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January 9, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Drew Park Sutton, Plaintiff/Appellant, v. North Dakota Department of Transportation, Defendant/Appellee.	)	Supreme Court No. 20180427 Williams County No. 53-2018-CV-00902

BRIEF OF APPELLANT

Appeal from Judgment, dated and filed on October 1, 2018

Entered following the District Court's Order (Affirming Hearing Officer's Decision)

dated and filed September 18, 2017

Williams County District Court

Northwest Judicial District

The Honorable Paul Jacobson

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[¶1] TABLE OF AUTHORITIES

North Dakota statutes

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[¶2] STATEMENT OF THE ISSUES

A. The Report and Notice form in this matter, on its face, did not sufficiently articulate reasonable grounds to believe Mr. Sutton was driving under the influence of alcohol, and did not sufficiently show that the officer formulated an opinion that Sutton's body contains alcohol, as required by N.D.C.C. § 39-20-04. The failure to comply with the basic and mandatory statutory requirements of N.D.C.C. § 39-20-04 deprives DOT of jurisdiction to impose administrative sanctions upon Mr. Sutton.

B. There was no affirmative refusal to submit to an onsite screening test. Therefore, DOT's finding of fact that "Mr. Sutton refused the onsite screening test" is not supported by a preponderance of the evidence and is not in accordance with the law. Also, the conclusions of law and order of the agency are not supported by its findings of fact. Specifically, the conclusion that "Mr. Sutton refused to submit to the onsite screening test" is not supported by the findings of fact or testimony at the hearing, and is not in accordance with the law.

[¶3] STATEMENT OF THE CASE

[¶4] On May 7, 2018, Drew Sutton was arrested for Driving Under the Influence after being stopped for speeding. (DOT Administrative Hearing Transcript ("Tr.") at 4, lines ("L.") 11-25). Sutton was issued a temporary operator's permit. (Exhibit 1b, Transcript of DOT Hearing). Sutton timely requested an administrative hearing and, on June 6, 2018, the Department of Transportation ("Department" and "DOT") held a hearing. After the hearing, the hearing officer mailed out a decision which ordered the revocation of Sutton's driving privileges for a period of one hundred eighty (180) days. (Appendix ("App.") at 4).

[¶5] On June13, 2018, Sutton filed a Notice of Appeal and Specifications of Error with the District Court alleging numerous errors in the DOT administrative proceedings. (App. 5-6). After both Petitioner and Respondent submitted written

arguments to the district court, the court issued its Order affirming the decision of the hearing officer. (App. 23-24).

[¶6] On October 1, 2018, Judgment was entered in this matter. (App. 25-26). On October 2, 2018, the Department filed a Notice of Entry of Judgment. (App. 27). On November 30, 2018, Sutton filed a Notice of Appeal to this Court seeking relief. (App. 28-31). Sutton asks this court to reverse the decision of the district court and to reinstate his driving privileges.

[¶7] STATEMENT OF THE FACTS

[¶8] On May 7, 2018, Drew Sutton was stopped for speeding by Officer Ware of the Williston Police Department. (Tr. at 4, L. 11-25). The officer ultimately asked Sutton if he would perform field sobriety tests, but Sutton declined. (Tr. at 7, L. 12-22).

[¶9] The officer then read Sutton the implied consent advisory for the preliminary breath test and requested a screening test. (Tr. at 7, L. 24 - 8, L. 11). The officer testified that Sutton declined the screening test, but could not recall "if it was verbal or not." (Tr. at 9, L. 4-11).

[¶10] The officer then placed Sutton under arrest for DUI, read another implied consent advisory to Sutton, and requested a breath sample. (Tr. at 9, L. 16 - 10, L.8). Sutton said "I don't know." (Tr. at 11, L. 14-15). Sutton "did not give [the officer] an answer." (Tr. at 18, L. 24 - 19, L.). Sutton told the officer that "he was scared" and it seemed to the officer that Sutton "was unsure of ... his testing obligation" and was unsure of "what he was required to do." (Tr. at 19, L. 10-15).

[¶11] At that point, the officer "deemed it a refusal by actions." (Tr. at 11, L. 15-16). The officer then issued Sutton a Report and Notice form. (Tr. at 11, L. 20-21).

[¶12] STANDARD OF REVIEW

[¶13] "The Administrative Agencies Practice Act, N.D.C.C. ch 28-32, governs review of an administrative decision to suspend or revoke a driver's license." *See Dworshak v. Moore*, 1998 ND 172, ¶6, 583 N.W.2d 799. "This Court will affirm 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.

N.D.C.C. § 28-32-46." *See Lee v. NDDOT*, 2004 ND 7, ¶8, 673 N.W.2d 245. "An agency's decisions on questions of law are fully reviewable." *See Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶6, 774 N.W.2d 645.

[¶14] LAW AND ARGUMENT

A. The Report and Notice form in this matter, on its face, did not sufficiently articulate reasonable grounds to believe Mr. Sutton was driving under the influence of alcohol, and did not sufficiently show that the officer formulated an opinion that Sutton's body contains alcohol, as required by N.D.C.C. § 39-20-04. The failure to comply with the basic and mandatory statutory requirements of N.D.C.C. § 39-20-04 deprives DOT of jurisdiction to impose administrative sanctions upon Mr. Sutton.

[¶15] In *Aamodt v. N.D. Department of Transportation,* plain-clothed Mandan Police officers in an unmarked vehicle observed Aamodt and another man "get out of a taxicab and walk toward a white Ford pickup." *See Aamodt v. N.D. Department of Transportation,* 2004 ND 134, ¶2, 682 N.W.2d 308. The officers, who felt the two men appeared intoxicated, "observed Aamodt get into the pickup through the driver's door and start the engine" and "also observed Smith urinating on the ground near the rear of the pickup." *See id*. After one officer observed Aamodt "exit the vehicle," the officer "approached him and asked for identification." *See id.*

[¶16] "While talking with Aamodt, the officer observed his slurred speech, bloodshot eyes, and the odor of alcohol" and then "asked Aamodt to submit to field tests and an S-D2 test, but Aamodt declined." *See Aamodt,* 2004 ND 134 at ¶3. Aamodt was arrested for APC, submitted to a chemical test, "was issued a temporary operator's permit," and, subsequently, "[a] copy of the report and notice form was timely submitted to the Department." *See id*.

[¶17] At his administrative hearing, Aamodt objected to the hearing and argued that the Department could not suspend his driving privileges "because the report turned in by the officer did not show reasonable grounds to believe Aamodt was in actual physical control of a motor vehicle while under the influence of alcohol, as required by N.D.C.C.

§ 39-20-03.1(3)." *See Aamodt,* 2004 ND 134 at ¶9. After "[t]he hearing officer overruled the objection," continued with the hearing, and ultimately "suspended Aamodt's driving privileges for 91 days," Aamodt appealed. *See id.* at ¶¶9-10.

[¶18] The district court reversed the hearing officer's decision and found that the Report and Notice form "did not state, as required by law, reasonable grounds to believe Aamodt was in actual physical control of a motor vehicle while under the influence of alcohol." *See Aamodt,* 2004 ND 134 at ¶10. The Court noted:

> "All Officer Bleth checked in the box for the 'Officer's Statement of Probable Cause' was 'already stopped' and 'odor of alcoholic beverage.' No explanation was submitted on the Report and Notice form by Officer Bleth."

See id at ¶10. The district court "explained that probable cause is a fundamental reason for making an arrest and that failing to even minimally state the officer's probable cause deprived the Department of authority to suspend Aamodt's driving privileges." *See id.* The Department appealed.

[¶19] This Court agreed that the Report and Notice form in *Aamodt* did not state reasonable grounds as required by statute, affirmed the decision of the district court, and reminded that "[t]he Department's authority to suspend a person's license is given by statute" and, accordingly, "[t]he Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges." *See Aamodt,* 2004 ND 134, at ¶15. This Court also remarked that, in enacting section 39-20-03.1, "[t]he legislature was concerned that the law not be "slanted too much toward the [agency's] convenience … and that the officer be able to articulate probable cause before taking a license." *See id* at ¶24 (emphasis added). The Court concluded by warning:

> "Driving privileges cannot be taken away without some basis. Requiring reasonable grounds before taking away a person's driving privileges ensures the law is not too slanted in favor of the Department and protects those who should not be punished. Without a finding of probable cause, there is no basis for taking away a person's driving privileges. Aamodt was entitled to know what the officer was relying on."

See id. at ¶25 (emphasis added).

[¶20] In our case, like *Aamodt*, the Williston police officer's Report and Notice form did not sufficiently "state" or "articulate" reasonable grounds to believe Sutton was driving under the influence of alcohol, as required by N.D.C.C. § 39-20-04[1]. Like *Aamodt*, all the officer in our case checked on the Report and Notice form was "traffic violation" and "odor of alcoholic beverage." *See* Exhibit 1b. The only statements provided in the "Explain" boxes were "EXCEEDED POSTED SPEED LIMIT" and "DECLINED FIELD SOBRIETY TESTS." *See id.* "The Department [would surely] concede[ ] this is insufficient to show probable cause." *See Aamodt*, 2004 ND 134, at ¶15. Like *Aamodt*, Mr. Sutton "was entitled to know what the officer was relying on" for probable cause. *See id.* at ¶25.

[¶21] "[P]robable cause is a fundamental reason for making an arrest and that failing to even minimally state the officer's probable cause deprive[s] the Department of authority to suspend … driving privileges." *See Aamodt, 2004 ND 134 at ¶10.* The police officer's Report and Notice form didn't sufficiently provide that information and "did not state, as required by law, reasonable grounds to believe" Mr. Sutton was driving under the influence of alcohol. *See id.* The officer's failure to comply with the basic and mandatory statutory requirements of N.D.C.C. § 39-20-04 by failing to "even minimally state the officer's probable cause deprived the Department of authority to suspend"

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[1] Formerly, N.D.C.C. § 39-20-03.1(3).

Sutton's driving privileges. *See id*. Consequently, the DOT's order is not in accordance with the law.

[¶22] Also, "[t]he report submitted to the Department of Transportation is devoid of any indication that [Sutton's] body contained alcohol," as required by N.D.C.C. § 39-20-04. *See Morrow v. Ziegler*, 2013 ND 28, ¶12, 826 N.W.2d 912. "[T]he officer's failure to record his belief that [Sutton's] body contained alcohol made the report deficient, and the Department did not have the authority to suspend [Sutton's] driving privileges." *See id*.

[¶23] Indeed, although the "odor of alcoholic beverage" box on the Report and Notice was checked, there is no delineation on the form that the odor came from Sutton or his body (for example, "odor of alcohol emanating from his mouth, body, etc."). It is just as likely from the face of the form that the odor came from a passenger or compartment of the vehicle.

[¶24] It is the face of the Report and Notice form that counts. In fact, if the face of the form is deficient, the officer cannot cure this jurisdictional flaw through hearing testimony. If this mandatory jurisdictional language and evidence is "omitted from the report and notice form," the Department is divested of jurisdiction, and it is not sufficient that the jurisdictional language "was provided during the hearing through the officer's testimony." *See Aamodt*, 2004 ND 134, at ¶21.

[¶25] Here, like in *Morrow*, "[t]he report submitted to the Department of Transportation is devoid of any indication that [Sutton's] body contained alcohol." *See Morrow v. Ziegler*, 2013 ND 28, at ¶12. "[T]he officer's failure to record his belief that [Sutton's] body contained alcohol made the report deficient, and the Department did not

have the authority to suspend [Sutton's] driving privileges." *See id*. Accordingly, the hearing officer's decision was not in accordance with the law.

B. There was no affirmative refusal to submit to an onsite screening test. Therefore, DOT's finding of fact that "Mr. Sutton refused the onsite screening test" is not supported by a preponderance of the evidence and is not in accordance with the law. Also, the conclusions of law and order of the agency are not supported by its findings of fact. Specifically, the conclusion that "Mr. Sutton refused to submit to the onsite screening test" is not supported by the findings of fact or testimony at the hearing, and is not in accordance with the law.

[¶26] The record in this matter does not show an affirmative refusal to submit to an onsite screening test. The officer testified that he requested an on-site screening breath test from Sutton, and Sutton declined. (Tr. at 8, L. 6-15). When asked by the hearing officer how Sutton declined testing, the police officer could not remember. (Tr. at 8, L. 16 - 9, L. 11). The officer testified: "I don't have ... an exact way that he declined ... I don't recall." (Tr. at 9, L. 4-11).

[¶27] "An affirmative refusal to submit to a chemical test must be clear and unequivocal." *See State v. Johnson*, 2009 ND 167, ¶10, 772 N.W.2d 591. Here, there is no evidence of an affirmative refusal. Indeed, the officer has no recollection of the refusal. This is insufficient to establish a clear and unequivocal affirmative refusal of a chemical test. Accordingly, there is no basis to revoke.

[¶28] CONCLUSION

[¶29] For the foregoing reasons, Drew Sutton respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted
this 9th day of January, 2019.

/s/ *Dan Herbel*

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[¶30] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 9, 2019, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Michael Pitcher, Assistant Attorney General, at the following:

Electronic filing to: "Michael Pitcher" < mtpitcher@nd.gov >

/s/ *Dan Herbel*

_____

Dan Herbel