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

SUPREME COURT NO. 20040323
DISTRICT COURT NO. 04-K-1578

CITY OF GRAND FORKS,

PLAINTIFF/APPELLEE,

vs.

STEVEN LEE BARNUM,

DEFENDANT/APPELLANT.

**APPEAL FROM DISTRICT COURT, GRAND FORKS COUNTY,
NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT**

BRIEF FOR APPELLEE

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II. TABLE OF AUTHORITIES

CASES

<u>City of Bismarck v. Bosch</u> , 2005 ND 12; 691 N.W. 2d 260 (N.D. 2005)	¶7
<u>Lee v. N.D. Dep't. of Transp.</u> , 2004 ND 7; 673 N.W.2d 245 (N.D. 2004)	¶7
<u>Moser v. N.D. State Highway Comm'r.</u> , 369 N.W. 2d 650 (N.D. 1985)	¶7
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STATUTES

N.D.C.C. § 39-20-07	¶4, 7
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OTHER

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III. JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction of this matter pursuant to North Dakota Century Code § 29-28-06(1) and Rule 3 of the North Dakota Rules of Appellate Procedure. Barnum timely appealed after being convicted by a jury of his peers.

IV. STATEMENT OF THE ISSUES

Whether the trial court erred in admitting the Intoxilyzer test results because the foundational requirements showing that the test as administered in accordance with the State Toxicologist's approved method were not met.

V. STATEMENT OF THE CASE

¶1 On May 28, 2004, Steven Lee Barnum was arrested and charged with Driving Under the Influence of Intoxication liquor in the City of Grand Forks, ND. After transferring the case to District Court for the Northeast Central District, He entered a plea of not guilty. A ii.

jury trial was held on November 9, 2004, before the Honorable Debbie G. Kleven. Barnum was found guilty and sentenced to a fine of \$250.00; an administrative fee of \$125.00; an indigent defense/facilities fee of \$100.00; ten days in jail suspended for one year; and one year unsupervised probation on condition the fees and fines were paid and a chemical dependency test was completed and filed with in 30 days. Barnum filed a Notice of Appeal on November 15, 2004.

VI. STATEMENT OF THE FACTS

¶2 On May 28, 2004, Officer Robbins of the Grand Forks Police Department conducted a traffic stop of Barnum in a parking lot adjacent to 13th Avenue South for speeding. T. at 30-32. As a result of this stop, Barnum was arrested for Driving Under the Influence of Intoxication Liquor. T. at 50. An Intoxilyzer test was conducted at the Grand Forks Police department by Officer Middleton with a result of 0.16 percent. T. at 21, 98, 111.

¶3 A jury trial was held on November 9, 2004, before the Honorable Debbie G. Kleven of the Northeast Central Judicial District. During the testimony of Officer Middleton, Barnum's attorney objected to the admission of the Intoxilyzer test record based upon improper foundation. T. at 106. The basis of the objection was that a certified copy of the operational checklist had not been admitted into evidence as required by statute. T. at 106-07. The objection was overruled and the test results were admitted. T. at 110. The jury subsequently found Barnum guilty. T. at 186.

VII. LAW AND ARGUMENT

Whether the trial court erred in admitting the Intoxilyzer test results because the foundational requirements showing that the test as administered in accordance with the State Toxicologist's approved method were not met.

¶4 Defendant Barnum (hereinafter Barnum) contends that admission of an operational checklist is a foundational requirement for admission of the test record. He bases this on N.D.C.C. § 39-20-07 (6) (c):

"The state toxicologist ..., and shall include in the record:

c. The operational checklist and forms prescribing the methods currently approved by the state toxicologist in using the devices during the administration of the tests." Id.

However, he neglects language in the same statute that gives authority and discretion to the state toxicologist to prepare and approve devices and documents and make changes:

"... according to methods and with devices approved by the state toxicologist ... The state toxicologist is authorized to approve satisfactory devices and methods of chemical analysis ..." Id. at (5).

"... Upon approval of the methods or devices, or both, required to perform the tests and the persons qualified to administer them, the state toxicologist shall prepare and file written record of the approval ..." Id. at (6).

"The material filed under this section may be supplemented when the state toxicologist determines it to be necessary, and any supplemental material has the same force and effect as the material that it supplements." Id.

Thus, the state toxicologist is the sole determiner of which machines to use and the methods to be employed in properly using them. The requirement is that these decisions be reduced to writing and filed. Id.

¶5 The machine used in this case is a different machine than was in use at the time the statute became effective and than what was discussed in previous cases, especially those cited by Barnum, in which an operational checklist form was required. See, e.g., Salter v. Hjelle, 415 NW 2d 328 (N.D. 1987). The previous machines required putting a form into

the machine for an internal printer to print the appropriate information. The current machine has an external printer (EP) and does not require a separate form because the external printer prints everything, including the checklist. Tr. 119, ln. 13-16. Further, this document printed by the external printer is entitled "Intoxilyzer Test Record And Checklist". App. at A. The state toxicologist has utilized her authority and discretion in choosing a machine, providing the requisite documents and filing those documents.

¶6 The opening paragraph of the Approved Method to Conduct Breath Tests with the Intoxilyzer 5000 KB-EP, states:

"The Test Record and Checklist will be printed as Form 106-KB-EP, at the completion of the subject test." App. at C.

The last two paragraphs of the same document state:

"The previous Approved Methods will remain approved and will be considered valid when used in conjunction with the respective Intoxilyzer Test Record and Checklist Form 106-I or Form 106-KB. When the test is conducted according to this method, it is considered as fairly administered and the result obtained is scientifically accepted as accurate." App. at E.

¶7 As this Court has stated, there must be strict compliance and requirements must be scrupulously met. Lee v. N.D. Dep't. Of Transp., 2004 ND 7 ¶ 7, 673 N.W. 2d 245, 249 (N.D. 2004); Moser v. N.D. State Highway Comm'r., 369 N.W. 2d 650, 654 (N.D. 1985). But, there is no need to be hyper technical. City of Bismarck v. Bosch, 2005 ND 12 ¶ 6: 691 N.W. 2d 260 (N.D. 2005). An interpretation of N.D.C.C. § 39-20-07 (6) (c) requiring a separate operational checklist when the machine doesn't use one would be hyper technical. The more reasoned approach is what the state toxicologist acted appropriately under the authority given by the Legislature under the statute and fulfilled the requirements of the statute in light of the way the new machine functions.

VIII. CONCLUSION

¶8 For the above stated reasons, the City respectfully requests that Barnum's request to reverse his conviction for Driving Under the Influence of Intoxicating Liquor be denied. If the Court does grant Barnum's motion, the City requests the matter be remanded to Grand Forks County District Court for a new trial.

Dated this 16th day of March, 2005.

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IX. CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2005, a copy of the foregoing Brief for Appellee was electronically filed with the North Dakota Supreme Court Administrator according to N.D. Sup. Admin. Order 14 at:

supclerkofcourt@ndcourts.com

I hereby certify that on the 16th day of March, 2005, a copy of the foregoing Brief for Appellee was served electronically upon Alexander Reichert according to N.D. Sup. Ct. Admin. Order 14 at:

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