

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jeffrey Darnell Kling,

Appellant,

Supreme Court No. 20200024

v.

Director, North Dakota
Department of Transportation,

Appellee.

BRIEF OF APPELLANT

Appeal from Judgment dated January 9, 2020
Dunn County District Court
Southwest Judicial District
Honorable Paul Jacobson
Dunn County Case No. 13-2019-CV-00096

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STATEMENT OF THE ISSUES

Issue for Review

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).

[¶1] STATEMENT OF THE CASE

[¶2] Jeffrey Darnell Kling, Appellant, appeals from a district court judgment affirming an administrative suspension of his driving privileges for a period of 91 days for having driven a vehicle while having an alcohol concentration over the legal limit (A. 11, 16-17).

[¶3] STATEMENT OF THE FACTS

[¶4] On September 20, 2019, Deputy John Vetsch arrested Mr. Kling for driving under the influence (A. 6, 7). After the arrest, Vetsch “recited the North Dakota implied consent advisory for chemical breath test.” (A. 7, lines 17-18).

[¶5] The Hearing Officer, at this point, did not inquire of Vetsch the specific language of the advisory he recited. Instead, the Hearing Officer asked if Vetsch went on to request a chemical breath test, whether a chemical breath test was administered, and whether Vetsch received results from that test. The Hearing Officer then established that those results were reported on the Report and Notice form. (A. 7-8).

[¶6] Thereafter in the hearing, the Hearing Officer offered Exhibit 1 into evidence, which contained the completed Report and Notice form (A. 10) and the supporting Intoxilyzer Test Record and Checklist showing the test results of 0.143 (Exhibit 1, Page 3 of 5).

[¶7] Kling objected to the completed Report and Notice form on foundation grounds, that the specifics of the implied consent advisory were not put in evidence and that there was insufficient evidence to show compliance under Chapter 39-20 and the statutes therein (A. 9, lines 9-19).

[¶8] Kling's objection was overruled (A. 9, line 20), and the Hearing Officer's Decision was to suspend Kling's driving privileges for 91 days (A. 11).

[¶9] Kling properly appealed to the district court (A. 12), and the district court affirmed the Hearing Officer's Decision (A. 14-15).

[¶10] Kling has properly appealed to the North Dakota Supreme Court (A. 17-18).

[¶11] ARGUMENT

[¶12] Issue for Review

[¶13] 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).

[¶14] N.D.C.C. § 39-20-01(3)(a), as amended on August 1, 2019, states:

3. 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 eighty days and up to three years.

(Emphasis added).

[¶15] N.D.C.C. § 39-20-03.1 provides for action following a test result for a resident operator “[i]f a person submits to a test under section 39-20-01” (emphasis added), and includes process for a Report and Notice form which includes a showing “that the individual was tested for alcohol concentration under this chapter”, which, Kling contends, includes a showing of compliance with N.D.C.C. § 39-20-01(3)(a).

[¶16] N.D.C.C. § 39-20-05(2) provides Kling with an administrative hearing on request, which includes the issue of “whether the individual was tested in accordance with section 39-20-01”, which, Kling contends, includes a showing of compliance with N.D.C.C. § 39-20-01(3)(a).

[¶17] Kling contends, under this statutory scheme in Chapter 39-20, there cannot be a valid test without a showing of compliance with N.D.C.C. § 39-20-01(3)(a).

[¶18] Here, the Report and Notice form (A. 10) contains language of an advisory which tracks verbatim the language of § 39-20-01(3)(a), and this

was sufficient to comply with N.D.C.C. § 39-20-03.1(4) and give the director jurisdiction.

[¶19] However, in this case, there was no testimony by Vetsch to show, in fact, compliance with N.D.C.C. § 39-20-01(3)(a), to thus meet the issue contained in N.D.C.C. § 39-20-05(2), “whether the individual was tested in accordance with section 39-20-01”.

[¶20] Rule 104(b), N.D.R.Ev., provides in relevant part, “When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.” Here, proof was not introduced sufficient to support a finding that the fact of compliance with N.D.C.C. § 39-20-01(3)(c) was done. Vetsch did not testify to the specifics of the advisory he recited, nor did he testify that the advisory contained in Exhibit 1, Page 2 of 5, is the advisory he recited.

[¶21] Rule 901(a), N.D.R.Ev., provides, “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” One manner this can be done is with “[t]estimony that an item is what it is claimed to be.” Rule 901(b)(1), N.D.R.Ev.

[¶22] Vetsch was at the hearing, in control of the Hearing Officer who marshalled the evidence for the director. The Hearing Officer could

have asked Vetsch the language he recited, or if he recited the advisory verbatim from the Report and Notice form. See, e.g., State v. Thompson, 2010 ND 10, ¶¶ 21-22, 777 N.W.2d 617.

[¶23] One legal scholar, in a discussion of the legal rules for laying foundation, has stated, “For our purposes, the most important procedural rule is that the proponent of an item of evidence must ordinarily lay the foundation before formally offering the item into evidence.” Evidentiary Foundations, Second Edition, Imwinkelried, Edward J. (The Michie Company 1989).

[¶24] Here, the proponent, the director, had to show foundation by showing compliance with N.D.C.C. § 39-20-01(3)(a). As we know, the specifics of the advisory, the facts, matter. See e.g. City of Bismarck v. Vagts, 2019 ND 224, 932 N.W.2d 523. However, the Hearing Officer who marshalled the evidence in this case made no attempt to show compliance with N.D.C.C. § 39-20-01(3)(a) to meet the issue in N.D.C.C. § 39-20-05(2), whether Kling was “tested in accordance with section 39-20-01”.

[¶25] CONCLUSION

[¶26] There was a failure to lay foundation for the test results, and therefore the test results were inadmissible. Consequently, there was insufficient evidence to support the decision to suspend Kling’s driving

privileges for 91 days. Kling respectfully requests the Supreme Court of North Dakota to reverse the decision against him and to order the reinstatement of his driving privileges.

[¶27] Respectfully submitted March 9, 2020.

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[¶28] CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing Brief of Appellant in PDF and Microsoft Word format and accompanying Appendix of Appellant in PDF format, by email, on March 9, 2020, on:

Office of Attorney General @ mtpitcher@nd.gov

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[¶27] Respectfully submitted March 17, 2020.

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[¶28] CERTIFICATE OF SERVICE

Michael R. Hoffman states that on March 17, 2020 a true and correct copy of the Brief of Appellant and Appendix of Appellant was filed and served electronically with the North Dakota Supreme Court Clerk through the North Dakota Supreme Court’s Electronic File & Serve (“EFS”), and that EFS will send a Service Notification to the following:

Office of Attorney General @ mtpitcher@nd.gov

[¶29] CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, the undersigned certifies that the foregoing brief complies with

the N.D.R.App.P. 32(a)(8)(A). The total pages of the brief, including this Certificate of Compliance, totals 11 pages.

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