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FEBRUARY 23, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff/Appellee,

v. Supreme Court No. 20140344

Michael Dale Filkowski,

Defendant/Appellant.

* *

BRIEF OF APPELLANT & Addendum

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Appeal from Criminal Judgment

McKenzie County District Court
Northwest Judicial District
McKenzie County Case No. 27 2013 CR 01349

* *

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Issue For Review

[1] Did the prosecution fail to lay the proper foundation for the admissibility of the blood alcohol test result in this case under N.D.C.C. § 39-20-07, and for that failure should this case be reversed and an acquittal entered?

STATEMENT OF THE CASE

[2] In this criminal case defendant Michael Filkowski was charged with, "Drove or in actual physical control of a motor vehicle while under the influence of alcohol or drugs and/or with AC of .08 or greater" (A. 4). Filkowski pleaded not guilty and a jury trial was had. The jury found Filkowski guilty as charged (A. 7), and Filkowski appeals from the Criminal Judgment (A. 5, 40).

STATEMENT OF THE FACTS

[3] On October 5, 2013 (Tr. 30), Filkowski was stopped for driving out of his travel lane (Tr. 30-32). Based on the observations of two officers, Filkowski was placed under arrest for the charge in this case (Tr. 33-36). Filkowski was taken to a hospital where he submitted to a blood test (Tr. 78-80).

[4] At trial, the prosecution offered State's Exhibit 2 (A. 11), the completed Submission for Blood (104). Filkowski objected that there were no foundational documents for admission of State's Exhibit 2 (A. 41-43). The objection was overruled (A. 43).

[5] State's Exhibit 3 (A. 13-14) was received (A. 44). Exhibit 3 is a Memo Regarding Designees of the State Crime Laboratory Director.

[6] When the prosecution offered State's Exhibit 4, List of Approved Designations of Individuals Medically Qualified to Draw Blood (September 29, 2011), (A. 15-16) into evidence, Filkowski conducted a voir dire examination of the prosecution's witness, Ms. Kali Hieb (A. 44). Going back to State's Exhibit 3, in which Hieb was listed as a designee (A. 13-14), Hieb admitted that she was designated by the Director of the State Crime Laboratory to "sign and certify records", and not designated by the Director "to approve Methods and devices, and approve individuals for the purposes of qualifying to do these blood tests." (A. 44-45). Hieb "cannot approve methods or devices or individuals." (A. 45). Hieb was not a designee for approving State's Exhibit 4 (A. 45).

[7] Filkowski objected to State's Exhibit 4 under N.D.C.C. § 39-20-07(5) (Add. 1-3) (A. 45) Filkowski contended the designee of the Director for purposes of 39-20-07(5) was not before the court (A. 46). Filkowski's objection was overruled (A. 47).

[8] The prosecution then offered State's Exhibit 5, List of Individuals certified to Conduct Blood Alcohol Analysis (August 1, 2012) (A. 17-19), into evidence (A. 48-49). Filkowski had the same objection to State's Exhibit 5 as he had to State's Exhibit 4, and his objection was overruled (A. 49).

[9] The prosecution offered State's Exhibit 6, List of Approved Biological Alcohol Analysis Instruments (July 1, 2013) (A. 19-20), into evidence (A. 49-50). Filkowski had the same objection, and it was overruled (A. 50).

[10] Filkowski had no objection to State's Exhibit 7, Approved Method to Conduct Blood Alcohol Analysis (TxS-020) Revision Number 0.1 (A. 21-36) (A. 50). That exhibit was authorized by the Director (A. 22) and certified as a true and correct copy by a designee for certifying records listed in State's Exhibit 3 (A. 14, 21).

[11] Finally, the prosecution offered State's Exhibit 8, a certified Toxicology Alcohol/Volatiles Analytical Report for Filkowski's blood (A. 37-39) into evidence (A. 51-52). Filkowski had the same objection as to foundation under N.D.C.C. § 39-20-07(5) (A. 53). The objection was overruled (A. 54).

[12] The result of Filkowski's blood test was over the legal limit (A. 54).

[13] Filkowski was prosecuted as charged, which included being under the influence of intoxicating liquor or having an alcohol concentration over the legal limit (A. 8-9). Both alternatives were included in each general Verdict form (A. 10). The jury's verdict was Guilty as charged (A. 7).

ARGUMENT

Issue for Review

[14] Did the prosecution fail to lay the proper foundation for the admissibility of the blood alcohol test result in this case under N.D.C.C. § 39-20-07, and for that failure should this case be reversed and an acquittal entered?

[15] This case was tried on September 5, 2014. Before the trial, Painte v. Dep't of Transportation, 2013 ND 95, 832 N.W.2d 319, was decided on June 19, 2013, and Franks v. N.D. Dep't of Transportation, 2014 ND 158, 849 N.W.2d 248, was decided on July 17, 2014.

[16] In this case, State's Exhibit 8 contained the same affidavit (A. 37) as the affidavit contained in Painte at ¶ 23. However, in this case the affiant, a prosecution witness, testified that she was a designee only for certifying records (A. 13-14) and she was not a designee for purposes of N.D.C.C. § 39-20-07 (see Add. 1-3; Painte at ¶¶ 19, 24-25).

[17] There was no evidence here that the Director or a designee of the Director approved the methods, devices or individuals reflected in State's Exhibit 2, 4, 5, 6 or 8. Charles E. Eder's name appears on State's Exhibit 4, 5 and 6, but, like Frank, "there is no evidence on the record that Eder is a

designee of the director of the state crime laboratory." Franks, at ¶ 6. Foundation, here, was not met. Franks, at ¶ 11.

[18] The prosecution failed to put in evidentiary proof that Eder was a designee of the Director, and therefore failed to properly prove that Filkowski was over the legal limit. Therefore, the prosecution failed to put in sufficient evidence to support the charge of .08 or greater. The prosecution should not get a second bite at the apple.

[19] In State v. Arnold, 514 A.2d 330 (Conn. 1986), the Court held, "A general verdict of guilty to a single count charging alternative methods of committing the same crime may be upheld only if there is sufficient evidence to support the verdict as to each alternative." The general verdict "must be set aside if the evidence as to . . . [any] alternative submitted was insufficient." Id., citing Cramer v. United States, 325 U.S. 1, 34-36 (1945).

[20] Filkowski requests the Court to reverse the judgment and enter an acquittal. See State v. Wright, 426 N.W.2d 3 (N.D. 1988); State v. Salhus, 220 N.W.2d 852 (N.D. 1974).

CONCLUSION

[21] WHEREFORE, Mr. Filkowski respectfully requests the Supreme Court of North Dakota to reverse the criminal judgment in this case, and enter an acquittal.

Dated: February 25, 2015.

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CERTIFICATE OF SERVICE

[22] I hereby certify that on February 25, 2015, the following documents:

BRIEF OF APPELLANT
And
APPENDIX OF APPELLANT

were emailed to the Clerk of the North Dakota Supreme Court @ supclerkofcourt@ndcourts.gov and a copy was emailed to the following:

Jacob T. Rodenbiker @ mcsa@co.mckenzie.nd.us
McKenzie County State's Attorney

/s/ Michael R. Hoffman
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ADDENDUM

Reasonable Grounds.

—In General.

Suspension of the licensee's driving privileges for 180 days for DUI was appropriate under N.D.C.C. § 39-20-05(2) because the officer had probable cause to arrest since witnesses described the vehicle involved in the accident; it was registered to the licensee; and the officer found the licensee extremely intoxicated. Because the officer had probable cause to arrest the licensee and had a right to remain at his elbow at all times, the officer did not violate the licensee's Fourth Amendment rights by following him into his bedroom without a warrant. Hoover v. Dir., N.D. DOT, 2008 ND 87, 748 N.W.2d 730, 2008 N.D. LEXIS 95 (May 15, 2008).

Scope of Hearing.

Suspension of driving privileges was proper, because N.D.C.C. § 39-20-05(3) by its terms specifically excluded from consideration at the administrative hearing whether the driver was informed of the consequences of refusal, and a reasoning mind could reasonably conclude that despite the driver's verbal acquiescence to the chemical testing, the context in which the words were stated, his subsequent threats, and his refusal to cooperate with officers belied any intent to take the test and amounted to a refusal to do so. Gardner v. N.D. DOT, 2012 ND 223, 822 N.W.2d 55, 2012 N.D. LEXIS 227 (Oct. 23, 2012).

Transmission of Test Results.

Mailing of the hearing officer's decision to the driver three days after the administrative hearing did not deprive the North Dakota Department of Transportation of authority to suspend the driver's driving privileges, because the statutory provision requiring the decision to be "immediately delivered" was not basic and mandatory, and the hearing officer's action did not prejudice the driver. Schock v. N.D. DOT, 2012 ND 77, — N.W.2d —, 2012 N.D. LEXIS 66 (Apr. 10, 2012).

Type of Hearing.

North Dakota Department of Transportation failed to conduct administrative hearings in which it suspended the drivers privileges of driving for alcohol-related offenses in accordance with the law because under N.D.C.C. § 39-20-05 hearings were intended to be conducted in person, not telephonically and neither driver waived his right to an in-person hearing. Landsiedel v. Dir., N.D. DOT, 2009 ND 196, 774 N.W.2d 645, 2009 N.D. LEXIS 196 (Nov. 17, 2009).

39-20-06. Judicial review.

Transcript.

Affirmation of an order suspending the driver's driving privileges for 180 days was improper because the Department of Transportation failed to transmit a record compiled in the administrative proceedings. Although the hearing officer did not abuse his discretion in setting the hearing date, the Department failed to certify a record on appeal to the district court, and there was no record on appeal establishing the Department's authority to suspend the driver's driving privileges. Baesler v. N.D. DOT, 2012 ND 39, — N.W.2d —, 2012 N.D. LEXIS 31 (Feb. 17, 2012).

Law Reviews.

North Dakota Supreme Court Review (State v. Hahne, 2007 ND 116, 736 N.W.2d 483 (2007)), see 84 N. Dak. L. Rev. 567 (2008).

39-20-07. Interpretation of chemical tests. Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any individual while driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor, drugs, or a combination thereof, evidence of the amount of alcohol concentration or presence of other drugs, or a combination thereof, in the individual's blood, breath, or urine at the time of the act alleged as shown by a chemical analysis of the blood, breath, or urine is admissible. For the purpose of this section:

1. An individual having, at that time, an alcohol concentration of not more than five one-hundredths of one percent by weight is presumed not to be under the influence of intoxicating liquor. This presumption has no application to the administration of chapter 39-06.2.
2. Evidence that there was at that time more than five one-hundredths

of one percent by weight alcohol concentration in an individual is relevant evidence, but it is not to be given prima facie effect in indicating whether the individual was under the influence of intoxicating liquor.

3. An individual having an alcohol concentration of at least eight one-hundredths of one percent by weight or, with respect to an individual under twenty-one years of age, an alcohol concentration of at least two one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after driving or being in physical control of a vehicle is under the influence of intoxicating liquor at the time of driving or being in physical control of a vehicle.
4. Alcohol concentration is based upon grams of alcohol per one hundred milliliters of blood or grams of alcohol per two hundred ten liters of end expiratory breath or grams of alcohol per sixty-seven milliliters of urine.
5. The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee. The director of the state crime laboratory or the director's designee is authorized to approve satisfactory devices and methods of chemical analysis and determine the qualifications of individuals to conduct such analysis, and shall issue a certificate to all qualified operators who exhibit the certificate upon demand of the individual requested to take the chemical test.
6. The director of the state crime laboratory or the director's designee may appoint, train, certify, and supervise field inspectors of breath testing equipment and its operation, and the inspectors shall report the findings of any inspection to the director of the state crime laboratory or the director's designee for appropriate action. Upon approval of the methods or devices, or both, required to perform the tests and the individuals qualified to administer them, the director of the state crime laboratory or the director's designee shall prepare, certify, and electronically post a written record of the approval with the state crime laboratory division of the attorney general at the attorney general website, and shall include in the record:
   a. An annual register of the specific testing devices currently approved, including serial number, location, and the date and results of last inspection.
   b. An annual register of currently qualified and certified operators of the devices, stating the date of certification and its expiration.
   c. The operational checklist and forms prescribing the methods currently approved by the director of the state crime laboratory or the director's designee in using the devices during the administration of the tests.
   d. The certificate of the director of the state crime laboratory designating the director's designees.
   e. The certified records electronically posted under this section may be supplemented when the director of the state crime laboratory or the director's designee determines it to be necessary, and any certified supplemental records have the same force and effect as the records that are supplemented.

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f. The state crime laboratory shall make the certified records required by this section available for download in a printable format on the attorney general website.

7. Copies of the state crime laboratory certified records referred to in subsections 5 and 6 that have been electronically posted with the state crime laboratory division of the attorney general at the attorney general website must be admitted as prima facie evidence of the matters stated in the records.
8. A certified copy of the analytical report of a blood or urine analysis referred to in subsection 5 and which is issued by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of a chemical analysis performed under this chapter. The certified copy satisfies the directives of subsection 5.
9. Notwithstanding any statute or rule to the contrary, a defendant who has been found to be indigent by the court in the criminal proceeding at issue may subpoena, without cost to the defendant, the individual who conducted the chemical analysis referred to in this section to testify at the trial on the issue of the amount of alcohol concentration or presence of other drugs, or a combination thereof in the defendant's blood, breath, or urine at the time of the alleged act. If the director of the state crime laboratory or designee is subpoenaed to testify by a defendant who is not indigent and the defendant does not call the witness to establish relevant evidence, the court shall order the defendant to pay costs to the witness as provided in section 31-01-16.
10. A law enforcement officer who has witnessed an individual who is medically qualified to draw the blood sample for testing may sign a verified statement that the law enforcement officer witnessed the individual draw the blood sample and the individual followed the approved methods of the state toxicologist. Further foundation is not required to establish that the blood sample was drawn according to the approved method of the state toxicologist.

Source: S.L. 1959, ch. 286, § 7; 1961, ch. 269, § 3; 1965, ch. 281, § 1; 1969, ch. 357, § 1; 1969, ch. 358, § 1; 1975, ch. 359, § 1; 1983, ch. 415, § 29; 1983, ch. 444, § 5; 1985, ch. 429, § 19; 1989, ch. 461, § 5; 1993, ch. 236, § 8; 1993, ch. 383, § 14; 1993, ch. 387, § 6; 1997, ch. 334, § 7; 1997, ch. 345, § 1; 1997, ch. 346, § 1; 1999, ch. 278, § 63; 1999, ch. 358, § 8; 2001, ch. 120, § 1; 2003, ch. 316, § 7; 2003, ch. 469, § 11; 2005, ch. 195, § 20; 2007, ch. 339, § 3; 2007, ch. 325, § 5; 2011, ch. 288, § 18; 2013, ch. 301, §§ 17–19.

Effective Date.

The 2013 amendment of this section by sections 17-19 of chapter 301, S.L. 2013 became effective July 1, 2013.

The 2011 amendment of this section by section 18 of chapter 288, S.L. 2011 became effective August 1, 2011.

Attendance of Trial by Analyst.

—Refusal to Allow Testimony.

Exclusion of the forensic analyst's testimony based on defendant's acquiescence to admission of the chemical test results was contrary to N.D.C.C. § 39-20-07 and the refusal to allow the analyst to testify was unreasonable and warranted a new trial. While defendant admitted to drinking and smelled of alcohol, there was little evidence indicating that he was under the influence of intoxicating liquor and thus, exclusion of the testimony was not harmless. State v. Schwab, 2008 ND 94, 748 N.W.2d 696, 2008 N.D. LEXIS 91 (May 15, 2008).

Blood or Breath Test Results.

—Admissibility.

Police officer's conclusory testimony was

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