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Court of Appeals of Nebraska.

Kriss L. SANDERSON, appellee,
v.
DEPARTMENT OF MOTOR VEHICLES, appellant.

No. A–05–043. | June 13, 2006.

Appeal from the District Court for Madison County: Robert B. Ensz, Judge. Reversed and remanded with directions.

Attorneys and Law Firms

Jon Bruning, Attorney General, and Laura L. Neesen for appellant.

Courtney Klein–Faust, of Fitzgerald, Vetter & Temple, for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

Opinion

SIEVERS, Judge.

***1** The Department of Motor Vehicles (the Department) appeals the judgment of the district court for Madison County, which reversed the decision of the Department to revoke the driver's license of Kriss L. Sanderson for 1 year.

FACTUAL AND PROCEDURAL BACKGROUND

Shortly before midnight on July 17, 2004, Nebraska State Patrol Trooper David Ramsey stopped Sanderson for speeding. During the stop, Trooper Ramsey detected an order of alcohol coming from within the vehicle and noticed that Sanderson had red, watery eyes. Trooper Ramsey had Sanderson perform several field sobriety tests, and Sanderson showed signs of impairment. After a preliminary breath test showed a result of .134, Trooper Ramsey placed Sanderson under arrest (on July 18, because it was then after midnight) for suspicion of driving under the influence. Sanderson was transported to a hospital in Norfolk, where he submitted to a blood test. Sanderson was then transported to the Madison County sheriff's office. The blood test result received by Trooper Ramsey on July 28 showed that Sanderson's alcohol content tested at .144 grams of alcohol per 100 milliliters of blood. Trooper Ramsey completed a sworn report and filed it with the Department on July 30. Sanderson was given a temporary license, valid for 30 days from the date of notice under the administrative license revocation (ALR) statutes. See Neb.Rev.Stat. § 60–498.01(5)(c) (Reissue 2004).

A petition for an ALR hearing was received by the Department on August 16, 2004, and a hearing was scheduled for September 1. Also on August 16, Sanderson filed a praecipe for subpoena duces tecum to be issued to Laurie Wieting (the analyst of Sanderson's blood test from the sample collected July 18, 2004). On August 23, the Department issued a subpoena duces tecum naming Wieting as the person to be subpoenaed and ordering her to appear at the September 1 hearing. Pursuant to the subpoena duces tecum, Wieting was also ordered to make the following available to Sanderson: the blood sample for Sanderson obtained pursuant to his arrest on July 18 and any available and relevant reports or documents that establish the foundational requirements for the admission into evidence of the results of any chemical analyses of any blood, breath or urine specimen, including but not limited to documents showing compliance with Title 177, N.A.C. for any analysis of a specimen of said Licensee's blood for alcohol content.

Trooper Ramsey notified the Department that due to a training conflict, he would be unable to attend the September 1, 2004, ALR hearing. The Department continued the hearing until September 17 and extended Sanderson's temporary license until September 18. On September 7, the Department issued a subpoena duces tecum naming Wieting as the person to be subpoenaed and ordering her to appear at the September 17 hearing. On September 8, pursuant to the instructions in the subpoena duces tecum, Wieting notified Sanderson's counsel and the Department that she was not available for the ALR hearing on September 17 because she had previously been subpoenaed to a jury trial in Nemaha County on that date. Sanderson did not ever file a motion to continue the hearing, nor did the Department continue the hearing on its own motion.

***2** On September 17, 2004, an ALR hearing was held, via teleconference, before a hearing officer for the Department, to determine whether Sanderson was operating or in the actual

physical control of a motor vehicle while under the influence of alcohol, in violation of Neb.Rev.Stat. § 60–6,196 (Reissue 2004). The hearing officer's report states that the hearing was conducted informally, which we take to mean that it was not a "rules of evidence hearing."

At the hearing, Sanderson argued that he was denied due process because Wieting was not present at the hearing and she was critical to Sanderson's ability to disprove the blood test result. The hearing officer noted that Sanderson could have requested a continuance if he felt Wieting's testimony was essential, but that Sanderson made no such request. Sanderson stated that if he had made a motion to continue, he would have lost his driving privileges, and that therefore, the Department should have moved for a continuance so that Wieting could appear and Sanderson's temporary license would have been extended. The hearing officer refused to grant a continuance on his own motion, and the hearing proceeded.

Trooper Ramsey participated in the ALR hearing and gave sworn testimony. The Department offered the "Notice/Sworn Report/Temporary License" signed by Trooper Ramsey, and such was received into evidence. Also received into evidence was the driving abstract for Sanderson showing a prior administrative license revocation.

The hearing officer recommended that the director of the Department (Director) find (1) that Trooper Ramsey had probable cause to believe Sanderson was operating or in the actual physical control of a motor vehicle in violation of § 60–6,196; (2) that Sanderson was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60–6,196(1); and (3) that Sanderson had a prior administrative license revocation. The Department entered an order revoking Sanderson's driver's license and/or operating privileges for 1 year, effective September 18, 2004.

On September 29, 2004, Sanderson filed his "Appeal Under the Administrative Procedures [sic] Act" in the district court for Madison County. Sanderson alleged numerous errors, including the failure of Wieting to appear at the hearing and the hearing officer's failure to continue the hearing on his own motion. The Department's order of revocation was stayed pending Sanderson's appeal to the district court. (We note that Sanderson argued to the district court that he was not provided with his blood sample as requested; however, he did not raise such argument to the hearing officer.)

A hearing on Sanderson's petition for judicial review was held, via teleconference, on December 3, 2004. On December 9, the district court entered an order finding as follows:

The only way in which Sanderson can refute the State's prima facie case is to show that his blood alcohol concentration was below the level to cause a revocation. Sanderson did not have this ability to refute the State's evidence at the hearing although he had previously requested the availability of the person and evidence representing his only means to do so. The Director had previously granted one continuance at the State's request. His refusal to do the same for Sanderson denied Sanderson, on September 17, 2004, any ability to refute the State's prima facie case. The Director erred in not doing so. The district court reversed the Department's September 18 order revoking Sanderson's license and remanded the case for a new hearing. The Department timely appeals the district court's order.

ASSIGNMENTS OF ERROR

***3** The Department alleges, restated, that the district court erred by (1) ruling that Sanderson was denied the ability to refute the State's prima facie case, based on the Department's refusal to continue the hearing on its own motion, and (2) determining that because the Department granted a continuance on the State's motion based on the arresting officer's unavailability, the hearing officer was obliged to also grant a continuance on his own motion based on the unavailability of Sanderson's witness—and that the failure to do so was error.

STANDARD OF REVIEW

Decisions of the Director, pursuant to Nebraska's ALR statutes, are appealed under the Administrative Procedure Act. *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002). A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. Neb.Rev.Stat. § 84–918(3) (Reissue 1999); *Trackwell v. Nebraska Dept. of Admin. Servs.*, 8 Neb.App. 233, 591 N.W.2d 95 (1999). 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. *Trackwell, supra.*

ANALYSIS

"The sworn report of the arresting officer shall be received into the record by the Hearing Officer as the jurisdictional document of the hearing, and upon receipt of the sworn report, the Director's order of revocation has prima facie validity." 247 Neb. Admin. Code, ch. 1, § 006.01 (2001). The Department makes a prima facie case for revocation once it establishes that the officer provided his or her sworn report containing the required recitations. *Morrissey v. Department of Motor Vehicles,* 264 Neb. 456, 647 N .W.2d 644 (2002) (citing *McPherrin v. Conrad,* 248 Neb. 561, 537 N .W.2d 498 (1995)). (Both *Morrissey* and *McPherrin* have been disapproved, but only to the extent that such cases suggest that a sworn report which does not include information required by statute may be supplemented by evidence offered at a subsequent hearing. See *Hahn v. Neth,* 270 Neb. 164, 699 N.W.2d 32 (2005).) The required recitations are (1) that the person was arrested as described in Neb.Rev.Stat. § 60–6,197(2) (Reissue 2004) (reasonable grounds to believe such person was driving under the influence) and the reasons for such arrest; (2) that the person was requested to submit to the required test; and (3) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration of .08 grams or more per 100 milliliters of blood or .08 grams or more per 210 liters of breath. § 60–498.01(3).

In the instant case, Trooper Ramsey's sworn report stated that Sanderson was validly arrested pursuant to § 60–6,197, and the report listed the reasons for arrest as "stopped for speeding (73/60), detected odor of alcoholic beverage, sobriety tests showed impairment, PBT of .134." The report further stated that Sanderson was requested to submit to the required test and that he did submit to a chemical test which indicated an alcohol concentration of .144 grams of alcohol per 100 milliliters of blood. Because Trooper Ramsey's report contained the required recitations, the Department made a prima facie case for revocation. Thus, the burden shifted to Sanderson to show that one or more of the recitations in the sworn report were false.

***4** Sanderson's counsel argued to the hearing officer and the district court that Sanderson was denied due process because Wieting was not present at the hearing and she was critical to Sanderson's ability to disprove the blood test result—although counsel for Sanderson did not explain to the hearing officer how Wieting's presence would disprove the blood test result. The hearing officer noted that a continuance could have been requested if Wieting's testimony was essential, but that Sanderson made no such request. Sanderson's counsel responded that if he had made a motion to continue, Sanderson would have lost his driving privileges during the continuance, and that therefore, the Department should have moved for a continuance so that Wieting could appear and Sanderson's temporary license would have been extended, or that the hearing officer should grant a continuance on his own motion. The State did not request a continuance, nor did the hearing officer grant a continuance on his own motion, and the hearing proceeded. Sanderson offered no evidence, and the revocation was ordered.

According to 247 Neb. Admin. Code, ch. 1, § 010.01 (2001), "Any party desiring a continuance of the hearing shall request the same in writing, stating the reasons for such request...." And, 247 Neb. Admin. Code, ch. 1, § 010.03 (2001), states in part that "[r]equests for continuance beyond the expiration date of the Appellant's temporary operator's license shall not stay the administrative license revocation, except when the motion for continuance is made by the Director."

Sanderson cited *McPherrin v. Conrad,* 248 Neb. 561, 537 N.W.2d 498 (1995), in his argument to the district court. However, the instant case is different from *McPherrin,* in which the Director refused to order the Department of Health to produce a sample of Michael McPherrin's blood for independent testing, stating that he, the Director, did not have the authority to issue an order directing another state agency to produce physical evidence. The Nebraska Supreme Court held that the Director did have the authority to order the Department of Health to produce a sample of McPherrin's blood for independent testing, because the Department of Health, like the Department of Motor Vehicles, was another agency of the State and the State is in effect one entity. The Nebraska Supreme Court found that McPherrin had the burden of establishing he did not have more than the allowable concentration of alcohol in his blood and that thus, the Department's failure to produce the sample of McPherrin's blood violated McPherrin's due process rights because "due process in an administrative proceeding includes the reasonable opportunity to present evidence concerning the accusation." *Id.* at 566, 537 N.W.2d at 501. In the instant case, the Director did order Wieting to appear at the hearing and also ordered her to provide Sanderson with a sample of his

blood prior to the hearing. Thus, *McPherrin* is clearly not determinative in this case.

***5** In *Bender v. Department of Motor Vehicles*, 8 Neb.App. 290, 301, 593 N.W.2d 27, 34 (1999), this court held that "[t]he decision of the hearing officer and the Director not to seek enforcement of the subpoena to [the witness], which [the witness] disobeyed, was arbitrary and untenable." The witness in *Bender* was an employee of a forensics laboratory who had been subpoenaed to testify about the analysis of the blood test, but the witness did not appear or give prior notice of unavailability. The Director's rationale for refusing to seek enforcement of the subpoena was the alleged tactic of the motorist's counsel in subpoenaing witnesses in other ALR matters and then not calling them as witnesses—a matter not of record which was inserted into the Director's decision after the hearing. We characterized the Director's action as a denial of due process. In support of our decision, we cited *In re Interest of Teela H.*, 4 Neb.App. 608, 547 N.W.2d 512 (1996), for the proposition that due process, although eluding precise definition, requires that there be fundamental fairness which involves, among other things, notice and opportunity to be heard.

The instant case is distinguishable from *Bender*, *supra*, which involved the failure of the hearing officer/Director to seek enforcement of a disobeyed subpoena for reasons which did not appear in the record. Here, the subpoenaed witness, Wieting, advised Sanderson's counsel and the Department more than a week before the September 17, 2004, hearing that she was not available because she was subpoenaed for a jury trial in Nemaha County on September 17. Thus, there was no refusal to obey a subpoena, nor was there arbitrary denial by the hearing officer to seek enforcement of the subpoena.

In *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005), the Nebraska Supreme Court held that driver's licenses are not to be taken away without procedural due process and that the fundamental requirement thereof is the opportunity to be heard at a meaningful time and in a meaningful manner. The court in *Chase* then said:

> In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the U.S. Supreme Court set forth three factors to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

269 Neb. at 893–94, 697 N.W.2d at 685.

The private interest at issue in this case is Sanderson's continued possession of his driver's license. And, "a driver's interest in his or her driving privileges is significant in today's society, as its loss may entail economic hardship and personal inconvenience." *Hass v. Neth*, 265 Neb. 321, 329, 657 N.W.2d 11, 20 (2003). The government's interest is "in protecting public health and safety by removing drunken drivers from the highways." *Id.* at 329, 657 N.W.2d at 21.

***6** As noted in *Chase*, *supra*, the second factor of the due process analysis in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (the risk of an erroneous deprivation of private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards), is the core of this appeal. The Department provided Sanderson notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. See *Hass*, *supra*. But, Wieting, the witness Sanderson wanted, could not then appear and the Department was not willing to continue the hearing on its own motion so that Wieting could later appear.

The record shows that Sanderson's counsel did not want to make the motion for a continuance because Sanderson would be unable to drive if the new hearing date was after September 18, 2004, when the temporary license expired. But, whether to ask for such continuance (which the record strongly suggests would have been granted) is a tactical decision for counsel and Sanderson which hinges on the likelihood that Wieting will provide evidence that her blood test analysis cannot be relied upon. If there is little or no likelihood of such "help" from Wieting, then a continuance is of no benefit to Sanderson, and under Nebraska's ALR law, he should not be driving after September 18. Sanderson's tactical choice was to not request a continuance and then argue on appeal that the failure of the hearing officer to make the motion to continue was a denial of due process. But, the logical predicate for that

proposition is that Sanderson indicate in some way to the hearing officer that Wieting's presence will tend to disprove the prima facie case and that having her present is not merely a "fishing expedition." If Sanderson makes some such showing in support of having the hearing officer order a continuance, then the notion that the refusal is fundamentally unfair gains some traction. We note that this situation is fundamentally different from *Bender v. Department of Motor Vehicles,* 8 Neb.App. 290, 593 N.W.2d 27 (1999), where we said that counsel did not have to disclose his strategy for examining the blood analyst in order to secure enforcement of the subpoena when the witness simply ignored the subpoena. Here, the question for us is whether some showing needs to be made to support having the hearing officer continue the hearing on his own motion, which has the effect of allowing the motorist to drive and poses a risk to the public, which risk the ALR procedure seeks to combat. We hold that under these circumstances, such a showing is required before one can conclude that a failure by the hearing officer to continue the matter on his own motion is a denial of due process.

The reality is that if Sanderson sought a continuance and Wieting did in fact impeach her analysis of the blood test—and there is absolutely nothing, not even a comment from counsel, to suggest that she would negate her own analysis—Sanderson would be unable to drive a minimal number of days. If, on the other hand, Wieting's testimony provided no "help" to Sanderson, he obviously is not harmed by the lack of the continuance, because his license would be lost in any event. In summary, because Wieting was Sanderson's witness, his choice was to disclose enough to the hearing officer to get him to order the continuance on his own or, in the alternative, to decide whether Wieting's testimony was helpful enough to request a continuance to get her testimony so as to ultimately avoid a year's revocation at the cost of a few days of nondriving during the continuance.

***7** On this record, the Department was under no obligation to continue the hearing on its own motion so that Wieting could appear. As stated previously, this was not a case in which the Department failed to issue a subpoena to Wieting, nor was it a case in which the Department failed to enforce the subpoena that was issued. The Department took all necessary steps in securing Wieting's presence, and the hearing officer was apparently willing to grant Sanderson a continuance if he would have requested one.

Additionally, the Department was under no obligation to continue the hearing on its own motion in order that Sanderson's witness be able to appear, merely because of a prior continuance given the State because of the unavailability of the arresting officer. (We note that the continuance posed no prejudice to Sanderson because the new date was at a time when his temporary license was still valid. See *Searcey v. Nebraska Dept. of Motor Vehicles,* 12 Neb.App. 517, 679 N.W.2d 242 (2004) (discussing lack of prejudice to motorist from continuance granted because of arresting officer's unavailability).) The district court cited no authority for the notion that because the State secures a continuance, the hearing officer must then give the motorist a continuance on the hearing officer's motion, irrespective of whether the motorist's unavailable witness will actually detract in any way from the State's prima facie case. Sanderson obviously did not disprove the State's prima facie case, and no basis for a reversal on that ground is present. We find no violation of Sanderson's due process rights, and the district court erred in reversing the order of the Department. Therefore, we reverse the order of the district court and reinstate the Department's order of revocation of Sanderson's license.

REVERSED AND REMANDED WITH DIRECTIONS.