

**OPINION
71-261**

November 30, 1971 (OPINION)

Colonel Ralph M. Wood

Superintendent

North Dakota Highway Patrol

RE: Notary Public - Oaths - Defined

This is in reply to your letter of November 23, 1971, in which you request our opinion on the following:

It has been brought to my attention that two cases which involve drivers suspended for refusal to take a chemical test for intoxication have had their licenses reinstated, for the reason that the officer that signed the affidavit was improperly sworn. In these two cases the officer signed the affidavit before a notary but was not asked to raise his hand nor swore to tell him the truth. I am enclosing the order of rescission from the Safety Responsibility Division of the State Highway Department on each of these cases.

May I have your official opinion and interpretation of sections 12-14-02 and 39-20-04 of the North Dakota Century Code as they would apply to conditions described above and by the enclose."

We must note, in the first instance, that this office does not issue opinions upon questions which are presently in litigation. However as we understand the situation the opinion is requested for future reference and the specific cases cited are only for purpose of example since an order of rescission has already been entered by the Safety Responsibility Division. Therefore our opinion is to be considered as applying only to future instances and is not intended as a ruling on the specific cases referred to in your letter.

Section 39-20-04 of the North Dakota Century Code, as amended provides:

REVOCATION OF PRIVILEGE TO DRIVE MOTOR VEHICLE UPON REFUSAL TO SUBMIT TO CHEMICAL TESTING. If a person under arrest refuses to submit to chemical testing, none shall be given, but the state highway commissioner, upon receipt of a sworn report of the law enforcement officer, forwarded by the arresting officer within five days after the refusal, showing that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon the public highways while under the influence of intoxicating liquor, and that the person had refused to submit to the test or tests, shall revoke his license of permit to drive and any nonresident operating privileges for a period of six months; or if the person is a resident without a license or a permit to operate a motor vehicle in this state the commissioner shall deny to the person the issuance of a license

or permit for a period of six months after the date of the alleged violation, subject to review as hereinafter provided." (emphasis supplied)

We would note the administrative review is limited to the questions of "whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle upon the public highways while under the influence of intoxicated liquor; whether the person was placed under arrest; and, whether he refused to submit to the test or tests." See section 39-20-05 of the North Dakota Century Code, as amended.

We are unaware of any decisions of our North Dakota supreme Court on the issue presented. However our attention has been directed to a relatively recent Kansas decision in which the Supreme Court of that state held the provision in an implied consent statute requiring a sworn report of a refusal to submit to chemical test to be forwarded to the motor vehicle department is mandatory and where the report was not in fact sworn to, subsequent proceedings for suspension and revocation of a driver's license were void. See *Wilcox v. Billings*, 200 Kansas 654, 438 P. 2d. 108 (1968). While the North Dakota statute and the Kansas statute are not identical, both statutes do require a sworn report by the law enforcement officer (arresting officer). In its decision the Kansas Court stated, page 112 of the *Pacific Reporter*: "Under other statutes (K. S. A. 21-701 and 54-105) false swearing in such matters is made criminal. False accusations may not be made with impunity. The provision for a sworn report then does afford some measure of reliability and some protection to the licensee against unwarranted accusation, and the jurat imports authenticity to the item to which it is affixed.

Certainly one purpose of 8-1001 (K. S. A.) is to provide a fair and reliable method for determining whether a license to drive should be revoked. Essential to that purpose, the legislature must have deemed it important that a report which could become the sole basis of a revocation of a driver's license be sworn to. We doubt if the legislature ever intended such drastic action should be taken on an unsworn averment alone. The very nature of the proceeding emphasizes this conclusion."

The court noted that during the trial of the matter it developed that the written report of refusal was not in fact sworn to although another police officer affixed a notarial seal to the report.

The Kansas Court cited no decisions from its own or other jurisdictions in support of its conclusion. The case is not binding on the Courts of this State but, if in point, might well be considered by our Courts. However we do not believe the decision is applicable to North Dakota for the following reason:

We note from an examination of the Kansas statutes that an oath in that state must be taken by placing the hand on the Holy Bible or by raising the right hand. See Chapter 54 of the Kansas Statutes Annotated, particularly section 54-102. There is no such requirement in North Dakota. In fact, section 12-14-02 of the North Dakota Century Code provides:

'OATH' DEFINED. The term 'oath' as used in this chapter, includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated. The signing of any writing purporting to be made under oath in the presence of an officer authorized to administer oaths, or the acknowledgement of the signing thereof to or before any such officer, or the presentation thereof to such officer by the person signing, or by his direction, to be authenticated as an oath, shall be deemed to be the taking of an oath. The certification of the officer purporting to take such oath shall be prima facie evidence of the taking thereof."

We have examined the form used by the Highway Patrol in reporting the refusal to take the test for intoxication. The form states at the beginning:

I, (name of arresting officer), being first duly sworn, depose and say * * *

The form then contains the essential information and has a place for the signature of the officer at the end. The form then states:

Subscribed and sworn to before me this ____ day of _____, 19____."

Following that is the place for notary public's signature, seal, date of expiration of commission, etc.

It is obvious to us that if such form is properly completed it is an oath or sworn statement as provided in section 12-14-02. It is the signing of a writing "purporting to be made under oath in the presence of an officer authorized to administer oaths, or the acknowledgement of the signing thereof to or before any such officer, or the presentation thereof to such officer by the person signing, or by his direction, to be authenticated as an oath" as provided in section 12-14-02 if the officer did in fact sign the form in the presence of a notary public, present it to the notary public in person or by his direction to be authenticated as an oath. A notary public is an officer authorized to administer oaths. See section 44-06-01 of the North Dakota Century Code, as amended.

There can be no doubt, in view of section 12-14-02, that if the instrument was properly signed by the arresting officer before a notary public same would constitute an oath even though the officer did not go through the ritual of actually swearing to the truth of same before the notary public. Section 12-14-02 is a part of title 12-14 of the Century Code which governs the crime of perjury and subordination of perjury. Thus if any of the statements contained in such report are false the officer signing same is subject to the penalties for perjury. Therefore the rationale of the Kansas Court that "false accusations may not be made with impunity" and the provision for a sworn report does "afford some measure of reliability and some protection to the licensee against unwarranted accusation" would be fulfilled in this state under the provisions of section 12-14-01. The reasoning of the Kansas Court would not be applicable in North Dakota in view of section 12-14-02.

We must conclude that the signature of an arresting officer on the form used to report refusal to take the chemical intoxication test is an oath and does meet the mandatory requirements of a sworn statement prescribed by section 39-20-04, if made before a notary public who has properly signed same, affixed his seal, etc.

HELGI JOHANNESON

Attorney General