20060202 & 20060269

ORIGINAL

IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

Tyler Allen Whitecalfe, Appellant. vs. North Dakota Department of Transportation, Appellee.	**Supreme Court No. 20060202** **Burleigh Co. No. 06-C-00416**

BURLEIGH COUNTY, NORTH DAKOTA
HONORABLE BRUCE B. HASKELL

George Steven Berg, Appellant, vs. North Dakota Department of Transportation, Appellee.	**Supreme Court No. 20060269** **Stark County No. 06-C-00308**

STARK COUNTY, NORTH DAKOTA
HONORABLE ALLAN SCHMALENBERGER

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CONSOLIDATED REPLY BRIEF OF APPELLANTS

****

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3. LAW AND ARGUMENT

4. The Department argues that Appellants knew why their driving privileges were being revoked. but fails to recognize that two of the central issues at the administrative hearing are:

   1) "whether a law enforcement 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"...and

   2) "whether the person was placed under arrest."

5. These issues have nothing to do with whether or not the person refused a chemical test. Rather, whether there is an illegal or unconstitutional stop or arrest is a significant issue which the Petitioner should be aware of, and this Court has numerous cases addressing such issues before the Department. *See Lapp v. Department of Transp.*, 2001 ND 140, 632 N.W.2d 419. A petitioner not knowing the pertinent information regarding the grounds for the stop or arrest might forgo altogether the opportunity to have a hearing on the matter.

6. The Department argues that these cases on appeal involve refusal cases and not cases involving actual chemical tests. Again, the Department fails to understand the central issues applicable at the administrative hearing which involve matters outside of whether or not a refusal occurred, and therefore, it is insignificant as to whether or not the administrative hearing involves a revocation proceeding involving a refusal or a suspension proceeding involving a chemical test. Moreover, while dozens of suspension cases remain stayed in District Court pending the outcome of this appeal, the Department (by and through appellate counsel in this case) has filed letters in both Burleigh Co. Case No.: 06-C-1884. *Kremer v. ND Dept. of Transportation* and

06-C-1702, *Larson v. ND Dept. of Transportation*, indicating that "[T]he issue presented in *Whitecalfe* is identical to the issue presented here..." To now face an argument contrary to the Department's previously held position is rather disheartening.

7. The Department argues that a due process argument was not raised below. This too is incorrect. In the Whitecalfe hearing, Whitecalfe argued:

> Mr. Sharp: Do the statutes...require those things that you've indicated the Supreme Court has noted a requirement for?
>
> * * *
>
> Mr. McCabe: That's all legislative, or excuse me, that's all holdings. I guess you would call it, from the Supreme Court. I mean, *due process* holdings. It's not in the statute. It's, I guess, what the Supreme Court has alluded to for *due process* reasons.

(Whitecalfe Hearing Tr., p. 5, lines 15-25 and p. 6, lines 1-4)(emphasis added).

8. Whitecalfe, in his Notice of Appeal and Specifications of Error, stated, in part, "[S]ignificantly, *due process*, fundamental fairness and proper "notification" requires...that it is important that a driver facing the loss of driving privileges be able to quickly, conveniently, and certainly know what the officer is relying on." (App. p. 10-11)(emphasis added). Whitecalfe, in his Reply Brief before the District Court, argued:

> In summary, it seems that the Supreme Court has put some teeth into the notice and due process requirements regarding what information a driver is supposed to receive prior to making the decision to request an administrative hearing. However, the Department's form currently provided to the Driver does not provide that information, and therefore the Department's form is currently flawed and in violation of Whitecalfe's *due process* and notice rights as spelled out in *Jorgensen, supra.*
>
> (emphasis added).

9. Whitecalfe also argued to the District Court during oral argument, "[W]ell it's the

same argument that I've been making all along. It's a *due process* argument based upon *Jorgensen* and *Aamodt*." (Whitecalfe Oral Argument Tr., p. 2, lines 21-22)(emphasis added). Similarly, Berg argued that:

> [Y]our honor...my arguments...you've heard them before, but I'm just preserving them for appeal because I know you've denied me in the past, but...I'm arguing based upon *Aamodt v. North Dakota Department of Transportation*...and *Jorgensen v. North Dakota Department of Transportation*...the point of these cases is that he should be able to know what he was arrested for prior to the need to request a hearing.

(Berg Hearing, Tr. p. 7, lines 18-25 and p. 9, lines 20-22).

10. Berg, in his Notice of Appeal and Specifications of Error, also stated, in part, "[S]ignificantly, *due process*, fundamental fairness and proper "notification" requires...that it is important that a driver facing the loss of driving privileges be able to quickly, conveniently, and certainly know what the officer is relying on." (App. p. 9-10)(emphasis added). Berg, in his Appellant Brief before the District Court, also argued:

> In summary, it seems that the Supreme Court has put some teeth into the notice and due process requirements regarding what information a driver is supposed to receive prior to making the decision to request an administrative hearing. However, the Department's form currently provided to the Driver does not provide that information, and therefore the Department's form is currently flawed and in violation of Whitecalfe's *due process* and notice rights as spelled out in *Jorgensen, supra.*

(emphasis added).

11. Additionally, the Appellants have continuously objected, argued and relied upon specific language from both *Jorgensen v. ND Dept. of Transp.*, 2005 ND 80, 695 N.W.2d 212 and *Aamodt v. ND Dept. of Transp.*, 2004 ND 134, 682 N.W.2d 308. Reliance upon these cases and arguing the contents of these cases was sufficient to preserve the issue for this Court's review on appeal. Similarly, in *State v. Lucero*,

127 N.M.672. 679. 986 P.2d 468, 475 (N.M.App.1999), the Court stated:

> The State asserts that...Lucero did not, at any time, assert his rights under the double jeopardy clause of the New Mexico Constitution. We disagree. Defendant Lucero's brief-in-chief argues that retrial should be barred under *Breit* and *State v. Huff*, both of which involve the state constitutional bar to reprosecution. This was sufficient to preserve the issue for our review on appeal.

(citations omitted).

12. Administrative hearings. particularly at the Department of Transportation, are summary proceedings which are limited in scope and duration. *See Berger v. State Highway Com'r*. 394 N.W.2d 678. 683 (N.D.1986): *also see Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.*, 698 N.W.2d 478, 480 (N.D.2005)(An eviction action under N.D.C.C. ch. 33-06 is a summary proceeding to recover possession of real estate).

13. A petitioner has a mere 10 days to request a DOT hearing, (N.D.C.C. § 39-20-05 (1)), and the hearings are expeditiously held within 30 days, N.D.C.C. § 39-20-05 (1), address narrow issues. (N.D.C.C. § 39-20-05 (2) or (3)), and are relatively short in duration. (See transcripts of both proceedings on appeal). The filing of motions, briefs and lengthy argument would "interfer[e] with the proceedings' summary character." *Berger v. State Highway Com'r, supra* at 683. Like evictions. the DOT "proceeding is limited to a speedy determination...without bringing in extraneous matters", and "the purpose of the statute is to provide an inexpensive, expeditious, and simple means to determine" suspension or revocation of driving privileges. *See Riverwood Commercial Park, LLC v. Standard Oil Co., Inc., supra* at 481.

14. Lastly, the Department has abandoned this issue by failing to raise any argument at the District Court level about failing to argue due process. *See Bollin v. North*

Dakota Dept. of Transp., 2005 ND 91, 696 N.W.2d 527 (Bollins claims the Department should not be able to argue he failed to preserve his objection because the argument was not raised at the district court.): *State v. Keilen*, 2002 ND 133, 649 N.W.2d 224, 229 ("While expressing no opinion on whether exigent circumstances existed, issues not briefed or argued are deemed abandoned.").

15. CONCLUSION AND PRAYER FOR RELIEF

16. WHEREFORE, the Appellants, by and through their attorney, Chad R. McCabe, respectfully pray that this Court will reverse the administrative revocation of their driving privileges.

Dated this 29th day of December, 2006.

/s/ Chad R. McCabe
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N.D. State Bar ID #05474

17. CERTIFICATE OF SERVICE

18. A true and correct copy of the foregoing document was sent by email on this 29th day of December, 2006, to:

Zachary Pelham
Asst. Attorney General
500 N. Ninth St.
Bismarck, ND 58501-4509
Email: zpelham@state.nd.us

/s/ Chad R. McCabe
CHAD R. MCCABE