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JULY 8, 2019
STATE OF NORTH DAKOTA

Corrections rec'd 7-11-19

IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

Corey Joseph Jesser,

Petitioner and Appellee,

v.

North Dakota Department of Transportation

Respondent and Appellant.

Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Cynthia M. Feland

SUPREME COURT NO. 20190101
BURLEIGH COUNTY NO. 08-2018-CV-02305
APPEAL FROM THE FEBRUARY 1, 2019
JUDGMENT OF THE DISTRICT COURT

****

BRIEF OF APPELLEE
ORAL ARGUMENT REQUESTED

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Chad R. McCabe
McCabe Law Firm
Attorney for Appellant
419 Riverwood Dr., Suite 104
Bismarck, ND 58504
(701) 222-2500
ND State Bar ID #05474

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STATEMENT OF THE ISSUE

ISSUE: **Jesser was denied his statutory right to a reasonable opportunity to consult with counsel in a meaningful way before deciding whether to submit to chemical testing, as provided by N.D.C.C. § 29-05-20, and therefore his failure to take the intoxilyzer test should not constitute a refusal upon which to revoke his driver's license.**

STATEMENT OF THE CASE

[¶ 1] The Statement of the Case is not in dispute.

STATEMENT OF FACTS

[¶ 2] On June 17, 2018, Morton County Sheriff Shaun Peterson conducted an investigation wherein Corey Jesser was found standing outside and near his vehicle which was alleged to have struck a vehicle. (Hearing Officer's Decision, Doc. ID No. 10, App. pp. 8-9). During the investigation, Peterson advised Jesser of the implied consent advisory for an onsite screeningn test and asked Jesser to submit to an onsite screening test. Jesser verbally stated he was not going to submit to the test. (Hearing Officer's Decision, Doc. ID No. 10, App. pp. 8-9).

[¶ 3] Peterson later arrested Jesser on the charge of Driving Under the Influence. (Hearing Officer's Decision, Doc. ID No. 10, App. pp. 8-9). Peterson informed Jesser of the post arrest implied consent advisory and asked Jesser if he would submit to a chemical breath test. (Hearing Officer's Decision, Doc. ID No. 10, App. pp. 8-9). Peterson asked Jesser if he would like to call an attorney. (Hearing Officer's Decision, Doc. ID No. 10, App. pp. 8-9). Jesser stated he would but that he did not know who to call. (Hearing Officer's Decision, Doc. ID No. 10, App. pp. 8-9). Jesser asked to speak with an attorney. (Tr. P. 24, lines 12-15). Peterson took no further action regarding obtaining a phone book or a telephone.

(Hearing Officer's Decision, Doc. ID No. 10, App. pp. 8-9). Jesser verbally stated that he would not submit to the chemical breath test. (Hearing Officer's Decision, Doc. ID No. 10, App. pp. 8-9).

STANDARD OF REVIEW

[¶ 4] The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs this Court's review of an administrative suspension of a driver's license. *Johnson v. Department of Transp.*, 2004 ND 148, 683 N.W.2d 886, ¶ 5. This Court exercises a limited review in appeals involving driver's license suspensions or revocations, and affirms 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.

Johnson, supra, at ¶ 5, citing N.D.C.C. § 28-32-46.

[¶ 5] On appeal from the district court's review of the administrative agency, this Court reviews the administrative agency's decision. *Schlosser v. N. Dakota Dep't of Transp.*, 2009 ND 173, ¶ 7, 775 N.W.2d 695. This Court reviews only the record that was submitted to the district court and does not make independent findings of fact or substitute its judgment for the agency's. *Id.* However, "Once the facts are established, their significance presents a question of law, which [this Court reviews] de novo," *Schoon v. N. Dakota Dep't of Transp*., 2018 ND 210, ¶ 7, 917 N.W.2d 199, 202, and "[I]f sound, the district court's analysis is entitled to respect." *Aamodt v. North Dakota Dept. Of Transp*., 2004 ND 134, 682 N.W.2d 308, ¶12.

LAW AND ARGUMENT

ISSUE: Jesser was denied his statutory right to a reasonable opportunity to consult with counsel in a meaningful way before deciding whether to submit to chemical testing, as provided by N.D.C.C. § 29-05-20, and therefore her failure to take the intoxilyzer test should not constitute a refusal upon which to revoke his driver's license.

[¶ 6] In *Kuntz v. State Highway Com'r*, 405 N.W.2d 285, 287 (N.D.1987), a majority of the Supreme Court held an accused, arrested for driving under the influence, has a limited *statutory* right to contact an attorney *before deciding whether to submit to alcohol testing*. (emphasis added). *See* N.D.C.C. §§ 29-05-20. The parameters of the statutory right to counsel were further defined by the Court in *Bickler v. North Dakota State Highway Commissioner,* 423 N.W.2d 146 (N.D.1988), *City of Mandan v. Jewett*, 517 N.W.2d 640 (N.D.1994), and *Baillie v. Moore*, 522 N.W.2d 748 (N.D.1994).

[¶ 7] This Court has repeatedly held that defendants must be afforded a reasonable opportunity to consult with counsel before deciding whether to submit to a chemical test.

State v. Pace, ¶ 6, 2006 ND 98, 713 N.W.2d 535. The Court has not exacted a definition for reasonable opportunity," and "objectively review[s] the totality of the circumstances to determine whether an opportunity to consult with counsel was reasonable." *Pace, supra,* ¶7.

[¶ 8] In *Kuntz*, this Court held:

> We hold that if an arrested person asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test. If he is not given a reasonable opportunity to do so under the circumstances, *his failure to take the test is not a refusal upon which to revoke his license under Chapter 39-20-, N.D.C.C.*
>
> *Id.* at 290. (emphasis added).

[¶ 9] In *Bickler*, this Court held, "when an *arrested* person asks to consult with counsel *before electing to take a chemical test* he must be given the opportunity to do so out of police hearing, and law enforcement must establish that such opportunity was provided." *Bickler* at 148 (emphasis added). Moreoever, in *Baillie, supra*, this Court held:

> We refuse to indulge in a case-by-case search for magical words which must be uttered by an arrestee as a prerequisite to being given an opportunity to consult an attorney. Rather, we hold that if a DUI arrestee, *upon being asked to submit to a chemical test*, responds with any mention of a need for an attorney--to see one, to talk to one, to have one, etc.--the failure to allow the arrestee a reasonable opportunity to contact an attorney prevents the revocation of his license for refusal to take the test. A refusal to take the test under these conditions is not the affirmative refusal necessary to revoke a license under § 39-20-04, N.D.C.C. Our intent is to set forth a "bright line" test to determine when an arrestee must be allowed a reasonable opportunity to consult with an attorney before deciding whether to take a chemical test. If the arrestee responds with any affirmative mention of a need for an attorney, law enforcement personnel must assume the arrestee is requesting an opportunity to consult with an attorney and must allow a reasonable opportunity to do so.
>
> *Id.* (emphasis added).

[¶ 10] The *Baillie* Court held:

> When Baillie stated he would not take a test without an attorney, the officer immediately assumed Baillie was refusing the test and *did not ask whether Baillie*

> *wanted to call an attorney nor was Baillie then offered use of a phone or directory to call an attorney*. We conclude that Baillie was not allowed a reasonable opportunity to exercise his statutory right to consult with an attorney and that his failure to take the intoxilyzer test did not constitute a refusal upon which to revoke his driver's license. Consequently, the Department's decision to revoke Baillie's license was not in accordance with the law, and we reverse.
>
> (emphasis added).

[¶ 11] In *In re R.P.*, ¶ 24, 2008 ND 39, 745 N.W.2d 642, this Court expanded this right to juvenile's opportunity to consult with his or her counsel, parent, guardian, or custodian:

> We now hold coupled with our decision in *Kuntz v. State Highway Com'r.,* 405 N.W.2d 285 (N.D.1987), that the right to counsel provision of the Uniform Juvenile Court Act, embodied in N.D.C.C. 27-20-26, provides juveniles a limited right to counsel before deciding whether to consent to chemical testing under N.D.C.C. § 39-20-01. Like other drivers' right to counsel before deciding whether to consent to chemical testing, a juvenile's right to consult with counsel is a limited right. A juvenile must be given a reasonable opportunity to consult only if doing so does not materially interfere with the test administration. As is the case with judicial consideration of whether a non-juvenile had a reasonable opportunity to consult with his attorney, a totality of the circumstances test applies to determine the reasonableness of a juvenile's opportunity to consult with his or her counsel, parent, guardian, or custodian.

[¶ 12] This Court found that R.P. requested to speak his parents before the Intoxilyzer test was administered, and that there was ample time to allow R.P. to speak to his parents and still administer a timely and accurate chemical test. *Id.* at ¶ 25. The Court found that the officers denied R.P. an opportunity to consult with his parents before he consented to the Intoxilyzer test, and held that this denial was a violation of R.P.'s limited statutory right to consult with counsel or his parents because allowing R.P. a reasonable opportunity to speak to his parents would not have materially interfered with administration of the Intoxilyzer test. *Id. Washburn v. Levi*, 2015 ND 299, 872 N.W.2d 604 again reiterated the bright line rule of *Baillie*, concluding that Washburn's statutory right to counsel was violated when he asked

to speak to an attorney but then said he wanted to call his father.

[¶ 13] In this case, it is clear that Jesser stated that he would speak to an attorney. Compare this case with *Cudmore v. Director North Dakota Dept. of Transp*., 2016 ND 64, 877 N.W.2d 52, where Cudmore said, "I'm going to f..king lawyer up," coupled with multiple vulgarities and physical violence. The Supreme Court stated:

> In this case, the reference to "lawyer up" mixed in with a barrage of profanity launched at the deputy is beyond the bright line in Baillie, either as a matter of fact under the circumstances of this case, or as a matter of public policy. *However, the reference to an attorney made by a person in a less bombastic and profane conversation might well invoke the bright line of Baillie.*
>
> *Id.* (emphasis added).

[¶ 14] Jesser argues that his request for an attorney invoked the bright line of *Baillie, supra*. Despite this, the hearing officer found that Jesser refused the screening test and therefore revoked Jesser's driving privileges for a period of 180 days. (Hearing Officer's Decision, Doc. ID No. 10). While the Department found that Jesser refused the screening test, under N.D.C.C. § 39-20-14(4), that statute provides that, "[T]he 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." In other words, the statute allows for an individual a statutory right to cure the refusal of the screening device. It follows that if the Petitioner is deprived of the statutory right to counsel after arrest, they cannot be held to have refused the screening device.

[¶ 15] Given that this Court has repeatedly held that defendants must be afforded a reasonable opportunity to consult with counsel before deciding whether to submit to a

chemical test, if the statutory opportunity to consult with counsel before deciding whether to submit to a chemical test has been deprived, then the statutory opportunity to cure the refusal fo the screening test has also been deprived. Even in *City of Mandan v. Leno*, 2000 ND 184, 618 N.W.2d 161 this Court refused to extend the right to counsel to a prearrest request to submit to a screening device. This Court's reasoning was based upon the fact that, "the chemical test was not an ultimate evidentiary test, but rather only an on-site screening test no admissible as evidence." *Id.*

[¶ 16] Based upon this, it only makes judicial sense to conclude that, if the statutory opportunity to consult with counsel before deciding whether to submit to a chemical test has been deprived, then the statutory opportunity to cure the refusal fo the screening test has also been deprived. This Court so stated in *Kuntz, supra*, holding that "the failure to take the test is not a refusal upon which to revoke his license *under Chapter 39-20-, N.D.C.C.*"

CONCLUSION AND PRAYER FOR RELIEF

[¶ 17] WHEREFORE, the Appellee, Corey Joseph Jesser, by and through his attorney, Chad R. McCabe, prays for this honorable Court to affirm the District Court's reversal of the hearing officer's decision.

Dated this 11th day of July, 2019.

/s/ Chad R. McCabe
CHAD R. MCCABE
McCabe Law Firm
Attorney for the Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
N.D. State Bar ID #05474

CERTIFICATE OF COMPLIANCE

[¶ 18] I, Chad R. McCabe, hereby certify that this document complies with the page limitations of Rule 32(a)(8), N.D.R.App.P. I am using Corel WordPerfect OfficeX4. The document has been scanned for viruses and is virus-free.

REQUEST FOR ORAL ARGUMENT

[¶ 19] This appeal concerns whether there the Department should have the authority to revoke driving privileges when there has been a deprivation of the statutory right to counsel after arrest for taking a chemical test, but when the prior screening test before arrest was denied by the subject. There has been inconsistent decisions from the Department's hearing officers on this issue, with some hearing officer's dismissing the Department's case and some revoking driving privileges. Oral argument would be helpful to further discuss this issue and answer any questions from this Court.

Dated this 11th day of July, 2019.

/s/ Chad R. McCabe
CHAD R. MCCABE
McCabe Law Firm
Attorney for the Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
N.D. State Bar ID #05474

CERTIFICATE OF SERVICE

[¶ 20] A true and correct copy of the foregoing document was sent by electronic transmission on this 11th day of July, 2019, to the following:

Michael Pitcher
Asst. Attorney General
Email: mtpitcher@nd.gov

/s/ Chad R. McCabe
CHAD R. MCCABE