

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Kenneth Paul Hoover,

Appellant,

v.

Supreme Court No. 20100226

Director, North Dakota Department  
of Transportation,

Appellee.

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

SEP 14 2010

STATE OF NORTH DAKOTA

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BRIEF OF APPELLANT

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Appeal from Judgment

Burleigh County District Court  
South Central Judicial District  
Civil No. 08 C 10 00198

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**STATEMENT OF THE ISSUES**

**ISSUE FOR REVIEW**

Was Hoover denied the opportunity to cure a prior refusal?

## STATEMENT OF THE CASE

Kenneth Paul Hoover appeals from a district court judgment affirming an administrative revocation of his driving privileges for a period of four years.

On December 18, 2009, at approximately 11:55 p.m., Sergeant Norman Ruud of the North Dakota Highway Patrol was traveling on Expressway in Morton County and observed a vehicle entering Express Bridge (A. 7, lines 9-14; 9, lines 3-6). Ruud followed the vehicle over Expressway Bridge. On the bridge, the vehicle did not signal a lane change. After exiting the bridge, the vehicle's driver-side tires crossed over a yellow line and the car almost struck a guardrail. (A. 9-10). Ruud put on his red lights and stopped the vehicle, which was driven by Kenneth Paul Hoover (A. 10-11).

Based on Ruud's observations of Hoover's physical condition, some attempt to do field sobriety tests, and a preliminary screening test, Ruud arrested Hoover for DUI (A. 11-14). At the scene, Ruud gave Hoover the implied consent advisory and requested a blood test (A. 14, lines 17-21; 18, lines 22-23). Hoover said he would submit to a blood test (A. 18, line 23). Ruud then drove Hoover to St. A's hospital. (A. 15, lines 1-2; A. 18-19).

While driving to St. A's, Hoover stated he had to use the restroom. Once at St. A's, Hoover was allowed to use the restroom. (A. 15, lines 3-4; 19, lines 8-11). Ruud then took Hoover to the cubicle where they draw blood. Hoover would not give an arm for the blood draw. Ruud told Hoover this would be considered a refusal. Hoover stated he was not refusing. However, Hoover still did not provide an arm for a blood draw, and Rudd again stated Hoover's actions would be considered a refusal. (A. 15, lines 7-20).

Ruud got Hoover out of his chair to leave the hospital. Hoover then asked to contact an attorney. Hoover was taken to a waiting room and allowed to call an attorney. This occurred at approximately 12:48 a.m. (A. 15-16). Ruud testified that Hoover stated something about leaving a message on his attorney's answering machine (A. 16, lines 21-23). Hoover stated he was not refusing the test, but would not give a test until his attorney either called him back or arrived at the hospital (A. 16, lines 6-9).

Ruud testified, "So, basically, at that point, we remained in the waiting room at St. A's." (A. 16, lines 13-15). Ruud asked Hoover two more times if he would consent to a blood test. Hoover repeated he was not refusing, but would not give a sample until he was able to either talk to his

attorney or his attorney arrived at the hospital. (A. 16, lines 15-18). No times were given for these two conversations.

The Hearing Officer then asked, "What happened after that?" (A. 16, line 24). Ruud stated they remained in the waiting room until approximately 2:00 a.m., when Ruud indicated to Hoover they were leaving the hospital to go to the jail and that Hoover's actions would be considered a refusal. (A. 17, lines 1-4).

At the jail, Ruud gave Hoover his paperwork, including the Report and Notice form (A. 23-24). When Ruud gave Hoover the Report and Notice form, Ruud had a conversation with Hoover that this, in fact, was a refusal (A. 25, lines 1-5). Hoover responded he was not refusing, and "actually asked to go take a blood test" (A. 25, lines 5-7). Ruud "told him that he needed to contact his counsel at that time." (A. 25, lines 7-8).

MR. HOFFMAN: At that point, you considered it too late?

SGT. RUUD: To ... too ... yea, the two hours were ... time limit was up. The main reason for staying at the hospital as long as we did it I've had indica ... or I've had situations like this before, where you take ... take them up to 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.

(A. 25, lines 9-19) (emphasis added).

Hoover argued to the Hearing Officer, "Mr. Hoover indicated the last conversation with the sergeant is that he would take the . . . the blood test."

(A. 38, lines 14-15). The Hearing Officer found in relevant part to this appeal:

Mr. Hoover . . . said he wanted to call an attorney. He was given 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.

(A. 43). The Hearing Officer concluded Hoover refused to test (A. 43). The Hearing Officer made no findings or conclusions in regard to curing the refusal.

#### STANDARD OF REVIEW

In Houn v. North Dakota Dep't. of Transportation, 2000 ND 131, ¶¶ 5-6, 613 N.W.2d 29, the Court wrote:

We review an administrative revocation of a driver's license under N.D.C.C. ch. 28-32, the Administrative Agencies Practice Act.



Krehlik v. Moore, 542 N.W.2d 443, 445 (N.D. 1996). We affirm the Department's decision unless we conclude: 1) the decision is not in accordance with the law; 2) the decision violates the constitutional rights of the appellant; 3) provisions of the Administrative Agencies Practices Act were not complied with in the proceedings before the agency; 4) the agency's rules or procedures have not afforded the appellant a fair hearing; 5) the agency's findings are not supported by a preponderance of the evidence; or 6) the conclusions of law and the agency's decision are not supported by its findings of fact. NDCC 28-32-19. North Dakota Dep't of Transp. V. DuPaul, 487 N.W.2d 593, 595 (N.D. 1992).

We give great deference to the Department's findings of fact, and we do not make independent findings or substitute our judgment for that of the Department; rather, we determine only whether a reasoning mind reasonably could have concluded the Department's findings were supported by the weight of the evidence from the entire record. Seela v. Moore, 1999 ND 243, ¶ 5, 603 N.W.2d 480; Asbridge v. North Dakota State Highway Comm'r, 291 N.W.2d 739, 744 (N.D. 1980). Our standard of review defers to the hearing officer's opportunity to hear the witnesses' testimony and to judge their

credibility, and we will not disturb the Department's findings unless they are against the greater weight of the evidence. Johnson v. North Dakota Dep't. of Transp., 530 N.W.2d 359, 361 (N.D. 1995).

Resolving underlying factual disputes is the exclusive province of the hearing officer. Id.

## ARGUMENT

### ISSUE FOR REVIEW

Was Hoover denied the opportunity to cure a prior refusal?

There is a legislative preference for a chemical test within a reasonable time. Houn v. North Dakota Dep't. of Transportation, 2000 ND 131, ¶¶ 9, 15, 613 N.W.2d 29, citing Krehlik v. Moore, 542 N.W.2d 443, 445, 447 (N.D. 1996). Therefore, a driver who changes his mind and requests a chemical test can cure a prior refusal. Maisey v. North Dakota Dep't. of Transportation, 2009 ND 191, ¶ 24, 775 N.W.2d 200. Therefore:

“[W]here . . . one who one 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.”

Maisey, at ¶ 24, citing Grosgebauer v. N.D. Dep't. of Transportation, 2008 ND 75, ¶ 13, 747 N.W.2d 510 (quoting Lund v. Hjelle, 224 N.W.2d 552, 557 (N.D. 1974)).

In Lund, the driver refused to submit to a blood test at a hospital. However, later at the police station, the driver changed his mind and requested to take the test. The officer did not allow the driver to take the test. The Court held this was error. The driver had cured his prior refusal.

Here, by Hoover's action of failing to provide an arm, Sergeant Ruud could reasonably conclude Hoover was refusing. Hoover was also afforded the opportunity to call a lawyer of his choosing, and Ruud did not have to wait an unreasonable time for an answer. See, Lies v. N.D. Dep't. of Transportation, 2008 ND 30, ¶ 10-12, 774 N.W.2d 783.

On the other hand, at the jail Hoover unequivocally stated he would take the test (cf. Maisey, wherein Maisey persisted with his condition that he speak with his lawyer first). However, at the jail, Hoover's time was found to have run out.

Hoover's time ran out because Sergeant Ruud simply sat in the hospital waiting room for one hour or more. Ruud's explanation was that he did not want to return to the hospital should Hoover, in fact, change his mind

at the jail. Hoover contends this is unreasonable. See, Krehlick v. Moore, supra.

Further, the facts appear to be, and the Hearing Officer appears to so find, that there were no more requests by Ruud for Hoover to take the test during or at the end of this hour period of time. At the end of this time, Ruud simply took Hoover from the waiting room to jail. This is contrary to Ruud's testimony that Hoover consistently refused the chemical test.

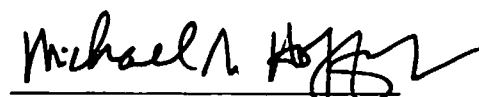
Hoover was denied the opportunity to cure his prior refusal by the arresting officer's actions. Hoover respectfully requests this court to reverse this case and to order the reinstatement of his driving privileges.

#### CONCLUSION

WHEREFORE, Hoover requests the Supreme Court of North Dakota to reverse the judgment of the district court.

Respectfully submitted this 14 day of September 2010.

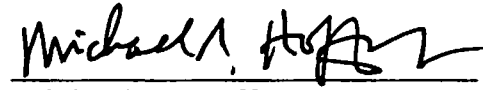
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CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing brief, along with a true copy of the Appendix, by hand delivery, on this 14 day of September 2010, on:

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