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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF
THE STATE OF NORTH DAKOTA

Richard Louis Keller,	)	
	)	**Supreme Court No.: 20140341**
Petitioner/Appellant,	)	
	)	**Burleigh County No.: 08-2014-CV-01131**
	)	
v.	)	
	)	
North Dakota Department	)	
of Transportation,	)	
	)	
Respondent/Appellee.	)	

REPLY BRIEF OF THE PETITIONER/APPELLANT

APPEAL FROM THE DISTRICT COURT,
SOUTH CENTRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA.
HONORABLE GAIL HAGERTY, PRESIDING.

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ARGUMENT

[¶1] The question of "scrupulous compliance" is a legal one, warranting de novo review. While not explicitly stated, the Court's decision in Schlosser v. Dep't of Transp., 2009 ND 173, 775 N.W.2d 695, supports this proposition.

[¶2] In Schlosser, the Court considered whether an officer's "conclusory and perfunctory testimony" that he followed each of the steps listed on Form 104 established scrupulous compliance with the approved method when Form 104 itself had not been introduced into evidence. Schlosser, 2009 ND 173 at ¶13. The language of the Court's decision is telling: "We conclude the hearing officer's finding of fact that the test was conducted 'in accordance with the state toxicologist's approved method' is not supported by a preponderance of the evidence." Id. This is de novo review of the record.

[¶3] De novo review makes sense here, as the facts of this case are not in dispute. The question at issue is a legal one—whether the DOT demonstrated scrupulous compliance with the approved method, thereby triggering the evidentiary shortcut provided by N.D.C.C. § 39-20-07. Regardless of the standard of review, the answer to that question is no.

[¶4] The DOT argues that prematurely terminating an Intoxilyzer test sequence is akin to a deviation involving a clerical or ministerial aspect of the approved method. It cites four cases for this proposition. None of these cases support the DOT's argument.

[¶5] The first case examined whether the twenty-minute waiting period could include the SD-2 waiting period and whether the record on appeal showed that the twenty-minute waiting period had been established. Johnson v. Dep't of Transp., 2004 ND 59, ¶¶13-18, 676 N.W.2d 807. The Court quoted the approved method before answering both questions in the affirmative: "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." Johnson, 2004 ND 59 at 13. Nothing in Johnson suggested that the approved method had been deviated from.

[¶6] The second case cited also concerned the twenty-minute waiting period. In that case, the Court determined that an officer continuously observed a DUI arrestee for twenty minutes prior to administering the Intoxilyzer test, and the arrestee presented no evidence to rebut this. Buchholz v. Dep't of Transp., 2002 ND 23, ¶12, 639 N.W.2d 490. In so deciding, the Court "decline[d] to amend" the approved method by interpreting that document beyond the plain language of its text. Buchholz, 2002 ND 23 at ¶12.

[¶7] The third case cited considered whether a deputy, rather than a nurse, could check a box on Form 104 indicating an intact seal on the blood kit canister prior to its use. Schwind v. Dep't of Transp., 462 N.W.2d 147, 152 (N.D. 1990). The Court determined that no "special scientific or medical training" is needed to "determine if a seal is intact[,]" thus an ordinary person could render this observation. Schwind, 462 N.W.2d at 152.

[¶8] The fourth case cited by the DOT actually concerns the administration of an Intoxilyzer test, and it lends support to Mr. Keller's position. In that case, the Court quoted language from the approved method pertaining to a previous iteration of Intoxilyzer machines: "'To initiate a test depress the 'Start Test' switch. The display will flash 'Insert Test Record.' Before the display time expires, insert a Form 106-I into the instrument. Once the Form 106-I is inserted, the Intoxilyzer will perform a series of diagnostic checks.'" Wagner v. Backes, 470 N.W.2d 598, 599 (N.D. 1991).

[¶9] The Intoxilyzer operator testified that he did not insert the Form 106-I into the machine before the display time had expired. Wagner, 470 N.W.2d at 599. While the arrestee "did not produce any evidence that the untimely insertion of the Form 106-I compromises the

accuracy of the test results[,]" scrupulous compliance with the approved method had not been demonstrated. Id. at 600. "We cannot say, without expert advice, that the failure to follow the portion of the approved method governing the timely insertion of the test record could not affect the test results." Id.

[¶10] Another apposite case bears mention here. In Ringsaker, the Court determined that when an Intoxilyzer machine printed nonsensical numbers—"22/*0/17"—in the "date" field of a test record, fair administration of the test had not been established. Ringsaker v. Dep't of Transp., 1999 ND 127, ¶¶3-14, 596 N.W.2d 328. In its decision, the Court echoed concerns voiced by the lower court:

> The date is part of the result reported by the machine test. Although the date is not the essential result of the test, when the date fails to print accurately, it raises questions regarding the trustworthiness of the entire test result. The concern is aptly stated in the hearing officer's observation that "[f]or some reason the date is not accurate." No evidence explains that reason nor is there any evidence that the inaccurate date does not also reflect on the accuracy of the blood alcohol result.

Ringsaker, 1999 ND 127 at ¶¶4, 10.

[¶11] The facts of this case, viewed through the lens of this precedent, warrant reversal. Here, the Intoxilyzer operator admitted that he did not follow the approved method, and he further testified as to how he should have run the test in order to comply with it. To approve this procedure is to "amend" the approved method, something that this Court has previously declined to do.

[¶12] As stated above, the guiding question in these cases is whether the deviation from the approved method could not affect the test results. The Intoxilyzer machine is fallible. It encounters errors described by the approved method and not so described. The DOT cannot authoritatively state, in the absence of expert testimony, how the machine's processes are affected when the approved method is not followed.

[¶13] The Intoxilyzer operator believed that it was a bad idea to prematurely terminate this test. To approve such a procedure is to ratify this method of conducting the test. In the wake of such precedent, terminating tests in this fashion may not seem like such a bad idea. The three minutes allotted for providing an adequate breath sample seemed too long, anyway.

CONCLUSION

[¶14] On review of the record, the DOT has not demonstrated scrupulous compliance with the approved method. Mr. Keller respectfully requests that the Court reverse the decisions below.

Dated December 22, 2014.

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CERTIFICATE OF SERVICE

[¶15] A true and correct copy of the foregoing Reply Brief of the Petitioner/Appellant was sent by e-mail December 22, 2014, to be delivered upon:

Michael Pitcher
mtpitcher@nd.gov

Dated December 22, 2014.

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