20110297

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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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

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] STATEMENT OF THE ISSUES

I. The hearing officer allowed testimony that constituted inadmissible hearsay evidence; without the hearsay testimony, 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

[¶3] STATEMENT OF THE CASE

[¶4] On March 6, 2011, Christopher Osaba was arrested for driving under the influence. (DOT Administrative Hearing Transcript ("Tr.") at 21, lines ("L.") 4-6). Mr. Osaba was issued a temporary operator's permit. (Exhibit 1b, Transcript of DOT Hearing). Osaba timely requested an administrative hearing and, on April 5, 2011, the Department of Transportation ("Department" and "DOT") held a hearing where the hearing officer at first excluded hearsay testimony regarding purported statements (that turned out to be false) from a non-present police officer that he had seen a videotape and observed Mr. Osaba driving. (Tr. at 7, L. 1-3). After the hearing officer determined that the Department would not be able to carry its burden of proof without the hearsay testimony, he later allowed the same uncorroborated and false hearsay testimony. (Tr. at 14, L. 7-17). Based on the hearsay testimony, the hearing officer concluded that the officer had reasonable grounds to arrest Osaba for DUI. (Appendix ("App.") at 4). The hearing officer revoked Mr. Osaba's driving privileges for a period of one year. (App. 5).

[¶5] On April 9, 2011, Mr. Osaba filed a Notice of Appeal and Specifications of Error with the District Court alleging numerous errors in the DOT administrative proceedings. (App. 6-8). After both Petitioner and Respondent submitted written

arguments to the district court, the court issued its Order affirming the decision of the hearing officer. (App. 40-48).

[¶6] On August 11, 2011, the Department mailed Osaba the Judgment, Order for Judgment, and Notice of Entry of Judgment in this matter. (App. 49-51). On October 7, 2011, Osaba filed a Notice of Appeal to this Court seeking relief. (App. 52-53). Osaba asks this court to reverse the decision of the district court and to reinstate his driving privileges.

[¶7] STATEMENT OF THE FACTS

[¶8] At Mr. Osaba's DOT hearing, Officer Tim Sass of the Bismarck Police Department testified that he had contact with Chris Osaba on March 6, 2011. (DOT Administrative Hearing Transcript ("Tr.") at 2, lines ("L.") 2-10). Officer Sass provided hearsay testimony about a dispatch call he received from Medcenter One regarding a complaint of disorderly conduct. (Tr. at 2, L. 11-14). After Osaba's counsel lodged a hearsay objection, the hearing officer overruled the objection and cited present sense impression, an exception to the hearsay rule, as the basis for his ruling. (Tr. at 2, L. 15-24).

[¶9] Officer Sass then testified that he responded to Medcenter One and found Osaba at the entrance with two security guards. (Tr. at 3, L. 1-4). When questioned by Officer Sass, Osaba "said that a friend had brought him to the hospital, and he was here to visit another friend in the hospital." (Tr. at 4, L. 18-22). Osaba told Officer Sass that he had not been driving. (Tr. at 17, L. 17-21). Officer Sass testified that "Officer Brocker went with Medcenter Security to view the video footage to see if [Osaba] had

shown up with somebody else in his vehicle, and if he had been driving." (Tr. at 5, L. 12-14). Officer Sass' testimony was then objected to as follows:

OFFICER SASS:	"… Officer Brocker then returned, and stated that …
MR. HERBEL:	Objection, hearsay.
MR. VUKELIC:	I need to hear what it was that he said.
OFFICER SASS:	Officer Brocker returned, after watching the video footage, and said it did show the pickup truck that was parked outside driving into the entrance. And that he saw Chris get out of the driver's truck, and walk into the hospital … get out of the driver's seat of the pickup, and walk into the hospital.

(Tr. at 6, L. 2-10) (emphasis added). The hearing officer sustained the hearsay objection, noting that Officer Brocker was not present at the hearing. (Tr. at 7, L. 1-3).

[¶10] Officer Sass thereafter testified that he "asked Chris [Osaba] if that was his vehicle outside" and Osaba "said it was not." (Tr. at 7, L. 5-7). Osaba "said it was his wife's, registered to her." (Tr. at 7, L. 22). Then Officer Sass arrested Osaba for disorderly conduct, not DUI, and the officer's "intention was to transport [Osaba] to the police station and run field sobriety tests down there." (Tr. at 7, L. 25 – 8, L. 3). Officer Sass handcuffed Osaba and "[t]ook him to the police station." (Tr. at 19, L. 1-4). Officer Sass then had Osaba perform field sobriety tests while he was under arrest. (Tr. at 20, L. 2-6).

[¶11] There is no evidence that Osaba was driving or that he committed a traffic violation. Officer Sass "didn't observe a traffic violation that night." (Tr. at 24, L. 5-7). Also, "the video itself does not show a traffic violation." (Tr. at 24, L. 8-10).

[¶12] Even though there was no evidence that Osaba committed a traffic offense, Officer Sass had Osaba submit to the S-D5 test, a preliminary, screening breath test. (Tr. at 10, L. 6-15). Osaba performed the S-D5 test "while he was still under arrest." (Tr. at 20, L. 13-18). Osaba "attempted three blows on the S-D5 machine" and "none were adequate samples." (Tr. at 20, L. 19-23). Officer Sass "deemed this a refusal." (Tr. at 20, L. 24-25).

[¶13] Then Officer Sass asked Osaba to submit to a test on the Intoxilyzer 8000 machine. Osaba "refused the test" and "[t]hen [Sass] arrested him for DUI." (Tr. at 21, L. 4-9). Officer Sass does not know what time the refusal occurred. (Tr. at 21, L. 10-13).

[¶14] Then, the hearing officer, who had already sustained Osaba's hearsay objection earlier, once again opened the hearsay line of questioning as follows:

MR. VUKELIC:	"… On what did you base your decision to arrest Mr. Osaba, for DUI?
OFFICER SASS:	The … the statement of Officer Brocker with the video footage, the odor of …
MR. HERBEL:	I would object to that as he's kind of backdooring hearsay into his testimony.
MR. VUKELIC:	For purposes of determining whether or not there's probable cause to make an arrest, <u>the statement is not hearsay</u>. So what was it that he told you?
OFFICER SASS:	The statement that he had stated; he saw Mr. Osaba driving into the entrance and exiting his vehicle."

(Tr. at 14, L. 7-17) (emphasis added). Previously, the hearing officer ruled that this same testimony was hearsay, which it is, and disallowed it.

[¶15] Officer Sass testified that he "did not observe Mr. Osaba driving." (Tr. at 14, L. 23-25). Officer Sass testified that he watched the video that Officer Brock had

observed and "there was nothing on video showing Mr. Osaba driving." (Tr. at 15, L. 7-11). Indeed, after viewing the video, Officer Sass was "unable to … identify what vehicles were pulling into the entrance" of the hospital and he "did not [see] Chris [Osaba] walking into the front door" of the hospital. (Tr. 23, L. 17-21).

[¶16] 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." (Tr. at 16, L. 2-5). Officer Sass testified that he had no admissible evidence "to bring to this tribunal that Mr. Osaba was driving." (Tr. at 16, L. 18-21).

[¶17] Officer Sass testified that the time of driving was 8:25 p.m. (Tr. at 16, L. 22-24). The "time of driving that [Sass] arrived at was not firsthand knowledge," but was instead "based on what Officer Brocker told" Sass he observed on the video. (Tr. at 17, L. 1-16). However, we know that the information Officer Brocker provided was untruthful. Therefore, not only do we not know the time of driving, we also do not know what time the refusal occurred. (Tr. at 21, L. 7-13).

[¶18] Following Mr. Osaba's administrative hearing, the hearing officer revoked Osaba's driving privileges for one year. (App. 5). Mr. Osaba appealed to the district court. (App. 6-8).

[¶19] On appeal to the district court, Honorable Judge Sonna M. Anderson determined that because "there was no moving traffic violation," there was then "no basis to request that Mr. Osaba submit to the SD-5 screening test." (App. 45). Therefore, Judge Anderson ruled that "Mr. Osaba's license cannot be revoked for failing to submit to the … screening test" under N.D.C.C. § 39-20-14, as the hearing officer determined.

(App. 45). The Department has not appealed Judge Anderson's ruling regarding the screening test and has, therefore, waived the issue.

[¶20] Judge Anderson stated that "Officer Brocker's testimony that he observed a video showing Mr. Osaba was driving would be inadmissible hearsay to prove that Mr. Osaba has been driving," but "it is not hearsay when it is offered to explain the basis for Officer Sass['] decision to place him under arrest for a DUI." (App. 47). Judge Anderson affirmed the decision of the hearing officer and ruled that certain factors were "sufficient to provide probable cause that Mr. Osaba had reasonable grounds to believe Mr. Osaba was under the influence of intoxicating liquor." (App. 47-48). Judge Anderson did not note any admissible and trustworthy evidence that Mr. Osaba had been driving.

[¶21] STANDARD OF REVIEW

[¶22] "The Administrative Agencies Practice Act, N.D.C.C. ch 28-32, governs review of an administrative decision to suspend or revoke a driver's license." *See Dworshak v. Moore*, 1998 ND 172, ¶6, 583 N.W.2d 799. "This Court will affirm 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.

N.D.C.C. § 28-32-46." *See Lee v. NDDOT*, 2004 ND 7, ¶8, 673 N.W.2d 245. This Court determines "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." *See Bryl v. Backes*, 477 N.W.2d 809, 811 (N.D. 1991).

[¶23] LAW AND ARGUMENT

I. The hearing officer allowed testimony that constituted inadmissible hearsay evidence; without the hearsay testimony, 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

[¶24] "The admissibility of evidence in any proceeding before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence." *See Maher v. Dept. of Transportation*, 539 N.W.2d 300, 303 (N.D. 1995) (citing N.D.C.C. 28-32-06(1); now N.D.C.C. 28-32-24(1)). Pursuant to Rule 802 of the North Dakota Rules of Evidence, hearsay testimony is not admissible.

[¶25] In the case at hand, the hearing officer sustained Osaba's hearsay objection when Officer Sass attempted to testify about what Officer Brocker told him was on video. (Tr. at 6, L. 2 - 7, L. 2). The hearing officer determined this testimony was hearsay

because Officer Brocker was not present at the hearing. (Tr. at 7, L. 1-3). However, later on in the hearing, the hearing officer allowed the same testimony, over Osaba's objection.

[¶26] In his decision, the hearing officer reasoned that the same testimony, the second time around, was not hearsay. (App. 4). The hearing officer stated that "[f]or 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." (App. 4). The hearing officer cited criminal cases, including *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005), for this proposition of law. (App. 4). However, in *Dorsey*, the Ninth Circuit Court upheld the testimony because it was not offered to prove the truth of the matter asserted and it did not go to the ultimate issue of the case. *See Dorsey*, 418 F.3d at 1044 (allowing the testimony in a limited suppression hearing context that does not reach the ultimate issue). In our case, the hearsay testimony was offered to establish the ultimate issue.

[¶27] Also, the *Dorsey* court allowed the testimony "because [since] the truth of Detective Potter's report was not at issue, her statement was not hearsay." *See Dorsey*, 418 F.3d at 1044. Contrarily in our case, the truth of Officer Brocker's statement was at issue. Officer Sass testified that he observed the video and the video did not show Osaba was driving like Brocker had said. Essentially, Officer Brocker's statement was untruthful and untrustworthy. Therefore, there was a serious issue regarding the veracity of the hearsay testimony and the hearing officer's reliance on *Dorsey* is misplaced.

[¶28] The hearing officer also reasoned that Officer Sass' hearsay testimony was admissible because "[t]his administrative hearing is analogous to a preliminary hearing in the criminal arena where probable cause is the applicable standard." (App. 4).

Preliminary hearings in North Dakota are governed by Rule 5.1 of the North Dakota Rules of Criminal Procedure. Criminal Rule 5.1 specifically permits that "[t]he finding of probable cause may be based on hearsay evidence in whole or in part." *See* N.D.R.Crim.P. 5.1(a). However, Rule 5.1, N.D.R.Crim.P., has no application in DOT administrative hearings. There is no similar provision in the Administrative Agencies Practices Act that permits findings or conclusions based upon hearsay evidence in whole or in part.

[¶29] In a criminal case, the preliminary hearing has a limited purpose. *See State v. Blunt*, 2008 ND 135, ¶15, 751 N.W.2d 692. "[A] preliminary hearing is not a trial on the merits." *See id*. "Rather, the preliminary hearing is a "safety device" to prevent the accused's detention without probable cause, and its purpose is to determine whether a trial should be held." *See id*. A hearing at the DOT is a trial on the merits, and it is not a preliminary hearing/proceeding with a limited purpose. That is why the administrative statutes do not allow hearsay testimony like Rule 5.1, N.D.R.Crim.P.

[¶30] Indeed, a preliminary hearing is not an adjudicative proceeding. *See State v. Woodrow*, 2011 ND 192, ¶14, 803 N.W.2d 572. A preliminary hearing does not reach or resolve the ultimate issue. Conversely, however, a hearing regarding the revocation of a driver's license is an adjudicative proceeding that reaches the ultimate issue. *See Schaaf v. N.D. Department of Transportation*, 2009 ND 145, 771 N.W.2d 237 (citing N.D.C.C. § 28-32-01(1)). The rules of evidence should not be relaxed or flouted in an adjudicative proceeding.

[¶31] Furthermore, in criminal cases, "preliminary questions concerning admissibility are matters for the judge, and that, in performing this function, he is not

bound by the Rules of Evidence except those with respect to privileges." *See United State v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). This is so because such hearings have limited application and they do not constitute a trial on the merits. A DOT hearing, on the other hand, 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).

[¶32] The way the hearing officer circumvented the rules of evidence to attempt to show reasonable grounds was not proper. In fact, without the supplemental inadmissible hearsay testimony, the Report and Notice form in this case does not show reasonable grounds as required by N.D.C.C. § 39-20-04. (Exhibit 1b, Transcript of DOT Hearing).

[¶33] It was improper for the hearing officer to permit Officer Sass' hearsay testimony about the untruthful statement from Officer Brocker, the second time around, in determining the ultimate issue in the case. Without the improper and untrue hearsay testimony, there were no reasonable grounds to believe that Mr. Osaba had been driving a motor vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. § 39-08-01. Therefore, the hearing officer's decision should be reversed.

[¶34] CONCLUSION

[¶35] 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 16th day of November, 2011.

/s/ *Dan Herbel*

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[¶36] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 16, 2011, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Michael Pitcher, counsel for Appellee, at the following:

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

Date this 16th day of November, 2011.

/s/ *Dan Herbel*

_____

Dan Herbel