

20090346

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 21, 2009
STATE OF NORTH DAKOTA

Christian Robert Wolfer,)	
)	
Plaintiff/Appellant,)	
)	
v.)	Supreme Court No. 20090346
)	
North Dakota Department of,)	Burleigh County No. 08-09-C-1291
Transportation,)	
)	
Defendant/Appellee.)	

BRIEF OF APPELLANT

Appeal from Judgment, dated and filed September 18, 2009

Entered Upon September 17, 2009, Order for Judgment and

September 15, 2009, Memorandum Opinion and Order

Affirming hearing officer's decision

Burleigh County District Court

South Central Judicial District

The Honorable David E. Reich

Dan Herbel
ND State Bar ID # 05769
Attorney for Appellant Christian Wolfer

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123

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[¶2] STATEMENT OF THE CASE

[¶3] On April 25, 2009, Christian Wolfer was arrested for driving under the influence and was issued a temporary operator's permit. (Exhibit 1b, Transcript of DOT Administrative Hearing). Mr. Wolfer timely requested an administrative hearing and, on June 3, 2009, the Department of Transportation ("Department" and "DOT") held a hearing where the hearing officer suddenly and unilaterally determined that testimony would be taken telephonically without giving notice of the telephonic nature of the proceedings. After Mr. Wolfer objected to the telephonic hearing, the hearing went forward and the hearing officer suspended Mr. Wolfer's driving privileges for a period of three hundred sixty-five (365) days. *See* Hearing Officer's Decision (Transcript attachment).

[¶4] On June 3, 2009, Mr. Wolfer filed a Notice of Appeal and Specifications of Error with the District Court alleging numerous errors in the DOT administrative proceedings. (Appendix ("App.") at 6 and 3-5, respectively). After both Petitioner and Respondent submitted written arguments to the district court, the court issued its Memorandum Opinion and Order affirming the decision of the hearing officer. (App. 34-41).

[¶5] On September 22, 2009, the Department mailed Mr. Wolfer the Judgment, Order for Judgment, and Notice of Entry of Judgment in this matter. (App. 42-44). On November 10, 2009, Wolfer filed a Notice of Appeal to this Court seeking relief. (App. 45-46). Mr. Wolfer asks this court to reverse the decision of the district court and to reinstate his driving privileges.

[¶6] STATEMENT OF THE ISSUES

- I. Because the hearing officer unilaterally determined that the hearing would be conducted telephonically, Mr. Wolfer's hearing was not conducted in accordance with the law
- II. Mr. Wolfer was denied due process in notice irregularities and deficiencies and was denied fairness and due process in the conduct of the hearing

[¶7] STATEMENT OF THE FACTS

[¶8] On April 25, 2009, "at 1:17 in the morning," Trooper Thomas Iverson of the North Dakota Highway Patrol had "contact with Christian Wolfer" on the Bismarck Expressway. (DOT Administrative Hearing Transcript ("Tr.") at 10, lines ("L.") 11-18). Mr. Wolfer was subsequently placed under arrest for DUI. (Tr. at 14, L. 16-17).

[¶9] Mr. Wolfer timely requested an administrative hearing regarding the potential suspension of his driving privileges. (Exhibit 1f). On May 22, 2009, the hearing officer mailed out a written Notice of the administrative hearing indicating that the hearing was scheduled and noticed as an in-person hearing requiring personal appearance of the trooper in Bismarck, ND, on June 3, 2009. (Exhibit 2). No notice was provided that there was going to be the taking of telephonic testimony.

[¶10] Although Trooper Iverson did not show for the hearing, for some reason the hearing officer called the trooper and began the hearing telephonically, even though Mr. Wolfer did not agree to a telephonic hearing and was not noticed of such a hearing. It is unknown how the hearing officer knew, offhand, the telephone number to reach the Trooper at the Highway Patrol office in Devils Lake or how the hearing officer knew that the Trooper was suddenly available telephonically at the time scheduled for hearing. The

unique circumstances evidence that the hearing officer had an ex parte communication with the trooper before the hearing.

[¶11] At Wolfer's administrative hearing, Trooper Iverson summarized his last minute request to reschedule Wolfer's hearing for the afternoon because the Trooper's schedule "kind of takes some priority" over Mr. Wolfer's hearing. (Tr. at 1, L. 6-16). The Trooper's request came 11 days after the Notice of Administrative Hearing and one (1) day before the administrative hearing. (Exhibit 2). As Trooper Iverson noted, however, Mr. Wolfer was not "available in the afternoon" because "he had to work" and could not change his schedule on one day's notice. (Tr. at 1, L. 19-20). The Trooper then stated: "But I guess I would be available to do it telephonically right now because I'm in Devils Lake at the time." (Tr. at 1, L. 20-22).

[¶12] Mr. Wolfer then objected to the telephonic hearing on fairness and due process grounds. (Tr. at 1, L. 25 – 4, L. 4). Mr. Wolfer also argued:

"We don't know if he's relying on notes, if he's relying on his incident report, which we have not been provided, and we have absolutely no ability to cross-examine him as to the veracity of that report. We don't know if he's testifying from other documents."

(Tr. at 3, L. 14-19). The hearing officer informed Mr. Wolfer: "I'm going to go forward with the hearing, and I'm overruling your objection." (Tr. at 7, L. 1-2). Mr. Wolfer then "ask[ed] for a ruling rather than the one-word denial" and requested: "I would ask for ... some reasoning. I think my client is entitled to a reason why this matter is not governed by due process, or why he's not entitled to due process." (Tr. at 7, L. 18-21).

[¶13] The hearing officer did not sufficiently address Mr. Wolfer’s request to explain his ruling and explain how going forward with the hearing withstood the notice deficiency. Instead, the hearing officer simply stated:

“He was notified of the hearing. The only thing that is different from a hearing where the trooper is in person is that his testimony is by telephone. I’ve conducted hundreds of hearings in this manner. I’ve had the issue challenged in court. It has been upheld.”

(Tr. at 7, L. 24 – 8, L. 4). Following the telephonic hearing, the hearing officer suspended Mr. Wolfer’s driving privileges for 365 days.

[¶14] STANDARD OF REVIEW

[¶15] The Administrative Agencies Practice Act, N.D.C.C. ch 28-32, governs review of an administrative decision to suspend or revoke a driver's license.” *See Dworshak v. Moore*, 1998 ND 172, ¶6, 583 N.W.2d 799. “This Court will affirm the agency's decision unless:

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.

N.D.C.C. § 28-32-46.” See *Lee v. NDDOT*, 2004 ND 7, ¶8, 673 N.W.2d 245. “In reviewing a license suspension, we give deference to the Department's findings” and determine “only whether a reasoning mind could have concluded the Department's findings were supported by the weight of the evidence from the entire record.” See *Eriksmoen v. NDDOT*, 2005 ND 206, ¶7, 706 N.W.2d 610. “An agency's decisions on questions of law are fully reviewable.” See *Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶6, 774 N.W.2d 645.

[¶16] LAW AND ARGUMENT

- I. Because the hearing officer unilaterally determined that the hearing would be conducted telephonically, Mr. Wolfer's hearing was not conducted in accordance with the law

[¶17] Recently, this Court held that “an ordinary reading of N.D.C.C. § 39-20-05 demonstrates the Legislature intended for the Department [of Transportation] to conduct in-person hearings, and the Department cannot unilaterally determine hearings will be conducted telephonically.” See *Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶12, 774 N.W.2d 645 (decided with *Neu v. Director, North Dakota Department of Transportation*, same cite). In our case, the Department's hearing officer unilaterally determined that Mr. Wolfer's hearing would be conducted telephonically and thereafter conducted the hearing telephonically over Mr. Wolfer's objection. Therefore, pursuant to *Landsiedel* and *Neu*, “the Department failed to

conduct” Mr. Wolfer’s administrative hearing “in accordance with the law.” *See Landsiedel*, 2009 ND 196 at ¶15.

- II. Mr. Wolfer was denied due process in notice irregularities and deficiencies and was denied fairness and due process in the conduct of the hearing

[¶18] “It is well settled that a driver's license is a protectable property interest that may not be suspended or revoked without due process.” *See Morrell v. N. Dak. Dept. of Transportation*, 1999 ND 140, ¶8, 598 N.W.2d 111. “Due process requires a participant in an administrative proceeding be given notice of the general nature of the questions to be heard, and an opportunity to prepare and be heard on those questions.” *See id* at ¶9. Notice is sufficient only “if it informs the party of the nature of the proceedings so there is no unfair surprise.” *See id*.

[¶19] In the case at hand, Mr. Wolfer was surprised that Trooper Iverson appeared telephonically and that the hearing officer proceeded as a matter of course telephonically, even though no proper or timely request for a telephonic hearing was made, even though there was no notice provided that the hearing would be of a telephonic nature, and even though Mr. Wolfer objected to the telephonic hearing when he was ambushed by the procedure and conduct commanded by the hearing officer. The hearing was scheduled and noticed as an in-person hearing requiring personal appearance of the trooper. Mr. Wolfer did not agree to a telephonic hearing. Notice is insufficient unless “it informs the party of the nature of the proceedings so there is no unfair surprise.” *See Morrell*, 1999 ND 140 at ¶9. Because Mr. Wolfer was unfairly surprised by the

telephonic nature of the proceedings, the notice in this case was insufficient and violative of due process.

[¶20] Additionally, because of the unfair surprise attendant with the telephonic nature of the proceedings, Mr. Wolfer was unable to adequately cross exam Trooper Iverson about the events on the night in question. When Wolfer's counsel asked the trooper to show the tribunal specifics regarding the traffic stop and field sobriety tests, the trooper answered as follows:

“MR. HERBEL: Are you able to now diagram the roadway to show where you initiated the traffic stop?

OFFICER IVERSEN: Am I able to do it now?

MR. HERBEL: Yes.

OFFICER IVERSEN: Well, I guess without you seeing it, is that what you're asking for me to diagram it for you?

MR. HERBEL: Yes.

OFFICER IVERSEN: Yeah, that'd be virtually impossible. I could do it for me to look at it myself right now, but I would have no way of showing you right now.”

(Tr. at 20, L. 5-14) (emphasis added).

...

“MR. HERBEL: The ... you testified about an eye test, the HGN test, correct?

OFFICER IVERSEN: That is correct.

MR. HERBEL: Are you able to now demonstrate for the tribunal how you perform that test?

OFFICER IVERSEN: For you to see it? No, I would not be able to.”

(Tr. at 21, L. 3-9) (emphasis added).

[¶21] The North Dakota Supreme Court spoke of “the shortcomings of telephonic testimony” and stated:

“The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.”

See Lawrence v. Delkamp, 2008 ND 111, ¶10, 750 N.W.2d 452. The Court further remarked: “Above all, in testimony by telephone the trier of facts is put in a difficult, if not impossible, position to take into account the demeanor of the witness in determining the witness' credibility.” *See id.* In this case, it was impossible for the hearing officer to take into account the demeanor of Trooper Iverson. Instead, the hearing officer predetermined and bestowed credibility on the trooper without seeing the trooper, over the objection of Mr. Wolfer and at his expense. The telephonic conduct of the hearing did not afford Mr. Wolfer a fair hearing.

[¶22] The *Lawrence* court further noted the inadequacy of telephonic testimony stating, “[i]n testimony by telephone the image of the witness cannot be seen nor does it disclose if the witness is using or relying upon any notes or documents and, as a result, meaningful communication is effectively curtailed or prevented.” *See Lawrence*, 2008 ND 111 at ¶10. In the present case, neither the tribunal nor Wolfer’s counsel could see if the trooper was reading from his incident report, his notes, or any other document. Therefore, meaningful communication was effectively curtailed and prevented. In fact, the trooper testified that he had at least a few (maybe more) documents in his immediate possession:

“MR. HERBEL: And you have that [incident] report in front of you, correct?”

OFFICER IVERSEN: Yes, I do.

MR. HERBEL: And you have your notes in front of you, correct?

OFFICER IVERSEN: That is correct.

MR. HERBEL: And you don't dispute that I have not been provided any of that material, correct?

OFFICER IVERSEN: I agree."

(Tr. at 20, L. 21 – 21, L. 2).

...

"MR. HERBEL: Do you have audio evidence of the alphabet test?

OFFICER IVERSEN: At our district office there is.

MR. HERBEL: And that hasn't been provided to Mr. Wolfer either. You don't dispute that, correct?

OFFICER IVERSEN: Correct, I do not dispute that."

(Tr. at 21, L. 24 – 22, L. 3).

[¶23] Therefore, not only could Wolfer's counsel not observe the witness and what he was utilizing for his testimony, but the trooper agreed that Mr. Wolfer had not been provided any of those reports and had not been provided discovery yet. (Tr. at 20, L. 25 – 21, L. 2). Indeed, Wolfer's counsel informed the hearing officer:

"We believe that having this hearing at the 11th hour telephonically is fundamentally unfair. There has been no incident report provided. We don't know what the officer ... or the trooper is going to be testifying to. The highway patrol refused, flat-out refused to provide the incident report yesterday afternoon. Trooper Iverson would not dispute that. There ... there's been no notice; no agreement on our part. It would substantially prejudice and infringe my client's rights to a fair hearing."

(Tr. at 2, L. 22 – 3, L. 5). Despite the fact that the trooper testified from documents never turned over to Mr. Wolfer and did so from a remote location to further secrete that documentary evidence, the hearing officer, nevertheless, allowed this inequity and went

forward with the unfair hearing where Mr. Wolfer's right to cross exam the trooper, the lone witness, was substantially infringed.

[¶24] Furthermore, the trooper testified about an original document he had in his exclusive possession in Devils Lake as follows:

“MR. VUKELIC: Did you fill out a Specimen Submitter's Checklist in the case?

OFFICER IVERSEN: Yes, I did.

MR. VUKELIC: Do you happen to have that with you today?

OFFICER IVERSEN: Yes, I do.

MR. VUKELIC: What time was the specimen obtained according to the document?

OFFICER IVERSEN: According to the document, the specimen was obtained at 1:59 a.m.

MR. VUKELIC: And, according to the document, what time was the specimen sealed?

OFFICER IVERSEN: According to the document, it was sealed at 2:01 a.m.

MR. VUKELIC: Did you do each of the items that are check marked on the form?

OFFICER IVERSEN: Yes, I did.

MR. VUKELIC: Did you sign it?

OFFICER IVERSEN: Yes, I did.”

(Tr. at 15, L. 15 – 16, L. 5) (emphasis added). Mr. Wolfer was not able to see the original document and cross exam on the original document which was concealed at a remote location. Mr. Wolfer was not provided a meaningful opportunity to participate in the hearing and to adequately challenge the evidence against him, and accordingly, his rights and interests were substantially prejudiced and infringed.

[¶25] The *Lawrence* court reminded of “the general rule that witnesses' testimony must be taken in open court” and that the high court has “already established that "orally in open court" means a witness must be physically present in court so the trier of fact can observe the witness' demeanor.” See *Lawrence*, 2008 ND 111 at ¶12. The *Lawrence* court also reminded that “Section 31-04-04, N.D.C.C., defines "oral examination" as "an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.” See *id* (emphasis added). The teachings of the *Lawrence* decision should be instructive on our case that state law and state rules require personal appearance of witnesses unless otherwise agreed to, waived, or mandated by compelling circumstances. Mr. Wolfer argues that the formulation and establishment of said law and rules are undergirded by due process and should help guide the court’s decision in this case.

[¶26] The *Lawrence* court cautioned about the use of contemporaneous transmission (telephonic testimony) stating that the civil rules were “not intended to allow contemporaneous transmission based upon mere convenience for a witness.” See *Lawrence*, 2008 ND 111 at ¶9. However, mere convenience for Trooper Iverson, a non-party witness to this action, was precisely why telephonic testimony was employed here. Indeed, Trooper Iverson stated unequivocally at Mr. Wolfer’s hearing that the reason he was appearing telephonically, in contradiction with the written notice, was because he chose to go to Devils Lake for a seminar and that the Trooper’s schedule “kind of takes some priority” over Mr. Wolfer’s hearing. (Tr. at 1, L. 6-16) (emphasis added). Mere convenience for a witness, particularly a non-party witness, does not justify the un-noticed, last-minute, unilaterally held telephonic hearing in this case.

[¶27] Additionally, appropriate safeguards should be “in place before permitting presentation of testimony in open court by contemporaneous transmission.” *See Lawrence*, 2008 ND 111 at ¶14. One such safeguard and “mechanism used by our courts to convey the importance of truthtelling to witnesses is the administration of the oath or affirmation.” *See id.* “The oath or affirmation is to be administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.” *See id.*

[¶28] In our case, Mr. Wolfer “stat[ed] an objection on the record as to the oath, that there was no onsite oath, and there’s no ... been no verification of the identity of the individual testifying.” (Tr. at 9, L. 16-19). The hearing officer responded: “Your objection is noted for the record. It is overruled;” without providing any rationale. (Tr. at 9, L. 20-21). Later, the hearing officer “testified”:

“I will note for the record that I recognized the voice of Thomas Iverson testifying here today. I’ve had Trooper Iverson testify at numerous hearings in the past.”

(Tr. at 24, L. 9-12). This was improper. “Considering the important function served by the proper administration of an oath or affirmation to a witness” in conveying the importance of truthtelling to witnesses and verifying the identity of the unseen witness, the hearing officer in this matter did not establish adequate safeguards to conduct the un-noticed telephonic hearing. *See Lawrence*, 2008 ND 111 at ¶15.

[¶29] “[A] fair trial in a fair tribunal is a basic requirement of due process.” *See Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975). “Basic notions of fundamental fairness also require a person challenging an agency action be adequately informed in advance of the questions to be addressed at the hearing so the

person can be prepared to present evidence and arguments on those questions.” See *Morrell*, 1999 ND 140 at ¶9. Here, there was no notice whatsoever relating to the telephonic nature of the proceedings. The lack of notice, along with the attendant compromised opportunity for Mr. Wolfer to meaningfully participate in the hearing and to adequately challenge the evidence against him, substantially prejudiced and infringed his rights and interests and denied Mr. Wolfer due process and a fair hearing.

[¶30] CONCLUSION

[¶31] For the foregoing reasons, Christian Wolfer respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted
this 21st day of December, 2009.

/s/ *Dan Herbel*

Dan Herbel
Attorney for Appellant Christian Wolfer
ND State Bar ID # 05769

Herbel Law Firm
The Regency Business Center
3333 East Broadway Avenue, Suite 1205
Bismarck, ND 58501
Phone: (701) 323-0123

[¶32] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 21, 2009, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Michael Pitcher, counsel for Appellee, at the following:

Electronic filing TO: “Michael Pitcher” < mtpitcher@nd.gov >

Date this 21st day of December, 2009.

/s/ *Dan Herbel*

Dan Herbel