NO. 23233

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

LESLIE LESTER BARRICKMAN, Petitioner-Appellee, v.
ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF HAWAIʻI, Respondent-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(JR99-0075/Original Case No. 99-02400)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Respondent-Appellant Administrative Director of the Courts, State of Hawaiʻi (the State), appeals the district court's December 1, 1999 Judgment on Appeal (Judgment) reversing the administrative hearing officer's (Hearing Officer's) September 27, 1999 Notice of Administrative Hearing Decision (Hearing Officer's Decision) revoking the driver's license of Petitioner-Appellee Leslie Lester Barrickman (Barrickman) for one year, from August 18, 1999, to August 18, 2000. We reverse the Judgment and affirm the Hearing Officer's Decision.

RELEVANT STATUTES

Hawaiʻi Revised Statutes (HRS) § 286-255(a) (Supp. 1999) states, in relevant part, as follows:

> Whenever a person is arrested for a violation of section 291-4 [driving under the influence of intoxicating liquor] or 291-4.4

[habitually driving under the influence of intoxicating liquor or drugs], . . . [t]he arresting officer shall inform the person that the person has the option to take a breath test, a blood test, or both. The arresting officer also shall inform the person of the sanctions under this part, including the sanction for refusing to take a breath or a blood test.

HRS § 286-259 (Supp. 1999) states, in relevant part, as follows:

> **Administrative Hearing.** (a) If the director administratively revokes the arrestee's license after administrative review, the arrestee may request an administrative hearing to review the decision . . . .
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> . . . .
>
> (c) The arrestee may be represented by counsel.
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> (d) The director shall conduct the hearing and have authority to:
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> . . . .
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> (2) Examine witnesses and take testimony;
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> (3) Receive and determine the relevance of evidence;
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> (4) Issue subpoenas, take depositions, or cause depositions or interrogatories to be taken;
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> . . . .
>
> (6) Make a final ruling.
>
> (e) The director shall affirm the administrative revocation only if the director determines that:
>
> . . . .
>
> (3) The evidence proves by a preponderance that the arrestee drove, operated, or was in actual physical control of the motor vehicle while under the influence of intoxicating liquor or while having an alcohol concentration of .08 or more or that the arrestee refused to submit to a breath or blood test after being informed of the sanctions of this part.
>
> (f) The arrestee's prior alcohol enforcement contacts shall be entered into evidence.

> (g) The sworn statements provided in section 286-257 shall be admitted into evidence. Upon notice to the director no later than five days prior to the hearing that the arrestee wishes to examine a law enforcement official who made a sworn statement, the director shall issue a subpoena for the official to appear at the hearing. If the official cannot appear, the official may at the discretion of the director testify by telephone.

HRS § 286-251 (Supp. 1999) defines "alcohol enforcement contact" as follows:

> "Alcohol enforcement contact" means any administrative revocation ordered pursuant to this part; any driver's license suspension or revocation imposed by this or any other state or federal jurisdiction for refusing to submit to a test for alcohol concentration in the person's blood; or any conviction in this or any other state or federal jurisdiction for driving, operating, or being in physical control of a motor vehicle while having an unlawful concentration of alcohol in the blood, or while under the influence of alcohol.

HRS § 286-260 (Supp. 1999) states, in relevant part, as follows:

> **Judicial review; procedure.** (a) If the director sustains the administrative revocation after administrative hearing, the arrestee may file a petition for judicial review within thirty days after the administrative hearing decision is mailed. . . .
>
> (b) The court shall schedule the judicial review as quickly as practicable, and the review shall be on the record of the administrative hearing without taking of additional testimony or evidence. . . .
>
> (c) The sole issues before the court shall be whether the director exceeded constitutional or statutory authority, erroneously interpreted the law, acted in an arbitrary or capricious manner, committed an abuse of discretion, or made a determination that was unsupported by the evidence in the record.
>
> (d) The court shall not remand the matter back to the director for further proceedings consistent with its order.

RELEVANT PRECEDENT

In State v. Wilson, 92 Hawai‘i 45, 987 P.2d 268 (1999),

the Hawai‘i Supreme Court affirmed the district court's order granting the defendant's motion to suppress the blood test results in his criminal DUI prosecution. The defendant had consented to a blood test after he was misinformed by the arresting officer

> [t]hat if you refuse to take any tests the consequences are as follows: (1) if your driving record shows no prior alcohol enforcement contacts during the five years preceeding [sic] the date of arrest, your driving privileges will be revoked for one year *instead of the three month revocation that would apply if you chose to take the test and failed it*[.]

Id., at 47, 987 P.2d at 270 (emphasis in the original). The misinformation was that "your driving privileges will be revoked for one year instead of the three month revocation that would apply if you chose to take the test and failed it[.]" In truth, the Hawai‘i Supreme Court said that an arrestee who is a first-time offender who chooses to take the test and fails it faces the possibility of license revocation for a period anywhere from three months to one year. The Hawai‘i Supreme Court decided that because the arresting officer relevantly and materially misinformed the arrestee of the administrative penalties applicable upon choosing to take the blood test and failing it, the arrestee did not knowingly and intelligently consent to a blood test. According to the Hawai‘i Supreme Court,

> [t]he statutory scheme, however, also protects the rights of the

> driver in that he or she may withdraw his or her consent before a test is administered. To this end, Hawaii's implied consent scheme mandates accurate warnings to enable the driver to knowingly and intelligently consent to or refuse a chemical alcohol test.
>
> . . . .
>
> . . . Not only was the information given to Wilson misleading, it was relevant to his decision whether to agree to or refuse the blood alcohol test. Thus, although Wilson elected to take the test, he did not make a knowing and intelligent decision whether to exercise his statutory right of consent or refusal.

Id. at 49-51, 987 P.2d at 272-274 (footnote and citations omitted) (emphasis in the original).

BACKGROUND

The Hearing Officer entered his Findings of Fact, Conclusions of Law, and Decision Sustaining Administrative Revocation of License and Amending the Period of Administrative Revocation on September 27, 1999.

Barrickman appealed. In his statement of the case, he alleged the following errors by the Hearing Officer:

1. Failing to comply with the requirement of HRS § 286-259(g) (Supp. 1999) that "[t]he sworn statements [of law enforcement officials] provided in section 286-257 shall be admitted into evidence."

2. Failing to enter a decision that makes it possible for the court to independently determine whether there was compliance with the mandatory requirement of HRS § 286-259(g).

3. Deciding that "[t]here existed reasonable suspicion for the stop of Arrestee's Vehicle" when neither the findings of fact stated in the Hearing Officer's Decision, nor the evidence adduced at the hearing, were sufficient to support that determination.

4. Deciding that Barrickman "refused to submit to a breath or blood test after being informed of the sanctions of HRS Chapter 286, part XIV, as amended," when neither the evidence nor the findings were sufficient to support that determination.

5. Entering findings of fact with respect to the field sobriety tests that were unsupported by the evidence adduced at the hearing.

6. Failing to strike Officer Sherwood's written statements and reports from the evidentiary record when he failed to appear at the August 18, 1999 hearing and failing to reverse the revocation at that time.[1]

7. Failing to render the entire decision in writing.

8. Deciding that Barrickman was issued a notice of administrative license revocation by the arresting officer.

9. Deciding that there was "justification for the

[1] Officer Sherwood testified at the September 22, 1999 hearing.

[officer] to order [Barrickman] to exit his vehicle."

10. Deciding that "[t]here existed reasonable suspicion for the stop of [Barrickman's] vehicle."

11. See item 4 above.

12. Failing to grant Barrickman temporary driving privileges between the August 18, 1999 hearing and the September 2, 1999 hearing.

13. Failing to grant Barrickman temporary driving privileges between the September 2, 1999 hearing and the September 2, 1999 hearing.

The district court reversed the Hearing Officer's Decision for the following reason:

> The arresting officer utilized HPD-396B (Administrative Driver's License Revocation Law form) which contains the same inaccurate information as referred to in the [State v.]Wilson[, 92 Hawai'i 45, 987 P.2d 268 (1999)] case. [Barrickman] was therefor[e] precluded from making a knowing and intelligent decision on whether or not to submit to the evidentiary blood alcohol test. His decision, therefore, does not constitute a knowing refusal to submit to the evidentiary blood alcohol test.
>
> The court finds that the evidence does not support the finding that [Barrickman] was fully informed of the sanctions under the Administrative Driver's License Revocation Law. Consequently, the administrative revocation of [Barrickman's] license is reversed.

In its January 29, 2000[2] Decision and Order Denying

[2] The file mark of the Decision and Order Denying Motion for Reconsideration (Decision and Order) reflects that the Decision and Order was filed on January 28, 2000; however, the Decision and Order was dated and signed by the judge on January 29, 2000. We conclude that the Decision and

Motion for Reconsideration, the district court stated, in relevant part, as follows:

> The arrestee in [Wilson] had his license revoked for a period of three months. It was argued that he did not suffer any prejudice since he received the precise three-month revocation that he had been advised of in HPD396B. The court in [Wilson], however, did not require that prejudice to the party be established. It appears that it is enough that the consent form was misleading and inaccurate to preclude a party from making a knowing and intelligent decision.
>
> A similar analysis also applies to refusal cases. The Wilson decision recognized that the implied consent statute is intended to provide an efficient means of gathering evidence of intoxication, however, the statutory scheme is also deemed as mandating accurate warnings to enable the driver to knowingly and intelligently consent to or refuse a chemical alcohol test. The driver's implied consent is qualified by his or her implied right to withdraw consent based on accurate disclosure of the consequences of both consent and refusal. A driver cannot knowingly and intelligently refuse without warnings regarding both the right of consent and refusal, and the consequences of each. . . .
>
> . . . .
>
> Although prejudice or harm to the party, as a result of receiving inaccurate and misleading information concerning the sanctions under the administrative driver's license revocation law is not required under Wilson, in this situation [Barrickman] did suffer harm. In [Barrickman's] case, if he had consented to the test, the results may have provided exculpatory evidence.
>
> . . . Wilson does not mandate the reversal of a license revocation. It's clear that while resulting test results or a refusal to submit to testing cannot be used against the driver, there is nothing to prohibit the prosecution from relying upon other available evidence of intoxication. . . .
>
> Although other evidence of intoxication exists in

Order was entered on January 29, 2000, the date the Decision and Order was signed by the judge.

> [Barrickman's] case, based on the facts of this particular case, the Court does not reinstate any period of a license revocation.

POINT ON APPEAL

The State contends that the district court reversibly erred when it reversed the Hearing Officer's Decision on the basis of Wilson because, in Wilson, the defendant/respondent took a blood test, whereas in this case, Barrickman refused a test and the allegedly misleading and/or missing information could not have contributed to his refusal to take a test.

DISCUSSION

1.

In Wilson, supra, the dissenting opinion noted that "[the defendant] has *never* asserted that he would have refused the test had he received a full explanation of the penalties under Gray[v. Administrative Director of the Court, 84 Hawai‘i 138, 931 P.2d 580 (1997)]." Wilson, 92 Hawai‘i at 60, 987 P.2d at 283 (emphasis in original). The majority opinion was silent on the question of the defendant's reliance on and prejudice from he relevant and material insufficient information/misinformation and concluded that the misinformation and/or insufficient information resulted in the absence of a knowing and intelligent consent.

In light of Wilson, we conclude that in this context the question of the arrestee's reliance is objective, not subjective. Based on the relevant statutes and Wilson, we conclude that the arrestee's reliance on misinformation and/or insufficient information from the arresting officer is conclusively presumed when the following conditions are satisfied:

1. Misinformation was given and/or a statute required the information to be given and the information was not given.

2. Misinformation and/or insufficient information was relevant and material to the arrestee's decision.

3. The arrestee has not admitted that he or she did not rely on the misinformation and/or insufficient information.

4. If given, the correct and/or sufficient information reasonably may have influenced a reasonable person to decide opposite of how the arrestee decided.

In Barrickman's case, we conclude that condition 4 was not satisfied. Barrickman was told that if he took the test and failed it, his driving privileges would be revoked for three months. He should have been told that his driving privileges would be revoked anywhere from three months to one year. If given, the correct and/or sufficient information would not have

influenced a reasonable person in Barrickman's shoes to decide opposite to how he decided. The situation presented in this case is the same as the situation presented in Yokouchi v. Administrative Director, 94 Hawai‘i 348, 14 P.3d 358 (2000).

2.

In his answering brief, Barrickman presents his own points on appeal. We will discuss them in order.

a.

Barrickman contends that this appeal is moot because the period of revocation of Barrickman's driving license privileges was not stayed pending appeal and has already been completed. We conclude that the appeal is not moot because a reversal of the Judgment will have an impact on Barrickman's record.

b.

Pursuant to its usual practice, the State did not file a brief in opposition to Barrickman's petition for judicial review or appearance at the judicial review hearing. After the district court entered its decision, the State filed its motion for reconsideration. Barrickman contends that by its inaction, the State waived its right to file a motion for reconsideration and its right to appeal the district court's decisions. While we

agree that the district court was authorized to summarily deny the State's motion for reconsideration, we disagree that the State waived its right to appeal the district court's decisions.

c.

The Hearing Officer decided that Barrickman "refused to submit to a breath or blood test after being informed of the sanctions of HRS Chapter 286 Part XIV[.]" Barrickman challenges this finding by contending that he was given misinformation and insufficient information.

Barrickman was given the same misinformation/insufficient information as was given in Wilson. In part 1 above, we rejected this challenge.

It is alleged that insufficient information was given in that the arresting officer failed to inform Barrickman (1) that an alcohol concentration of .08 or more would fail a breath or blood test and anything less than that would pass, and (2) that if he passed, he would get his license back and the administrative revocation proceedings would be terminated with prejudice. We conclude that this information was not required to be given. HRS § 286-255(a) requires the giving of information "of the sanctions under [part XIV of HRS Chapter 286]." HRS § 286-259(e)(3) (Supp. 1999) similarly requires the giving of

information "of the sanctions of [Part XIV of HRS Chapter 286]." No statute requires communication that the presence of .08 or more alcohol is failing. All drivers who drive after consuming alcohol must know that fact. That information is not encompassed within the meaning of the word "sanctions." Similarly, no statute requires communication of the consequences of passing. Those consequences are not encompassed within the meaning of the word "sanctions."

d.

Barrickman contends that each of his thirteen points asserted in the district court provides an independently sufficient reason for affirming the Hearing Officer's Decision. Because HRS § 286-260(d) forbids remands, the district court should have expressly decided the merit of each point. Because it did not, we do not know whether the district court decided that they were without merit or that they were moot. In either case, upon our review of the record, we expressly decide that none of them provides a basis for reversing the Hearing Officer's Decision.

CONCLUSION

Accordingly, we reverse the district court's December 1, 1999 Judgment on Appeal that reversed the Hearing

Officer's September 27, 1999 Notice of Administrative Hearing Decision revoking the driver's license of Petitioner-Appellee Leslie Lester Barrickman from August 18, 1999, to August 18, 2000.

DATED: Honolulu, Hawai‘i, March 12, 2001.

On the briefs:

Girard D. Lau,
Deputy Attorney General,
for Respondent-Appellant.

Chief Judge

Timothy I. Mac Master
for Petitioner-Appellee.

Associate Judge

Associate Judge