

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

**FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
April 23, 2012  
STATE OF NORTH DAKOTA**

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

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PETITION FOR REHEARING

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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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[¶1] TABLE OF AUTHORITIES

North Dakota rules

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North Dakota cases

*Schock v. N.D. Department of Transportation*, 2012 ND 77 ..... ¶¶8, 10, 12, 13

[¶2] PRIOR PROCEEDINGS

[¶3] On March 13, 2011, Paul Schock was arrested “for driving under the influence of alcohol.” (DOT Administrative Hearing Transcript (“Tr.”) at 7, lines (“L.”) 9-10). Mr. Schock was issued a temporary operator’s permit, which showed the time of driving to be 12:54 a.m., and the time of the chemical breath test to be 3:07 a.m. (Appendix (“App.”) at 3b) (Exhibit 1b from the hearing). Mr. Schock timely requested an administrative hearing and, on Friday, April 8, 2011, the Department of Transportation (“Department” and “DOT”) held a hearing for Mr. Schock. (Tr. at 1, L. 5-6).

[¶4] Despite there being a gap of time between driving and the breath test in excess of two (2) hours, the hearing officer nevertheless determined that the breath “test was conducted within two hours of driving” and suspended Mr. Schock’s driving privileges for a period of 180 days. (App. 4).

[¶5] On April 13, 2011, Mr. Schock filed a Notice of Appeal and Specifications of Error with the District Court alleging numerous errors in the DOT administrative proceedings. (App. 5-7). After both Petitioner and Respondent submitted written arguments to the district court, the court issued its Order on Appeal affirming the decision of the hearing officer. (App. 28-29).

[¶6] The day after the district court affirmed the hearing officer’s decision, Mr. Schock moved for reconsideration of the court’s order. (App. 30-32). The district court denied Mr. Schock’s request for reconsideration without providing any basis for denying said request and without providing any analysis. (App. 36).

[¶7] On August 26, 2011, the Department mailed Schock the Judgment, Order for Judgment, and Notice of Entry of Judgment in this matter. (App. 37-39). On August 31, 2011, Schock filed a Notice of Appeal to this Court seeking relief. (App. 40-41).

[¶8] Mr. Schock asked this court to reverse the decision below. On April 10, 2012, this court affirmed the decision below in *Schock v. N.D. Department of Transportation*, 2012 ND 77. Mr. Schock now petitions for rehearing.

#### [¶9] LAW AND ARGUMENT

- A. The evidence presented at Mr. Schock’s hearing did not establish that the chemical test was performed within two (2) hours of driving

[¶10] This Court made a finding that “[t]he evidence presented at the hearing showed that the police officer ... began to administer the breath test at 1:56 a.m.” See *Schock v. N.D. Department of Transportation*, 2012 ND 77 at ¶20. However, the hearing officer did not make this finding and there was no testimony advanced at Mr. Schock’s administrative hearing to support this finding. There was no evidence presented at Mr. Schock’s hearing that the test began at 1:56 a.m. Indeed, we don’t know if the breath machine was turned on at 1:56 or if “1:56” is even a measure of time.

[¶11] The Department of Transportation suggested, well after the hearing, that the test began at 1:56 a.m. and this court believed that the record supported this conjecture. Mr. Schock argues that this court misapprehended the facts in the record because the Department presented speculation in the form of a matter of fact.

[¶12] In reality, we do not know if the police officer had even arrived in Stanton, ND, by the speculated time. Mr. Schock’s vehicle was stopped in Beulah, ND, and he

was ultimately transported to Stanton, ND, for the breath test. *See Schock v. N.D. Department of Transportation*, 2012 ND 77 at ¶2.

[¶13] It was incorrect for this Court to begin with the premise that the “1:56” on the test record, which appears without an “a.m.” or “p.m.” designation, is when the officer “began to administer the breath test.” *See Schock v. N.D. Department of Transportation*, 2012 ND 77 at ¶20. There was no evidence offered, admitted, or made part of the record to support this Court’s finding and the hearing officer below made no such finding. In fact, the hearing officer found that “[t]he test was completed at 3:07 a.m.,” but he did not make a finding as to when the test began. (Appendix (“App.”) at 4) (hearing officer’s decision).

#### [¶14] CONCLUSION AND RELIEF SOUGHT

[¶15] Because Mr. Schock argues that this court misapprehended the facts in the record, and since Mr. Schock was denied the opportunity for oral argument in the original submission, he respectfully requests that that this Honorable Court either make a final disposition of the case, without argument, by reversing the hearing officer’s decision to suspend, or place the matter on the Court’s calendar for oral argument and resubmission, pursuant to Rule 40 of the North Dakota Rules of Appellate Procedure. *See N.D.R.App.P.* 40.

Respectfully submitted  
this 23<sup>rd</sup> day of April, 2012.

*/s/ Dan Herbel*

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[¶16] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 23, 2012, the PETITION FOR REHEARING 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](mailto:mtpitcher@nd.gov) >

Date this 23<sup>rd</sup> day of April, 2012.

*/s/ Dan Herbel*

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Dan Herbel