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IN THE SUPREME COURT OF NORTH DAKOTA

August 27, 2010

Jonathan Thomas Kasowski, Petitioner and Appellant, v. Director, North Dakota Department of Transportation, Respondent and Appellee.	Supreme Court No. 20100232 Cass County No. 09-2010-CV-958

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN MARQUART, PRESIDING

BRIEF OF APPELLANT

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[¶ 3] STATEMENT OF THE ISSUES

1. Whether the Appellant's license revocation should be reversed as the officer's actions denied the appellant a reasonable opportunity to consult with counsel before deciding to take a chemical test.

STATEMENT OF THE CASE

[¶ 4] This is an appeal from the June 30, 2010 judgment of the Cass County District Court, (Appendix ("App.") at 14), which affirmed the March 19, 2010 decision of an administrative hearing officer revoking the Appellant's driving privileges for a period of four years (App. at 4-5).

[¶ 5] On March 19, 2010, a hearing was held before an administrative hearing officer of the North Dakota Department of Transportation Office. (App. at 4). The hearing concerned the driving privileges of the Appellant Jonathan Kasowski. Id. The specific issue was whether Mr. Kasowski's driving privileges would be revoked for four years. (App. at 4-5).

[¶ 6] The testimony at the hearing indicated that Officer Tyler Williams stopped Mr. Kasowski in his vehicle for a traffic violation before ultimately placing Kasowski under arrest for driving under the influence. (App. at 4-5). Kasowski went on to refuse a chemical test. Id. Although Kasowski mentioned contacting an attorney on at least two occasions, Williams did not give him an opportunity to do so. (T. at 16, 23-25).

[¶ 7] After the evidence had been presented, the hearing officer decided to revoke Kasowski's driving privileges. (App. at 4-5). The hearing officer reasoned that although Kasowski twice mentioned speaking to an attorney, he had no right to do so on the first occasion because he had not yet been arrested. (App. at 4). As for the second occasion, the hearing officer concluded that Kasowski indicated that he had decided against speaking to an attorney. Id.

[¶ 8] Kasowski appealed the hearing officer's decision to the Cass County District Court, which, as indicated above, affirmed that decision. (App. at 14). Kasowski now

asks this Court to reverse those rulings and to order the reinstatement of his driving privileges.

STATEMENT OF THE FACTS

[¶ 9] On or about February 18, 2010 at approximately 12:40 a.m., West Fargo Police Officer Tyler Williams initiated a traffic stop on a car driven by Kasowski by activating his emergency lights. (T. at 7). When he first spoke with Kasowski, Williams asked for identification and proof of insurance. (T. at 11). Williams then had him get out of the car and subjected Kasowski to a pat search before seating him in the back seat of the patrol car. (T. at 12). The patrol car is designed so that the rear doors cannot be opened from the inside. (T. at 22-23).

[¶ 10] Once inside the patrol car, Officer Williams physically inspected Kasowski's mouth and asked if he had been drinking. (T. at 12, 13). Kasowski denied drinking. (T. at 21). Williams agreed that he asked about drinking again and said something along the lines of "[n]ow don't lie to me because you lied to me earlier…" (T. at 23). At that point Kasowski asked to speak with a lawyer. Id. Williams testified that "I asked Kasowski when we got into the car, if… if he had been drinking at all, and he stated that he wanted to talk to his… his attorney about that." (T. at 13, 15-17, 16-20, 23, 17-24). Williams ignored the request for counsel, and did not provide Kasowski an opportunity to speak to an attorney at that time. (T. at 13, 22-24). Williams testified that that he "…went right into advising Kasowski of the North Dakota implied consent law" for purposes of the onsite breath screening test. (T. at 13, 14). Officer Williams also testified that when Kasowski asked for his attorney, his response to the question was that he never told Kasowski "No" but that "he didn't offer a response for that." (T. at 14).

[¶ 11] Officer Williams testified that he did not have Kasowski perform any field sobriety tests because he assumed that Kasowski was not to going to perform them since he wanted to talk to an attorney. (T. at 14). After Williams read the implied consent advisory, Kasowski refused the screening test. (T. at 15). Williams then placed Kasowski in handcuffs and advised him that he was under arrest. (T. at 15). Williams drove Kasowski to the Cass County Jail. (T. at 14-16).

[¶ 12] In the sally port of the jail there was another discussion about an attorney. Williams' testimony on the matter was inconsistent. During direct examination Williams said "I advised him that we would have … that he could … he would be able to make a phone call to contact his attorney, and he just told me that there … he wouldn't be able to get a hold of him this time of night." (T. at 16). During cross examination the following exchange took place between Kasowski's attorney Cash Aaland and Williams:

> MR. AALAND: Okay. Now, Officer, when you pulled into the sally port, Mr. Kasowski then brought up the lawyer again. Correct?
>
> OFFICER WILLIAMS: Correct.
>
> MR. AALAND: And that's when he had a conversation after that, about whether or not he could get a hold of him. Correct?
>
> OFFICER WILLIAMS: Correct.
>
> MR. AALAND: That was after he said, I'll … I'll contact my lawyer as soon as I can. And then he said … then the conversation ensued about whether or not he could get one that late at night. Correct?
>
> OFFICER WILLIAMS: Correct.

(T. at 19). Later in the hearing attorney Aaland and Williams shared this exchange:

> MR. AALAND: So, again as I understand it then, you're pulling into the sally port. He's handcuffed in the backseat. Correct?

OFFICER WILLIAMS: Yes.

MR. AALAND: And he says something about contacting his attorney as soon as he can. Correct?

OFFICER WILLIAMS: I don't recall exactly how it had gone down, but it was something along the lines of that.

MR. AALAND: And you told him, you said something about whether or not he wanted to contact his attorney, and he said that he wouldn't be able to get a hold of one that late at night?

OFFICER WILLIAMS: Yep, that sounds correct.

MR. AALAND: And that conversation was while he was handcuffed in the backseat of your patrol vehicle. Correct?

OFFICER WILLIAMS: Correct.

MR. AALAND: And at no point after that, did you give him access to a phone or a phone book? Correct?

OFFICER WILLIAMS: Correct.

(T. 24-25). After Kasowski mentioned his desire to speak to a lawyer for the second time he declined the chemical test. (T. at 16). Williams never gave him a chance to contact a lawyer.

[¶13] When the hearing concluded, the hearing officer entered a decision revoking Kasowski's driving privileges for a period of 4 years. (App. at 4-5). Among other things the hearing officer concluded that Kasowski decided against speaking to an attorney before deciding to refuse the chemical test. (App. at 4, T. at 32).

[¶ 14] Kasowski appealed the order of revocation to the Cass County District Court. (App. at 6-7). The district court affirmed the hearing officer's decision and entered its judgment on June 30, 2010. (App. at 14). After the district court affirmed the hearing officer's ruling, Kasowski filed this appeal. (App. at 16).

JURISDICTIONAL STATEMENT

[¶ 15] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI § 8, N.D.C.C. §§ 27-05-06(4) and 39-20-06. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. §§ 28-27-01 and 28-27-02. This appeal is timely under N.D.R.App.P. 4(a)(1).

LAW & ARGUMENT

[¶ 16] The standard of review of a driver's license suspension is well established. "The Department's authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges." Schaaf v. N.D. Dep't of Transp., 2009 ND 145, ¶ 9, 771 N.W.2d 237. This Court reviews the Department's decision to suspend driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Barros v. N.D. Dep't of Transp., 2008 ND 132, ¶ 7, 751 N.W.2d 261. Under N.D.C.C. § 28-32-49, this Court will reverse the Department's order 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.

"An agency's decisions on questions of law are fully reviewable." Kiecker v. N.D. Dep't of Transp., 2005 ND 23, ¶ 8, 691 N.W.2d 266 (quoting Huff v. Bd. of Medical Examiners, 2004 ND 225, ¶ 8, 690 N.W.2d 221).

[¶ 17] In this case, the order suspending Kasowski's driving privileges is not in accordance with the law, the hearing officer's factual findings were not supported by a preponderance of the evidence, and the conclusions of law and order of the agency are not supported by the findings of fact.

I. Kasowski was not given a reasonable opportunity to consult with counsel before deciding whether to take a chemical test in violation of his statutory right to counsel.

[¶ 18] Section 29-05-20 of the North Dakota Century Code provides the following: "The accused in all cases must be taken before a magistrate without unnecessary delay, and any attorney at law entitled to practice in the courts of record of this state, at his request, may visit such person after his arrest." The North Dakota Supreme Court has held that this gives citizens a statutory right to counsel. Kuntz v. State Highway Commissioner, 405 N.W.2d 285, 288 (N.D. 1987). Furthermore, the North Dakota Supreme Court has "repeatedly held that defendants must be afforded a reasonable opportunity to consult with counsel before deciding whether to submit to a chemical test." State v. Pace, 2006 ND 98, ¶ 6, 713 N.W.2d 535; Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 12, 622 N.W.2d 180; Baillie v. Moore, 522 N.W.2d 748, 750 (N.D.1994); Kuntz, 405 N.W.2d at 288.

[¶ 19] "The failure to allow a DUI arrestee a reasonable opportunity to consult with a lawyer after the arrestee has made such a request prevents the revocation of his driver's license for refusal to take a chemical test." Baillie v. Moore, 522 N.W. 2d 748,

750. To determine whether an opportunity to consult with counsel was reasonable, the totality of the circumstances must be explored. Eriksmoen v. Dir., N.D. Dep't of Transp., 2005 ND 206, ¶ 9, 706 N.W.2d 610. As this Court has explained:

> There are no bright line rules for determining whether a 'reasonable opportunity' to consult with an attorney has been afforded; rather the determination of whether a reasonable opportunity has been provided turns on an objective review of the totality of the circumstances.

Pace, 2006 ND 98, ¶¶ 6-7, 713 N.W. 2d 535.

[¶ 20] In Kuntz, 405 N.W.2d 285 (N.D. 1987) the specific right at issue was the right to visit with an attorney upon request after arrest within the context of an implied consent proceeding. Id. at 288. In its holding the Court held that,

> [I]f an arrested person asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test. If he is not given a reasonable opportunity to do so under the circumstances, his failure to take the test is not a refusal upon which to revoke his license under Chapter 39-20, N.D.C.C.

Id. at 290.

[¶ 21] In this case, Kasowski invoked his right to speak with an attorney on two separate occasions. The first time was while Kasowski was sitting in the rear of the squad car after being asked to take the screening test prior to his arrest. (T. at 13, 23). The second time was just after Williams read him the implied consent in the sally port at the jail and asked for the chemical test while sitting in the rear of the squad car in handcuffs. (T. at 15-16, 24-25).

[¶ 22] The hearing officer reasoned that Kasowski's first request for counsel without significance because, in his view, Kasowski had not been placed under arrest at that point. (App. at 4). Although Kasowski had not been specifically told he was under

arrest when he first mentioned the need for an attorney, Williams informed him that he was under arrest almost immediately after that. (T. at 15). Moreover, as this Court has held, an investigative detention justified by a mere reasonable suspicion can become so intrusive that it morphs into a de facto arrest even where the arrestee has not specifically been told he is under arrest. City of Devils Lake v. Grove, 2008 ND 155, ¶ 10, 755 N.W.2d 485. "[F]ormal words of arrest are not a condition precedent to the existence of an arrest." Id. (quoting State v. Anderson, 336 N.W.2d 634, 639 (N.D. 1983)). Indeed, an "officer's subjective intent or outward statements do not necessarily control whether, or when, a party is under arrest." Grove, 2008 ND at ¶ 10 (quoting State v. Linghor, 2004 ND 224, ¶ 14, 690 N.W.2d 201). Rather, "[a]n arrest occurs when circumstances exist that would cause a reasonable person to conclude he was under arrest and not free to leave." State v. Anderson, 2006 ND 44, ¶ 22, 710 N.W.2d 392.

[¶ 23] Given that by the time Kasowski first mentioned an attorney he had already been interrogated, accused of lying about his alcohol use, pat searched, and detained in the backseat of a patrol car that could not be opened from the inside, any difference between the detention he had endured to that point and a formal arrest is entirely illusory. (T. at 12-14, 23). Under these circumstances a reasonable person would feel he was under arrest and not free to leave. Still, Williams simply ignored this initial request for counsel, and instead he "just went right into advising [Kasowski] of the North Dakota implied consent advisory law." (T. at 14). Williams stated that he "didn't offer a response" to Kasowski's request for an attorney. (T. at 14). Williams obviously understood that Kasowski wanted to speak to an attorney since his testimony reflects that

he decided not to administer any field sobriety tests based on Kasowski's assertion that he wanted to speak to an attorney. (T. at 14).

[¶ 24] Even if this Court concludes that Kasowski was not under arrest at the time of the first lawyer request, that request is significant nonetheless. If assuming for the sake of argument, Kasowski was not entitled to speak to a lawyer right at the moment he asked for one, the request was still made and Williams should have responded to it. Williams should have either provided Kasowski with the opportunity to speak with a lawyer just after he told him he was under arrest or explained that he could speak to lawyer at some later point. While the law suggests that a person has a statutory right to counsel after the arrest when a request for counsel is made, it does not necessarily follow that only a post-arrest demand for counsel is valid. Such a reading of the law penalizes a person who invokes his or her rights early in the process even where, as here, the officer's reaction discourages further demands and sends the message that the request will not be honored.

[¶ 25] Kasowski again mentioned a lawyer at the jail and made a comment indicating that it might be too late to reach one. (T. at 16). On this subject, Williams contradicted himself throughout the hearing. At one point, Williams claimed that he brought up the right to an attorney at the jail. (T. at 16). Later he suggested it was Kasowski who raised the issue the second time. (T. at 24-25). Still later he admitted that Kasowski said something along the lines of his wanting to contact an attorney as soon as he could. (T. at 24).

[¶ 26] On this record it is not clear that Kasowski abandoned his right to speak with an attorney as the hearing officer concluded. (T. at 32, App. at). What is clear is that

Kasowski indicated that he wanted to speak with a lawyer on at least two occasions and that he was never given an opportunity to do so. (T. at 13, 23, 15-16, 24-25). The North Dakota Supreme Court has explicitly rejected the type of hairsplitting analysis the hearing officer engaged in. While the contours of the discussion at the jail may been somewhat vague, this state's highest court has said:

> We refuse to indulge in a case-by-case search for magical words which must be uttered by an arrestee as a prerequisite to being given an opportunity to consult an attorney. Rather, we hold that if a DUI arrestee, upon being asked to submit to a chemical test, responds with any mention of a need for an attorney-to see one, to talk to one, to have one, etc.-the failure to allow the arrestee a reasonable opportunity to contact an attorney prevents the revocation of his license for refusal to take the test.

Baillie, 522 N.W.2d at 750). In the case at bar, it is clear Kasowski did ask for a lawyer and that he was not given an opportunity to speak to one. The fact is that Officer Williams had obvious knowledge that Kasowski wanted to speak to an attorney early in the custodial process and he did absolutely nothing to provide a reasonable opportunity to comply with his requests.

[¶ 27] The hearing officer concluded that Kasowski's statement that he would not be able to contact an attorney at that time of night constituted a waiver of his request to speak to an attorney prior to the submission of a chemical test. (T. at 31-32). Regardless of the nature of the wording of the request, considering the facts presented in an objective manner Kasowski never told Williams that he changed his mind regarding his prior requests for an attorney. Williams still knew that Kasowski wanted to speak to an attorney, and Williams' actions of not initiating the field sobriety tests, as well as commenting about his speaking to an attorney, strengthens the notion that he had an obligation to provide Kasowski with a reasonable opportunity to speak to an attorney.

[¶ 28] The law is clear that under these circumstances the failure to take the chemical test cannot be construed as a refusal as Kasowski was not afforded a reasonable opportunity to consult with an attorney before deciding not to take the chemical test.

CONCLUSION

[¶ 29] For all of the foregoing reasons, Jonathan Thomas Kasowski asks this Court to reverse the lower court's ruling affirming the hearing officer's decision and to order the reinstatement of Kasowski's driving privileges.

Dated this the 25th day of August, 2010.

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[¶ 30] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Assistant Attorney General Douglas Anderson, pursuant to Administrative Order 14 on the 25th day of August, 2010. Specifically, the preceding Brief of Appellant and the Appendix to Brief of Appellant were electronically filed and served as follows:

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/S/ Jesse N. Lange
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