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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Corey Lee Jundt,	
Appellant,	**Supreme Ct. No. 20200115**
v.	**District Court No. 08-2020-CV-00587**
North Dakota Department of Transportation,	**ORAL ARGUMENT REQUESTED**
Appellee.	

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED APRIL 2, 2020
BURLEIGH COUNTY, NORTH DAKOTA
SOUTHCENTRAL JUDICIAL DISTRICT

HONORABLE JAMES S. HILL

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STATEMENT OF ISSUES

[¶1] Jundt waived his argument that the Department lacked jurisdiction to suspend his driving privileges based on the Report and Notice failing to show compliance with the implied consent advisory under N.D.C.C. § 39-20-01(3)(a).

[¶2] The providing of the implied consent advisory in accordance with N.D.C.C. § 39-20-01(3)(a) is not a basic and mandatory provision of N.D.C.C. § 39-20-03.1(4).

[¶3] Jundt was tested in accordance with N.D.C.C. § 39-20-01 and his test results are admissible regardless of whether the implied consent advisory was recited.

STATEMENT OF CASE

[¶4] On January 7, 2020, Officer Mark Muscha (Officer Muscha) of the Bismarck Police Department arrested Corey Lee Jundt for driving under the influence of alcohol. Appendix (App.) 6. A Report and Notice, including a temporary operator's permit, was issued to Jundt after the results of a valid Intoxilyzer test indicated his alcohol concentration was .190 percent by weight. Id. The Report and Notice notified Jundt of the Department's intent to suspend his driving privileges. Id.

[¶5] In response to the Report and Notice, Jundt requested an administrative hearing. App. 7. The hearing was held on February 3, 2020. Index # 4, at 1; Index # 6. 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 eighteen one-hundredths of one percent by weight.

Id.

[¶6] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Jundt's driving privileges for a period of 180 days. App. 8. Jundt requested judicial review of the hearing officer's decision. App. 10-11.

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 erred in admitting chemical breath test results into evidence. This matter also involves the interpretation of N.D.C.C. § 39-20-01 following the 2019 Legislative changes and whether the statute applies when a person voluntarily consents to chemical testing. Oral argument would be helpful in the Court's review of the statutory changes to the law.

STATEMENT OF FACTS

[¶8] On January 7, 2020 at 11:18 p.m. Officer Muscha observed a vehicle fail to signal a lane change and then fail to signal a turn. Index # 4, at 5, ll. 19-23. After the turn the vehicle did not maintain its lane of travel and crossed the center line.

Id. at 5, l. 25 – 6, l. 1. Officer Muscha activated his patrol vehicle's emergency lights and initiated a traffic stop. Id. at 6, ll. 2-9. Officer Muscha identified Jundt as the driver and lone occupant of the vehicle. Id. at 6, ll. 14-19. The odor of an alcohol was detected coming from within the vehicle and Jundt stated was coming from Lucky's Bar. Id. at 6, ll. 22-25. Jundt acknowledged drinking four tall Coors Light beers having consumed his last beer approximately 45 minutes prior to the stop. Id. at 7, ll. 10-12.

[¶9] Officer Muscha administered the horizontal gaze nystagmus (HGN) test, and Jundt displayed four of six clues, failing the test. Id. at 8, ll. 4-20. Jundt told Officer Muscha multiple times to "just take me in." Id. at 9, ll. 5-6. Officer Muscha read the implied consent advisory and requested Jundt take an onsite screening test. Id. at 9, ll. 7-14. Jundt agreed and the test showed Jundt's alcohol concentration was over the legal limit. Id. at 9, l. 14 – 10, l. 19. Jundt was arrested and transported to the police department. Id. at 11, ll. 6-7.

[¶10] Officer Muscha requested a chemical breath test and Jundt said okay. Id. at 12, ll. 9-13. Due to an oversight in communicating with his backing officer, Officer Muscha did not provide Jundt the implied consent advisory for the chemical test. Id. at 11, ll. 23-25.

[¶11] The chemical test was administered by Officer Collin Schlecht in accordance with the approved method and the results showed that Jundt's alcohol concentration was 0.19 percent by weight. Index # 5, at 3. Officer Muscha completed the Report and Notice and issued it to Jundt. Index # 4, at 13, ll. 1-6; App. 6.

STATEMENT OF ADMINISTRATIVE PROCEEDING

[¶12] At the hearing Jundt objected to the introduction of Exhibit 1 into evidence, and moved to dismiss his suspension on the basis that the Department lacked jurisdiction to suspend him, or alternatively, did not prove that he was tested in accordance with N.D.C.C. § 39-20-01 because the implied consent advisory was not read to him after arrest. Index # 4, at 13, ll. 16-25. Jundt argued that compliance with N.D.C.C. § 39-20-01(3)(a) was required for there to be a valid request for testing and for the Department to show he was tested in accordance with N.D.C.C. § 39-20-01. Id. at 13, l. 25 – 14, l. 15. The hearing officer denied Jundt's motion to dismiss and overruled the objection, finding that the reading of the implied consent advisory is not part of the testing process under N.D.C.C. § 39-20-01. Id. at 14, l.16 – 15, l. 14. The hearing officer also noted that due to the legislative changes to N.D.C.C. § 39-20-01 there is no longer a timing requirement mandating the implied consent advisory be read after arrest. Id. at 16, l. 18 – 17, l. 24. Jundt requested the opportunity to file a post hearing brief which the hearing officer permitted. Id. at 18, ll. 19-20. Jundt submitted his post hearing brief on February 6, 2020. Index # 22. The hearing officer issued her decision later that same day. App. 8. Among her findings, the hearing officer found:

> Officer Muscha read an implied consent advisory for a screening test. Officer Muscha is trained and certified to administer the Alco Sensor FST. Officer Muscha administered the Alco Sensor FST fairly and in accordance with the approved method. The test results obtained show Mr. Jundt had an alcohol concentration of 0.181. Officer Muscha placed Mr. Jundt under arrest. Officer Muscha then requested an (sic) chemical test, and asked Officer Schlecht to administer the test. Officer Schlecht is trained and certified to administer the Intoxilyzer 8000. Officer Schlecht administered the Intoxilyzer 8000 fairly and in accordance with the approved method

> within two hours of the time of driving. The test results obtained show Mr. Jundt had an alcohol concentration of 0.190. Officer Muscha issued the temporary operator's permit. The report and notice form was properly sent to the NDDOT. An implied consent advisory pertaining to a chemical test was not read after Mr. Jundt was placed under arrest.

Id. The hearing officer thereafter concluded that "Mr. Jundt was . . . tested in accordance with N.D.C.C. section 39-20-01." Id. In analyzing Jundt's argument that he was not properly tested in accordance with N.D.C.C. § 39-20-01 because he was not read the implied consent advisory after arrest, the hearing officer explained:

> Mr. Jundt argues that because he was not read the implied consent advisory for a chemical test, that the request for testing was not in accordance with N.D.C.C. section 39-20-01 and the Department lacks the ability to sanction Mr. Jundt. Mr. Jundt raised this as a jurisdictional issue, but also seems to be arguing that the remedy is that that test result cannot be used. Mr. Jundt is incorrect in his argument that he was not read an implied consent advisory, he was given an advisory which conveyed all of the information about the consequences of refusal, but lacked the words "at the direction of law enforcement." That being said, despite being asked, Mr. Jundt failed to show any statutory language, or case law which says that the reading of the advisory is basic and mandatory, such that it becomes jurisdictional, or how with the new law changes, the law now requires that the test results be suppressed. The changes in the law, essentially codified the ruling in Alvarado, which says if the advisory is not given, proof of the refusal cannot be used in the administrative hearing. Here a test was requested under N.D.C.C. § 39-20-01. A test was voluntarily agreed to by Mr. Jundt. A test was administered in accordance with N.D.C.C. section 39-20-01.

Id.

[¶13] Jundt requested judicial review of the Hearing Officer's Decision. App. 10-11. The district court issued its Memorandum and Order on Administrative Appeal in which the court affirmed the Hearing Officer's Decision. App. 12-19. Judgment was entered on April 2, 2020. App. 21. Jundt appealed from the Judgment to this

Court. App. 23-24. The Department asks this Court to affirm the judgment of the Dunn County District Court and the administrative suspension of Jundt's driving privileges for a period of 180 days.

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. "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 "[i]nterpretation 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. Jundt waived any argument he might have had regarding the Department's jurisdiction to suspend his driving privileges based on the Report and Notice failing to show compliance with the implied consent advisory under N.D.C.C. § 39-20-01(3)(a) by failing to include the issue in his specifications of error before the district court.

[¶16] "Judicial review of a hearing officer's decision to suspend, revoke, or deny a driver's license is governed by N.D.C.C. § 39-20-06, and provides:

> Any person whose operator's license or privilege has been suspended, revoked, or denied by the decision of the hearing officer under section 39-20-05 may appeal within seven days after the date of the hearing under section 39-20-05 as shown by the date of the hearing officer's decision, section 28-32-42 notwithstanding, by serving on the director and filing a notice of appeal and specifications of error in the district court in the county where the events occurred for which the demand for a test was made, or in the county in which the administrative hearing was held."

Rounkles v. Levi, 2015 ND 128, ¶ 10, 863 N.W.2d 910 (quoting N.D.C.C. § 39-20-

06). "[A] person appealing to the district court from the Department's decision to suspend driving privileges must comply with the specification-of-error requirement of N.D.C.C. § 28–32–42(4)." Id. (quoting Hamre v. N.D. Dep't of Transp., 2014 ND 23, ¶ 8, 842 N.W.2d 865 (quoting Daniels v. Ziegler, 2013 ND 157, ¶ 7, 835 N.W.2d 852)).

[¶17] "In Hamre, this Court discussed the interplay between N.D.C.C. §§ 28-32-42(4) and 39-20-06:

> 'Both statutes require the filing of specifications of error. To comply with the requirements of N.D.C.C. § 28-32-42(4), the specifications of error must 'identify what matters are truly at issue with sufficient specificity to fairly apprise the agency, other parties, and the court of the particular errors claimed.' Vetter v. N.D. Workers Comp. Bureau, 554 N.W.2d 451, 454 (N.D. 1996). This Court stated that after its decision in Vetter, it would no longer tolerate imprecise or boilerplate specifications of error. See generally id. Boilerplate specifications of error are those that are general enough to apply to any administrative agency appeal. Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 14, 663 N.W.2d 161. This rationale has also been applied in driver's license suspension cases. Id. Furthermore, the same purpose for filing the specifications of error applies under both statutes--to prevent meaningless specifications of error. We recognize that compliance with the specifications-of-error requirement, because of the different time limitations for filing, may be more difficult under N.D.C.C. § 39-20-06, but this is for the legislature to address.'"

Id. (quoting Hamre, at ¶ 8 (quoting Dettler v. Sprynczynatyk, 2004 ND 54, ¶ 15, 676 N.W.2d 799)).

[¶18] "In Hamre, this Court determined that issues not included in the specifications of error are not preserved for judicial review." Id. (citing Hamre, at ¶ 10). The Court has "also stated that a party may not merely assert the right to reserve additional specifications of error pending review of the administrative hearing transcript." Id. (citing Beylund v. Levi, 2015 ND 18, ¶ 11, 859 N.W.2d 403

(relying on Isaak v. Sprynczynatyk, 2002 ND 64, ¶¶ 4, 7, 642 N.W.2d 860)).

[¶19] In this case, Jundt's Notice of Appeal and Specifications of Error, filed and served on February 13, 2020, (App. 10-11) lacks any arguably "minimally sufficient specification of error for review" regarding the failure of the Report and Notice to show compliance with the implied consent advisory under N.D.C.C. § 39-20-01(3)(a). Cf. Hamre, 2014 ND 23, ¶ 9, 842 N.W.2d 865. Jundt waived any argument he might have had regarding the Department's jurisdiction based on the Report and Notice's failure to show compliance with the substance of the implied consent advisory by failing to include the issue in his original specifications of error on appeal.

[¶20] Further, Jundt's appellate brief before the district court did not include a jurisdictional argument based on the failure of the Report and Notice to show law enforcement had provided him with the implied consent advisory under N.D.C.C. § 39-20-01(3)(a). Index # 20. By not raising this issue in the district court below, the argument has been waived and Jundt should be prohibited from raising it for the first time on appeal.

II. The Department had the authority to suspend Jundt's driving privileges based on the Report and Notice.

[¶21] Even if this Court wants to consider Jundt's argument that the Department was deprived of jurisdiction because of the Report and Notice's failure to show compliance with N.D.C.C. § 39-20-01(3)(a), it should still affirm the hearing officer's decision because the Department is not required to show compliance with the implied consent advisory on the Report and Notice. The prerequisites for the exercise of Department's jurisdiction to suspend or revoke a person's driving

privileges are established by statute. See Bosch v. Moore, 517 N.W.2d 412, 413 (N.D. 1994). "The Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute." Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 15, 682 N.W.2d 308. "The Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges." Id.

[¶22] "Whether the provision is basic and mandatory rests primarily on whether the Department's authority is affected by failure to apply the provision." Morrow v. Ziegler, 2013 ND 28, ¶ 9, 826 N.W.2d 912 (citing Aamodt, at ¶ 23). The Court must articulate "what in [the statute] is a basic and mandatory requirement such that the Department would be without authority to adjudicate revocation of [a person's] driving privileges." Ike v. Dir., N.D. Dep't of Transp., 2008 ND 85, ¶ 7, 748 N.W.2d 692.

[¶23] Usually, when no statutory remedy is specified for an agency's failure to satisfy a statutory provision, the Court will not reverse without a showing of prejudice. Greenwood v. Moore, 545 N.W.2d 790, 795-96 (N.D. 1996). The Court also "construe[s] statutes to avoid ludicrous and absurd results when possible." Ding v. Dir., N.D. Dep't of Transp., 484 N.W.2d 496, 501 (N.D. 1992).

[¶24] Section 39-20-03.1(4), N.D.C.C. -- the statute at issue in this case -- requires the temporary operator's permit – i.e., the Report and Notice – show "that the officer had reasonable grounds to believe the individual had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01, or equivalent ordinance, that the individual was lawfully arrested, that the

individual was tested for alcohol concentration under the chapter, and that the results of the test show that the individual had an alcohol concentration of at least eight one-hundredths of one percent by weight . . . ." Jundt argues the Department is deprived of jurisdiction to proceed against his driving privileges because the Report and Notice failed to show compliance with N.D.C.C. § 39-20-01(3)(a). Appellant's Br. ¶¶ 9-11. Jundt's argument is flawed.

[¶25] The Department's jurisdiction is not dependent upon whether a law enforcement officer completes a form in the manner contemplated by the Department unless a statutory provision in the statute requires the information be noted on the form. In Aamodt, the Supreme Court observed the plain language of N.D.C.C. § 39-20-03.1(3) explicitly requires that probable cause to arrest be noted on the Report and Notice. 2004 ND 134 at ¶ 14. On that basis, the Court affirmed the reversal of Aamodt's driving privileges because, it concluded, "the statutory provision at issue is a basic and mandatory provision and therefore the Department had no authority to suspend Aamodt's driving privileges." Id. at ¶ 26 (emphasis added.)

[¶26] Similarly, in Jorgensen v. N.D. Dep't of Transp., 2005 ND 80, ¶ 11, 695 N.W.2d 212, the Court addressed the portion of N.D.C.C. § 39-20-03.1(3)[1] which required the Report and Notice demonstrate that "the results of the test show that the person had an alcohol concentration of at least eight one-hundredths of one percent by weight." The law enforcement officer "did not record the results of a

[1] The provisions of subsection 3, N.D.C.C. § 39-20-03.1(3) were moved to subsection 4 of the statute in 2009 via House Bill 1233.

chemical test of Jorgensen's blood" on the Report and Notice, but did provide Jorgensen with a copy of the analytical report for his blood test. Id. at ¶ 3. The Court concluded:

> Section 39-20-03.1, N.D.C.C., reflects a legislative intent to remove drunk drivers from the roads without slanting the law too much toward the Department's convenience. Section 39-20-05(1), N.D.C.C., gives a driver only a short time--ten days--after the issuance of a temporary operator's permit within which to request a hearing to challenge the suspension of his or her driving privileges. Thus, in determining whether to request a hearing, it is important that a driver facing the loss of driving privileges be able to quickly, conveniently, and certainly know what the officer is relying on. That information will be more quickly, conveniently, and certainly conveyed to the driver by inserting in the appropriate blank space on the report and notice form the results of the test than by giving the driver a copy of the analytical report of the analysis of the blood sample tested, which may well be confusing to one unacquainted with such documents. The legislature's intent will be best fulfilled by a bright-line requirement that the report and notice form contain the test result, as specified in N.D.C.C. § 39-20-03.1(3). We conclude that inclusion of the test result in the officer's certified report to the Department is a basic and mandatory provision of the statute, without which the Department may not suspend a person's driving privileges.

Id. at ¶ 13 (internal citation omitted) (emphasis added).

[¶27] While the Report and Notice contains a box noting "Was advised by law enforcement of the implied consent advisory for a chemical test as required by NDCC, Section 39-20-01", there is no provision in the statute (N.D.C.C. § 39-20-03.1(4)) that requires that box to be checked or makes inclusion of that information on the Report and Notice "basic and mandatory." That the information may be relevant or helpful to the Department, and to Jundt, does not make it basic and mandatory. Jundt's suggestion otherwise adds words and requirements to the statute that are not there.

[¶28] Jundt improperly conflates testing for alcohol concentration under chapter

39-20, N.D.C.C. with reciting of the implied consent advisory under N.D.C.C. § 39-20-01(3)(a). The Report and Notice does show that Jundt "[p]rovided a specimen of 'breath' for testing under NDCC Chapter 39-20 or 39-06.2-10.2" and that his test result of .190 was obtained at 23:53 (11:53 PM). App. 6. This information was all that was necessary for the Department to determine Jundt had been tested for alcohol concentration as required by N.D.C.C. § 39-20-03.1(4). The Department had jurisdiction to take action to suspend Jundt's driving privileges based on its receipt of the Report and Notice from Officer Muscha.

III. Jundt was tested in accordance with N.D.C.C. § 39-20-01 and his chemical breath test results are admissible irrespective of whether Officer Muscha recited the implied consent advisory.

[¶29] "'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). This Court has stated that the implied consent statute requires that specific information be communicated by law enforcement to an individual arrested for driving under the influence. 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). Id. at ¶¶ 11-12, 14.

[¶30] Jundt argues he was not tested in accordance with N.D.C.C. § 39-20-01 because he was not provided the implied consent advisory under N.D.C.C. § 39-20-01(3)(a). Appellant's Br. ¶ 14. Jundt asserts that to be tested in accordance with N.D.C.C. § 39-20-01 a valid request for testing must occur. Id. at ¶¶ 15-16. Jundt cites to O'Connor, and Alvarado v. N.D. Dep't of Transp., 2019 ND 231, 932 N.W.2d 911, to support his position. Jundt's argument is meritless because he misinterprets the holdings of O'Connor and Alvarado, particularly in light of the statutory changes to N.D.C.C. § 39-20-01 after those cases were decided.

[¶31] The Supreme 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 McCoy v. N.D. Dep't of Transp., 2014 ND 119, ¶ 13, 848 N.W.2d 659; 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, 798-801 (N.D. 1985); State v. Abrahamson, 328 N.W.2d 213, 215-18 (N.D. 1982); cf. Herrman v. Dir., N.D. Dep't of Transp., 2014 ND 129, ¶ 8, 847 N.W.2d 768 ("Herrman agreed to take the onsite screening test, and section 39-20-14, N.D.C.C. does not apply when a person voluntarily consents to testing"). "[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, ¶ 12, 877 N.W.2d 312 (citing to Hoffner and Abrahamson).

[¶32] 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 had 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. In his concurring opinion, then Chief Justice VandeWalle 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.

[¶33] 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)(a). 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, ¶ 17, 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, ¶ 11, 920 N.W.2d 306 ("We have never held that § 39-20-01(3) 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, ¶ 12, 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.).

[¶34] 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).

[¶35] 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) 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 Jundt consented to a chemical breath test and the statutory provision in N.D.C.C. § 39-20-01(3)(b) is not applicable. Index # 5, at 3. While Jundt points out that the reading of the advisory has not been explicitly excluded as an issue at the hearing under the current version of the law, the 2019 legislative changes clearly indicate that reading of the advisory is only vital to a determination of whether the driver refuses testing and does not apply when the driver consents.

[¶36] Further, as Alvarado makes clear "[a] request to submit to testing must be made in accordance to N.D.C.C. § 39-20-01 to support a determination that there has been a **refusal** to submit to testing under N.D.C.C. § 39-20-01." 2019 ND 231 at ¶ 9 (emphasis added). Thus, Alvarado, is distinguishable from Jundt's case

because its holding applies to cases where the driver refuses to submit to testing and Jundt did not refuse the test. Therefore, Jundt can obtain no relief even if the advisory was not given to him because the advisory is unnecessary where the person voluntarily consents to the test. Generally when no statutory remedy is provided the court will not reverse without a showing of prejudice. See Bayles v. N.D. Dep't of Transp., 2015 ND 298, ¶ 17, 872 N.W.2d 626. Jundt has not and cannot show any prejudice regarding Officer Muscha's failure to recite the advisory noting the consequences of refusing a chemical test because he voluntarily submitted to the test. The consequences for refusing a chemical test as specified in N.D.C.C. § 39-20-01(3)(a) were not applied to Jundt.

[¶37] Although it is uncontested that N.D.C.C. § 39-20-01(3)(b) is not applicable Jundt argues his test results are still inadmissible because without a showing of a properly recited implied consent advisory under N.D.C.C. § 39-20-01(3)(a), his test results were not "properly obtained" under N.D.C.C. § 39-20-07(5). Jundt's argument is again flawed because N.D.C.C. § 39-20-07(5) pertains to the process and analysis of chemical testing and does not apply to the reading of the implied consent advisory.

[¶38] Jundt fails to cite to a single case that applies N.D.C.C. § 39-20-07 to the reading of the implied consent advisory, or any other statutory provision in N.D.C.C. 39-20-01 for that matter. In fact, this Court has repeatedly found that the purpose of N.D.C.C. § 39-20-07 is to ease the state's burden in laying an evidentiary foundation for chemical test reports. Filkowski v. Dir., N.D. Dep't of Transp., 2015 ND 104, ¶ 11, 862 N.W.2d 785 ("Section 39-20-07, N.D.C.C.,

governs the admission of blood-alcohol test reports and allows the use of certified documents to establish an evidentiary foundation for the report."). Accord Frank v. Dir, N.D. Dep't of Transp., 2014 ND 158, ¶¶ 9-10, 849 N.W.2d 248; Potratz v. N.D. Dep't of Transp., 2014 ND 48, ¶ 20, 843 N.W.2d 305; State v. Lutz, 2012 ND 156, ¶ 11, 820 N.W.2d 111; Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 9, 775 N.W.2d 695; Salter v. Hjelle, 415 N.W.2d 801, 804 (N.D. 1987).

[¶39] This Court has found the foundational requirements of N.D.C.C. § 39-20-07 were met and chemical test results admissible in cases where drivers challenged the legality of their consent to the chemical testing. See Beylund v. Levi, 2017 ND 30, 889 N.W.2d 907; Crawford v. Dir., N.D. Dep't of Transp., 2017 ND 103, 893 N.W.2d 770. In Beylund, this Court stated "[o]ur caselaw involving administrative license proceedings is consistent with the rationale of [Pennsylvania Bd. of Probation and Parole] v. Scott, 524 U.S. 357, 363-364 (1998)] and does not require exclusion of the results of blood tests in administrative license proceedings under N.D.C.C. ch. 39-20, which provides the statutory framework for chemical tests for intoxication and implied consent and procedures for administrative license proceedings." 2017 ND 30, at ¶ 18.

[¶40] This Court stated that the two cases at issue [in Beylund] "involve the admissibility of the results of blood tests, which the legislature has directed must be received into evidence under N.D.C.C. § 39-20-07(5) when the sample was properly obtained and the test fairly administered." Id. at ¶ 25. Section 39-20-07(5)'s specific provisions "for the admissibility of the results of the blood tests is part of the flexible administrative procedure for license suspension and revocation

proceedings." Id. The Court concluded "the specific statutory procedure for administrative license proceedings and the civil nature of those proceedings does not require exclusion of the results of the blood tests in the administrative proceedings." Id.

[¶41] In Crawford v. Dir., N.D. Dep't of Transp., "Crawford argue[d] he did not voluntarily consent to the warrantless blood test incident to his arrest and his driving privileges should be reinstated." 2017 ND 103, ¶ 8, 893 N.W.2d 770. "[Crawford] argue[d] the implied consent advisory was a misstatement of the law and his consent to the warrantless blood test incident to his arrest was not knowingly, freely, and voluntarily given." Id.

[¶42] This Court, however, determined that "under Beylund and for purposes of this appeal, we assume Crawford's consent to the warrantless blood test was involuntary, and we conclude the exclusionary rule and North Dakota law does not require the suppression of his blood test results in this civil administrative license suspension proceeding." Id. at ¶ 10. See also Junas v. Dir., N.D. Dep't of Transp., 2017 ND 130, ¶¶ 1-2, 895 N.W.2d 314 (summarily affirming hearing officer's decision under Beylund where Junas claimed he "did not voluntarily consent to a warrantless blood test incident to his arrest."); Ueckert v. Dir., N.D. Dep't of Transp., 2017 ND 55, ¶ 1, 891 N.W.2d 778 (summarily affirming hearing officer's decision under Beylund where "Ueckert argued the results of his blood test were obtained in violation of his constitutional rights and his consent was invalid because he was threatened with criminal prosecution if he refused.") See also Holte v. N.D. State Highway Comm'r, 436 N.W.2d 250, 252 (N.D. 1989) ("The

benefit of using reliable information of intoxication in license revocation proceedings, even when the evidence is inadmissible in criminal proceedings, outweighs the possible benefit of applying the exclusionary rule to deter unlawful conduct. Consequently, the exclusionary rule formulated under the fourth and fourteenth amendments was inapplicable in this license revocation proceeding.”).

[¶43] Under Beylund, Crawford, Junas, and Ueckert, the exclusionary rule does not require the exclusion of Jundt’s chemical breath test in this civil administrative proceeding even though Officer Muscha failed to provide the implied consent advisory after his arrest.

CONCLUSION

[¶44] The Department respectfully requests this Court affirm the judgment of the Dunn County District Court and the Department’s decision suspending Jundt’s driving privileges for a period of 180 days.

Dated this 12th day of June, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Corey Lee Jundt, Appellant,	**Supreme Ct. No. 20200115**
v.	**District Court No. 08-2020-CV-00587**
North Dakota Department of Transportation, Appellee.	**CERTIFICATE OF COMPLIANCE**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellee contains 27 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 12th day of June, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Corey Lee Jundt, Appellant, v. North Dakota Department of Transportation, Appellee.	**Supreme Ct. No. 20200115** **District Court No. 08-2020-CV-00587** **CERTIFICATE OF SERVICE**

[¶1] I hereby certify that on June 12, 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 Chad R. McCabe at crmccabe@midconetwork.com.

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