

No. 45327-4

COURT OF APPEALS DIVISION TWO
STATE OF WASHINGTON

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Petitioner,

v.

JAMES DONALD WATKINS,

Respondent.

09
JUL 11 11 11:00
COURT OF APPEALS DIVISION TWO
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. IDENTITY OF RESPONDENT AND BRIEF INTRODUCTION

Respondent is James Donald Watkins.

The Respondent, hereafter Mr. Watkins, was arrested on November 22, 2012 for attempting to elude a police vehicle and DUI. The arresting officer was one Pierce County Sheriff's Deputy M. Smith. Deputy Smith did not possess a valid BAC card on this date, and accordingly was unable to process Mr. Watkins for DUI. Trooper Rushton met Deputy Smith at the Fircrest Police Station for the sole purpose of conducting the DUI processing, which would include advisement of implied consent warnings and administration of breath testing.

Deputy Smith's report, relied upon by the Department of Licensing, was not properly certified pursuant to RCW 9A.72.085. Trooper Rushton's report was properly certified. Additionally, Trooper Rushton signed a cover page under penalty of perjury that would not only purport to certify all documents attached to the cover page, but also declare under penalty of perjury that the arrest was lawful and that there was probable cause supporting said arrest.

Ultimately, the issue before this Court is whether the State can deprive an individual of a property interest protected by due process on the basis of unsworn testimony. The answer must be No.

II. TRIAL COURT /RALJ DECISION

The Hearing Examiner held that the Department's jurisdiction was established by receipt of Trooper Rushton's report, which was sworn to under RCW 9A.72.085. (DOL, pg. 12). The Hearing Examiner further held that Trooper Rushton's certification under 9A.72.085 properly certified all documents and reports attached to the certification, including Deputy Smith's unsworn report. (DOL, pg. 12). The Hearing Examiner ultimately sustained the Department's proposed action and Mr. Watkins' driver's license was revoked.

Mr. Watkins appealed the decision to the Pierce County Superior Court. The Superior Court reversed. The court held that the Hearing Examiner erred in relying on an unsworn report to establish jurisdiction. Further, that the Hearing Examiner erred in relying on an unsworn report to establish probable cause for the stop and arrest of Mr. Watkins. The court found that the secondary officer could not properly certify another officer's report under penalty of perjury. The Department sought discretionary review with this Court, which was granted.

III. STATEMENT OF THE CASE

Mr. Watkins was arrested for DUI and attempting to elude a police vehicle on November 22, 2012 by Pierce County Sheriff's Deputy M. Smith. Deputy Smith did not possess a valid BAC operators permit card at the time. Trooper Rushton was dispatched to the Fircest Police Station to conduct the DUI processing portion of the arrest. (DOL, pg. 27-29). Trooper Rushton also had a field training officer with him, a Trooper Zeller.

Trooper Rushton met Deputy Smith at the station. According to Trooper Rushton he was advised by Deputy Smith that Mr. Watkins had been arrested for eluding; that he detected the odor of intoxicants coming from Mr. Watkins; that Mr. Watkins declined to perform voluntary field sobriety tests; that Mr. Watkins was then placed under arrest for eluding and DUI. (DOL, pg. 27-28). Trooper Rushton then went through the DUI processing with Mr. Watkins, which included the advisement of implied consent and the offering of a breath test.

Trooper Rushton then submitted the DUI arrest report to the DOL. (DOL, pg. 22). This single page document was signed under penalty of perjury by declaration authorized pursuant to RCW 9A.72.085, by Trooper

Rushton only. This document indicated, under penalty of perjury, that Mr. Watkins was lawfully arrested. That at that time there was reasonable grounds to believe Mr. Watkins had been driving while under the influence. The document was signed under penalty of perjury using the certification provided by RCW 9A.72.085, but also indicated under this same certification that all accompanying reports, documents, and information contained therein was true and correct. Again, this certification was executed by Trooper Rushton alone.

Other than the conclusory statements provided to Trooper Rushton, all evidence pertaining to the traffic stop and arrest of Mr. Watkins was contained within the unsworn report of Deputy Smith. (DOL, pg. 36-37). It should be noted that Deputy Smith's report did not indicate what he facts he relayed to the trooper.

The Hearing Examiner held that Deputy Smith's report was admissible at the hearing because it was attached to Trooper Rushton's sworn certification. (DOL, pg. 12). The Hearing Examiner then went on to rely upon Deputy Smith's report to establish jurisdiction, probable cause for the traffic stop, and probable cause for the arrest. (DOL, pg. 12-13).

IV. ARGUMENT

1. Standard of Review.

A. Factual Determinations

An appellate court reviews findings of fact using a substantial evidence standard. State v. Halstein, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). The State does not assign any error to the factual determinations made by the trial court. Unchallenged findings are verities on appeal. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

B. Legal Rulings

Issues constituting a question of law are reviewed de novo. Pattison v. DOL, 112 Wn. App. 670 (2002); Jury v. DOL, 114 Wn. App. 726 (2002). This Court reviews a DOL final order in the same manner as an appeal from a decision from a court of limited jurisdiction. Walk v. DOL, 95 Wn. App. 653, 656 (1999). In reviewing a license revocation decision, this Court stands in the same position as the superior court. Grewal v. DOL, 108 Wn. App. 815, 819 (2001).

The review of the meaning of statutes and regulations governing administrative proceedings is de novo. City of Seattle v. Clark-Munoz, 152 Wn.2d 39, 43 (2004).

2. Argument

Under implied consent law, once a person has submitted to a breath or blood test in violation of applicable law or refused consent to the same, the arresting officer, or other law enforcement officer at whose direction any test has been given, immediately notifies the Department of the arrest and transmits to the Department a sworn report or report under a declaration authorized by RCW 9A.72.085. This report must state that there was a lawful arrest supported by probable cause and that the person either consented to a test that resulted in readings constituting a violation or refused consent. See, RCW 46.20.308 (5). This document establishes the Department's jurisdiction to act. Upon receipt of this document, the Department issues an order of suspension or revocation, which triggers the driver's 20 day time frame for contesting the proposed action. See, RCW 46.20.308 (6) (7).

If the driver does nothing, the Department's proposed action will take effect 60 days from the date of arrest. If the driver contests within the 20 day time frame, a hearing is scheduled that must be held within 60 days from the date of arrest. The driver is then provided with the evidence the Department will rely upon at the hearing. This evidence typically consists

of the arresting officer's report and other documents used in the normal course of any DUI arrest. Such documents consist of the constitutional rights form; implied consent form; field sobriety test work sheet; impound documents, breath test ticket; and other forms an officer may execute during the course of a DUI arrest. The hearing provides the driver with the opportunity to challenge the facts and evidence the Department would rely on in support of its proposed action. The hearing process must comport with due process as there is a recognized property interest in a driver's license.

The Department's ability to act is essentially set forth in RCW 46.20.308 (8), which contains two "sworn report" clauses. Alforde v. DOL, 115 Wn App. 576 (2003) provides a detailed explanation of this.

The first paragraph of RCW 46.20.308 (8) contains the prima facie evidence clause, which provides:

The sworn report or report under a declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under influence of intoxicating liquor...

The second paragraph, after describing conduct of hearing, subpoenas, and document production requirements, states as follows:

...The sworn report or report under declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation.

Here, Trooper Rushton signed the one page DUI arrest report, which is essentially a cover sheet that is referred to in the first paragraph of RCW 46.20.308 (8), referenced above. The receipt of this document vested the DOL with jurisdiction to act: to start the process. However, Trooper Rushton could not have declared under penalty of perjury that Mr. Watkins was lawfully arrested based on probable cause because he had absolutely no first hand knowledge of such facts. Likewise, Trooper Rushton cannot declare under penalty of perjury that another officer's unsworn report is true and correct for the purposes of admissibility or consideration at the administrative hearing. Deprivation of a property interest on the basis of unsworn testimony violates the basic notions of due process.

RCW 46.20.308 (8) refers to a sworn report or report under a declaration authorized by 9A.72.085 of **the** law enforcement officer and any other evidence accompanying the report shall be admissible... Both common sense and case law support the reasoning that only **the** officer

that wrote **the** report can provide a declaration under RCW 9A.72.085 that the report is true and correct. In many DUI arrest scenarios there is only one officer involved. The arresting officer is often the one who makes the traffic stop; conducts the DUI investigation from contact to arrest; and ultimately processes for DUI post arrest, which would include the implied consent advisement and breath or blood testing.

Under this common scenario, this one officer would submit the one page report of DUI arrest. This officer would have first hand knowledge of all facts and circumstances. This one officer would be providing a sworn declaration properly certifying his report and all the accompanying documents that would have been generated by this officer during the course of the DUI investigation and arrest. Again, an example of such documents would include the constitutional rights form; implied consent warnings form; the breath test ticket; the officer's own police report or written narrative regarding the facts of the case. It is this common scenario that the statute is clearly referring to when it contemplates "the" officer and "a" sworn report.

RCW 46.04.010 is instructive on the scope and construction of terms and provides that words or phrases used in the singular or plural shall include the singular or plural unless the context thereof shall indicate

to the contrary. This reasoning of the statutory language is supported by common sense and case law, which does not allow for the admission or consideration of unsworn testimony at a official proceeding wherein a property interest protected by due process is at stake.

There are two issues at work here: 1) Whether an officer lacking personal knowledge regarding the grounds for stop and arrest can nonetheless declare under penalty of perjury that the arrest was lawful and supported by probable cause. This merely covers the jurisdictional document that begins the process. 2) Whether a hearing examiner can rely upon unsworn testimony to establish the issues necessary to revoke an individual's driver's license. This pertains to the actual evidence offered against a driver at the hearing itself. The answer to the first issue should be no; the answer to the second issue is a definite no.

RCW 46.20.308 (8) authorizes the admission of an officer's report that is sworn or otherwise properly presented under declaration pursuant to RCW 9A.72.085. RCW 9A.72 contains several applicable definitions worth noting here. RCW 9A.72.010 (4) defines "Official proceeding" as a proceeding heard legislative, judicial, **administrative**, or other governmental agency or official authorized to hear evidence under oath, including any referee, **hearing examiner**, commissioner, notary or other

person taking testimony or depositions. A hearing before the Department of Licensing is an administrative proceeding that is presided over by a hearing examiner. The hearing examiner is provided statutory authority to receive testimony and evidence under oath and make decisions regarding the deprivation of property. A DOL hearing is unquestionably an "official proceeding."

RCW 9A.72.010 (2) defines "Oath" as an affirmation and every other mode authorized by law of attesting to the truth of that which is stated. RCW 9A.72.010 (3) states that an oath is required or authorized by law when the use of the oath is specifically provided for by statute or regulatory provision. RCW 9A.72.010 (6) defines "Testimony" as including oral or written statements, documents, or any other material that may be offered by a witness in an official proceeding.

RCW 46.20.308 requires a prima facie showing of specifically defined issues through a sworn report or report offered by declaration under RCW 9A.72.085 before a driver's license can be revoked, that is, through testimony under oath. In Metcalf v. DOL, 11 Wn. App. 819 (1974), the driver argued that the Department did not have jurisdiction to revoke a driver's license on the basis of an unsworn report. The court agreed and noted that the law disapproves of visiting serious consequences

upon parties on the basis of unsworn evidence. Id. at 821. The court further held that "...were we to construe the statute as the department suggests, the presumption of credibility, which serves as the basis for the first determination, would cease to exist, for the presumption does not attach to an unsworn statement. Without the presumption, the Department's revocation would be based only upon unsworn allegations with little assurance of an accurate result."

The State Supreme Court in In re Ross, 45 Wn.2d 654 (1954), held that the state could not deprive parents of custodial rights without a fair hearing that required witness testimony to be sworn under oath.

Nirk v. City of Kent Civil Service Comm'n, 30 Wn. App. 214 (1981), involved a civil service employment statute that provided for hearings exempted from the rules of evidence, authorized the tribunal to administer oaths, issue subpoenas, and require the attendance of witnesses, all similar to implied consent hearings before the DOL. The issue in Nirk centered around the tribunal failing to place witnesses under oath prior to taking testimony. Although the statute governing the hearing process provided that such hearings may be informal and relaxed the technical rules of evidence, the court held that witnesses must be sworn. Id. at 217. The court further noted that under ER 603, which is based in part on

article 1, section 6 of the state constitution, witnesses are required to be sworn: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered..." The court continued: "The primary function of requiring witnesses to be sworn is to add an additional security for credibility by impressing upon them their duty to tell the truth, and to provide a basis for a charge of perjury." Id. at 218.

The Nirk court pointed out that the administration of an oath is significant in arriving at the truth. The court reasoned that because the statute governing discharge hearings provided for the administration of oaths, the legislature recognized that witnesses should be sworn. Id. See also, In re Ross, 45 Wn.2d 654 (1954), holding that in a deprivation proceeding the witnesses should be sworn. The Nirk court further concluded as follows:

Administrative agencies may sometimes reach decisions solely written evidence, which can expedite and simplify formal administrative proceedings through reducing the controversy to verified written statements, which are then exchanged by the parties for the purpose of rebuttal... Therefore, **the statements should be under oath even when the testimony is written. Such a requirement poses a minimal inconvenience to the administrative body** and is consistent with the informality of the hearing. Id. at 219.

Mr. Watkins, as with any driver, enjoys a property interest in his driver's license that is protected by due process. The law does not allow the deprivation of a property interest on the basis of unsworn testimony. The state has not provided any direct authority that would condone such a departure from due process protections and the notions of fundamental fairness inherently required within the administrative hearing process. The hearing examiner found probable cause for the traffic stop and arrest on the basis of unsworn testimony. Recognizing the unsworn nature of the offered testimony, the hearing examiner then found that a second officer, with no involvement in the arrest and no first hand knowledge of the facts, could somehow declare the first officer's report true and correct under penalty of perjury. The superior court disagreed.

The superior court's order is consistent with and harmonizes with legal practice and doctrines, case law, statutes, as well as the state constitution. The superior court's order treats both parties equally at law and avoids different legal treatment and standards between parties. Moreover, the superior court's ruling is supported by common sense.

The State argues that an unsworn report, i.e., unsworn written testimony offered against an individual for the purpose of property deprivation, is admissible merely by virtue of the fact that it accompanies

a separately sworn report. The process must be kept in mind. Historically, receipt of a sworn report from the arresting officer was the jurisdictional prerequisite to the Department's action. See, Binckley v. DMV, 23 Wn. App. 412 (1979); Martinez v. DOL, 70 Wn. App. 398 (1993). This required a sworn report before a notary. In 1995 the process was changed to allow the submission of certified reports under declaration per RCW 9A.72.085, however, this did not change the fact that it was still sworn testimony. This first step only establishes jurisdiction. If the driver does nothing, the Department's proposed action goes into effect.

If the Department's proposed action is challenged, the process moves to the second step. A formal administrative hearing is held and the matters within the sworn report are subject to scrutiny. The sworn report is no longer controlling. The hearing provides the opportunity to challenge the facts. At the hearing, the Department considers its records and may receive sworn testimony. RCW 46.20.332. The State argues that at this stage of the process, where the facts are challenged, that the Hearing Examiner may receive, consider, and rely upon unsworn testimony to deprive a property interest.

RCW 46.20.308 (8) can be broken down as follows: "The sworn report [which would refer to reports sworn before a notary] or report under

declaration authorized by RCW 9A.72.085 of the law enforcement officer..." This first portion clearly references testimony and further indicates it must be sworn. The term "report" must be read in both the singular and the plural according to RCW 46.04.010, which discusses the scope and construction of terms. Consequently, this portion of the statute is referring to report or reports submitted by law enforcement officers to be used as testimony.

The second portion reads: "...and any other evidence accompanying the report shall be admissible without further evidentiary foundation." This clearly refers to the type of additional evidence noted above; evidence and documents outside the actual written testimony that are generated as a result of such testimony. Furthermore, the language states: "...admissible without *further* evidentiary foundation," which obviously assumes some level of foundation to begin with. This makes sense when dealing with additional evidence prepared by the same officer who has provided sworn testimony in the first instance. It does not make sense when used as a means to admit unsworn testimony, which is what the State is asking this Court accept. The court in Alforde noted that the DOL is not granted unlimited license to submit material under the guise of

a coversheet, 115 Wn. App. at 582, yet here the State seeks not just admit material, but unsworn testimony.

The deprivation of property on the basis of unsworn testimony offends due process and RCW 46.20.308 (8) should not be read to accomplish such an absurd result.

The State also argues that the officer's unsworn testimony is admissible under the Department's rules, which allow the admission of hearsay and relaxed rules of evidence. The Department relies on Ingram v. DOL, 162 Wn.2d 514 (2007) in support of this position.

In Ingram, the driver claimed that a separate sworn declaration provided by the State Toxicologist regarding a relevant piece of evidence did not accompany the officer's report and was not otherwise specifically admissible. The Department argued that it could consider its own records and that the hearing examiner could, per administrative regulation, consider relevant evidence received before the end of the hearing. Id. at 520.

The court held that the officer is not the only witness authorized to testify via sworn report or sworn declaration and that the hearing examiner had the authority to admit relevant evidence received before the end of the

hearing. Id. at 526. The bottom line for purposes of the case at hand is that Ingram dealt with a sworn declaration.

The State also cites to Alforde v. DOL, 115 Wn. App. 576 (2003). Alforde involved the use of cover sheets that served as a blanket declaration and purported to properly certify all documents that followed pursuant to RCW 9A.72.085. This cover sheet was not signed by the officers involved in the DUI arrest. Alforde argued that because the cover sheet was not signed, the accompanying documents were inadmissible and the Department could not therefore establish the prima facie evidence requirements. Id. at 579-580.

The court observed that it is the sworn report, the one page jurisdictional document, and the complete police report that constitutes prima facie evidence that the statutory requirements were complied with. Id. The court found that although the DOL does not have unlimited license to submit material under its cover sheet, both officer's reports were independently certified pursuant to RCW 9A.72.085. The one page jurisdictional document and the properly sworn police reports were sufficient to establish a prima facie case. Id. at 580-581. The claimed technical deficiency was overlooked because the officer's reports were independently sworn according to RCW 9A.72.085. In the case at hand,

we are dealing with an unsworn report and attempt by another officer to certify under penalty of perjury information to which he has no first hand knowledge.

The cases relied upon by the State all have one important factor in common: they contained properly sworn testimony, which is what is missing in the case at hand. Under the State's argument there would be no need to require that any testimony offered be under oath. While the rules of evidence are relaxed, the issues that must be met at the hearing to justify the deprivation of a property interest must be established by sworn testimony if the proceeding is to comport with due process and fundamental fairness.

It is anticipated that the State will discuss the application of the "fellow officer" rule in its reply brief. Accordingly, it will be discussed here briefly.

The "fellow officer rule," which allows a court to consider the cumulative knowledge of police officers in determining whether there was probable cause for an arrest, does not apply to misdemeanors. State v. Ortega, 177 Wn.2d 116 (2013). Although there is an exception for traffic infractions, neither the general presence requirement nor the other exceptions expressly allow an officer to rely on the request of a witnessing

officer in arresting a misdemeanor or gross misdemeanor suspect. Id.
DUI is a gross misdemeanor.

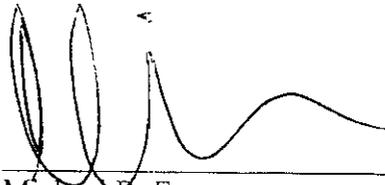
Furthermore, the secondary officer did not perform an arrest at the direction of the officer with first hand knowledge. As detailed above, the primary officer effected the traffic stop and made the arrest decision. This officer then transported Mr. Watkins to the police station where the secondary officer met him solely for the purpose of administering the breath test. The information provided by the arresting officer to the secondary officer was conclusory at best, and certainly did not provide enough objective fact in and of itself to establish probable cause or even reasonable suspicion. The "fellow officer rule" simply does not apply here.

V. CONCLUSION

The State essentially asks this Court to approve of a scheme whereby the Department is vested with jurisdiction on the basis of a sworn report coming from an officer with no personal knowledge of the facts he or she certifies are true. Perhaps this is acceptable. The State then asks this Court to approve of the use of and reliance upon unsworn testimony to effectuate the deprivation of a property interest subject to due process. This is unacceptable and does not comport with due process. Mr. Watkins

respectfully asks this Court to affirm the decision reached by the Superior Court.

Respectfully submitted this 11th day of July, 2014.

A handwritten signature in black ink, consisting of several loops and a trailing line, positioned above a horizontal line.

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PROOF OF SERVICE

I certify that I served a copy of the, RESPONDENTS BRIEF on all parties or their counsel of record on the date below as follows: by mail.

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COURT OF APPEALS
DIVISION II
2014 JUL 11 PM 1:38
STATE OF WASHINGTON
BY DEPUTY

RE: James D. Watkins No. 45327- 4 (PCSC No. 13-2-07421-0)

I, Margaret Tillman on July 11, 2014, mailed a copy of the Respondents Brief at United State Post Office Located at 609 SW 150th St Burien WA. 98166 to the address listed above.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of July at Burien, WA.

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