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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jay Olson, Appellee, v. North Dakota Department Of Transportation, Appellant.	**Supreme Ct. No. 20120352** **District Ct. No. 27-2012-CV-0003**

APPEAL FROM THE DISTRICT COURT
MCKENZIE COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

HONORABLE DAVID W. NELSON

APPELLEE'S BRIEF

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TABLE OF CONTENTS

Page Number

TABLE OF AUTHORITIES

Statutes and Other Authorities

I. ISSUE PRESENTED FOR REVIEW

[¶001] Whether the Hearing Officer properly determined that Officer Blood had ascertained that Olson had nothing to eat, drink, or smoke within twenty minutes of submitting to a breath sample as required by the approved method.

II. STATEMENT OF CASE

[¶002] This case involves an appeal by the North Dakota Department of Transportation ("Department"), of a district court judgment reversing the 180 day suspension of Jay Olson's ("Olson") driving privileges. Olson requests the Court to uphold the district court's reversal of his administrative license suspension.

III. STATEMENT OF FACTS

[¶003] On December 10, 2011, Watford City Police Officer, Daniel Blood ("Officer Blood"), was on routine patrol in Watford City when he observed a vehicle driven by Jay Olson ("Olson"). Appellant's Appendix (App.) 5-6. Officer Blood initiated a traffic stop of Olson's vehicle. App. 7. Officer Blood approached Olson's vehicle in order to make an inquiry into his driving behavior and to review his driver's license. App. 7. After spending some time with Olson, Officer Blood detected the odor of alcohol and commanded him to exit his vehicle to submit to field sobriety testing. App. 8.

[¶004] Prior to administering the field sobriety tests, Officer Blood discovered that Olson had chewing tobacco in his mouth and had him remove it. App. 18, 19. Next, Officer Blood administered standardized and non-standardized field sobriety tests. App. 9-13, 21-22. At the administrative hearing, Officer Blood initially stated that he could not recall the time that he began to perform field sobriety tests on Olson. App. 18. However, upon further questioning from the hearing officer, Officer Blood estimated it took ten minutes to complete the field sobriety tests. App. 21, 22. At 12:17 a.m., Officer Blood administered the SD-5 screening test. App. 18. Immediately upon completion of the SD-5 screening test, Officer Blood placed Olson under arrest at 12:18 a.m. for driving under the influence of alcohol. App. 14. Officer Blood then requested Olson to submit to a chemical test in the form of breath test. App. 15. Olson agreed and at 12:30 a.m. Officer Blood began testing him on the Intoxilyzer 8000. App. 15. Upon completion of the Intoxilyzer 8000 test, Olson was given a copy of the North Dakota Report and Notice

Form. App. 5, 19.

IV. STANDARD OF REVIEW

[¶005] The review of an administrative license suspension is governed by N.D.C.C. ch. 28-32, the Administrative Agencies Practice Act. Houn v. N.D. Dep't of Trans., 2000 ND 131, ¶ 5, 613 N.W.2d 29. The Department's decision will be affirmed unless any of the following are present:

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 finds 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.

Johnson v. N.D. Dep't of Trans., 2004 ND 148, ¶ 5, 683 N.W.2d 886, N.D.C.C. § 28-32-46.

[¶006] This Court gives deference to the administrative agency's findings of fact and will not substitute its judgment for that of the agency. Maisey v. N.D. Dep't

of Transp., 2009 ND 191, ¶ 9, 775 N.W.2d 200. Instead, the Court will decide "only whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id. "If sound, the district court's analysis is entitled to respect." Id. An issue presented that is a mixed question of law and fact is reviewed de novo. Id.

V. LAW AND ARGUMENT

I. Officer Blood Did Not Ascertain a Twenty Minute Waiting Period Before Administering the Intoxilyzer Test To Olson.

[¶007] N.D.C.C. § 39-20-07 governs the interpretation of chemical test results. This section applies to both criminal and civil proceedings involving the allegations that a person operated a motor vehicle under the influence of alcohol. In order for the test results to be admitted into evidence, it must be shown that the sample was properly obtained and the test was fairly administered. N.D.C.C. 39-20-07(5). One of the requirements set forth in the Approved Method to Conduct Breath Tests with the Intoxilyzer 8000 is the operator of the testing device must ascertain the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample. Transcript Department Ex. 8, page 2 of 4.

[¶008] In Bickler v. N.D. State Highway Comm'r, this court stated that in order to ascertain whether a subject has eaten, drank or smoked, "[t]he duty to assure the integrity of the sample requires the officer to maintain observation of the subject, and necessarily limits the extent of the privacy reasonably available under the circumstances." 423 N.W. 2d 146, 147-48 (N.D. 1988). The Supreme Court has also stated 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." Buchholz v. N.D. Dep't of Trans., 2002 ND 23, ¶7, 639 N.W.2d 490 (N.D. 2002). "Failure to abide by the Approved Method renders the accuracy and reliability of the test results doubtful without explanatory testimony by the State toxicologist." Schirado v. State Highway Comm'r, 382 N.W.2d 391, 392 (N.D. 1986). Because the statue allows evidence to be admitted without expert witness testimony that would establish reliability and accuracy, all of the requirements of the statute must be scrupulously met to ensure that testing is uniform and fairly administered. Moser v. State Highway Comm'r, 369 N.W.2d 650, 654 (N.D. 1985). In sum, it is clear that the burden of proof is upon the Department to show clearly that the approved method for the operation of the Intoxilyzer test was scrupulously followed.

[¶009] In this case, the Officer Blood did not ascertain that Olson did not have anything to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample. The definition of the word "ascertain" in the Approved Method is at the heart of this appeal. Interpretation of the Approved Method is a question of law. Hettich v. Moore, 514 N.W.2d 378, 380 (N.D. 1994). In State v. Chihanski, this Court defined ascertain by referring to Black's Law Dictionary 114 (6th ed. 1990). 540 N.W.2d 621, 624 (N.D. 1995). Ascertain was defined as "to find out by investigation." Id. This same authoritative text, however, defines the meaning of ascertain as "to render certain or definite". Black's Law Dictionary 114 (6th ed. 1990). Therefore, the definition is ambiguous. When ambiguities exist in criminal statutes, this Court generally resolves them in favor of the accused. State v. Brossart, 1997

ND 119, ¶ 23, 556 N.W.2d 752. Although the instant case is not a criminal case, this Court stated that "loss of driving privileges is not insubstantial and may entail economic hardship and personal inconvenience." Kobilansky v. Liffrig, 358 N.W.2d 781, 787 (N.D. 1984). The ambiguity that exists in the definition of the word ascertain must be construed against the Department. Therefore, it must be certain and definite that the individual submitting to an Intoxilyzer test has had nothing to eat, drink, or smoke twenty minutes before submitting to an Intoxilyzer test.

[¶010] In the instant case, Officer Blood failed to scrupulously comply with the Approved Method when he did not ascertain a twenty minute waiting period before administering a breath test to Olson. It was clearly established that before Officer Blood conducted his field sobriety tests, he had Olson remove chewing tobacco from his mouth. On cross-examination, Officer Blood stated that he did not recall what time he started the field sobriety tests. Upon further questioning from the hearing officer, Officer Blood estimated that it took ten minutes to complete field sobriety testing. Officer Blood then stated that he arrested Olson at 12:18 a.m. The Intoxilyzer test was completed at 12:30 a.m. Therefore, it was incumbent upon Officer Blood to ascertain he had Olson remove the chewing tobacco from his mouth before 12:10 a.m. Officer Blood only presented an estimate of what time he had Olson remove the chewing tobacco from his mouth. It is difficult to argue that Officer Blood was certain or definite about the time he had Olson remove the tobacco from his mouth. The Court has stated that scrupulous compliance with the Approved Method does not mean hypertechnical compliance. Steinmeyer v. N.D. Dep't of Trans., 2009 ND 126 ¶ 9, 768 N.W.2d 491. In this case, requiring law

enforcement to record the time that Olson cleared his mouth is not onerous or hypertechnical, it is a relatively small requirement for somebody like Officer Blood who knows he needs to comply with the Approved Method before he administers an Intoxilyzer test.

[¶011] The Department cites Thorsrud v. Dir., Dep't of Transp., 2012 ND 136, 819 N.W.2d 483, in support for overturning the district court's judgment. Appellant's Brief at 7-8. However, the instant case and Thorsrud differ on many key points. In Thorsrud, the arresting officer checked the mouth of Thorsrud at 2:31 a.m. and determined it was clear. Id. at ¶ 2. An Intoxilyzer test was performed at 2:52 a.m. Id. However, in between the mouth check and the Intoxilyzer test, Thorsrud used the restroom unsupervised. Id. ¶ 3. Thorsrud testified that she did not place anything in her mouth while in the restroom. Id. By allowing Thorsrud to use the bathroom unsupervised, the Court held the Officer Nielson deviated from the Approved Method. Id. ¶ 10. Therefore, Thorsrud had rebutted the Department's prima facie evidence of the Intoxilyzer test. This Court held, however, since Thorsrud stated that she did not place anything in her mouth while in the bathroom, any defect in the administration of the test was cured.

[¶012] Unlike in Thorsrud, it was clearly established that Olson had chewing tobacco in his mouth. Thorsrud also offered a clearly established time when the mouth check occurred. The time that Olson's mouth was cleared in this case has never been established. When Officer Blood stated that he did not recall how long it took to complete field sobriety testing on Olson, the Department's prima facie evidence of complying with the approved method was rebutted. When the hearing

officer engaged in further questing of Officer Blood after cross-examination, Officer Blood testified that field sobriety testing lasted an estimated ten minutes. Unlike in Thorsrud where there was clear testimony that cured the defect of fair administration of the Intoxlizer test, no testimony curing the defect occurred in this case. As a result of the deviation from the Approved Method, the hearing officer wrongfully relied on the Intoxlyzer result when suspending Olson's driving privileges.

CONCLUSION

[¶013] For the reasons stated above, Olson respectfully requests that this Court affirm the judgment of the district court overturning the hearing officer's decision suspending his driving privileges for 180 days.

Dated this 4 day of December, 2012.

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CERTIFICATE OF SERVICE BY US MAIL

I hereby certify that a true and correct copy of the Appellee's Brief was served by U.S. first class mail on this 6th day of December, 2012, addressed to:

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