

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.)	

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

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[¶1] TABLE OF AUTHORITIES

North Dakota statutes

Chapter 28-32, N.D.C.C. ¶12

N.D.C.C. § 28-32-46 ¶12

N.D.C.C. § 39-20-03.1(3) ¶16

N.D.C.C. § 39-20-03.1(4) ¶¶2, 13, 19, 24, fn.1

North Dakota Supreme Court cases

Aamodt v. N.D. Department of Transportation,
2004 ND 134, 682 N.W.2d 308 ¶¶14-19, 22-24

Dworshak v. Moore, 1998 ND 172, 583 N.W.2d 799 ¶12

Landsiedel v. Director, ND Depart of Transportation,
2009 ND 196, 774 N.W.2d 645 ¶12

Lee v. N.D. Dept of Transportation, 2004 ND 7, 673 N.W.2d 245 ¶12

Moran v. ND Dept. Of Trans., 543 N.W.2d 767 (N.D. 1996) ¶22

[¶2] STATEMENT OF THE ISSUES

- A. The Report and Notice form in this matter, on its face, did not sufficiently articulate reasonable grounds to believe Mr. Schatz was driving under the influence of alcohol, as required by N.D.C.C. § 39-20-03.1(4). The delineation of “reasonable grounds” is a basic and mandatory statutory requirement. The failure to comply with the basic and mandatory statutory requirements of N.D.C.C. § 39-20-03.1(4) deprives DOT of jurisdiction to impose administrative sanctions upon Mr. Schatz.

[¶3] STATEMENT OF THE CASE

[¶4] On August 25, 2018, Michael Schatz was arrested for Driving Under the Influence after being stopped for not using his turn signal. (DOT Administrative Hearing Transcript (“Tr.”) at 8, lines (“L.”) 18-24). Schatz was issued a temporary operator’s permit. (Exhibit 1, page 2 of 6, Transcript of DOT Hearing). Schatz timely requested an administrative hearing and, on September 24, 2018, the Department of Transportation (“Department” and “DOT”) held a hearing. After the hearing, the hearing officer mailed out a decision which ordered the suspension of Schatz's driving privileges for a ninety-one (91) days. (Appendix (“App.”) at 4).

[¶5] On October 1, 2018, Schatz filed a Notice of Appeal and Specifications of Error with the District Court alleging numerous errors in the DOT administrative proceedings. (App. 5-6). After both Petitioner and Respondent submitted written arguments to the district court, the court issued its Order affirming the decision of the hearing officer. (App. 21-25).

[¶6] On February 6, 2019, Judgment was entered in this matter. (App. 26-27). On February 6, 2019, the Department filed a Notice of Entry of Judgment. (App. 28). On February 28, 2019, Schatz filed a Notice of Appeal to this Court seeking relief. (App.

29-32). Schatz asks this court to reverse the decision of the district court and to reinstate his driving privileges.

[¶7] STATEMENT OF THE FACTS

[¶8] On August 25, 2018, a Bismarck Police officer stopped Mr. Schatz's vehicle for not using his turn signal before making a turn at an intersection. (Tr. at 5, L. 15-20). The police officer asked Mr. Schatz if he would like to perform field sobriety tests, and Schatz declined to perform those tests. (Tr. at 7, L. 16-19).

[¶9] Schatz was arrested on suspicion of DUI. Schatz submitted to a chemical breath test which showed a test result of 0.08. Subsequently, the police officer issued Schatz a Report and Notice form that did not sufficiently articulate reasonable grounds to believe Schatz was driving under the influence of alcohol. *See* Exhibit 1 (page 2 of 6).

[¶10] Because Schatz's test result was 0.08 and since he has no criminal history, Schatz's driving privileges were suspended for 91 days.

[¶11] STANDARD OF REVIEW

[¶12] “The Administrative Agencies Practice Act, N.D.C.C. ch 28-32, governs review of an administrative decision to suspend or revoke a driver's license.” *See Dworshak v. Moore*, 1998 ND 172, ¶6, 583 N.W.2d 799. “This Court will affirm the agency's decision unless:

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.” *See Lee v. NDDOT*, 2004 ND 7, ¶8, 673 N.W.2d 245. “An agency's decisions on questions of law are fully reviewable.” *See Landsiedel v. Director, North Dakota Department of Transportation*, 2009 ND 196, ¶6, 774 N.W.2d 645.

[¶13] LAW AND ARGUMENT

- A. The Report and Notice form in this matter, on its face, did not sufficiently articulate reasonable grounds to believe Mr. Schatz was driving under the influence of alcohol, as required by N.D.C.C. § 39-20-03.1(4). The delineation of “reasonable grounds” is a basic and mandatory statutory requirement. The failure to comply with the basic and mandatory statutory requirements of N.D.C.C. § 39-20-03.1(4) deprives DOT of jurisdiction to impose administrative sanctions upon Mr. Schatz.

[¶14] In *Aamodt v. N.D. Department of Transportation*, plain-clothed Mandan Police officers in an unmarked vehicle observed Aamodt and another man “get out of a taxicab and walk toward a white Ford pickup.” *See Aamodt v. N.D. Department of*

Transportation, 2004 ND 134, ¶2, 682 N.W.2d 308. The officers, who felt the two men appeared intoxicated, “observed Aamodt get into the pickup through the driver's door and start the engine” and “also observed Smith urinating on the ground near the rear of the pickup.” *See id.* After one officer observed Aamodt “exit the vehicle,” the officer “approached him and asked for identification.” *See id.*

[¶15] “While talking with Aamodt, the officer observed his slurred speech, bloodshot eyes, and the odor of alcohol” and then “asked Aamodt to submit to field tests and an S-D2 test, but Aamodt declined.” *See Aamodt*, 2004 ND 134 at ¶3. Aamodt was arrested for APC, submitted to a chemical test, “was issued a temporary operator's permit,” and, subsequently, “[a] copy of the report and notice form was timely submitted to the Department.” *See id.*

[¶16] At his administrative hearing, Aamodt “objected to the hearing” and argued that the Department could not suspend his driving privileges “because the report turned in by the officer did not show reasonable grounds to believe Aamodt was in actual physical control of a motor vehicle while under the influence of alcohol, as required by N.D.C.C. § 39-20-03.1(3).”¹ *See Aamodt*, 2004 ND 134 at ¶9. After “[t]he hearing officer overruled the objection,” continued with the hearing, and ultimately “suspended Aamodt's driving privileges for 91 days,” Aamodt appealed. *See id.* at ¶¶9-10.

[¶17] The district court reversed the hearing officer’s decision and found that the Report and Notice form “did not state, as required by law, reasonable grounds to believe Aamodt was in actual physical control of a motor vehicle while under the influence of alcohol.” *See Aamodt*, 2004 ND 134 at ¶10. The Court noted:

¹ Now, N.D.C.C. § 39-20-03.1(4).

“All Officer Bleth checked in the box for the 'Officer's Statement of Probable Cause' was 'already stopped' and 'odor of alcoholic beverage.' No explanation was submitted on the Report and Notice form by Officer Bleth.”

See id at ¶10. The district court “explained that probable cause is a fundamental reason for making an arrest and that failing to even minimally state the officer's probable cause deprived the Department of authority to suspend Aamodt's driving privileges.” *See id*.

The Department appealed.

[¶18] The North Dakota Supreme Court agreed that the Report and Notice form in *Aamodt* did not state reasonable grounds as required by statute, affirmed the decision of the district court, and reminded that “[t]he Department's authority to suspend a person's license is given by statute” and, accordingly, “[t]he Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges.” *See Aamodt*, 2004 ND 134, at ¶15. The high court also remarked that, in enacting section 39-20-03.1, “[t]he legislature was concerned that the law not be “slanted too much toward the [agency's] convenience . . . and that the officer be able to articulate probable cause before taking a license.” *See id* at ¶24 (emphasis added). The Court concluded by warning:

“Driving privileges cannot be taken away without some basis. Requiring reasonable grounds before taking away a person's driving privileges ensures the law is not too slanted in favor of the Department and protects those who should not be punished. Without a finding of probable cause, there is no basis for taking away a person's driving privileges. Aamodt was entitled to know what the officer was relying on.”

See id. at ¶25 (emphasis added).

[¶19] In our case, like *Aamodt*, the face of the police officer's Report and Notice form did not sufficiently "state" or "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). Like *Aamodt*, all the officer in our case 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" and "THE ODOR OF AN ALCOHOLIC BEVERAGE WAS EMITTING OF HIS BREATH. ADMITTED TO HAVE 4 BEER WITHIN THE LAST HOUR. THOUGHT HE SHOULD NOT HAVE BEEN DRIVING. REFUSED TO PERFORM FST." See *id.* This language is not sufficient to pass the facial test from *Aamodt*, as the face of the form does not show probable cause that Schatz was impaired and under the influence. See *Aamodt*, 2004 ND 134, at ¶15. Like *Aamodt*, Mr. Schatz "was entitled to know what the officer was relying on" for probable cause. See *id.* at ¶25.

[¶20] The face of the form, stating an "odor of an alcoholic beverage," does not show impairment. If it did, every bartender would be subject to arrest heading home from closing his 2 a.m. shift. The face of the form, stating Schatz "admitted to have 4 beer [sic] within the last hour," does not show impairment. This statement says nothing of impairment, does not suggest whether the beer was alcoholic or non-alcoholic, and it is not at all consistent with the 0.08 test result.

[¶21] The face of the form, stating Schatz "thought he should not have been driving" does not show impairment. This statement is conclusory and it does not elaborate on whether he "thought" he should not be driving because he was tired, or because he had no license in his immediate possession. The conclusory statements on the

face of the Report and Notice form do not show physical evidence, observations, or manifestations that Schatz was impaired or that he was under the influence of anything (for example, no swaying, no stumbling, no staggering, no problems with balance, no problems with coordination, no bloodshot watery eyes, no slurred speech, etc). Therefore, the face of the Report and Notice form did not show probable cause that Schatz was DUI.

[¶22] "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). "Further, the law enforcement officer must have reason to believe the driver's impairment is caused by alcohol." *See id.* "Both elements -- impairment and indication of alcohol consumption -- are necessary to establish probable cause to arrest for driving under the influence." *Id.* In our case, the face of the Report and Notice form does not show impairment and does not show probable cause. Therefore, the form fails the "facial test" under *Aamodt*.

[¶23] It is the face of the Report and Notice form that counts. In fact, if the face of the form is deficient, the police officer cannot cure this jurisdictional flaw through hearing testimony. If this mandatory jurisdictional language and evidence is "omitted from the report and notice form," the Department is divested of jurisdiction, and it is not sufficient that the jurisdictional language "was provided during the hearing through the officer's testimony." *See Aamodt*, 2004 ND 134, at ¶21.

[¶24] "[P]robable cause is a fundamental reason for making an arrest" and failing to state impairment and to state "the officer's probable cause deprive[s] the

Department of authority to suspend ... driving privileges.” *See Aamodt*, 2004 ND 134, at ¶10. The police officer’s Report and Notice form didn’t sufficiently provide that information and “did not state, as required by law, reasonable grounds to believe” Mr. Schatz was driving under the influence of alcohol. *See id.* The officer’s failure to comply with the basic and mandatory statutory requirements of N.D.C.C. § 39-20-03.1(4) by failing to "state the officer's probable cause deprived the Department of authority to suspend” Schatz’s driving privileges. *See id.* Consequently, the DOT’s order is not in accordance with the law.

[¶25] CONCLUSION

[¶26] For the foregoing reasons, Michael Schatz respectfully requests that this Court reverse the decision of the district court and reinstate his driving privileges.

Respectfully submitted
this 19th day of April, 2019.

/s/ Dan Herbel

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[¶27] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 19, 2019, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Michael Pitcher, Assistant Attorney General, at the following:

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

Dated this 19th day of April, 2019.

/s/ Dan Herbel

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