

ORIGINAL

20010291

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Michael Isaak,
Appellee,
v.
David Sprynczynatyk, Director,
North Dakota Department of
Transportation,
Appellant.

Supreme Ct. No. 20010291

District Ct. No. 01-C-00311

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT
STARK COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE RONALD L. HILDEN

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Whether the 365-day administrative suspension should be reinstated because Isaak's Specifications of Error failed to identify the sole issue he raised before the district court.

II. Whether evidence of Isaak's prior DUI violation was properly shown by the certified copy of Isaak's driving record.

STATEMENT OF CASE

The North Dakota Department of Transportation ("Department") appeals from a district court judgment reversing the administrative hearing officer's decision to suspend the driving privileges of Michael Isaak ("Isaak") for 365 days and imposing a suspension of 91 days. The Department seeks reversal of the district court's judgment and reinstatement of the 365-day suspension.

Stark County Deputy Sheriff Roger Marks arrested Isaak for driving while under the influence of alcohol on June 8, 2001. (Appendix ("A.") at 2, lines ("ll.") 8-11; A. at 11, ll. 15-16.) After a blood test indicated Isaak's alcohol concentration had been at least .10 percent by weight, Isaak was issued a Report and Notice, indicating the Department intended to suspend his driving privileges. (A. at 28.) Isaak requested a hearing on the intent to suspend.

An administrative hearing took place on July 18, 2001. (A. at 1, ll. 1-4.) The hearing officer issued a decision finding Isaak had a prior DUI violation within 5 years and, accordingly, suspending Isaak's driving privileges for 365 days. (A. at 27, ll. 8-11; A. at 34.) Isaak appealed from the administrative decision to district court. On August 16, 2001, the district court issued its Memorandum Opinion and Order reversing the 365-day administrative suspension. (A. at 39.) Judgment imposing a 91-day suspension was entered on November 16, 2001. (A. at 41.) The Department appeals to this Court.

STATEMENT OF FACTS

On June 8, 2001, Deputy Marks stopped Isaak for speeding. (A. at 7, ll. 4-5.) Isaak had an odor of alcohol about him and slurred speech. (A. at 7, ll. 24-25.) Isaak failed several field sobriety tests and was arrested for driving while under the influence of alcohol. (A. at 9-11.) Isaak submitted to a blood test, and

the results indicated he had an alcohol concentration of .16 percent by weight. (A. at 11, ll. 17-25; A. at 33.)

At the administrative hearing, a certified copy of Isaak's North Dakota driving record was admitted into evidence. (A. at 29.) Isaak's driving record showed: (1) he had a prior DUI violation for an offense committed on February 22, 1998; (2) a notice of hearing on the prior DUI violation was sent to Isaak; and (3) Isaak's driving privileges were suspended for the DUI violation beginning on April 15, 1999. (A. at 29.) A Uniform Traffic Ticket and Complaint ("Complaint") was admitted with the driving record. (A. at 30-31.) The Complaint showed Isaak was arrested for DWI in Arkansas on February 22, 1998, and the sentence imposed included costs of \$701. (A. at 30-31.) Deputy Marks was the only witness who testified at the hearing. (A. at 1-27.) Considering Isaak's prior DUI violation, the hearing officer issued a decision suspending Isaak's driving privileges for 365 days, the suspension period for a second offense within 5 years. (A. at 27, ll. 8-11.)

Isaak submitted Specifications of Error dated July 18, 2001. (A. at 35.) In the Specifications, Isaak listed the following as errors:

1. The destruction of notes by the arresting officer should have prevented the introduction of the field sobriety tests and consequently there would be no probable cause.
2. There was improper foundation for the introduction of the blood test results.
3. Any other issues to be determined following a review of the hearing transcript.

(A. at 35.)

In his district court brief, Isaak's sole argument was there should be no penalty enhancement, i.e. suspension based upon a second offense within five years, because the foundation for the first offense was improper. (A. at 36-38.)

STANDARD OF REVIEW

An appeal from an administrative hearing officer's decision suspending a license under N.D.C.C. § 39-20-05 is governed by the Administrative Agencies Practices Act at N.D.C.C. ch. 28-32. See Houn v. North Dakota Dep't of Transp., 2000 ND 131, ¶ 5, 613 N.W.2d 29. Under the Act, a 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 appellant's constitutional rights; provisions of chapter 28-32 are not complied with in proceedings before the agency; the agency's rules or procedures have not afforded the appellant a fair hearing; the agency's findings of fact are not supported by a preponderance of the evidence; or the agency's conclusions of law and order are not supported by its findings of fact. Id.

LAW AND ARGUMENT

- I. **The 365-day administrative suspension should be reinstated because Isaak's Specifications of Error failed to identify the sole issue he raised before the district court.**

A party appealing from an agency decision must comply with the specification of error requirement of N.D.C.C. § 28-32-15(4).¹ Section 28-32-15(4), N.D.C.C., provides "[a]n appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken[.]" This Court has explained N.D.C.C. § 28-32-15(4) requires "reasonably specific specifications of error calculated to identify what matters are truly at issue with sufficient specificity to appraise the agency, other parties, and the

¹ The specification of error requirements are now included in N.D.C.C. § 28-32-42(4) which became effective August 1, 2001.

court of the particular errors claimed.” Vetter v. North Dakota Workers Compensation Bureau, 554 N.W.2d 451, 454 (N.D. 1996). This Court forewarned “[t]he time has come to compel compliance with the specificity requirement of § 28-32-15(4), N.D.C.C. Summary affirmance of any administrative agency decision is appropriate if an appellant’s specifications of error ‘fail to specifically identify any error with any particularity.’” Id. (citation omitted).

The sole issue Isaak raised before the district court was an issue he failed to identify in his Specifications of Error. Isaak contended there was not a proper foundation for his prior DUI violation. Isaak, however, did not assert such error in his Specifications of Error. Although Isaak asserted as error, “[a]ny other issues to be determined,” such assertion does not constitute a “reasonably specific specification[] of error calculated to identify what matters are truly at issue with sufficient specificity to appraise the agency, other parties, and the court of the particular errors claimed.” See id.

Because Isaak failed to comply with specifications of error requirements, the 365-day administrative suspension should be reinstated. This Court, accordingly, need not reach the second issue in this brief.

II. Evidence of Isaak’s prior DUI violation was properly shown by the certified copy of Isaak’s driving record.

This section assumes for the sake of argument Isaak properly specified the error he asserted in district court. Isaak contended there was not a proper evidentiary foundation for his prior DUI violation and his suspension, thus, should have been for 91 days, the suspension period for a first violation within the past five years.

Under the circumstances set forth in N.D.C.C. § 39-20-04.1(1), the Department is required to suspend a person’s driver’s license:

- a. For ninety-one days if the person's driving record shows that within the five years preceding the date of the arrest, the person has not previously violated section 39-08-01 or equivalent ordinance or the person's operator's license has not previously been suspended or revoked under this chapter.
- b. For three hundred sixty-five days if the person's driving record shows that within, the five years preceding the date of the arrest the person has once previously violated section 39-08-01 or equivalent ordinance or the person's operator's license has once previously been suspended or revoked under this chapter.

Section 39-20-05(4), N.D.C.C., indicates that "[a]t a hearing under this section, the regularly kept records of the director may be introduced. Those records establish prima facie their contents without further foundation." See also Maher v. North Dakota Dep't of Transp., 539 N.W.2d 300, 303 (N.D. 1995); McNamara v. Director of North Dakota Dep't of Transp., 500 N.W.2d 585, 590-91 (N.D. 1993); Domres v. Backes, 487 N.W.2d 605, 607 (N.D. 1992).

At Isaak's administrative hearing, a certified copy of his driving record was admitted into evidence, and it showed Isaak had a prior DUI violation within the past five years. Isaak's driving record provided he had a violation for "INTOXICATING LIQUOR-DUI" for an offense committed on February 22, 1998. (A. at 29.) His record further showed a suspension hearing notice on the DUI violation was issued and a 91-day suspension was imposed beginning April 15, 1999. Isaak's certified driving record established prima facie his prior DUI violation, "without further foundation." See N.D.C.C. § 39-20-05(4). Isaak presented no evidence rebutting the certified copy of his driving record.

The Complaint admitted with Isaak's driving record was unnecessary to establish Isaak's "driving record shows that within, the five years preceding the date of the arrest the person has once previously violated section 39-08-01 or equivalent ordinance[.]" See N.D.C.C. § 39-20-04.1(1)(b). In any event, the

Complaint is consistent with the driving record and does not refute the information in the driving record. Consistent with the driving record, the Complaint indicates Isaak was arrested for DWI on February 22, 1998, and a sentence was imposed by the court. (A. at 30-31.)

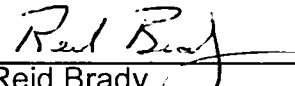
The certified copy of Isaak's driving record showed Isaak had a prior DUI violation within the past five years. The Department, therefore, appropriately suspended Isaak's driving privileges for 365 days under N.D.C.C. § 39-20-04.1(1)(b).

CONCLUSION

The Department respectfully requests this Court reverse the district court judgment and reinstate the 365-day administrative suspension.

Dated this 3rd day of January, 2002.

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STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Michael Isaak,)
)
Appellee,)
)
v.)
)
David Sprynczynatyk, Director,)
North Dakota Department of)
Transportation,)
)
Appellant.)

AFFIDAVIT OF SERVICE BY MAIL

**Supreme Ct. No. 20010291
District Ct. No. 01-C-00311**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 3rd day of January, 2002, I served the attached **BRIEF OF APPELLANT** and **APPENDIX** upon Michael Isaak, by and through his attorney Ronald A. Reichert, by placing a true and correct copy thereof in an envelope addressed as follows:

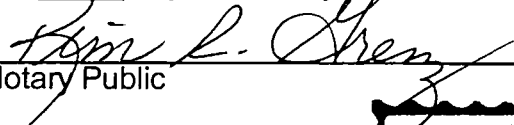
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P.O. Box K
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and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 3rd day of January, 2002.



Notary Public

