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DECEMBER 3, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

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

HONORABLE GAIL H. HAGERTY

BRIEF OF APPELLEE TIMOTHY A. MEES

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STATEMENT OF ISSUE

[1] **Whether the Department proved that Mees had nothing to eat, drink or smoke for twenty minutes prior to administering the Intoxilyzer 8000 to Mees, as required in the State Toxicologist's approved method?**

STATEMENT OF CASE

[2] On January 29, 2012, Bismarck Police Officer Mark Otterness ("Otterness") stopped a vehicle being operated by Timothy Mees ("Mees") for various motor vehicle equipment and registration deficiencies. (Administrative Hearing Transcript at page 5, lines 1-10; p. 5, lines 16-17). Almost immediately, Otterness commenced a DUI investigation. (Tr. at p.5, lines 20-23; Tr. at p. 6, lines 1-12). Upon concluding his investigation, Otterness arrested Mees for DUI. (Tr, at p. 10, lines 17-20; Report and Notice Form, Tr. Exhibit 1b). Otterness then requested that Mees provide a chemical breath sample for the purpose of determining his alcohol concentration, pursuant to North Dakota Century Code § 39-20-01. (Tr, at p. 10, lines 21-23; Tr. Exhibit 1b). Mees agreed. (Tr. at p. 9, lines 24-25; p. 10, line 1).

[3] Mees was then transported to the Police Department. (Tr. at p. 32, lines 12-20). Another officer administered the chemical test to Mees. (Tr. at p. 11, lines 3-7, 10-14; p.33, lines 15-23). Otterness did not witness the administration of the test. (Tr. at p. 11, lines 1-19). After the other officer was done, Otterness was provided an Intoxilyzer Test Record and Checklist. (Tr. at p. 11, lines 20-25; p. 12, lines 1-5; Tr. Exhibit 1c).

[4] With the information in the Test Record and Checklist, Otterness completed a Report and Notice form and hand-delivered it to Mees. (Tr. at p. 4, lines 8-17; Tr. Exhibit 1b; Tr. Tr. Exhibit 1c). The Report and Notice form issued to Mees' informed Mees that the

North Dakota Department of Transportation ("NDDOT" or "Department") intended to suspend Mees' driving privileges for operating a vehicle with a breath-alcohol concentration more than .08%. (Tr. at p. 4, lines 8-17; Tr. Exhibit 1b). Mees thereafter made a timely request for an administrative hearing pursuant to N.D.C.C. § 39-20-05. (Tr. Exhibit 1e).

[5] The administrative hearing was held on February 24, 2012. (Tr. at p. 1, lines 1-4). Otterness testified at the hearing. (Tr. at pp. 3-39). The officer who administered the Intoxilyzer 8000 to Mees on January 29, 2012, was not called to testify at the hearing. Following the hearing, NDDOT Hearing Officer Mary Ellen Varvel found that Mees had submitted a chemical breath sample in accordance with the State Toxicologist's approved method. (Hearing Officer's Decision; Appellant's App. at p. 46). The Hearing Officer suspended Mees' driving privileges for 91days. (Hearing Officer's Decision; Appellant's App. at p. 46). Mees thereafter timely requested judicial review of the Hearing Officer's decision. (Notice of Appeal and Specifications of Error, Appellant's App. at pp. 47-48).

[6] The Honorable Gail H. Hagerty, District Judge for the South Central Judicial District, issued an Opinion and Order, dated June 21, 2012. (Appellant's App. at pp. 49-51). In her Order, the District Judge concluded that "there was not sufficient evidence to establish that the intoxilyzer test was properly administered." (Appellant's App. at pp. 49-51). Based thereon, the hearing officer's decision to suspend Mees' driving privileges was reversed. (Appellant's App. at pp. 49-51).

[7] An Order for Judgment was entered on June 25, 2012. (Appellant's App. at p. 52). Judgment was entered June 27, 2012. (Appellant's App. at p. 53). Notice of Entry of Judgment was filed and served on the Appellant on July 20, 2012. (Appellant's App. at p. 54). Appellant filed its Notice of Appeal on September 17, 2012. (Appellant's App. at p.

55).

[8] On appeal, the Department argues that the approved method was followed and the hearing officer's decision should be reinstated.

STATEMENT OF FACTS

[9] On January 29, 2012, Bismarck Police Officer Mark Otterness stopped a pickup truck being operated by Timothy Mees for no license plates, no temporary registration sticker, and oversized tires at 12:53 AM. (Administrative Hearing Transcript at page 5, lines 1-10; p. 5, lines 16-17). Upon stopping the vehicle, Otterness conducted a DUI investigation and had Mees perform several sobriety tests. (Tr. at p.5, lines 20-23; Tr. at p. 6, lines 1-12, 15-25; p. 7, lines 9-25; p. 9, lines 6-15; p. 9, lines 23-25; p. 10, lines 1-15). One field test Mees was asked to perform was a preliminary breath test ("PBT"). (Tr, at p. 10, lines 21-23; Tr. Exhibit 1b). It was at this time, apparently, another assisting officer, Officer Roger Marks, noticed that Mees had tobacco in his mouth. (Tr. at p. 31, lines 11-13).

[10] Mees was subsequently arrested for suspicion of DUI at 1:03 AM. (Tr. at p. 10, lines 17-18; Report and Notice Form, Appellant's Appendix at p. 44). Otterness transported Mees to the Bismarck Police Department in his patrol vehicle; arriving at the police station between 1:08 AM and 1:10 AM. (Tr. at p. 32, lines 12-25; p. 33, lines 1-11). When they arrived, Otterness escorted Mees into the booking room where Otterness worked on paperwork for a short time. (Tr. at p. 11, lines 13-14; p. 34, lines 14-21).

[11] Sometime thereafter, Otterness turned custody of Mees over to another officer at the station, Mitch Wardzinski. (Tr. at p. 11, lines 3-7, 10-14; p.33, lines 15-23). Wardzinski had agreed to administer the Intoxilyzer 8000 to Mees for Otterness. (Id.) Otterness did not observe Wardzinski administer the test to Mees. (Tr. at p. 11, lines 15-16). Otterness did

not tell Wardzinski that Otterness had observed Mees not eat, drink or smoke for the prior twenty minutes. (Tr. at p. 36, lines 1-7). Otterness did not tell Wardzinski that, since the stop, Marks had observed Mees consuming chewing tobacco. (Id.) Wardzinski commenced the test at 1:25 AM. (Tr. at p. 34, lines 5-10; Tr. Exhibit 1c). When he started the test, Mees had been in Wardzinski's presence for less than twenty minutes. (Tr. at p. 36, lines 1-7). Despite this, when asked upon immediately upon starting the machine to begin a test for Mees, Wardzinski recorded that a twenty- minute wait period had, in fact, been verified.(Tr. at p. 34, lines 22-25; p. 35, lines 1-15; Tr. Exhibit 1c).

[12] After the Intoxilyzer 8000 test was complete, Wardzinski printed and provided Otterness with the Intoxilyzer Test Record and Checklist. (Tr. at p. 11, lines 20-25; p. 12, lines 1-5; Tr. Exhibit 1c). Otterness used the Test Record and Checklist provided to him by Wardzinski to complete the Report and Notice Form. (Tr. at p. 4, lines 8-17; Tr. Exhibit 1b; Tr. Exhibit 1c). Mees requested an administrative hearing. (Tr. at Ex. 1e). One was held on February 24, 2012. (Tr. at p. 1, lines 1-4).

[13] Officers Marks and Wardzinski did not testify at the administrative hearing. (Tr.). Otterness did. (Tr. at pp. 3-39) Otterness testified that he never checked to insure that Mees had nothing in his mouth for twenty minutes prior to the Intoxilyzer 8000 being conducted. (Tr. at p. 36, lines 1-7). Otterness also provided the following testimony:

> MR. TURNER*: All right. So 1:25 is when [Wardzinski] would've commenced starting the test. Now, you said you were an approved Intoxilyzer operator, correct?*
>
> OFFICER OTTERNESS*: Correct.*
>
> MR. TURNER*: Now. One of the first things when you flip on that machine, or if it's already on and warmed up, one of the first things you do is answer a few questions, a series of questions that it poses . . .*

OFFICER OTTERNESS*: Yeah.*

MR. TURNER*: . . . to you, right?*

OFFICER OTTERNESS*: That's correct.*

MR. TURNER*: One of the first questions it poses to you is a 20 minute waiting period ascertained, correct?*

OFFICER OTTERNESS*: Right.*

MR. TURNER*: That's like one of the first things.*

OFFICER OTTERNESS*: Yep.*

. . . .

MR. TURNER: *Now, and I . . . this . . . this is just what I want to know. Is if you type in yes at 1:25, wouldn't it be reasonable to assume that you have to know at 1:05 that this individual has not had anything in his mouth?*

OFFICER OTTERNESS: *That's correct.*

MR. TURNER*: But you never asked him, you never . . .*

OFFICER OTTERNESS*: No, I did not.*

MR. TURNER: . . . *affirmatively, correct. You never affirmatively checked.*

OFFICER OTTERNESS: *Right.*

MR. TURNER*: You may or may not know the answer to the question. So Officer Wardzinski would have no clue the twenty minute waiting period was ascertained?*

OFFICER OTTERNESS*: That's correct.*

MR. TURNER*: Cause you didn't do it, and he didn't have [Mees] for 20 minutes?*

OFFICER OTTERNESS*: No, he did not.*

(Tr. at p. 34, lines 22-25; p. 35, lines 1-12, 16-22; p. 36, lines 1-7).

STANDARD OF REVIEW

[14] The Administrative Agencies Practices Act, N.D.C.C. Chapter 28-32, governs the review of an administrative suspension of a driver's license. *Johnson v. ND Department of Transportation,* 2004 ND 148, ¶ 5, 683 N.W.2d 886. The Department's decision shall be affirmed unless one of the following errors is made:

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 also, Johnson v. ND Department of Transportation,* 2004 ND 148, ¶ 5.

[15] On an appeal from a district court's ruling on an administrative appeal, the North Dakota Supreme Court reviews the agency's order in the same manner. *Johnson*, at ¶6; *citing*, *Anderson v. Director, N.D. Dept. of Trans.*, 2005 ND 97, ¶7, 696 N.W.2d 918.

LAW AND ARGUMENT

[16] The Department Lacked Jurisdiction To Suspend Mees' Driving Privileges When It Failed To Establish That The State Toxicologist's Approved Method For Administering The Intoxilyzer 8000 Was Followed.

[17] The admissibility of an Intoxilyzer test result is governed by N.D.C.C. § 39-20-07(5). *Buchholz v. N.D. Department of Transportation,* 2002 ND 23, ¶7, 639 N.W.2d 490. Pursuant to N.D.C.C. § 39-20-07(5), the results of the Intoxilyzer 8000 are admissible only if "the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee." *Id.*

[18] The approved method must be scrupulously followed. *Id.* Without strict compliance with the approved method, the scientific accuracy of the test cannot be established without expert testimony. *Ringsacker v. Director, N.D. Dept. of Transportation,* 1999 ND 127, ¶8, 596 N.W.2d 328, *citing, Bryl v. Backes*, 477N.W.2d 809, 813 (N.D. 1991).

[19] If there is a deviation from the approved method which goes to the scientific accuracy of a test, a hearing officer cannot assume that the test was accurate. *Wagner v. Backes*, 470 N.W.2d 598 (N.D. 1991) (citing *Price v. North Dakota DOT Director*, 469 N.W.2d 560 (N.D.1991). "To establish fair administration, the director can prove that those portions of the approved method which go to the scientific accuracy and reliability of the test have been "scrupulously" complied with, or he can offer expert testimony." *Wagner v. Backes*, 470 N.W.2d 598 (N.D. 1991) (citing *State v. Schwalk*, 430 N.W.2d 317, 323-24 (N.D. 1988).

[20] Since there was no expert testimony provided in the instant matter, the director must establish that the approved method for conducting the Intoxilyzer 8000 on Mees was scrupulously followed. *See*, *Wagner v. Backes*, 470 N.W.2d at 323-24.

[21] In the Testing Procedure section of the Approved Method to Conduct Breath Tests with the Intoxilyzer 8000, certified by the State Toxicologist on September 29, 2011, and in place when the test was administered to Mees, it reads as follows: .

> To initiate a test, press the "Esc" key twice. The display will read "Enter Password:." Depress the "Start Test" switch. The instrument will display "Please scan ID or press enter." The operator may swipe his Chemical Test Operator Certificate under the camera. He should then review the inputted information. If the card is not available, he should press "Enter." The operator should then enter his operator number and name when prompted.
>
> 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 by answering the question "20 Minute Wait?." The operator should then answer "Y" or "N."

(Tr. at Exhibit 4).

[22] Otterness testified at the administrative hearing that the operator of the Intoxilyzer8000 could not have ascertained that Mees had had nothing to eat, drink or smoke within twenty minutes prior to the collection of the breath sample. Otterness testified that the operator, Officer Wardzinski, did not receive Mees for testing until sometime after 1:08 AM, but answered "yes" to the 20-minute wait question at 1:25 AM, or 17 minutes after Mees arrived at the station. Therefore, Wardzinski, could not have possibly answered the "20 Minute Wait?" question affirmatively. Wardzinski entered erroneous information by answering yes.

[23] Despite knowing that Wardzinski recorded inaccurate data into the machine, the Department first urges the Court to overlook this fact and find that, because the Intoxilyzer Test Record was admitted into evidence at the hearing, it should nevertheless be considered facially accurate. The Appellant apparently is unfamiliar with the phrase "garbage in, garbage out". As noted above, if there is a deviation from the approved method which goes to the scientific accuracy of a test, a hearing officer cannot assume that the test was accurate. *Wagner v. Backes*, 470 N.W.2d 598 (N.D. 1991).

[24] Even so, Mees asserts that he has shown, through testimony Otterness provided during cross-examination, that the "prima facie" evidence that the Department advocates was sufficiently rebutted or contradicted

[25] The Department next argues that the twenty minute wait period is to be calculated from 1:29 AM, because that is when the first breath sample was recorded by the Intoxilyzer. This overlooks the fact that the Approved Method in place when Mees was tested which requires the operator, *"before proceeding"* to ascertain whether the subject has had nothing to eat, drink or smoke. (Tr. at Exhibit 4; Tr. at p. 34, lines 22-25; p. 35, lines 1-12).

[26] Moreover, the Department's claim discounts the fact that the already established erroneous response given by Wardzinski is a substantive error; affecting the accuracy of the results. Wardzinski entered incorrect information by answering yes. If Wardzinski had instead answered "No", the factually correct answer, no breath sample could have been collected.

[27] Finally, the Department argues that Otterness' failure to check the mouth is not fatal to it establishing that a twenty minute period was determined. In doing so, it cites to

this Court's decision in *Buchholz*; wherein this Court held that it was not necessary for an officer to ask subjects if they have anything in their mouths or to check their mouths prior to administering the test. *Buchholz* at ¶12. *Buchholz* is distinguishable from the present case.

[28] In *Buccholz*, the Supreme Court found that the Officer in that case observed Buchholz for twenty minutes prior to administering the Intoxilyzer test, and that during this time, the Officer testified that he had not observed Buchholz eat, drink or smoke. *Buchholz* at ¶ 12. Here, according to Otterness's testimony, Mees did in fact have something in his mouth sometime after Mees was pulled over and prior to the administration of the Intoxilyzer test. Mees had chewing tobacco in his mouth.

[29] It's common knowledge that chewing tobacco is a smokeless tobacco, consumed by the user by placing the "chaw", "dip" or "plug" into one's mouth and chewing, or sucking on it. When this tobacco is chewed on, it mixes with the user's mouth saliva to create a kind of nicotine-infused tobacco juice. This tobacco juice, which accumulates in the user's mouth, can then be either spat out or swallowed by the user.

[30] Although purportedly Marks had Mees remove the tobacco, Otterness did not verify, either by asking or by a visual inspection, that Mees no longer had any chewing tobacco therein. Marks also did not testify. There is no evidence Marks verified Mees' mouth was clear or that he told Mees that, in order for the tests to be accurate, Mees' mouth must voided of all of the tobacco. In *Buchholz*, the officer testified at the hearing that he had observed the subject for twenty minutes not consume anything in his presence. Here, even though Otterness had been personally interacting with Mees, Otterness conceded that he could not ascertain a twenty minute wait period where Mees had not consumed anything or

had any tobacco in his mouth. This is inapposite to *Buchholz*, where there was no evidence that Buchholz ever had consumed anything.

[31] Also, despite the Department's assertions to the contrary, there is no definitive time for when the chewing tobacco may have been discovered, and potentially removed, from Mees' mouth. As noted above, Otterness conceded he could not establish a twenty minute wait period with any confidence.

[32] In the present case, much like *Wagner*, the officers deviated from a portion of the State Toxicologist's Approved Method by not ascertaining that nothing was in Mees's mouth and by disregarding the 20-minute wait period required for an accurate test from the Intoxilyzer 8000. Because this deviation could affect scientific accuracy and reliability of the test, and there was no expert testimony on the effect of the deviation on the accuracy of the test results, the director failed to show that the test was "fairly administered."

CONCLUSION

[33] WHEREFORE, the Appellee, Timothy Mees, respectfully prays that this Court affirm the ruling of the District Court that there existed insufficient evidence to establish that the test was fairly administered.

Dated this 3rd day of December 2012.

____

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IN THE SUPREME COURT

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Appellee,	)	
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vs.	)	**CERTIFICATE OF SERVICE**
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North Dakota Department of	)	
Transportation,	)	**Supreme Court No.: 20120348**
	)	**District Court No.: 08-2012-CV-00401**
Appellant.	)	

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

I, Tyrone J. Turner, hereby certify that on December 3, 2012, I served the BRIEF OF APPELLEE TIMOTHY A. MEES upon the following by emailing a true and correct copy to the following email addresses:

Michael T. Pitcher	Supreme Court Clerk of Court
mtpitcher@nd.gov	supclerkofcourt@ndcourts.gov

and by mailing a true and correct copy to the following U.S. Mail address:

None.

Dated this 3rd day of December, 2012.

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