

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

|                            |   |                                      |
|----------------------------|---|--------------------------------------|
| Michael Aaron Schatz,      | ) |                                      |
|                            | ) |                                      |
| Plaintiff/Appellant,       | ) |                                      |
|                            | ) |                                      |
| v.                         | ) |                                      |
|                            | ) |                                      |
| North Dakota Department of | ) | Supreme Court No. 20190068           |
| Transportation,            | ) |                                      |
|                            | ) | Burleigh County No. 08-2018-CV-02533 |
| Defendant/Appellee.        | ) |                                      |

---

REPLY BRIEF OF APPELLANT

---

Appeal from Judgment, filed on February 6, 2019

Entered following the District Court's Order Affirming Hearing Officer's Decision

dated and filed February 1, 2019

Burleigh County District Court

South Central Judicial District

The Honorable Bruce A. Romanick

Dan Herbel  
ND State Bar ID # 05769  
Attorney for Appellant Michael Aaron Schatz

Herbel Law Firm  
The Regency Business Center  
3333 East Broadway Avenue, Suite 1205  
Bismarck, ND 58501  
Phone: (701) 323-0123  
herbellawfirm@yahoo.com

TABLE OF CONTENTS

|                              |     |
|------------------------------|-----|
| Table of Authorities .....   | ¶1  |
| Law and Argument .....       | ¶2  |
| Conclusion .....             | ¶21 |
| Certificate of Service ..... | ¶23 |

[¶1] TABLE OF AUTHORITIES

North Dakota statutes

N.D.C.C. § 39-20-01 ..... ¶¶14-15  
N.D.C.C. § 39-20-03.1(4) ..... ¶¶16, 20  
N.D.C.C. § 39-20-04 ..... ¶¶14-15  
N.D.C.C. § 39-20-14 ..... ¶¶14-15

North Dakota Supreme Court cases

*Aamodt v. N.D. Department of Transportation*,  
2004 ND 134, 682 N.W.2d 308 ..... ¶10  
*Moran v. ND Dept. Of Trans.*, 543 N.W.2d 767 (N.D. 1996) ..... ¶¶9, 12, 17  
*Morrow v. Ziegler*, 2013 ND 28, 826 N.W.2d 912 ..... ¶18  
*State v. Boehm*, 2014 ND 154, 849 N.W.2d 239 ..... ¶9  
*Sutton v. North Dakota Department of Transportation*,  
2019 ND 132, \_\_\_ N.W.2d \_\_\_, 2019 WL 2135860 ..... ¶¶6, 11-16, 19

State Supreme Court cases (other jurisdictions)

*Jones v. Commonwealth of Virginia*, 688 S.E.2d 269 (Va. 2010) ..... ¶¶8, 13

## [¶2] LAW AND ARGUMENT

[¶3] Although all that matters in Schatz's argument is the face of the Report and Notice form, and whether it evidences impairment, the Department of Transportation (DOT) does not fully disclose the factual testimony. In its recitation of the facts, DOT informs this Court that Mr. Schatz's "vehicle stopped past the stop line, and into the middle of the intersection." *See* Brief of Appellee, at p. 2, ¶5. However, when asked on cross examination if the "vehicle had stopped in the middle of the intersection," the police officer did not say "yes." (DOT Administrative Hearing Transcript ("Tr.") at 12, lines ("L.") 19-23). Instead, he explained that the vehicle had stopped past the sidewalk/crosswalk, so "in [his] eyes" that is in the intersection. (Tr. at 12, L. 21-23). This description is arguably different than most folks' idea of what constitutes the "middle" of the intersection.

[¶4] The officer did testify, as the video indicates, that the nose of Schatz's vehicle did go past the stop sign. But, as the officer clarified, there is no way Schatz's vehicle could have been in the middle of the intersection, as the officer was in the middle of the intersection travelling westbound on Broadway Avenue while Schatz was turning eastbound (right) onto Broadway Avenue from 24th Street. (Tr. at 13, L. 10 - 14, L. 3) ("He was stopped as I passed him"). In fact, the reason for the stop, and that which is indicated on the face of the Report and Notice form, is the failure to use a turn signal.

[¶5] The Department also avers that Schatz "finished" four beers. *See* Brief of Appellee, at p. 2, ¶5. However, the testimony of the officer was that Schatz "had four beers in the last hour." (Tr. at 7, L. 3-9). There was no testimony that Schatz "finished" four beers. Indeed, that would not be consistent with Schatz's BAC of 0.08.

[¶6] In the grand scheme of Schatz's argument, though, the foregoing is neither here nor there. "[W]e do not allow hearing testimony to aid a report that is deficient." *See Sutton v. North Dakota Department of Transportation*, 2019 ND 132, ¶7, \_\_\_ N.W.2d \_\_\_, 2019 WL 2135860.

[¶7] The Department argues that Schatz's statement that he should not have been driving, without further explanation, "alone is enough" to establish impairment. *See* Brief of Appellee, at p. 9, ¶22. Notably, DOT provides no citation to any authority for this sweeping argument.

[¶8] Next, the Department argues that the refusal of field sobriety tests "may have some relevance" on probable cause. *See* Brief of Appellee, at p. 9, ¶23. However, because "there are numerous innocent reasons why a person may refuse to engage in tests that are not required by law, including that a person may be tired,<sup>1</sup> may lack physical dexterity, may have a limited ability to speak the English language, or simply may be reluctant to submit to subjective assessments by a police officer," the refusal of those tests may be marginally relevant only "[w]hen other facts show a driver's consumption of alcohol and the discernable effect of such consumption on the driver's mental or physical state" - i.e. impairment. *See Jones v. Commonwealth of Virginia*, 688 S.E.2d 269, 272-73 (Va. 2010).

[¶9] Again, probable cause to arrest for DUI comes down to impairment. "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 Moran v. ND Dept. Of Trans.*, 543 N.W.2d 767, 770 (N.D. 1996) (emphasis added); *see also State v. Boehm*,

---

<sup>1</sup> A driver may also feel he should not be driving because he is too tired to be driving.

2014 ND 154, ¶8, 849 N.W.2d 239. "Further, the law enforcement officer must have reason to believe the driver's impairment is caused by alcohol." *See Moran*, at 770.

"Both elements -- impairment and indication of alcohol consumption -- are necessary to establish probable cause to arrest for driving under the influence." *See id.*

[¶10] In our case, the face of the Report and Notice form shows alcohol consumption, but it does not show impairment. Because the face of the form does not show impairment, it does not show probable cause. Therefore, the form fails the "facial test" under *Aamodt v. N.D. Department of Transportation*, 2004 ND 134, 682 N.W.2d 308.

[¶11] Recently, this Court decided *Sutton v. North Dakota Department of Transportation*, 2019 ND 132, \_\_\_ N.W.2d \_\_\_, 2019 WL 2135860, where this Court commented: "Our cases indicate that the Report and Notice typically includes more specific information than is present here." *See Sutton*, at ¶7. In *Sutton*, this Court determined that "the report contained enough information to constitute reasonable grounds" when the officer "checked the "odor of alcoholic beverage" box, wrote "declined field sobriety tests," checked the "traffic violation box," wrote Sutton "exceeded posted speed limit," and marked the "refused onsite screening test" and "refused" chemical breath test boxes without further explanation." *See id.*

[¶12] With the understanding of this Court's jurisprudence that "[b]oth elements -- impairment and indication of alcohol consumption -- are necessary to establish probable cause to arrest for driving under the influence," *See Moran*, at 770, it is difficult to discern from *Sutton* what constitutes impairment on the face of the Report. Is impairment shown by the Report's statement of refusing a screening test? Or, by the

Report's statement of refusing an intoxilyzer test? The Department has not provided citation to a court of last resort that has said that refusing a pre-arrest or post-arrest breath test constitutes impairment, and Schatz is also not acquainted with any such court.

[¶13] In fact, the only case the Department put forward here, and in *Sutton*, is a case from the Virginia Supreme Court which says that refusing field sobriety tests is not relevant to probable cause, unless "discernable" impairment accompanies the refusal. *See Jones*, 688 S.E.2d, at 272-73. Essentially, the *Jones* court said there must be stand-alone impairment.

[¶14] Hopefully, *Sutton* was limited to the Department's jurisdiction to revoke for refusing a screening breath test under N.D.C.C. § 39-20-14, where impairment is not an issue, and not the refusal of a test under N.D.C.C. § 39-20-01. Upon further reflection, that seems to be the case, because all that is necessary for the Department to acquire jurisdiction to revoke under N.D.C.C. § 39-20-04 for refusing a Section 39-20-14 screening test is a Report and Notice form that shows the officer "had reason to believe that the person committed a moving traffic violation" and "in conjunction with the violation" the officer "formulated an opinion that the person's body contains alcohol." *See* N.D.C.C. § 39-20-04.

[¶15] Moreover, the *Sutton* court plainly said: "Although Officer Ware testified to physical signs of Sutton's alcohol impairment, nothing was included in the report." *See Sutton*, at ¶7 (emphasis added). This tells practitioners that there was no jurisdiction to revoke for refusing a N.D.C.C. § 39-20-01 (chemical) test, but there was jurisdiction to revoke for refusing a N.D.C.C. § 39-20-14 (screening) test. *See* N.D.C.C. § 39-20-04 (compare "reasonable grounds" to "reason to believe" within the text of Section 39-20-

04). What is confusing to practitioners, then, is why the *Sutton* court seemingly moved on to address jurisdiction for a Section 39-20-01 refusal when the Department had already acquired jurisdiction under N.D.C.C. § 39-20-04 for a Section 39-20-14 refusal - if that is what the court did (it could also be argued that *Sutton* blended the two separate avenues of revocation under Section 39-20-04).

[¶16] In this case, unlike *Sutton*, there is no jurisdiction to revoke for refusing the screening test, because the Report and Notice form shows that Schatz cured that refusal by submitting to an intoxilyzer test. In our case, unlike *Sutton*, "the report must show that the officer had reasonable grounds" to believe Schatz was driving under the influence, which includes "impairment," in order for the Department to acquire jurisdiction to suspend. *See* N.D.C.C. § 39-20-03.1(4).

[¶17] In our case, all the officer checked on the Report and Notice form was "traffic violation" and "odor of alcoholic beverage." *See* Exhibit 1 (page 2 of 6). The statements provided in the "Explain" boxes were "no turn signal when turning left," the "odor of an alcoholic beverage was emitting of his breath," "admitted to have 4 beer within the last hour" (is it "a beer," 1 "beer" or 4 "beers"?), "thought he should not have been driving," and "refused to perform FST." *See id.* These statements show alcohol consumption (1 beer or 4 beers), but they do not show discernable impairment. "Both elements -- impairment and indication of alcohol consumption -- are necessary to establish probable cause to arrest for driving under the influence." *See Moran*, at 770.

[¶18] It does not seem particularly laborious to require an officer to articulate impairment on the Report and Notice form. Nor does it seem especially painstaking to insist that the officer scribble on the Report his observations of things that would tend to



show impairment, such as poor balance, poor coordination, bloodshot eyes, slurred speech, stumbling, staggering, swaying; for examples. If we don't require that articulation by "either a direct statement or by the officer's observations," we are then "[a]llowing the Department to infer elements that are basic and mandatory without any factual basis on the report to support the inference." *See Morrow v. Ziegler*, 2013 ND 28, ¶12, 826 N.W.2d 912 (it is improper to infer a reasonable belief a driver's body contains alcohol because the driver refused a screening test). This "slants the law too much toward the Department's convenience." *See id.*

[¶19] It is convenient, and downright easy, for the Department to sanction drivers because of heavily-slanted North Dakota law. Here, and in *Sutton*, the Department seeks to transform "convenient" to "unimpeded." Mr. Schatz asks that this Court require the showing of actual impairment, not inferred impairment.

[¶20] Since the Report and Notice form in this matter does not show actual impairment, it does not articulate reasonable grounds to believe Schatz was driving under the influence of alcohol, as required by N.D.C.C. § 39-20-03.1(4). Because the form does not show reasonable grounds, the Department is divested of jurisdiction to impose administrative sanctions upon Mr. Schatz. Consequently, the Department's order is not in accordance with the law.

#### [¶21] CONCLUSION

[¶22] For the foregoing reasons, and those advanced in his initial brief, Michael Schatz respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted  
this 27th day of May, 2019.

*/s/ Dan Herbel*

---

Dan Herbel  
Attorney for Appellant Michael Aaron Schatz  
ND State Bar ID # 05769

Herbel Law Firm  
The Regency Business Center  
3333 East Broadway Avenue, Suite 1205  
Bismarck, ND 58501  
Phone: (701) 323-0123  
herbellawfirm@yahoo.com

[¶23] CERTIFICATE OF SERVICE

[¶24] The undersigned hereby certifies that, on May 27, 2019, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Michael Pitcher, Assistant Attorney General, at the following:

Electronic filing to: “Michael Pitcher” < mtpitcher@nd.gov >

Dated this 27th day of May, 2019.

*/s/ Dan Herbel*

---

Dan Herbel  
Attorney for Appellant Michael Aaron Schatz  
ND State Bar ID # 05769

Herbel Law Firm  
The Regency Business Center  
3333 East Broadway Avenue, Suite 1205  
Bismarck, ND 58501  
Phone: (701) 323-0123  
herbellawfirm@yahoo.com