.C. § 39-20-01. Like this case, when *Alvarado* was decided, there was no statutory remedy for a failure to read the full implied consent advisory in an administrative action regarding refusing a chemical test.

[¶ 19] In *Alvarado, supra* at ¶ 9, this Court provided a judicial remedy for a failure to read the implied consent advisory under N.D.C.C. § 39-20-01, even when the statute failed to provide a remedy. This Court held a request to submit to testing must be made in accordance

to N.D.C.C. § 39-20-01 to support a determination that there has been a refusal to submit to testing under N.D.C.C. § 39-20-01:

The language of N.D.C.C. § 39-20-04, relating to the imposition of revocation as a penalty, and *N.D.C.C. § 39-20-05, relating to how the administrative hearing is conducted, both require a request for testing be made under N.D.C.C. § 39-20-01*. We conclude that *a prerequisite to a determination that an operator has refused a request for testing is finding that the request for testing was made under N.D.C.C. § 39-20-01*.

Id. (emphasis added).

[¶ 20] *Alvarado* teaches us that, “[T]he plain language of N.D.C.C. § 39-20-01(3)(a) requires a valid request for testing before any next steps can occur, whether that be an individual consenting to or refusing chemical testing.” *Alvarado* at ¶ 13 (C.J. Vandewalle, concurring)(emphasis added). Just as a prerequisite to a determination that there was a test administered under N.D.C.C. § 39-20-01 is finding that the request for testing was made under N.D.C.C. § 39-20-01, see *Throlson v. Backes*, 466 N.W.2d 124, 127 (N.D.1991)(“[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*”)(emphasis added), a prerequisite to a determination that there was a test administered under N.D.C.C. § 39-20-14 is finding that the request for testing was made under N.D.C.C. § 39-20-14(3).

[¶ 21] A request to submit to testing must be made in accordance to N.D.C.C. § 39-20-14(3) to support a determination that there has been a refusal to submit to testing under N.D.C.C. § 39-20-14. Following the judicial remedy provided in *Alvarado*, Nelson argues a prerequisite to a determination that there was a test administered under N.D.C.C. § 39-20-14 is finding that the request for testing was made under N.D.C.C. § 39-20-14(3). Because the request for a screening test was not in compliance with N.D.C.C. § 39-20-14(3), the request for testing

was not in compliance with N.D.C.C. § 39-20-14 which was a required prerequisite prior to administering the screening test.

CONCLUSION AND PRAYER FOR RELIEF

[¶ 22] In *Alvarado, supra* at ¶ 9, this Court created a judicial remedy when no statutory remedy existed, and held that a request to submit to testing must be made in accordance to N.D.C.C. § 39-20-01 to support a determination that there has been a refusal to submit to testing under N.D.C.C. § 39-20-01. Similarly, Nelson argues a request to submit to testing must be made in accordance to N.D.C.C. § 39-20-14(3) to support a determination that there has been a refusal to submit to testing under N.D.C.C. § 39-20-14. Because the request for a screening test was not in compliance with N.D.C.C. § 39-20-14(3), the request for testing was not in compliance with N.D.C.C. § 39-20-14 which was a required prerequisite prior to administering the screening test.

[¶ 23] WHEREFORE, the Petitioner and Appellant, Alexander Brent Nelson, by and through his attorney, Chad R. McCabe, respectfully prays for this Court to reverse the judgment of the district court and hearing officer's decision.

Dated this 18th day of January, 2023.

/s/ Chad R. McCabe
CHAD R. MCCABE
McCabe Law Firm
Attorney for the Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
N.D. State Bar ID No. 05474

REQUEST FOR ORAL ARGUMENT

[¶ 24] This appeal raises an unresolved issue of whether there is a valid request to submit to a screening test in accordance with N.D.C.C. § 39-20-14(3). Oral argument would be helpful to further discuss these issues and answer any questions from this Court.

CERTIFICATE OF PAGE COMPLIANCE

[¶ 25] The undersigned certifies that this brief is in compliance with the page limitations of Rule 32, N.D.R.App.P.

Dated this 18th day of January, 2023.

/s/ Chad R. McCabe
CHAD R. MCCABE
McCabe Law Firm
Attorney for the Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
N.D. State Bar ID No. 05474

CERTIFICATE OF SERVICE

[¶ 26] A true and correct copy of the foregoing document was sent by electronic transmission on this 18th day of January, 2023, to the following:

Michael T. Pitcher
Asst. Attorney General
mtpitcher@nd.gov

Dated this 18th day of January, 2023.

/s/ Chad R. McCabe
CHAD R. MCCABE
McCabe Law Firm
Attorney for the Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
N.D. State Bar ID No. 05474

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Alexander Brent Nelson,)
)
Petitioner and Appellant,)
)
vs.)
)
North Dakota Department of)
Transportation,)
)
Respondent and Appellee,)
_____)

CERTIFICATE OF SERVICE**Supreme Court Case No.: 20220355**

[¶ 1] A true and correct copy of the following was electronically filed on this 19th day of January, 2023:

BRIEF OF APPELLANT

to be served upon:

Michael T. Pitcher
Asst. Attorney General
mtpitcher@nd.gov

Dated this 19th day of January, 2023.

/s/ Chad R. McCabe _____

CHAD R. MCCABE

Attorney for the Defendant/Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
crmccabe@midconetwork.com
N.D. State Bar ID No. 05474