2010 WL 3719888

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Court of Appeals of Nebraska.

Nicholas A. LARKINS, Appellee,
v.
DEPARTMENT OF MOTOR VEHICLES
OF the STATE of Nebraska, Appellant.

No. A–09–1087. | Sept. 14, 2010.

West KeySummary

1 **Automobiles**
Intoxication and implied consent in general

Officer's sworn report contained sufficient facts to establish, in license revocation proceeding, that motorist was operating or in physical control of vehicle. District court found that officer's report which stated, "stopped vehicle for speeding," was insufficient to establish that motorist was operating the vehicle. The notion that one's vehicle could be speeding without such person driving or operating the vehicle was illogical. Therefore, the sworn report was sufficient to establish that motorist was in control of the vehicle when it was stopped for speeding. Neb.Rev.St. § 60–498.01(3).

Cases that cite this headnote

Appeal from the District Court for Sarpy County: Max Kelch, Judge. Motion for rehearing sustained. Original memorandum opinion withdrawn. Reversed and remanded with direction.

Attorneys and Law Firms

Jon Bruning, Attorney General, and Matthew A. Works for appellant.

No appearance for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

Opinion

**MEMORANDUM OPINION
AND JUDGMENT ON APPEAL**

PER CURIAM.

INTRODUCTION

***1** Because case law holds that an agency record before the court is deemed admitted into evidence without necessity of formal offer, we sustain the motion for rehearing of the Nebraska Department of Motor Vehicles (Department) and withdraw our former memorandum opinion in this administrative license revocation appeal. Reaching the merits, we conclude that a sworn report stating, in pertinent part, "[s]topped vehicle for speeding," conveyed facts sufficient to demonstrate that the person was operating a motor vehicle. We reverse the district court's contrary decision, and remand the matter with direction to review the Department's decision de novo on the record of the Department.

BACKGROUND

We initially submitted this appeal without oral argument pursuant to Neb. Ct. R.App. P. § 2–111(B)(1) (rev.2008). In *Larkins v. Department of Motor Vehicles,* No. A–09–1087, 2010 WL 3137263 (Neb.App. Aug.3, 2010) (selected for posting to court Web site), we concluded that the record from the district court was insufficient to conduct a meaningful review and we reversed the district court's decision and remanded the matter for further proceedings.

In the Department's brief on rehearing, it noted that it had filed a supplemental praecipe with the district court directing the court to transmit to this court the certified record of the Department in the administrative proceedings leading to the instant appeal. We now have the agency record before us.

Because the legal issue on the merits is very narrow, we note only that the sworn report submitted to the Department by the arresting officer stated the reasons for the arrest of Nicholas A. Larkins as follows: "Stopped vehicle for speeding, odor of an alcoholic beverage. Conducted SFST's -showed signs of impairment[.] Completed PBT—failed .238[.] Conducted chemical test[.]"

The district court concluded that the sworn report met the requirements of Neb.Rev.Stat. § 60–498.01(3)(b) and (c) (Reissue 2004), but failed to fulfill the requirement of subsection (3)(a) that the sworn report state that "the person was arrested as described in subsection (2) of [Neb.Rev.Stat. §] 60–6,197 [(Reissue 2004)]." § 60–498.01(3)(a). The court was focusing on the language of Neb.Rev.Stat. § 60–6,197(2) (Reissue 2004) authorizing peace officers to require chemical tests of arrested persons regarding acts committed while the "person was driving or was in the actual physical control of a motor vehicle in this state." The court characterized the sworn report as stating that "the officer came into contact with [Larkins] due to a traffic stop for speeding" and concluded that "[t]his allegation only partially meets the requirements of ... § 60–498.01(3)(a), due to the failure to set forth [that Larkins] was operating or in actual physical control of a motor vehicle."

ASSIGNMENTS OF ERROR

In the Department's motion for rehearing, it asserts that we erred in finding that the district court was required to mark the agency record as an exhibit and receive it in evidence at the appeal hearing.

***2** In the Department's initial brief on appeal, it assigned that the district court erred in finding that the reasons for arrest in the sworn report of the law enforcement officer, which stated in pertinent part, "[s]topped vehicle for speeding," did not contain facts establishing that Larkins was operating or in actual physical control of a motor vehicle. Larkins did not file a brief in this court.

STANDARD OF REVIEW

Under the Administrative Procedure Act, Neb.Rev.Stat. §§ 84–901 to 84–920 (Reissue 2008 & Supp.2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record. *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008).

ANALYSIS

Agency Record.

In the Department's brief on rehearing, it calls our attention to the Nebraska Supreme Court's decision in *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982) (superseded by statute on other grounds as stated in *Payne v. Nebraska Dept. of Corr. Servs.*, 249 Neb. 150, 542 N.W.2d 694 (1996)). In *Maurer*, the court held that where appeals are taken from an administrative agency to the district court, pursuant to the provisions of § 84–917 (Reissue 1981), the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence.

We agree that our initial opinion did not consider the *Maurer* opinion and that our initial opinion "is inconsistent with *Maurer* and will likely create confusion among district courts throughout the state." Brief for appellant on rehearing at 2. We therefore sustain the Department's motion for rehearing and withdraw our former memorandum opinion. Because of the ultimate disposition, we also determine that no oral argument should be allowed on rehearing.

Although we adhere to the *Maurer* holding, we observe that *Maurer* was decided, at least in part, in reaction to the adoption of statutory language formerly found in Neb.Rev.Stat. § 25–2733(2) (Reissue 1995) (where it had been recodified from Neb.Rev.Stat. § 24–541.06 (Cum.Supp.1982), as the Supreme Court cited to it), which provided that on appeal from county court to district court, the county court bill of exceptions was by the act of filing by the district court clerk considered as admitted in evidence before the district court. Interestingly, in 2008, that

language was replaced by general language authorizing rules by the Nebraska Supreme Court regarding bills of exceptions. Section 25–2733(2) was amended as follows:

> ***3** (2) ~~The bill of exceptions, if filed with the clerk at of before the hearing, shall be considered admitted in evidence on the hearing of the appeal unless the court on objection by a party excludes all or part of it.~~ *The ordering, preparing, signing, filing, correcting, and amending of the bill of exceptions shall be governed by the rules of practice prescribed by the Supreme Court.*

2008 Neb. Laws, L.B. 1014, § 13. However, the sections of the Administrative Procedure Act relied upon by the *Maurer* court have not been changed in any manner that would affect the reasoning of the *Maurer* opinion. Thus, we have the curious situation where the statute that probably prompted the *Maurer* interpretation has been effectively repealed, yet the *Maurer* holding continues.

Before turning to the merits of the Department's appeal, we also note that the Department should share some of the blame for our initial misstep. The Department's brief on rehearing notes that it "filed a[p]raecipe for [s]upplemental [t]ranscript with the Clerk of the Sarpy County District Court ... requesting that the certified agency record, including both the transcript and the bill of exceptions ... be forwarded to this [c]ourt." Brief for appellant on rehearing at 3. Thus, the Department tacitly admits that its initial praecipes to the district court were not sufficient to direct the district court to transmit the agency record to this court. Presumably, when the Department prepared its initial brief on appeal to this court, it was aware that the agency record was not transmitted by the district court. But, in any event, we now have the agency record before us and turn to the merits of the Department's appeal.

District Court's Standard of Review.

Before turning to the specific issue before us, we note that the district court's decision incorrectly stated its standard of review. Although the district court's use of the wrong standard of review does not affect the main issue presented by the instant appeal, it does relate to the proper scope of the district court's action upon remand.

The district court relied upon Neb.Rev.Stat. § 60–4,105(3) (Reissue 2004) and *Strong v. Neth*, 267 Neb. 523, 676 N.W.2d 15 (2004), for the proposition that in an appeal of a revocation of a motor vehicle operator's license, the district court hears the appeal as in equity without a jury and determines anew all questions raised before the director of the Department.

However, administrative license revocations of the type in the case before us arise under § 60–498.01 and Neb.Rev.Stat. § 60–498.04 (Reissue 2004). The latter section states that such appeals are taken to the district court "in accordance with the Administrative Procedure Act." *Id.* Section 60–4,105, upon which the district court relied, begins, in subsection (1), with the phrase "[u]nless otherwise provided by statute." Section 60–498.04 provides "otherwise," and thus, it, rather than § 60–4,105, controls the instant appeal.

***4** Similarly, *Strong v. Neth*, *supra*, was an appeal from the revocation of a commercial driver's license under an entirely different provision of law concerning an interstate compact and the driver's conduct and legal proceedings in Wyoming.

As we explained in *DeBoer v. Nebraska Dept. of Motor Vehicles*, 16 Neb.App. 760, 751 N.W.2d 651 (2008), in reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals. Pursuant to § 84–917(5)(a) (Reissue 2008) of the Administrative Procedure Act, the district court reviews an agency decision de novo on the record of the agency. *DeBoer v. Nebraska Dept. of Motor Vehicles*, *supra*. We have already set forth our own standard of review under the Administrative Procedure Act, and we now turn to the main issue before us.

Sufficiency of Sworn Report.

The district court correctly recognized that the sufficiency of the sworn report depends upon whether the instant sworn report is more comparable to the sworn report in *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb.App. 446, 729 N.W.2d 95 (2007), or to the one in *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). In each instance, an important issue was whether the sworn report set forth an adequate recitation that the person was driving or was in actual physical control of a motor vehicle.

In *Yenney*, the pertinent part of the sworn report stated: " '[P]assed out in front of [the gas] Station, near front doors. Signs of alcohol intoxication.' " 15 Neb.App. at 451, 729 N.W.2d at 99 (emphasis omitted). This court determined that

this information was insufficient to show that the person was driving or in a vehicle or even near one.

On the other hand, in *Betterman*, the sworn report stated: " '[R]eckless driving. Driver displayed signs of alcohol intoxication. Refused all SFST and later breath test.' " 273 Neb. at 182, 728 N.W.2d at 578. The Nebraska Supreme Court found that the recitation was sufficient to meet the requirements of § 60–498.01(2), which are in all material respects the same as the requirements of § 60–498.01(3).

The district court concluded that the recitation "[s]topped vehicle for speeding" was more akin to the sworn report in *Yenney* than to such report in *Betterman*. The court found the word "driving" in *Betterman* to be essential. We disagree. The critical issue is whether the words used in the sworn report are sufficient to convey the information required by § 60–498.01(3). We conclude that these words convey that Larkins' vehicle was speeding, which necessarily means that Larkins was driving or was in actual physical control of a motor vehicle. We do not understand the notion that one's "vehicle" can be "speeding" without such person driving or operating the vehicle. The district court's contrary decision did not conform to the law.

***5** It necessarily follows that the decision of the district court must be reversed. However, our answer to the narrow question of law regarding the sufficiency of the sworn report does not empower us to direct the district court to affirm the agency decision. The district court applied the wrong standard of review and did not review the Department's decision de novo on the Department's record. See *DeBoer v. Nebraska Dept. of Motor Vehicles*, 16 Neb.App. 760, 751 N.W.2d 651 (2008). Moreover, the district court's initial decision was limited to the narrow question of whether the sworn report was sufficient to convey jurisdiction upon the Department. While we are empowered to determine that the district court erred in deciding this narrow question, our standard of review does not permit us to perform the de novo review that should have been made by the district court on the Department's record. Therefore, we must remand the matter to the district court with direction to review the agency decision de novo on the record of the agency.

CONCLUSION

We conclude that the Department's motion for rehearing should be sustained, and we withdraw our former memorandum opinion which stated, among other things, that the district court should have had the agency record marked as an exhibit and received in evidence. Because neither party objected to the agency record filed in the district court, the record was properly before the district court without necessity of formal offer. And because the record has been transmitted to this court, it is properly before us.

On the merits of the Department's appeal, we conclude that the sworn report stating, in pertinent part, "[s]topped vehicle for speeding," was sufficient to convey the information required by § 60–498.01(3)(a) that Larkins was driving or was in actual physical control of a motor vehicle. The district court's contrary decision did not conform to the law. We therefore reverse the judgment and remand the matter to the district court with direction to review the agency decision de novo on the record of the agency.

REVERSED AND REMANDED WITH DIRECTION.