COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
JUL 20 2015

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Case No. 34,245

ORIGINAL

JUAN ANTONIO OCHOA BARRAZA,

Defendant-Appellant,

vs.

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT,
MOTOR VEHICLE DIVISION,

Plaintiff-Appellee

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**Appeal**
from the Second Judicial District, Division II,
County of Bernalillo State of New Mexico,
No. D-101-CV-20118965
(The Honorable Stan Whitaker)

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# REPLY BRIEF OF APPELLANT

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## RECORDATION OF PROCEEDINGS AND CITATION TO THE RECORD

When citing to the record proper, counsel for Appellant uses the numbers assigned by the trial court clerk in preparing the record for transmission to the Court of Appeals, e.g, [RP 15]. When citing to the CD audio of Metropolitan Court proceedings, the cite appears as [CD month/day/year at hour:minute:second]. Citations to the appellee's response brief appear as [RB page number].

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### I. THE DISTRICT COURT SHOULD NOT HAVE CONSIDERED PREJUDICE ON DIRECT NOR APPELLATE REVIEW BECAUSE PREJUDICE WAS NOT IN THE ADMINISTRATIVE RECORD AND THE ISSUE WAS NOT RAISED NOR ARGUED BY THE PARTIES.

The MVD now joins the district court's erroneous position that Appellant did not demonstrate prejudice and is therefore not entitled to relief. [Answer Brief (hereinafter "AB") at 11-12.] The MVD attempts to justify this by claiming that Appellant actually raised the issue. [AB at 11.]

As a general rule, issues not raised at trial should not be considered *sua sponte* on appeal. *State v. Chakerian*, 2015-NMCA-052, ¶ 25, 348 P.3d 1027, 1034, *cert. granted* (May 11, 2015). In *Chakerian*, the trial court, entirely on its own, invoked direct review instead of appellate review and decided the case on reasoning that was not argued by either party. *Id.* at ¶ 25. The correct standard of review in the district court is, however, whether substantial evidence in the record as a whole supports the agency's decision. *State, Dep't of Transportation, Motor Vehicle Div. v. Romero*, 106 N.M. 657, 659, 748 P.2d 30, 32 (Ct. App. 1987); *see also Schuster v. State Dep't of Taxation & Revenue, Motor Vehicle Div.*, 2012-NMSC-025, ¶ 19, 283 P.3d 288, 294.

As a matter of law, the district court's direct review below necessarily involved fact-finding in order for it to be direct review. It is not within the purview of the proper appellate process in the case at bar to engage in fact-finding, but

rather to review the record. Nevertheless, in its Order Disposing of Administrative Appeal, the district court determined on direct review that there was not a showing of prejudice and therefore no basis to grant a writ of mandamus. The district court, however, based its dismissal on the briefs and record below, as if on appellate review, which is a legal impossibility. Again, nowhere in the briefing at any time, nor in the administrative hearing officer's decision, was there a claim of a need to demonstrate prejudice, or lack thereof, for relief.

Since the court below applied the incorrect standard of review, and then misapplied that standard, it should be overturned.

## II. THE IMPLIED CONSENT ADVISORY WAS BOTH PROCEDURALLY AND SUBSTANTIVELY DEFICIENT BECAUSE IT SHOULD HAVE BEEN GIVEN IN SPANISH AND SHOULD HAVE PROVIDED NOTICE OF THE OPPORTUNITY FOR AN INDEPENDENT TEST.

The issue of whether an arrestee must actually understand the information in the Implied Consent Advisory has not been addressed in New Mexico. Contrary to the MVD's contention, this case does not present that issue. [AB at 14.]

The true issue is whether police may read the implied consent warnings in English when the arrestee's primary language is not English and the police are aware of this, and when the police can *easily* read the advisory in the arrestee's native language but choose not to.

The MVD's contention that to require police in some circumstances to read the advisory in a language other than English would turn the purpose of the Act on

its head is without merit. [AB at 16.] *Maso* already addressed this issue when it found that providing ten days' notice in written English to obtain a hearing is sufficient time for translation to satisfy due process. *Maso v. State Taxation and Revenue Dept., Motor Vehicle Div.*, 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286. This case is no different. The Department must not be allowed to engage in a pattern of behavior that could disadvantage non-English speakers, as it sought to do in *Maso* and seeks to do in this case.

Breath tests cannot be administered under the Implied Consent Act if the arrestee has not been advised of the implied consent advisory. *State v. Jones*, 1998-NMCA-076, ¶¶ 16-21, 125 N.M. 556, 964 P.2d 117, 122-23. The advisory is substantive and essential and must be communicated to the arrestee, despite the Department's assertion that the advisory must only be read if the arrestee agrees to be tested. [AB at 14.] According to *Jones*, there is no such discretion. *Id.* at ¶ 19. Section 66-8-109, NMSA 1978 requires the information of the advisory to be communicated by the police to the arrestee. While the Department correctly points out that there is no right to refuse a chemical test, [AB at 15], such is not the issue here. Rather, the correct standard is that a person who refuses to be tested cannot be punished for this if the advisory is not properly read to them. Such information should be conveyed in a complete fashion. The MVD cites authority that holds as

much in *Fugere v. State, Tax and Rev Dept.,MVD*, 120 N.M. 29, 33, 897 P.2d 216, 220 (Ct. App. 1995). [AB at 10,11.]

Contrary to the Department's position, there is indeed authority in New Mexico to support a requirement of law enforcement to advise one of his rights in his native language prior to proceeding with any actions that have adverse legal consequences to him. Such is the case in an interrogation. The sound reasoning of such cases, which Appellant has already cited in his Brief-in-Chief, bear on the non-English-speaker's right to receive advisements such as *Miranda* warnings and, it follows, Implied Consent Warnings, in one's native language. At the very least, the state has a duty to make a meaningful effort to achieve a translation that an arrestee can understand. The Department would read the *Miranda* cases in isolation, but that would frustrate a non-English-speaker's right to obtain the information in a form they could reasonably be expected to understand, whether they are constitutional rights advisements or statutory rights advisements, as is the case with the implied consent advisory.

In essence, the Department urges a standard by which a court must rely on an officer's subjective determination that a motorist understands English and any refusal is therefore a question of fact. [AB at 18.] That argument must fail because an officer reading the implied consent advisory to the recipient in a language that the recipient cannot understand is not a reading at all. Similarly, a reading of the

implied consent advisory in a language partially understood by the listener is not a complete or sufficient reading. Either scenario is inadequate and cannot support revocation of the person's license. This is especially true if an adequate translation is readily available to the officer, as it was in this case.

The MVD also overstates the strength of its position in the facts from the record. [AB at 14, 18.] The Department would have this Court believe that Appellant really understood English, based on Deputy Foster's assessment. Again, Deputy Foster is not bilingual. But it is uncontested that Deputy Jareno is bilingual and stated that Appellant was a native Spanish speaker and did not speak English to the level of a native of the United States.

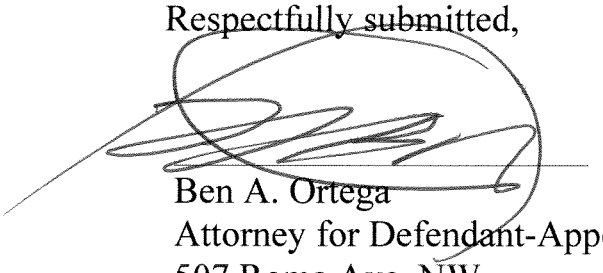
Also, Deputy Foster never asked Appellant if Appellant wanted the Act read to him in Spanish, yet both Foster and Jareno thought that Appellant's primary language was Spanish. [CD at 19:45 and 29:00.] While it is true that Appellant knew some English and used it to communicate with the officers, Deputy Foster's decision not to read the implied consent advisory in Spanish was arbitrary. For one, he had the field tests translated to Spanish, as Appellant conversed with Deputy Jareno in Spanish during the investigation. Nevertheless, Deputy Foster unilaterally concluded that Appellant knew English sufficiently enough to read him the implied consent advisory based on his limited contact. Had Deputy Jareno stated that Appellant spoke English on the same level as a native U.S. speaker, then

this may not have been an issue. However, that was not the case here. The hearing officer's reliance on Deputy Foster's judgment was arbitrary and the evidence did not support the decision that Appellant "refused" testing.

## CONCLUSION

The district court should be reversed.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

This certifies that on this 20th day of July, 2015, a true and correct copy of the foregoing was placed in the United States Mail, first class-postage prepaid, addressed to:

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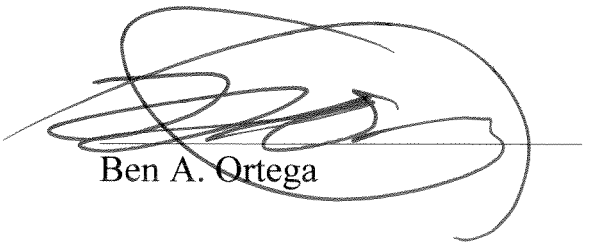

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