Filed 6/29/20 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 146

Jeremy Nathan Grove, Appellee

v.

Department of Transportation, Appellant

No. 20200016

Appeal from the District Court of Traill County, East Central Judicial District, the Honorable Susan L. Bailey, Judge.

REVERSED.

Opinion of the Court by VandeWalle, Justice.

Challis D. Williams (argued), and Alexander F. Reichert (on brief), Grand Forks, ND, for appellee.

Douglas B. Anderson, Assistant Attorney General, Bismarck, ND, for appellant.

Grove v. NDDOT
No. 20200016

VandeWalle, Justice.

[¶1] The Department of Transportation appealed from a district court judgment reversing a hearing officer's decision suspending Jeremy Grove's driver's license. We reverse.

I

[¶2] In July 2019, North Dakota Highway Patrol trooper Cody Harstad stopped a vehicle operated by Grove for traveling 70 miles per hour in a 55 mile-per-hour zone. Upon approaching the vehicle, Harstad observed signs that Grove was intoxicated. Harstad administered field sobriety tests and an on-site screening test. The results of the tests indicated Grove was under the influence of alcohol. Grove was arrested and cited for driving under the influence of alcohol. Subsequent to his arrest, Harstad read Grove the implied consent advisory, and Grove submitted to a chemical breath test. The results of the chemical test showed Grove had a blood alcohol concentration of .232% by weight.

[¶3] Grove requested an administrative hearing pursuant to N.D.C.C. § 39-20-05. At the hearing, Grove argued the Department did not have authority to suspend his license based on two grounds. First, the hearing officer sought to introduce the Report and Notice form into evidence. Grove objected to admitting the Report and Notice form because it contained the results of the on-site screening test and Grove was not challenging whether probable cause existed to place Grove under arrest. The hearing officer admitted the Report and Notice form into evidence over Grove's objection.

[¶4] Grove also argued the implied consent advisory read to him prior to taking the chemical breath test was substantively incorrect. Harstad testified he read Grove the exact implied consent advisory contained in the Report and Notice form. The implied consent in the Report and Notice form read:

> I must inform you that North Dakota Law requires you to take a chemical breath or urine test to determine whether you are under the influence of alcohol or drugs. Refusal to take a chemical breath or urine test may result in the revocation of your driving privileges for a minimum of 180 days and up to 3 years. I must also inform you that refusal to take a chemical breath or urine test is a crime punishable in the same manner as driving under the influence.

Grove argued this reading of the implied consent advisory was incorrect because it informed Grove North Dakota law required the driver to take a "chemical breath or urine test" when, at the time of Grove's arrest, N.D.C.C. § 39-20-01(3)(a) required a law enforcement officer to inform a driver that North Dakota law required the driver submit to a "chemical test." The hearing officer rejected Grove's argument concluding adding the words "breath" and "urine" did not violate the requirements of § 39-20-01(3)(a). The hearing officer suspended Grove's driver's license for 180 days concluding, based on the results of the field sobriety tests, Harstad had reasonable grounds to arrest Grove, Grove was tested in accordance with N.D.C.C. § 39-20-01, and the Intoxilyzer test results showed Grove had an alcohol concentration of at least .08% by weight.

[¶5] Grove appealed the hearing officer's decision to the district court. On appeal to the district court, Grove first argued the hearing officer erred by admitting the Report and Notice form into evidence when it contained the results of the on-site screening test and probable cause was not challenged. Second, Grove argued omission of the phrase "directed by the law enforcement officer" from the implied consent advisory rendered the advisory incorrect under this Court's then recently issued opinion *City of Bismarck v. Vagts*, 2019 ND 224, 932 N.W.2d 523. Grove did not argue to the district court that adding the words "breath" and "urine" rendered the advisory incorrect as he did at the administrative hearing. The Department argued Grove waived his *Vagts* argument because he did not object on such grounds or raise the issue at the administrative hearing.

[¶6] The district court reversed the hearing officer's decision. The court determined, "omission of the phrase 'directed by the law enforcement officer' is

a substantive omission and not in compliance with the statutory requirements for the implied consent advisory" under *Vagts*. The court also determined Grove did not waive his argument because the administrative hearing was held on August 5, 2019, and the *Vagts* decision was issued on August 22, 2019. The court reasoned, "Neither counsel for Mr. Grove, nor the hearing officer, could necessarily have predicted that omission of the phrase 'directed by the law enforcement officer' would constitute a substantive omission thus rendering the advisory insufficient and the test results inadmissible." The district court did not decide whether admission of the Report and Notice form containing the on-site screening test results was error or whether adding the words "breath" and "urine" was a substantive change to the implied consent advisory.

II

[¶7] The Department argues the district court erred in reversing the hearing officer's decision based on an issue Grove failed to preserve for appeal. The district court reversed the hearing officer's decision based on our decision in *City of Bismarck v. Vagts*, 2019 ND 224, 932 N.W.2d 523. In *Vagts*, we concluded omission of the phrase "directed by the law enforcement officer" is a substantive omission from the statutory implied consent advisory. *Id.* at ¶ 18. The district court relied on *Vagts* in reversing the hearing officer's decision despite the fact that Grove did not raise the *Vagts* issue at the administrative hearing and the issue was not contemplated by the hearing officer.

[¶8] "Rule 103 of the North Dakota Rules of Evidence governs the preservation of issues on appeal from administrative hearings." *Ouradnik v. Henke*, 2020 ND 39, ¶ 12, 938 N.W.2d 392 (citing *May v. Sprynczynatyk*, 2005 ND 76, ¶ 24, 695 N.W.2d 196). "To preserve a claim of error under Rule 103, a party must timely object and state the specific ground unless it was apparent from the context." *Id.* (citing N.D.R.Ev. 103(a)(1)). The purpose of an appeal to the district court from an administrative hearing is to review the actions of the Department, not to grant the appellant the opportunity to develop new theories of the case. *See In re Estate of Brandt*, 2019 ND 87, ¶ 32, 924 N.W.2d 762. "Failure to raise an issue at the administrative hearing normally precludes review by this Court." *Henderson v. Dir., N.D. Dep't of Transp.*, 2002 ND 44, ¶

14, 640 N.W.2d 714 (quoting *Bieber v. N.D. Dep't of Transp. Dir.*, 509 N.W.2d 64, 68 (N.D. 1993)). "We will reverse the district court's judgment when the basis of the decision was not raised in the administrative hearing." *Ouradnik*, at ¶ 12 (citing *Jones v. Levi*, 2016 ND 245, ¶ 11, 888 N.W.2d 765).

[¶9] In addition to objecting at the administrative hearing, the appealing party must comply with the specification-of-error requirement provided in N.D.C.C. §§ 28-32-42(4) and 39-20-06. *Hamre v. N.D. Dep't of Transp.*, 2014 ND 23, ¶ 8, 842 N.W.2d 865. "[T]he specifications of error must 'identify what matters are truly at issue with sufficient specificity to fairly apprise the agency, other parties, and the court of the particular errors claimed.'" *Ouradnik*, 2020 ND 39, ¶ 13, 938 N.W.2d 392 (quoting *Rounkles v. Levi*, 2015 ND 128, ¶ 10, 863 N.W.2d 910). We do not accept boilerplate specifications of error. *Hamre*, at ¶ 8 (quoting *Daniels v. Ziegler*, 2013 ND 157, ¶ 7, 835 N.W.2d 852). "Boilerplate specifications of error are those that are general enough to apply to any administrative agency appeal." *Id.*

[¶10] At the administrative hearing, Grove argued the implied consent advisory read to him was incorrect because it stated North Dakota law required him to submit to a "chemical breath or urine" test rather than a "chemical" test. On appeal to the district court, Grove did not argue the implied consent was incorrect because it specified breath or urine. Rather, he argued the implied consent was incorrect because it omitted the phrase "directed by the law enforcement officer" based on our then recently issued *Vagts* decision. The district court relied on *Vagts* in reversing the hearing officer's decision. The basis of the district court's decision was not raised in the administrative hearing. While our opinion in *Vagts* had not been issued until after the administrative hearing was held, this Court heard oral arguments in *Vagts* on June 6, 2019, and the issue in *Vagts* had been fully briefed prior to oral argument. The issue in *Vagts* was a matter of public record prior to Grove's administrative hearing.

[¶11] The specification of error filed by Grove was also insufficient to preserve the *Vagts* issue for appeal. Grove's specification of error stated: "The hearing officer erred in admitting the chemical test results into evidence because the

law enforcement officer failed to inform Mr. Grove of the proper implied consent advisory." This statement is not sufficiently specific to apprise the agency, other parties, and the court of the particular error claimed. The specification does not state what added or omitted language or substantive change caused the advisory to be deficient. The specification of error as stated by Grove is general enough to apply to any administrative agency appeal in which the language of the implied consent advisory is at issue. Grove's specification of error was boilerplate, and we do not accept it as sufficiently specific to have preserved the *Vagts* issue for appeal.

[¶12] Because Grove did not raise the same issue on appeal to the district court that he did at the administrative hearing or in his specification of error to the district court, the issue was precluded from review. Grove also did not preserve for appeal the issue he raised at the administrative hearing because he did not raise the issue to the district court or to this Court. *Roberts v. N.D. Dep't of Transp.*, 2015 ND 137, ¶ 14, 863 N.W.2d 529. The basis of the district court's decision was not raised in the administrative hearing. We reverse the decision of the district court.

III

[¶13] Grove argues the hearing officer erred in admitting the Report and Notice form containing the on-site screening test results into evidence because he did not challenge whether probable cause existed for his arrest. The Department contends that "the existence of probable cause by statute is always to be an issue in administrative license revocation proceedings, regardless of whether or not an individual chooses to challenge that determination."

[¶14] "The Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute." *Aamodt v. N.D. Dep't of Transp.*, 2004 ND 134, ¶ 15, 682 N.W.2d 308. "The Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person's driving privileges." *Id.* (citing *Schwind v. Dir., N.D. Dep't of Transp.*, 462 N.W.2d 147, 150 (N.D. 1990)). If a hearing is requested under N.D.C.C. § 39-20-05, an individual's driving privileges may be suspended after the hearing officer's "findings, conclusion, and decision from the hearing confirm that the

law enforcement officer had reasonable grounds to arrest the person and test results show that the arrested person was driving or in physical control of a vehicle while having an alcohol concentration of at least [.08%] by weight . . . ." N.D.C.C. § 39-20-04.1(1). "Reasonable grounds" is synonymous with probable cause. *Deeth v. Dir., N.D. Dep't of Transp.*, 2014 ND 232, ¶ 12, 857 N.W.2d 86 (citing *Moser v. N.D. Highway Comm'r*, 369 N.W.2d 650, 652-53 (N.D. 1985)). Confirmation that the law enforcement officer had probable cause to arrest the individual is material to the Department's authority to suspend a person's driving privileges and is a predicate to the Department's acting. *See Aamodt*, at ¶ 23 (interpreting the "reasonable grounds" requirement in N.D.C.C. § 39-20-03.1).

[¶15] "[T]he purpose of an on-site chemical screening test is to insure that sufficient probable cause exists to warrant an arrest." *Fossum v. N.D. Dep't of Transp.*, 2014 ND 47, ¶ 16, 843 N.W.2d 282 (quoting *Asbridge v. N.D. State Highway Comm'r*, 291 N.W.2d 739, 745 (N.D. 1980)). Consistent with their intended purpose, the results of an on-site screening test or tests may be used as a basis for determining probable cause. *See* N.D.C.C. § 39-20-14(3); *Fossum*, at ¶ 19; *Brewer v. Ziegler*, 2007 ND 207, ¶ 25, 743 N.W.2d 391. On appeals from criminal trials, however, we have said "the results of preliminary breath tests are to be excluded from evidence unless probable cause for the arrest is being challenged." *State v. Rende*, 2018 ND 33, ¶ 6, 905 N.W.2d 909 (citing *Barrios-Flores v. Levi*, 2017 ND 117, ¶ 12, 894 N.W.2d 888; *City of Fargo v. Erickson*, 1999 ND 145, ¶ 10, 598 N.W.2d 787; *State v. Schimmel*, 409 N.W.2d 335, 339 (N.D. 1987)); *see also Fossum*, at ¶ 19 ("On-site screening tests are not admissible to establish blood alcohol content for purposes beyond probable cause to arrest and require further testing.").

[¶16] Grove requested a hearing under N.D.C.C. § 39-20-05. Because he requested a hearing, the hearing officer was required to confirm Grove's arrest was supported by probable cause. The Report and Notice containing the results of Grove's on-site screening test was admissible to establish probable cause to arrest. Moreover, Grove suffered no additional prejudice from the results of the on-site screening test being submitted into evidence. *Cf. Madison v. N.D. Dep't of Transp.*, 503 N.W.2d 243, 246 (N.D. 1993) ("Ordinarily, we do not reverse an

evidentiary miscue, particularly, in a nonjury case, when that error causes no prejudice."); *Frost v. N.D. Dep't of Transp.*, 487 N.W.2d 6, 11 (N.D. 1992) (concluding evidence was properly admitted at administrative hearing when petitioner did not demonstrate any unfair prejudice from admission of the evidence). The results could not be used to determine whether Grove had an alcohol concentration of at least .08% by weight. *See* N.D.C.C. § 39-20-03.1, -04.1, -05; *Fossum*, 2014 ND 47, ¶ 19, 843 N.W.2d 282. Admitting the on-site screening test results in an administrative hearing is different than admitting such results in a criminal trial where the results have the potential to significantly impact the jury. *See Rende*, 2018 ND 33, ¶ 9, 905 N.W.2d 909; *Erickson*, 1999 ND 145, ¶ 17, 598 N.W.2d 787; *Schimmel*, 409 N.W.2d 335, 339 (N.D. 1987). Our decision here should not be interpreted as overruling our decision in *Rende* or other criminal cases in which we have held the results of preliminary breath tests are to be excluded from evidence unless probable cause for the arrest is being challenged. Nor should this decision be construed as allowing screening test results to be considered in an administrative hearing for any purpose other than establishing whether probable cause existed to arrest the petitioner. The hearing officer did not err in admitting the Report and Notice form containing the results of Grove's on-site screening test into evidence.

IV

[¶17] We reverse the district court judgment and reinstate the administrative hearing officer's decision.

[¶18] Gerald W. VandeWalle
Jerod E. Tufte
Daniel J. Crothers
Lisa Fair McEvers
Jon J. Jensen, C.J.