

157 P.3d 1129 (Table)

Unpublished Disposition

(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Donald A. BECKER, Appellant,

v.

KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 96,344. | May 18, 2007.

Appeal from Ellis District Court; Edward E. Bouker, judge.
Opinion filed May 18, 2007. Affirmed.

Attorneys and Law Firms

[Michael S. Holland II](#) and [Michael S. Holland](#), of Holland and Holland, of Russell, for appellant.

James G. Keller, of Legal Services Bureau, Kansas Department of Revenue, of Topeka, for appellee.

Before [MCANANY](#), P.J., [GREEN](#) and [CAPLINGER](#), JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM.

*1 Donald A. Becker appeals from a judgment of the trial court affirming the suspension of his driving privileges. Becker contends that his substantive due process rights were violated when he was not provided the implied consent advisories relating to commercial driver's licenses, even though he was not driving a commercial vehicle when he was arrested. We disagree and affirm.

The facts relevant to this appeal are not in dispute. Becker was stopped and arrested for driving under the influence. Although Becker held a commercial driver's license, he was driving a noncommercial vehicle when he was stopped.

Becker was read and furnished a DC-70 implied consent form. The form contained the advisories from K.S.A.2006 Supp. 8-1001(f). Becker took and failed a breath alcohol test.

Based on the results of this test, the officer issued a notice of suspension of Becker's driver's license.

Following an administrative hearing, the administrative hearing officer affirmed the suspension of Becker's driving privileges. Becker moved for judicial review of the order, arguing, *inter alia*, that his due process rights were violated because the implied consent law, [K.S.A. 8-1001 et seq.](#), provided incorrect warnings with regard to commercial driver's license holders.

Before the trial court, the case was submitted based upon stipulated facts. The parties agreed that Becker possessed a Kansas commercial driver's license when he was arrested, but that Becker was driving a noncommercial vehicle. The parties further stipulated that the officer furnished Becker with the notices required by K.S.A.2006 Supp. 8-1001(f), both orally and in writing, but that Becker was not informed of the effect on commercial driving privileges set out in K.S.A.2006 Supp. 8-2, 142(a)(2)(B). Finally, the parties agreed that Becker's blood alcohol test produced a test result above 0.08.

The trial court affirmed the Kansas Department of Revenue's (KDR) suspension of Becker's driving privileges, finding that the officer had given the required statutory notices and that additional requirements should not be added beyond that required by the implied consent statutes. The court also rejected Becker's due process argument, finding that Becker had furnished no authority for his argument. The court also determined that there was no conflict between the various statutory provisions.

Do the statutory implied consent notices, which are required to be given before requesting a chemical test, violate the substantive due process rights of a commercial driver's license holder by misstating the law regarding such person's driving privileges?

Becker challenges the trial court's decision affirming the KDR's suspension of his driving privileges, arguing that his substantive due process rights were violated by the officer's "incorrect explanation of the law as part of the implied consent advisories." Specifically, Becker maintains that the officer advised him in accordance with a DC-70 form that a test failure would result in a 30-day suspension of his driving privileges, but in actuality, because he had a commercial driver's license, either a test refusal or test failure would result in his driving privileges being suspended for a minimum of 1 year. For this reason, Becker contends that the notices

required by K.S.A.2006 Supp. 8-1001(f) and stated on the DC-70 form are legally incorrect and misleading as applied to the holder of a commercial driver's license. Becker argues that the administrative action should be dismissed.

*2 In contrast, the KDR maintains that the notices given by the officer accurately stated the repercussions of a test refusal or failure to Becker's regular driving privileges and contends that was all that was required by statute because Becker was driving a noncommercial vehicle when he was stopped. Additionally, the KDR disputes Becker's allegation of a violation of his substantive due process rights.

The parties agree that this court has unlimited review over the question presently before this court. Indeed, whether Becker's due process rights were violated is a question of law over which this court has de novo review. *Hemphill v. Kansas Dept. of Revenue*, 270 Kan. 83, 89, 11 P.3d 1165 (2000).

Statutes

K.S.A.2006 Supp. 8-1001 authorizes the KDR to suspend an individual's driving privileges. By operating a motor vehicle, a person gives his or her consent to submit to chemical testing to determine the presence of alcohol. K.S.A.2006 Supp. 8-1001(a). Under K.S.A.2006 Supp. 8-1001(f), however, before administering a chemical test, an officer must provide the driver of a noncommercial vehicle certain notices—both orally and in writing. One such notice is the following: “[I]f the person submits to and completes the test or tests and the test results show an alcohol concentration of .08 or greater, the person's driving privileges will be suspended for 30 days for the first occurrence.” K.S.A.2006 Supp. 8-1001(f) (E). Additionally, the officer must inform the person that a *refusal* to submit to and complete the test will result in a 1-year suspension of his or her driving privileges for the first occurrence. K.S.A.2006 Supp. 8-1001(f)(D).

Only when an officer has reasonable grounds to believe that a person has been driving a commercial vehicle while having alcohol or drugs in such person's system must the officer *also* inform the driver that he or she will be disqualified from driving a commercial vehicle for at least 1 year following either a test refusal or failure. K.S.A. 8-2,145(a); K.S.A.2006 Supp. 8-1001(g). Interestingly, K.S.A.2006 Supp. 8-1001(g) states: “Any failure to give the notices required by K.S.A. 8-2,145 and amendments thereto shall not invalidate any action taken as a result of the requirements of this section.”

The 1-year disqualification referenced in K.S.A. 8-2,145 is prescribed in K.S.A.2006 Supp. 8-2,142(a). As Becker correctly notes, the legislature amended K.S.A. 8-2,142 in 2003. L.2003, ch. 42, section 7. Before that amendment, a driver's commercial license was subject to a 1-year suspension for a test refusal or failure only when the person was driving a commercial vehicle at the time of the stop. K.S.A. 8-2,142(a). The 2003 amendment expanded the scope of the suspension to apply to a driver's commercial license even when the person was stopped while driving a noncommercial vehicle. K.S.A.2006 Supp. 8-2,142(a). Importantly, the legislature did not choose to amend the required implied consent notices to include notice of the 1-year suspension of a driver's commercial license when the person is stopped while driving a noncommercial vehicle. See K.S.A.2006 Supp. 8-1001(g).

Application of Statutes to Becker

*3 In challenging the notices furnished by the deputy from the DC-70 form, Becker makes much of the fact that K.S.A.2006 Supp. 8-1001(f) speaks only to an individual's “driving privileges” without specifying the type of driving privileges at stake. Relying on the 1-year suspension mandated by K.S.A.2006 Supp. 8-2,142(a), Becker contends that he was, therefore, subject to a minimum of a 1-year suspension of “his driving privileges” for a test failure rather than the mere 30-day suspension identified by the officer. It is in this regard that Becker asserts that he was without the information necessary to allow him to make an informed decision regarding whether to submit to chemical testing. Taking his argument a step further, Becker contends that the failure to provide legally accurate notices under the implied consent law constituted a violation of his substantive due process rights.

Becker asserts that this issue is one of first impression in Kansas. In doing so, Becker distinguishes cases involving an officer's inaccurate recitation of the required notices, such as *Meigs v. Kansas Dept. of Revenue*, 251 Kan. 677, 840 P.2d 448 (1992). Indeed, in *Meigs*, our Supreme Court held that the officer did not substantially comply with the mandatory implied consent notices by incorrectly informing Meigs that a test refusal would result in a suspension of her license for at least 180 days where the statute had been amended to mandate a suspension of at least 1 year. 251 Kan. at 678-79. Here, Becker maintains that he was given statutorily required notices that were themselves erroneous recitations of the law.

Nevertheless, since the filing of briefs in this case, this court has had the opportunity to address this issue. In *State v. Becker*, 36 Kan.App.2d 828, 145 P.3d 938 (2006), *rev. denied* 283 Kan. ___ (2007), this court rejected identical arguments raised in a criminal appeal from a driving under the influence (DUI) conviction. In that case, this court stated:

“ ‘The right to drive a motor vehicle on the public streets is not a natural right but a privilege, subject to reasonable regulation in the public interest.’ [Citation omitted.] The State has an important interest in regulating the driving privileges of licensees. The suspension of an individual's driving privileges is part of the civil regulatory scheme designed to foster public safety by suspending the driving privileges of those individuals who have exhibited dangerous driving behavior. [Citation omitted.] Furthermore, the legislature has enacted a comprehensive statute designed to provide notice to a licensee before he or she submits to chemical testing. [Citation omitted.]” 36 Kan.App.2d 835-36

Significantly, Becker fails to cite any cases discussing substantive due process rights. Simply pressing a point without pertinent authority is akin to failing to brief an issue; when a defendant fails to brief an issue, that issue is deemed waived or abandoned. *State v. Rupnick*, 280 Kan. 720, 738-39, 125 P.3d 541 (2005).

*4 Instead of discussing any substantive due process cases, Becker simply cites *Standish v. Department of Revenue*, 235 Kan. 900, 683 P.2d 1276 (1984), to support his assertion that he was misled by the legally inaccurate notices furnished by the officer in contravention of the purposes of the implied consent law. *Standish* offers little guidance, however, as it is factually dissimilar to the present case. In *Standish*, an officer told Standish of his *Miranda* warnings before requesting that he submit to a chemical test without explaining the inapplicability of the right to counsel when determining whether to submit to testing. Our Supreme Court concluded that because the *Miranda* warnings, without further explanation from the officer, confused Standish, his refusal to submit to testing was reasonable. 235 Kan. at 905. In contrast, the officer here provided Becker the notices required by K.S.A.2006 Supp. 8-1001(f), thus advising Becker of the impact a test failure would have on his noncommercial driving privileges.

In a further attempt to show that the notices furnished by the officer constituted a violation of his substantive due process rights, Becker posits a hypothetical scenario wherein an

officer incorrectly informs him that a test refusal would result in a 1-year jail sentence. Contending that such a misstatement of the law would certainly amount to a violation of substantive due process regardless of whether the legislature approved the legally incorrect statement, Becker then questions how far the legislature can go when setting out to inform an individual of the legal consequences of his or her actions.

Becker's hypothetical and accompanying query mischaracterize the facts of the present case and demonstrate the faulty premise of Becker's challenge to the notices provided by the officer. The fact remains that the officer correctly informed Becker of the consequences of a test failure to his driving privileges; his noncommercial driving privileges were subject to a 30-day suspension under K.S.A.2006 Supp. 8-1001(f)(E). To this end, Becker incorrectly views the entirety of his driving privileges—both commercial and noncommercial—as being subject to the 1-year suspension referenced in K.S.A. 8-2,145 and prescribed by K.S.A.2006 Supp. 8-2,142.

Under K.S.A.2006 Supp. 8-2,142(a), a person is disqualified from driving a *commercial vehicle* for at least 1 year upon a first occurrence of a test refusal or failure while driving either a commercial or noncommercial vehicle. Importantly, however, K.S.A.2006 Supp. 8-2,142(l) (formerly K.S.A.2005 Supp. 8-2,142[k]) states:

“Upon suspension, revocation, cancellation or disqualification of a commercial driver's license under this act, the license shall be immediately surrendered to the division if still in the licensee's possession. If otherwise eligible, and upon payment of the required fees, *the licensee may be issued a noncommercial driver's license for the period of suspension, revocation, cancellation or disqualification of the commercial driver's license* under the same identifier number.” (Emphasis added.)

*5 As the KDR correctly notes, Becker wholly fails to acknowledge the existence and effect of K.S.A.2006 Supp. 8-2,142(l). When subsections (a) and (l) of K.S.A.2006 Supp. 8-2,142 are considered together, it is clear only Becker's commercial driving privileges were subject to a 1-year suspension for his test failure. Following the 30-day suspension of his noncommercial license, Becker would be free to apply for a noncommercial driver's license under K.S.A.2006 Supp. 8-2,142(l).

Substantive due process protects an individual from arbitrary government action. The applicable standard is one of

reasonableness; accordingly, analysis of a substantive due process claim requires a “balancing of the nature of the individual interest infringed, the importance of the government interest furthered, the degree of infringement and the sensitivity of the government entity responsible for the action to more carefully tailored alternative means of achieving its goal. [Citations omitted.]” ’ *Darling v. Kansas Water Office*, 245 Kan. 45, 51, 774 P.2d 941 (1989).

Certainly, the State has an important interest in regulating the driving privileges of licensees. Indeed, “[t]he right to drive a motor vehicle on the public streets is not a natural right but a privilege, subject to reasonable regulation in the public interest. [Citation omitted.]” *Standish*, 235 Kan. at 904. The suspension of an individual's driving privileges is part of the civil regulatory scheme designed to foster public safety by restricting the driving privileges of those individuals who have exhibited dangerous driving behavior. *Ruble v. Kansas Dept. of Revenue*, 26 Kan.App.2d 1, 3-4, 973 P.2d 213 (1999). To this end, the legislature has enacted a comprehensive statute designed to provide notice to a licensee before he or she submits to chemical testing. *State v. Kristek*, 14 Kan.App.2d 77, 79, 781 P.2d 1113 (1989). The statute's purpose is to coerce submission to chemical testing through the threat of statutory penalties such as license revocation and admission into evidence in a DUI proceeding of a test refusal. *Furthmyer v. Kansas Dept. of Revenue*, 256 Kan. 825, 835, 888 P.2d 832 (1995). A review of the implied consent law shows the State's sensitivity to tailoring the means it uses to achieve its important goal of public safety.

Other states have rejected substantive due process claims with respect to various statutory schemes suspending or revoking driver's licenses based upon a rational basis analysis. See *State v. Bennett*, 142 Idaho 166, 125 P.3d 522 (2005) (suspension or revocation of driver's license as punishment for underage purchase, consumption, or possession of alcoholic beverages was rationally related to legitimate government interest in prevention of underage drinking and thus did not violate due process or equal protection); *Walton v. Commonwealth*, 255 Va. 422, 497 S.E.2d 869 (1998) (upholding suspension of a driver's license for a drug offense that does not involve the operation of a motor vehicle; it is reasonable to conclude that a purpose of the statute is

to protect persons using the Commonwealth's highways); *Amunrud v. Bd. of Appeals*, 158 Wash.2d 208, 143 P.3d 571 (2006) (statute revoking father's driver's license for failure to pay child support did not violate father's right to substantive due process even though it prevented him from working as taxi driver; under rational basis test, it was reasonable to believe that driver's license suspension scheme would provide a powerful incentive to those in arrears in their child support payments to come into compliance).

*6 Upon review of the factors identified in *Darling*, it appears Becker suffered no violation of his substantive due process rights as a result of the implied consent notices' failure to inform him of the consequences of a test failure on his commercial driving privileges.

Conclusion

Becker has failed to establish either the existence of a substantive due process right involving the implied consent notices given by the officer or a violation of such a right. Rather, the premise of Becker's challenge to the notices—that they incorrectly state the law as applied to the holder of a commercial driver's license—is refuted by K.S.A.2006 Supp. 8-2,142(1), which allows such person to apply for a noncommercial driver's license following the expiration of the 30-day suspension set forth in K.S.A.2006 Supp. 8-1001(f)(E). Moreover, notice is a procedural, rather than substantive, right. See *State v. Wilkinson*, 269 Kan. 603, 608, 9 P.3d 1 (2000) (basic elements of procedural due process are notice and opportunity to be heard at meaningful time and in meaningful manner). Becker does not assert a violation of his procedural due process rights, nor does such a violation appear evident.

For these reasons, Becker's challenge to the trial court's decision affirming the KDR's suspension of his driving privileges fails.

Affirmed.

Parallel Citations

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