

**ORIGINAL**

20040323CA

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IN THE NORTH DAKOTA SUPREME COURT

March 30, 2005

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CITY OF GRAND FORKS,	)	
	)	Supreme Court No. 20040323
APPELLEE.	)	Grand Forks Co. No. 04-K-01578
	)	
Vs.	)	
	)	
STEVEN LEE BARNUM,	)	
	)	
APPELLANT.	)	
	)	

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APPEAL FROM THE DISTRICT COURT,  
GRAND FORKS COUNTY, NORTH DAKOTA  
NORTHEAST CENTRAL JUDICIAL DISTRICT  
THE HONORABLE DEBBIE G. KLEVIN, PRESIDING

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REPLY BRIEF OF APPELLANT

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## LAW AND ARGUMENT

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

¶1] As no operational checklist was admitted at trial, the foundational requirements were not met to allow the admission of the Intoxilyzer test results. "The foundational requirements needed to show that the Breathalyzer test was 'fairly administered' so as to render the results admissible, may be met either through testimony of the state toxicologist or through the introduction of certified copies of approved methods and techniques filed by the state toxicologist with the clerk of the district court pursuant to N.D.C.C. § 39-20-07." *Moser v. N.D. State Highway Comm'r.*, 369 N.W.2d 650, 653 (1985), citing *State v. Schneider*, 270 N.W.2d 787, 791 (N.D. 1978). In this case, the state toxicologist did not testify, which means the only way the foundational requirements could be met was "through the introduction of certified copies of approved methods and techniques filed by the state toxicologist with the clerk of the district court." *Id.* "The term 'approved method' has become a word of art," and "refers to the document filed by the State Toxicologist...showing the operational checklist and forms prescribing the methods currently approved by the State Toxicologist in using the devices during the administration of the tests." *City of Bismarck v. Bosch*, 2005 ND 12 at ¶ 10, 691 N.W.2d 260, 264. No exception for the new Intoxilyzer 5000 KB-EP has been made to exempt the requirement for an operational checklist to be filed with the clerk of court or to exempt its admission at trial to establish the proper foundation for the admission of the test results. In this case, the documents introduced to show the approved method of the State Toxicologist did

not include an operational checklist, and as such the foundational requirements for introduction of the Intoxilyzer test were not met.

[¶2] The test results alone are not sufficient to fulfill the foundational requirements even if the title of the document incorporates the word “checklist.” “In order for a test record to establish prima facie its resulting blood alcohol concentration, it must be accompanied by a certified copy of the checklist. Without a checklist the test records are not prima facie evidence of their results.” *Salter v. Hjelle*, 41 N.W.2d 801, 804 (N.D. 1987). The test record itself cannot be sufficient to show fair administration as “the Intoxilyzer record does not establish that the approved method was followed.” *Id.* at 805. As the court found in *Salter*, the test record is insufficient because it does not indicate compliance with all the requirements of the approved method. Therefore, the mere inclusion of the word checklist in the title of the test results themselves does not satisfy the requirement of having a certified checklist accompany the test results.

[¶3] As the documentation requirements to establish the proper foundation for the admission of the Intoxilyzer were not scrupulously followed, Barnum’s test results should not have been admitted. This Court has held that the “documentation requirements must be scrupulously met to ensure a uniform basis of testing and fair administration.” *Lee v. Dept’ of Transp.*, 2004 ND 7, ¶ 11, 673 N.W.2d 245, 249, citing *Moser v. N.D. State Highway Comm’r*, 369 n.W.2d 650, 654 (N.D. 1985). The City asserts that “there is no need to be hypertechnical” in meeting the documentation requirements, but this is an incorrect interpretation of the law. *Appellee’s Brief* at ¶7. It has been held that there is no need to be hypertechnical in following the approved

methods of the state toxicologist to show fair administration of the test, but that has never been extended to the documentation requirements to lay the proper foundation for admission of the test results. *See City of Bismarck v. Bosch*, 2005 ND 12, ¶6, 691 N.W.2d 260, 264; *Johnson v. N.D. Dep't. of Transp.*, 2004 ND 59, ¶12, 676 N.W.2d 807, 810; *Bucholz v. N.D. Dep't. of Transp.*, 2002 ND 23, ¶7, 639 N.W.2d 490, 494; *City of West Fargo v. Hawkins*, 2000 ND 168, ¶16, 616 N.W.2d 856, 859; *McPeak v. Moore*, 545 N.W.2d 761, 762 (N.D. 1996); *State v. Chihanski*, 540 N.W.2d 621, 624 (N.D. 1995). N.D.C.C. § 39-20-07 requires proper documentation of test administration so that lengthy expert testimony can be avoided. *Lee*, 2004 ND 7, ¶11, 673 N.W.2d at 249. “If the [government] wishes to rely on the eased requirements for admissibility under N.D.C.C. § 39-20-07, it must adhere to those requirements. *Id.* 2004 ND 7, ¶ 17, 673 N.W.2d at 250. The foundational requirements were not met in the present case, as no operational checklist was admitted to accompany the test results to show that the test was fairly administered. Although foundational requirements have been eased to avoid lengthy expert testimony, the City failed to meet those requirements, and therefore Barnum’s test results should not have been admitted at trial.

## CONCLUSION

[¶ 4] For the reasons stated above, the Intoxilyzer test results should have been excluded from evidence because the foundational requirements showing that the test was administered in accordance with the State Toxicologist’s approved method were not met.

[¶ 5] WHEREFORE, Barnum respectfully requests that the Court reverse the district court's decision convicting him of Driving Under The Influence Of Intoxicating Liquor.

Dated this 30<sup>th</sup> day of March, 2005.

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**CERTIFICATE OF FILING AND SERVICE BY E-MAIL**

Alexander F. Reichert, being first duly sworn, deposes and says that on the 30<sup>th</sup> day of March, he filed by email the attached Reply Brief of Appellant according to the N.D. Sup. Ct. Admin. Order 14 upon:

**[supclerkofcourt@ndcourts.com](mailto:supclerkofcourt@ndcourts.com)**

Alexander F. Reichert, being first duly sworn, deposes and says that on the 30<sup>th</sup> day of March, he served by email the attached Reply Brief of Appellant as required by N.D. Sup. Ct. Admin. Order 14(D)(1), in Word Format (document formatting and page numbering may be slightly different than Word), upon:

Gary Euren  
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Dated this 30<sup>th</sup> day of March, 2005.

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