

NO. 46341-5

(Pierce County Superior Ct. No. 13-2-15050-1)

**IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

LOUIS P. TRUTMAN,
Respondent,

vs.

STATE OF WASHINGTON DEPARTMENT OF LICENSING
Petitioner,

RESPONDENT'S BRIEF

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I. IDENTIFICATION OF RESPONDENT

The Respondent is Louis P. Trutmam, Washington Driver's License

II. STANDARD OF REVIEW

The Court of Appeals reviews the Department's decision from the same position as the Superior Court. *Clement v. Dep't of Licensing*, 109 Wn. App. 371, 373, 35 P.3d 1171 (2001).

The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determination supported by substantial evidence in the record: (a) that were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. RCW 46.20.308(9)

III. ERRORS OF LAW

1. Did the Departments hearing officer committed an error by admitting Trooper Bangart's unsworn narrative report, which was

subsequently overturned by the Pierce County Superior Court? Should the Superior Court Order be affirmed?

2. Did the Department's hearing officer commit error by admitting evidence of the breath test results contrary to RCW 46.61.506(4)(a)(1) which requires that the person who performs the test be authorized to perform such test by the state toxicologist?

IV. DECISION AND RELIEF REQUESTED

Mr. Trutman asks this court to deny the Appeal seeking review of the decision which reversed the Department of Licensing's suspension of Louis P. Trutman's drivers privilege for 90 days and disqualification of his commercial driver's license for one year entered in Pierce County Superior Court Cause No. 13-2-15050-1 May 9, 2014. Mr. Trutman seeks review pursuant to RCW 46.61.506(4)(a)(1) of the hearing officers decision.

V. RELEVANT FACTS

On July 19, 2013 Washington State Sergeant Bangart of the Washington State Patrol stopped Mr. Trutman for driving in the center turn lane passing motor vehicles. (CP Pg. 24) Sergeant Bangart performed an initial investigation pursuant to the stop. He requested back-up

assistance and Trooper Howson responded. Trooper Howson placed Mr. Trutman under arrest and transported him to the Washington State Patrol district office for processing for DUI. (CP Pg.16)

The Department of Licensing notified Mr. Trutman that they would suspend his driver's license and disqualify his commercial driver's license based on the results of the breath test received. (CP Pg. 63-64) (DOL Pg. 60-61). Mr. Trutman requested a hearing. (CP Pg. 63-64) (DOL Pg. 60-61).

Later Trooper Howson transmitted a certified "Washington State DUI Arrest Report" to the Department of Licensing. (CP Pg. 25) (DOL Pg. 22). Attached to the DUI Arrest Report were 2 narrative reports. The report of Trooper Howson was certified. (CP Pg. 76-79) (DOL Pg. 73-76). The Narrative Report of Sergeant Bangart was not. (CP Pg. 73-75) (DOL Pg. 70-72).

At the hearing Mr. Trutman moved for the suppression of Sergeant Bangart's report because it was not certified. The hearing officer admitted the uncertified and unsworn report of Sergeant Bangart stating as follows:

"Sergeant Bangart's report is admissible because it accompanies Trooper Howson's certified report. See, RCW 46.20.308. Further WAC 448-103-120 provides that the Hearing Officer determines admissibility and weight to be

given evidence.” “The petitioner has the ability to submit evidence and call witnesses to contradict the information contained in the report. The report will be considered in determining the lawfulness of the initial detention.” (CP Pg.26) (DOL Pg. 23)

Mr. Trutman asked that the result of the breath test be suppressed because Trooper Howson had not provided evidence that he was authorized to perform such test by the State Toxicologist pursuant to RCW 46.61.506(4)(a)(1). The Hearing Officer in the decision stated:

“The Petitioner argued that the officer did not provide sufficient information regarding his certification on the administration of the breath test.” The argument is not persuasive. The officer indicated in his report that he is certified on the BAC, which is another name of the DataMaster, and that the test was conducted in accordance with his training. Due process affords the petitioner the opportunity to submit evidence or call witnesses to overcome the prima facie case.”

The hearings officer entered the Order suspending Mr. Trutman’s personal license and commercial driver’s license (CP Pg. 22) Mr. Trutman filed a Motion to reconsider the decision for the reasons listed and said Motion was denied. (CP Pg.9)

The Pierce County Superior Court reversed the Department of Licensing’s hearing officer finding Trooper Bangart’s report was uncertified and unsworn. (CP Pg. 115) There was no ruling on the 46.61.506(4)(a)(1) issue.

VI. ARGUMENT I

1. **No Evidence of Driving:** The unsworn report of Sergeant Bangart is not admissible. The hearing officer admitted Sergeant Bangart's report attached to the jurisdictional document which was the cover sheet for the DUI Arrest Report.(CP Pg.67) Said DUI Arrest Report was signed by Trooper Howson under penalty of perjury July 9, 2013. The Bangart report was provided as (CP Pg. 73-75). There is a specific place for Sergeant Bangart to sign said report. (CP Pg. 75) There is no signature. Further according to RCW 9A.72.085 for it to be a sworn report the statute requires there be a signature, date and place where signed. In this case there is no signature and accordingly the Bangart report should not have been admitted into evidence.

Without the underlying evidence the facts which brought about the original stop and arrest would not have been before the hearings officer. Accordingly, Sergeant Bangart's observations and the basis for the arrest would not have been before the hearing.

Under the "fellow officer rule", the cumulative knowledge of all officers involved in an arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect. *State vs. Noll*, 117

Wn. App. 647 (2003). The rule allows an arresting officer to rely on what other officers know when officers are acting together as a unit. *Id.*

An arresting officer who does not possess sufficient information to constitute probable cause may still make a warrantless arrest if (1) he/she is acting upon a directive from a fellow officer; and (2) the police as a whole possess sufficient information to constitute probable cause. *State v. Maesse*, 29 Wn. App. 642 (1981).

However, the “fellow officer rule” is not recognized outside the context of probable cause to make a warrantless felony arrest. *See, State v. Bravo-Ortega*, 177 Wn.2d 116 (2013). While there is an exception for traffic infractions, the rule’s proper operation does not extend to misdemeanor traffic crimes such as DUI.

According to the certified report of Trooper Howson his contact with Sergeant Bangart regarding the facts of the stop are as follows:

PERSONAL CONTACT:

I exited my patrol vehicle and walked up to Sergeant BANGART and the defendant...Sergeant BANGART then advised me to place the defendant under arrest. I placed the defendant into handcuffs...

ARREST OF THE DEFENDANT:

...I re-contacted Sergeant BANGART and he advised me of why he had stopped the defendant and further stated that the defendant had weapons...(CP Pg. 20)(Administrative Record (ARC) at 17)

According to Trooper Howson's report there is no testimony by Howson as to what probable cause Sergeant Bangart had said regarding the circumstances surrounding the stop of Mr. Trutman.

The report of Sergeant Bangart is not "sworn to" or compliance with RCW 9A.72.085 and it lacks a "presumption of credibility." *Metcalf v. Dept. of Motor Vehicles*, 11 Wash. App 819 (1974) A properly sworn report carries a presumption of creditability or an unsworn report is without such a presumption and "the department's revocation will be based only on unsworn allegations with no assurance of an accurate result." *Metcalf v. Dept. of Motor Vehicles*, 11 Wash. App 820 (1974)

Thus, information obtained by Sergeant Bangart or any other officers are not imputable to Trooper Howson, the arresting officer, as to whether Trooper Howson had probable cause to arrest Mr. Trutman for DUI rests solely upon information that Trooper Howson directly obtained. Officer Howson listed no witnesses claiming to have observed Mr. Trutman's driving. Trooper Howson had reason to believe that Mr. Trutman was intoxicated, and had consumed alcohol.

The suspension of Mr. Trutman's license presents a Due Process issue in this case. According to *Nirk v. Kent Civil Serv. Comm'n* as cited in *Watkins V. State, Dept. of Licensing*, 187 Wash.App. 591 (2016)

[Witness] 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 informality of the hearing.

[W]ithout sworn testimony a reviewing court is unable to review the Commission's decision on appeal. In reviewing an adjudicatory administrative decision, a court must presume that the evidence presented is truthful... In the case of unsown testimony, however the evidence cannot be given the traditional presumption of truthfulness and we are, therefore, unable to perform our appellate review function.

[C]onsidering the importance of the oath, the significant interest at stake in discharge hearing, the legislative provision authorizing the administration of oaths, and the minimal inconvenience that such a requirement would cause, due process requires that witnesses be sworn at a civil service discharge hearing.

The court in *Watkins* discussed the *Mathews* due process factors.

“First, the private interest affected here was driving privileges. While driving privileges are a protected property interest, they are not equal to an interest in employment because depriving an individual of employment often call[s] into question [the litigant's] good name, honor or integrity. ‘ “ See 30 Wash.App. at 216, 633 P.2d 118 (quoting *State v. Civil Serv. Comm'n*, 25 Wash.App. 174, 182, 605 P.2d 796 (1980).

Trutman argues that driving privileges are equal to an interest in employment. Mr. Trutman has a Commercial Driver's License (CDL). Without the Commercial Driver's License Mr. Trutman has lost his job and ability to earn a living. This deprives him of a way to make a living

and calls in to question his good name, honor and integrity. This is why *Nirk* applies

In *Watkins* the next Mathews factor was discussed.

“Second, both the risk of erroneously depriving an individual of driving privileges by admitting an uncertified arrest report whose accuracy was certified by another officer and the probable value of excluding such an uncertified arrest report are insignificant. Where one officer’s certified report declared under penalty of perjury that an uncertified arrest report was accurate, that uncertified arrest report’s accuracy was supported by a certified report, unlike the witnesses in *Nirk*. See *Watkins* 187 Wash.App at 27, 349 P.3d 946.

The reports in this matter are witness statements and Trutman argues that it is important to have all reports certified. Trutman argues that Trooper Bangart did not certify his report. Trooper Howson was not present when Trooper Bangart initially stopped Mr. Trutman. Further, there is no mention of Mr. Trutman’s name in the Howson report. Further, the Appellant has alleges that Trutman’s name is associated with a video yet no video was produced in the Administrative Hearing and is not part of the record. Trooper Howson cannot testify as to the truth and veracity of Trooper Bangart’s report. There is no mention of Trutman’s driving or actions relayed to Trooper Howson by Trooper Bangart in Trooper Howson’s report.

The third *Mathews* factor discussed in *Watkins* stated: “Considering the State’s interest, Watkin’s argument asks us to require each witness who provides a statement accompanying an

officer's certified report to certify his or her own statement. This would place an additional administrative burden on the State, by requiring the State to obtain a certification from each witness whose statement accompanied an officer's certified report. This administrative burden could compromise an integral function of the driving privileges revocation procedure: rapidly removing intoxicated drivers from the road." See *State v. Vasquez*, 148 Wash.2d at 315, 59 P.3d 648.

Trutman argues *Nirk* supports the conclusion that requiring Trooper Bangart to sign his report would not be placing an additional administrative burden on the state. *Nirk* supports this conclusion. The requirement is that the Trooper sign his report and make it consistent with RCW 9A.72.085. The certified statement language was created in order to eliminate the requirement of securing a notary for sworn statements and make it easier to submit evidence. The officer only needs to certify under penalty of perjury under the laws of the State of Washington that the report is true and correct and put in the date, location and sign the report. RCW 9A.72.085 In this case Trooper Bangart did not do it. There is no evidence attested to in Trooper Howson's report that Trooper Bangart was unavailable to sign his report or that Trooper Howson attempted to get the signature.

By applying these *Mathews* factors Trutman argues that due process requires the uncertified report of Trooper Bangart not be admitted because commercial driving privileges are a protected property interest

and revoking such privileges must comply with due process. Without the report there is no foundational evidence and the Superior Court order should remain in effect.

2. **The Breath Test Result Should Be Suppressed:**

Trutman argues there was not a valid test because Trooper Howson did not provide proof that he was authorized by the State Toxicologist to perform a breath or blood test.

According to the DUI Arrest Report (CP Pg. 19) (ARC at 16) there is a box that reads “ at the time of this test(s) I was certified to operate the BAC Data Master, the BAC Data Master CDM, and PBT and possessed a valid permit issued by the State Toxicologist. This box was not checked. This is a preprinted form.

Trooper Howson in his narrative in the Report of Investigation/Supplemental Report (CP Pg.76) (ARC at 73) checked a box stating “I have received BAC training and am certified to operate the BAC. The breath test was conducted in accordance with my training. I have received the BAC refresher training.” This was not part of the pre-prepared forms and appears to have been inserted into the form by Trooper Howson. It specifically does not state that he has a valid permit issued by the State Toxicologist or was authorized to perform such test.

Nowhere in the statement by Trooper Howson does it state that he is “authorized by the toxicologist to do so. RCW 46.61.506(4)(a)(1) sets forth the eight requirements which must be completed for a breath test result to be admissible. The relevant portion of the statute is as follows:

A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist...

Without this statutory requirement having been met the breath test is not admissible. Without a breath test result there cannot be a suspension of Mr. Trutman’s license because there is no proof of a breath test result over .08 and the administrative decision be overruled.

VII. CONCLUSION

Based on the foregoing the Respondent Louis Trutman respectfully requests that the court affirm the decision of the Superior Court concerning the uncertified statement argument or in the alternative reversing the decision of the hearing officers revocation Order pursuant to RCW 46.61.506(4)(a)(1) because the breath test result should have been suppressed.

RESPECTFULLY SUBMITTED this 17th day of February,

2016.

TROUP, CHRISTNACHT, LADENBURG
McKASY, DURKIN & SPEIR, INC., P.S.

A handwritten signature in black ink, appearing to read 'J. Christnacht', written over a horizontal line.

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I, Lindsey Colon, certify that I served a copy of this document-
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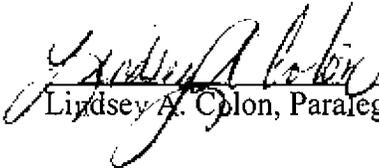
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I certify under penalty of perjury under the law of the state of
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DATED this 11th day of February 11, 2016, at Tacoma, WA.


Lindsey A. Colon, Paralegal

TROUP CHRISTNACHT LADENBURG MCKASY DURKIN

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