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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Paul Alfred Schock, Plaintiff/Appellant, v. North Dakota Department of Transportation, Defendant/Appellee.	)	Supreme Court No. 20110254 Mercer County No. 29-2011-CV-01084

REPLY BRIEF OF APPELLANT

Appeal from Judgment, dated and filed August 25, 2011,

Entered Upon the July 28, 2011, Order of Denial (of Reconsideration), and

the July 20, 2011, Order on Appeal, affirming the Hearing Officer's Decision,

all filed in Mercer County District Court

South Central Judicial District

The Honorable Bruce B. Haskell

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[¶2] LAW AND ARGUMENT

A. The evidence presented did not establish that the chemical test was performed within two (2) hours of driving

[¶3] The Department suggests that "[t]he test record shows the test beginning … at 1:56 a.m." *See* Brief of Appellee at 11. However, this is pure conjecture on the part of the Department. There was no evidence presented that the test began at 1:56 a.m. We could speculate that the 1:56 figure means that the breath machine was turned on at 1:56, or that a technician at the police station started a series of calibration tests at 1:56, or that the standard solution was prepared at 1:56, or a number of other hypothesized thoughts. However, we just don't know. Indeed, we don't even know whether the 1:56 figure denotes a reading of time. There was no testimony about the 1:56 figure. Because there was no testimony regarding the 1:56 figure, it would not be proper for this Court to employ post-hearing conjecture to create evidence (like the Department requests) that was never presented and never subject to challenge at the administrative hearing.

[¶4] Furthermore, if this breath testing machine, a marvel of science, adjusted for daylight savings time, then one would think the readout on the test record would indicate that the times had been adjusted. There is no evidence in the record that the machine adjusted for daylight savings time or that the test was performed at any time other than 3:07 a.m.

[¶5] What we do know, however, is that the chemical test was performed at 3:07 a.m., and that the time of driving was 12:54 a.m. (App. 3b). The police officer physically handwrote in those times on the Report and Notice form. (App. 3b). No other evidence was presented to refute those times.

[¶6] The contents of the Report and Notice form alone can establish the time of driving and the time of testing. *See Maher v. Dept. Of Transportation*, 539 N.W.2d 300, 303 (N.D. 1995). The DOT has consistently taken the position that the Report and Notice form "is prima facie evidence of the time" of driving and the time of testing, especially when that "evidence was not refuted." *See Pavek v. Moore*, 1997 ND 77, ¶8, 562 N.W.2d 574. Additionally, this Court has "held the Report and Notice form, coupled with an officer's testimony, may be sufficient to establish the time of driving in order to determine whether the chemical test was performed within two hours of that time." *See id*. In our case, the Report and Notice form shows that the time of driving was 12:54 a.m., and that the time of testing was 3:07 a.m. – more than two (2) hours apart. (App. 3b) (Exhibit 1b from the hearing). There was no testimony offered or admitted to refute the times hand-written by the police officer.

[¶7] Moreover, the cases cited by the Department of Transportation (DOT) on pages 6-7 of its brief, regarding taking judicial notice of daylight savings time, are not anywhere near on point and they have no application to the legal analysis in our case. The Department's citation to those cases only confuses the issue. *See* Brief of Appellee at 6-7.

[¶8] Whether a hearing officer has the power to take judicial notice of a fact is not the issue. Rule 201 of the North Dakota Rules of Evidence "applies only to adjudicative facts that are not subject to reasonable dispute." *See* Explanatory Note to N.D.R.Ev. 201. In our case, there is a reasonable dispute about when the chemical test was performed. Indeed the only evidence offered and admitted into evidence by the Department shows that the chemical test was performed more than two (2) hours after

driving. The Report and Notice form shows that the time of driving was 12:54 a.m., and that the time of testing was 3:07 a.m. (App. 3b) (Exhibit 1b from the hearing). The police officer, who was the only witness at Mr. Schock's hearing, did not testify about any other times for driving or testing and did not testify that daylight savings played any part in the time of testing. For a tribunal or a court to make up its own testimony, and call it judicial notice, is a perversion of justice and due process.

[¶9] Also, although the Department relies exclusively on a Chemical Test Operator Manual that was never offered, admitted, or even mentioned at the hearing, the police officer did not testify about a manual. Additionally, the hearing officer never referred to a manual at the hearing and did not reference it in his decision.

[¶10] Nevertheless, the Department continues to reference and advocate for a Chemical Test Operator Manual that was never offered, admitted, or made part of the record. *See* Brief of Appellee, pages 8-11. Indeed, like the argument advanced at the district court level, the Department continues to argue that the Manual is an item "which the Department could introduce" and one that "may be offered." *See* Brief of Appellee at 10 (emphasis added). However, N.D.C.C. § 28-32-24, which applies to DOT hearings, mandates:

> "No information or evidence except that which has been offered, admitted, and made a part of the official record of the proceeding shall be considered by the administrative agency."

See N.D.C.C. § 28-32-24. Therefore, neither the DOT nor this court can consider the Operator Manual or anything else outside the record. It would not be fair to Mr. Schock, and indeed be violative of due process, for the DOT and reviewing courts to take into account evidence that was never offered, admitted, reviewed, or subjected to challenge.

[¶11] The Department also asks this Court to take judicial notice of the chemical test manual, even though it was never offered, admitted, and made a part of the official record. *See* Brief of Appellee at 8. The Department does not ask this Court to take judicial notice that the chemical test was performed within two hours of driving. However, Mr. Schock believes that either request would be improper.

[¶12] Judicial notice has its place in the law. "This does not mean, however, that "judicial notice * * * should be used as a device … on appeal" to uphold "an almost complete failure to present adequate evidence to the trial court." *See* Explanatory Note to N.D.R.Ev. 201 (emphasis added). It is not for the district court or this Court to offer, admit, and consider evidence the Department completely failed to present.

[¶13] Because there was no evidence offered, admitted, or made part of the record, establishing that the chemical test was performed within two (2) hours of driving, the order is not in accordance with the law and the hearing officer's decision should be reversed.

[¶14] Mr. Schock is aware that this Court has waived oral argument in this matter. However, Mr. Schock would like the opportunity to answer any questions the Court might have because he earnestly believes there was no basis in law for the DOT to suspend his license. It is not for this Court to read through a manual that Mr. Schock was never presented with and one which was never offered and admitted at his hearing.

B. The immediacy requirement of N.D.C.C. § 39-20-05(5)

[¶15] The Department acknowledges that it did not comply with the immediacy requirement of N.D.C.C. § 39-20-05(5).[1] The Department also acknowledges that it mailed out the decision on April 11th and dated the decision April 8th, thereby stripping away four (4) days from the 7-day appeal timeframe. The Department argues, however, that Mr. Schock was not prejudiced by the noncompliance and therefore the noncompliance is of no moment. *See* Brief of Appellee at 16.

[¶16] However, the non-compliance in this case is very much like the non-compliance in *Jorgensen*. *See Jorgensen v. N.D. Department of Transportation*, 2005 ND 80, 695 N.W.2d 212. This Court determined, in *Jorgensen*, that "[t]he legislature's intent will be best fulfilled by a bright-line requirement that the report and notice form contain the test result, as specified in N.D.C.C. § 39-20-03.1(3)." *See Jorgensen*, 2005 ND 80 at ¶13. This Court felt that it was "important that a driver facing the loss of driving privileges be able to quickly, conveniently, and certainly know what the officer is relying on" in "determining whether to request a hearing," especially since a driver has only ten days to request a hearing. *See id*.

[¶17] Similarly in our case, N.D.C.C. § 39-20-06 provides the driver even less time, 7 days, to determine whether to appeal the decision of the hearing officer. Therefore, it is "important that a driver facing the loss of driving privileges be able to quickly, conveniently, and certainly know what the [hearing] officer is relying on" and to have delivered to him, immediately, a copy of the suspension decision, as required by

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[1] The Department agrees that they stipulated to the fact that Schock was not orally informed of the hearing officer's findings and decision at the conclusion of the hearing and that the decision was not mailed out to Mr. Schock until three (3) days after the hearing. *See* Brief of Appellee at 5.

N.D.C.C. § 39-20-05(5), in "determining whether to" appeal the DOT decision to the district court.

[¶18] In fact, "[a]n ordinary reading of N.D.C.C. § 39-20-05 demonstrates the Legislature intended for the Department to" require their hearing officer to ""immediately deliver" the decision where the driver appears" and "for mail delivery [only] where the driver fails to appear at the hearing." *See Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶12, 774 N.W.2d 645. "The legislature's intent will be best fulfilled by a bright-line requirement that the" hearing officer's decision by immediately delivered to a present driver, as specified in N.D.C.C. § 39-20-05(5), instead of being held for three days and then placed in the mail. *See Jorgensen*, 2005 ND 80 at ¶13.

[¶19] The DOT failed to abide by the immediacy requirement of N.D.C.C. § 39-20-05(5). The DOT's failure to comply with the statutory immediacy requirement, a basic and mandatory requirement of N.D.C.C. § 39-20-05(5), deprives the DOT of jurisdiction to impose administrative sanctions upon Mr. Schock. Therefore, the DOT's decision should be reversed.

[¶20] Mr. Schock desires oral argument in this case. Mr. Schock's arguments are not frivolous in nature and they should not be deemed undeserving of oral argument.

[¶21] CONCLUSION

[¶22] For the foregoing reasons, Paul Schock respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges. Mr. Schock also asks this court to determine that attorney's fees and costs are warranted.

Respectfully submitted
this 28th day of November, 2011.

/s/ *Dan Herbel*

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[¶23] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 28, 2011, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Michael Pitcher, counsel for Appellee, at the following:

Electronic filing TO: "Michael Pitcher" < mtpitcher@nd.gov >

Date this 28th day of November, 2011.

/s/ *Dan Herbel*

Dan Herbel