104 Wash.App. 1036

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

John Michael HOAG, Respondent,
v.
STATE of Washington, Department of Licensing, Appellant.

No. 45245–2–I. | Feb. 5, 2001.

Appeal from Superior Court of Whatcom County, Docket No. 99–2–00642–5, judgment or order under review, date filed 08/20/1999; David S. Nichols, Judge.

Attorneys and Law Firms

Dale T. Wagner, Bellingham, WA, for appellant(s).

John Hoag, Appearing pro se, Blaine, WA, for respondent(s).

Opinion

UNPUBLISHED OPINION

PER CURIAM.

***1** Drivers who refuse a test of their breath or blood alcohol level shall have their driver's license revoked if the refusal occurred after a legal arrest for driving under the influence of intoxicating liquor or drugs (DUI). Substantial evidence supported the hearing officer's finding that probable cause existed to arrest Hoag for DUI. We reverse the superior court and affirm the hearing officer.

FACTS

The Department of Licensing (Department) revoked the driver's license of John Hoag pursuant to Washington's implied consent law after the Department concluded that Hoag refused to submit to a breath/blood test for alcohol and drugs. Hoag had been arrested for DUI.

Deputy Nyhus of the Whatcom County Sheriff's Office was advised of a domestic disturbance, that two males were leaving the area in a small blue vehicle, and that one of them had a shotgun. As Deputy Nyhus approached the area, he observed a small blue Honda automobile with two male occupants travelling from the direction of the domestic disturbance at a speed well in excess of the posted limit. The deputy followed the vehicle and noticed that the license tabs were expired.

The deputy stopped the car and identified the driver as John Hoag. The deputy noticed that Hoag's eyes were bloodshot and watery and that he swayed from side to side while standing, moving from foot to foot to maintain his balance. He detected the odor of intoxicants on Hoag's breath and observed an open, nearly empty bottle of hard liquor on the emergency brake, between the front seats. He also noticed a large empty can of beer under the passenger seat. The deputy arrested Hoag for DUI.

At the Whatcom County jail, the deputy advised Hoag of his constitutional rights, gave Hoag the implied consent warnings for breath tests, and allowed Hoag to speak with a public defender prior to making a decision regarding a breath test. After speaking to the attorney, Hoag refused to submit to the breath test as requested by the deputy.

The Department issued an order of revocation of Hoag's driving privilege. Hoag requested an administrative hearing to challenge the revocation. The hearing officer concluded that Deputy Nyhus had reasonable grounds to believe Hoag had been driving under the influence of intoxicating liquor. The hearing officer also concluded that the deputy had probable cause to arrest Hoag; he was properly advised of his implied consent warning; and he was asked to submit to a test of his breath and refused to do so. The hearing officer affirmed the revocation of Hoag's driving privilege. Hoag appealed the revocation to superior court. The superior court reversed the revocation of Hoag's license finding a lack of probable cause to arrest Hoag for DUI. The Department appealed.

DISCUSSION

This court reviews an administrative decision from the same position as the superior court.[1] The superior court reviews a final order of the Department of Licensing in the same manner as an appeal from a decision of a court of limited jurisdiction.[2] The reviewing court shall accept the factual determinations of the administrative agency so long as they are supported by substantial evidence in the record.[3]

***2** Under Washington's implied consent law, any person who drives a motor vehicle is deemed to have given consent to a test for breath and blood alcohol levels if arrested for any

offense involving driving or the physical control of a motor vehicle while under the influence of intoxicating liquor or drugs. [4] The Department shall revoke the driving privilege of persons who refuse the test, subject to an opportunity for administrative review. [5]

'A lawful arrest is a prerequisite to the application of the implied consent statute.' [6] The fourth amendment of the United States Constitution requires that for an arrest to be lawful, an officer must have probable cause to believe a crime has been committed. [7]

The implied consent law itself also requires the arresting officer to have "reasonable grounds to believe the person had been driving ... a motor vehicle while under the influence of intoxicating liquor." [8] This is separate from the requirement of probable cause to arrest, but where the suspect was arrested for driving while under the influence of intoxicating liquor the two requirements are analyzed together. [9] Here the superior court reversed the hearing officer based on a lack of probable cause and did not address the statutory requirement of reasonableness.

Here the facts were sufficient to support the hearing officer. The deputy had a reasonable basis to stop Hoag because the vehicle and its occupants matched the general description of crime suspects reported in the area at the time; he observed Hoag travelling in excess of the speed limit; and Hoag had expired license tabs. The deputy observed that after Hoag exited the vehicle he seemed confused, swayed from side to side to maintain his balance, leaned on a parked vehicle, and failed follow the deputy's directions. Hoag had watery bloodshot eyes and smelled of intoxicants when the deputy contacted him. The deputy found an open and partially consumed bottle of liquor between the front seats of the car. These facts are sufficient. [10]

Substantial evidence supported the hearing officer's finding of probable cause. [11] There is no basis in the record to support the superior court's conclusion.

The trial court is reversed.

Parallel Citations

2001 WL 111762 (Wash.App. Div. 1)

Footnotes

1 *Walk v. Dep't of Licensing,* 95 Wn.App. 653, 656, 976 P.2d 185 (1999) (citing *Galvin v. Employment Sec. Dep't,* 87 Wn.App. 634, 640, 942 P.2d 1040 (1997)). Walk states: '{W}e stand in the same position as the trial court.' (Emphasis added.) This is a common misstatement that could lead to confusion. While the superior court is ordinarily a trial court, when it reviews administrative decisions it acts as an appellate court with the administrative agency being the trial court.

2 *Walk,* 95 Wn.App. at 656 (citing RCW 46.20.308(9); *Hatfield v. Dep't of Licensing,* 89 Wn.App. 50, 52–53, 947 P.2d 269 (1997)).

3 *Walk,* 95 Wn.App. at 656 (citing *Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) 9.1(b)); Galvin,* 87 Wn.App. at 640 (citing *Penick v. Employment Sec. Dep't,* 82 Wn.App. 30, 37, 917 P.2d 136 (1996)).

4 RCW 46.20.308(1).

5 RCW 46.20.308(6)—(8).

6 *O'Neill v. Dep't of Licensing,* 62 Wn.App. 112, 116, 813 P.2d 166 (1991) (citing *Campbell v. Dep't of Licensing,* 31 Wn.App. 833, 837, 644 P.2d 1219 (1982)).

7 *Staats v. Brown,* 139 Wn.2d 757, 771, 991 P.2d 615 (2000) (citing *Graham v. Connor,* 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

8 *O'Neill,* 62 Wn.App. at 116 (quoting RCW 46.20.308); *Bell v. Dep't of Motor Vehicles,* 6 Wn.App. 736, 739, 496 P.2d 545 (1972)).

9 *O'Neill,* 62 Wn.App. at 116 (citing *Fritts v. Dep't of Motor Vehicles,* 6 Wn.App. 233, 237–38, 492 P.2d 558 (1971)).

10 See *State v. Gillenwater,* 96 Wn.App. 667, 669, 980 P.2d 318 (1999), *review denied,* 140 Wn.2d 1004 (2000); *State v. Smith,* 130 Wn.2d 215, 223–24, 922 P.2d 811 (1996); *Bokor v. Dep't of Licensing,* 74 Wn.App. 523, 527–28, 874 P.2d 168 (1994); *O'Neill,* 62 Wn.App. at 117–18.

11 Subsequent to the hearing officer's decision in this case, the Supreme Court held that a hearing officer's finding of probable cause may also be precluded on the basis of collateral estoppel if a court has already found that probable cause to arrest did not exist on the underlying DUI prosecution. *Thompson v. Dep't of Licensing,* 138 Wn.2d 783, 982 P.2d 601 (1999). This court may take judicial notice of facts not subject to reasonable dispute and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 101, 201(b)(2), 1101(a). The District Court Information System (DISCIS) is part of the court's

own computer record system and meets the requirements of ER 201(b)(2). We take judicial notice of the fact that DISCIS shows that Hoag's underlying DUI was not dismissed for lack of probable cause, but rather was fully adjudicated as 'not guilty.' Accordingly, collateral estoppel under Thompson does not apply to Hoag.

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