20110162

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kristi J. Burgess,	)	STATE OF NORTH DAKOTA
	)	
Appellee,	)	**Supreme Ct. No. 20110162**
	)	
v.	)	**District Ct. No. 51-10-C-1769**
	)	
North Dakota Department of Transportation,	)	
	)	
Appellant.	)	

APPEAL FROM THE DISTRICT COURT
WARD COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

HONORABLE DOUGLAS L. MATTSON

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

Under Holte v. N.D. State Highway Comm'r, 436 N.W.2d 250 (N.D. 1989), if a driver voluntarily submits to a chemical blood test requested by law enforcement the results are admissible in a civil proceeding even if a driver's limited statutory right to counsel has been denied. Burgess voluntarily submitted to a blood test following her arrest for DUI even though it was undisputed she requested to speak with an attorney prior to her arrest. Should Burgess's driving privileges be suspended due to the blood test results?

STATEMENT OF CASE

Officer Shane Haug of the Minot Police Department arrested Burgess for driving a vehicle while under the influence of intoxicating liquor on September 11, 2010. Appendix ("App.") 25. Officer Haug issued a Report and Notice, which included a temporary operator's permit, to Burgess after a blood test indicated Burgess had an alcohol concentration of .24 percent by weight. App. 25.

Burgess requested an administrative hearing. Transcript ("Tr.") Exhibit ("Ex.") 1f. The hearing occurred on October 20, 2010. Tr. Ex. 2. Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Burgess's driving privileges for two years. App. 24. Burgess appealed to the Ward County District Court. App. 26-27. Judge Douglas L. Mattson reversed the hearing officer's decision. App. 28-33. The Order for Judgment was filed on April 7, 2010 and Judgment was entered the same day. App. 34-35. The Department appealed from the Judgment to this Court. App. 36. The Department asks this Court to reverse the Judgment of the

Ward County District Court and affirm the administrative suspension of Burgess's driving privileges for two years.

STATEMENT OF FACTS

On September 11, 2010, at 11:19 p.m., Minot Police Officer Shane Haug ("Officer Haug") arrived at the scene of a two-vehicle collision in Minot, North Dakota. App. 4-5. Burgess was the registered owner and driver of one of the vehicles in the accident. App. 6. Burgess told the officer the accident happened 15 minutes earlier. App. 6. Burgess smelled of an alcoholic beverage and exhibited poor balance. App. 6. Officer Haug asked Burgess how the accident occurred and Burgess "shook her head side to side, kind of like she didn't know what had happened." App. 7. Officer Haug asked Burgess if she felt the alcohol she had consumed that evening had affected her ability to drive and Burgess said no. App. 8-9. Officer Haug asked Burgess how much she had to drink and Burgess stated she did not want to answer any more questions and told Officer Haug she wanted to speak with an attorney. App. 9.

Officer Haug recited the implied consent advisory and asked Burgess to submit to an S-D2 onsite screening test. App. 9. Burgess agreed and the test results showed she was above the legal limit. App. 7, 11.

Officer Haug advised Burgess she was being placed under arrest for driving under the influence of alcohol ("DUI"). App. 11. Officer Haug transported Burgess to Trinity Hospital. App. 11. According to Officer Haug, Burgess did not request to speak with an attorney after being placed under arrest, even after he

recited the implied consent advisory and requested she submit to a chemical blood draw. App. 15.

Burgess testified that she believed she requested to speak with an attorney after she was placed under arrest. App. 19. Officer Haug, however, testified:

> Well, [Burgess] certainly did not request an attorney after I read the implied consent or placed her under arrest. If ... if she had, I would have accommodated that, and that's pretty clear to my job, as far as my responsibilities once they're under arrest; and I'm ... I'm aware of the case law as far as the ... the blood test is concerned with, if they request an attorney, to make an accommodation to provide them with one. So if ... if she had asked for an attorney, I would have made an accommodation to provide her with one.

App. 21.

Burgess agreed to submit to the blood test. App. 11, 20. The blood test was performed in accordance with the approved method and the results showed Burgess's blood alcohol concentration to be .24 percent by weight. Tr. Ex. 1d. Burgess testified she understood she needed to submit to the blood draw because of the implied consent advisory. App. 20.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

In his Order reversing the hearing officer's decision, Judge Mattson noted there was a factual dispute regarding whether Burgess requested to speak with an attorney after she was arrested, and that the Hearing Officer did not make a specific finding in that regard. App. 32. Judge Mattson stated as follows:

> The Hearing Officer did not make a specific finding on whether Burgess made a request to talk to an attorney after her arrest and before she submitted to the blood test. In his Findings of Fact, the Hearing Officer stated "[Burgess] requested she be allowed to talk to an attorney before answering any questions," and in his

> Conclusions of Law, the Hearing Officer stated that Burgess had no right to consult with an attorney before submitting to the S-D2 test and that the blood test was fairly administered and the test results were admissible.
>
> Arguing that *Leno*, in effect, requires someone to continue to request to speak to counsel until such time that they state their request at the right stage of the proceedings, Burgess urged the Court to find that the chemical test results were inadmissible and stated her belief that it was time to readdress the Supreme Court's decisions in *Leno* and *Holte*.
>
> There is no dispute that Burgess asked to talk to an attorney before her arrest. There is a dispute as to whether she requested to talk to an attorney after her arrest and before she submitted to the blood test. That fact goes to the heart of the case, and the Hearing Office [sic] did not make a specific finding.
>
> The Court, therefore, finds that the Hearing Officer's findings of fact do not sufficiently address the evidence presented to the agency by the appellant. N.D.C.C. § 28-32-46(7).
>
> IT IS, THEREFORE, ADJUDGED, ORDERED, AND DECREED that the decision of the Department of Transportation is REVERSED.

App. 32-33.

STANDARD OF REVIEW

"An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C." McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). "This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision." Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993). "However, the district court's analysis is entitled to respect if its

reasoning is sound." Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

This Court's review "is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency's decision is supported by the conclusions of law." McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep't of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder's decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." Id. (citation omitted).

LAW AND ARGUMENT

Burgess was not denied a reasonable opportunity to consult an attorney prior to refusing to submit to the chemical test for intoxication.

This Court has held that "a person arrested for driving under the influence of intoxicating liquor has a qualified statutory right to consult with an attorney before deciding whether to submit to a chemical test." City of Mandan v. Leno, 2000 ND 184, ¶ 8, 618 N.W.2d 161 (citing Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 290 (N.D. 1987)). "[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." Kuntz, 405 N.W.2d at 290. "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.

The "right of an arrested person to have a reasonable opportunity to consult with an attorney before taking a chemical test is a statutory right based on N.D.C.C. § 29-05-20." Leno, 2000 ND 184 at ¶ 9 (citing Kuntz, 405 N.W.2d at 287.) "[T]his limited right to consult with an attorney is derived solely from the statute, and not the state or federal constitutions." Id. (external citations omitted.) "[T]he limited statutory right for a reasonable opportunity to consult with an attorney attaches only after arrest." Id. at ¶ 1 (emphasis added) (citing N.D.C.C. § 29-05-20).

The issue of whether a reasonable opportunity to consult an attorney has been provided to an arrestee properly arises in those circumstances in which the request has been made in direct response to the person having been asked to submit to a chemical test and for purposes of deciding whether to take the chemical test, rather than in the investigative setting preceding that request. In Baillie v. Moore, 522 N.W.2d 748, 749 (N.D. 1994) after being "asked . . . to submit to an Intoxilyzer examination . . . . Baillie responded that he would not take the test without an attorney." This Court held "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." Id. at 750 (emphasis added). "A

refusal to take the test under these conditions is not the affirmative refusal necessary to revoke a license under § 39-20-04, N.D.C.C." Id. (emphasis added). See also Lies v. Dir., N.D. Dep't of Transp., 2008 ND 30, ¶ 3, 744 N.W.2d 783 ("Lies stated he would not submit to testing until he spoke with his lawyer," after "Officer Roehrich recited to Lies the implied-consent advisory and asked Lies if he would submit to a blood test."); State v. Pace, 2006 ND 98, ¶ 2, 713 N.W.2d 535 ("Officer Hagel asked Pace for consent to a blood draw" . . . . Pace responded, 'I don't know how to answer that' and asked if he could speak to his attorney."); Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 2, 622 N.W.2d 180 ("Following the arrest, Officer Sullivan recited the implied consent advisory and asked Wetzel to submit to a blood-alcohol concentration test. . . . Officer Sullivan again asked Wetzel if he would submit to a blood test. Wetzel said he wanted to talk to an attorney."); Ehrlich v. Backes, 477 N.W.2d 211, 212 (N.D. 1991) (law enforcement officer "asked [Ehrlich] to take a chemical test of her blood to determine its blood-alcohol content. Ehrlich said that she would not take the test unless an attorney was present."); Kuntz, 405 N.W.2d at 286 (Kuntz requested an opportunity to consult his attorney after being requested to submit to an Intoxilyzer test). But cf. Leno, ¶¶ 4-5 (when "asked if he would consent to an on-site pre-breathalyzer screening test. . . . Leno asked if he could speak to his attorney . . ." . . . . When "asked if he would submit to a blood test at the Law Enforcement Center . . . . [t]he officer testified Leno did not again ask to speak to his attorney at this point.").

In this case, Burgess argued she was denied her qualified right to speak with an attorney. Burgess's argument is unpersuasive on two levels. First, Burgess had no right to speak with an attorney prior to her arrest. Indeed, as noted above, this limited statutory right-to-counsel attaches after arrest. Second, even if Burgess was deprived of this limited statutory right, she is not entitled to the reinstatement of her driving privileges because this Court has held that chemical test results are admissible at a civil administrative implied consent hearing even if it is undisputed the arrestee's limited statutory right to counsel was violated. Holte v. N.D. State Highway Comm'r, 436 N.W.2d 250, 252 (N.D. 1989).

In this case, it is undisputed that Burgess asked to speak to an attorney prior to her arrest. Officer Haug testified Burgess asked to speak to an attorney prior to her arrest. App. 9. This request occurred after Officer Haug asked Burgess about how much she had to drink. Id. Prior to this request, Officer Haug had asked Burgess how the accident occurred and whether she felt the alcohol she had consumed had affected her ability to drive. App. 7. Officer Haug testified he did not ask Burgess any more questions after she requested an attorney and instead moved onto a different part of the investigation. App. 9, 22. Officer Haug then read the implied consent advisory and requested Burgess submit to an S-D2 onsite screening test. App. 9. Burgess agreed. App. 7. The onsite screening result showed Burgess's blood alcohol level to be above the legal limit. App. 11. Officer Haug then arrested Burgess for driving under the influence. Id.

What was disputed at the hearing was whether Burgess requested to speak with an attorney after being placed under arrest. According to Officer Haug, Burgess did not mention wanting to speak to an attorney again after her initial request which had occurred prior to Officer Haug reciting the implied consent advisory and asking Burgess to submit to the onsite screening test. App. 14-15. Burgess on the other hand testified she "believed" she had asked to speak with an attorney after she was arrested. App. 19. She admitted, however, that she was not 100% sure. Id. Burgess also acknowledged she did not mention an attorney once she arrived at the hospital for the blood draw. App. 20. On rebuttal, Officer Haug disagreed with Burgess's testimony and testified he was certain Burgess did not request an attorney after she was arrested. App. 21.

The hearing officer did not make an explicit finding regarding whether Burgess made a request to speak with an attorney after arrest, but did find that Burgess "voluntarily agreed to the blood draw." App. 24, l. 2. The hearing officer further concluded that under the reasoning in Holte Burgess's "blood test was fairly administered, the test results are admissible, and the results mandate suspension of Burgess' driving privileges." App. 24, ll. 20-22.

On appeal to the Ward County District Court Burgess admitted that, under Holte, her blood test results were admissible even if her limited statutory right to counsel was violated. App. i, Doc. 8, p. 2. Burgess simply claimed the holdings in Holte and Leno needed to be readdressed. Id. While Burgess did explain why

she believed Leno was improperly decided[1], she did not advance a reason for why Holte was decided incorrectly. Id.

This Court's holding in Holte was the result of its conclusion not to apply an exclusionary rule in a civil, administrative proceeding. The Court explained its conclusion, as follows:

> 'The benefit of using reliable information of intoxication in license revocation proceedings, even when that evidence is inadmissible in criminal proceedings, outweighs the possible benefit of applying the exclusionary rule to deter unlawful conduct. Consequently, the exclusionary rule formulated under the fourth and fourteenth amendments was inapplicable in this license revocation proceeding.'

Holte, 436 N.W.2d at 252 (quoting Westendorf v. Iowa Dep't of Transp., 400 N.W.2d 553, 557 (N.D. 1987)).

By way of contrast, in Kuntz v. State Highway Com'r, 405 N.W.2d 285 (N.D. 1987), prior to the Holte decision, a majority of this Court held as follows:

> We hold that if 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 (emphasis added).

On the face of it, the Holte and Kuntz decisions may appear to be somewhat at odds. In other words, the question arises why, on the one hand, should one arrestee's driving privileges be suspended under Holte when the

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[1] Burgess argued it would be an idle act for a DUI arrestee to have to re-request to speak with an attorney after arrest if the first request to speak with an attorney prior to arrest was ignored by law enforcement.

arrestee submits to a chemical test after the arrestee's request to speak with an attorney is denied when, on the other hand, another arrestee's driving privileges cannot be revoked under Kuntz when the arrestee declines to submit to a chemical test after the arrestee's request to speak with an attorney is denied?

The answer is that, as noted above, this Court declined to apply an exclusionary rule in Holte and the Court was not confronted with the question of whether to apply an exclusionary rule in Kuntz. Now-Chief Justice VandeWalle explained the distinction in the majority opinion in Holte as follows:

> Kuntz involved the narrow issue of what constitutes a refusal and did not involve the suppression of evidence in an administrative hearing. The majority opinion [in Kuntz] specifically noted that '[w]e do not exclude any evidence.' Id. at 286. n. 1.

Holte, 436 N.W.2d at 251. In other words, without having to consider the exclusionary rule, a majority concluded in Kuntz that, as a matter of law, a refusal justifying revocation of driving privileges does not occur when an arrestee is denied the limited statutory right to counsel. On the other hand, a majority concluded that chemical test results are admissible in a civil, administrative implied consent proceeding, even when the arrestee was denied the limited statutory right to counsel, because the exclusionary rule is inapplicable in civil proceedings.

Here, even if Burgess asked to speak with an attorney after arrest and prior to the chemical blood test, she voluntarily submitted to the test. This is not a case like Kuntz, or Baillie v. Moore, 522 N.W.2d 748 (N.D. 1994), where the driver *refused* to submit to the requested chemical test after having been denied the opportunity to contact an attorney. In Kuntz and Baillie, this Court held 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." Kuntz, 405 N.W.2d at 290; Baillie, 522 N.W.2d at 751 (quoting Kuntz) (emphasis added). The key difference from Holte and Kuntz/Baillie is the driver in Holte submitted to a chemical test even though he allegedly was denied his statutory right to consult with an attorney. Here, even if Burgess's statutory right to consult with counsel was denied, she *submitted* to the blood test. Applying Holte, the Ward County District Court's decision should be reversed and the hearing officer's decision suspending Burgess's driving privileges should be affirmed.

Even if this Court were to overrule Holte and find the exclusionary rule to apply in civil administrative hearings, this Court should not simply affirm the district court's decision but should remand the matter back to the hearing officer for a determination of whether Burgess requested to consult with an attorney following her arrest. Such a finding was not made by the hearing officer because clearly established precedent in Holte made such a finding unnecessary. If it is determined on remand that Burgess did not make an attorney request following arrest then the suspension of Burgess's driving privileges would be supported by this Court's holding in Leno.

Burgess asserts that Leno, however, needs to be revisited, arguing that it would be an idle act for her to have to re-request to speak with an attorney after arrest when her first request to speak with an attorney prior to arrest was ignored by the law enforcement officer. App. i, Doc. 8. at p. 2. Burgess's argument is factually and legally erroneous.

While it is undisputed that Burgess made a request to speak to an attorney prior to her arrest, Burgess's request was not associated or tied to a request for a chemical test but was associated with the officer asking her questions about alcohol consumption. Officer Haug testified he asked Burgess if she felt the alcohol she had consumed that evening had affected her ability to drive and Burgess said no. App. 8-9. Officer Haug asked Burgess how much she had to drink and Burgess stated she did not want to answer any more questions and told Officer Haug she wanted to speak with an attorney. App. 9. At this point, Burgess was not faced with the decision of whether to submit to a chemical test and whether, in making that specific decision, she desired to consult an attorney. In fact, Burgess was not even faced with a decision of whether she would submit to an onsite screening test at that point in time. It was not until afterwards that Officer Haug read the implied advisory and requested Burgess submit to an S-D2 onsite screening test. App. 9. And there is no evidence showing Burgess requested to speak with an attorney for purposes of deciding whether she would submit to the onsite screening test.

More importantly, the weight of the evidence appears to show that Burgess did not request to speak with an attorney after her arrest in connection with Officer Haug's request for a chemical blood test. While Burgess alleges she asked to speak to an attorney after arrest she admitted she was not certain. App. 19. Burgess also acknowledged she did not mention wanting to speak to an attorney at the hospital where she voluntarily submitted to the blood draw. App. 20. On redirect, Officer Haug testified he was certain Burgess did not

request an attorney after her arrest and indicated that if she made such a request he would have let her attempt to contact an attorney. App. 21. Therefore, it is more likely the hearing officer would determine that Burgess did not make a request for an attorney after arrest. This is particularly true when considering that Burgess's blood test results revealed her blood alcohol level that night was three times the legal limit.

Simply because a person makes an attorney request pre-arrest does not make post-arrest request an idle act. The Leno court explained there are critical differences between pre-arrest and post-arrest requests for counsel which "destroy the basis for extending the limited statutory right to counsel to attach prior to arrest." 2000 ND 184 at ¶ 11. This is so because a pre-arrest request to consult an attorney and the chemical test requested at that stage of investigation is not an ultimate evidentiary test, but rather, only an onsite screening test not admissible as evidence. Further, the Court indicated that "[t]he first part of the rationale for establishing this limited statutory right for a person arrested for DUI to consult with an attorney prior to the chemical test was to alleviate the 'strange circumstances' of the confusion specific to the implied consent situation." Id. at ¶ 12. The strange circumstance described occurs when a person arrested has been given the Miranda warning, which includes words of assurance of a right to counsel and then immediately thereafter is read the implied consent advisory by law enforcement which requires consent or refusal without the opportunity to consult with an attorney. Such confusion is only unique to post-arrest situations. Id. The rationale of the Leno decision is sound and should not be modified.

CONCLUSION

The Department respectfully requests that this Court reverse the judgment of the Ward County District Court and affirm the Department's decision suspending Burgess's driving privileges for two years.

Dated this 11th day of July, 2011.

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