20180155
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 26, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dustin Alan LeClair,	)	
	)	
Appellee,	)	Supreme Court No.
	)	20180155
vs.	)	
	)	
Thomas Sorel, Director	)	Cass County Case No.
Department of Transportation,	)	09-2018-CV-00019
	)	
Appellant.	)	

ON APPEAL FROM A JUDGMENT ENTERED APRIL 6, 2018 REVERSING THE DECISION OF THE DEPARTMENT OF TRANSPORTATION AND REINSTATING APPELLEE'S DRIVING PRIVILEGES FROM THE DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT CASS COUNTY, NORTH DAKOTA, THE HONORABLE WADE WEBB, PRESIDING.

BRIEF OF APPELLEE

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[¶4] I. The District Court Correctly Ruled That the Administrative Hearing Officer's Decision Was Not in Accordance With the Law.

[¶5] Dustin LeClair's driving privileges were suspended by order of the Department of Transportation hearing officer on December 26, 2017. Appendix to Brief of Appellant ("***Appx.***"), 7. LeClair appealed the hearing officer's decision to Cass County district court. Appx., 9. The district court heard oral argument on the matter on March 26, 2018. Appx., 11. The district court determined that LeClair was provided an "incomplete post-arrest implied consent advisory" which did not comply with N.D.C.C. § 39-20-01(3)(a). Appx., 11. The district court also considered the Supreme Court's decision in State v. O'Connor, 2016 ND 72. Appx., 11. The district court reversed the hearing officer's decision and reinstated LeClair's driving privileges. Appx., 11, 13. The Department of Transportation subsequently filed an appeal. Appx., 19-20.

[¶6] The Administrative Practices Act, N.D.C.C. ch. 28-32, governs the Supreme Court's review of an administrative decision to suspend a driver's license. Pesanti v. N.D. Dep't of Transportation, 2013 ND 210, ¶ 7, 839 N.W.2d 851. "The review is limited to the record before the administrative agency." Id. (internal citation omitted). The Court must affirm a hearing officer'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 provision 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. In administrative hearings, the burden of proof lies with the Department of Transportation. Morrell v. N. Dak. Dept. of Transportation, 1999 ND 140, ¶ 14, 598 N.W.2d 111 (citing Kobilansky v. Liffrig, 358 N.W.2d 781, 790 (N.D. 1984)).

[¶7] The North Dakota Legislature requires an officer to inform a person charged with DUI of the implied consent advisory prior to taking a chemical test. "[T]he 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." N.D.C.C. § 39-20-01(3)(a) (emphasis added). The word "punishable" was omitted by Officer Kyle Johnson when he read the implied consent advisory to LeClair prior to the chemical breath test. Further, a chemical test is not admissible if the officer "fails to inform the individual charged as required under subdivision a." N.D.C.C. § 39-20-01(3)(b).

[¶8] Words in any statute are understood in their ordinary sense unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Words and phrases are read and understood according to context, the rules of grammar, and approved

usage. N.D.C.C. § 1-02-03. When the statute is clear, the letter of it shall not be disregarded in favor of pursuing the spirit. N.D.C.C. § 1-02-05. "[I]t is presumed that . . . [t]he entire statute is intended to be effective." N.D.C.C. § 1-02-38(2). When the plain meaning of a statute is apparent, it is not necessary to dig into a further meaning. Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993).

> It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent.

Id. (quoting City v. Dickinson v. Thress, 69 N.D. 748, 290 N.W. 653, 657 (N.D. 1940)).

[¶9] The hearing officer's decision was not in accordance with North Dakota law. The hearing officer reviewed the squad car video of Officer Johnson's encounter with LeClair. In the video, prior to LeClair submitting to a chemical test, Officer Johnson stated:

> I must inform you that North Dakota law requires you take a chemical, breath or urine test to determine whether you are under the influence of alcohol or drugs. Refusal to take a chemical, breath or urine test may result in the revocation of your driving privileges for a minimum of 180 days and up to three years. I must also inform you that refusal to take a chemical, breath or urine test is a crime in the same manner as a driving under the influence charge. Today you will be performing the chemical breath test. Do you consent to taking the chemical test that I'm requesting?

Doc ID# 24 (Ex. 16 – DVD at 2:46:36, et seq.). This recital of the implied consent advisory is not in compliance with the statute. Specifically, this recital omits the word "punishable" from the phrase ". . . refusal . . . is a crime punishable in the same manner as driving under the influence." See N.D.C.C. § 39-20-01(3)(a).

[¶10] The hearing officer specifically made findings regarding Officer Johnson's recital of the implied consent advisory. The hearing officer held:

> LeClair argued that this [sic] driving privileges should not be suspended pursuant to NDCC section 39-20-01, Subd. 3a and 3b as Johnson failed to state that refusing to submit to the chemical breathe [sic] test was "punishable in the same manner" as opposed to what Johnson did state which was "a crime in the same manner as driving under the influence charge."
>
> The law does not require an officer use the exact words of the statute. State v. Johnson, 2009 ND 167. The officer must advise the person about the implied consent and inform the person of the consequences of refusal, including the loss of driving privileges. LeClair was advised that refusing to submit to the chemical test was considered a crime in the same manner as a driving under the influence charge. LeClair, having been convicted of a DUI in the past, was aware that there are consequences such as jail time and a fine when convicted of DUI. Johnson's reading of the implied consent adequately advised LeClair of the consequences for refusing the breathe [sic] test.

Appx., 7. The hearing officer's findings are not consistent with current North Dakota law.

[¶11] The hearing officer and the Department of Transportation take the position that the omission of the word "punishable" from Officer Johnson's recital is not fatal to admission of the chemical breath test. In particular, the Department asks this Court to simply ignore its recent rulings in favor of past rulings that are more favorable to the Department's position. However, the Department's position is not supported by by current North Dakota law.

[¶12] The hearing officer relied upon State v. Johnson, 2009 ND 167, 772 N.W.2d 591, concluding that Officer Johnson was not required to recite the mandatory language of N.D.C.C. § 39-20-01(3)(a). The hearing officer's reliance on Johnson is misplaced, as the specific holding in Johnson relied upon by the hearing officer was itself based on this Court's prior holding in State v. Salter, 2008 ND 230, 758 N.W.2d 702. Specifically, the Salter opinion held when an officer advised the driver of implied consent, "The arresting officer does not have

to use the exact language of N.D.C.C. § 39-20-01 in advising the driver to invoke the provisions of the implied consent law." Id. at ¶ 7. This rule is no longer the law.

[¶13] This Court analyzed its holding in Salter when it decided State v. O'Connor, 2016 ND 72, 877 N.W.2d 312. It was determined the Salter Court did not err in deciding to uphold the hearing officer's suspension. Id. at ¶ 10. However, the O'Connor Court made an important distinction.

> When Salter was decided, N.D.C.C. §§ 39-20-01 and 39-20-14 (2007) required identical implied consent advisories be given before submission to the screening test and the chemical test. Neither statute stated any consequence for an officer's failure to strictly comply with those requirements. Under the reasoning of Salter, the consequence for an officer's failure to comply with the statutory procedures required the district court to determine whether the defendant voluntarily gave "actual consent" for the chemical test under the Fourth Amendment. 2008 ND 230, ¶¶ 6, 7, 10, 758 N.W.2d 702.

Id. at ¶ 11. In 2013, the Legislature made refusal of a chemical test a crime. Id. (citing State v. Smith, 2014 ND 152, ¶ 9, 849 N.W.2d 599). In 2015, the Legislature attached a specific consequence for an officer's failure to give the proper implied consent advisory. Id. (citing 2015 N.D. Sess. Laws ch. 268, § 9). A plain reading of the statute shows a chemical test is not admissible in an administrative proceeding if the officer fails to inform the driver of the implied consent advisory as stated in N.D.C.C. § 39-20-01(3)(a). Id.; N.D.C.C. § 39-20-01(3)(b).

[¶14] Even when analyzing LeClair's case through the lens of O'Connor, with the same skepticism as argued by the Department of Transportation on whether including of the word "punishable" would have made a difference, this

Court has discussed why the Department's argument is wrong. Chief Justice VandeWalle wrote,

> It seems odd, if not absurd, that a person who agrees to take the test after an advisory which neglected to tell the person that the refusal to take the test is a crime punishable in the same manner as driving under the influence and was told only that it was a crime to refuse was disadvantaged by the advisory. Are we to assume that had the person been given the proper advisory he would have refused to take the test? I understand that had the person refused to take the test and been convicted and punished in the same manner as driving under the influence, the person could very well have been disadvantaged by the advisory in this instance. Nevertheless, I agree that 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.

O'Connor, 2016 ND 72, ¶ 18, 877 N.W.2d 312 (VandeWalle, C.J., concurring specially) (emphasis added). The bright line established by the Legislature is that an officer must read the implied consent advisory as written in N.D.C.C. § 39-20-01(3)(a) or the chemical test will not be admissible. Officer Johnson failed to comply with this statute. As a bright line rule, LeClair's test is not admissible.

[¶15] The Salter Court even stated, "If the statutory requirements have been complied with, a person's consent to the chemical testing is implied and the person must affirmatively refuse to submit to the testing in order to withdraw consent." Salter, 2008 ND 230, ¶ 7, 758 N.W.2d 702. Officer Johnson did not comply with the statute. The statute requires use of the word "punishable" in the implied consent advisory. N.D.C.C. § 39-20-01(3)(a). Failure to recite the proper implied consent advisory prevents admission and use of a chemical test in an administrative or criminal hearing. N.D.C.C. § 39-20-01(3)(b).

[¶16] As absurd as the hearing officer and Department of Transportation may believe it necessary to include this word, the Legislature has made very clear the implied consent advisory must be read as written.

> The Legislature has directed that a specific warning be provided to an arrested defendant before the results of a chemical test can be admitted in a criminal or administrative proceeding. "We give special deference to the Legislature when an implied consent statute governing admissibility of evidence is part of a legislative design that essentially authorizes and creates the item of disputed evidence."

O'Connor, 2016 ND 72, ¶ 13, 877 N.W.2d 312 (quoting City of Fargo v. Ruether, 490 N.W.2d 481, 484 (N.D. 1992)). If the Legislature did not want the implied consent advisory to include the word "punishable," it would have removed the word from the statute. As this Court noted in O'Connor, adopting the Department's argument now "would eviscerate the 2015 amendment to N.D.C.C. § 39-20-01(3)." Id. It cannot be overstated that the implied consent advisory before the Court in LeClair's case is substantially similar to the implied consent advisory before the O'Connor Court.

[¶17] The Department wants the Court to provide some leniency for a law enforcement officer who does not recite verbatim the implied consent advisory. The Department relies on Asbridge v. N.D. State Highway Comm'r, 291 N.W.2d 739 (N.D. 1980), for the proposition that a precise recital is not required. In Asbridge, the issue was whether the officer used precise terminology when informing the defendant of the reason for the arrest. Id. at 746. The Court found that the officer's responses to the hearing officer's questions were "not truly representative of the actual words used by the officer at the time of the arrest. The officer was merely responding to questions raised by the hearing officer, and was never asked to recite the precise words he used[.]" Id. The case

now before this Court is a striking contrast. The hearing officer, the district court, and this Court are aware of the precise words used by Officer Johnson when he read the implied consent advisory to LeClair. The Asbridge Court was forgiving of the officer because the Court was not going to infer the officer's words during the arrest. This Court knows as fact that Officer Johnson did not recite the proper implied consent advisory to LeClair.

[¶18] The Department further relies on Asbridge to argue that, "[f]rom a practical standpoint, however, we cannot expect a police officer to recite the exact words of the statute[.]" Id. at 749. While that may have been true in 1980, when Asbridge was decided, that argument cannot be controlling in 2018.

[¶19] Officer Johnson provided testimony during the administrative hearing that he read the implied consent advisory from his own card, presumably prepared for him by a government agency. With regard to the implied consent advisory read to LeClair, Officer Johnson testified as follows:

> **Officer Johnson:** I asked him to turn around and place his hands behind his back. I placed him under arrest by handcuffing him behind his back, checking for proper fit and double locking them for safety.
>
> **Mr. Allen:** Did you tell him what you were arresting him for?
>
> **Officer Johnson:** Yes, for driving under the influence.
>
> **Mr. Allen:** What happened after you handcuffed him and informed him?
>
> **Officer Johnson:** I had him sit in . . . well, after doing a search, I had him sit in the rear seat of my patrol car. When I reapproached I spoke with the passenger who had also been drinking. Said she was not able to drive. I had an assisting officer, Sergeant Dura, who was on scene. He gave that passenger a ride home. And then he parked the vehicle there on scene. I had to ask for permission to move it because it was not legally parked. And so once I got that I moved it and parked it, locked it up.

Mr. Allen: Then what happened?

Officer Johnson: I transported Mr. LeClair to the Cass County Jail. In the jail sally port, I read the North Dakota implied consent advisory from the back of the Report and Notice. Asked for a chemical breath test, which he did say he would take.

Transcript of Testimony of Administrative Hearing ("***Transcript***"), Doc ID# 10, 12:20-13:17 (emphasis added).

[¶20] Upon cross-examination, after an opportunity to review the squad car video, Officer Johnson further testified:

Mr. Heck: I thought you said . . . you obviously read the North Dakota implied consent advisory; correct?

Officer Johnson: Yes.

Mr. Heck: But you didn't advise him that it was a crime punishable in the same manner as a DUI correct? Just that it was a crime similar to a DUI; is that fair?

Officer Johnson: I read it off the card that I had with me.

Transcript, 16:8-16:14 (emphasis added). Officer Johnson was not required to memorize and recite the current implied consent advisory. He simply had to read the statute. It is not the fault of LeClair that Officer Johnson's card did not include the word "punishable."

[¶21] The Department also argues that Miranda warnings need not be recited verbatim in order to provide a defendant with notice of his Constitutional rights. The Department is correct in its interpretation, but it has no bearing on this case. Miranda warnings are not part of the North Dakota Legislature's statutory framework, some of which are specifically crafted to advise motorists of the implied consent advisory for chemical tests.

[¶22] CONCLUSION

[¶23] Officer Johnson did not comply with North Dakota law when he failed to recite the proper implied consent advisory before LeClair submitted to a chemical breath test. The hearing officer's decision to suspend LeClair's driving privileges is not based on current North Dakota law. The current implied consent advisory requires the officer inform a driver that refusal to take the test is a crime punishable in the same manner as DUI. Officer Johnson's failure to properly inform LeClair of the implied consent advisory prevents admission of the chemical test.

[¶24] LeClair respectfully prays that the Court affirm the district court's order reversing the hearing officer's decision and reinstating LeClair's driving privileges.

[¶25] Dated this 26th day of June, 2018.

/s/ Lee M. Grossman

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[¶26] CERTIFICATE OF COMPLIANCE

[¶27] The undersigned, as the attorney representing Appellee, Dustin Alan LeClair, and the author the Brief of Appellee Dustin Alan LeClair, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the total number of words from the portion of the brief entitled "Statement of the Issues" through the signature line does not exceed 8,000. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

[¶28] Dated this 26th day of June, 2018.

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Appellant.	)	

CERTIFICATE OF SERVICE

[¶1] I, Lee M. Grossman, an attorney licensed in the State of North Dakota, hereby certify that on **June 28, 2018,** the following documents were filed with the North Dakota Supreme Clerk of Court:

1. **Appellee's Brief;**
2. **Certificate of Service.**

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

Thomas Sorel
Director of Department of Transportation
c/o aglass@nd.gov

Douglas Anderson
dbanders@nd.gov

[¶3] A check payable to the North Dakota Dakota Supreme Court in the amount of $25.00 has been mailed for the filing fee pursuant to N.D.R.App.P. 25. This service has been made pursuant to N.D.R.App.P. 25 and N.D.R.Ct. 3.5.

[¶4] Dated: June 28, 2018.

/s/ Lee Grossman

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