IN THE SUPREME COURT OF TEXAS

NO. 10-0321

TEXAS DEPARTMENT OF PUBLIC SAFETY, PETITIONER,

v.

STEPHEN JOSEPH CARUANA, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued September 14, 2011

JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE GUZMAN joined.

CHIEF JUSTICE JEFFERSON filed a concurring opinion, in which JUSTICE LEHRMANN joined.

The issue in this case is whether a peace officer's arrest report must be excluded from evidence if not sworn as required by law. Because it is no less a criminal offense to make a false statement in a governmental record than it is to make one under oath, we hold that an officer's failure to swear to a report does not deprive it of the assurance of veracity or render it inadmissible. Consequently, we reverse the court of appeals' judgment[1] and remand the case to that court.

[1] ___ S.W.3d ___ (Tex. App.–Austin 2010).

Stephen Joseph Caruana, age 21, was arrested by state trooper Eric Flores for driving while intoxicated.[2] A person arrested for driving while intoxicated in Texas is deemed to have consented to submit to the taking of a breath or blood specimen to determine its alcohol concentration.[3] Under the state Administrative License Revocation ("ALR") program, if the person refuses to provide a specimen, or if the specimen provided has an alcohol concentration in excess of the legal limit, the Texas Department of Public Safety will automatically suspend the person's driver's license.[4] Flores requested a breath specimen from Caruana and read him the statutory warning about possible consequences of providing or refusing to provide a specimen.[5] Caruana provided a specimen that tested 0.163 and 0.157, about twice the legal limit.

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[2] "A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE § 49.04(a). A person under 21 years of age, a "minor" under the Alcoholic Beverage Code, "commits an offense if the minor operates a motor vehicle in a public place . . . while having any detectable amount of alcohol in the minor's system." TEX. ALCO. BEV. CODE §§ 106.01, 106.041(a).

[3] TEX. TRANSP. CODE § 724.011(a) ("If a person is arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle in a public place . . . while intoxicated, . . . the person is deemed to have consented, subject to this chapter, to submit to the taking of one or more specimens of the person's breath or blood for analysis to determine the alcohol concentration or the presence in the person's body of a controlled substance, drug, dangerous drug, or other substance.").

[4] TEX. TRANSP. CODE §§ 724.035(a) ("If a person refuses the request of a peace officer to submit to the taking of a specimen, the department shall: (1) suspend the person's license to operate a motor vehicle on a public highway for 180 days . . . ."), 524.012(b) ("The department shall suspend the person's driver's license if the department determines that: (1) the person had an alcohol concentration of a level specified by Section 49.01(2)(B), Penal Code, while operating a motor vehicle in a public place . . . ."); TEX. PENAL CODE § 49.01(1) ("'Alcohol concentration' means the number of grams of alcohol per: (A) 210 liters of breath; (B) 100 milliliters of blood; or (C) 67 milliliters of urine."); *id.* § 49.01(2) ("'Intoxicated' means: . . . (B) having an alcohol concentration of 0.08 or more.").

[5] TEX. TRANSP. CODE § 724.015 (before requesting that a person submit to the taking of a specimen, an officer shall inform the person, orally and in writing, of, e.g., that a refusal or over- limit result will result in a license suspension). Flores read Caruana a "Statutory Warning" from a standard form DIC-24 that stated in part: "You will be asked to give a specimen of your breath and/or blood. . . . If you refuse . . . [,] [y]our license . . . to operate a motor vehicle will be suspended . . . . If you are 21 years of age or older and submit to the taking of a specimen and an analysis of the specimen shows that you have an alcohol content of 0.08 or more, your license . . . to operate a motor vehicle will be suspended . . . ."

Flores filed an arrest report with the Texas Department of Public Safety. When a person provides a specimen that fails the alcohol concentration test, suspension of his driver's license is governed by chapter 524 of the Texas Transportation Code.[6] The arresting officer is required to send the department "a sworn report of information relevant to the arrest."[7] Had Caruana refused to provide the requested specimen, administrative suspension of his driver's license would have been governed by chapter 724 of the Texas Transportation Code. In that situation, the arresting officer must only "make a written report of the refusal" for the department.[8] Chapter 724 does not require the report to be sworn.[9]

The Department suspended Caruana's driver's license, and Caruana requested an administrative hearing to challenge the suspension.[10] At that hearing, conducted by an administrative law judge ("ALJ") employed by the State Office of Administrative Hearings

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[6] TEX. TRANSP. CODE § 524.011(a) ("An officer arresting a person shall comply with Subsection (b) if: (1) the person is arrested for [driving while intoxicated], submits to the taking of a specimen of breath or blood and an analysis of the specimen shows the person had an alcohol concentration of a level specified by Section 49.01(2)(B), Penal Code . . . .").

[7] *Id.* § 524.011(b)(4)(D).

[8] TEX. TRANSP. CODE § 724.032(a)(4); *see also id.* §724.031 (if a person refuses the request for a specimen, "the peace officer shall request the person to sign a statement" regarding the request, warning, and refusal).

[9] *Id.* §724.031.

[10] *See* TEX. TRANSP. CODE § 524.031 ("If, not later than the 15th day after the date on which the person receives notice of suspension . . . , the department receives at its headquarters in Austin, in writing, including a facsimile transmission, or by another manner prescribed by the department, a request that a hearing be held, a hearing shall be held as provided by this subchapter.").

("SOAH"),[11] the Department called Flores to testify and offered his report of the incident.[12] Although the report stated that Flores had sworn to it,[13] he admitted on questioning by Caruana's counsel that he had not actually done so. Caruana's counsel objected to admission of the report on that basis.

Under the Administrative Procedure Act and SOAH rules, ALR proceedings are governed by "the rules of evidence as applied in a non-jury civil case in a district court of this state".[14] Rule 803(8) of the Texas Rules of Evidence, applicable in district courts, states that the following are not excluded from evidence by the hearsay rule:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
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> (A) the activities of the office or agency;
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> (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or

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[11] *See id.* § 524.033(a) ("A hearing under this subchapter shall be heard by an administrative law judge employed by the State Office of Administrative Hearings.').

[12] Caruana's counsel requested Flores' presence, as the certified breath test operator, pursuant to former 1 TEX. ADMIN. CODE §159.15(a) (2008) (State Office of Admin. Hearings, Hearings) (applicable to cases under Chapter 524 of the Transportation Code), repealed by 34 Tex. Reg. 329 (2009). Under the current provisions, a defendant may request a subpoena from the ALJ for the breath test operator or technical supervisor, under §159.101, and issue a subpoena for other witnesses, under limitations set by those rules. 1 TEX. ADMIN. CODE §§159.101 (Breath Test Operator and Technical Supervisor), .103 (Subpoenas) (2012), adopted by 34 Tex. Reg. 330, 332-333 (2009).

[13] The statement read: "SWORN AND SUBSCRIBED before me on the *14th* day of *January*, *2008* *Scott Haag* ~~Notary Public~~ *Peace Officer #4885*, State of Texas".

[14] TEX. GOV'T CODE § 2001.081 ("The rules of evidence as applied in a nonjury civil case in a district court of this state shall apply to a contested case except that evidence inadmissible under those rules may be admitted if the evidence is: (1) necessary to ascertain facts not reasonably susceptible of proof under those rules; (2) not precluded by statute; and (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs."); 1 TEX. ADMIN. CODE § 159.211(b) (2012), replacing 1 TEX. ADMIN. CODE § 159.23(b) (2009), adopted by 19 Tex. Reg. 10221, 10228 (1994), repealed by 34 Tex. Reg. 329 (2009).

> (C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;
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> unless the sources of information or other circumstances indicate lack of trustworthiness.[15]

SOAH's Rule 159.23,[16] in effect at the time, also provided that "[a]n officer's sworn report of relevant information shall be admissible as a public record."[17] Rule 803(8) does not require that reports be sworn to be admissible. Rule 159.23 did not specifically address unsworn reports.

The ALJ overruled Caruana's objection. Flores then testified that everything in the report was true and correct "to the best of my knowledge." Based on the report and the breath test results, the ALJ sustained the suspension of Caruana's driver's license.

Caruana appealed to the county court, which reversed the administrative ruling. On appeal by the Department, a divided court of appeals affirmed the county court.[18] The majority concluded that to admit unsworn reports in evidence would be inconsistent with Rule 159.23's specific provision making sworn reports admissible and would allow the Department to circumvent the statutory requirement that reports be sworn.[19] To sustain the suspension of Caruana's license, the Department was required to prove not only that the alcohol concentration in his breath exceeded the

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[15] TEX. R. EVID. 803(8).

[16] 1 TEX. ADMIN. CODE § 159.23(c)(7) (2008), repealed by 34 Tex. Reg. 329 (2009), replaced by 1 TEX. ADMIN. CODE §159.211 (2012), adopted by 34 Tex. Reg. 334, 335 (2009); *see also* former 1 TEX. ADMIN. CODE §159.15(c) (2009).

[17] 1 TEX. ADMIN. CODE § 159.23(c)(7) (2009).

[18] ___ S.W.3d ___ (Tex. App.–Austin 2010).

[19] *Id.* at ___.

legal limit, but that he had been operating a motor vehicle in a public place at the time and that there was probable cause to arrest.[20] Flores did not provide such evidence himself, and therefore, the majority held, without the report there was no evidence to support the ALJ's ruling.[21] The dissent argued that admission of unsworn reports was not specifically prohibited by Rule 159.23 and is permitted by Rule 803(8).[22]

We granted the Department's petition for review.[23]

The Department argues that the court of appeals misconstrued the text of Rule 159.23. We agree. By expressly providing for the admission of sworn reports, the rule does not imply that unsworn reports are inadmissible. The inverse of a statement is not always true. Thus, if B is true when A is true — all men (A) are mortal (B) — it does not follow that B is false when A is false — all other creatures (not-A) are immortal (not-B). The fact that a sworn report (A) is admissible (B) does not mean that an unsworn report (not-A) is inadmissible (not-B); as a matter of logic, the former simply does not speak to the latter. By expressly making sworn reports admissible, Rule 159.23 does not foreclose the admission of unsworn reports; rather, it leaves the matter to Rule 803(8), which imposes no condition that public offices' reports be sworn.

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[20] "The issues that must be proved at a hearing by a preponderance of the evidence are: (1) whether: (A) the person had an alcohol concentration of a level specified by Section 49.01(2)(B), Penal Code, while operating a motor vehicle in a public place . . . ; and (2) whether reasonable suspicion to stop or probable cause to arrest the person existed." TEX. TRANSP. CODE § 524.035(a). "If the administrative law judge finds in the affirmative on each issue in Subsection (a), the suspension is sustained." TEX. TRANSP. CODE § 524.035(b). "If the administrative law judge does not find in the affirmative on each issue in Subsection (a), the department shall: . . . (2) reinstate the person's driver's license . . . ." TEX. TRANSP. CODE § 524.035(c).

[21] ___ S.W.3d at ___.

[22] *Id.* at ___ (Jones, C.J., dissenting).

[23] 54 Tex. Sup. Ct. J. 538 (Feb. 8, 2011).

Furthermore, the admission of unsworn reports does not subvert the statutory ALR scheme. Chapter 724, which governs cases in which a driver has refused to provide a specimen, has its origins in a 1969 statute, which required an officer's report to be sworn.[24] The requirement assured the report's truthfulness by subjecting the officer to the criminal penalty for perjury.[25] But in the 1973 overhaul of the Texas Penal Code, the Legislature created a new offense — for making a false statement in a governmental record[26] — and set the penalty the same as that for perjury.[27] When the license suspension statute was revised in 1983, the requirement that an officer's report be sworn was dropped in lieu of a provision specifically stating that the report was a governmental record under the Penal Code.[28] That provision was retained for refusal cases when the Legislature, in 1993, adopted a comprehensive, statewide ALR program,[29] but was dropped in the 1995 recodification, obviously as surplusage, given the Penal Code's broad definition of governmental records —

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[24] Act of May 24, 1969, 61st Leg., R.S., ch. 434, § 2, 1969 Tex. Gen. Laws 1468, 1468, formerly TEX. REV. CIV. STAT. ANN. art. 6701*l*-5, § 2.

[25] TEX. PENAL CODE art. 302 (1925) ("Perjury is a false statement, either written or verbal, deliberately and wilfully made, relating to something past or present, under the sanction of an oath, or such affirmation as is by law equivalent to an oath, where such oath or affirmation is legally administered, under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice.").

[26] Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 948, codified as TEX. PENAL CODE § 37.10 ("A person commits an offense if he: (1) knowingly makes a false entry in, or false alteration of, a governmental record . . . ."); *see* STATE BAR COMM. ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE: A PROPOSED REVISION 270 (Final Draft Oct. 1970) ("[Proposed § 37.10] broadens Texas law to include a prohibition against making false entries in governmental records.").

[27] Both are Class A misdemeanors. Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 948, codified as TEX. PENAL CODE § 37.10(c); TEX. PENAL CODE § 37.02(b).

[28] Act of May 27, 1983, 68th Leg., R.S., ch. 303, § 4, 1983 Tex. Gen. Laws 1568, 1579, formerly TEX. REV. CIV. STAT. ANN. art. 6701*l*-5, §§ 2(d) and 2(h).

[29] Act of May 29, 1993, 73rd Leg., R.S., ch. 886, § 9, 1993 Tex. Gen. Laws 3515, 3526, formerly TEX. REV. CIV. STAT. ANN. art. 6701*l*-5, § 2(t).

"anything . . . kept by government for information".[30] Though it may certainly be argued that the formality of an oath focuses the affiant's attention on the importance of complete truthfulness, the Legislature concluded that the desired assurance of veracity was provided by the criminal penalty for making a false statement in a governmental record.

The 1993 statute provided for the first time for administrative license suspension in cases when a driver's specimen failed to pass the alcohol concentration test[31] (which were formerly handled by the courts) — now chapter 524. These provisions required that the officer's report be sworn.[32] Though it is not clear why the requirement should have been included for failure cases when it had been abandoned for refusal cases, it is perfectly clear that the purpose of the requirement — an assurance of truthfulness — is as fully served in failure cases by the criminal penalty for making a false statement in a governmental record as it is in refusal cases.

Although chapters 524 and 724 describe the arresting officer's report differently, nothing in the differences suggests that the report should be sworn in failure cases and not sworn in refusal cases. In failure cases, the report must

> (1) identify the arrested person;
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> (2) state the arresting officer's grounds for believing the person committed the offense;

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[30] Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 948, codified as TEX. PENAL CODE § 37.01(1), now § 37.01(2).

[31] Act of May 29, 1993, 73rd Leg., R.S., ch. 886, § 1, 1993 Tex. Gen. Laws 3515, 3516-3520, formerly TEX. REV. CIV. STAT. ANN. art. 6687b-1, now TEX. TRANSP. CODE §§ 524.001-.051.

[32] Act of May 29, 1993, 73rd Leg., R.S., ch. 886, § 1, 1993 Tex. Gen. Laws 3515, 3516, formerly TEX. REV. CIV. STAT. ANN. art. 6687b-1, § 3(a), now TEX. TRANSP. CODE § 524.011(b)(4)(D).

(3) give the analysis of the specimen if any; and

(4) include a copy of the criminal complaint filed in the case, if any.[33]

In refusal cases, the report must

> (1) show the grounds for the officer's belief that the person had been operating a motor vehicle . . . while intoxicated; and
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> (2) contain a copy of:
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> (A) the refusal statement requested . . . ; or
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> (B) a statement signed by the officer that the person refused to:
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> (i) submit to the taking of the requested specimen; and
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> (ii) sign the requested statement . . . .[34]

In both situations, the report must be filed within five days of the arrest on a form prescribed by the Department.[35] Department regulations echo the statutory requirement that the report be sworn in failure cases but otherwise prescribe the same information in both reports, except for differences due to whether the driver refused to give a specimen or the specimen failed the test.[36] In both instances, a report's veracity is assured by the prohibition against false statements in government records.

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[33] TEX. TRANSP. CODE § 524.011(c).

[34] *Id.* § 724.032(b).

[35] *Id.* §§ 524.011(b)(4), 742.032(c).

[36] *Compare* 37 TEX. ADMIN. CODE § 17.4(1) (2012) (Tex. Dep't Pub. Safety, ALR Reports) (for refusal cases) *with id.* § 17.4(2) (for failure cases).

SOAH's Rule 159.23 applied to officer reports in both refusal and failure cases alike, just as the rule that replaced it does, current Rule 159.211.[37] The court of appeals read the rule to exclude unsworn reports only in failure cases, but nothing in the rule justifies the distinction. If under the rule only sworn reports are admissible, then unsworn reports are inadmissible in both failure and refusal cases. That is Caruana's reading of the rule. But without an arrest report in evidence, the proof necessary to sustain suspension of a license in a refusal case can come only from the arresting officer, who would usually find it difficult, if not impossible, to recall a particular arrest. SOAH's rule, as construed by Caruana, would hinder and often preclude license suspensions in refusal cases. Nothing in chapter 724 suggests that the Legislature intended such a result. The lack of any requirement that the arrest report be sworn should make license suspension easier if anything, certainly not harder. It is unreasonable to conclude that SOAH presumed upon itself to create impediments to license suspension where none existed in the statute by adopting procedural rules for ALR proceedings. The only reasonable conclusion, fully supported by Rule 803(8), is that arrest reports are admissible without being sworn.

The court of appeals was concerned that allowing admission of reports under Rule 803(8) makes Rule 159.23's express admission of sworn reports mere surplusage. We think that SOAH, in crafting its rules, was understandably careful to adhere to all statutory requirements. But chapter 524 requires only that arrest reports be sworn; it does not make verification a condition of inadmissibility, any more than the five-day deadline, or the requirement that approved forms be used. Read literally, Rule 159.23 is consistent with chapter 524.

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[37] 1 TEX. ADMIN. CODE § 159.211.

The court of appeals was also concerned that the Department not be allowed to circumvent chapter 524's requirement of a sworn report. But chapter 524 does not prescribe the consequence for a failure to satisfy that requirement or others. If some sanction should be imposed, it need not be automatic exclusion of an arrest report. If the Department's failure to follow statutory procedures substantively affects a suspension hearing, the ALJ certainly has authority to provide a remedy in that case.

In that regard, we note that public offices' reports which meet the requirements of Rule 803(8) are not excluded from evidence as hearsay "unless the sources of information or other circumstances indicate lack of trustworthiness."[38] In determining whether such circumstances exist, an ALJ has discretion to consider whether an officer's failure to swear to a report casts doubt on the facts stated in it or was merely an oversight. In this case, the ALJ concluded that the report should be admitted. That conclusion was not precluded by SOAH's rules or by chapter 524.

The concurrence argues that "peace officers' reports, when offered by [DPS] in an ALR proceeding, lack the trustworthiness necessary to come within the public records hearsay exception",[39] period, "because of the 'presumed unreliability of law enforcement observations in an adversarial, investigative setting'".[40] We do not share this presumption. Rule 803(8) excludes investigative reports when offered against the defendant in a criminal case, not because law enforcement officers are disinclined to be truthful, but because a criminal case pits law enforcement

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[38] TEX. R. EVID. 803(8).

[39] *Post* at ___.

[40] *Post* at ___ (citing *Fischer v. State*, 252 S.W.3d 375 (Tex. Crim. App. 2008)).

and defendants as adversaries, and conviction should not be based on an officer's testimony offered *in absentia*. ALR proceedings are civil, not criminal. Law enforcement investigation reports are commonly admitted in civil cases — car wrecks, for example. The concurrence cites no authority for the categorical exclusion of such reports in civil cases that, in the concurrence's words, "share[] many characteristics of a criminal prosecution for the same underlying conduct."

The concurrence founders on the fact that Rule 803(8) does not distinguish between sworn and unsworn reports. A report is no less admissible in a civil case merely because it is unsworn, nor is a report any more admissible against the defendant in a criminal case because it is sworn. No case cited by the concurrence draws the distinction it does. The concurrence argues that the administration of an oath "impresses upon [the officer] the seriousness of the matter and reinforces that his statement is subject to penalties if untrue."[41] But by statute, "an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law" as long as it is "subscribed . . . as true under penalty of perjury".[42] *Id*. § 132.001(c)(2). The verity of a declaration is thus assured by the criminal penalties for perjury, not a raised arm.[43]

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[41] *Post* at ___.

[42] TEX. CIV. PRAC. & REM. CODE § 132.001(a), (c)(2).

[43] The concurrence also argues that because Flores' report fails to state that it was made under penalty of perjury, he did not have "the seriousness of the matter" impressed upon him. But, even accepting the concurrence's interpretation of § 132.001(c)(2) , the report's standard form still includes language showing that it is to be "sworn and subscribed to" by its author. Although the jurat should have been completed by a notary public, instead of Flores, its language still served to put Flores on notice of his duty to tell the truth, of which, of course, he should already have been aware.

Finally, the concurrence would exclude unsworn reports in Chapter 724 "refusal" cases even though nothing in the law requires that they be sworn. Surely a report that meets all requirements of law should be admissible.

The ALJ acted within his discretion in admitting the officer's report. Thus, the judgment of the court of appeals must be reversed. In accordance with the Department request, we remand the case to the court of appeals to consider whether the ALJ's ruling sustaining suspension of Caruana's license was supported by substantial evidence.

Nathan L. Hecht
Justice

Opinion issued: March 30, 2012