Filed
Washington State
Court of Appeals
Division Two

August 9, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LOUIS P. TRUTMAN, Respondent, v. STATE, DEPARTMENT OF LICENSING, Petitioner.	No. 46341-5-II UNPUBLISHED OPINION

BJORGEN, C.J. — We accepted discretionary review of a superior court order reversing the Washington State Department of Licensing's (Department's) decision to suspend Louis Trutman's personal driver's license and disqualify his commercial driver's license. The Department contends that the administrative hearing examiner correctly admitted as evidence a law enforcement officer's unsworn report establishing reasonable grounds to believe that Trutman was driving while under the influence of alcohol. Thus, the Department argues the superior court erred by reversing the Department's decision on that basis. Under our recent opinion in *Watkins v. Department of Licensing*, 187 Wn. App. 591, 349 P.3d 946 (2015), the hearing examiner properly admitted the officer's unsworn report. Accordingly, we vacate the superior court's order of reversal and remand for reinstatement of the Department's final order revoking Trutman's driving privileges.

FACTS

On July 9, 2013, Washington State Patrol (WSP) Sergeant David Bangart saw a vehicle using a center turn lane to pass other vehicles. Bangart stopped the vehicle and spoke with the driver, Trutman. While speaking with Trutman, Bangart detected the odor of intoxicants. Trutman admitted to consuming three or four beers. After Trutman performed field sobriety tests, WSP Trooper R. I. Howson arrived and placed him under arrest.

After transporting Trutman to the WSP office, Howson advised Trutman of his implied consent rights with regard to performing a breath test. Trutman agreed to submit to a breath test, which showed his blood alcohol concentration was over the legal limit for operating a motor vehicle.

On July 16, Howson faxed his arrest report to the Department. Howson attached to his arrest report Bangart's unsigned[1] investigation report, which included a narrative of the circumstances leading to Trutman's arrest. On July 24, the Department sent Trutman notices that it would suspend his personal driver's license for 90 days and would disqualify his commercial driver's license for one year. The notices informed Trutman of his right to contest the suspension/disqualification by requesting an administrative hearing. Trutman requested an administrative hearing. Relevant to this appeal, Trutman argued at the hearing that the Department's proposed actions should be rescinded because "Trooper Bangor's [sic] narrative is not properly certified and therefore should be suppressed and without his report there is

[1] The Order Granting Discretionary Review states that Bangart's electronic signature does appear on the report in the area for the officer's printed name, but not in association with the statement, "I certify (or declare) under penalty of perjury under the laws of the State of Washington that this report is true and correct (RCW 9A.72.085)." Clerk's Papers (CP) at 75. Because we decide this appeal under *Watkins*, we assume without deciding that this signature was not an effective certification.

insufficient evidence of a lawful stop and insufficient probable cause for arrest." Clerk's Papers (CP) at 23.

On October 23, a hearing officer entered findings of fact, conclusions of law, and an order sustaining the Department's determination that Trutman's driving privileges be suspended. Regarding Trutman's contention with the admission of Bangart's investigation report, the hearing officer concluded:

> 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 report was created by a trained officer in the course of his duty. The documentary evidence submitted here by the officer is reliable. The officer contemporaneously recorded the significant details, including significant times, locations, and events and much of it is corroborated by Trooper Howson. [Trutman] 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 at 26. Trutman moved for reconsideration of the final order revoking his driving privileges, which motion the hearing examiner denied.

Trutman appealed to the superior court. The superior court reversed the Department's decision to revoke Trutman's driving privileges, concluding that the October 23 order "contained an error of law in that it relied upon an unsworn report to establish probable cause for the arrest." CP at 115. The Department moved for discretionary review of the superior court's order reversing its decision to revoke Trutman's driving privileges, which motion we stayed pending our decision in *Watkins*. Following publication of our opinion in *Watkins*, a commissioner of this court lifted the stay and granted discretionary review. 187 Wn. App. 591.

ANALYSIS

I. STANDARD OF REVIEW AND GOVERNING LEGAL PRINCIPLES

Watkins sets out the applicable standard of review and relevant legal principles:

> The implied consent statute governs our review of the Department's order. Former RCW 46.20.308(9) [(December 6, 2012)]; *Cannon v. Dep't of Licensing*, 147 Wash.2d 41, 48, 50 P.3d 627 (2002). The implied consent statute generally provides that a driver is deemed to have consented to a blood or breath test if at the time of his arrest, the arresting officer has reasonable grounds to suspect that the driver was operating a motor vehicle under the influence. Former RCW 46.20.308. . . . The purpose of the implied consent statute is to "'insure swift and certain punishment for those who drink and drive,'" and "free Washington roads of drivers who take the wheel under the influence of alcohol or controlled substances." *State v. Vasquez*, 148 Wash.2d 303, 315, 59 P.3d 648 (2002) (quoting former RCW 46.20.308 Historical and Statutory Notes, "Legislative finding, intent—1983 ch. 165" at 387).
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> We review the Department's administrative decisions "from the same position as the superior court." *Clement v. Dep't of Licensing*, 109 Wash. App. 371, 374, 35 P.3d 1171 (2001). We review errors of law de novo and findings of fact for substantial evidence. *See Lynch v. Dep't of Licensing*, 163 Wn. App. 697, 705, 262 P.3d 65 (2011).
>
> The issue on appeal concerns interpretation of the implied consent statute. Interpretation of a statute is a question of law that we review de novo. *Grey v. Leach*, 158 Wash. App. 837, 844, 244 P.3d 970 (2010). When interpreting a statute, we seek to ascertain the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Where a statute's meaning is plain on its face, we give effect to that meaning as expressing the legislature's intent. [*Campbell*,] 146 Wash.2d at 9-10.

87 Wn. App. at 596-97.

II. Admission of Bangart's Unsigned Investigation Report

The Department contends that the hearing examiner properly admitted and considered Bangart's investigation report to establish the officers' reasonable grounds to believe that Trutman was driving under the influence of alcohol.[2] Thus, the Department argues that the

[2] Former RCW 46.20.308(1) (December 6, 2012) provides in relevant part:

> Any person who operates a motor vehicle within this state is deemed to have given consent . . . to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration . . . in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor.

superior court erred by reversing the order of suspension and disqualification based on admission of the investigation report. We agree, vacate the superior court's order of reversal, and remand for reinstatement of the Department's final order.

Watkins controls our resolution of this appeal. In that case we held that an officer's uncertified report is admissible in a license revocation hearing under former RCW 46.20.308 if the uncertified report accompanies another officer's certified report. *Watkins*, 187 Wn. App. at 601-02. In so holding, we relied on language in *Department of Licensing v. Cannon*, 147 Wn.2d 41, 51, 50 P.3d 627 (2002), stating:

> "At the hearing, the law enforcement officer's sworn [or certified] report is prima facie evidence of a valid arrest and compliance with the requirements of the implied consent statute. The sworn [or certified] report and *any other evidence accompanying it*, as well as certifications authorized by the criminal rules for courts of limited jurisdiction, *are admissible at the hearing without further evidentiary foundation.*"

Watkins, 187 Wn. App. at 601 (internal citation omitted) (emphasis added) (quoting *Cannon*, 147 Wn.2d at 51).

Here, as in *Watkins*, Bangart's uncertified investigation report accompanied Howson's certified arrest report. 187 Wn. App. at 601. Howson's certified report stated, "I certify . . . under penalty of perjury . . . that the foregoing and the accompanying reports/copies of documents and the information contained therein are true, correct, and accurate." CP at 67. Accordingly, the hearing examiner did not err by concluding that Bangart's uncertified report was admissible and, consequently, the superior court erred by concluding otherwise.

Trutman does not attempt to distinguish this case from *Watkins*, and instead relies on *Nirk v. Kent Civil Service Commission*, 30 Wn. App. 214, 633 P.2d 118 (1981), to argue that admission of the uncertified investigation report violated his due process rights. However, we rejected this same argument in *Watkins* and, in doing so, held that *Nirk* was distinguishable after

consideration of the factors set forth in *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). 187 Wn. App. at 603-04. Because we have already rejected this same due process argument in *Watkins* after fully considering the *Matthews* factors, we need not readdress the issue. Because the hearing examiner properly admitted and relied on Bangart's uncertified investigation report, we vacate the superior court's order of reversal.

III. BREATH TEST CERTIFICATION NOT AT ISSUE

Trutman contends that the hearing examiner erred by failing to suppress his breath test results because Howson failed to check a box on his arrest report verifying his certification to administer breath tests. Because Trutman did not seek cross review of this issue by timely filing a notice of discretionary review as required under RAP 2.4(a), we do not address it here.

The Department's motion for discretionary review presented the two following issues:

> 1. Consistent with the plain language of the implied consent law and the Department's relaxed rules of evidence, did the Department's hearing officer properly admit Trooper Bangart's narrative report, which accompanied the signed certified report?
>
> 2. Was Trooper Bangart's failure to sign the report in the appropriate place a technical deficiency that should not defeat the Department's case?

Motion for Discretionary Review at 3. A commissioner of this court granted discretionary review as to these issues, concluding that the superior court's decision to reverse the Department's license revocation order conflicted with our opinion in *Watkins*. The commissioner did not grant review on the issue of Howson's breath test certification.

If Trutman wanted this court to review the hearing examiner's revocation decision on this alternative basis, he must have sought cross review of that issue under RAP 2.4(a), which provides in relevant part:

> The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review *only* (1) if the respondent also

> seeks review of the decision by the timely filing of a . . . notice of discretionary review, or (2) if demanded by the necessities of the case.

(Emphasis added.) Trutman did not file a notice of discretionary review, and review of this issue is not demanded by the necessities of the case. Trutman did not raise the issue in either his response to the Department's motion for discretionary review or in his supplemental brief addressing the Department's motion for discretionary review. Accordingly, we do not address it.

We vacate the superior court's order of reversal and remand for reinstatement of the Department's final order revoking Trutman's driving privileges.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, C.J.

BJORGEN, C.J.

We concur:

Johanson, J.

JOHANSON, J.

Maxa, J.

MAXA, J.