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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Carter Allan Schulke, Appellee, v. William T. Panos, Director, Department of Transportation, Appellant.	**Supreme Ct. No. 20190328** **District Court No. 09-2019-CV-01945** **ORAL ARGUMENT REQUESTED**

APPEAL FROM THE SEPTEMBER 11, 2019,
JUDGMENT OF THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

HONORABLE TRISTAN J. VAN DE STREEK

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

[¶1] Whether the District Court erred in granting Schulke's appeal and reversing the Hearing Officer's Decision when it determined the hearing officer's legal conclusion that Schulke refused an "onsite" screening test is erroneous as a matter of law.

STATEMENT OF CASE

[¶2] West Fargo Police Officer Matthew Oldham ("Officer Oldham") arrested Carter Allan Schulke ("Schulke") on May 11, 2019, for the offense of driving while under the influence of intoxicating liquor. Appendix to Brief of Appellant ("Dep't App.") at 7. After the conclusion of the June 5, 2019, administrative hearing, the hearing officer issued his findings of fact, conclusions of law, and decision revoking Schulke's driving privileges for a period of three years. Id. at 8-9.

[¶3] Schulke requested judicial review of the Hearing Officer's Decision by the District Court. Id. at 10-12. The District Court reversed the Hearing Officer's Decision. Id. at 13-16. The Department has appealed the District Court's Judgment. Id. at 17-18.

REQUEST FOR ORAL ARGUMENT

[¶4] The Department requests the Court schedule oral argument in this case under N.D.R.App.P. 28(h). This matter involves the question of statutory interpretation as to whether the use of the word "onsite" with respect to screening tests under N.D.C.C. § 39-20-14 requires that such preliminary tests only be administered at the scene of a traffic stop even when undisputed officer-safety concerns dictate otherwise. 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

[¶5] On May 11, 2019, at approximately 1:52 a.m., Officer Oldham stopped a vehicle that was being operated by Schulke, after he observed the vehicle "traveling at 90 miles an hour in a 35 mile an hour zone." Transcript ("Tr.") at 3, l. 18 – 4, l. 23. When Officer Oldham initiated a traffic stop of the vehicle, Schulke attempted to flee. Id. at 4, ll. 2-3. Officer Oldham explained he had his overhead emergency lights on and his siren going, however, Schulke "continued to drive at a high rate of speed." Id. at 4, ll. 16-20. Officer Oldham was able to complete what he described to be a "felony stop" of Schulke's vehicle. Id. at 4, l. 4.

[¶6] After being stopped, Schulke "came out of his vehicle in an aggressive manner" and would not obey Officer Oldham's commands to stop, requiring that the law enforcement officer draw his "weapon for safety concerns." Id. at 5, ll. 1-23. Officer Oldham and other officers handcuffed and searched Schulke, and then placed him in the rear seat of the law enforcement officer's patrol vehicle. Id. at 5, l. 23 – 6, l. 9. Officer Oldham advised Schulke he was under arrest "[f]or fleeing, driving under suspension, reckless endangerment and possession of drug paraphernalia." Id. at 6, ll. 17-19.

[¶7] Officer Oldham testified "I went to advise him that he was under arrest for those charges and detected a strong odor of alcohol coming from his persons. Due to the behavior of the stop, no sobriety tests were done at the scene for safety concerns and conduct … asked to be conducted at the jail." Id. at 6, ll. 21-25. Officer Oldham transported Schulke to the jail where he asked Schulke if he would

consent to field sobriety testing, however, Schulke refused the law enforcement officer's request. Id. at 7, ll. 8-10. Officer Oldham testified "I read him the North Dakota implied consent for the preliminary breath test. Again, he stated he was not there for that reason and he refused and started to become uncooperative." Id. at 7, ll. 17-22.

[¶8] Officer Oldham informed Schulke of the implied consent advisory and requested he submit to a chemical breath test. Id. at 9, ll. 1-15. Officer Oldham testified "[h]e stated again, no, he was not brought there for that reason. And then became extremely uncooperative to the point where deputies took over and removed him from the sally point to a side cell." Id. at 9, ll. 16-20. Officer Oldham arrested Schulke for "DUI refusal." Id. at 8, ll. 16-18.

STATEMENT OF ADMINISTRATIVE PROCEEDING

[¶9] At the hearing, Schulke objected to the proposed revocation of his driving privileges based on his refusal of the onsite screening test on the grounds that (1) "he wasn't advised that he had the opportunity to cure his refusal by submitting to the chemical breath test," and (2) that "[he] was also approached with the DUI after a defacto arrest with field sobriety … or with field … field sobriety testing with the submission of the onsite screening test." Id. at 14, ll. 1-19.

[¶10] The hearing officer concluded that "Schulke also argued that he was never informed that he could cure his refusal if he submitted to the intoxilyzer test. I do not find this argument persuasive pursuant to Castillo v. NDDOT, 2016 ND 253. I also do not find that the evidence showed that Schulke was illegal seized at any time during the encounter." Dep't App. at 8.

[¶11] Schulke requested judicial review of the Hearing Officer's Decision. Id. at 10-12. Schulke's specifications of error included the claim that "[t]he hearing officer erred in concluding that the post-arrest, custodial request for an on-site screening test did not violate N.D.C.C. § 39-20-14(3)." Id. at 11.

[¶12] On appeal to the District Court, Schulke admitted that Officer Oldham had sufficient grounds to request he submit to the screening test. See Appellant's Brief at 4 (Register of Actions at Index # 14). Schulke also did not deny the existence of legitimate officer-safety concerns. Rather, Schulke argued purely as a matter of statutory interpretation that "[b]y including the word 'onsite' in Section 39-20-14(1), the Legislature necessarily required a screening test requested through Section 39-20-14(1) by performed 'onsite,'" and that "a screening test requested after formal arrest and transportation offsite to the Cass County Jail is not an onsite screening test." Id. at 5 (emphasis in original). Schulke alleged that "[b]ecause Mr. Schulke was not 'onsite' when Officer Oldham requested the screening test-he was offsite at the Cass County Jail-the request was not proper within the plain language of Section 39-20-14." Id.

[¶13] The District Court issued its Order Reversing Hearing Officer's Decision in which the Court determined "[t]he hearing officer's legal conclusion that Schulke refused an 'onsite' screening test is erroneous as a matter of law." Dep't App. at 13. Judgment was entered on September 11, 2019. Id. at 15. The Department appealed the Judgment to the North Dakota Supreme Court. Id. at 17-18. The Department requests this Court reverse the Judgment of the Cass County District Court and affirm the Hearing Officer's Decision revoking Schulke's driving

privileges for a period of three years.

STANDARD OF REVIEW

[¶14] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to revoke 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.

[¶15] "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.

[¶16] "Statutory interpretation is a question of law, fully reviewable on appeal." DeForest v. N.D. Dep't of Transp., 2018 ND 224, ¶ 8, 918 N.W.2d 43 (quoting Teigen v. State, 2008 ND 88, ¶ 19, 749 N.W.2d 505). "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. (quoting Zajac v. Traill Cty. Water Res. Dist., 2016 ND 134, ¶ 6, 881 N.W.2d 666; citing N.D.C.C. § 1-02-02).

[¶17] "Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language." Id. (quoting Robot Aided Mfg., Inc. v. Moore, 1999 ND 14, ¶ 12, 589 N.W.2d 187 (quoting N.D.C.C. § 1-02-03)). "The primary purpose of statutory interpretation is to determine the intention of the legislation." Id. (quoting Zajac, at ¶ 6). "[The Court's] focus is on what meaning was intended by words and phrases enacted into law. '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."'" Id. (quoting Zajac, at ¶ 6) (quoting N.D.C.C. § 1-02-05)).

[¶18] The Court "construe[s] statutes to avoid absurd or illogical results." DeForest, 2018 ND 224, ¶ 9, 918 N.W.2d 43 (quoting State v. Stegall, 2013 ND 49, ¶ 16, 828 N.W.2d 526 (quoting Mertz v. City of Elgin, 2011 ND 148, ¶ 7, 800 N.W.2d 710); citing N.D.C.C. § 1-02-38(4) ("In enacting a statute, it is presumed that: ... [a] result feasible of execution is intended.")). "Statutes are interpreted in

context." Id. (quoting In Interest of K.G., 551 N.W.2d 554, 556 (N.D. 1996)). "They are 'construed as a whole and are harmonized to give meaning to related provisions.'" Id. (quoting Indus. Contractors, Inc. v. Taylor, 2017 ND 183, ¶ 11, 899 N.W.2d 680). "Further, '[i]f an irreconcilable conflict exists, the latest enactment will ... be regarded as an exception to or as a qualification of the other.'" Id. (quoting City of Bismarck v. Fettig, 1999 ND 193, ¶ 18, 601 N.W.2d 247; citing N.D.C.C. § 1-02-08).

LAW AND ARGUMENT

The District Court erred in granting Schulke's appeal and reversing the Hearing Officer's Decision when it determined the hearing officer's legal conclusion that Schulke refused an "onsite" screening test is erroneous as a matter of law.

A. Reasonable officer-safety concerns justified Officer Oldham's decision to administer the "onsite" screening test at the Cass County jail rather than at the scene of the traffic stop.

[¶19] "An officer may detain an individual at the scene of a traffic stop for a reasonable period of time necessary for the officer to complete his duties resulting from the traffic stop." Ell v. Dir., 2016 ND 164, ¶ 12, 883 N.W.2d 464 (quoting State v. Franzen, 2010 ND 244, ¶ 8, 792 N.W.2d 533). "A person's Fourth Amendment rights are violated by the continued detention after the purposes of the initial traffic stop are completed, unless the officer develops reasonable suspicion that other criminal activity is afoot, then the officer may expand the scope of the stop to address that suspicion." Id. (citing Franzen, at ¶ 9).

[¶20] "The constitutionality of an investigative detention is judged under the framework established in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889

(1968), which requires 'that an investigative detention be "reasonably related in scope to the circumstances which justified the interference in the first place."'" City of Devils Lake v. Grove, 2008 ND 155, ¶ 13, 755 N.W.2d 485 (quoting State v. Fields, 2003 ND 81, ¶ 8, 662 N.W.2d 242). "An investigative detention may continue as long as reasonably necessary to conduct duties resulting from a traffic stop and to issue a warning or citation." Id. at ¶ 14 (citing Fields, at ¶ 8).

[¶21] "If an investigative detention lasts too long or its manner of execution unreasonably infringes an individual's Fourth Amendment interests, it may no longer be justified as an investigative stop and, as a full-fledged seizure, must be supported by probable cause." Grove, 2008 ND 155, ¶ 15, 755 N.W.2d 485 (citing United States v. Sharpe, 470 U.S. 675, 685 (1985); State v. Ressler, 2005 ND 140, ¶ 19, 701 N.W.2d 915). "To determine whether an investigative detention has become a de facto arrest, th[e] [Supreme] Court considers whether the invasion of an individual's Fourth Amendment interests is so minimally intrusive as to be justifiable on reasonable suspicion." Id. (citing State v. Heitzmann, 2001 ND 136, ¶ 18, 632 N.W.2d 1).

[¶22] "Th[e] [Supreme] Court also considers the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." Id. (citing Heitzmann, 2001 ND 136, ¶ 18, 632 N.W.2d 1). "There is no bright line rule for determining when a seizure becomes a de facto arrest." Id. (citing Heitzmann, at ¶ 18).

[¶23] "Officers conducting investigative stops 'may take steps reasonably necessary to protect their personal safety.'" United States v. Binion, 570 F.3d

1034, 1039 (8th Cir. 2009) (quoting United States v. Stachowiak, 521 F.3d 852, 855 (8th Cir. 2008) (quoting United States v. Shranklen, 315 F.3d 959, 961 (8th Cir. 2003))). "The question is an objective one: 'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" Id. (quoting Terry, 392 U.S. at 27).

[¶24] "[T]here are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention." Florida v. Royer, 460 U.S. 491, 504 (1983). See, e.g., United States v. Martinez, 462 F.3d 903, 908 (8th Cir. 2006) ("[O]bvious exigencies of the situation" may justify "moving a suspect from one location to another [without] exceed[ing] the bounds of *Terry* because it was reasonable to relocate the suspect for questioning."); Murphy v. Mifflin Cty. Reg'l Police Dep't, 548 Fed. Appx. 778, 781 (3d Cir. 2013) ("Although he was placed in handcuffs for transport to the police station, the use of handcuffs does not necessarily transform an investigatory seizure into a formal arrest requiring probable cause. Furthermore, relocating Murphy to the police station to continue the investigation did not convert his detention into an arrest.") (citations omitted).

[¶25] Furthermore, once an arrest based upon probable cause has been made, "the requirement that the detention be minimally intrusive no longer applie[s]." Binion, 570 F.3d at 1040. "[A] suspect's involuntary removal and transportation to a police station is lawful if based on probable cause, regardless of whether such continued detention is a formal arrest or an involuntarily detention for further questioning." United States v. Hale, Case No. 6:17-CR-03021-MDH, 2019 WL

2337390, at *5 (W.D. Mo. Jan. 2, 2019) (quoting United States v. Williams, 604 F.2d 1102, 1124 (8th Cir. 1979) (citing Dunaway v. New York, 442 U.S. 200, 213-15 (1979))).

[¶26] In this case, it is undisputed that after being stopped, Schulke "came out of his vehicle in an aggressive manner" and would not obey Officer Oldham's commands to stop, requiring that the law enforcement officer draw his "weapon for safety concerns." Tr. at 5, ll. 1-23. Officer Oldham and other officers handcuffed and searched Schulke, and then placed him in the rear seat of the law enforcement officer's patrol vehicle. Id. at 5, l. 23 – 6, l. 9.

[¶27] Officer Oldham advised Schulke he was under arrest "[f]or fleeing, driving under suspension, reckless endangerment and possession of drug paraphernalia." Id. at 6, ll. 17-19. Officer Oldham testified "I went to advise him that he was under arrest for those charges and detected a strong odor of alcohol coming from his persons. Due to the behavior of the stop, no sobriety tests were done at the scene for safety concerns and conduct … asked to be conducted at the jail." Id. at 6, ll. 21-25.

[¶28] Reasonable officer-safety concerns justified Officer Oldham's decision to administer the "onsite" screening test at the Cass County jail, rather than at the scene of the traffic stop. In addition, by the time Officer Oldham transported Schulke to the Cass County jail, Schulke was under arrest for fleeing, driving under suspension, reckless endangerment and possession of drug paraphernalia so the requirement that the detention be minimally intrusive no longer applied.

B. Section 39-20-14, N.D.C.C., does not require that the "onsite" screening test be administered at the scene of the traffic stop when exigent circumstances exist.

[¶29] Exigent circumstances – as applied to search and seizure issues – may justify deviations from statutory or constitutional provisions. See, e.g., Kentucky v. King, 563 U.S. 452, 462 (2011) ("[T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable . . . ."); United States v. Hill, 430 F.3d 939, 941 (8th Cir. 2005) ("[A] 'legitimate concern for the safety' of law enforcement officers or other individuals constitutes exigent circumstances that justify warrantless entry."); United States v. Vance, 53 F.3d 220, 222 (8th Cir. 1995) (quoting United States v. Antwine, 873 F.2d 1144, 1147 (8th Cir. 1989)); United States v. Bonner, 874 F.2d 822, 823-24 (D.C. Cir. 1989) (where "officers' entrance into the apartment [arguably] failed to comply with the knock-and-announce statute," court stated "we are further satisfied that exigent circumstances obtained so as to justify any deviation from complete compliance with the terms of the statute").

[¶30] An exigent circumstances rule similarly should be applied to the administration of screening tests under section 39-20-14. At the time of Schulke's arrest, section 39-20-14(1) provided for an "onsite screening test or tests" as follows:

> 1. Any individual who operates a motor vehicle upon the public highways of this state is deemed to have given consent to submit to an ***onsite screening test or tests*** of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer who has reason to believe that the individual committed a moving traffic violation or a violation under section 39-08-01 or an equivalent offense, or was

> involved in a traffic accident as a driver, and in conjunction with the violation or the accident the officer has, through the officer's observations, formulated an opinion that the individual's body contains alcohol.

N.D.C.C. § 39-20-14(1) (2017 N.D. Sess. Laws ch. 268, § 8) (emphasis added).[1]

[2] Section 39-20-14(1) does not define the physical limitations of "onsite."

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[1]As enacted by the 1971 North Dakota Legislative Assembly, section 39-20-14 provided for the administration of a "chemical screening test or tests" without reference to an "onsite" location under the following conditions:

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to submit to a ***chemical screening test or tests*** of his breath for the purpose of estimating the alcohol content of his blood if he is involved in any collision which results in death or ***personal injury requiring hospitalization***, upon the request of a law enforcement officer who has reason to believe that such person was under the influence of intoxicating liquor at the time of the collision. A person shall not be required to submit to a chemical screening test or tests of his breath while at a hospital as a patient if the medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement, or objects to the test or tests on the ground that such would be prejudicial to the proper care or treatment of the patient. . . .

1971 N.D. Sess. Laws ch. 383, § 1 (emphasis added).

[2]The 1973 North Dakota Legislative Assembly amended section 39-20-14 to provide for the administration of an "*on site* chemical screening test or tests" under the following conditions:

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to submit to an on site chemical screening test or tests of his breath for the purpose of estimating the alcohol content of his blood upon the request of a law enforcement officer who has reason to believe that such person committed a moving traffic violation. A person shall not be required to submit to a chemical screening test or tests of his breath while at a hospital as a patient if the medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement, or objects to the test or tests on the ground that such

[¶31] Section 39-20-14(2), however, provides an *express* exception to the requirement that the screening test be administered "onsite" under the exigent circumstances when the driver is a patient in a hospital as follows:

> 2. An individual may not be required to submit to a screening test or tests of breath ***while at a hospital as a patient*** if the medical practitioner in immediate charge of the individual's case is not first notified of the proposal to make the requirement, or objects to the test or tests on the ground that such would be prejudicial to the proper care or treatment of the patient.

N.D.C.C. § 39-20-14(2) (2017 N.D. Sess. Laws ch. 268, § 8) (emphasis added).

[¶32] The critical factor regarding a screening test when combined with exigent circumstances – as seemingly recognized by this Court – should not be the characterization of the location of its administration, but rather, its distinction should be as a *preliminary screening test* as opposed to a *subsequent chemical test*. See, e.g., Roberts v. N.D. Dep't of Transp., 2015 ND 137, ¶ 11, 863 N.W.2d 529 ("[T]he North Dakota Century Code authorizes two separate tests, each for a specific purpose under N.D.C.C. §§ 39-20-01 and 39-20-14. Section 39-20-04, N.D.C.C., authorizes revocation for refusal of the preliminary onsite screening test under section 39-20-14 and for refusal of the subsequent chemical test to determine alcohol concentration under section 39-20-01.").

[¶33] In this case, reasonable officer-safety concerns justified Officer Oldham's decision to administer the "onsite" screening test at the Cass County jail, rather

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> would be prejudicial to the proper care or treatment of the patient. . . .

1973 N.D. Sess. Laws ch. 315, § 1.

than at the scene of the traffic stop. These same reasonable officer-safety concerns constituted exigent circumstance which did not require that the "onsite" screening test be administered at the scene of the traffic stop.

CONCLUSION

[¶34] The Department requests this Court reverse the Judgment of the Cass County District Court and affirm the Hearing Officer's Decision revoking Schulke's driving privileges for a period of three years.

Dated this 9th day of December, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Carter Allan Schulke, Appellee, v. William T. Panos, Director, Department of Transportation, Appellant.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20190328** **District Court No. 09-2019-CV-01945**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellant contains 20 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Arial 12 point font.

Dated this 9th day of December, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Carter Allan Schulke, Appellee, v. William T. Panos, Director, Department of Transportation, Appellant.	**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL** **Supreme Ct. No. 20190328** **District Court No. 09-2019-CV-01945**

[¶1] I hereby certify that on December 9, 2019, the following documents: **BRIEF OF APPELLANT, CERTIFICATE OF COMPLIANCE, and APPENDIX TO BRIEF OF APPELLANT** were filed electronically with the Clerk of Supreme Court. Service is being accomplished upon Carter Allan Schulke, by and through his attorney, Luke T. Heck at lheck@vogellaw.com.

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