222 P.3d 1019 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

George TUBBS, Appellant,
v.
KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 101,454. | Jan. 29, 2010.
| Review Denied Nov. 8, 2010.

West KeySummary

1 **Automobiles**
Advice or warnings; presence of counsel

A defendant was not entitled to suppress evidence of his breath test results. Before the defendant was given the breath test, he was provided with a form that contained statutorily required implied consent advisories for commercial driver's licenses (CDL), and there was no requirement for the officer to read CDL advisories to an individual with a CDL when driving a noncommercial vehicle. Therefore the defendant had notice of the impact of a test refusal or test failure on his CDL. K.S.A. 8-1001(f).

Cases that cite this headnote

Appeal from Thomas District Court; Glenn D. Schiffner, Judge.

Attorneys and Law Firms

Roger L. Falk and Casey J. Cotton, of Law Office of Falk & Cotton, P.A., of Wichita, for appellant.

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

Before McANANY, P.J., GREEN and MALONE, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM.

***1** George Tubbs appeals from the trial court's grant of summary judgment in favor of the Kansas Department of Revenue (KDR) affirming the KDR's suspension of Tubbs' driving privileges. Tubbs' sole argument on appeal is that his breath test results should have been suppressed because the administering officer failed to provide the implied consent advisories relating to a commercial driver's license (CDL) before asking him to submit to the breath test. Based on this court's reasoning in *Robinson v. Kansas Dept. of Revenue*, 37 Kan.App.2d 425, 428, 154 P.3d 508, *rev. denied* 284 Kan. 947 (2007), and the numerous cases that have followed *Robinson*, we affirm the trial court's decision.

In November 2004, Tubbs was stopped by Trooper Brian Horney for a traffic violation after Tubbs nearly hit Horney. Although Tubbs possessed a CDL, he was driving a noncommercial motor vehicle when he was stopped by Horney. After making initial observations of Tubbs, Horney conducted field sobriety tests and later arrested Tubbs for driving under the influence of alcohol (DUI). Horney gave Tubbs oral and written notices (DC-70) as required by K.S.A. 8-1001(f). Tubbs submitted to a breath alcohol test, which showed that he had a breath-alcohol concentration of .08 or greater.

Horney completed an officer's certification and notice of driver's license suspension (DC-27) form, which outlined the procedure for requesting an administrative hearing, and served it on Tubbs. Horney also served Tubbs with a copy of the commercial certification (CDL-5) form.

Tubbs timely requested an administrative hearing. At the administrative hearing, Tubbs argued that he was not notified of the consequences of a test refusal or test failure on his CDL. When Tubbs was arrested, he had a prior administrative suspension resulting from a test failure. Due to Tubbs' prior occurrence, he faced a suspension of 1 year to his regular driving privileges under K.S.A. Supp. 8-1014. Moreover, because this was his second occurrence, Tubbs faced disqualification of his CDL eligibility for life.

After the administrative hearing, the hearing officer issued an order affirming the suspension of Tubbs' driving privileges for a test failure. The hearing officer, however, dismissed the CDL-5 certification because there was no evidence that Tubbs was driving a commercial vehicle when he was stopped. The hearing order provided that the action on Tubbs' driving privileges would begin on the 30th day after the date of the order, unless Tubbs filed a timely petition for review.

Tubbs petitioned the trial court for review of the administrative hearing order. Although Tubbs raised several arguments in his petition for review, the parties later stipulated that the only issue was whether Tubbs was required to be advised, before administration of the breath test, that a failure or refusal of the test would also affect his eligibility to possess a CDL. The KDR later moved for summary judgment on that single issue. When Tubbs failed to respond, the trial court granted the KDR's motion for summary judgment but gave Tubbs until a certain date to file a response.

***2** Thereafter, Tubbs filed a response to the KDR's motion for summary judgment and also filed a cross-motion for summary judgment. In a memorandum decision, the trial court determined that there was no statutory requirement that Tubbs be provided with notice, before the test request, of the consequences of a test refusal or failure on a CDL; and that Tubbs had not been denied due process because he had two opportunities to challenge the factual basis underlying the disqualification of his CDL, which had not yet been affected. Accordingly, the trial court granted the KDR's motion for summary judgment and denied Tubbs' cross-motion for summary judgment.

On appeal, Tubbs argues that the failure of Trooper Horney to furnish the statutorily mandated implied consent advisories for CDL holders before the breath test was administered rendered his later test result inadmissible in the administrative action.

Because the relevant facts in this case are undisputed, appellate court's review of the trial court's order regarding summary judgment is de novo. *Central Natural Resources v. Davis Operating Co.*, 288 Kan. 234, 240, 201 P.3d 680 (2009).

Moreover, the issue raised by Tubbs requires statutory interpretation, which is a pure question of law subject to unlimited appellate review. See *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 629, 176 P.3d 938 (2008).

When an appellate court is called upon to interpret a statute, the court's first task is to attempt to give effect to the intent of the legislature as expressed through its language. When a statute is plain and unambiguous, a court does not attempt to determine what the law should or should not be; nor does a court attempt to divine the legislative intent behind it. A court will not read or rewrite such a statute to add something not readily found within it. If a statute is clear as written, there is no need to resort to statutory construction. In short, statutory interpretation begins with the language selected by the legislature. If that language is clear and unambiguous, then statutory interpretation ends there as well. *Martin*, 285 Kan. at 629, 176 P.3d 938.

Implied Consent Advisories

K.S.A. 8-1001 authorizes the KDR to suspend an individual's driving privileges. When operating a motor vehicle, a person gives his or her implied consent to submit to chemical testing to determine the presence of alcohol. K.S.A. 8-1001(a). Under K.S.A. 8-1001(f), however, before administering a chemical test, an officer must furnish the driver of a noncommercial vehicle certain notices-both orally and in writing. One such notice is the following:

> "[I]f the person submits to and completes the test or tests and the test results show an alcohol concentration of .08 or greater, the person's driving privileges will be suspended for 30 days for the first occurrence, one year for the second, third or fourth occurrence and permanently revoked for a fifth or subsequent offense ." K.S.A. 8-1001(f)(E).

***3** Additionally, the officer must tell the person that a *refusal* to submit to and to complete the test will result in a 1-year suspension of his or her driving privileges for the first occurrence, a 2-year suspension for the second occurrence, a 3-year suspension for the third occurrence, a 10-year suspension for the fourth occurrence, and a permanent revocation for the fifth or subsequent occurrence. K.S.A. 8-1001(f)(D).

CDL Notice Requirements

The two statutes at issue here are K.S.A. 8-1001(g) and K.S.A. 8-2,145(a). K.S.A. 8-1001(g) governs when a commercial driver is to be given oral and written notice:

> "If a law enforcement officer has reasonable grounds to believe that the person has been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and

amendments thereto, while having alcohol or other drugs in such person's system, the person shall also be provided the oral and written notice pursuant to K.S.A. 8-2,145 and amendments thereto. *Any failure to give the notices required by K.S.A. 8-2,145 and amendments thereto shall not invalidate any action taken as a result of the requirements of this section* .... Any failure to give the notices required by K.S.A. 8-1567a, and amendments thereto, shall not invalidate any action taken as a result of the requirements of this section." (Emphasis added.)

K.S.A. 8-2,145(a) states the penalty for a commercial driver with a blood-alcohol concentration of .04 or greater:

> "Prior to requesting a test or tests pursuant to K.S.A. 8-2,137, and amendments thereto, in addition to any notices provided pursuant to K.S.A. 8-1001, and amendments thereto, the following notice shall be provided orally and in writing: Whenever a law enforcement officer has reasonable grounds to believe a person has been driving a commercial motor vehicle while having alcohol or other drugs in such person's system and the person refuses to submit to and complete a test or tests requested by a law enforcement officer or submits to and completes a test requested by a law enforcement officer which determines that the person's alcohol concentration is .04 or greater, the person will be disqualified from driving a commercial motor vehicle for at least one year, pursuant to Kansas law."

Both K.S.A. 8-1001(g) and K.S.A. 8-2,145(a) state that the commercial implied consent advisories are to be given when an officer has "reasonable grounds to believe a person has been driving a commercial motor vehicle." These statutes do not state that the advisories shall be given to persons with commercial licenses driving noncommercial vehicles. As a result, the plain language of these statutes does not require an arresting officer to read the CDL advisories to an individual with a commercial license when driving a noncommercial vehicle.

The minimum 1-year disqualification referred to in K.S.A. 8-2,145 is prescribed in K.S.A.2008 Supp. 8-2,142(a) for a "first occurrence" under that subsection. Moreover, K.S.A.2008 Supp. 8-2,142(c) also prescribes permanent CDL disqualification "upon the second or a subsequent occurrence of any offense, test refusal or test failure specified in subsection (a), or any combination thereof, arising from two or more separate incidents." As Tubbs correctly notes, the legislature amended K.S.A. 8-2,142 in 2003. L.2003, ch. 42, sec. 7. Before that amendment, a driver's commercial license was subject to a minimum 1-year suspension for a "first occurrence" or a permanent disqualification upon a second or subsequent occurrence for a test refusal or failure only when the person was driving a commercial vehicle when stopped. K.S.A. 8-2,142(a) and (c). The 2003 amendment expanded the scope of the suspension to apply to a driver's commercial license even when the person was stopped while driving a noncommercial vehicle. K.S.A.2008 Supp. 8-2,142(a).

***4** Importantly, the legislature chose not to amend the required implied consent notices to include notice of the minimum 1-year suspension or permanent disqualification of a CDL when the person is stopped while driving a noncommercial vehicle. See K.S.A. 8-1001(g). *Robinson*, 37 Kan.App.2d at 428, 154 P.3d 508. Until such time as the legislature chooses to amend the required implied consent notices in such a manner, there is no requirement that an individual possessing a CDL but driving a noncommercial motor vehicle must be advised of the potential ramifications under K.S.A.2008 Supp. 8-2,142 of failing or refusing a chemical breath test.

Tubbs attempts to analogize this case to *Meigs v. Kansas Dept. of Revenue*, 251 Kan. 677, 840 P.2d 448 (1992), where our Supreme Court held that the implied consent notices of K.S.A.1990 Supp. 8-1001(f)(1) were mandatory rather than directory. Because the officer in *Meigs* did not substantially comply with the mandatory implied consent notices of K.S.A.1990 Supp. 8-1001(f)(1), our Supreme Court affirmed the trial court's suppression of the defendant's breath test results. 251 Kan. at 680-83, 840 P.2d 448. Nevertheless, as this court pointed out in *Robinson*, there is a crucial distinction between *Meigs* and a case involving the CDL notice requirements: "the notices at issue in Meigs were statutorily required, whereas the notice at issue here was not." *Robinson*, 37 Kan.App.2d at 428, 154 P.3d 508.

Notices Given to Tubbs

Tubbs further suggests that he was misled by the notices provided to him because he was informed that his driving privileges would only be suspended for a period of 1 year if he submitted to testing as a second occurrence and that the CDL suspension periods applied only if he was driving a commercial vehicle. To support his argument, Tubbs cites to the DC-27, DC-70, and CDL-5 forms that were provided to him.

In addressing Tubbs' argument, this court does not consider either the CDL-5 or the DC-27 forms. Both of these forms were served on Tubbs after he submitted to the breath test and, therefore, have no bearing on his argument that his breath test results should be suppressed because the officer failed to provide the CDL notices *before* the breath test. As a result, the DC-70 form, which contained the implied consent advisory notices given to Tubbs before he submitted to the breath test, is the only form that this court considers.

The DC-70 form served on Tubbs before he submitted to the breath test contains the appropriate implied consent advisories required by K.S.A. 8-1001(f). Thus, Tubbs was told that his driving privileges could be suspended for 1 year for a second occurrence if he failed the breath test. Tubbs points out, however, that the reverse side of the DC-70 contains the following statement relating to suspension of commercial driving privileges:

> **"CDL ADVISORY**
>
> "IF THE PERSON WAS DRIVING A COMMERCIAL VEHICLE, AS DEFINED BY KANSAS LAW, THE FOLLOWING NOTICE IS ALSO APPLICABLE. IF THE PERSON WAS NOT DRIVING A COMMERCIAL VEHICLE AS DEFINED BY KANSAS LAW, THE FOLLOWING NOTICE DOES NOT APPLY.
>
> ***5** "Whenever a law enforcement officer has reasonable grounds to believe a person has been driving a commercial vehicle while having alcohol or other drugs in such person's system and the person refuses to submit to and complete a test or tests requested by a law enforcement officer or submits to and completes a test requested by a law enforcement officer which determines that the person's alcohol concentration is .04 or greater, the person will be disqualified from driving a commercial vehicle for at least one year, pursuant to Kansas law."

The CDL advisory contained on the back of the DC-70 form is an accurate statement of the law and is required by K.S.A. 8-2,145(a) when an officer has reasonable suspicion that a licensee was driving a commercial vehicle while having alcohol or drugs in the licensee's system. See *Robinson*, 37 Kan.App.2d 425, Syl. ¶ 2, 154 P.3d 508 ("Where an officer encounters a person who is driving a commercial vehicle and appears to be driving under the influence alcohol or drugs, the officer must inform the driver that he or she will be disqualified from driving a commercial vehicle for at least 1 year following either a test refusal or test failure.") The CDL advisory properly states that it does not apply to licensees driving noncommercial vehicles because it lists the penalty for a commercial licensee whose alcohol concentration is .04 or greater. Instead, the penalties for a CDL licensee driving a noncommercial vehicle come into effect when the licensee is convicted of a violation of K.S.A. 8-1567 or the licensee fails to submit to or complete an alcohol test. See K.S.A 2008 Supp. 8-2,142(a)(2). As a result, there was no error in the implied consent advisories given to Tubbs.

Previous Decisions

Tubbs concedes that this court in *Robinson*, 37 Kan.App.2d at 428, 154 P.3d 508, rejected the position that he is now taking in the present appeal. This court held that when a person is stopped for a suspected DUI while driving a noncommercial vehicle, an officer is not required by statute to provide notice of the effect a breath test failure will have on that person's commercial driver's license. 37 Kan.App.2d at 428, 154 P.3d 508. This court further rejected the appellant's argument that his procedural due process rights were violated because the officer did not warn him how a test failure would affect his CDL under K.S.A.2006 Supp. 8-2,142. This court found that the driver had received all of the notices required under K.S.A.2006 Supp. 8-1001(f) before he submitted to the breath test, and he "was afforded two opportunities, the administrative hearing and the de novo review before the district court, to contest the finding that he failed the [breath] test." 37 Kan.App.2d at 429, 154 P.3d 508. Thus, the driver's procedural due process rights were satisfied, and the driver received notice and an opportunity to be heard at a meaningful time and in a meaningful manner. 37 Kan.App.2d at 428-29, 154 P.3d 508.

Similarly, Tubbs' due process rights were satisfied in this case when he received the implied consent advisories required by K.S.A. 8-1001(f) and the notifications that he had the right to request a hearing and was then afforded the administrative hearing and the de novo review before the district court to

voice his objections to the breath test results and the resulting suspension.

***6** Numerous decisions by this court have followed *Robinson.* See *State v. Becker,* 36 Kan.App.2d 828, 832-33, 145 P.3d 938 (2006), *rev. denied* 283 Kan. 932 (2007); *Hilburn v. Kansas Dept. of Revenue,* No. 97,523, unpublished opinion filed March 7, 2008; *State v. Farrell,* No. 97,467, unpublished opinion filed January 25, 2008; *Garrison v. Kansas Dept. of Revenue,* No. 96, 289, unpublished opinion filed August 3, 2007; *Baker v. Kansas Dept of Revenue,* No. 95, 886, unpublished opinion filed March 23, 2007.

We agree with the previous decisions by this court. As a result, we affirm the trial court's decision affirming the KDR's suspension of Tubbs' driving privileges.

Affirmed.

Parallel Citations

2010 WL 445895 (Kan.App.)