



NUMBER 13-15-00280-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Appellant,

v.

JASON DANIEL PENA,

Appellee.

**On appeal from the County Court at Law
No. 1 of Nueces County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Longoria and Hinojosa
Memorandum Opinion by Chief Justice Valdez**

An administrative law judge (ALJ) entered an order suspending appellee Jason Daniel Pena's driver's license following his arrest for driving while intoxicated (DWI). Pena appealed the decision to the county court, which reversed the ALJ's suspension order. We reverse and render judgment reinstating the ALJ's suspension order.

I. Background

On March 21, 2014, Officer Alan McCollom of the Corpus Christi Police Department arrested Pena for DWI outside a bar. Officer McCollom asked Pena to provide a breath specimen, and Pena refused. Thereafter, the Department sought suspension of Pena's driver's license based on his refusal to provide a breath specimen pursuant to section 724.035 of the Texas Transportation Code. See TEX. TRANSP. CODE ANN. § 724.035(a) (West, Westlaw through 2015 R.S.) (authorizing license suspension for a person who refuses to provide a breath specimen after being arrested for DWI).

A. Administrative Suspension Hearing

An ALJ convened an administrative hearing, at which the Department shouldered the burden to prove the following elements in order to suspend Pena's driver's license:

1. [R]easonable suspicion . . . existed to stop . . . [Pena];
2. [P]robable cause existed to believe that [Pena] was . . . operating a motor vehicle in a public place while intoxicated;
3. [Pena] was placed under arrest by the officer and was requested to submit to the taking of a specimen; and
4. [Pena] refused to submit to the taking of a specimen on request of the officer.

TEX. TRANSP. CODE ANN. § 724.042(1)–(4) (West, Westlaw through 2015 R.S.).

The disputed issues at the hearing centered on the first two elements—i.e., whether there was reasonable suspicion to stop and probable cause to arrest Pena for DWI. To satisfy these elements, the Department offered Officer McCollom's written report of the arrest into evidence without objection. Officer McCollom's report contained the following relevant facts regarding the events leading up to Pena's arrest:

- Stacy Jorgensen, an off-duty peace officer employed by a school district, called dispatch to report that he had followed “a possible intoxicated driver” to a bar after he observed the driver swerve out of his lane across multiple lanes, clip the median, and drive onto a sidewalk on his way to a bar.
- Jorgensen observed that the driver exited his truck and entered the bar.
- The driver remained in the bar for an unspecified period of time.
- The driver then exited the bar, “flip[ped]” Jorgensen off, and yelled “fuck you.”
- Jorgensen made “contact” with the driver and obtained his driver’s license.
- Officer McCollom then arrived to the scene, collected the driver’s license from Jorgensen, and made contact with the driver who was identified as Pena.
- Jorgensen confirmed that Pena was the same person who drove erratically to the bar.
- Upon making contact with Pena, Officer McCollom observed the following signs of intoxication: Pena’s breath smelled of an “intoxicating beverage”; his eyes were bloodshot red; his speech was slurred; and his balance was unsteady.
- Officer McCollom asked Pena to perform a standard field sobriety test, and Pena refused.
- Officer McCollom placed Pena under arrest for DWI.

The Department rested.

Pena then offered his recollection of the events leading up to his arrest. Pena testified, in relevant part, that he drove completely sober to the bar; that he obeyed all traffic laws on his way to the bar; that he drank an unspecified amount of alcohol while inside the bar; and that thirty minutes later, he exited the bar to smoke a cigarette outside his truck and got arrested for DWI.

After considering the Department's evidence, as well as Pena's testimony, the ALJ ordered that Pena's driver's license be suspended. In support of its order, the ALJ found the following:

1. [R]easonable suspicion to stop [Pena] existed, in that, a certified peace officer . . . observed [Pena] fail to maintain a single [lane] of travel several times, hit a median, and drive on a sidewalk.
2. Probable cause existed to believe that [Pena] was operating a motor vehicle in a public place while intoxicated because, in addition to the facts in No. 1, the officer observed that [Pena]: had a strong odor of an alcoholic beverage; had red, bloodshot eyes; had slurred speech; and refused to submit to field sobriety tests.

B. Appeal to County Court

Pena appealed the ALJ's decision to the county court. The county court reversed the ALJ's decision, concluding that there was "no substantial evidence" to support it. This appeal by the Department followed.

II. Discussion

By two issues, which we treat as one, the Department contends that the county court erred in reversing the ALJ's decision because substantial evidence supported it.

A. Standard of Review

As happened in this case, the ALJ's decision may be appealed to a county court. See TEX. TRANSP. CODE ANN. § 724.047 (West, Westlaw through 2015 R.S.). However, "[t]he burden for overturning [the ALJ's decision] is quite formidable." *Tex. Dep't of Pub. Safety v. Pucek*, 22 S.W.3d 63, 67 (Tex. App.—Corpus Christi 2000, no pet.). Judicial review of the ALJ's decision is based on the substantial evidence rule. See *Dep't of Pub. Safety v. Hirschman*, 169 S.W.3d 331, 336 (Tex. App.—Waco 2005, pet. denied). Under the substantial evidence rule, the ALJ's decision is presumed to be supported by

substantial evidence, and the burden is on the person challenging the suspension—in this case, Pena—to prove otherwise. See *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994). “Substantial evidence requires only more than a scintilla.” *Hirschman*, 169 S.W.3d at 336. As such, evidence before the ALJ may actually preponderate against its decision but nonetheless amount to substantial evidence. See *id.* The “true test is not whether the [ALJ] reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the [ALJ].” *Id.*

The ALJ is the sole judge of the weight and credibility of the evidence. *Id.* Consequently, any evidentiary ambiguities should be resolved in favor of the ALJ’s decision, and a county court may not substitute its judgment for that of the ALJ as to the weight of the evidence. See *id.*

We review de novo the county court’s decision to reverse the ALJ’s order suspending Pena’s license. *Id.*

B. Analysis

In view of the forgoing, the question is whether substantial evidence supports the ALJ’s finding that Pena was legally detained and arrested for DWI.

1. Legality of Pena’s Detention

Jorgensen was a commissioned police officer for a school district at the time he stopped Pena. As such, Jorgensen fit into the definition of “peace officer” under article 2.12(8) of the Texas Code of Criminal Procedure. See TEX. CODE CRIM. PROC. ANN. art. 2.12(8) (West, Westlaw through 2015 R.S.) (providing that an officer commissioned by a school district under article 37.081 of the Texas Education Code is a “peace officer”).

Therefore, Jorgensen was subject to the criminal code's provisions governing police conduct. *Id.*

It is undisputed that Jorgensen stopped Pena off school grounds. However, this fact did not deprive Jorgensen of legal authority to stop Pena. Specifically, article 14.03(d) of the criminal code provides that a "peace officer who is outside his jurisdiction may arrest, without warrant, a person who commits [a DWI offense] within the officer's presence or view." TEX. CODE CRIM. PROC. ANN. art. 14.03(d) (West, Westlaw through 2015 R.S.). "Arrest" under article 14.03[d] is not limited to a formal custodial arrest based on probable cause, but also applies when an officer, outside of his jurisdiction, makes an investigative detention based on reasonable suspicion. See *Garcia v. State*, 296 S.W.3d 180, 184 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *State v. Purdy*, 244 S.W.3d 591, 594 (Tex. App.—Dallas 2008, pet. struck); see also *Brother v. State*, 166 S.W.3d 255, 260 (Tex. Crim. App. 2005). Thus, Jorgensen was legally authorized to temporarily detain Pena pursuant to article 14.03(d) if he reasonably suspected that Pena drove to the bar intoxicated based on the erratic driving he observed. See TEX. CODE CRIM. PROC. ANN. art. 14.03(d).

Here, the ALJ had before it evidence that Jorgensen observed Pena swerve out of his lane across multiple lanes, clip the median, and drive onto a sidewalk on his way to the bar. A rational inference from Pena's erratic driving could be that he was intoxicated. See *Brother*, 166 S.W.3d at 257 (observing that a temporary detention is constitutionally authorized "when the detaining officer has specific articulable facts which, taken together with rational inferences from those facts, lead the officer to conclude that the person detained is, has been, or soon will be engaged in criminal activity"); see also *id.* at 257–

60 (holding the witness's description of erratic driving was sufficient to provide at least reasonable suspicion of intoxication); *Ortiz v. State*, 930 S.W.2d 849, 856 (Tex. App.—Tyler 1996, no pet.) (holding there was reasonable suspicion to believe the defendant was driving while intoxicated where the defendant hit a median and weaved inside his lane multiple times); *Curtis v. State*, 238 S.W.3d 376, 378 (Tex. Crim. App. 2007) (observing that intoxication need not be the most likely explanation for erratic driving in order to justify an investigative stop for DWI).

Pena testified that he obeyed all traffic laws on his way to the bar—a fact which, if believed, runs contrary to the ALJ's finding of reasonable suspicion. However, the ALJ, as the fact finder, was not required to believe Pena's testimony, and apparently did not. *See Hirschman*, 169 S.W.3d at 335–37.

Disagreeing with the ALJ, the county court determined that Jorgensen lacked authority to stop Pena because the school district did not approve, in writing, Jorgensen's actions as required by section 37.081 of the Texas Education Code. TEX. EDUC. CODE ANN. § 37.081(e) (West, Westlaw through 2015 R.S.) (providing that a "school district must authorize in writing any off-duty law enforcement activities performed by a school district peace officer"). However, the record shows that the school district's written policy incorporates by reference article 14.03(d) of the code of criminal procedure, which authorizes extra-jurisdictional DWI stops based on reasonable suspicion. *See Garcia*, 296 S.W.3d at 184; *Purdy*, 244 S.W.3d at 594; *see also Brother*, 166 S.W.3d at 260. Furthermore, the fact that Jorgensen was off-duty did not change his status as a peace officer. *See Moore v. State*, 562 S.W.2d 484, 486 (Tex. Crim. App. 1978) (holding that a search conducted by an off-duty policeman fell within the perimeters of the Fourth

Amendment's proscription of unreasonable searches and seizures); *DeMoss v. State*, 12 S.W.3d 553, 557 (Tex. App.—San Antonio 1999, pet. ref'd) (same).

We therefore conclude that substantial evidence supported the ALJ's finding that reasonable suspicion existed to stop Pena for DWI. See *Hirschman*, 169 S.W.3d at 336.

2. Legality of Pena's Arrest

Pena's arrest was legal only if probable cause existed to believe that he committed DWI. See TEX. TRANSP. CODE ANN. § 724.042(2)(A). Probable cause to arrest exists where the police have reasonably trustworthy information that, when considered as a whole, is sufficient to warrant a reasonable person to believe a particular person has committed an offense. *Hughes v. State*, 24 S.W.3d 833, 838 (Tex. Crim. App. 2000) (citing *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997)).

Here, the ALJ had before it evidence indicating that, in the thirty minutes leading up to his arrest for DWI, Pena swerved out of his lane across multiple lanes, clipped a median, and drove onto a sidewalk on his way to a bar. Furthermore, at the time of his arrest, Pena's breath smelled of alcohol, his eyes were bloodshot red, his speech was slurred, his balance was unsteady, and he refused to take a field sobriety test—all signs associated with intoxication. See *Cotton v. State*, 686 S.W.2d 140, 142–43 & n. 3 (Tex. Crim. App. 1985) (listing signs of intoxication); see also *State v. Garrett*, 22 S.W.3d 650, 654 (Tex. App.—Austin 2000, no pet.) (finding probable cause to arrest for DWI when the defendant smelled of alcohol, had watery eyes, was unsteady on his feet, and drove illegally); *Texas Dept. of Pub. Safety v. Gilfeather*, 293 S.W.3d 875, 880 (Tex. App.—Fort Worth 2009, no pet.) (considering the defendant's refusal to participate in a field sobriety test as a factor in assessing probable cause to arrest him for DWI). Considering the

evidence as a whole, we conclude that probable cause existed to believe that Pena committed DWI. See *Hughes*, 24 S.W.3d at 838; *Garrett*, 22 S.W.3d at 654; *Gilfeather*, 293 S.W.3d at 880.

Disagreeing with the ALJ, the county court determined that probable cause was lacking because Pena testified that he did not drink alcohol until after he arrived to the bar. However, the county court's reason for reversing the ALJ hinges on a credibility determination, which does not square with the substantial-evidence standard of review. See *Hirschman*, 169 S.W.3d at 335–37. Under the substantial-evidence standard, the ALJ decides witness credibility issues. See *id.* As such, the ALJ was not required to believe Pena's self-serving testimony that he drank only after he made it to the bar.¹ By believing Pena, the county court did not give proper deference to the ALJ's role as the judge of witness credibility. See *id.*

Excising Pena's testimony from the probable-cause equation, the ALJ had before it evidence that Pena exhibited signs associated with intoxication approximately thirty minutes after he drove so erratically that he drove onto a sidewalk on his way to a bar, among other things. We conclude that substantial evidence supports the ALJ's finding that probable cause existed to arrest Pena for DWI. See *Hirschman*, 169 S.W.3d at 336. We therefore sustain the Department's issues.

III. Conclusion

We reverse the county court's judgment and render judgment reinstating the ALJ's suspension order.

¹ We would note that there is no evidence to corroborate Pena's testimony that he drank alcohol only after he made it to the bar.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
15th day of June, 2017.