20200016

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 27, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jeremy Nathan Grove,	)	
	)	
Appellee,	)	
	)	Supreme Court No. 20200016
vs.	)	Case No. 49-2019-CV-00120
	)	
	)	
Department of Transportation,	)	
	)	
Appellant.	)	

ON APPEAL FROM THE DISTRICT COURT JUDGEMENT ENTERED
NOVEMBER 19, 2019
FOR THE EAST CENTRAL JUDICIAL DISTRICT
TRAILL COUNTY, NORTH DAKOTA
THE HONORABLE SUSAN L. BAILEY, PRESIDING.

BRIEF OF APPELLEE
JEREMY NATHAN GROVE

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STATEMENT OF THE ISSUES

I. The District Court did not err in reversing the decision of the hearing officer because the issue was properly raised before the hearing officer and the specification of error adequately informed the Department of the issues presented on appeal.

II. Mr. Grove agrees with the Department that, in the event the Supreme Court reverses the District Court's Judgment on the preceding issue, a remand to the District Court is not necessary for a determination on Mr. Grove's remaining issue on appeal, because the Supreme Court is an appropriate body who can rule on the issue.

III. The hearing officer erred in admitting the Report and Notice into evidence over Mr. Grove's objections that the document contained the results of the administered preliminary breath test.

STATEMENT OF THE FACTS

[¶ 1] On July 13, 2019, at approximately 11:29 p.m., North Dakota Highway Patrol Trooper Cody Blake Harstad ("Trooper Harstad") was sitting stationary on Traill County Route 21 near the intersection of 167th Ave NE. In the Matter of the Suspension of the Driving Privileges of Jeremy Nathan Grove, Hearing Transcript, p. 4 (hereinafter Hr'g. Tr.). Trooper Harstad testified he observed a vehicle traveling eastbound on Traill County Road 21 and using his radar observed a reading in excess of 70 miles per hour in a 55 mile per hour speed zone. Id. at p. 4-5. Trooper Harstad initiated a traffic stop on the vehicle. Id. at p. 5-6. Trooper Harstad identified the driver as the appellee, Jeremy Nathan Grove ("Mr. Grove"). Id. at p. 6.

[¶ 2] Trooper Harstad testified he observed Mr. Grove exhibit indicators of intoxication and had Mr. Grove perform field sobriety tests. Id. at p. 7-12. After concluding the field sobriety testing, Trooper Harstad testified Mr. Grove submitted to an on-site screening breath test. Id. at p. 12-13. Trooper Harstad included the results of the screening

breath test on the Report and Notice. Appellant's App. at p. 8. Trooper Harstad placed Mr. Grove under arrest and advised him it was for driving under the influence of alcohol or drugs. Hr'g Tr. at p. 13. Trooper Harstad transported Mr. Grove to the Traill County Jail. Id. at p. 14.

[¶ 3] Once at the county jail, Trooper Harstad advised Mr. Grove of an improper version of the implied consent advisory, including "urine" in the advisory and omitting "directed by the law enforcement officer." Id. at p. 14-15, 28-29. At the time of Mr. Grove's arrest, the Report and Notice contained the following advisory:

> I must inform you that North Dakota law requires you to take a chemical breath or urine test to determine whether you are under the influence of alcohol or drugs. Refusal to take a chemical breath or urine test may result in the revocation of your driving privileges for a minimum of 180 days and up to 3 years. I must also inform you that refusal to take a chemical breath or urine test is a crime punishable in the same manner as driving under the influence. Do you consent to take the chemical breath/urine test that I'm requesting?

Appellant's App. at p. 8. Mr. Grove submitted to a chemical breath test. Hr'g Tr. at p. 14. Trooper Harstad issued Mr. Grove a Report and Notice form that same night. Id. at p. 16-17.

LAW AND ARGUMENT

I. The District Court did not err in reversing the decision of the hearing officer because the issue was properly raised before the hearing officer and the specification of error adequately informed the Department of the issues presented on appeal.

[¶ 4] "The rule that issues must be made before the administrative agency to preserve them on appeal is not absolute." Nelson v. Cass County Soc. Services, 424 N.W.2d 371, 375 n. 5 (N.D. 1988). The North Dakota Supreme Court has considered

issues that were not raised before the hearing officer when it is "in the interest of justice" to do so. Walter v. N.D. State Hwy. Com'r, 391 N.W.2d 155, 158 n. 6 (N.D. 1986); Nelson, 424 N.W.2d at 375 ("Notwithstanding our usual practice of refusing to consider an issue on appeal that was not raised at the Department hearing . . . we will remand this appeal in the interests of justice . . . ."). The Supreme Court permits the retroactive application of judicial opinions, even when there was no specific objection made at the administrative level. See Forster v. N. Dakota Workers Comp. Bureau, 447 N.W.2d 501, 506 (N.D. 1989).

[¶ 5] "An arresting officer may request an individual to submit to chemical testing to determine alcohol concentration via blood, breath, or urine." LeClair v. Sorel, 2018 ND 255, ¶ 8, 920 N.W.2d 306. At the time of Mr. Grove's arrest, N.D.C.C. 39-20-01(3)(a) read:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to submit to 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 and 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. If the officer requests the individual to submit to a blood test, the officer may not inform the individual of any criminal penalties until the officer has first secured a search warrant.

"Under N.D.C.C. § 39-20-01(3)(b), a breath test is not admissible in an administrative proceeding if the arresting officer fails to inform the individual as required under N.D.C.C. § 39-20-01(3)(a). LeClair, at ¶ 8; see N.D.C.C. 39-20-01(3)(b); see also State v. O'Connor, 2016 ND 72, ¶ 14, 877 N.W.2d. 312. "The law enforcement officer shall determine which of the tests is to be used." N.D.C.C. 39-20-01(2); see Schoon v. N. Dakota Dep't of

Transp., 2018 ND 210, ¶ 9, 917 N.W.2d 199.

[¶ 6] "[T]he Legislature has established a bright line and the statutes leave no room for this Court to engage in a determination of legislative intent or whether or not a person was disadvantaged by an incorrect or incomplete advisory." O'Connor, 2016 ND 72, ¶ 18, 877 N.W.2d 312 (VandeWalle, C.J., specially concurring). Omission of the phrase "directed by a law enforcement officer" from the implied consent advisory in place at the time of Mr. Grove's arrest did not substantially comply with N.D.C.C. § 39-20-01(3)(a) rendering the results inadmissible. See City of Bismarck v. Vagts, 2019 ND 224, ¶ 17, 932 N.W.2d 523.

[¶ 7] Mr. Grove did in fact object to the inaccurate implied consent warning read by Trooper Harstad. There were several serious problems with the implied consent warning read by Trooper Harstad. While Mr. Grove did highlight one portion of the defunct reading in his closing argument, the objection to the implied consent warning as a whole was apparent from the context. In the interests of justice, the Supreme Court should affirm the decision of the District Court reversing the decision of the Department.

[¶ 8] The District Court's retroactive application of Vagts to this case was proper. As noted by the Department, retroactive application of judicial opinions is permitted in North Dakota. The Department relies heavily on outside jurisdictions to support its argument that there are restrictions on retroactive application of judicial opinions. In referencing this state's case law, the Department only highlights the Supreme Court's analysis of retroactively applying Beckler v. N. Dakota Workers Compen. Bureau, 418 N.W.2d 770, 770 (N.D. 1988) to the Forster case. 447 N.W.2d 501. In Forster, "[n]either

Forster's petition nor his argument at the formal hearing asserted any violation by the Bureau of his due-process rights under Beckler, even though Beckler had been decided by that time." Id. at 502. "Forster's specifications of error did not contain any allegation that he had been denied due process." Id. It wasn't until the agency's decisions were appealed that Forster, in his brief, raised the due process issue discussed in Beckler. Id. ("Nevertheless, Forster did raise a due-process issue in his brief to the district court, contending that the Bureau violated his constitutional rights under the Beckler decision."). Despite not having made the specific objection on the issue, the district court in Forster retroactively applied the Beckler decision to Forster's case. Id. The Supreme Court affirmed the district court's retroactive application of Beckler. Id. at 506.

[¶ 9] The Department points out that the Forster opinion contains guidance on the retroactive application of Beckler: The "decision should be applied retrospectively only to those claims that were pending in the appeal process as of the date of that decision, and in which the issue was raised before the Bureau and on appeal either by the specifications of error or trial by agreement of the parties." Forster, 447 N.W.2d at 505. However, this limitation only applies to the retroactive application of Beckler and is not the rule for all retroactive applications of judicial opinions. The Supreme Court in Forster was addressing very specific concerns raised by the agency about the retroactive application of Beckler to pending cases. Id.

> The Bureau contends that it had justifiably relied upon its pre-Beckler termination procedures and that a retrospective application of Beckler would interfere with the Bureau's justified reliance upon its past administrative procedures. It also argues that because the district court actually found that Forster was not entitled to any benefits beyond those he was already paid, retroactive application of Beckler would not serve its

> purpose, i.e., that the requirement of certain procedural safeguards will minimize the risk of erroneous deprivation of disability benefits. Finally, the Bureau contends that a retrospective application of Beckler could create a potentially large, unfunded liability caused by newly filed claims from individuals whose benefits were terminated under the Bureau's procedures prior to the Beckler decision.

Id. at 504. These concerns were addressed by the Supreme Court and it responded with the above referenced limits "to restrict the unknown and unlimited liability that may result to the Bureau." Id. at 505.

[¶ 10] Here, the facts are more supportive to the retroactive application of Vagts to Mr. Grove's case then the retroactive was application of Beckler to Forster's case. In Mr. Grove's case, the hearing officer issued his decision on August 8, 2019, Mr. Grove filed his Notice of Appeal and Specifications of Error on August 13, 2019, and on August 22, 2019, the Supreme Court published the Vagts decision. In Forster, the Beckler opinion was published before the agency rendered its decision, and Forster didn't raise the disputed issue until the briefs were filed. Unlike Forster, Mr. Grove's Specification of Error did raise the issue of the improper implied consent warning: "The hearing officer erred in admitting the chemical test results into evidence because the law enforcement officer failed to inform Mr. Grove of the proper implied consent advisory." Appellant's App. at p. 15. This specification adequately informed the Department of the bases for appeal, distinguishing this case from the recently decided Ouradnik case. See Ouradnik v. N.D. Dep't. of Transp., 2020 ND 39, in which this Court held Mr. Ouradnik did not preserve the issue for appeal when he failed to object to the completeness of the implied consent advisory and subsequently failed to raise the issue in his specification of error. See Id. at ¶ 15.

[¶ 11] The District Court found, "Mr. Grove's counsel's failure to specifically assert an objection to the admissibility of the test results based on the omission of the phrase 'directed by the law enforcement officer' did not constitute a waiver of the objection based on law emerging subsequent to the administrative hearing." Appellant's App. at p. 20. The District Court rejected the idea that the ruling in Vagts was predictable, was not novel, or that Mr. Grove waived any argument he might have had regarding the absence of the phrase "directed by the law enforcement officer". Specifically, the District Court stated, "Neither counsel for Mr. Grove, nor the hearing officer, could necessarily have predicted that omission of the phrase "directed by the law enforcement officer" would constitute a substantive omission thus rendering the advisory insufficient and the test results inadmissible." Appellant's App. at p. 20.

[¶ 12] Clearly, the argument was novel enough that neither Mr. Grove's counsel nor the hearing officer could anticipate the Supreme Court's decision in Vagts. This argument is bolstered by the finding made at the administrative level wherein the hearing officer stated, "Likewise, language that is synonymous with the statutory language is acceptable as long as it is 'substantively complete and reasonable calculated to convey the entire substance of the advisory.'" Appellant's App. at p. 14. Had the hearing officer anticipated the Vagts decision, he would have recognized the statutory language recited to Mr. Grove was not "substantively complete." Applying the Department's standard would produce absurd results and would require an individual to object to every change or omission to the implied consent advisory read by the law enforcement officer before the issue could be heard on appeal.

[¶ 13] Finally, Mr. Grove had until August 23, 2019, to file a petition for reconsideration with the DOT pursuant to N.D.C.C. § 28-32-40. This deadline came after the publication of the Vagts opinion, August 22, 2019. However, rather than petition the Department for reconsideration, because the appeal process had already begun through the filing of the Notice of Appeal and Specifications of Error on August 13, 2019, it was in the interest of judicial economy to proceed with the appeal. Rightfully, the District Court properly considered the Vagts opinion, just as the hearing officer would in a reconsideration action. The District Court's order reversing the hearing officer was proper and must be upheld on appeal.

II. Mr. Grove agrees with the Department that, in the event the Supreme Court reverses the District Court's Judgment on the preceding issue, a remand to the District Court is not entirely necessary for a determination on Mr. Grove's remaining issue on appeal because the Supreme Court is an appropriate body who can rule on the issue.

[¶ 14] Mr. Grove does not disagree with the Department's position related to other issues not addressed at the district court level. Historically, in administrative hearing reviews, the Supreme Court will remand to the district court in situations where not all issues appealed were considered. See e.g. Thornton v. N. Dakota State Hwy. Com'r, 399 N.W.2d 861, 864 (N.D. 1987) ("Because the district court did not address all of Thornton's contentions and reversed the administrative hearing officer's determination to suspend Thornton's driving privileges based on its misinterpretation of the term "intoxicating liquor", we reverse the district court's decision in regard to this matter and remand the case for a determination of the other issues raised by Thornton in his appeal to the district court."). If the Supreme Court decides to adopt the approach espoused by the Department,

the Court should ensure it considers the several required factors referenced by the Department in the Federal Circuit cases it highlighted. Such factors include:

> (1) whether the parties have fully briefed the issue before this Court;
> (2) the merits involve purely legal questions;
> (3) the district court has no comparative advantage in reviewing the agency action for compliance with applicable law; and
> (4) a remand to the district court would be a waste of judicial resources.

Am. Inst. of Certified Pub. Accountants v. IRS, 746 Fed. Appx. 1, 8 (D.C. Cir. 2018) (quotations omitted) ("Because each of these conditions obtains here, we proceed to the merits of the dispute.").

III. The hearing officer erred in admitting the Report and Notice into evidence over Mr. Grove's objections that the document contained the results of the administered preliminary breath test.

[¶ 15] "Under N.D.C.C. § 39-20-14(3), the results of a screening test may only be used to determine whether further testing shall be given…" City of Bismarck v. King, 2019 ND 74, ¶ 28, 924 N.W.2d 137. The North Dakota Supreme Court has stated: "the results of preliminary breath tests are to be excluded from evidence unless probable cause for the arrest is being challenged." State v. Rende, 2018 ND 33, ¶ 6, 905 N.W.2d 909. Without the report and notice, the Department does not have the authority to suspend an individual's driving privileges. Potratz v. North Dakota Dep't of Transp., 2014 ND 48, ¶ 10, 843 N.W.2d 305.

[¶ 16] In the case at hand, Trooper Harstad included the preliminary breath test results on the report and notice. Hr'g Tr. at p. 19-21. Over objection, the Hearing Officer admitted the report and notice into evidence with the preliminary breath test results on the document. Hr'g. Tr. at p. 24. At no time during the entire administrative hearing did Mr.

Grove challenge probable cause to arrest. Because the preliminary breath test results are not allowed into evidence, the Hearing Officer erred by admitting the report and notice into evidence.

[¶ 17] The Department argues probable cause is always an issue and therefore preliminary breath test results are always admissible in an administrative proceeding. Appellant's Brief at ¶ 47. The Department's argument essentially abrogates all case law regarding admissibility of preliminary breath test results into evidence. See Barrios-Flores v. Levi, 2017 ND 117, ¶ 12, 894 N.W.2d 888; see also City of Fargo v. Erickson, 1999 ND 145, ¶ 10, 598 N.W.2d 787; see also State v. Schimmel, 409 N.W.2d 335, 339 (N.D. 1987). This Court has repeatedly stated the results of a screening test are only to be used to determine whether further testing under § 39-20-01 shall be given, thus, the results of the test should not have been admitted into evidence. Mr. Grove's objection to the admission of the Report and Notice was valid and should have been sustained.

CONCLUSION

[¶ 18] Because the District Court's retroactive application of Vagts was proper under the circumstances, or in the alternative, the hearing officer erred in admitting the Report and Notice into evidence, Mr. Grove respectfully requests this Court **AFFIRM** the November 19, 2019 Order reversing the hearing officer's decision reinstating Mr. Grove's driving privileges.

Dated this 27th day of March, 2020.

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	)	
Appellant.	)	

CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned, as the author of the Brief of Appellee, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that is contains 15 pages.

[¶ 2] This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 word processing software in Times New Roman 12-point font.

Dated this 27th day of March, 2020.

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	)	
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[¶ 1] I hereby certify that on March 27, 2020, the following documents: **BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court through E-Filing Portal and served on Douglas B. Anderson at dbanders@nd.gov.

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