

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

DAVID A. JACOBSON,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI00-60

JUDGMENT ON APPEAL

DATE OF HEARING: February 16, 2001.

DATE OF RENDITION: February 18, 2001.

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

APPEARANCES:

For plaintiff-appellant: Rodney J. Palmer without plaintiff-appellant.
For defendant-appellee: David M. Streich, Brown County Attorney, on behalf of Nebraska Attorney General.

SUBJECT OF JUDGMENT: Decision on the merits on petition for review under Administrative Procedure Act.

FINDINGS: The court finds and concludes that:

1. This court determines the action after de novo review upon the record of the agency. As the Nebraska Court of Appeals recently restated, proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Chrysler Corp. v. Lee Janssen Motor Co.*, 9 Neb. App. 721, ___ N.W.2d ___ (2000). In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals. *Id.*

2. The court separately discusses the claims asserted in the petition for review. Although the plaintiff concentrated his oral argument on a single issue, he submitted a brief.

3. Paragraph 5 of the petition generally alleges that the procedure used by the department was contrary to law and in excess of the statutory authority and jurisdiction of the agency. This general assertion is insufficient as an assignment of error. A generalized and vague assignment of error that does not advise

an appellate court of the issue submitted for decision will not be considered. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 750 (2000). This court finds nothing in the record to show that the procedure was contrary to law or in excess of the statutory authority and jurisdiction of the agency.

4. The plaintiff's claim in paragraph 11 (which is repeated in paragraph 12) that the director's decision was arbitrary and capricious is superseded by this court's standard of review.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).

5. Paragraph 11 of the petition also claims that the decision resulted from evidence which was not competent, was irrelevant, consisted of hearsay, and for which insufficient foundation was established. This generalized and vague claim also fails to advise this court of the issue or issues sought to be presented. Moreover, 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.

6. The plaintiff complains in paragraph 13A that the hearing officer should not have taken official notice of Title 177 and Title 247 of the Nebraska Administrative Code. This court rejected the identical argument in *Johnson v. Nebraska Dep't of Motor Vehicles*, 2001-013, Cherry Cty. No. CI00-104 (8th Dist. Ct. Neb. 2001) (citing *Nissen v. Nebraska Dep't of Corr. Servs.*, 8 Neb. App. 865, 602 N.W.2d 672 (1999) and NEB. REV. STAT. § 84-906.05 (Reissue 1999)).

7. Paragraph 13D of the petition apparently alleges the hearing officer improperly allowed testimony about the Class C permit and checklist without being received into evidence. Paragraph 13E apparently claims the hearing officer improperly allowed testimony concerning the calibration of the preliminary breath test device without the checklist being in evidence. The actual language of the petition alleges the hearing officer "testified" about these topics. The record shows no testimony by the hearing officer, but does show testimony of the arresting officer on these subjects. The plaintiff raised no objection to the foundational questions on those subject and failed to object on those grounds when the officer

testified that the plaintiff failed the preliminary breath test. Those objections were waived. A party may not predicate error on the admission of evidence to which a timely objection was not made. *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988); *State v. Blair*, 227 Neb. 742, 419 N.W.2d 868 (1988). The later overruling of an objection on such grounds to similar testimony would constitute, at most, harmless error. The plaintiff's claims lack merit.

8. Similarly, paragraph 13F alleges the hearing officer "[t]estified about past [sic] arrest advisement without being in evidence or subject to cross examination." The record shows no testimony by the hearing officer. Again, there is testimony by the arresting officer. And, similarly, the plaintiff failed to timely object to the testimony on that subject by the arresting officer. The objection was waived. This claim also lacks merit.

9. Paragraph 13G alleges the hearing officer "failed to advised [sic] taking an alcohol test would result in loss of drivers [sic] licenses [sic] for one year." In paragraph 13H, the plaintiff asserts that the arresting officer "left [a]ppellant with impression he had already taken a breath test and had failed and didn't advise of consequences of not taking second test."

10. Although the first allegation is somewhat murky, this court assumes that the plaintiff is alleging failure to comply with § 60-6,197(10) which requires that "[a]ny person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." NEB. REV. STAT. § 60-6,197(10) (Cum. Supp. 2000).

11. The officer testified that he read a "Post Arrest Chemical Test Advisement" form to the plaintiff; however, that form does not appear in the record. Although the officer testified about at least part of the content of the form, because the plaintiff failed to include the form in the record this court cannot assume that the form does not properly advise the motorist. The motorist in an administrative license revocation appeal bears the burden of proof. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). Moreover, the portion that was read does appear to establish adequate compliance with the statutory mandate. The plaintiff failed to meet his burden to show that the officer failed to comply with § 60-6,197(10).

12. The second allegation is absolutely inconsistent with the officer's credible testimony. In opposition are the plaintiff's bare statements that nothing was said at the sheriff's office about taking an intoxilyzer test, that he was not advised in any way that it was required, and that he did not recall any post-arrest advisements. 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. The plaintiff failed to meet his burden of proof on these issues.

13. The preceding issues were stated in the petition, but not orally argued or briefed. No further discussion of those issues is required.

14. In his brief and at oral argument, the plaintiff concentrated on his two principal allegations. Paragraph 13B alleges that the hearing officer improperly "received oral testimony concerning speeding without foundation." Paragraph 13C claims error occurred in receiving "oral testimony concerning speeding by offer not for the truth of the matter which was irrelevant."

15. The department's counsel premised probable cause or reasonable suspicion for the stop on the observations of speeding by the plaintiff.

16. The plaintiff relies on § 60-6,192, arguing that the arresting officer's testimony about his visual observations of the plaintiff's vehicle's speed should not have been admitted without the corroboration of a microwave, mechanical, or electronic speed measurement device. NEB. REV. STAT. § 60-6,192 (Reissue 1998).

17. The defendant counters the argument by citing the Nebraska Supreme Court decision in *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). Here, as in *Howard*, the testimony of speed is not adduced to establish his rate of speed so as to prove a charge that he exceeded a particular speed limit. Consequently, the speed was not "at issue" as contemplated by § 60-6,192. The absence of corroboration by use of a device is immaterial; none was required.

18. The cases of *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991), and *State v. Kincaid*, 235 Neb. 89, 453 N.W.2d 738 (1990), cited by the plaintiff, were cases in which the defendant was charged with speeding, and speed was clearly "at issue." They do not support the plaintiff's legal position on this matter. The plaintiff also cited *State v. Kudlacek, supra*; however, that case did not

address visual observations, but concerned the foundational requirements for testimony regarding speed measurement device results. *Kudlacek* has no bearing on the present issue.

19. However, the plaintiff also argues that the department failed to adduce sufficient foundation to support the officer's testimony of his visual observations of the plaintiff's vehicle's speed.

20. The plaintiff did make a foundational objection when the topic was first raised. Exhibit 1, at 5:8-10. Some argument followed. In the course of argument, the plaintiff also raised a relevance objection. *Id.* at 5:20-6:1. After the objections were overruled, the plaintiff requested a continuing objection, but did not state any grounds for the continuing objection. *Id.* at 6:5-6. That constituted only a general objection, which is insufficient to support a claim of error. *State v. Farrell*, 242 Neb. 877, 497 N.W.2d 17 (1993); NEB. REV. STAT. § 27-103(1)(a) (Reissue 1995).

21. Even if the foundational objection was properly preserved, the plaintiff's claim lacks merit. The plain language of § 60-6,192 declares determinations of motor vehicle speed based upon the "visual observation" of "any peace officer" to be "competent evidence for all other purposes" except where "the speed of the vehicle is at issue." As *State v. Howard* clearly declares that speed is not at issue here, the plain language of § 60-6,192 makes a peace officer's visual observations admissible. The defendant clearly adduced evidence that the arresting officer was a peace officer. Under § 60-6,192, that establishes the basis for admission of the visual observations of speed. This court is not free to impose requirements contrary to the plain language of the statute.

22. An arrested motorist "refuses" to submit to a chemical test where the motorist's conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person's belief that the motorist understood the officer's request for a test and manifested a refusal or unwillingness to submit to the requested test. *State v. Clark*, 229 Neb. 103, 425 N.W.2d 347 (1988). Anything less than an unqualified, unequivocal assent to an arresting officer's request to submit to a chemical test constitutes a motorist's refusal to submit to a chemical test. *Id.*

23. Upon de novo review, the court finds by the greater weight of the evidence that:

a. The arresting officer had probable cause to believe that the plaintiff was operating or in actual physical control of a motor vehicle in violation of section 60-6,196; and,

b. The plaintiff refused to submit to or failed to complete a chemical test after being requested to do so by the officer.

24. The decision of the director should be affirmed.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation rendered on November 9, 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. Any request for attorneys' fees, express or implied, is denied.

Signed in chambers at Ainsworth, Nebraska, on February 18, 2001.
DEEMED ENTERED upon the date of filing by the court clerk.

If checked, the Court Clerk shall:

BY THE COURT:

⋮ 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:

William B. Cassel
District Judge