

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Debbie Painte,	)	
	)	Supreme Ct. No. 20120316
Appellee,	)	
	)	District Ct. No. 30-2012-CV-00317
v.	)	
	)	
Director, North Dakota Department of	)	
Transportation,	)	
	)	
Appellant.	)	

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OCT 25 2012

STATE OF NORTH DAKOTA

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

HONORABLE BRUCE B. HASKELL

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CORRECTED APPELLEE'S BRIEF

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TUNTLAND & COLLING  
Tom Tuntland  
Bar ID#03250  
Attorney for Debbie Painte, Appellee  
210 Collins Ave., P. O. Box 1315  
Mandan, ND 58554  
Phone (701) 667-1888 Fax (701) 667-1308  
tomtut@usa.net

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## I. ISSUES PRESENTED FOR REVIEW

Ms. Painte agrees with the Appellant's statement of the issues presented for review.

## II. STATEMENT OF THE CASE

The Director of the North Dakota Department of Transportation appeals to this court from the District Court's Order on Appeal of June 18, 2012 (App. pp. 19-22) and the Judgment of the District Court which reversed the Hearing Officer's Decision of June 28, 2012 (App. p. 24)

On March 28, 2011 Mandan Police Officer Brent Wilmeth issued a report and Notice Under Chapter 39-20 N.D.C.C. to the Appellee, Debbie Ann Painte. (App. p. 3)

If the Appellant alleges the Report and Notice established facts sufficient to support a finding of the officer had probable cause to believe that Ms. Painte was in actual physical control of a motor vehicle, Ms. Painte directs this Court's attention to the allegations in the Report and Notice that: "On the above date, there existed reasonable grounds to believe the above-named person was operating  Non-commercial motor vehicle." The form goes on to state "Reasonable suspicion to stop or reason to lawfully detained:  Already stopped."

No facts justifying the detention or the arrest for being in actual physical control are set forth in the Report and Notice. See Aamodt v. North Dakota Dep't of Transp., 2004 ND 134, ¶ 23, 682 N.W.2d 308, cited in Brewer v. Ziegler, 2007 ND 207, 743 N.W.2d 391, 397 which notes the absence of the grounds for probable cause to arrest, and failure to include that information in the Report and Notice precludes the Department from suspending driving privileges. This holding was repeated in Whitecalfe v. North Dakota Department of

Transportation, 2007 ND 32 [¶ 10], 727 N.W.2nd 779.

In the foregoing cases this court held the arresting officer's failure to include in the Report and Notice filed with the Department of Transportation the grounds for probable cause to arrest, and failure to include that information precluded the Department from suspending driving privileges. The court held such a statement was basic and mandatory but did not address whether absence of such a statement was jurisdictional.

Of course issues involving subject matter jurisdiction cannot be waived and can be raised *sua sponte* at any time. See e.g. Trottier v. Bird, 2001 ND 177 [¶ 5], 635 N.W.2nd 157.

In any event the Report and Notice did not contain hearsay statements from which the hearing officer could find Ms. Painte was in actual physical control of a motor vehicle.

Before she received her copy of the Report and Notice Ms. Painte requested an Administrative Hearing on the issue of the suspension or revocation of her driving privileges. (App. p. 9). A hearing was scheduled (App. p. 12) and held on April 10, 2012. (App. p. 15)

The hearing officer ordered Ms. Painte's driving privileges to be suspended for 180 days. Hearing Officer's Decision (App. p. 15)

Ms. Painte filed a timely Notice of Appeal from the Hearing Officer's decision. (App. pp. 16 - 17). Her specifications of error included an allegation that the hearing officer failed to find that Ms. Painte was in a position to operate the controls of the vehicle (which was the sole ground decided by the District Court) and that the Department of Transportation failed to lay sufficient foundation for the admission of the analysis of a blood sample taken from Ms. Painte. Notice of Appeal and Specifications of Error. (App. pp. 16-17).

On appeal the District Court reversed the Hearing Officer's decision because the hearing officer did not find, either as a finding of fact or a conclusion of law, that Ms. Painte was in a position to operate the controls of the vehicle. Order on Appeal, (App. pp. 19-22).

The Director appeals to this court for that Order and the Judgment entered thereon.

### III. STATEMENT OF FACTS

Ms. Painte agrees with all of Appellant's Statement of Facts found at pages 2 - 3 of Appellant's brief except she takes issue with Appellant's conclusion regarding the blood test results found at page 3 of Appellant's Brief because of the foundational deficiencies complained of in Ms. Painte's Specifications of Error.

Ms. Painte objected to reception or consideration of the blood test results (App. p. 4) on the grounds that the "certification" by Roberta Grieger-Nimmo (the analyst who conducted the test) was hearsay and that in the "certification" Ms. Grieger-Nimmo purported to give approval to a method and a device "which, statutorily, Roberta Grieger-Nimmo cannot do." (Administrative Hearing Transcript p. 13).

Ms. Painte's objections were overruled. (Administrative Hearing Transcript p. 14)

The District Court did not Rule on the validity of Ms. Painte's foundational objection.

### IV. STANDARD OF REVIEW

Appellant correctly states the standard of review in this case at pages 7-8 of Appellant's Brief.

### V. ARGUMENT

#### A. INSUFFICIENT FINDINGS OF FACTS TO SUPPORT PROBABLE CAUSE CONCLUSION.

Officer Jose arrested Ms. Painte for “actual physical control of a motor vehicle” The relevant portion of Section 39-08-01 N.D.C.C. reads:

1. A person may not . . . be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:

a. That person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle.

b. That person is under the influence of intoxicating liquor

. . .

The key factor in determining whether the defendant is in “actual physical control” of vehicle is whether defendant is able to manipulate vehicle's controls. That control exists when defendant has real, not hypothetical, bodily restraining or directing influence over vehicle's movements of machinery. Hawes v. North Dakota Dept. of Transp., 2007 ND 177, 741 N.W.2d 202; Obrigewitch v. Director, North Dakota Dept. of Transp., 2002 ND 177, 653 N.W.2d 73; City of Fargo v. Novotny, 562 N.W.2d 95, 1997 ND 73, rehearing den.; State v. Huber, 555 N.W.2d 791 (N.D. 1996); Salvaggio v. North Dakota Dept. of Transp., 1991, 477 N.W.2d 195 (N.D. 1991).

In this case there was no evidence that Ms. Painte was observed in a position where she was exercising real control over the vehicle. There was no evidence that she was, or ever had been, in a position to manipulate the vehicle’s controls. There was no probable cause.

Section 39-20-05 (2) N.D.C.C. directs the hearing officer to determine whether the arresting officer had reasonable grounds to believe the persons had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in



violation of Section 39-08-01 N.D.C.C. or equivalent ordinance.

For the hearing officer to determine that there was probable cause to believe that Ms. Painte was in Actual Physical Control of a Motor Vehicle there had to be some evidence admitted from which the hearing officer could have concluded that Ms. Painte was in a position to manipulate the vehicle's controls. There was no such evidence.

The District court held that if the hearing officer had found there was evidence Ms. Painte was in a position to manipulate the vehicle's controls the hearing officer did not clearly explain what evidence the hearing officer relied on that supported such a finding and did not explain what findings of fact supported the officer's conclusions of law. Order on Appeal. (App. pp. 19-22 at 21).

The Appellant argues that from the evidence Hearing Officer could have inferred Ms. Painte was in a position to manipulate the vehicle's controls. But if the hearing officer made such an inference she didn't tell the driver, and the reviewing court, that she was doing so.

#### B. INSUFFICIENT FOUNDATION FOR CONSIDERATION OF ANALYTICAL REPORT.

The certification of the blood test appears at Exhibit 1 (c). (App. p. 4). The certification was not signed by the Director of the State Crime Laboratory. Instead, Roberta Grieger-Nimmo, the analyst who analyzed the sample of Ms. Painte's blood, certified the blood test result, gave approval to the methods and devices she used and in a glaring hearsay declaration stating that she was a "designee of the Director of the State Crime Laboratory." This self-serving hearsay declaration was the sole certification.

In Section 39-20-07 N.D.C.C. the Legislature has granted the Director of the State

Crime Laboratory broad powers to approve devices and methods to conduct analysis of breath and blood samples. The legislature also granted the Director of the State Crime Laboratory the power to designate others who can exercise those powers. Section 39-20-07 (5), (6), (7) and (8) N.D.C.C. It granted the Director the power to post his designations on the Attorney General's website. Section 39-20-07 (7) N.D.C.C.

Section 39-20-07 N.D.C.C. refers to two types of designees that can be appointed by the Director of the State Crime Lab, namely (First) persons designated to train analysts and intoxilyzer operators and to inspect and approve equipment – Subsections (5) and (6) of Section 39-20-07 N.D.C.C.; and (Second) persons designated to issue a certified copy of an analytical report of a blood or urine analysis, which, when certified by a proper official, is required to be accepted as prima facie evidence. Section 39-20-07(8) N.D.C.C.

Ms. Grieger-Nimmo didn't tell us in her hearsay "certification" whether she claimed to be a certified copy designee or a equipment and personnel designee. She simply alleged in her unsworn out-of-court statement she was a "designee of the Director of the State Crime Laboratory."

But the legislature does not permit self-designation. The designation must be made by the Director of the State Crime Laboratory. See Section 39-20-07 subsections 5, 6, 7 and 8, N.D.C.C.

Absent the testimony of the Director of the State Crime Laboratory the designation must fit within one of the exceptions to the hearsay rule.

State v. Salhus, 220 N.W.2d 852, 857 (N.D. 1974) considered a similar problem. Officer Elter, a Breathalyzer Operator, possessed and offered a certificate signed by the State

Toxicologist to prove his qualifications. This court held the certificate was inadmissible hearsay.

In the instant case, a certificate qualifying Officer Elter to administer Breathalyzer tests was admitted into evidence over objection. This certificate, which was signed by the Acting State Toxicologist, also certifies that the Breathalyzer is a device certified by him to meet 'the requirements of Section 39-20-07 of N.D.C.C., for the analysis of breath to determine blood alcohol concentration, . . . '

The certificate was objected to at the trial level as hearsay and at the appellate level for lack of foundation. The certificate was not admissible, although it could readily have been made admissible by compliance with Rule 44(a)(1), North Dakota Rules of Civil Procedure, setting forth the requirements for authentication of records and copies of records.

State v. Salhus, 220 N.W.2d 852, 857 (N.D. 1974)

There was no testimony by the Director of the Crime Laboratory. The "Certificate" was not admissible as an official record to prove the Director's approval of the methods or devices used to analyze Ms. Painte's blood sample nor was the "certificate" admissible to prove that Ms. Grieger-Nimmo had been designated by the Director of the State Crime Laboratory to issue certified copies of analytical reports which are to be given "prima facie" weight. The legislature had eased the burden of proving whether or not Ms. Grieger-Nimmo had been "designated" by permitting the Director of the State Crime Laboratory to post his designations on the Attorney General's Website. There was no evidence offered or received that the Director of the Crime Laboratory had done so. The "Certificate" at Exhibit 1c (App. p. 4) was inadmissible hearsay and should not have been considered by the hearing officer.

The language of Section 28-32-24(1) N.D.C.C. makes "clear that the Rules of

Evidence are to be the norm in administrative practice, and that any deviation from that norm must be carefully considered and explained." Madison v. N.D. Dep't of Transp., 503 N.W.2d 243, 246 (N.D. 1993).

Section 39-20-07 N.D.C.C. governs the admission of a blood alcohol test report. The purpose of this statute is to "ease[] the burden . . . , in laying an evidentiary foundation for a blood alcohol report." Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 9, 775 N.W.2d 695.

"A certified copy of the analytical report of a blood, urine, or saliva analysis .. .which is issued by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of a chemical analysis." Section 39-20-07 (8) N.D.C.C. Foundational documents establishing that the method and devices used in testing the sample were approved by the Director of the State Crime Laboratory" must be *admitted* before an analytical report will be received into evidence. State ex. rel. Roseland v. Herauf, 2012 ND 151, ¶ 12-13, 819 N.W.2d 546. Only the "director of state crime laboratory or the director's designee" are authorized to prepare and file foundational documents. Section 39-20-07(5) and (6), N.D.C.C.

When a driver appeals to the District Court from an adverse decision by a Hearing Officer the District Court's "[r]eview is limited to the record before the agency." Knoll Dep't of Transp., 2002 ND 84, ¶ 6, 644 N.W.2d 191. The record on appeal may consist only of the items enumerated in Section 28-32-44(4) N.D.C.C. This includes a transcript of the hearing, "including all testimony taken and any written statements, exhibits, reports, memoranda, documents, or other information or evidence considered before final

disposition of proceedings," Id.

Although the District Court did not consider or rule on Ms. Painte's second specification of error, there is no doubt that if the court had done so the Hearing Officer's decision would have been reversed on jurisdictional and foundational grounds.

CONCLUSION

For the foregoing reasons Ms. Painte asks this Court to affirm the District Court's reversal of the Hearing Officer's decision.

Dated October 26, 2012.

TUNTLAND & COLLING  
Tom Tuntland  
Attorney for Debbie Painte, Appellee  
210 Collins Ave., P. O. Box 1315  
Mandan, ND 58554  
Phone (701) 667-1888 Fax (701) 667-1308  
tomtut@usa.net

  
Tom Tuntland Bar ID#03250

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ATTORNEY'S CERTIFICATE OF SERVICE

The undersigned attorney certifies that on October 26, 2012 he served a copy of the following documents :

CORRECTED APPELLEE'S BRIEF.

by placing the same in an envelope addressed as follows, which address is the last know address of the party to be so served and depositing the same, with postage prepaid into the United States mails at Mandan, North Dakota:

Douglas B. Anderson  
Office of Attorney General  
Attorney General's Office South  
500 N 9<sup>th</sup> Street  
Bismarck, ND 58501-4509

TUNTLAND & COLLING  
Tom Tuntland  
Attorney for Debbie Painte, Appellee  
P.O. Box 1315  
Mandan, ND 58554  
ID# 03250

