

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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James George McClintock, Jr.,	)	
	)	
Appellee,	)	
	)	Supreme Court No. 20200164
vs.	)	Case No. 35-2020-CV-00007
	)	
	)	
Department of Transportation,	)	
	)	
Appellant.	)	

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ON APPEAL FROM THE DISTRICT COURT JUDGEMENT ENTERED  
APRIL 17, 2020  
FOR THE NORTHEAST JUDICIAL DISTRICT  
PIERCE COUNTY, NORTH DAKOTA  
THE HONORABLE MICHAEL P. HURLY, PRESIDING.

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**BRIEF OF APPELLEE  
JAMES GEORGE MCCLINTOCK JR.**

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[¶ 2] **LAW AND ARGUMENT**

**I. The District Court correctly concluded the Hearing Officer erred in admitting the Intoxilyzer Record and Checklist into evidence.**

[¶ 3] Section 39-20-07, N.D.C.C. governs the admission of a chemical test result and allows the use of certified documents to establish the evidentiary foundation for the result. Ell v. Dir., Dep't. of Transp., 2016 ND 164, ¶ 17, 883 N.W.2d 464. Section 39-20-07(5), N.D.C.C., eases the burden in laying an evidentiary foundation for chemical test results, provided that four foundational elements are met. Id. at ¶ 18. One of these foundational elements requires the breath test to have been “fairly administered.” Id. (citing Filkowski v. Dir., N.D. Dep't. of Transp., 2015 ND 104, ¶ 12, 862 N.W.2d 785). When the approved method is followed, the test is both fairly administered and scientifically accurate. Salter v. Hjelle, 415 N.W.2d 801, 803 (N.D. 1987). The statute eases the Department’s burden in laying an evidentiary foundation for a chemical test result by “allowing the admittance of scrupulously completed documents in lieu of lengthy testimony . . . [.]” and also ensures the test was fairly administered. Id. (citing Frank v. Dir., N.D. Dep't. of Transp., 2014 ND 158, ¶ 10, 849 N.W.2d 248).

[¶ 4] The scientific accuracy of the test cannot be established without expert testimony if there is not strict compliance with the approved method. Lee v. N.D. Dep't. of Transp., 2004 ND 7, ¶ 12, 673 N.W.2d 245. “If the documentary evidence and testimony does not show scrupulous compliance with the methods approved by the director of the state crime laboratory of the director’s designee, the evidentiary shortcut provided by N.D.C.C. § 39-20-07 cannot be used and fair administration of the test must be established through expert testimony.” State v. Van Zomerem, 2016 ND 98, ¶ 10, 879 N.W. 2d 449.

The approved method to conduct breath tests with the Intoxilyzer 8000 requires the device to be installed by a field inspector before use. Ell, 2016 ND 164 at ¶ 21. Without evidentiary or testimonial proof of compliance with the approved method, the Department cannot make prima facie showing the approved method was followed. Id. at ¶ 22.

[¶ 5] In this case, the hearing officer, over objection, admitted Exhibit 1. Hr’g Tr. at p. 34. The hearing officer also admitted several exhibits without objection. Id. at pp. 2-3. Exhibit 7, admitted without objection, is the Intoxilyzer 8000 Installation and Repair Checkout for the machine in question. Exhibit 7 clearly shows the device was installed by Jeremy Monroe on August 16, 2018. Appellant’s App. at pp. 21-24. Exhibit 5 is a List of Certified Chemical Test Operators dated July 1, 2019. Appellant’s App. at pp. 15-20. Exhibit 5 shows Jeremy Monroe was certified as a Field Inspector Certification on January 1, 2019—a date after the date of installation shown on Exhibit 7. Jeremy Monroe does not appear in any of the supplements offered and admitted by the Department. The Department did not offer any evidentiary or testimonial proof that Jeremy Monroe was certified as a Field Inspector when this particular Intoxilyzer 8000 machine was installed.

[¶ 6] The certification on Exhibit 7 clearly states, “This installation has been reviewed and the instrument is approved to be used for the analysis of breath to determine alcohol concentration **from the date the Field Inspector performed the installation.**” (Emphasis added). Ms. Grieger-Nimmo’s approval of the device was conditioned on the device being installed by a Field Inspector. The Department did not introduce any evidence showing Jeremy Monroe was certified as a field inspector on the date he installed the device. No expert testimony was offered at the hearing.

[¶ 7] Because the Department failed to introduce evidentiary or testimonial proof of compliance with the approved method, proper foundation for the Intoxilyzer test result was not laid. The hearing officer misapplied the law and abused her discretion in admitting the breath test result. Because the hearing officer erred in admitting the breath test result, the hearing officer's findings are not supported by a preponderance of the evidence and the decision is not in accordance with the law. The district court correctly determined the same.

[¶ 8] In an attempt to skirt the mandates announced in Ell, the Department relies primarily on Exhibit 7, the Intoxilyzer 8000 Installation and Repair Checkout, to show compliance with the approved method. Appellant's Brief at ¶ 25. Additionally, the Department argues Exhibit 5 was not admitted to show Jeremy Monroe was certified as a field inspector but rather to show Dep. Volk was certified as a chemical test operator. Id. at ¶ 22. The Department also argues that it is not statutorily required to show Monroe was certified as a field inspector at the time of the installation; rather, "the statute simply requires the test to be shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee." Id. at ¶ 23. Finally, the Department argues that if Mr. McClintock was concerned about Monroe's authorization as a field inspector, "he could have had a subpoena issued to Monroe, Grieger-Nimmo, or the State Toxicologist, to challenge Monroe's qualifications . . . . McClintock also could have attempted to introduce the July 1, 2019 yearly List of Certified Chemical Test Operators . . . into evidence . . .". Appellant's Brief at ¶ 29. These arguments are without merit.

[¶ 9] As previously stated, the approved method requires the Intoxilyzer 8000 must be installed by a Field Inspector prior to use. Exhibit 8, p. 4 (Appellant's App. at p. 3, Index # 13). Therefore, the Department does indeed have to show the machine was installed by Monroe while he was a field inspector.

[¶ 10] Contrary to the Department's assertion, Exhibit 5 was not admitted into evidence for any limited purpose. See Hr'g. Tr. at p. 3. Exhibit 5 was certainly admitted to show Dep. Volk was certified as a chemical test operator as required; however, Exhibit 5 also shows Monroe was certified as a Field Inspector beginning January 1, 2019. What Exhibit 5 does not show, though, is that Monroe was certified as a Field Inspector on the date he installed the machine in 2018, an essential fact the Department must show in order to comply with the approved method.

[¶ 11] Exhibit 7, admittedly, is an installation and Repair Checkout for the machine in question. Appellant's App. at p. 21. Exhibit 7 shows the device was installed by Monroe on August 16, 2018. Appellant's App. at p. 21. The Department argues Monroe's signature on the document is somehow an attestation he was certified as a field inspector at the time of the installation, because "the regularly kept records of the state crime laboratory may be introduced at a hearing and those records are prima facie evidence of their contents without further foundation." Appellant's Brief at ¶ 19.

[¶ 12] Assuming the installation and repair checkout is given prima facie weight by statute, Mr. McClintock rebutted the prima facie evidence offered in Exhibit 7 through Exhibit 5. The evidentiary documentation admitted into evidence need not be read in isolation. The documents can and should be read to together, drawing reasonable

inferences and conclusions from them as a whole. Here, the documentation admitted at the hearing undoubtedly shows the following:

- Intoxilyzer Machine (Serial Number 80-005951) was installed by Monroe on 8/16/2018. See Ex. 7 (Appellant’s App. at p. 21);
- It was certified for use “from the date the Field Inspector performed the installation” on 8/20/2018 by Roberto Grieger-Nimmo. Id.; and
- Monroe was certified as a Field Inspector on 1/1/2019 (Id. at p. 16).

Exhibit 7 only shows the machine was installed by Monroe on 8/16/18, while Exhibit 5 shows that Monroe was not certified as a field inspector at the time of installation, rebutting the prima facie content of Exhibit 7 and rebutting the presumption of fair administration of the chemical test. Roberto Grieger-Nimmo’s certification is meaningless until it is shown a **“Field Inspector performed the installation”** as the certification clearly states. (Emphasis added). The Department’s reliance on Exhibit 7, particularly Grieger-Nimmo’s certification is misplaced. The Department simply cannot justify the hearing officer’s decision to admit the Intoxilyzer test into evidence without documentary or testimonial proof the approved method was followed.

[¶ 13] The Department argues Mr. McClintock could have issued various subpoenas or introduced the 2018 yearly list of certified chemical test operators to challenge Monroe’s bears the burden of introducing foundational documents establishing Monroe’s certification of a field inspector. Appellant’s Brief at ¶ 29. It is not Mr. McClintock’s burden to introduce foundational documents regarding an Intoxilyzer test.



That burden falls squarely on the Department. As such, the Department did not introduce any documentation showing Monroe was certified on the date the machine was installed.

[¶ 14] Because the Department failed to introduce evidentiary or testimonial proof of compliance with the approved method, proper foundation for the Intoxilyzer test result was not laid. The hearing officer misapplied the law and abused her discretion in admitting the breath test result. The district court correctly overturned the Hearing Officer's decision suspending Mr. McClintock's driving privileges. The district court's order must be affirmed.

### **CONCLUSION**

[¶ 15] The district court correctly determined the Department erred in admitting the Intoxilyzer Record and Checklist into evidence because it failed to introduce documentary or testimonial evidence showing the device was installed by a field inspector. Mr. McClintock respectfully requests this Court **AFFIRM** the April 17, 2020 Order reversing the hearing officer's decision reinstating Mr. McClintock's driving privileges.

Dated this 21st day of August, 2020.

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**/s/Challis D. Williams**

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**CERTIFICATE OF COMPLIANCE**

[¶ 1] The undersigned, as the author of the Brief of Appellee, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 9 pages.

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

Dated this 21st day of August, 2020.

**REICHERT LAW OFFICE**

**/s/Challis D. Williams**

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[¶ 1] I hereby certify that on August 21, 2020, the following documents:  
**BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court through E-Filing Portal and served on Michael Pitcher at mtpitcher@nd.gov.

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