NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0991

JOHNNY L. COOK, JR.

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF PUBLIC SAFETY, LICENSE CONTROL AND DRIVER IMPROVEMENT DIVISION

Judgment Rendered: MAR 2 5 2015

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Appealed from the
18th Judicial District Court
In and for the Parish of West Baton Rouge
State of Louisiana
Case No. 40,890

The Honorable William C. Dupont, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

THERIOT, J.

Plaintiff/Appellant, Johnny L. Cook, Jr., seeks review of a district court judgment that affirmed the suspension of his driver's license. For the reasons that follow, we vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

On or about March 5, 2013, Mr. Cook was arrested in West Baton Rouge Parish for driving while intoxicated (DWI) and was subsequently charged with DWI, second offense, in violation of La. R.S. 14:98(C). On the date of his arrest, Mr. Cook was given the opportunity to submit a breath sample on the Intoxilyzer 5000. He was advised of his rights to a chemical test through a form signed by himself and the arresting officer, but Mr. Cook refused to take the chemical breath test. Pursuant to La. R.S. 32:667, Mr. Cook's license was seized and suspended.

Mr. Cook's suspension was brought before an Administrative Law Judge (ALJ) with the Division of Administrative Law on June 24, 2013. The ALJ affirmed the suspension based on Mr. Cook's refusal to submit to the chemical breath test. As a result, Mr. Cook filed a petition for judicial review of the ruling suspending his driver's license.

A hearing was held before the district court on February 11, 2014. Counsel for Mr. Cook and the State were present and made legal arguments to the court. No evidence or testimony was submitted during the hearing, but information about Mr. Cook's most recent DWI arrest and two prior DWI arrests were discussed. According to the transcript, Mr. Cook's first DWI charge was nolle prossed, but his license remained suspended for the full term. For his second DWI charge, Mr. Cook pled guilty in accordance with article 894 of the Louisiana Code of Criminal Procedure, and his

license was immediately reinstated. On his third and most recent DWI charge, Mr. Cook pled guilty to the reduced charge of reckless operation of a vehicle, in violation of La. R.S. 14:99. The DWI charge was dismissed, but his license remained suspended. In all three of his DWI arrests, Mr. Cook refused the chemical breath test.

Counsel for the State argued that since Mr. Cook had refused the chemical breath test two previous times, the term of his suspension should be two years, or approximately 730 days under La. R.S. 32:667(B)(2)(c)(i).[1] Counsel for Mr. Cook argued that since he pled guilty to a reduced charge of reckless operation, his license should be immediately reinstated under La. R.S. 32:667(H)(1).[2] He further argued that La. R.S. 32:667(H)(3), which is an exception to La. R.S. 32:667(H)(1) in the case of a second refusal of the chemical breath test,[3] does not apply retroactively to his two previous

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[1] La. R.S. 32:667(B)(2)(c)(i) states:

> (2) If the person refused to submit to the [chemical breath] test, his driving privileges shall be suspended as follows:
>
> (c)(i) Two years from the date of suspension on the second and subsequent refusal occurring within ten years of the date of a refusal to submit to the test.

[2] La. R.S. 32:667(H)(1) states:

> H. (1) When any person's driver's license has been seized, suspended, or revoked, and the seizure, suspension, or revocation is connected to a charge or charges of violation of a criminal law, and the charge or charges do not result in a conviction, plea of guilty, or bond forfeiture, the person charged shall have his license immediately reinstated and shall not be required to pay any reinstatement fee if at the time for reinstatement of driver's license, it can be shown that the criminal charges have been dismissed or that there has been a permanent refusal to charge a crime by the appropriate prosecutor or there has been an acquittal. If, however, at the time for reinstatement, the licensee has pending against him criminal charges arising from the arrest which led to his suspension or revocation of driver's license, the reinstatement fee shall be collected. Upon subsequent proof of final dismissal or acquittal, other than under Article 893 or 894 of the Code of Criminal Procedure, the licensee shall be entitled to a reimbursement of the reinstatement fee previously paid. In no event shall exemption from this reinstatement fee or reimbursement of a reinstatement fee affect the validity of the underlying suspension or revocation.

[3] La R.S. 32:667(H)(3) states:

> (3) Paragraph (1) of this Subsection shall not apply to a person who refuses to submit to an approved chemical test upon a second or subsequent arrest for R.S. 14:98 or 98.1, or a parish or municipal ordinance that prohibits driving a motor vehicle while intoxicated. However, this Paragraph shall not apply if the second or subsequent arrest occurs more than ten years after the prior arrest.

refusals, since the refusals occurred prior to that paragraph's enactment in 2012.[4]

On March 11, 2014, the district court affirmed the ALJ's suspension of Mr. Cook's license for 730 days. From that judgment, Mr. Cook appeals.

ASSIGNMENT OF ERROR

In his sole assignment of error, Mr. Cook asserts that the district court erred in determining that the argument submitted by the State, without further competent evidence, was sufficient to meet its burden of proof to establish La. R.S. 32:667(H)(3) is applicable in this matter.

STANDARD OF REVIEW

On review of the administrative suspension of a driver's license pursuant to the implied consent law, the district court is required to conduct a trial *de novo* to determine the propriety of the suspension. Such a trial is a civil action amenable to all of the ordinary rules of procedure and proof. Further, the fact that this is an action for judicial review of a decision resulting from an administrative hearing does not change the burden of proof placed by law on the plaintiff. La. R.S. 32:668(C); *Stoltz v. Dept. of Public Safety and Corrections*, 2013-1968 (La. App. Cir. 6/25/14), 147 So.3d 1131, 1133.

On review of the district court's judgment, no deference is owed by the court of appeal to factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. *Maraist v. Alton Ochsner Medical Foundation,* 2002-2677 (La. App. 1 Cir. 5/26/04), 879 So.2d 815, 817. Thus, an appellate court sitting in review of an administrative agency's final decision reviews the findings and decision of

[4] See: 2012 La. Acts 663, § 1, eff. June 7, 2012. Mr. Cook's two prior refusals occurred on June 21, 2008 and December 5, 2011.

the administrative agency and not the decision of the district court. *Smith v. State Dept. of Health and Hospitals,* 39,368 (La. App. 2 Cir. 3/2/05), 895 So.2d 735, 739, writ denied, 2005-1103 (La. 6/17/05), 904 So.2d 701.

DISCUSSION

Despite the above standard of review that we must follow in reviewing the instant case, we note that Mr. Cook's assignment of error deals with the action of the district court, and not the action of the ALJ. He avers that the district court was incorrect not to require the State to introduce evidence of Mr. Cook's prior DWI arrests and refusals of the chemical breath test. We will therefore address this issue.

When the review hearing came before the district court, a *de novo* trial was not held. Rather, the hearing was converted to a rule to show cause, and no evidence or testimony regarding Mr. Cook's previous convictions or refusals was admitted into evidence. The only information regarding Mr. Cook's convictions and refusals lie in the exhibits attached to the State's memorandum submitted prior to the hearing, but none of this information was formally introduced and admitted pursuant to the Louisiana Code of Civil Procedure and the Louisiana Code of Evidence. A rule to show cause is a contradictory motion. La. C.C.P. art. 963. Since the district court did not hold a *de novo* trial in this matter, the court acted outside of the guidelines set forth in La. R.S. 32:668(C); See also *Stoltz*, 147 So.3d at 1131.

There would be no need for the rules of procedure and proof in these hearings, if the scope of the hearing was limited to review of the administrative record. In drafting La. R.S. 32:668, the legislature envisioned a hearing in the district court encompassing the taking of testimony and the introduction of evidence to which the rules of civil procedure and evidence

would apply. *Flynn*, 608 So.2d at 998. Further, the fact that this is an application for judicial review of a decision resulting from an administrative hearing does not change the burden of proof placed by law on the plaintiff. *Millen,* 978 So.2d at 961. Therefore, before we can conduct our own review of whether the ALJ's actions were appropriate, Mr. Cook must be afforded judicial review by the district court, through a *de novo* trial.

DECREE

The March 11, 2014 judgment of the 18th JDC in the above matter is vacated and remanded for further proceedings as set forth in this opinion. All costs of this appeal, in the amount of $511.00, are assessed to the State of Louisiana through the Department of Public Safety, License Control and Driver Improvement Division.

VACATED AND REMANDED.