

20150344

IN THE SUPREME COURT

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STATE OF NORTH DAKOTA

FEB 10 2016

Bo Daniel Schmidt)
)
 Appellant,)
)
 v.)
)
 Grant Levi, Director of the North)
 Dakota Department of Transportation,)
)
 Appellee.)

STATE OF NORTH DAKOTA

Supreme Ct. No. 20150344

District Ct. No. 45-2015-CV-00433

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

HONORABLE ZANE ANDERSON

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

- [¶1] Whether Schmidt waived his argument that he was confused and misled by the reading of the implied consent advisory when he failed to present a factual basis supporting his argument?
- [¶2] Whether Schmidt's arguments that North Dakota's implied consent laws are unconstitutional have been rejected by this Court and are without merit?

STATEMENT OF CASE

[¶3] On March 7, 2015 Sergeant Mike Hanel (Sgt. Hanel) of the Dickinson Police Department arrested Schmidt for driving under the influence (DUI). Transcript (Tr.) Exhibit (Ex.) 1b. A Report and Notice, including a temporary operator's permit, was issued to Schmidt after chemical Intoxilyzer test results indicated Schmidt's alcohol concentration was .124 percent by weight. Id. The Report and Notice notified Schmidt of the Department's intent to suspend his driving privileges. Id.

[¶4] In response to the Report and Notice, Schmidt requested an administrative hearing. Tr. Ex. 1e. The hearing was held on April 1, 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 eight one-hundredths of one percent but less than 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 Schmidt's driving privileges for 91 days. App. 5. Schmidt appealed that decision to the Stark County District Court. App. 28-32.

STATEMENT OF FACTS

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

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶6] Schmidt 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. 28-32. With respect to Schmidt's argument that the implied consent advisory read to him was misleading because it did not inform him of the statutory right to refuse a chemical test, Judge Anderson found Schmidt failed to introduce the advisory into evidence, and as such "it is difficult for the Court to determine whether the language of the implied consent advisory is misleading." App. 37. Judge Anderson further determined that "Schmidt did not present any evidence showing he was misled by the advisory to believe he would be physically forced to submit to the test." Id. Additionally, Judge Anderson stated, "assuming the implied consent advisory the police officer read to Schmidt complied with N.D.C.C. § 39-

20-01, the Court concludes it would not mislead drivers into believing they would be physically forced to submit to a chemical test.” App. 38.

[¶7] Judge Anderson also rejected Schmidt’s various arguments claiming North Dakota’s implied consent laws are unconstitutional.

[¶8] The district court issued its Memorandum Opinion and Order Affirming the Hearing Officer’s Decision on September 23, 2015. App. 33-41. Judgment was entered on September 25, 2015. App. 44. Schmidt appealed the Judgment to this Court. App. 47-51. On appeal, the Department requests this Court affirm the Judgment of the Stark County District Court and the Hearing Officer’s Decision revoking Schmidt’s driving privileges for a period of 91 days.

STANDARD OF REVIEW

[¶9] “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.

[¶10] 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)).

[¶11] 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).

[¶12] “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. **Schmidt’s argument fails because there is no factual basis to show that Schmidt was confused or misled by the reading of the implied consent advisory.**

[¶13] Schmidt asserts the implied consent advisory read by Sgt. Hanel was misleading because it failed to advise him of his limited statutory right to refuse. Appellant’s Br. ¶ 19. Schmidt’s argument is meritless.

[¶14] First, Schmidt has not provided any facts regarding Sgt. Hanel’s reading of the implied consent advisory for this court to review. The Supreme Court has

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).

[¶15] Second, Schmidt has provided no factual basis showing he was confused by the advisory or misled or improperly coerced, in any way, into submitting to the chemical test. During the hearing Schmidt acknowledged that Sgt. Hanel read him the implied consent advisory and asked him if he would perform a breathalyzer test. Tr. 41, ll. 6-9; Tr. 42, ll. 6-10. In response to this request, Schmidt testified, “I said yes because I didn’t know that if I said no if I was going to end up in jail or what was going to happen.” Tr. 42, ll. 11-14. Schmidt further testified the reason he submitted to the Intoxilyzer test was “so I would not lose my license for that automatic year.” Tr. 42, ll. 16-17. Nothing in this dialogue shows Schmidt was misled or improperly coerced by the reading of the implied consent advisory. And while Schmidt may have been slightly confused as to what would happen if he refused the test, it cannot be said that Schmidt’s confusion was due to the implied consent advisory.

[¶16] Further, even presuming or acknowledging that the implied consent advisory does not explicitly state the subject has a “limited statutory right to refuse,” that information is implied in the advisory. In fact, it goes without saying

that an advisory which notifies the subject that refusal of a test may result in criminal penalties and the loss of driving privileges, provides notice to the subject that he or she can choose to refuse. This is particularly true where the advisory asks the subject if they are willing to consent to the test. The limited statutory right to refuse, is just that – a limited right. It does not prevent the legal consequences imposed by the Legislature from attaching if the motorist refuses. For these reasons Schmidt's argument that the advisory is misleading should be rejected.

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

[¶17] Schmidt 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.¹

Id. at ¶ 12.

[¶18] 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.

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

CONCLUSION

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

¹Petitions 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).

Dated this 10th day of February, 2016.

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

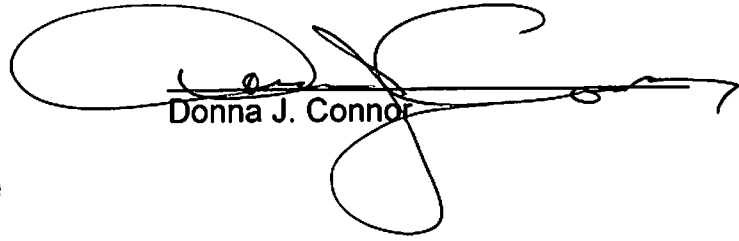
[¶1] Donna J. Connor states under oath as follows:

[¶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 10th day of February, 2016, I served the attached **BRIEF OF APPELLEE** upon Bo Daniel Schmidt, 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 10th day of February, 2016.



Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2019