20140341
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 10, 2014
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.	)	

BRIEF OF THE PETITIONER/APPELLANT

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

/s/ *Justin Vinje*
Justin Vinje
Vinje Law Firm
Attorney for the Petitioner/Appellant
120 North 3rd Street, Ste. #210
Bismarck, N.D. 58501
(701) 258-9475
justin@vinjelaw.com
Bar ID #: 06066

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

CASELAW

STATUTES

STATEMENT OF THE ISSUE

[¶1] Whether the record on appeal fails to demonstrate scrupulous compliance with the approved method, warranting exclusion of the Intoxilyzer test record.

STATEMENT OF THE CASE

[¶2] Following the issuance of a report and notice form, Mr. Keller requested an administrative hearing to determine the status of his driving privileges. (Appellant's App. at 29, 32-33.) The North Dakota Department of Transportation ("DOT") held an administrative hearing in this matter on March 12, 2014. (Id. at 4-27.) Following the administrative hearing, the hearing officer issued a decision suspending Mr. Keller's driving privileges for a period of one year. (Id. at 45.)

[¶3] Mr. Keller sought reconsideration of the hearing officer's decision. (Id. at 46.) The DOT denied the relief requested in the petition for reconsideration. (Id. at 50.)

[¶4] Mr. Keller filed his notice of appeal and specification of error with the district court and submitted briefs in support of his position. (Id. at 3, 51-55, 62-63.) The DOT submitted a responsive brief. (Id. at 56-61.) The district court issued an order affirming the decision below. (Id. at 64-68.) Mr. Keller submitted a timely notice of appeal from the judgment of the district court. (Id. at 70, 71-72.)

STATEMENT OF THE FACTS

[¶5] Bismarck Police Officer David Stewart issued a Report and Notice Form to Richard Keller on February 18, 2014. (Appellant's App. at 29.) Mr. Keller requested an administrative hearing prior to any attempted suspension of his driving privileges. (Id. at 32-33.) The Department of Transportation ("DOT") held an administrative hearing in this matter on March 28, 2014. (Id. at 4-27.)

[¶6] During the hearing, Officer Stewart explained that he stopped a motor vehicle driven by Richard Keller for traveling over a lane-dividing line. (Id. at 10.) After stopping the vehicle, the officer identified Mr. Keller, age sixty-five, as the driver. (Id. at 10, 12.)

[¶7] During the traffic stop, the officer made observations regarding Mr. Keller's physical appearance and conducted a preliminary breath test. (Id. at 11-15.) Officer Stewart subsequently arrested Mr. Keller for driving under the influence. (Id. at 15.)

[¶8] Officer Stewart transported Mr. Keller to the Bismarck Police Department for chemical testing via the Intoxilyzer 8000. (Id.) Mr. Keller blew into the Intoxilyzer machine several times, providing an adequate sample for the first subject test. (Id. at 17, 30.)

[¶9] At this point, Mr. Keller attempted twice to provide a second subject test, "and then he decided he was done. He wasn't trying to not cooperate, but he wasn't going to blow anymore." (Id. at 17.) "He … he stated that he already [had] blown multiple times, originally at the scene with the PBT. He'd already blown multiple times in this and he just wasn't going to blow anymore." (Id. at 21.) The officer did acknowledge that he had earlier told Mr. Keller that he would "take the lower of the two tests." (Id.)

[¶10] Officer Stewart testified that he then decided to terminate the test, though he conceded that he should have allowed the machine to complete its test sequence: "At that point in time, I should have let the machine time out. Without thinking about it, I hit the end test button." (Id.)

[¶11] The text of the Intoxilyzer test record also reveals that the officer prematurely terminated the test sequence. (Id. at 30.) The line that normally describes a subject's second breath sample instead reads: "07 *Subject Test ABT* 19:54[,]" and the text where the test record normally describes the reported alcohol concentration instead reads only: "*Sequence Aborted[.]" (Id.)

[¶12] Mr. Keller objected to the admission of the test record, stating that scrupulous compliance with the approved method had not been demonstrated, and that expert testimony would be necessary to admit the test record. (Id. at 17-18, 23-24.) The hearing officer overruled the objection and admitted the test record. (Id. at 17, 24-26.)

[¶13] On cross-examination, Officer Stewart acknowledged referring to the mechanism by which he terminated the test as both the "end test button" and the "escape button." (Id. at 17, 23.) The officer subsequently admitted that he could not recall the actual name for the button that he pressed to terminate the test sequence. (Id. at 23.)

[¶14] Regardless of the button's name and function, Officer Stewart agreed that its use is not contemplated by the approved method, and he also agreed that he should have allowed the machine to run its process to completion: "I … without even thinking about it I just hit the escape button. If I would have stopped and thought for a second, I would have just let the machine time out, which would have been a better thing to do." (Id.)

[¶15] The hearing officer issued a decision suspending Mr. Keller's driving privileges for one year. (Id. 45.) Mr. Keller sought reconsideration of the decision; upon reconsideration, the hearing officer upheld the decision. (Id. at 46-49, 50.) Mr. Keller subsequently filed a notice of appeal and specification of error with the district court. (Id.

at 3.) The parties briefed the issue, and the district court affirmed the hearing officer's decision. (Id. at 51-55, 56-61, 62-63, 64-68.) Mr. Keller filed a timely notice of appeal from the judgment of the district court. (Id. at 70, 71-72.)

ARGUMENT

I. The DOT failed to show scrupulous compliance with the approved method, warranting exclusion of the Intoxilyzer test record.

[¶16] By choosing to abort the Intoxilyzer test sequence, the officer deviated from the plain language of the approved method. Absent scrupulous compliance with the approved method, expert testimony is necessary to admit the test record. If expert testimony is not offered, the test record should not be considered.

[¶17] The N.D. Century Code provides, in relevant part, that the district court should reverse an agency's decision when any of the following circumstances apply:

1. The order is not in accordance with the law.

2. The order is in violation of the appellant's constitutional rights.

3. Provisions of this chapter are not complied with in proceedings before the agency.

4. The agency's rules or procedures have not afforded the appellant a fair hearing.

5. The agency's findings of fact are not supported by a preponderance of the evidence.

6. The agency's conclusions of law and order 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; Gabel v. Dep't of Transp., 2006 ND 178, ¶7, 720 N.W.2d 433. Questions of law presented in an administrative appeal are reviewed de novo. Gabel, 2006 ND 178 at ¶8 (internal citations omitted). The question of scrupulous compliance is a legal one, warranting de novo review.

[¶18] Insufficient foundation existed to admit Exhibit 1 in this case, as the record failed to establish scrupulous compliance with the approved method. In the absence of scrupulous compliance, expert testimony is required:

> To use the shortcut provided by N.D.C.C. § 39-20-07, the documents and testimony must show "scrupulous compliance with the methods approved by the State Toxicologist." [State v. Jordheim, 508 N.W.2d 878, 882 (N.D. 1993).] If scrupulous compliance with the methods approved by the State Toxicologist is not shown, then the Department must introduce expert testimony to establish fair administration of the test. Id. (citing [State v. Schwalk, 430 N.W.2d 317, 324 (N.D. 1988)]; State v. Nygaard, 426 N.W.2d 547, 549 (N.D. 1988)).

Schlosser v. Dep't of Transp., 2009 ND 173, ¶10, 775 N.W.2d 695. This is equally true in breath testing cases:

> "[F]air administration of the breathalyzer test requires, at the minimum, a showing that the test was 'performed according to the methods and/or with devices approved by the state toxicologist...'" The foundational requirements needed to show that a Breathalyzer test was "fairly administered" so as to render the results admissible, may be met either through the testimony of the state toxicologist or through the introduction of certified copies of approved methods and techniques filed by the state toxicologist with the clerk of the district court pursuant to NDCC Sec. 39-20-07. State v. Schneider, [270 N.W.2d 787, 791 (N.D. 1978)]. Absent testimony by the state toxicologist, the foundational requirement necessary to show fair administration of a breathalyzer test and admissibility of the test results is a showing that the test was administered in accordance with the approved methods filed with the clerk of the district court. Thus, reliability and accuracy of the results are established by demonstrating compliance with the methods adopted by the state toxicologist. Because the statute permits admission of such evidence without expert witness testimony to establish accuracy and reliability, all the requirements of the

> statute must be scrupulously met to ensure a uniform basis of testing throughout the State and fair administration.

Moser v. State Highway Comm'r, 369 N.W.2d 650, 653-543 (N.D. 1985) (quoting Schneider, 270 N.W.2d at 791). Further, there is no legal presumption that chemical testing for intoxication has been performed according to the approved method until proven otherwise, as "such a presumption 'would effectively eliminate the requirement of Sec. 39-20-07(5) that the [State] prove fair administration.'" Schwalk, 430 N.W.2d at 324 (quoting Salter v. Hjelle, 415 N.W.2d 801, 804-05 (N.D. 1987).

[¶19] In this case, the officer manually aborted the Intoxilyzer test. The approved method to conduct these tests was admitted as Exhibit 8. This exhibit sets forth the testing procedure. (Appellant's App. at 35-44.) The testing procedure does not describe a scenario where testing is prematurely terminated by an officer. Rather, the approved method explicitly states that the "subject has another three minutes to provide an adequate breath sample." (Appellant's App. at 41.)

[¶20] The officer acknowledged that he should have let the test time out, as described in the approved method, and he also acknowledged that manually aborting the test did not comport with the approved method. On this record, scrupulous compliance with the approved method was not demonstrated. Expert testimony was necessary to admit the test record. The DOT did not offer expert testimony, so the test record should not have been admitted into evidence.

CONCLUSION

[¶21] Scrupulous compliance was not demonstrated. The test record should not have been admitted. Mr. Keller respectfully requests that this Court reverse the decisions below.

Dated November 14, 2014.

/s/ *Justin Vinje*

Justin Vinje
Vinje Law Firm
Attorney for the Petitioner/Appellant
120 North 3rd Street, Ste. #210
Bismarck, N.D. 58501
(701) 258-9475
justin@vinjelaw.com
Bar ID #: 06066

CERTIFICATE OF SERVICE

[¶22] A true and correct copy of the foregoing Petitioner/Appellant's Brief and Appendix were sent by e-mail November 14, 2014, to be delivered upon:

Michael Pitcher
mtpitcher@nd.gov

Dated November 14, 2014.

/s/ *Justin Vinje*
Justin Vinje
Vinje Law Firm
Attorney for the Petitioner/Appellant
120 North 3rd Street, Ste. #210
Bismarck, N.D. 58501
(701) 258-9475
justin@vinjelaw.com
Bar ID #: 06066