ORIGINAL (e-filed) 20080066

THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

March 18, 2008

Supreme Court 20080066
Morton Co. No. 07-C-00949

Christopher Barros,

Appellant,

v.

North Dakota Department of Transportation,

Appellee.

Appeal from District Court Decision Upholding Administrative Hearing Decision

BRIEF FOR APPELLANT

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ISSUE PRESENTED

I. **[¶1]The ND DOT failed to present any evidence that could establish a chain of custody for Mr. Barros blood sample and therefore the blood sample is inadmissible.**

STATEMENT OF THE CASE

[¶2]On October 19, 2007, at approximately 12:47 a.m., Christopher Barros was arrested for being in actual physical control of a vehicle while under the influence of alcohol in the city of Mandan, North Dakota. On November 30, 2007, an administrative hearing was held by the North Dakota Department of Transportation (hereinafter ND DOT) to determine whether to suspend Barros' driving privileges. The hearing was held before Hearing Officer Jim Vukelic. The hearing officer determined Barros was in violation of N.D.C.C. § 39-08-01. Based upon the conclusions drawn from the administrative hearing, the hearing officer suspended Barros' driving privileges for 91 days. Barros timely filed his Notice of Appeal from the administrative hearing pursuant to N.D.C.C. 39-20-06.

[¶3]On February 22, 2008, the Morton County District Court affirmed the decision of the hearing officer.

[¶4]Barros has timely filed his Notice of Appeal from the District Court on March 5th, 2008, and now asks this court to overturn the decision of the administrative agency.

STATEMENT OF FACTS

[¶5]On October 19, 2007 an officer from the Mandan Police Department was dispatched to an apartment building in Mandan, North Dakota. (Appellant's Appendix at 8 hereinafter Appx.). Upon arriving at the apartment complex the officer began investigating Barros for suspicion of actual physical control. (Appx. 8). After determining there was adequate probable cause to believe Barros had been in actual

physical control of a vehicle while intoxicated the officer placed Barros under arrest. (Appx. 12).

[¶6]Upon arrest the officer took Barros to the Morton County Jail for a blood draw. (Appx. 12-13). The Officer filled out the label that was sealed over Barros' blood sample. (Appx. 15). The identifying data on the blood tested in this case was labeled 10/18/07. (Appx. 32). The Form 104 indicates that the blood tested at the State Crime lab was originally collected one day prior to Barros' arrest. (Appx. 32).

[¶7]No one from the State Crime Laboratory testified at the Administrative Hearing. The blood vial was not available for examination. The officer testified that he never saw the blood sample that was tested at the lab nor did he see the label that was affixed over the top of the blood sample to be sure that it was his handwriting. (Appx. 18). The officer testified that he could not say for sure whether the label was bad handwriting, whether he wrote the wrong date, or whether they tested the wrong blood at the crime lab. (Appx. 18). Nevertheless, the hearing officer found that chain-of-custody had been established in relation to the blood test and the test was received into evidence. (Appx. 37). The hearing officer concluded that Barros was in violation of N.D.C.C. 39-20-04.1 and suspended Barros' driving privileges for a period of 91 days. (Appx. 37).

[¶8]The Morton County District Court affirmed the Hearing Officer's decision. Barros now appeals.

STANDARD OF REVIEW

> [¶9]The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs appeals from an administrative hearing officer's suspension of a drivers license under N.D.C.C. § 39-20-04.1. On appeal from the district court we review the record of the administrative agency. The decision of the agency must be affirmed on appeal if: 1) the findings of fact are supported by a preponderance of the evidence; 2) the conclusions of law

> are sustained by the findings of fact; 3) the decision is supported by the conclusions of law; and 4) the decision is in accordance with the law. We accord great deference to administrative agency rulings, and we do not make independent findings of fact or substitute our judgment for that of the agency, but we determine only whether a reasoning mind could have reasonably concluded the facts or conclusions were supported by the weight of the evidence.

Seela v. Moore, 1999 ND 243, ¶ 5, 603 N.W.2d 480, 482 (internal citations omitted).

ARGUMENT

I. [¶10]The ND DOT failed to present any evidence that could establish a chain of custody for Mr. Barros' blood sample and therefore the blood sample is inadmissible.

[¶11]The directions for sample collection and submission on Form 104 essentially comprise two components. The first "ensures that the scientific accuracy and reliability of the test are not affected by improper collection or preservation of the blood sample." McNamara v. Director of North Dakota Dep't. of Transp., 500 N.W.2d 585, 589 (N.D. 1993). The second component "provides an evidentiary shortcut for establishing chain of custody." Id. "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 and that the sample is in substantially the same condition." State v. Zink, 519 N.W.2d 581, 584 (ND 1994), citing State v. Reil, 409 N.W.2d 99, 104 (ND 1987). To meet the chain-of-custody requirement for purposes of admission of the evidence, the State must persuade the court that "in reasonable probability the article has not been changed in any important respect from its original condition." Zink, at 584. In this case, the Form 104 document does not on its face establish chain of custody for admissibility purposes and the State

must therefore rely on expert testimony to explain the discrepancies that exist on the Form 104 in order to have the blood result admitted into evidence.

[¶12] "Absent such a written certification that all the State Toxicologist's directives for sample collection have been followed, Form 104 does not on its face establish fair administration of the test, and the State must therefore do so by other evidence." State v. Schwalk, 430 N.W.2d. 317, at 322 (N.D. 1988). The State did not follow all the directives on Form 104, so it may not rely on it as sole evidence that chain of custody has been established. If all of the steps of Form 104 are followed, the State may use it on its face because there will be no doubt of procedure. Clearly, when all the information on the Form 104 is consistent, chain of custody is established. However, when the date of sample collection as labeled occurs prior to the arrest, chain of custody cannot be presumed from the Form 104 alone. Indeed, one could hardly imagine a more fundamental way in which chain of custody could be destroyed.

[¶13]The North Dakota Supreme Court has held blood alcohol test results are inadmissible where the State failed to prove chain of custody either through compliance with the directions on Form 104 or through other evidence. See State v. Nygaard, 426 N.W.2d 547 (N.D. 1988); State v. Wright, 426 N.W.2d 3 (N.D. 1988); State v. Reil, 409 N.W.2d 99 (N.D. 1987). The certifications of the specimen submitter and receiver provide "an evidentiary shortcut for establishing chain of custody" by ensuring the specimen is received in the same condition as it was submitted. Schwalk, at 322. The compliance with the Form 104 adequately demonstrates the connection between the taking of the blood sample and its receipt at the State Toxicologist's office. State v.

Nygaard, 426 N.W.2d at 549. The State failed to show a chain of custody for the blood sample in this case.

[¶14]The ND DOT failed to provide any evidence that could show that the sample tested was the same one originally drawn from Barros. Form 104 establishes that the blood sample was drawn on October 19, 2007. On the face of Form 104, under the section "for laboratory use", there is contradictory information stating the blood that was tested was drawn on October 18, 2007. Without testimony from a qualified individual at the lab, we do not know if the sample which was tested was drawn on October 18, 2007 or October 19, 2007. A discrepancy of this nature leaves doubts as to whether the sample, when tested, was in substantially the same condition as when it was drawn from the accused or whether the sample tested is the same one originally drawn from the defendant. State v. Reil, 409 N.W.2d at 104; State v. Nygaard, 426 N.W.2d at 548. The Form 104 indicates the blood sample tested in this case was drawn on October 18, 2007. Because of this major discrepancy, the State failed to prove the chain of custody for the blood sample, and the sample is inadmissible. It is impossible for a sample drawn on October 18, 2007 to be Barros' blood sample. The Form 104 cannot be used as an evidentiary shortcut for the admission of the blood sample in this case due to the discrepancy on the face of the document. Therefore, the State needed to rely on other evidence and testimony to ensure the chain of custody was established in this matter in order to get the blood result admitted into evidence.

[¶15]The only evidence presented besides the Form 104 was that of testimony from the officer. The officer testified that he is not sure why the date on the label on the blood tested for Barros read 10/18/07 instead of 10/19/07. The officer testified that he

didn't know whether it was bad penmanship, a mistake on his part, or in fact a different vial of blood than the one he collected which led to a specimen sample dated 10/18/07 being tested. The State failed to introduce the vial itself so that the officer could have cleared up the discrepancy in the Form 104. Indeed, the officer did not testify to any procedures or evidentiary processes of the State Crime Lab. The ND DOT failed to show with "reasonable probability" that the sample tested was the same sample that was taken from Barros. Without chain of custody, the blood test should have been found inadmissible and Barros' driving privileges should not have been suspended.

[¶16]The hearing officer's decision in this matter completely disregarded the fundamental principle regarding chain of custody. (Appx. 37). Barros did not argue that the test was not scientifically accurate. However, when the date on the Form 104 does not correspond with the date on the Specimen Submitter's Checklist chain of custody is destroyed. This is not hyper-technical compliance. This is one of the most basic tenets of evidentiary rules in that prior to its admission, evidence must be what it is purported to be. Mere speculation by an officer that "bad handwriting" is the cause of the problem cannot usurp chain of custody requirements. In fact, the officer admitted that he had not seen the blood vial since the night of the arrest and that he had no idea as to whether the blood tested was the same as that which he collected. (Appx. 18). It is not Barros's burden to dissuade every reasonable reason for a mistake of this magnitude. It is the State's burden to establish chain-of-custody through expert testimony provided that the Form 104 is not completed properly. The State cannot shift the burden of establishing chain of custody by hypothetically concluding that bad penmanship is the reason for the

improper date. Rather, it is the State's burden to prove that the blood tested was the blood collected from Barros.

[¶17]Where the State has established chain of custody procedures, they have to scrupulously comply with their own directives in order to admit them without the testimony of someone from the state toxicology lab. Receipt and dating of a sample is not a clerical duty. It is required that it be received, correctly logged in with, and stored by one of the certified analysts. The burden is on the State to establish chain of custody from the time the blood is drawn through the time it is analyzed. The state failed to establish the chain of custody in this matter, therefore, the blood result was inadmissible and should not have been admitted into evidence.

CONCLUSION

[¶18]The hearing officer's decision to admit the blood test was in error because the ND DOT failed to establish a chain of custody.

[¶19]WHEREFORE, Barros respectfully asks this Court to overturn the decision of the ND DOT and reinstate his driving privileges.

Dated this 18th day of March, 2008.

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