IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kenneth Paul Hoover,	)	
	)	
Appellant,	)	**Supreme Ct. No. 20100226**
	)	
v.	)	
	)	**District Ct. No. 08-10-C-00198**
Director, North Dakota Department of Transportation,	)	
	)	
	)	
Appellee.	)	
	)	

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

HONORABLE GAIL HAGERTY

BRIEF OF APPELLEE

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STATEMENT OF ISSUE

Whether Hoover was provided a reasonable opportunity to cure his refusal to submit to the blood test.

STATEMENT OF CASE

North Dakota Highway Patrol Sergeant Norman Ruud arrested Kenneth Paul Hoover ("Hoover") on December 19, 2009, for the offense of driving a vehicle while under the influence of intoxicating liquor. (Hoover Appendix ("App.") 43.) Hoover requested a hearing in accordance with N.D.C.C. § 39-20-05.

The administrative hearing was held on January 19, 2010, at which time the hearing officer considered the following issues pertaining to Hoover's refusal to submit to an alcohol concentration test under N.D.C.C. § 39-20-01:

> (1) whether a law enforcement 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 or any drug or substance, in violation of North Dakota Century Code section 39-08-01, or equivalent ordinance;
>
> (2) whether the person was placed under arrest; and
>
> (3) whether the person refused to submit to the test or tests.

(App. 5, ll. 11-20.)

Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision dated January 19, 2010, revoking Hoover's driving privileges for a period of four years. (App. 43.)

STATEMENT OF FACTS

On December 18, 2009, at approximately 11:55 p.m., North Dakota Highway Patrol Sergeant Norman Ruud ("Sgt. Ruud") observed a vehicle "[begin] to accelerate and [move] across the center line, straddling the center line for a short distance, and then moving into the left hand lane." (App. at 7, ll. 12-17; 9, ll. 2 to 10, ll. 3.) Sgt. Ruud testified the vehicle almost struck a metal guardrail. (App. 10, ll. 8-11.) Sgt. Ruud activated his red lights and initiated a traffic stop of the vehicle. (App. 10, ll. 19-22.)

Sgt. Ruud observed the strong odor of an alcoholic beverage coming from the interior of the vehicle and observed the driver, who was identified as Hoover, had extremely slurred speech. (App. 11, ll. 17 to 12, ll. 5.) Hoover also appeared lethargic and "at times [was] unable to keep his head up." (App. 12, ll. 5-6.)

Sgt. Ruud attempted to administer the horizontal gaze nystagmus test, however, Hoover was unable to follow the directions. (App. 12, ll. 15-22.) The alphabet recitation test was administered but was not completed. (App. 13, ll. 7-8.) Sgt. Ruud did not administer the physical field sobriety tests due to Hoover's poor balance. (App. 13, ll. 10-15.) Hoover produced a result of .21 on the S-D5 onsite screening test. (App. 13, ll. 15 to 14, ll. 8.)

Sgt. Ruud placed Hoover under arrest for driving while under the influence of alcohol. (App. 14; ll. 9-13.) After informing him of the implied consent advisory, Sgt. Ruud requested Hoover consent to a blood test. (App. 14, ll. 14-21.) Hoover initially stated he would submit to the blood test. (App. 15, ll. 1-2;

18, ll. 20-23.) When he sat in the cubicle for the blood draw, Hoover placed "one arm on the gurney . . . with his . . . head on the hand, and the other arm . . . tucked in tight against him." (App. 15, ll. 6-9.) Sgt. Ruud testified Hoover stated "I'm not refusing your test;" however, despite Sgt. Ruud's instruction, Hoover refused to provide the nurse his arm to obtain the blood sample. (App. 15, ll. 10-13.) After Sgt. Ruud informed Hoover that his action would be considered to be a refusal, Hoover again stated he was not refusing. (App. 15, ll. 13-20.)

Hoover then requested he be allowed to contact his attorney. (App. 15, ll. 20-21.) Hoover was taken to the hospital waiting room and provided a phone book and a phone to contact an attorney. (App. 15, ll. 21-23.) Hoover was unable to find a telephone number, so Sgt. Ruud helped Hoover locate a number. (App. 15, ll. 23 to 16, ll. 2.) Hoover informed Sgt. Ruud that "until his attorney either called him back or arrived at the hospital, he was not going to give . . . a test." (App. 16, ll. 6-9.) Hoover's attempt to contact an attorney occurred at 12:48 a.m. (App. 16, ll. 9-10.)

Sgt. Ruud remained in the waiting room with Hoover and "asked him two more times if he would consent to a blood test." (App. 16, ll. 13-16.) Hoover responded that "he was not refusing, but he would not give a sample until he was able to either talk to his attorney or his attorney arrived at the hospital." (App. 16, ll. 16-18.) Sgt. Ruud was unaware whether Hoover ever talked to his attorney. (App. 16, ll. 19-23.)

At approximately 2:00 a.m., Sgt. Ruud advised Hoover he was transporting him to the Burleigh County jail and that he was considering his

actions to be a refusal. (App. 17, ll. 1-5.) Sgt. Ruud testified that the 2:00 a.m. timeframe was after two hours from the time of Hoover's driving. (App. 17, ll. 1-8.) Sgt. Ruud testified:

> It was my opinion that I had afforded him more than ample opportunity to obtain a blood test and say yes, because we were at the hospital for over an hour in the waiting room, and at no time did he indicate that he would submit to a blood test, even though he was asked.

(App. 17, ll. 8-12.)

Sgt. Ruud provided Hoover the Report and Notice at the jail. (App. 24, ll. 4-10.) T. Ex. 1b. Sgt. Ruud informed Hoover he had considered it a refusal and Hoover "adamantly denied that he [was] refusing, and actually asked to go take a blood test, and [Sgt. Ruud] told him that he needed to contact his counsel at that time." (App. 25, ll. 1-8.) Sgt. Ruud explained:

> The two hours were . . . time limit was up. The main reason for staying at the hospital as long as we did is I've had indica . . . or I've had situations like this before, where you take . . . take them up to the jail, they say I'm not refusing, I want a blood test. I have to transport them back to the hospital where if you just wait there for the two hours, and they consistently refuse, I feel that I've provided him with ample opportunity to obtain a test, and, as I explained to Mr. Hoover that night, his physical actions had more weight than his verbal communications.

(App. 25, ll. 10-19.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

The administrative hearing officer found:

> Sgt. Ruud arrested Kenneth Hoover for DUI. Sgt. Ruud gave the implied consent advisory to Mr. Hoover, then requested blood testing. Mr. Hoover said he would submit to blood testing, so Sgt. Ruud transported him to St. Alexius Medical Center for blood drawing. Mr. Hoover stated, I'm not refusing your test, but at the same time, physically would not allow the nurse to have access to either of his arms for drawing his blood. Mr. Hoover then said he wanted to call an attorney. He was given an opportunity to call an attorney. Afterwards, Sgt. Ruud asked Mr. Hoover at least two

> more times if he would submit to blood testing. Each time Mr. Hoover said he would not consent unless he talked with his attorney or his attorney came to the hospital. Sgt. Ruud remained at the hospital with Mr. Hoover until around 2:00 a.m., until after the end of the two hour period during which testing for alcohol concentration could be done. Kenneth Hoover did not consent to having his blood drawn for testing during that entire time at the hospital. Sgt. Ruud then took Mr. Hoover to the jail. Sgt. Ruud issued a Report and Notice form to Mr. Hoover at the jail after 2:00 a.m. on December 19, 2009. . . .

(App. 40.) The hearing officer held "Mr. Hoover was arrested for DUI, and he refused to submit to the requested test for alcohol concentration." (App. 41, ll. 2-4.)

Hoover appealed the administrative decision to the Burleigh County District Court. (App. 3-4.) Hoover identified the issue on appeal to the district court as follows:

> If there was a refusal, Mr. Hoover was denied the opportunity to cure the refusal.

(App. 3.)

Judge Gail Hagerty issued an Order on May 12, 2010, affirming the hearing officer's decision. (App. 45-47.) Judge Hagerty ruled:

> In this case, the record indicates that Sgt. Ruud first had contact with Hoover at 11:55 p.m. on December 18, 2009. After making observations which led Sgt. Ruud to conclude Hoover was driving under the influence, Ruud placed Hoover under arrest. Hoover was given the implied consent advisory and was taken to a hospital for the purpose of having a blood test drawn. Hoover would not provide his arm for testing and Ruud began to take him from the hospital to the jail.
>
> Hoover then asked to speak to an attorney. He was provided with a telephone book and was assisted in making a call. He was unable to reach an attorney and indicated he would not submit to a test until his attorney called him or came to the hospital. At about 2

> a.m. on December 19, Ruud took Hoover from the hospital to the jail.
>
> Hoover argues that he was not given a chance to cure this refusal.
>
> After reviewing the record, I conclude the hearing officer reasonably concluded that Hoover was given a reasonable opportunity to cure his refusal and was kept at the hospital for the two-hour period during which test results would be considered to have evidentiary value.
>
> The administrative decision revoking Hoover's driving privileges for four years is **AFFIRMED.**

(App. 46-47.) Judgment was entered on May 17, 2010. (App. 48.) Hoover appealed the Judgment to the North Dakota Supreme Court. (App. 50.) The Department requests this Court affirm the judgment of the Burleigh County District Court and the administrative revocation of Hoover's driving privileges for a period of four years.

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 and 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.

Section 28-32-46, N.D.C.C., provides 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, at ¶ 5.

LAW AND ARGUMENT

Hoover was provided a reasonable opportunity to cure his refusal to submit to the blood test.

"[A] driver is able to cure a prior refusal if he changes his mind and requests the test." Grosgebauer v. N.D. Dep't of Transp., 2008 ND 75, ¶ 13, 747 N.W.2d 510 (citing Lund v. Hjelle, 224 N.W.2d 552, 557 (N.D. 1974)). The North Dakota Supreme Court has conditioned a driver's opportunity to cure a refusal to submit to a chemical test for intoxication as follows:

> [O]ne who is arrested for driving while under the influence of intoxicating liquor first refuses to submit to a chemical test to determine the alcoholic content of his blood and later changes his mind and requests a chemical blood test, the subsequent consent to take the test cures the prior first refusal when the request to take the test is made within a reasonable time after the prior first refusal; when such a test administered upon the subsequent consent would still be accurate; when testing equipment or facilities are still readily available; when honoring a request for a test, following a prior first refusal, will result in no substantial inconvenience or expense to the police; and when the individual requesting the test has been in police custody and under observation for the whole time since his arrest.

Lund, at 557.

"The two-hour limitation for taking a blood-alcohol test in N.D.C.C. § 39-20-04.1, narrows the reasonable time within which arrestees may attempt to cure a prior refusal, but does not refute the underlying rationale of Lund, which recognizes a preference for a chemical test within a reasonable time." Houn v. N.D. Dep't of Transp., 2000 ND 131, ¶ 9, 613 N.W.2d 29. In Houn, "Bismarck police officer Glen Valley observed Houn driving erratically at 1:10 a.m." and "arrested Houn at about 1:30 a.m. for driving under the influence." Id. at ¶ 2. When "asked . . . to submit to an Intoxilyzer test to measure his blood-alcohol

concentration. Houn indicated he wanted to speak to a specific attorney, but he was unable to contact that attorney." Id. "[Houn] stated he would not take a test without legal representation." Id. "Houn subsequently indicated he would take the test at about 2:50 a.m., but Valley, who was not a certified Intoxilyzer operator, informed Houn it was too late." Id.

The North Dakota Supreme Court held:

> Although the Legislature has expressed its desire for suspects to take a chemical test, Lund . . . do[es] not require law enforcement officers to honor an attempted cure if the officers reasonably believed it was not possible to do a test within the appropriate time frame, testing facilities were not readily available, and trying to obtain a test would have caused substantial inconvenience or expense to law enforcement. We decline to adopt a requirement that law enforcement must honor an attempted cure if there is a theoretical possibility a chemical test could be concluded within two hours. Under Lund and its progeny, the standard is whether the proffered test reasonably could have been taken before the expiration of the two-hour period. . . . .

Id. at ¶ 18.

A request to cure a prior refusal also must be a "clearly articulated reconsideration." Grosgebauer, at ¶ 15 (citing Lund, at 557). In Lund, the driver initially agreed to submit to a blood test, but "upon arrival at the hospital [he] refused to submit to the test." 224 N.W.2d at 554. After being transported to the jail, however, "Lund thereupon informed Officer Cummings that he would take the chemical blood test, but the officer declined to permit him to take the chemical blood test." Id. at 554-55. The Supreme Court held Lund's reconsideration was sufficiently articulated such that he should have been provided an opportunity to cure his prior refusal to submit to the blood test. Id. at 557.

In Grosgebauer, at ¶ 3, the driver's "mumbling and swearing" in a response to the law enforcement officer's requests he submit to a blood test were considered to be a refusal to submit to the chemical test. At the jail, Grosgebauer overhead a conversation between the arresting officer and a corrections staff member in which the officer stated "Grosgebauer had refused the blood test." Id. at ¶ 4. "Grosgebauer overheard this conversation and said words approximating 'I did not refuse.'" Id. On appeal, "Grosgebauer argue[d] his statement of 'I did not refuse' was sufficient to signify he had 'change[d] his mind and request[ed] a chemical blood test.'" Id. at ¶ 15 (quoting Lund, at 557). The Supreme Court held:

> Here, Grosgebauer, who earlier had claimed he did not understand the Miranda warning, swore and mumbled when asked to submit to testing. Then, after he overheard a conversation between the officer and a jailer, responded with an ambiguous statement. This is not a clearly articulated reconsideration like that expressed by the driver in Lund. Therefore, a preponderance of the evidence supports the Department's determination that Grosgebauer did not cure his refusal to submit to testing.

Id.

In Maisey v. N.D. Dep't of Transp., 2009 ND 191, ¶ 4, 775 N.W.2d 200, the driver responded to the law enforcement officer's request he submit to a blood test by agreeing, but stating he "wanted to speak with a specific lawyer first." "Maisey called the lawyer and left a message on the lawyer's answering machine." Id. "The deputy then asked Maisey if he would submit to the blood test, but Maisey said he would like to speak with his lawyer first." Id. After Maisey declined to go into the exam room at the hospital after being requested to do so by the deputy if he wanted to submit to the test, "[t]he deputy determined

Maisey had refused to submit to the blood test because he did not get up and walk into the exam room." Id.

"As the deputy was taking Maisey out of the hospital, Maisey stated that he wanted to take the blood test, but still wanted to speak to his lawyer first." Id. at ¶ 5. "Maisey grabbed the doorframe and told the deputy again that he was not refusing to take the blood test." Id.

On appeal, "Maisey . . . argue[d] that he cured any alleged refusal to submit to the blood test." Id. at ¶ 24. The Supreme Court held:

> Here, after the deputy determined that Maisey had refused the test, Maisey requested to take the test. However, he persisted with his condition that he speak with his lawyer first. This was not a clearly articulated reconsideration. After refusing to submit to the blood test, Maisey never clearly stated that he was now willing to take the test. A reasoning mind could reasonably conclude Maisey did not cure his refusal.

Id. at ¶ 26 (emphasis added).

In this case, Hoover concedes it was reasonable for Sgt. Ruud to conclude he was refusing to submit to the blood test by his "action of failing to provide an arm." (App. Brief 8.) Hoover, instead, argues Hoover was denied an opportunity to cure the refusal as the result of Sgt. Ruud's action he deems unreasonable in causing the two-hour time limit to expire by "simply [sitting] in the hospital waiting room for one hour or more." (App. Brief 8-9.) Hoover does not explain what actions Sgt. Ruud should have taken in the alternative.

Sgt. Ruud first observed Hoover commit the moving traffic violations at 11:55 p.m. (App. at 7, ll. 12-17; 9, ll. 2 to 10, ll. 3.) For a chemical test to have been valid it must have been conducted within the two-hour time frame ending at

1:55 a.m. Following what Hoover concedes reasonably could be considered to be a refusal, Hoover was taken to the hospital waiting room and provided a phone book and a phone to contact an attorney with which he attempted to contact an attorney at 12:48 a.m. (App. 15, ll. 21-23; 16, ll. 9-10.)

Hoover conditioned his consent to submit to the blood test, as did the driver in Maisey, on his ability to speak with his attorney by telephone or in person. (App. 16, ll. 6-9, 16-18.) The evidence established Sgt. Ruud remained in the waiting room with Hoover and "asked him two more times if he would consent to a blood test." (App. 16, ll. 13-16.) At approximately 2:00 a.m., Sgt. Ruud advised Hoover he was transporting him to the Burleigh County jail and that he was considering his actions to be a refusal. (App. 17, ll. 1-5.) Sgt. Ruud testified that the 2:00 a.m. timeframe was after two hours from the time of Hoover's driving. (App. 17, ll. 1-8.) Only after Sgt. Ruud and Hoover arrived at the jail did Hoover arguably sufficiently articulate his reconsideration to submit to the blood test. At that point the two-hour timeframe to submit to the test had expired. Under the standard set forth in Houn, the proffered test undisputedly could not have been taken before the expiration of the two-hour period.

Sgt. Ruud's actions in remaining in the waiting room and asking him two more times if he would consent to a blood test reasonably were taken for the purpose of avoiding a result such as in Houn. Sgt. Ruud testified:

> It was my opinion that I had afforded him more than ample opportunity to obtain a blood test and say yes, because we were at the hospital for over an hour in the waiting room, and at no time did he indicate that he would submit to a blood test, even though he was asked.

(App. 17, ll. 8-12.) Sgt. Ruud explained:

> The two hours were . . . time limit was up. The main reason for staying at the hospital as long as we did is I've had indica . . . or I've had situations like this before, where you take . . . take them up to the jail, they say I'm not refusing, I want a blood test. I have to transport them back to the hospital where if you just wait there for the two hours, and they consistently refuse, I feel that I've provided him with ample opportunity to obtain a test, and, as I explained to Mr. Hoover that night, his physical actions had more weight than his verbal communications.

(App. 25, ll. 10-19.)

Hoover was provided a reasonable opportunity to cure his refusal to submit to the blood test and must suffer the consequences of his failure to do so.

CONCLUSION

The Department respectfully requests that this Court affirm the judgment of the Burleigh County District Court and the Department's decision revoking Kenneth Paul Hoover's driving privileges for a period of four years.

Dated this 13th day of October, 2010.

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