IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Justin James Kapple,

Petitioner/Appellee,

v.

Director, North Dakota Department of Transportation,

Respondent/ Appellant.

Supreme Ct. No. 20160029

District Ct. No. 08-2015-CV-01638

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED JANUARY 4, 2016
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE B. HASKELL

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

[¶1] Whether the Department had the authority to revoke Kapple's driving privileges based upon the Report and Notice?

STATEMENT OF CASE

[¶2] On August 18, 2015 Deputy Levi Marshall (Deputy Marshall) of the Burleigh County Sheriff's Department arrested Justin Kapple (Kapple) for driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor. Appendix (App.) 28. A Report and Notice, including a temporary operator's permit, was issued to Kapple after Kapple refused to submit to a chemical blood test. The Report and Notice notified Kapple of the Department's intent to revoke his driving privileges. Id.

[¶3] In response to the Report and Notice, Kapple requested an administrative hearing. Transcript (Tr.) Exhibit (Ex.) 1c. The hearing was held on July 16, 2015. App. 1; Tr. Ex. 2. In accordance with N.D.C.C. 39-20-05(2) the hearing officer considered three broad issues, as follows:

> (1) Whether a law enforcement 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 or any drug or substance in violation of N.D.C.C. section 39-08-01, or equivalent ordinance;
>
> (2) Whether the person was placed under arrest; and
>
> (3) Whether the person refused to submit to the test or tests.

Tr. Ex. 2.

[¶4] At the close of the hearing, the hearing officer issued her findings of fact, conclusions of law and decision revoking Kapple's driving privileges for three years. App. 29. Kapple appealed that decision to this Court. App. 30-31.

STATEMENT OF FACTS

[¶5] On June 18, 2015, at 10:39 p.m., Deputy Marshall was in his patrol car in the Kimball Bottoms, boat landing area, when he observed a vehicle being driven by a male with a female passenger coming up out of the area. App. 4, ll. 8-13. The vehicle hastily veered off into the fishing/camping area and the male driver quickly exited and began walking away from the vehicle. App. 4, ll. 13-16. Deputy Marshall thought this behavior was suspicious, especially considering the time of the night, and decided to see what was going on. App. 4, ll. 16-19. The deputy stopped his patrol car near the vehicle without activating his emergency lights, exited and walked up to the male who was standing near the river. App. 4, l. 25 – Tr. 5, l. 4; App. 16, ll. 13-14; App. 19, ll. 18-19. Deputy Marshall engaged the individual, later identified as Kapple, in conversation. App. 5, l. 6; App. 20, ll. 10-11. Deputy Marshall detected a strong odor of alcohol coming from Kapple, and saw that Kapple had red watery eyes. App. 5, ll. 17-19. Kapple claimed he was not the driver of the vehicle. App. 5, ll. 21-23.

[¶6] Deputy Marshall asked Kapple to perform field sobriety tests. App. 6, ll. 9-12. Kapple failed the horizontal gaze nystagmus (HGN) test exhibiting all six of the possible clues. App. 7, ll. 7-13. Kapple declined to submit to any further field sobriety testing. App. 7, ll. 21-22.

[¶7] Deputy Marshall placed Kapple under arrest for driving under the influence (DUI). App. 8, ll. 8-9. Deputy Marshall recited the implied consent advisory and requested Kapple take a chemical blood test. App. 8, ll. 21-22. Kapple stated he did not want to take the test. App. 9, l. 11. Deputy Marshall completed the Report and Notice and issued it to Kapple. App. 10, l. 7-23.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶8] Kapple requested judicial review of the Hearing Officer's Decision by the Burleigh County District Court in accordance with N.D.C.C. § 39-20-06. App. 30-31. On appeal, Kapple alleged:

> Exhibit 1b, under Officer's Statement of Probable Cause, reasonable suspicion to stop or reason to lawfully detain, does not in fact state a reasonable suspicion to lawfully detain in violation of Aamodt v. N.D. Dep't of Transportation, 2004 ND 134, 682 N.W.2d 308, and its progeny.

Id.

[¶9] The district court issued its Order on Appeal on November 16, 2015, reversing the hearing officer's decision. App. 32-34. Regarding the Officer's Statement of Probable Cause on the Report and Notice form and whether it was in compliance with N.D.C.C. § 39-20-03.1, Judge Haskell wrote:

> The issue is reasonable suspicion that the appellant was under the influence of alcohol. The Statement contains no information as to reasonable suspicion that the appellant was under the influence of alcohol. Therefore, the statement is not in compliance, and, as it is a basic and mandatory provision of the statute, the Department lacked authority to suspend the appellant's privileges.

App. 33. The Department sought reconsideration of the Order on Appeal. App. 1, Doc. 21-23. The district court denied the Departments reconsideration request on December 10, 2015. App. 35. Judgment was entered on January 4, 2016.

App. 36. The Department appealed the Judgment to this Court. App. 38-39. The Department requests this Court reverse the judgment of the Burleigh County District Court and reinstate the administrative revocation of Kapple's driving privileges for a period of three years.

STANDARD OF REVIEW

[¶10] The Administrative Agencies Practices Act governs an appeal from an administrative hearing officer's decision suspending a license. N.D.C.C. ch. 28-32; N.D.C.C. ch. 39-20. The appeal is civil in nature. Knoll v. N.D. Dep't of Transp., 2002 ND 84, ¶ 16, 644 N.W.2d 191. And it is separate and distinct from any criminal matter that may ensue. Id. The North Dakota Century Code provides, in relevant part, that a court must affirm an agency's order except in the event of any of the following:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency 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.

[¶11] The hearing officer's findings of fact must be upheld if they are supported by a preponderance of the evidence. Kahl v. Dir., N.D. Dep't of Transp., 1997 ND 147, ¶ 10, 567 N.W.2d 197. 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). A reviewing court, rather, 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.)

LAW AND ARGUMENT

The Department had the authority to revoke Kapple's driving privileges based upon the Report and Notice.

[¶12] 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.

[¶13] "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 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.

[¶14] 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).

[¶15] Section 39-20-04(1), N.D.C.C. -- the statute at issue in this case -- requires the temporary operator's permit – i.e., the Report and Notice – show "that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01 or equivalent ordinance . . ., that the person was lawfully arrested if applicable, and that the person had refused to submit to the test or tests under section 39-20-01." On Appeal to the district court Kapple argued that the Report and Notice failed to show the officer had reasonable suspicion to detain his person. App. i, at Doc. 13. Kapple's argument is both factually and legally erroneous.

[¶16] In Aamodt, this Court considered the question of whether the failure of the Report and Notice to show the law enforcement officer had probable cause to arrest Brian Aamodt deprived the Department of authority to suspend his driving privileges. As shown by the Report and Notice admitted as Exhibit 1b in Kapple's appeal, the bottom of the Report and Notice form contains a box

entitled, "OFFICER'S STATEMENT OF PROBABLE CAUSE." App. 28. Two sections (left and right) are contained under that heading. Id. In Aamodt, the officer checked the "already stopped" square in the box on the left and the "odor of alcoholic beverage" square in the box on the right. Aamodt, 2004 ND 134 at ¶ 10. No other information was provided under the 'OFFICER'S STATEMENT OF PROBABLE CAUSE" heading in the Report and Notice in Aamodt. Id.

[¶17] The Department conceded in Aamodt that this was insufficient to show probable cause but argued that this did not deprive the Department of authority to suspend Aamodt's driving privileges. Id. This Court disagreed, concluding the statutory provision in N.D.C.C. § 39-20-03.1(3) is "basic and mandatory" and that, as a result of the deficient Report and Notice, the Department did not have authority to suspend Aamodt's driving privileges. Id. at ¶ 26. Kapple's reliance on Aamodt is misplaced.

[¶18] In Moran v. N.D. Dep't of Transp., 543 N.W.2d 767 (N.D. 1996), the Supreme Court summarized the probable cause test for DUI cases as follows:

> In order to arrest a driver for driving under the influence, the law enforcement officer first must observe some signs of impairment, physical or mental. See State v. Salhus, 220 N.W.2d 852 (N.D. 1974). Further, the law enforcement officer must have reason to believe the driver's impairment is caused by alcohol. See id.; see also Keane v. Com'r of Public Safety, 360 N.W.2d 357 (Minn. Ct. App. 1984). Both elements - - impairment and indication of alcohol consumption - - are necessary to establish probable cause to arrest for driving under the influence.

Id. at 770. Thus, probable cause is a two-prong test requiring evidence of impairment and evidence of alcohol consumption.

[¶19] The Report and Notice in Aamodt stated that the odor of an alcoholic beverage had been detected. Aamodt, 2004 ND 134 at ¶ 10. Thus, the Report and Notice satisfied the second prong of the Moran test that requires an indication of alcohol consumption. However, in Aamodt, there was no indication at all below the "OFFICER'S STATEMENT OF PROBABLE CAUSE" heading suggesting that Aamodt had been impaired. Id. at ¶ 10. Therefore, there was no information in the Report and Notice in Aamodt satisfying the first prong of the Moran test, which requires an indication of impairment. Moran, 543 N.W.2d at 770.

[¶20] As was the case in Aamodt, here, the space below the "OFFICER'S STATEMENT OF PROBABLE CAUSE" heading states that Kapple was "already stopped" with the additional explanation:

> Driver noticed squad car, stopped and exited immediately. Deputy witneseed (sic) male in driver seat driving before it came to a stop.

Tr. Ex. 1b. Yet, by way of contrast to Aamodt, however, Kapple's report and notice provides more information showing he was under the influence of alcohol than simply the "odor of alcohol" box being checked.

[¶21] The Report and Notice pertaining to Kapple does contain the notation of an "odor of an alcoholic beverage" but also shows that Kapple also had "poor balance" and "failed field sobriety test(s)". Tr. Ex. 1b. To this point, Deputy Marshall wrote:

> Driver displayed very poor balance. Driver had strong odor of alcoholic beverages. Driver Failed HGN. Driver refused all other tests including on site screening test.

Id. Since the space below the "OFFICER'S STATEMENT OF PROBABLE CAUSE" includes an indication of both alcohol consumption and impairment, the Report and Notice satisfied the basic and mandatory statutory provision in N.D.C.C. § 39-20-04(1). This is no different than what this Court recently decided satisfied jurisdiction in Olson v. Levi, 2015 ND 250, 870 N.W.2d 222. On the issue of whether the Report and Notice showed reasonable grounds to believe an individual is under the influence of alcohol, the Olson Court cited to several other cases involving the sufficiency of the Report and Notice form. One of those cases was Maisey v. N.D. Dep't of Transp., 2009 ND 191, 775 N.W.2d 200. The Court in Olson quoted from Maisey as follows:

> In this case, the deputy checked the boxes indicating "already stopped," "odor of alcoholic beverage," "poor balance," and "failed field sobriety test(s)." The boxes indicating "poor balance" and "failed field sobriety test(s)" show that the deputy observed that Maisey was physically or mentally impaired. The box indicating "odor of alcoholic beverage" shows the deputy had reason to believe the impairment was caused by alcohol. Maisey reads Aamodt to mean an officer must always provide a more detailed written statement of the facts supporting probable cause to believe the driver was driving under the influence of alcohol This requirement is not found in N.D.C.C. §§ 39-20-03.1([4]), 39-20-04(a), or in Aamodt. The hearing officer's determination that the Report and Notice showed probable cause to believe Maisey was driving under the influence of alcohol was in accordance with the law.

Olson, 2015 ND 250 at ¶ 9. As in Maisey and Olson the same exact boxes were checked on Kapple's Report and Notice, with the addition of further explanation. The Report and Notice was sufficient to meet the requirements of section 39-20-04(1). The Department had the authority to revoke Kapple's driving privileges based upon the Report and Notice.

[¶22] In contrast to what Kapple argues, N.D.C.C. § 39-20-04(1) does not require the Report and Notice to show the legal basis for detaining Kapple's person – beyond that of driving under the influence or actual physical control. Nowhere in N.D.C.C. § 39-20-04(1) does it identify that the Report and Notice must show reasonable suspicion to lawfully detain the driver. The statute simply requires a showing "that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01, or equivalent ordinance." As demonstrated above, Kapple's Report and Notice makes this showing. While the Report and Notice form contemplates a reason to lawfully detain such erratic driving, a traffic stop, or crash (See Tr. Ex. 16) no statutory directive requires this information. This information may be useful to the Department, but the information is not necessary for the Department to have jurisdiction to suspend or revoke driving privileges.

[¶23] And even if this Court disagrees and believes a showing of reasonable suspicion to lawfully detain the person is necessary on the Report and Notice, a reasoning mind could reasonably determine such a showing was made in this case. Under the "Reasonable suspicion to stop or reason to lawfully detain" section, Deputy Marshall marked the already stopped box and explained that "[d]river noticed squad car, stopped and exited immediately. Deputy witneseed (sic) male in driver seat driving before it came to a stop." App. 28. From this information it can be reasonably determined that no traffic stop occurred and that Deputy Marshall had a casual encounter with Kapple. Thus, no seizure occurred

upon the initial contact. The Report and Notice further shows that Deputy Marshall noted indications of impairment during his contact with Kapple, which gave him cause to lawfully seize Kapple. Specifically, Deputy Marshall checked boxes on the form noting "odor of alcohol, poor balance, and failed field sobriety tests.

[¶24] The odor of alcohol – alone – observed in conjunction with the investigation of a separate traffic offense has expressly been held to provide a reasonable and articulable suspicion sufficient to justify a greater intrusion unrelated to the initial traffic offense. See In re Z.C.B., 2003 ND 151, ¶ 9, 669 N.W.2d 478 (N.D. 2003) ("[w]hen an officer detects an odor of alcohol emanating from a vehicle, having a driver exit the vehicle and asking whether he has been drinking constitutes a common sense investigation . . ."); State v. Lopez, 631 N.W.2d 810, 812 (Minn. Ct. App. 2001) (finding odor of alcohol coming from interior of car provided officer with reasonable suspicion to continue the detention and conduct an investigation); State v. Kolendar, 786 P.2d 199, 201 (Or. Ct. App. 1990) (stating "[t]he odor of alcohol on a person's breath is an objective, observable fact that permits an officer reasonably to suspect intoxication."); Miller v. Harget, 458 F.3d 1251, 1259 (11th Cir. 2006) ("when Officer Harget smelled alcohol coming from the vehicle Mr. Miller had been driving, he had reasonable suspicion to detain Mr. Miller in order to investigate"); Nickelson v. Kansas Dep't of Revenue, 102 P.3d 490, 496 (Kan. Ct. App. 2004) (Deputy had grounds to detain Nickelson for further investigation after lawful public safety stop when Deputy "immediately smelled a strong odor of alcohol upon approaching

Nickelson's vehicle"); State v. Gordon, 854 A.2d 74, 79 (Conn. App. Ct. 2004) (detection of odor of alcohol on the defendant's breath provided law enforcement officer "a reasonable and articulable suspicion that the defendant had been operating his motor vehicle while under the influence of intoxicating liquor, which warranted an extension of the initial investigatory stop."); Howard v. State, 595 S.E.2d 660, 662 (Ga. Ct. App. 2004) ("After making a valid stop to check the driver's identity, the officer's detection of the strong odor of alcohol made it reasonable for him to continue the detention to ask Howard if he had been drinking"); State v. Bissegger, 76 P.3d 178, 183 (Utah Ct. App. 2003) (continuation of the detention to conduct field sobriety test was justified when, after the purpose for the initial traffic stop was concluded, law enforcement officer smelled alcohol on defendant); State v. Butler, 577 S.E.2d 498, 501 (S.C. Ct. App. 2003) (law enforcement officer justified in extending the scope and duration of the traffic stop based on his suspicion of open containers of alcohol from observation of smell of alcohol coming from the van).

[¶25] If the odor of alcohol alone can provide justification to expand the scope of a traffic stop, it should easily provide sufficient justification to investigate a potential DUI situation where no traffic stop has occurred but the individual has been seen operating a motor vehicle. Kapple's report and notice reasonably shows sufficient grounds for law enforcement's seizure of his person.

CONCLUSION

[¶26] The Department respectfully requests that this Court reverse the judgment of the Burleigh County District Court and affirm the Department's decision revoking Kapple's driving privileges for a period of three years.

Dated this 2nd day of March, 2016.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____

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STATE OF NORTH DAKOTA

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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 2nd day of March, 2016, I served the attached **BRIEF OF APPELLANT and APPENDIX OF APPELLANT** upon Justin James Kapple, by and through his attorney Michael R. Hoffman, by placing a true and correct copy thereof in an envelope addressed as follows:

Michael R. Hoffman
Attorney at Law
P.O. Box 1056
120 N. 3rd St., Ste. 100
Bismarck, ND 58502-1056

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 2nd day of March, 2016.

Notary Public

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