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SUPREME COURT
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20010222

Cody Darrell Henderson,	)	
	)	
Appellee,	)	**Supreme Ct. No. 20010222**
	)	
v.	)	**District Ct. No. 01-C-12**
	)	
Director, North Dakota Department of Transportation,	)	
	)	
Appellant.	)	

FILED
IN THE OFFICE OF THE
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OCT 16 2001
STATE OF NORTH DAKOTA

**APPEAL FROM THE DISTRICT COURT
ADAMS COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT**

HONORABLE RONALD L. HILDEN

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Whether Henderson's admission he had drunk alcohol before driving to the lake was properly admitted into evidence.

II. Whether one could reasonably find Henderson had drunk alcohol before driving to the lake.

III. Whether the Intoxilyzer test results were properly admitted into evidence.

STATEMENT OF CASE

The North Dakota Department of Transportation ("Department") appeals from the district court judgment reversing the administrative hearing officer's decision to suspend the driving privileges of Cody Darrell Henderson ("Henderson"). The Department seeks reversal of the district court's judgment and reinstatement of the administrative suspension.

Adams County Deputy Sheriff Darrin Heinert arrested Henderson for driving or being in actual physical control of a vehicle while under the influence of alcohol on January 14, 2001. (Appendix ("A") 13, lines ("ll.") 17-20; A 73-74.) Deputy Heinert issued a Report and Notice, including a temporary operator's permit, to Henderson on the same day, after the results of an Intoxilyzer test showed Henderson's alcohol concentration was .11 percent by weight. (A 73; A 85.)

An administrative hearing took place on January 31, 2001. (A 1, ll. 1-4.) The hearing officer issued a decision suspending Henderson's driving privileges for 91 days. (A 72, ll. 5-6; A 88.) Henderson appealed from the administrative decision to district court. (A i.) On August 16, 2001, the district court issued its Memorandum Decision reversing the administrative suspension. (A 89.) Judgment was entered on August 28, 2001. (A 90.) The Department appeals to this Court. (A 91.)

STATEMENT OF FACTS

At approximately 12:40 a.m. on January 14, 2001, Deputy Heinert saw a pickup stuck in a snow bank near Mirror Lake in Adams County. (A 6, ll. 10-17; A 7, ll. 12-14; A 41, ll. 13-16.) The pickup had not been there when Deputy Heinert had driven by approximately twenty minutes earlier. (A 14, ll. 7-12.) Deputy

Heinert saw Henderson shoveling near the idling pickup. (A 6, ll. 19-20; A 14, ll. 24-25.) Henderson was trying to dig the pickup out of the snow bank. (A 43, ll. 14-17; A 55, ll. 26-27.) Henderson's girlfriend was sitting in the passenger's seat of the pickup. (A 44, l. 7.) Deputy Heinert approached to offer assistance. (A 6, l. 22.)

Deputy Heinert asked what had happened, and Henderson indicated he had driven down to the lake to see who was fishing and had gotten stuck. (A 7, ll. 9-11.) Henderson had a strong odor of alcohol on his breath, and his speech was slurred. (A 7, ll. 22-24.) Deputy Heinert asked Henderson if he was the driver, and Henderson admitted he was. (A 7, ll. 24-25.) Deputy Heinert asked Henderson if he had drunk anything, and Henderson admitted he had drunk two or three beers before driving down to the lake. (A 8, ll. 24-27; A 9, ll. 1-2; A 28, ll. 6-19; A 64, ll. 26-27; A 65, ll. 1-11.)

Deputy Heinert brought Henderson to the patrol car and explained he suspected Henderson had been driving while under the influence of alcohol. (A 9, ll. 4-8.) Henderson submitted to, and failed, a horizontal gaze nystagmus test. (A 9-11.) Henderson began to argue with Deputy Heinert. (A 12, l. 8.) Henderson implored Deputy Heinert to just give Henderson a ride home and forget about the incident. (A 12, ll. 8-10.) Henderson said he had just been promoted and a DUI violation would harm his job situation. (A 12, ll. 10-11.)

Henderson was arrested for driving or being in actual physical control of a vehicle while under the influence of alcohol. (A 13, ll. 17-20; A 73-74.) Henderson submitted to an Intoxilyzer test, and the results indicated his alcohol concentration was .11 percent by weight. (A 85.)

Henderson requested an administrative hearing on the intent to suspend his driving privileges. Deputy Heinert, Henderson, and Henderson's girlfriend testified at the hearing. (A i.) Deputy Heinert testified Henderson admitted he drank before driving down to the lake. (A 8, ll. 24-27; A 9, ll. 1-2; A 28, ll. 6-19; A 64, ll. 26-27; A 65, ll. 1-11.) Henderson and his girlfriend testified Henderson did not drink before driving down to the lake and Henderson's girlfriend was going to drive home from the lake. (A 41, ll. 24-27; A 42, l. 1; A 43, ll. 12-14; A 54, ll. 1-6; A 55, ll. 14-18.) Henderson testified he had drunk three beers. (A 42, ll. 16-25.)

The hearing officer found:

> At 12:40 a.m. Deputy Darren Heinert saw a vehicle that was stuck in a snowbank in the ditch and stopped to offer assistance. He had driven by the area 20 to 30 minutes earlier, and there was no vehicle in the ditch. ... Mr. Henderson admitted driving the vehicle in the ditch, admitted drinking, and had slurred speech.

(A 71, ll. 5-8, 13-14.) The hearing officer concluded Deputy Heinert "had reasonable grounds to believe Mr. Henderson had been driving a vehicle in violation of section 39-08-01 or equivalent ordinance." (A 71, ll. 26-27; A 72, l. 1.)

STANDARD OF REVIEW

The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of an administrative decision to suspend a driver's license. See Houn v. North Dakota Dep't of Transp., 2000 ND 131, ¶ 5, 613 N.W.2d 29. The court reviews the hearing officer's decision, not the district court's decision. Morrell v. North Dakota Dep't of Transp., 1999 ND 140, ¶ 6, 598 N.W.2d 111. The court must affirm the hearing officer's decision unless: the order is not in accord with the law; the order is in violation of the licensee's constitutional rights; provisions of chapter 28-32 are not complied with in proceedings before the hearing officer; the hearing officer's rules or procedures have not afforded the licensee a fair

hearing; the hearing officer's findings of fact are not supported by a preponderance of the evidence; or the hearing officer's conclusions of law and order are not supported by the findings of fact. Id.

LAW AND ARGUMENT

I. Henderson's admission he had drunk alcohol before driving to the lake was properly admitted into evidence.

Henderson, in his district court brief, argued his admission he had drunk alcohol before driving down to the lake should have been excluded because he had not been advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). During the administrative hearing, Henderson, however, did not object to the testimony regarding his admission, and thus review, if any, should be limited. Bieber v. North Dakota Dep't of Transp. Director, 509 N.W.2d 64, 68 (N.D. 1993) (noting "[f]ailure to raise an issue at the administrative hearing normally precludes review by this Court").

If the Court reaches the issue, two alternative grounds show Henderson's admission was properly admitted into evidence. First, there was no Miranda violation because Henderson made the admission before being arrested or restrained to the degree associated with an arrest. Second, the exclusionary rule under Miranda is inapplicable to administrative suspension hearings.

A. There was no Miranda violation because Henderson made the admission before being arrested or restrained to the degree associated with an arrest.

In criminal proceedings, a person's statements made in response to custodial interrogation may be suppressed if the person has not been advised of the Miranda rights. City of Fargo v. Egeberg, 2000 ND 159, ¶ 12, 615 N.W.2d 542. "[T]he ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on

freedom of movement' of the degree associated with a formal arrest." State v. Martin, 543 N.W.2d 224, 226-27 (N.D. 1996) (citation omitted).

"To make this determination, 'the factual situation, atmosphere, and physical surroundings during the investigation and questioning must be considered to ascertain the degree of police domination and restraint or compulsion.'" Id. at 227. Admissions made outside and "[e]xpos[ed] to public view" are less likely to involve custody than admissions made inside and isolated from public view. See State v. Sabinash, 1998 ND 32, ¶ 15, 574 N.W.2d 827; State v. Pitman, 427 N.W.2d 337, 342 (N.D. 1988).

The record shows Henderson had not been arrested or restrained to the degree associated with an arrest when he admitted he had drunk before driving down to the lake. Henderson made the admission shortly after he and Deputy Heinert began talking. Henderson and Deputy Heinert were still standing outside Henderson's pickup at the time of Henderson's admission. Deputy Heinert did not bring Henderson to the patrol car, conduct the horizontal gaze nystagmus, and ultimately arrest Henderson, until after Henderson's admission. No evidence indicates a "coercive or police-dominated atmosphere" existed at the time of Henderson's admission. See State v. Berger, 329 N.W.2d 374, 377 (N.D. 1983). The evidence thus shows that at the time of the admission there had been no "formal arrest or restraint on [Henderson's] freedom of movement of the degree associated with a formal arrest." See Martin, 543 N.W.2d at 226-27. Because Henderson had not been arrested or restrained to the degree associated with an arrest when he made the admission, there was no Miranda violation.

B. The exclusionary rule under Miranda is inapplicable to administrative suspension hearings.

A person's Miranda rights derive from the right to not be compelled to be a witness against himself "in any criminal case." City of Fargo v. Egeberg, 2000 ND 159, ¶¶ 11-12, 615 N.W.2d 542. Both the federal and state constitutions protect an individual from being "compelled in any criminal case to be a witness against himself[.]" N.D. Const. art. I, § 12; U.S. Const. amend V. (emphasis added).

A license suspension hearing is a civil proceeding distinguishable from a criminal proceeding:

> Proceedings under Chapter 39-20 of the North Dakota Century Code are civil in nature. The purpose of the implied consent law is to discourage individuals from driving an automobile while under the influence of intoxicants; to revoke the driving privileges of those persons who do drive while intoxicated; and to provide an efficient means of gathering reliable evidence of intoxication or nonintoxication. To further this objective, the Implied Consent Act provides for civil administrative proceedings in appropriate instances. These proceedings are separate and distinct from the criminal proceedings which may ensue from the arrest of an offending motorist.

Ding v. Director, North Dakota Dep't of Transp., 484 N.W.2d 496, 500 (N.D. 1992) (citation omitted). "The rights that the licensee may assert in a criminal proceeding are not applicable in implied-consent hearings under Chapter 39-20, N.D.C.C." Pladson v. Hjelle, 368 N.W.2d 508, 511 (N.D. 1985).[1]

This Court has recognized constitutional protections afforded criminal defendants do not apply in civil proceedings. In State v. Zimmerman, 539 N.W.2d

[1] In McNamara v. Director of North Dakota Dep't of Transp., 500 N.W.2d 585, 591-92 (N.D. 1993), the Court noted "the Fifth Amendment privilege against self-incrimination does not apply to implied consent matters." (citation omitted). The Court, however, did not decide the issue of whether there is an administrative law requirement of advising suspects of their Miranda rights which would require suppression of statements. Id. at 592.

49, 55 (N.D. 1995), the Court emphasized the remedial nature of administrative license suspension proceedings and concluded an administrative license suspension does not constitute punishment for double jeopardy analysis. In Rozan v. Rozan, 129 N.W.2d 694, 709 (N.D. 1964), this Court noted a party's failure to testify permits an unfavorable inference in a civil proceeding. See also Hammeren v. North Dakota State Highway Comm'r, 315 N.W.2d 679, 682 (N.D. 1982) (noting the licensee's failure to testify at the administrative hearing).

Protection against illegal stops and arrests is specifically incorporated into the administrative process by statute. See N.D.C.C. § 39-20-05(2) (indicating "whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance" is one of the issues to be determined at the administrative hearing). Although a Miranda violation arguably could affect the issue of whether an officer had reasonable grounds to believe the person had been driving while under the influence of alcohol, two alternative reasons show Miranda is not controlling here.

First, Henderson failed to previously argue that the admission was necessary to establish reasonable grounds to arrest. Second, there was probable cause, without Henderson's admission, to believe Henderson had been driving while under the influence of alcohol. Henderson was shoveling near a tire on the driver's side of the pickup. The pickup was idling and was stuck in a snow bank. Henderson's girlfriend was sitting in the passenger seat. Henderson had a strong odor of alcohol about him and slurred speech. While such evidence likely would be

insufficient to establish guilt, an officer could reasonably believe Henderson had been driving while under the influence of alcohol.

Because a license suspension hearing is a remedial, administrative proceeding and because constitutional protections expressly afforded criminal defendants do not apply in civil proceedings, the exclusionary rule under Miranda is inapplicable to this matter. Henderson's admission was properly admitted into evidence.

II. One could reasonably find Henderson had drunk alcohol before driving to the lake.

Henderson previously contended the determination he had drunk alcohol before driving to the lake is unreasonable. Although the hearing officer did not expressly find Henderson had drunk alcohol before driving to the lake, she concluded Deputy Heinert had reasonable grounds to believe Henderson had been driving a vehicle while under the influence of alcohol. (A 71, ll. 26-27; A 72, l. 1.) Moreover, there was extensive testimony regarding whether Henderson drank alcohol before he drove down to the lake. Henderson's attorney cross-examined Deputy Heinert regarding Henderson's admission to drinking alcohol before driving to the lake. (A 64, ll. 26-27; A 65; ll. 1-9.) The hearing officer cross-examined Henderson regarding whether he had drunk before driving to the lake. (A 52, ll. 2-4.) Further, Henderson's attorney argued Henderson had not drunk alcohol before he drove down to the lake. (A 65, ll. 19-23; A 66, ll. 26-27; A 67, l. 1; A 69, ll. 22-23.) Given these circumstances, it can be inferred the hearing officer found Henderson had drunk alcohol before driving down to the lake. See Peek v. Berning, 2001 ND 34, ¶ 15, 622 N.W.2d 186 (recognizing an implied finding in a child custody matter); City of Jamestown v. Neumiller, 2000 ND 11, ¶ 11, 604 N.W.2d 441 (inferring a trial court finding from a general verdict of guilty).

In reviewing an administrative decision, a court must give great deference to a hearing officer's findings of fact and cannot make independent findings or substitute its judgment for that of the hearing officer. Houn v. North Dakota Dep't of Transp., 2000 ND 131, ¶ 6, 613 N.W.2d 29. This standard of review "defers to the hearing officer's opportunity to hear the witnesses' testimony and to judge their credibility[.]" Id. "Resolving underlying factual disputes is the exclusive province of the hearing officer." Id. A reviewing court thus determines only whether a reasoning mind reasonably could have concluded the hearing officer's findings were supported by the weight of the evidence from the entire record. Id.

One could reasonably determine Henderson drank alcohol before driving to the lake. Deputy Heinert testified he asked Henderson if he had drunk anything and Henderson admitted he had drunk two or three beers before driving down to the lake. (A 8, ll. 24-27; A 9, ll. 1-2; A 28, ll. 6-19; A 64, ll. 26-27; A 65, ll. 1-11.) Deputy Heinert testified that when he began conducting field sobriety tests, Henderson asked, "what if I told you [my girlfriend] was driving and I was trying to dig out so that I could push her out while she was driving." (A 28, ll. 1-3.) Deputy Heinert testified Henderson asked Deputy Heinert to just drive Henderson home and forget about the situation. (A12, ll. 8-10.) Deputy Heinert also testified Henderson said he had just been promoted and a DUI violation would harm his job situation. (A 12, ll. 10-11.)

Although Henderson and his girlfriend testified Henderson had not drunk before driving to the lake and his girlfriend was going to drive home, "the fact that some of the evidence in the record supports findings contrary to those of the hearing officer does not alone justify reversal of the agency decision on appeal." Johnson v. North Dakota Dep't of Transp., 530 N.W.2d 359, 361 (N.D. 1995).

"Determining the credibility of witnesses and the weight to be given their testimony" is the "exclusive province of the hearing officer." Id.

In light of the record and the hearing officer's opportunity to hear the witnesses' testimony and to judge their credibility, the hearing officer's inferred finding Henderson drank before driving to the lake is reasonable.

III. The Intoxilyzer test results were properly admitted into evidence.

Henderson previously argued the Intoxilyzer test results should not have been admitted into evidence because the State Toxicologist's approved method was not followed. Under N.D.C.C. § 39-20-07(5), "[t]he results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the state toxicologist[.]"

Henderson contended the approved method was not followed because the date was misprinted on the Intoxilyzer test result. The State Toxicologist's approved method for conducting an Intoxilyzer test provides "[i]f an asterisk "*" is included in the date or an incorrect date is printed, the operator shall write the correct date on the Form 106-I. This alone will not cause the test to be invalid." (A 78.)

The record here shows the approved method was followed. The machine-printed date on the test result includes an asterisk. (A 79.) The test result also includes a handwritten correct date. (A 79.) The "Remarks" section provides "Date: 01-14-01" and includes Deputy Heinert's initials. (A 79.) Deputy Heinert thus did follow the approved method and the test results are valid.

Henderson also previously argued the test results are unreliable based on his testimony he had drunk only three beers. The record, however, shows the sample was properly obtained and the test was fairly administered. (A 15-21.) Moreover, Henderson did not argue the sample was not properly obtained or the test was not fairly administered. Because the record shows the results of the Intoxilyzer test were properly obtained, the test was fairly administered, and the approved method was followed, the results were properly admitted into evidence. See N.D.C.C. § 39-20-07(5).

CONCLUSION

The Department respectfully requests this Court reverse the district court's judgment and reinstate the administrative suspension.

Dated this 16th day of October, 2001.

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