

20110297

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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Christopher Anthony Osaba,  
Plaintiff/Appellant,

v.

North Dakota Department  
of Transportation,

Defendant/Appellee.

Supreme Ct. No. 20110297

District Ct. No. 08-2011-CV-00872

APPEAL FROM THE DISTRICT COURT  
BURLEIGH COUNTY, NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE SONNA M. ANDERSON

BRIEF OF APPELLEE

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## STATEMENT OF ISSUE

The testimony that formed the basis for Officer Sass's seizure of Osaba for driving under the influence of intoxicating liquor was admissible into evidence.

## STATEMENT OF CASE

On March 6, 2011, Bismarck Police Officer Tim Sass (Officer Sass) of the Bismarck Police Department arrested Christopher Anthony Osaba (Osaba) for driving a vehicle while under the influence of intoxicating liquor (DUI). Transcript ("Tr.") at Exhibit ("Ex.") 1b. A Report and Notice, including a temporary operator's permit, was issued to Osaba after Osaba refused to submit to a chemical blood test requested by the Officer. Id. The Report and Notice notified Osaba of the Department's intent to revoke his driving privileges. Id.

In response to the Report and Notice, Osaba requested an administrative hearing. Tr. Ex. 1c. The hearing was held on April 5, 2011. Tr. Ex. 2. In accordance with N.D.C.C. 39-20-05(3) the hearing officer considered two sets of issues as it was alleged that Osaba refused to submit to requests for an onsite screening test and a chemical test. The hearing officer considered the following issues regarding Osaba's refusal of the on-site screening test:

- (1) [w]hether a law enforcement officer had reason to believe [Osaba] committed a moving traffic violation or was involved in a traffic accident as a driver;
- (2) [w]hether in conjunction with the accident or violation, the officer has, through the officer's observations, formulated an opinion that [Osaba] body contains alcohol; and
- (3) [w]hether [Osaba] refused to submit to the onsite screening test.

Tr. Ex. 2. The hearing officer also considered the following issues in regards to Osaba's refusal of the alcohol concentration test:

- (1) [w]hether a law enforcement officer had reasonable grounds to believe [Osaba] had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug or substance in violation of N.D.C.C. section 39-08-01, or equivalent ordinance;
- (2) [w]hether [Osaba] was placed under arrest; and
- (3) [w]hether [Osaba] refused to submit to the test or tests.

Tr. Ex. 2.

At the close of the hearing, the hearing officer issued his findings of fact, conclusions of law and decision revoking Osaba's driving privileges for one year.

Tr. 21-23. Osaba appealed that decision to this Court. See Notice of Appeal and Specifications of Error.

### **STATEMENT OF FACTS**

On March 6, 2011 after 8:25 p.m., Officer Sass responded to a call from the security staff at MedCenter One hospital in Bismarck, North Dakota. Tr. 2. The caller said a man, later identified as Christopher Osaba, was running up and down the hallways punching signs and damaging property. Id. When Officer Sass arrived at the hospital, two security guards had Osaba standing with them. Tr. 3. Officer Sass asked Osaba his name and he replied "Joshua" in a slurred voice. Id. Officer Sass asked a second time for Osaba's name and he did not reply. Tr. 4. Officer Sass looked at Osaba's wallet and found a driver's license identifying him as Christopher Osaba. Id.



Officer Sass could smell the odor of an alcoholic beverage coming from Osaba and saw that his eyes were bloodshot and glossy. Id. Osaba was swaying back and forth as he stood. Id. Officer Sass asked Osaba if he had been drinking and how he had gotten to the hospital. Id. Osaba did not indicate if he had been drinking but said a friend had brought him to the hospital. Id. Officer Sass asked him to identify the friend and Osaba did not respond. Id. Officer Sass asked Osaba who he came to see at the hospital and Osaba said he was there to see his friend, Blake Park. Tr. 5. Officer Sass asked Osaba if his friend was in the ER or was staying at the hospital for another medical reason, and Osaba did not respond. Id. The hospital checked their records and found no patient by the name of Blake Park. Id. The hospital also paged the name Blake Park but no one responded. Id.

Officer John Bocker (Officer Bocker) and Officer Heinert arrived on scene to assist. Id. Officer Bocker went with MedCenter One security to view video footage from the hospital cameras to see if Osaba had been driving. Id. Officer Bocker returned and informed Officer Sass about what he saw on the video. Tr. 6. Officer Sass testified that Officer Bocker told him the video showed Osaba driving and parking a Dodge pickup truck in the hospital entrance, getting out of the driver's seat and walking into the hospital at 8:25 p.m. Tr. 6, 14, 16-17. According to Officer Bocker's description of what he observed on the video, Officer Sass believed a traffic violation had been committed. Tr. 10. Osaba objected to these statements on hearsay grounds. Tr. 6. The hearing officer originally sustained the objection but later allowed the statements for the

purposes of determining whether Officer Sass has probable cause to arrest. Tr. 7, 14.

A blue Dodge Ram pickup was parked at the entrance of the hospital. Tr. 7. Officer Sass asked Osaba if the pickup outside was his, and Osaba said it was not. Id. Officer Sass ran the license plate on the pickup and it came back registered to Osaba and his wife. Id. Keys to the pickup were found on Osaba's possession. Tr. 8.

Officer Sass placed Osaba under arrest for disorderly conduct. Id. Inside the patrol car Officer Sass read Osaba his Miranda rights and transported Osaba to the Bismarck Police station. Id. Once they arrived at the police station Officer Sass removed Osaba's handcuffs and informed Osaba that due to the odor of an alcoholic beverage, the video footage, and the signs that he had been drinking he wanted Osaba to perform field sobriety tests. Id. Osaba agreed to the testing. Id.

Osaba failed the horizontal gaze nystagmus (HGN), walk-and-turn, and one-leg-stand field sobriety tests. Tr. 8-10. Officer Sass recited the implied consent advisory and requested Osaba submit to the S-D5 onsite screening test. Tr. 10-11. Osaba agreed to take the test, but did not provide an adequate breath sample on the first attempt. Tr. 12. Officer Sass instructed Osaba to take a deep breath and give a long continuous breath and not several short breaths or block the device with his tongue. Tr. 12. Osaba again did not provide an adequate sample on the second attempt. Id. Osaba was told that if he failed to provide an adequate breath sample on the third attempt he would be deemed to have

refused the test. Id. Again Osaba did not provide an adequate sample. Id. Officer Sass believed Osaba was purposely trying not to give an adequate reading. Tr. 22. Officer Sass deemed Osaba's actions to be a refusal and he then placed Osaba under arrest for DUI. Tr. 12-13. Officer Sass recited the implied consent advisory and asked Osaba to submit to a chemical Intoxilyzer test. Tr. 13. Osaba refused. Id.

Following this incident, Officer Sass reviewed a video sent to him by the hospital in preparation for the upcoming criminal DUI trial. Tr. 15, 23. The video he reviewed only showed the lobby of the hospital and did not verify whether Osaba had been driving. Tr. 23. Officer Sass was not sure he reviewed the same video as Officer Brocker had and, at the time of the hearing, he had not talked to Officer Brocker about it. Tr. 15, 23.

### **PROCEEDINGS ON APPEAL TO DISTRICT COURT**

Osaba appealed the administrative decision to the Burleigh County District Court. App. 6. In the Appellant's Notice of Appeal and Specifications of Error, Osaba identified several issues on appeal, which included the following:

1. The order is not in accordance with the law; specifically:
  - a. There were no reasonable grounds to believe that Mr. Osaba had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. § 39-08-01;  
...
  - c. The hearing officer allowed testimony that constituted inadmissible hearsay evidence;

3. The rules or procedure of the agency have not afforded the appellant a fair hearing; specifically, the hearing officer allowed testimony that constituted inadmissible hearsay evidence.

App. 7.

With respect to Osaba's contention that there was no reasonable grounds to believe Osaba had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor, the hearing officer found in part as follows:

Osaba smelled of an alcoholic beverage and had bloodshot, glossy eyes. He swayed as he stood. He said a friend brought him to the hospital and he was there to see Blake Park. Hospital staff checked their records and found no reference to Blake Park. They paged Blake Park but no one responded. Bismarck Police Officer John Brocker arrived on scene and went to view a video which was taped by a hospital camera. . . . Officer Brocker then returned and told Officer Sass that he reviewed a video which showed Osaba driving up to the hospital in a pickup at 8:25 p.m. A blue Dodge Ram pickup was parked outside an entry to the hospital. The Dodge was registered to Osaba and his wife. Osaba was arrested for Disorderly Conduct. Keys to the pickup were found in his possession.

App. 4. The hearing officer concluded:

Osaba argues the statement from Officer Brocker was inadmissible hearsay, that there was no admissible evidence introduced to show he was driving the Dodge, and therefore this matter must be dismissed. For the limited purpose of determining if Officer Brocker had reasonable grounds to arrest Osaba for DUI, the clear majority of courts deciding such matters held the statement from a third party is not hearsay. See *United States v. Dorsey*, 418 F.3d 1038 (9<sup>th</sup> Cir. 2005); *Kelly v. Myler*, 149 F.3d 641, 647 (7<sup>th</sup> Cir. 1998); *United States v. Torres*, 504 F.Supp. 864, 866 (E.D. Cal. 1980); *West v. State*, 120 S.W.3d 100 (Ark. Ct. App. 2003); and *Benford v. State*, 895 S.W.2d 716 (Tex. App. 1994).

One of the issues at this administrative hearing is whether the arresting officer had reasonable grounds to arrest a petitioner for DUI. Reasonable grounds and probable cause are synonymous in

this context. This administrative hearing is analogous to a preliminary hearing in the criminal arena where probable cause is the applicable standard. The Court in *United States v. Torres*, 504 F.Supp. 864, 866 (E.D. Cal. 1980), said, "In effect, in a 'probable cause' hearing the hearsay evidence is admitted not for its truth, but for the purpose of establishing what was known. The court then must weigh the knowledge in light of its reliability to determine if a reasonable officer would believe a crime had been committed and defendant was the culprit." I conclude the statement of Officer Brocker to Officer Sass, that he reviewed a video which showed Osaba driving to the hospital at 8:25 p.m. is admissible for purposes of determining probable cause for Osaba's arrest.

As to reliability, the statement from a fellow police officer is presumably reliable. *Benford v. State*, 895 S.W.2d 716 (Tex. App. 1994). Officer Sass had reasonable grounds to believe Osaba drove while under the influence based on Officer Brocker's statement, Osaba's odor, appearance, slurred speech, swaying, and his bizarre behavior in the hospital.

App. 4.

Judge Anderson affirmed the hearing officer's decision revoking Osaba's driving privileges for one year. App. 40-48. In regards to whether inadmissible hearsay evidence was used to determine probable cause to arrest Osaba for driving under the influence, Judge Anderson ruled:

Mr. Osaba argues . . . that Officer Sass did not have sufficient admissible information to place Mr. Osaba under arrest for DUI because (1) Officer Sass did not observe Mr. Osaba driving the vehicle and (2) Mr. Osaba denied driving the vehicle; and (3) Officer's Brocker's hearsay statement that Mr. Osaba had been driving was inadmissible.

. . .

As to the validity of Officer Sass' determination to place Mr. Osaba under arrest for DUI, Officer testified that he relied on Officer Brocker's statement that, on the videotape, Officer Brocker observed the pickup come to a stop and Mr. Osaba exit the driver's side of the pickup to conclude that Mr. Osaba had been driving a vehicle. Officer Sass relied on his own observations of Mr. Osaba, specifically, the odor of alcoholic beverage, poor balance, failed

field sobriety tests and the failed screening test to determine that Mr. Osaba was under the influence.

The Court notes that Mr. Osaba's license is not revoked because of a finding that he was, in fact, driving under the influence, but rather that he refused the test required after he was placed under arrest for a DUI. This is an important distinction, because Officer Brocker's testimony that he observed a video showing Mr. Osaba was driving would be inadmissible hearsay to prove that Mr. Osaba had been driving. However, it is not hearsay when it is offered to explain the basis for Officer Sass decision to place him under arrest for a DUI.

For purposes of determining probable cause to arrest for DUI, Officer Sass was, in fact entitled to rely on the presumptively reliable statement of a fellow officer that indicated that Mr. Osaba was, in fact, the driver of the vehicle to establish probable cause that Mr. Osaba was driving.

App. 46-47.

Judgment was entered on August 10, 2011. App. 50. Osaba appealed the Judgment to this Court. App. 52. The Department requests this Court affirm the judgment of the Burleigh County District Court and the administrative revocation of Osaba's driving privileges for a period of one year.

#### **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**

### **The testimony that formed the basis for Officer Sass’s seizure of Osaba was admissible into evidence.**

The argument Osaba makes in his brief is that the hearing officer erred by admitting statements into evidence that established there was probable cause for Officer Sass to arrest Osaba for driving under the influence of intoxicating liquor (DUI). Osaba Br. ¶¶ 24-33. This Court has observed that the abuse of discretion standard should be applied when reviewing the evidentiary ruling of an administrative agency. See Knudson v. Dir., N.D. Dep’t of Transp., 530 N.W.2d

313, 316 (N.D. 1995). An abuse of discretion occurs when an administrative agency acts in an arbitrary, unreasonable or capricious manner. Id.

As will be shown below, the hearing officer did not abuse his discretion in admitting the out-of-court statements into evidence to establish that Officer Sass had probable cause to arrest Osaba for DUI because the statements were not hearsay for two related reasons. First, the out-of-court statements made by Officer Brocker were properly imputed to Officer Sass and were used to show what was known by Officer Sass prior to arresting Osaba. Second, Officer Brocker's statements were not offered for the truth of the matter but were offered to show Officer Sass's state of mind.

- A. Officer Brocker's statements were properly imputed to Officer Sass and relied upon in determining whether there is probable cause to arrest Osaba for driving under the influence.

Officer Brocker relayed information to Officer Sass that Officer Sass relied upon in arresting Osaba for DUI. This Court has observed that "officers who are working together can relay information to each other, and each can act upon it." City of Wahpeton v. Roles, 524 N.W.2d 598, 600 (N.D. 1994). Knowledge from one officer can be imputed to another officer when the officer possessing the knowledge communicates the information to the acting officer. City of Minot v. Keller, 298 ND 38, ¶ 12, 745 N.W.2d 638. Further, "officer to officer communications are presumptively reliable." Id. at ¶ 13. Hence, Officer Brocker's knowledge that he communicated to Officer Sass was imputed to Officer Sass.



In this case, Officer Sass and Officer Brocker were working closely together and both responded to a dispatch call regarding a disturbance at MedCenter One hospital. Officer Sass arrived at the hospital and observed Osaba with two hospital security guards. Tr. 3. Osaba smelled of an alcoholic beverage, his eyes were bloodshot and glossy, and he was swaying as he stood. Tr. 4. Officer Sass asked Osaba how he had got to the hospital and Osaba claimed a friend had brought him. Id. However, when asked by the officer to identify his friend Osaba did not respond. Id. Officer Brocker arrived to assist and went to review the hospital's surveillance video to see if Osaba had driven himself to the hospital. Tr. 5. After watching footage from the hospital's video cameras Officer Brocker returned and while face to face told Officer Sass that he watched Osaba driving his pickup into the hospital entrance, exit the driver's side door, and walk into the hospital. Tr. 6

Osaba does not argue that the knowledge Officer Brocker conveyed did not provide Officer Sass with sufficient grounds to arrest Osaba for DUI. Instead, Osaba argues the hearing officer improperly admitted Officer Sass's testimony regarding what Officer Brocker told him was observed on the hospital's video cameras because it was inadmissible hearsay evidence. As a result, Osaba contends, Officer Sass should not have been permitted to testify about the statements made by Officer Brocker. This contention is meritless.

As previously discussed Officer Brocker's knowledge was properly imputed to Officer Sass. Imputed knowledge is not hearsay, just as an informant's tip to law enforcement is not hearsay and can be relied upon by law

enforcement in determining whether there is probable cause to arrest or reasonable suspicion to stop a vehicle. See Anderson v. Dir., N.D. Dep't of Transp., 2005 ND 97, 696 N.W.2d 918.

In State v. Miller, 510 N.W.2d 638 (N.D. 1994), this Court indicated the most reliable tip is the one relayed personally to the officer. Id. at 640, citing State v. Lykken, 406 N.W.2d 664 (N.D. 1987). In this particular case, it would be virtually impossible to find that the tip is not the most reliable inasmuch as it was relayed personally from one officer to another officer, both of whom were working on the same call to the hospital that evening. In Lykken, there was a face to face conversation between the officer and an informant known to the officer. The informant gave the officer a description and license number of the vehicle and told the officer he thought the driver might be impaired because he had seen the vehicle driving the wrong way on the highway. This Court held under those circumstances the information provided by the tip itself was sufficient to raise a reasonable and articulable suspicion for the stop in that case.

Similarly, in this case, the face to face communication from Officer Brocker to Officer Sass provided reliable information which Officer Sass could rely on in making his determination whether there was probable cause to arrest.

Under N.D.C.C. § 39-20-05(2), one of the issues at an implied consent hearing is whether the law enforcement officer had "reasonable grounds" to believe that a person had driven a vehicle while under the influence of alcohol. "The term 'reasonable grounds' as used in Section 39-20-05, N.D.C.C., is

synonymous with the term 'probable cause.'" Zietz v. Hjelle, 395 N.W.2d 572, 574 (N.D. 1986).

"[P]robable cause exists when the facts and circumstances within a police officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." Zietz, 395 N.W.2d at 574. "In making a determination of probable cause each case must turn on the particular facts and circumstances apparent to the officer involved at the time of the arrest." Vogel v. Dir., N.D. Dep't of Transp., 462 N.W.2d 129, 131 (N.D. 1990) (citing Witte v. Hjelle, 234 N.W.2d 16 (N.D. 1975) (emphasis added)).

This Court observed that, "[i]n determining whether there is probable cause to make an arrest, it is not necessary that an officer possess knowledge of facts sufficient to establish guilt." State v. Prigge, 437 N.W.2d 520, 521 (N.D. 1989). In other words, "[t]he validity of the arrest does not depend on whether the suspect actually committed a crime." State v. Smith, 452 N.W.2d 86, 88 (N.D. 1990) (citing Michigan v. DeFillippo, 433 U.S. 31, 36 (1979)). Other courts have said that probable cause is to be judged by the probabilities and practical considerations of everyday life on which average men, particularly average police officers, can be expected to act. State v. Webb, 432 So.2d 362, 364 (La. Ct. App. 1983). In determining probable cause "the court is to consider the information available to the officer from the standpoint of one versed in law enforcement, taking the officer's training and experience into account." State v. Kutz, 671 N.W.2d 660, 667 (Wis. Ct. App. 2003). "The officer's belief may be

predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department." Id. Further, "[i]t is not necessary for an officer to actually see a person driving in order to have probable cause to arrest that person for driving while intoxicated, rather the officer may rely on circumstantial evidence." Kramer v. Dir., of Revenue, 924 S.W.2d 308, 310 (Mo. Ct. App. 1996).

Officer Sass has reasonable grounds to arrest Osaba for DUI. Officer Sass's own observations of Osaba during the incident indicated Osaba was impaired and his impairment was due to alcohol. Indeed, Osaba had the odor of an alcoholic beverage on his breath and person, his eyes were bloodshot and glossy, he swayed as he stood, and he failed the three standardized field sobriety tests administered to him. Tr. 4, 8-10.

Further, the imputed knowledge from Officer Brocker only confirmed Officer Sass's reasonable belief that Osaba had driven to the hospital. Prior to Officer Brocker relaying his observations from the hospital video to Officer Sass, Osaba had told Officer Sass that a friend had driven him to the hospital. Tr. 4. Yet, when Officer Sass asked Osaba who had driven him to the hospital Osaba did not respond. Id. After Officer Brocker told Officer Sass what he observed on the video, Officer Sass asked Osaba if the blue Dodge pickup parked outside belonged to him, and although Osaba denied it, Officer Sass confirmed it did belong to Osaba by checking the license plate and verifying its ownership. Tr. 7. Keys to the pickup were found on Osaba's person. Tr. 8.

Osaba argues the hearing officer improperly relied on case law precedent involving preliminary hearings in the criminal arena to determine the statements made by Officer Brocker to Officer Sass were admissible. Osaba Br. ¶¶ 28-31. Osaba's argument is incorrect. While it is true that preliminary hearings in criminal cases are governed by the rules of criminal procedure, specifically Rule 5.1 which allows hearsay evidence, the common law also allows hearsay testimony when determining whether there was probable cause to arrest. See State v. Midell, 2011 ND 114, ¶ 11, 798 N.W.2d 645 (stating, "The standard of probable cause at the preliminary hearing is the same standard of probable cause required for a valid arrest."), and United States v. Torres, 504 F.Supp. 864, 866 (E.D. Cal. 1980) (explaining that under the common law in determining probable cause hearsay evidence is admitted not for its truth, but for the purpose of establishing what was known). In Torres, the court admitted over objection both hearsay and hearsay on hearsay from the one government witness who testified. 504 F.Supp. at 866. The Court determined that in the probable cause context of the hearing the hearsay statements do not go to the admissibility but the weight accorded to the evidence. Id. This was so, because the hearsay rule arose in the context of jury trials and was premised on the fear that a jury would not be able to properly assess the weight which should be given to hearsay but the same problem did not exist with a legally trained judge. Id. at 867. A judge has the ability to appreciate that hearsay evidence may not be entitled to the same weight as other evidence. Id.

In Neer v. Dep't of Revenue, 204 S.W.3d 315 (Mo. Ct. App. 2006), a case factually similar to the one at hand, the Missouri Court of Appeals reversed a trial court's determination that law enforcement lacked probable cause to arrest the suspect for driving under the influence. Id. at 324. The evidence presented to the trial court on a trial de novo following the administrative suspension revealed that officers were dispatched to a home in response to a reported disturbance between Mr. Neer and the owners of the home. Id. at 317. Although they did not find an ongoing disturbance the officers smelled the odor of intoxicants on Mr. Neer's breath and he admitted driving to the home but there was contradicting evidence on how long Mr. Neer had been at the home. Id. at 317-322. Mr. Neer also told the officers he had consumed alcohol while at the residence. Id. at 320.

At trial, Sergeant Long was asked whether either of the home owners had told him that Mr. Neer had just driven to the residence and Neer objected prior to the sergeant responding on hearsay grounds. Id. The trial court sustained the hearsay objection but admitted the sergeant's response "for the sole purpose of advising the court what the officer did next." Id. Sergeant Long then testified that Ms. Periman told him that Mr. Neer had just driven to her residence." Id. Sergeant Long was then asked if either Mr. or Ms. Periman said that Mr. Neer had consumed any alcohol at their residence. Id. Neer again objected on hearsay grounds and the trial court sustained the objection. Id. An offer of proof was made and Sergeant Long testified that Mr. and Ms. Periman told him that Mr. Neer had not consumed alcohol at their residence. Id. Both of the above statements from the Perimans were also included in the arresting officer's

Offense/Incident Report which although admitted into evidence was limited to exclude the statements. Id. at 319.

The trial court reversed the administrative suspension of Neer's driving privileges by finding the arresting officer improperly relied on untrustworthy hearsay information from the Perimans and that he was selective in the information he used to justify his actions. Id. at 321. On Appeal the Director of the Department contended the trial court misapplied the law by improperly excluding the portions of the Offense/Incident Report containing the hearsay statements. Id. at 322. The court agreed stating, "the hearsay statements of Mr. and Ms. Periman were admissible because 'information given by eyewitnesses to the arresting officer directly, or through other officers is admissible to establish probable cause because it is not offered for its truth, but to explain the basis for a belief that probable cause to arrest existed.'" Id. (quoting Hunter v. Dir., of Revenue, 75 S.W.3d 299, 303 (Mo. Ct. App. 2002)). The court further stated:

Further, the statements of the trial court when sustaining Mr. Neer's hearsay objections, at the conclusion of trial, and in the judgment, indicate the trial courts' erroneous belief that the hearsay statements are unreliable and not competent evidence to show that the officer acted with probable cause. As noted previously, an arresting officer, such as Officer Thompson, can develop probable cause by considering all the information known to the officer, including hearsay statements.

Id.

In the case at hand, Officer Brocker's statements to Officer Sass were used to explain the basis for Officer Sass arresting Osaba for DUI. See Tr. 14. At the time of the incident Officer Sass had reason to believe Officer Brocker's information was credible and came from sources indicating its veracity. While

Osaba claims the information was untruthful because the video Officer Sass viewed following this incident did not show Osaba driving, as shown above, probable cause is determined at the time the officer makes the arrest not from information that is gathered later. Further, Officer Sass made it clear at the hearing he was not sure he was viewing the same video Officer Brocker had. Tr. 15, 23.

Osaba also argues the hearing officer's reliance on preliminary hearing case law is misplaced because the ultimate issue of the case is not decided in preliminary hearings and alleges the ultimate issue is decided in the administrative hearing. Osaba Br. ¶ 26. Again, Osaba is mistaken.

While it is true a criminal preliminary hearing is not a trial on the merits and its purpose is to determine whether probable cause exists to detain the person and whether a trial should be held, an administrative hearing is also a hearing with a limited purpose. In accordance with N.D.C.C. § 39-20-05(2) the scope of the hearing in a suspension proceeding covers only four issues. The first issue is simply to determine whether there is probable cause to believe the person was driving a vehicle while under the influence of alcohol. Id. Nothing more is required than a showing of probable cause. The Department need not show beyond a reasonable doubt that Osaba was driving under the influence nor does it need to do so by a preponderance of the evidence to prevail on the hearing's first issue. The hearing officer only determines whether law enforcement had probable cause to arrest. Thus, counter to Osaba's argument, the ultimate question at the hearing is not whether Osaba was driving a vehicle



while under the influence of alcohol, but whether the Department had grounds to revoke Osaba's driving privileges for his refusal to submit to a chemical test requested by law enforcement after he had been placed under arrest for DUI. The legislature does not require the Department to prove by a preponderance of the evidence that Osaba had been driving under the influence.

In closing, the question before this Court is whether the hearing officer abused his discretion by acting in an arbitrary, unreasonable or capricious manner in admitting Officer Brocker's statements for the limited purpose of determining whether there was probable cause to arrest Osaba for DUI. This Court should conclude that Osaba has not shown that the hearing officer abused his discretion.

- B. Officer Brocker's statements to Officer Sass were offered to prove Officer Sass's state of mind and were not inadmissible hearsay.

Similar to the argument above and, perhaps, only distinguishable on a subtle basis, the hearing officer did not abuse his discretion in admitting the statements made by Officer Brocker to Officer Sass because the out-of-court statements were not offered to prove the truth of the matter asserted but to show Officer Sass's state of mind.

Under N.D.R.Ev. 801(c), hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." If an out-of-court statement is not offered to prove its truth, it is not hearsay. Moen v. Thomas, 2001 ND 95, ¶ 11, 627 N.W.2d 146; Ehrlich v. Backes, 477 N.W.2d 211, 214 (N.D. 1991); State v.

Welch, 426 N.W.2d 550, 555 (N.D. 1988). A statement offered to prove that it was made is not hearsay. Moen, at ¶ 11, 627 N.W.2d 146; Ehrlich at 214; Welch, at 555.

A statement offered to show its effect upon the state of mind of the listener, rather than the truth of the matter asserted, is not hearsay. State v. Bernstein, 2005 ND 371, ¶ 23, 697 N.W.2d 371. "When a person's knowledge or lack of knowledge is at issue, statements affecting the person's state of mind are not hearsay:

Words offered to prove the effect on the hearer are admissible when they are offered to show their effect on one whose conduct is at issue.

When a person's knowledge or state of mind is at issue, evidence that he had heard or read a statement may be relevant, and it lies beyond reach of a hearsay objection. Where reasonableness of a party's conduct is at issue, knowledge of certain statements may have probative value regardless of the truth of the statements. Thus, an out-of-court statement may be offered to explain responsive conduct ....

Evidence which would otherwise be hearsay may be admissible, as bearing on the state of mind of the defendant, if it is not offered for the truth of the statement. This nonhearsay use has been invoked with respect to the issue of duress, authorization, violation, motive, good faith, and knowledge or belief, or absence of knowledge."

Id. (citing 29 Am.Jur.2d *Evidence* § 666 (1994)).

Officer Brocker's statements to Officer Sass that Osaba drove a pickup truck into the hospital entrance, exited the driver's side door of the pickup, and walked into the hospital, were not offered to prove Osaba had been driving under the influence. Rather, Officer Brocker's statements were offered to show the effect the statements had on Officer Sass, in conducting his DUI investigation

and whether he would arrest Osaba for driving under the influence of intoxicating liquor. Officer Brocker's statements provided Officer Sass with reason to believe Osaba had not been given a ride to the hospital as he claimed, and that it was reasonable to believe Osaba had committed an alcohol related driving offense.


It is uncontested that Officer Sass's own observations of Osaba during the incident indicated Osaba was impaired and his impairment was due to alcohol. Indeed, Osaba had the odor of an alcoholic beverage on his breath and person, his eyes were bloodshot and glossy, he swayed as he stood, and he failed the three standardized field sobriety tests administered to him. Officer Brocker's statements were admissible to show Officer Sass's state of mind – that he believed he had sufficient grounds to arrest Osaba for DUI.

#### **CONCLUSION**

The Department respectfully requests this Court affirm judgment of the Burleigh County District Court and affirm the hearing officer's decision revoking Osaba's driving privileges for one year.

Dated this 16<sup>th</sup> day of December, 2011.

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By: \_\_\_\_\_

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Christopher Anthony Osaba,	)	
	)	
Plaintiff/Appellant,	)	<b>Supreme Ct. No. 20110297</b>
	)	
v.	)	<b>District Ct. No. 08-2011-CV-00872</b>
	)	
North Dakota Department	)	
of Transportation,	)	
	)	
Defendant/Appellee.	)	

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STATE OF NORTH DAKOTA    )  
  ) ss.  
COUNTY OF BURLEIGH    )

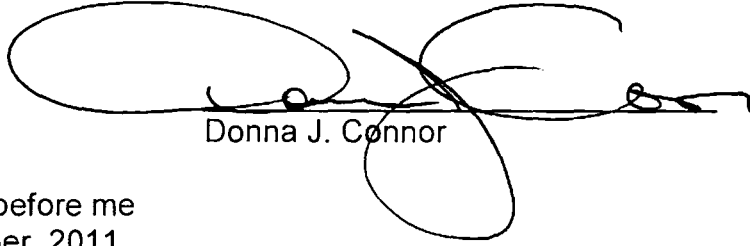
Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 16<sup>th</sup> day of December, 2011, I served the attached **BRIEF OF APPELLEE** upon Christopher Anthony Osaba, by and through his attorney Dan Herbel, by placing a true and correct copy thereof in an envelope addressed as follows:

Dan Herbel  
Attorney at Law  
The Regency Business Center  
3333 East Bismarck Avenue, Suite 1205  
Bismarck, ND 58501

and depositing the same, with postage prepaid, in the United States mail at  
Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me  
this 16<sup>th</sup> day of December, 2011.



Notary Public

