

297 P.3d 1194 (Table)

Unpublished Disposition

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Court of Appeals of Kansas.

Raymond J. ROTHER, Appellant,

v.

KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 107,416. | March 29, 2013.

Appeal from Sumner District Court; R. Scott McQuinn Judge.

Attorneys and Law Firms

[Roger L. Falk](#), of Law Office of Roger L. Falk, P.A., of Wichita, for appellant.

James G. Keller, deputy general counsel, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before [MALONE](#), C.J., [GREEN](#) and [STANDRIDGE](#), JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM.

*1 Raymond Rother appeals the district court's decision to uphold the Kansas Department of Revenue's (KDR) suspension of his driving privileges. Rother argues that the district court erred in dismissing his petition for review on the ground that the petition raised issues that were not considered at the administrative hearing. Rother also argues that the administrative hearing officer abused his discretion and violated Rother's due process rights by denying his request for a continuance of the hearing. For the following reasons, we affirm the district court's judgment.

On July 7, 2010, Sumner County Sheriffs Deputy Michael Roths pulled over a vehicle driven by Rother because the vehicle had driven left of center. On Form DC-27, Roths stated that he smelled an odor of alcohol and that Rother slurred his speech and had bloodshot eyes. Rother refused

to submit to or complete alcohol testing, so KDR began proceedings to suspend his driving privileges.

In December 2010, KDR notified Rother that an administrative hearing would be held on January 20, 2011. Rother claims that shortly before the hearing date, he sent KDR a written request for a continuance of the hearing, stating that he had just started working and would not have the money to hire an attorney before the hearing. Rother claims that KDR denied this request, but there is nothing in the record denying Rother's written request.

Rother and Roths were both present at the administrative hearing on January 20, 2011. Rother requested a continuance of the hearing, which the hearing officer denied. According to the administrative hearing notes, Rother raised two issues: (1) Roths marked the box on the DC-27 that indicated that Rother did not have a commercial driver's license (CDL) when in fact Rother did have a CDL and (2) Rother was never criminally charged with driving under the influence (DUI). The hearing officer affirmed KDR's suspension of Rother's driving privileges.

Rother timely filed a petition for judicial review in Sumner County District Court. In the petition, Rother asserted that he argued at the administrative hearing: (1) Roths did not have reasonable grounds to believe he was illegally operating a motor vehicle under the influence of alcohol; (2) Rother relied on Roths' incorrect statement that the arrest would not affect Rother's CDL; (3) Rother was denied his right to a timely hearing; (4) a DC-70 form was never properly served on him or read to him; and (5) the DC-27 was not personally served on him. KDR filed an answer to the petition, challenging Rother's characterization of the issues raised at the administrative hearing, pointing out that the administrative hearing notes listed only two issues.

On July 22, 2011, KDR filed a motion to dismiss and noted that Rother raised only two issues at the administrative hearing: the indication on the DC-27 that Rother did not have a CDL and failure to charge Rother with DUI. KDR asserted that the district court was limited to consideration of those two issues and because neither issue could be resolved in Rother's favor, KDR requested the district court dismiss the case. Rother filed a response to the motion to dismiss and argued that the district court was not limited to consideration of the issues raised at the administrative hearing. He also argued that the administrative hearing officer's denial of a continuance violated his due process rights.

*2 On September 27, 2011, the district court held a hearing on the motion to dismiss. At the hearing, KDR reasserted its arguments from its motion and also argued that the denial of Rother's request for a continuance was not a due process violation. Rother admitted that prior caselaw stated that issues not raised at the administrative hearing cannot be considered by the district court but contended that the law had changed. The district court found that the denial of the continuance was not an abuse of the hearing officer's discretion and granted the motion to dismiss. On October 21, 2011, the district court filed a more detailed journal entry, finding that Rother was restricted to the two issues he raised at the administrative hearing and neither of those issues could be resolved in his favor. Rother timely appealed the district court's judgment.

On appeal, Rother argues that the district court erred in granting KDR's motion to dismiss. Rother contends that limiting the issues a district court may consider to those raised at the administrative hearing level denied him due process of law because it prevented him from having the de novo hearing to which he was entitled. Rother also asserts that the administrative hearing officer's denial of his request for a continuance violated his due process rights and was arbitrary, unreasonable, and capricious.

Rother also argues that KDR acted outside its jurisdiction by proceeding with the suspension despite Rother's failure to (1) warn him about the consequences of testing or test refusal and (2) personally serve him with the DC-27 form. These arguments are included in the issues that the district court did not consider because Rother did not raise the issues at the administrative hearing. Thus, we must first determine whether this limitation of issues was correct. If the limitation was proper, this court need not examine these issues on their merits because they were not properly preserved for judicial review.

Did the district court err in limiting its consideration to the issues raised at the administrative hearing?

Rother argues that the district court's decision to consider only those issues raised at the administrative hearing violated his right to due process, as it denied him the opportunity for a de novo proceeding in the district court. Whether Rother's due process rights were violated is a question of law over which an appellate court exercises unlimited review. *State v. Kirkpatrick*, 286 Kan. 329, 351, 184 P.3d 247 (2008).

Our Supreme Court has “previously recognized that limited due process applies” in driver's license suspension proceedings. See *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 632, 176 P.3d 938 (2008); *Kempke v. Kansas Dept. of Revenue*, 281 Kan. 770, 776, 133 P.3d 104 (2006) (“ ‘ ‘Suspension of issued licenses ... involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.’ ‘ [Citations omitted.]”). Rother begins his due process argument by noting that the statute governing procedures at the administrative level severely limits prehearing discovery and witnesses allowed at the hearing. See *K.S.A.2010 Supp. 8-1020(e)-(g)*. Because of these limitations, Rother argues that the district court's decision to consider only those issues raised at the administrative hearing denied him the opportunity for a de novo trial.

*3 Rother misconstrues the meaning of the term “de novo trial” in the context of a driver's license suspension proceeding. The issue before the district court was whether Rother could raise issues he did not raise at the administrative hearing, not whether Rother was allowed a de novo trial on issues properly raised and argued at the administrative hearing. Additionally, this court has previously discussed the meaning of the term “trial de novo” in the context of driver's license suspensions and stated:

“From our reading of ... cases addressing de novo review, the Supreme Court has not interpreted any statute to allow true de novo review in the sense of a new trial on facts and issues as though they had never been tried. Even under the de novo review recognized in [Kansas Commission on Civil Rights] cases, the court is restricted to those issues preserved in a motion for rehearing before the commission and to a review of the agency record.” *Angle v. Kansas Dept. of Revenue*, 12 Kan.App.2d 756, 765, 758 P.2d 226, rev. denied 243 Kan. 777 (1988).

Rother provides no legal authority for his proposition that by denying him the opportunity to raise issues before the district court that he did not raise at the administrative level, the district court denied him a de novo trial or in any way violated his due process rights. In fact, the Kansas Supreme Court has repeatedly held that in an appeal from a decision by an administrative agency, a party may only argue issues that were raised at the administrative hearing. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 411, 204 P.3d 562 (2009) (“In an appeal from a decision by an administrative agency, a party may only argue the issues

raised at the administrative hearing. [Citations omitted .]”); *Kempke*, 281 Kan. at 795, 133 P.3d 104 (Discussing due process requirements the court stated: “It must be noted that the licensee bears the burden of adequately raising those issues of concern at the administrative hearing in order to raise them before the district court. [Citations omitted.] This burden, however, does not impact the licensee’s due process rights....”); *Nurge v. University of Kansas Med. Center*, 234 Kan. 309, 315, 674 P.2d 459 (1983) (“[T]he ‘trial de novo’ is ‘limited to those issues fairly raised in an application for rehearing before the commission.’” [Citation omitted.]”).

We conclude the district court did not err in limiting Rother to the issues raised at the administrative hearing. Because the only documentation of the hearing is the administrative hearing notes, a determination of the issues preserved for judicial review must depend on these notes. See *Kingsley*, 288 Kan. at 412–13, 204 P.3d 562 (looking to administrative hearing notes to determine issues raised at the hearing); accord *Rebel v. Kansas Dept. of Revenue*, 288 Kan. 419, 428, 204 P.3d 551 (2009) (same). The only issues listed in the administrative hearing notes were (1) Rother’s incorrect marking of the DC–27 to indicate Rother did not have a CDL and (2) the effect of the fact that Rother was not criminally prosecuted for DUI. Therefore, these are the only two issues the district court could properly determine. Rother has not argued the error of the district court’s findings on either of these issues. See *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011) (stating that an issue not briefed is deemed waived and abandoned).

The administrative hearing officer’s denial of Rother’s request for a continuance

*4 Rother also argues that the administrative hearing officer erred in denying his request for a continuance of the administrative hearing. Rother argues that the hearing officer’s denial of the continuance violated his due process rights because it denied him the opportunity to hire counsel. Rother also asserts that the denial of the continuance was arbitrary, unreasonable, and capricious.

As KDR notes, a panel of this court recently addressed an argument similar to Rother’s argument in *Reese v. Kansas Dept. of Revenue*, No. 104,721, 2012 WL 401620 (Kan.App.2012) (unpublished opinion). In *Reese*, a Kansas Highway Patrol Trooper stopped Timothy Reese for speeding. After Reese failed field sobriety tests, admitted to consuming alcohol, and refused to submit to a chemical

analysis test, KDR began the process of suspending his driver’s license. In February 2009, Reese requested an in-person administrative hearing and KDR notified Reese in May that his hearing was scheduled for July 23, 2009. Reese requested a continuance of the hearing; the continuance was denied, and neither Reese nor his attorney attended the hearing. The hearing officer upheld the suspension of Reese’s driver’s license.

On appeal, Reese argued that KDR both denied him due process and abused its discretion by refusing to continue the administrative hearing. Reese contended that the denial denied him his constitutionally guaranteed due process in that issues in the district court are limited to those raised in the administrative hearing and “ ‘[b]ecause [Reese’s] attorney could not attend the administrative hearing and therefore[] could not raise or preserve any issues[,] [Reese] was essentially left with nothing to appeal.’ ” 2012 WL 401620, at *2. This court recognized that “[t]he basic elements of procedural due process are notice and an opportunity to be heard. [Citation omitted.]” 2012 WL 401620, at *2. This court found that Reese’s due process rights were not violated and KDR did not abuse its discretion by denying the request for continuance. 2012 WL 401620, at *3. Specifically, this court stated:

“Reese was informed that his continuance was denied several weeks before the date of the hearing. Reese had notice of the hearing and had an opportunity to be present. As the district court stated, Reese ‘could have secured other counsel or appeared in person.’ Further, if Reese had chosen to appear at the hearing and merely raised his issues, ‘then the matters could have been appealed to the District Court and counsel would have been available to represent the interests of his client[].’ ” 2012 WL 401620, at *3.

Here, Rother was notified of the date of his hearing—January 20, 2011—in a letter dated December 17, 2010. Although the letter was mailed approximately 1 month prior to the date of the hearing, Rother requested the in-person hearing in a letter faxed July 20, 2010. As the district court stated in affirming the denial of the continuance, “[Rother] had months and months and months to go get an attorney to represent him at

that hearing.” Rother has not shown that the hearing officer's denial of his request for a continuance denied him notice of the hearing or an opportunity to be heard; accordingly, the denial did not violate his due process rights.

*5 Rother also asserts that the denial of the continuance was arbitrary, unreasonable, and capricious. A ruling on a motion for continuance will not be disturbed absent an abuse of discretion. See *State v. Cook*, 281 Kan. 961, 986, 135 P.3d 1147 (2006) (stating that, in a criminal case, whether to grant a continuance lies within the sound discretion of the district court). A judicial action constitutes an abuse of discretion if the action is arbitrary, fanciful, or unreasonable or is based on an error of law or fact. *Critchfield Physical Therapy v. The Taranto Group, Inc.*, 293 Kan. 285, 292, 263 P.3d 767 (2011). The party asserting the abuse of discretion bears the burden of showing it. *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009).

Here, although Rother alleges that the hearing officer's action in denying the request for a continuance was an abuse of discretion, he does not further explain or support this contention. Instead, Rother again emphasizes the timeline of his request for the hearing, notification of the hearing date, and his request for a continuance. Rother reiterates that the denial of the continuance denied him due process, yet he does not explain why the action was otherwise an abuse of discretion. A point raised incidentally in a brief and not argued therein is deemed abandoned. *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 71, 274 P.3d 609 (2012). Rother has failed to meet his burden of showing that the administrative hearing officer abused his discretion by denying the motion for continuance.

Affirmed.

Parallel Citations

2013 WL 1339900 (Kan.App.)