

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Holden Thomas Kastet,

Appellee,

v.

Ronald Henke, Interim Director,  
Department of Transportation,

Appellant.

**Supreme Ct. No. 20200003**

**District Ct. No. 47-2019-CV-00486**

**ORAL ARGUMENT REQUESTED**

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**APPEAL FROM THE OCTOBER 29, 2019,  
JUDGMENT OF THE DISTRICT COURT  
STUTSMAN COUNTY, NORTH DAKOTA  
SOUTHEAST JUDICIAL DISTRICT**

**HONORABLE CHERIE L. CLARK**

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**BRIEF OF APPELLANT**

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## **STATEMENT OF ISSUES**

[¶1] Whether the hearing officer abused his discretion in admitting Kastet's chemical breath test results into evidence?

[¶2] Whether the evidence in the record established that Trooper King scrupulously complied with the approved method for testing Kastet's breath on the Intoxilyzer 8000 when a previously initiated testing sequence was aborted due to radio frequency interference (RFI) being detected, at a time when Kastet was exercising his statutory right to counsel, and prior to Kastet providing any breaths samples for analysis or actively participating in the testing sequence.

## **STATEMENT OF CASE**

[¶3] On July 7, 2019, Trooper Nathaniel King (Trooper King) of the North Dakota Highway Patrol arrested Holden Thomas Kastet (Kastet) for driving a vehicle while under the influence of intoxicating liquor (DUI). Appendix (App.) 18. A Report and Notice, including a temporary operator's permit, was issued to Kastet after chemical Intoxilyzer test results indicated Kastet's alcohol concentration was 0.097 percent by weight. Id. The Report and Notice notified Kastet of the Department's intent to suspend his driving privileges. Id.

[¶4] In response to the Report and Notice, Kastet requested an administrative hearing. Transcript of Testimony of Administrative Hearing (Tr.) at Exhibit (Ex.) 1, page 5. The hearing was held on August 2, 2019. Tr. Ex. 2. In accordance with N.D.C.C. § 39-20-05(2) the hearing officer considered four broad issues, as follows:

- (1) Whether the arresting 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 in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;

- (2) Whether the person was placed under arrest;
- (3) Whether the person was tested in accordance with N.D.C.C. section 39-20-01 and, if applicable, section 39-20-02; and;
- (4) Whether the test results show the person had an alcohol concentration of at least eight one-hundredths of one percent but less than eighteen one-hundredths of one percent by weight.

Tr. Ex. 2.

[¶5] Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Kastet's driving privileges for a period of 365 days. App. 31-32.

[¶6] Kastet requested judicial review of the hearing officer's decision. App. 33-35. The District Court reversed the Hearing Officer's Decision. App. 36. Judgment was entered on October 29, 2019. App. 38. The Department has appealed the District Court's Judgment. App. 40-41.

### **REQUEST FOR ORAL ARGUMENT**

[¶7] 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 whether the hearing officer abused his discretion in admitting chemical breath test results into evidence. This matter may also involve the interpretation of the state toxicologist's approved method for conducting a breath test on the Intoxilyzer 8000 and oral argument would be helpful in the Court's review of the Hearing Officer's decision.

### **STATEMENT OF FACTS**

[¶8] On July 6, 2019, at 7:11 a.m., Trooper King stopped a vehicle driven by

Kastet for exceeding the posted speed limit. Tr. 4, l. 17 – Tr. 6, l. 3. Trooper King detected the odor of an alcoholic beverage and observed indicia of intoxication coming from Kastet. Tr. 7, ll. 8-10. Kastet acknowledged consuming alcohol the night before. Tr. 7, ll. 12-13. Following the administration of several field sobriety tests, and an onsite screening test, Trooper King arrested Kastet for driving under the influence of alcohol (DUI) at 7:38 p.m. Tr. 7, l. 13 – Tr. 12, l. 13. Trooper King provided the statutory implied consent advisory to Kastet and asked if he would submit to a chemical breath test. Tr. 13, ll. 20-24. Kastet agreed to take the test. Tr. 13, l. 25 – Tr. 14, l. 1. Kastet was transported to the Stutsman County Correctional Center. App. 7, ll. 3-4.

[¶9] Trooper King started the Intoxilyzer 8000 chemical breath testing machine in preparation for the test. App. 7, ll. 16-17. Before any breath samples were provided, Kastet invoked his limited statutory right to speak with his attorney prior to testing. App. 7, ll. 17-19. Trooper King provided Kastet an opportunity to attempt to contact his counsel by using the jail telephone. App. 7, ll. 21-22; App. 8, ll. 1-3. The Intoxilyzer 8000 machine continued running while Kastet was making phone calls. App. 7, ll. 22-23.

[¶10] While Kastet was making calls, another law enforcement officer set down his laptop computer by the Intoxilyzer instrument. App. 9, ll. 19-23. At 8:27 a.m., the Intoxilyzer 8000 automatically terminated the first chemical breath test due to detecting radio frequency interference (RFI) and printed a test record. App. 9, l. 23 – App. 10, l. 9; App. 19. At the time RFI was detected, Kastet was continuing to page through a phone directory to find other attorneys to contact after calls to

his attorney were unsuccessful. App. 8, ll. 1-7; App. 10, ll. 19-24; App. 16, ll. 14-15. Trooper King advised Kastet they were nearing the two-hour testing time limit and that Kastet needed to make a decision if he wanted to take the test or not. App. 9, ll. 6-9.

[¶11] At 8:55 a.m., Trooper King restarted the Intoxilyzer 8000 instrument and administered a chemical breath test to Kastet. App. 9, ll. 9-10; App. 20. The laptop was no longer present. App. 16, ll. 16-18. Trooper King administered the Intoxilyzer 8000 chemical breath test to Kastet in accordance with the approved method obtaining a result of 0.097 at 9:03 a.m. App. 11, l. 3 – App. 12, l. 1; App. 20.

### **STANDARD OF REVIEW**

[¶12] “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.

[¶13] “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.

### **LAW AND ARGUMENT**

**The hearing officer properly considered the results of the Intoxilyzer 8000 test Trooper King administered to Kastet.**

[¶14] Kastet raises the issue of whether his Intoxilyzer test results were admissible. This Court reviews the administrative hearing officer’s ruling for an abuse of discretion. See Knudson v. Dir., N.D. Dep’t of Transp., 530 N.W.2d 313, 316 (N.D. 1995). An abuse of discretion occurs when a hearing officer acts in an arbitrary, unreasonable, or capricious manner or misinterprets or misapplies the law. Id. Thus, the broad question, properly framed, is whether the hearing officer abused his discretion in admitting Kastet’s Intoxilyzer test results into evidence.

[¶15] “Section 39-20-07, N.D.C.C., . . . allows the use of certified documents to establish the evidentiary foundation for the result.” Ell v. Dir., Dep’t of Transp.,

2016 ND 164, ¶ 17, 883 N.W.2d 464. The Supreme Court has “said four foundational elements must be documented or demonstrated for the admission of the test result:

(1) the sample must be properly obtained, (2) the test must be fairly administered, (3) the method and devices used to test the sample must be approved by the director of the state crime laboratory or the director's designee, and (4) the ... test must be performed by an authorized person or by one certified by the director of the state crime laboratory or the director's designee as qualified to perform it.”

Id. at ¶ 18 (quoting Filkowski v. Dir., N.D. Dep't of Transp., 2015 ND 104, ¶ 12, 862 N.W.2d 785). “The statute eases the Department’s burden in laying an evidentiary foundation for a chemical test result by ‘allowing the admittance of scrupulously completed documents in lieu of lengthy testimony ... [,]’ and also ensures the test was fairly administered.” Id. (quoting Frank v. Dir., N.D. Dep't of Transp., 2014 ND 158, ¶ 10, 849 N.W.2d 248; citing Lee v. N.D. Dep't of Transp., 2004 ND 7, ¶ 10, 673 N.W.2d 245).

[¶16] “The scientific accuracy of the test cannot be established without expert testimony if there is not strict compliance with the approved method.” Ell v. Dir., Dep't of Transp., 2016 ND 164, at ¶ 19 (citing Lee, 2004 ND 7, ¶ 12, 673 N.W.2d 245). “If the documentary evidence and testimony does not show scrupulous compliance with the methods approved by the director of the state crime laboratory or the director’s designee, the evidentiary shortcut provided by N.D.C.C. § 39-20-07 cannot be used and fair administration of the test must be established through expert testimony.” Id. (quoting State v. Van Zomeren, 2016 ND 98, ¶ 10, 879 N.W.2d 449). However, this Court has noted, “‘scrupulous’ compliance does not mean ‘hypertechnical’ compliance.” Buchholtz v. Dir., N.D. Dep't of Transp., 2008

ND 53, ¶ 10, 746 N.W.2d 181 (external citations omitted.) Even when there is a deviation from the state toxicologist's directions, the test results may be admitted if the deviation could not have substantially affected the test results. Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147, 152 (N.D. 1990); see also Wagner v. Backes, 470 N.W.2d 598, 600 (N.D. 1991) ("When . . . we have been able to say that the deviation involved some clerical or ministerial aspect of an approved method and, therefore, could not have affected the test results, we have upheld a license suspension.").

[¶17] On appeal to the district court Kastet argued the approved method was not scrupulously followed by Trooper King because "[t]he Intoxilyzer 8000 aborted the first chemical breath test due to RFI, and printed a test record, at 8:27 a.m." and Kastet's second test was not obtained until 9:03 a.m., which is not "without delay." App. 3, at Index # 21 ¶¶ 7-8. Kastet's argument is factually erroneous, as Kastet was only administered one chemical Intoxilyzer test as correctly determined by the hearing officer. The first chemical breath test printout which was generated after "RFI" was detected was not a test being administered to Kastet. App. 19.

[¶18] The undisputed evidence shows that after arresting Kastet for DUI, Trooper King read the implied consent advisory and requested Kastet submit to a chemical breath test to which Kastet agreed. Tr. 13, l. 5 – Tr. 14, l. 1. Trooper King transported Kastet to the Stutsman County Correctional Center and started the Intoxilyzer 8000 machine in preparation for the testing. App. 7, ll. 3-14. Prior to Kastet blowing into the machine and providing the first subject breath sample, Kastet asked to speak with his attorney Luke Heck. App. 7, ll. 16-19. Trooper King allowed Kastet to make

phone calls to his attorney, and even provided Kastet a phone book so Kastet could locate and make calls to other attorneys after Kastet's calls to attorney Heck went unanswered. App. 7, l. 21 – App. 8, l. 7.

[¶19] During this time Trooper King allowed the Intoxilyzer 8000 to continue to run. App. 7, ll. 22-23. While Kastet was making phone calls and searching a phone directory, another law enforcement officer entered the testing room and set a laptop computer next to the Intoxilyzer 8000. App. 9, ll. 17-24. This caused the Intoxilyzer 8000 to automatically terminate due to its detection of Radio Frequency Interference (RFI). App. 10, ll. 1-9. The Intoxilyzer printed a test record showing the test was terminated due to RFI being detected at 8:27 a.m. App. 10, l. 11; App. 19. For the next, approximately 30 minutes, Kastet continued to page through the phone book and make calls to attorneys. App. 8, ll. 9-12.

[¶20] After observing Kastet not making any more phone calls, Trooper King advised him he needed to make a decision if he was going to take the test or not. App. 9, ll. 2-9. At 8:55 a.m. an Intoxilyzer 8000 test was administered to Kastet by Trooper King. App. 9, ll. 9-10; App. 20. The laptop was no longer in the testing room and the test was conducted in accordance with the approved method, without RFI being detected. App. 16, ll. 8-20; App. 20.

[¶21] Based on these undisputed facts, the hearing officer concluded, “[t]he test was fairly administered in accordance with Chapter 39-20 and the approved method.” Tr. 36, ll. 4-6. In reaching this conclusion, the hearing officer explained:

Counsel argued that King violated the approved method because he did not immediately remove the laptop from the counter next to the 8000. Counsel acknowledged that when the 8000 reported RFI, no test was being administered to Mr. Kastet because he was attempting

to contact an attorney. Counsel further argued that there was an 27 minute delay between the RFI error and King restarting the machine. Again, Counsel acknowledged that the first test had been abandoned because Kastet requested to speak to an attorney before providing a breath sample. He provided no factual or scientific evidence to suggest that the second test was inaccurate. In *Mees v. NDDOT*, 2013 ND 36, the North Dakota Supreme Court held, “The Intoxilyzer Test Record and Checklist is presumed to show fair administration of the approved method until the defendant shows that the evidence as a whole clearly negates the presumed fact. The defendant must do more than raise a mere possibility of error.” *Id.* at ¶12. The Court instructed that the driver must show a departure from the approved method. *Id.* In Kastet’s case, the first test was abandoned, not because of an RFI error, but because he needed time to call an attorney. At that point, King had the option of manually aborting the test, or simply letting it run its course and “time out” without a breath sample being collected. It was merely fortuitous that another officer set his laptop next to the machine after the test had been abandoned. Once the machine automatically terminated the test, King was under no obligation to interrupt Kastet’s efforts to immediately restart the test. Reading “repeat the test without delay” under these circumstances makes sense in context of the other provisions of the approved method. For two other possible test errors, the approved method requires a delay because the problem involves the breath sample itself. For a “Difference Too Great” error, “The operator shall wait another 20 minutes and ensure the subject has had nothing to eat, drink, or smoke before repeating the Intoxilyzer® 8000 test.” Exhibit 8, page 8 of 9, ¶C. Likewise for an “Invalid Sample” error, “The operator shall wait another 20 minutes and ensure the subject has had nothing to eat, drink, or smoke before repeating the Intoxilyzer® 8000 test.” *Id.* at ¶D. The RFI error does not involve a tainted breath sample, and therefore, the approved method does not require a 20-minute delay before re-testing. Counsel did not suggest that the test might be scientifically inaccurate.

App. 31-32. The hearing officer’s analysis is factually correct and legally sound.

[¶22] The facts in Kastet’s case are substantially similar with the facts presented in *Maier v. N.D. Dep’t of Transp.*, 539 N.W.2d 300 (N.D. 1995). In *Maier*, no blood was collected in the initial attempt to obtain a chemical blood sample from Timothy Maier. *Id.* at 301. The vacutainer and kit were discarded. *Id.* A second kit was opened and a blood sample was drawn into the vacutainer. *Id.* The sample was

forwarded to the State Toxicology Lab for testing and the test result indicated the alcohol concentration was above the legal limit. Id. At the administrative hearing, the hearing officer suspended Maher's driving privileges. Id. The district court reversed the administrative suspension, holding in part that the failure to forward the first vacutainer, under N.D.C.C. § 39-20-03.1, divested the Department of jurisdiction to suspend Maher's driving privileges. Id.

[¶23] This Court reversed the district court's decision in Maher and reinstated the administrative suspension, explaining as follows:

The hearing officer found no blood had entered the first vacutainer tube. It is impossible to obtain an analytical report of a blood test from a vacutainer tube without any blood in it. Therefore, N.D.C.C. § 39-20-03.1 does not require an officer to forward an opened, empty blood collection kit to the Director of the Department of Transportation. As the hearing officer stated, requiring the officer to forward an opened, yet empty test kit would be a 'useless and idle gesture.'

Id. at 302. Similarly, in the case at hand, the hearing officer made a finding of fact that "no test was being administered to Mr. Kastet because he was attempting to contact an attorney." App. 31. The uncontested evidence supports this finding as Kastet had not attempted to blow into the Intoxilyzer 8000 machine before invoking his limited statutory right to speak with counsel after Trooper King had activated the Intoxilyzer 8000 machine. App. 7, ll. 16-19.

[¶24] As was the case in Maher, it is likewise impossible to obtain a breath test result from a machine with no breath sample in it. The hearing officer's factual determination is not against the greater weight of the evidence. The first and only chemical breath test administered to Kastet was the test shown in Exhibit 1, page 4. See App. 20. Therefore, the approved method's instructions when a test is aborted

due to the detection of RFI noting: “The operator shall check for any radio interference near the Intoxilyzer 8000 and repeat the test without delay” was not relevant in this case because no test was being administered. In other words, there was no test to “repeat” as noted in the approved method.

[¶25] In the alternative, even if this Court believes the approved method’s directive to “repeat the test without delay” after detecting RFI is applicable in this case, it was not violated under the circumstances. This Court has held “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 . . . .” Baillie v. Moore, 522 N.W.2d 748, 750 (N.D. 1994). Thus, when Kastet asked to speak to an attorney prior to providing a breath sample for testing Trooper King was mandated to provide him with an opportunity to contact an attorney.

[¶26] It is uncontested that Trooper King did not prevent or hinder Kastet from contacting counsel. In fact, Trooper King provided Kastet with a phone and a phone book to make calls to his attorney and other attorneys. App. 7-9. When Trooper King observed Kastet no longer making calls he again asked Kastet to submit to a chemical breath test and immediately administered the test to Kastet on the Intoxilyzer 8000 machine. App. 10, l. 11 – App. 11, l. 9. The hearing record shows no delay from the time RFI was detected on the first test record (App. 19) to Kastet’s providing of two adequate breath samples on the second Intoxilyzer 8000 test (App. 20). Therefore, under the circumstances Trooper King acted “without delay” in

repeating Kastet's breath test.

[¶27] Yet, even if the court believes there was a deviation from the approved method's directive due to a delay in Kastet's chemical test following the detection of RFI, Kastet's test result was still admissible because there was no showing that this deviation could have affected the test result. Here, it is uncontested that Kastet's chemical test (App. 20) was conducted within two hours of the time of his driving and there is nothing on the face of Kastet's chemical test record that calls into question the validity of the alcohol concentration.

[¶28] More importantly, it seems apparent from a comparison of the approved method's descriptions of other display notifications that the phrase "repeat the test without delay" when RFI is detected, as opposed to "wait another 20 minutes" when "Invalid Sample" is displayed or "[a]n alternative test for the subject need to be obtained" when "Interferent Detect" is displayed, implies that in cases of RFI nothing prevents the operator from immediately starting a chemical test over again. App. 29. Yet, nothing in the approved method's RFI directions explains that waiting to retest, although unnecessary, calls into question evidentiary usefulness of the test result. Id. In other words, the approved method directions do not expound upon why the test must be done "without delay." This is in contrast to the other display notifications, such as "Invalid Sample," "Interferent Detect," or "Ambient Fail" that do provide details as to why a waiting period is required or why an alternative test needs to be sought. Id. The "repeat without delay" language of the approved method, therefore, is not a decree to test immediately after the detection of RFI but simply a directive indicating that no other requirements are required to be satisfied before testing is again



permitted. Therefore, because the “repeat without delay” language is not scientifically mandatory a failure to follow this directive does not impact the scientific accuracy of a subsequent test result.

### **CONCLUSION**

[¶29] The Department requests this Court reverse the Judgment of the Stutsman County District Court and affirm the Hearing Officer’s Decision suspending Kastet’s driving privileges for a period of 365 days.

Dated this 12<sup>th</sup> day of February, 2020.

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Holden Thomas Kastet,

Appellee,

v.

Ronald Henke, Interim Director,  
Department of Transportation,

Appellant.

**CERTIFICATE OF COMPLIANCE**

**Supreme Ct. No. 20200003**

**District Ct. No. 47-2019-CV-00486**

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[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellant contains 17 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 12<sup>th</sup> day of February, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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Appellant.

**CERTIFICATE OF SERVICE  
BY ELECTRONIC MAIL**

**Supreme Ct. No. 20200003**

**District Ct. No. 47-2019-CV-00486**

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[¶1] I hereby certify that on February 12, 2020, 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 Holden Thomas Kastet, by and through his attorney, to Luke Heck at lheck@vogellaw.com.

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