

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Corey Joseph Jesser,)	
)	
Appellee,)	Supreme Ct. No. 20190101
)	
v.)	
)	District Ct. No. 08-2018-CV-02305
North Dakota Department of)	
Transportation,)	ORAL ARGUMENT REQUESTED
)	
Appellant.)	

**APPEAL FROM THE FEBRUARY 1, 2019
JUDGMENT OF THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT**

HONORABLE CYNTHIA M. FELAND

BRIEF OF APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellant.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	3
	<u>Paragraph</u>
Statement of Issues	1
Statement of Case	3
Request for Oral Argument.....	6
Statement of Facts.....	7
Statement of Proceedings on Appeal to District Court.	12
Standard of Review	17
Law and Argument.....	23
I. Jesser was not denied a right to consult with an attorney before deciding whether to submit to the chemical test for intoxication.	23
II. Jesser did not satisfy the statutory requirements of N.D.C.C. § 39-20-14 in order to cure his refusal of the onsite screening test.....	32
Conclusion.....	36

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<u>Baillie v. Moore,</u> 522 N.W.2d 748 (N.D. 1994)	23
<u>City of Grand Forks v. Risser,</u> 512 N.W.2d 462 (N.D. 1994)	25
<u>City of Mandan v. Leno,</u> 2000 ND 184, 618 N.W.2d 161	23, 32
<u>Eriksmoen v. Dir., N.D. Dep't of Transp.,</u> 2005 ND 206, 706 N.W.2d 610	31
<u>Groe v. Comm'r of Pub. Safety,</u> 615 N.W.2d 837 (Minn. Ct. App. 2000)	26
<u>Haynes v. Dir., Dep't of Transp.,</u> 2014 ND 161, 851 N.W.2d 172	17, 18
<u>In re Estate of Elken,</u> 2007 ND 107, 735 N.W.2d 842	19
<u>In re F.F.,</u> 2006 ND 47, 711 N.W.2d 144	19
<u>Kasowski v. Dir., N.D. Dep't of Transp.,</u> 2011 ND 92, 797 N.W.2d 40	25
<u>Kuntz v. State Highway Comm'r,</u> 405 N.W.2d 285 (N.D. 1987)	23, 24, 33
<u>Lange v. N.D. Dep't of Transp.,</u> 2010 ND 201, 790 N.W.2d 28	25
<u>Lies v. Dir., N.D. Dep't of Transp.,</u> 2008 ND 30, 744 N.W.2d 783	26
<u>Maisey v. N.D. Dep't of Transp.,</u> 2009 ND 191, 775 N.W.2d 200	25
<u>Mertz v. City of Elgin, Grant Cty.,</u> 2011 ND 148, 800 N.W.2d 710	22

<u>Nelson v. Johnson,</u> 2010 ND 23, 778 N.W.2d 773	19
<u>Scott v. N.D. Dep't of Transp.,</u> 557 N.W.2d 385 (N.D. 1996)	34
<u>State ex rel. Dep't of Human Servs. v. N.D. Ins. Reserve Fund,</u> 2012 ND 216, 822 N.W.2d 38.....	20
<u>State v. Pace,</u> 2006 ND 98, 713 N.W.2d 535.....	26
<u>State v. Stegall,</u> 2013 ND 49, 828 N.W.2d 526.....	22
<u>Wetzel v. N.D. Dep't of Transp.,</u> 2001 ND 35, 622 N.W.2d 180.....	26
<u>Zajac v. Traill Cty. Water Res. Dist.,</u> 2016 ND 134, 881 N.W.2d 666.....	19, 21

Statutes

N.D.C.C. ch. 28-32	17
N.D.C.C. ch. 39-20	24, 33
N.D.C.C. § 1-02-02.....	19
N.D.C.C. § 1-02-03.....	19
N.D.C.C. § 1-02-05.....	21
N.D.C.C. § 1-02-38.....	22
N.D.C.C. § 1-02-39.....	21
N.D.C.C. § 28-32-46.....	17
N.D.C.C. § 29-05-20.....	23
N.D.C.C. § 39-08-01.....	32
N.D.C.C. § 39-20-01.....	32, 34
N.D.C.C. § 39-20-05(3)	4

N.D.C.C. § 39-20-14.....	2, 6, 32-35
N.D.C.C. § 39-20-14(3)	32
N.D.C.C. § 39-20-14(4)	32
N.D.R.App.P. 28(h).....	6

STATEMENT OF ISSUES

[¶1] Whether Jesser was denied his limited statutory right to counsel when he stated he would not know who to call after being informed he would be provided a phone and a phonebook in order to contact an attorney?

[¶2] Whether Jesser satisfied the statutory requirements of N.D.C.C. § 39-20-14 in order to cure his refusal of the onsite screening test.

STATEMENT OF CASE

[¶3] On June 17, 2018, Deputy Shaun Peterson (Deputy Peterson) of the Morton County Sheriff's Office arrested Corey Joseph Jesser (Jesser) for driving a vehicle while under the influence of intoxicating liquor (DUI). Appendix (App.) 15. A Report and Notice, including a temporary operator's permit, was issued to Jesser after Jesser refused to submit to a chemical breath test requested by the deputy. Id. The Report and Notice notified Jesser of the Department's intent to revoke his driving privileges. Id.

[¶4] In response to the Report and Notice, Jesser requested an administrative hearing. Transcript (Tr.) at Exhibit (Ex.) 1, pg. 3. The hearing was held on July 17, 2018. App. 5. At the hearing the hearing officer considered two sets of issues as law enforcement alleged Jesser refused to submit to requests for an onsite screening test and a chemical test. In accordance with N.D.C.C. § 39-20-05(3) the hearing officer considered the following issues regarding Jesser's refusal of the on-site screening test:

- (1) Whether a law enforcement officer had reason to believe the person committed a moving traffic violation or was involved in a traffic accident as a driver;

- (2) Whether in conjunction with the accident or violation, the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol; and
- (3) Whether the person refused to submit to the onsite screening test.

Tr. Ex. 2. The hearing officer also considered the following issues in regards to Jesser's refusal of the alcohol concentration test:

- (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.

Id.

[¶5] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Jesser's driving privileges for a period of 180 days based on Jesser's refusal of both the onsite screening test and chemical test. App. 16-17. Jesser requested judicial review of the hearing officer's decision. App. 18-19.

REQUEST FOR ORAL ARGUMENT

[¶6] The Department requests the Court schedule oral argument in this case under N.D.R.App.P. 28(h). This matter involves the statutory interpretation of N.D.C.C. § 39-20-14 and oral argument would be helpful in the Court's de novo review of the District Court's decision and the Hearing Officer's decision.

STATEMENT OF FACTS

[¶7] On June 17, 2018, at approximately 1:08 a.m., dispatch received multiple

calls about a hit and run accident involving a black SUV. Tr. 4, ll. 14-16; Tr. 5, ll. 20-24. At 1:25 a.m., Deputy Peterson was dispatched to assist. Tr. 4, ll. 16-17; Tr. 5, ll. 2-6. Dispatch advised Deputy Peterson that one of the callers had heard the vehicle dragging vehicle parts on the ground as it was moving. Tr. 4, ll. 19-24. Deputy Peterson responded to the area and saw a trail of fluid near the accident site which led around the block to the vehicle described by dispatch to include a license plate number. Tr. 7, l. 19 – Tr. 8, l. 2; Tr. 9, ll. 24-25.

[¶8] A man, later identified as Jesser, was standing outside the vehicle on the sidewalk near the passenger side of the vehicle, which had noticeable front-end and passenger-side damage. Tr. 10, ll. 1-2; Tr. 11, ll. 10-11. As Deputy Peterson approached, Jesser began walking away, but stopped at Deputy Peterson's instruction. Tr. 11, ll. 1-2. Jesser was on the phone at the time. Tr. 11, ll. 3-4. Jesser told Deputy Peterson he was looking for a ride. Tr. 12, ll. 6-7. Jesser told Deputy Peterson he was not driving the vehicle at the time of the accident and did so more than once. Tr. 12, l. 25 – Tr. 13, l. 1. Jesser acknowledged to Deputy Peterson that he had consumed alcohol but said the deputy had not seen him driving. Tr. 15, ll. 6-9. The keys to the vehicle were on Jesser's person. Tr. 13, ll. 8-13. A woman, later identified as Jesser's wife was seated in the front passenger seat of the vehicle. Tr. 13, ll. 18-21.

[¶9] After observing indicia of Jesser's intoxication and administering a series of field sobriety tests, Deputy Peterson read Jesser the implied consent advisory and requested that he submit to an onsite screening test. Tr. 15, l. 14 – Tr. 20, l. 11. Jesser refused to submit to the test. Tr. 20, ll. 12-21. Deputy Peterson then

informed Jesser he was under arrest for driving under the influence. Tr. 21, ll. 9-12.

[¶10] Deputy Peterson read Jesser the post-arrest implied consent advisory and requested he submit to a chemical breath test. Tr. 22, ll. 6-11; App. 7, ll. 3-6. Jesser went back and forth about whether he wanted to take the test or not because Deputy Peterson had not seen him driving. App. 7, ll. 10-12. Deputy Peterson asked Jesser if he wished to consult with an attorney. App. 7, ll. 12-13. Jesser responded saying he would like to, but did not know who to call. App. 7, ll. 13-14.

[¶11] Deputy Peterson escorted Jesser inside the Burleigh Morton Detention Center and attempted to make arrangements for Jesser to contact an attorney by requesting a phone book from jailers at the detention center. App. 7, ll. 14-16; App. 8, l. 1. Jailers were uncooperative in assisting Deputy Peterson in obtaining a phone and phone book for Jesser. App. 8, ll. 1-3. Deputy Peterson advised Jesser that he would get a phonebook and access to a phone to contact an attorney. App. 8, ll. 3-5. Jesser said he did not have an attorney and “just kept saying he didn’t know who to call.” App. 8, ll. 5-6. Deputy Peterson subsequently requested Jesser provide an answer to his request for a chemical test. App. 8, ll. 18-19. Jesser did not push the issue about wanting to speak to an attorney. App. 8, l. 20 – App. 9, l. 15. Instead, he verbally told Deputy Peterson that he did not want to take the chemical breath test. App. 9, l. 20 – App. 10, l. 1.

STATEMENT OF PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶12] At the conclusion of the hearing, Jesser argued he was denied his statutory

right to counsel and thus cannot be said to have refused the chemical test. Tr. 59-61. Jesser further argued that because his right to counsel was denied he did not have an opportunity to cure his refusal of the onsite screening test by submitting to a chemical test and therefore, the Department cannot revoke his driving privileges for his refusal of the onsite screening test. Id.

[¶13] Based on the evidence submitted at the hearing, the hearing officer determined:

Mr. Jesser argues his right to counsel was violated because he asked for an attorney and was deprived of his right to counsel. Therefore, it cannot be determined that he refused the chemical test. Because it has been determined Mr. Jesser refused to submit to an onsite screening test, there is no need to reach the second set of issues on the refusal of a chemical test. Even if the second set of issues were to be reached, Mr. Jesser did not invoke his limited statutory right to counsel in this case. Deputy Peterson told Mr. Jesser he would provide him with a telephone book and a telephone in order to contact an attorney. Mr. Jesser stated, again, he would not know who to call. Mr. Jesser never asked to speak to an attorney. He only stated he would talk to an attorney, but wouldn't know who to call. His statements regarding an attorney were passive. Mr. Jesser never accepted Deputy Peterson's offer of a telephone and telephone book. There was no request to speak to an attorney by Mr. Jesser. Even if Mr. Jesser had made a request to speak to any attorney, a reasonable opportunity was offered him by Deputy Peterson and Mr. Jesser did not take him up on that offer. He again stated he would not know who to call. The limited statutory right to counsel was not violated.

App. 17. The hearing officer issued her decision revoking Jesser's driving privileges for a period of 180 days. Id.

[¶14] Jesser sought judicial review of the hearing officer's decision on two grounds, alleging:

- 1) The Department erred in revoking on the refusal of the screening device without addressing the merits of whether the post arrest failure to allow the arrestee a reasonable opportunity to contact

an attorney prevented the revocation of his license for refusal to take the test. While the Department alleged that Jesser refused chemical testing N.D.C.C. § 39-20-14, under subsection (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 to cure the refusal of the screening device and the Attorney General’s Office, in representing the Department, has consistently taken the position that if the Petitioner is deprived of the right to counsel after arrest, they cannot be held to have refused the screening device.

2) . . .

3) In this case, it is clear that, after being arrested Mr. Jesser stated that he would speak to an attorney, and he argues that his reference to an attorney was not make (sic) with bombastic and profane language and therefore invoked the bright line of *Baillie, supra*. Therefore, Jesser’s failure to take the test is not a refusal upon which to revoke his license under Chapter 39-20, N.D.C.C., and the Department erred in revoking his driving privileges.

App. 18-19.

[¶15] The District Court issued its Order on Appeal on January 29, 2019, in which the Court reversed the Hearing Officer’s Decision. App. 25. The District Court ruled that Jesser’s response to Deputy Peterson’s question “if he wished to speak to an attorney” of “he did” constituted an “affirmative mention of a need for an attorney”. App. 24. The District Court further determined that “[o]ther than the initial request for assistance from detention staff, Deputy Peterson took no further steps to retrieve a phone and phone book for Jesser and instead demanded Jesser provide an answer to his request for a chemical breath test.” *Id.* The District Court concluded:

Based on a review of the record in this case, after making an “affirmative mention of a need for an attorney,” Jesser was not

allowed a reasonable opportunity to exercise his statutory right to consult with an attorney as required by Section 29-05-20 before deciding whether to submit to chemical testing. Thus, Jesser's failure to take the intoxilyzer test did not constitute an affirmative refusal upon which to revoke his driver's license. Consequently, the hearing officer's decision to revoke Jesser's license was not supported by the weight of the evidence from the record. The Department's decision to revoke Jesser's driving privileges is hereby **REVERSED**.

App. 25. The District Court, however, failed to address the Department's argument that irrespective of whether his statutory right to counsel was denied, the Department had authority to revoke his driving privileges for his refusal of the onsite screening test.

[¶16] Judgment was entered on February 1, 2019. Id. at 27. The Department appealed the Judgment to the North Dakota Supreme Court. App. 29-30. The Department requests this Court reverse the Judgment of the Burleigh County District Court and reinstate the Hearing Officer's Decision suspending Jesser's driving privileges for a period of 180 days.

STANDARD OF REVIEW

[¶17] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to [suspend] driving privileges." Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

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.

[¶18] “In an appeal from a district court’s review of an administrative agency’s decision, [the Court] review[s] the agency’s decision.” Haynes, 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court “do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record.” Id.

[¶19] “Statutory interpretation is a question of law, which is fully reviewable on appeal.” Zajac v. Traill Cty. Water Res. Dist., 2016 ND 134, ¶ 6, 881 N.W.2d 666 (citing Nelson v. Johnson, 2010 ND 23, ¶ 12, 778 N.W.2d 773). “The primary purpose of statutory interpretation is to determine the intention of the legislation.” Id. (citing In re Estate of Elken, 2007 ND 107, ¶ 7, 735 N.W.2d 842). “Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears.” Id. (citing

N.D.C.C. § 1-02-02). “Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language.”

N.D.C.C. § 1-02-03, see also In re F.F., 2006 ND 47, ¶ 13, 711 N.W.2d 144 (“The legislature adheres to commonly accepted grammatical rules.”).

[¶20] “Statutory language must be interpreted in context, with the goal of giving meaning and effect to every word, phrase, and sentence.” State ex rel. Dep’t of Human Servs. v. N.D. Ins. Reserve Fund, 2012 ND 216, ¶ 9, 822 N.W.2d 38 (citations omitted). “Statutes are construed as a whole and are harmonized to give meaning to related provisions.” Id.

[¶21] “If the language of a statute is clear and unambiguous, ‘the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.’” Zajac, 2016 ND 134, ¶ 6, 881 N.W.2d 666 (citing N.D.C.C. § 1-02-05) (alteration added in Zajac). “If the language of the statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute.” Id. (citing N.D.C.C. § 1-02-39).

[¶22] “Further, [the Court] ‘construe[s] statutes to avoid absurd or illogical results.’” State v. Stegall, 2013 ND 49, ¶ 16, 828 N.W.2d 526 ((quoting Mertz v. City of Elgin, Grant Cty., 2011 ND 148, ¶ 7, 800 N.W.2d 710) (citing N.D.C.C. § 1-02-38 (“In enacting a statute, it is presumed that: ... [a] just and reasonable result is intended.”)). “Extrinsic aids may be used to interpret a statute to avoid an absurd result and to determine whether the interpretation is consonant with legislative intent.” Id. (internal and external citations omitted).

LAW AND ARGUMENT

I. **Jesser was not denied a right to consult with an attorney before deciding whether to submit to the chemical test for intoxication.**

[¶23] “[A] person arrested for driving under the influence of intoxicating liquor has a qualified statutory right to consult with an attorney before deciding whether to submit to a chemical test.” Baillie v. Moore, 522 N.W.2d 748, 750 (N.D. 1994) (citing Kuntz v. State Highway Comm’r, 405 N.W.2d 285, 290 (N.D. 1987)). The “right of an arrested person to have a reasonable opportunity to consult with an attorney before taking a chemical test is a statutory right based on N.D.C.C. § 29-05-20.” City of Mandan v. Leno, 2000 ND 184, ¶ 9, 618 N.W.2d 161 (citing Kuntz, 405 N.W.2d at 287).

[¶24] “[I]f 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.” Kuntz, 405 N.W.2d at 290. “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.

[¶25] This Court has stated that “an arrestee making an ambiguous statement suffers the consequence of that ambiguity.” Kasowski v. Dir., N.D. Dep’t of Transp., 2011 ND 92, ¶ 14, 797 N.W.2d 40 (citing Lange v. N.D. Dep’t of Transp., 2010 ND 201, ¶ 7, 790 N.W.2d 28 (discussing ambiguity regarding a request to take an independent chemical test for intoxication); Maisey v. N.D. Dep’t of Transp., 2009 ND 191, ¶ 20, 775 N.W.2d 200 (discussing ambiguity concerning a refusal to take a chemical test for intoxication)). “An arrestee cannot complain

about a law enforcement officer's reasonable interpretation of the arrestee's ambiguous statements." Id. (quoting Lange, at ¶ 7). "An officer who deems a request to be ambiguous should attempt to clarify the matter with the driver." City of Grand Forks v. Risser, 512 N.W.2d 462, 464 (N.D. 1994).

[¶26] "There are no bright line rules for determining whether a 'reasonable opportunity' to consult with an attorney has been afforded; rather, the determination of whether a reasonable opportunity has been provided turns on an objective review of the totality of the circumstances." Lies v. Dir., N.D. Dep't of Transp., 2008 ND 30, ¶ 10, 744 N.W.2d 783 (citing State v. Pace, 2006 ND 98, ¶¶ 6-7, 713 N.W.2d 535). "Whether a person has been afforded a reasonable opportunity to consult with an attorney is a mixed question of law and fact." Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 10, 622 N.W.2d 180 (citing Groe v. Comm'r of Pub. Safety, 615 N.W.2d 837, 841 (Minn. Ct. App. 2000)).

[¶27] In this case, Jesser's argument that he was denied his right to consult with an attorney before deciding whether to submit to the chemical test for intoxication fails, because under the totality of the circumstances Jesser did not affirmatively request for an attorney. Further, in the alternative, if Jesser did make an affirmative request Deputy Peterson did not interfere with Jesser's request and a reasonable opportunity was provided Jesser.

[¶28] After being read the implied consent advisory and being asked to submit to a chemical breath test by Deputy Peterson, Jesser would not make a decision and instead went back and forth about whether he wanted to do the test arguing with Deputy Peterson that the deputy did not see him driving. App. 6, ll. 10-12. Deputy

Peterson then asked Jesser if he wanted to consult an attorney, and Jesser responded by saying he would like to but he did not know who to call. App. 6, ll. 12-14. They arrived at the Burleigh Morton Detention Center and Deputy Peterson attempted to make arrangements with the jail staff for Mr. Jesser to use a phone and phone book but jail staff was uncooperative in providing the items. App. 7, ll. 14-16; App. 7, l. 21 – App. 8, l. 3. Deputy Peterson advised Jesser he would provide him with a phone and phonebook to contact an attorney. App. 8, ll. 3-5. Jesser, however, indicated he did not have an attorney and “he just kept saying he didn’t know who to call.” App. 8, ll. 5-6.

[¶29] While it is undisputed that Deputy Peterson took no further action to retrieve a phone or phone book after Jesser’s comments of not knowing who to call, it is also undisputed that Jesser did not again make any mention of an attorney, at that time or any time thereafter, or push the issue any further. App. 9, ll. 3-5 ; App. 9, ll. 9-15; App. 10, ll. 7-10. When Deputy Peterson again asked Jesser if he was willing to submit to the chemical breath test, Jesser said no. App. 9, l. 20 – App. 10, l. 1.

[¶30] Based upon the evidence, the hearing officer found:

Deputy Peterson informed Mr. Jesser of the post-arrest implied consent advisory for a chemical test. Deputy Peterson asked Mr. Jesser to submit to a chemical breath test. Deputy Peterson asked Mr. Jesser if Mr. Jesser would like to speak to an attorney. Mr. Jesser stated he would but that he did not know who to call. Deputy Peterson told Mr. Jesser he would have access to a telephone and a phone book. Mr. Jesser again stated he would not know who to call. Deputy Peterson took no further action regarding obtaining a phone book or a telephone. Mr. Jesser never again mentioned anything about contacting an attorney to Deputy Peterson. Deputy Peterson again asked if Mr. Jesser would take the chemical breath test. Mr. Jesser verbally stated he would not submit to the chemical

breath test. No chemical test was administered with regard to this encounter. No evidence was submitted to show that Mr. Jesser ever changed his mind or stated he wanted to submit to a chemical test breath test.

Tr. 65, l. 16 – Tr. 66, l. 6. From these findings the hearing officer then concluded:

. . . , Mr. Jesser did not invoke his limited statutory right to counsel in this case. Deputy Peterson told Mr. Jesser he would provide him with a telephone book and a telephone in order to contact an attorney. Mr. Jesser stated, again, he would not know who to call. Mr. Jesser never asked to speak to an attorney. He only stated he would talk to an attorney, but wouldn't know who to call. Once Deputy Peterson told him he would provide a telephone and telephone book, Mr. Jesser again stated he would not know who to call. His statements regarding an attorney were passive. Mr. Jesser never accepted Deputy Peterson's offer of a telephone and telephone book. There was no request to speak to an attorney by Mr. Jesser. Even if Mr. Jesser had made a request to speak to an attorney, a reasonable opportunity was offered him by Deputy Peterson and Mr. Jesser did not take him up on that access. He again stated he would not know who to call. The limited statutory right to counsel was not violated.

Tr. 67, ll. 3-19.

[¶31] Deference must be given by the Court to the hearing officer's interpretation of Jesser's statements under the applicable standard of review. See Eriksmoen v. Dir., N.D. Dep't of Transp., 2005 ND 206, ¶ 13, 706 N.W.2d 610 ("The hearing officer concluded Eriksmoen's 'limited statutory right to consult with an attorney was afforded to her.' . . . We believe the hearing officer's findings are supported from the record and are not clearly erroneous.") Jesser must suffer the consequences of his statements. Jesser cannot complain about the reasonable objective interpretation of his statements, which were that he would not know who to call and that he did not want the deputy to follow through with providing him with a phone or phonebook. Jesser was not denied his statutory right to consult with an attorney before deciding whether to submit to a blood test. Therefore, the Department had authority to revoke Jesser's driving privileges for his refusal to

submit to the chemical breath test.

II. Jesser did not satisfy the statutory requirements of N.D.C.C. § 39-20-14 in order to cure his refusal of the onsite screening test.

[¶32] “[R]efusal of the screening test can be cured by consenting to take the chemical test after arrest.” Leno, 2000 ND 184, ¶ 15, 618 N.W.2d 161. Section 39-20-14(3) provides that “[i]f [an] 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.*” N.D.C.C. § 39-20-14(3) (emphasis added). Section 39-20-14(4) 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.*” N.D.C.C. § 39-20-14(4) (emphasis added).

[¶33] Under Kuntz, if an arrested person is not given a reasonable opportunity “to consult with an attorney before deciding to take a chemical test . . . his failure to take the test is not a refusal upon which to revoke his license under Chapter 39-20, N.D.C.C.” 405 N.W.2d at 290. However, that principle has never been extended to a person’s ability to cure a refusal of an onsite screening test. Rather, its application has been limited to the requested chemical test. Instead, the plain language of N.D.C.C. § 39-20-14 makes it explicitly clear the only way to “cure” the refusal of onsite screening test is when the motorist actually provides a sufficient sample for a chemical test.

[¶34] While there are legal or statutory reasons why a person who fails to submit to a chemical test under N.D.C.C. § 39-20-01 cannot be determined to have “refused” the chemical test, neither this Court nor the legislature has explained that chemical test request deficiencies cures the refusal of an onsite screening test. See e.g. Scott v. N.D. Dep’t of Transp., 557 N.W.2d 385, 387-88 (N.D. 1996) (holding that an unarrested driver cannot cure a refusal of an onsite screening test and further explaining that even if Scott has been functionally arrested the arrest itself is not enough to trigger the required testing under N.D.C.C. § 39-20-01). In fact, the language of N.D.C.C. § 39-20-14 does not provide for curing of an onsite screening test refusal when law enforcement fails to comply with the requirements of N.D.C.C. § 39-20-01, but instead provides for the curing of the refusal only when the individual provides a sufficient chemical sample of breath, blood, or urine. If the legislature intended for statutory or legal violations of N.D.C.C. § 39-20-01 to cure onsite screening test refusals it could have plainly and easily said so.

[¶35] Jesser did not satisfy the statutory requirements of N.D.C.C. § 39-20-14 in order to cure his refusal of the onsite screening test.

CONCLUSION

[¶36] The Department requests this Court reverse the Judgment of the Burleigh County District Court and affirm the Hearing Officer’s Decision revoking Jesser’s driving privileges for a period of 180 days.

Dated this 8th day of May, 2019.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Michael Pitcher
Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellant.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Corey Joseph Jesser,)	
)	CERTIFICATE OF COMPLIANCE
Appellee,)	
)	
v.)	Supreme Ct. No. 20190101
)	
North Dakota Department of)	District Ct. No. 08-2018-CV-02305
Transportation,)	
)	
Appellant.)	

¶1 The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellant contains 21 pages.

¶2 This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2017 word processing software in Arial 12 point font.

Dated this 8th day of May, 2019.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Michael Pitcher
Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellant.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Corey Joseph Jesser,)	
)	
Appellee,)	Supreme Ct. No. 20190101
)	
v.)	District Ct. No. 08-2018-CV-02305
)	
North Dakota Department of)	CERTIFICATE OF SERVICE
Transportation,)	
)	
Appellant.)	

[¶1] I hereby certify that on May 8, 2019, the following documents: **BRIEF OF APPELLANT, CERTIFICATE OF COMPLIANCE, and APPENDIX TO BRIEF OF APPELLANT** were filed through electronic filing and served upon Chad R. McCabe at crmccabe@midconetwork.com.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Michael Pitcher
Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email mtpitcher@nd.gov

Attorneys for Appellant.