20140161

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Nathaniel Deeth,
Petitioner/Appellee,

v.

Director, North Dakota Department of Transportation,
Respondent/Appellant.

Supreme Ct. No. 20140161

District Ct. No. 08-2013-CV-02646

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

HONORABLE BRUCE B. HASKELL

BRIEF OF APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Other Authorities

STATEMENT OF ISSUE

Whether the preponderance of the evidence supports the hearing officer's determination that Deeth was in actual physical control of his vehicle while under the influence of intoxicating liquor.

STATEMENT OF CASE

North Dakota Highway Patrol Sergeant Steven Fischer ("Sgt. Fischer") arrested Deeth on August 21, 2013, for the offense of being in actual physical control of his vehicle while under the influence of intoxicating liquor. (App. to Br. of Appellant ("Department's App.") 5.) Deeth requested a hearing in accordance with N.D.C.C. § 39-20-05. (Id. at 6.) An administrative hearing was held on September 13, 2013, however, Deeth failed to appear at the hearing. At the conclusion of the hearing, the hearing officer issued her Hearing Officer's Decision revoking Deeth's driving privileges for a period of 180 days. (Id. at 8.)

Deeth submitted a Petition for Reconsideration and Request for a Hearing based upon his inability to attend the hearing, which the hearing officer granted. (R. 11; Department's App. 9.) A second administrative hearing was held on October 16, 2013, at which the hearing officer considered the following issues pertaining to Deeth's refusal to submit to an alcohol concentration test under N.D.C.C. § 39-20-01:

> (1) [w]hether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance;
>
> (2) [w]hether the person was placed under arrest; and
>
> (3) [w]hether the person refused to submit to the test or tests.

(Id. at 7.)

Following the hearing, the hearing officer issued her Hearing Officer's Decision on Rehearing revoking Deeth's driving privileges for a period of 180 days. (Id. at 10-11.) Deeth filed a Petition for Reconsideration, which the hearing officer denied. (R. 18; Department's App. 12.) Deeth appealed to the district court from the hearing officer's denial of his Petition for Reconsideration. (Id. at 13-15.)

STATEMENT OF FACTS

On August 21, 2013, Sgt. Fischer responded to a report that had been received by the Highway Patrol from the North Dakota Department of Transportation of "a vehicle that was parked in the south parking lot in the eastbound Apple Creek rest area of I-94, which is about nine to ten miles east of Bismarck." (Tr. 5, l. 7 – 6, l. 7; 16, ll. 4-17.) Sgt. Fischer stated the report indicated the vehicle had been parked at the location "for approximately three days" and "it had not moved." (Tr. 6, ll. 8-12; 16, ll. 18-20.)

Upon arriving at the rest area Sgt. Fischer observed that both back passenger doors of the reported vehicle were open and that there was "an individual that was laying in the back seat of the vehicle." (Tr. 6, l. 16 – 7, l. 3.) The occupant of the vehicle, who was identified as Deeth, informed Sgt. Fischer that "he had a dead battery at that particular point in time." (Tr. 7, ll. 9-11.) Sgt. Fischer testified "I asked him about the battery just to see if he had some kind of a plan as far as how he was going to proceed, as far as moving the vehicle. And

he stated that ... he didn't state anything to me at that point in time." (Tr. 7, ll. 11-14.)

While speaking with Deeth, Sgt. Fischer observed indicia of Deeth's intoxication, including "a strong stale odor of alcoholic beverages coming from inside the vehicle," "numerous opened bottles of what appeared to be a beer" within the vehicle, and Deeth's slurred speech and bloodshot and glassy eyes. (Tr. 7, l. 25 -- 8, l. 10.) After Deeth requested he be allowed to exit the backseat of his vehicle, Deeth then entered the driver's door of the vehicle to search for his driver's license. (Tr. 8, l. 11 -- 9, l. 8.)

Sgt. Fischer testified:

> I asked him about the keys for the vehicle as well too, which he proceeded to start looking for inside the vehicle. There was quite a bit of items ... personal items that Mr. Deeth had inside the vehicle. So, he stated he wasn't able to find the keys, but he did give me his Wisconsin driver's license.

(Tr. 9, ll. 8-13.) Sgt. Fischer further stated "when I did ask him about the keys, though, too, he was looking inside the vehicle for that, because I did particularly ask him for that. So he was looking inside, probably knowing that that's where they would be at." (Tr. 21, ll. 6-9.)

Sgt. Fischer requested Deeth submit to a series of field sobriety tests which Deeth failed. (Tr. 10, l. 18 -- 14, l. 18.) Sgt. Fischer placed Deeth "under arrest for actual physical control of a motor vehicle while under the influence of alcohol." (Tr. 14, ll. 19-22.) Sgt. Fischer informed Deeth of the implied consent advisory and requested he submit to blood test, which Deeth refused. (Tr. 14, l. 25 – 15, l. 10.)

Sgt. Fischer stated that after Deeth was arrested, he searched the vehicle, but was unable to locate the keys. (Tr. 19, ll. 9-13.) Sgt. Fischer explained "[Deeth] had a tremendous amount of his personal belongings that were inside. So, I did give an honest effort to try and find the keys, was not able to." (Tr. 19, ll. 12-15.) Sgt. Fischer testified "[a]gain, he had a lot ... a lot of items that ... that were there. So, could the keys have been there? Yes, absolutely. Just because of the amount of items that he had that were in that particular area." (Tr. 19, ll. 16-21.)

Sgt. Fischer testified Deeth's vehicle was moved from the rest area by a towing company. (Tr. 18, l. 24 -- 19, l. 7.) Sgt. Fischer explained:

> [W]e had a conversation about what he wanted to do with his vehicle. And at that point, I offered the tow truck to him. He had told me that he didn't have anybody else that would be available to come and get the vehicle. So, it was agreed by him to go ahead and have the vehicle towed.

(Tr. 28, l. 24 – 29, l. 5.) Sgt. Fischer responded in the affirmative to the leading question of Deeth's counsel: "So, the only means by which that vehicle was moved was through the tow truck." (Tr. 20, ll. 4-6.)

Sgt. Fischer responded in the negative to the question of Deeth's counsel: "Do you have any evidence that the battery wasn't dead?" (Tr. 20, ll. 7-9.) When questioned if "[a]ssuming that there's no battery for it, how would he have been able to start the car with a dead battery nine to ten miles outside of town," Sgt. Fischer responded "[h]e could have had somebody come in to the rest area, jump start him with a set of cables. There's numerous of ways that he could

have made that happen." (Tr. 21, ll. 13-18.) Deeth did not testify at the administrative hearing. (Tr. 29, ll. 17-20.)

At the hearing, Sgt. Fischer was questioned with respect to whether -- in his opinion -- Deeth had the ability to manipulate the vehicle's controls as follows:

> Mr. Suhr: So, based on the evidence you have, was Mr. Deeth at all able to manipulate the controls of the vehicle?
>
> Sgt. Fischer: Not that I'm aware of.
>
> Mr. Suhr: So, you have no evidence that he was able to manipulate the controls?
>
> Sgt. Fischer: No, but when I did ask him about the keys, though, too, he was looking inside the vehicle for that, because I did particularly ask him for that. So he was looking inside, probably knowing that that's where they would be at.

(Tr. 21, ll. 1-9.)

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Following the close of evidence at the administrative hearing, Deeth requested the matter be dismissed because there purportedly were "not reasonable grounds to find that [he] was in actual physical control of the vehicle at the time he was in the condition as described by the officer through his testimony and the articulated field sobriety tests and the testing." (Tr. 32, ll. 8-13.)

The hearing officer determined "Sgt. Fischer had reasonable grounds to believe that Nathaniel W. Deeth was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of NDCC 39-08-01 or equivalent ordinance. . . ." (Department's App. 11.) The hearing officer did *not*

find the vehicle's battery was in fact dead. Rather, the hearing officer found that in response to Sgt. Fischer's inquiry as to "why he was there," "Deeth responded that the car's battery was dead." (Id. at 10.) The hearing officer "noted that there are several businesses in the Bismarck area that provide 24-hour emergency services for vehicles; the emergency services available include booster starts or jump starts for car batteries as well as towing services." (Id. at 11.)

The hearing officer found the key to Deeth's vehicle could not be located, but noted based upon the evidence that "Deeth had lots of personal items, including numerous alcoholic beverage containers, in his car." (Id.). The hearing officer stated "[t]he presence of the vehicle ignition key is not essential to a determination of reasonable grounds to believe a person is in actual physical control of a vehicle . . ." (Id.)

Following the hearing, the hearing officer issued her Hearing Officer's Decision on Rehearing revoking Deeth's driving privileges for a period of 180 days. (Id.) Deeth filed a Petition for Reconsideration, which the hearing officer denied. (R. 18; Department's App. 12.) Deeth appealed to the district court from the hearing officer's denial of his Petition for Reconsideration. (Id. at 13-15.)

Deeth sought to reverse the hearing officer's determination that he was in actual physical control of his vehicle based primarily on the hearing officer's statement that there are "several businesses in the Bismarck area that provide 24-hour emergency services for vehicles; the emergency services available include booster starts or jump starts for car batteries as well as towing services." (Id. at 13-14.) Deeth also alleged "[t]he hearing officer [did] not acknowledge the

officer's admission" as to whether he had the ability to manipulate the vehicle's controls. (Id. at 14.)

Judge Bruce B. Haskell issued an Order on Appeal on February 24, 2014, reversing the hearing officer's decision. (Id. at 16-18.) Judge Haskell ruled:

> [¶3] One of the factors in determining whether a vehicle operator is in actual physical control of the vehicle is whether the driver is able to manipulate the controls of the vehicle. City of Fargo v. Novotny, 1997 ND 73, 562 N.W.2d 95. In this case, the sergeant testified that the appellant could not have manipulated the controls of the vehicle. Tr. At 20-21. The hearing officer's Findings of Fact do not address the issue of manipulation of controls of the vehicle. Her Conclusions of Law likewise do not address the issue other than the conclusion that the presence of the ignition key is not essential to the determination of reasonable grounds to believe a person is in actual physical control of a vehicle. The hearing officer's Finding of Fact that businesses in the area could have provided booster or jumper services to the appellant are not supported by any evidence in the record. The State argues that the hearing officer was justified in taking judicial notice of this fact. *The State further argues that, even if the hearing officer could not take judicial notice of said fact, "the high volume of traffic in the public rest area off of I-94 makes it reasonable to believe that at some point in time, a person traveling the interstate highway might have offered to jump start [appellant's] vehicle and could have set out on an inebriated journey.*" Brief of Appellant at 9.
>
> [¶4] The Court recognizes that the North Dakota Supreme Court has found in numerous cases that what would appear to be inoperable vehicles could be operated when, in this Court's opinion, those findings are based on maybes, mights, and could-bes. In this case, the Court finds that the hearing officer's Findings of Fact are not supported by the record. There is no evidence in the record of jump starting services available to the appellant. *There is no evidence of the volume of traffic in the area nor whether any of the occupants of said traffic could or would provide aid to the appellant.* More important, the evidence is that the appellant could not have manipulated the controls of the car because the battery was dead and because the ignition key could not be found.

(Id. at 16-17 (emphasis added).)

Judgment was entered on March 28, 2014. (Id. at 20-21.) The Department appealed the Judgment to the North Dakota Supreme Court. (Id. at 22.) The Department requests this Court reverse the Judgment of the Burleigh County District Court and reinstate the Hearing Officer's Decision on Rehearing revoking Deeth's driving privileges for a period of 180 days.

STANDARD OF REVIEW

"The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of administrative license suspensions." Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. "On appeal from a district court's review of an administrative agency's decision, [the North Dakota Supreme Court] review[s] the agency decision." Elshaug v. Workforce Safety & Ins., 2003 ND 177, ¶ 12, 671 N.W.2d 784. The Court reviews "the agency's findings and decisions, and not those of the district court, though the district court's analysis is entitled to respect if its reasoning is sound." Hawes v. N.D. Dep't of Transp., 2007 ND 177, ¶ 13, 741 N.W.2d 202.

Section 28-32-46, N.D.C.C., provides the Court must affirm an administrative agency's order unless one of the following is 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 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.

"[T]he ability to control and operate the vehicle . . . is a question of fact properly left to the agency to decide." Vanlishout v. N.D. Dep't. of Transp., 2011 ND 138, ¶ 17, 799 N.W.2d 397 (citing Salvaggio v. N.D. Dep't of Transp., 477 N.W.2d 195, 198 (N.D. 1991) ("The question of Salvaggio's control of the vehicle was . . . one of fact.")). "When reviewing the agency's factual findings, [the Court] do[es] not make independent findings of fact or substitute [its] judgment for that [of the] agency, but determine[s] only whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence from the entire record." Ringsaker, at ¶ 5.

"[T]he ultimate conclusion of whether the facts meet the legal standard that the arresting officer had reasonable grounds to believe [a person] had been in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of § 39-08-01, N.D.C.C., is a question of law fully reviewable on appeal." Obrigewitch v. Dir., N.D. Dep't of Transp., 2002 ND 177, ¶ 8, 653 N.W.2d 73 (citing Stanton v. Moore, 1998 ND 213, ¶ 10, 587 N.W.2d 148).

LAW AND ARGUMENT

The preponderance of the evidence supports the hearing officer's determination that Deeth was in actual physical control of his vehicle while under the influence of intoxicating liquor.

A. General.

Section 39-08-01(1)(a), N.D.C.C., prohibits a person from being "in actual physical control ["APC"] of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if . . . [t]hat person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after . . . being in actual physical control of a vehicle." N.D.C.C. § 39-08-01(1)(a).

The North Dakota Supreme Court has "repeatedly recognized that the purpose of the actual-physical-control offense is to prevent an intoxicated person from getting behind the steering wheel of a motor vehicle because that person may set out on an inebriated journey at any moment and is a threat to the safety and welfare of the public." State v. Saul, 434 N.W.2d 572, 576-77 (N.D. 1989). "The actual physical control statute is a preventive measure, enabling law enforcement to apprehend intoxicated drivers before they strike." City of Fargo v. Novotny, 1997 ND 73, ¶ 5, 562 N.W.2d 95.

"The purpose of Section 39-08-01, North Dakota Century Code, is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers." State v. Ghylin, 250 N.W.2d 252, 253, Syl. 1 (N.D. 1977). Accordingly, the Supreme Court has "long construed the actual

physical control statute to broadly prohibit any exercise of dominion or control over a vehicle by an intoxicated person." Hawes, at ¶ 6.

"The essential elements of APC are: (1) the defendant is in actual physical control of a motor vehicle on a highway or upon public or private areas to which the public has a right of access; and (2) the defendant was under the influence of intoxicating liquor, drugs, or other substances." State v. Haverluk, 2000 ND 178, ¶ 15, 617 N.W.2d 652. "Intent to operate a motor vehicle is not an element of the offense of actual physical control." Novotny, at ¶ 6.

"The primary factor in determining the offense of actual physical control is whether the defendant has the ability to manipulate the controls of the vehicle." Rist v. N.D. Dep't of Transp., 2003 ND 113, ¶ 14, 665 N.W.2d 45. "A driver has 'actual physical control' of his car when he has real (not hypothetical), bodily restraining or directing influence over, or domination and regulation of, its movements of machinery." Ghylin, 250 N.W.2d at 254 (quoting Commw. v. Kloch, 327 A.2d 375, 383 (Pa. Super. Ct. 1975)). However, as discussed below, *"[t]his Court has said the presence of an ignition key or whether the vehicle is operable are not dispositive in deciding whether an individual committed the offense of actual physical control."* State v. Pena Garcia, 2012 ND 11, ¶ 9, 812 N.W.2d 328, 331 (emphasis added).

B. The possible means to remove a temporary impediment to the operation of a vehicle.

The Supreme Court has "upheld numerous convictions in which the defendant was not able to instantaneously operate the vehicle, but was still deemed to have had actual physical control because *the temporary impediment*

could have been removed and the defendant could again have attempted to drive." Vanlishout, at ¶ 17 (emphasis added). In certain cases, the potential means by which the temporary impediment could have been removed has been seemingly evident from record. See, e.g., id. at ¶ 18 ("Vanlishout's friend testified he was on his way back to the scene with a pickup to pull the car out [of ditch]."); Salvaggio, 477 N.W.2d at 196 ("Salvaggio was at the rear of the pickup attempting to put chains on the left rear tire" of vehicle that was stuck in a ditch); Ghylin, 250 N.W.2d at 255 ("At trial, Ghylin testified that he was attempting to get his vehicle out of the ditch, and that the vehicle almost broke free when Deputy Sheriff Genter arrived."); State v. Schuler, 243 N.W.2d 367, 369 (N.D. 1976) (law enforcement officer testified that the high-centered vehicle "could have been backed up by rocking it.").

Nevertheless, even in such cases where the means by which a temporary impediment could be overcome is evident from the record, the Supreme Court has recognized the *possibility* of other means by which the impediment could have been removed. For example, in Hawes, at ¶ 2, the driver was located by a law enforcement officer "on an Interstate 29 exit ramp, passed out in the driver's seat of her vehicle with the keys in the ignition. A visibly intoxicated Hawes told the officer she was waiting for 'OnStar' to bring her gas." In addition, "Hawes later claimed her car had run out of gas while a friend drove her home and she was waiting for her friend to return with gas when the officer found her." Id.

Yet, despite these *demonstrable means* by which the temporary impediment could have been removed, the Supreme Court recognized "[t]he

mere fact that Hawes' vehicle was out of gas *does not eliminate the possibility that she might obtain gas* ***from any number of sources, such as a passing motorist*** or 'OnStar,' allowing her to set out on an inebriated journey at any moment." Id. at ¶ 6 (emphasis added).

With respect to other possible means by which a vehicle might be made operable, the Alabama Criminal Court of Appeals has stated "'*it is not a requirement that the vehicle be moving on its own power, or that the vehicle travel a particular distance*' in order to conclude that a defendant was in 'actual physical control' of the automobile." Mester v. State, 755 So.2d 66, 70 (Ala. Crim. App. 1999) (quoting Colorado Div. of Rev. v. Lounsbury, 743 P.2d 23, 27 (Colo. 1987)) (emphasis added). See also Hester v. State, 270 S.W.2d 321, 322 (Tenn. 1954) ("The Legislature did not place in the [DUI] statute a requirement that the motor vehicle be operated under its own power.").

The operation of a vehicle includes that movement accomplished by the vehicle being pushed or by coasting. See State v. Adams, 127 P.3d 208, 211 (Idaho Ct. App. 2005) ("Other jurisdictions . . . have generally concluded that actual physical control requires that the vehicle be capable of operation, of readily being made operable, *or of being put into motion as by coasting.*") (emphasis added). See also Adler v. Dep't of Motor Vehicles, 279 Cal. Rptr. 28, 31 (Cal. Ct. App. 1991) (under California's statutory definition of a "driver," "even a person standing outside the car, trying to push it into a position so he could start it using another vehicle, was nevertheless 'engaged in driving or operating' that car."); Lounsbury, 743 P.2d at 26 (citing cases from other jurisdictions for the

proposition that a vehicle being towed or pushed constituted driving a vehicle under DUI statutes.).

Furthermore, the operation of a vehicle includes that movement of only a few feet. See Bradam v. State, 235 S.W.2d 801, 802 (Tenn. 1950) ("[T]he fact that the car moved only a few feet does not justify a holding as a matter of law that the accused was not driving [while under the influence].") (quoting 5 Am. Jur. § 771); People v. Cobb, 661 N.Y.S.2d 903, 904 (N.Y. App. Div. 1997) ("[T]he fact that defendant's car moved only a few feet during the episode offers no defense to this otherwise viable reckless driving prosecution.").

C. The location of the key is one factor in the consideration of actual physical control.

"Actual physical control of a vehicle does not solely depend on the location of the ignition key. The location of the key is one factor among others to consider." City of Fargo v. Theusch, 462 N.W.2d 162, 163 (N.D. 1990) (citation omitted). "Because the location of the vehicle keys is only one factor, the vehicle keys are 'not necessary to support probable cause to arrest.'" Haverluk, at ¶ 18 (quoting State v. Wanzek, 1999 ND 163, ¶ 17, 598 N.W.2d 811 (citation omitted)).

D. Sgt. Fischer had probable cause to arrest Deeth for being in actual physical control of his vehicle while under the influence of intoxicating liquor.

"An arrest is a seizure and must be supported by probable cause." City of Jamestown v. Jerome, 2002 ND 34, ¶ 5, 639 N.W.2d 478. "[P]robable cause exists when the facts and circumstances within a police officer's knowledge and of which he had reasonable trustworthy information are sufficient to warrant a

person of reasonable caution to believe that an offense has been or is being committed." Zietz v. Hjelle, 395 N.W.2d 572, 574 (N.D. 1986). "When determining whether probable cause exists to arrest . . . the officer need not possess knowledge or facts sufficient to establish guilt." Moran v. N.D. Dep't of Transp., 543 N.W.2d 767, 770 (N.D. 1996). "'The validity of the arrest does not depend on whether the suspect actually committed a crime. . . .'" State v. Smith, 452 N.W.2d 86, 88 (N.D. 1990) (quoting Mich. v. DeFillippo, 433 U.S. 31, 36 (1979)).

In this case, Sgt. Fischer responded to a report on August 21, 2013, of a vehicle that had been parked for approximately three days, during which period of time, it purportedly had not been moved, at the Apple Creek rest area off of the eastbound lane of Interstate 94 about nine to ten miles east of Bismarck. Sgt. Fischer observed Deeth lying in the backseat of that vehicle in an inebriated condition.

Deeth informed Sgt. Fischer that "he had a dead battery at that particular point in time." (Tr. 7, ll. 9-11.) Although Sgt. Fischer was unable to locate vehicle's ignition keys, his search efforts were hindered by the "tremendous amount of his personal belongings that were inside." (Tr. 19, ll. 13-14.) Furthermore, when Sgt. Fischer asked Deeth about the location of the keys "[Deeth] was looking inside, probably knowing that that's where they would be at." (Tr. 21, ll. 6-9.)

Sgt. Fischer responded in the negative to the question of Deeth's counsel: "Do you have any evidence that the battery wasn't dead?" (Tr. 20, ll. 7-9.)

However, without the ignition key, Sgt. Fischer would not have been able to confirm that Deeth's battery in fact was dead.

Deeth failed to present any evidence at the administrative hearing to support his claim that his battery was dead or that his vehicle's keys were not in his vehicle or within proximity to his vehicle at the rest area. Deeth also failed to present any evidence that his vehicle could not have been put into motion by being pushed -- even if only by himself -- or by coasting.

Accordingly -- unlike the district court on appeal -- the hearing officer did *assume* Deeth's battery was dead. The hearing officer, instead, limited her finding to the evidence presented that in response to Sgt. Fischer's inquiry as to "why he was there," "Deeth responded that the car's battery was dead." (Department's App. 10.) Although, the hearing officer "noted that there are several businesses in the Bismarck area that provide 24-hour emergency services for vehicles; the emergency services available include booster starts or jump starts for car batteries as well as towing services" (Id. at 11), in the absence of conclusive proof that Deeth's battery was dead, the reliability of this observation is not crucial to hearing officer's decision.

Even if it were to be presumed that Deeth's battery was dead and the hearing officer's offered means to overcome the temporary impediment is not accepted by the Court, the Court's "passing motorist" from Hawes, at ¶ 6, fills the void. The district court rejected the Department's argument that "even if the hearing officer could not take judicial notice of said fact, 'the high volume of traffic in the public rest area off of I-94 makes it reasonable to believe that at some

point in time, a person traveling the interstate highway might have offered to jump start [appellant's] vehicle and could have set out on an inebriated journey.'" (Id. at 17 (quoting Br. of Appellant 9).)

The district court stated "[t]here is no evidence of the volume of traffic in the area nor whether any of the occupants of said traffic could or would provide aid to the appellant." (Id.) The district court's position overlooks the fact that the possibility of a "passing motorist" assisting Deeth in jump starting his vehicle at a rest area off of Interstate 94, about nine to ten miles east of Bismarck, is no more implausible than a passing motorist providing gas to Hawes at an Interstate 29 exit ramp.

The hearing officer also limited her findings regarding Deeth's ignition keys to the evidence presented at the administrative hearing. The hearing officer found the keys to Deeth's vehicle could not be located, but noted based upon the evidence that "Deeth had lots of personal items, including numerous alcoholic beverage containers, in his car." (Id. at 11.) The hearing officer had no evidence to conclude the ignition keys were not in Deeth's vehicle or within proximity to his vehicle at the rest area. The hearing officer, in accordance with supporting caselaw, appropriately stated "[t]he presence of the vehicle ignition key is not essential to a determination of reasonable grounds to believe a person is in actual physical control of a vehicle . . ." (Id.)

Deeth further alleged on appeal that "[t]he hearing officer [did] not acknowledge the officer's admission" as to whether he had the ability to manipulate the vehicle's controls. (Id. at 14.) At the hearing, Sgt. Fischer was

questioned with respect to whether -- in his opinion -- Deeth had the ability to manipulate the vehicle's controls as follows:

> Mr. Suhr: So, based on the evidence you have, was Mr. Deeth at all able to manipulate the controls of the vehicle?
>
> Sgt. Fischer: Not that I'm aware of.
>
> Mr. Suhr: So, you have no evidence that he was able to manipulate the controls?
>
> Sgt. Fischer: No, but when I did ask him about the keys, though, too, he was looking inside the vehicle for that, because I did particularly ask him for that. So he was looking inside, probably knowing that that's where they would be at.

(Tr. 21, ll. 1-9.)

Sgt. Fischer's subjective belief concerning the *ultimate* finding of fact as to whether Deeth had the ability to manipulate the controls of his vehicle is not dispositive of the issue of probable cause in this case. See United States v. Silva, 742 F.3d 1, 8 (1st Cir. 2014) ("[A]n officer's subjective belief that he or she lacked probable cause is not dispositive where the facts support an objective finding that the standard has been satisfied.") It was not crucial that the hearing officer address this questioning of Sgt. Fischer in reaching her determination.

The hearing officer determined "Sgt. Fischer had reasonable grounds to believe that Nathaniel W. Deeth was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of NDCC 39-08-01 or equivalent ordinance. . . ." (Department's App. 11.) The hearing officer made sufficient findings of fact from which she could reasonably conclude Deeth had the ability to manipulate the controls of his vehicle and from which the Court can

discern the hearing officer's rationale in determining Deeth was in actual physical control of his vehicle. Cf. Painte v. Dir., Dep't of Transp., 2013 ND 95, ¶ 15, 832 N.W.2d 319 ("Based on review of the record, evidence exists from which the hearing officer could reasonably conclude Painte was able to manipulate the vehicle's controls. . . . Based on the findings, we are able to discern the hearing officer's rationale in reaching the conclusion the police officer had reasonable grounds to believe Painte was in actual physical control of the vehicle in violation of N.D.C.C. § 39–08–01.").

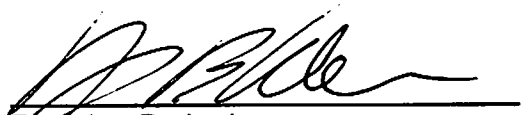
A reasoning mind reasonably could have determined that the hearing officer's factual conclusions were proven by the weight of the evidence and that the findings of fact support the hearing officer's conclusion Deeth was in actual physical control of his vehicle.

CONCLUSION

The Department respectfully requests this Court reverse the Judgment of the Burleigh County District Court and reinstate the Hearing Officer's Decision on Rehearing revoking Nathaniel Deeth's driving privileges for a period of 180 days.

Dated this 10th day of June, 2014.

State of North Dakota
Wayne Stenehjem
Attorney General

By: 

Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellant.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Nathaniel Deeth, Appellee, v. Director, North Dakota Department of Transportation, Appellant.	**Supreme Ct. No. 20140161** **District Ct. No. 08-2013-CV-02646** **AFFIDAVIT OF SERVICE BY MAIL**

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

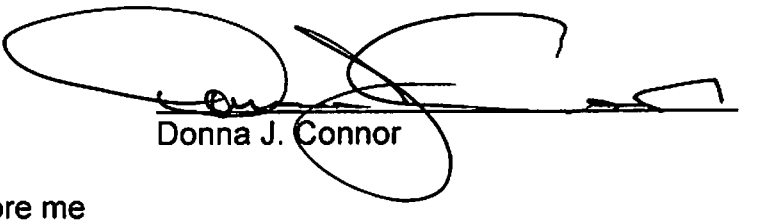
Donna J. Connor states under oath as follows:

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 10th day of June, 2014, I served the attached **BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT** upon the appellee by placing true and correct copies thereof in an envelope addressed as follows:

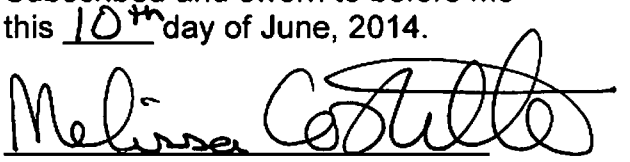
Lloyd C. Suhr
Suhr & Lofgren PLLC
P.O. Box 2393
Bismarck, ND 58502-2393

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 10th day of June, 2014.



Notary Public