

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 Ct. No. 20210045**

**District Ct. No. 09-2020-CV-03119**

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

**HONORABLE STEVEN L. MARQUART**

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**REPLY BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES

[¶1] Whether Trooper Hoffner had a reasonable and articulable suspicion to stop Hussiene’s vehicle for entering an intersection on a red light.

[¶2] Whether a preponderance of evidence supports the hearing officer’s finding that Hussiene refused to submit to a chemical test.

## LAW AND ARGUMENT

### **I. Trooper Hoffner had sufficient grounds to stop Hussiene’s vehicle.**

[¶3] In his appellate brief, Hussiene contends the greater weight of the evidence establishes his vehicle did not enter the intersection on a red light as determined by the district court and in contrast to the hearing officer’s decision. As discussed below, Hussiene errs in his rebuttal of the hearing officer’s finding that Trooper Hoffner “observed a vehicle driven westbound on 13<sup>th</sup> Avenue by Petitioner Yonis Daud Hussiene (Hussiene) enter the intersection of 13<sup>th</sup> Avenue and an I-20 ramp on a red light and initiated a traffic stop” as the finding is not contradicted by the video evidence and Trooper Hoffner’s testimony as he and the district court suggest. See Brief of Appellee ¶ 24.

[¶4] It is uncontested that Trooper Hoffner testified he observed Hussiene’s vehicle enter the intersection on a red light. App. 10, 23. Hussiene contends the video evidence rebuts that testimony. Yet, it is also uncontested that the traffic-control device in question is not visible on the dashcam video. See Index # 17. Hussiene’s argument is essentially because the green arrow allowing north bound facing traffic to turn left through the intersection was not illuminated when Hussiene entered the intersection, then his traffic-control light must not have been red. Brief of Appellee ¶ 25. Hussiene further argues his

vehicle “cleared the intersection before the green arrow appeared.” Id. at ¶ 26. The Department disputes these claims.

[¶5] Intersection is defined, in pertinent part, as:

“Intersection” means the area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicle traveling upon different highways joining at any other angle may come in conflict.

N.D.C.C. § 39-01-01(32). The dashcam video evidence shows Hussiene’s vehicle moving through the intersection and still within the dashcam’s view when the northbound green turn arrows activate. Index # 17 at 00:00 – 00:04. More importantly, considering the video does not show the entire intersection – from the lateral boundary lines of the two roadways – then it cannot be unequivocally stated that Hussiene’s vehicle had cleared the intersection. This is particularly true where the traffic-control device at issue cannot be seen and Hussiene’s car was not beyond the traffic-control device or the boundary of the intersection when the green turn arrows illuminated. Id.

[¶6] Hussiene also tries to discount Trooper Hoffner’s uncontested testimony about the traffic-control device having a three second delay, by asserting Trooper Hoffner was not sure of his knowledge. While it is true Trooper Hoffner’s statement was “I want to say I believe it’s about a three second delay” any uncertainty in the statement was as to the exact length of the delay and not that fact that the traffic-control device had a delay. App. 24. Further, Hussiene, did not provide any evidence discounting the fact of a delay. Hussiene did not object to Trooper Hoffner’s testimony or provide any contradictory evidence.

[¶7] Hussiene further alleges that Trooper Hoffner admitted he was watching Hussiene’s traffic-control device, which was left of the patrol car, and thus he asserts that Trooper

Hoffner could not have simultaneously watched Hussiene’s vehicle enter the intersection from the right. Brief of Appellee ¶ 29. Hussiene misinterprets the entirety of Trooper Hoffner’s testimony on cross examination about this issue. See App. 23, l. 23 – App. 24, l. 22. The dialogue between Trooper Hoffner and counsel shows Trooper Hoffner was not indicating his head was turned towards the traffic-control device but only that he was watching the traffic-control device. But he also clearly testified he could see Hussiene’s vehicle when it entered the intersection.

[¶8] Additionally, and perhaps more importantly, this Court has ruled:

Whether a driver committed a traffic violation does not control whether an officer had the reasonable suspicion necessary to justify a traffic stop. Although not addressed by the parties, an officer’s objectively reasonable mistake, whether of fact or law, may provide the reasonable suspicion necessary to justify a traffic stop.

State v. Hirschhorn, 2016 ND 117, ¶ 14, 881 N.W.2d 244. Thus, whether Trooper Hoffner was mistaken on when Hussiene’s vehicle entered the intersection, it is uncontested that Trooper Hoffner believed Hussiene entered it on a red light in violation of N.D.C.C. § 39-10-05(3). Therefore, even if it could be shown that Trooper Hoffner was mistaken as to his belief about Hussiene entering the intersection on a red light, which the Department does not concede, the belief was more than reasonable under the circumstances and any mistake of fact on the trooper’s part did not deprive him of reasonable and articulable suspicion to stop Hussiene’s vehicle.

[¶9] Hussiene’s additional claims about the dashcam video showing a reflection of the moment the lights controlling the westbound traffic changed from yellow to red, and Hussiene’s denial of running the red light as heard on the video dialogue, can be disregarded. First, as to the video’s alleged showing of a reflection of the traffic-control

device in question, no such lights change can be discerned by any reasonable person viewing the video. Second, Hussiene's subjective statements of denial of the traffic offense do not control. And, even on that point, it is important to note that prior to Hussiene's denial of running a red light, he had told Trooper Hoffner that he was not watching the traffic-control device because he had friends who were following his vehicle and he was looking in the rear view mirror watching them and was not looking at the lights. App. 11, 14-18; Index # 17 at 1:09 – 1:20.

[¶10] The evidence presented at the hearing established that Trooper Hoffner had a reasonable and articulable suspicion to stop Hussiene's vehicle for running a red light.

**II. The preponderance of the evidence supports the hearing officer's finding that Hussiene refused the chemical test.**

[¶11] As noted in Hussiene's appellate brief, two issues were raised on appeal to the district court. Brief of Appellee ¶ 12. Besides challenging the grounds for the stop of his vehicle, Hussiene also raised the issue of whether the evidence showed he refused a chemical test. App. 30. The parties briefed both issues and argued both issues before the district court. App. 3, at Index ## 21, 23. The district court noted in its decision that "[t]he issues before the Court that Hussiene brings are two-fold," yet the court reversed the hearing officer's decision solely on the grounds that Trooper Hoffner failed to have a reasonable and articulable suspicion to stop his vehicle without explicitly ruling on the refusal issue. App. 32-35.

[¶12] While this Court could remand the matter to the district court for its analysis of the refusal issue, the Department believes that is unnecessary as this Court has stated many times that when a decision of an administrative agency is appealed from the district court to the Supreme Court, this Court reviews the decision of the hearing officer and not the

decision of the district court. See e.g., Berger v. N.D. Dep't of Transp., 2011 ND 55, ¶ 5, 795 N.W.2d 707 (stating “When a decision of an administrative agency is appealed from the district court to this Court, we review the decision of the agency.”). Because the hearing officer’s decision is supported by the weight of the evidence this Court should affirm the decision finding that Hussiene refused to submit to a chemical test.

[¶13] “[T]he failure to submit to a test, whether by stubborn silence or by a negative answer, can be a refusal.” Mayo v. Moore, 527 N.W.2d 257, 260 (N.D. 1995). A refusal also can be the product of a person’s nonresponsive behavior. See, e.g., Maisey v. N.D. Dep't of Transp., 2009 ND 191, ¶ 21, 775 N.W.2d 200 (“Here it was reasonable for the deputy to interpret Maisey’s words and actions to be a refusal to submit to the blood test. Maisey ambiguously responded to the deputy’s request to take the blood test, stating that he would submit to the test, but only after speaking with his lawyer. . . . Based on Maisey’s statements, it was reasonable for the deputy to determine that Maisey was not going to submit to the blood test.”); Grosgebauer v. N.D. Dep't of Transp., 2008 ND 75, ¶ 12, 747 N.W.2d 510 (“Each time the officer read the implied consent to Grosgebauer, ‘the response was the same: Grosgebauer swore at the officer and grumbled but would not submit.’” (original emphasis)).

[¶14] “When a driver creates ambiguity regarding whether he or she will submit to chemical testing, the driver cannot complain about any reasonable interpretation of the driver’s words and actions by the officer.” Maisey, at ¶ 20 (citing State v. Johnson, 2009 ND 167, ¶ 10, 772 N.W.2d 591). “Whether a driver has refused to submit to a chemical test is a question of fact.” Pokrzywinski v. Dir., N.D. Dep't of Transp., 2014 ND 131, ¶ 15, 847 N.W.2d 776.



[¶15] The hearing officer resolved that question of fact in this case by making a finding that Hussiene refused the chemical test. The hearing officer's findings, in relevant part, read as follows:

Hoffner provided the implied consent advisory and requested a chemical breath test. Hussiene said that he already took a breath test. Trooper [Hoffner] again requested a chemical breath test explaining the criminal consequences of refusing and Hussiene refused. Hoffner noted the refusal of a chemical breath test on the Report and Notice and issued the driver's copy to Hussiene.

App. 29. Thereafter the hearing officer concluded "Hussiene . . . refused a chemical breath test." Id.

[¶16] The hearing officer's findings are supported by the evidence. After arresting Hussiene for driving under the influence, Trooper Hoffner asks Hussiene "Are you going to give me a breath test tonight or not?" Index # 17, at 15:14. Hussiene responded by asking if he was getting arrested? Id. at 15:19. Trooper Hoffner confirms Hussiene is being arrested and again asks if he is going to give a breath test. Id. at 15:21. Hussiene's response cannot be easily discerned. Id. Counsel asserts Hussiene said yes, but it is apparent that Trooper Hoffner did not understand it as such because he immediately follows up with "Well, it's either you give me a breath test . . . and we go to the jail" explaining the breath test location is at the jail. Id. at 15:26. Hussiene complains about being arrested and Trooper Hoffner explains he is being charged no matter what and again tries to explain what will occur if he submits to a breath test and what will occur if he refuses. Id. at 15:43. Hussiene says "I don't want to go to jail." Id. at 16:28. Trooper Hoffner tells Hussiene he is not going to jail but will receive a promise to appear and redirects the conversation back to whether Hussiene will or will not take the breath test. Id. at 16:29 – 16:41. Hussiene responds "right now" and Trooper Hoffner explains, they would have to go to the jail first but he needs to

know if Hussiene is going to take the test. Id. at 16:42. Hussiene says “I’ll take whatever ... I promise to appear.” Id. at 16:46.

[¶17] Hussiene asserts that it was at this point that Trooper Hoffner did not take Hussiene’s yes for an answer. Brief of Appellee at ¶ 35. What Hussiene fails to reference, however, is that Trooper Hoffner appears to attempt to take Hussiene’s response affirmatively because he begins to tell Hussiene how he will proceed, but is immediately cut off by Hussiene asking if this DUI is going to cost him his life or his job? Id. at 16:50. Then after advising Hussiene of his Miranda rights, Trooper Hoffner again clarifies by asking Hussiene, “So, are you going to give me a breath test” and Hussiene says “for what?” Id. at 17:25. The conversation continues for some time with Hussiene asking the trooper what he is being charged with and why he was stopped in the first place. Id. at 17:30 – 18:10. Trooper Hoffner again attempts to redirect the conversation by reading the implied consent advisory. Id. at 18:11. After completing the advisory, Trooper Hoffner directly asks Hussiene “Are you willing to give me a breath test or not?” and Hussiene responds “No.” Id. at 18:28. Hussiene complains he already did a breath test and Trooper Hoffner explains to Hussiene that he submitted to a preliminary breath test. Id. at 18:45. Trooper Hoffner thereafter told Hussiene:

So, here’s the options, if you don’t want to give me a breath test it’s a refusal and you can get an Uber. If you give me the breath test, we’re going to go to the jail and then you get released ... you’re getting released either way.  
**So, I want to know if you want to take the breath test or not?**

Hussiene responds “I don’t want to.” Id. at 19:03. Trooper Hoffner then advises Hussiene that it is a crime to refuse a chemical breath test in North Dakota. Id. at 19:27. Trooper Hoffner subsequently asks at least two more times if Hussiene will or will not take the test

and Hussiene eventually responds: “I do not want to take a breath test.” Id. at 20:35. Trooper Hoffner advised Hussiene, his response is considered a refusal. Id. at 20:41.

[¶18] Hussiene argues that Trooper Hoffner’s conversation was entirely misleading and confusing, essentially asserting that the trooper wanted Hussiene to refuse. Appellant’s Br. ¶ 36. Hussiene’s argument is meritless.

[¶19] Hussiene did not testify at the hearing and provide any evidence that he was confused by Trooper Hoffner’s request to submit to a chemical Intoxilyzer test. Hussiene relies solely on his interpretation of the video evidence to allege that Hussiene was confused. This Court has observed that “[r]esolving disputes over the underlying facts and circumstances . . . is the exclusive province of the hearing officer, as is determining the credibility of the witnesses and the weight to be given their testimony.” Zimmerman v. N.D. Dep’t of Transp., 543 N.W.2d 479, 481 (N.D. 1996). The hearing officer reviewed the video evidence and found that Hussiene refused the chemical Intoxilyzer test. This is not against the greater weight of the evidence.

### **CONCLUSION**

[¶20] The Department requests this Court reverse the Judgment of the Cass County District Court and affirm the Hearing Officer’s Decision suspending Hussiene’s driving privileges for a period of 180 days.

Dated this 1<sup>st</sup> day of June, 2021.

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**CERTIFICATE OF COMPLIANCE**

**Supreme Ct. No. 20210045**

**District Ct. No. 09-2020-CV-03119**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Reply Brief of Appellant contains 12 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Times New Roman 12 point font.

Dated this 1<sup>st</sup> day of June, 2021.

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**CERTIFICATE OF SERVICE  
BY ELECTRONIC MAIL**

**Supreme Ct. No. 20210045**

**District Ct. No. 09-2020-CV-03119**

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[¶1] I hereby certify that on June 1, 2021, the following documents: **REPLY BRIEF OF APPELLANT and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court. Service is being accomplished upon Yonis Daud Hussiene, by and through his attorney, Jesse N. Lange at officemanager@aalandlaw.com.

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