

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

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Morgan Lies,	)	
Appellant,	)	
	)	
vs.	)	Supreme Court No. 20180393
	)	Case No. 36-2018-CV-00182
North Dakota Department	)	
Of Transportation,	)	
Appellee.	)	

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APPEAL FROM THE DISTRICT COURT  
RAMSEY COUNTY, NORTH DAKOTA  
NORTHEAST JUDICIAL DISTRICT  
HONORABLE DONOVAN FOUGHTY, PRESIDED.

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**BRIEF OF APPELLANT**

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<b><u>STATUTE(S):</u></b>	
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## STATEMENT OF THE ISSUE

**I. Whether The Hearing Officer’s decision violated Appellant’s constitutional rights (NDCC § 28-32-46(2)) because there was no evidence or testimony that the arresting officer and/or the directing officer possessed a reasonable and articulable suspicion that Appellant was violating the law prior to the stop of Appellant’s vehicle.**

## STATEMENT OF THE CASE

[¶ 1] Morgan Lies (Lies), appeals from a civil judgment entered on August 24, 2018 in the District Court of Ramsey County (District Court) (Appendix (“App.”) at 30). Said judgment affirmed the decision of the Administrative Hearing Officer (Hearing Officer) issued on May 3, 2018 suspending Lies’ driving privileges for a period of ninety-one (91) days. (App. at 6). Although the period of suspension has long since passed and Lies now has his driving license returned, Lies seeks reversal of the District Court’s judgement and the Hearing Officer’s decision.

[¶ 2] On April 6, 2018, Lies was arrested by Officer Samantha Rodriguez (Rodriguez) for the offense of Driving Under the Influence in the City of Devils Lake. (DOT Administrative Hearing Transcript (“Tr.”) at 5). Lies requested an Administrative Hearing through the North Dakota Department of Transportation (the “Department” and “DOT”) which was held on May 2, 2018. The decision of the Hearing Officer suspending Lies’ driving privileges was issued on May 3, 2018. (Tr. at 40, line (“L.”) 24). Lies filed a Notice of Appeal to District Court and Specification of Errors on May 7, 2018. (App. at 3). Subsequently, Lies filed a Brief in support of his Appeal on July 13, 2018. (App. at 8). The Department filed its response to Lies’ Brief on July 30, 2018. (App. at 17).

[¶ 3] The District Court issued an Order affirming the decision of the Hearing Officer on August 21, 2018, finding Officer Rodriguez possessed a reasonable and articulable suspicion to stop Lies’ vehicle. (App at 29). In said Order, Honorable Judge Donovan Foughty made no

specific Findings related to the specific issues and arguments put forth by Lies and the Department and simply cited NDCC § 28-32-46. Id. Lies timely filed his Notice of Appeal to the North Dakota Supreme Court on October 26, 2018. (App. at 31). Lies argues the District Court erred in finding Officer Rodriguez possessed a reasonable and articulable suspicion to justify the stop of Lies and therefore, erred in affirming the Hearing Officer's decision.

Therefore, the District Court's order should be reversed.

### **STATEMENT OF THE FACTS**

[¶ 4] On the evening of April 6, 2018 at approximately 7:05 PM (Tr. 32 at L. 11), a white HHR leaves Ed's Bait Shop & Bar (Ed's). The video of the white HHR leaving Ed's is time stamped approximately 7:15 PM. (Ex. 11). Anelle Howard (Howard) is a manager at Ed's. Howard testified the time stamp is fast by ten (10) minutes. Therefore, the actual time the white HHR left Ed's was 7:05 PM. (Tr. at 32).

[¶ 5] Off duty North Dakota Highway Patrol (NDHP) Officer Chris Laite (Laite) witnessed the white HHR leave Ed's driving erratically and relayed this information to on duty NDHP Officer Kyle Mlynar (Mlynar). (Tr. at 6). No license plate number was given and, other than a model and color, no other identifying information regarding the driver or the vehicle was provided by Laite to Mlynar. (Tr. at 22). This information was then relayed by Mlynar to Rodriguez at approximately 7:30 PM. (Tr. at 6). Rodriguez spoke with Mlynar in the parking lot of the Glass Shop in Devils Lake at approximately 7:30 PM as he was surveilling a white HHR at the McDonald's drive thru. Rodriguez then left the area. (Tr. at 8).

[¶ 6] Sometime shortly before 8:00 PM, Rodriguez ended up behind a white HHR. (Tr. at 22). Rodriguez testified that there was no way of knowing that this particular white HHR was the same white HHR that had left Ed's nearly fifty-five (55) minutes prior. (Tr. at 22 & 26).

However, although not certain, she likely assumed that it was the same white HHR that was being surveilled by Mlynar at McDonalds around 7:30 PM. Rodriguez testified that she did not witness any erratic driving and no description of erratic driving was relayed to her from Mlynar. (Tr. at 9). No radio traffic concerning erratic driving was ever relayed or heard by any other officers. (Tr. at 27). Rodriguez then pulled over the white HHR at the direction of Mlynar. (Tr. at 13). The presumed reason for the stop was the initial report of Laite. (Tr. at 10 & 27). At no time prior to the stop or after the stop did Mlynar ever provide Rodriguez with any additional information that would support a reasonable suspicion for the stop. (Tr. at 13).

[¶7] Lies was the driver of the white HHR stopped by Rodriguez. He smelled of alcohol, admitted consuming alcohol, failed some field sobriety tests, failed an initial screening test and was eventually placed under arrest for driving under the influence (DUI) at 8:15 PM. (Tr. at 13-18; App. at 5). Pursuant to proper procedures, Lies submitted to an Intoxilyzer breath test at around 9:00 PM and the results were 0.12%. (App. at 5). Lies was then charged with DUI and issued a Report and Notice. (App. at 5).

### **STANDARD OF REVIEW**

[¶8] The Administrative Agencies Practice Act, NDCC chapter 28-32, governs the review of administrative license suspensions. Anderson v. ND Dept. of Transportation, 2005 ND 97, ¶ 6, 696 N.W.2d 918. NDCC § 28-32-46 provides that the Court must affirm an administrative agency's order unless:

1. The order is not in accordance with the law.
- 2. The order is in violation of the constitutional rights of the Petitioner.**
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 Petitioner 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 Petitioner.

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.

[¶9] "The review is limited to the record before the administrative agency." Mees v. ND Dept. of Transportation, 2013 ND 36, ¶7, 827 N.W.2d 345. The Supreme Court reviews the administrative hearing officer's decision and gives deference to the administrative hearing officer's findings. Dettler v. Sprynczynatyk, 2004 ND 54, ¶8, 676 N.W.2d 799. The Supreme Court does not make independent findings or substitute their judgment for that of the agency. Id. Rather, they "determine only whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id. "We defer to the hearing officer's opportunity to judge the credibility of witnesses." Schock v. ND Dept. of Transportation, 2012 ND 77, ¶12, 15 N.W.2d 255.

[¶10] However, whether the facts meet the legal standard, rising to the level of reasonable and articulable suspicion, is a question of law fully reviewable on appeal. Schock, at ¶12. Pesanti v. ND Dept. of Transportation, 2013 ND 210, ¶7, 839 N.W.2d 851.

### **LAW AND ARGUMENT**

- I. **The Hearing Officer's decision violated Appellant's constitutional rights (NDCC § 28-32-46(2)) because there was no evidence or testimony that the arresting officer and/or the directing officer possessed a reasonable and articulable suspicion that Appellant was violating the law prior to the stop of Appellant's vehicle.**

[¶11] "Unreasonable searches and seizures are prohibited by the Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and by

Article I, § 8 of the North Dakota Constitution.” State v. Fasteen, 2007 ND 162, ¶6, 740 N.W.2d 60. “Under the doctrine announced by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, police may, in appropriate circumstances, detain an individual for investigative purposes when there is no probable cause to make an arrest if the police have a reasonable and articulable suspicion that criminal activity is afoot.” Id.

[¶12] “For a valid investigative stop of a vehicle under the Terry doctrine, an officer must have a reasonable and articulable suspicion the motorist has violated or is violating the law.” Id. The law governing investigative stops of vehicles is clear. An officer must have a reasonable and articulable suspicion that a motorist has violated or is violating the law in order to legally stop a vehicle. State v. Kenner, 1997 ND 1, 559 N.W.2d 538 citing State v. Miller, 510 N.W.2d 638 (N.D. 1994).

[¶13] The North Dakota Supreme Court has discussed three situations that provide an officer reasonable and articulable suspicion to stop a vehicle: (1) when the officer relied on a directive or request for action from another officer; (2) when the officer received tips from other police officers or informants, which were then corroborated by the officer's own observations; and (3) when the officer directly observed illegal activity. Anderson v. ND Dept. of Transportation, 696 N.W.2d 918, ¶9, 2005 ND 97 citing In re T.J.K., 1999 ND 152, ¶8, 598 N.W.2d 781. In the present case, Rodriguez was acting on a directive from another officer, Mlynar.

[¶14] “Where one officer relays a directive or request for action to another officer without relaying the underlying facts and circumstances, the directing officer's knowledge is imputed to the acting officer.” State v. Miller, 510 N.W.2d 638, 643 (N.D. 1994); Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); see also State v. Rodriguez, 454 N.W.2d 726, 729 (N.D. 1990). “Thus, an officer who is unaware of the factual basis for probable cause, may

make an arrest upon a directive. The rationale for the Whiteley rule is that the arresting officer is entitled to assume that whoever issued the directive had probable cause." Miller Id. The question then becomes whether the directing officer had probable cause. Id.; United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). [Emphasis ours] The same analysis applies in the reasonable suspicion context. Miller Id.; see Hensley, supra.

[¶15] For the purposes of the case at hand, the important language from all of the above is:

**“The question then becomes whether the directing officer had probable cause. Id.; United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). [Emphasis ours] The same analysis applies in the reasonable suspicion context. Miller Id.; see Hensley, supra.”**

[¶16] In the case at hand, it is undisputed that a white HHR left Ed’s at 7:05 PM. The video shows the vehicle leaving Ed’s and the manager testified that based on the timestamp being ten (10) minutes fast the vehicle would have left at approximately 7:05 PM. (Tr. at 32). Other than a model and color, there is absolutely no other identifying information regarding the vehicle that was relayed directly from Laite to Mlynar or Rodriguez. Additionally, other than the initial report, there was no report, information or testimony about erratic driving by the white HHR that left Ed’s, any other white HHR or Appellant’s vehicle (a white HHR). No such information was ever relayed or heard by any other officers over the radio. Although the reported initial erratic driving appears to be contradicted by the surveillance video from Eds’s, it was reported by Laite that he believed it to be driving erratically. Appellant concedes that whether the vehicle was in fact driving erratically is irrelevant to the discussion at hand. What is relevant to the discussion is that the video establishes a time of approximately 7:05 PM for when Laite would have witnessed the vehicle leave Ed’s.

[¶17] It is also clear from the record that Mlynar was surveilling a white HHR at 7:30 PM and

likely for some time prior to 7:30 PM. (Tr. at 6). This is a full twenty-five (25) minutes after the white HHR had left Ed's. It wasn't until nearly thirty (30) minutes after the McDonald's surveillance that Mlynar directs Rodriguez to stop the vehicle. (Tr. at 22). This time frame is supported by Rodriguez's testimony, as well as the Report and Notice, which indicates Appellant, Lies, was placed under arrest at approximately 8:14 PM. (App. at 5)

[¶18] Neither Mlynar nor Laite testified at the Hearing. The only testimony was from Officer Rodriguez and Officer Johnson. Officer Johnson administered the Intoxilyzer and had been monitoring radio traffic. Neither Rodriguez nor Johnson could provide any information supporting the contention that the white HHR driven by Lies was in fact the same white HHR that had left Ed's a full fifty-five (55) minutes prior.

[¶19] Additionally, there was not a single bit of testimony or evidence regarding erratic driving witnessed by Rodriguez. There was also no evidence indicating Mlynar had observed any erratic driving himself or that he had relayed any such information to Rodriguez directly or indirectly over the radio. Additionally, there was no evidence showing that Mlynar knew the white HHR driven by Appellant was the same HHR that had left Ed's.

[¶20] Even if there was evidence showing Mlynar believed it was the same HHR that had left Ed's, it would be difficult to argue that Mylar possessed any reasonable suspicion that would support the stop of Mr. Lies's vehicle nearly fifty-five (55) minutes later. In fact, if Appellants' white HHR was in fact the same HHR that had left Ed's, Appellant argues the continued surveillance for nearly fifty-five (55) minutes without any additional observation of erratic driving actually negates any reasonable suspicion that may have existed at the time of the initial report.

[¶21] Although Anderson and Whiteley would allow Rodriguez to stop the vehicle driven by

Lies based upon a directive from Mlynar, Hensley, Miller and Kenner all reiterate and require that the directive be based upon Mlynar himself having probable cause or reasonable suspicion to order the directive and impute said probable cause or reasonable suspicion upon Rodriguez. Appellant, Lies, argues no evidence or testimony was submitted at the Hearing which would support a finding of reasonable suspicion on the part of Mlynar and thereby imputing said suspicion to Rodriguez.

[¶22] To allow Rodriguez to stop Mr. Lies based upon a directive from Mlynar without any evidence or testimony supporting reasonable suspicion on Mlynar's part to thereby impute upon Rodriguez would allow law enforcement to simply by-pass the reasonable suspicion requirement altogether. Upholding a stop under these circumstances would allow a law enforcement officer who wanted to stop a vehicle without reasonable suspicion to simply give a directive to another officer to stop the vehicle. The directing officer would then not have to show up to testify as to his/her basis for directing the stop and to allow the accused person to cross examine the witness and challenge the testimony against him/her in a criminal or administrative action. Rather the directing officer could simply rely on the Court to assume he/she had reasonable suspicion for issuing the directive in the first place. That is exactly what has happened in this case and it is contradictory to any reasonable Fourth Amendment logic and case law.

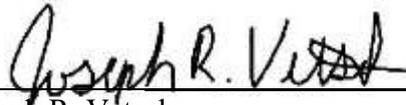
### **CONCLUSION**

[¶23] The Hearing Officer's decision violated Appellant's constitutional rights (NDCC § 28-32-46(2)) because there was no evidence or testimony that the arresting officer and/or the directing officer possessed a reasonable and articulable suspicion that Appellant was violating the law prior to the stop of Appellant's vehicle. Appellant, Lies, respectfully requests this Court REVERSE the August 24, 2018 Order affirming the Hearing Officer's decision suspending

Appellant's driving privileges.

[¶24] Furthermore, unless otherwise determined by the North Dakota Supreme Court, Appellant requests the Court schedule and hear Oral Arguments in this case.

[¶25] Dated this 5<sup>th</sup> day of December, 2018.



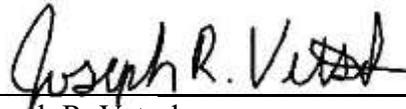
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**CERTIFICATE OF COMPLIANCE**

The undersigned, as the attorney representing Appellant, Morgan Lies, and the author of the Brief of Appellant, hereby certifies that said Brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 2691 words from the portion of the Brief entitled “Statement of the Issues” through the signature line. This word count was done with the assistance of the undersigned’s computer system, which also counts abbreviates as words.

Dated this 5<sup>th</sup> day of December, 2018.



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