

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Wilbur Paul Hunts Along,

Appellant,

v.

Supreme Court No. 20180146

Director, North Dakota Department
of Transportation,

Appellee.

BRIEF OF APPELLANT

and Addendum

Appeal from Judgment dated February 15, 2018

Dunn County District Court
Southwest Judicial District
Honorable Rhonda R. Ehlis
Civil No. 13-2017-CV-00115

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
Statement of the Issue:	
Issue for Review:	
The Director failed to show refusal to submit to testing “under section . . . 39-20-14”, and therefore revocation under N.D.C.C. § 39-20-04(1) was not supported	
	<u>Paragraph</u>
Statement of the Case	1
Statement of the Facts	3
Argument	12
Conclusion	32
Certificate of Service	35

ADDENDUM

N.D.C.C. § 39-20-05

N.D.C.C. § 39-20-14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph</u>
<u>Greenwood v. Moore</u> , 545 N.W.2d 790 (N.D. 1996) . . .	29
<u>State v. O’Connor</u> , 2016 ND 72, 877 N.W.2d 312	30
 <u>North Dakota Century Code</u>	
N.D.C.C. § 1-02-02	29
N.D.C.C. § 1-02-05	30
N.D.C.C. § 39-20-01	19
N.D.C.C. § 39-20-04	14-17, 21, 23
N.D.C.C. § 39-20-05	23, 24, 25, 26
N.D.C.C. § 39-20-14	8, 10, 14, 16-18, 24, 26, 31

STATEMENT OF THE ISSUE

Issue for Review

The Director failed to show refusal to submit to testing “under section . . . 39-20-14”, and therefore revocation under N.D.C.C. § 39-20-04(1) was not supported.

[¶1] STATEMENT OF THE CASE

[¶2] Wilbur Paul Hunts Along, Appellant, appeals from a district court judgment affirming an administrative revocation of his driving privileges for a period of two years for Appellant's refusal to submit to a screening test (A. 35, 49).

[¶3] STATEMENT OF THE FACTS

[¶4] On October 20, 2017, a Dunn County Deputy Sheriff stopped Appellant's vehicle for crossing the center line (A. 6, lines 23-25; 8, lines 17-20).

[¶5] The deputy made contact with Appellant and smelled an odor of an alcoholic beverage coming from Appellant's breath (A. 10, lines 9-10).

[¶6] The deputy read to Appellant "the North Dakota implied consent advisory and asked him if he would be willing to take the Alco-Sensor screening device test." (A. 15, lines 17-19).

[¶7] The deputy testified Appellant refused to take the test (A. 15, lines 22-25).

[¶8] The deputy issued to Appellant a Report and Notice form which states Appellant "[r]efused onsite screening test (NDCC Section 39-20-14 . . .)" (see A. 17, lines 16-18; A. 33).

[¶9] The Hearing Officer sent Appellant a Notice of Administrative

Hearing Before the NDDOT Director for a revocation hearing for refusing to submit to the “screening test” (A. 34; see A. 4, lines 13-22).

[¶10] Following the testimony of the deputy at the administrative hearing, above-described, Appellant objected that the record did not show that the screening test offered to Appellant was a screening test under N.D.C.C. § 39-20-14 (A. 32, lines 6-10).

[¶11] The Hearing Officer ruled against Appellant, concluding Appellant “refused to submit to the on-site screening test” (A. 35).

[¶12] ARGUMENT

[¶13] Issue for Review

[¶14] The Director failed to show refusal to submit to testing “under section . . . 39-20-14”, and therefore revocation under N.D.C.C. § 39-20-04(1) was not supported.

[¶15] Although the notice from the Director to Appellant did not state (A. 34), and the statements of the Hearing Officer at the hearing did not state (see A. 4), the Director’s action against Appellant in this case was under N.D.C.C. § 39-20-04(1).

[¶16] N.D.C.C. § 39-20-04 is entitled, Revocation of privilege to drive motor vehicle upon refusal to submit to testing. More specifically,

N.D.C.C. § 39-20-04(1) applies “[i]f a person refuses to submit to testing under section . . . 39-20-14”.

[¶17] N.D.C.C. § 39-20-04(1) provides that the Report and Notice form (see A. 33) must show “that the person had refused to submit to the test or tests under section . . . 39-20-14”.

[¶18] Going to N.D.C.C. § 39-20-14, entitled Screening tests, subsection 3 first states, “The screening test or tests must be performed by an enforcement officer certified as a chemical test operator by the director of the state crime laboratory or the director’s designee and according to methods and with devices approved by the director of the state crime laboratory or the director’s designee.” (See Add. 4).

[¶19] The next sentence states, “The results of such screening test must be used only for determining whether or not a further test shall be given under the provisions of section 39-20-01.” (Add. 4, emphasis added).

[¶20] The next sentence provides for the advisory to be given to the individual, and the sentence after that states in part, “If such individual refuses to submit to such screening test or tests, none may be given . . .” (Add. 4, emphasis added).

[¶21] Finally, the last sentence of subsection 3 states in part, “Such refusal is sufficient cause to revoke such individual’s license or permit to

drive in the same manner as provided in section 39-20-04 . . . (Add. 4, emphasis added).

[¶22] In this case, there was no evidence that “the Alco-Sensor screening device test” (A. 15, line 19) offered to Appellant was a device approved by the director of the state crime laboratory or the director’s designee, or that the test was going to be performed by an enforcement officer, certified as a chemical test operator by the director of the state crime laboratory or the director’s designee, according to methods approved by the director of the state crime laboratory or the director’s designee. This is the sum and substance of this appeal.

[¶23] Going back to the notice from the Director to Appellant (A. 34), the notice does state, “This hearing will be held in accordance with North Dakota Century Code section 39-20-05.” N.D.C.C. § 39-20-05 is entitled in part, Administrative hearing on request, and N.D.C.C. § 39-20-05(1) indicates such hearings include revocation hearings under section 39-20-04 (Add. 1).

[¶24] N.D.C.C. § 39-20-05(3) specifically applies to hearings for revocation for refusing to submit to a test “under section . . . 39-20-14” (Add. 2). Subsection 3 lists the third issue for such a hearing as, “whether

the person refused to submit to the onsite screening test” (Add. 2), with the only logical reference back being a test “under section 39-20-14”.

[¶25] N.D.C.C. § 39-20-05(4)(b) and (c) specifically apply to the admissibility of records relating to “approved methods, devices, operators” and the “director’s designees” (Add. 2).

[¶26] Finally, N.D.C.C. § 39-20-05(5) provides the hearing officer must find “based on a preponderance of the evidence, that the person refused a test under section . . . 39-20-14” (Add. 2).

[¶27] Appellant contends the entire statutory scheme applicable to this case is that the test refused must be one where the device is shown to be approved, and the operator and method are also shown to be approved, and these things must be proved by a preponderance of the evidence. Here, there was no such evidence. This is not a preponderance of the evidence.

[¶28] Appellant contends his interpretation of the statutory scheme is correct.

[¶29] “[W]e look first to the plain language of a statute for legislative intent, and the legislative intent is presumed to be clear if the language is clear and unambiguous.” Greenwood v. Moore, 545 N.W.2d 790, 794 (N.D. 1996). “Words used in a statute ‘are to be understood in their ordinary sense.’” Greenwood v. Moore, *supra*, quoting N.D.C.C. § 1-02-02.

[¶30] Further, “we need not explore legislative history when the Legislature has clearly and unambiguously spoken.” State v. O’Connor, 2016 ND 72, ¶ 13, 877 N.W.2d 312, citing N.D.C.C. § 1-02-05. “When the working of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” O’Connor, supra.

[¶31] Here, proving a person refused a test under section 39-20-14 means proving the person refused a device which was approved and which was to be conducted by an approved operator according to an approved method. Such was clearly not shown in this record. There was not even an attempt to prove these requirements.

[¶32] CONCLUSION

[¶33] WHEREFORE, Appellant, respectfully requests the Supreme Court of North Dakota to reverse the judgment appealed from and to order the reinstatement of Appellant’s driving privileges.

[¶34] Respectfully submitted June 5, 2018.

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/s/Michael R. Hoffman
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[¶35] CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing Brief of Appellant in PDF and Microsoft Word format and accompanying Appendix of Appellant in PDF format, by email, on June 5, 2018, on: Clerk of the North Dakota Supreme Court @ supclerkofcourt@ndcourts.gov and service was made by emailed to the following: Office of Attorney General @ dbanders@nd.gov; mtpitcher@nd.gov

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ADDENDUM

TABLE OF CONTENTS

	<u>Page</u>
N.D.C.C. § 39-20-05	1
N.D.C.C. § 39-20-14	4

39-20-05. Administrative hearing on request - Election to participate in the twenty-four seven sobriety program.

1. Before issuing an order of suspension, revocation, or denial under section 39-20-04 or 39-20-04.1, the director shall afford that person an opportunity for a hearing if the person mails or communicates by other means authorized by the director a request for the hearing to the director within ten days after the date of issuance of the temporary operator's permit. Upon completion of the hearing, an individual may elect to participate in the twenty-four seven sobriety program under chapter 54-12. The hearing must be held within thirty days after the date of issuance of the temporary operator's permit. If no hearing is requested within the time limits in this section, and no affidavit is submitted within the time limits under subsection 2 of section 39-20-04, and if the individual has not provided the director with written notice of election to participate in the twenty-four seven sobriety program under chapter 54-12, the expiration of the temporary operator's permit serves as the director's official notification to the person of the revocation, suspension, or denial of driving privileges in this state.
2. If the issue to be determined by the hearing concerns license suspension for operating a motor vehicle while 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, the hearing must be before a hearing officer assigned by the director and at a time and place designated by the director. The hearing must be recorded and its scope may cover only the issues of whether the arresting officer had reasonable grounds to believe the individual had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance or, with respect to an individual under twenty-one years of age, the individual had been driving or was in actual physical control of a vehicle while having an alcohol concentration of at least two one-hundredths of one percent by weight; whether the individual was placed under arrest, unless the individual was under twenty-one years of age and the alcohol concentration was less than eight one-hundredths of one percent by weight, then arrest is not required and is not an issue under any provision of this chapter; whether the individual was tested in accordance with section 39-20-01 and, if applicable, section 39-20-02; and whether the test results show the individual had 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. For purposes of this section, a copy of a certified copy of an analytical report of a blood or urine sample from the director of the state crime laboratory or the director's designee, or electronically posted by the director of the state crime laboratory or the director's designee on the crime laboratory information management system and certified by a law enforcement officer or individual who has authorized access to the crime laboratory management system through the criminal justice data information sharing system or a certified copy of the checklist and test records from a certified breath test operator, and a copy of a certified

- copy of a certificate of the director of the state crime laboratory designating the director's designees, establish prima facie the alcohol concentration or the presence of drugs, or a combination thereof, shown therein.
3. If the issue to be determined by the hearing concerns license revocation for refusing to submit to a test under section 39-20-01 or 39-20-14, the hearing must be before a hearing officer assigned by the director at a time and place designated by the director. The hearing must be recorded. The scope of a hearing for refusing to submit to a test under section 39-20-01 may cover only the issues of whether a law enforcement 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 or, with respect to a person under twenty-one years of age, the person had been driving or was in actual physical control of a vehicle while having an alcohol concentration of at least two one-hundredths of one percent by weight; whether the person was placed under arrest; and whether that person refused to submit to the test or tests. The scope of a hearing for refusing to submit to a test under section 39-20-14 may cover only the issues of whether the law enforcement officer had reason to believe the person committed a moving traffic violation or was involved in a traffic accident as a driver, whether in conjunction with the violation or the accident the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol and, whether the person refused to submit to the onsite screening test.
 4. At a hearing under this section, the regularly kept records of the director and state crime laboratory may be introduced. Those records establish prima facie their contents without further foundation. For purposes of this chapter, the following are deemed regularly kept records of the director and state crime laboratory:
 - a. Any copy of a certified copy of an analytical report of a blood or urine sample received by the director from the director of the state crime laboratory or the director's designee or electronically posted by the director of the state crime laboratory or the director's designee on the crime laboratory information management system and certified by, and received from, a law enforcement officer or an individual who has authorized access to the crime laboratory management system through the criminal justice data information sharing system, or a certified copy of the checklist and test records received by the director from a certified breath test operator;
 - b. Any copy of a certified copy of a certificate of the director of the state crime laboratory or the director's designee relating to approved methods, devices, operators, materials, and checklists used for testing for alcohol concentration or the presence of drugs received by the director from the director of the state crime laboratory or the director's designee, or that have been electronically posted with the state crime laboratory division of the attorney general at the attorney general website; and
 - c. Any copy of a certified copy of a certificate of the director of the state crime laboratory designating the director's designees.
 5. At the close of the hearing, the hearing officer shall notify the person of the hearing officer's findings of fact, conclusions of law, and decision based on the findings and conclusions and shall immediately deliver to the person a copy of the decision. If the hearing officer does not find in favor of the person, the copy of the decision serves as the director's official notification to the person of the revocation, suspension, or denial of driving privileges in this state. If the hearing officer finds, based on a preponderance of the evidence, that the person refused a test under section 39-20-01 or 39-20-14 or that the person had an alcohol concentration of at least eight one-hundredths of one percent by weight or, with respect to a person under twenty-one years of age, an alcohol concentration of at least two one-hundredths of one percent by weight, the hearing officer shall immediately take possession of the person's temporary operator's permit issued under this chapter. If the hearing officer does not find against the person, the hearing officer shall sign, date, and mark on the person's permit an extension of driving privileges for the next twenty days and shall return the permit to the person.

The hearing officer shall report the findings, conclusions, and decisions to the director within ten days of the conclusion of the hearing. If the hearing officer has determined in favor of the person, the director shall return the person's operator's license by regular mail to the address on file with the director under section 39-06-20.

6. If the person who requested a hearing under this section fails to appear at the hearing without justification, the right to the hearing is waived, and the hearing officer's determination on license revocation, suspension, or denial will be based on the written request for hearing, law enforcement officer's report, and other evidence as may be available. The hearing officer shall, on the date for which the hearing is scheduled, mail to the person, by regular mail, at the address on file with the director under section 39-06-20, or at any other address for the person or the person's legal representative supplied in the request for hearing, a copy of the decision which serves as the director's official notification to the person of the revocation, suspension, or denial of driving privileges in this state. Even if the person for whom the hearing is scheduled fails to appear at the hearing, the hearing is deemed to have been held on the date for which it is scheduled for purposes of appeal under section 39-20-06.
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39-20-14. Screening tests.

1. Any individual who operates a motor vehicle upon the public highways of this state is deemed to have given consent to submit to an onsite screening test or tests of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer who has reason to believe that the individual committed a moving traffic violation or was involved in a traffic accident as a driver, and in conjunction with the violation or the accident the officer has, through the officer's observations, formulated an opinion that the individual's body contains alcohol.
 2. An individual may not be required to submit to a screening test or tests of breath while at a hospital as a patient if the medical practitioner in immediate charge of the individual's case is not first notified of the proposal to make the requirement, or objects to the test or tests on the ground that such would be prejudicial to the proper care or treatment of the patient.
 3. The screening test or tests must be performed by an enforcement officer certified as a chemical test operator by the director of the state crime laboratory or the director's designee and according to methods and with devices approved by the director of the state crime laboratory or the director's designee. The results of such screening test must be used only for determining whether or not a further test shall be given under the provisions of section 39-20-01. The officer shall inform the individual that North Dakota law requires the individual to take the screening test to determine whether the individual is under the influence of alcohol and that refusal of the individual to submit to a screening test may result in a revocation for at least one hundred eighty days and up to three years of that individual's driving privileges. If such individual refuses to submit to such screening test or tests, none may be given, but such refusal is admissible in a court proceeding if the individual was arrested in violation of section 39-08-01 and did not take any additional chemical tests requested by the law enforcement officer. Such refusal is sufficient cause to revoke such individual's license or permit to drive in the same manner as provided in section 39-20-04, and a hearing as provided in section 39-20-05 and a judicial review as provided in section 39-20-06 must be available.
 4. The director must not revoke an individual's driving privileges for refusing to submit to a screening test requested under this section if the individual provides a sufficient breath, blood, or urine sample for a chemical test requested under section 39-20-01 for the same incident.
 5. No provisions of this section may supersede any provisions of chapter 39-20, nor may any provision of chapter 39-20 be construed to supersede this section except as provided herein.
 6. For the purposes of this section, "chemical test operator" means an individual certified by the director of the state crime laboratory or the director's designee as qualified to perform analysis for alcohol in an individual's blood, breath, or urine.
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