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STATE OF NORTH DAKOTA

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

George Steven Berg

Appellant,

v.

North Dakota Department of Transportation

Appellee.

**Appeal from the District Court
Southwest Judicial District
Stark County, North Dakota
The Honorable Allan Schmalenberger**

**SUPREME COURT NO. 20060269
STARK COUNTY NO. 06-C-00308**

BRIEF OF APPELLANT

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1. TABLE OF CONTENTS

	PARAGRAPH NO.
STATEMENT OF ISSUE	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	8
LAW AND ARGUMENT	13
ISSUE: The Department lacked jurisdiction to revoke Berg’s driving privileges because the copy of the Report and Notice given to Berg 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.”	13
CONCLUSION AND PRAYER FOR RELIEF	15
CERTIFICATE OF SERVICE	17

2. STATEMENT OF ISSUE

ISSUE: The Department lacked jurisdiction to revoke Berg's driving privileges because the copy of the Report and Notice given to Berg 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."

3. STATEMENT OF THE CASE

Nature of Case

4. The case on appeal is a civil case wherein Berg's driving privileges were revoked by the North Dakota Department of Transportation for a period of four (4) years.

Course of Proceedings

5. Berg was issued a Report and Notice on March 18, 2006, regarding the possible revocation of his driving privileges. (Exhibit 1(b); Exhibit 4). Berg timely requested a hearing which was received by the Department on March 23, 2006. (Exhibit 1(c). which was then held on April 10, 2006. (see hearing transcript).
6. Berg's driving privileges were revoked for a period of four (4) years on April 10, 2006. (Hearing Officer's Decision). Berg filed a Petition for Reconsideration with the Department on April 24, 2006. (App. pp. 2-5). The Petition was denied on May 3, 2006. (App. p. 6). Berg timely filed his Notice of Appeal and Specifications of Error with the Stark Co. District Court on May 31, 2006. (App. pp. 7-8).

Disposition in the Court Below.

7. The Court issued a Memorandum affirming the hearing officer's decision on August 25, 2006. (App. pp. 19-13). Judgment was entered on September 7, 2006. (App. p. 16). Notice of Entry of Judgment was sent on September 11, 2006. (App. p. 14). Berg timely filed his Notice of Appeal on October 10, 2006. (App. p. 18).

8. STATEMENT OF FACTS

9. On March 18, 2006, Dickinson Police Officer Michael Hanel arrested Berg on the charge of Driving Under the Influence of Alcohol. (Hearing Officer's Decision). Hanel advised Berg of the implied consent law and asked for a breath specimen.

10. Hanel issued a temporary operator's permit to Berg on a report and notice form issued by the Department of Transportation. (Exhibit 1(b)). The permit indicated Berg had refused to submit to a chemical test and that the Department could revoke Berg's driving privileges. (Exhibit 1(b)). The permit indicated that it was not valid as a temporary operator's permit because Berg had a suspended/revoked license. (Exhibit 1(b)). The form also apprised Berg of procedures for an administrative hearing to contest the proposed suspension. (Tr. p. 6, lines 23-25, p. 7, line 1, Exhibit 4).
11. The report and notice form consists of an original and two copies. (Tr. p. 7-14). Hanel submitted the original form to the Department. (Exhibit 1(b)). The Department's copy bore a section entitled "Officer's Statement of Probable Cause." That portion of the form described the reasons for stopping or detaining Berg as well as the reasons for his arrest. (Exhibit 1(b)). The driver's copy of the report and notice form did not bear any of that information. (Tr. p. 6, lines 23-25, p. 7, lines 6-17, Exhibit 4). Berg received a copy of the original report and notice form with the probable cause information on it only after he requested an administrative hearing when he was then sent hearing exhibits from the DOT (Exhibit 1(b)).
12. At the hearing, Berg objected to Exhibit 1 and 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 Berg prior to his request for a hearing (Tr. p. 7, lines 18-25, p. 8, lines 1-13, p. 9, lines 2-24).

13. LAW AND ARGUMENT

ISSUE: The Department lacked jurisdiction to revoke Berg's driving privileges because the copy of the Report and Notice given to Berg 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."

14. By Order of the Supreme Court on October 26, 2006, this case was consolidated with the case of *Whitcalfe v. North Dakota Dept. of Transportation*. Supreme Court No. 20060202. Therefore, Berg refers to the Appellant's Brief in that consolidated matter and relies upon that law and argument set forth in that matter.

15. CONCLUSION AND PRAYER FOR RELIEF

16. WHEREFORE, the Petitioner/Appellant, George Steven Berg, by and through his attorney, Chad R. McCabe, respectfully prays that this Court will reverse the administrative revocation of his driving privileges.

Dated this 16th day of November, 2006.

/s/ Chad R. McCabe
CHAD R. MCCABE
Attorney for the Petitioner/Appellant
523 North Fourth Street
Bismarck, North Dakota 58501
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 16th day of November, 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