20140161

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 26, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Nathaniel Deeth, Petitioner/Appellee, -vs- Director, North Dakota Department of Transportation, Respondent/Appellant.	)	Supreme Ct. No. 20140161 District Ct. No. 08-2013-CV-02646

BRIEF OF APPELLEE

APPEAL FROM

Burleigh County District Court
South Central Judicial District
The Honorable Bruce B. Haskell, Presiding

/s/ Lloyd C. Suhr
Lloyd C. Suhr (ID # 05405)
Jackson J. Lofgren (ID #06310)
Attorney for Defendant-Appellee
120 N. 3rd St., Suite 175
P.O. Box 2393
Bismarck, ND 58502
(701) 223-3874
lawfirm@suhrandlofgre

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

[¶1] I. Whether the hearing officer's findings of fact are supported by the preponderance of the evidence?

[¶2] II. Whether the hearing officer's conclusions of law are supported by its findings of fact?

[¶3] III. Is the agency's decision supported by the conclusions of law?

STATEMENT OF THE CASE

[¶4] Deeth joins in the Appellant's Statement of the Case as being substantially accurate.

STATEMENT OF FACTS

[¶5] Deeth joins in the Appellant's Statement of Facts as being substantially accurate.

STANDARD OF REVIEW

[¶6] Judicial review of administrative license suspensions is governed by the Administrative Agencies Practices Act, N.D.C.C. ch. 28-32. Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, ¶ 5, 596 N.W.2d 328. Review is limited to the record before the agency, and this Court will not review the decision of the district court. Id. The question is whether a reasoning mind reasonably could have decided that the factual conclusions were proven by the weight of the evidence from the entire record. Id. However, where the district court's analysis is sound, it is entitled to respect. Hawes v. N.D. Dep't of Transp., 2007 ND 177, ¶ 13, 741 N.W.2d 202.

[¶7] Under N.D.C.C. § 28-32-46, the agency's decision must be affirmed unless any of the following are found to exist:

> 1. The order is not in accordance with the law.
>
> 2. The order is in violation of the constitutional rights of the appellant.
>
> 3. 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.

[¶8] This Court will normally engage in a three-step process when reviewing an appeal from an administrative agency decision. Hawes v. N.D. Dep't of Transp., 2007 ND 177, ¶ 13, 741 N.W.2d 202. They are: 1) are the agency's findings of fact supported by a preponderance of the evidence; 2) are the conclusions of law sustained by the agency's findings of fact? ; and 3) is the agency's decision supported by the conclusions of law?

[¶9] In deciding whether the agency's findings of fact are supported by a preponderance of the evidence, review is limited to the record before the agency, and deciding ' "whether a reasoning mind reasonably could have determined the factual conclusions were proven by the weight of the evidence. " ' Id. at ¶ 14 (*quoting* Kraft v. N.D. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572)). ' "[T]he ultimate conclusion of whether the facts meet the legal standard . . . is a question of law, fully reviewable on appeal. " ' Id. (*quoting* Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 7, 663 N.W.2d 161).

ARGUMENT

I. The hearing officer's findings of fact are not supported by the preponderance of the evidence.

[¶10] The hearing officer found 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". [App. p. 11]. There was no evidence presented to support this finding. Nonetheless, the hearing officer relied upon it to conclude as a question of law that the arresting officer, North Dakota Highway Trooper Steven Fischer ("Fischer), had reasonable grounds to believe Deeth was in actual physical control of a motor vehicle while under the influence of intoxicating liquor.

[¶11] Fischer testified that a call had been received that a vehicle, (determined to be Deeth's) had been parked at a rest area on I-94 about nine to ten miles east of Bismarck for a period of three to four days. [Trans. p. 6, lines 2-13]. When Fischer got to the rest area, Deeth advised him that he had a dead battery. [Trans. p. 7, lines 1-11. Fischer could not dispute this. [Trans. p. 20, lines 7-9]. Fischer conceded he looked for Deeth's keys but could not locate them. [Trans. p. 20, lines 12-15]. Fischer never saw Deeth operate or start the vehicle, nor was he able to testify anyone else saw Deeth operate or start the vehicle. [Tran. p. 20, lines 16-25]. Fischer conceded that he was unaware of any evidence that Deeth was able to manipulate the controls of the vehicle. [Trans. p. 21, lines 1-3],

and that he did not know how Deeth would have been able to manipulate the controls of the vehicle. [Trans. p. 22, lines 3-7].

[¶12] The key factor in determining whether someone is in actual physical control of a motor vehicle is whether the driver is able to manipulate the vehicle's controls. City of Fargo v. Novotny, 1997 ND 73, ¶7, 562 N.W.2d 95. Fischer speculated that somebody could have come in to the rest area and jump-started the vehicle. [Trans. p. 21, lines 16-17]. There was absolutely no evidence to support this speculation. It was actually Fischer who eventually called a tow truck, not Deeth, and that was only after Deeth had been arrested. [Trans. p.18, lines 24-25; p. 19, lines 1-3].

[¶13] The hearing officer concluded "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". [App. p. 11]. There was never any testimony about the availability of such a service, and no evidence that Deeth even had a phone or other means to contact one. As this finding was completely lacking in evidentiary basis in the record, it is unsupported by a preponderance of the evidence and cannot sustain any subsequently reached conclusion of law.

II. The hearing officer's conclusions of law are not supported by the findings of fact.

[¶14] The hearing officer concluded that "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". [App. P. 11]. This conclusion is

not supported by the findings of fact. "Reasonable grounds" and "probable cause" mean the same thing. Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 14, 682 N.W.2d 308.

[¶15] Whether a person has the ability to control and operate a vehicle is a question of fact for the agency to decide. Vanlishout v. N.D.Dep't of Transp., 2011 ND 138, ¶ 17, 799 N.W.2d 397. ' " 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 . . . " ' State v. Ghylin, 250 N.W.2d 252, 254 (N.D. 1977) (quoting Commonwealth v. Kloch, 327 A.2d 375, 383 (1975)). (Emphasis added). The key factor in determining whether someone is in actual physical control is whether the driver is able to manipulate the vehicle's controls. City of Fargo v. Novotny, 1997 ND 73, ¶7, 562 N.W.2d 95.

[¶16] The Appellant ("Department") cites a number of decisions where involving the offense of Actual Physical Control where the vehicle had some form of impediment to its operation. However, those cases bear major factual distinctions from the facts in this case.

[¶17] In Vanlishout v. N.D. Dep't of Transp., the driver was found in the backseat of a car that was running, but stuck in a ditch. 2011 ND 138, ¶¶ 3-4, 799 N.W2d. 397. He was found to be in actual physical control because the car was running at the time the officer arrived on scene, a friend was already on his way back to the scene to pull the car out, and all the driver had to do was move from the back seat to the front seat and attempt to drive. Id. at ¶ 18.

[¶18] In Salvaggio v. N.D. Dept of Transp., 477 N.W.2d 196 (N.D. 1991) the driver's vehicle was stuck in a ditch with the engine running, and the driver was at the rear of the vehicle attempting to put chains on. Id. at 196. The driver admitted he had been driving when the vehicle went into the ditch. Id. He was found to be in actual physical control because he had attempted to place tire chains on the running vehicle and had admitted to driving previously. Id. at 198.

[¶19] In State v. Ghylin, 250 N.W.2d 252 (N.D. 1977) the driver was seen getting out of the driver's side of the vehicle which was stuck in the ditch, made a motion as if he were taking the keys out of the ignition, and had the keys in his hand as he stepped out. The driver admitted to that he had driven into the ditch and gotten stuck. Id. at 252. This evidence was sufficient to find that he was in actual physical control of the vehicle.

[¶20] In State v. Schuler, 243 N.W.2d 367, 370 (N.D. 1976), the driver was in actual physical control of her vehicle when she was found sitting behind the steering wheel with the keys in the ignition and turned to the "on" position, with the transmission in the drive position. The vehicle was apparently high centered, but testimony was received the vehicle could have been moved simply by rocking it. Id. at 369.

[¶21] In Hawes v. N.D. Dep't of Transp., an officer found Hawes passed out in the driver's seat of her vehicle with the keys in the ignition. 2007 ND 177, ¶ 2, 741 N.W.2d 202. Hawes told the officer she was waiting for "OnStar" to bring her gas and also advised she was waiting for a friend to return with gas when the officer found her. Id. At issue was a jury instruction reading as follows:

> A vehicle is operable if it was operable or could have been made operable while the person was still under the influence of intoxicating liquor or while the person would have had an alcohol concentration of at least .08% by weight at the time of the performance of a chemical test within two hours after being in actual physical control of the vehicle. This is a question for you to decide.
>
> Id. at ¶ 3.

[¶22] In approving this instruction, this Court noted that the mere fact that Hawes' vehicle was out of gas did not eliminate the possibility gas could be obtained from other sources, such as a passing motorist or "OnStar". Id. at ¶ 6. However, this Court also qualified that such an instruction could be problematic where the question of whether a vehicle could be made operable while the driver was still intoxicated is more remote. Id. at ¶ 7.

[¶23] In those cases, there was evidence in the record that the vehicle was mechanically functional or actually running when the officer arrived. Where some kind of temporary impediment to the vehicle's immediate operation or mobility existed, resources necessary to fix the problem were either already available (e.g. simply rocking a high-centered vehicle back and forth) or affirmative steps to fix the problem had already been taken (e.g. placing chains on tires, placing a phone call to a friend to pull the vehicle out of the ditch, having gasoline en-route from OnStar or a friend). In each case the ability to make the vehicle immediately operational or mobile was premised on facts in the record showing resources already available, or actions already taken-- not speculation about what resources "could" be available, or what actions "could" be taken.

[¶24] In this case however, Deeth's vehicle was clearly not functioning or running when Fischer arrived. There was no evidence that the resources needed to make Deeth's vehicle operational were immediately available.

[¶25] The ignition keys were never even located. Deeth recognizes that this is only one factor to consider. State v. Haverluk, 2000 ND 178, ¶17, 617 N.W.2d 652. However, it is compelling evidence that Deeth was not able to manipulate the vehicle's controls when considered in conjunction with the evidence of the dead battery.

[¶26] There was no evidence that any resources to jump-start the battery were already present. There was no evidence that any steps to jump-start the battery had been taken, were attempted, or were even anticipated while Deeth was in an intoxicated state. Fischer never testified to finding a cell phone in Deeth's car from which a call to someone to jump-start the battery could have been placed. Even if a phone had been found it is unknown if Deeth's battery was even capable of being jump-started. The Department's argument rests entirely on speculation and unknown contingencies, without supporting fact, that the battery "could" have been jump-started. Even Fischer conceded he had no supporting evidence.

[¶27] As this Court cautioned in Hawes, the remoteness of facts showing how a vehicle could have been made operable must be considered in each case. Fischer's concession that he did not know how Deeth would have been able to operate the vehicle exemplifies such a remoteness.

[¶28] The Department argues that Deeth failed to offer "conclusive proof" that his battery was even dead. There are two problems with this.

[¶29] First, at no point did Fischer ever testify or even suggest that he doubted Deeth's statement that the battery was dead. The Department's argument assumes, without a basis in the record, that the question was even in in dispute.

[¶30] Second, it is well-settled that the moving party has the burden of proof in administrative hearings. Morrell v. North Dakota Dept. of Transp., 1999 ND 140, ¶ 14, 598 N.W.2d 111, 115 (N.D. 1999); see also Ringsaker v. Dir., N.D. Dep't of Transp., 1999 ND 127, ¶11, 596 N.W.2d 328; Kopp v. North Dakota Workers Comp. Bureau, 462 N.W.2d 132, 141 (N.D. 1990); Matter of Stone Creek Channel Improvements, 424 N.W.2d 894, 898 (N.D.1988); Kobilansky v. Liffrig, 358 N.W.2d 781, 790 (N.D.1984). The Department's argument seeks to improperly shift a fact proving burden to Deeth.

[¶31] Under the Department's reasoning, as long as one can imagine a way in which a vehicle could be made operational, that is good enough. There would simply never be a situation where a driver would be unable to manipulate the controls of the vehicle as there would always be a conceivable series of events one could imagine to make the vehicle operable again--regardless of the absence of evidence as to when, or how this would come to occur. Hypothetical control would be sufficient, contrary to what is stated in Ghylin.

III. The hearing officer's decision is not supported by its conclusions of law.

[¶32] The hearing officer's decision to revoke was not supported by her conclusions of law. The decision relied on pure speculation. The district court's reasoning on the other hand was premised on fact and evidence, including Fischer's own concession that he had no idea how Deeth would have actually been able to manipulate the controls of the vehicle. The district court's reasoning should be given respect.

[¶33] Based on the record, a reasoning mind could not conclude that the hearing officer's findings of fact or conclusions of law were supported by the weight of the evidence. As a result, the hearing officer's decision to revoke was not supported by the weight of the evidence.

CONCLUSION

[¶34] Based upon the foregoing, the Deeth respectfully requests that this Court affirm the Judgment of the district court.

Dated this 26th day of June, 2014

/s/ Lloyd C. Suhr

Lloyd C. Suhr (ID #05405)
Attorney for Appellee
120 N. 3rd St., Suite 175
P.O. Box 2393
Bismarck, ND 58502
(701) 223-3874
lawfirm@suhrandlofgren.com

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Vicki Becker, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 26th day of June, 2014, I electronically submitted the following:

1. Brief of Appellee
2. Affidavit of Service

to the North Dakota Supreme Court for filing and that the same document(s) were also served upon the following person(s) at the following e-mail address, which is published in the North Dakota Supreme Court online directory:

Douglas B. Anderson
dbanders@nd.gov

Vicki Becker
Vicki Becker

On the 26th day of June 2014, before me personally appeared Vicki Becker, known to me to be the same person described in and who executed the within and foregoing instrument and acknowledged to me that she executed the same.

Notary Public

LLOYD C. SUHR
Notary Public
State of North Dakota
My Commission Expires Aug. 20, 2019