291 P.3d 1073 (Table)
Unpublished Disposition
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Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Justin L. WHITEMAN, Appellant.

No. 107,335. | Jan. 11, 2013.

Appeal from McPherson District Court; Carl B. Anderson, Jr., Judge.

Attorneys and Law Firms

Roger L. Falk, of Law Office of Roger L, Falk, P.A., of Wichita, and Kristen B. Patty, of Wichita, for appellant.

Gary Luke Foiles, deputy county attorney, David Aaron Page, county attorney, and Derek Schmidt, attorney general, for appellee.

Before PIERRON, P.J., MALONE, C.J., and BUKATY S.J.

Opinion

MEMORANDUM OPINION

PER CURIAM.

***1** Justin L. Whiteman appeals the district court's denial of his motion to suppress the results of a blood-alcohol test he agreed to take after being arrested for driving under the influence of alcohol (DUI). We affirm.

Whiteman was charged with speeding, in violation of K.S.A. 8–1558, and DUI, in violation of K.S.A.2009 Supp. 8–1567(a). Before trial, he filed a motion to suppress the results of his blood test. Whiteman argued it would be "incredulous" for the district court to find valid consent where an officer provided "inaccurate legal information" to him. The court held an evidentiary hearing on the motion.

At the suppression hearing, Sgt. Jason Smith of the McPherson County Sheriff's Department testified that on June 20, 2010, at around 1 a.m., he was driving north on the interstate where the speed limit was 70 mph. A truck travelling south caught his attention because it was "obviously" speeding. After clocking the truck at 90 mph, Sgt. Smith turned around through the median and gave chase. Before activating his patrol car's emergency lights, Sgt. Smith saw the truck's brake lights illuminate twice. According to his training and experience, erratic braking is a possible sign of impairment.

Sgt. Smith initiated a traffic stop and made contact with the driver—Whiteman. Sgt. Smith smelled a strong odor of alcohol emanating from the truck and saw Whiteman fumble for his insurance paperwork. Whiteman denied that he had been drinking. Sgt. Smith asked Whiteman to exit the truck and sit in the patrol car. Inside the patrol car, Sgt. Smith smelled a very strong odor of alcohol on Whiteman's breath. Then Whiteman backpedalled and admitted he had been drinking. He also divulged he had a prior DUI conviction and had been advised by his attorney to refuse testing.

Whiteman reluctantly agreed to submit to field sobriety testing. He did not follow one of Sgt. Smith's instructions on the horizontal gaze nystagmus and exhibited impairment clues on the walk-and-turn (3 of 8) and one-leg-stand (1 of 4) tests. According to Sgt. Smith's training and experience, a person who exhibits two or more clues may have an illegal blood-alcohol concentration (BAC). Even though Whiteman confessed that he could not pass the field sobriety tests, Sgt. Smith talked him into taking a preliminary breath test (PBT). The following conversation can be heard on the patrol car video, which was admitted into evidence:

> "Whiteman: I mean I gotta blow .04.
>
> "Sgt. Smith: Uh, you got, no you're not operating under [commercial driver's license (CDL)] status, man. Okay, so don't worry about it. You are .113, okay, that is .08 is the legal limit that you have to worry about right now.... The zero-four part does not kill you, here. If you were driving a truckload of pigs, sure, alright, but you're not."

After arresting Whiteman for DUI, Sgt. Smith gave him the implied consent advisory. Sgt. Smith read the nine implied consent notices on the front of DC–70 form. He did not read the .02 advisory for drivers under 21 or the CDL advisory on the back of the form because Whiteman was over 21 and "wasn't operating under CDL status." Sgt. Smith knew that Whiteman had a CDL because he saw the "big red letters" on

his driver's license and dispatch reported a "valid CDL." The following conversation can be heard on the patrol car video:

***2** "Sgt. Smith: So that's all nine that apply to you, okay? The CDL part doesn't apply to you because it's just, you're not operating under CDL status right now. So, my question to you is, will you submit to a blood test to determine the alcohol level in your system?

"Whiteman: A blood test?

"Sgt. Smith: Yes, sir. We, we don't do breath. All I do is blood.

"Whiteman: I, I suppose so.

"Sgt. Smith: Okay. Alright.

....

"Whiteman: So if, for some reason, uh, they take this blood and, and I'm not under the influence at that time, am I good?

"Sgt. Smith: Uh, well then what it is, we would have to prove that you were unsafe to operate, even though you had been drinking but tested under .08, okay?

"Whiteman: Which probably won't happen.

"Sgt. Smith: Who knows, okay? But, uh, as far as your license, you wouldn't lose the license because you wouldn't test over oh-eight."

Following his blood-test failure, Whiteman received a notice of suspension. The DC–27 form contained the following information:

"*If you possess a commercial drivers license*, the following *additional* action will be taken on your *commercial driving privileges* as a result of a conviction for violating K.S.A. 8–1567 or a final determination that you have refused or failed a test, as defined in K.S.A. 8–1013, and amendments thereto.

"*First Occurrence*, as defined by K.S.A. 8–1013(e): 1 year suspension of commercial driving privileges.

"*Second Occurrence*, as defined by K.S.A. 8–1013(e): permanent revocation of commercial driving privileges."

Whiteman testified that after being stopped, he was concerned about his CDL because it was required for his employment. He said he agreed to take the blood test because Sgt. Smith told him twice that it would not affect his CDL. Whiteman said his CDL had not yet been revoked. Whiteman further testified that the "permanent revocation" language on the DC–27 form was "just the opposite" of what Sgt. Smith told him.

After hearing all the evidence, the district court took the matter under advisement and allowed the parties to submit additional authority. Almost 2 weeks later, the district court denied Whiteman's motion to suppress:

> "The Court finds that Sergeant Smith gave [Whiteman] incorrect information concerning the effects of a [blood] test on his CDL license, but the appropriate implied consent notices were given and the area that Sergeant Smith got into was a non-mandated area. The Court sees no prejudice to [Whiteman] from what he was told by Sergeant Smith and therefore the Court finds that such incorrect information should not be allowed to defeat the actual testing that took place and [Whiteman's] motion challenging this point is overruled."

Whiteman's case proceeded to a bench trial on stipulated facts. The stipulation contained his continuing objection to the admission of the blood-test results and preserved his right to appeal the district court's denial of his motion to suppress. The court found Whiteman guilty on both counts, placed him on probation for 1 year, and fined him $1,000 for his second DUI and $105 for speeding.

***3** Whiteman first argues his motion to suppress should have been granted because he was misinformed of the effect of alcohol testing on his CDL. The State counters that this issue has already been resolved against Whiteman in *State v. Becker*, 36 Kan.App.2d 828, 145 P.3d 938 (2006), *rev. denied* 283 Kan. 932 (2007).

When the facts material to a district court's decision on a motion to suppress are not in dispute, whether to suppress is a question of law over which an appellate court has unlimited review. *State v. Porting*, 281 Kan. 320, 324, 130 P.3d 1173 (2006). Additionally, whether a defendant'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).

The Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights prohibit unreasonable governmental searches and seizures. See *State v. Conn*, 278 Kan. 387, 399, 99 P.3d 1108 (2004) (blood test is a search). A warrantless search is per se unreasonable unless it falls within an exception to the search warrant requirement recognized in Kansas. *State v. Daniel*, 291 Kan. 490, 496, 242 P.3d 1186 (2010), *cert. denied* 131 S.Ct. 2114 (2011); see *State v. Sanchez–Loredo*, 294 Kan. 50, 55, 272 P.3d 34 (2012) (consent is a recognized exception). By operating a motor vehicle in Kansas, a person is deemed to have consented to alcohol testing. K.S.A.2009 Supp. 8–1001(a).

A law enforcement officer must request an alcohol test if the officer has reasonable grounds to believe a person was operating a vehicle while under the influence of alcohol and the person has been arrested for DUI. K.S.A.2009 Supp. 8–1001(b)(1)(A). The officer must give the person certain notices, orally and in writing, before administering a blood test. K.S.A.2009 Supp. 8–1001(k). Sgt. Smith correctly gave Whiteman notice that "if the person *refuses* to submit to and complete any test of ... blood ... requested by a law enforcement officer, the person's driving privileges will be suspended for ... two years for the second occurrence," and "if the person *submits to* and completes the test ... and the test results show an alcohol concentration of .08 or greater, the person's driving privileges will be suspended for one year for the second ... occurrence." (Emphasis added.) K.S.A.2009 Supp. 8–1001(k)(4), (6).

Whiteman contends that his implied consent to the blood test is invalid because Sgt. Smith did not give him notice that his CDL would be suspended for life upon his second noncommercial DUI conviction, test refusal, test failure, "or any combination thereof, arising from two or more separate incidents." K.S.A.2009 Supp. 8–2,142(a)(2), (c). This court rejected his argument in *Becker*, 36 Kan.App.2d at 832–36. Becker, like Whiteman, was stopped while driving a noncommercial vehicle and was not given notice that his CDL would be suspended if he failed an alcohol test.

***4** The *Becker* court first recited the relevant portions of the implied consent law. The CDL notice must only be given when the officer has reasonable grounds to believe the person has been driving a commercial vehicle. See K.S.A.2009 Supp. 8–1001(1); K.S.A.2009 Supp. 8–2,145(a) (officer must give person notice that he will be disqualified for at least 1 year from commercial driving upon test refusal or a test result showing a BAC of .04 or greater). Otherwise, the officer need only give the notices applicable to noncommercial drivers. 36 Kan.App.2d at 832; see K.S.A.2009 Supp. 8–1001(k).

The *Becker* court then examined the legislative history of the impact of DUI-related events on CDLs. Before the 2003 amendments, a CDL was subject to suspension only when the person was stopped while driving a commercial vehicle. See K.S.A.2002 Supp. 8–2,142(a), (c) (suspension for life upon second occurrence of commercial DUI, test refusal, or test failure). But the applicable statute now provides for CDL suspension even when the person was stopped while driving a noncommercial vehicle. See K.S.A.2009 Supp. 8–2,142(a), (c) (suspension for life upon second occurrence of commercial or noncommercial DUI, test refusal, or test failure). In this case, however, it is the legislature's inaction that is the most significant. The legislature did not amend the mandated notices to include a CDL suspension notice when a person is stopped while driving a noncommercial vehicle. See 36 Kan.App.2d at 832–33; K.S .A.2009 Supp. 8–1001(k) (officer not required to give person notice that CDL will be suspended upon a noncommercial DUI, test refusal, or test failure).

After reviewing *Meigs v. Kansas Dept. of Revenue*, 251 Kan. 677, 840 P.2d 448 (1992), and *Standish v. Kansas Dept. of Revenue*, 235 Kan. 900, 683 P.2d 1276 (1984)—both cited by Whiteman—the *Becker* court held that Becker's substantive due process rights were not violated by the officer's failure to notify him of an alcohol test's impact on his CDL. 36 Kan.App.2d at 835–36 (notice is a procedural rather than a substantive right); see *State v. Griffin*, No. 98,802, 2008 WL 4140644, at *l–2 (Kan.App.2008) (unpublished opinion) (reaching same conclusion as *Becker); State v. Felder*, No. 96,538, 2007 WL 1530259, at *6 (Kan.App.2007) (unpublished opinion), *rev. denied* 284 Kan. 948 (2007); *State v. Flying Out*, No. 96,722, 2007 WL 1461399, at *1 (Kan.App.2007) (unpublished opinion) (same), *rev. denied* 284 Kan. 948 (2007);

Whiteman asserts that his implied consent to the blood test is invalid, not only because Sgt. Smith did not give him notice of the lifetime CDL suspension, but because he gave him misinformation about the effect of an alcohol test on his CDL. This argument was rejected in *Cuthbertson v. Kansas Dept. of Revenue*, 42 Kan.App.2d 1049, 220 P.3d 379 (2009), *rev. denied* 291 Kan. 910 (2010). Cuthbertson, like Whiteman,

was stopped while driving a noncommercial vehicle and given misinformation about the impact of an alcohol test on his CDL. Cuthbertson was told that a test failure would have "the same" effect on his CDL as on his regular driver's license, 42 Kan.App.2d at 1050, and Whiteman was told that testing over .04 "w[ould] not kill [him]" and he would not lose "the license" unless he tested over .08.

***5** The *Cuthbertson* court made three key findings. One, the driver received all of the implied consent notices required by law, *i.e.*, the notices applicable to noncommercial drivers. 42 Kan.App.2d at 1052–55; see K.S.A.2009 Supp. 8–1001(k). Two, although the driver was not entitled to notice of the "collateral damage" to his CDL, once the officer "dove into the pool of gratuitous information, his responses [were] required to be correct statements of the law." 42 Kan.App.2d at 1055. And three, a driver who received an incorrect nonmandated notice must demonstrate prejudice to show reversible error. 42 Kan.App.2d at 1055–56. The *Cuthbertson* court held that the CDL misinformation was harmless error because even if the driver had been given the correct notice —that the only way to avoid a lifetime CDL suspension was to submit to an alcohol test and post a BAC of less than .08 —the driver presumably would have still taken the test. 42 Kan.App.2d at 1055–56.

Here, Sgt. Smith gave Whiteman the only implied consent notices required by law, the ones applicable to noncommercial drivers. See *Becker*, 36 Kan.App.2d at 832–36. Any nonmandated notice Sgt. Smith gave Whiteman was required to be a correct statement of the law. See *Cuthbertson*, 42 Kan.App.2d at 1055. While it can be argued that Sgt. Smith did not give an incorrect notice because he never mentioned Whiteman's CDL directly, the State fails to challenge the district court's finding that Sgt. Smith gave Whiteman "incorrect information" about the effect of a blood test on his CDL. Finally, the CDL misinformation was harmless error because even if Whiteman had been given the correct notice, he still would have had to submit to the blood test, post a BAC of less than .08, and avoid a noncommercial DUI conviction to prevent a lifetime suspension of his CDL. See 42 Kan.App.2d at 1056.

The district court did not err in denying Whiteman's motion to suppress the blood-test results.

Affirmed.

Parallel Citations

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