

IN THE SUPREME COURT OF NORTH DAKOTA

City of West Fargo,

Petitioner,

v.

The Honorable Thomas R. Olson,
Judge of District Court, East Central
Judicial District, and Brady Duane
Johnson,

Respondents.

Supreme Court No. _____

Cass County
District Court No. 2019-CR-04563

**Petition for Supervisory Writ from Order Dated June 19, 2020
Cass County District Court
East Central Judicial District
Honorable Thomas R. Olson, Presiding**

PETITION FOR SUPERVISORY WRIT

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JURISDICTIONAL STATEMENT

[¶ 1] The City of West Fargo petitions the Court for a supervisory writ directing the district court to vacate its pretrial order holding the City is required under the Confrontation Clause to produce at trial Roberta Grieger-Nimmo, the individual who merely installed and inspected the Intoxilyzer 8000 testing device used in this case of Driving Under the Influence (“DUI”), and allow the admission of the Defendant’s chemical breath test result without testimony from Grieger-Nimmo.

[¶ 2] This Court has discretionary authority to issue supervisory writs under N.D. Const. art. VI, § 2 and N.D.C.C. § 27–02–04. State, ex rel. Roseland v. Herauf, 2012 ND 151, ¶ 3, 819 N.W.2d 546. The Court exercises its discretion “rarely and cautiously and only to rectify errors and prevent injustice in extraordinary cases in which no adequate alternative remedy exists.” Id.

[¶ 3] This is an appropriate case for the Court to exercise its supervisory jurisdiction because the City lacks another adequate remedy. See id. at ¶ 4. The City’s ability to appeal is limited. Id. (citing N.D.C.C. § 29-28-07). If the Defendant were acquitted at trial, the City could not appeal. Id. If the Defendant were convicted at trial, the Defendant would not likely raise the issue on appeal, and the possibility that the City could raise it is remote. Id.

[¶ 4] In addition, this is an extraordinary case because word of this strategy of “demanding” Grieger-Nimmo be produced under the Confrontation Clause has spread among the defense bar, and identical demands have been filed in numerous

DUI cases in the state, including several pending before the same trial judge in this case.¹ It is believed that the district court in this case was the first to decide the issue among North Dakota trial courts. After the district court's decision here, three other judges in the same county ruled the opposite way on the issue.² A ruling from this Court is needed to provide a definitive answer.

[¶ 5] This Court has exercised its supervisory jurisdiction in cases nearly identical to this one where the prosecution has challenged a district court's order to produce a witness at trial under the Confrontation Clause. State ex rel. Madden v. Rustad, 2012 ND 242, ¶¶ 4-5, 823 N.W.2d 767; Herauf, 2012 ND 151, ¶¶ 2-4, 819 N.W.2d 546. In so doing, this Court has rejected common arguments from the defense bar that alternative remedies exist for the prosecution. Rustad, 2012 ND 242, ¶ 7, 823 N.W.2d 767; Herauf, 2012 ND 151, ¶ 5, 819 N.W.2d 546.

[¶ 6] The Court should conclude here, as it has done previously under identical circumstances, that this is an appropriate case to exercise its supervisory jurisdiction.

¹This has become a popular demand after Roberta Grieger-Nimmo left the Office of the North Dakota State Toxicologist and moved to Minnesota. See, e.g., State v. Schlecht, Barnes County Case No. 37-2020-CR-00010; State v. Flores, Cass County Case No. 09-2019-CR-05356; State v. Mandt, Cass County Case No. 09-2019-CR-04900; City of Fargo v. Zanton, Cass County Case No. 09-2020-CR-00146; City of West Fargo v. Traughber, Cass County Case No. 09-2019-CR-04950; City of West Fargo v. Stuvland, Cass County Case No. 09-2019-CR-04506; City of West Fargo v. Nelson, 09-2019-CR-04030; City of West Fargo v. Miller, Cass County Case No. 09-2020-CR-00096; City of West Fargo v. Ackerman, Cass County Case No. 09-2019-CR-05460; City of West Fargo v. Tischart, Cass County Case No. 09-2020-CR-00299; City of West Fargo v. Schwartz, Cass County Case No. 09-2019-CR-05461; City of West Fargo v. Anderson, Cass County Case No. 09-2019-CR-04651.

²See, e.g., State v. Grothmann, Cass County Case No. 09-2019-CR-04831; State v. Halstenson, Cass County Case No. 09-2020-CR-00227; State v. Weltikol, Cass County Case No. 09-2020-CR-00736.

STATEMENT OF THE ISSUES

[¶ 7] Did the district court err by concluding the Defendant is entitled under the Sixth Amendment to be confronted at trial with Roberta Grieger-Nimmo when the documents signed by Grieger-Nimmo are nontestimonial and only establish the accuracy of the Intoxilyzer 8000 testing device?

STATEMENT OF THE CASE

[¶ 8] The City of West Fargo charged Defendant Brady Duane Johnson with Driving Under the Influence. (App. at 1.) Prior to trial, the Defendant demanded that he be allowed to cross-examine Roberta Grieger-Nimmo, a former designee of the State Toxicologist who conducted the installation and initial inspection of the Intoxilyzer 8000 testing device used in this case. (App. at 4-5, 31.) The district court ruled that the City would be required to produce Grieger-Nimmo at trial under the Confrontation Clause. (App. at 35-37.) The City now petitions this Court for a supervisory writ directing the district court to vacate its order and allow the admission of the Defendant's chemical breath test result without testimony from Grieger-Nimmo.

STATEMENT OF THE FACTS

[¶ 9] Shortly after the City charged the Defendant with DUI, he initially filed a general "Objection to Introduction of Analytical Report and Demand for Cross-Examination." (Index # 7.) Twelve days before the scheduled jury trial, the Defendant filed a more specific "supplement" to the "objection" in which he demanded cross-examination under the Confrontation Clause of Roberta Grieger-

Nimmo, a former designee of the State Toxicologist who conducted the installation and initial inspection of the Intoxilyzer 8000 testing device used in this case. (App. at 4-5, 31.) The jury trial was ultimately continued due to the COVID-19 pandemic. (Index # 24.)

[¶ 10] The City requested a hearing so that the district court could rule on the issue prior to trial. At the hearing, the defense presented arguments based on the false premise that Grieger-Nimmo was somehow a testimonial witness under the Confrontation Clause. (Tr. at 6-9.) Apparently accepting the defense's false premise at face value, the district court provided no legal analysis or reasoning for its decision and issued the following ruling:

I don't know if I have a pattern of ruling. It's my inclination when the dispute is whether the defendant is going to be available of his constitutional right, I tend to lean towards the defendant. Let's make sure the rights are protected rather than making that another issue on appeal. So I'm going to grant the motion, require that the City bring forward Ms. Grieger – I can't remember her name but – bring forward Ms. Grieger-Nimmo in person to testify.

(App. at 36-37; see also Order dated June 19, 2020, App. at 35.)

[¶ 11] Having no other remedy to rectify the district court's error, the City filed this petition for a supervisory writ.

ARGUMENT

I. The City is not required to produce Roberta Grieger-Nimmo at trial under the Confrontation Clause.

[¶ 12] When an officer arrests a person for DUI, the officer typically requests a chemical breath test from the arrestee to measure his alcohol concentration. Since

it is a crime to refuse such a test, see N.D.C.C. § 39-08-01(1)(e), DUI arrestees generally consent. The test is conducted using the Intoxilyzer 8000 testing device.

[¶ 13] After the DUI arrestee completes the chemical breath test, the Intoxilyzer device prints the results on a document called the “Test Record and Checklist.” (Index # 27.) This Test Record and Checklist is an analytical report under N.D.R.Ev. 707.

[¶ 14] The results of a chemical breath test must be received into evidence when it is shown that: (1) the sample was properly obtained; (2) the test was fairly administered; (3) the test was performed according to methods and devices approved by the state crime lab; and (4) the test was performed by an authorized individual. N.D.C.C. § 39-20-07(5); see also Ell v. Dir., N.D. Dep’t of Transp., 2016 ND 164, ¶ 18, 883 N.W.2d 464. “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.” State v. Blaskowski, 2019 ND 192, ¶ 5, 931 N.W.2d 226 (quotation omitted). One of the foundational elements required for admission of chemical breath test results is a showing that the testing device was installed by a field inspector. Id. at ¶ 6. The document used to meet this requirement is the “Installation and Repair Checkout,” which was reviewed and certified in this case by Roberta Grieger-Nimmo. (App. at 31.)

[¶ 15] Under North Dakota Rule of Evidence 707, a criminal defendant may object to the introduction of an analytical report by identifying “a person who made a testimonial statement in the report to be produced to testify about the report at

trial.” N.D.R.Ev. 707(b) (emphasis added). If a proper objection is made, the City must produce the person requested. Id. The analytical report produced for a chemical breath test is the Test Record and Checklist. See N.D.R.Ev. 707, Explanatory Note. In this case, the only person who made a testimonial statement in the analytical report would be James Ellefson, the officer who conducted the chemical breath test and signed the Test Record and Checklist. (Index # 27.)

[¶ 16] The Defendant here filed an objection under Rule 707, demanding cross-examination of Roberta Grieger-Nimmo. (App. at 4.) The Defendant stated in the objection that Grieger-Nimmo “had direct involvement in the review and approval of foundational documentary evidence and conducted the initial inspection of the Intoxilyzer machine used in this matter.” (Id.) The Defendant then cited State, ex rel. Roseland v. Herauf, 2012 ND 151, 819 N.W.2d 546, for the proposition that “a signed statement under N.D.C.C. § 39-20-07(5) constitutes a testimonial statement triggering confrontation rights under N.D.R.Evid. 707.” (Id.) The Defendant attached Exhibits A and B to his objection, which are the initial inspection from November 2018 and the installation and repair checkout from December 2018. Grieger-Nimmo conducted the initial inspection, which State Toxicologist Charles Eder reviewed. (App. at 5.) Grieger-Nimmo also reviewed and certified the Installation and Repair Checkout that Kathryn Allen of the Cass County Sheriff’s Office completed. (App. at 31.)

[¶ 17] At the outset, it must be noted that these foundational documents are not the type of “analytical reports” governed by Rule 707. But even assuming they

are, the Defendant is only entitled to cross-examine Grieger-Nimmo under the Confrontation Clause if she made a testimonial statement in these documents.

[¶ 18] This Court has explained the function of the Confrontation Clause:

The confrontation clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The United States Supreme Court held this amendment prohibits the admission of testimonial hearsay against the accused, unless the witness is unavailable to testify and the accused previously had an opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). The confrontation clause does not apply to non-testimonial hearsay.

State v. Duncan, 2011 ND 85, ¶ 13, 796 N.W.2d 672. Taking guidance from the United States Supreme Court, this Court has also outlined what qualifies as testimonial:

ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Herauf, 2012 ND 151, ¶ 9, 819 N.W.2d 546 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009)). But the Court was mindful to clarify this definition:

[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. While . . . it is the obligation of the prosecution to establish the chain of custody, . . . this does not mean

that everyone who laid hands on the evidence must be called.

Id. (quoting Melendez-Diaz, 557 U.S. at 311 n.1) (emphasis added) (alteration and quotation omitted).

[¶ 19] In Herauf, which the Defendant relied upon in claiming that Grieger-Nimmo is a testimonial witness, this Court concluded that Rule 707 and N.D.C.C. § 39-20-07 required the prosecution to produce at trial the individual who drew the defendant's blood. 2012 ND 151, ¶ 19, 819 N.W.2d 546. Under the statute at that time (changed during the 2013 legislative session), "a prerequisite to admission of an analytical report is a signed statement from the individual medically qualified to draw the blood sample that the blood sample was properly drawn." Id. at ¶ 14 (citing N.D.C.C. § 39-20-07(10) (2012)). The Court concluded that the "signed statement" under N.D.C.C. § 39-20-07(10) (2012) constituted a testimonial statement rather than a foundational requirement. Id. at ¶¶ 14-15. The Court stated that "the sole purpose of the signed statement in subsection 10 is to establish prima facie evidence that the blood sample was properly drawn." Id. at ¶ 14. Because the Court concluded that a signed statement under subsection 10 is testimonial, the "individual who signs such a statement is a witness for confrontation purposes and the defendant is entitled to be confronted with that individual at trial." Id. at ¶ 15.

[¶ 20] There is no blood sample in this case, so the holding of Herauf does not apply. Even if the Court extended the holding in Herauf to chemical breath tests, it would be akin to requiring the prosecution to produce at trial the officer who conducted the chemical breath test and signed the Test Record and Checklist, which

the City would obviously do at a trial. The officer's signature on the Intoxilyzer Test Record and Checklist would be the only document that qualifies as a testimonial statement, and the Test Record and Checklist is the only analytical report under Rule 707 relevant to this case.

[¶ 21] Other cases from this Court with issues much more similar to this case than Herauf demonstrate that Grieger-Nimmo is not a testimonial witness. In State v. Lutz, the defendant argued that the person who prepared the volatiles solution used in the chemical blood test was a testimonial witness under the Confrontation Clause. 2012 ND 156, ¶ 6, 820 N.W.2d 111. This Court held the expected testimony from the person who prepared the volatiles solution fell “squarely within footnote one of *Melendez-Diaz*.” Id. at ¶ 8. The Court reasoned that the volatiles solution was prepared three months before the defendant was charged with the crime, and there was nothing in the record to suggest the solution was prepared for prosecutorial purposes at a later trial. Id. Here, Grieger-Nimmo conducted the initial inspection of the Intoxilyzer on November 26, 2018 (App. at 7), which was nearly 10 months before the Defendant was charged with DUI. Grieger-Nimmo reviewed the Installation and Repair Checkout on December 31, 2018 (App. at 31), which was nearly nine months before the Defendant was charged. There is nothing to suggest she signed these documents anticipating they would be used at a trial against a criminal defendant who had not yet committed the charged crime. The Lutz Court also cited with approval other states' caselaw holding that documents pertaining to calibration and proper functioning of breath-test devices are

nontestimonial for confrontation purposes. Lutz, 2012 ND 156, ¶¶ 9-11, 820 N.W.2d 111.

[¶ 22] In State v. Severinson, the defendant argued that N.D.R.Ev. 707 and the Confrontation Clause required the State to produce an individual who conducted a peer review of the analytical report, completed by a forensic scientist at the state crime lab. 2013 ND 121, ¶¶ 2-5, 833 N.W.2d 517. The Court distinguished Herauf from other cases. Id. at ¶¶ 8-11. The Court continued its analysis, noting the case of State, ex rel. Madden v. Rustad, 2012 ND 242, ¶ 19, 823 N.W.2d 767, held that the State was not required to produce the Director of the State Crime Laboratory at trial. Id. at ¶ 12. In Rustad, the Court directed the district court to vacate its order requiring the State to produce the Director, “concluding the director’s certification of the analytical report was not a testimonial statement.” Id. at ¶ 13 (quoting Rustad, at ¶ 19). The Court summarized Rustad as follows:

We again noted, “There is no statutory language like the language in N.D.C.C. § 39-20-07(10), which requires the Director to make testimonial statements in the prima facie evidence established under the evidentiary shortcuts in N.D.C.C. § 39-20-07.” Rustad, at ¶ 17. “Nothing in the Director’s expected testimony would prove the substance of the results of the analytical report, or that the blood sample was properly drawn. Id. The State was not required to produce the director because the record “did not establish the Director conducted or otherwise participated in the blood analysis or made any testimonial statements in analytical reports.” Id.

Id.

[¶ 23] The Severinson Court stated that “no statute similar to N.D.C.C. § 39-20-07(10) discusses the requirement of peer review procedures.” Id. at ¶ 16. “Thus,

as in *Lutz*, the analysis from *Herauf* is “inapplicable on this issue.” Id. (quoting Lutz, 2012 ND 156, ¶ 6, 820 N.W.2d 111). The Court continued, “The issue here falls more squarely within our reasoning in *Lutz* and *Rustad*, where we held the State was not required to produce the witnesses.” Id. The Court concluded the testimony of the individual who conducted the peer review would be limited to his review of the forensic scientist’s analytical report, “which relates to the chain of custody or the accuracy of the testing procedure.” Id. (quoting Lutz, at ¶ 8). Similarly, nothing in his testimony “would prove the substance of the results of the analytical report.” Id. (quotation omitted). The Court held the peer review was not testimonial and the State was not required to produce the witness under N.D.R.Ev. 707 and the Confrontation Clause. Id.

[¶ 24] Here, Grieger-Nimmo’s signature on the foundational documents is not a testimonial statement. There is no statute similar to N.D.C.C. § 39-20-07(10) requiring an individual conducting the initial inspection or reviewing the installation completed by another individual to testify. The analysis in *Herauf* is therefore inapplicable on this issue. Grieger-Nimmo’s testimony would be limited to the initial inspection and installation, which relate to the chain of custody or accuracy of the testing device. Furthermore, Grieger-Nimmo’s testimony would not prove the substance of the result in the analytical report. Grieger-Nimmo did not administer the chemical breath test to the Defendant or otherwise participate in collecting the Defendant’s breath sample. She also did not conduct any analysis of the Defendant’s breath test. Grieger-Nimmo’s involvement is therefore not

testimonial and the City is not required to produce her under N.D.R.Ev. 707 and the Confrontation Clause.

[¶ 25] In addition to binding authority from this Court and the United States Supreme Court, it appears that every state to decide this issue has ruled that foundational documents pertaining to breath-test devices are nontestimonial. “[B]oth before and after *Melendez–Diaz* was decided, a virtually uniform national consensus emerged classifying documents similar to these as nontestimonial.”³ People v. Pealer, 985 N.E.2d 903, 908 (N.Y. 2013) (citing cases nationwide), cert. denied, 571 U.S. 846 (2013). Citing a plethora of cases nationwide, the Court of Appeals of New York stated, “We endorse this widely-held view and hold that documents pertaining to the routine inspection, maintenance and calibration of breathalyzer machines are nontestimonial under *Crawford* and its progeny.” Id.; see also Matthies v. State, 85 So. 3d 838, 844 (Miss. 2012) (“[R]ecords pertaining to intoxilyzer inspection, maintenance, or calibration are indeed nontestimonial in nature, and thus, their admission into evidence is not violative of the Confrontation Clause of the Sixth Amendment.”).

[¶ 26] Other states have held similar documents are nontestimonial. Citing Melendez-Diaz, the Illinois Appellate Court stated, “We find the testimony and

³ Although the Pealer Court said that the national consensus was “virtually” uniform, this appears to have been an understatement. The two cases cited by the Pealer Court for not being in line with the national consensus were actually either not on point to the issue at hand or non-binding on the court. Pealer, 985 N.E.2d at 908 n.1. One was a non-binding city court case from New York that Pealer overruled. People v. Carreira, 893 N.Y.S.2d 844 (City Ct. 2010), abrogated by People v. Pealer, 985 N.E.2d 903 (N.Y. 2013). The other was a federal district court case where the confrontation issue was not about the foundational documents for the Intoxilyzer, but instead about the officer who actually administered the test and signed the Test Record and Checklist. United States v. Gorder, 726 F. Supp. 2d 1307, 1314 (D. Utah 2010).

logbooks provided in this case as to the certification of the Breathalyzer were not testimonial and established a sufficient foundation that it was regularly tested and accurate.” People v. Jacobs, 939 N.E.2d 64, 71 (Ill. App. Ct. 2010). The Court went on to say, “The certifications of accuracy at issue here differ from the affidavits in *Melendez-Diaz* and do not establish an element of the offenses. The certifications were not compiled during the investigation of a particular crime and do not establish the criminal wrongdoing of the defendant.” Id. at 72. “Instead, the certification does nothing more than establish the machine had been working properly. Thus, the evidence was not testimonial and its introduction did not violate defendant’s right to confront witnesses.” Id.

[¶ 27] The Court of Appeals of Oregon has also concluded that Intoxilyzer testing certifications are nontestimonial:

Although Intoxilyzers produce evidence that is used only in criminal prosecutions or administrative hearings, the person who performs the test of a machine's accuracy does so with no particular prosecutorial use in mind, and, indeed, there is no guarantee that the machine will ever, in fact, be used. Intoxilyzer certificates of accuracy are kept for possible use at trial or administrative hearing.

State v. Bergin, 217 P.3d 1087, 1089 (Or. Ct. App. 2009).

[¶ 28] In this case, Grieger-Nimmo’s involvement and signature on certain documents that establish the accuracy of the Intoxilyzer used on the Defendant is not testimonial, and the introduction of the foundational documents does not violate the Defendant’s constitutional right to confrontation.

CONCLUSION

[¶ 29] Roberta Grieger-Nimmo is not a testimonial witness, and her testimony is not required at trial under the Confrontation Clause in order for the Intoxilyzer test result to be admitted. The City respectfully requests the Court issue a supervisory writ directing the district court to vacate its pretrial order holding that the City is required under the Confrontation Clause to produce at trial Grieger-Nimmo, and allow the admission of the Defendant's chemical breath test result without testimony from Grieger-Nimmo.

Dated: July 9, 2020.

/s/ Elle M. Molbert

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CERTIFICATE OF COMPLIANCE

[¶ 30] Pursuant to N.D.R.App.P. 32(e), the undersigned hereby certifies that the above brief contains 18 pages, which complies with the page limitation under N.D.R.App.P. 32(a)(8)(A).

Dated: July 9, 2020.

/s/ Elle M. Molbert

Elle M. Molbert

ND ID No. 08757

CERTIFICATE OF SERVICE

[¶ 31] I hereby certify that on July 9, 2020, I caused to be electronically filed the **Petition for Supervisory Writ, Petitioner's Appendix, and Transcript of June 17, 2020 Hearing** with the Clerk of the North Dakota Supreme Court via the North Dakota Supreme Court E-Filing Portal and served the same on Mark Friese, attorney for Brady Johnson, and the Honorable Thomas Olson via the North Dakota Supreme Court E-Filing Portal as follows:

Email to Mark Friese at: mfriese@vogellaw.com

Email to Honorable Thomas Olson at: tolson@ndcourts.gov

Dated: July 9, 2020.

/s/ Elle M. Molbert

Elle M. Molbert

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