

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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Jonathan Paul Ike,

DEC 31 2007

Appellant,

STATE OF NORTH DAKOTA

v.

Supreme Court No. 20070302

Director, North Dakota Department
of Transportation,

Appellee.

BRIEF OF APPELLANT

Appeal from Judgment

Williams County District Court
Northwest Judicial District
Civil No. 07 C 00449

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STATEMENT OF THE ISSUES

ISSUE FOR REVIEW NO. 1

Was Exhibit 1b inadmissible in that statutory foundation for proceeding with the administrative hearing against Ike was not shown?

ISSUE FOR REVIEW NO. 2

Was Exhibit 1d inadmissible in that it was not shown that the specimen collector was on the List of Approved Designations of Individuals Medically Qualified to Draw Blood?

STATEMENT OF THE CASE

Jonathan Paul Ike appeals from a district court judgment affirming an administrative suspension of his driving privileges for a period of 91 days (A. 33-37).

On May 11, 2007, Heather Christianson of the Williston Police Department arrested Ike for DUI (A. 7-13). Christianson took Ike to a hospital for a blood draw (A. 13-15).

At the administrative hearing in this matter, the department introduced Exhibit 1b, the Report and Notice form (A. 15, 29). On its face, Exhibit 1b shows that Heather Christianson personally issued the included Temporary Operator's Permit to Ike on May 24, 2007 (A. 29). However, at the hearing, Christianson's testimony showed that she did not in fact serve Ike with the Temporary Operator's Permit (A. 17, lines 19-21; 19, lines 11-13), and she did not know who did (A. 16, lines 20-25). Ike objected to Exhibit 1b on foundation as to proper service or the fact of service of the Temporary Operator's Permit, and his objections were overruled (A. 15-17; 19-20; 26, lines 17-22).

At the hearing, the department also introduced Exhibit 10, the State Toxicologist's List of Approved Designations of Individuals Medically Qualified to Draw Blood (A. 6, 31-32). Ike had no objection to Exhibit 10

(A. 6). However, based upon Exhibit 10, Ike objected to Exhibit 1d for its failure to comport with Exhibit 10 (A. 20, 30).

Exhibit 10 includes in the List of Approved Designations of Individuals Medically Qualified to Draw Blood the letters, MLT, which designates a Medical Laboratory Technician (A. 32). Exhibit 1d, however, lists a signature for the specimen collector, followed by what appears to be MLIH56), or perhaps MLIHS6) (A. 30). The exhibit also lists a printed name of the specimen collector followed by what appears to be MLTIHSCP), or perhaps MLT/HSCP) (A. 30). Ike's objection to Exhibit 1d was overruled. The Hearing Officer stated, "I see the initials MLT" and "I note that Exhibit 10 includes MLT as the abbreviation for Medical Laboratory Technician." (A. 20, lines 14-18).

ARGUMENT

ISSUE FOR REVIEW NO. 1

Was Exhibit 1b inadmissible in that statutory foundation for proceeding with the administrative hearing against Ike was not shown?

NDCC 39-20-03.1(1) provides in relevant part that the law enforcement officer "shall immediately issue to that person a temporary operator's permit if the person then has valid operating privileges". Also, "[t]he law enforcement officer shall sign and note the date on the temporary

operator's permit." The record of the hearing in this case fails to show compliance with NDCC 39-20-03.1(1) in both regards.

NDCC 39-20-03.1(3) provides also in relevant part, "The law enforcement officer, within five days of the issuance of the temporary operator's permit, shall forward to the director a certified written report in the form required by the director and the person's operator's license taken under subsection 1 or 2." The hearing record in this case fails to show if this subsection has been met in that we do not know the date of service, if any, on Ike. Therefore, the hearing record in this case fails to show compliance with NDCC 39-20-03.1(3).

The hearing officer in this case indicated to Ike that Ike's arguments regarding Exhibit 1(b) would be taken into consideration in reaching a decision in this matter (A. 26, lines 17-22). However, in the hearing officer's decision, the hearing officer failed to address Ike's objections to Exhibit 1(b) (A. 33). Proper foundation for proceeding against Ike in this matter was not shown.

In Jorgensen v. N.D. Department of Transportation, 2005 ND 80, ¶ 3, 695 N.W.2d 212, the Court stated, "As required by N.D.C.C. § 39-20-03.1, a report and notice form was sent to the Director of the Department." Ike contends that the provisions of Section 39-20-03.1 applicable here, those

from subsections 1 and 3 cited above, are basic and mandatory provisions under the reasoning of Jorgensen, and that failure to comply with the provisions deprived the department of authority to proceed against him. Id. at ¶¶ 10-11.

ISSUE FOR REVIEW NO. 2

Was Exhibit 1d inadmissible in that it was not shown that the specimen collector was on the List of Approved Designations of Individuals Medically Qualified to Draw Blood?

NDCC 39-20-02 provides in relevant part as follows:

“Only an individual medically qualified to draw blood, acting at the request of a law enforcement officer, may withdraw blood for the purpose of determining the alcohol, drug, or combination thereof, content therein. The director of the state crime laboratory or the director’s designee shall determine the qualifications or credentials for being medically qualified to draw blood, and shall issue a list of approved designations including medical doctor and registered nurse.”

(Emphasis added).

In State v. Lynch, 2001 ND 173, ¶ 10, 635 N.W.2d 164, the Court held it must be shown that “the individual who drew the blood is medically qualified under N.D.C.C. § 39-20-02.” The Court, quoting State v. Jordheim, 508 N.W.2d 878, 882 (N.D. 1993), also stated: “If the documentary evidence and the testimony of the participants in administering the test do not show scrupulous compliance with the methods approved by

the State Toxicologist, the statutory mode of authentication cannot be used.”
Id. at ¶ 12.

Here, Heather Christianson gave no testimony as to the qualifications of the specimen collector (see A. 15). The specimen collector did not testify.

Further, the documentary evidence does not show scrupulous compliance with Exhibit 10. Lynch, supra; Jordheim, supra. The Exhibit 1d did not state either “MLT” or “Medical Laboratory Technician”. It stated, at best, MLT followed by additional writing, with no explanation what the attempted designation meant. Exhibit 1d was not properly completed in accordance with Exhibit 10, and hence it was not scrupulously completed. Kiecker v. N.D. Department of Transportation, 2005 ND 23, ¶¶ 9-10, 691 N.W.2d 266. Fair administration of this blood test was not properly shown, and therefore Exhibit 1d should not have been admitted.

In Bollin v. N.D. Department of Transportation, 2005 ND 91 ¶ 11, 696 N.W.2d 527, the Court, quoting Lee v. N.D. Dep’t. of Transportation, 2004 ND 7, ¶ 16, 673 N.W.2d 245, stated, “[w]hen 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.” Here, neither the specimen collector nor the

State Toxicologist testified. Therefore, fair administration was not proven through expert testimony.

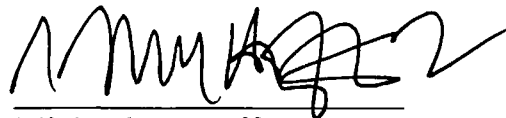
The hearing officer concluded the letters MLT proved the specimen collector was a Medical Laboratory Technician. The hearing officer, however, ignored the other letters or what they meant. There was no evidence upon which to base his conclusion that the MLT contained in the sequence of all the letters meant Medical Laboratory Technician. The hearing officer's conclusion was not reasonable as it was not based on any evidence. Bollin, at ¶¶ 11-13.

CONCLUSION

Wherefore, Ike requests the Supreme Court of North Dakota to reverse the judgment of the district court.

Respectfully submitted this 31 day of December 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing document by mail, on this 31 day of December 2007, on:

Mr. Douglas B. Anderson
Assistant Attorney General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509

A handwritten signature in black ink, appearing to read "Michael R. Hoffman", written over a horizontal line.

Michael R. Hoffman