

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2021 ND 43

Joshua Breeze,

Appellant

v.

William Panos, Director, North Dakota
Department of Transportation,

Appellee

No. 20200267

Appeal from the District Court of Grand Forks County, Northeast Central
Judicial District, the Honorable Lolita G. Hartl Romanick, Judge.

REVERSED.

Opinion of the Court by Tufte, Justice, in which Chief Justice Jensen and
Justices Crothers and McEvers joined. Justice McEvers filed an opinion
concurring specially. Justice VandeWalle filed an opinion concurring and
dissenting.

Kiara C. Kraus-Parr, Grand Forks, N.D., for appellant.

Douglas B. Anderson, Assistant Attorney General, Office of Attorney General,
Bismarck, N.D., for appellee.

Breeze v. NDDOT
No. 20200267

Tufte, Justice.

[¶1] Joshua Breeze appeals a district court judgment affirming the North Dakota Department of Transportation’s suspension of his driving privileges based on a conviction for driving under the influence. On appeal, Breeze argues that Corporal Waltz did not have jurisdiction to arrest him. We reverse the Department’s order suspending Breeze’s driving privileges and the district court’s judgment affirming the Department’s order.

I

[¶2] It was after midnight when Corporal Waltz was driving west on Demers Avenue in Grand Forks near the 2500 block and noticed a vehicle that appeared not to have its lights on. Waltz moved closer to the vehicle and confirmed that the lights were not on. At this point, he was in the 2700 block of Demers Avenue and activated his emergency lights to initiate a traffic stop. When Waltz activated his emergency lights, the vehicle was in the left turn lane used to turn south on Columbia Road. After Waltz activated his emergency lights, “[t]he vehicle turned off the roadway to a safer area and turned on to the on ramp to Columbia Road and then it stopped.” At this point, Waltz made contact with the driver of the vehicle and identified him to be Breeze. Waltz noticed an odor of alcohol coming from the vehicle, which contained passengers, and had Breeze step away from the vehicle. At this point Waltz continued to notice the smell of alcohol. Breeze consented to a field sobriety test and an on-site screening test. Waltz then placed Breeze under arrest, gave him the implied consent advisory, and took him to the station for a chemical test, with test results of 0.227.

II

[¶3] The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs our review of the Department of Transportation’s decision to suspend or revoke a driver’s license. *Haynes v. Dir., Dep’t of Transp.*, 2014 ND 161, ¶ 6, 851 N.W.2d 172. In an appeal from a district court’s review of an administrative

agency's decision, we review the agency's decision and give great deference to the Department's findings of fact. *Id.* (citing *Wampler v. N.D. Dep't of Transp.*, 2014 ND 24, ¶ 6, 842 N.W.2d 877). We determine "whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." *Id.* We must affirm the Department's decision unless:

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 [chapter 28-32] 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. We must decide whether Waltz's arrest was authorized by law. *Kroschel v. Levi*, 2015 ND 185, ¶ 14, 866 N.W.2d 109.

[¶4] Breeze argues that Waltz, a UND police officer, was outside of his jurisdiction when he stopped Breeze and therefore had no authority for the stop or the subsequent chemical test. The Department argues that Waltz was in "hot pursuit" and therefore had authority for the stop. "[A]s a general rule a police officer acting outside his jurisdiction is without official capacity and without official power to arrest." *Kroschel*, 2015 ND 185, ¶ 7. "Hot pursuit" is defined by statute as meaning "the immediate pursuit of a person who is endeavoring to avoid arrest." N.D.C.C. § 15-10-17(2)(d).

[¶5] While the hearing officer did not expressly find that Waltz was in hot pursuit, the findings do state that “Cpl. Waltz initiated a traffic stop at the 2700 block of Demers Avenue. Cpl. Waltz had jurisdiction for the stop. The vehicle continued to drive, and did not come to a stop. Cpl. Waltz followed the vehicle with his traffic lights in operation. The vehicle eventually came to stop.” It is not disputed that Waltz initiated the stop inside his jurisdiction but arrested Breeze outside his jurisdiction. The hearing officer implied that Waltz was in “hot pursuit” by finding that he had jurisdiction for the stop. Here, Waltz testified that Breeze completed his turn through the intersection, pulled over on the side of the road in “a safer area” and confirmed “he was not evading me.” A person must be endeavoring to avoid arrest for an officer to be in “hot pursuit.” From the entire record, a reasoning mind could not have reasonably concluded the preponderance of the evidence supports that Waltz was in “hot pursuit,” as defined by section 15-10-17(2)(d), N.D.C.C., when he continued beyond his jurisdictional boundary to arrest Breeze. Therefore, Waltz did not have authority to arrest Breeze. Section 39-20-01(2), N.D.C.C., requires a valid arrest to have occurred in order to revoke Breeze’s driving privileges. *Olson v. N.D. Dep’t of Transp.*, 2018 ND 94, ¶ 23, 909 N.W.2d 676. Therefore, the Department’s order was not in accordance with the law because Breeze was not subject to a valid arrest.

[¶6] Breeze argues he is entitled to attorney’s fees and costs under N.D.C.C. § 28-32-50(1) if he prevails and the Court determines the agency acted without substantial justification. “Merely because an administrative agency’s actions are not upheld by a court does not mean that the agency’s action was not substantially justified.” *Kroschel*, 2015 ND 185, ¶ 35 (quoting *Tedford v. Workforce Safety & Ins.*, 2007 ND 142, ¶ 25, 738 N.W.2d 29). The hearing officer and district court believed a reasonable basis in law and fact existed to uphold Breeze’s arrest by Waltz. Award of attorney’s fees is not warranted.

III

[¶7] We have considered Breeze’s remaining issues and arguments and conclude they are either without merit or unnecessary to our decision. We

reverse the Department's order suspending Breeze's driving privileges and the district court judgment affirming the Department's order.

[¶8] Jon J. Jensen, C.J.
Daniel J. Crothers
Lisa Fair McEvers
Jerod E. Tufte

McEvers, Justice, concurring specially.

[¶9] I agree with and have signed with the majority based on the statutory definition of "hot pursuit" under N.D.C.C. § 15-10-17(2)(d), which allows law enforcement officers, employed by an institution under the control of the state board of higher education, to continue beyond the jurisdictional borders of the institution if there is "hot pursuit." While I tend to agree with Justice VandeWalle, that this set of facts seems to create an absurd result, it is the legislative assembly's limitation on jurisdiction which creates the result, not our previous decisions. The officer here testified the driver was not evading him. By defining "hot pursuit" as requiring both "immediate pursuit" and "pursuit of a person who is endeavoring to avoid arrest," the legislative assembly may have failed to foresee this type of situation; or, perhaps it was an intentional limitation on university law enforcement officers.

[¶10] Lisa Fair McEvers

VandeWalle, Justice, concurring and dissenting.

[¶11] I concur with the majority opinion regarding attorney's fees. I respectfully dissent regarding the suspension of Breeze's driving privileges.

[¶12] "[A]s a general rule a police officer acting outside his jurisdiction is without official capacity and without official power to arrest." *Kroschel v. Levi*, 2015 ND 185, ¶ 7, 866 N.W.2d 109 (quoting *Johnson v. N.D. Dep't of Transp.*, 2004 ND 148, ¶ 10, 683 N.W.2d 886). However, for the purposes of jurisdiction, it is logical to assume a traffic stop is initiated when an officer activates his vehicle's overhead lights and exerts some authority. See *State v. Wilkie*, 2017

ND 142, ¶ 14, 895 N.W.2d 742. Other courts have held an officer may arrest and cite a driver for violations in the officer's jurisdiction even when the driver does not evade the officer and stops his car in another jurisdiction. *See, e.g., State v. Gates*, 145 So.3d 288, 299 (La. 2014) (citing *State v. Terracina*, 309 So.2d 271, 273 (La. 1975)); *City of Heath v. Johnson*, No. 04-CA-29, 2005 WL 299710, at 4 (Ohio Ct. App. Feb. 3, 2005); *Commonwealth v. Paradise*, No. 626 MDA 2015, 2015 WL 7760351, at 8-9 (Pa. Super. Ct. Dec. 2, 2015).

[¶13] In this case, the officer initiated the stop while he was still in his jurisdiction, and Breeze stopped his car just outside of the officer's jurisdiction. Had Breeze evaded arrest, the officer would have had authority to continue in hot pursuit. However, Breeze was not evading the officer. Instead, he merely completed his turn through the intersection and pulled over on the side of the road in a safer area. We construe our statutes to avoid absurd results. *State v. Sorensen*, 482 N.W.2d 596, 598 (N.D. 1992). We should also avoid applying our previous decisions so as to create absurd results. Allowing Breeze to escape consequences simply because he did not evade the officer and parked his car outside of the officer's jurisdiction creates an absurd result.

[¶14] Gerald W. VandeWalle