In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-09-00053-CV

TEXAS DEPARTMENT OF PUBLIC SAFETY, Appellant

V.

MICHAEL B. ELLER, Appellee

On Appeal from the County Court at Law
Panola County, Texas
Trial Court No. 2009-067

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Michael B. Eller was stopped by a police officer while driving because his license plate was not properly illuminated. During the investigation of the illumination issue, Eller admitted he had been drinking. The officer administered several field sobriety tests, which Eller failed. Intoxilyzer tests confirmed Eller's blood alcohol level was well above the legal limit. He received notification that his driver's license was being suspended by the Texas Department of Public Safety (DPS).

Eller requested a hearing in front of an administrative law judge (ALJ) to determine whether suspension of his driver's license was warranted. The ALJ found that it was. Eller sought judicial review of the ALJ's decision in the district court, which found the officer did not have reasonable suspicion to stop him. DPS appeals from the district court order reversing the ALJ's suspension of Eller's driver's license. Because we conclude (1) at least a scintilla of evidence supports the finding that there was reasonable suspicion for the stop, and (2) at least a scintilla of evidence supports the finding that Eller's alcohol concentration was over the limit, we reverse the county court at law's judgment and reinstate the judgment of the ALJ.

If a person is arrested for drunk driving and takes a test that shows his or her alcohol concentration to be 0.08 or higher, the DPS is directed to suspend his or her driver's license. *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 130 (Tex. 1999); *see* TEX. PENAL CODE ANN. § 49.01(2)(B) (Vernon 2003); TEX. TRANSP. CODE ANN. § 524.012(b)(1) (Vernon Supp. 2009). A person notified of the suspension of his or her driver's license may request a hearing before an ALJ.

TEX. TRANSP. CODE ANN. §§ 524.031, 524.033 (Vernon 2007). At an administrative license hearing, the DPS must prove by a preponderance of the evidence that there was reasonable suspicion to stop a person who had an alcohol concentration of 0.08 or above while that person was operating a motor vehicle in a public place. TEX. TRANSP. CODE ANN. § 524.035(a) (Vernon Supp. 2009). "A person whose driver's license suspension is sustained may appeal the decision" to obtain judicial review. TEX. TRANSP. CODE ANN. § 524.041 (Vernon 2007).

At the trial court level, review of an ALJ's decision is appellate in nature. *Tex. Dep't of Pub. Safety v. Harris*, No. 06-07-00085-CV, 2007 WL 4386012, at * 2 (Tex. App.—Texarkana Dec. 18, 2007, pet. denied) (mem. op.). Likewise, we independently determine de novo whether the ALJ's decision was supported by the evidence before it. *Id.* (citing *Tex. Dep't of Pub. Safety v. Cuellar*, 58 S.W.3d 781, 783 (Tex. App.—San Antonio 2001, no pet.); *Raesner v. Tex. Dep't of Pub. Safety*, 982 S.W.2d 131, 132 (Tex. App.—Houston [1st Dist.] 1998, no pet.)).

Our review is conducted under a substantial evidence standard.[1] *Mireles*, 9 S.W.3d at 131 (citing TEX. TRANSP. CODE ANN. § 524.041; TEX. GOV'T CODE ANN. § 2001.174)). A court applying the substantial evidence standard of review may not substitute its judgment for that of the agency.

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[1]Under the substantial evidence rule, a reviewing court may reverse or remand the case for further proceedings only if substantial rights of the appellant have been prejudiced by ALJ findings or rulings that were: (A) in violation of a constitutional or statutory provision; (B) in excess of the agency's statutory authority; (C) made through unlawful procedure; (D) affected by other error of law; (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. TEX. GOV'T CODE ANN. § 2001.174 (Vernon 2008).

Id. at 131. Findings, inferences, conclusions, and decisions of the ALJ are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise. *Tex. Dep't of Pub. Safety v. Raffaelli*, 905 S.W.2d 773, 775 (Tex. App.—Texarkana 1995, no pet.). If there is more than a scintilla of evidence to support either affirmative or negative findings on a specific matter, the administrative decision must be upheld. *Id.* at 776; *Harris*, 2007 WL 4386012, at *2.

"At its core, the substantial evidence rule is a reasonableness or rational basis test." *Raffaelli*, 905 S.W.2d at 775. The issue for the reviewing court is only whether the record demonstrates some reasonable basis for the ALJ's action, not whether it was correct. *Mireles*, 9 S.W.3d at 131. We must affirm the ALJ's findings if there is more than a scintilla of evidence to support them. *Id.* In fact, the ALJ's decision may be sustained even if the evidence preponderates against it. *Id.* "Thus, as has been acknowledged, the burden for overturning an agency ruling is formidable." *Harris*, 2007 WL 4386012, at *2.

(1) At Least a Scintilla of Evidence Supports the Finding that There Was Reasonable Suspicion for the Stop

"Reasonable suspicion exists when an officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead the officer to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity." *Harris*, 2007 WL 4386012, at *3; *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001); *see also Terry v. Ohio*, 392 U.S. 1 (1968). In assessing the reasonable suspicion determination, we consider the totality of the circumstances while giving almost total deference to the ALJ's determination of

historical facts. *Harris*, 2007 WL 4386012, at *3 (citing *Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007)).

All motor vehicles in Texas must have a "taillamp or a separate lamp shall be constructed and mounted to emit a white light that: (1) illuminates the rear license plate; and (2) makes the plate clearly legible at a distance of 50 feet from the rear." TEX. TRANSP. CODE ANN. § 547.322(f) (Vernon 1999). The officer testified at the hearing in front of the ALJ that "[h]alf of [the license plate light] was completely out. The other half was barely on, but it was completely blacked out from my view." He clarified he could not see Eller's license plate from a distance of fifty feet, and that there really was no white light illuminating the plate.[2] We conclude substantial evidence supported the ALJ's decision that the officer had a reasonable suspicion the Texas Transportation Code was being violated at the time he stopped Eller.

(2) At Least a Scintilla of Evidence Supports the Finding that Eller's Alcohol Concentration Was Over the Limit

At the hearing in front of the ALJ, Eller objected to the admission of the certified breath test result on the basis that there was no evidence it was administered in accordance with the Breath

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[2]Eller argues that at least one half of the license plate was working and that the officer could see the license plate when he turned on his headlights. While we can concede the rear license plate was "barely" illuminated, nothing in the record suggests the plate was "clearly legible at a distance of 50 feet from the rear." TEX. TRANSP. CODE ANN. § 547.322(f). We do not rewrite the statute to say the plate must be legible if a police officer is driving behind a suspect with his lights on because the statute's purpose may also be to ensure officers on foot and potential witnesses are able to see the license plate. In any event, even had Eller presented conflicting evidence on this point, we would still be unable to disregard the ALJ's factual determinations. *Mireles*, 9 S.W.3d at 131.

Alcohol Testing Program. An affidavit of a breath test technical supervisor, admitted over the objection that it was conclusory, stated "the records show that the test was administered in compliance with the laws of the State of Texas and Regulations of the Breath Alcohol Testing Program." The bare printout of the test results, signed by the administering officer, was also included. Eller's counsel made clear that he was not disputing the "machine was working fine."[3] The district court did not rule on Eller's complaint regarding admissibility of the breath test results.

Nevertheless, Section 524.038 of the Texas Transportation Code controls admissibility of a technical supervisor's affidavit with respect to a blood test. TEX. TRANSP. CODE ANN. § 524.038 (Vernon 2007). As a statutory exception to the hearsay rule, such an affidavit is admissible if it contains statements "on (1) the reliability of the instrument and the analytical results; and (2) compliance with state law in administration of the program." *Id.*; *see also Tex. Dep't of Pub. Safety v. Jimenez*, 995 S.W.2d 834, 837 (Tex. App.—Austin 1999, no pet.). Such statements have been held not conclusory in the context of administrative hearings. *Tex. Dep't of Pub. Safety v. Seidule*, 991 S.W.2d 290, 294 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Further, the affidavit establishes the proper predicate for admissibility of the breath test results. *Jimenez*, 995 S.W.2d at 837. "In the absence of a fact issue concerning whether the [breath] test was performed according to the methods approved by the Department of Public Safety," "DPS was not obligated to prove

[3]"If unextrapolated breath-test results are sufficient to sustain a criminal conviction for drunk driving, they are certainly sufficient to sustain an administrative license suspension." *Mireles*, 9 S.W.3d at 131.

compliance," and the breath test "was properly admitted at the administrative hearing." *Tex. Dep't of Pub. Safety v. Barrera*, No. 13-03-145-CV, 2004 WL 1351744, at *2 (Tex. App.—Corpus Christi June 17, 2004, no pet.) (mem. op.); *Sims v. State*, 735 S.W.2d 913, 919 (Tex. App.—Dallas 1987, pet. ref'd).

The breath tests, demonstrating Eller had a blood alcohol level of 0.129 during the first testing and 0.126 during the second testing, are more than a scintilla of evidence to support the ALJ's finding that Eller had an alcohol concentration of 0.08 or more while driving. *See Mireles,* 9 S.W.3d at 132. The ALJ's judgment should not have been reversed. We reverse the judgment of the county court at law and reinstate the judgment of the ALJ.

Josh R. Morriss, III
Chief Justice

Date Submitted: October 13, 2009
Date Decided: November 4, 2009