

IN THE SUPREME COURT OF NORTH DAKOTA

June 6, 2010

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Vanessa Christine Lange,	)
	)
	)
Appellee,	)
	)
v.	)
	)
Director, North Dakota	)
Department of Transportation,	)
	)
Appellant.	)
	)
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Supreme Court No. 20100096

District Court No. 30-09-C-00876

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

THE HONORABLE GAIL HAGERTY

**BRIEF OF APPELLEE**

AALAND LAW OFFICE, LTD.

By: Jesse N. Lange (ND ID No. 06008)  
415 11th St. S.; P.O. Box 1817  
Fargo, ND 58107-1817  
Telephone: (701) 232-7944  
Facsimile: (701) 232-4037  
Attorneys for the Appellant

**[¶ 1] TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ¶ 2

    Cases ..... ¶ 2

    Statutes and Rules ..... ¶ 2

STATEMENT OF THE ISSUE ..... ¶ 3

STATEMENT OF THE FACTS ..... ¶¶ 4-9

LAW & ARGUMENT ..... ¶¶ 10-15

CONCLUSION ..... ¶ 16

CERTIFICATE OF SERVICE ..... ¶ 17

**[¶ 2] TABLE OF AUTHORITIES**

**CASES**

Bienek v. N.D. Dep’t of Transp., 2007 ND 117, 736 N.W.2d 492 ..... ¶ 10

City of Fargo v. Bakkerud, 1998 ND 77, 576 N.W.2d 858 ..... ¶ 13

City of Fargo v. Stutlien, 505 N.W.2d 738 (N.D. 1993) ..... ¶ 14

City of Grand Forks v. Risser, 512 N.W.2d 462 (N.D. 1994) ..... ¶¶ 12, 13, 15

Elshaug v. W.S.I., 2003 ND 177, 671 N.W.2d 784 ..... ¶ 10

Knoll v. N.D. Dep’t of Transp., 2002 ND 84, 644 N.W.2d 191 ..... ¶ 10

Lock v. Moore, 541 N.W.2d 84 (N.D. 1995) ..... ¶ 13

Luebke v. N.D. Dep’t of Transp., 1998 ND 110, 579 N.W.2d 189 ..... ¶ 14

State v. Dressler, 433 N.W.2d 549 (N.D. Ct. App. 1988) ..... ¶¶ 12, 13, 14

State v. Messner, 481 N.W.2d 236 (N.D. 1992) ..... ¶¶ 13, 14

**STATUTES AND RULES**

N.D.C.C. § 39-20-01 ..... ¶ 11

N.D.C.C. § 39-20-02 ..... ¶ 12

N.D.C.C. § 28-32-46 ..... ¶ 10

**[¶ 3] STATEMENT OF THE ISSUE**

- I.** Whether the District Court correctly and soundly reversed the Department's hearing officer where Lange was denied a reasonable opportunity to obtain an independent test.

## STATEMENT OF THE FACTS

[¶ 4] Just before midnight on September 9, 2009, Officer Kapella initiated a traffic stop on a vehicle driven by Vanessa Christine Lange. (Appendix “App.” at 4-5). Although he did not detect an odor of alcohol, which he considered unusual in a DUI investigation, Kapella decided to conduct such an investigation anyway. (App. at 25-26).

[¶ 5] Lange had no problems with her speech whatsoever. (App. at 27). She was cooperative, friendly, and did everything asked of her. (App. at 27-28). Her fine motor skills were fully intact as she produced her license, registration, and insurance without any problems. (App. at 28-29). Nevertheless, Kapella had Lange get out of her car to conduct field tests. (App. at 6). At some point while they were still at the scene, Lange’s passenger called an attorney. (App. at 13). Kapella allowed Lange to speak with the attorney but did not allow her to consult the attorney outside of his presence until later. (App. at 14).

[¶ 6] After he placed Lange under arrest, Kapella read the implied consent, and Lange ultimately agreed to a blood draw. (App. at 10-11). However, before she consented, Lange spoke to her attorney by phone while she was at the jail. (App. at 10). After speaking with her attorney, Lange asked to go to the hospital for a blood draw. (App. at 14-16, 56-57). During the administrative hearing, the following exchange took place concerning the nature of Lange’s discussions with her attorney, her request for a blood draw at the hospital, and Kapella’s response to that request:

Q: Sir, when you got to the jail and you asked for a blood test, was that where you asked for the blood test at the jail?

A: I, initially, on the transport, I a ... I told her. I asked for the blood test, but she had mentioned while on the ... during

the traffic stop that she wanted to speak with a lawyer while I was not listening.

Q: Okay.

A: So I asked her but then told her she did not have to answer until she ... wanted to speak with a lawyer, as she requested before, she could do that.

Q: Okay. So a lawyer actually called while you were doing ...

A: Yes. Actually ...

Q: ... even though ...

A: ...I believe her passenger called her lawyer and then came out of the vehicle, and she ... actually, I allowed her to speak with her lawyer first.

Q: Okay. And you wouldn't give her the opportunity to speak with the attorney outside your presence. Correct?

A: Not on ... during the traffic stop ...

Q: Okay.

A: ... no.

Q: Later on, though, you did?

A: Yes, I did.

Q: At the jail?

A: At the jail, I did, yes.

Q: After she spoke to her attorney, she then asked to go to the hospital for a blood draw. Correct?

A: Correct.

Q: And wa ... was it your understanding that she wanted to get her own blood test?

A: She asked if she could go to the hospital to do the blood test, and I told her that we do the blood tests at the jail. We have a nurse come to the jail and do the blood test.

Q: Okay. But she ... she wanted to go to the hospital and get her own blood test. Correct?

A: She ... she was asked if she could do the blood test at the jail or the hospital.

Q: Okay. Well, do you know? I mean, didn't she want her own independent test?

A: That's what she requested me and the standing ... our standard procedure is ...

Q: Okay.

A: ... to do a ... have our nurse come to the jail to do it.

Q: So ... so ... but your understanding was that she wanted to do her own independent test. Correct?

A: My understanding was that she wanted to do the blood test at the hospital.

Q: Right. But just a second ago, you said she wanted her own independent test. Correct?

A: At the hospital, she said she ask ... she requested if she could do a blood test at the hospital.

Q: And ... you would not ... you told her that you would not take her to the hospital. Correct?

A: Correct.

Q: Okay. And did you give her the opportunity to have somebody else come to the hospital to ... to draw her blood for her own independent test?

A: To the hospital?

Q: Or, I'm sorry, come to the jail and draw her blood for her own independent test?

A: The only certified person we have to draw blood through the Morton County Jail and through ours is our nurse, and that's who came.

Q: Okay. So the only test you were going to allow her to take was her ... was the test that you were ... or, I'm sorry. Was ... was the person that you had to withdraw the blood. Correct?

A: The city has to ...

Q: You ... you wouldn't allow her to get her own independent test. Correct?

A: No.

(App. at 13-16) (emphasis added).

[¶ 7] After seemingly admitting that he understood Lange's request as a request for her own test and that he did not allow it, Kapella claimed that Lange never used the term "independent test" and that she did not ask again once he said the nurse would draw her blood at the jail. (App. at 19). He did admit that he took no steps to clarify what Lange's intentions were. (App. at 56-57).

[¶ 8] After the hearing, the hearing officer issued a decision suspending Lange's driving privileges and concluding that if she intended to request an independent test, she did not clearly communicate it to Kapella and that he did nothing to impede her ability to gain an independent test. (App. at 66). Lange appealed to the District Court. (App. at i, 79-81).

[¶ 9] On appeal to the District Court, the Honorable Gail Hagerty reversed the hearing officer's decision. (App. at 85). Judge Hagerty explained that "Lange's questions concerning testing should have alerted the arresting officer to the possibility she was requesting information about the procedure for independent testing." Id. She continued, "[t]he officer should have attempted to clarify the matter with Lange." Id.



“Because he did not, the decision to suspend Lange’s driving privileges for 91 days is REVERSED.” Id. The Department responded to Judge Hagerty’s decision by filing this appeal. (App. at 89).

### **LAW & ARGUMENT**

[¶ 10] The Administrative Agencies Practice Act (N.D.C.C. chapter 28-32) governs the review of a decision to suspend a person driving privileges. Knoll v. N.D. Dep’t of Transp., 2002 ND 84, ¶ 6, 644 N.W.2d 191. The District Court may reverse the hearing officer’s decision when:

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. “On appeal from a district court’s review of an administrative agency’s decision, [the North Dakota Supreme Court] review[s] the agency decision.” Bienek v. N.D. Dep’t of Transp., 2007 ND 117, ¶ 6, 736 N.W.2d 492 (quoting Elshaug v. W.S.I., 2003 ND 177, ¶ 12, 671 N.W.2d 784). However, “[t]he district court’s analysis is entitled to respect if its reasoning is sound, because the legislatively-mandated district court review cannot be ineffectual.” Id.

**I. Lange was denied a reasonable opportunity to obtain an independent test.**

[¶ 11] Section 39-20-01 of the North Dakota Century Code provides for testing to determine the alcohol content of a motorist's blood. Under that statute a person who operates a motor vehicle within this state has already consented to a chemical test by operation of law. Id. Said test must be administered at the direction of law enforcement only after the person has been placed under arrest. Id.

[¶ 12] “[A] person arrested for driving under the influence of alcohol must be afforded a reasonable opportunity to secure an additional test by a person of his own choosing if he requests one.” City of Grand Forks v. Risser, 512 N.W.2d 462, 463 (N.D. 1994) (quoting State v. Dressler, 433 N.W.2d 549, 550 (N.D. Ct. App. 1988)). N.D.C.C. § 39-20-02 provides a driver may have an additional test at his own expense:

The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of the person's choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer with all costs of an additional test or tests to be the sole responsibility of the person charged. The failure or inability to obtain an additional test by a person does not preclude the admission of the test or tests taken at the direction of a law enforcement officer.

[¶ 13] A “request for an independent test must be clear and unambiguous.” Risser, 512 N.W.2d at 463 (quoting State v. Messner, 481 N.W.2d 236, 239 (N.D. 1992)). If an arrestee requests an independent test, the police officer must afford the person a reasonable opportunity to secure such a test and must not prevent or hinder the person's timely reasonable attempts to obtain the test. City of Fargo v. Bakkerud, 1998 ND 77, ¶ 6, 576 N.W.2d 858 (citing Lock v. Moore, 541 N.W.2d 84, 87 (N.D. 1995)). “The results of chemical tests administered at the direction of law enforcement officers may be suppressed, or charges dismissed, when a motorist is not afforded his statutory

right to an independent test.” Risser, 512 N.W.2d at 463 (quoting Dressler, 433 N.W.2d at 551). The totality of the circumstances must be considered in the determination of whether the arrestee made a reasonable request for an independent test and whether the police interfered by denying the person a reasonable opportunity to obtain the test. Bakkerud, 1998 ND at ¶ 6 (citing Messner, 481 N.W.2d at 240).

[¶ 14] In Dressler, the court said, “The results of chemical tests administered at the direction of law enforcement officers may be suppressed, or charges dismissed, when a motorist is not afforded his statutory right to an independent test.” 433 N.W.2d at 551. The North Dakota Supreme Court has adopted and applied the Dressler court’s rationale. See Luebke v. N.D. Dep’t of Transp., 1998 ND 110, ¶ 10, 579 N.W.2d 189; See also Messner, 481 N.W.2d at 240. In City of Fargo v. Stutlien, 505 N.W.2d 738, 744-45 (N.D. 1993), the court reiterated that dismissal of the charges is an appropriate remedy.

The Court said:

In Dressler, the North Dakota Court of Appeals affirmed the suppression of the results of blood and breath tests administered at the direction of law enforcement officials. The court concluded the defendant was deprived of a reasonable opportunity to exercise his statutory right to an additional, independent test. The court also said dismissal may be an appropriate remedy for the violation of a DUI arrestee’s statutory right to an additional, independent test. Dressler at 551.

Messner and Dressler indicate suppression of the results of a blood test given by law enforcement officials is an appropriate remedy for the denial of a reasonable opportunity to obtain an additional, independent blood alcohol test; and dismissal of the criminal charges may also be warranted.

Id.

[¶ 15] The hearing officer’s ruling on this issue rests in part on the fact that Lange did not clarify her intentions to his satisfaction. His ruling seems to suggest that her

request was ambiguous. While it is true that the North Dakota Supreme Court has held that a request for an independent test must be unambiguous, the Court has also explained that:

To be unambiguous, a request need not exclude all possible alternative interpretations that a police officer might put on the request. An officer who deems a request to be ambiguous should attempt to clarify the matter with the driver.

Risser, 512 N.W.2d at 463-464. This is the language Judge Hagerty seized upon in reversing the hearing officer's decision. The record is quite clear that Kapella made no attempt to clarify what Lange's intentions were. He asked no follow up questions even though he suggested, when first asked, that he understood Lange to be asking for her own test. He testified clearly that she asked for a test at the hospital and "not [through] our nurse..." (App. at 56). He also testified that Lange asked for a test at the hospital immediately after she finished speaking with her attorney and that he told her the answer was no. The fact that Lange may have been too timid to persist after the officer had already told her "no," should be held against her. A police officer is an authority figure, and a jail is an inherently coercive environment. Lange did what most people would do in her situation. Given the totality of the circumstances, Lange asked for an independent test, and rather than clarify her intentions, as the law requires, the officer interfered with her ability to get such a test by simply telling her that it was not going to happen.

### **CONCLUSION**

[¶ 16] For all the foregoing reasons, Lange respectfully asks this Court to affirm the district court's order of January 21, 2010 and its judgment issued March 19, 2010.

Dated this the 6th day of June, 2010.

AALAND LAW OFFICE, LTD.

By: /S/ Jesse N. Lange  
Jesse N. Lange (ND ID No. 06008)  
415 11th St. S.; P.O. Box 1817  
Fargo, ND 58107-1817  
Telephone: (701) 232-7944  
Facsimile: (701) 232-4037  
Attorneys for the Appellant

**[¶ 17] CERTIFICATE OF SERVICE**

A copy of this document was e-filed with the North Dakota Supreme Court and served upon Douglas B. Anderson, pursuant to Administrative Order 14 on the 6th day of June, 2010. Specifically, the preceding Brief of Appellee was electronically filed and served as follows:

The North Dakota Supreme Court  
[supclerkofcourt@ndcourts.com](mailto:supclerkofcourt@ndcourts.com)

Douglas B. Anderson – Attorney for the Appellant  
[dbanders@nd.gov](mailto:dbanders@nd.gov)

/S/ Jesse N. Lange  
Jesse N. Lange (ND ID No. 06008)