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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Andrew John Gillmore,	)	
	)	
Appellant,	)	**Supreme Ct. No. 20150321**
	)	
v.	)	**District Ct. No. 45-2015-CV-00367**
	)	
Grant Levi, Director of the North Dakota Department of Transportation,	)	
	)	
Appellee.	)	

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED SEPTEMBER 3, 2015
STARK COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE WILLIAM HERAUF

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[¶1] Whether Gillmore showed the Intoxilyzer 8000 has an inherent margin of error, and that it is relevant under N.D.C.C. ch. 39-20?

[¶2] Whether the hearing officer abused her discretion in admitting Gillmore's Intoxilyzer test record into evidence?

[¶3] Whether Gillmore freely and voluntarily consented to the field sobriety tests providing law enforcement with probable cause to arrest him for driving under the influence?

[¶4] Whether the Department had authority to suspend Gillmore's driving privileges irrespective of whether Gillmore was informed of the implied consent advisory after arrest?

[¶5] Whether Gillmore's arguments that North Dakota's implied consent laws are unconstitutional have been rejected by this Court and are without merit?

STATEMENT OF CASE

[¶6] On February 14, 2015 Sergeant Nick Gates (Sgt. Gates) of the Dickinson Police Department arrested Andrew John Gillmore (Gillmore) for driving under the influence (DUI). Transcript (Tr.) Exhibit (Ex.) 1b. A Report and Notice, including a temporary operator's permit, was issued to Gillmore after chemical Intoxilyzer test results indicated Gillmore's alcohol concentration was .082 percent by weight. Id. The Report and Notice notified Gillmore of the Department's intent to suspend his driving privileges. Id.

[¶7] In response to the Report and Notice, Gillmore requested an administrative hearing. Tr. Ex. 1e. The hearing was held on March 10, 2015. Tr. Ex. 2. In accordance with N.D.C.C. 39-20-05(2) the hearing officer considered four broad issues, as follows:

> (1) Whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical

control of a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;

(2) Whether the person was placed under arrest;

(3) Whether the person was tested in accordance with N.D.C.C. section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and

(4) Whether the test results show the person had an alcohol concentration of at least eighteen one-hundredths of one percent by weight.

Tr. Ex. 2.

At the close of the hearing, the hearing officer issued her findings of fact, conclusions of law and decision suspending Gillmore's driving privileges for 91 days. Tr. 58-59. Gillmore appealed that decision to the Stark County District Court. App. 30-33.

STATEMENT OF FACTS

[¶8] The Department accepts the Statement of the Facts in Gillmore's brief and as described in the hearing officer's decision. See App. 5.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶9] Gillmore requested judicial review of the Hearing Officer's Decision by the Stark County District Court in accordance with N.D.C.C. § 39-20-06. App. 30-33. With respect to Gillmore's argument that his test results failed to show he had an alcohol concentration of at least eight one-hundredths of one percent by weight due to the Intoxilyzer 8000 having an inherent margin of error, Judge Herauf found Gillmore did not establish the Intoxilyzer 8000 had a margin of error of .003, as he claimed. App. 37. Judge Herauf further ruled "whether the

Intoxilyzer has a margin of error is irrelevant in an administrative license suspension for driving under the influence of alcohol." App. 39.

[¶10] Regarding Gillmore's argument he was not tested according to the approved method by being told to blow as hard as he could, the court concluded the police officer followed the Approved Method in conducting Gillmore's breath test. App. 42. In reaching this conclusion Judge Herauf wrote:

> Although the Approved Method does not specify that the operator should instruct the subject to blow as hard as he can, doing so does not result in a deviation from the Approved Method.

App. 41. Judge Herauf also noted the police officer's instruction did not result in an inadequate breath sample for either subject breath test and, therefore, it was not unreasonable for the hearing officer to conclude the approved method was followed. App. 42.

[¶11] Judge Herauf also rejected Gillmore's various arguments claiming North Dakota's implied consent laws are unconstitutional.

[¶12] The district court issued its Memorandum Opinion and Order Affirming the Hearing Officer's Decision on August 31, 2015. App. 34-43. Judgment was entered on September 3, 2015. App. 46. Gillmore appealed the Judgment to this Court. App. 49-52. On appeal, the Department requests this Court affirm the Judgment of the Stark County District Court and the Hearing Officer's Decision revoking Gillmore's driving privileges for a period of 91 days.

STANDARD OF REVIEW

[¶13] "An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act,

Chapter 28-32, N.D.C.C." McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). "This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision." Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993). "However, the district court's analysis is entitled to respect if its reasoning is sound." Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

[¶14] This Court's review "is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency's decision is supported by the conclusions of law." McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep't of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

[¶15] Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder's decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." Id. (citation omitted).

[¶16] "When an 'appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency's order unless it finds the agency's order is not in accordance with the law.'" Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646

N.W.2d 704). The "[i]nterpretation of a statute is a question of law fully reviewable on appeal." State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

LAW AND ARGUMENT

I. Gillmore's driving privileges were properly suspended for 91 days regardless of whether the inherent margin of error is relevant under N.D.C.C. ch. 39-20.

[¶17] Gillmore asserts he "demonstrated at the hearing that the margin of error for the Intoxilyzer 8000 is plus or minus .003." Appellant's Br. ¶ 18. Gillmore's argument is erroneous.

[¶18] It is true Gillmore argued at the hearing that the margin of error for the Intoxilyzer 8000 was .003, but Gillmore provided no evidence to support this assertion. Tr. 50, ll. 2-5. Sgt. Gates acknowledged the Intoxilyzer 8000 does have a margin of error, but no evidence was presented as to what the margin of error is for the device. Tr. 36, ll. 18-19. More particularly, Gillmore attempted to advocate that a state crime laboratory record retained by the attorney general's office shows the deviation for the Ethanol Breath Standard, for Lot No. 33913080A4 (the lot used in Gillmore's test) had a deviation or margin of error of .002. See Tr. 34, l. 24 – Tr. 38, l. 24. Gillmore's attorney indicated he would submit the document to the hearing officer following the hearing. Tr. 37, ll. 9-24. However, Gillmore failed to send this document to the hearing officer and it was not made a part of the record. See Record; Tr. 38, ll. 2-3.

[¶19] Yet, even if it is true that the Ethanol Breath Standard used in Gillmore's chemical test had its own margin of error of .002, there was no expert testimony or other evidence presented by Gillmore to show how the Ethanol Breath

Standard range impacted the results of Gillmore's breath sample. Simply put, there was no proper showing by Gillmore that the Intoxilyzer 8000 had a margin of error of plus or minus .003, and therefore Gillmore's argument need not be considered. However, even if it is presumed that the Intoxilyzer 8000 used to perform Gillmore's chemical test had an inherent margin of error of .003, as Gillmore claims, Gillmore's Intoxilyzer test results were properly admitted into evidence.

A. The inherent margin of error is irrelevant under N.D.C.C. ch. 39-20.

[¶20] The premise underlying Gillmore's argument is that, as a matter of law, the margin of error must be taken into consideration in a civil administrative implied consent proceeding. This argument has been asserted in numerous implied consent appeals in this state. In the past, the decision most often cited by drivers ostensibly in support of this argument was Haynes v. State Dept. of Pub. Safety, 865 P.2d 753 (Alaska 1993). The Alaska Supreme Court held in Haynes that a chemical test result that may be reduced below the legal limit by applying a margin of error inherent in a particular test cannot serve as the basis for a license revocation in an implied consent proceeding. Id. at 756.

[¶21] The Alaska Supreme Court, however, emphasized that courts around the country have determined that whether or not the margin of error is relevant depends on the plain language of the particular state statute, explaining as follows:

> In Barcott v. Department of Public Safety, 741 P.2d 226 (Alaska 1987), we addressed the issue of whether the hearing officer must consider the inherent margin of error in a chemical analysis

> designed to test the presence of alcohol in a person's breath. In the course of our analysis, we examined how courts in other jurisdictions interpreted their own DWI statutes with regard to the issue of inherent margin of error in a chemical blood/breath alcohol test. Essentially, the courts' analyses hinged on whether the particular court interpreted its jurisdictional DWI statute to create an offense upon a test reading in excess of their statutory limit or upon an actual level of alcohol in excess of the limit. Courts that interpret their DWI statutes to create an offense upon a test reading in excess of the statutory limit presume that the legislature considered the inherent risk of error in the chemical analysis and found it to be tolerably inaccurate; thus, the courts did not require the fact finder to consider the inherent margin of error of a particular testing device. In contrast, courts that interpret their DWI statute to create an offense upon an actual level of alcohol do not presume that their legislature considered the inherent margin of error of a chemical test; thus, those courts require the fact finder to consider the inherent margin of error before rendering a decision.

Haynes, 865 P.2d at 755 (footnotes omitted)(internal citations omitted.)[1]

[¶22] It is worth noting that all of the foreign state decisions cited in Haynes for the proposition that the fact finder must consider the inherent margin of error before rendering a decision are criminal cases interpreting criminal statutes. See Haynes, 865 P.2d at 755. On the other hand, the foreign state decisions cited in Haynes for the proposition that the fact finder need not consider the inherent margin of error consist of a mix of criminal and civil implied consent cases. See id.

[¶23] Under N.D.C.C. § 39-08-01(1)(a), a person is subject to criminal sanctions for driving a motor vehicle when "[t]hat person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of performance

[1] The Alaska Court of Appeals later noted that a subsequent statutory amendment in response to Haynes rendered the inherent margin of error of chemical testing devices irrelevant in Alaska. See Bushnell v. State of Alaska, 5 P.3d 889 (Alaska Ct. App. 2000).

of a chemical test . . . ." (emphasis added). The criminal statute makes no mention of the "test result." Thus, the plain language of North Dakota's criminal DUI statute appears to create an offense based on the actual level of alcohol, which would require the trial court to consider the inherent margin of error of the chemical testing device.

[¶24] On the other hand, consideration of a plethora of statutes in N.D.C.C. ch. 39-20 demonstrates that the civil administrative action depends on the test reading or result and not the actual level of alcohol concentration. For example, as stated in the opening paragraph of N.D.C.C. § 39-20-03.1, the law enforcement officer issues a temporary operator's permit notifying the driver of the Department's intent to suspend driving privileges if the "test shows" an alcohol concentration of at least .08 percent by weight. Further, N.D.C.C. § 39-20-03.1(4) requires that the law enforcement officer to forward to the Department a "certified written report" - - the Report and Notice - - showing, among other things, that "the results of the test show" that the person arrested had an alcohol concentration of at least .08 percent by weight.

[¶25] The opening paragraph of N.D.C.C. § 39-20-04.1(1) requires the director of the Department to suspend the driving privileges of those persons who do not request an administrative hearing, and those persons who request an administrative hearing when, among other things, the "test results show" an alcohol concentration of at least .08 percent by weight. Finally, N.D.C.C. § 39-20-05(2) states that one of the four broad statutory issues to be considered by

the hearing officer is "whether the test results show" the person had an alcohol concentration of at least .08 percent by weight.

[¶26] The majority of courts that have considered this question in other jurisdictions have concluded that the inherent margin of error of a chemical testing device is irrelevant when statutory language makes "test results" the trigger to administrative action. See e.g. Wieseler v. Prins, 805 P.2d 1044, 1046 (Ariz. Ct. App. 1990) (margin of error did not need to be considered because civil statute authorized license suspension when "a blood alcohol test result 'indicate[d] 0.10 or more alcohol concentration in the person's blood or breath.'"); Nugent v. Iowa Dep't of Transp., 390 N.W.2d 125, 128 (Iowa 1986)(margin of error did not need to be considered because civil statute authorized license revocation "when 'the test results indicate[d] ten hundredths or more of one percent by weight of alcohol in the person's blood.'"); Loxtercamp v. Comm'r of Pub. Safety, 383 N.W.2d 335, 336-37 (Minn. Ct. App. 1986)(margin of error did not need to be considered because civil statute required license revocation "when 'the test results indicate[d] an alcohol concentration of .10 or more.'").

[¶27] Under these circumstances, this Court should conclude that the inherent margin of error of chemical testing devices is irrelevant under N.D.C.C. ch. 39-20. As a result, the appropriate suspension period for Gillmore is 91 days as his test result unequivocally shows an alcohol concentration above the legal limit.

B. Even considering the margin of error, it still is statistically more likely than not that Gillmore's alcohol concentration was at least .08 percent by weight.

[¶28] This Court need not reach this issue if the court accepts the Department's

argument that the inherent margin of error of Intoxilyzer 8000 is irrelevant under N.D.C.C. ch. 39-20. However, even if this Court concludes the margin of error is relevant, Gillmore's driving privileges still were properly suspended for 91 days.

[¶29] The North Dakota Supreme Court has observed that "we will not disturb the agency's findings unless they are against the greater weight of the evidence." Johnson v. N.D. Dep't Transp., 530 N.W.2d 359, 361 (N.D. 1995) (emphasis added). The Supreme Court has explained the term "preponderance of the evidence" as follows:

> [It] does not necessarily refer to the testimony of the greater number of witnesses, but 'evidence more worthy of belief,' or 'the greater weight of the evidence.' The 'preponderance of the evidence,' therefore, does not mean 'the greater number of witnesses' or 'the greater amount of testimony,' but 'testimony that brings the greater conviction of truth.'

Benzmiller v. Swanson, 117 N.W.2d 281, 288 (N.D. 1962).

[¶30] In Lara v. Tanaka, 924 P.2d 192 (Hawaii 1996), the Hawaii Supreme Court considered whether the preponderance of the evidence established that Lara's blood-alcohol concentration was at least .10 percent after concluding its implied consent statute provided that a license suspension must be based upon a driver's actual blood-alcohol concentration rather than the test result.

[¶31] In Lara, the Intoxilyzer test result indicated Lara's blood-alcohol concentration was .107 percent. Id. at 195. The evidence in Lara established the margin of error was 0.01. Id. The court then noted as follows:

> Assuming the maximum margin of error in [Lara's] favor, his blood alcohol level at the time the test was administered could have been 0.097 percent, or a bare three one/thousandths below the legal limit. At the other end of the scale, [Lara's] actual BAC may have been as high as 0.117 percent, seventeen one/thousandths over

> the limit. Clearly, the . . . hearing officer could conclude by a preponderance of the evidence in this case, including the margin of error, that it was more probable than not that [Lara] 'had a blood alcohol content of .10% or more.'

Id.

[¶32] In this case, even if it was shown that the Intoxilyzer 8000 had an inherent margin of error of .003, applying that margin of error, Gillmore's actual alcohol concentration would fall in a range from a low of .079 to a high of .085. It is, thus, readily apparent that, even applying the margin of error, it is statistically more likely than not that Gillmore's actual alcohol concentration was at least .08 percent by weight. Therefore, it clearly is more likely than not that, statistically speaking, Gillmore's actual alcohol concentration was at least .08 percent by weight. Therefore, even if the margin of error is considered, Gillmore's driving privileges were properly suspended for 91 days.

II. The hearing officer reasonably found the Intoxilyzer test was fairly administered and the results were reliable and authentic.

A. This Court reviews the administrative hearing officer's evidentiary ruling for abuse of discretion.

[¶33] Gillmore raises the issue of whether his Intoxilyzer test results were inadmissible. This Court reviews the administrative hearing officer's ruling for an abuse of discretion. See Knudson v. Dir., N.D. Dept. of Transp., 530 N.W.2d 313, 317-18 (N.D. 1995). An abuse of discretion occurs when a hearing officer acts in an arbitrary, unreasonable, or capricious manner or misinterprets or misapplies the law. Id. Thus, the broad question, properly framed, is whether the hearing officer abused her discretion in admitting Gillmore's Intoxilyzer test results into evidence.

B. Gillmore's Intoxilyzer test was properly admitted into evidence.

[¶34] This Court has observed that "'[t]he admissibility of an Intoxilyzer test result is governed by N.D.C.C. § 39-20-07(5).'" Buchholtz v. Dir., N.D. Dep't of Transp., 2008 ND 53, ¶ 10, 746 N.W.2d 181 (quoting Johnson v. N.D. Dep't of Transp., 2004 ND 59, ¶ 11, 676 N.W.2d 807). This Court also has observed that "'[f]air administration of an Intoxilyzer test may be established by proof that the method approved by the State Toxicologist for conducting the test has been scrupulously followed.'" Buchholtz, 2008 ND 53, at ¶ 10 (quoting Buchholz v. N.D. Dep't of Transp., 2002 ND 23, ¶ 7, 639 N.W.2d 490). However, this Court has noted, "'scrupulous' compliance does not mean 'hypertechnical' compliance." Buchholtz, 2008 ND 53, at ¶ 10 (external citations omitted.) Even when there is a deviation from the state toxicologist's directions, the test results may be admitted if the deviation could not have substantially affected the test results. Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147, 152 (N.D. 1990); see also Wagner v. Backes, 470 N.W.2d 598, 600 (N.D. 1991) ("When . . . we have been able to say that the deviation involved some clerical or ministerial aspect of an approved method and, therefore, could not have affected the test results, we have upheld a license suspension.").

[¶35] The hearing officer admitted Gillmore's Intoxilyzer Test Record and Checklist into evidence. Tr. 38, l. 25 – Tr. 41, l. 23; Tr. Ex. 1c. As noted on the Intoxilyzer Test Record and Checklist, Sgt. Gates tested Gillmore's alcohol content on February 15, 2015. Tr. Ex. 1c. Sgt. Gates also noted on the

Intoxilyzer Test Record and Checklist that "I followed the Approved Method and the instructions displayed by the Intoxilyzer in conducting this test." Id.

[¶36] Gillmore argues his test record should not have been admitted into evidence because the officer instructed Gillmore to "blow as hard as he could." Appellant's Br. ¶ 23. Gillmore specifically alleges the approved method does not instruct an operator to advise the subject to blow as hard as they can and because Sgt. Gates gave this instruction, the failure to follow the approved method invalidates the test. Id. Gillmore's argument is misplaced.

[¶37] Gillmore has failed to show there was any deviation from the approved method which would impact the scientific accuracy of the test. Simply because Sgt. Gates may have told Gillmore to "blow as hard as he could" does not suggest a violation of the approved method. It is uncontested Gillmore's Intoxilyzer test shows two sufficient breath samples. Neither sample was deemed deficient by the Intoxilyzer 8000. Put simply, Gillmore provided proper samples of air for both subject breath tests, as required by the approved method. See Ex. 8.

[¶38] The approved method explains:

> If the subject does not blow with sufficient pressure and/or time to achieve an adequate breath sample, "Please Blow Until Tone Stops" will reappear with intermittent beeps. The subject has another three minutes to provide an adequate breath sample.

Id. at p. 6, 15b. In interpreting the test, the approved method states:

> A. The results of adequate breath samples will be printed as "Subject test 1" and/or "Subject test 2." The lower of the two subject tests will be reported as the alcohol concentration.

> B. If any breath sample is determined to be deficient, meaning the subject did not provide a breath sample or did not provide an adequate breath sample, the instrument will print "*Subject Test" followed by "#.###*" with the highest alcohol concentration obtained during the test. The asterisk (*) cross-references a message printed below on the test record.
>
> 1. If any one of the two breath samples rendered by the subject is deficient or the subject does not provide one of the two samples, the single test obtained shall constitute a valid test and the three digits for that test will be reported as the breath alcohol concentration.

Tr. Ex. 8, p. 7. Here, as explained above, there were two adequate breath samples provided by Gillmore. See Tr. Ex. 1c. No asterisks or deficiencies occurred on either subject tests. In accordance with the approved method the lower of the two subject tests was reported as the alcohol concentration. Id. The hearing officer did not abuse her discretion in admitting the test record into evidence.

III. Gillmore voluntarily consented to the field sobriety tests, and Sgt. Gates had probable cause to arrest him.

[¶39] "The issue of voluntariness is generally decided by examining the totality of the circumstances which surround the giving of consent to see whether it is the product of an essentially free and unconstrained choice or the product of coercion." Fossum v. N.D. Dep't of Transp., 2014 ND 47, ¶ 13, 843 N.W.2d 282 (quoting State v. Anderson, 336 N.W.2d 634, 639 (N.D. 1983) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

[¶40] In this case, Gillmore testified at the administrative hearing, but presented no evidence contradicting the fact he voluntarily consented to the field sobriety tests. In fact, when asked by his counsel why he took the horizontal gaze

nystagmus (HGN) test, in particular, Gillmore responded, "[j]ust to comply with an officer . . . I didn't feel like I was at all doing wrong, so I just wanted to do anything he asked of me at that point in time." Tr. 44, ll. 18-20. Further, Gillmore provided no evidence regarding his consent to the other field sobriety tests allowing the inference to be drawn that his consent was free and voluntary. See Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986) ("[f]ailure of a party to testify permits an unfavorable inference in a civil proceeding" and "the hearing officer could also consider the lack of contrary evidence"). Gillmore voluntarily consented to the field sobriety tests and Sgt. Gates had probable cause to arrest him.

IV. The Department had authority to suspend Gillmore's driving privileges irrespective of whether Sgt. Gates informed Gillmore of the implied consent advisory after arrest.

[¶41] In this case, the undisputed evidence established Sgt. Gates read the implied consent advisory to Gillmore prior to requesting an onsite screening test. Tr. 22, ll. 1-7. Gillmore agreed to take the onsite test but after failing to blow into the device on 5 occasions the sergeant deemed Gillmore's actions to be a refusal. Tr. 10, ll. 18-19; Tr. 25, ll. 8-9. Sgt. Gates then placed Gillmore under arrest, transported him to the law enforcement center and asked him to take a chemical breath test on the Intoxilyzer 8000. Tr. 10, l. 25 – Tr. 11, l. 1. Gillmore consented to the chemical Intoxilyzer test. Tr. 12, ll. 2-3. Gillmore argues the Department lacked authority to suspend his driving privileges, because he was not informed of the implied consent advisory after arrest, and in particular, was

not informed that refusal to submit to the test is a crime. Appellant's Br. ¶ 27. Gillmore's argument is both factually and legally erroneous.

A. Gillmore has failed to make a factual showing that the implied consent advisory, including the provision that refusal to submit to the test is a crime, was not provided to him.

[¶42] Section 39-20-01(2), N.D.C.C., (2013) provides the test or tests to determine the alcohol concentration in an individual's blood "must be administered at the direction of a law enforcement officer only after placing the individual . . . under arrest and informing that individual that the individual is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof." N.D.C.C. § 39-20-01(2). Section 39-20-01(3) further provides:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges. . . .

N.D.C.C. § 39-20-01(3) (2013) (emphasis added).

[¶43] Gillmore has not provided this Court with any facts showing Sgt. Gates failed to provide the implied consent advisory to him after his arrest for driving under the influence. Gillmore's argument is one paragraph long and includes no references to the transcript. This Court has indicated that a party waives an issue by not providing supporting argument, and without supporting reasoning or

citations to relevant authorities, an argument is without merit. Riemers v. O'Halloran, 2004 ND 79, ¶ 6, 678 N.W.2d 547. This Court has also stated, "judges 'are not ferrets' who 'engage in unassisted searches of the record for evidence to support a litigant's position.'" Minto Grain, LLC v. Tibert, 2009 ND 213, ¶ 27, 776 N.W.2d 549 (citing Coughlin Constr. Co., Inc. v. Nu-Tec Indus., 2008 ND 163, ¶ 9, 755 N.W.2d 867; Buchholz v. Barnes Cty. Water Bd., 2008 ND 158, ¶ 16, 755 N.W.2d 472; State v. Noack, 2007 ND 82, ¶ 8, 732 N.W.2d 389; Holden v. Holden, 2007 ND 29, ¶ 7, 728 N.W.2d 312; Earnest v. Garcia, 1999 ND 196, ¶ 10, 601 N.W.2d 260). Because Gillmore has provided no factual basis showing Sgt. Gates failed to provide the implied consent advisory to him after his arrest, including the provision that refusal to take the test is a crime, his argument should be dismissed. Yet, even if the Court wants to consider Gillmore's argument it should be rejected.

[¶44] This Court has repeatedly held, that "[t]he Department's Report and Notice form is admissible as prima facie evidence of its contents once it is forwarded to the director of the Department." Dawson v. N.D. Dep't of Transp., 2013 ND 62, ¶ 23, 830 N.W.2d 221. See also Schock v. N.D. Dep't of Transp., 2012 ND 77, ¶ 15, 815 N.W.2d 255; Pavek v. Moore, 1997 ND 77, ¶ 8, 562 N.W.2d 574 (citing Maher v. N.D. Dep't of Transp., 539 N.W.2d 300, 303 (N.D. 1995)). The term "prima facie evidence" is defined as meaning "[e]vidence good and sufficient on its face . . . and which if not rebutted or contradicted, will remain sufficient." Black's Law Dictionary 1071 (5th ed. 1979). "If a driver want[s] to discredit the prima facie fairness and accuracy of a test, it [is] the driver's responsibility to

produce evidence that the test was not fairly or adequately administered. . . . A driver must do more than raise the mere possibility of error." Berger v. State Highway Comm'r, 394 N.W.2d 678, 688 (N.D. 1986).

[¶45] Here the Department's copy of the Report and Notice form was timely forwarded to the Department by Sgt. Gates. Tr. Ex. 1b (stating "Received Driver's License & Traffic Safety Division 2015 FEB 18 AM 10:38"). This copy was also provided to Gillmore's counsel prior to the hearing. See Tr. Ex. 3. The Report and Notice form unequivocally indicates that Gillmore "[w]as advised by law enforcement of the implied consent advisory contained on this form." While it is true that Sgt. Gates did not independently recall at the hearing if he read the implied consent advisory again after Gillmore's arrest, his assertion on the Report and Notice was not rebutted by Gillmore. Tr. 14, ll. 18-23. In fact, Gillmore provided no testimony or evidence that the advisory was not given after arrest.

[¶46] Further, at no time during the hearing did Gillmore inquire into the specific language of the advisory given by Sgt. Gates. In other words Gillmore did not challenge the sufficiency of the legal requirements of what information was given in the advisory during the hearing. If Gillmore believed Sgt. Gates failed to inform him of any specific provisions of the advisory, particularly whether he was informed that refusal was a crime, he could have testified to that at the hearing, but he did not do so. See Geiger, 396 N.W.2d at 303 ("[f]ailure of a party to testify permits an unfavorable inference in a civil proceeding" and "the hearing officer could also consider the lack of contrary evidence"). Additionally, in the

very least, Gillmore could have questioned Sgt. Gates as to the language used in the advisory that was read to him. Gillmore did not do so.

B. The question of whether Gillmore was informed that his privilege to drive would be revoked for refusal to submit to the chemical test was not within the scope of issues to be determined at the administrative hearing.

[¶47] The prerequisites for the exercise of Department's jurisdiction to suspend or revoke a person's driving privileges are established by statute. See Bosch v. Moore, 517 N.W.2d 412, 413 (N.D. 1994). "The Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute." Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 15, 682 N.W.2d 308. "The Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges." Id.

[¶48] "Whether the provision is basic and mandatory rests primarily on whether the Department's authority is affected by failure to apply the provision." Morrow v. Ziegler, 2013 ND 28, ¶ 9, 826 N.W.2d 912 (citing Aamodt, 2004 ND 134 at ¶ 23). The Court must articulate "what in [the statute] is a basic and mandatory requirement such that the Department would be without authority to adjudicate revocation of [a person's] driving privileges." Ike v. Dir., N.D. Dep't of Transp., 2008 ND 85, ¶ 7, 748 N.W.2d 692.

[¶49] Usually, when no statutory remedy is specified for an agency's failure to satisfy a statutory provision, the Court will not reverse without a showing of prejudice. Greenwood v. Moore, 545 N.W.2d 790, 795-96 (N.D. 1996). The Court also "construe[s] statutes to avoid ludicrous and absurd results when possible." Ding v. Dir., N.D. Dep't of Transp., 484 N.W.2d 496, 501 (N.D. 1992).

[¶50] The Aamodt Court noted that "[i]n Schwind v. Director, N.D. Department of Transportation, 462 N.W.2d 147, 150 (N.D. 1990), and in Samdahl v. N.D. Department of Transportation Director, 518 N.W.2d 714, 717 (N.D. 1994), [it] concluded the statutory provisions in question were not mandatory, because requiring compliance would lead to an absurd result." Aamodt, 2004 ND 134 at ¶ 16. In neither Schwind or Samdahl was the driver able to demonstrate prejudice as the result of the deficiency in the statutory compliance. See Schwind, 462 N.W.2d at 151 (Schwind did not show he was prejudiced by the law enforcement officer's failure to indicate on the report and notice form whether his driver's license was attached); Samdahl, 518 N.W.2d at 717 ("It would be an absurd result if, in the absence of any showing of harm or prejudice to Samdahl, we were to hold the officer's failure to strictly comply with the statute resulted in Samdahl retaining his driving privileges.").

[¶51] In Gardner v. N.D. Dep't of Transp., 2012 ND 223, 822 N.W.2d 55, "Gardner argue[d] because the officer did not again inform him of the consequences of refusal of the blood test after arrest as required by N.D.C.C. § 39-20-01, his failure to submit to the blood test was not a refusal." Id. at ¶ 7. N.D.C.C. § 39-20-05(2) (2013) limits the scope of an administrative hearing to four issues:

> whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance . . .; whether the person was placed under arrest, . . .; whether the person was tested in accordance with section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and whether the test results show the person had an alcohol concentration of at least two one-hundredths of one percent by weight.

Id.

[¶52] The statute also explicitly indicates that "[w]hether the person was informed that the privilege to drive might be suspended based on the results of the test is not an issue." Likewise in refusal cases, this Court has indicated that section 39-20-05(2) "specifically states '[w]hether the person was informed that the privilege to drive would be revoked or denied for refusal to submit to the test or tests is not an issue.'" Gardner, 2012 ND 223 at ¶ 9 (quoting N.D.C.C. § 39-20-05(3)). The Court noted "'[t]he purpose for this provision is to '[prohibit] a driver from raising the issue of ignorance of the law.'" Id. (quoting Olson v. N.D. Dep't of Transp., 523 N.W.2d 258, 261 (N.D. 1994)). The Court concluded "[s]ection 39-20-05(3) by its terms specifically excludes from consideration at the administrative hearing whether or not the driver was informed of the consequences of refusal. Nothing in the statutes or case law mitigates this exclusion . . ." Id. at ¶ 14.

[¶53] While Gillmore is correct that the statute does not explicitly exclude from consideration at the administrative hearing whether or not the driver was informed that refusal is a crime punishable in the same manner as driving under the influence, the fact is whether this precise language of the advisory is given or not has no application in a civil implied consent hearing. The administrative consequence for refusing to submit to a chemical test requested by law enforcement is the revocation of driving privileges. The Department does not and cannot criminally prosecute an individual for refusal. Therefore, Gillmore's argument is not brought in the right forum. His argument may have merit in the

criminal arena, but not in the civil arena. Therefore, the statutory language indicating that law enforcement should inform the individual that refusal is a crime punishable in the same manner as DUI cannot be found to be basic and mandatory to the Department's authority to revoke driving privileges. And perhaps, most importantly, Gillmore did not refuse to submit to the test and was not charged with the crime of refusal.

[¶54] As described above, Gillmore was informed of the implied consent law, including the provision that refusal to submit to the test was a crime. And even if this court were to disagree that the proper advisory had been given, Gillmore has not and cannot show any prejudice from any alleged failure of not being notified of the criminal provision. This is particularly true where Gillmore has not shown he was charged with the crime of refusal. For these reasons, the Department had authority to revoke Gillmore's driving privileges.

V. Gillmore's arguments that North Dakota's implied consent laws are unconstitutional have been rejected by this Court and are without merit.

[¶55] Gillmore raises numerous arguments claiming North Dakota's implied consent law and test refusal statute are unconstitutional, which have already been rejected by the Court. Addressing identical challenges, the Court in Olson v. Levi, 2015 ND 250, 870 N.W.2d 222 stated:

> In State v. Smith, 2014 ND 152, ¶ 16, 849 N.W.2d 599 and McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 21, 848 N.W.2d 659, we held consent to a chemical test is not coerced and is not rendered involuntary merely by a law enforcement officer's reading of the implied consent advisory that accurately informs the arrestee of the consequences for refusal, including the administrative and criminal penalties, and presents the arrestee with a choice. See also Wall v. Stanek, 794 F.3d 890 (8th Cir. 2015) (applying Minnesota law).

> In State v. Birchfield, 2015 ND 6, ¶ 19, 858 N.W.2d 302, we held the criminal refusal statute is not unconstitutional under the Fourth Amendment or N.D. Const. art. I, § 8. In Beylund v. Levi, 2015 ND 18, ¶¶ 30-31, 859 N.W.2d 403, we held the implied consent law does not violate the doctrine of unconstitutional conditions. In State v. Baxter, 2015 ND 107, ¶¶ 13-17, 863 N.W.2d 208, we held the criminal refusal statutes do not violate a defendant's due process rights. Recently, in State v. Kordonowy, 2015 ND 197, ¶¶ 15-19, we held the criminal refusal statutes are not unconstitutionally vague. Olson's arguments do not convince us to revisit these issues. [2]

Id. at ¶ 12.

[¶56] The Court also rejected the argument that "the criminal refusal statutes violate N.D. Const. art. I, § 20, which provides '[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.'" Id. at ¶ 13 (quoting N.D. Const. art. I, § 20). "This provision prohibits the government from enacting legislation that violates the rights set forth in Article I of the Constitution." Id. The Court explained "[o]ur recent case law noted above establishes that the implied consent laws do not violate any rights guaranteed under Article I." Id. "Therefore, the Legislature has not violated N.D. Const. art. I, § 20, and Olson's argument is without merit." Id.

[¶57] Pending a decision on the constitutional issues by the United States Supreme Court, the rulings of this Court control the outcome of Gillmore's constitutional challenges.

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[2]Petitions for certiorari have been granted by the United States Supreme Court in Birchfield, petition for cert. granted, 2015 WL 8486653 (U.S. Dec. 11, 2015) (No. 14-1468), and Beylund, petition for cert. granted, 2015 WL 3867245, (U.S. Dec. 11, 2015) (No. 14-1507).

CONCLUSION

[¶58] The Department respectfully requests this Court affirm judgment of the Stark County District Court and affirm the hearing officer's decision suspending Gillmore's driving privileges for 91 days.

Dated this ___ day of January, 2016.

State of North Dakota
Wayne Stenehjem
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By: _____

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Andrew John Gillmore, Appellant, v. Grand Levi, Director of the North Dakota Department of Transportation, Appellee.	)))))))))	**Supreme Ct. No. 20150321** **District Ct. No. 45-2015-CV-00367**

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

[¶1] Donna J. Connor states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 15th day of January, 2016, I served the attached **BRIEF OF APPELLEE** upon Andrew John Gillmore, by and through his attorney, Thomas F. Murtha IV, by placing a true and correct copy thereof in an envelope addressed as follows:

Thomas F. Murtha, IV
Attorney at Law
P.O. Box 1111
Dickinson, ND 58602-1111

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 _____ day of January, 2016.

_____
Notary Public