OPINION
70-227

October 21, 1970 (OPINION)

Mr. Walter R. Hjelle

State Highway Commissioner

State Highway Department

RE: Motor Vehicles - Implied Consent Law - Validity of Arrest at Nig

This is in reply to your letter of October 8, 1970, with regard to your administration of the Implied Consent Law as set forth in Chapter 39-20 of the North Dakota Century Code as amended to date.

You mention that on numerous occasions the issue has been raised that an arrest made at night for an offense not committed in the officer's presence was not a valid arrest under the provisions of Section 29-06-08. We note an opinion of this office of date March 11, 1970, to the effect that an arrest for driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages could be made without a warrant whether at night or any other time. You enclose with your letter a copy of a district court opinion, which states in specific terms that: "I disagree with this opinion." The court's opinion definitely does relate to an instance where the arrest was made for the offense of driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages, where the offense was not committed in the officer's presence and where the arrest was made at night without a warrant. The court's opinion is definitely to the effect that the arrest in that instance was invalid.

To quote from the court's opinion:

> "Until the legislature does narrow the restrictions of Section 29-06-16, officers of the law may not arrest persons at nighttime without a warrant for misdemeanors unless such misdemeanors are committed or attempted in the presence of the officer. That is the present state of the law in North Dakota."

In the circumstances set forth in the opinion, the clear implication of same is that there is no exception to this principal, for the offense commonly denominated D.W.I.

Your question is stated as:

> "Whether or not the District Court opinion is binding upon an administrative hearing officer in those cases where the factual situations are similar to those appearing in the case of City of Minot v. Raymond O. Knudson." (The district court opinion previously referred to).

Our opinion must necessarily be that this district court opinion is binding upon an administrative hearing officer in those cases where

the factual situations are similar to those appearing in the case of the city of Minot v. Raymond O. Knudson, i.e., where a court has in effect declared the arrest invalid, or made other determinations which must necessarily imply invalidity of the arrest. See, for example, the decisions in Colling v. Hjelle, 125 N.W.2d. 453, McDonald v. Ferguson 129 N.W.2d. 348. It does not necessarily follow that the more fact that the arrest was made at night for a D.W.I. offense, not committed in the officer's presence, would justify the highway commissioner in failing to revoke the driver's license.

While the effect of a court decision invalidating an arrest may well be to make any action undertaken thereunder a nullity, we do not believe the highway commissioner under Chapter 39-20 is given jurisdiction to make the initial determination as to the invalidity of the arrest. It is entirely conceivable in an instance where the arrest was made at night for a D.W.I. offense, not committed in the officer's presence, that the defendant will plead guilty and be convicted of the offense charged. While the district court opinion you forward will very probably be followed in that court and all lower courts within that judicial district, and while same will where available be considered at least persuasive authority in other judicial districts in the state, it is also entirely conceivable that another district court might arrive at a different legal conclusion, if the question is presented to it.

We must thus conclude that where the person has in fact been arrested, even though there may be valid legal questions as to the ultimate validity of the arrest and such arrest may later be judicially declared to be invalid and the Highway Commissioner has been so informed, the order of the Highway Commissioner should be modified accordingly.

We do note that the McDonald v. Fergus decision cited supra determines that the order of the Highway Commissioner is in the instance void. It does not indicate whether the Highway Commissioner had knowledge of the acquittal of the offense charged at the time of issuance of the order. In the Colling v. Tjelle decision cited supra it is stated that at the time the hearing was held the defendant had been acquitted of the charge for which he was placed under arrest. In both instances the Supreme Court considers in some detail the arrest itself, though the ultimate decision in both instances appear to rest on the fact that there has been an acquittal of the offense charged.

We recognize that the highway commissioner or the hearing officer handling the matter might be reluctant to enter an order which as in the two cases cited might be determined to be void. The statutory provision, however, does appear to require the highway commissioner's action to be taken, without necessarily waiting for a judicial determination of the validity of the arrest. Thus, we note that Section 39-20-04 of the 1969 Supplement in the instance of a resident without a license or permit to operate a motor vehicle in this state requires denial to such person of license or permit for a period of six months after the date of the alleged violation, not from the date of the judicial determination, that there has been a valid arrest or conviction of the offense charged. On such basis it would seem doubtful that the highway commissioner could continue hearings on the

basis of evidence that might later cause a court to determine the arrest to be invalid, until such time as the court determined the arrest to be valid or invalid.

It is thus our conclusion that upon receipt of the sworn report referred to in Section 39-20-04 of the 1969 Supplement to the North Dakota Century Code showing that such officer has made an arrest to the point where the alleged offender charged has been detained to be brought before a court for judicial determination, 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, the highway commissioner is required to take the action specified in said Section 39-20-04. It is our further conclusion that the issue of "whether the person was placed under arrest" as specified in Section 39-20-05 of the 1969 Supplement to the North Dakota Century Code at the administrative hearing held on his request must necessarily relate to whether or not there has been an arrest to the point where the offender charged has been detained to be brought before a court for judicial determination, not as to whether the arrest will be subsequently judicially determined to be valid or invalid. At such time as "new evidence" showing that the arrest has been judicially determined to be invalid is presented, the order of the highway commissioner should properly be modified in accordance with same.

We trust the within and foregoing will be sufficient for your purposes.

HELGI JOHANNESON

Attorney General