

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**ERIC L. GOOCHEY,**

Plaintiff-Appellant,

vs.

**NEBRASKA DEPARTMENT OF  
MOTOR VEHICLES,**

Defendant-Appellee.

Case No. CI03-25

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** October 3, 2003.  
**DATE OF RENDITION:** October 15, 2003.  
**DATE OF ENTRY:** Court clerk’s file-stamp date per § 25-1301(3).

**APPEARANCES:**

For appellant: Rodney J. Palmer without appellant.  
For appellee: Charlotte Koranda, Assistant Attorney General, appearing telephonically.

**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 has 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, 619 N.W.2d 78 (2000). 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. *Chrysler Corp. v. Lee Janssen Motor Co.*, *supra*.

2. The court has considered all of the claims asserted in the petition for review. However, the court does not discuss in detail those issues clearly lacking any legal merit. See *Gillespie v. Nebraska Dep't of Motor Vehicle*, 2001-036 (Neb. Dist. Ct., 8<sup>th</sup> Dist., 2001).

3. The evidence essentially pits the appellant's credibility against the arresting officer's credibility. To establish probable cause for the later stop, the officer testified that he earlier observed the appellant driving a pickup that struck a trailer in a dealership parking lot. The collision did not cause any property damage. After initialing stating that he did not recall, the appellant then unequivocally testified that his vehicle did not collide with the trailer. The arresting officer admitted a later conversation with the appellant in which the officer stated that he could not identify the appellant at the time of the earlier collision with the trailer. However, regardless of whether the appellant was the driver of the vehicle that earlier struck the trailer, the appellant admitted that he had been operating the pickup on the public roads before the time when the officer found the appellant sleeping in the vehicle. When the officer later saw the appellant, the appellant's head was against the steering wheel with the motor running. The observation of a sleeping driver in a parked vehicle with the motor running raised a reasonable suspicion of unlawful activity for further inquiry. The odor of an alcoholic beverage from the vehicle added more reason for inquiry. After trying and failing to wake the appellant, the officer called for an ambulance. This added more reason for inquiry. The emergency medical technicians administered oxygen and after some time the appellant regained consciousness. The emergency personnel transported appellant to the hospital. All of these circumstances, considered together, established probable cause for the peace officer to believe that the appellant was operating or in the actual physical control of a motor vehicle in violation of § 60-6,196.

4. The department bears an initial burden of production to make a prima facie case for revocation. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). It meets that burden by the proper introduction of the officer's sworn report. *Id.* It then becomes the

licensee's burden to establish grounds for reversal by a preponderance of the evidence. *Id.* The motorist in an administrative license revocation appeal bears the ultimate burden of proof once the sworn report is properly received in evidence. See also *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002). The appellant failed to meet that burden.

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

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

b. The appellant refused to submit to a chemical test after being requested to do so by the peace officer in violation of § 60-6,197.

6. The decision of the director should be affirmed.

**JUDGMENT:** IT IS THEREFORE ADJUDGED that:

1. The order of revocation rendered on July 23, 2003, 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 at **Ainsworth**, Nebraska, on **October 15, 2003**;  
DEEMED ENTERED upon file stamp date by court clerk.  
If checked, the court clerk shall:

Mail a copy of this order to all counsel of record and any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Note the decision on the trial docket as: [date of filing] Signed "**Judgment on Appeal**" entered.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mail postcard/notice required by § 25-1301.01 within 3 days ("Revocation order affirmed; stay dissolved; costs taxed to appellant").  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

BY THE COURT:

---

**William B. Cassel**  
District Judge

Mailed to: