

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 5, 2012
STATE OF NORTH DAKOTA

Charles Michael Morrow,

Appellant,

v.

Francis G. Ziegler, Director of
the North Dakota Department
of Transportation,

Appellee.

Supreme Court Case No. 20120323
District Court Case No. 13-2012-CV-43

APPELLANT'S REPLY BRIEF

**APPEAL FROM THE JUDGMENT OF
THE DUNN COUNTY DISTRICT
COURT, THE HONORABLE H.
PATRICK WEIR, AFFIRMING AN
ADMINISTRATIVE DECISION OF
THE NORTH DAKOTA
DEPARTMENT OF
TRANSPORTATION**

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[¶3] ISSUES ADDRESSED IN REPLY BRIEF

I. Does the Report and Notice Form drafted by the North Dakota Department of Transportation comply with the requirements of N.D.C.C. § 39-20-03.2 and § 39-20-04?

II. Does N.D.C.C. § 39-20-03.2 permit the Report and Notice Form drafted by the North Dakota Department of Transportation to allow for conveyance by implication that the law enforcement officer formulated an opinion that a driver's body contained alcohol?

III. Is Mr. Morrow limited to a remedy to request that the North Dakota Department of Transportation amend its Report and Notice?

[¶4] LAW AND ARGUMENT

[¶5] Analysis

I. The Report and Notice form drafted by the North Dakota Department of Transportation does not technically comply with the requirements of N.D.C.C. § 39-20-03.2 and § 39-20-04 because despite including a section called "Officer's Statement of Probable Cause" to be filled out by the law enforcement officer recording information reflecting the officer's observations the form does not include a section for the officer to state his opinion that the subject's body contained alcohol.

[¶6] The North Dakota Department of Transportation's (Department's) argument appears to ignore the language and form of the Report and Notice. As can be seen on the Report and Notice form there is a section identified as "OFFICER'S STATEMENT OF PROBABLE CAUSE." In this section there are instructions that state "[c]heck appropriate boxes and explain." Under those instructions is a box with the language "Probable cause to arrest/lawfully detain." The officer in Mr. Morrow's case wrote "N/A" in this section.

[¶7] With regard to the Report and Notice form N.D.C.C. § 39-20-03.2.3 states

specifically that “the report must include information as provided in section 39-20-04” which in turn states that the report submitted to the director shows that the officer has formulated an opinion through his observations that the person’s body contains alcohol. N.D.C.C. § 39-20-04(1).

[¶8] In fairness, the Report and Notice form currently in use by the Department appears to allow the officer to show he has formulated an opinion regarding alcohol in the body of the subject by using the probable cause to arrest/lawfully detain section to record his observations. Mr. Morrow is at a loss as to why the Department would argue otherwise or would ignore the language on the form it drafted.

[¶9] The Department’s argument in this case also brings to light that the Report and Notice form currently in use does not have a section specifically stating that the officer has formulated an opinion that the person’s body contains alcohol. Instead, the Report and Notice form provides a section for the officer to record his or her observations but again no section to record the officer’s opinion.

[¶10] The Department points out in its brief on page 5 that the Hearing Officer determined that the Report and Notice form “does not call for the officer to document the evidence that the driver’s body contains alcohol.” Mr. Morrow argues that this position by the Hearing Officer is an error because the Report and Notice form does contain a section for the officer to document his observations. Mr. Morrow argues that the Hearing Officer should have found that the Report and Notice form does not call for the officer to document his opinion that the person’s

body contains alcohol.

[¶11] The parties appear to agree that on its face the Report and Notice form that was used did not include observations nor did it include an opinion that Mr. Morrow's body contained alcohol. The Department should have noticed this error (no observations recorded and no opinion) when it first received the Report and Notice form from the officer and not revoked Mr. Morrow's driving privileges for one year.

[¶12] **Analysis**

II. N.D.C.C. § 39-20-03.2 does not permit the Report and Notice Form drafted by the North Dakota Department of Transportation to allow for conveyance by implication that the law enforcement officer formulated an opinion that a driver's body contained alcohol.

[¶13] The Department argues that the act of certification that Mr. Morrow refused the onsite screening test conveyed by implication to the Department the opinion that Mr. Morrow's body contained alcohol and that this fulfills the requirements of N.D.C.C. 39-20-04(1). Appellee's Brief page 11. The Department cites no authority for its argument and Mr. Morrow is aware of none.

[¶14] Mr. Morrow argues that N.D.C.C. 39-20-04(1) does not allow the officer to convey by implication that a person's body contains alcohol but rather according to the language of N.D.C.C. 39-20-04(1) the officer must actually use the report to "show" that the officer through observations formulated an opinion that the person's body contains alcohol. See Whitecalfe v. North Dakota Dept. of Transp., 2007 ND 32 at ¶12, 727 N.W.2d 779 at 785 ("For the Department to have the

authority to revoke the individual's driving privileges the plain language of N.D.C.C. § 39-20-04 requires that information be included in the report sent to the Department.'').

[¶15] **Analysis**

III. Mr. Morrow is not limited to a remedy to request that the North Dakota Department of Transportation amend its Report and Notice form.

[¶16] The Department's argument that Mr. Morrow's remedy is somehow limited because the Department's Report and Notice form is deficient is without merit. As previously argued if the Report and Notice form lacks the information required by law for the Department to have jurisdiction to suspend driving privileges the Department has no authority to suspend driving privileges. See Id.

[¶17] **CONCLUSION**

[¶18] The Department's arguments are without merit. Irrespective of any technical deficiency in the Report and Notice form the actual form presented to the Department in Mr. Morrow's case lacked the specific information required by statute.

[¶19] The Report and Notice form submitted to the Department did not indicate that the law enforcement officer had an opinion that Mr. Morrow's body contained alcohol nor did it indicate the observations of the law enforcement officer. Therefore the Department acted without substantial justification when it revoked Mr. Morrow's North Dakota driving privileges for one year. Pursuant to N.D.C.C. § 28-32-50, because the Department of Transportation acted without substantial

justification in revoking Mr. Morrow's North Dakota driving privileges, the court must award the party not an administrative agency reasonable attorney's fees and costs if the court finds in favor of that party. Mr. Morrow respectfully requests that he be awarded his reasonable attorney's fees and costs.

Dated: November 5, 2012

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CERTIFICATE OF SERVICE

v.

Francis G. Ziegler, Director of the North
Dakota Department of Transportation,

Appellee.

Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 6984 and states that on November 5, 2012 he served the following on Douglas Bruce Anderson:

APPELLANT'S REPLY BRIEF

by electronically mailing a true and correct copy to the following:

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Dated: 11-5-2012



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