IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSEMARY REYES,
Appellant,
vs.
THE STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY,
Respondent.

No. 58152

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a Department of Motor Vehicles (DMV) matter. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Appellant Rosemary Reyes was arrested for driving while under the influence (DUI). After being read Nevada's implied consent law regarding evidentiary testing, Reyes was taken to jail. Upon entering the jail, the arresting officer checked if there was anyone present certified to operate the breath-test machine. While the breath-test machine was operable at the time, the arresting officer was not certified to operate the machine, so he could not administer the test. Because there was no one present who could administer the test, Reyes' arresting officer told her that she must take a blood test because a breath test was not reasonably available. The arresting officer indicated that while he still had some time left in which to test Reyes, a big booking could cause a delay that could break the requisite two-hour window for DUI chemical testing.[1]

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[1]There is a two-hour rule for evidentiary testing in DUI cases because the effectiveness and reliability of the tests decline over time. See NRS 484C.110; see also State, Dep't of Mtr. Vehicles v. Brough, 106 Nev.

Reyes submitted to the evidentiary blood test at the jail, and the analysis showed an alcohol concentration of .147, over the maximum limit of .08. NRS 484C.110(1)(b). Based on the results of the blood test, Reyes' driving license was revoked for a period of three months.

Reyes appealed this revocation. After a hearing, the administrative law judge utilized the plain meaning of the term "reasonably available" in NRS 484C.160(4) to find that the breath test was not reasonably available as there were no certified breath-test operators present, there was no procedure in place to contact other officers who could administer the test, and no designated breath-test operator was available to come to the jail. The judge determined that this decision was in accord with the purpose of the implied consent statutes. Reyes petitioned the district court for judicial review and the district court affirmed the decision.[2]

On appeal, Reyes raises one issue—whether, under NRS 484C.160(4), she should have been able to refuse a blood test when there were no police officers at the jail certified to perform the breath test but there was still time available in which a breath-test-certified police officer could have been located. We affirm the decision of the district court.

Standard of review

"When a party challenges a district court's decision to deny a petition for judicial review of an administrative agency's determination, our function, which is identical to that of the district court, is to review the

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492, 496, 796 P.2d 1089, 1092 (1990); Schroeder v. State, Dep't of Motor Vehicles, 105 Nev. 179, 182, 772 P.2d 1278, 1280 (1989).

[2]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

evidence presented to the agency and ascertain whether the agency abused its discretion by acting arbitrarily or capriciously." Father & Sons v. Transp. Servs. Auth., 124 Nev. 254, 259, 182 P.3d 100, 103 (2008). In performing this review, this court cannot "substitute its judgment for that of the agency as to the weight of evidence on questions of fact." Schepcoff v. SIIS, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

While we independently review purely legal determinations, "[w]e defer to an agency's findings of fact as long as they are supported by substantial evidence." Rio All Suite Hotel & Casino v. Phillips, 126 Nev. ___, ___, 240 P.3d 2, 4 (2010); see NRS 233B.135(3). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion." Law Offices of Barry Levinson v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). Our review is limited to the record before the agency. NRS 233B.135(1)(b); Garcia v. Scolari's Food & Drug, 125 Nev. 48, 56, 200 P.3d 514, 520 (2009).

The breath alcohol test was not reasonably available

Reyes argues that her blood test should have been excluded because her arresting officer did not substantially comply with the provisions of Nevada's implied consent laws as he had many reasonable means available to provide her with the elected breath test. We disagree.

Nevada's implied consent statute, NRS 484C.160(1)[3] provides that through the act of driving a vehicle, the person "shall be deemed to have given his or her consent to an evidentiary test of his or her blood, urine, breath or other bodily substance to determine the concentration of alcohol in his or her blood or breath" if there is reasonable grounds to

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[3]In 2009, NRS 484C.160 was substituted in revision for NRS 484.383.

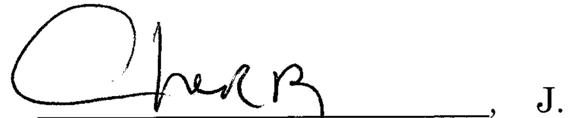
believe that the person was driving while intoxicated. NRS 484C.160(4)(a) states that if an evidentiary test is to be conducted "the person may refuse to submit to a blood test if means are reasonably available to perform a breath test."

We conclude that the arresting officer substantially complied with Nevada's implied consent law as there were no means reasonably available at the time that would have allowed for a breath test. The arresting officer was not certified to operate the breath-test machine, upon arrival at the jail there was no one certified to operate the breath-test machine, the arresting officer's patrol colleagues were not certified to operate the breath-test machine, and there was no hotline to call to request a certified operator. Nothing in Nevada's implied consent law requires a police officer to exhaust any and all avenues, including waiting until the last minute, to locate a breath-test-certified officer before the two-hour requirement expires. We conclude that, in line with the district court's determination, the actions of the arresting officer satisfied the requirements of the statute. Moreover, this conclusion is consistent with our long-standing policy that "'the implied consent statute should be liberally construed so as to keep drunk drivers off the streets.'" Ebarb v. State, Dep't of Mtr. Vehicles, 107 Nev. 985, 987, 822 P.2d 1120, 1122 (1991) (quoting State, Dep't of Mtr. Vehicles v. Kinkade, 107 Nev. 257, 259, 810 P.2d 1201, 1203 (1991), and citing Davis v. State, 99 Nev. 25, 27, 656 P.2d 855, 856 (1983)). We conclude that the administrative law judge based his decision upon substantial evidence and did not act arbitrarily or capriciously or abuse his discretion in determining that the

breath test was not reasonably available.[4] Thus, we affirm the district court's denial of the petition for judicial review.

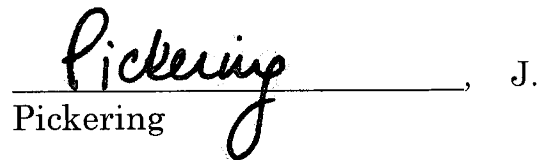
Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_______________________, J.
Cherry

_______________________, J.
Gibbons



_______________________, J.
Pickering

cc: Hon. Joanna Kishner, District Judge
William F. Buchanan, Settlement Judge
Chesnoff & Schonfeld
Attorney General/Las Vegas
Eighth District Court Clerk

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[4]Reyes also contends that the administrative law judge and the district court erred in disregarding prior case authority. Reyes asserts that this case and Wharton v. State, Dep't of Motor Vehicles, Case No. A544377 (Nev. Eighth Judicial District Court, October 19, 2007), are indistinguishable and, accordingly, the Wharton decision should have been followed. In addition to the fact that the Wharton decision is not binding on this court, the two cases are distinguishable based on the extent to which attempts were made to find a person who could administer the breath test. Accordingly, we conclude that the administrative law judge did not err. See Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1013 (9th Cir. 2006) (stating that unpublished decisions lack precedential value).