IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES,
Appellant,
vs.
JOSHUA JEFFERY JOHNSON,
Respondent.

No. 50036

FILED

JUL 17 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting judicial review of and reversing an administrative decision revoking respondent's driving privileges. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

On December 31, 2005, Nevada Highway Patrol Trooper Hoskins observed respondent Joshua Johnson's vehicle speeding and making an unsafe lane change southbound on U.S. Highway 95. Trooper Hoskins stopped the vehicle and smelled the odor of marijuana. Johnson voluntarily surrendered a small bag of what Trooper Hoskins believed to be marijuana, as well as a multi-colored glass pipe. Johnson also admitted to having consumed alcohol. Trooper Hoskins did not arrest Johnson at this point, but rather requested that drug recognition expert (DRE) Trooper Howell come to the scene. DRE Trooper Howell conducted some testing, the nature and results of which are not included in the record, and concluded that Johnson was under the influence of a controlled substance. Based on DRE Trooper Howell's conclusion, Trooper Hoskins then arrested Johnson for driving under the influence of alcohol and/or drugs. Johnson was taken to the Clark County Detention Center where blood was

drawn. The results of the blood tests detected no alcohol, but did detect the presence of marijuana (1.3 ng/mL of Delta-9-tetrahydrocannabinol). The level of marijuana found in Johnson's blood sample was below the statutory prohibited amount in NRS 484.379(3) of 2.0 ng/mL, so he was not criminally prosecuted.

Johnson timely requested an administrative hearing, which was held on August 3, 2006. The only witness called by appellant Department of Motor Vehicles (DMV) was Trooper Hoskins. Trooper Hoskins testified that "based on John Howell stating that he believed [Johnson] was under the influence of marijuana, I arrested him for driving under the influence of alcohol and/or drugs." Johnson objected to the admissibility of the hearsay testimony of the absent DRE Trooper Howell and argued that without the hearsay testimony there were no reasonable grounds adequate to arrest Johnson and require a blood draw.

Following the hearing, the Driving Under the Influence (DUI) adjudicator held that DRE Trooper Howell's hearsay statements were admissible under the general exception to the hearsay rule, NRS 51.315(1). The DUI adjudicator reasoned that because the circumstances under which DRE Trooper Howell made those statements to Trooper Hoskins offered assurances of accuracy not likely to be enhanced by calling him as a witness, the statements were admissible in light of this court's decision in State, Department of Motor Vehicles v. Kiffe.[1] Consequently,

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[1]101 Nev. 729, 732-33, 709 P.2d 1017, 1019-20 (1985) (holding that hearsay statements of an officer may be admitted in an administrative proceeding if they are of a type commonly relied upon by reasonable and prudent persons in the conduct of their affairs and if the statement's nature and special circumstances under which it was made offer

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the DUI adjudicator held that Trooper Hoskins' testimony, even though based in part on the out-of-court statements made to him by DRE Trooper Howell at the scene, constituted substantial evidence to support the revocation of Johnson's driver's license.

Johnson sought judicial review, arguing that the hearsay statements in Kiffe were distinguishable from the hearsay statements in his case. Following a hearing, the district court held that the hearsay statements of DRE Trooper Howell should have been excluded. It therefore reversed the administrative order revoking Johnson's driving privileges, because once Trooper Howell's hearsay statements were excluded, the decision was no longer based on substantial evidence.

On appeal, the DMV argues that the district court erred in holding that the hearsay statements and unsubstantiated conclusions of DRE Trooper Howell should have been excluded, and that the declaration of withdrawal of the blood sample was incomplete and improperly admitted. Specifically, the DMV contends that under Kiffe, DRE Trooper Howell's examination of Johnson and opinion that Johnson was under the influence of a controlled substance are admissible statements. The DMV also asserts that even without the hearsay statements, substantial evidence supports the DUI adjudicator's decision to revoke Johnson's driver's license.

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assurances of accuracy not likely to be enhanced by calling the declarant as a witness even though he is available).

Johnson, however, argues that DRE Trooper Howell's hearsay statements are not the type of statements this court considered in Kiffe and that DRE Trooper Howell's absence at the hearing deprived him of his right to cross-examine an opposing witness on relevant issues. Johnson asserts that without DRE Trooper Howell's hearsay statements, Trooper Hoskins lacked reasonable grounds to believe that Johnson was under the influence of a controlled substance and, consequently, there is not substantial evidence to support the DUI adjudicator's decision to revoke his driving privileges.

Our role in reviewing an administrative agency's decision is the same as that of the district court: to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of discretion.[2] We are limited to the record and may not substitute our judgment for that of the agency regarding questions of fact.[3] If the agency's decision is supported by substantial evidence, that is, evidence which a reasonable mind might accept as adequate to support a conclusion, we will not disturb the agency's decision.[4] However, questions of law are reviewed de novo.[5] "A reviewing court may reverse the decision of an administrative agency if

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[2]Wright v. State, Dep't of Motor Vehicles, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005).

[3]Id.

[4]Id.

[5]Weaver v. State, Dep't of Motor Vehicles, 121 Nev. 494, 498, 117 P.3d 193, 196 (2005).

substantial rights of the appellant have been prejudiced by legal error or an abuse of discretion."[6]

We review de novo the district court's determination that the DUI adjudicator committed legal error in admitting DRE Trooper Howell's hearsay statements.[7] After reviewing the record, we agree that the district court properly concluded that DRE Trooper Howell's hearsay statements should have been excluded and thus properly reversed the DUI adjudicator's decision to revoke Johnson's driver's license.[8] Specifically, Trooper Hoskins testified that he arrested Johnson based on DRE Trooper Howell's opinion that Johnson was under the influence of a controlled substance. DRE Trooper Howell's opinion that Johnson was under the influence of a controlled substance was based on DRE Trooper Howell's experience as a drug recognition expert and on the results of the unspecified tests that he administered to Johnson. The record contains no reports or affidavits describing which tests were administered or the tests' results to substantiate DRE Trooper Howell's hearsay statements. Because DRE Trooper Howell was not subpoenaed as a witness, Johnson was precluded from cross-examining him about his opinion that Johnson was under the influence of a controlled substance.

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[6]Beavers v. State, Dep't of Mtr. Vehicles, 109 Nev. 435, 438, 851 P.2d 432, 434 (1993).

[7]Weaver, 121 Nev. at 498, 117 P.3d at 196.

[8]In light of our decision to affirm the district court's decision to exclude DRE Trooper Howell's hearsay statements, we do not consider appellant's claim regarding the declaration for the withdrawal of blood.

As regards the DUI adjudicator's reliance on the Kiffe opinion, the adjudicator improperly relied on Kiffe in admitting DRE Trooper Howell's hearsay statements. In Kiffe, appellant Kiffe argued that one officer's statements to a second officer that he observed Kiffe driving in an erratic fashion, offered through the testimony of the second officer, were inadmissible hearsay. This court held that the first officer's statements were admissible under NRS 51.075(1), the general exception to the hearsay rule, which provides that a statement is not excluded if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.[9] The Kiffe court further concluded that the first officer's statements were also admissible pursuant to NRS 233B.123(1), as the statements were of the type commonly relied upon by reasonable and prudent persons in the conduct of their affairs and they were not otherwise precluded by statute.[10]

The nature of the hearsay statement at issue in this case, however, differs from the hearsay statements in Kiffe. In this case, the hearsay statement is the opinion of DRE Trooper Howell that Johnson was under the influence of a controlled substance. This is a conclusory opinion and is not supported by facts or data in any written report or affidavit. The assurances of accuracy and reliability of this statement could indeed be enhanced by calling DRE Trooper Howell as a witness. His testimony could provide the facts and data on which he relied in

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[9]Kiffe, 101 Nev. at 732, 709 P.2d at 1019-20.

[10]Id. at 733, 709 P.2d at 1020.

reaching his opinion that Johnson was under the influence of a controlled substance. As the record currently stands, DRE Trooper Howell alone knows which tests he administered to Johnson and the results of those tests.

Furthermore, DRE Trooper Howell's statement that Johnson was under the influence of a controlled substance is not the type of statement commonly relied upon by reasonable and prudent persons in the conduct of their affairs. DRE Trooper Howell's opinion that Johnson was under the influence was based on his specialized knowledge of controlled substances and his expert ability to administer certain tests and determine their results.

Additionally, in State, Department of Motor Vehicles v. Evans,[11] this court noted that appellant Evans had a right to confront and cross-examine opposing witnesses on any matter relevant to the issues under NRS 233B.123(4). Thus, Evans was permitted to cross-examine the officer on the reasonableness of the officer's belief that Evans was driving.[12] Here, Johnson was precluded from cross-examining DRE Trooper Howell on the reasonableness of his belief that Johnson was under the influence of a controlled substance. Trooper Hoskins explicitly relied upon DRE Trooper Howell's opinion in arresting Johnson for driving under the influence of a controlled substance. Johnson, therefore, should have been able to cross-examine DRE Trooper Howell regarding this

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[11]114 Nev. 41, 45, 952 P.2d 958, 961 (1998).

[12]Id.

opinion. Accordingly, the district court properly concluded that the DUI adjudicator erred in admitting DRE Trooper Howell's hearsay statements.

Johnson argues that without the hearsay statements of DRE Trooper Howell, substantial evidence does not support the DUI adjudicator's decision to revoke his license. The DMV contends that even without DRE Trooper Howell's statements, there is substantial evidence to support the DUI adjudicator's decision.

We review the DUI adjudicator's order revoking Johnson's driver's license for an abuse of discretion.[13] Having determined that DRE Trooper Howell's statements should have been excluded, we examine the remainder of the record, excluding those hearsay statements, to determine whether substantial evidence supports the revocation.[14]

The DMV must revoke the driver's license of anyone certified, based on the result of an evidentiary test obtained under NRS 484.383, as having a detectable amount of a prohibited substance in his blood.[15] Under NRS 484.383(1)(a), if a police officer has reasonable grounds to believe that a person is driving or is in actual physical control of a vehicle on a public road while under a controlled substance's influence, the person is deemed to have consented to an evidentiary blood test, at the officer's discretion, to determine whether a controlled substance is present.

Thus, the relevant question before us is whether Trooper Hoskins had reasonable grounds, at the time he ordered the blood test, to

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[13]Weaver, 121 Nev. at 498, 117 P.3d at 196.

[14]Wright, 121 Nev. at 125, 110 P.3d at 1068.

[15]NRS 484.385.

believe that Johnson had been driving under the influence of a controlled substance. Trooper Hoskins testified that: he observed a silver Acura heading southbound on U.S. Highway 95 make an unsafe lane change at 85 miles per hour, cutting off a car with less than a car length; he stopped the car and made contact with the driver and sole occupant of the vehicle, Johnson; he detected a strong odor of marijuana emanating from the vehicle and observed that Johnson's eyes were bloodshot; Johnson surrendered a small plastic baggie containing a green leafy substance that Trooper Hoskins believed to be marijuana; and Johnson also surrendered a small multi-colored glass pipe.

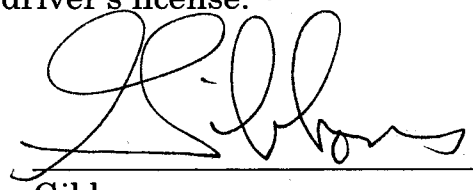
While these facts in and of themselves could possibly have provided reasonable grounds, Trooper Hoskins' request for a drug recognition agent to come to the scene suggests that Trooper Hoskins did not believe that he had reasonable grounds at that time to arrest Johnson. Trooper Hoskins declined to arrest Johnson based on this information and instead summoned DRE Trooper Howell, a drug recognition expert. Only after DRE Trooper Howell stated that he believed Johnson was under the influence of marijuana did Trooper Hoskins arrest Johnson. Moreover, at the DMV hearing, Trooper Hoskins testified that he relied on DRE Trooper Howell's statements in deciding to arrest Johnson.

Without DRE Trooper Howell's hearsay statements, there is not substantial evidence that Trooper Hoskins' decision to order the evidentiary test was based on reasonable grounds. We therefore conclude that the DUI adjudicator abused its discretion in revoking Johnson's driving privileges.

Accordingly, we affirm the district court's decision to grant judicial review and its determination that the DUI adjudicator erred in

admitting DRE Trooper Howell's hearsay statements. Furthermore, we affirm the court's decision to reverse the DUI adjudicator's order revoking Johnson's driver's license because Johnson was prejudiced by the DUI adjudicator's legal error and because the DUI adjudicator abused its discretion in revoking Johnson's driver's license.[16]

It is so ORDERED.



_____, C.J.
Gibbons

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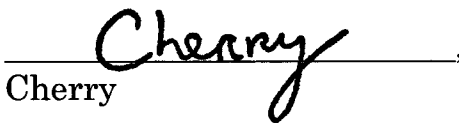
Maupin



_____, J.
Cherry

cc: Hon. Kenneth C. Cory, District Judge
Janet Trost, Settlement Judge
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[16]Beavers, 109 Nev. at 438, 851 P.2d at 434.