

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

ANTHONY B. GANSER,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI00-53

JUDGMENT ON APPEAL

DATE OF HEARING: December 20, 2000.

DATE OF RENDITION: January 3, 2001.

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 court separately discusses the claims of error asserted in the petition.
3. The plaintiff's claim that the director's decision was arbitrary and capricious is superseded by this court's standard of review.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).

4. The petition next claims that the decision resulted from evidence which was not competent, was irrelevant, consisted of hearsay, and for which insufficient foundation was established. 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, this court disregards any improperly received evidence. This issue requires no further discussion.

5. The petition claims that the hearing officer erred by proceeding to hearing without the plaintiff's presence after a motion to continue or bifurcate the hearing. The record does not show that the plaintiff ever requested the hearing officer to bifurcate the hearing. Having failed to request bifurcation, the plaintiff cannot now assign such failure as error on appeal. The plaintiff's attorney did request a continuance of the hearing "until a later date so that he can be present to present his defense." E1, at 4:15-17. The plaintiff did not show any specific cause for the failure to appeal nor request any recess to attempt to inquire into the plaintiff's absence. Where a party's motion for continuance is based upon the occurrence or nonoccurrence of events within the party's own control, denial of such motion generally is not an abuse of discretion. *State v. Fletcher*, 8 Neb. App. 498, 596 N.W.2d 717 (1999). Litigants are not permitted to use a continuance to manipulate or obstruct orderly procedure or to interfere with the fair administration of justice. *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988). The hearing officer did not abuse his discretion in denying the continuance for unspecified cause.

6. 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.

7. The plaintiff complains that the hearing officer erroneously allowed hearsay testimony by the officer concerning the content of Jill Ganser's statements to the arresting officer. This court agrees. The hearsay statements of Jill Ganser should not have been admitted into evidence. Upon de novo review, this court disregards these hearsay statements erroneously received by the hearing officer. *Nixon v. Harkins, supra*. Consequently, this court disregards this improperly received evidence.

8. The plaintiff next complains regarding testimony concerning the administration and results of the horizontal gaze nystagmus test by the arresting officer. The Nebraska Supreme Court recently reconsidered the status of that technique under Nebraska law. In *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000), the court concluded that the basic scientific principle upon which the HGN field sobriety test is based, i.e., that alcohol consumption causes nystagmus, is generally accepted in the relevant scientific community. However, the court also concluded that, in light of evidence in the record that nystagmus can be caused by factors other than alcohol and that intoxication cannot be established by the HGN test alone, limitations should be placed upon the purposes for which HGN test results are admissible. The Supreme Court held in *Baue* that the HGN field sobriety test meets the *Frye* standard for acceptance in the relevant scientific communities, and when the test is given in conjunction with other field sobriety tests, the results are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol. The Supreme Court overruled *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986), to the extent inconsistent with that holding. In *Baue*, the court also adopted the majority view regarding foundation for testimony concerning administration of the test, and stated that a police officer may testify to the results of HGN testing if it is shown that the officer has been adequately trained in the administration and assessment of the HGN test and has conducted the testing and assessment in accordance with that training. The *Baue* decision predated the hearing in this case. The department's attorney adduced the arresting officer's testimony to make the required showing. The hearing officer properly admitted the HGN testimony.

9. The petition alleges the hearing officer improperly allowed evidence of a Class C permit checklist. The plaintiff made no such objection at the hearing. The plaintiff did object at the hearing to the admission of the preliminary breath test result. However, his petition does not allege error in that regard.

The plaintiff failed to object to that which he now claims error, and now fails to claim error as to that to which he did object. Any claim of error as to either matter has been waived.

10. The petition claims that the hearing officer erroneously refused to consider the plaintiff's claim that "Deputy St. Arnaud has been judicially declared non-certified as a law enforcement officer." E1 at 26:12-28:10. The plaintiff failed to adduce evidence of the cited decision. But the plaintiff's claim fails for a more basic reason. The plaintiff's request makes it clear that the decision of which plaintiff sought notice was a county court decision. Both the county court and the state administrative agency are inferior to the district court in Nebraska's legal structure. Although a county court is a court of record and its decisions are entitled to respect, they are not binding precedent to a district court or to a state administrative agency. *State v. Nichols*, 8 Neb. App. 654, 600 N.W.2d 484 (1999). Vertical stare decisis compels inferior courts to follow strictly the decisions rendered by courts of higher rank within the same judicial system. See *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996) (Connolly, J., concurring in the result) (citing *State v. Menzies*, 889 P.2d 393 (Utah 1994), and *Barstow v. State*, 742 S.W.2d 495 (Tex. App. 1987)). As the Court of Appeals held in *Nichols*, Supreme Court Rule 2E(5) obviously overrules and replaces the four-judge holding of *Metro Renovation v. State*, which questioned the applicability of vertical stare decisis. Because the county court is not of higher rank in the judicial system than the quasi-judicial actions of a state administrative agency, the county court's decisions have no precedential effect with regard to a state administrative agency. The hearing officer properly declined to give precedential effect to the recited decision.

11. The plaintiff's petition also alleges that the arresting officer failed to testify as to the meaning of the results of the tests given. Although the petition does not explicitly so state, the record shows the plaintiff's argument before the hearing officer concerned the field sobriety tests and the horizontal gaze nystagmus test. E1, at 31:2-32:13. The plaintiff essentially claims that the officer's testimony failed to contain the "magic" words. Nebraska law does not require an expert medical opinion to be couched in the magic words "to a reasonable degree of medical certainty." *Bates v. Design of the Times, Inc.*, 9 Neb. App. 260, 610 N.W.2d 41 (2000); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Similarly, the law does not require the officer to use specific words. From the context of the officer's testimony, it is apparent that he identified the specific problems with the performance of the tests. In

context, the implication of the testimony is clear. The hearing officer was entitled to draw reasonable inferences from the officer's testimony that the plaintiff failed the respective tests. The testimony does not give rise to any reasonable inference that the plaintiff passed the tests. The hearing officer did not err in making those reasonable inferences, and declining to make unreasonable inferences to the contrary.

12. As noted above, some of the plaintiff's issues address the weight and credibility of the evidence. In such matters, this court considers and gives weight to the fact that the agency hearing examiner observed the witness and accepted one version of the facts rather than another.

13. 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). The plaintiff failed to sustain his burden of proof.

14. 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).

15. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation rendered on October 13, 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 O'Neill, Nebraska, on January 3, 2001.
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 _____.

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