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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Yonis Daud Hussiene, Petitioner and Appellee, v. Director, North Dakota Department of Transportation, Respondent and Appellant.	Supreme Court No. 20210045 Cass County Case No. 09-2020-CV-03119

APPEAL FROM THE DECEMBER 17, 2020
JUDGMENT OF THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

HONORABLE STEVEN L MARQUART

BRIEF OF APPELLEE
***** ORAL ARGUMENT REQUESTED *****

AALAND LAW OFFICE, LTD.

By: Jesse N. Lange (ND ID 06008)
415 11th St. S.; P.O. Box 1817
Fargo, ND 58107-1817
Telephone: 701-232-7944
officemanager@aalandlaw.com

Attorneys for Appellee

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[¶ 1] **STATEMENT OF THE ISSUES**

[¶ 2] Whether the district court correctly reversed the decision of the hearing officer when it determined that law enforcement seized Mr. Hussiene without a reasonable and articulable suspicion of criminal activity in violation of his constitutional rights.

[¶ 3] Whether the Department proved that Mr. Hussiene refused the chemical test.

[¶ 4] **STATEMENT OF THE CASE**

[¶ 5] The Director of the North Dakota Department of Transportation (the Department) appeals from a civil Judgment entered on December 17, 2020, including the Memorandum Opinion and Order entered on December 16, 2020, in Cass County District Court by the Honorable Steven L. Marquart. The Judgment and Order of the District Court reversed the decision of the Administrative Hearing Officer, which revoked Appellee Yonis Daud Hussiene's driving privileges for 180 days. Appendix to Brief of Appellant (Appellant's App.) at 32-35, 36.

[¶ 6] On September 5, 2020, Trooper Ryan Hoffer (Hoffner) of the North Dakota Highway Patrol arrested Mr. Hussiene for driving or being in actual physical of a vehicle while under the influence of alcohol. Hoffner issued a Report and Notice form to Mr. Hussiene claiming that he refused the chemical test. Appellant's App. at 27. Mr. Hussiene requested an administrative hearing regarding the proposed revocation of his driving privileges. Appellant's App. at 28. The administrative hearing was held on October 2, 2020. Appellant's App. at 3, Index # 8. On October 5, 2020, the hearing officer issued his findings of fact, conclusions of law, and decision revoking Mr. Hussiene's driving privileges for 180 days. Appellant's App. at 29. On October 9, 2020, Mr. Hussiene filed

a Notice of Appeal and Specifications of Error in Cass County District Court. Appellant's App. at 30. Mr. Hussiene and the Department each filed Briefs and oral argument was held in District Court on December 15, 2020. Appellant's App. at 3, Index #21, 32. The District Court issued its order reversing the Administrative Hearing Officer, concluding that 1) "a reasoning mind could not have reasonably determined that Hussiene ran a red light", and that 2) "Trooper Hoffner failed to have a reasonable and articulable suspicion that Mr. Hussiene had violated or was about to violate the law." Appellant's App. at 34, ¶¶ 9, 10. Judgment was entered on December 17, 2020. Appellant's App. at 36. The Department then appealed to this Court. Appellant's App. at 38. The appellee submits this brief in response to the Brief of Appellant filed by the Department on March 22, 2021.

[¶ 7] STATEMENT OF THE FACTS

[¶ 8] On September 5, 2020, Hoffner's patrol vehicle was stopped at a red light facing north where the I-29 exit ramp and 13th Avenue intersect. Appellant's App. at 10, lines 19-21; 22, lines 5-9, 18-19; 23, lines 12-13. Hoffner was looking off to the left at the lights for westbound traffic. Appellant's App. at 24, lines 1-2. Mr. Hussiene was traveling west on 13th Avenue and proceeded through the intersection where Hoffner was stopped. Appellant's App. at 22, lines 20-24. After the green turn arrow permitting northbound traffic to turn left through the intersection was displayed, Hoffner turned left and stopped Mr. Hussiene for allegedly going through a red light. Appellant's App. at 10, lines 21-25; 11, lines 1-5.

[¶ 9] An audio / video recording of the incident captured by Hoffner's dash cam was offered and admitted in to evidence as Exhibit 17 at the administrative hearing. Appellant's App. at 3, Index #17. At the hearing, Hoffner mentioned that he believed the

lights have a three second delay. Specifically, Hoffner asserted "And I want to say I believe it's about a three second delay so that allows you to clear the intersection for the other traffic to go." Appellant's App. at 24, lines 9-11. He speculated that if Mr. Hussiene entered the intersection on the yellow light, he would have cleared it within those three seconds. Appellant's App. at 24, lines 19-21. Hoffner did not articulate any basis or knowledge for this three second delay. The video of the incident starts recording at 22:08:41. Appellant's App. at 3, Index #17. The video shows Mr. Hussiene entering the intersection when the video begins and shows Hussiene clear the intersection before the green turn arrow appears at 22:08:45 in the video. Appellant's App. at 3, Index #17.

[¶ 10] After Mr. Hussiene was stopped for the alleged traffic violation, Hoffner ultimately conducted a DUI investigation and arrested Mr. Hussiene for driving under the influence of alcohol. Appellant's App. at 16, lines 12-14. Hoffner asked Mr. Hussiene to take a chemical breath test and a lengthy discussion ensued about the chemical breath test and the traffic stop. Appellant's App. at 16, lines 14-25; Appellant's App. at 3, Index #17. A chemical test was not administered. Hoffner issued Mr. Hussiene a promise to appear citation for refusal to submit to a chemical test and dropped him off at Love's Gas Station so he could walk home. Appellant's App. at 17, lines 6-16.

[¶ 11] The hearing officer found that Mr. Hussiene entered the intersection of 13th Avenue and an I-29 ramp on a red light. Appellant's App. at 29. The findings also indicated that Mr. Hussiene refused the chemical test. Id. The hearing officer went on to conclude that "Trooper Hoffner had a reasonable and articulable basis to stop the vehicle driven by Mr. Hussiene for a moving traffic violation" and that Mr. Hussiene "refused a

chemical breath test." Id. Based on these findings, the hearing officer revoked Mr. Hussiene's driving privileges. Id.

[¶ 12] Mr. Hussiene raised two issues on appeal to the district court, specifically that Mr. Hussiene was unlawfully seized without a reasonable suspicion of his state and federal constitutional rights to be free form unreasonable searches and seizures and that the evidence did not show that Mr. Hussiene refused the chemical test. Appellant's App. 30. Mr. Hussiene submitted a brief to the district court on December 4, 2020, addressing both of these issues. Appellant's App. at 3, Index #21. The Department filed an answer brief responding to both issues in Mr. Hussien's brief. Appellant's App. at 3, Index #23. Oral argument was also held before District Court Judge Steven L. Marquart on both issues noticed in the appeal and briefed by both parties. Appellant's App. at 3. The Memorandum Opinion and Order of the Court reversed on the grounds that Trooper Hoffer failed to have a reasonable and articulable suspicion that Mr. Hussiene had violated or was about to violate the law. Appellant's App. at 32-35. The district court did not address the issue regarding Mr. Hussiene's alleged refusal of the chemical test. Id.

[¶ 13] STANDARD OF REVIEW

[¶ 14] The Administrative Agencies Practice Act, N.D.C.C. Ch. 28-32, governs the review of an administrative license suspension. Facio v. N.D. Dep't of Transp., 500 ND 199, ¶ 6, 931 N.W.2d 498, 500 (citing Jangula v. N.D. Dep't of Transp., 2016 ND 116, ¶ 5, 881 N.W.2d 639). The North Dakota Supreme Court "reviews the decision under N.D.C.C. § 28-32-49 in the same manner as the district court under N.D.C.C. § 28-32-46." Facio, 500 ND at ¶ 6, 931 N.W.2d 498, 500. The District Court may reverse the hearing officer's decision when:

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. § 38-32-46.

[¶ 15] On appeal from the district court's review of the administrative agency, this Court reviews the administrative agency's decision. Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 7, 775 N.W.2d 695. "The review is limited to the record before the administrative agency." Mees v. N.D. Dep't of Transp., 2013 ND 36, ¶ 7, 827 N.W.2d 345. The Supreme Court does not make independent findings or substitute their judgment for that of the agency. faciov. Sprynczynatyk, 2004 ND 54, ¶ 8, 676 N.W.2d 799. Rather, they "determine only whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id. However, "[t]he district court's analysis is entitled to respect if its reasoning is sound, because the legislatively-mandated district court review cannot be ineffectual." Bieneck v. N.D. Dep't of Transp., 2007 ND 117, ¶ 16., 736 N.W.2d 492.

[¶ 16] STATEMENT ON ORAL ARGUMENT

[¶ 17] The appellant hereby requests oral argument. Appellant would like the opportunity to address the Court regarding the evidence, including the dash cam video, and the issues presented.

[¶ 18] LAW AND ARGUMENT

I. The District Court did not err in reversing the decision of the hearing officer because law enforcement seized Mr. Hussiene without a reasonable, articulable suspicion of criminal activity in violation of his constitutional rights.

[¶ 19] "The Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and Article I, section 8, of the North Dakota Constitution protect individuals from unreasonable searches and seizures." State v. Matthews, 2003 ND 108, ¶ 9, 665 N.W.2d 28, 31. For constitutional purposes, a "seizure" occurs when an officer has in some way restrained a citizen's liberty by means of physical force or show of authority. City of Fargo v. Sivertson, 1997 ND 204, ¶ 8, 571 N.W.2d 137. The North Dakota Supreme Court has expounded on that proposition, explaining that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." State v. Fields, 2003 ND 81, ¶ 11, 662 N.W.2d 242 (quoting State v. Koskela, 329 N.W.2d 587, 589 (N.D. 1983) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

[¶ 20] An investigative stop of an automobile is a Fourth Amendment seizure. City of Devils Lake v. Grove, 2008 ND 155, ¶ 12, 755 N.W.2d 485. See City of Grand Forks v. Mitchell, 2008 ND 5, 743 N.W.2d 800. "When conducting a traffic stop, an officer can temporarily detain the traffic violator at the scene of the violation" as long as the

"investigative detention [is] 'reasonably related in scope to the circumstances which justified the inference in the first place."' Id. at ¶¶ 12, 13 (quoting Fields, 2003 ND at ¶ 8, 662 N.W.2d 242) (quoting Terry v. Ohio, 392 U.S. 1, 29 (1968)). The United States Supreme Court has instructed that:

> Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of [the Fourth Amendment]. An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.

State v. Johnson, 2006 ND 248, ¶ 6, 724 N.W.2d 129, 131 (citing Whren v. United States, 517 U.S. 806, 809–10(1996).

[¶ 21] Police may stop persons in the absence of probable cause only under limited circumstances, namely, when there exists a reasonable and articulable suspicion that the person was committing a crime or was about to commit a crime. Terry v. Ohio, 392 U.S. 1 (1968). In State v. Placek, 386 N.W.2d 36, 37 (N.D. 1986) the North Dakota Supreme Court stated: "[t]he law governing investigative stops of automobiles is clear: an officer must have an articulable and reasonable suspicion that a motorist is violating the law in order to legally stop a vehicle." Id. Under the "articulable and reasonable suspicion" standard, the "articulable aspect requires that the stop be justified with more than just a vague 'hunch' or other non-objective facts; and the reasonable aspect means that the articulable facts must produce, by reasonable inference, a reasonable suspicion of unlawful conduct." State v. VandeHoven, 388 N.W.2d 857, 858 n.1 (ND 1986).

[¶ 22] The reasonable suspicion standard is objective and based on the totality of the circumstances, but the "mere hunch illegal activity is taking place is not enough to

justify the detention of a motorist." State v. Johnson, 2006 ND 248, ¶ 9, 724 N.W.2d 129, 131(citing Kappel v. Dir., N.D. Dep't of Transp., 1999 ND 213, ¶ 7, 602 N.W.2d 718) "An investigative stop of a moving vehicle must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity, and mere curiosity, suspicion, vague hunches, or other non-objective facts will not suffice." State v. Johnson, 2006 ND 248, ¶ 9, 724 N.W.2d 129, 131 (citing Salter v. N.D. Dep't of Transp., 505 N.W.2d 111, 114 (N.D.1993). In State v. Goehring, 374 N.W.2d 882, 888 (N.D. 1985), the Court forbade stops based on mere suspicion, describing such conduct as an exercise of "unbridled discretion."

[¶ 23] On appeal, the Department contends that Hoffner had sufficient grounds to stop Mr. Hussiene's vehicle for running a red light. The Department argues that 1) the district court's decision is in error because the video evidence is not conclusive and does not contradict the trooper's testimony and 2) the district court failed to give the proper deference to the uncontested findings made by the hearing officer.

[¶ 24] The hearing officer found that Hoffner "observed a vehicle driven westbound on 13th Avenue by Petitioner Yonis Daud Hussiene (Hussiene) enter the intersection of 13th Avenue and an I-29 ramp on a red light and initiated a traffic stop." Appellant's App. at 29. This finding is contradicted by the video evidence as well as by Hoffner's testimony. Further, the hearing officer's conclusion that "Trooper Hoffner had a reasonable and articulable basis to stop the vehicle driven by Mr. Hussiene for a moving traffic violation" is also erroneous and in conflict with the evidence. Id. The greater weight of the evidence establishes that Mr. Hussiene did not enter the intersection on a red light.

[¶ 25] The position of Hoffner's patrol vehicle and Mr. Hussiene's vehicle are important to note. Hoffner exited I-29 and was stopped facing north at a red light where the exit ramp and 13th Avenue intersect. Appellant's App. at 22, lines 5-15; 23, lines 5-23. Mr. Hussiene was traveling west on 13th Avenue and proceeded through the intersection where Hoffner was stopped. Appellant's App. at 23. Lines 20-24. In his decision, the hearing officer claimed that Mr. Hussiene entered the intersection on a red light. Appellant's App. at 29. However, when asked at the hearing if the turn arrow was green when Mr. Hussiene entered the intersection, Hoffner responded "No, not when he entered. It's not like he entered it when the green arrows are green." Appellant's App. at 24, lines 15-19. Obviously, if the green arrow allowing northbound traffic to turn left through the intersection had been illuminated when Mr. Hussiene entered the intersection, then Mr. Hussiene's light would have been red. However, that is not the case.

[¶ 26] According to Hoffner's testimony, Mr. Hussiene was already in the intersection when the green arrow for northbound traffic appeared. Appellant's App. at 24, lines 5-9, 18-19. However, the video shows that Mr. Hussiene actually cleared the intersection ***before*** the green arrow appeared. Appellant's App. at 3, Index #17. Hoffner claimed that Mr. Hussiene's vehicle,

> was the only vehicle that went through the intersection. And he was still in the intersection when they had the green arrow to go. And I want to say I believe it's about a three second delay so that allows you to clear the intersection for the other traffic to go.
>
> …
>
> if he would have entered the intersection within those three seconds when it was yellow he would have cleared the intersection.

Appellant's App. at 24, lines 7-11, 20-21. The Appellant relies heavily on Hoffner's comments regarding this three second delay. However, Hoffner did not provide any basis for his assertions about a three second delay. In fact, he did not even claim to know for a fact that there was a three second delay. Indeed, instead of just saying there is a three second delay, he said "I want to say I believe it's about a three second delay…" Appellant's App. at 24, lines 9-11. It's not at all clear whether this assertion was based on actual knowledge or simply on something he'd once been told by someone else who may or may not have had any actual knowledge.

[¶ 27] In addition to showing that Mr. Hussiene cleared the intersection before the green arrow signaling northbound traffic appeared, the video also shows a reflection of the lights signaling the westbound traffic. Appellant's App. at 3, Index #17. While it is very subtle, the moment the lights controlling Mr. Hussiene's westbound lane change from yellow to red can be seen reflected off of the left side of the hood on Hoffner's patrol vehicle. Id. Mr. Hussiene was already through the intersection when the lights changed to red. Id. The hearing officer's contention that "The video evidence was consistent with his testimony" is erroneous. Appellant's App. at 29. Even if there was a three second delay for vehicles to clear the intersection, Mr. Hussiene had cleared the intersection before the light turned green, and well before any of the vehicles in the left turn lane proceeded into the intersection.

[¶ 28] The Department claims that the Hoffner's testimony was uncontested and should be accepted as true. However, the Department fails to recognize that the video disputes Hoffner's testimony in two ways. First is what can be seen on the video – Mr. Hussiene clearing the intersection before the traffic signal changes, and second what can

be heard on the video. Appellant's App. at 3, Index #17. During the stop, there is a quite lengthy conversation between Hoffner and Mr. Hussiene about the chemical test and the traffic stop. Id. Several times during this conversation, Mr. Hussiene tells Hoffner that he didn't run the red light. Id.

[¶ 29] In his decision, the hearing officer noted that "Hoffner could see the lights governing Hussiene's direction of traffic." Appellant's App. at 29. When asked at the hearing where he was looking at the moment Mr. Hussiene entered the intersection, Hoffner replied "I was looking at the lights off to the left for the ones traveling westbound." Appellant's App. at 23, lines 23-25; 25, lines 1-2. If Hoffner was watching the traffic signal to his left for the cross traffic, he could not have simultaneously watched Mr. Hussiene's vehicle enter the intersection off to his right.

[¶ 30] The evidence established that Mr. Hussiene was not in the intersection when the light for the cross traffic turned green. Based on the evidence, a reasoning mind could not reasonably conclude that Mr. Hussiene entered the intersection on red light. Reasonable suspicion needs to be based on more than a hunch or an officer's subjective opinion. See State v. Smith, 452 N.W.2d 86, 88 (N.D. 1990). The evidence failed to establish a reasonable and articulable suspicion to stop Mr. Hussiene for a traffic violation which resulted in an unlawful seizure in violation of Mr. Hussiene's constitutional rights.

II. The evidence did not establish that Mr. Hussiene refused the chemical test.

[¶ 31] Although the Appellant did not address it, Hussiene raised a second issue before the District Court. In addition to the stop issue, Hussiene argued that the evidence did not establish that he refused the chemical test. The District Court did not address this issue in its ruling as the stop issue was dispositive. In cases involving administrative

hearing reviews, the Supreme Court has remanded to the district court in situations where not all issued appealed were considered. See Thornton v. N.D. State Highway Commissioner, 399 N.W.2d 861 (N.D. 1987) ("Because the district court did not address all of Thornton's contentions and reversed the administrative hearing officer's determination to suspend Thornton's driving privileges based on its misinterpretation of the term "intoxicating liquor", we reverse the district court's decision in regard to this matter and remand the case for a determination of the other issues raised by Thornton in his appeal to the district court."). However, since there have been situations in which appellate courts have resolved issues on appeal that were left unresolved by the district court rather than simply remanding, Huissene will address the refusal issue as well. See Hudson United Bank v. LiTenda Mortg. Corp., 142 F.3d 151 (3d Cir. 1998); Chase Manhattan Bank, N.A. v. Am. Nat'l Bank and Trust Co., 93 F.3d 1064 (2d Cir.1996); Am. Inst. of Certified Pub. Accountants v. Internal Revenue Service, 746 Fed. Appx. 1 (D.C. Cir. 2018).

[¶ 32] The North Dakota Century Code provides that "Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use … is deemed to have given consent, and shall consent … to a chemical test, or tests, of the blood, breath, saliva, or urine for the purpose of determining the alcohol concentration…" N.D.C.C. § 39-20-01. Consent is implied and can only be withdrawn by affirmatively refusing to submit to a chemical test. State v. Mertz, 362 N.W.2d 410, 413-14 (N.D. 1985). "An affirmative refusal to submit to a chemical test must be clear and unequivocal." State v. Johnson, 2009 ND 167, ¶ 10, 772 N.W.2d 591). Whether a person refused to submit to a chemical test is a question of fact.

Johnson, 2009 ND at ¶ 8, 772 N.W.2d 591. (citing Grosgebauer v. N.D. Dep't of Transp., 2008 ND 75, ¶ 7, 747 N.W.2d 510). An affirmative refusal is required to withdraw implied consent. Johnson, 2009 ND at ¶ 8, 772 N.W.2d 591. When determining whether an individual affirmatively refused a test, the Court is entitled to consider all of the statements surrounding the request for the test. Id. at ¶ 9.

[¶ 33] In this case, Mr. Hussiene agreed to take a chemical breath test, but Hoffner didn't accept his answer and seemingly tried to talk Hussiene out of taking the test. The conversation between Hoffner and Mr. Hussiene regarding the chemical test was rather lengthy and confusing as evidenced by Exhibit 17, the dashcam video of the incident. The portion of the video relevant to the Appellant's argument starts approximately thirteen minutes into the video and begins with the conversation preceding the preliminary breath test (PBT). Appellant's App. at 3, Index #17. Hoffner asked Mr. Hussiene if he had anything in his mouth, read the implied consent advisory for the PBT, and then asked "Do you consent to the screening test I'm requesting?" Id. at 12:51. Mr. Hussiene immediately agreed to the PBT and blew in to the machine. Id. at 14:05. The entire testing process for the PBT including the request for the PBT, the mouth check, and the actual test itself took less than two minutes. Id. at 12:51 – 14:12.

[¶ 34] Following the PBT Mr. Hussiene was told he was under arrest. Id. at 15:15. Hoffner indicated that he had to read Miranda and asked "Are you going to give me a breath test tonight or not?" Id. at 5:19. Mr. Huissene's response is difficult to hear, but in the opinion of counsel it sounds like he says "yeah" before Hoffner continues to speak. During the dialogue that follows on video, Hoffner tells Mr. Hussiene that if he wants to take the breath test, then they're going to the jail and it's a promise to appear and someone

can come and get him, and if he doesn't want to take the breath test, it's a refusal and then someone can come and get him. Id. at 15:27. Hoffner's explanation implies that the only difference between taking the test or not taking the test is that Mr. Hussiene will go to jail if he takes the test.

[¶ 35] At this point in the video, Hoffner has requested the test, but he still has not read Mr. Hussiene the implied consent for the chemical breath test. At approximately 16 minutes and 36 seconds into the video Hoffner asks "do you want to take the breath test or not?" twice in rapid succession. Mr. Hussiene's response is "I will take whatever." Id. at 16:45. Instead of taking yes for an answer, Hoffner then advised Mr. Hussiene of Miranda, and asks "So are you going to give me a breath test?" Id. at 17:25. Mr. Hussiene had already consented to the chemical breath test when Hoffner posed the question to him again. Hoffner read the implied consent and some additional conversation took place about the traffic stop. Id. at 18:10. Once again Hoffner asked "are you willing to give me a breath test or not?" Id. at 18:29. Mr. Hussiene responded that he didn't want to take the test and said "I have to understand what I am giving a breath test for? I just gave you one and you're telling me…" Id. at 18:31. Hoffner again advised Mr. Hussiene "if you don't want to take the test it's a refusal and you can get an uber or if you want to take the test we're going to go to the jail and then you can get released, so I need to know if you want to take the test or not" Id. at 19:03. Mr. Hussiene indicated that he did not want to take the test. Id. at 19:19. Hoffner then told Mr. Hussiene that refusing the test is a crime. Id. at 19:20). Mr. Hussiene responded that he does not want to be charged with a crime and rather than telling Mr. Hussiene he can avoid the charge by simply taking the test, Hoffner told him that "it's basically the same thing." Id. at 19:38. Hoffner then asks two more

times if Mr. Hussiene is going to give him a breath test. Id. at 20:07. Following the two additional test requests, Mr. Hussiene inquired "I don't need to take the test, right?" Id. at 20:29. Hoffner responded "No it's either a yes I want to or no I don't want to." Id. at 20:30. Mr. Hussiene says he does not want to take the test. Id. at 20:34. After additional conversation, Hoffner told Mr. Hussiene "Just so we're on the same page, you do not want to take the test" and that he's going to get one cite, DUI refusal. Id. at 23:08. Later in the video, Mr. Hussiene brings up the citation and inquired "so refusing the DUI doesn't matter?" Id. at 47:00. Hoffner again told him that it is the same thing. Id. at 47:00. Hoffner eventually dropped Mr. Hussiene off at Love's Gas Station with his paperwork, including the promise to appear citation for refusal to submit to a chemical test and sent him on his way. Id. at 49:00.

[¶ 36] The entire conversation regarding the chemical breath test is misleading and confusing. When Hoffner asked Mr. Hussiene to take the PBT, he simply said "Do you consent to the screening test I'm requesting?" Id. at 13:41. Mr. Hussiene's response was immediate and unequivocal – he said he would take the test and took it right away. After the first conversation took place regarding the chemical breath test, which included the test request, Mr. Hussiene said he would "take whatever." Nonetheless, the evidence shows that Hoffner would not accept yes for an answer. After Mr. Hussiene agreed to the test, Hoffner asked him at least five more times if he was going to take the test . Not only does he continue to ask Mr. Hussiene if he is going to take the test that he already agreed to take, but tells him multiple times that a DUI and refusing the test are the same thing and that the only difference is that if he takes the test he goes to jail and if he doesn't he can call someone to pick him up. It is difficult to listen to the long and confusing exchange without

concluding that Hoffner wanted Mr. Hussiene to refuse. In all fairness, it seems that he tried to convince Mr. Hussiene to do so. When he requested the PBT Hoffner made a straight forward request, "will you consent?," and Mr. Hussiene immediately complied. When he requested the chemical test Hoffner suddenly started asking if Mr. Hussiene "wanted" to take the test, but only after Mr. Hussiene said he would "take whatever." Hoffner also made sure to repeatedly mention that taking the test would mean having to go to jail before being released and that being charged with refusal was no different from being charged with DUI. Obviously, no one wants to be hauled to jail to take a chemical test, so it is not surprising that someone in Hussiene's position would say no when asked whether he "wants" to do so. The question is not whether Mr. Hussiene wanted to take the test. The question is whether Mr. Hussiene would consent to the chemical test regardless of whether he wanted to do so. When Hoffner simply asked if he would take the breath test Mr. Hussiene said he would take whatever. As the North Dakota Supreme Court has said "[a]n affirmative refusal to submit to a chemical test must be clear and unequivocal." State v. Johnson, 2009 ND 167, ¶ 10, 772 N.W.2d 591). In this case, Mr. Husseine expressed a willingness to take the test, but not a desire to do so. He did not affirmatively refuse in a clear and unequivocal manner.

[¶ 37] CONCLUSION

[¶ 38] Mr. Hussiene respectfully requests that the Court affirm the district court's judgment and order reversing the hearing officer's decision and reinstating Mr. Hussiene's driving privileges.

[¶ 39] In the event the Court reversed the district court's decision, Mr. Hussiene respectfully requests that this Court address the remaining issue raised by Mr. Hussiene on appeal, but not addressed by the District Court in its Memorandum Opinion and Order

Dated this 21st day of May, 2021.

AALAND LAW OFFICE, LTD.

By: /s/ *Jesse N. Lange*

Jesse N. Lange (ND ID 06008)
415 11th Street South; P.O. Box 1817
Fargo, ND 58107-1817
Telephone: 701-232-7944
Attorney for Yonis Daud Hussiene
Petitioner / Appellee
officemanager@aalandlaw.com

[¶ 40] CERTIFICATE OF COMPLIANCE

[¶ 41] The undersigned hereby certifies that this document complies with the page limitation designated in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, and further certified that this document contains twenty-two (22) pages.

Dated this 21st day of May, 2021.

AALAND LAW OFFICE, LTD.

By: /s/ *Jesse N. Lange*

Jesse N. Lange (ND ID 06008)
415 11th Street South; P.O. Box 1817
Fargo, ND 58107-1817
Telephone: 701-232-7944
Attorney for Yonis Daud Hussiene
Petitioner / Appellee
officemanager@aalandlaw.com

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Yonis Daud Hussiene, Petitioner and Appellee, v. Director, North Dakota Department of Transportation, Respondent and Appellant.	**DECLARATION OF ELECTRONIC SERVICE** Supreme Court No. 20210045 Cass County Case No. 09-2020-CV-03119

[¶1] Sheri VanderWolde hereby certifies that she is of legal age, not a party to the above-entitled matter, and that on the 21st day of May, 2021, the following document:

Brief of Appellee

was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted via email to the last known e-mail address of the below person as follows:

Michael T. Pitcher, Assistant Attorney General – Attorney for Respondent / Appellant
mtpitcher@nd.gov

[¶2] To the best of declarant's knowledge, information, and belief, such address as given above is the actual address of the party intended to be served.

[¶3] I declare, under penalty of perjury of the law of North Dakota, that the foregoing is true and correct.

Signed on this 21st day of May, 2021, at Fargo, North Dakota, United States.

/s/ *Sheri VanderWolde*
Sheri VanderWolde