20200164

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James George McClintock, Jr., Appellee, v. Department of Transportation, Appellant.	**Supreme Ct. No. 20200164** **District Ct. No. 35-2020-CV-00007** **ORAL ARGUMENT REQUESTED**

APPEAL FROM THE APRIL 17, 2020
JUDGMENT OF THE DISTRICT COURT
PIERCE COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT

HONORABLE MICHAEL P. HURLY

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

[¶1] Whether the greater weight of the evidence showed that Intoxilyzer 8000, serial number 80-005951, was installed by a field inspector prior to use.

STATEMENT OF CASE

[¶2] On December 21, 2019, Deputy Shelby Volk (Deputy Volk) of the Pierce County Sheriff's Office arrested James George McClintock (McClintock) for the offense of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor. Appendix of Appellant (App.) 13. A Report and Notice, including a temporary operator's permit, was issued to McClintock after chemical breath test results indicated McClintock's alcohol concentration was .138 percent by weight. Id. The Report and Notice notified McClintock of the Department's intent to suspend his driving privileges. Id.

[¶3] In response to the Report and Notice, McClintock requested an administrative hearing. Index # 6, at 4. The administrative hearing was held on January 14, 2020, 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.

App. 7; Index # 7.

[¶4] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending McClintock's driving privileges for a period of 91 days. App. 35-36. McClintock requested judicial review of the hearing officer's decision. App. 37-38.

REQUEST FOR ORAL ARGUMENT

[¶5] The Department requests the Court schedule oral argument in this case under N.D.R.App.P. 28(h). This matter involves the interpretation of the state crime laboratory's approved method to conduct a chemical breath test on the Intoxilyzer 8000 device and whether the Department's documentary foundation as to the installation of the device used to test McClintock's breath was rebutted by other evidence. Oral argument would be helpful in the Court's de novo review of the District Court's decision and the Hearing Officer's decision.

STATEMENT OF FACTS

[¶6] On December 21, 2019, at 1:28 a.m., Deputy Volk observed a vehicle that had run off the roadway and was stuck in a snow embankment. Transcript (Tr.) [Index # 5] at 6, ll. 5-8. Deputy Volk saw a male standing by the open driver's door, holding onto the door. Id. at 6, ll. 8-10. Other individuals were in the vicinity attempting to help get the vehicle unstuck. Id. at 6, ll. 10-11. Deputy Volk parked his patrol car and approached the individual by the driver's door. Id. at 6, ll. 16-23. As he did so he detected the odor of alcoholic beverage emitting from the person. Id. at 6, ll. 24-25. The male, later identified as McClintock acknowledged driving the vehicle and said he had spun out around the corner into the snow bank. Id. at

7, ll. 1-3. Deputy Volk observed that the vehicle was still running as exhaust was emitting from the rear of the vehicle. Id. at 7, ll. 10-15.

[¶7] After observing indicia of McClintock's intoxication and administering field sobriety tests, which indicated McClintock was impaired, Deputy Volk placed McClintock under arrest for being in actual physical control of a vehicle while under the influence of intoxicating liquor. Id. at 7, l. 20 – 14, l. 5. The results of a chemical Intoxilyzer test established McClintock had a blood alcohol concentration of 0.138 percent by weight. App. 14.

STATEMENT OF PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶8] At the conclusion of the hearing, McClintock argued the Department did not introduce sufficient evidence to show the Intoxilyzer 8000 device used to test his breath was installed by a field inspector prior to use. App. 11, l. 16 – App. 12, l. 7. More particularly, McClintock asserted that the exhibits offered by the Department, specifically Exhibit 5 and Exhibit 7 together show that the field inspector installed the Intoxilyzer machine prior to being certified as a field inspector. Id.

[¶9] Based on the evidence presented at the hearing, the hearing officer determined:

> The certified test record establishes testing took place on an Intoxilyzer 8000 with the serial number 80-005951. Exhibit 1. Exhibit 7 establishes this instrument was installed by the Field Inspector on August 16, 2018 and certified by a designee of the Crime Laboratory Director, Roberta Grieger-Nimmo, as being properly installed and ready for use for the analysis of breath to determine alcohol concentration. Roberta Grieger-Nimmo is authorized to appoint and train field inspectors for breath testing equipment and to approve devices. Exhibit 15. This instrument was found to be an approved chemical testing device. Exhibit 6, 7, 15. No other evidence was presented, and the exhibits were not impeached. The greater weight of the evidence establishes testing took place on an instrument

> whose installation was approved by the Crime Laboratory and testing was carried out in accordance with the approved method. Exhibit 1, 8.

App. 35. The hearing officer issued her decision suspending McClintock's driving privileges for a period of 91 days. App. 35-36.

[¶10] McClintock sought judicial review of the hearing officer's decision, alleging in pertinent part as follows:

> 2) The Hearing Officer's findings of fact that law enforcement followed the approved method in conducting breath tests is not supported by a preponderance of the evidence when the exhibits offered and admitted at the hearing did not show the Intoxilyzer machine was installed by an individual authorized to perform an installation in violation of the North Dakota Supreme Court's mandate in Ell v. Director, Dep't of Transp., 2016 ND 164, 883 N.W.2d 464.

App. 37.

[¶11] The District Court issued its Order on Appeal on April 15, 2020, in which the Court reversed the hearing officer's decision. App. 39-42. The District Court noted:

> The situation before the court is unique. The evidence shows the individual who installed this particular machine, Jeremy Monroe, was listed as a field inspector beginning January 1, 2019 and his certification expires on January 1, 2021 (Doc. No. 5). The Intoxilyzer 8000 installation and Repair Checkout, State's Exhibit 7 at the hearing, showed Monroe installed the machine on August 16, 2018. (Doc. 12). While Monroe's installation may have subsequently been reviewed by another field inspector (Roberta Greiger-Nimmo), there is no evidence that Monroe was in fact a field inspector when he *personally* installed the machine in August 2018.

App. 40. The District Court further determined "[t]he evidence shows the individual who was responsible for installing the Intoxilyzer and making sure it was in good working order was not personally certified to be a field inspector on the date of

installation." Id. The District Court concluded the Department did not show fair administration of the chemical test, and failed to remedy the situation by producing expert testimony to establish that the test was administered fairly. Id. Relying on State v. Blaskowski, 2019 ND 192, ¶ 11, 931 N.W.2d 226 the District Court rejected the Department's arguments as to the purpose of Exhibit 5 and concluded:

> While the State may not have offered Exhibit 5 to show Monroe was a field inspector, it does not refute that he was the individual who installed the machine and the State did not provide any other evidence showing he was a field inspector in August 2018. Whether a test was administered by a certified chemical test operator has nothing to do with whether the machine itself was initially installed by a certified field inspector. Both are required under the law and the holdings of the North Dakota Supreme Court.

App. 41.

[¶12] Judgment was entered on April 17, 2020. App. 44. The Department appealed the Judgment to the North Dakota Supreme Court. App. 46-47. The Department requests this Court reverse the Judgment of the Pierce County District Court and reinstate the Hearing Officer's Decision suspending McClintock's driving privileges for a period of 91 days.

STANDARD OF REVIEW

[¶13] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to [suspend] 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.

[¶14] "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.

LAW AND ARGUMENT

The hearing officer did not abuse her discretion in admitting McClintock's chemical Intoxilyzer tests results into evidence.

A. This Court reviews the administrative hearing officer's evidentiary ruling for abuse of discretion.

[¶15] At the administrative hearing McClintock raised the issue of whether his Intoxilyzer test results were inadmissible. This Court reviews the administrative

hearing officer's ruling for an abuse of discretion. See Knudson v. Dir., N.D. Dept. of Transp., 530 N.W.2d 313, 317-18 (N.D. 1995). An abuse of discretion occurs when a hearing officer acts in an arbitrary, unreasonable, or capricious manner or misinterprets or misapplies the law. Id. Thus, the broad question, properly framed, is whether the hearing officer abused her discretion in admitting McClintock's Intoxilyzer test results into evidence.

B. McClintock's Intoxilyzer test was properly admitted into evidence.

[¶16] This Court has observed that "'[t]he admissibility of an Intoxilyzer test result is governed by N.D.C.C. § 39-20-07(5).'" Buchholtz v. Dir., N.D. Dep't of Transp., 2008 ND 53, ¶ 10, 746 N.W.2d 181 (quoting Johnson v. N.D. Dep't of Transp., 2004 ND 59, ¶ 11, 676 N.W.2d 807). This Court also has observed that "[f]air administration of an Intoxilyzer test may be established by proof that the method approved by the State Toxicologist for conducting the test has been scrupulously followed." Buchholtz, 2008 ND 53, ¶ 10, 746 N.W.2d 181 (quoting Buchholz v. N.D. Dep't of Transp., 2002 ND 23, ¶ 7, 639 N.W.2d 490). However, "'scrupulous' compliance does not mean 'hypertechnical' compliance." Buchholtz, 2008 ND 53, ¶ 10, 746 N.W.2d 181 (external citations omitted.) Even when there is a deviation from the state toxicologist's directions, the test results may be admitted if the deviation could not have substantially affected the test results. Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147, 152 (N.D. 1990); see also Wagner v. Backes, 470 N.W.2d 598, 600 (N.D. 1991) ("When . . . we have been able to say that the deviation involved some clerical or ministerial aspect of an approved method and, therefore, could not have affected the test results, we have upheld a

license suspension.").

[¶17] The hearing officer admitted McClintock's Intoxilyzer Test Record and Checklist into evidence. App. 10, ll. 3-5; App. 14. As noted on the Intoxilyzer Test Record and Checklist, Deputy Volk tested McClintock's breath alcohol content on December 21, 2019. App. 14. Deputy Volk also noted on the Intoxilyzer Test Record and Checklist that "I followed the approved method and the instructions displayed by the Intoxilyzer in conducting this test." Id.

[¶18] In Ell v. Dir., Dep't of Transp., 2016 ND 164, 883 N.W.2d 464, this Court found that the approved method to conduct breath tests with the Intoxilyzer 8000 required the device to be installed by a field inspector prior to use. Id. at ¶ 20; accord State v. Blaskowski, 2019 ND 192, ¶ 6, 931 N.W.2d 226. This was so because the approved method for the test states the first step in instrument preparation for a test is that "[t]he Intoxilyzer 8000 must be installed by a Field Inspector prior to use." Ell, 2016 ND 164 at ¶ 20. This Court in Ell held that because, "[t]here was no documentary or testimonial evidence that the device was installed by a field inspector. . . . The documentary evidence and testimony did not show scrupulous compliance with the approved method to conduct the breath test." Id. at ¶ 21.

[¶19] In contrast to Ell and Blaskowski, here, there was documentary evidence submitted showing the Intoxilyzer device, used to conduct McClintock's chemical breath test, was installed by a field inspector prior to use. To that end the Department offered Exhibit 7, which is the "Intoxilyzer 8000 Installation and Repair Checkout" form and its 3 associated "run" tests for the Intoxilyzer device, serial

number 80-005951. App. 21-24. The serial number matches the serial number on the Intoxilyzer used to perform McClintock's test. See App. 14. Under N.D.C.C. § 39-20-05(4), 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.

C. McClintock did not rebut the prima facie evidence of proper installation of the Intoxilyzer 8000 device used to analyze the alcohol concentration of his breath.

[¶20] Once Exhibit 7 and McClintock's Intoxilyzer Test Record and Checklist were admitted into evidence the Department met its prima facie case of fair administration of his chemical test. 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). This Court has stated, "[i]f 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). 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); 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").

[¶21] At the hearing, McClintock attempted to rebut the prima facie showing of fair administration of his chemical test by arguing there was insufficient foundation for the admission of the Intoxilyzer test results because there was no evidence in the record to suggest that Jeremy Monroe (Monroe), the individual who installed his Intoxilyzer device, was certified as a field inspector. App. 11, l. 16 – App. 12, l. 7. McClintock bases his argument on the fact that Exhibit 5 – List of Certified Chemical Test Operators – shows Monroe being certified as a field inspector on January 1, 2019 through January 1, 2021. Id.

[¶22] The problem with McClintock's argument is that Exhibit 5, was not offered to show that field inspector Monroe was certified as a field inspector but was offered to show that Deputy Volk was an approved chemical test operator as required by N.D.C.C. § 39-20-07(5). Under N.D.C.C. § 39-20-07(5):

> The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is 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, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee. The director of the state crime laboratory or the director's designee is authorized to approve satisfactory devices and methods of chemical analysis and determine the qualifications of individuals to conduct such analysis, and shall issue a certificate to all qualified operators who exhibit the certificate upon demand of the individual requested to take the chemical test.

Id. Exhibit 5 conclusively shows that Deputy Volk possessed a certificate of qualification to administer McClintock's Intoxilyzer 8000 test on December 21, 2019. See App. 19-20.

[¶23] In contrast, nothing in the statute requires the Department to show that the field inspector who installs the Intoxilyzer device to be certified to do so. In fact,

the statute does not mention anything about a field inspector. 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. To comply with this statutory directive the Department offered Exhibit 6 – the List of Approved Chemical Testing Devices showing that Intoxilyzer 8000 machine used to test McClintock's breath was approved, and Exhibit 8 – The Approved Method to Conduct Breath Test with Intoxilyzer 8000.

[¶24] In Ell, this Court based its decision on the language in the approved method that "the Intoxilyzer 8000 must be installed by a field inspector prior to use." But here unlike Ell, the Department also offered Exhibit 7 which showed that the Intoxilyzer device used to perform McClintock's chemical test was installed by a field inspector prior to use. App. 21-24.

[¶25] McClintock is simply challenging whether Monroe was a "certified" field inspector in August 2018. But the approved method does not indicate the field inspector must be certified. In any event, the evidence Monroe was an approved field inspector in August 2018 was Monroe's signature on Exhibit 7 – The Installation and Repair Checkout report, in the space designated "Field Inspector Signature." App. 21. The attached printer test, ACA test, and RFI test records show the same signature on the line above "Operator Signature, JEREMY MONROE"). App. 22-24. Monroe's signature on the Intoxilyzer 8000 Installation and Repair Checkout form is his attestation that he was a field inspector. App. 21.

[¶26] Further, the August 16, 2018, installation of Intoxilyzer 8000, serial number 80-005951 was "Reviewed/Certified By" Roberta Grieger-Nimmo. App. 21. As

shown by Exhibit 15, Roberta Grieger-Nimmo (Grieger-Nimmo) is a proper designee of the Director of the State Crime Laboratory, and is authorized to "approve breath alcohol methods and devices", and to "train, certify, and supervise field inspectors for the breath testing equipment" among other duties. See App. 26, 28, 30, 32, 34. Thus, in contrast the District Court's belief Grieger-Nimmo is much more than "another field inspector" who simply reviewed Monroe's installation. See App. 40, at ¶ 7. Grieger-Nimmo, trains, certifies, and supervises field inspectors, and she approved Monroe's installation and attested to the instrument's use for alcohol concentration testing. App. 21.

[¶27] Under N.D.C.C. § 31-11-03(15) a disputable presumption is made "[t]hat official duty has been performed regularly." Cf. Bieber v. N.D. Dep't of Transp., Dir., 509 N.W.2d 64, 68 (N.D. 1993) ("The official acts of the State Toxicologist are entitled to a disputable presumption of regularity."); State v. VandeHoven, 388 N.W.2d 857, 859 (N.D. 1986) ("The disputable presumption of regularity pursuant to § 31-11-03(15), N.D.C.C., applies to the official acts of the State Toxicologist; and because no evidence that would contradict this presumption was introduced, the presumption stands."). The Legislature also intended that this authority could be delegated. VandeHoven, 388 N.W.2d at 860. The authority is now delegated by the director of the crime laboratory to the director's designees, which include Grieger-Nimmo. See N.D.C.C. § 39-20-05(4)(c) (certificates of the director designating the director's designees); N.D.C.C. § 39-20-07(6) (the state crime laboratory director or the director's designees may "appoint, train, certify, and supervise field inspectors" and "the inspectors shall report the findings of any

inspection" to the director or the director's designee for appropriate action).

[¶28] The installation record, Exhibit 7, is prima facie evidence of Monroe being a field inspector as recognized at the state crime laboratory. Therefore, it was McClintock's burden to rebut the prima facie evidence. Prima facie evidence is not rebutted by merely pointing out that Monroe's current listing as a field inspector on Exhibit 5, almost a full year after the installation of the device, shows a certification from 1/1/2019 through 1/1/2021. Rather, McClintock was required to present actual evidence contradicting the prima facie evidence that Monroe was an authorized field inspector in August 2018 and that Intoxilyzer 8000, serial number 80-005951, was installed prior to its use.

[¶29] If 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 as a field inspector at the hearing. Otherwise McClintock also could have attempted to introduce the July 1, 2018 yearly List of Certified Chemical Test Operators and its supplements into evidence to verify whether Monroe was in fact listed as a "certified" field inspector at the time his Intoxilyzer device was installed in August 2018.[1] Yet, as it stands, McClintock has showed at most a mere possibility of error but has not overcome the disputable presumption of regularity as to the acts of the state crime laboratory in the installation of Intoxilyzer 8000 device, serial number 80-005951.

[1] Prior to the hearing, the Department provided notice to McClintock that the regularly kept records of the State Crime Laboratory, which include yearly lists of Certified Chemical Test operators from 2013 to the present, were available at http://www/ag.nd.gov/CrimeLab/Lab.htm. See Index # 8 (Exhibit 3).

CONCLUSION

[¶30] The Department requests this Court reverse the Judgment of the Pierce County District Court and affirm the Hearing Officer's Decision suspending McClintock's driving privileges for a period of 91 days.

Dated this 24th day of July, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James George McClintock, Jr., Appellee, v. Department of Transportation, Appellant.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20200164** **District Ct. No. 35-2020-CV-00007**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellant 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 24th day of July, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James George McClintock, Jr., Appellee, v. Department of Transportation, Appellant.	**Supreme Ct. No. 20200164** **District Ct. No. 35-2020-CV-00007** **CERTIFICATE OF SERVICE**

[¶1] I hereby certify that on July 24, 2020, the following documents: **BRIEF OF APPELLANT, CERTIFICATE OF COMPLIANCE, and APPENDIX TO BRIEF OF APPELLANT** were filed through electronic filing and served upon Challis D. Williams at supportstaff@reichertlaw.com.

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