

20150149

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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AUG 20 2015

Casey Jerald Washburn,)	STATE OF NORTH DAKOTA
)	
Appellee/Cross-Appellant,)	Supreme Ct. No. 20150149
)	
v.)	District Ct. No. 47-2014-CV-00703
)	
Grant Levi, Director)	
Department of Transportation,)	
)	
Appellant/Cross-Appellee.)	

**APPEAL FROM THE DISTRICT COURT
STUTSMAN COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT**

HONORABLE JOHN E. GREENWOOD

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

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STATEMENT OF ISSUES

[¶1] Whether Washburn properly preserved the arguments that Officer Staska lacked probable cause to believe he was impaired by alcohol and that he was entitled to attorney's fees, by not designating these issues in his Notice of Cross-Appeal?

[¶2] Whether the hearing officer's findings of fact support the conclusion of law that Officer Staska had reasonable grounds to believe Washburn was impaired and his impairment was caused by alcohol?

[¶3] Whether Washburn has established he is entitled to an award of attorney's fees?

LAW AND ARGUMENT

I. **Washburn did not properly preserve the issues of whether law enforcement had probable cause to believe he was impaired by alcohol and whether he was entitled to attorney's fees, by not including these issues in his Notice of Cross-Appeal.**

[¶4] In accordance with N.D.C.C. § 28-32-49 any party of record, including an administrative agency, may appeal from the judgment of the district court in an appeal from an order of an administrative agency. North Dakota Rule of Appellate Procedure 3 prescribes how an appeal is taken to this Court and what contents are required in a Notice of Appeal.

[¶5] Subsection 3, N.D.R.App.P. 3 provides that "[t]he notice of appeal must:

- (1) specify the party or parties taking the appeal;
- (2) designate the judgment, order, or part thereof being appealed;
- (3) name the court to which the appeal is taken; and
- (4) in an appeal from a civil case or a post-conviction relief proceeding, include a preliminary statement of issue.

Id. (emphasis added). Here, the Department appealed from the district court's judgment that the arresting officer lacked probable cause to believe Washburn was in actual physical control of his vehicle. The district court affirmed the hearing officer's decision on the other issues and also denied Washburn's request for attorney's fees. App. 86.

[¶6] On June 9, 2015 Washburn filed a Notice of Cross Appeal. Appellee/Cross Appellant's Appendix (CA App.) 1. In his cross appeal Washburn's preliminary statement of the issues reads: "Was Appellee, Casey Jerald Washburn, afforded a reasonable opportunity to consult with an attorney prior to deciding whether or not to submit to a chemical test?" CA App. 1. Washburn, however, did not designate that he was appealing the district court's judgment finding that Officer Staska had probable cause to believe Washburn was impaired by alcohol; nor did he designate that he was challenging the district court's denial of his request for attorney fees. Because Washburn failed to properly preserve these issues on appeal, the Court should disregard his arguments set forth in sections 3(a)(i) and 4 of his brief.

II. The evidence supports the hearing officer's finding that Officer Staska had probable cause to believe Washburn was impaired and his impairment was caused by alcohol.

[¶7] Even if this Court believes Washburn preserved the issue of whether the arresting officer had probable cause to believe he was impaired by alcohol, this Court should affirm the hearing officer and district court decisions finding probable cause of Washburn's impairment by alcohol.

[¶8] “Probable cause to arrest a driver for driving under the influence exists if the police officer (1) observes some signs of physical or mental impairment, and (2) has reason to believe the driver's impairment is caused by alcohol.” Sayler v. N.D. Dep't of Transp., 2007 ND 165, ¶ 19, 740 N.W.2d 94. “Both elements - impairment and indication of alcohol consumption - are necessary to establish probable cause to arrest for driving under the influence.” Moran v. N.D. Dep't of Transp., 543 N.W.2d 767, 770 (N.D. 1996).

[¶9] “Detection of the odor of alcohol, observation of signs of impairment, and failure of field sobriety tests are relevant factors in determining probable cause to arrest a driver for driving under the influence of alcohol.” City of Devils Lake v. Grove, 2008 ND 155, ¶ 11, 755 N.W.2d 485. A “police officer’s detection of an alcohol odor and observation of glassy, red, watery, and bloodshot eyes [are] relevant factors.” Baer v. Dir., N.D. Dep't of Transp., 1997 ND 222, ¶ 12, 571 N.W.2d 829. See also State v. Kier, 678 N.W.2d 672, 678 (Minn. Ct. App. 2004) (“Common indicia of intoxication include an odor of alcohol, bloodshot and watery eyes, slurred speech, and an uncooperative attitude.”). The absence of field sobriety tests does not necessarily “fatally flaw the probable cause determination.” City of Missoula v. Forest, 769 P.2d 699, 701 (Mont. 1989).

[¶10] In this case, Washburn argues Officer Staska lacked probable cause to arrest him for driving under the influence of intoxicating liquor, because no field sobriety tests were conducted, and the only factor observed was an odor of alcohol emanating from Washburn. Appellee's Br. ¶ 44. Washburn's argument is meritless.

[¶11] While it is true Washburn refused to perform any field sobriety tests, the observations Officer Staska made during his contact with Washburn provided probable cause for Washburn's Actual Physical Control (APC) arrest. Upon finding Washburn passed out in his vehicle, Officer Staska could smell the odor of an alcoholic beverage coming from inside the vehicle. App. 8, ll. 13-15. After waking Washburn and conversing with him, Officer Staska testified the odor of alcohol became stronger when Washburn was talking. App. 10, ll. 21-23. Officer Staska also noted Washburn was slurring his words. Id. Washburn was also observed leaning on his vehicle after exiting. App. 11, ll. 9-10. Further, Washburn was very uncooperative, argumentative, and belligerent with Officer Staska throughout the encounter. App. 9, l. 7 – App. 10, l. 11; App 11, l. 24 – App. 12, l. 10; App. 13, ll. 1-2. See Chadwick v. Moore, 551 N.W.2d 783, 786-87 (N.D. 1996) (indicating that a driver's hostile, pugnacious behavior helped support probable cause for DUI); State v. Berger, 2004 ND 151, ¶¶ 12-20, 683 N.W.2d 897 (defendant's belligerent physically aggressive conduct was a factor in the probable cause determination); Pearson v. Commonwealth, 551 A.2d 394, 395 (Pa. Commw. Ct. 1988) (Motorcyclist's odor of alcohol, glassy eyes, and belligerent behavior gave officer probable cause to arrest for driving under the influence).

[¶12] Washburn's slurred speech, leaning on his vehicle, and uncooperative belligerent conduct, along with the odor of an alcoholic beverage exuding from him provided Officer Staska with sufficient cause to arrest him for APC. The totality of the circumstances, reveal Officer Staska had reason to believe

Washburn was physically and mentally impaired and that Washburn's impairment was caused by alcohol.

III. Washburn has not established he is entitled to an award of attorney's fees.

[¶13] N.D.C.C. § 28-32-50(1) provides as follows:

"In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, the court must award the party not an administrative agency reasonable attorney's fees and costs if the court finds in favor of the party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification."

(Emphasis added.)

[¶14] This Court has summarized the appropriate standards for application of the "substantially justifiable" test, as follows:

"[Section 28-32-50, N.D.C.C.,] sets forth a two-part test which must be met in order to properly award attorney fees: first, the nonadministrative party must prevail, and second, the agency must have acted without 'substantial justification.' Here, the nonadministrative party prevailed and, therefore, the first requirement has been fulfilled. The second requirement is shaped by our definition of substantial justification. In defining this term we have been guided by the United States Supreme Court's definition of the term 'substantially justified.' There it was said that substantially justified means 'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person. A position may be justified, despite being incorrect, so long as a reasonable person could think that it has a reasonable basis in law and fact. Substantial justification represents a middle ground between the automatic award of fees to the prevailing party on one side, and awarding fees only when a position is frivolous or completely without merit on the other."

Kroschel v. Levj, 2015 ND 185, -- N.W. 2d -- (quoting Lamplighter Lounge, Inc. v. State, 523 N.W.2d 73, 75 (N.D. 1994)).


[¶15] Washburn has not persuasively established the Department “acted without substantial justification.” Indeed, at a minimum, the Department’s position in regards to the issues of whether law enforcement had probable cause to believe Washburn was impaired by alcohol and whether Washburn was afforded a reasonable opportunity to consult with counsel is substantially justified given the district court ruled in the Department’s favor. And for the reasons specified in the Department’s Appellant’s Brief the district court’s decision reversing the hearing officer on the issue of whether there was probable cause to believe Washburn was in actual physical control of his vehicle was incorrect. And, even if this Court does not agree with the Department’s argument and affirms the decision of the district court, on the grounds that Officer Staska lacked probable cause to arrest Washburn for APC, the hearing officer’s decision was not without merit, and cannot be said to have been frivolous. Therefore, this Court should deny Washburn’s request for attorney’s fees.

CONCLUSION

[¶16] The Department respectfully requests that this Court reverse the judgment of the Stutsman County District Court and affirm the Department’s decision revoking Washburn’s driving privileges for 180 days.

Dated this 20th day of August, 2015.

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Supreme Ct. No. 20150149
District Ct. No. 47-2014-CV-00703

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

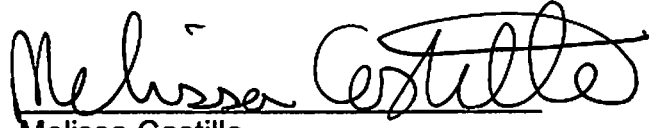
Melissa Castillo states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

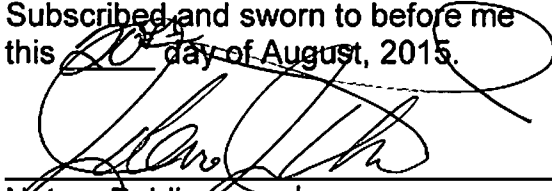
2. I am of legal age and on the 20th day of August, 2015, I served the attached **REPLY BRIEF OF APPELLANT/CROSS-APPELLEE** upon Casey Jerald Washburn, by and through his attorney Luke Heck, by placing a true and correct copy thereof in an envelope addressed as follows:

Luke Heck
Attorney at Law
Severson, Wogsland & Liebl
4627 44th Avenue South, Suite 108
Fargo, ND 58104

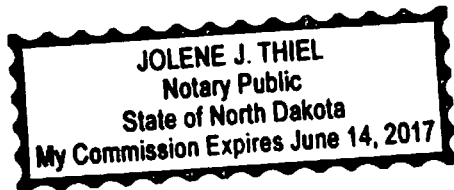
and depositing the same, with postage prepaid, in the United States mail at
Bismarck, North Dakota.


Melissa Castillo

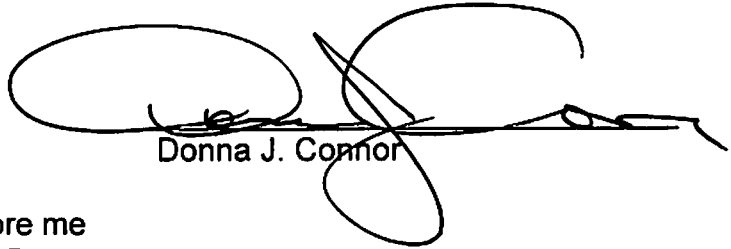
Subscribed and sworn to before me
this 20th day of August, 2015.



Notary Public

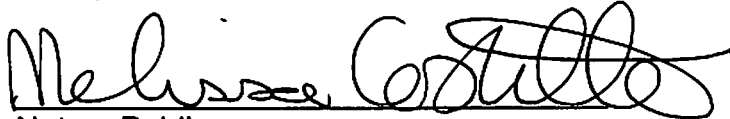


and depositing the same, with postage prepaid, in the United States mail at
Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 17th day of August, 2015.



Notary Public

