

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

RECEIVED BY CLERK
SUPREME COURT APR 21 2008

Christopher Barros,

Appellant,

v.

North Dakota
Department of Transportation,

Appellee.

Supreme Ct. No. 20080066

District Ct. No. 07-C-00949

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APPEAL FROM THE DISTRICT COURT
MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA

HONORABLE THOMAS J. SCHNEIDER

BRIEF OF APPELLEE

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STATEMENT OF ISSUE

Whether the Department established the chain of custody of Barros' blood sample.

STATEMENT OF CASE

Mandan City Police Officer Michael Kapella arrested Christopher Barros ("Barros") on October 19, 2007, for the offense of being in actual physical control of a vehicle while under the influence of intoxicating liquor. (Appellant Br.'s Appendix ("Barros App.") A-8, ll. 4-9; A-12, ll. 15-17.) Barros requested a hearing on October 26, 2007, in accordance with N.D.C.C. § 39-20-05. (Barros App. A-34.)

The administrative hearing was held on November 30, 2007. (Appendix to Appellee's Brief ("DOT App.") 1.) The hearing officer, in accordance with N.D.C.C. § 39-20-05, considered the following issues:

- (1) [w]hether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;
- (2) [w]hether the person was placed under arrest;
- (3) [w]hether the person was tested in accordance with N.D.C.C. section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and
- (4) [w]hether the test results show the person had an alcohol concentration of at least eight one-hundredths of one percent but less than eighteen one-hundredths of one percent by weight.

(Barros App. A-37.)

Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision dated November 30, 2007, suspending Barros' driving privileges for a period of 91 days. (DOT App. 1.)

STATEMENT OF FACTS

On October 19, 2007, Mandan Police Officers Michael Kapella ("Officer Kapella") and William Stepp ("Officer Stepp") responded to a report of a domestic disturbance involving a male attempting to break into a residence. (Barros App. A-8, ll. 4-16; A-19, ll. 17-20; A-23, ll. 23-25; A-24, ll. 1-5.) Upon arriving at the scene, the officers observed a single vehicle, occupied by a male, parked on the street in front of the residence with its brake lights flashing on and off. (Barros App. A-8, ll. 16-23; A-19, ll. 21-24; A-20, ll. 1-11; A-24, ll. 16-17.) Barros' vehicle was not running and the key was not in the ignition, but instead, was in the center console between the driver's and passenger's seats. (Barros App. A-11, ll. 2-13; A-21, ll. 12-18.) The officers subsequently placed the key in the ignition to verify it belonged to the vehicle. (Barros App. A-17, ll. 16-18.)

Officer Kapella approached the vehicle to investigate whether the occupant, identified as Barros, was the subject of the incident report. (Barros App. A-11, ll. 17-25; A-12, 1-2; A-20, ll. 11-17.) Barros appeared to be "visibly upset" and crying and his speech was slurred. (Barros App. A-9, ll. 9-11; A-10, ll. 2-3; A-11, ll. 19-20; A-21, ll. 2-6.) Barros informed Officer Kapella he had been arguing with his girlfriend and knocking on her door; however, she would not open the door. (Barros App. A-9, ll. 11-21; A-10, ll. 5-8.) Officer Kapella observed the moderate odor of alcoholic beverage on Barros. (Barros App. A-9, ll. 21-24.) Barros admitted he had consumed five alcoholic beverages. (Barros App. A-9, ll. 21-25; A-10, ll. 1-2; A-21, ll. 8-11.) Barros requested Officer Kapella place him under arrest for "DUI." (Barros App. A-10, ll. 2-3.)

Barros agreed to Officer Kapella's request he submit to a series of field sobriety tests. (Barros App. A-10, ll. 9-12.) Barros displayed the "lack of smooth pursuit in both eyes and nystagmus at maximum deviation in his right eye" while

performing the horizontal gaze nystagmus test. (Barros App. A-10, ll. 13-16.) Barros was unable to complete the walk-and-turn test and advised Officer Kapella he did not want to attempt the one-legged stand test. (Barros App. A-10, ll. 16-23; A-12, ll. 6-11.) Barros submitted to an S-D2 onsite screening test on which he produced a result of .149. (Barros App. A-12, ll. 11-16; A-21, ll. 22-25; A-22, ll. 1-14.) Officer Kapella placed Barros under arrest for being in actual physical control of a vehicle while under the influence of intoxicating liquor and transported him to the Morton County law enforcement center. (Barros App. A-12, ll. 16-25.)

Officer Kapella informed Barros of the implied consent advisory and requested he submit to a blood test to determine his blood alcohol concentration, to which Barros agreed. (Barros App. A-13, ll. 1-4; A-22, ll. 15-20.) Officer Kapella requested a nurse meet him at the law enforcement center to conduct Barros' blood sample draw. (Barros App. A-13, ll. 4-6.) Officers Kapella and Stepp testified they observed Barros' blood draw conducted at 1:16 a.m., on October 19, 2007. (Barros App. A-15, ll. 3-9.) After the blood sample was drawn from Barros, the sample vial was inverted, sealed, and placed in a protective container, which, in turn, was sealed and placed in the mailbox by Officer Kapella to be sent to the North Dakota Crime Laboratory. (Barros App. A-13, ll. 9-15.)

Officer Kapella testified he performed all steps identified on the Specimen Submitter's Checklist and then completed the checklist. (Barros App. A-13, ll. 16-25; A-14, ll. 1-10; A-33.) Officer Stepp testified he observed Officer Kapella affix the label over the tube containing the blood drawn from Barros and observed Officer Kapella complete the Specimen Submitter's Checklist on October 19, 2007. (Barros App. A-23, ll. 8-19.) Officer Kapella testified he completed the top one-third of the Submission for Blood (104). (Barros App. A-

14, 11-18; A-32.) Officer Kapella testified the registered nurse who drew Barros' blood sample completed the middle one-third of the Submission for Blood (104) in his presence. (Barros App. A-14, ll. 19-25; App. A-15, ll. 1-2; A-32.) The nurse noted the date of the collection of Barros' blood sample on the Submission for Blood (104) as "0116" a.m. on "10/19/07." (Barros App. A-32.)

Upon direct examination, Officer Kapella acknowledged the notation under "Remarks" from the North Dakota Crime Laboratory that "Date of sample collection on tube label 10/18/07." (Barros App. A-15, ll. 10-14; A-32.) Officer Kapella testified he intended the date on blood sample vial to be October 19, 2007, and there were no other blood draws from Barros on either October 18, 2007, or October 19, 2007. (Barros App. A-15, ll. 23-25; App. A-16, ll. 6-15.) Officer Kapella testified the discrepancy with regard to which date Barros' blood sample was drawn was "[p]robably bad handwriting on my part, obviously," as he has bad handwriting. (Barros App. A-15, ll. 15-17; App. A-16, ll. 3-5.) On cross-examination, Officer Kapella testified he was not present at the crime lab when the test was conducted, and he "could not say for sure" what date was written on the label, if it was the result of bad handwriting or he wrote the incorrect date, or whether the crime lab tested the wrong blood sample. (Barros App. A-18, ll. 11-19.)

Barros' chemical test for intoxication established he had a blood alcohol concentration 0.13% by weight. (Barros App. 32.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Barros appealed the administrative decision to the Morton County District Court. (DOT App. 2-3.) In the Appellant's Notice of Appeal and Specification of Error, Barros identified his single issue on appeal to the district court as "[t]he

hearing officer improperly admitted the results of the blood test because the department failed to establish chain of custody.”¹ (DOT App. 2-3.)

Judge Thomas J. Schneider issued a Memorandum Opinion and Order on February 12, 2008, affirming the hearing officer’s decision. (Barros App. A-2-A-3.) Judge Schneider ruled “Officers Kapella and Stepp’s testimony, along with the completed and certified Form #104, established the chain of custody for the blood sample.” (Barros App. A-2.) Judgment was entered on February 22, 2008. (DOT App. 5.) Barros appealed the Judgment to the North Dakota Supreme Court. (Barros App. A-4.) The Department requests this Court affirm the judgment of the Morton County District Court and the administrative suspension of Barros’ driving privileges for a period of 91 days.

STANDARD OF REVIEW

“The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of administrative license suspensions.” Ringsaker v. Dir., N.D. Dep’t of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. “On appeal from a district court’s review of an administrative agency’s decision, [the North Dakota Supreme Court] review[s] the agency decision.” Elshaug v. Workforce Safety & Ins., 2003 ND 177, ¶ 12, 671 N.W.2d 784. The Court reviews “the agency’s findings and decisions, and not those of the district court, though the district court’s analysis is entitled to respect if its reasoning is sound.” Hawes v. N.D. Dep’t of Transp., 2007 ND 177, ¶ 13, 741 N.W.2d 202.

¹ In his brief on appeal to the district court, Barros also asserted “Officer Kapella lacked a reasonable suspicion to approach Mr. Barros [sic] vehicle and begin questioning him, and as a result all evidence obtained after that is inadmissible.” (Barros App. A-1, Action 7). Although the district court reviewed the merits of the issue, Barros failed to satisfy the specificity requirements of N.D.C.C. § 39-20-06 with respect to the issue and, in accordance with Dettler v. Sprynczynatyk, 2004 ND 54, ¶ 21, 676 N.W.2d 799, it was not necessary for the district court to review the merits of the argument. Barros has not requested review of the issue on appeal to the Supreme Court.

Section 28-32-46, N.D.C.C., provides that the Court must affirm an administrative agency's order unless one of the following is present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

"When reviewing the agency's factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that agency, but determine[s] only whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence from the entire record." Ringsaker, 1999 ND 127, ¶ 5, 596 N.W.2d 328.

LAW AND ARGUMENT

The Department established the chain of custody of Barros' blood sample.

The North Dakota Supreme Court has followed the authority identified in Sullivan v. Municipality of Anchorage, 577 P.2d 1070, 1072 (Alaska 1978), that in considering the chain of custody for the admissibility of blood-alcohol tests:

"[E]very step need not be proven to an absolute certainty as long as the circumstances of the test provide a reasonable assurance that

the sample was withdrawn and tested in a reliable manner. Under this view, the ultimate question is whether sufficient evidence was presented to warrant a finding that the blood was in fact extracted from the defendant and was tested in a trustworthy manner.”

State v. Reil, 409 N.W.2d 99, 101 (N.D. 1987). The Supreme Court further has held:

“While it is not necessary for the State to call all persons who have handled the blood sample in order to introduce the test results, it is incumbent upon the State to show that the sample tested is the same one originally drawn from the defendant.” State v. Reil, 409 N.W.2d at 104. As held in State v. Nygaard, 426 N.W.2d at 548, the sample when tested must be in substantially the same condition as when it was drawn from the accused.

State v. Jordheim, 508 N.W.2d 878, 883 (N.D. 1993). “[T]he certifications of the specimen submitter and receiver [on the Submission for Blood (Form 104)] provide ‘an evidentiary shortcut for establishing chain of custody’ by ensuring the specimen is received in the same condition as it was submitted.” Id. (quoting State v. Schwalk, 430 N.W.2d 317, 322 (N.D. 1988)). In addition to the written certification, the testimony of the specimen submitter also is sufficient to establish -- or complete gaps in -- the chain of custody for the purpose of the consideration of the results of blood-alcohol tests. See id. at 883; State v. Hanson, 345 N.W.2d 845, 850 (N.D. 1984).

In this case, Barros relies on the notation under “Remarks” from the North Dakota Crime Laboratory that the date of the sample collection on the tube label was October 18, 2007, rather than October 19, 2007, to argue the chain of custody for his blood sample was not established. Officers Kapella and Stepp testified they observed Barros’ blood draw conducted at 1:16 a.m. on October 19, 2007. (Barros App. A-15, ll. 3-9.) Officer Kapella testified he completed the top one-third of the Submission for Blood (104). (Barros App. A-14, 11-18; App. 32.) Officer Kapella testified the registered nurse who drew Barros’ blood sample completed the middle one-third of the Submission for Blood (104) in his

presence. (Barros App. A-14, ll. 19-25; App. A-15, ll. 1-2; App. A-32.) The nurse noted the date of the collection of Barros' blood sample on the Submission for Blood (104) as "0116" a.m. on "10/19/07." (Barros App. A-32.) After the blood sample was drawn from Barros, the sample vial was inverted, sealed, and placed in a protective container, which, in turn, was sealed and placed in the mailbox by Officer Kapella to be sent to the North Dakota Crime Laboratory. (Barros App. A-13, ll. 9-15.)

On October 22, 2007, the sealed container, which included the Submission for Blood (Form 104) described as having been completed by Officer Kapella and the nurse and bearing Barros' name, was received by the North Dakota Crime Laboratory along with a labeled blood tube. (Barros' App. A-32.) The individual processing the blood specimen noted the "Date of sample collection on tube label 10/18/07." (Id.) Officer Kapella testified the discrepancy with regard to which date Barros' blood sample was drawn was "[p]robably bad handwriting on my part, obviously," as he has bad handwriting. (Barros App. A-15, ll. 15-17; App. A-16, ll. 3-5.) Officer Kapella testified he intended the date on the blood sample vial to be October 19, 2007, and there were no other blood draws from Barros on either October 18, 2007, or October 19, 2007. (Barros App. A-15, ll. 23-25; App. A-16, ll. 6-15.) Officer Stepp testified he observed Officer Kapella affix the label over the tube containing the blood drawn from Barros and observed Officer Kapella complete the Specimen Submitter's Checklist on October 19, 2007. (Barros App. A-23, ll. 8-19.)

Although Officer Kapella could not positively identify the reason for the discrepancies in the date on the tube and the date of the collection of Barros' blood sample, Kapella's close proximity observations and/or personal handling of the blood tube -- including its inversion, the placement of the seal on the tube,

and the tube's placement in the container with the Submission for Blood (Form 104), which was then received in the same condition at the North Dakota Crime Laboratory -- give reasonable assurance that the blood drawn from Barros was the same blood as that the Crime Lab tested. Officer Kapella's acknowledgement of his bad handwriting provides sufficient explanation as to the discrepancy in the date on the tube. The Department established the chain of custody of Barros' blood sample and the result of his blood-alcohol test was properly admitted into evidence.

CONCLUSION

The Department respectfully requests that this Court affirm the judgment of the Morton County District Court and the Department's decision suspending Christopher Barros' driving privileges for a period of 91 days.

Dated this 21st day of April, 2008.

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