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ORIGINAL

20090106

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

NO. 20090106

Larry Sample, d/b/a Sample Auto Sales,

Appellant/Appellee,

vs.

North Dakota Department of Transportation,

Appellee/Appellant.

FILED
IN THE OFFICE OF THE
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APR 24 2009

STATE OF NORTH DAKOTA

Appeal from District Court, Burleigh County, North Dakota
South Central Judicial District
Honorable Gail Hagerty

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the order is in accordance with the law as the North Dakota Department of Transportation Director does not have the authority to suspend Sample's motor vehicle dealer's license for a violation of N.D.C.C. § 39-04-17.
2. Whether the order is not in accordance with the law as the North Dakota Department of Transportation Director is limited to a monetary fine of not less than Fifty Dollars (\$50.00) for an alleged violation of N.D.C.C. § 39-04-17.
3. Whether conclusion of law number 5, is incorrect as a matter of law in that N.D.C.C. § 39-04-17 is a law relating to the sale of motor vehicles.
4. Whether conclusion of law number 5, is incorrect as a matter of law, in that DOT does not have the authority to suspend Sample's dealer license for a violation of N.D.C.C. § 39-04-17.
5. Whether conclusion of law number 5 is in error, as a matter of law, as there is no authorization for the director to take into consideration a prior suspension in assessing a new suspension penalty against Sample.
6. Whether the findings of fact that Sample's conduct amounted to a "willful" violation of N.D.C.C. § 39-04-17 are not supported by the evidence.

STATEMENT OF CASE

This case initiated with the stopping of Robin Hall by North Dakota Highway Patrol Trooper Pulver. On May 27, 2008, Larry Sample, d/b/a Sample Auto Sales ("Sample") was served with a notice of opportunity to respond from the ND Department of Transportation ("DOT"). (App. p. 3). The notice indicated Sample appeared to have violated N.D.C.C. § 39-04-17. On June 2, 2008, Sample responded to the notice. (App. p. 4). On June 16, 2008, DOT sent an intent to suspend dealers license to Sample alleging he had violated N.D.C.C. § 39-04-17. (App. p. 5). On June 26, 2008, Sample sent a response to DOT disagreeing with the intent to suspend and asked for a hearing. (App. p. 6). A hearing was held on September 4, 2008 at the Office of Administrative Hearings, the Honorable Allen C. Hoberg presiding. After the hearing, Findings of Fact, Conclusions of Law, and Order were issued by ALJ Hoberg on September 8, 2008. (App. p. 7). An Order of Dealer License Suspension was issued September 22, 2008. (App. p. 15). This Order purported to suspend Sample's motor vehicle dealer's license from October 28 through October 30, 2008. A timely notice of appeal and specification of errors was filed with the District Court on October 10, 2008. (App. p. 16). Service of the same was admitted by Assistant Attorney General Michael T. Pitcher on the same date. (App. p. 18). The enforcement of the Order was stayed pending appeal to the District Court pursuant to N.D.C.C. § 39-01-16. On March 3, 2009, the District Court issued an Order affirming DOT's decision to suspend Sample's dealers license for three days. (App. p. 19). An Order for Judgment and Judgment in the matter were filed on March 10, 2009. (App. p. 22 and 23). Notice of Entry of

Judgment was given on March 12, 2009. (App. p. 25). An Order Suspending Dealers License was issued on March 11, 2009 purporting to suspend Sample's dealers license from March 24 through March 26, 2009. (App. p. 24). A Motion for Injunction pending Appeal was filed contemporaneously with the Notice of Appeal. (App. p. 26 and 27). On March 20, 2009, the District Court ordered an Injunction restraining the enforcement of the order of dealer license suspension. (App. p. 28).

STATEMENT OF FACTS

The underlying facts in this case are not necessarily in dispute. Sample is a licensed motor vehicle dealer doing business as Sample Auto Sales in Dickinson, North Dakota. On September 15, 2007, Sample agreed to sell a motor vehicle to Rhonda Hall. He issued to her a "Notary Public or Dealer Certificate of License Application". (App. p. 2). Sample had an agreement with Ms. Hall that she would come back and pay for the car the following day. She never showed up and Sample took measures to try to find Ms. Hall but was unsuccessful. It was not until approximately six (6) months later that Ms. Hall came in and made payment for the license and registration.

The matter came to the attention of North Dakota law enforcement on March 12, 2008, when Rhonda Hall's husband, Robin, was stopped by a North Dakota Highway Patrolman. The patrolman noticed the vehicle did not have license plates but did have a Certificate affixed to the vehicle. The Certificate was more than 30 days old. In March 2008, Hall made arrangements with Sample to purchase the vehicle and at that time the licensing fee was paid approximately six (6) months late. This was reported to the Department of Transportation who properly notified

Sample they were intending to suspend his dealers license for a violation of N.D.C.C. § 39-04-17. Based upon these facts, the hearing officer made a finding that Sample willfully violated N.D.C.C. § 39-04-17 and should have his license suspended. The ALJ also took into consideration this was supposedly Sample's second violation and a three (3) day suspension was proper. It is upon this record that Sample filed his notice of appeal.

STANDARD OF REVIEW

An appeal from an administrative agency decision is governed by N.D.C.C. § 28-32-49. This statute allows this Court to review the appeal of a determination made by an administrative agency based upon the record. In doing so, the Court must affirm the order of the agency unless it finds the order is not in accordance with the law, the findings of fact are not supported by a preponderance of the evidence, and the conclusions of law and order are not supported by the findings of fact. While the courts give some deference to the findings of fact made by an agency, questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative agency. See Gray vs. North Dakota Game and Fish Department, 2005 ND 204 ¶ 7, 706 N.W. 2d 614. For the most part, this appeal presents questions of law for this Court to decide.

LAW AND ARGUMENT

1. The Order is not in accordance with the law as the North Dakota Department of Transportation Director does not have the authority to suspend Sample's motor vehicle dealers license of N.D.C.C. ¶ 39-04-17.

The action that has been taken against Sample is a suspension of his motor

vehicle dealers license for a period of three (3) days. Sample's first notification of the intended action of DOT was the notice of opportunity to respond dated May 27, 2008. Sample is placed on notice he supposedly has violated N.D.C.C. § 39-04-17. (App. p. 3). Furthermore, in the intent to suspend his dealers license, Sample is once again notified he has allegedly violated N.D.C.C. § 39-04-17. (App. p. 5). Notwithstanding the fact N.D.C.C. § 39-04-17 provides for its own penalty, the DOT placed Sample on notice based upon that statute, "your history of violations and pursuant to the provisions of the applicable statute, § 39-22(N.D.C.C.)" he was threatened with a three day suspension.

It appears the Director of the North Dakota Department of Transportation believes under the authority given to him by the legislature, he has the authority to make such a suspension. The North Dakota Department of Transportation is created by the legislature and only has such authority as given to it by the legislature. It is well settled that public officials have only such authority as is expressly given to them by the Constitution and statutes together with those powers and duties which are necessarily implied from the express grant of authority. AFSCME vs. Olson, 338 N.W. 2d 97, 100 (N.D. 1983). Sample objects to the action taken by the Department of Transportation in suspending his license as he contends the authority granted to the Department of Transportation by the legislature does not allow for a suspension of his license under these facts and for an alleged violation of N.D.C.C. § 39-04-17.

In order to make such a determination, this Court will need to interpret several statutes which specifically govern this case. The primary objective in

interpreting a statute is to determine legislative intent. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. If the language of a statute is clear and unambiguous, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. The language of a statute must be interpreted in context and according to the rules of grammar, giving meaning and effect to every word, phrase, and sentence. N.D.C.C. § 1-02-03 and 1-02-38(2). See also In re estate of Elken, 2007 ND 107 ¶ 7, 735 N.W. 2d 842.

The statute which is alleged to have been violated by Sample is N.D.C.C. § 39-04-17. Chapter 39-04 N.D.C.C. is North Dakota's Motor Vehicle registration law. See City of Grand Forks vs. Mitchell, 2008 ND 5, 743 N.W. 2d 800 ¶ 10. This statute provides as follows:

"39-04-17. Certificate of notary showing compliance with registration is prima facie evidence—Penalty

The possession of a certificate made out by a notary public or an authorized agent of a licensed vehicle dealer who took the acknowledgment of the application when the vehicle was first registered or required to be registered under the laws of this state, if such certificate shows the date of application, the make, registered weight, and year model of the motor vehicle, the manufacturer's number of the motor vehicle which such application describes, and further shows that such notary public, or authorized agent of a vehicle dealer, personally mailed the application with the remittance fee, is prima facie evidence of compliance with motor vehicle law with reference to the vehicle therein described, for a period of thirty days from the date of such application. Any violation of this section is an infraction punishable by a fine of not less than fifty dollars. (Emphasis supplied)

From a reading of this section, the statute provides for its own penalty which does not include suspension. The penalty for a violation of the statute is a fine not

less than fifty dollars.

The other statute this Court will need to review is N.D.C.C. § 39-22-04 as it was relied upon by the Hearing Officer and the Department in suspending Mr. Sample's motor vehicle dealers license. The applicable portion of N.D.C.C. § 39-22-04 provides the Director with authority to suspend a dealer's license for "willfully violating a law relating to the sale, distribution, or financing of motor vehicles...". This statute does not allow the Director to suspend a license for an alleged violation for the registration of a vehicle. Nonetheless, the DOT and the Hearing Officer clearly relied upon this statute to suspend Sample's license. In doing so, in Conclusion of Law #5, the Hearing Officer states "N.D.C.C. § 39-22-04 authorizes the DOT to suspend a dealer's license for willfully violating a law relating to the sale, distribution, or financing of motor vehicles. N.D.C.C. § 39-04-17 is a law relating to the sale of motor vehicles." (App. p. 13). It is clear from this statute and from the Mitchell case, Chapter 39-04 deals with the registration of motor vehicles and does not deal with the sale, distribution, or financing of motor vehicles as set forth in 39-22-04. Therefore, Conclusion of Law #5 is incorrect as a matter of law.

The District Court, in considering a similar argument, did not enter into any specific analysis nor cite to the Rules of Statutory Construction. The Court's analysis of the argument was one line in the Order which states "The fact that a criminal penalty- a fifty dollar fine- could be imposed does not preclude suspension of Sample's license." (App. p. 21). Nor does the analysis take into consideration instances when this Court has had to reconcile statutes in which a specific statute provided for a penalty and a more general statute provided otherwise.

An examination of the opinions issued by this Court will not reveal a decision on a conflict between N.D.C.C. § 39-04-17 and 39-22-04. However, in the criminal law context, a similar case has arisen in which a statute provided for a specific penalty and a more general statute allowed for its suspension. In State vs. Brandon, 413 N.W. 2d 340 (N.D. 1987), the defendant plead guilty to the charge of armed robbery. The defendant had used a pistol to rob a bingo parlor in Fargo of approximately \$8,000. He later confessed to the crime and entered a plea of guilty. Id. at 340-341. N.D.C.C. § 12.1-32-02.1(1) provided for a mandatory minimum sentence of four years for this crime. The defendant argued the trial court was not precluded from suspending the sentence pursuant to the provisions of Chapter 12-53 N.D.C.C. The District Court determined he could not suspend Brandon's sentence and was required to follow the directives of the mandatory minimum sentence provided for in 12.1-32-02.1. Id. at 340-341. In Brandon, this Court recognized it was the duty of the legislature, in a valid exercise of its police power, to define what acts constitute criminal offenses and set the maximum and minimum sentencing guidelines for violation of those criminal statutes. Id. at 341. This Court determined the legislature had taken away the discretion of the Court to suspend the sentence and the Court only had the authority to impose the minimum sentence as prescribed by the legislature. In essence, this Court upheld the legislative direction on the imposition of a penalty for the violation of a statute. Sample argues the same type of analysis was not undertaken by the DOT when it ignored a specific directive of the legislature pursuant to N.D.C.C. § 39-04-17.

As set forth in the facts, Sample sold a vehicle to Ms. Hall on or about

September 15, 2007. He allowed her to take the vehicle on the promise she would return the next day and pay for it. The error which he allegedly made was not dealing properly with the registration of the vehicle. His actions of not properly registering the vehicle do not relate to the sale, distribution, or financing of a motor vehicle as set forth in 39-22-04. Rather, his actions deal solely with the registration of the vehicle under N.D.C.C. § 39-04-17.

If statutes are to be interpreted to determine the intent of the legislature, the authority given to the DOT by the legislature under N.D.C.C. § 39-04-17 is clear and it is especially clear in regard to the penalty that can be assessed for a violation of the statute. Under the statute, "a violation of this section is an infraction punishable by a fine of not less than \$50.00". There is no suspension penalty provided for in 39-04-17.

Since the legislature has specifically expressed its intent and did not do so in an unambiguous manner, the plain language of the statute controls and the DOT did not have the authority to suspend Mr. Sample's motor vehicle dealer's license for a violation of N.D.C.C. § 39-04-17. The legislature has limited the authority of the Department of Transportation. DOT does not have the implied authority to go beyond the parameters set by the legislature. Therefore, the Order of the ALJ as adopted by the Department of Transportation is not in accordance of the law which will require a reversal of the action. See N.D.C.C. § 28-32-46.

The Department of Transportation argued the actions of Sample in this case were willful and they dealt with the sale of a motor vehicle. According to the ALJ in the Findings of Fact, on September 15, 2007, Sample issued to Hall a "Notary

Public or Dealer Certificate of License Application" ("Certificate") pursuant to N.D.C.C. § 39-04-17. Sample did not remit the application for license and the remittance fee for the vehicle at that time or a later date. (Findings of Fact #3 and #4, App. p. 8). The ALJ made further findings "when a motor vehicle is sold and the title is transferred to the purchaser, either the purchaser or the dealer selling the motor vehicle may make application for registration and register the motor vehicle for licensing. (Finding of Fact #5, App. p. 8). Finally, in Finding of Fact #18, the ALJ found "Sample did not mail the application for registration for the vehicle with the remittance fee to DOT, Motor Vehicle Division, within 30 days. Neither did Hall mail the application for registration for the vehicle or remittance fee to DOT, Motor Vehicle Division, within 30 days. (App. p. 11). Based upon these findings, the inactions by Sample which allegedly supports the action taken by DOT involves his failure to properly register the vehicle and to comply with the registration statute which is found in N.D.C.C. § 39-04-17.

Sample would contend N.D.C.C. § 39-04-17 is a specific statute which provides for a specific penalty for violating that statute. In North Dakota, one of the basic rules of statutory construction is a specific statute controls a general statute. See Johnson vs. Nodak Mutual Insurance Company, 2005 N.W. 2d 112 ¶ 12, 699 N.W. 2d 45. Simply put, N.D.C.C. § 39-04-17 is a specific statute and N.D.C.C. § 39-22-04 is a general statute. When faced with conflicting statutory provisions on the same subject matter, the court makes every attempt to harmonize and give meaning to each without rendering one or the other useless. When conflicting statutory provisions cannot be harmonized, the court then applies N.D.C.C. § 1-02-

07 that specific provisions control over general provisions, absent a manifestation of legislative intent to the contrary. See Van Raden Homes, Inc. vs. Dakota View Estates, 520 N.W. 2d 866, 868 (N.D. 1994). In that regard, the specific language of N.D.C.C. § 39-04-17 would control and would only allow the Department of Transportation to issue a fine to Sample and not a suspension.

All of these same arguments can be made for the error which was made by DOT in considering a past suspension to assess the penalty. (App. p. 13-14). If the legislature wanted to give DOT the right to consider past suspensions, it could have done so. It did not do so and it is improper for the DOT to rely upon a past suspension to assess a penalty of suspension. Obviously, if this Court believes the only penalty that can be assessed against Sample is a monetary penalty under N.D.C.C. § 39-04-17, this issue is moot. However, if this Court does believe suspension is proper, suspension cannot be enhanced by a prior suspension unless the legislature gives DOT the authority to consider the same.

2. The finding of fact that Sample's conduct amounted to a willful violation of N.D.C.C. § 39-04-17 are not supported by the evidence.

The ALJ found the action of Sample in failing to pay the registration fee within 30 days of the sale of the vehicle was a willful violation of the statute. In the testimony at the hearing, it was clear Sample had made an arrangement with his buyer to allow her to leave the premises with the vehicle and return the next day and pay for it. Unfortunately for Sample, his customer did not show up to pay for the vehicle and did not show up until somewhere around March 25, 2008. Sample did not make the payment as required by law because he did not receive his payment.

He, in good faith, relied upon his customer to come back the next day after the sale and make the payment. His failure to then remit that amount of money to the State should not be seen as a willful act and is not supported by a preponderance of the evidence. This factual finding is also an error on the part of the ALJ which requires a reversal.

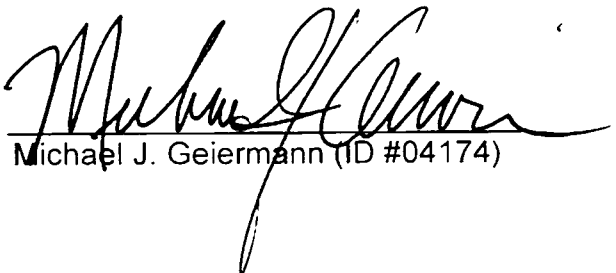
Lastly, it also appears there is some type of reliance by the DOT in assessing a penalty against Sample on the fact Sample was found guilty of a similar offense in 2006. The evidence of his prior violation is not admissible and does not somehow give DOT the right to suspend his license or to add an additional penalty. Such authority, if it existed, is only granted by the legislature and the legislature has given the DOT the right to fine Sample but not to suspend his dealers license.

CONCLUSION

For all of the reasons set forth herein, appellant respectfully requests this Court to overturn the Order of the DOT.

Dated this 24th day of April, 2009.

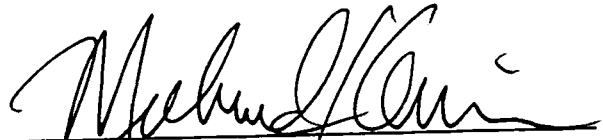
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed to the following this 24th day of April, 2009:

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