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MAY 13, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

Corey Lee Jundt

Petitioner and Appellant,

v.

North Dakota Department of Transportation,

Respondent and Appellee.

Appeal from Judgment entered on April 2, 2020
The Honorable James S. Hill
Burleigh County, North Dakota
South Central Judicial District

SUPREME COURT NO. 20200115
BURLEIGH COUNTY NO. 08-2020-CV-00587

****

BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

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Chad R. McCabe
McCabe Law Firm
Attorney for Appellant
419 Riverwood Dr., Suite 104
Bismarck, ND 58504
(701) 222-2500
ND State Bar ID No. 05474

TABLE OF CONTENTS

PAR. NO.

TABLE OF AUTHORITIES

ND SUPREME COURT: **PARA. NO.**

NORTH DAKOTA CENTURY CODE:

OTHER:

STATEMENT OF THE ISSUES

ISSUE 1: **The Department did not meet the basic and mandatory provisions of N.D.C.C. § 39-20-03.1(4) when the Report and Notice failed to show compliance with N.D.C.C. § 39-20-01(3)(a), and therefore did not show that Jundt was tested under Chapter 39, without which the Department had no authority to suspend Jundt's driving privileges.**

ISSUE 2: **N.D.C.C. § 39-20-05(2) sets for the scope of issues to be determined at the hearing, including, "whether the individual was tested in accordance with N.D.C.C. § 39-20-01," and the Department failed to establish compliance with N.D.C.C. § 39-20-01(3)(a) because Jundt was not provided with any implied consent advisory for chemical testing.**

ISSUE 3: **A prerequisite to a determination that there was a test administered under N.D.C.C. § 39-20-01 is finding that the request for testing was made under N.D.C.C. § 39-20-01. Because Jundt was not provided with any implied consent advisory for chemical testing under N.D.C.C. § 39-20-01(3)(a), the request for testing was not in compliance with N.D.C.C. § 39-20-01, and therefore insufficient to support a sanction by the Department.**

STATEMENT OF THE CASE

NATURE OF CASE

[¶ 1] The case on appeal is a civil case wherein Corey Lee Jundt's driving privileges were suspended for 180 days. (App. p. 8, Doc. ID No. 16).

COURSE OF PROCEEDINGS

[¶ 2] Jundt was issued a Report and Notice on January 8, 2020, regarding the possible suspension of his driving privileges. (App. p. 6, Doc. ID No.: 5). Jundt timely requested a hearing (App. p. 7, Doc. ID No.: 5), which was held on February 3, 2020 (Doc. ID No.: 4).

[¶ 3] At the administrative hearing, the hearing officer offered Exhibit 1 into evidence. (Doc. ID No. 4, Tr. p. 13, lines 14-15). Jundt objected and argued that the Department did not have jurisdiction to suspend him, or alternatively, did not prove all issues set forth in the

scope of issues to suspend him, arguing that he was not tested in accordance with N.D.C.C. § 39-20-01 because there was no valid request for testing under N.D.C.C. § 39-20-01 when an implied consent advisory for a chemical test was not read to him. (Doc. ID No. 4, Tr., p. 13, line 16 through p. 18, line 18).

[¶ 4] Jundt was also allowed to file a post hearing brief as to his objection, (Doc. ID No. 4, Tr. p. 18, lines 19-21), and filed his brief with the hearing officer. (Doc. ID No.: 22). The hearing officer overruled Jundt's objection and admitted Exhibit 1 into evidence. (Doc. ID No. 4, Tr. p. 18, lines 22-23). The hearing officer suspended Jundt for 180 days. (App. p. 8, Doc. ID No.: 16). Jundt timely filed a Notice of Appeal and Specifications of Error with the Burleigh Co. District Court on February 13, 2020. (App. p. 10, Doc. ID No.: 2).

DISPOSITION IN THE COURT BELOW

[¶ 5] On April 1, 2020, the Hon. James S. Hill issued an Order affirming the hearing officer's decision. (App. p. 12, Doc. ID No.: 28). Order for Judgment was entered on April 2, 2020, (App. p. 20, Doc. ID No. 32), and Judgment was entered on April 2, 2020. (App. p. 21, Doc. ID No.: 33). Notice of Entry of Judgment was entered on April 3, 2020, (App. p. 22, Doc. ID No.: 34) and Jundt timely filed his Notice of Appeal on April 3, 2020. (App. p. 23, Doc. ID No.: 36).

STATEMENT OF FACTS

[¶ 6] On January 7, 2020, Bismarck Police Officer Muscha stopped a vehicle driven by Jundt for failing to use a turn signal. (Doc. ID No. 4, Tr. p. 5, lines 5-22). From that encounter, Muscha began an investigation on driving under the influence of alcohol and administered the HGN field sobriety test. (Doc. ID No. 4, Tr. p. 7, lines 13-17). Muscha then read an onsite screening advisory, Jundt consented to the screening test, and Muscha administered a screening test. (Doc. ID No. 4, Tr. p. 9, lines 8-18). Muscha then placed Jundt under arrest. (Doc. ID No. 4, Tr. p. 10, lines 21-24).

[¶ 7] Muscha then requested a chemical test, Jundt agreed to take a chemical test, and a chemical test was administered. (Doc. ID No. 4, Tr. p. 12, lines 9-15). Due to an oversight, Jundt was never read the implied consent advisory for a chemical test. (Doc. ID No. 4, Tr. p. 11, lines 23-25; p. 12, lines 2-8; p. 32, lines 20-25; p. 33, line 1). Muscha then forwarded a Report and Notice to the ND Department of Transportation showing that the ND Implied Consent Advisory for a chemical test was not given to Jundt, (App. p. 6, Doc. ID No.: 5), and the box on the form showing compliance with the advisory requirement is not checked.

STANDARD OF REVIEW

[¶ 8] The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs this Court's review of an administrative suspension of a driver's license. *Johnson v. Department of Transp.*, 2004 ND 148, 683 N.W.2d 886, ¶ 5. This Court reviews that record of the administrative agency as a basis for its decision rather than the district court decision." *Lamb v. Moore*, 539 N.W.2d 862, 863 (N.D.1995). However, "[I]f sound, the district court's analysis is entitled to respect." *Aamodt v. North Dakota Dept. Of Transp.*, 2004 ND 134,

682 N.W.2d 308, ¶12. This Court exercises a limited review in appeals involving driver's license suspensions, and affirms the agency's decision unless:

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.

Johnson, supra, at ¶ 5, citing N.D.C.C. § 28-32-46.

LAW AND ARGUMENT

ISSUE 1: The Department did not meet the basic and mandatory provisions of N.D.C.C. § 39-20-03.1(4) when the Report and Notice failed to show compliance with N.D.C.C. § 39-20-01(3)(a), and therefore did not show that Jundt was tested under Chapter 39, without which the Department had no authority to suspend Jundt's driving privileges.

[¶ 9] N.D.C.C. § 39-20-03.1(4) requires that the officer's certified report "*must show*...that *the individual was tested for alcohol concentration under this chapter*, "(emphasis added), which is a basic and mandatory provision of the statute without which the Department has no authority to suspend driving privileges. *Compare Jorgensen v. North Dakota Dept. of*

Transp, 2005 ND 80, § 13, 695 N.W.2d 212 (inclusion of test result is basic and mandatory).

[¶ 10] Here, Muscha forwarded a Report and Notice to the ND Department of Transportation showing that the ND Implied Consent Advisory for a chemical test was not given to Jundt, (App. p. 6, Doc. ID No.: 5), and the box on the form showing compliance with the advisory requirement is not checked. N.D.C.C. § 39-20-01(3)(a)[1] mandates:

> 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.

[¶ 11] The Report and Notice did not show compliance with N.D.C.C. § 39-20-01(3)(a) and therefore did not show that Jundt was tested under Chapter 39, which is a basic and mandatory provision of the statute without which the Department had no authority to suspend Jundt's driving privileges.

ISSUE 2: N.D.C.C. § 39-20-05(2) sets for the scope of issues to be determined at the hearing, including, "whether the individual was tested in accordance with N.D.C.C. § 39-20-01," and the Department failed to establish compliance with N.D.C.C. § 39-20-01(3)(a) because Jundt was not provided with any implied consent advisory for chemical testing.

[¶ 12] N.D.C.C. § 39-20-05(2) sets forth the scope of issues to be determined at the hearing,

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[1]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.

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.

including, "whether the individual was *tested in accordance with N.D.C.C. § 39-20-01."* (emphasis added). Also see the Department's Exhibit 2 (Doc. ID No. 5), which specifically states, in part, "[T]he issues to be considered and decided at the administrative hearing are...(3) Whether the person was tested in accordance with N.D.C.C. section 39-20-01 and, if applicable, section 39-20-02." See also Tr. p. 1, lines17-18 (Doc. ID No. 4).

[¶ 13] It is well-settled that the moving party, here the Department, has the burden of proof in an administrative hearing. *Morrell v. North Dakota Dept. of Transp.*, 1999 ND 140, ¶ 14, 598 N.W.2d 111. While it is undisputed that the provisions of N.D.C.C. § 39-20-01(3)(a) were not complied with, the Department argues 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 principles. This argument ignores the scope of issues which the Department had the burden to prove to suspend Jundt's driving privileges. Indeed, in *Kobilansky v. Liffrig*, 358 N.W.2d 781, 790 (N.D. 1984), this Court made clear that the Department has the burden of proving all issues delineated in N.D.C.C. § 39-20-05(2):

> Here, the Commissioner, as the complainant [see NDCC §§ 39-20-05 and 28-32-05(1)] is the moving party and *had the burden to prove the four issues delineated in § 39-20-05(2)*.
>
> (emphasis added).

[¶ 14] Thus, as mandated by N.D.C.C. § 39-20-05(2) the Department had the burden of proving, "Whether the person was tested in accordance with N.D.C.C. section 39-20-01 and, if applicable, section 39-20-02." The Department could not meet its burden of proof on this issue, because Jundt was not tested in accordance with N.D.C.C. § 39-20-01. Proving that Jundt "was tested in accordance with N.D.C.C. § 39-20-01" would necessarily require the

Department to prove that the provisions of N.D.C.C. § 39-20-01(3)(a) were complied with. In failing to meet the burden of proof as to this required issue, the Department had no authority to suspend Jundt's driving privileges.

ISSUE 3: A prerequisite to a determination that there was a test administered under N.D.C.C. § 39-20-01 is finding that the request for testing was made under N.D.C.C. § 39-20-01. Because Jundt was not provided with any implied consent advisory for chemical testing under N.D.C.C. § 39-20-01(3)(a), the request for testing was not in compliance with N.D.C.C. § 39-20-01, and therefore insufficient to support a sanction by the Department.

[¶ 15] A prerequisite to a determination that there was a test administered under N.D.C.C. § 39-20-01 is finding that the request for testing was made under N.D.C.C. § 39-20-01. See *Throlson v. Backes*, 466 N.W.2d 124, 127 (N.D.l991)("[I[t is axiomatic that before there can be a "refusal" to submit to testing under Section 39-20-01, *there must be a valid request for testing under the statute*.")(emphasis added). Section 39–20–01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general. *State v. O'Connor*, 2016 ND 72, ¶ 7, 877 N.W.2d 312. In *O'Connor*, the State argued that because O'Connor indicated he recalled the advisory given before the onsite screening test, that advisory was sufficient. *Id.* at ¶ 9. This Court disagreed, and held that, "[]Permitting an implied consent advisory given before an arrest to satisfy this requirement is wholly incompatible with the statute's language." *Id.* at ¶ 11.

[¶ 16] Recently in *Alvarado v. N.D. Dep't of Transp*., 2019 ND 231, ¶ 9, 932 N.W.2d 911, this Court recently went so far as to provide a judicial remedy for a failure to read the implied consent advisory under N.D.C.C. § 39-20-01, even when the statute failed to provide a remedy. The Court held that 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:

> The language of N.D.C.C. § 39-20-04, relating to the imposition of revocation as a penalty, and *N.D.C.C. § 39-20-05, relating to how the administrative hearing is conducted, both require a request for testing be made under N.D.C.C. § 39-20-01.* We conclude that *a prerequisite to a determination* that an operator has refused a request for testing *is finding that the request for testing was made under N.D.C.C. § 39-20-01.*
>
> *Id.* (emphasis added).

[¶ 17] *Alvarado* teaches us that, "[T]he plain language of N.D.C.C. § 39-20-01(3)(a) requires a valid request for testing before any next steps can occur, *whether that be an individual consenting to or refusing chemical testing*." *Alvarado* at ¶ 13 (C.J. Vandewalle, concurring)(emphasis added). Similarly here, a prerequisite to a determination that there was a test administered under N.D.C.C. § 39-20-01 is finding that the request for testing was made under N.D.C.C. § 39-20-01. Because Jundt was not provided with any implied consent advisory for chemical testing under N.D.C.C. § 39-20-01, the request for testing was not in compliance with N.D.C.C. § 39-20-01 which was a required prerequisite prior to administering the chemical test.

[¶ 18] While the Department points out that N.D.C.C. § 39-20-01 was again in amended in 2019, the Department is incorrect that the statute was returned to the way it was prior to the 2015 amendments, and also wrongly takes us back to the abrogated voluntary consent holdings in *Fossum v. N.D. Dep't of Transp*.,2014 ND 47, 843 N.W.2d 282, *City of Bismarck v. Hoffner*,379 N.W.2d 797 (N.D.1985), and *State v. Abrahamson*, 328 N.W.2d 213 (N.D.1982), again arguing 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 principles.

[¶ 19] In *O'Connor*, this Court held that that "the voluntary consent holding is *Fossum, Hoffner, and Abrahamson* have been abrogated by the plain language of the amended statute as well." *Id.* at ¶ 12. This Court's reasoning was based, in part, on the legislature making refusal to take a chemical test a crime. *Id.* at ¶ 11. That reasoning has not changed, as refusal to submit to a chemical test remains a crime. See N.D.C.C. § 39-08-01(e).[2]

[¶ 20] Moreover, *Fossum, Hoffner, and Abrahamson* come from the days when both N.D.C.C. § 39-20-05(2) and N.D.C.C. § 39-20-05(3) previously contained a statutory preclusion to any argument that the implied consent advisory was not read. Prior to 2015, N.D.C.C. § 39-20-05(2) read, in part, "[W]hether the individual was informed that the privilege to drive might be suspended based on the results of the test is not an issue," while N.D.C.C. § 39-20-05(3) also read, in part, "[W[hether the individual was informed that the privilege to drive would be revoked or denied for refusal to submit to the test or tests is not

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[2] 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:

* * *

e. That individual refuses to submit to any of the following:

(1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or

(2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01.

an issue."

[¶ 21] However, in 2015, Senate Bill 2052 removed that prohibiting language from the statute, thereby making the issue of the reading of the implied consent advisory mandatory and an issue to be addressed at the administrative hearing. See SB 2052 (2015). Despite the Department's argument that the 2019 amendments returned the implied consent law to the way it was prior to the 2015 amendments, the legislature did not restore the prohibiting language and it remains removed. *See State v. Dennis*, 2007 ND 87, ¶ 12, 733 N.W.2d 241 ("The Legislature must be presumed to have meant what it has plainly expressed.")."

[¶ 22] Clearly, the legislature has spoken with the directive that the implied consent advisory for a chemical test be read. See *Keys v. Amundson*, 343 N.W.2d 78 (N.D.1983)("statutes and rules are to be construed in a way which does not render them useless, and because the law neither does nor requires idle acts we will not assume that any statute or rule was intended to be useless rhetoric.") and *Scott v. North Dakota Worker's Compensation Bureau*, 1998 ND 221, 587 N.W.2d 153("It is presumed the legislature acts with a purpose and does not perform useless acts.").

[¶ 23] Furthermore, prior to the 2015 amendment, there were no statutory consequences for a failure to read the implied consent advisory for a chemical test. But even the 2019 amendment continues to contain a statutory exclusion for any failure to read the implied consent advisory, (see N.D.C.C. § 39-20-01(3)(b)[3]), while the 2019 amendment also precludes criminal prosecution for refusing a chemical test when the implied consent

[3]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.

advisory is not read. See N.D.C.C. § 39-08-01(f)[4]. Also see *Olson v. N.D. Dept. of Transp. Director*, 523 N.W.2d 258, 260 (N.D. 1994), where there was a failure to advise the child's parent of the implied consent advisory, and this Court held, "[i]f the statutory directives are not complied with, then a child's subsequent failure to take a chemical test is not a refusal for purposes of section 39–20–01." *Id.* at 261. Even in *Neset v. North Dakota State Highway Commissioner*, 388 N.W.2d 860, 863 (N.D. 1986) and *Yellowbird v. N. Dakota Dep't of Transp*., 2013 ND 131, 833 N.W.2d 536, this Court addressed and considered legal challenges as to which officer(s) could give the implied consent advisory.

[¶ 24] Furthermore, under N.D.C.C. § 39-20-07(5), chemical test results are admissible at trial only if the test was 1) *properly obtained*; 2) fairly administered; and 3) performed according to methods and with devices approved by the state crime laboratory director. (emphasis added). According to N.D.C.C. § 39-20-01(2), to be "properly obtained," a chemical test must be administered only after providing required advisories. Evidence obtained in contravention of statute certainly is not "properly obtained." Cf. Merriam-Webster's Online Dictionary (providing a legal definition of "proper" as "marked by fitness or correctness" or "being in accordance with established procedure, law, jurisdiction, or standards of care, fairness, and justice"). Likewise, a sample is not "properly obtained" if a motorist's rights are violated. See *Fasching v. Backes*, 452 N.W.2d 324, 326 (N.D. 1990) (Levine, J., dissenting). In the context of DUI cases, the Legislature has made clear that a precondition of admissibility of a chemical test is a specific and complete

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[4] f. *Subdivision e does not apply to an individual unless the individual has been advised of the consequences of refusing a chemical test* consistent with the Constitution of the United States and the Constitution of North Dakota.

advisory. Because the proper admonition was not provided, the resulting test is inadmissible.

[¶ 25] Like an appellate court's deference to a trial court ruling, similar deference is rightfully extended to legislative judgments concerning admissibility of evidence created by legislative design. See *State v. Vetsch*, 368 N.W.2d 547, 551 (N.D.1985)(outlining the legislature's "power to make" chemical test evidence admissible); see also, *City of Fargo v. Ruether*, 490 N.W.2d 481 (N.D. 1992)(affirming exclusion of screening testing evidence designated as inadmissible at trial statute). In *Reuther*, this Court said, "We give special deference to the Legislature when a statute governing admissibility of evidence is part of a legislative design that essentially authorizes and creates the item of disputed evidence." *Id.* at 484. Because there are both civil and criminal aspects of DUI cases, courts "give great latitude to the Legislature in framing the boundaries for admissibility of the evidence generated by the legislative design." *Id.* (emphasis added).

[¶ 26] The issue is not one of relevance, but admissibility as determined by compliance with legislative requirements. See *Reuther* at 484 (rejecting the government's claim that relevance trumps admissibility). Specifically citing N.D.R.Ev. 402, this Court held "even relevant evidence may be made inadmissible by the Legislature." *Id.* Because prior to administration of the chemical test officers failed to provide a complete and proper advisory as required by N.D.C.C. § 39-20-01(3)(a), the test should have been excluded. N.D.C.C. § 39-20-07(5).

CONCLUSION AND PRAYER FOR RELIEF

[¶ 27] We have reached a point in our North Dakota jurisprudence wherein the reading of the implied consent advisory is both necessary and prudent, for it is now a crime to refuse to submit to a breath chemical test with serious due process and liberty interests involved. In the interest of justice, this Court should decline the Department's invitation to roll back the legal progress North Dakota has made to establish some basic fundamental requirements of fair warning prior to allowing the government to prosecute individuals on chemical testing or to administratively suspend or revoke their driving privileges. Jundt respectfully prays that this Court will reverse the judgment affirming the administrative suspension of his driving privileges.

Dated this 13th day of May, 2020.

/s/ Chad R. McCabe
CHAD R. MCCABE
McCabe Law Firm
Attorney for the Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
N.D. State Bar ID No. 05474

REQUEST FOR ORAL ARGUMENT

[¶ 28] This appeal concerns a fundamental issue at the core of the thousands of DUI cases our State deals with every year, that is whether compliance with N.D.C.C. § 39-20-01(3)(a) is required for chemical testing and administrative suspension of driving privileges. Oral argument would be helpful to further discuss this issue and answer any questions from this Court.

CERTIFICATE OF SERVICE

[¶ 30] A true and correct copy of the foregoing document was sent by electronic transmission on this 13th day of May, 2020, to the following:

Michael Pitcher
Asst. Attorney General
Email: mtpitcher@nd.gov

Dated this 13th day of May, 2020.

/s/ Chad R. McCabe
CHAD R. MCCABE
McCabe Law Firm
Attorney for the Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
N.D. State Bar ID No. 05474

CERTIFICATE OF PAGE COMPLIANCE

[¶ 29] The undersigned certifies that this brief is in compliance with the page limitations of Rule 32, N.D.R.App.P.

Dated this 13th day of May, 2020.

/s/ Chad R. McCabe
CHAD R. MCCABE
McCabe Law Firm
Attorney for the Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
N.D. State Bar ID No. 05474

CERTIFICATE OF SERVICE

[¶ 30] A true and correct copy of the foregoing document was sent by electronic transmission on this 14th day of May, 2020, to the following:

Michael Pitcher
Asst. Attorney General
Email: mtpitcher@nd.gov

Dated this 14th day of May, 2020.

/s/ Chad R. McCabe
CHAD R. MCCABE
McCabe Law Firm
Attorney for the Appellant
419 Riverwood Dr., Suite 104
Bismarck, North Dakota 58504
(701) 222-2500
N.D. State Bar ID No. 05474