

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

GREGORY C. IRWIN,

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF MOTOR
VEHICLES,**

Defendant-Appellee.

Case No. CI01-24

JUDGMENT ON APPEAL

DATE OF HEARING: August 31, 2001.

DATE OF RENDITION: August 31, 2001.

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

APPEARANCES:

For plaintiff-appellant: Rodney J. Palmer, of Palmer & Kozisek, P.C., without plaintiff.

For defendant-appellee: David M. Streich, Brown County Attorney, on behalf of the
Nebraska Attorney General.

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

PROCEEDINGS: See journal entry rendered on August 31, 2001.

FINDINGS: The court finds and concludes that:

1. On appeal under the Administrative Procedure Act, this court reviews the decision de novo on the agency record. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *Langvardt v. Horton*, 254 Neb. 878, 581 N.W.2d 60 (1998); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). 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). 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. *Wolgamott v. Abramson, supra; Booker v. Nebraska State Patrol*, 239 Neb. 687, 477 N.W.2d 805 (1991).

2. The court has considered only those claims asserted in the petition for review necessary to reach a decision.

3. Several of the assertions of the petition for review regarding the prehearing procedures are similar to those considered in *Gillespie v. Nebraska Dep't of Motor Vehicle*, 2001-036 (Neb. Dist. Ct., 8th Dist., 2001). The explanations set forth in *Gillespie* need not be repeated here. The plaintiff's procedural claims lack merit.

4. Section 006.01 of the regulations provides that "[t]he sworn affidavit of the arresting officer shall be received into the record by the Hearing Officer as the jurisdictional document of the hearing, and upon receipt of the sworn report, the Director's order of revocation has prima facie validity." 247 Neb. Admin. Code, ch. 1, § 006.01 (1998). However, that section does not relieve the defendant of the foundational requirements for admission of the report in a "rules of evidence" hearing. In *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), the Nebraska Supreme Court concluded that the defendants made a prima facie case once they established the officer *provided* his sworn report containing the required recitations.

5. The only foundational testimony adduced regarding the sworn report was that sought by the department's counsel:

Q: Okay. As a result of all of this, did you fill out a sworn report?

A: Yes, I did.

Q: And there's an Exhibit 4-1. You got that?

A: I have got it in front of me at this point, yes.

Q: Is that an accurate copy of your sworn report?

A: Yes.

Q: And that's your signature down there at the bottom?

A: It's my signature, and I recognize the writing as mine.

E1, 18:14-24.

6. The record is absolutely void of any foundational evidence that the arresting officer “provided” the sworn report to the department. While the foundational testimony was adequate to show completion of the record in the hands of the arresting officer, the defendant failed to adduce any evidence that the arresting officer transmitted the report to the department. The document is not certified under seal of the department, and consequently, is not self-authenticating. NEB. REV. STAT. § 27-902 (Reissue 1995). The plaintiff properly objected on foundation, and the hearing officer erred in overruling the foundational objection.

7. The plaintiff did not specifically assign that error in the petition for review. However, this court doubts that review on this issue is limited by that failure in view of the de novo on the agency record standard. Even if the ordinary appellate rule limiting consideration upon appeal to assigned errors does apply to this court’s de novo review, an appellate court may, at its option, notice plain error. *In re Guardianship & Conservatorship of Borowiak*, 10 Neb. App. 22, 624 N.W.2d 72 (2001). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. The basic due process standard underlying the plain error doctrine applies equally to the administrative process. The failure to adduce proper foundation for the basic jurisdictional document strikes at the heart of the integrity of the administrative hearing process. Such failure constitutes plain error and requires reversal of the director’s order.

8. Even if the department had adduced sufficient foundation to support admission of the sworn report, the plaintiff met his burden to establish the absence of probable cause for the stop, and thus, for the arrest, by the greater weight of the evidence. The plaintiff did allege the absence of probable cause for the arrest in his petition for review.

9. The hearing officer erroneously allowed the arresting officer to testify to the hearsay statements of Kristi Frew. Although purportedly not offered to prove the truth of the matters asserted, the department argued, and the hearing officer and the director plainly relied upon, the content of those statements. If the department wished to rely on the content of Ms. Frew’s testimony to establish probable cause, it should have called her as a witness, thereby subjecting her statements to cross examination. The court disregards the erroneously received hearsay statements.

10. The evidence plainly establishes that the arresting officer observed no traffic violation, and had no personal knowledge of any facts establishing probable cause for the stop. That action occurred as a result of mere suspicion or a hunch. The administration of field sobriety tests failed to establish any objective support for the arrest. The arresting officer did not administer a preliminary breath test because of the absence of a calibrated unit. Such evidence does not support a finding that the arresting officer had probable cause to believe the plaintiff was operating or in the actual physical control of a motor vehicle in violation of § 60-6,196. Indeed, the evidence supports a contrary finding.

11. Upon de novo review, the court concludes that the defendant failed to properly establish a prima facie case, and that the plaintiff established the absence of probable cause by the greater weight of the evidence. The director's order must be reversed with direction to dismiss the proceeding.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The Order of Revocation rendered against the plaintiff-appellant on May 25, 2001, is reversed and the cause remanded to the director with direction to dismiss the proceeding.

2. Costs on appeal in the amount of \$179.91 are taxed to the defendant-appellee, and judgment is entered in favor of the plaintiff-appellant and against the defendant-appellee for such costs. The judgment shall bear interest at the rate of 5.442% per annum from date of entry of judgment until paid.

3. Any request for attorney fees, express or implied, is denied.

Signed at Ainsworth, Nebraska, on August 31, 2001.

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.
Done on _____, 20__ by ____.
- Enter judgment for costs with interest on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days ("Order of Revocation reversed and remanded with direction to dismiss; judgment against defendant for costs of \$179.91 with interest at 5.442% per annum from date of judgment").
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