

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

KEITH A. HALLOCK,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI00-52

JUDGMENT ON APPEAL

DATE OF HEARING: December 20, 2000.

DATE OF RENDITION: December 29, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiff-appellant:

Rodney J. Palmer without plaintiff.

For defendant-appellee:

David M. Streich, Brown County Attorney, on behalf of Nebraska Attorney General.

SUBJECT OF JUDGMENT: Appeal de novo upon agency record pursuant to NEB. REV. STAT. § 60-6,208 and Administrative Procedure Act.

PROCEEDINGS: See journal entry filed December 21, 2000.

FINDINGS: The court finds and concludes that:

1. This court determines the action after de novo review upon the record of the agency.
2. The petition asserts that (1) the procedure used was contrary to law and was in excess of the statutory authority or jurisdiction of the agency, (2) the director's decision was arbitrary and capricious, (2) the director failed to hold the hearing in the county of the arrest, (3) the hearing officer failed to find (a) that the arresting officer was not properly certified, (b) that the arresting officer lacked probable cause to stop plaintiff, (c) that plaintiff was violating no law and was in a pasture at the time of the stop and arrest, and (d) that the arresting officer did not have objective reasons for the arrest because he did not know the results of field sobriety tests, and (4) the hearing officer erred in assuming the arresting officer took the first available class.

3. Other than the issue of venue, neither the plaintiff's brief nor the plaintiff's oral argument asserts any specific claim how the procedure used was contrary to law, in excess of statutory authority, or beyond the agency's jurisdiction. Having reviewed the record, this court finds no support for this general contention.

4. Although the plaintiff raised the issue of venue at the hearing, after the objection was overruled the plaintiff disclaimed any request for continuance and elected to participate in the hearing. Under this court's prior rulings in similar circumstances, the plaintiff is deemed to have agreed to the venue. In *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, ___ N.W.2d ___ (2000), the Supreme Court found that a general objection to a "telephone" hearing did not raise the venue objection, and found that it was thereby waived. The Supreme Court did not reach the issue of waiver by further participation in the hearing. This court sees no justification for allowing the plaintiff to raise the venue objection, but to decline to request a continuance and proceed to participate in the hearing, thereby gambling on a favorable result, without being considered as having agreed to the venue. See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). This court adheres to prior decisions in this district on the agreement to venue resulting from participation on the merits.

5. The plaintiff's claim that the director's decision was arbitrary and capricious 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).

6. Some of the plaintiff's issues address the weight and credibility of the evidence. In this instance, this 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.

7. 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, 248 Neb. 561, 537 N.W.2d 498 (1995); *Bender v. Department of Motor Vehicles*, 8 Neb. App. 290, 593 N.W.2d 27 (1999).

8. The plaintiff claims the hearing officer failed to find that the arresting officer was not certified and erred in assuming the officer took the first available class.

a. These claims focus on the meaning of NEB. REV. STAT. § 81-1414 (Cum. Supp. 2000). At the time of the appointment of the officer in question, a previous version of the statute was effective. NEB. REV. STAT. § 81-1414 (Reissue 1999). Before the incidents giving rise to the present case, the new version became effective on July 13, 2000. This court concludes the amendments do not change the analysis.

b. This court has some doubt that the plaintiff has standing to assert a claim of noncompliance with the statute, but for sake of analysis assumes that the plaintiff may do so.

c. The statute allows conditional appointment upon two requirements. First, the person may receive conditional appointment “if he or she immediately applies for admission” The evidence is undisputed that the officer commenced his appointment on December 27, 1999. In response to counsel’s question when he applied for certification, the officer testified that “[a]pproximately one to two weeks after [he] arrived here [his] packets were sent in.” E1, at 16:14-17. The evidence does not correlate the date he “arrived here” with the date of appointment. As the plaintiff bears the burden of proof, he failed to prove when the application for admission was made in relation to the date of appointment. Even if we assumed that the date of appointment coincided with the date of arrival, the court considers the application within one to two weeks as substantial compliance with the statute.

d. Second, the statute authorizes conditional appointment where the appointee “enrolls in the next available basic training class.” The officer testified that he was assigned to a class in October, that he did not have any choice as to which class he would go to, and that he did not know how many schools the training center put on per year or whether the center has on-going classes. The plaintiff adduced no evidence that there was any class prior to the October class in which the arresting officer could have enrolled. The problem is not that the hearing officer assumed that the arresting officer enrolled in the first available class; rather, the plaintiff failed to prove that the arresting officer did not enroll in the first available class. The plaintiff failed to sustain his burden of proof.

9. The plaintiff claims that he was violating no law and that the stop occurred “in a pasture”.

a. The evidence demonstrates without any real dispute that the events took place on the grounds of the Brown County Agricultural Society during the Brown County Fair.

b. NEB. REV. STAT. § 60-6,108(1) (Reissue 1998) generally limits application of the Nebraska Rules of the Road to highways, but expressly states that “sections 60-6,196, 60-6,197, and 60-6,212 to 60-6,218 shall apply upon highways and anywhere throughout the state except private property which is not open to public access.”

c. The court was curious as to the omission from the exception of the statutes between 60-6,197 and 60-6,212. A review of the content shows that the Legislature was merely making sure that the specific offenses of the enumerated sections applied to most places off of highways, because those specified offenses clearly “relat[e] to the operation of vehicles” NEB. REV. STAT. § 60-6,108(1) (Reissue 1998). The procedural statutes, such as § 60-6,205, are not “provisions of the Nebraska Rules of the Rule *relating to operation of vehicles*” *Id.* (emphasis supplied). Specifically, § 60-6,205 specifies procedures for speedy impoundment and revocation of an operator’s license in the event of violation of §§ 60-6,196 or 60-6,197, and do not relate to how a person is required to operate or not operate a motor vehicle. The decision in *Bassinger v. Agnew*, 206 Neb. 1, 290 N.W.2d 793 (1980), applied to rules of the road other than those specifically enumerated in § 60-6,108(1) (then codified as § 39-603). Consequently, the analysis of *Bassinger* does not apply in this case.

d. The plaintiff had the burden to show that the location of the events was “private property which is not open to public access.” Although the evidence as to the status as “private property” is debatable, the evidence wholly fails to support any claim that it “was not open to public access.” Indeed, the evidence is overwhelming to the contrary. The plaintiff’s claims regarding the location of the stop lack any merit.

10. The plaintiff claims that the arresting officer lacked probable cause for the stop. On September 3, 2000, at approximately 12:45 p.m., the officer observed the plaintiff, whom the officer knew personally, in his vehicle with the engine running, doors locked, resting over the steering wheel with his eyes closed. The officer and three other deputies beat on the vehicle for several minutes until the plaintiff roused

to open the door. The officer noted a very strong odor of an alcoholic beverage coming from the defendant's person. The officer told the plaintiff to leave the vehicle and not drive that evening. The plaintiff assured the officer he would not drive further that night, and went into the dance hall. Twenty to thirty minutes later, the plaintiff emerged from the dance hall, "staggering to his vehicle" and began to drive away. Rarely does an officer have more specific probable cause as to the particular offense of driving under the influence as are present in this case. The plaintiff's claim lacks any merit.

11. The plaintiff also claims that the officer did not have objective reasons for the arrest because he did not know the specific results of field sobriety tests. The absence of testimony as to the specific results of the tests must be weighed in the determining the credibility of the witnesses, and the court has considered that absence in favor of the plaintiff in the weighing process. But the evidence, upon this court's de novo review, fails to sustain the plaintiff's burden to show that the arresting officer lacked probable cause for the arrest.

12. 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 (Cum. Supp. 2000); 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 (Cum. Supp. 2000).

13. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation rendered on October 6, 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.

4. Any request for attorneys' fees, express or implied, is denied.

Signed in chambers at Ainsworth, Nebraska, on December 29, 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 Brown County Attorney and the Attorney General for defendant.**

Done on _____, 20____ by _____.

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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