

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Charles Michael Morrow,

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

Appellant,

APPELLANT'S BRIEF

v.

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

Appellee.

Supreme Court Case No.
20120323

Thomas F. Murtha IV
North Dakota Attorney ID#6984
PO Box 1111
Dickinson ND 58602-1111
701-227-0146
Attorney for Appellant

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II. Did the Administrative Hearing Officer err by finding that checking the box “refused onsite screening test” and certifying that “this report is true and correct” satisfies the requirements of N.D.C.C. § 39-20-14?

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I. The Hearing Officer’s decision to revoke Mr. Morrow’s driving privileges for one year is an error because N.D.C.C. § 39-20-03.2 requires that the law enforcement officer shall forward to the director a certified written report and “if the person was issued a temporary operator’s permit because of the person’s refusal to submit to a test under sections 39-20-01 and 39-20-14, the report must include information as provided in section 39-20-04.” The report submitted by the

law enforcement officer must indicate in writing that “the officer has, through the officer’s observations, formulated an opinion that the person’s body contains alcohol” and the report submitted by law enforcement had no written indication that Mr. Morrow’s body contained alcohol. N.D.C.C. § 39-20-04 Subd. 1.

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[¶3] **JURISDICTIONAL STATEMENT**

[¶4] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI § 8, N.D.C.C. § 27-05-06(4) and N.D.C.C. § 39-20-06. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 28-27-01 and N.D.C.C. § 28-27-02. This appeal is timely under N.D.R.App.P. 4(a)(1).

[¶5] **STATEMENT OF THE ISSUES ON APPEAL**

I. Did the Administrative Hearing Officer err in revoking Mr. Morrow’s driving privilege for one year because the report submitted by the law enforcement officer to the Department of Transportation only marked the box labeled “refused onsite screening test” despite the requirement of N.D.C.C. § 39-20-03.2 that the report must include information as provided in section 39-20-04 “that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01 or equivalent ordinance or, for purposes of section 39-20-14, had reason to believe that the person committed a moving traffic violation or was involved in a traffic accident as a driver, and in conjunction with the violation or accident the officer has, through the officer's observations, formulated an opinion that the person’s body contains alcohol . . . ?”

II. Did the Administrative Hearing Officer err by finding that checking the box “refused onsite screening test” and certifying that “this report is true and correct” satisfies the requirements of N.D.C.C. § 39-20-14?

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant Charles Michael Morrow appeals from the North Dakota Department of Transportation’s March 1, 2012 decision revoking his North Dakota driving privileges for one year and the District Court’s June 1, 2012 Order and June 11, 2012 Judgment affirming that decision. Appendix 9, 10, 15, 15.

[¶8] The Department erred when it concluded that the Report and Notice form

does not call for the officer to document the evidence that the driver's body contains alcohol and that the elements of N.D.C.C. § 39-20-14 are met by the officer checking the box "refused onsite screening test" and certifying that the report is true and correct. Appendix 5. Pursuant to N.D.C.C. § 39-20-04 the officer must certify to the Department that the officer formulated an opinion that the person's body contains alcohol. Because the Department has made an error of law and fact its decision to revoke Mr. Morrow's North Dakota driving privileges for one year should be reversed.

[¶9] Mr. Morrow filed his notice of appeal on August 9, 2012. Appendix 18.

[¶10] **STATEMENT OF THE FACTS**

[¶11] On February 5, 2012 law enforcement observed Mr. Morrow's vehicle speeding and initiated a traffic stop. Transcript page 6, lines 3-7 (T. 6:3-7). The law enforcement officer observed Mr. Morrow to have bloodshot and glossy eyes and noted an odor of an alcoholic beverage coming from Mr. Morrow. T. 8:19-24; 9:17-18. Mr. Morrow admitted to consuming alcohol. T. 9:23-24; 10:9-10. Mr. Morrow submitted to field sobriety tests. T. 10:25; 11; 12:1-19; 13:6-25; 14:1-16. Mr. Morrow passed the HGN, Backwards Count and failed the Alphabet and Finger Dexterity. Id. Law enforcement read Mr. Morrow the implied consent advisory and offered a preliminary breath test. T. 14:18-25; 15; 16:1-2. Mr. Morrow refused the offer to take the preliminary breath test. Id. Law enforcement then issued Mr. Morrow a Report and Notice and released him. Appendix 8, T. 16:4-8. Law enforcement then mailed a copy of the Report and Notice to the DOT

(Exhibit 1b). Appendix 8, T. 17:14-22. The law enforcement officer did not feel he had probable cause to arrest Mr. Morrow and that Mr. Morrow was “obviously” safe to drive. T. 19:12-16; 21:13-15.

[¶12] The law enforcement officer did not indicate on the Report and Notice sent to the DOT (Exhibit 1b) that his opinion was that Mr. Morrow’s body contained alcohol. Appendix 8, T. 20:14-20.

[¶13] **LAW AND ARGUMENT**

[¶14] **Standard of Review**

[¶15] “The [North Dakota Department of Transportation’s] authority to suspend driving privileges is governed by statute, and the Department must meet basic and mandatory statutory requirements to have the authority to suspend driving privileges. Schaaf v. N.D. Dep’t of Transp., 2009 ND 145, ¶ 9, 771 N.W.2d 237.”
Landsiedel v. Director Dept. of Transp., 2009 ND 196 ¶6, 774 N.W.2d 645, 647.

The North Dakota Supreme Court exercises

limited review of the administrative revocation of driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Wetzel v. N.D. Dep’t of Transp., 2001 ND 35, ¶ 9, 622 N.W.2d 180. [The North Dakota Supreme Court’s] standard of review is the same standard applied by the district court. N.D.C.C. § 28-32-49. [The court] must affirm the administrative 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.

Bell v. North Dakota Dep't of Transp., 2012 ND 102 ¶8, 816 N.W.2d 786.

¶16] **Analysis**

I. The Hearing Officer's decision to revoke Mr. Morrow's driving privileges for one year is an error because N.D.C.C. § 39-20-03.2 requires that the law enforcement officer shall forward to the director a certified written report and "if the person was issued a temporary operator's permit because of the person's refusal to submit to a test under sections 39-20-01 and 39-20-14, the report must include information as provided in section 39-20-04." The report submitted by the law enforcement officer must indicate in writing that "the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol" and the report submitted by law enforcement had no written indication that Mr. Morrow's body contained alcohol. N.D.C.C. § 39-20-04 Subd. 1.

¶17] The North Dakota Supreme Court has stated that

[t]he Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute. The Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges. Schwind v. Director, N.D. Department of Transportation, 462 N.W.2d 147, 150 (N.D. 1990).

Aamodt v. North Dakota Dept. of Transp., 2004 ND 134 ¶15, 682 N.W.2d 308, 313-314.

¶18] In Mr. Morrow's case the statute specifically required that the Report and Notice sent to the Department of Transportation contain information that the

officer observed and formulated an opinion that Mr. Morrow's body contained alcohol. Without that information in the report the Department lacked the statutory authority to revoke Mr. Morrow's driving privileges. See Id.

[¶19] Whitecalfe v. North Dakota Dept. of Transp., 2007 ND 32, 727 N.W.2d 779, provides an analysis on a similar fact pattern to the present case. Whitecalfe is a consolidated decision on two refusal cases. The fact difference is that the Report and Notice in Whitecalfe sent to the Department included a probable cause explanation but the Report and Notice given to the drivers did not. The North Dakota Supreme Court explained that the statute did not require that the probable cause explanation be served on the driver before the Department had jurisdiction to revoke driving privileges but the statute did require that the probable cause explanation be sent to the Department.

[¶20] In our current case no explanation was sent to the Department that Mr. Morrow's body contained alcohol therefore under the rationale in Whitecalfe the Department did not have jurisdiction to revoke his driving privileges. Id. at 785, ¶12 ("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.).

[¶21] **Analysis**

II. Simply checking the box "refused onsite screening test" and certifying that "this report is true and correct" on the Report and Notice does not satisfy the requirements of N.D.C.C. § 39-20-14.

[¶22] Aamodt v. North Dakota Dept. of Transp., 2004 ND 134, 682 N.W.2d 308,

articulates the concept of whether certain statutory provisions are basic and mandatory provisions that require compliance before the Department is authorized to suspend a person's driving privileges. That decision made it unequivocal that including the probable cause explanation in the Report and Notice sent to the Department was basic and mandatory. The Hearing Officer concludes however that simply checking the box "refused onsite screening test" and certifying the report is true and correct satisfied the requirements of N.D.C.C. § 39-20-14. This conclusion was an error and is neither supported by the facts nor the law.

[¶23] The officer wrote "N/A" in the probable cause/lawfully detain portion of the Report and Notice and made no mention of alcohol in Mr. Morrow's body. The certification statement only certifies that the report is true and correct; the certification statement does not state that the elements of N.D.C.C. 39-20-14 have been satisfied. Therefore the facts do not support the Hearing Officer's conclusion.

[¶24] **CONCLUSION**

[¶25] Because N.D.C.C. § 39-20-04 specifically requires that the certified written report of the law enforcement officer, for purposes of section 39-20-14, show that the law enforcement officer had reason to believe that the person committed a moving traffic violation or was involved in a traffic accident as a driver, and in conjunction with the violation or accident the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol and the Report and Notice submitted to the Department contained no information

regarding the officer's opinion that Mr. Morrow's body contained alcohol the Department lacked the statutory authority to revoke Mr. Morrow's driving privileges.

[¶26] Therefore based on the foregoing arguments and law, Mr. Morrow respectfully requests that the decision of the Hearing Officer to revoke his driving privileges for one year be reversed.

[¶27] 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 and 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: September 24, 2012

/s/ Thomas F. Murtha IV
Thomas F. Murtha IV (ID #06984)
135 Sims, Suite 217
PO Box 1111
Dickinson, ND 58602-1111
Telephone: (701) 227-0146
Attorney for Appellant

