IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Timothy A. Mees, Appellee,	)	**Supreme Ct. No. 20120348**
v.	)	**District Ct. No. 08-2012-CV-00401**
North Dakota Department of Transportation, Appellant.	)	

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

HONORABLE GAIL HAGERTY

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

Whether the hearing officer reasonably determined that it was ascertained that Mees had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample as required in the state toxicologist's approved method?

STATEMENT OF CASE

On January 29, 2012, Officer Mark Otterness (Officer Otterness) arrested Timothy A. Mees (Mees) for the offense of driving a vehicle while under the influence of intoxicating liquor (DUI). Appendix (App.) 44. A Report and Notice, including a temporary operator's permit, was issued to Mees after chemical test results indicated Mees's blood alcohol concentration was .125 percent by weight. Id. The Report and Notice notified Mees of the Department's intent to suspend his driving privileges. Id.

In response to the Report and Notice, Mees requested an administrative hearing. Transcript (Tr.) Exhibit (Ex.) 1e. The hearing was held on February 24, 2012. App. 1. In accordance with N.D.C.C. § 39-20-05(2) the hearing officer considered four broad issues, as follows:

> (1) [w]hether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;
>
> (2) [w]hether the person was placed under arrest;
>
> (3) [w]hether the person was tested in accordance with N.D.C.C. section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and;

(4) [w]hether the test results show the person had an alcohol concentration of at least eight one-hundredths of one percent but less than eighteen one-hundredths of one percent by weight.

App. 1; Tr. Ex. 2.

Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Mees's driving privileges for a period of 91 days. App. 46. Mees requested judicial review of the hearing officer's decision. App. 47-48.

STATEMENT OF FACTS

On January 29, 2012, at 12:53 a.m. Officer Otterness initiated a traffic stop of Mees's vehicle because it did not have a license plate or a temporary registration sticker displayed. App. 4-5, 44. The vehicle also had oversized tires. App. 5. Officer Otterness identified Mees as the driver and detected the odor of an alcoholic beverage on his breath and noticed that Mees's speech was slurred. Id. Mees admitted consuming alcohol. App. 6.

Mees agreed to submit to field sobriety testing as requested by the officer. Id. Mees failed the three standardized field sobriety tests – the horizontal gaze nystagmus (HGN), the walk-and-turn and one-leg stand. App. 6-9. At the administrative hearing the hearing officer found Officer Otterness did not conduct the HGN test in accordance with his training and therefore did not consider it for purposes of determining probable cause to arrest. App. 43.

Following the field sobriety tests, Officer Otterness recited the implied consent advisory and requested Mees submit to an S-D5 onsite screening test. App. 9. Mees agreed. App. 9-10. Another officer assisting Officer Otterness

noticed that Mees had some chewing tobacco in his mouth and had him remove it. App. 31. Officer Otterness then waited three minutes in accordance with the approved method prior to having Mees perform the onsite screening test. App. 10, 31. The results showed that Mees's alcohol content was above the legal limit. App. 10.

Officer Otterness placed Mees under arrest for driving under the influence of alcohol at 1:03 a.m. App. 10, 31. Officer Otterness handcuffed Mees and placed him in the back seat of the patrol car. App. 10. Officer Otterness asked Mees if he would take a chemical breath test and Mees agreed. Id. Officer Otterness transported Mees to the Bismarck Police Department. App. 10, 32. Officer Otterness testified he arrived at the police department at either 1:08 or 1:10 a.m. App. 33. Officer Otterness and Mees walked directly into the booking room. App. 34. Officer Mitchell Wardzinski (Officer Wardzinski) was right there, having just completed running an Intoxilyzer test for another officer. App. 11. It was determined that Officer Wardzinski would also conduct Mees's Intoxilyzer test. Id. Officer Wardzinski began Mees's Intoxilyzer 8000 test at 1:25 a.m. and Mees's first breath sample occurred at 1:29 a.m. App. 45. The results of the Intoxilyzer test indicated Mees's alcohol concentration was .125 percent by weight. Id.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

In her Order reversing the hearing officer's decision, Judge Hagerty stated:

> Mr. Mees argues that the breath test in this case was not properly administered because the evidence does not establish that

> there was a 20-minute waiting period during which Mr. Mees had nothing to eat, drink, or smoke prior to administration of the test. The Department of Transportation argues the time period should be measured from the time when the test was administered, and that the hearing officer may have concluded there were 20 minutes prior to 1:29 a.m. when Mr. Mees was being observed. However, the officer administering the test indicated on a form at 1:25 a.m. that Mr. Mees had nothing to eat, drink, or smoke for the prior 20 minutes. The evidence does not support that statement
>
> Because I conclude there was not sufficient evidence to establish that the Intoxilyzer test was properly administered, the decision of the hearing officer suspending Mr. Mees driving privileges for 91 days is REVERSED.

App. 50-51.

Judgment was entered on June 27, 2012. App. 53. Notice of Entry of Judgment was filed July 20, 2012. App. 54. The Department appealed the Judgment to this Court. App. 55. The Department requests this Court reverse the judgment of the Burleigh County District Court and reinstate the administrative suspension of Mees's driving privileges for a period of 91 days.

STANDARD OF REVIEW

"An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C." McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). "This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision." Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993). "However, the district court's analysis is entitled to respect if its reasoning is sound." Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

This Court's review "is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency's decision is supported by the conclusions of law." McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep't of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder's decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only "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." Id. (citation omitted).

LAW AND ARGUMENT

The hearing officer's finding that the twenty minute waiting period was established is not against the greater weight of the evidence.

This Court has observed that "'[t]he admissibility of an Intoxilyzer test result is governed by N.D.C.C. § 39-20-07(5).'" Buchholtz v. Dir., N.D. Dep't of Transp., 2008 ND 53, ¶ 10, 746 N.W.2d 181 (quoting Johnson v. N.D. Dep't of Transp., 2004 ND 59, ¶ 11, 676 N.W.2d 807). This Court also has observed that "'[f]air administration of an Intoxilyzer test may be established by proof that the method approved by the State Toxicologist for conducting the test has been scrupulously followed.'" Buchholtz, 2008 ND at ¶ 10 (quoting Buchholz v. N.D. Dep't of Transp., 2002 ND 23, ¶ 7, 639 N.W.2d 490). However, "'scrupulous'

compliance does not mean 'hypertechnical' compliance." Buchholtz, 2008 ND 53 at ¶ 10 (external citations omitted.) The controlling statute, "[N.D.C.C. § 39-20-07,] does not require testimony of the state toxicologist or of the Intoxilyzer operator to show fair administration of the test." Frost v. N.D. Dep't of Transp., 487 N.W.2d 6, 8 (N.D. 1992).

The "Approved Method to Conduct Breath Tests" states in pertinent part as follows:

> Before proceeding, the operator must ascertain that the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample.

Tr. Ex. 8.

The question on appeal is whether a reasoning mind reasonably could have concluded that the greater weight of the evidence established that the twenty-minute waiting period was ascertained. For the reasons set forth below, the hearing officer reasonably determined the approved method was followed in this case. First, the Intoxilyzer Test Record and Checklist shows the approved method was followed. N.D.C.C. § 39-20-05(4) provides, in part, that a certified copy of the Intoxilyzer checklist is prima facie evidence of its contents without further foundation. The term "prima facie evidence" is defined as meaning "[e]vidence good and sufficient on its face . . . and which if not rebutted or contradicted, will remain sufficient." Black's Law Dictionary 1071 (5th ed. 1979). "If a driver want[s] to discredit the prima facie fairness and accuracy of a test, it [is] the driver's responsibility to produce evidence that the test was not fairly or adequately administered. . . . A driver must do more than raise the mere

possibility of error." Berger v. State Highway Comm'r, 394 N.W.2d 678, 688 (N.D. 1986).

Officer Wardzinski, the Intoxilyzer operator, answered "Y" or yes on the Intoxilyzer Test Record and Checklist in response to the question of whether the twenty-minute waiting period had been ascertained. App. 45. In addition, just above his signature, Officer Wardzinski certified he had followed the approved method, part of which required the twenty-minute waiting period to be ascertained. Id. Thus, when Mees's Intoxilyzer test record was admitted into evidence, Officer Wardzinski's statement that the twenty-minute waiting period was ascertained became "prima facie evidence". Prima facie evidence is not rebutted simply by asserting that it was not established how the waiting period was ascertained. Rather, Mees was required to present actual evidence contradicting the prima facie evidence that the twenty-minute waiting period was ascertained. See Thorsrud v. Dir., Dep't of Transp., 2012 ND 136, ¶ 10, 819 N.W. 2d 483 (stating, "once the record and checklist was received into evidence, Thorsrud had the burden to present sufficient evidence to rebut the prima facie evidence of fair administration by proving Officer Nielsen had not followed the approved method").

A more careful look at this Court's decision in Thorsrud is helpful. In analyzing whether the Department had met its burden to show that the twenty-minute waiting period had been ascertained, the Court stated:

> Under N.D.C.C. § 39-20-05(4), once the Intoxilyzer Test Record and Checklist was admitted into evidence, the Department "establish[ed] prima facie [its] contents without further foundation" that Officer Nielsen had followed the approved method and

> ascertained the twenty-minute waiting period. The Intoxilyzer Test Record and Checklist is "presumed to be sufficiently complete to show fair administration until the defendant shows that 'the evidence as a whole clearly negates the presumed fact.'" State v. Zimmerman, 516 N.W.2d 638, 642 (N.D. 1994) (citing N.D.C.C. § 12.1-01-03(4)(a)). Therefore, a driver may rebut the Department's documentary foundation of fair administration by establishing either a deviation from approved procedures or a lack of fair administration despite compliance with approved procedures. State v. Erickson, 517 N.W.2d 646, 648 (N.D. 1994) (citing Zimmerman, at 642).

Id. at ¶ 10. The Court found Thorsrud had sufficiently rebutted the Department's documentary foundation of fair administration by "present[ing] testimonial evidence, corroborated by cross-examination of Officer Nielsen, that established she was allowed to use the restroom without supervision during the twenty-minute waiting period." Id. However, the Court indicated that Thorsrud's rebuttal of the Department's documentary prima facie showing did not mean the test was not fairly administered. The Court indicated, "'[o]nce the defendant has successfully rebutted the prosecution's prima facie showing, the prosecution may present testimony to show fair administration despite defendant's rebuttal.'" Id. at ¶ 12 (quoting Erickson, 517 N.W.2d at 648-49). The Court then looked to whether other evidence had been presented in the case proving the test was performed according to the approved method and found that it had been. Id. at ¶¶ 12-13.

Unlike Thorsrud, here, Mees did not rebut the prima facie showing that the twenty-minute waiting period was ascertained by his own testimony. Instead, on appeal to the district court, Mees alleged that Officer Otterness's own testimony

called into question whether the twenty-minute period was ascertained. App. i., Doc. 8 at 7.

There are at least two erroneous premises underlying Mees's argument that the evidence cannot support the finding that the twenty-minute waiting period was ascertained. First, Mees contended that the twenty-minute waiting period had to be the twenty-minute period up to 1:25 a.m. because the Intoxilyzer test "commenced" at 1:25 a.m. Id. Mees's argument is contrary to the plain language of the approved method. Specifically, the approved method states, in part, "the operator must ascertain that the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample . . . ." Tr. Ex. 8, p. 2 of 4 (emphasis added.) It is undisputed that the Intoxilyzer test record shows that the first breath sample was collected at 1:29 a.m. App. 45. Therefore, the waiting period had to be ascertained for at least a twenty minute period prior to 1:29 a.m. and not 1:25 a.m.

The following exchange occurred between Mees's attorney and Officer Otterness on cross-examination:

> Mr. TURNER: You may or may not know the answer to the question. So Officer Wardzinski would have no clue the 20-minute waiting period was ascertained?
>
> OFFICER OTTERNESS: That's correct.
>
> MR. TURNER: Cause (sic) you didn't do it, and he didn't have him for 20-minutes.
>
> OFFICER OTTERNESS: No, he did not.

App. 36, ll. 1-7. This exchange did not produce evidence rebutting the prima facie case that the twenty-minute waiting period was ascertained because it is

clear that Officer Otterness' answers were based on a misconception of what the approved method requires that is readily apparent from a careful review of the questions and answers preceding this excerpt.

Specifically, just prior to the testimony reflected by this excerpt, Mees's attorney again had suggested through his questions that the twenty-minute waiting period had to have been ascertained beginning at 1:05 a.m. because the test "commenced" at 1:25 a.m. App. 35, ll. 16-20. Officer Otterness agreed with this premise even though, as shown above, the premise is clearly wrong in that the first breath sample was not collected until 1:29 a.m. App. 45. Thus, when Officer Otterness agreed that Officer Wardzinski "didn't have [Mees] for the 20-minutes" App. 36, ll. 5-7, Officer Wardzinski clearly was referring to the twenty-minute period from 1:05 a.m. to 1:25 a.m. The more relevant question – which was not asked – would have been whether Officer Wardzinski "had" Mees from 1:09 a.m. to 1:29 a.m. The evidence is that Officer Otterness and Mees arrived at the police department between 1:08 a.m. to 1:10 a.m. and went directly to the booking room. Thus, Mees did not present any evidence indicating he could not have been in Officer Wardzinski's presence for the relevant time period from 1:09 a.m. to 1:29 a.m.

Mees's second erroneous premise is that the twenty-minute waiting period cannot be ascertained without the officer either asking if the subject has anything in his or her mouth or inspecting the subject's mouth. However, this Court has specifically rejected that argument. See Buchholz, 2002 ND 23, ¶ 12 (stating, "[w]e conclude the State Toxicologist's approved method does not require test

operators to ask subjects if they have anything in their mouths or to check their mouths prior to administering the test"). Nonetheless, it is clear from the cross-examination of Officer Otterness that he bought into Mees's erroneous premise. App. 30, ll. 20-23 and App. 35, ll. 16-25. Officer Otterness's answers to questions with faulty premises about the requirements of the approved method cannot constitute evidence contradicting the prima facie evidence that the twenty-minute waiting period was ascertained.

In this regard, it is instructive to consider the Supreme Court's analysis in Johnson v. North Dakota Department of Transportation, 2004 ND 59, 676 N.W.2d 807. The arresting officer testified in Johnson that, in his mind, he ascertained the 20-minute waiting period beginning when the subject and he arrived at the corrections center. Id. at ¶ 16. The problem was that the first breath sample was collected just 16 minutes later. Id. at ¶ 15. Nonetheless, this Court upheld the suspension of the subject's driving privileges, explaining that the objective evidence showed that, before arriving at the corrections center, the arresting officer had ascertained the waiting period for an onsite screening test. Id. at ¶ 17. Thus, this Court explained, "[r]egardless of when the officer said he began to ascertain the time, the evidence supports the hearing officer's finding that the twenty-minute waiting period had been observed by the time the officer administered the Intoxilyzer test." Id.

This Court's analysis continued as follows:

> "Johnson argues there was no testimony provided to establish that he was continuously observed by the officer from the point of administration of the S-D2 test until the point of the Intoxilyzer test. Although there was no testimony that the officer constantly

> observed Johnson, observation is not the exclusive method of ascertaining whether the twenty-minute requirement has been met. Furthermore, a fact-finder can draw reasonable inferences from the evidence. It is not unreasonable for a fact-finder to infer that a person who had been handcuffed behind his back and had remained in police custody would have had nothing to eat, drink, or smoke during that time."

Id. at ¶ 18.

In this case, Officer Otterness ascertained a three-minute waiting period before administering the S-D5 test. Officer Otterness arrested and handcuffed Mees after administration of the S-D5 test. App. 10, ll. 17-19. The arrest occurred at 1:03 a.m. App. 31, ll. 22-25. Officer Otterness then searched Mees. App. 32, ll. 10-11. Mees then was placed in back of the patrol car. App. 10, l. 20; App. 32, ll. 8-9. Officer Otterness drove Mees to the Bismarck Police Department. App. 32, ll. 16-18. Officer Otterness estimated he arrived at the police department from 1:08 a.m. to 1:10 a.m. App. 33, ll. 9-11. Officer Otterness and Mees walked directly into the booking room. App. 34, ll. 14-15. Officer Otterness testified "[Mees] sat directly in front of me . . . [w]here I watched him and he did not place anything in his mouth, and during that time, and I started doing the paperwork." App. 34, ll. 17-21. Officer Otterness testified Officer Wardzinski administered the Intoxilyzer test. App. 11, ll. 5-7. The first breath sample was collected at 1:29 a.m. App. 45. The test results indicated Mees had an alcohol concentration of .125 percent by weight at 1:36 a.m. Id.

The Department's position is that, when the Intoxilyzer test record was admitted into evidence, it constituted prima facie evidence that the twenty-minute waiting period was ascertained. Further, a balanced review of the objective,

relevant evidence does not rebut the prima facie evidence that the twenty-minute waiting period was ascertained.

Further, even if this Court disagrees with the Department's position that Mees failed to rebut the prima facie evidence that the twenty-minute waiting period was ascertained, this Court should still reverse the district court and affirm the hearing officer's decision because as in Thorsrud other evidence was presented showing the test was performed according to the approved method. A reasoning mind reasonably could determine based on the facts cited above that Mees had nothing to eat, drink, or smoke, within twenty minutes before the collection of his breath sample.

CONCLUSION

The Department respectfully requests that this Court reverse the judgment of the Burleigh County District Court and affirm the Department's decision suspending Mees's driving privileges for 91 days.

Dated this 29th day of October, 2012.

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STATE OF NORTH DAKOTA

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Appellee,	)	**Supreme Ct. No. 20120348**
	)	
v.	)	**District Ct. No. 08-2012-CV-00401**
	)	
North Dakota Department of Transportation,	)	
	)	
Appellant.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 29th day of October, 2012, I served the attached **BRIEF OF APPELLANT and APPENDIX OF APPELLANT** upon Timothy A. Mees, by and through his attorney Tyrone J. Turner, by placing a true and correct copy thereof in an envelope addressed as follows:

Tyrone J. Turner
Attorney at Law
P.O. Box 2056
Bismarck, ND 58502-2056

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Donna J. Connor

Subscribed and sworn to before me
this 29th day of October, 2012.

Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2013