

ORIGINAL - e-filed
20060202

IN THE SUPREME COURT
IN THE STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

Tyler Allen Whitecalfe

OCT 03 2006

Appellant,

STATE OF NORTH DAKOTA

v.

North Dakota Department of Transportation

Appellee.

Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Bruce B. Haskell

SUPREME COURT NO. 20060202
BURLEIGH COUNTY NO. 06-C-00416

BRIEF OF APPELLANT

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2. TABLE OF AUTHORITIES

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3. STATEMENT OF ISSUE

ISSUE: The Department lacked jurisdiction to revoke Whitecalfe's driving privileges because the copy of the Report and Notice given to Whitecalfe prior to his request for a hearing did not indicate any "reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01 or equivalent ordinance," a basic and mandatory provision required by due process and N.D.C.C. § 39-20-04, so that, "in determining to request a hearing, 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 upon."

4. STATEMENT OF THE CASE

Nature of Case

5. The case on appeal is a civil case wherein Whitecalfe's driving privileges were revoked by the North Dakota Department of Transportation for a period of one year.

Course of Proceedings

6. Whitecalfe was issued a Report and Notice on February 3, 2006, regarding the possible revocation of his driving privileges. (Exhibit 11. App. p. 2). Whitecalfe timely requested a hearing which was received by the Department on February 10, 2006. (Exhibit 1(c)). which was then held on March 6, 2006. (App. p. 5; also see hearing Transcript).
7. Whitecalfe's driving privileges were revoked for a period of one year on March 6, 2006. (Hearing Officer's Decision, App. p. 4). Whitecalfe timely filed his Notice of Appeal and Specifications of Error with the Burleigh County District Court on March 8, 2006. (App. pp. 10-11).

Disposition in the Court Below.

8. Oral argument was held on this matter before the Honorable Bruce B. Haskell on July 7, 2006. (Oral Argument Tr.). The Court then issued an Order for Judgment affirming the hearing officer's decision on July 13, 2006. (App. pp. 12-13). Judgment was entered on July 14, 2006. (App. p. 6). Notice of Entry of Judgment was sent on July 18, 2006. (App. p. 15). Whitecalfe timely filed his Notice of Appeal on July 19, 2006. (App. p. 16).

9. STATEMENT OF FACTS

10. On February 3, 2006, Deputy Ron Dietz arrested Whitecalfe on the charge of Driving Under the Influence of Alcohol. (Hearing Officer's Decision). Dietz advised Whitecalfe of the implied consent law and asked for a blood specimen. Whitecalfe initially agreed, but later refused, reiterating that he would only submit to an Intoxilyzer test. (Hearing Officer's Decision).
11. Dietz issued a temporary operator's permit to Whitecalfe on a report and notice form issued by the Department of Transportation. (Hearing Officer's Decision: Exhibit 11, App. p. 2). The permit indicated Whitecalfe had refused to submit to testing and also stated a refusal of testing requested by a law enforcement officer results in the revocation of a person's driving privileges for up to four years. (Hearing Officer's Decision, Exhibit 11, App. p. 2). The permit extended Whitecalfe's driving privileges for a period of twenty-five days unless terminated earlier by the decision of a hearing officer. Dietz signed and dated the permit. (Hearing Officer's Decision, Exhibit 11, App. p. 2). The form also apprised Whitecalfe of procedures for an administrative hearing to contest the proposed revocation. (Hearing Officer's Decision, Exhibit 11, App. p. 2).
12. The report and notice form consists of an original and two copies. (Hearing Officer's Decision). Deitz submitted the original form to the Department. (Hearing Officer's Decision). The Department's copy bore a section entitled "Officer's Statement of Probable Cause." (Hearing Officer's Decision). That portion of the form described the reasons for stopping or detaining Whitecalfe as well as the reasons for his arrest. (Hearing Officer's Decision). The driver's copy of the report and notice form did not

bear any of that information. (Hearing Officer's Decision). Whitecalfe received a copy of the original report and notice form with the probable cause information on it after he requested an administrative hearing. (Hearing Officer's Decision).

13. An administrative hearing was held on March 6, 2006, with regard to the revocation of Whitecalfe's driving privileges. At the hearing, Whitecalfe made a motion to dismiss for lack of jurisdiction, based upon the lack of a probable cause statement being on the copy of the report and notice given to Whitecalfe prior to his request for a hearing. (Tr. pp. 3-7; Exhibit 11, App. p. 2; Exhibit 12, App. p. 3).

14. STANDARD OF REVIEW

15. The facts in this case are undisputed, and the only issue is the interpretation of N.D.C.C. § 39-20-04 and caselaw provided by *Jorgensen v. North Dakota Dept. of Transp.*, 2005 ND 80, 695 N.W.2d 212 and *Aamodt v. North Dakota Dept. of Transp.*, 2004 ND 134, 682 N.W.2d 308, in conjunction with applicable facts at hand. Accordingly, "[T]he interpretation of a statute is a question of law, fully reviewable" on appeal. *Phipps v. North Dakota Dept. of Transp.*, 2002 ND 112, 646 N.W.2d 704, citing *Keepseagle v. Backes*, 454 N.W.2d 312, 315 (N.D.1990). Also see *Salter v. North Dakota Dept. of Transp.*, 505 N.W.2d 111 (N.D.1993)("the ultimate conclusion of whether [the] facts meet the legal standard...is a question of law which is fully reviewable on appeal.")

16. LAW AND ARGUMENT

ISSUE: The Department lacked jurisdiction to revoke Whitecalfe's driving privileges because the copy of the Report and Notice given to Whitecalfe prior to his request for a hearing did not indicate any "reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01 or equivalent ordinance," a basic and mandatory provision required by due process and N.D.C.C. § 39-20-04, so that, "in determining to request a hearing, 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 upon."

17. This Court has made clear that the statutory provision in N.D.C.C. § 39-20-03.1, et seq., is a basic and mandatory provision and the Department has no authority to suspend driving privileges unless the provisions are followed. *Aamodt v. North Dakota Dept. of Transp.*, 2004 ND 134, 682 N.W.2d 308, ¶ 26 (emphasis added). Thus, "[W]hen determining whether to suspend a person's driving privileges, the Department must determine whether there were reasonable grounds to believe the person was driving or was in actual physical control of a motor vehicle while under the influence of alcohol, whether the person was properly tested, and whether the person's blood-alcohol level exceeded the legal limit." *Aamodt, supra* at ¶ 23.

18. In *Aamodt*, this Court stated:

Driving privileges cannot be taken away without some basis. Requiring reasonable grounds before taking away a person's driving privileges ensures the law is not too slanted in favor of the Department and protects those who should not be punished. Without a finding of probable cause, there is not basis for taking away a person's driving privileges. *Aamodt* was entitled to know what the officer was relying on.

Id at ¶ 25.

19. Subsequently, in *Jorgensen v. North Dakota Dept. of Transp.*, 2005 ND 80, 695 N.W.2d 212, this Court relied upon *Aamodt* and further held that chemical test results

were also a basic and mandatory provision required “to give the Department the authority to suspend a driver’s license and to provide a driver the means ‘to know what the officer was relying on.’” *Jorgensen*, ¶ 12, citing *Aamodt*, ¶ 25. “[This] statutory provision...involves requirements that are material to the Department’s decision to suspend a person’s driving privileges and are predicates to the Department’s acting.” *Aamodt, supra* at ¶ 23. *Jorgensen* also emphasized that the information is required “before the report [is] sent to the department or provided to the driver.” *Jorgensen*, ¶ 12.

20. Significantly, *Jorgensen* held:

Section 39-20-05(1), N.D.C.C., gives a driver only a short time—ten days—after the issuance of a temporary operator’s permit within which to request a hearing to challenge the suspension of his or her driving privileges. *Thus, in determining whether to request a hearing, 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.*

Jorgensen, ¶ 13 (emphasis added).

21. In this case, the facts are undisputed that the probable cause statement was lacking in Whitecalfe’s form and that this information was not provided to him prior to his request for a hearing. It was only after he requested his hearing that he received such information from the Department. Therefore, Whitecalfe was not able to “quickly, conveniently, and ce rtainly know what the officer [was] relying on” prior to “determining whether to request a hearing.” *Jorgensen, supra* at ¶ 13.

22. Nevertheless, the Department argues that *Jorgensen v. North Dakota Department of Transportation*, 2005 ND 80, 695 N.W.2d 212, only applies when the incomplete report and notice involves the Department and that there is no requirement to provide

the driver with a copy of the complete information prior to the driver requesting a hearing. In making this argument, the Department seeks to rely strictly on statutory requirements, rather than the notice and due process requirements specifically spelled out in *Jorgensen*, as *Jorgensen* carefully emphasized that the information is required “before the report [is] sent to the department *or provided to the driver.*” *Jorgensen*, ¶ 12 (emphasis added). Moreover, *Jorgensen* held that, “in determining whether to request a hearing, 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.” *Jorgensen, supra* at ¶ 13.

23. Furthermore, the Department’s own Chief Hearing Officer has consistently dismissed cases in which the report and notice did not contain the chemical test results despite the fact that the form sent to the Department did have the information and that a complete Report and Notice was later sent from the Department to the Driver for the requested administrative hearing. (*See* attachments to Appellant’s District Court Reply Brief of Matter of Lindsey J. Deutsch (January 27, 2006)(dismissing because the “Report and Notice form that had been issued to Ms. Deutsch...was incomplete....and did not show the type of testing or the time of testing or the results of the testing”) and matter of Richard Burke Baer (May 10, 2006)(dismissing because “the Report and Notice form that was issued to Mr. Baer was incomplete, that is, it did not include the blood test results.”); Oral Argument Tr. p. 4, lines 5-7, 18-25; p. 5, lines 1-3) . Based upon this, it is readily apparent that the Department’s own counsel and Chief Hearing Officer are at odds with each other on this significant legal issue.

