

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

THE STATE OF SOUTH DAKOTA,)	
THE DEPARTMENT OF PUBLIC SAFETY,)	Appeal No. 30499
)	
Appellant,)	
)	
vs.)	
)	
DONALD WILLIAM BLAZER,)	
)	
Appellee.)	
)	

Appeal from the Circuit Court, Fifth Judicial Circuit
Edmunds County, South Dakota
The Honorable Richard Sommers
Circuit Court Judge

APPELLANT'S BRIEF

Notice of Appeal was filed on October 19, 2023

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PRELIMINARY STATEMENT

For convenience and clarity, Appellant/State of South Dakota, the Department of Public Safety, will be referred to as the “Department.” Appellee/Donald W. Blazer will be referred to as “Blazer.” References to the Office of Hearing Examiners will be “OHE.” References to the OHE’s Findings of Fact, Conclusions of Law, and Order will be designated “FF,” “CL,” and “Order” and the corresponding number. References to the Settled Record will be “SR” and the page number. References to the Commercial Driver’s License will be “CDL.” References to the March 10, 2023, hearing transcript will be designated “T” and the page/line number. References to the Appendix will be “Appx.” and the corresponding number.

JURISDICTIONAL STATEMENT

This appeal is taken from the circuit court’s September 20, 2023, Memorandum Decision wherein it reversed the decision of the Administrative Law Judge, and ultimately, the decision of the Department. On October 19, 2023, the Department filed its Notice of Appeal. This Court has jurisdiction over this appeal pursuant to SDCL §§ 1-26-30; 1-26-30.2; 1-26-37; and 15-26A-6.

STATEMENT OF ISSUES

The broad issues before this Court are:

- A. DID THE CIRCUIT COURT ERR BY DECLARING THAT A BREATHALYZER TEST SATISFIES THE REQUIREMENTS OF SDCL 32-12A-46?**

The circuit court erred when it declared a breathalyzer test satisfies the requirements of SDCL 32-12A-46.

Relevant Cases:

Beare v. Smith, 140 N.W.2d 603 (S.D. 1966)
Dep.t of Public Safety v. Gates, 350 N.W.2d 59, 60 (S.D. 1984)
State v. Arnold, 379 N.W.2d 322, 323 (S.D. 1986)
State v. Richards, 378 N.W.2d 259 (S.D. 1985)

Relevant Statutes and Rules:

SDCL 32-12A-46
SDCL 32-23-1.2
SDCL 32-12A-36
SDCL 32-12A-37
49 CFR § 384.215

B. DID THE CIRCUIT COURT ERR WHEN IT FAILED TO INTERPRET THE LAWS FOR CDL HOLDERS IN FAVOR OF THE PUBLIC INTEREST?

The Circuit Court erred when it failed to interpret the laws for CDL holders in favor of the public interest and against the driver involved.

Relevant Cases:

Beare v. Smith, 140 N.W.2d 603 (S.D. 1966)
Dep.t of Public Safety v. Gates, 350 N.W.2d 59, 60 (S.D. 1984)
Peterson v. State, 261 N.W.2d 405 (S.D. 1977)
State v. Arnold, 379 N.W.2d 322, 323 (S.D. 1986)

Relevant Statutes and Rules:

SDCL 32-12A-36
SDCL 32-12A-46
SDCL 32-23-1.2
SDCL 32-12A-37
49 CFR § 384.215

STATEMENT OF THE CASE AND FACTS

Blazer is a CDL holder in the State of South Dakota. SR 40, 64; FF 2. On January 10, 2014, Blazer received a traffic ticket for Driving Under the Influence pursuant to SDCL 32-23-1. SR 43-45, 48, 51; FF 3. On March 27, 2014, Blazer was convicted of Driving Under the Influence. *See State v. Blazer*, 46 CRI 14-22; SR 41, SR 44-45, 64, 110-111; FF 4; T 42, ln. 25; T 43, ln. 1-2; Appx. 28-29. This type of traffic violation is

considered a major traffic offense and is subject to CDL disqualification for a period of not less than one year. SR 46, 49, 53-54. The Department is required to satisfy the requirements of disqualification pursuant to 49 CFR § 384.231. SR 56; Appx. 27. This was Blazer's first major traffic offense, and on or about March 27, 2014, the Department notified Blazer that his CDL would be disqualified for a period of one year. SR 46. Blazer did not appeal this period of disqualification, and his CDL was disqualified for one year beginning March 27, 2014. SR 41, 64; FF-5. Blazer's CDL was restored March 16, 2017. SR 41.

On December 28, 2022, Blazer was involved in a two-vehicle accident near MM 280 on US 12 where his vehicle crossed over the center line. SR 38, 64, 76; FF 6; T 8, ln. 17-25; Appx. 17, 30-31. Blazer left the scene of the accident before law enforcement arrived and continued to travel westbound on US 12. SR 38, 77; T 9, ln. 16-23; Appx. 18, 30-31. Blazer was later found and apprehended by law enforcement after he exited his vehicle and took off on foot. SR 38, 77-78; T 9, ln. 24-25; T 10, ln. 1-3; Appx. 19, 30-31. Once detained, Blazer admitted to being the driver of the vehicle and that he drank approximately four beers prior to driving the vehicle that evening. SR 38, 78, 194 (Ex. 1 – video received into evidence and Appellant's notated refusal of chemical analysis); T 10, ln. 4-9; Appx. 19, 30-31. Blazer was administered a Preliminary Breathalyzer Test ("PBT"), and the result was .102%. SR 38, 64, 78, 194 (Ex. 1); FF 6; T 10, ln. 10-13; Appx. 19, 30-31.

Recognizing that Blazer was a CDL holder, Trooper Tyler Woodside read Blazer the implied consent card for CDL holders and asked Blazer to provide a blood sample, to which Blazer refused. SR 35-38, 64, 78, 194 (Ex. 1); FF 7-8; T 10, ln. 17-20; Appx. 19,

30-31. Blazer was then read his Miranda Rights and Transported to the Brown County Jail. SR 37-39, 64, 78, 194 (Ex. 1); FF 8; T 10, ln. 21-22; Appx. 19, 30-31. While in the Brown County Jail, Trooper Woodside obtained a search warrant for a blood sample, and witnessed the Registered Nurse obtain a blood sample from Blazer that same evening. SR 39, 64, 78; FF 8; T 10, ln. 21-25; Appx. 19, 30-31. Blazer was then released to jail staff. SR 39, 78-79; T 10, ln. 25; T 11, ln. 1; Appx. 20-21, 30-31.

Refusal to consent to submit to a chemical analysis is also considered a major traffic offense subject to a period of disqualification. SR 49, 51. This would be Blazer's second major traffic offense, which subjects his CDL to a period of lifetime disqualification. SR 50. Upon notification of Blazer's refusal, the Department mailed Blazer notice that his CDL would be disqualified for life on or about January 5, 2023. SR 23, 64; FF 9. Blazer timely requested an administrative hearing, on January 19, 2023. SR 22, 65; FF 10. An administrative hearing was held on March 10, 2023. SR 26.

At the administrative hearing, Blazer was represented by counsel. SR 57, 69-120; T 1-60. Based upon the record before the OHE and the exhibits and testimony submitted, the OHE rendered its proposed decision disqualifying Blazer's CDL for life on April 13, 2023. SR 64-66; Appx. 10-12. The Department adopted the OHE's proposed decision in full and issued its Final Decision on April 17, 2023. SR 67; Appx. 8-9.

Blazer appealed to the Circuit Court on April 27, 2023. SR 1-2. On June 19, 2023, Blazer filed his initial Brief. SR 130-144. Blazer's brief admitted, *inter alia*, that on December 28, 2022, he refused to submit to a chemical analysis. SR 132. However, Blazer argued that such action was 1) satisfied when he submitted to a PBT and 2) a violation of his constitutional rights. SR 133-142.

On July 19, 2023, the Department responded. SR 145-148. The Department asserted that it appropriately exercised its authority to disqualify Blazer's CDL privileges following Blazer's refusal, and that binding precedent required Blazer's refusal be subject to the requirements of SDCL §§ 32-12A-37 and 32-12A-46, as well as CFR §§ 383.51, 384.216, and 384.231 (the requirements of the CFR being adopted through SDCL 32-12A-58)¹; SR 145-148; Appx. 24-27.

On July 25, 2023, Blazer filed his Reply Brief. SR 160-162. In his reply, Blazer focused only on his constitutional challenge to the blood withdrawal, and provided no additional argument as to whether a PBT specifically fits within the parameters of SDCL 32-12A-46. SR 160-162.

On August 17, 2023, via email, the circuit court directed the parties to address the following question:

“Counsel as you didn't request oral arguments in this matter, I want your input on *State v. Richards*, 378 N.W. 2d 259 (1985) wherein the Supreme Court did rule that a breath test was a chemical analysis. Neither of you referred to this case in your briefs. Mr. Taliaferro please respond within a week from today and Ms. Severyn you have one week after that.”

SR 175; Appx. 13.

Blazer responded the next day, arguing that a PBT is a chemical analysis for purposes of SDCL 32-12A-46, although the Court in *Richards* only addressed a PBT criminally within the parameters of SDCL 32-23-7. SR 163-166. The Department responded on August 25, 2023, with an Objection and Response, arguing that 1) the

¹ These laws are expressly adopted by the Legislature. “The state hereby adopts Title 49 of the Code of Federal Regulations, chapter 3, subpart B, parts 383 and 384, inclusive, as of January 1, 2015.” SDCL 32-12A-58.

circuit court improperly augmented the record by posing additional questions not raised by the parties on appeal and 2) that *Richards* is inapplicable to the facts at hand in Blazer's case because *Richards* only deals with the admissibility of PBTs in criminal proceedings and does not address PBTs as chemical analyses within the parameters of SDCL 32-12A-46. SR 167-171. Blazer filed a reply to the Department's Objection and Response on August 26, 2023, stating that the Department briefly mentioned *Richards* in a footnote and further arguing that the holding in *Richards* applies to SDCL 32-12A-46. SR 172-174.

On September 20, 2023, the circuit court issued its memorandum decision that reversed the Department's Final Decision. SR 177-179; Appx. 3-6. The circuit court's decision was largely based on its analysis of *Richards*. *Id.* The circuit court held that because *Richards* establishes that a PBT is a chemical analysis, Blazer ultimately complied with SDCL 32-12A-46 when he submitted to the chemical analysis of his breath. SR 179; Appx. 3-6. At that point, the circuit court determined that the Department erred in its application of SDCL 32-12A-46 when it attempted to disqualify Blazer's CDL for life. *Id.*

On September 20, 2023, Notice of Entry of the memorandum decision was filed. SR 181; Appx. 1-2. On October 16, 2023, the circuit court filed its Order reversing the decision made by OHE and affirmed by the Department. SR 187; Appx. 7. On October 19, 2023, the Department timely filed its Notice of Appeal. SR 188; Appx. 14. Accordingly, this Brief follows.

STANDARD OF REVIEW

This Court's standard of review is settled law. Great weight is given to the findings made and inferences drawn by the Department on questions of fact; reversal is only appropriate when the Department's findings are clearly erroneous in light of the entire record; and issues of statutory interpretation are reviewed *de novo*. *See generally, Jans v. Dep't of Public Safety*, 2021 S.D. 51, ¶ 10, 964 N.W.2d 749, 753; *Ibrahim v. Dep't of Public Safety*, 2021 S.D. 17, ¶ 25, 956 N.W.2d 799, 805 (with both *Jans* and *Ibrahim* reaffirming the standard of review set forth by *In re Jarman*, 2015 S.D. 8, ¶ 8, 860 N.W.2d 1, 5). In a *de novo* review, no deference is given to the circuit court's decision. *Thom v. Barnett*, 2021 S.D. 65, ¶ 13, 967 N.W.2d 261, 267.

ARGUMENT

A. DID THE CIRCUIT COURT ERR BY DECLARING A BREATHALYZER TEST SATISFIES THE REQUIREMENTS OF SDCL 32-12A-46?

The circuit court erred when it declared a breathalyzer test satisfies the requirements of SDCL 32-12A-46.

In matters of statutory interpretation, this Court begins with the plain language and structure of the statute. *In re Certification of a Question of Law from the U.S. Dist. Court, Dist. of S.D., S. Div.*, 2014 S.D. 57, ¶ 8, 851 N.W.2d 924, 927. Words and phrases in a statute must be given their plain meaning and effect, it is fundamental that the words of a statute must be read in their context, and it must be done with a view to their place in the overall statutory scheme. *Id.* This Court reviews a circuit court's statutory interpretation *de novo*, with no deference to the circuit court's statutory interpretation. *Thom; Jans; Ibrahim; Jarmen; supra.*

In pertinent part, SDCL 32-12A-46 provides:

“Any person who holds...a...commercial driver license and operates any...noncommercial motor vehicle in this state is considered to have given consent to the withdrawal of blood or other bodily substance to determine the amount of alcohol in that person's blood, or to determine the presence of any controlled drug or substance. The chemical analysis shall be administered at the direction of a law enforcement officer who, after stopping or detaining any person who holds...a...commercial driver license, has probable cause to believe that the person was driving or in actual physical control of a...noncommercial motor vehicle while having any alcohol or drugs in that person's system. Any person requested by a law enforcement officer under this section to submit to a chemical analysis shall be advised by the officer that:

(1) If the person refuses to submit to the chemical analysis, none may be given, unless a warrant for the chemical analysis is issued; and

(2) If the person refuses to submit to the chemical analysis requested, the person shall be:

(a) Immediately placed out of service for a period of twenty-four hours, if operating a commercial motor vehicle at the time of the refusal; and

(b) Disqualified from operating a commercial motor vehicle for a period of not less than one year; or

(3) If the person submits to a chemical analysis which discloses that the person was operating the commercial motor vehicle while there was 0.04 percent or more by weight of alcohol in that person's blood the person shall be disqualified from operating a commercial motor vehicle for not less than one year.”

SDCL 32-12A-46, emphasis added.

The warrant requirement in this statute differentiates a blood draw from a breath test, which does not require a warrant, and this is further substantiated by SDCL 32-23-

1.2 which states:

“Every person operating a vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a law enforcement officer, submit to a breath test to be administered by such officer. If such test

indicates that such operator has consumed alcohol, the law enforcement officer may require such operator to submit to a chemical test in the manner set forth in this chapter.”

SDCL 32-23-1.2, emphasis added; *See also, Department of Public Safety v.*

Gates, infra.

SDCL 32-12A-36 sets forth the major traffic offenses which subject a CDL holder to disqualification. In pertinent part, SDCL 32-12A-36 provides as follows:

“Any person is disqualified from driving a commercial motor vehicle for a period of not less than one year:

(1) If convicted of a first violation of driving or being in actual physical control of a commercial or noncommercial motor vehicle while under the influence of alcohol, or any controlled drug or substance, in violation of § 32-23-1;

...

(5) For refusing to submit to a chemical analysis for purposes of determining the amount of alcohol or drugs in that person's blood or other bodily substance while driving a commercial or noncommercial motor vehicle in violation of § 32-12A-43 or 32-12A-46;

...”

SDCL 32-12A-36, emphasis added.

In pertinent part, SDCL 32-12A-37 provides as follows:

“Any person is disqualified for life for the commission of two or more violations of any of the subdivisions specified in § 32-12A-36, or any combination of those subdivisions, arising from two or more separate incidents...”

Further, federal law mandates CDL disqualification for certain offenses. 49 CFR

§ 384.215 provides:

“The State must disqualify from operating a CMV each person who is convicted, as defined in § 383.5 of this subchapter, in any State or jurisdiction, of a disqualifying offense specified in items (1) through (8) of Table 1 to § 383.51 of this subchapter for no less than one year.

49 CFR § 384.215, emphasis added; SR 65.

This Court has previously interpreted refusal to submit to a chemical analysis of one's blood for purposes of determining cancellation, suspension, or revocation of a driver's license. *Beare v. Smith*, 140 N.W.2d 603 (S.D. 1966). In *Smith*, this Court addressed Beare's refusal to submit to a blood test directed to be taken by the arresting officer. *Beare, supra.*, 140 N.W.2d at 605-606. Beare was informed of the consequences of not submitting to the blood test, and – although he requested to have his own physician draw his blood – the Court determined that he ultimately refused to take the test directed to be taken by the law enforcement officer, and that in and of itself qualified as the refusal. *Id.* at 607.

This Court further held that the legislative intent behind implied consent statutes – such as the ones we have in South Dakota – are clear in that they were created to protect the public interest and in doing so impose certain conditions on drivers which are specified in our statutes. *Beare, supra.* at 606. “Once the conditions of the statute are met, refusal to submit to the test [directed to be taken by law enforcement] results in mandatory loss of license.” *Id.* at 606 (citing, *Chmelka v. Smith*, 130 N.W.2d 423 (S.D. 1964)); See also SDCL 32-12A *et seq.* Beare was advised of the risks of refusing to take the blood test and ultimately chose between “taking a chance that an unfavorable test result might aid in his conviction or, by refusing, losing his license for a period [of time] under the statute.” *Beare, supra.* at 606; See also, *Blow v. Commissioner*, 164 N.W.2d 351 (S.D. 1969). In making this determination, this Court ultimately held that although such a choice “may appear severe and in some cases cause hardship...the legislature deemed it necessary for the protection of the public.” *Beare, supra.*, at 607.

Likewise, in *Department of Public Safety v. Gates*, Gates was stopped by an officer after the officer noticed Gates drifting back and forth over the center line of oncoming traffic. 350 N.W.2d 59, 60 (S.D. 1984). After the officer stopped Gates and noticed an odor of alcohol on his breath, Gates was asked to perform various field sobriety tests and submit to a PBT – to which he eventually complied with and failed. *Id.*, 350 N.W.2d 59 at 60. Gates was informed by the officer that he may be requested to take additional tests, and – after Miranda warnings and the implied consent laws were read – the officer requested that Gates submit to a blood test, to which he ultimately refused. *Id.*, at 60. Gates based his refusal of the blood test on the fact that he had already submitted to the PBT, even though the officer explained to Gates that the PBT was part of the field sobriety tests and was neither intended to nor replaces the blood draw. *Id.*

The arresting officer sent notice of Gates' refusal to the Department of Public Safety and the Department of Public Safety sent Gates notice of intent to revoke his license as a result. *Gates, supra.* at 61. After both an administrative judge and circuit court judge decided in favor of the Department of Public Safety on this particular issue, Gates argued upon review that the circuit court erred when it determined he did not comply with the requirements of a chemical analysis. *Id.* Gates argued that a breath test is a chemical analysis and satisfies the purposes of such, and that the officer had no authority to request a blood test after he was administered a PBT. *Id.* In making such an argument, Gates relied on the holding in *Stensland v. Smith*, 116 N.W.2d 653 (S.D. 1962), in which this Court said: "it seems clearly evident that a motorist in this state impliedly consents to only one of the tests mentioned in our law." *Gates, supra.* at 61 (quoting, *Stensland, supra.* 116 N.W.2d at 654). This Court held in *Gates*, however, that

Stensland was decided prior to the enactment of SDCL 32-23-1.2, and that SDCL 32-23-1.2 clearly states that a PBT is required by law and may be supplemented by a chemical test -- such as a blood draw -- at the request of law enforcement. *Gates, supra.* at 61; *See also*, SDCL 32-23-1.2.

Further, “[t]he statutory framework established by the Legislature in chapter 32-12A is comprehensive and provides the Department with exclusive authority to regulate CDLs in South Dakota.” *Jans, supra.*, ¶ 19, 964 N.W.2d at 755. *See also, State v. Arnold*, 379 N.W.2d 322, 323 (S.D. 1986) (outlining the State’s 1) highly legitimate governmental interest in maintaining, protecting, and regulating the public safety through driving licensure provisions; 2) driving licensure requirements achieve compelling state interests of maintaining, protecting, and regulating the public safety, the use of its public thoroughfares, and those who drive thereon; and 3) they are the least restrictive means for so doing); *Revocation of Fischer*, 395 N.W.2d 598 (S.D. 1986) (where judicial leniency occurs, the Department is authorized to commence a separate and distinct civil proceeding to administratively disqualify a license holder); *Maas v. Dept. of Commerce and Regulation*, 2003 S.D. 48, 661 N.W.2d 726 (holding that the Department has independent authority to disqualify driving privileges, and that where judicial leniency occurs, the Department has administrative authority to act).

In application, the OHE found that Blazer had committed two major traffic offenses in the State of South Dakota while he held a valid CDL. SR 64-65; FF 1-11; COL 1-3. Blazer committed his first major traffic offense when he was convicted of DUI on March 27, 2014. SR 64; FF 4-5. Blazer committed his second major traffic offense on December 28, 2022, when he refused to submit to a withdrawal of his blood. SR 64; FF

6-9. As a result, the OHE correctly determined that Blazer's CDL must be disqualified for life. SR 65; COL 3. This decision was ultimately affirmed by the Department. SR 67.

Additionally, at the administrative hearing on March 10, 2023, Blazer admitted to drinking and driving the night of December 28, 2022, he admitted to watching the body cam video that shows he refused to submit to a withdrawal of his blood after he was read the implied consent laws, he admitted to hearing the officer who arrested him testify that PBTs and blood withdrawals are not one in the same, he admitted to having a prior major traffic offense on his record, and he admitted to being aware of and understanding the statutory authority that allows the Department to disqualify his CDL for life. SR 109-111, 130-144; T 41, ln. 2-4, 15-16; T 42, ln. 11-25; T 43, ln. 1-10; Appx. 21-23. These facts are not contested.

Blazer argues, however, that in submitting to a PBT he satisfied the requirements of submitting to a chemical analysis required under state civil law. SR 111; T 43, ln. 11-24. The circuit court agreed with this reasoning when it interpreted the facts of this case in *State v. Richards*, which holds that a breathalyzer is a chemical analysis in a criminal context. SR 177-180; *State v. Richards*, 378 N.W.2d 259 (S.D. 1985). The facts in *Richards*, however, deal primarily with the admissibility of PBTs in a criminal trial for DUI if the issue of probable cause is raised, and are not applicable to the facts of this case – which the Department argued in its memorandum response. SR 167-171; *See also*, *Richards, supra*. at 260.

The facts here are more akin to the facts in *Beare* and *Gates*, wherein this Court clearly differentiated between a PBT and blood draw and ultimately held that a blood draw can still be requested even after a PBT is administered – and failure to comply with

the blood draw as directed can result in consequences for CDL holders that favor the public interest over those who choose to drive drunk on the highways of our state. *Beare; Gates; supra*. Likewise, proceedings “to determine or review the propriety of the cancellation, suspension, or revocation of a driver’s license [are] separate and distinct from a criminal trial of DUI...and the efficacy of the revocation...does not hinge on whether there is a conviction or acquittal on a criminal charge related to the test.” *Beare, supra.*, 140 N.W.2d 603 at 606, emphasis added.

Here, the facts are undisputed that Blazer was driving while intoxicated and that, after being administered a PBT which revealed a BAC of .102%, he refused to submit to a withdrawal and chemical analysis of his blood when directed by the officer to do so. SR 35-38, 64, 78, 194 (Ex. 1 – video received into evidence and Appellant’s notated refusal of chemical analysis); FF 6-8; T 10, ln. 10-13, 17-20; Appx. 19. Blazer was informed of the consequences of such refusal and ultimately chose to risk losing his license over potentially being convicted of DUI. *Id.*; *Beare; Blow; supra*. A chemical analysis of Blazer’s blood at the time it was taken revealed a BAC below the legal limit to be convicted at a criminal trial for DUI, but is still relevant civilly for purposes of having his CDL disqualified for life. SR 60, 61; *Beare; Revocation of Fischer; Maas; supra*. The refusal resulting in disqualification satisfies the purpose and intent of our state laws by protecting the interests of public safety and ensuring that bad actors are still punished when they choose to drink and drive. *See generally, Beare; Chmelka; Blow; Jans; Arnold; Gates; supra*.

In conclusion, the OHE and the Department correctly held that Blazer is a CDL holder who committed his second major traffic offense while operating a noncommercial

motor vehicle, pursuant to SDCL 32-12A-36, when he refused to submit to a withdrawal and chemical analysis of his blood in violation of SDCL 32-12A-46, and such offense mandates the disqualification of his CDL for life in accordance with SDCL 32-12A-37 and 49 CFR § 384.215. The circuit court's conclusion to the contrary was an error of law, and it should be reversed.

B. DID THE CIRCUIT COURT ERR WHEN IT FAILED TO INTERPRET THE LAWS FOR CDL HOLDERS IN FAVOR OF THE PUBLIC INTEREST.

The circuit court erred when it failed to interpret the laws for CDL holders in favor of the public interest and against the driver involved.

Case law holds that a CDL is not a right, it is a privilege, that privilege is conditioned, and subject to regulation under the State's police power. *See Peterson v. State*, 261 N.W.2d 405 (S.D. 1977); *Beare*; *Chmelka*; *Gates*; *supra*. As previously mentioned in the foregoing argument, this Court has held that 1) the State has a highly legitimate governmental interest in maintaining, protecting, and regulating public safety through licensure provisions; 2) licensure provisions achieve compelling state interests of maintaining, protecting, and regulating the public safety, the use of its public thoroughfares, and those who drive thereon; and 3) they are the least restrictive means for so doing. *Arnold, supra.*, at 323.

In addition, several of our sister states have interpreted similar CDL laws and provide persuasive authority. *See generally, Young v. Commissioner of Pub. Safety*, 420 N.W.2d 585, 586 (Minn. 1988) (holding "laws prohibiting DWI are remedial statutes. Consequently, such laws are liberally interpreted in favor of the public interest and against the private interests of the drivers involved. . . ."); *Zimmerman v. Comm'r of Pub. Safety*, A15-2031 (Minn. App. Aug 29, 2016) (holding Minnesota's implied consent laws

allow for revocation for refusal to submit to chemical analysis, and that refusal is a question of fact); *Jones v. Dir. of Revenue*, 237 S.W.3d 624, 625 (Mo. App. E.D. 2007); *Stuart v. Ark. Dep't of Fin. & Admin.*, 2017 Ark. App. 139, 515 S.W.2d 656 (affirming CDL revocation for refusal to take chemical test). Moreover, implied consent laws, “are designed to combat the increasing menace and danger caused by drunken drivers using the public highways,” and are intended to eliminate or control the ability of such bad actors to continue to drive even if a criminal conviction is not received. *Beare, supra.* at 606. One of the various conditions contained in our implied consent laws, as previously addressed, is the condition that a person consent to a chemical analysis if directed by a law enforcement officer to do so, or face the consequences specified in statute upon refusal. SDCL 32-12A-36(5); -44; -46; *Gates, supra.*

In application, law enforcement requested that Blazer submit to a blood test, and he refused. SR 35-38, 64, 78, 194 (Ex. 1 – video received into evidence and Appellant’s notated refusal of chemical analysis); FF 6-8; T 10, ln. 10-13, 17-20; Appx. 19. The refusal came after Blazer had submitted to a PBT, which he argues is enough to satisfy the civil requirements of our state laws. SR 130-144. SDCL Ch. 32-12A specifically provides clear, certain, and unambiguous language contemplating the administration of a chemical test via a blood test and provides for administrative penalties upon refusal. *See generally*, SDCL 32-12A-36(5); -44; -46.

Additionally, both statutory authority and case precedent outline that a law enforcement officer may require a blood test in addition to a PBT. *See generally*, SDCL 32-23-1.2; SDCL 32-12A-46; *Gates, supra.* Furthermore, these implied consent laws provide drunk drivers with a choice between losing their license for a period of time or

potentially be convicted of DUI, and that is a risk Blazer chose to take when he refused to consent to the withdrawal of his blood. *Beare; Blow; supra*. The absence of such laws would allow bad actors like Blazer – who crossed over the center line and caused a head on collision – to essentially get away with their crime without suffering any additional consequences to his CDL. Such a scenario is contrary to the established intent of these laws and would invalidate their overall purpose of safeguarding the legitimate governmental interest in maintaining, protecting, and regulating the public safety. *See generally, Beare; Chmelka; Blow; Jans; Arnold; Gates; Young; supra*.

In conclusion, the circuit court erred in failing to liberally construe these laws in favor of public safety. By contrast, the OHE and the Department correctly held that Blazer refused to submit to a withdrawal and chemical analysis of his blood in violation of SDCL 32-12A-46, and such offense mandates the disqualification of his CDL for life in accordance with SDCL 32-12A-37 and 49 CFR § 384.215. Such disqualification is necessary to ensure that the interests of public safety are still being met even though Blazer was never criminally convicted of DUI. The circuit court's conclusion to the contrary was an error of law, and it should be reversed.

CONCLUSION

The Department respectfully requests that this Court reverse the circuit court's Memorandum Opinion and Order, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Blazer's CDL privileges for life. The Department makes this request on two grounds.

First, the Department requests this Court reverse the circuit court's opinion that Blazer satisfied the requirements of SDCL 32-12A-46 when he submitted to a chemical

analysis of his breath. Blazer's refusal to submit to a chemical analysis of his blood when directed to by law enforcement was a qualifying major traffic offense that subjects his CDL to disqualification. This was Blazer's second major traffic offense, which requires a mandatory disqualification of his CDL for life. The Department requests that this analysis be done by reaffirming this Court's binding precedent set forth above. This calls for a reversal of the circuit court and a reinstatement of the Department's Final Decision disqualifying Blazer's CDL privileges for life.

Second, the Department requests this Court reverse the circuit court's finding because it is contrary to the legitimate governmental interest in maintaining, protecting, and regulating the public safety through driving licensure provisions. The circuit court erred in its factual interpretation of the record and in its legal interpretation of the legislative intent behind our laws. This, too, calls for a reversal of the circuit court's finding and a reinstatement of the Department's Final Decision disqualifying Blazer's CDL privileges for life.

REQUEST FOR ORAL ARGUMENT

The Department of Public Safety hereby requests oral argument on all issues and matters raised in this appeal.

Dated this 4th day of December 2023.

RESPECTFULLY SUBMITTED,

/s/ Jenna R. Severyn

Jenna R. Severyn

SPECIAL ASSISTANT

ATTORNEY GENERAL

206 W. Missouri Ave.

P.O. Box 1174

Pierre, SD 57501-1174

Tele: 605-224-0461

jseveryn@pirlaw.com

CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, State of South Dakota, the Department of Public Safety, hereby certify that on the 4th day of December 2023, a true and correct copy of Appellant's Brief was served by Odyssey File and Serve upon:

Brandon M. Taliaferro
Taliaferro Law Office
P.O. Box 287
Aberdeen, SD 57401
taliaferrolawfirmmpc@yahoo.com

and 1 original was mailed (or hand delivered) to the South Dakota Supreme Court.

Dated this 4th day of December 2023.

/s/ Jenna R. Severyn
Jenna R. Severyn
SPECIAL ASSISTANT ATTORNEY
GENERAL
206 W. Missouri Ave.
P.O. Box 1174
Pierre, SD 57501-1174
Tele: 605-224-0461
jseveryn@pirlaw.com

CERTIFICATE OF COMPLIANCE

Jenna R. Severyn, the attorney for Appellant, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

- a. Appellant's Brief does not exceed 32 pages.
- b. The body of Appellant's Brief was typed in Times New Roman 12-point typeface;
and
- c. The body of Appellant's brief contains 5,282 words and 26,392 characters with no spaces and 31,657 characters with spaces, according to the word and character counting system in Microsoft Office 365 for Windows used by the undersigned.

/s/ Jenna R. Severyn
Jenna R. Severyn
Special Assistant Attorney General
206 W. Missouri Ave.
PO Box 1174
Pierre, SD 57501
(605) 224-0461
jseveryn@pirlaw.com

APPENDIX

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STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
) ss	
COUNTY OF EDMUNDS)	FIFTH JUDICIAL CIRCUIT
DONALD WILLIAM BLAZER,	22Civ23-24
Plaintiff,	
vs.	NOTICE OF ENTRY OF
SD DEPARTMENT OF PUBLIC SAFETY,	MEMORANDUM DECISION
Defendant.	

TO: THE SOUTH DAKOTA DEPARTMENT OF PUBLIC SAFETY, Program Director
JOHN BROERS, Attorney JENNA SEVERYN, and Administrative Law Judge RYAN P.
DARLING

Notice is hereby given that the *Memorandum Decision* in the above entitled action, a copy of which is attached hereto, was signed by the court on September 20, 2023 attested by the clerk on September 20, 2023, and filed in the office of the Clerk of Courts in Edmunds County at Ipswich, South Dakota on September 20, 2023.

Dated this 20th day of September, 2023.

/s/ Brandon M. Taliaferro

Brandon M. Taliaferro, Esq.
Attorney for Donald William Blazer
TALIAFERRO LAW FIRM, P.C.
P.O. Box 287
Aberdeen, SD 57402-0287
(605)-681-5920
taliaferrolawfirm@pc@yahoo.com

CERTIFICATE OF SERVICE

The undersigned, attorney for Plaintiff above named, hereby certifies that on the 20th day of April 2023, a true and correct copy of the foregoing *Notice of Entry of Memorandum Decision* will be served on the below individuals/agencies via e-file, email, fax and/or hand delivery:

Mr. John Broers
Program Director
DPS
118 West Capitol Ave
Pierre, SD 57501

Ms. Jenna Severyn
P.O. Box 1174
Pierre, SD 57501

Honorable Ryan P. Darling
Office of Hearing Examiners
523 East Capitol Ave.
Pierre, SD 57501

/s/ Brandon M. Taliaferro

FILED

SEP 20 2023

STATE OF SOUTH DAKOTA
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT

IN CIRCUIT COURT

COUNTY OF EDMUNDS

FIFTH JUDICIAL CIRCUIT

DONALD WILLIAM BLAZER,

Plaintiff,

v.

SD DEPARTMENT OF PUBLIC SAFETY,

Defendant.

**22CIV23-24
MEMORANDUM DECISION**

An administrative hearing was held on March 10, 2023, in the above-entitled matter. Plaintiff appealed the ALJ decision, and the parties agreed to waive oral argument and submit briefs. The final brief was submitted on August 26, 2023.

Preliminarily, the State argues that this court cannot consider State v. Richards, 378 N.W.2d 259 (SD 1985) because that would be supplementing the record in some fashion. This court is unaware of any prohibition against it conducting research into relevant case law that, for whatever reason, was not cited by counsel in briefing. It most certainly is not supplementing the record to review relevant South Dakota case law, or any case law for that matter.

STATEMENT OF FACTS

On or about March 2014, Plaintiff, Donald William Blazer (hereinafter "Blazer"), was convicted of a DUI 1st offense. On or about December 28, 2022, Blazer was involved in an automobile accident which resulted in him receiving a severe concussion. After law enforcement arrived at the scene, they requested that Blazer submit to a preliminary breath test. Blazer immediately complied. After finishing his investigation and arresting Blazer, Trooper Woodside read Blazer the implied consent for CDL holders and requested that Blazer submit to a further warrantless blood draw. Blazer did not comply. Trooper Woodside read Blazer his Miranda rights

and sought a search warrant. After the search warrant was authorized and presented to Blazer, he complied. South Dakota Department of Public Safety contends that Blazer's initial refusal to submit to a chemical analysis of his blood warrants a lifetime disqualification of Blazer's CDL privilege. Blazer argues that he submitted to a chemical analysis when he complied with Trooper Woodside's request to submit to a preliminary breath test.

ISSUE

Whether the ALJ erred in finding Blazer refused to submit to a chemical analysis pursuant to SDCL 32-12A-46 and SDCL 32-21A-36(5).

ANALYSIS AND DECISION

SDCL § 32-12A-46 provides:

Any person who holds or is required to hold a commercial learner's permit or commercial driver license and operates any commercial or noncommercial motor vehicle in this state is considered to have given consent to the withdrawal of blood or other bodily substance to determine the amount of alcohol in that person's blood, or to determine the presence of any controlled drug or substance. The chemical analysis shall be administered at the direction of a law enforcement officer who, after stopping or detaining any person who holds or is required to hold a commercial learner's permit or commercial driver license, has probable cause to believe that the person was driving or in actual physical control of a commercial or noncommercial motor vehicle while having any alcohol or drugs in that person's system. Any person requested by a law enforcement officer under this section to submit to a chemical analysis shall be advised by the officer that:

- (1) If the person refuses to submit to the chemical analysis, none may be given, unless a warrant for the chemical analysis is issued; and
- (2) If the person refuses to submit to the chemical analysis requested, the person shall be:
 - (a) Immediately placed out of service for a period of twenty-four hours, if operating a commercial motor vehicle at the time of the refusal; and
 - (b) Disqualified from operating a commercial motor vehicle for a period of not less than one year; or
- (3) If the person submits to a chemical analysis which discloses that the person was operating the commercial motor vehicle while there was 0.04 percent or more by weight of alcohol in that person's blood the person shall be disqualified from operating a commercial motor vehicle for not less than one year.

Based upon the plain language of SDCL § 32-12A-46, Blazer contends that he submitted to chemical analysis of "other bodily substance." Of significance, this statute does not require an individual to submit to a warrantless test after an arrest is made, but simply after stopping or detaining that individual. That was done in this case. South Dakota Department of Public Safety contends that the statute does not provide Blazer with an either-or choice and that he was required to submit to a blood draw. The question turns on whether an intoximeter or PBT is a chemical analysis. This question was resolved in State v. Richards, 378 N.W.2d 259, 262 (SD 1985). In that case, the court held that because an intoxilyzer (or PBT) determines blood alcohol content by measuring the alcohol content of a person's breath, it accomplishes a chemical analysis. Id. The court in Richards further noted that "[t]he phrase 'chemical analysis' commonly includes 'tests for identifying chemical compounds by their physical properties, as the intoxilyzer does.'" Richards, at 261 (quoting City of Dayton v. Schenck, 63 Ohio Misc. 14, 16, 409 N.E.2d 284, 286 (1980)).

Because Richards establishes that an intoxilyzer is a chemical analysis, brought about by measurement of breath, Blazer did submit to a chemical analysis when he complied with Trooper Woodside's request to submit to a preliminary breath test. As such, Blazer was in compliance with SDCL § 32-12A-46 in that he submitted to a chemical analysis of "other bodily substance," here, his breath. Further, the arresting officer testified that the intoximeter he used measures blood alcohol content.

CONCLUSION

The ALJ's decision is reversed. Pursuant to SDCL § 32-12A-46, Blazer submitted to a chemical analysis of his breath upon request from law enforcement. South Dakota case law

establishes that a breath test is a chemical analysis. As such, Blazer was in compliance with SDCL § 32-12A-46. This court reverses the decision of the ALJ.

DATED this 20th day of Sept., 2023 at Aberdeen, South Dakota.

BY THE COURT:

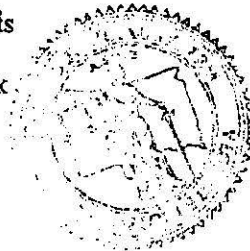


Richard A. Sommers
Circuit Judge

ATTEST:


Jean Hutson, Edmunds County Clerk of Courts

By: _____, Deputy Clerk



STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
) ss	
COUNTY OF EDMUNDS)	FIFTH JUDICIAL CIRCUIT
DONALD WILLIAM BLAZER,	22Civ23-24
Plaintiff,	
vs.	ORDER REVERSING ALJ DECISION
SD DEPARTMENT OF PUBLIC SAFETY,	
Defendant.	

An administrative hearing was held on March 10, 2023, in the above-entitled matter. Plaintiff appealed the ALJ decision. In this administrative appeal, Plaintiff was represented by attorney, Brandon M. Taliaferro. Defendant was represented by Asst. Attorney General Jenna Severyn. The parties' briefing concluded on August 26, 2023. Having considered the briefs of the parties and for good cause appearing, it is hereby:

ORDERED, that pursuant to SDCL 32-12A-46, Blazer submitted to a chemical analysis of his breath upon request from law enforcement; and it is further


ORDERED, that South Dakota caselaw establishes that a breath test is a chemical analysis and Blazer was in compliance with SDCL 32-12A-46; and it is further

ORDERED, that this Court's *Memorandum Decision* dated September 20, 2023, is incorporated by reference herein; and it is further

ORDERED, that the decision of the ALJ is hereby reversed.

BY THE COURT:

10/16/2023 10:38:51 AM


Honorable Richard A. Sommers
Circuit Court Judge

ATTEST:

Jean Hutson, Clerk of Courts

Attest.

Hutson, Jean

By: _____, Deputy

Clerk/Deputy



Filed on: 10/17/2023 Edmunds County, South Dakota 22CIV23-000024



SOUTH DAKOTA
DEPARTMENT
OF PUBLIC SAFETY

prevention ~ protection ~ enforcement

DRIVER LICENSING

STATE OF SOUTH DAKOTA
DEPARTMENT OF PUBLIC SAFETY
DRIVER LICENSING PROGRAM

IN THE MATTER OF

DONALD WILLIAM BLAZER

V.

DEPARTMENT OF PUBLIC SAFETY

FINAL DECISION AND
NOTICE OF ENTRY
DI 23-011

After reviewing the record and the proposed decision of the Hearing Examiner in this matter,

IT IS HEREBY ORDERED that pursuant to SDCL 1-26D-6 the Hearing Examiner's proposed decision dated **April 13, 2023**, is adopted in full and shall be **effective** ten days after having been received by the petitioner or ten days after failure to accept delivery as provided by SDCL 1-26-32.

IT IS FURTHER ORDERED that the Proposed Order of the Hearing Examiner regarding Donald William Blazer be affirmed. Mr. Blazer's commercial driver's license/privilege shall be disqualified for life.

If you have not already, you are required to surrender your South Dakota Commercial Driver's License to this office. It is a Class 1 misdemeanor to be in possession of an invalid driver's license/permit (SDCL 32-12-67, 32-12-68). Enclosed is a self-addressed, stamped envelope for your use to return your driver license. Alternatively, you may surrender it at a South Dakota exam station and apply for a South Dakota non-commercial driver's license. Please refer to the enclosed brochure for the identification documents you will be required to present if you wish to apply for a non-commercial driver's license. The application fee is \$28.00.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that this Final Decision was duly issued and entered on the 1th day of April, 2023.

Parties are hereby advised of the right to further appeal the final decision to circuit court within thirty (30) days of receiving such decision pursuant to the authority of SDCL Chapter 1-26.

Dated

4-17-23


John Broers

Program Director

Department of Public Safety

Driver Licensing

118 West Capitol

Pierre, SD 57501

Filed: 5/26/2023 8:23 AM CST Edmunds County, South Dakota 22CIV23-000024

- Page 67 -

Appx. 8

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53



SOUTH DAKOTA
DEPARTMENT
OF PUBLIC SAFETY

prevention • protection • enforcement

DRIVER LICENSING

54

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AFFIDAVIT OF MAILING

I, Rhyenn Absher, being sworn, state that on 18 April 23, I served a true and correct copy of the Proposed Decision, Findings of Fact, Reasoning, Conclusions of Law, Proposed Order, and Final Decision and Notice of Entry by US mail, first class, postage prepaid to the parties listed below.

Rhyenn Absher, Program Assistant I
South Dakota Department of Public Safety
Driver Licensing Program

BRANDON TALIAFERRO
PO BOX 287
ABERDEEN, SD 57402

RYAN DARLING
OFFICE OF HEARING EXAMINERS
523 EAST CAPITOL AVE
PIERRE, SD 57501

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**STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS**

DONALD WILLIAM BLAZER

**PROPOSED DECISION
DPS-DI 23-011**

V.

**SD DEPARTMENT OF
PUBLIC SAFETY**

An administrative hearing was held in this matter on March 10, 2023. Petitioner/licensee, Donald William Blazer (Blazer), appeared and testified at the hearing. Blazer was represented by attorney, Brandon Taliaferro. The Department of Public Safety (Department) was represented by Jenna Severyn. The Department had witnesses, Rhyenn Absher and Tyler Woodside. Based on the evidence, the arguments of the parties, and the law, the Hearing Examiner enters the following Findings of Fact, Reasoning, Conclusions of Law, and Proposed Order.

ISSUES

Whether the Department of Public Safety has the authority to disqualify Blazer's commercial driving privileges for life because he refused to submit to a chemical test?

FINDINGS OF FACT

1. Blazer currently lives at 13221 371st Avenue in Mina South Dakota.
2. Blazer has a commercial drivers license (CDL). The number is 00196847.
3. On or about January 10, 2014, Blazer received a citation for driving under the influence.
4. Blazer was convicted of driving under the influence on March 27, 2014.
5. This was his first offense. Blazer's CDL was disqualified for one year, effective March 27, 2014.
6. On or about December 29, 2022, Blazer was involved in two vehicle crash. The State Trooper smelled the odor of alcohol on Blazer. He admitted to drinking four beers. The State Trooper initiated a PBT test, and the result was .102%.
7. The officer read the implied consent instructions and asked Blazer to do a withdrawal and chemical analysis of his blood. Blazer replied, "I do not want anything drawn from me".
8. Blazer refused to submit to a chemical analysis. Blazer was given the Miranda Warning and refused to speak. Later a warrant was obtained, and a blood test was taken.
9. The Department sent a "Notification of Withdrawal of Driving Privileges" letter to Blazer on January 5, 2023. The letter stated that Blazer's commercial driver license and privilege were to be disqualified for life. The effective date of the

disqualification was to be January 20, 2023.

10. Blazer filed a timely appeal of the determination.
11. Any additional findings included in the Reasoning section of this decision are incorporated herein by this reference. To the extent any of the foregoing are improperly designated and are instead conclusions of law, they are hereby redesignated and incorporated herein as conclusions of law.

REASONING

Blazer was convicted of driving while intoxicated on March 27, 2014. This was his first offense and his CDL was disqualified for a year. SDCL 32-12A-36(1) provides that any person is disqualified from driving a commercial motor vehicle for a period of not less than one year if they are convicted of a first violation of driving or being in actual physical control of a commercial or noncommercial motor vehicle while under the influence of alcohol, or any controlled drug or substance, in violation of § 32-23-1.

Then on December 29, 2022, Blazer refused to submit to a chemical test. SDCL 32-12A-36(5) provides that any person is disqualified from driving a commercial motor vehicle for a period of not less than one year for refusing to submit to a chemical analysis for purposes of determining the amount of alcohol or drugs in that person's blood or other bodily substance while driving a commercial or noncommercial motor vehicle in violation of § 32-12A-43 or 32-12A-46. This was Blazer's second major offense.

SDCL 32-12A-37 states that any person is disqualified for life for the commission of two or more violations of any of the subdivisions specified in § 32-12A-36, or any combination of those subdivisions, arising from two or more separate incidents. The department may adopt rules, pursuant to chapter 1-26, under which a disqualification for life under this section may be reduced to a period of not less than ten years.

In this case, Blazer committed two violations of SDCL 32-12A-36¹, driving under the influence and refusing a chemical test. The evidence did show that Blazer was read the implied consent instructions and then refused to take a chemical test. The law specifically states that a person is disqualified for life for two or more violations. The South Dakota Legislature took a step to ensure that commercial drivers could not escape the consequences of a serious traffic violation and still hold a CDL. Therefore, Blazer's commercial drivers license must be disqualified for life.

CONCLUSIONS OF LAW

1. The Department of Public Safety has jurisdiction over the parties and subject matter of this appeal. The Office of Hearing Examiners has authority to conduct the appeal pursuant to the provisions of SDCL 1-26D.
2. Any Conclusions of Law in the reasoning section of this decision are incorporated herein by reference. To the extent any of the foregoing are improperly designated and are instead findings of fact, they are hereby redesignated and incorporated

¹ The South Dakota laws are very similar to the Federal laws. See 49 CFR 383.51.

52

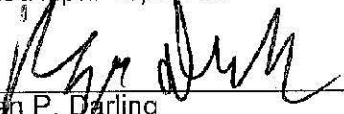
herein as findings of fact.

3. Blazer's commercial driving privileges must be disqualified for life. SDCL 32 12A-37.

PROPOSED ORDER

It is the proposed order of the Hearing Examiner that the determination of the Department of Public Safety be affirmed. Donald William Blazer's commercial drivers license must be disqualified for life.

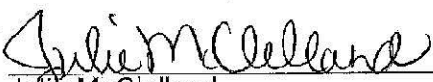
Dated April 13, 2023.



Ryan P. Darling
Office of Hearing Examiners
523 East Capitol Avenue
Pierre, SD 57501

CERTIFICATE OF SERVICE

I certify that on April 13, 2023, at Pierre, South Dakota, a true and correct copy of the proposed Decision in the above-entitled matter was sent via U.S. Mail or Inter-Office Mail to each party listed below.



Julie McClelland
Legal Secretary

DONALD BLAZER
13221 371ST AVE
MINA SD 57541

JENNA SEVERYN
PO BOX 1174
PIERRE SD 57501

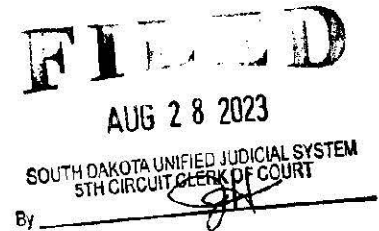
BRANDON TALIAFERRO
PO BOX 287
ABERDEEN SD 57402

JOHN BROERS
118 WEST CAPITOL AVE
PIERRE SD 57501

Hutson, Jean (UJS)

From: Sommers, Judge Richard
Sent: Monday, August 28, 2023 9:16 AM
To: Hutson, Jean (UJS)
Subject: FW: [EXT] Donald Blazer v SD DPS, 22Civ23-24 (Administrative Appeal)

Please file these emails.



From: Sommers, Judge Richard
Sent: Thursday, August 17, 2023 11:57 AM
To: Brandon Taliaferro <taliaferrolawfirm@pca.com>
Cc: Jenna Severyn <jschweiss@pirlaw.com>
Subject: RE: [EXT] Donald Blazer v SD DPS, 22Civ23-24 (Administrative Appeal)

Counsel as you didn't request oral arguments in this matter, I want your input on State v. Richards, 378 N.W. 2d 259 (1985) wherein the Supreme Court did rule that a breath test was a chemical analysis. Neither of you referred to this case in your briefs. Mr. Taliaferro please respond within a week from today and Ms. Severyn you have one week after that.

From: Brandon Taliaferro <taliaferrolawfirm@pca.com>
Sent: Tuesday, July 25, 2023 9:09 AM
To: Sommers, Judge Richard <Richard.Sommers@uds.state.sd.us>
Cc: Jenna Severyn <jschweiss@pirlaw.com>
Subject: [EXT] Donald Blazer v SD DPS, 22Civ23-24 (Administrative Appeal)

Judge Sommers and Counsel:

Attached, please find courtesy copies of the following:

1. Appellant's Brief; and
2. Appellant's Reply Brief.

Thanks,

Brandon

Brandon M. Taliaferro, Esq.
TALIAFERRO LAW FIRM, P.C.
P.O. Box 287
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(605)-681-5920
(605)-262-0829 (fax)

STATE OF SOUTH DAKOTA)
 §§
COUNTY OF EDMUNDS)

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
THE DEPARTMENT OF PUBLIC SAFETY,
Appellant,

v.

DONALD WILLIAM BLAZER,
Appellee.


22 CIV 23-24

NOTICE OF APPEAL

To: DONALD WILLIAM BLAZER, and
Brandon M. Taliaferro, Attorney for Appellee.

Please take notice, that the State of South Dakota, the Department of Public Safety,
appeals to the Supreme Court of South Dakota from the Circuit Court's Memorandum Decision,
filed and entered on the 20th day of September 2023.

October 19, 2023.


Jenna R. Severyn
Special Assistant Attorney General
206 W. Missouri Avenue
PO Box 1174
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STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS

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DONALD WILLIAM BLAZER,
Petitioner,

-vs-

SOUTH DAKOTA DEPARTMENT
OF PUBLIC SAFETY,
Respondent.

= = = = =

Transcript of Hearing
March 10, 2023
2:05 p.m.

= = = = =

A P P E A R A N C E S

BRANDON TALIAFERRO,
appearing on behalf of the Petitioner;
JENNA SEVERYN,
appearing on behalf of the Respondent.

Reported by Cheri McComsey Wittler, RPR, CRR
Precision Reporting, 213 South Main, Onida, SD
cwittler@venturecomm.net

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1 there?

2 THE WITNESS: I'm a basic patrol on the
3 highways, county roads in the Aberdeen area, handle
4 traffic enforcement, DUI investigation, crash
5 investigation.

6 ADMINISTRATIVE LAW JUDGE: Okay. Ms. Severyn,
7 questions.

8 MS. SEVERYN: Yes. Thank you, your Honor.

9 DIRECT EXAMINATION

10 BY MS. SEVERYN:

11 Q. Trooper Woodside, how long have you worked in your
12 capacity as a state trooper?

13 A. Just over six years.

14 Q. Were you on duty the night of December 28, 2022?

15 A. Yes, I was.

16 Q. Do you recall what happened that evening?

17 A. At approximately 2215 hours I was out on patrol.

18 Brown County Dispatch (Inaudible) a call for a
19 two-vehicle injury crash that occurred near mile marker
20 280 on U.S. 12. I responded to that crash.

21 When I arrived on scene I seen there was a Mercedes
22 SUV in the middle of the road that had front end damage.
23 While I was en route to the crash Brown County Dispatch
24 also advised that one of the vehicles that was involved
25 in the crash had continued westbound after the crash. So

1 when I arrived on scene I made contact with the driver of
2 that SUV, made sure she was all right.

3 Since there was no other units on the scene prior to
4 my arrival , I just parked my patrol car in front of her
5 vehicle so there wasn't any secondary accidents. While I
6 was talking to that driver to get her information to find
7 out sort of her side of the story for what happened in
8 the accident, a passerby stopped by me and explained to
9 me that the other vehicle involved in the crash was
10 probably approximately about a half-mile west of the
11 scene on U.S. 12, and he stated that there was nobody
12 inside the vehicle.

13 Again, so once the ambulance arrived on the scene, I
14 let the driver and passenger from that Mercedes SUV go in
15 there, obtained a BBT from her, results in zeros.

16 The deputy (Inaudible) Edmunds County Sheriff's
17 Office and Deputy (Inaudible) of the Brown County
18 Sheriff's Office went up to where the other vehicle that
19 was driven by -- later discovered to be driven by
20 Mr. Donald Blazer, Deputy (Inaudible) had seen that there
21 was footprints from the vehicle that went into the ditch
22 out on the -- that went to the railroad that was just
23 north of U.S. 12.

24 He followed them and he came in contact with
25 Mr. Blazer and he brought him back to his vehicle and

1 that's where Deputy Rice had placed Mr. Blazer in
2 handcuffs and had him detained and had him in the back
3 seat of his patrol vehicle.

4 Deputy Rice explained to me that Blazer admitted
5 that he was the driver, that he had consumed alcoholic
6 beverages. When he opened the cage to his patrol vehicle
7 so I could talk to Mr. Blazer I could smell the odor of
8 an alcoholic beverage coming from his person. And then I
9 had him come in --

10 I placed him in the cage of my patrol vehicle.
11 Again I asked him how much alcohol he had consumed. He
12 said he had four beers. I obtained a PBT from him. The
13 result was .102 percent. I advised him that I'd be
14 placing him under arrest for DUI. I ran his driver's
15 license through State Radio communications, verified that
16 he had a valid driver's license.

17 I discovered that he was a CDL, commercial driver's
18 license, holder so I read him the implied consent card
19 for a commercial driver's license holder, and at the end
20 of that he refused the blood draw.

21 After that I transported him to the Brown County
22 Jail. At the Brown County Jail I obtained a search
23 warrant from the Honorable Judge Cullen McNeece to obtain
24 the blood sample from Mr. Blazer. The blood sample was
25 obtained. Then after the blood draw he was released to

1 the jail staff.

2 Q. Trooper Woodside, what is the reasoning behind doing
3 both the breathalyzer test and the blood withdraw?

4 A. The PBT's just to confirm that from my observations
5 of Mr. Blazer that he had, in fact, been consuming
6 alcoholic beverages. The blood draw I can send off to
7 the State Health Lab in Pierre, South Dakota. It's a
8 test for the blood alcohol content.

9 Q. Did you submit a notice of refusal to submit to a
10 chemical analysis by a CDL holder in this matter?

11 A. Yes, I did.

12 MS. SEVERYN: Your Honor, let the record reflect
13 that that's marked at page 4 and 5 of what has been
14 entered as Exhibit A into the record.

15 Q. (BY MS. SEVERYN) Trooper Woodside, who do you
16 submit this to?

17 A. It would be the Department of Public Safety Office
18 of Driver Licensing.

19 Q. At what point did you submit this?

20 A. This event happened on the 28th. I submitted it on
21 December 29.

22 Q. Is it your obligation to submit this whether
23 Mr. Blazer was convicted or not?

24 A. (Inaudible) yes.

25 Q. Did you also make a report of this incident?

1 BY MS. SEVERYN:

2 Q. Mr. Blazer, do you recall drinking the night of
3 December 28, 2022?

4 A. Yes.

5 Q. Do you recall admitting to law enforcement that you
6 had had approximately four alcoholic beverages?

7 A. No.

8 Q. Well, since you admitted to remembering drinking
9 that night, is it possible you didn't remember anything
10 else because you'd been drinking?

11 A. No.

12 Q. Do you remember telling the officer to stop reading
13 you your Miranda Rights?

14 A. No.

15 Q. Did you review the video?

16 A. I watched it.

17 Q. Did you see yourself clearly refuse to submit to the
18 chemical test?

19 A. No.

20 Q. You watched the video, but you didn't hear yourself
21 refuse to submit to the chemical test?

22 A. The breath test. I remember the breath -- doing the
23 breath test.

24 Q. And I'm not asking you what you remember. I'm
25 asking you what you watched in the video. Do you

1 remember seeing yourself in the video refuse to submit to
2 the chemical test?

3 A. No.

4 Q. Did you watch the video?

5 A. I watched it, but there's a lot of static and stuff
6 that was being played over the video when you watch it.

7 Q. Do you recall everybody else testifying today that
8 they clearly heard you refuse to submit to the chemical
9 test?

10 A. Yes.

11 Q. Did you hear testimony today that statutory
12 authority is given to the Department to disqualify your
13 commercial driving privileges because you refused to
14 submit to that chemical test?

15 A. I have heard that.

16 Q. Did you receive the packet that we went through at
17 today's hearing?

18 A. Yes.

19 Q. Did you review the packet?

20 A. Yes.

21 Q. Did you see the statutes that provide the Department
22 with the authority to disqualify your commercial driving
23 privileges if you refuse to submit to the chemical test?

24 A. Yes.

25 Q. Do you understand that you do have a prior

1 conviction on your record for a DWI?

2 A. Yes.

3 Q. Do you understand that refusing to take a chemical
4 test as required by a state or jurisdiction is considered
5 a significant offense in these matters?

6 A. I didn't refuse a chemical test. I took a
7 breathalyzer test.

8 Q. Do you recall hearing testimony today that those
9 tests are not one in the same?

10 A. Yeah.

11 Q. So by submitting to a breathalyzer test do you
12 understand that the chemical test is a separate test?

13 A. No.

14 Q. And why not?

15 A. The law doesn't say that.

16 Q. What does the law say, sir?

17 A. Under 32 -- hang on a minute. Under 32-12-36 under
18 5, refusing to submit to a chemical analysis for the
19 purpose of determining the amount of alcohol (Inaudible)
20 blood or other bodily substance.

21 Q. Does that specific subsection address a breath test?

22 A. Yes.

23 Q. Does it -- can you tell me where?

24 A. (Inaudible). It says the other bodily substance.

25 Q. Did you hear your attorney question Ms. Absher on

30

§383.51 Disqualification of drivers.

(a) *General.* (1) A person required to have a CLP or CDL who is disqualified must not drive a CMV.

(2) An employer must not knowingly allow, require, permit, or authorize a driver who is disqualified to drive a CMV.

(3) A holder of a CLP or CDL is subject to disqualification sanctions designated in paragraphs (b) and (c) of this section, if the holder drives a CMV or non-CMV and is convicted of the violations listed in those paragraphs.

(4) *Determining first and subsequent violations.* For purposes of determining first and subsequent violations of the offenses specified in this subpart, each conviction for any offense listed in Tables 1 through 4 to this section resulting from a separate incident, whether committed in a CMV or non-CMV, must be counted.

(5) The disqualification period must be in addition to any other previous periods of disqualification.

(6) *Reinstatement after lifetime disqualification.* A State may reinstate any driver disqualified for life for offenses described in paragraphs (b)(1) through (8) of this section (Table 1 to §383.51) after 10 years, if that person has voluntarily entered and successfully completed an appropriate rehabilitation program approved by the State. Any person who has been reinstated in accordance with this provision and who is subsequently convicted of a disqualifying offense described in paragraphs (b)(1) through (8) of this section (Table 1 to §383.51) must not be reinstated.

(7) A foreign commercial driver is subject to disqualification under this subpart.

(b) *Disqualification for major offenses.* Table 1 to §383.51 contains a list of the offenses and periods for which a person who is required to have a CLP or CDL is disqualified, depending upon the type of vehicle the driver is operating at the time of the violation, as follows:

15

40

TABLE 1 TO §383.51

If a driver operates a motor vehicle and is convicted of:	For a first conviction or refusal to be tested while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a first conviction or refusal to be tested while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a first conviction or refusal to be tested while operating a CMV transporting hazardous materials as defined in §383.5, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a second conviction or refusal to be tested in a separate incident of any combination of offenses in this Table while operating a CMV, a person required to have a CLP or CDL and a CLP or CDL holder must be disqualified from operating a CMV for * * *	For a second conviction or refusal to be tested in a separate incident of any combination of offenses in this Table while operating a non-CMV, a CLP or CDL holder must be disqualified from operating a CMV for * * *
(1) Being under the influence of alcohol as prescribed by State law * * *	1 year	1 year	3 years	Life	Life.
(2) Being under the influence of a controlled substance * * *	1 year	1 year	3 years	Life	Life.
(3) Having an alcohol concentration of 0.04 or greater while operating a CMV * * *	1 year	Not applicable	3 years	Life	Not applicable.
(4) Refusing to take an alcohol test as required by a State or jurisdiction under its implied consent laws or regulations as defined in §383.72 of this part * * *	1 year	1 year	3 years	Life	Life.
(5) Leaving the scene of an accident * * *	1 year	1 year	3 years	Life	Life.

16

§ 384.216 Second offenses.

(41)

- (a) *General rule.* The State must disqualify for life from operating a CMV each person who is convicted, as defined in § 383.5 of this subchapter, in any State or jurisdiction, of a subsequent offense as described in Table 1 to § 383.51 of this subchapter.
- (b) *Special rule for certain lifetime disqualifications.* A driver disqualified for life under Table 1 to § 383.51 may be reinstated after 10 years by the driver's State of residence if the requirements of § 383.51(a)(6) have been met.

[67 FR 49762, July 31, 2002; 78 FR 58480, Sept. 24, 2013]

(17)

§ 384.231 Satisfaction of State disqualification requirement.

42

(a) *Applicability.* The provisions of §§

384.203, 384.206(b), 384.210, 384.213, 384.215 through 384.219, 384.221 through 384.224, and 384.231 of this part apply to the State of licensure of the person affected by the provision. The provisions of § 384.210 of this part also apply to any State to which a person makes application for a transfer CDL.

(b) *Required action -*

(1) *CLP or CDL holders.* A State must satisfy the requirement of this subpart that the State disqualify a person who holds a CLP or a CDL by, at a minimum, disqualifying the person's CLP or CDL for the applicable period of disqualification.

(2) *A person required to have a CLP or CDL.* A State must satisfy the requirement of this subpart that the State disqualify a person required to have a CLP or CDL who is convicted of an offense or offenses necessitating disqualification under § 383.51 of this subchapter. At a minimum, the State must implement the limitation on licensing provisions of § 384.210 and the timing and recordkeeping requirements of paragraphs (c) and (d) of this section so as to prevent such a person from legally obtaining a CLP or CDL from any State during the applicable disqualification period(s) specified in this subpart.

(c) *Required timing.* The State must disqualify a driver as expeditiously as possible.

(d) *Recordkeeping requirements.* The State must conform to the requirements of the CDLIS State Procedures Manual (incorporated by reference in § 384.107(b).) These requirements include the maintenance of such driver records and driver identification data on the CDLIS as the FMCSA finds are necessary to the implementation and enforcement of the disqualifications called for in §§ 384.215 through 384.219, and 384.221 through 384.224 of this part.

[67 FR 49762, July 31, 2002, as amended at 73 FR 73126, Dec. 1, 2008; 76 FR 26896, May 9, 2011]

18

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM

CASE SUMMARY

CASE NO. 46CRI14-000022

STATE OF SOUTH DAKOTA vs. DONALD WILLIAM
BLAZER§
§
§
§Location: Meade
Judicial Officer: Strawn, Eric
Filed on: 01/13/2014

CASE INFORMATION

Offense	Citation	Statute Deg	Date	Case Type:	Criminal Circuit
Plaintiff: STATE OF SOUTH DAKOTA					
1. DRIVING UNDER INFLUENCE-1ST OF	017072	32-23- M1 2	01/10/2014	Case Status:	03/27/2014 Terminated

Statistical Closures
03/27/2014 Terminated

PARTY INFORMATION

Plaintiff	STATE OF SOUTH DAKOTA	<i>Lead Attorneys</i> BORDEWYK, MICHELE 605-347-4491(W)
Defendant	BLAZER, DONALD WILLIAM	KINNEY, MATTHEW <i>Retained</i> 605-642-2147(W)

DATE

EVENTS & ORDERS OF THE COURT

01/13/2014	TICKET
01/13/2014	PROBABLE CAUSE
01/13/2014	BOND \$500 UNSECURED
01/21/2014	NOTICE OF APPEARANCE AND REQUEST FOR DISCOVERY W/CS
01/30/2014	Initial/Arraignment (Judicial Officer: Palmer-Percy, Michelle)
01/30/2014	Plea (Judicial Officer: Palmer-Percy, Michelle) 1. DRIVING UNDER INFLUENCE-1ST OF Not Guilty
01/30/2014	INFORMATION
02/18/2014	Status Hearing (Judicial Officer: Strawn, Eric)
03/27/2014	Change of Plea/Sentencing (Judicial Officer: Strawn, Eric)
03/27/2014	Amended Plea (Judicial Officer: Strawn, Eric) 1. DRIVING UNDER INFLUENCE-1ST OF Guilty
03/27/2014	Disposition (Judicial Officer: Strawn, Eric) 1. DRIVING UNDER INFLUENCE-1ST OF Judgment on Plea of Guilty
03/27/2014	Sentence (Judicial Officer: Strawn, Eric) 1. DRIVING UNDER INFLUENCE-1ST OF Sentenced Condition - Adult: 1. FIN-F/C DUE, THAT THE DEFENDANT PAY FINE AND COSTS., 03/27/2014 - 03/27/2014, Active 03/27/2014 2. PROB-360, THAT THE DEFENDANT VIOLATE NO LAWS FOR A PERIOD OF 360 DAYS., 03/27/2014 - 03/22/2015, Active 03/27/2014 Fee Totals: DRIVING UNDER INFLUENCE-1ST OF Pronounced Fine \$ 315.00

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM

CASE SUMMARY

CASE No. 46CRI14-000022

Total Fine \$ 315.00

Court Costs (Blood
Test, etc) 85.00Court Costs Class 1
Misdemeanor + State
Fine 399.00

Fee Totals \$ 484.00

License Suspension

Types: Driver's License

Revoked

Term: 30 Days

Effective: 03/31/2014

Surrendered to Court: 04/01/2014

Driving Permit

Comment: DL revocation effective on March 31 at 5 pm

Driving Permit

Issued 3/31/2014

Expires 4/30/2014

Driving Permit Reason:

Purposes: Employment or Business

Driving Permit Hours: Sunday (4:00 AM TO 12:00 AM), Monday (4:00 AM TO
12:00 AM), Tuesday (4:00 AM TO 12:00 AM), Wednesday (4:00 AM TO 12:00
AM), Thursday (4:00 AM TO 12:00 AM), Friday (4:00 AM TO 12:00 AM),
Saturday (4:00 AM TO 12:00 AM)

Driving Permit Comment: HOURS WILL VARY


Incarceration

Begins: 03/27/2014

Total Term: 30 Days

Location: Jail

Suspended: 30 Days

03/27/2014  BLOOD ALCOHOL AFFIDAVIT04/01/2014  RESTRICTED DRIVER'S PERMIT04/03/2014  JUDGMENT OF CONVICTION

DATE

FINANCIAL INFORMATION

Defendant BLAZER, DONALD WILLIAM

Total Charges

484.00

Total Payments and Credits

484.00

Balance Due as of 01/19/2023

0.00

24

SOUTH DAKOTA HIGHWAY PATROL

Web: dps.sd.gov/enforcement/highway_patrol/



Case Narrative for HP22006671CR (12/29/22
17:28)

Printed on December 29, 2022

Primary Report By Tyler Woodside, 12/29/22 17:28

Blazer DUI Arrest Report

Case #HP22006671CR

Typed By Tyler Woodside

On December 28, 2022 at approximately 2215 hours, Brown County Dispatch aired a call of a two vehicle injury crash that occurred near MM 280 on US 12. They advised that one of the vehicles involved in the crash had left the scene and was continuing to travel westbound on US 12. I advised Brown County Dispatch and State Radio Communications that I would be en route. Brown County Dispatch advised that they had deputies responding to this call as well. I arrived at MM 280 on US 12 at approximately 2219 hours. Upon arrival, I saw a black Mercedes Benz ML 350 bearing South Dakota license plate number: 3C7267 in the eastbound passing lane with it's hazard lights on. I also noticed that there was an SUV parked on the shoulder of the westbound lane and that there were three people standing outside of the vehicle. I parked behind the Mercedes in the road and exited my patrol vehicle.

I made contact with the three individuals standing by the SUV on the shoulder of the highway. One of them stated that she was the driver, the other stated that she was the passenger and the other drove upon the crash scene and stopped to check on them. I asked the driver and passenger if they were alright and they stated that they were. The driver was on the phone with her mother and she advised her daughter that she should be evaluated by the Ambulance Crew. I asked Brown County Dispatch if they had an ambulance en route and they stated that they did. I identified the driver of the Mercedes as Baela Jolyn East (DOB:08/08/2006) and the passenger as Brooklyn Margaret Bohling (DOB: 04/13/2006). I ran East's name and date of birth through State Radio Communications to verify that she had a valid driver's license, which she did. I also asked her for the registration and proof of insurance for the vehicle and she was able to provide me with both. I asked East what had happened and she stated that she was driving eastbound on US 12 in the passing lane and that a westbound SUV crossed over the center line and hit her vehicle. She stated that she tried to swerve into the driving lane to avoid the other vehicle, but was unable to. She stated that the westbound SUV continued driving after hitting her vehicle. While talking to East, another individual who drove past the scene stopped and advised me that the other vehicle involved in the crash was just about a half mile west of the scene on the shoulder of the road. He stated that there was no one inside the vehicle. I took pictures of East's vehicle as part of my crash investigation. Deputies Gavin Wright of the Brown County Sheriff's Office and Kyle Couchey of the Edmunds County Sheriff's Office arrived on scene and drove to where the other vehicle involved in the crash was parked. I stayed with East and Bohling until the ambulance arrived on scene. I obtained a PBT from East and the result was .000%. Both East and Bohling were evaluated and cleared by the ambulance crew.

I then drove up to where the other vehicle involved in the crash was parked and seen that Deputy Wright had the driver of this vehicle detained. Deputy Wright advised me that Deputy Couchey followed footprints in the snow left from the driver of the vehicle, from the roadway up to the railroad tracks and later found the driver walking on the railroad tracks. Deputy Wright told me that the individual that he had detained admitted to being the driver of the vehicle and that he was the only one inside the vehicle at the time of the crash. He stated that the driver admitted to having drank four beers. I later identified the driver as Donald William Blazer (DOB: 02/13/1967) by his South Dakota driver's license. I had Blazer get out of Deputy Wright's vehicle and placed him in the cage of my patrol vehicle. Deputy Wright had already placed the driver in handcuffs (checked for fit and double locked). While placing Blazer in the cage of my patrol vehicle, I could smell the odor of an alcoholic beverage coming from his person and noticed that his eyes were bloodshot and watery. I asked Blazer what he remembered about the crash and he stated that he couldn't remember much. I asked Blazer how much alcohol he had to drink and he told me that he had four beers. I administered a PBT to Blazer at approximately 2251 hours and the result was .102%. I did not have Blazer perform Standardized Field Sobriety Tests due to the fact that he had fled the scene of the crash. I advised Blazer that he was under arrest for DUI. I ran Blazer's name and date of birth through State Radio Communications to verify that he had a valid driver's license which he did. I seen that Blazer had a commercial driver's license. I read Blazer the implied consent card for CDL holders at approximately 2254 hours and he refused to provide a blood sample. I read Blazer the Miranda Warning at approximately 2255 hours and he invoked his rights and was not willing to talk to me. I then got the license

Case HP22006671CR

Page 1 of 2

Filed: 5/26/2023 8:23 AM CST Edmunds County, South Dakota 22CIV23-000024

- Page 38 -

Appx. 30

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plate number from Blazer's vehicle and took pictures of the damage. The vehicle that Blazer was driving was a 2007 GMC Envoy bearing South Dakota License Plate number: CHTTRBX.

At approximately 2300 hours, I left the scene and transported Blazer to the Brown County Jail. Deputy Wright remained on scene with Blazer's vehicle until it was towed from the scene by Knight's Towing of Aberdeen, SD. I arrived at the jail at approximately 2312 hours. While at the jail, State Radio Communications advised me that Blazer had one prior DUI. Also while at the jail, I obtained a search warrant from the Honorable Judge Cullen McNeece to obtain a blood sample from Blazer. At approximately 0053 hours, I witnessed RN LeAnn Harrell obtain a blood sample from Blazer's left arm. The blood sample was sealed and remained in my custody until I deposited it at the Aberdeen, SD Post Office at approximately 0105 hours. After the blood draw, Blazer was released to the Jail Staff.

Blazer was issued a citation for DUI 2nd Offense (Alcohol), Leaving Accident Scene- Failure to Provide Information and Driving on the Wrong Side of the Road.

End of Report

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 30499

**STATE OF SOUTH DAKOTA, THE DEPARTMENT OF PUBLIC
SAFETY,**

Appellant,

vs.

DONALD WILLIAM BLAZER,

Appellee.

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
EDMUNDS COUNTY, SOUTH DAKOTA

THE HONORABLE RICHARD A. SOMMERS
CIRCUIT JUDGE

APPELLEE'S BRIEF

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ATTORNEYS FOR APPELLANT

NOTICE OF APPEAL FILED: OCTOBER 19, 2023

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PRELIMINARY STATEMENT

References to Appellee Donald W. Blazer will be “Blazer.” References to Appellant State of South Dakota Department of Public Safety will be “Department.” References to witnesses will be by last name (i.e., “Woodside”). References to the Appendix will be “Appx.” References to transcripts and records will be referred to as follows:

Settled Record.....SR

Administrative Hearing TranscriptTT

Each citation will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This is an appeal from the circuit court’s Memorandum Decision, dated September 20, 2023, reversing the decision of the Administrative Law Judge. The Department filed its Notice of Appeal on October 19, 2023. Jurisdiction is appropriate pursuant to SDCL § 1-26-37.

STATEMENT OF THE ISSUES

- I. Did the lower court err in holding Blazer complied with SDCL § 32-12A-46 when he submitted to the chemical analysis of his breath when requested by Trooper Woodside?**

The circuit court held Blazer complied with SDCL § 32-12A-46 when he submitted to the chemical analysis of his breath when requested by Trooper Woodside.

- *State v. Richards*, 378 N.W.2d 277 (S.D. 1985)
- *Stensland v. Smith*, 79 S.D. 651, 116 N.W.2d 653 (S.D. 1962)
- *State v Walz*, 88 S.D. 262, 218 N.W.2d 480 (S.D. 1974)

- *Peterson v. State*, 261 N.W.2d 405 (S.D. 1977)

STATEMENT OF THE CASE

This case involves the State of South Dakota Department of Public Safety. The Department provided Blazer with a notification of intent to disqualify Blazer's commercial driver's license for life following an arrest for DUI in late December 2022 and an alleged refusal by Blazer to submit to a chemical analysis to determine his BAC pursuant to SDCL 32-12A-46. (SR-9-10) Blazer also had a prior DUI conviction in 2014. (SR-30-31) Blazer's recent DUI arrest was dismissed as his BAC was below the legal limit. (SR-44-46) The Department sought a lifetime CDL disqualification against Blazer based on his 2014 DUI conviction and his alleged failure to submit to a chemical analysis during his December 2022 encounter with Trooper Woodside.

Blazer requested an administrative hearing and the same was held on March 10, 2023, before the Honorable ALJ Ryan P. Darling. On April 13, 2023, ALJ Darling submitted findings of fact, conclusions of law, and a proposed order disqualifying Blazer's CDL privileges for life finding that Blazer failed to submit to a chemical analysis as required by the implied consent statute and based on Blazer's 2014 DUI conviction. (SR-64-66); Appx. 1-3. Based on those two violations, the ALJ determined a lifetime disqualification of Blazer's CDL privileges was appropriate pursuant to SDCL 32-12A-37. (SR-66) The Department approved the proposed order and the same became a final order on April 17, 2023. (SR-67)

On April 27, 2023, Blazer appealed to the Circuit Court. (SR-1) Briefing concluded on August 26, 2023. On September 20, 2023, the circuit court issued its memorandum decision reversing the decision of the ALJ. (SR-177-180); Appx. 4-7. The circuit held that Trooper Woodside's intoximeter was a chemical analysis of other bodily substance and that Blazer complied with SDCL § 32-12A-46 when he submitted to the chemical analysis of his breath when requested by Trooper Woodside. The circuit also pointed out that Trooper Woodside testified that the intoximeter he used measures blood alcohol content. (SR-177-179)

On September 20, 2023, Blazer filed a Notice of Entry of the memorandum decision. (SR-181) On October 16, 2023, the circuit court's order reversing the decision below was filed. (SR-187) The Department filed its Notice of Appeal on October 19, 2023. (SR-188)

STATEMENT OF THE FACTS

In March 2014, Blazer was convicted of a DUI 1st offense. On December 28, 2022, Blazer was arrested for a DUI. Blazer was involved in a car wreck on December 28, 2022 and smashed his head into his front windshield which resulted in a severe concussion that caused him to miss work for several weeks. (SR-63; TT pg. 38, lines 21-25 and pg. 39, lines 1-7). Trooper Woodside requested that Blazer submit to a breath test on his department issued Intoximeter. Blazer immediately complied. (TT pg. 16, lines 23-25). Trooper Woodside arrested Blazer for DUI. (SR-38) Trooper Woodside then requested Blazer submit to a warrantless blood draw pursuant to the implied consent statute. (SR-38) Blazer said something to the extent

of, I don't want it drawn from me. Trooper Woodside then read Blazer his *Miranda* rights. (TT pg. 17, lines 1-4). Trooper Woodside sought a search warrant for Blazer's blood. (TT pg. 17, lines 5-8). When the search warrant was authorized and presented to Blazer, Blazer immediately complied. (TT pg. 17, lines 9-11). The criminal case stemming from this encounter in late December 2022 was dismissed by the State of South Dakota as Blazer had a BAC 0.70%. (SR-60-62). At the administrative hearing, the uncontroverted testimony of Trooper Woodside was that a preliminary breath test, using his department issue intoximeter, is a chemical analysis that measures blood alcohol. (TT PG. 16, lines 5-22).

STANDARD OF REVIEW

This Court's review of agency decisions is the same as the review made by the circuit court with no presumption the circuit court's decision was correct. *In re Jarmon*, 2015 S.D. 8, 860 N.W.2d 1 (S.D. 2015). The agency's findings on questions of fact will be reversed only when those findings are clearly erroneous in light of the entire record. *Id.*

Issues of statutory and constitutional interpretation are questions of law. *Gray v. Gienapp*, 2007 S.D. 12, ¶15, 727 N.W.2d 808, 812. This Court reviews the interpretation and application of each de novo. *See Ibrahim v. Dep't of Public Safety*, 2021 S.D. 51, ¶12, 956 N.W.2d 799 ("We review questions of statutory interpretation de novo"); *State v. Goulding*, 2011 S.D. 25, ¶5, 799 N.W.2d 412, 414 ("Statutory interpretation and application are questions of law that we review do novo."); *Kraft v.*

Meade Cnty. ex rel. Bd. of Cnty. Comm'rs, 2006 S.D. 113, ¶2, 726 N.W.2d 237,
239("Constitutional interpretation is a question of law reviewable de novo.").

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THAT BLAZER COMPLIED WITH SDCL 32-12A-46 WHEN HE SUBMITTED TO THE CHEMICAL ANALYSIS OF HIS BREATH AT THE REQUEST OF TROOPER WOODSIDE

A. Blazer's submission to the requested chemical analysis of his breath satisfied his obligation under SDCL § 32-12A-46 to submit to a chemical analysis

SDCL § 32-12A-46 provides:

Any person who holds or is required to hold a commercial learner's permit or commercial driver license and operates any commercial or noncommercial motor vehicle in this state is considered to have given consent to the withdrawal of blood or other bodily substance to determine the amount of alcohol in that person's blood, or to determine the presence of any controlled drug or substance. The chemical analysis shall be administered at the direction of a law enforcement officer who, after stopping or detaining any person who holds or is required to hold a commercial learner's permit or commercial driver license, has probable cause to believe that the person was driving or in actual physical control of a commercial or noncommercial motor vehicle while having any alcohol or drugs in that person's system. Any person requested by a law enforcement officer under this section to submit to a chemical analysis shall be advised by the officer that:

- (1) If the person refuses to submit to the chemical analysis, none may be given, unless a warrant for the chemical analysis is issued; and
- (2) If the person refuses to submit to the chemical analysis requested, the person shall be:
 - (a) Immediately placed out of service for a period of twenty-four hours, if operating a commercial motor vehicle at the time of the refusal; and
 - (b) Disqualified from operating a commercial motor vehicle for a period of not less than one year; or
- (3) If the person submits to a chemical analysis which discloses that the person was operating the commercial motor

vehicle while there was 0.04 percent or more by weight of alcohol in that person's blood the person shall be disqualified from operating a commercial motor vehicle for not less than one year.

Id. (Emphasis Added).

The undisputed testimony in the record from Trooper Woodside is that a preliminary breath test using his department issued Intoximeter, is a chemical analysis of breath that tests for blood alcohol content. Specifically, Trooper Woodside's testimony provided:

Question: Now Trooper, what sort of breathalyzer do you use at scenes of things like this DUI investigation?

Trooper: Just an intoximeter, the PBT that was issued to me by the South Dakota Highway Patrol.

Question: Okay. Are you familiar with how it works?

Trooper: Yes, I am.

Question: Then you would agree that the breathalyzer measures blood alcohol content, correct?

Trooper: Yes.

Question: And the way the breathalyzer measures blood alcohol content is due to a chemical reaction when the breath goes into the machine, correct?

Trooper: Yes.

Question: And then if somebody's been drinking alcohol, that chemical reaction will lead to an electrical current that will give you a readout of a value, correct?

Trooper: Yes.

Question: And in this case you asked Mr. Blazer to give you – submit to a PBT at the scene, and he did that, correct?

Trooper: Yes, he did.

(TT pg. 16, lines 5-25)

Based on the Trooper's testimony, it is unchallenged on the record below that a preliminary breath test, using the Trooper's department issued Intoximeter, is a chemical analysis of breath that measures blood alcohol content. It also clear from the record below that the Trooper requested Blazer submit to a chemical analysis of his breath and that Blazer did indeed submit to that chemical analysis of his breath when requested. *Id.* The chemical analysis of Blazer's breath provided Trooper Woodside with a BAC reading of .102%. (SR-38). After submission to the chemical analysis of his breath, Blazer contends the State's legitimate interest in preserving the safety of public highways was effectuated as the Trooper had a BAC reading to determine if Blazer was above the legal limit. *See Mackey v. Montrym*, 443 U.S. 1,17 (1979)(the States and the Federal Government have a "paramount interest . . . in preserving the safety of . . . public highways.") Blazer contends that he did submit to a chemical analysis of his blood "or other bodily substance" to determine the level of alcohol in his body as required by SDCL § 32-12A-46.

After submission to the chemical analysis of his breath, the Trooper arrested Blazer for DUI and requested Blazer submit to a warrantless blood draw pursuant to the implied consent statute. At this point, Blazer is being held in the back of the Trooper's squad car, in handcuffs and under arrest for DUI. Blazer did not consent to a warrantless blood draw until he was presented with a valid search warrant at which time he also complied with the blood draw. (TT pg 17, lines9-11). The

Department, as well as the ALJ, disregarded the fact that Blazer submitted to a chemical analysis of his breath at the scene when requested by the Trooper. Instead, the Department and the ALJ only focused on the Trooper's request for a second chemical analysis: a warrantless blood draw. Blazer contends the implied consent statute does not mandate that a commercial driver's license holder submit to multiple chemical analyses of their bodily substances to be in compliance. In *Stensland v. Smith*, 79 S.D. 651, 116 N.W.2d 653 (S.D. 1962), Stensland was arrested for driving under the influence and his license was suspended for refusing to take a chemical test to determine his blood alcohol content pursuant to the implied consent law. On appeal, Stensland argued an arrested motorist has the right to choose the type of chemical test to be administered under South Dakota's implied consent law. *Id.* The *Stensland* Court reviewed the implied consent statute and determined that a motorist does not have the right to choose which chemical test they will take. *Id.* at 654-55. The Court also determined that motorists in this state impliedly consent to only one of the tests mentioned in our law:

Under our law a driver is likewise deemed to have given his consent 'to a chemical analysis of his blood, urine, breath, or other bodily substance'. Our statute speaks in the singular with reference to 'a chemical analysis', 'such test', and 'such chemical analysis'. In this respect the language of our statute differs from the text of the Uniform Chemical Test For Intoxication Act wherein a driver is deemed to have given consent 'to a chemical test, or tests, of his blood, breath, saliva, or urine'. 1957 Handbook of the National Conference of Commissioners on Uniform State Laws, p. 220. The North Dakota statute follows the language of the Uniform Act which was interpreted by the North Dakota court in the case of *Timm v. State*, N.D., 110 N.W.2d 359, to mean that a motorist in that state consents to all four of the tests mentioned in their statute.

Our statute is obviously more restrictive. It does not contain the alternative plural words 'or tests'. Accordingly, it seems clearly evident that a motorist in this state impliedly consents to only one of the tests mentioned in our law.

Id. at 654. The *Stensland* Court determined that motorists in South Dakota impliedly consent to only one of the tests: chemical test of breath, chemical test of blood, chemical test of urine, or chemical test of other bodily substance. The *Stensland* Court also determined that the motorist does not get to choose which of the chemical tests they will take. *Id.* at 655; *See also Smith v. Cozens*, 25 Cal.App.3d, 300, 302 (1972) (“(c)learly implied in the statute is the requirement that one of its described tests be submitted to and completed expeditiously; otherwise the purpose of the law would be frustrated.”) Here, the Trooper requested Blazer submit to the chemical analysis of his breath. It was not Blazer attempting to choose which test he wanted to take.

In *State v. Walz*, 88 S.D. 262 (S.D. 1974), 218 N.W.2d 480, a highway patrolman executed a traffic stop for erratic driving. After smelling alcohol on Walz, the Trooper advised Walz of the implied consent law and requested Walz submit to the chemical analysis of his breath via breathalyzer. *Walz*, 218 N.W.2d at 481. Walz complied with the chemical analysis of his breath but the Trooper wasn’t satisfied because he felt Walz didn’t blow deep enough breaths. *Id.* The trooper then asked Walz to submit to a second test, this time a blood test. *Id.* However, the Trooper informed Walz he was under no obligation to take a second test; that he could refuse; and that his refusal would not affect his driver’s license. *Id.* Walz voluntarily

consented to the second test. On appeal Walz relied on *Strensland, supra*, and argued the second test should be suppressed because he can only be compelled to submit to one chemical test under the implied consent law. The *Walz* Court found *Strensland* inapplicable to the second test because Walz gave actual consent so the Court didn't reach Walz' claim that the Trooper's request for a second chemical test is not allowed under the implied consent law.

Here, the first chemical analysis requested by Trooper Woodside was the chemical analysis of Blazer's breath and it is unquestionable that Blazer immediately complied with the Trooper's request. Given that, Blazer contends that he did not refuse to submit to a chemical analysis under SDCL § 32-12A-46 as he submitted to the requested chemical analysis of his breath and therefore he did not violate SDCL § 32-12A-36(5), which provides in pertinent part:

Any person is disqualified from driving a commercial motor vehicle for a period of not less than one year:

(5) For refusing to submit to *a chemical analysis* for purposes of determining the amount of alcohol or drugs in that person's blood or other bodily substance while driving a commercial or noncommercial motor vehicle in violation of § 32-12A-43 or 32-12A-46.

Id. (Emphasis Added)

The above statute uses the singular word "a" making it a violation if a CDL holder refuses to submit to "a" chemical analysis. Blazer submitted to the first chemical analysis requested by the Trooper: the chemical analysis of his breath. Blazer contends the ALJ erred in concluding that Blazer refused to submit to a chemical analysis under SDCL § 32-12A-46 and that the ALJ erred in using that

alleged failure to submit to a chemical analysis as a basis to disqualify Blazer's CDL pursuant to SDCL § 32-12A-36(5). Blazer respectfully requests the circuit court's decision reversing the ALJ's decision be affirmed.

B. TROOPER WOODSIDE'S DEPARTMENT ISSUED INTOXIMETER ACCOMPLISHES A CHEMICAL ANALYSIS OF BREATH TO DETERMINE BLOOD ALCOHOL CONTENT

The implied consent laws in South Dakota discuss the various methods of testing that a motorist or CDL holder has "impliedly consented" to in exchange for the privilege of driving, including the chemical analysis of breath. *See* SDCL § 32-12A-36(2)(. . . of alcohol in that person's blood as shown by chemical analysis of that person's breath, blood, or other bodily substance); SDCL § 32-12A-36(4)(...for refusing to submit to chemical analysis for purposes of determining the amount of alcohol or drugs in that person's blood or other bodily substance); SDCL § 32-12A-46(...given consent to withdrawal of blood or other bodily substance to determine the amount of alcohol).

Our DUI statutes also reference chemical analysis of breath. SDCL § 32-23-1(1)(no person may drive or be in actual physical control of any vehicle while there is 0.08 percent or more by weight of alcohol in that person's blood as shown by chemical analysis of that person's breath, blood, or other bodily substance); SDCL § 32-23-7(1)(in any criminal prosecution. . . the amount of alcohol in the defendant's blood. . . as shown by chemical analysis of the defendant's blood, breath, or other bodily substance. . .); SDCL § 32-23-10(. . consent to the withdrawal of blood or other bodily substance and chemical analysis of the person's blood, breath, or other

bodily substance. . .); SDCL § 32-23-10.1(. . . refuse to submit to chemical analysis of the person's blood, urine, breath or other bodily substance, or allow the withdrawal of blood or other bodily substance for chemical analysis. . .); SDCL § 32-23-14(. . . this limitation does not apply to the taking of breath or other bodily substance specimen); SDCL § 32-23-17(. . . costs occurred for the withdrawal and chemical analysis of blood or other bodily substance); SDCL § 32-23-21(any person under the age of twenty-one. . . of 0.02 percent or more by weight of alcohol in the person's blood as shown by a chemical analysis of the person's breath, blood, or other bodily substance).

Numerous cases in South Dakota demonstrate that chemical analysis of breath has been commonly sought by law enforcement pursuant to the implied consent statutes. See *State v Walz*, 218 N.W.2d at 481(trooper requested submission to chemical analysis of breath under implied consent law); *Peterson v. State*, 261 N.W.2d 405, 407 (S.D. 1977)(arresting officer asked him to submit to chemical analysis of his breath under implied consent law); *Rouse v. Dep't of Public Safety*, 261 N.W.2d 418 (S.D. 1978)(Rouse was read her rights under implied consent law and requested to take a breath test); *Dep't of Public Safety v. Storjohann*, 262 N.W.2d 64 (S.D. 1978)(Officer read him the implied consent warning and requested defendant submit to a chemical test of his breath); *State v Anderson*, 359 N.W.2d 887, 890 (S.D. 1984)(Officer requested defendant submit to preliminary breath test using PBT); *State v Richards*, 378 N.W.2d 259 (S.D. 1985)(Defendant submitted to chemical analysis of breath); *State v. Zoss*, 360 N.W.2d 523, 524 (S.D. 1984)(Officer advised Defendant of implied consent law

and was asked to take a chemical breath test); *State v McCarty*, 434 N.W.2d 67, 68 (S.D. 1988)(Defendant consented to the chemical analysis of her breath). Blazer contends that even though law enforcement's ability to accomplish chemical analysis of breath has increased, given the ease of portability, since South Dakota's first implied consent law was enacted in 1959, subsequent caselaw has confirmed that testing an individual's breath for blood alcohol content can accomplish a chemical analysis.

C. BEARE V. SMITH AND DEP'T OF PUBLIC SAFETY V. GATES ARE DISTINGUISHABLE AND WERE DECIDED PRIOR TO STATE V. RICHARDS

Blazer contends the facts in *Beare v. Smith*, 82 S.D 20, 140 N.W.2d 603 (S.D. 1966), are distinguishable from the facts in this case. In *Beare*, the Trooper requested Beare submit to a chemical analysis of his blood. *Id.* at 605. Beare initially agreed to submit to the blood test but then refused and said he wanted his own doctor to do the test. *Id.* The issue in *Beare* was whether Beare refused the blood test by insisting his own doctor do the test rather than submitting to the blood test and having his own doctor perform an additional blood test as outlined in the statute. *Id.* The *Beare* Court held that constituted a refusal by Beare to submit to a chemical analysis. *Id.* at 607. Here, Blazer had already submitted to the chemical analysis of his breath and was placed under arrest when the Trooper asked him to submit to a second chemical analysis: a warrantless blood draw pursuant to the implied consent statute.

In *Dep't of Public Safety v. Gates*, 350 N.W.2d 59 (S.D. 1984), Gates was stopped by a highway patrolman for traffic violations. *Id.* at 60. The Trooper smelled alcohol

on Gates' breath and had him perform field sobriety tests. *Id.* The Trooper then requested Gates take a preliminary breath test. *Id.* Of note, the Trooper informed Gates of the following: He was informed of the purposes of the PBT, that he did not have to take the test, that the test results would be used as evidence in court, and the Trooper further explained that the test did not replace any other tests that may be requested. *Id.* Gates initially refused the PBT, then took and failed the PBT. The Trooper arrested Gates and requested he submit to a warrantless blood draw pursuant to the implied consent law. *Id.* Gates argued that the PBT was a chemical analysis of breath and therefore satisfied SDCL § 32-23-10. Gates relied on *Stensland v. Smith, supra*, for the proposition that a "motorist in this state impliedly consents to only one of the tests mentioned in our law." *Id.* The *Gates* Court pointed out that *Stensland* was decided prior to enactment of SDCL § 32-23-1.2 which provides:

Every person operating a vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a law enforcement officer, submit to a breath test to be administered by such officer. If such test indicates that such operator has consumed alcohol, the law enforcement officer may require such operator to submit to a chemical test in the manner set forth in this chapter.

The *Gates* Court rejected Gates' argument and stated the PBT may be required in addition to a chemical test pursuant to SDCL § 32-23-10. *Id.* at 61. However, the *Gates* Court did not hold that a PBT can never accomplish a chemical analysis. Here, unlike in *Gates*, Blazer was never informed of the purpose of the PBT, that he did not have to consent to the PBT, or that the PBT did not replace any other tests that may be requested. Blazer contends that even if SDCL § 32-23-1.2 authorizes law

enforcement to request a breath test, the record below establishes the testing of Blazer's breath, using the Trooper's department issued Intoximeter, was a chemical analysis of breath, blood, urine or other bodily substance as required by the implied consent statute. Blazer contends he satisfied the requirement that he submit to a chemical analysis based on the record below and subsequent caselaw.

Approximately eighteen months after the *Gates* decision, *State v. Richards*, 378 N.W.2d 259 (S.D. 1985), was decided. In *Richards*, the Defendant submitted to the chemical analysis of his breath via PBT and Intoxilyzer. *Id.* at 260. Richards argued admitting the results of the PBT at trial was prejudicial error. *Id.* The Court quickly resolved that issue reaffirming its holding in *State v. Anderson*, 359 N.W.2d 887, 892 (S.D. 1984), that PBT results are not admissible as evidence against a defendant at trial unless a defendant challenges probable cause for the arrest. Richards' next issue on appeal was a claim that the intoxilyzer does not determine the amount of alcohol in the blood by "chemical analysis" as required under SDCL § 32-23-7 because the Intoxilyzer uses infrared light rather than a chemical to absorb alcohol in the sample. *Id.* at 261. In rejecting Richards' argument that the Intoxilyzer does not determine alcohol in blood by chemical analysis, the *Richards* Court stated:

We disagree. The phrase "chemical analysis" commonly includes "tests for identifying chemical compounds by their physical properties, as the Intoxilyzer does." *City of Dayton v. Schenck*, 63 Ohio Misc. 14, 16, 409 N.E.2d 284, 286 (1980). In *Gandara v. State*, 661 S.W.2d 749, 751 (Tex.App. 8th Dist.1983), the court said:

Appellant argues that the phrase "chemical analysis of ... breath" in Article 6701/-5 means a test of one's breath by chemicals as opposed to a test of the chemicals in the breath.

We find the distinction insignificant. The purpose of the test is to ascertain the chemical content of the breath and scientifically correlate the results to an anticipated chemical content of the blood. The intoxilyzer procedure achieves that purpose despite its use of infrared light in lieu of reactive chemicals.

Accordingly, we hold that because the intoxilyzer determines blood alcohol content by measuring the alcohol content of a person's breath, it accomplishes a chemical analysis pursuant to SDCL 32-23-7.

Id. at 262.

Here, Trooper Woodside's Intoximeter accomplished a chemical analysis of Blazer's breath, just as the Intoxilyzer did in *Richards*, because it "determines blood alcohol content by measuring the alcohol content of a person's breath." *Id.* At the administrative hearing below, the Department called Trooper Woodside to the stand. Trooper Woodside's testimony on cross examination confirmed that the Trooper's department issued Intoximeter is a chemical analysis that measures blood alcohol content of breath. Trooper Woodside testified:

Question: Now Trooper, what sort of breathalyzer do you use at scenes of things like this DUI investigation?

Trooper: Just an intoximeter, the PBT that was issued to me by the South Dakota Highway Patrol.

Question: Okay. Are you familiar with how it works?

Trooper: Yes, I am.

Question: Then you would agree that the breathalyzer measures blood alcohol content, correct?

Trooper: Yes.

Question: And the way the breathalyzer measures blood alcohol content is due to a chemical reaction when the breath goes into the machine, correct?

Trooper: Yes.

Question: And then if somebody's been drinking alcohol, that chemical reaction will lead to an electrical current that will give you a readout of a value, correct?

Trooper: Yes.

Question: And in this case you asked Mr. Blazer to give you – submit to a PBT at the scene, and he did that, correct?

Trooper: Yes, he did.

(TT pg. 16, lines 5-25)

Blazer contends the use of the term PBT should not discount what the device actually accomplishes. Even in the 1980's when *Gates*, *Anderson*, and *Richards* were decided, the PBT was found to be as accurate as the Intoxilyzer. In *Anderson*, 359 N.W.2d at 890, the Court discussed the State Chemist and Director of the South Dakota State Chemical Laboratory's deposition testimony regarding the accuracy of the PBT and Intoxilyzer:

Dr. Joel Padmore is the State Chemist and Director of the South Dakota State Chemical Laboratory. His agency has provided blood alcohol analyses for law enforcement agencies since 1951 and has provided technical support and training for breath testing devices since the late 1960's and early 1970's. In 1979, the State Chemistry Lab assumed responsibility for supervision and maintenance of all evidentiary breath testing devices and received legislative approval for that function as of July 1, 1980. Under its statutory responsibilities, the State Chemistry Lab evaluated portable breath testing devices for the South Dakota Department of Public Safety in the spring of 1981. In a

deposition taken for this case by Anderson's attorney, Dr. Padmore explained the PBT.

Preliminary breath testing is accomplished through the use of portable devices that, according to Dr. Padmore, are as accurate statistically as intoxilyzers, the results of which are currently used in this state as evidence to show blood alcohol levels in excess of .10 and violations of SDCL 32-23-1. Both machines measure breath alcohol content in grams per hundred cubic centimeters on an equivalent blood alcohol analysis, commonly called weight percent. The intoxilyzers and the PBTs used in South Dakota are both accurate to within two to three percent, which means that the variance when measuring a test standard of .10 is between .098 and .12. Dr. Padmore tested the PBTs under simulated field conditions and found them no more susceptible to error than intoxilyzers operated in fixed positions, given equally competent test administration. Both devices, if operated improperly, can indicate a lower breath alcohol content than is actually present, but neither can indicate a level greater than is actually present.

Blazer contends that a PBT can be an effective tool for law enforcement to police our highways for drunk drivers. At the same time, the PBT in this case, the Intoximeter, can accomplish a chemical analysis of an individual's breath to measure blood alcohol content.

The record before the Administrative Law Judge was that the Trooper's department issued Intoximeter is a chemical analysis of breath that measures blood alcohol content and that Blazer immediately submitted to the chemical analysis of his breath when requested by Trooper Woodside. Mr. Blazer contends that the record below and the holding in *Richards*, that an intoxilyzer is a chemical analysis pursuant to SDCL 32-23-7 because it determines blood alcohol content by measuring the

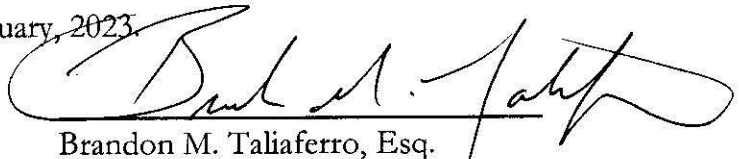
alcohol content of a person's breath, demonstrate the ALJ's ruling that Blazer failed to submit to a chemical analysis was clearly erroneous.

CONCLUSION

State v. Richards, supra, established that "because the Intoxilyzer determines blood alcohol content by measuring the alcohol content of a person's breath, it accomplishes a chemical analysis." The record below establishes that a breath test on the Trooper's department issued Intoximeter is a chemical analysis of breath that tests for blood alcohol content and that Blazer did submit to the chemical analysis of his breath when requested by the Trooper. This satisfied the requirements of SDCL § 32-12A-46 that a CDL holder consent to "a chemical analysis." The ALJ erred, based on the record below, by finding Blazer refused to submit to a chemical analysis. The ALJ also erred by using Blazer's alleged failure to submit to a chemical analysis as a violation of SDCL § 32-12A-36(5) subjecting Blazer to a lifetime ban of his CDL privileges.

Blazer respectfully requests this Court affirm the circuit court's reversal of the ALJ's decision because Blazer did submit to a chemical analysis of his breath to determine the amount of alcohol in his blood.

Dated this 16th day of January, 2023.



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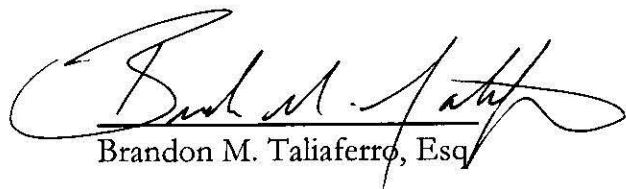
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of this brief and all appendices was submitted via mail to the Supreme Court Clerk's Office and a copy of the foregoing brief and all appendices were served via Odyssey File and Serve upon:

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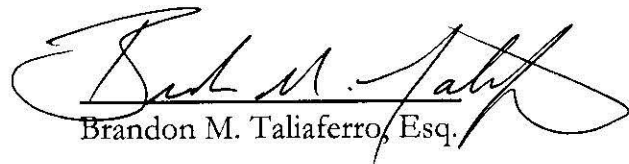
on this 16th day of January, 2023.



Brandon M. Taliaferro, Esq.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 5350 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.



Brandon M. Taliaferro, Esq.

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**STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS**

DONALD WILLIAM BLAZER

**PROPOSED DECISION
DPS-DI 23-011**

V.

**SD DEPARTMENT OF
PUBLIC SAFETY**

An administrative hearing was held in this matter on March 10, 2023. Petitioner/licensee, Donald William Blazer (Blazer), appeared and testified at the hearing. Blazer was represented by attorney, Brandon Taliaferro. The Department of Public Safety (Department) was represented by Jenna Severyn. The Department had witnesses, Rhyenn Absher and Tyler Woodside. Based on the evidence, the arguments of the parties, and the law, the Hearing Examiner enters the following Findings of Fact, Reasoning, Conclusions of Law, and Proposed Order.

ISSUES

Whether the Department of Public Safety has the authority to disqualify Blazer's commercial driving privileges for life because he refused to submit to a chemical test?

FINDINGS OF FACT

1. Blazer currently lives at 13221 371st Avenue in Mina South Dakota.
2. Blazer has a commercial drivers license (CDL). The number is 00196847.
3. On or about January 10, 2014, Blazer received a citation for driving under the influence.
4. Blazer was convicted of driving under the influence on March 27, 2014.
5. This was his first offense. Blazer's CDL was disqualified for one year, effective March 27, 2014.
6. On or about December 29, 2022, Blazer was involved in two vehicle crash. The State Trooper smelled the odor of alcohol on Blazer. He admitted to drinking four beers. The State Trooper initiated a PBT test, and the result was .102%.
7. The officer read the implied consent instructions and asked Blazer to do a withdrawal and chemical analysis of his blood. Blazer replied, "I do not want anything drawn from me".
8. Blazer refused to submit to a chemical analysis. Blazer was given the Miranda Warning and refused to speak. Later a warrant was obtained, and a blood test was taken.
9. The Department sent a "Notification of Withdrawal of Driving Privileges" letter to Blazer on January 5, 2023. The letter stated that Blazer's commercial driver license and privilege were to be disqualified for life. The effective date of the

disqualification was to be January 20, 2023.

10. Blazer filed a timely appeal of the determination.
11. Any additional findings included in the Reasoning section of this decision are incorporated herein by this reference. To the extent any of the foregoing are improperly designated and are instead conclusions of law, they are hereby redesignated and incorporated herein as conclusions of law.

REASONING

Blazer was convicted of driving while intoxicated on March 27, 2014. This was his first offense and his CDL was disqualified for a year. SDCL 32-12A-36(1) provides that any person is disqualified from driving a commercial motor vehicle for a period of not less than one year if they are convicted of a first violation of driving or being in actual physical control of a commercial or noncommercial motor vehicle while under the influence of alcohol, or any controlled drug or substance, in violation of § 32-23-1.

Then on December 29, 2022, Blazer refused to submit to a chemical test. SDCL 32-12A-36(5) provides that any person is disqualified from driving a commercial motor vehicle for a period of not less than one year for refusing to submit to a chemical analysis for purposes of determining the amount of alcohol or drugs in that person's blood or other bodily substance while driving a commercial or noncommercial motor vehicle in violation of § 32-12A-43 or 32-12A-46. This was Blazer's second major offense.

SDCL 32-12A-37 states that any person is disqualified for life for the commission of two or more violations of any of the subdivisions specified in § 32-12A-36, or any combination of those subdivisions, arising from two or more separate incidents. The department may adopt rules, pursuant to chapter 1-26, under which a disqualification for life under this section may be reduced to a period of not less than ten years.

In this case, Blazer committed two violations of SDCL 32-12A-36¹, driving under the influence and refusing a chemical test. The evidence did show that Blazer was read the implied consent instructions and then refused to take a chemical test. The law specifically states that a person is disqualified for life for two or more violations. The South Dakota Legislature took a step to ensure that commercial drivers could not escape the consequences of a serious traffic violation and still hold a CDL. Therefore, Blazer's commercial drivers license must be disqualified for life.

CONCLUSIONS OF LAW

1. The Department of Public Safety has jurisdiction over the parties and subject matter of this appeal. The Office of Hearing Examiners has authority to conduct the appeal pursuant to the provisions of SDCL 1-26D.
2. Any Conclusions of Law in the reasoning section of this decision are incorporated herein by reference. To the extent any of the foregoing are improperly designated and are instead findings of fact, they are hereby redesignated and incorporated

¹ The South Dakota laws are very similar to the Federal laws. See 49 CFR 383.51.

herein as findings of fact.

3. Blazer's commercial driving privileges must be disqualified for life. SDCL 32 12A-37.

PROPOSED ORDER

It is the proposed order of the Hearing Examiner that the determination of the Department of Public Safety be affirmed. Donald William Blazer's commercial drivers license must be disqualified for life.


Dated April 13, 2023.



Ryan P. Darling
Office of Hearing Examiners
523 East Capitol Avenue
Pierre, SD 57501

CERTIFICATE OF SERVICE

I certify that on April 13, 2023, at Pierre, South Dakota, a true and correct copy of the proposed Decision in the above-entitled matter was sent via U.S. Mail or Inter-Office Mail to each party listed below.



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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF EDMUNDS

FIFTH JUDICIAL CIRCUIT

DONALD WILLIAM BLAZER,

Plaintiff,

v.

SD DEPARTMENT OF PUBLIC SAFETY,

Defendant.

22CIV23-24

MEMORANDUM DECISION

An administrative hearing was held on March 10, 2023, in the above-entitled matter. Plaintiff appealed the ALJ decision, and the parties agreed to waive oral argument and submit briefs. The final brief was submitted on August 26, 2023.

Preliminarily, the State argues that this court cannot consider State v. Richards, 378 N.W.2d 259 (SD 1985) because that would be supplementing the record in some fashion. This court is unaware of any prohibition against it conducting research into relevant case law that, for whatever reason, was not cited by counsel in briefing. It most certainly is not supplementing the record to review relevant South Dakota case law, or any case law for that matter.

STATEMENT OF FACTS

On or about March 2014, Plaintiff, Donald William Blazer (hereinafter "Blazer"), was convicted of a DUI 1st offense. On or about December 28, 2022, Blazer was involved in an automobile accident which resulted in him receiving a severe concussion. After law enforcement arrived at the scene, they requested that Blazer submit to a preliminary breath test. Blazer immediately complied. After finishing his investigation and arresting Blazer, Trooper Woodside read Blazer the implied consent for CDL holders and requested that Blazer submit to a further warrantless blood draw. Blazer did not comply. Trooper Woodside read Blazer his Miranda rights

and sought a search warrant. After the search warrant was authorized and presented to Blazer, he complied. South Dakota Department of Public Safety contends that Blazer's initial refusal to submit to a chemical analysis of his blood warrants a lifetime disqualification of Blazer's CDL privilege. Blazer argues that he submitted to a chemical analysis when he complied with Trooper Woodside's request to submit to a preliminary breath test.

ISSUE

Whether the ALJ erred in finding Blazer refused to submit to a chemical analysis pursuant to SDCL 32-12A-46 and SDCL 32-21A-36(5).

ANALYSIS AND DECISION

SDCL § 32-12A-46 provides:

Any person who holds or is required to hold a commercial learner's permit or commercial driver license and operates any commercial or noncommercial motor vehicle in this state is considered to have given consent to the withdrawal of blood or other bodily substance to determine the amount of alcohol in that person's blood, or to determine the presence of any controlled drug or substance. The chemical analysis shall be administered at the direction of a law enforcement officer who, after stopping or detaining any person who holds or is required to hold a commercial learner's permit or commercial driver license, has probable cause to believe that the person was driving or in actual physical control of a commercial or noncommercial motor vehicle while having any alcohol or drugs in that person's system. Any person requested by a law enforcement officer under this section to submit to a chemical analysis shall be advised by the officer that:

- (1) If the person refuses to submit to the chemical analysis, none may be given, unless a warrant for the chemical analysis is issued; and
- (2) If the person refuses to submit to the chemical analysis requested, the person shall be:
 - (a) Immediately placed out of service for a period of twenty-four hours, if operating a commercial motor vehicle at the time of the refusal; and
 - (b) Disqualified from operating a commercial motor vehicle for a period of not less than one year; or
- (3) If the person submits to a chemical analysis which discloses that the person was operating the commercial motor vehicle while there was 0.04 percent or more by weight of alcohol in that person's blood the person shall be disqualified from operating a commercial motor vehicle for not less than one year.

Based upon the plain language of SDCL § 32-12A-46, Blazer contends that he submitted to chemical analysis of "other bodily substance." Of significance, this statute does not require an individual to submit to a warrantless test after an arrest is made, but simply after stopping or detaining that individual. That was done in this case. South Dakota Department of Public Safety contends that the statute does not provide Blazer with an either-or choice and that he was required to submit to a blood draw. The question turns on whether an intoximeter or PBT is a chemical analysis. This question was resolved in State v. Richards, 378 N.W.2d 259, 262 (SD 1985). In that case, the court held that because an intoxilyzer (or PBT) determines blood alcohol content by measuring the alcohol content of a person's breath, it accomplishes a chemical analysis. Id. The court in Richards further noted that "[t]he phrase 'chemical analysis' commonly includes 'tests for identifying chemical compounds by their physical properties, as the intoxilyzer does.'" Richards, at 261 (quoting City of Dayton v. Schenck, 63 Ohio Misc. 14, 16, 409 N.E.2d 284, 286 (1980)).

Because Richards establishes that an intoxilyzer is a chemical analysis, brought about by measurement of breath, Blazer did submit to a chemical analysis when he complied with Trooper Woodside's request to submit to a preliminary breath test. As such, Blazer was in compliance with SDCL § 32-12A-46 in that he submitted to a chemical analysis of "other bodily substance," here, his breath. Further, the arresting officer testified that the intoximeter he used measures blood alcohol content.


CONCLUSION

The ALJ's decision is reversed. Pursuant to SDCL § 32-12A-46, Blazer submitted to a chemical analysis of his breath upon request from law enforcement. South Dakota case law

establishes that a breath test is a chemical analysis. As such, Blazer was in compliance with SDCL § 32-12A-46. This court reverses the decision of the ALJ.

DATED this 20th day of Sept., 2023 at Aberdeen, South Dakota.

BY THE COURT:



Richard A. Sommers
Circuit Judge

ATTEST:

Jean Hutson, Edmunds County Clerk of Courts

By: _____, Deputy Clerk

STATE OF SOUTH DAKOTA)
) ss
COUNTY OF EDMUNDS)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

DONALD WILLIAM BLAZER,

22Civ23-24

Plaintiff,

vs.

ORDER REVERSING ALJ DECISION

SD DEPARTMENT OF PUBLIC SAFETY,

Defendant.

An administrative hearing was held on March 10, 2023, in the above-entitled matter. Plaintiff appealed the ALJ decision. In this administrative appeal, Plaintiff was represented by attorney, Brandon M. Taliaferro. Defendant was represented by Asst. Attorney General Jenna Severyn. The parties' briefing concluded on August 26, 2023. Having considered the briefs of the parties and for good cause appearing, it is hereby:

ORDERED, that pursuant to SDCL 32-12A-46, Blazer submitted to a chemical analysis of his breath upon request from law enforcement; and it is further

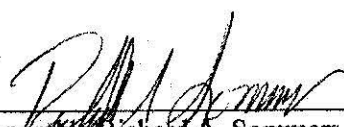
ORDERED, that South Dakota caselaw establishes that a breath test is a chemical analysis and Blazer was in compliance with SDCL 32-12A-46; and it is further

ORDERED, that this Court's *Memorandum Decision* dated September 20, 2023, is incorporated by reference herein; and it is further

ORDERED, that the decision of the ALJ is hereby reversed.

BY THE COURT:

10/16/2023 10:38:51 AM


Honorable Richard A. Sommers
Circuit Court Judge

ATTEST:

Jean Hutson, Clerk of Courts

Attest.

Hutson, Jean

By: _____, Deputy

Clerk/Deputy



**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

THE STATE OF SOUTH DAKOTA,)	
THE DEPARTMENT OF PUBLIC SAFETY,)	Appeal No. 30499
)	
Appellant,)	
)	
vs.)	
)	
DONALD WILLIAM BLAZER,)	
)	
Appellee.)	
)	

Appeal from the Circuit Court, Fifth Judicial Circuit
Edmunds County, South Dakota
The Honorable Richard Sommers
Circuit Court Judge

APPELLANT’S REPLY BRIEF

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PRELIMINARY STATEMENT

For convenience and clarity, the Appellant/State of South Dakota, the Department of Public Safety, will be referred to as the “Department.” The Appellee/Donald W. Blazer will be referred to as “Blazer.” References to Blazer’s Brief will be referred to as “BB” and the appropriate page number. References to the Settled Record will be “SR” and the appropriate page number. References to the March 10, 2023, hearing transcript will be designated “T” and the page/line number. References to the Commercial Driver’s License will be “CDL.”

ARGUMENT

A. THE CIRCUIT COURT ERRED BY DECLARING THAT A BREATHALYZER TEST SATISFIES THE REQUIREMENTS OF SDCL 32-12A-46.

1. BLAZER’S CLAIM THAT HE SATISFIED THE REQUIREMENTS OF SDCL 32-12A-46 WHEN HE SUBMITTED TO A CHEMICAL ANALYSIS OF HIS BREATH IS IN ERROR.

Both the circuit court and Blazer are incorrect in their interpretation of SDCL 32-12A-46. This error is afforded no deference and reviewed *de novo*. *See generally, Jans v. Dep’t of Public Safety*, 2021 S.D. 51, ¶ 10, 964 N.W.2d 749, 753; *Ibrahim v. Dep’t of Public Safety*, 2021 S.D. 17, ¶ 25, 956 N.W.2d 799, 805; *Thom v. Barnett*, 2021 S.D. 65, ¶ 13, 967 N.W.2d 261, 267. Blazer argues that because he submitted to the Preliminary Breathalyzer Test (“PBT”) administered by Trooper Woodside, he submitted to a chemical analysis of his blood “or other bodily substance” to determine the level of alcohol in his blood as required by SDCL 32-12A-46. BB 6-7. With that, Blazer argues that this Court should look past his refusal to submit to the blood draw as requested during the stop in question.

As authority, Blazer relies upon the *Stensland* case, wherein this Court held, “it seems clearly evident that a motorist in this state impliedly consents to only one of the tests mentioned in our law.” *Stensland v. Smith*, 116 N.W.2d 653, 654 (S.D. 1962). In *Stensland*, the Court reviewed South Dakota’s implied consent statute, which at that time was SDC 1960 Supp. 44.0302-1, and determined that a motorist did not have the right to choose which chemical test they will take. *Id.*, 116 N.W.2d at 654-655. In support of the *Stensland* opinion, Blazer also cites a portion of an opinion from a California case, wherein a California appellate court essentially held that requiring an individual to submit to more than one test described in their States’s implied consent laws would frustrate the intent and purpose of the law altogether. *See Smith v. Cozens*, 25 Cal.App.3d, 300, 302 (1972). That said, focusing solely on *Stensland* with a disregard to all other *stare decisis* is inaccurate, and cases out of California are just that: non-binding authority.

The superseding opinion and a direct overlay is found in *Dep’t of Pub. Safety v. Gates*, 350 N.W.2d 59 (S.D. 1984). In that case, Gates was administered a PBT after he was stopped by an officer for drifting back and forth over the center line. *Gates*, 350 N.W.2d at 60. Gates was informed by the officer that he may be requested to take additional tests, and – after Miranda warnings and the implied consent laws were read – the officer requested that Gates submit to a blood test, to which Gates refused. *Id.*

Like Blazer, Gates based his refusal of the blood test on the fact that he had already submitted to the PBT, even though the officer explained to Gates that the PBT was part of the field sobriety tests and was neither intended to nor replaces the blood draw. *Gates*, 350 N.W.2d. at 60. Like Blazer, Gates also argued that a breath test is a chemical analysis and satisfies the purposes of such, and that the officer had no authority

to request another test after he was administered a PBT. *Id.* at 60. Like Blazer, Gates relied upon the *Stensland* opinion in making that exact same argument. *Id.* at 61.

The key difference between *Stensland, supra.*, and the circumstances in *Gates, supra.*, comes with a modernized statutory enactment. This Court held in *Gates*, which was decided in 1984, that when *Stensland* was decided in 1972, it was prior to the enactment of SDCL 32-23-1.2. *Gates*, 350 N.W.2d. at 61. In *Gates*, the Court further held SDCL 32-23-1.2 clearly states that a PBT is required by law and may be supplemented by a chemical test – such as a blood draw – at the request of law enforcement. *Id.* at 61; *see also* SDCL 32-23-1.2.

Applied here, Blazer was apprehended by law enforcement when he caused a serious accident by crossing over the center line, fled the scene of the accident, and later ran on foot in an attempt to elude law enforcement altogether. SR 38, 64, 76-78; T 8, ln. 17-25; T 9, ln. 16-25. As a result of the accident and his admission to having been drinking that evening, Blazer was administered a PBT which indicated he had a BAC of .102%. SR 38, 64, 78, 194; T 10, ln. 4-9; T 10, ln. 10-13.

In accordance with SDCL 32-12A-46, and the precedent established in *Gates, supra.*, Trooper Woodside requested that Blazer also submit to a chemical analysis of his blood, which Blazer admits that he refused. SR 35-38, 64, 78, 194; T 10, ln. 17-20; BB 7. In his brief, Blazer states that he “did not consent to a warrantless blood draw until he was presented with a valid search warrant,” as if to signify that his compliance with the warrant is enough to satisfy the law. BB 7. However, when a warrant is issued, compliance is no longer optional. And, no matter what way Blazer tries to phrase it, non-compliance with an officer’s request to voluntarily submit to a withdrawal of one’s blood

is grounds for mandatory CDL disqualification. *See generally*, 49 CFR §§ 383.51; 384.215; 384.216; 384.231; SDCL §§ 32-12A-36(5); 32-12A-37; 32-12A-46.

2. BLAZER'S INTERPRETATION AND APPLICATION OF *RICHARDS*, *INFRA*. IS IN ERROR.

Blazer attempts to muddy the waters by circling back to the circuit court's augmentation of the record with *State v. Richards*, 378 N.W. 2d 259 (S.D. 1985). In his brief, Blazer contends that because *Richards* was decided after the *Gates* decision, it somehow overturns the precedent established in *Gates*, even though the two deal with an entirely distinct set of circumstances and the *Gates* opinion was not addressed in *Richards* at all. BB 15.

First, *Richards* addressed a PBT's impact in a criminal proceeding within the parameters of SDCL 32-23-7 and did not address a PBT civilly within the parameters of SDCL 32-12A-46 nor the applicability of SDCL 32-12A-36(5). *Richards, supra*. Specifically, the central holding of *Richards* is narrowly tailored to whether the PBT results were properly admitted as a "chemical analysis" in the criminal proceeding pursuant to SDCL 32-23-7, to which extent the Court held they were. *Richards*, 378 N.W.2d at 261-62. Blazer fails to recognize the narrow scope of the *Richards* holding, and attempts to apply it to the facts and circumstances in his case, notwithstanding the fact that *Richards* only applies to whether a PBT is admissible as a chemical analysis in criminal proceedings pursuant to SDCL 32-23-7.

Second, *Gates* is a civil, administrative licensure case. Although *Gates* dealt with the criminal DUI statutes as well, this case introduced a key formula into the entire equation: SDCL 32-23-1.2. This statute reads:

Every person operating a vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter **shall**, at the request of a law enforcement officer, submit to a breath test to be administered by such officer. If such test indicates that such operator has consumed alcohol, the law enforcement officer may require such operator to submit to a **chemical test** in the manner set forth in this chapter.

SDCL 32-23-1.2 (emphasis added).

Blazer further contends that *Richards* somehow overrules *Gates*, even though there is no explicit mention of that premise. As a general rule, precedent is only overruled through explicit action. *Estes v. Lonbaken*, 2011 S.D. 51, ¶ 12, 803 N.W.2d 609 (J. Konenkamp concurring). The *Richards* case fails in that regard, as there is not even mention of *Gates* within, much less a wholesale overruling of its precedential value. Blazer therefore errs in submitting this argument, and the circuit court erred in agreeing that that the holding in *Richards* should be applied to Blazer's case to show that Blazer complied with the requirements of SDCL 32-12A-46. Put another way, *Gates* remains the direct overlay.

Further, in relying upon *Stensland* and *Richards*, Blazer contends that the *Gates* Court misinterpreted our implied consent laws when it, "did not hold that a PBT can never accomplish a chemical analysis," as if to somehow suggest that submitting to a PBT alone – despite the fact that such a test may be supplemented with another test at the discretion of a law enforcement officer – is enough to satisfy SDCL 32-12A-46. BB 14; *Stensland*; *Richards*, *supra*. Even the *Richards* opinion refutes this, when the Court stated that the purpose of a PBT is "to ascertain the chemical content of the breath and scientifically correlate the results to an anticipated chemical content of the blood." *Richards*, 378 N.W.2d at 262.

Blazer further argues that the facts and circumstances in *Gates* are distinguishable from the facts and circumstances in his own case because, “Blazer was never informed of the purpose of the PBT, that he did not have to consent to the PBT, or that the PBT did not replace any other tests that may be requested.” BB 14. These arguments are factually inaccurate based upon the record before this Court and only serve to distract this Court from the actual underlying issues before it. *See generally*, SR 35-39, 64, 78, 194 (Ex. 1); FF 7-8; T 10, ln. 17-20.

Blazer could have also refused consenting to the PBT and chose otherwise. *See generally*, SR 38, 64, 78, 194 (Ex. 1); FF 6; T 10, ln. 10-13. Further, to make the argument that Blazer was never informed of the PBT, or that the PBT somehow replaces all other tests requested, is neither set forth in statute nor a requirement of law enforcement. The Court in *Gates* made it clear that because a PBT is mandatory, an officer may supplement such an analysis with a separate chemical test in the manner set forth by law which is aligned with the spirit, interpretation, and intent of SDCL 32-12A-46. *Gates, supra.* at 61.

Last, Blazer’s argument would fundamentally cherry-pick which statutes to read and when. In reality, statutes are read *sui generis*. Here, reading the statutory framework *sui generis*, it outlines that when law enforcement has come across a vehicular accident or violation of the rules of the road, they may administer a breath test; in the event of detection of alcohol, the officer may request additional blood testing; that CDL holders are required to submit to testing; should the CDL holder refuse, it is a disqualifying offense; and two violations warrant a lifetime disqualification. SDCL §§ 32-23-1.2; 32-

12A-46; 32-12A-36(5); 32-12A-37; *Gates, supra.*; see generally, SR 41, 46, 49-51, 53-54, 64-65.

Accordingly, based on the foregoing facts and legal argument, this Court should reverse the circuit court, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Blazer's commercial driving privileges for life.

B. THE CIRCUIT COURT ERRED WHEN IT FAILED TO INTERPRET THE LAWS FOR CDL HOLDERS IN FAVOR OF THE PUBLIC'S INTEREST AND AGAINST THE DRIVER INVOLVED.

1. BLAZER'S CLAIM THAT THE STATE'S LEGITIMATE INTEREST IN PRESERVING PUBLIC SAFETY WAS SATISFIED WHEN HE WAS ADMINISTERED A PBT IS IN ERROR.

In his Brief, Blazer mentions the State's legitimate interest in preserving the public's safety only once, and then appears to avoid addressing it further. BB 7. In particular, he states, "[a]fter submission to the chemical analysis of his breath, Blazer contends the States's legitimate interest in preserving the safety of public highways was effectuated as the Trooper had a BAC reading to determine if Blazer was above the legal limit." BB 7. In support of this statement, Blazer cites the case of *Mackey v. Montrym*, 443 U.S. 1 (1979). In *Montrym*, The U.S. Supreme Court ultimately held:

The Commonwealth's interest in public safety is substantially served by the summary suspension of those who refuse in several ways to take a breath-analysis test upon arrest. First, the very existence of the summary sanction of the statute serves as a deterrent to drunken driving. Second, it provides strong inducement to take the breath-analysis test and thus effectuates the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings. Third, in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of public highways.

Montrym, 443 U.S. at 18.

Although the *Montrym* case primarily deals with a constitutional question surrounding the mandatory suspension of a driver's license upon a finding of guilt for refusing to take a PBT in accordance with a particular Massachusetts statute, the same principals can largely be applied to the case before this Court now.

This type of an administratively coercive statute of general applicability was held constitutional in the seminal case of *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 (2013). There, the U.S. Supreme Court directly acknowledged – but specifically did not challenge – the viability of administrative statutes which are tailored to coerce drivers into compliance with the law. *McNeely, supra.*, 569 U.S. at 160-161, 133 S. Ct. at 1566; *see also, City of Wichita v. Jones*, 353 P.3d 472 (Kan. App. 2015). In *Birchfield*, the Court echoed this, wherein it reinforced the applicability of civil penalties and evidentiary consequences on motorists who refuse to comply. *Birchfield v. N.D.*, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). Likewise, in *Stuart*, the Court provides persuasive authority and confirmed that when an officer reads an administratively coercive statute aloud, thereby informing an individual of their choices and the possible consequences of those choices, the individual is bound by the choice they make and cannot later argue that they were not made aware of the penalties that exist as a result. *Stuart v. Ark. Dep't of Fin. & Admin.*, 2017 Ark. App. 139, 515 S.W.2d 656, 661.

South Dakota case law holds that a CDL is not a right, it is a privilege – and that privilege is conditioned and subject to regulation under the State's police power. *See Peterson v. State*, 261 N.W.2d 405 (S.D. 1977). Further, "[t]he statutory framework established by the Legislature in chapter 32-12A is comprehensive and provides the Department with exclusive authority to regulate CDLs in South Dakota." *Jans, supra.*, ¶

19, 964 N.W.2d at 755; *see also*, *State v. Arnold*, 379 N.W.2d 322, 323 (S.D. 1986) (outlining the State's 1) highly legitimate governmental interest in maintaining, protecting, and regulating the public safety through driving licensure provisions; 2) driving licensure requirements achieve compelling state interests of maintaining, protecting, and regulating the public safety, the use of its public thoroughfares, and those who drive thereon; and 3) they are the least restrictive means for so doing); *Revocation of Fischer*, 395 N.W.2d 598 (S.D. 1986) (where judicial leniency occurs, the Department is authorized to commence a separate and distinct civil proceeding to administratively disqualify a license holder); *Maas v. Dept. of Commerce and Regulation*, 2003 S.D. 48, 661 N.W.2d 726 (holding that the Department has independent authority to disqualify driving privileges, and that where judicial leniency occurs, the Department has administrative authority to act).

The State's compelling interest of maintaining, protecting, and regulating the public's safety is so much more than simply having a law enforcement officer administer a PBT. Administratively coercive statutes provide that those who choose to drive drunk – and at the same time end-run the testing requirements – are administratively removed from the road. *See generally*, *Young v. Commissioner of Pub. Safety*, 420 N.W.2d 585, 586 (Minn. 1988) (holding, “Laws prohibiting DWI are remedial statutes. Consequently, such laws are liberally interpreted in favor of the public interest and against the private interests of the drivers involved. . . .”); *Zimmerman v. Comm'r of Pub. Safety*, A15-2031 (Minn. App. Aug 29, 2016) (holding Minnesota's implied consent laws allow for revocation for refusal to submit to chemical analysis, and that refusal is a question of fact); *Jones v. Dir. of Revenue*, 237 S.W.3d 624, 625 (Mo. App. E.D. 2007); *Stuart*,

supra., 515 S.W.2d 656, 659, 661 (affirming CDL revocation for refusal to take chemical test).

One of the various conditions contained in the administratively coercive laws of our state is the condition that a CDL holder take a chemical analysis if directed by a law enforcement officer to do so, or face the consequences for refusal. SDCL 32-12A-36(5); 32-12A-37; 32-12A-46; *Gates, supra.* Applied here, the State's legitimate interest in safeguarding the highways of our State is satisfied only if Blazer is punished in accordance with both state and federal laws, and this being his second major offense, his CDL should be disqualified for life. Such disqualification is necessary to ensure that the interests of public safety are met.

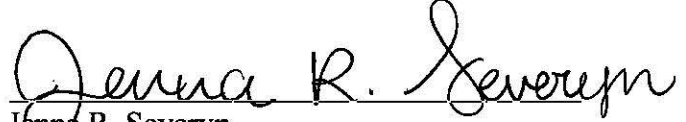
Accordingly, based on the foregoing facts and legal argument, this Court should reverse the circuit court, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Blazer's commercial driving privileges for life.

CONCLUSION

The Department respectfully requests that this Court reverse the circuit court's Memorandum Opinion and Order, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Blazer's commercial driving privileges for life. The Department makes this request as previously stated in the Appellant's Brief, and for the reasons above.

Dated this 3th day of February 2024.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, reading "Jenna R. Severyn". The signature is written in a cursive style with a large, looping "J" and "S".

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CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, State of South Dakota, The Department of Public Safety, hereby certifies that on the 13th day of February 2024, a true and correct copy of Appellant's Reply Brief was served by Odyssey File and Serve upon:

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and the original was mailed (or hand delivered) to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501, as well as filing by electronic service in Word format to the Clerk of the South Dakota Supreme Court at:
SCClerkBriefs@ujs.state.sd.us.

Dated this 13th day of February 2024.


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CERTIFICATE OF COMPLIANCE

Jenna R. Severyn, the attorney for Appellant, hereby certifies that the foregoing reply brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

- a. Appellant's Reply Brief does not exceed 16 pages.
- b. The body of Appellant's Reply Brief was typed in Times New Roman 12-point typeface; and
- c. The body of Appellant's Reply Brief contains 2,932 words and 15,074 characters with no spaces and 17,999 characters with spaces, according to the word and character counting system in Microsoft Office 365 for Windows used by the undersigned.



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