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Unpublished Disposition

Only the Westlaw citation is currently available.

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123. Supreme Court of Nevada.

Robert B. LUCE, Appellant,

v.

The STATE of Nevada DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY, Respondent.

No. 57076. | Nov. 21, 2011.

#### Attorneys and Law Firms

Janet Trost, Settlement Judge

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#### Opinion

##### **ORDER OF AFFIRMANCE**

\*1 This is an appeal from a district court order denying a petition for judicial review in a Department of Motor Vehicles driver's license revocation action. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

According to the administrative law judge's findings of fact, on September 19, 2009, the Henderson Police Department received a telephone call reporting a possible drunk driver from an individual who had followed the other vehicle and informed the police that the possibly drunk driver had entered a gated community. Henderson Police Officer Chen arrived on the scene, spoke to the reporting witness and, after entering the gated community, stopped in front of the address of the registered owner of the reported vehicle. Officer Chen observed the vehicle parked in the street at this address and watched as appellant walked up the driveway to the residence. Immediately after appellant entered the residence through the garage, Officer Chen walked up to the home's front door, apparently knocked or rang the doorbell, and appellant answered at the door.

Henderson Police Department Officer Donnelly also arrived at the scene and interviewed the original reporting witness. The witness told Officer Donnelly that appellant was driving erratically, had almost hit her when he swerved into her lane, and at one point almost drove into a wall. The witness also added that it appeared that appellant was driving at a high rate of speed and that he ran a red light. Officer Donnelly subsequently spoke with appellant and, in the process, smelled alcohol on appellant and observed appellant's eyes as bloodshot and watery. Officer Donnelly also believed that appellant was having a difficult time understanding him, was speaking quickly, and had a blank stare and unsteady gait. Appellant denied consuming any alcohol and stated that there was no one else in his house. After appellant failed certain field sobriety tests, blood samples were ultimately taken that revealed appellant's blood-alcohol level had an alcohol concentration of .136 grams per 100 milliliters, which was over the legal .08 limit.

Thereafter, respondent State of Nevada Department of Motor Vehicles and Public Safety (DMV) revoked appellant's driving privileges and appellant subsequently requested an administrative hearing challenging the revocation. A hearing was conducted, during which Officer Donnelly testified for the DMV, and a friend of appellant's testified on appellant's behalf. Neither Officer Chen, the original reporting witness, nor appellant testified at this hearing. While Officer Donnelly's testimony largely set forth the facts recounted above, appellant's friend testified that, that evening, he and appellant had planned to watch a football game together, and that the friend had let himself into appellant's house and was there when appellant arrived. According to the friend, appellant subsequently arrived at the house and was upset over the outcome of a boxing match. The friend also testified that appellant, immediately upon arriving at the house, went to the refrigerator and poured a large glass of vodka and drank it.<sup>1</sup> The friend noted that, after the passage of a certain period of time, Officer Chen knocked at the door, and that the friend watched the events from inside the house but did not want to get personally involved.

\*2 In the administrative law judge's written decision, he expressed some skepticism over the testimony of appellant's friend, and noted that, even if that testimony was believed, then appellant was not telling the truth when he told Officer Donnelly that he had not consumed alcohol that night, since the friend had testified that appellant drank a large glass of vodka immediately after arriving at the house. Ultimately, the administrative law judge concluded that

Officer Donnelly had reasonable grounds to believe that appellant had operated a vehicle while under the influence of alcohol and sustained respondent's revocation of appellant's driver's license. Appellant then petitioned the district court for judicial review, which was denied, and now appeals to this court.

On appeal, appellant argues that the administrative law judge abused his discretion in sustaining the license revocation because it had not been legally established that he was in actual physical control of a vehicle in a public area while intoxicated. Additionally, appellant asserts that the evidence provided at the hearing, regarding whether Officer Donnelly had reasonable grounds to conclude that appellant had operated a vehicle under the influence, was merely uncorroborated double hearsay and that such evidence is insufficient to constitute the necessary substantial evidence to support an administrative law decision. Appellant also reiterates the friend's testimony that he only drank alcohol after driving. The DMV argues that the district court's decision should be affirmed.

In reviewing an administrative decision, this court, like the district court, may not substitute its judgment for that of the administrative tribunal on the weight of evidence on any question of fact. *NRS 233B.135(3)*; *Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383–84 (2008) (noting that this court's level of review of administrative decisions mirrors that of the district court). Rather, this court will generally review an administrative decision to determine whether the decision is supported by substantial evidence, “which is evidence that a reasonable mind could find adequately upholds a conclusion.” *Clark County Sch. Dist. v. Bundley*, 122 Nev. 1440, 1445–46, 148 P.3d 750, 754 (2006). Nonetheless, an administrative decision may be set aside if it is “affected by error of law,” *Dredge v. State ex rel. Dep't Prisons*, 105 Nev. 39, 43, 769 P.2d 56, 58–59 (1989), or if the decision is arbitrary or capricious or constitutes an abuse of discretion. *NRS 233B.135(3)(f)*.

Under Nevada law, the administrative driver's license revocation process is considered civil in nature rather than criminal, and the objective is not to punish the licensee but to protect the public from dangerous drivers. *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 498–99, 117 P.3d 193, 197 (2005). Further, in revoking a driver's license, the DMV does not need to prove that the driver was in fact operating or in actual physical control of the vehicle while under the influence, but that the police officer directing that the driver

be tested for alcohol consumption have reasonable grounds for believing that the driver had been operating the vehicle while under the influence. *Id.* at 499, 117 P.3d at 197.

\*3 While mere uncorroborated hearsay alone may not constitute substantial evidence to support an administrative decision upholding a DMV driver's license revocation, *State, Dep't of Mtr. Vehicles v. Kinkade*, 107 Nev. 257, 260–61, 810 P.2d 1201, 1203 (1991), statements testified to, such as one from a nontestifying police officer to a testifying police officer, can constitute substantial evidence when the circumstances under which the statement was made offers assurances of accuracy and when the statement can be corroborated by other facts. *State Dept. Mtr. Veh. v. Kiffe*, 101 Nev. 729, 732–33, 709 P.2d 1017, 1019–20 (1985); *see also State, Dep't Mtr. Veh. v. Evans*, 114 Nev. 41, 44–45, 952 P.2d 958, 960–61 (1998).

Having reviewed the parties' arguments and the record on appeal, we affirm the district court's denial of appellant's petition for judicial review. From directly observing appellant's condition after being led out of the house by Officer Chen, Officer Donnelly had a reasonable belief that appellant might be under the influence of alcohol. *Weaver*, 121 Nev. at 498–99, 117 P.3d at 197. Further, while Officer Donnelly did not have any direct knowledge that appellant had recently been driving, we conclude that his reliance on the witness's statement that appellant had been driving shortly before the police officers arrived was reasonable, as appellant's friend's subsequent testimony at the administrative hearing that appellant arrived at the house shortly before Officer Chen knocked on the door corroborates Officer Donnelly's decision to use the witness's information to form a belief that appellant had recently been driving. *Kiffe*, 101 Nev. at 732–33, 709 P.2d at 1019–20 (determining that the fact that the testifying officer observed the driver close to his car corroborated out-of-court statements). Further, there was never any assertion at the administrative hearing that appellant had not recently driven to his house. *See Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (explaining that substantial evidence may be inferentially shown by a lack of certain evidence); *see also Weaver*, 121 Nev. at 499–500, 117 P.3d at 197 (affirming a revocation of a driver's license when the driver had admitted that he had been driving at the time he crashed his car but asserted that he only drank after the accident). Accordingly, we conclude that substantial evidence in the record supports the conclusion that Officer Donnelly had reasonable grounds for determining that appellant had been operating a vehicle

while under the influence, and thus, the administrative law judge did not abuse his discretion in upholding the DMV's revocation of appellant's driver's license. Accordingly, we affirm the district court's denial of appellant's petition for judicial review.

It is so ORDERED.

Footnotes

- 1 According to the friend's testimony, the amount of vodka was a tall, plastic cup-sized glass.