

IN THE NORTH DAKOTA SUPREME COURT

February 14, 2005

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

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB 14 2005

STATE OF NORTH DAKOTA

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

BRIEF OF APPELLANT

ALEXANDER F. REICHERT
ATTORNEY FOR APPELLANT
REICHERT LAW OFFICE
405 BRUCE AVENUE, SUITE 100A
GRAND FORKS, N.D. 58201
(701) 787-8802
(ND ID #05446)

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STATEMENT OF THE ISSUE

- 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.

STATEMENT OF THE CASE

[¶ 1] On May 28, 2004, Barnum was arrested and charged with Driving Under The Influence Of Intoxicating Liquor in the City of Grand Forks, North Dakota. On November 9, 2004, Barnum was tried for this offense before the Honorable Debbie G. Klevin in the Northeast Central Judicial District. After entering a plea of not guilty, a jury trial was held. Barnum was convicted and a verdict of guilty was entered to the charge of Driving Under The Influence Of Intoxicating Liquor, a Class B Misdemeanor, in violation of N.D.C.C. § 39-08-01. Judge Klevin imposed the following sentence: pay a fine in the amount of \$250.00, pay criminal administration fee in the amount of \$125.00, pay defense/facility administration fee in the amount of \$100.00, and serve ten days in the Grand Forks County Correctional Center, with ten days being suspended. Barnum was placed on unsupervised probation for a period of one year from the date of the Criminal Judgment and ordered to undergo a chemical dependency evaluation. Barnum filed a Notice of Appeal on November 15, 2004. Barnum now asks this Court to reverse the Criminal Judgment entered against him by the district court and dismiss the charges, or, in the alternative, order a new trial.

STATEMENT OF THE FACTS

[¶ 2] On May 28, 2004, at approximately 12:25 a.m., Officer Robbins conducted a traffic stop of Barnum in a parking lot adjacent to 13th Avenue South in Grand Forks. (T. at 30-32). Officer Robbins intended to give Barnum a warning for going 35 mph in a 25-mph zone. (T. at. 37, 62). As a result of this stop, Barnum was arrested for Driving Under The Influence of Intoxicating Liquor. (T. at 50). Barnum

was taken to the Grand Forks Police Department, where he consented to an Intoxilyzer test. (T. at 51). The Intoxilyzer test was administered by Officer Jay Middleton. (T. at 51, 98). The test indicated that Barnum had a blood alcohol content of 0.16 percent. (T. at 111) (D. at 22).

[¶ 3] A jury trial was held on November 9, 2004. During the testimony of Officer Jay Middleton, Barnum's attorney objected to the admission of the Intoxilyzer results based on improper foundation. (T. at 106). Specifically, Barnum's attorney objected to the admission of the test results because certified copies of the operational checklist had not been admitted into evidence as required by statute. and because according to the documentation provided by the State Toxicologist, the Intoxilyzer used to conduct the test was last calibrated in Bismarck and Barnum was tested in Grand Forks. (T. at 106-07). The trial court allowed Barnum's attorney to conduct voir dire of the officer. (T. at. 108). Officer Middleton testified that any time the Intoxilyzer machine is moved it must be recalibrated. (T. at. 108). The objection to the admission of the test results was then overruled and the documents were admitted. (T. at 110). The City then stipulated that, according to the list of the approved chemical testing devices, the machine used for Barnum's test was last inspected in Bismarck. (T. at 127).

[¶ 4] Barnum was convicted of Driving Under The Influence Of Intoxicating Liquor, a Class B misdemeanor, in violation of N.D.C.C. § 39-08-01 (D. at 27). Barnum appeals this conviction (D. at 30) (A. at 6).

LAW AND ARGUMENT

- I. [¶ 5] 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.

[¶ 6] The trial court clearly erred in admitting the results of the Intoxilyzer test into evidence because the foundational requirements under N.D.C.C. § 39-20-07(5) were not met. N.D.C.C. § 39-20-07(5) provides in part:

“5. The results of 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, and by an individual possessing a certificate of qualification to administer the test issued by the state toxicologist...”

The purpose of this Section “is to ease the requirements for admissibility of chemical test results while ensuring that the test upon which the results are based is fairly administered.” *Salter v. Hjelle*, 415 N.W.2d 801, 803 (N.D. 1987). A chemical test is fairly administered when the approved method is followed. *Id.* Fair administration can be established by certified copies of the operational checklist and listings of the approved chemical testing devices and certified operators. *Id.* The government has the burden of establishing that the Intoxilyzer test was fairly administered. *Lee v. N.D. Dep't of Transp.*, 2004 ND 7, ¶ 17, 673 N.W.2d 245, 250 (N.D. 2004). In this case, the City did not carry its burden as the proper documentation to show fair administration, specifically a copy of the operational checklist, was not admitted, and, therefore, the foundational requirements were not met. The statute requires proper documentation of test administration so that lengthy expert testimony can be avoided.

Lee, 2004 ND 7 at ¶ 11, 673 N.W.2d at 249. The “documentation requirements must be scrupulously met to ensure a uniform basis of testing and fair administration.” *Id.* citing *Moser v. N.D. State Highway Comm’r*, 369 N.W.2d 650, 654 (N.D. 1985). “Without strict compliance with the approved method, the scientific accuracy of the test cannot be established without expert testimony.” *Lee*, 2004 ND 7 at ¶ 7, 673 N.W.2d at 249, citing *Ringsaker v. Dir., N.D. Dep’t of Transp.*, 1999 ND 127, ¶ 8, 596 N.W.2d 328 (N.D. 1999). “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.” *Lee*, 2004 ND 7, ¶ 17, 673 N.W.2d at 250. The documentation requirements were not strictly complied with in the present case as certified copies of the operational checklist were not admitted. The scientific accuracy of Barnum’s test and, therefore, the fair administration of the test, were not established. As such, the foundational requirements to admit the test results were not met.

[¶ 7] As no checklist was admitted into evidence, the test results themselves could not be evidence that the test was fairly administered. “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). Although the City provided other documentation relating to the approved method and certified operators and tests (D. at 16-21), those documents are not sufficient for admission of the test when the checklist has not been admitted. The admission of certified copies of the State’s Toxicologist’s approved method and the lists of certified chemical test operators and approved certified chemical test operators

and approved chemical testing devices do not alone provide the necessary foundation for test results. *Id.* at 805. “Their contents do not show that the requirements of § 39-20-07(5) are met.” *Id.* As such, the City failed to fulfill the foundational requirements to admit the test results as the checklist is required to show that the test was fairly administered.

[¶ 8] Although the test results are entitled “Intoxilyzer Test Record and Checklist,” the document is insufficient to show fair administration. (D. at 22). A checklist must accompany a test record in order to be admissible. *Salter v. Hjelle*, 41 N.W.2d 801, 804 (N.D. 1987). The City argued at trial that the new Intoxilyzer machine incorporates the checklist into the test results which alleviates the need for admission of a checklist. (T. at 107). This assertion is incorrect. As this Court has previously held “the Intoxilyzer record does not establish that the approved method was followed.” *Id.* at 805. In addition, the Intoxilyzer record alone does not ensure that every step of the State Toxicologist’s methods have been complied with. “The State Toxicologist has not informed us whether any step in the approved method is dispensable in reaching a scientifically accurate result or in establishing fair administration.” *Id.* As such, contrary to the City’s assertion at trial, the test record is not sufficient to show that all the steps have been complied with in accord with the State Toxicologist’s approved method. 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. *Id.* at 806. In *Salter*, the court, in finding the Intoxilyzer test results inadmissible, noted at least four requirements of the approved method which were not addressed on the test record. *Id.* As the test record in *Salter* was insufficient to ensure

that all steps of the approved method were followed, so is the test record in the present case, as most of the steps required by the State Toxicologist are not even addressed on the test record. Specifically, the following steps listed in the State Toxicologist's approved method are not referred to in the test record:

1. To turn the instrument on, depress the "Power" (red) switch.
2. The instrument should be allowed sufficient time to warm-up and complete a series of diagnostic checks.
3. When these internal diagnostic checks have been completed, the instrument will display "Ready to Start" as one of the alternating displays.
4. To initiate a test, press the "Esc" key twice.
5. The display will read "PASSWORD=."
6. Depress the "Start Test" switch.
7. Before proceeding, the operator must ascertain that the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample by answering the question "20 MIN WAIT? Y/N."
8. Then, "# PRINT COPIES?" will appear on the display.
9. The operator should enter the number of copies needed, followed by the information requested.
10. At the completion of the entry, the operator may review the data and make any necessary corrections.
11. The Intoxilyzer will perform a series of diagnostic checks.
12. Only when the internal diagnostic checks are completed, will it proceed to test a sample of room air.

13. During this test, the display will read "Room Air," the time, and the date.
14. Upon completion of the room air test, the display will alternate between a scrolled instruction of "Please Blow Into Mouthpiece Until Tone Stops" and a flashing directive of "Please Blow."
15. At this point, the operator should place a clean mouthpiece in the end of the breath tube and instruct the subject to blow into the mouthpiece.
16. If the instrument accepts the breath as an adequate sample, the subject test result will be displayed.
17. The operator should remove the mouthpiece from the breath tube and dispose of it.
18. Then the instrument will ask the operator if a clean mouthpiece was used and disposed of by displaying "CLN MTHPC? Y/N."
19. The operator should answer the questions whether a clean mouthpiece was used and disposed of.
20. After the sample chamber has been cleared, and the room air test result has been completed by the instrument, the display will ask for the simulator temperature.
21. The operator should enter the temperature of the simulator.
22. The proper operating temperature of the simulator is $34.0 \pm 0.2^{\circ}\text{C}$.
23. The instrument will automatically pump in simulator solution vapor.
24. It will then analyze the alcohol concentration and display it.
25. Room Air will once again be pumped through the sample chamber until it is cleared of standard solution vapor and a room air test displayed.

26. The instrument will display "STD SOL TST COMP?."
27. The operator should answer the question whether the standard solution test has been completed.
28. When the display scrolls the instruction "Please Blow Into Mouthpiece Until Tone Stops" followed by a flashing directive "Please Blow," the operator should place another clean mouthpiece in the breath tube and instruct the subject to blow into the mouthpiece.
29. If the instrument accepts the breath as an adequate sample, the subject test result will be displayed.
30. The operator should remove the mouthpiece from the breath tube and dispose of it.
31. The instrument will ask if a clean mouthpiece was used and disposed of by displaying "CLN MTHPC? Y/N."
32. The operator should answer the question whether a clean mouthpiece was used and disposed of.
33. Room air will once again be pumped through the chamber to clear it and the room air test results displayed.
34. The display will then read "Difference OK" or "Diff. Too Great" if two breath samples are determined to be adequate.
35. The printer prints the Form 106-KB-EP and observe it for legibility.
36. When the test record is printed at the end of the test, if upon review of any of this inputted information is incorrect, the operator may amend the test record by crossing out the incorrect inputted information and then writing the

correction on the test record.

37. Sign all printed copies.

38. A scrolling display will show “Push Button to Reprint Card” followed by a flashing directive of “Reprint Card.”

39. If the printed Form 106-KB-EP is illegible, press the “Start Test” switch.

40. The printer will print the test information and checklist as a Form 106-KB-EP and eject it from the printer.

41. Remove the second Form 106-KB-EP from the printer and sign all copies.

42. Retain both sets of copies for evidentiary purposes.

(D. at 17). Clearly, the few steps noted on the test record do not constitute a checklist which ensures that all of the above mentioned steps were completed in administering the test. As such, the test results should not have been admitted into evidence because the results themselves are inadmissible without an accompanying checklist.

[¶ 9] The City offered no other evidence to establish that the test had been fairly administered. When the documentation requirements of N.D.C.C. § 39-20-07(5) are not met, “other proof of fair administration may be provided by testimony of the State Toxicologist or a showing that the test was performed according to the approved method.” *Salter v. Hjelle*, 415 N.W.2d 801, 803 (N.D. 1987). “When the State fails to establish compliance with the toxicologist’s directions, which go to the scientific accuracy of the test, the State must prove fair administration through expert testimony....Absent a showing of strict compliance with the approved method, expert testimony is necessary to demonstrate the scientific accuracy of the test.” *Lee v. N.D. Dep’t of Transp.*, 2004 ND 7, ¶16, 673 N.W.2d 245, 249 (N.D. 2004) (citations

omitted). The State Toxicologist did not testify to show fair administration of the test. so other expert testimony to show the test was fairly administered was required. However, neither Officer Robbins or Officer Middleton was established as an expert witness, and, therefore, their testimony could not prove fair administration of Barnum's test. Not only did the City fail to carry its burden by not scrupulously complying with the documentation requirements, the government failed by not providing other evidence, through testimony by the State Toxicologist or by any other expert witness, to show fair administration of the test.

CONCLUSION

[¶ 10] 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.

[¶ 11] 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 14th day of February, 2005.

Alexander F. Reichert
ALEXANDER F. REICHERT
(ND ID #05446)
405 Bruce Avenue, Suite 100A
Grand Forks, ND 58201
Telephone No. (701) 787-8802
Attorney for Appellant

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APPELLANT.		

AFFIDAVIT OF FILING AND SERVICE BY E-MAIL

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

supclerkofcourt@ndcourts.com

Alexander F. Reichert, being first duly sworn, deposes and says that on the 14th day of February, he served by email the attached 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
Attorney for Appellee
garyeuren@qwest.net

Dated this 14th day of February, 2005.

ALEXANDER F. REICHERT

SUBSCRIBED AND SWORN to before me this 14th day of February, 2005.

Notary Public, State of North Dakota