

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

ROY E. BENNETT,
Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**
Defendant-Appellee.

Case No. CI00-84

JUDGMENT ON APPEAL

DATE OF HEARING: December 15, 2000.

DATE OF RENDITION: December 19, 2000.

DATE OF ENTRY: Date of filing (§ 25-1301).

APPEARANCES:

For plaintiff-appellant: Rodney J. Palmer without plaintiff.
For defendant-appellee: Eric A. Scott, Cherry County Attorney, on behalf of the Attorney General.

SUBJECT OF JUDGMENT: 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. The court has received and considered the plaintiff's brief. The court heard the plaintiff's oral argument, and the defendant submitted the matter without oral argument.

2. The petition asserts that (1) the director's decision was arbitrary and capricious, (2) the hearing officer erred in finding reasonable suspicion or probable cause for the stop, (3) the hearing officer erred in failing to find the absence of objective reasons for the arrest, (4) incomplete police reports were provided in response to the motion to produce, (5) the hearing officer erred in admitting or considering the officer's testimony regarding any probationary status of plaintiff, (6) the hearing officer erred in taking judicial notice of regulations, (7) the hearing officer's advance possession of documents tendered for possible offer as exhibits at the hearing, and (8) the arresting officer's failure to identify the plaintiff.

3. The plaintiff's first issue is superseded by this court's standard of review. This court reviews the decision de novo on the record. That standard incorporates a more thorough review than that

contemplated by the plaintiff's assignment of error. However, 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).

4. The plaintiff asserts the absence of probable cause for the stop. Contrary to the plaintiff's assertion, the officer's observation of plaintiff's vehicle near a liquor sales establishment was not the only reason for the stop. The officer also testified that he observed plaintiff's vehicle "drift" within his lane of traffic. A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping the vehicle for investigation regarding the driver's condition in operating the weaving vehicle. *State v. Cox*, 3 Neb. App. 80, 523 N.W.2d 52 (1994). Thereafter, the officer's observations provided probable cause for the ultimate arrest.

5. The plaintiff next asserts the absence of "objective reasons" for the arrest. The officer observed the odor of alcoholic liquor, plaintiff's slurred speech, plaintiff's use of the roof of the motor vehicle to steady himself in exiting the vehicle, and the use of vehicle for support while walking toward the rear of the vehicle. These observations were sufficient to provide probable cause for the arrest. The plaintiff refused to submit to any field sobriety tests or to a preliminary breath test. Plaintiff's argument is tantamount to an assertion that a motorist can prevent an arrest for driving under the influence by refusing any "objective" tests and thereafter complaining because none were administered. This contention lacks support in Nebraska jurisprudence.

6. The plaintiff asserts that police reports were incomplete in violation of the motion to produce. The motion to produce and the department's response were received as Exhibit 5. The plaintiff raised the issue in objecting to Exhibit 3, the sworn report and its attachment, on the basis that it was incomplete. A careful review of the officer's testimony shows that he referred to other documents submitted along with the sworn report and attachment, but *not* that the other documents were *attached* to the sworn report. Thus, the entire report with attachment was offered and received in evidence. Neither the plaintiff nor the defendant sought to offer the additional documents referred to by the officer. The plaintiff's contention lacks merit.

7. The plaintiff asserts that there was “[n]o evidence of probation or terms of probation (for random drug stop).” As noted above, there was reasonable suspicion to support the vehicle stop and probable cause for the arrest. This situation cannot reasonably be described as a “random drug stop.” The plaintiff testified that the officer said it was a random drug check. There is no other evidence to that effect and the court finds that the plaintiff’s testimony lacks credibility on that issue. The hearing officer considered the officer’s testimony regarding the officer’s “belief” that the plaintiff was on probation and concerning what might be prohibited by the terms of probation. Upon de novo review, this court disregards any evidence erroneously received by the hearing officer. *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985). Consequently, even if the officer’s testimony was inadmissible, which this court does not determine, this court simply disregards that testimony in its de novo review.

8. The plaintiff complains that the hearing officer should not have taken official notice of Title 177 and Title 247 of the Nebraska Administrative Code. In *Nissen v. Nebraska Dep’t of Corr. Servs.*, 8 Neb. App. 865, 602 N.W.2d 672 (1999), the Nebraska Court of Appeals observed that NEB. REV. STAT. § 84-906.05 of the Administrative Procedure Act had been amended, effective August 28, 1999, to provide that every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State pursuant to NEB. REV. STAT. § 84-906. Where an amendment to a statute makes a procedural change, it is binding upon a tribunal on the effective date of the amendment and is applicable to pending cases. *Nissen v. Nebraska Dep’t of Corr. Servs.*, *supra*. Properly adopted and filed agency regulations have the effect of statutory law. *Id.* An agency does not have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule. *Id.* The hearing officer properly took notice of the applicable agency rules and regulations.

9. The plaintiff alleges that an improper ex parte contact occurred with the hearing officer. The record shows that the complained conduct consists of having the department’s proposed exhibits mailed to the hearing officer in order to have them available for the hearing. The record expressly shows that the hearing officer did not review the exhibits prior to the hearing. This court finds nothing improper concerning the mailing of hearing exhibits to the hearing officer so that they would be available for the hearing. This record clearly shows that the hearing officer did not review them prior to the hearing. This

court need not consider what effect, if any, such review might have under similar circumstances. This court does not render advisory opinions.

10. The plaintiff also asserts that “the officer did not identify the motorist.” Clearly, the arresting officer testified at the hearing regarding his identification of the driver. This court assumes that the plaintiff refers to lack of testimony at the hearing specifically identifying the plaintiff as the same person. This is not a criminal case where the state would have the burden to identify the defendant. This is a civil action where the plaintiff had the burden to prove that one or more of the recitations of the sworn report were false. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). The plaintiff failed to do so.

11. Many of the plaintiff’s issues essentially address the weight and credibility of the evidence. The court considers and gives weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another.

12. In an administrative license revocation proceeding, the burden is upon a driver to prove that one or more of the recitations in an asserting officer’s sworn statement were false. *McPherrin v. Conrad, supra; Bender v. Department of Motor Vehicles*, 8 Neb. App. 290, 593 N.W.2d 27 (1999). The plaintiff failed to sustain his burden of proof.

13. 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 (Supp. 1999); 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 (Supp. 1999).

14. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

- 1. The Order of Revocation rendered on September 22, 2000, 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 this judgment becomes final.
- 3. Costs on appeal are taxed to the plaintiff-appellant.

Signed in chambers at Ainsworth, Nebraska, on December 19, 2000.

DEEMED ENTERED upon the date of filing by the 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 Cherry County Attorney and the Attorney General for defendant.**

Done on _____, 20__ by ____.

- 9 Enter judgment on the judgment record.

Done on _____, 20__ by ____.

- : Mail postcard/notice required by § 25-1301.01 within 3 days, **stating “Order of revocation affirmed; stay dissolved; costs taxed to plaintiff.”**

Done on _____, 20__ by ____.

- : Note the decision on the trial docket as: [date of filing] Signed “Judgment on Appeal” entered.

Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge