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JANUARY 8, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Christopher Anthony Osaba, Plaintiff/Appellant, v. North Dakota Department of Transportation, Defendant/Appellee.	)	Supreme Court No. 20110297 Burleigh County No. 08-2011-CV-872

REPLY BRIEF OF APPELLANT

Appeal from Judgment, dated and filed August 10, 2011

Entered Upon August 1, 2011, Order on Appeal, affirming the administrative decision

Burleigh County District Court

South Central Judicial District

The Honorable Sonna M. Anderson

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[¶2] LAW AND ARGUMENT

[¶3] The Department of Transportation (DOT) argues that because Osaba's pickup was in the parking lot and since Osaba had keys on his person that this establishes that Osaba was driving. *See* Brief of Appellee at 14. However, this does not establish that Osaba was driving and it certainly does not indicate that Osaba had driven any vehicle within two hours of contact with police. The Department devotes a lot of time discussing impairment and not driving.

[¶4] Also, the cases cited by the DOT, including cases citing the *Whiteley* rule, are decisions made in the context of a suppression hearing – a hearing with a limited purpose. *See* Brief of Appellee at 10 and 12. These cases are only relevant to preliminary proceedings, held prior to a trial on the merits, where the rules of evidence are relaxed.

[¶5] However, to indulge the DOT, "Whiteley establishes that if an officer has probable cause and communicates that fact to a second officer, the second officer also enjoys the benefit of that probable cause." *See City of Minot v. Keller*, 2008 ND 38, ¶11, 745 N.W.2d 638 (citing *Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971)). Therefore, the first officer must have probable cause before it can be imputed to the second officer. Indeed, in *Whiteley*, because the issuing law enforcement agency did not have probable cause, the arresting officers that received the communication did not have probable cause. *See Keller*, 2008 ND 38 at ¶9 (citing *Whiteley*) ("because neither the issuing agency nor the arresting officers had probable cause the defendant's Fourth Amendment rights were violated and the exclusionary rule applied").

[¶6] In our case, Officer Brocker did not have probable cause to arrest Osaba. If Brocker would have had probable cause, he would have arrested Osaba on the spot or directed Officer Sass to arrest Osaba. Instead, Brocker made up a story about what he observed on video; or at least that is Officer Sass's hearsay version of events. In fact, Officer Sass "emailed the prosecutor in [the criminal side of the] case, and informed him that the video did not show Mr. Osaba driving;" and the case was dismissed. (DOT Administrative Hearing Transcript ("Tr.") at 16, lines ("L.") 2-5). Because Brocker did not have probable cause, no probable cause can be imputed to Officer Sass under the *Whiteley* rule.

[¶7] If this Court would allow the practice of one officer testifying about what another officer told him in order to prove the Department's case, the Department could just call an officer, unrelated to the investigation, to the DOT hearing and have him provide hearsay testimony. The Department could then call it "state of mind" testimony and the investigating officer would never be subject to questioning.

[¶8] While the Department spends a considerable amount of its brief discussing imputed knowledge, it does not commit much discussion to the hearsay testimony of Officer Sass. When the Department finally does discuss the hearsay issue, their argument is unclear. On the one hand, the Department argues that Officer Sass' testimony is not hearsay. On the other hand, the Department argues that the testimony is admissible as state of mind hearsay testimony. To make this second argument, however, the Department has to acknowledge and argue that the testimony is indeed hearsay, but that there is an exception that allows it in evidence. However, the Department does not make that argument and, therefore, their argument is inconsistent and unclear.

[¶9] Additionally, the Department never made an argument at the administrative hearing that Officer Sass' testimony fell under the state of mind hearsay exception, nor did the hearing officer rule that the testimony was admissible under the state of mind exception. Instead, the hearing officer indicated that the testimony was not hearsay. (Tr. at 14, L. 7-17).

[¶10] Although the state of mind exception was not raised by the Department at the administrative hearing and is therefore waived, the Department is now presumably attempting to argue that Sass' testimony about what Officer Brocker told him is admissible under Rule 803(3) of the North Dakota Rules of Evidence. Yet, the Department does not directly articulate that argument and the Department never cites Rule 803(3), NDREv.

[¶11] In fact, Rule 803(3), NDREv., indicates that the state of mind exception does not include "a statement of memory or belief to prove the fact remembered or believed." *See* NDREv. 803(3) (emphasis added). Thus, Officer Sass cannot testify about Officer Brocker's memory or belief of what he says he observed in order to prove that Officer Brocker observed it. Moreover, the DOT did not raise the state of mind exception at the hearing and the hearing officer did not rely on it in his decision.

[¶12] In our case, the truth of Officer Sass' testimony was squarely at issue, and therefore it was improper to allow the hearsay testimony of which the veracity could not be challenged by Osaba's counsel. Also, a preliminary hearing in a criminal case has a limited purpose and it is not the equivalent of an administrative hearing, which is essentially a trial on the merits of the administrative matter. A DOT hearing, unlike a

preliminary hearing, is a trial on the merits that reaches the ultimate issue and therefore the hearing officer is bound by the Rules of Evidence. *See* N.D.C.C. § 28-32-24(1).

[¶13] Without the improper and untrue hearsay testimony, there were no "reasonable grounds to believe" that Mr. Osaba "had been driving … a motor vehicle while in violation of section 39-08-01," as defined by N.D.C.C. § 39-20-04. Therefore, the hearing officer's decision should be reversed.

[¶14] CONCLUSION

[¶15] For the foregoing reasons, Christopher Osaba respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted
this 8th day of January, 2012.

/s/ *Dan Herbel*

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[¶16] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 8, 2012, 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 8th day of January, 2012.

/s/ *Dan Herbel*

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Dan Herbel