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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jeffrey Darnell Kling, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	**Supreme Ct. No. 20200024** **District Court No. 13-2019-CV-00096**

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED JANUARY 9, 2020
DUNN COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE PAUL W. JACOBSON

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[¶1] The hearing officer did not err in finding that a preponderance of the evidence showed that Deputy Vetsch recited the implied consent advisory to Kling in accordance with N.D.C.C. § 39-20-01(3)(a).

[¶2] Kling's chemical breath test results were admissible regardless of whether the implied consent advisory was recited to Kling.

STATEMENT OF CASE

[¶3] On September 20, 2019, Deputy John Vetsch (Deputy Vetsch) of the Dunn County Sheriff's Department arrested Jeffrey Darnell Kling (Kling) for driving a vehicle while under the influence of intoxicating liquor (DUI). Appendix of Appellant (App.) 10. A Report and Notice, including a temporary operator's permit, was issued to Kling after chemical Intoxilyzer test results indicated Kling's alcohol concentration was .143 percent by weight. Id. The Report and Notice notified Kling of the Department's intent to suspend his driving privileges. Id.

[¶4] In response to the Report and Notice, Kling requested a hearing in accordance with N.D.C.C. § 39-20-05. Transcript (Tr.) Exhibit (Ex.) 1 at 4. The administrative hearing was held on October 21, 2019, at which time the hearing officer considered the following issues:

> (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.

Index # 5.

[¶5] Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Kling's driving privileges for a period of 91 days. App. 11. Kling requested judicial review of the hearing officer's decision. App. 12-13.

STATEMENT OF ADMINISTRATIVE PROCEEDING

[¶6] At the hearing Deputy Vetsch testified he recited the implied consent advisory to Kling after Kling's arrest and before requesting Kling to submit to a chemical breath test. App. 7, ll. 7-20. Kling's counsel did not ask any questions of Deputy Vetsch during cross examination about the language the deputy used in reciting the implied consent advisory. Instead, when the hearing officer offered the Report and Notice into evidence, Kling objected to the Report and Notice on the grounds the specifics of the implied consent advisory had not been put in evidence and argued that the markings on the Report and Notice were insufficient to show compliance with the statute. App. 9, ll. 7-19. The hearing officer overruled the objection. App. 9, ll. 20-22.

[¶7] In her decision the hearing officer found that "Deputy Vetsch read the implied consent advisory pertaining to a chemical test." App. 11. The hearing officer thereafter concluded "Mr. Kling was placed under arrest and tested in accordance with N.D.C.C. § 39-20-01." Id.

[¶8] Kling requested judicial review of the Hearing Officer's decision alleging, in pertinent part:

> There was insufficient evidence to show a valid chemical test in that there was a failure to show a proper implied consent advisory, in that there was a failure to show the specifics of the implied consent advisory given to Mr. Kling and that the implied consent advisory complied with N.D.C.C. § 39-20-01(3)(a).

App. 12.

[¶9] Judge Paul Jacobson affirmed the hearing officer's decision stating:

> The only issued raised on appeal and addressed in Appellant's brief is that there was insufficient evidence to show a valid chemical test in that there was a failure to show a proper implied consent advisory, in that there was a failure to show the specifics of the implied consent advisory given to the Appellant and that the implied consent advisory complied with N.D.C.C. § 39-20-01(3)(a). The record reflect[s] that Deputy Vetch (sic) testified "I recited the North Dakota implied consent advisory for chemical breath test" to Appellant. It also reflects Deputy Vetch (sic) marked the box indicating Appellant was advised by law enforcement of the implied consent advisory for a chemical test as required by N.D.C.C. Section 39-20-01, on the Report and Notice (Exhibit 1 at Docket No. 2). This prima facie evidence that there was compliance with the requirement was not contradicted by the Appellant. Accordingly, there was evidence from which the hearing officer could reasonably conclude that Appellant was provided the proper implied consent advisory prior to administering the chemical breath test.

App. 15. Judge Jacobson issued his order on January 7, 2020. Id. Judgment was entered on January 9, 2020. App. 16. Kling appealed from the Judgment to this Court. App. 17-18. The Department asks this Court to affirm the judgment of the Dunn County District Court and the administrative suspension of Kling's driving privileges for a period of 91 days.

STANDARD OF REVIEW

[¶10] "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.

[¶11] "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. "When an 'appeal involves

the interpretation of a statute, a legal question, this Court will affirm the agency's order unless it finds the agency's order is not in accordance with the law.'" Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646 N.W.2d 704). The "interpretation of a statute is a question of law fully reviewable on appeal." State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

LAW AND ARGUMENT

I. Deputy Vetsch complied with N.D.C.C. § 39-20-01(3)(a) in reading the North Dakota implied consent advisory to Kling prior to the administration of the chemical breath test.

[¶12] North Dakota law directs an officer to inform a driver of a distinct advisory after arrest and prior to administering a chemical test. N.D.C.C. § 39-20-01(3) outlines the advisory and the consequences of failing to convey it as follows:

> a. The law enforcement officer shall inform the individual 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 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.
>
> b. If an individual refuses to submit to testing under this section, proof of the refusal is not admissible in any administrative proceeding under this chapter if the law enforcement officer fails to inform the individual as required under subdivision a.

[¶13] Deputy Vetsch complied with N.D.C.C. § 39-20-01(3)(a) and read Kling the North Dakota implied consent advisory prior to the chemical breath test. Deputy Vetsch clearly testified, "I recited the North Dakota implied consent advisory for chemical breath test." Tr. 13, ll. 17-18.

[¶14] The Report and Notice Deputy Vetsch issued to Kling serves as prima facie evidence that Deputy Vetsch read the implied consent advisory to Kling as required by law. App. 10. N.D.C.C. § 39-20-05(4) provides that the regularly kept records of the director may be introduced at a hearing and that those records are prima facie evidence of their contents without further foundation. "The Department's Report and Notice form is admissible as prima facie evidence of its contents once it is forwarded to the director of the Department." Dawson v. N.D. Dep't of Transp., 2013 ND 62, ¶ 23, 830 N.W.2d 221. See also Schock v. N.D. Dep't of Transp., 2012 ND 77, ¶ 15, 815 N.W.2d 255; Pavek v. Moore, 1997 ND 77, ¶ 8, 562 N.W.2d 574 (citing Maher v. N.D. Dep't of Transp., 539 N.W.2d 300, 303 (N.D. 1995)). In addition to Deputy Vetsch's testimony, as cited above, Kling's Report and Notice shows the implied consent advisory as required under N.D.C.C. § 39-20-01 was given. App. 10. Deputy Vetsch marked the box indicating Kling "[w]as advised by law enforcement of the implied consent advisory for a chemical test as required by NDCC Section 39-20-01." Id. The box includes the advisory language as follows:

> **CHEMICAL TEST:**
> The law enforcement officer shall inform the individual 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 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.

Id.

[¶15] The Department met its prima facie case. The term "prima facie evidence" is defined as meaning "[e]vidence good and sufficient on its face . . . and which if not rebutted or contradicted, will remain sufficient." Black's Law Dictionary 1071

(5th ed. 1979). "If a driver want[s] to discredit the prima facie fairness and accuracy of a test, it [is] the driver's responsibility to produce evidence that the test was not fairly or adequately administered. . . . A driver must do more than raise the mere possibility of error." Berger v. State Highway Comm'r, 394 N.W.2d 678, 688 (N.D. 1986). Prima facie evidence is not rebutted simply by asserting, in the absence of any evidence, that the implied consent advisory may not have been read in full.

[¶16] Rather, Kling was required to present actual evidence contradicting the prima facie evidence that the implied consent advisory was given "as required by NDCC Section 39-20-01." See Gillmore v. Levi, 2016 ND 77, ¶ 12, 877 N.W.2d 801 (stating, "… Gillmore had the burden to rebut the prima facie evidence contained in the Report and Notice); Ebach v. N.D. Dep't of Transp., 2019 ND 80, ¶ 13, 924 N.W.2d 105 ("Once the Intoxilyzer Test Record and Checklist is admitted into evidence, the Department establishes prima facie its contents without further foundation; if Ebach wished to rebut the Department's documentary foundation of fair administration 'by establishing either a deviation from approved procedures or a lack of fair administration despite compliance with approved procedures,' he had the opportunity and the burden to present sufficient evidence accordingly."); Thorsrud v. Dir., N.D. Dep't of Transp., 2012 ND 136, ¶ 10, 819 N.W.2d 483 (stating, "once the record and checklist was received into evidence, Thorsrud had the burden to present sufficient evidence to rebut the prima facie evidence of fair administration by proving Officer Nielsen had not followed the approved method").

[¶17] Here, Deputy Vetsch testified he gave the advisory. App. 7, ll. 17-18. In Gillmore, the Supreme Court noted that "Gillmore did not testify the officer failed

to read this advisory after his arrest, and therefore he failed to rebut the officer's giving him the proper advisory." Gillmore, 2016 ND 77 at ¶15. While Gillmore was decided under a former version of N.D.C.C. § 39-20-01, the analysis of whether prima facie evidence has been rebutted has not changed.

[¶18] As in Gillmore, Kling likewise did not testify that Deputy Vetsch failed to read the advisory after his arrest, and so he failed to rebut Deputy Vetsch's testimony that he gave the proper advisory. If Kling believed Deputy Vetsch failed to properly recite the appropriate advisory language he could have either elicited testimony from Deputy Vetsch as to the language used in giving the advisory or he could have testified himself as to Deputy Vetsch's advisory. Neither of these events occurred, and Kling has failed to overcome the rebuttable presumption of the Report and Notice.

[¶19] Finally, in light of the Report and Notice and Deputy Vetsch's testimony, there is evidence from which the hearing officer could reasonably conclude that Kling was provided the proper implied consent advisory after arrest. Accordingly, the hearing officer's Findings of Fact, judged under the preponderance of the evidence standard, must be affirmed. See Huff v. N.D. State Bd. of Med. Exam'rs-Investigative Panel B., 2004 ND 225, ¶ 14, 690 N.W.2d 221 (affirming medical board's decision when the board chose to believe the testimony of witnesses over the testimony of the doctor).

II. Kling's chemical breath test results are admissible irrespective of whether Deputy Vetsch properly recited the implied consent advisory.

[¶20] Even if the Court disagrees with the Department's argument in Section I of its brief it should still affirm the hearing officer's decision because whether or not

law enforcement provided a substantively complete implied consent advisory to Kling his test results are admissible.

[¶21] "'Section 39-20-01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general.'" State v. Bauer, 2015 ND 132, ¶ 7, 863 N.W.2d 534 (quoting State v. Birchfield, 2015 ND 6, ¶ 7, 858 N.W.2d 302). Under N.D.C.C. § 39-20-01, when an individual is placed under arrest for driving under the influence of alcohol or drugs, a law enforcement officer is authorized to request the individual submit to a chemical test of the individual's blood, breath, or urine." City of Bismarck v. Vagts, 2019 ND 224, ¶ 10, 932 N.W.2d 523 (citing State v. Bohe, 2018 ND 216, ¶ 10, 917 N.W.2d 497). The North Dakota Supreme Court has stated that "[t]he implied consent statute requires that specific information be communicated by law enforcement to an individual arrested for driving under the influence." LeCair v. Sorel, 2018 ND 255, ¶ 23, 920 N.W.2d 306; State v. O'Connor, 2016 ND 72, ¶¶ 8, 11, 877 N.W.2d 312; N.D.C.C. § 39-20-01(3)(a). The remedy or consequence when this information is not provided to a driver is set forth by the legislature in N.D.C.C. § 39-20-01(3)(b). O'Connor, at ¶¶ 11-12, 14.

[¶22] This Court has consistently held that the provisions of N.D.C.C. § 39-20-01 do not apply if a person voluntarily submits to a chemical test under Fourth Amendment consent principles. See Fossum v. N.D. Dep't of Transp., 2014 ND 47, ¶ 1, 843 N.W.2d 282; City of Bismarck v. Hoffner, 379 N.W.2d 797 (N.D. 1985); State v. Abrahamson, 328 N.W.2d 213, 215-18 (N.D. 1982). "[T]he purpose of the implied consent law is to have a procedure in place when someone says no; N.D.C.C § 39-20-01 does not apply when the driver consents to testing."

O'Connor, 2016 ND 72, at ¶ 12, (citing to Hoffner and Abrahamson).

[¶23] However, as O'Connor pointed out, this changed in 2015 when the legislature amended N.D.C.C. § 39-20-01 and enacted subsection 3(b), "making chemical test results inadmissible in criminal or administrative proceedings for violations under its provisions unless the officer informs the defendant of the chemical test implied consent advisory after the defendant has been arrested." O'Connor, 2016 ND 72 at ¶ 12. In O'Connor the Court further noted that because of the statutory amendments "[t]he implied consent law currently applies equally to people who consent and say 'yes' because only after consent is there a test that is inadmissible." Id. Then Chief Justice VandeWalle, in his concurring opinion, explained the state of law at this time as follows:

> It seems odd, if not absurd, that a person who agrees to take the test after an advisory which neglected to tell the person that the refusal to take the test is a crime punishable in the same manner as driving under the influence and was told only that it was a crime to refuse was disadvantaged by the advisory. Are we to assume that had the person been given the proper advisory he would have refused to take the test? I understand that had the person refused to take the test and been convicted and punished in the same manner as driving under the influence, the person could very well have been disadvantaged by the advisory in this instance. Nevertheless, I agree that the 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.

Id. at ¶ 18.

[¶24] Following O'Connor, this Court addressed several cases involving compliance with the implied consent advisory language in N.D.C.C. § 39-20-01(3). See Vagts, 2019 ND 224 at ¶ 17. ("We conclude the officer's omission of the phrase 'directed by the law enforcement officer' was a substantive omission and

did not comply with the statutory requirements for the implied consent advisory."); State v. Vigen, 2019 ND 134, 927 N.W.2d 430 (An informed consent advisory omitting statutory language regarding refusal to submit to a urine test does not comply with N.D.C.C. § 39-20-01(3)(a)); State v. Dowdy, 2019 ND 50, 923 N.W.2d 109 (An arresting officer's inclusion of additional information in the implied consent advisory must not materially mislead or coerce a defendant); City of Grand Forks v. Barendt, 2018 ND 272, 920 N.W.2d 735 (The implied consent advisory under N.D.C.C. § 39-20-01(3) must be read after placing an individual under arrest and before administering a chemical test to determine alcohol concentration or the presence of other drugs); LeClair v. Sorel, 2018 ND 255, 920 N.W.2d 306 ("We have never held that § 39-20-01(3)(a) must be read word-for-word – only that the substance must be conveyed in a way 'reasonably calculated to be comprehensible to the driver.'"); Korb v. N.D. Dep't of Transp., 2018 ND 226, 918 N.W.2d 49 ("If the additional language provided by the officer is accurate, its presence does not alter the sufficiency of a complete, accurate implied consent advisory under N.D.C.C. § 39-20-01(3)."); Schoon v. N.D. Dep't of Transp., 2018 ND 210, 917 N.W.2d 199 (If a law enforcement officer fails to provide a driver the complete statutory implied consent advisory after the defendant's arrest and before the driver's submission to the chemical test, the result is inadmissible in any criminal or administrative proceeding.).

[¶25] In these cases, this Court made it clear that "[u]nless all substantive information in N.D.C.C. § 39-20-01(3)(a) is communicated to the driver, chemical test results are not admissible." See LeClair, 2018 ND 255 at ¶ 9. The Court

further clarified: "it is only for substantive omissions that we have concluded an advisory was deficient." Id. at ¶ 11 (citing O'Connor, 2016 ND 72 at ¶ 3). Yet, as plainly referenced and discussed in each of the above noted cases, the necessity of whether all substantive information had been conveyed in the implied consent advisory under N.D.C.C. § 39-20-01(3)(a) was because the legislature, at that time, made chemical test results inadmissible under the plain language of N.D.C.C. § 39-20-01(3)(b).

[¶26] N.D.C.C. § 39-20-01(3) was revised via House Bill 1534 during the 2019 legislative session. The amendments to the statute became effective August 1, 2019. The amendments to N.D.C.C. § 39-20-01(3)(b) included the removal of the penalty of inadmissibility of chemical test results when the advisory language has not been provided and now notes only that "proof of the refusal is not admissible in any administrative proceeding under this chapter if the law enforcement officer fails to inform the individual as required in subdivision a." Id. In doing so, the legislature returned the implied consent law to the way it was prior to the 2015 amendments. In other words, the implied consent law currently does not apply when someone says "yes" to chemical testing. Here, it is uncontested that Kling consented to a chemical breath test and the statutory provision in N.D.C.C. § 39-20-01(3)(b) is, therefore, not applicable. Kling can obtain no relief even if the specifics of the advisory were not given to him because he voluntarily consented to the test.

CONCLUSION

[¶27] The Department respectfully requests this Court affirm the judgment of the

Dunn County District Court and the Department's decision suspending Kling's driving privileges for a period of 91 days.

Dated this 6th day of April, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jeffrey Darnell Kling, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	**Supreme Ct. No. 20200024** **District Court No. 13-2019-CV-00096** **CERTIFICATE OF COMPLIANCE**

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Brief of Appellee contains 18 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 6th day of April, 2020.

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STATE OF NORTH DAKOTA

Jeffrey Darnell Kling, Appellant, v. Director, North Dakota Department of Transportation, Appellee.	**Supreme Ct. No. 20200024** **District Court No. 13-2019-CV-00096** **CERTIFICATE OF SERVICE**

[¶1] I hereby certify that on April 6, 2020, the following documents: **BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court through the E-filing Portal and served upon Michael R. Hoffman at hoffmanmike@yahoo.com.

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