

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

TIMOTHY J. ECKERMAN,
Plaintiff,

vs.

**DEPARTMENT OF MOTOR VEHICLES,
STATE OF NEBRASKA,**
Defendant.

Case No. CI99-188

JUDGMENT ON APPEAL

DATE OF HEARING: February 17, 2000.

DATE OF DECISION: March 2, 2000.

APPEARANCES:

For plaintiff:

Forrest F. Peetz without plaintiff.

For defendant:

Thomas P. Herzog, Holt County Attorney, on behalf of the Attorney General.

SUBJECT OF ORDER:

Petition for review pursuant to Administrative Procedures Act.

FINDINGS:

The court finds and concludes that:

1. This court determines the action after de novo review upon the record of the agency. For the court's convenience in drafting this judgment, the court incorporates certain findings of fact by the director. However, the court reaches such factual findings independently following its own de novo review.

2. Ordinarily, this court would be inclined to apply the rule that, where the evidence is in conflict, the district court, in applying a de novo standard of review, can consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997).

3. However, in this instance, the hearing officer's analysis, which was adopted by the director, improperly relies on events after the stop.

a. In analyzing the officer's testimony, the hearing officer stated "it seems likely someone at two and a half times the legal [limit is] not going to drive error free for the few blocks the [o]fficer witnessed his driving." T11. Thereafter, in considering the testimony of a witness called by the

plaintiff, the hearing officer determined the testimony “was not especially credible, in large part because, again, it seems unlikely someone at two and a half times the legal limit is going to drive as error free as [the witness] described.” T11.

b. The determination of probable cause must be made concerning the circumstances known to the officer prior to the stop. That determination cannot be affected by subsequent events. *State v. Martin*, 232 Neb. 385, 440 N.W.2d 676 (1989) (citing *Rios v. United States*, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960)). The officer did not know, and could not then have known, that the plaintiff was “at two and a half times the legal limit.” The director erred in considering that matter in the probable cause determination.

c. Consequently, the court does not consider nor give weight to the fact that the hearing officer heard the witnesses and accepted one version over another. However, the director’s error does not end the inquiry. The statute requires this court to consider the evidence de novo.

4. This court must make a credibility determination upon the record made. The court does so without regard to the subsequent events. Lacking the benefit of viewing the witnesses, this court carefully considers the indicia of credibility of witnesses to the extent that such can be discerned from the cold record. See, e.g., *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987).

5. The court concludes that the officer’s testimony is more credible than the opposing evidence. Once the officer’s sworn report was established, the director’s order of revocation had prima facie validity. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). It then became the licensee’s burden to establish grounds for reversal by a preponderance of the evidence. The plaintiff failed to meet that burden.

6. The court, upon de novo review, adopts the findings of fact in paragraphs 1 through 3, inclusive, set forth on page 2 of the director’s order. (T9).

7. The court finds, by the greater weight of the evidence, that:

a. The officer had probable cause to believe that the plaintiff was operating or in the actual physical control of a motor vehicle in violation of NEB. REV. STAT. § 60-6,196 (Reissue 1998); and,

b. The plaintiff was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1998).

8. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation entered on December 7, 1999, is affirmed.

2. The suspension of such revocation on appeal under NEB. REV. STAT. § 60-6,208 (Reissue 1998) is dissolved, and the full period of revocation shall run from the date of final judgment herein.

3. Costs on appeal are taxed to the plaintiff.

Signed in chambers at O'Neill, Nebraska, on March 2, 2000.

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties, **including both the Holt County Attorney and the Attorney General for defendant.**
Done on _____, 19____ by _____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 19____ by _____.
- : Enter the decision on the trial docket as: Signed "Judgment on Appeal" entered affirming order of revocation, dissolving automatic suspension of revocation, and taxing costs to plaintiff.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge