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OCTOBER 3, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Cordell James Zeien,

Appellant/Petitioner,

v.

Thomas Sorel, Director of the North Dakota Department of Transportation,

Appellee/Respondent.

Supreme Court Case No. 20190264
District Court Case No. 53-2019-CV-00168

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE WILLIAMS COUNTY DISTRICT COURT, THE HONORABLE JOSH B. RUSTAD, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

ORAL ARGUMENT REQUESTED

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[¶1] TABLE OF CONTENTS

By paragraph

[¶2] **TABLE OF AUTHORITIES**

UNITED STATES SUPREME COURT

FIFTH CIRCUIT

NORTH DAKOTA

UNITED STATES CONSTITUTION

NORTH DAKOTA CONSTITUTION

NORTH DAKOTA CENTURY CODE

NORTH DAKOTA RULES OF APPELLATE PROCEDURE

[¶3] **JURISDICTIONAL STATEMENT**

[¶4] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI § 8, N.D.C.C. § 27-05-06(4) and N.D.C.C. § 39-20-06. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 28-27-01 and N.D.C.C. § 28-27-02. This appeal is timely under N.D.R.App.P. 4(a)(1).

[¶5] **STATEMENT OF THE ISSUE ON APPEAL**

Did the Administrative Hearing Officer err in the Findings of Fact and Conclusions of Law because law enforcement failed to read the advisory required pursuant to N.D.C.C. § 39-20-01(3)(a)?

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Cordell James Zeien, appeals to the Supreme Court of North Dakota from the decision of the North Dakota Department of Transportation issued by Hearing Officer Sarah Huber dated November 13, 2018 and mailed November 14, 2018 revoking his North Dakota driving privileges for 180 days and Hearing Officer's Disposition of Petition for Reconsideration issued by Hearing Officer Sarah Huber dated December 31, 2018 and mailed on January 2, 2019 informing Mr. Zeien that his petition for reconsideration was granted but his prayer for relief was denied, and the Order for Judgment dated June 24, 2019, and Judgment dated July 31, 2019 by the District Court, Judge Josh B. Rustad, affirming the decision of the North Dakota Department of Transportation.

[¶8] **STATEMENT OF THE FACTS**

[¶9] On October 11, 2018 law enforcement made contact with Mr. Zeien who was parked on the side of a gravel road. Transcript page 9, lines 4-23 (T. 9:4-23).

[¶10] Upon speaking with Mr. Zeien law enforcement made observations that led them

to believe Mr. Zeien had consumed alcohol and began an investigation for actual physical control. T. 4:6-6:25. After conducting an investigation of Mr. Zeien law enforcement arrested him. T. 20:2-3.

[¶11] After arresting Mr. Zeien law enforcement read Mr. Zeien an incorrect implied consent advisory by specifically only informing Mr. Zeien that "refusal to take the test as directed by law enforcement is a crime" and omitted that refusal to take a breath or urine test is a crime (Exhibit 16 (Audio/Visual Recording beginning at approximately 42:39)) and asked Mr. Zeien to submit to a breath test, to which Mr. Zeien stated he would rather not. T. 20:21-21:8.

[¶12] **LAW AND ARGUMENT**

[¶13] **Standard of Review**

[¶14] "[R]eview of an administrative agency's suspension of a driver's license is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28–32." Richter v. N.D. Dep't of Transp., 2010 ND 150, ¶ 6, 786 N.W.2d 716.

[¶15] N.D.C.C. § 28-32-46 states the standard of review for this matter.

> A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are 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.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

[¶16] N.D.C.C. § 28-32-24(3) states that

> [u]pon proper objection, evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded. In the absence of proper objection, the agency, or any person conducting a proceeding for it, may exclude objectionable evidence.

See Richter v. North Dakota Department of Transportation, 2008 ND 105, ¶9 (N.D. 2008), 750 N.W.2d 430.

[¶17] "An agency's decisions on questions of law are fully reviewable." Kiecker v. North Dakota Dep't of Transp., 2005 ND 23, ¶ 8, 691 N.W.2d 266 (citations omitted). "Whether a finding of fact meets a legal standard is a question of law," which is fully reviewable on appeal. State v. Mitzel, 2004 ND 157, ¶ 10, 685 N.W.2d 120. "The existence of consent is a question of fact to be determined from the totality of the circumstances." Id. at ¶ 13. Whether consent is voluntary is generally decided from the totality of the circumstances. McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 14. The "standard of review for a claimed violation of a constitutional right is de novo." Id. at ¶ 8.

[¶18] **The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because law enforcement failed to read the advisory required pursuant to N.D.C.C. § 39-20-01(3)(a) and therefore Mr. Zeien did not refuse a**

chemical test.

[¶19] The advisory read to Mr. Zeien by law enforcement failed to communicate substantive information of the statute N.D.C.C. § 39-20-01(3)(a). A review of the audio visual recording confirms the testimony from law enforcement at the hearing that law enforcement failed to inform Mr. Zeien as required pursuant to N.D.C.C. § 39-20-01(3)(a) which specifically requires that

> [t]he law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to submit to a test directed by the law enforcement officer may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years. In addition, the law enforcement officer shall inform the individual refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence.

[¶20] In this case law enforcement specifically only informed Mr. Zeien that "refusal to take the test as directed by law enforcement is a crime" and omitted that refusal to take a breath or urine test is a crime. Exhibit 16, Audio/Visual Recording beginning at approximately 42:39. The failure by law enforcement to read a complete advisory has been previously addressed by the North Dakota Supreme Court in part as follows:

> Section 39-20-01(3), N.D.C.C., requires "a specific warning be provided to an arrested defendant before the results of a chemical test can be admitted in a[n] ... administrative proceeding." O'Connor, at ¶ 13. Neither the plain language of N.D.C.C. § 39-20-01(3) nor its legislative history indicate an intent by the legislature to restrict an officer's speech to only the specific words written in the statute. Instead, the statute provides only the mandatory language that must be included in the advisory. See N.D.C.C. § 39-20-01(3)(b); State v. Bohe, 2018 ND 216, ¶ 16, 917 N.W.2d 497.

Korb v. N. Dakota Dep't of Transportation, 2018 ND 226, ¶ 10, 918 N.W.2d 49, 53.

> As [the North Dakota Supreme Court] explained in State v. O'Connor, 2016 ND 72, 877 N.W.2d 312, this provision[,N.D.C.C. § 39-20-

> 01(3)(b),] sets out clear and specific instructions for exactly what information must be communicated to a driver who is arrested for driving under the influence. Subdivision (b) strictly requires communicating all the information required by subdivision (a) before a test result is admissible. O'Connor, at ¶¶ 8, 11 (applying same version of § 39-20-01(3) at issue here). Considering only the statute as explained by O'Connor, the advisory was incomplete and thus inadmissible under subdivision (b).

Schoon v. N. Dakota Dep't of Transportation, 2018 ND 210, ¶ 12, 917 N.W.2d 199, 203.

> In Schoon, we determined a substantive modification of the advisory provided by N.D.C.C. § 39-20-01(3)(a) rendered the advisory incomplete. 2018 ND 210, ¶ 12, 917 N.W.2d 199. In coming to our decision, this Court held that the admissibility requirement in N.D.C.C. § 39-20-01(3)(b) is not conditioned on whether the advisory was accurate in stating the law or whether the advisory accurately communicated the consequences of the choices available. Id. at ¶ 20. Section 39-20-01(3)(b), N.D.C.C., expressly conditions the admissibility of a chemical test on whether the officer informed the driver of the contents of N.D.C.C. § 39-20-01(3)(a). Id. Although the omitted language of the required implied consent advisory in this case differs from the omitted language of the advisory in Schoon, both omissions were substantive. In turn, the omission of substantive language compels the same result as Schoon; Vigen was not fully informed on the contents of N.D.C.C. § 39-20-01(3)(a), and any evidence obtained as a result of the breath test is therefore inadmissable under N.D.C.C. § 39-20-01(3)(b).

State v. Vigen, 2019 ND 134, ¶ 14, 927 N.W.2d 430, 433–34.

> We have concluded the legislature unambiguously required a request for a refusal be preceded by a request for testing made in compliance with N.D.C.C. § 39-20-01. While this Court has allowed law enforcement to deviate from a verbatim reading of the statutory language of N.D.C.C. § 39-20-01(3)(a), we do require that the advisory communicate all substantive information of the statute. See State v. Vigen, 2019 ND 134, ¶ 15, 927 N.W.2d 430; see also Korb v. N.D. Dep't of Transp., 2018 ND 226, ¶ 10, 918 N.W.2d 49 (finding that N.D.C.C. § 39-20-01(3)(a) provides the mandatory language that must be included in the advisory). Because Alvarado was only provided with a partial implied consent warning (he was not informed that refusing to take a chemical test could be treated as a "crime"), the request for testing was neither in compliance with N.D.C.C. § 39-20-01 nor sufficient to result in a refusal to submit to testing. We therefore conclude the administrative determination that Alvarado refused to take a chemical test is either not in compliance with the law or not supported by the administrative findings.

> A request to submit to testing must be made in accordance to N.D.C.C. § 39-20-01 to support a determination that there has been a refusal to submit to testing under N.D.C.C. § 39-20-01. A request for testing subsequent to a partial implied consent warning is not a request to test under N.D.C.C. § 39-20-01. We affirm the district court, reverse the decision of the administrative hearing officer, and reinstate Alvarado's driving privileges.

Alvarado v. N. Dakota Dep't of Transportation, 2019 ND 231, ¶¶ 8-9, 932 N.W.2d 911.

[¶21] In Vigen the chemical test was inadmissible because law enforcement failed to advise that it is a crime to refuse to submit to a urine test. Law enforcement failed to advise Mr. Zeien that it is a crime to refuse to submit to a urine or breath test therefore as per Vigen the advisory was inadequate. In Alvorado the driver was not considered to have refused to submit to a chemical test because the advisory was inadequate. The advisory read to Mr. Zeien was inadequate and therefore as per Alvorado Mr. Zeien did not refuse to submit to a chemical test.

[¶22] Because the law enforcement officer did not follow the mandate of N.D.C.C. § 39-20-01 the Department lacks jurisdiction to take action against Mr. Zeien's driving privileges. N.D.C.C. § 39-20-04 permits the Department to take action against a driver who refuses to submit to a test under N.D.C.C. § 39-20-01. Because law enforcement did not follow the requirements of N.D.C.C. § 39-20-01(3)(a) Mr. Zeien actually never refused to submit to testing under N.D.C.C. § 39-20-01.

[¶23] **CONCLUSION**

[¶24] According to the United States Supreme Court the continued possession of a driver's license may become essential to earning a livelihood; as such, it is an entitlement which cannot be taken without the due process mandated by the Fourteenth Amendment. See Dixon v. Love, 431 U.S. 105 (1977); Bell v. Burson, 402 U.S. 535 (1971).

> Individuals may look to several constitutional provisions for protection against state action that results in a deprivation of their property. The Fourteenth Amendment guarantees that individuals are not to be deprived of their property without due process of law, a protection that has been viewed as guaranteeing procedural due process and substantive due process. Procedural due process promotes fairness in government decisions "[b]y requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.' " Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Substantive due process, "by barring certain government actions regardless of the fairness of the procedures used to implement them, [ ] serves to prevent governmental power from being 'used for purposes of oppression.' " Id. (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 15 L.Ed. 372 (1856)).

John Corp. v. City of Houston, 214 F.3d 573, 577 (5th Cir. 2000). Based on the forgoing arguments and law Mr. Zeien respectfully requests the hearing officer's decision be reversed.

[¶25] **REQUEST FOR ORAL ARGUMENT**

[¶26] Mr. Zeien respectfully requests that the North Dakota Supreme Court schedule oral argument for this case as permitted pursuant to N.D.R.App.P. 28(h). This matter involves the statutory interpretation of N.D.C.C. § 39-20-01 and N.D.C.C. § 39-20-04. Oral argument would be helpful to the Court and allow the parties to answer any questions the Justices may have concerning the issues presented in this appeal.

Dated: October 3, 2019

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CERTIFICATE OF COMPLIANCE

[¶27] The undersigned certifies that pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellant contains 12 pages.

[¶28] This brief has been prepared in a proportionally spaced typeface (Times New Roman 12 point font) using the software program Microsoft Office Word.

Dated: October 3, 2019

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CERTIFICATE OF SERVICE

[¶29] Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on October 3, 2019 he electronically served the following on the Clerk of the North Dakota Supreme Court, and the North Dakota Attorney General:

APPELLANT'S BRIEF
APPELLANT'S APPENDIX

through the North Dakota Supreme Court's E-filing Portal.

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Dated: October 3, 2019

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