

**IN THE SUPREME COURT
IN THE STATE OF NORTH DAKOTA**

Spence William Koenig

Appellant,

v.

North Dakota Department of Transportation

Appellee.

**Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Gail Hagerty**

**SUPREME COURT NO. 20110249
BURLEIGH COUNTY NO. 08-11-C-00581**

BRIEF OF APPELLANT

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2. STATEMENT OF ISSUE

ISSUE: Whether Koenig was denied an opportunity to obtain an independent test, when he was held in custody for an additional three hours and fifteen minutes with no attempt or offer to take him to the nearby hospital for a blood draw, after he had requested an independent test and also made sufficient arrangements with the hospital for an independent test.

3. STATEMENT OF THE CASE

NATURE OF CASE

4. The case on appeal is a civil case wherein Spence William Koenig's driving privileges were suspended by the North Dakota Department of Transportation for a period of 91 days.

COURSE OF PROCEEDINGS

5. Koenig was issued a Report and Notice on February 7, 2011, regarding the possible suspension of his driving privileges. (Exhibit 1(b), App. p. 4). Koenig timely requested a hearing which was held on February 25, 2011. (App. p. 5; also see Hearing Transcript of February 25, 2011).
6. Koenig's driving privileges were suspended for a period of 91 days on February 28, 2011. (Hearing Officer's Decision, App. p. 6). Koenig timely filed his Notice of Appeal and Specifications of Error with the Burleigh Co. District Court on March 7, 2011. (App. pp. 8-9).

DISPOSITION IN THE COURT BELOW

7. On July 21, 2011, the Hon. Gail Hagerty issued an Order affirming the hearing officer's decision. (App. pp. 10-13). Order for Judgment was entered on August 24, 2011, (App. p. 14), and Judgment was entered on August 24, 2011. (App. p. 15).

Notice of Entry of Judgment was sent on August 24, 2011. (App. p. 16). Koenig timely filed his Notice of Appeal on August 24, 2011. (App. p. 17).

8. STATEMENT OF FACTS

9. On January 16, 2011, Trooper Rost stopped a vehicle for speeding and expired registration tabs. (Hearing Officer's Decision, App. p. 6). The time of driving was recorded at 12:35 a.m. (Exhibit 1(b), App. p. 4). The driver, Spence William Koenig, was subsequently arrested for DUI. (Hearing Officer's Decision, App. p. 6). The time of arrest was recorded at 12:47 a.m. (Exhibit 1(b), App. p. 4). Koenig consented to blood testing to determine his alcohol concentration after the arrest. (Hearing Officer's Decision, App. p. 6). Koenig was allowed to phone an attorney, and then Koenig and Rost went up to the jail. (Tr. p. 20, lines 6-8).
10. Either just before or as Rost was removing the handcuffs, Koenig said that he would like an independent test. (Tr. p. 20, lines 9-11). Koeng recalls asking a couple of times to Rost. (Tr. p. 31, lines 8-9). Rost responded that Koenig was being released on a promise to appear and that he was free to go as soon as someone sober over the age of 18 came to get him. (Tr. p. 21, lines 5-24, Hearing Officer's Decision, App. p. 6). Rost advised Koenig that whoever came to pick him up, they could bring him over and they could take him wherever he wanted to get a blood test. (Tr. p. 22, lines 3-5). A blood test was then conducted at Rost's direction on Koenig at the Morton County Law Enforcement Center in Mandan. (Tr. p. 10, lines 4-8). The time of the blood draw was recorded at 1:21 a.m. (Exhibit 1(b), App. p. 4).
11. Koenig was then placed in custody at the Morton County Correctional Center until someone came to sign for him. (Tr. p. 22, lines 13-14; p. 23, lines 21-23). Chris

Waller, a correctional officer at the Morton County Law Enforcement Center, testified that Rost brought Koenig into the custody of the jail. (Tr. p. 23, lines 20-23). Koenig was in custody until someone could come and pick him up. (Tr. p. 24, lines 22-23).

12. While in custody at the jail, and about 10-15 minutes after Rost obtained his blood test, Koenig made a request around 1:46 a.m. to Waller that he wanted an independent blood test. (Tr. p. 25, lines 3-25). Waller stood in the booking room while Koenig asked Waller if he could call St. Alexius Hospital. (Tr. p. 26, lines 6-10). Waller dialed the phone number to St. Alexius Hospital, and Koenig then spoke to the hospital, asked them what he needed to do to get an independent blood test, and made arrangements for a blood test at the hospital. (Tr. p. 26, lines 13-25).
13. Koenig was setting up an appointment at the hospital. (Tr. p. 26, lines on the phone. (Tr. p. 26, line 25; p. 27, lines 1-2). Koenig was talking to the nurse on call at St. Alexius and was told that if he could get over there they would do an independent blood draw. (Tr. p. 32, lines 4-10). Koenig told Waller that he was told that he just needed to come in to the hospital and that they would do the blood draw. (Tr. p. 27, lines 1-8).
14. After this, Waller placed Koenig in a holding cell because Koenig said that his girlfriend was on her way to pick him up. (Tr. p. 27, lines 9-12). No one ever picked up Koenig and he remained in custody in the holding cell until 5:00 in the morning when he was able to leave on his own. (Tr. p. 27, 13-19; p. 33, lines 10-17).
15. Waller testified that he knew that Koenig wanted to do an independent test. (Tr. p. 27, line 25; p. 28, lines 1-3). Waller testified that he knew that Koenig had made

arrangements for an independent blood test and that Koenig was in his custody. (Tr. p. 28, lines 3-6; p. 29, lines 17-19). Waller knew that it was Koenig's desire to get a test and that he was hoping to get one. (Tr. p. 29, lines 20-22). Waller also came to realize that the Koenig's requested ride was not coming. (Tr. p. 28, lines 7-10). Waller testified that no one ever took Koenig to the hospital. (Tr. p. 28, lines 22-25).

16. Koenig never requested a ride or transportation from the jail staff to the hospital, (Tr. p. 29, lines 5-8, 16), but he did tell Waller that he needed to get over there to get the test done. (Tr. p. 33, lines 1-4). Nobody from the jail ever offered to take Koenig to the hospital for the blood draw. (Tr. p. 33, lines 18-20). Waller told Koenig that he would have to wait in a holding cell until he could arrange for a ride or someone could pick him up. (Tr. p. 33, lines 4-9). Koenig testified that he was hoping that someone would pick him up so that he would get a ride to the hospital. (Tr. p. 31, lines 21-24; p. 34, lines 6-9). Instead, he was held in custody until 5:00 a.m. (Tr. p. 33, lines 12-13).
17. At the administrative hearing, the Department offered Exhibit 1 into evidence and Koenig objected, arguing that he was deprived of his statutory right to an independent blood test and that therefore the State's test should be suppressed. (Tr. p. 12, lines 18-23; p. 13, lines 2-4). The hearing officer received Exhibit 1 into the record, which contained a blood test with a finding of .12 percent. (Tr. p. 13, lines 5-12; Exhibits 1(b)-1(e)).
18. Koenig argued that he was held in custody and made arrangements for an independent blood test, and that was denied the right to an independent blood test provided by N.D.C.C. § 39-20-02 and caselaw. (Tr. p. 34, line 20 - p. 37, line 23).

The hearing officer found that “Koenig was allowed a reasonable opportunity to obtain an independent test” and suspended Koenig for 91 days. (Hearing Officer’s Decision, App. p. 6).

19. STANDARD OF REVIEW

20. This Court's review of an administrative suspension of a driver's license is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. *Lange v. North Dakota Dept. of Transp.*, 2010 ND 201, ¶ 5, 790 N.W.2d 28. This Court reviews that 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). However, “[I]f sound, the district court's analysis is entitled to respect.” *Aamodt v. North Dakota Dept. Of Transp.*, 2004 ND 134, 682 N.W.2d 308, ¶12. This Court exercises a limited review in appeals involving driver's license suspensions or revocations, and affirms the agency's decision unless:

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.

Lange, supra at ¶ 5 (citing N.D.C.C. § 28-32-46).

21. “[T]he ultimate conclusion of whether [the] facts meet the legal standard, rising to

the level of a reasonable and articulable suspicion, is a question of law which is fully reviewable on appeal.” *Salter v. North Dakota Dept. of Transp.*, 505 N.W.2d 111, 112 (N.D.1993).

22. LAW AND ARGUMENT

ISSUE: Whether Koenig was denied an opportunity to obtain an independent test, when he was held in custody for an additional three hours and fifteen minutes with no attempt or offer to take him to the nearby hospital for a blood draw, after he had requested an independent test and also made sufficient arrangements with the hospital for an independent test.

23. Under N.D.C.C. § 39-20-01, law enforcement dictates which type of chemical test for intoxication will be administered and where the test will be conducted. *Lange, supra* at ¶ 6. An individual arrested for intoxication may have a medically qualified individual of their choosing, and at the driver's expense, administer an additional chemical test for intoxication, which is independent of the test administered by law enforcement. *Lange, supra* at ¶ 6 (citing N.D.C.C. § 39-20-02). The results of chemical tests administered at law enforcement direction may be suppressed, or charges may be dismissed, where an arrestee is denied the right to an independent chemical test. *Lange, supra* at ¶ 6. Chemical test results for intoxication will not be excluded where an arrestee makes no effort to obtain an additional independent test or some independent factor prevents test results from being obtained. *Lange, supra* at ¶ 6.
24. Whether an arrestee has made a reasonable request for an independent test, and whether law enforcement has denied the arrestee's opportunity to obtain an independent test, depends upon the totality of the circumstances. *Lange, supra* at ¶

7. Law enforcement officers do not have a duty to inform an arrestee of the availability of an independent test and generally do not need to assist an arrestee in obtaining another test. *Id.*

25. However, in *State v. Messmer*, 481 N.W.2d 236 N.D.1992), this Court first addressed the question of what police must do when an independent test is requested by a person in custody. *Id.* at 239. This Court held that, giving an accused access to a telephone may not always, in all circumstances, satisfy the minimal requirements of reasonableness, and police may have a duty to further accommodate an accused's reasonable request for an independent test by a person of his own choosing. *Messmer, supra* at 240. In *Luebke v. North Dakota Department of Transportation*, 1998 ND 110, 579 N.W.2d 189, this Court further explained:

before law officers must do more than allow telephone access, a driver must show he had made arrangements [for a test] with a qualified person of his choosing, that the test would be made if he came to the hospital, that he so informed the personnel at the jail where he was under arrest...

Id. at ¶ 13.

26. Access to a telephone will not be a reasonable opportunity to secure an independent test in all circumstances, such as where an arrestee has done more than made a mere request for an independent test. *Lange, supra* at ¶ 13. In *Luebke*, this Court reversed with instructions to remand to the agency for findings on whether Luebke had made sufficient arrangements for an independent test at the hospital. *Id.* at ¶ 17.
27. For arrestees held in custody, this Court has consistently looked to whether the arrestee has made arrangements for an independent test. In *Lange, supra* at ¶14, Lange asked if she could go to a hospital to take a blood test, and this Court found

that there was no indication Lange made or attempted to make arrangements for an independent test. In *Lock v. Moore*, 541 N.W.2d 84 (N.D.1995), this Court found that, with unlimited access to a telephone, Lock made only two telephone calls, one to his wife and another to a friend, but did not make arrangements for a test. *Id.* at 88. “He could of and should have used the opportunity to make arrangements...and failed to pursue his opportunity when he did not even ask Officer Lincoln for further information regarding arrangements.” *Lock, supra* at 88. In *City of Grand Forks v. Risser*, 512 N.W.2d 462, 464 (N.D.1994), this Court found that Risser made some telephone calls, but none were to a medical facility to arrange for a blood test.

28. Here, Koenig said to Trooper Rost that he would like an independent test and was told that whoever came to pick him up could take him wherever he wanted to get a blood test. He was then placed in custody at the Morton County Correctional Center until someone came to sign for him. While in custody at the jail, and about 10-15 minutes after Rost obtained his blood test, Koenig made a request that he wanted an independent blood test and asked Correctional Officer Waller if he could call St. Alexius Hospital. Waller dialed the phone number to St. Alexius Hospital, and Koenig then spoke to the nurse on call and asked what he needed to do to get an independent blood test, and made arrangements for a blood test at the hospital. Koenig set up an appointment at the hospital and told Waller that he was told that he just needed to come in to the hospital and that they would do the blood draw, and he also told Waller that he needed to get over to the hospital to get the test done.
29. It is unreasonable to fault Koenig for failing to specifically request a ride to the hospital when that step is not required under caselaw. Moreover, Waller knew that

Koenig wanted to do an independent test, knew that Koenig had made arrangements for an independent blood test, knew that it was Koenig's desire to get a test and that he was hoping to get one, *was told by Koenig that he needed to get over to the hospital and get the test done*, and knew that Koenig was in his custody, and also came to realize that Koenig's requested ride was not coming. (emphasis added). Indeed, the district court erred in finding that, "[T]here was no way officers could have know (sic) Koenig's girlfriend would not pick him up," (Order, p. 3, App. p. 12), given Waller's testimony that he came to realize that the Koenig's requested ride was not coming. (Tr. p. 28, lines 7-10).

30. The Department misinterprets *State v. Messner, supra*, and *Luebke v. N.D. Dep't of Transp., supra*, in arguing there is no statutory right to police assistance in obtaining an independent test. Rather, in *Messmer* this Court held that, when an independent test is requested by a person in custody, giving an accused access to a telephone may not always, in all circumstances, satisfy the minimal requirements of reasonableness, and police may have a duty to further accommodate an accused's reasonable request for an independent test by a person of his own choosing. *Messmer, supra* at 240.
31. The Department also argues that *Luebke* was based upon an affirmative duty from a Highway Patrol Manual, but the manual was not part of the equation in this Court's decision. The *Luebke* Court again quoted *Harper v. State*, 164 Ga.App. 230, 296 S.E.2d 782, 783 (1982) and explained that, before law officers must do more than allow telephone access, a driver must show he had made arrangements [for a test] with a qualified person of his choosing, that the test would be made if he came to the hospital, that he so informed the personnel at the jail where he was under arrest. *Id.*

at ¶ 13.

32. In *Luebeke*, the statute created the affirmative duty for an individual held in custody, not the Highway Patrol Manual. The manual doesn't create the legal duty, and the only consideration given such a manual is whether the procedure used by the officer is sufficient under existing legal duties. See *State v. Everson*, 474 N.W.2d 695, 699 (N.D.1991)(the procedure, in accordance with the Highway Patrol Manual and used by the officer, was sufficiently systematic to pass constitutional muster).

33. In *Luebke*, the arresting officer took the position Luebke was not in his custody at the time of his request and therefore he had no duty to transport Luebke. *Id.* at ¶ 14. The Sheriff's office also claimed that they had no duty to transport Luebke because the applicable policies placed that duty on the arresting officer. *Id.* at ¶ 14. This Court rejected that argument and held:

But the effect of the shift of custody from the arresting officer to other officers has no effect on our review in this case. The duty not to hinder or prevent a driver's reasonable attempts to have an independent test applies to all custodial officers, not to the arresting officer only.

Id. at ¶ 14.

34. Here, while in custody at the jail, Koenig set up an appointment at the hospital and told Correctional Officer Waller that he was told that he just needed to come in to the hospital and that they would do the blood draw, and he also told Waller that he needed to get over to the hospital to get the test done. Koenig did each and every step required of him under our caselaw to secure an independent test while being held in custody.

35. Koenig was deprived of his statutory right to an independent test when he was held

in custody for an additional three hours and fifteen minutes with no offer to take him to the hospital for a blood draw. At some point, the responsibility of securing Koenig's right to an independent blood test became that of law enforcement holding him in custody. "The duty not to hinder or prevent a driver's reasonable attempts to have an independent test applies to all custodial officers..." *Luebke* at ¶ 14. Moreover, as was stated in *State v. Dressler*, 433 N.W.2d 549, 551 (N.D.App.1989), the probative value of a blood test diminishes with the passage of time, and in a short period of time an intoxicated person may sober up sufficiently to negate the materiality of a blood test where the sample has not been timely withdrawn.

36. Despite this, no one ever took Koenig to the hospital nor ever offered to take Koenig to the hospital for the blood draw. He was simply advised that he would have to wait in a holding cell until he could arrange for a ride or someone could pick him up, and remained there in custody until 5:00 a.m. At some point early on, Waller should have recognized that Koenig needed a ride to the hospital and that he should be taken to the hospital for his requested independent test which he made arrangements for. He candidly admitted that he came to realize that Koenig's requested ride was not coming.
37. It was a gross deprivation of Koenig's statutory right to an independent test to hold Koenig in custody for an additional three hours and fifteen minutes with no attempt or offer to take him to the hospital for a blood draw. Holding him in custody for over three hours was inexcusable and violated his statutory right to obtain an independent blood test.

38. CONCLUSION AND PRAYER FOR RELIEF

39. WHEREFORE, the Appellant, Spence William Koenig, by and through his attorney, Chad R. McCabe, respectfully prays that this Court will reverse the judgment affirming the administrative suspension of his driving privileges.
40. Dated this 18th day of October, 2011.

/s/ Chad R. McCabe
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41. CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by electronic transmission on this 18th day of October, 2011, to the following:

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/s/ Chad R. McCabe
CHAD R. MCCABE