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MEMORANDUM OPINION
Court of Appeals of Texas,
Houston (1st Dist.).

TEXAS DEPARTMENT OF
PUBLIC SAFETY, Appellant
v.
Kristina Ann POTTER, Appellee.

No. 01–09–00822–CV. | April 15, 2010.

West KeySummary

1 **Automobiles**
Refusal of test

Substantial evidence supported the decision of an Administrative Law Judge (ALJ) suspending a driver's license for 180 days, finding that a state trooper had probable cause to believe that a licensee who refused to provide a blood or breath specimen was driving while intoxicated. The evidence showed that licensee was uncontrollably crying, had emotional outbursts, had glassy, red eyes, and that her breath smelled strongly of alcohol. A trial court upon appeal erred in relying on licensee's contention that the Department of Public Safety failed to prove a temporal link between licensee's driving and her intoxication. V.T.C.A., Government Code § 2001.174U.S.C.A. Amend. 4; V.T.C.A., Transportation Code § 724.035.

Cases that cite this headnote

On Appeal from the County Court at Law, Austin County, Texas, Trial Court Case No. 09CV4474.

Attorneys and Law Firms

Angela Nicole Funk, Ketan Natvarlal Patel, for Texas Department of Public Safety.

Charley L. Smith, for Kristina Ann Potter.

Panel consists of Justices JENNINGS, HANKS, and BLAND.

MEMORANDUM OPINION

JANE BLAND, Justice.

***1** After Kristina Potter refused to perform field sobriety tests or provide a blood or breath specimen following her involvement in a car accident, the Texas Department of Public Safety (Department) suspended her driving-license privileges for 180 days. *See* TEX. TRANSP. CODE ANN. §§ 724.035, 742.042 (Vernon Supp.2009). An administrative law judge (ALJ) upheld the suspension, and Potter appealed the decision to county court. The county court granted Potter's appeal and reversed the suspension. The Department now appeals that ruling, contending that the county court failed to apply the proper standard in reviewing the administrative decision. We reverse the county court's judgment and reinstate the suspension.

Background

The accident

In the early morning hours of November 29, 2008, Texas State Trooper Vacek was dispatched to a one-vehicle rollover accident on State Highway 159 in Bellville. When he arrived, Vacek first spoke with Michael Blezinger, who told him that he had reported the accident. Potter stood near a drainage ditch beside the road and an overturned gray Jeep Liberty. Blezinger pointed at Potter and told Vacek that she was the driver of the Jeep, and that he thought she had been drinking.

Vacek walked over to Potter, noting various items, apparently thrown from the car during the rollover, strewn all over the ground. In particular, he noticed an open can of beer that appeared to have condensation on it. When he approached, Potter identified herself as the driver of the vehicle. Once Vacek established that Potter did not need medical attention, he asked her to explain what happened. Potter said that she lost control while she was trying to send a text message.

During her interaction with Vacek, Potter was crying uncontrollably and had several emotional outbursts. Vacek also noticed that Potter's eyes were bloodshot and glassy and that her breath smelled strongly of alcohol. Vacek asked Potter if she had been drinking. Potter admitted to having two beers, but said that she did not remember how long it had been since she drank them.

When Vacek asked Potter if she was willing to perform field sobriety tests, Potter replied that she was told to wait for her attorney to arrive. Based on his observations, Vacek concluded that Potter had lost the normal use of her mental and physical faculties due to alcohol ingestion, placed Potter under arrest, handcuffed her, and placed her in the patrol car of a local deputy at the scene.

When Potter's attorney arrived, Potter consulted with him. Then, the deputy took Potter to the Austin County jail while Vacek continued his investigation of the accident scene. When he was finished, Vacek met Potter at the jail. He requested that she give a breath specimen to analyze the concentration of alcohol in her system and began to read her the statutory warning informing her that her license would be suspended for 180 days if she refused to do so.

***2** After Vacek finished the first paragraph, Potter told him that she was going to refuse to give a specimen. Vacek finished reading the statutory warning and gave Potter a copy of the form. Potter next complained of wrist pain and was taken to a nearby hospital. Once there, she refused to submit to a blood exam, but consented to an x-ray.

Proceedings below

At Potter's request, a hearing on the suspension took place before an ALJ. The ALJ decided that the Department was authorized to suspend Potter's license for the prescribed period, based on findings that (1) Potter was operating the Jeep at the time of the accident, (2) probable cause existed to believe that Potter was operating a motor vehicle in a public place while intoxicated, based on Vacek's observations of her condition and her own admission that she had consumed alcoholic beverages before operating the Jeep, and (3) Potter refused to perform any field sobriety tests or provide any breath or blood specimen.

Potter appealed the suspension to the county court at law. After reviewing the hearing transcript and evidence presented to the ALJ, as well as arguments of counsel, the county court signed an order granting Potter's appeal. The Department timely filed its appeal of this order.

Discussion

Standard of review

"[C]ourts review administrative license suspension decisions under the substantial evidence standard." *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex.1999); *see* TEX. TRANSP. CODE ANN. § 724.047 (Vernon 1999) ("Chapter 524 governs an appeal from an action of the department, following an administrative hearing under this chapter, in suspending or denying the issuance of a license."); *id.* § 524.043 (Vernon 2007) (establishing rules for appeal but not defining the scope of review). In contested cases, if more than a scintilla of evidence supports the administrative findings, we affirm those findings; "[i]n fact, an administrative decision may be sustained even if the evidence preponderates against it." *Mireles*, 9 S.W.3d at 131. Courts may not substitute their judgment for

> the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but ... (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: ... (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole....

TEX. GOV'T CODE ANN. § 2001.174 (Vernon 2008). We review the county court's substantial evidence review of the administrative ruling de novo. *See Tex. Dep't of Pub. Safety v. Alford*, 209 S.W.3d 101, 103 (Tex.2006) (noting that ALJ's findings are entitled to deference but that "whether there is substantial evidence to support an administrative decision is a question of law" and as such, neither county court nor ALJ's determination of issue is entitled to deference on appeal).

License suspension

***3** Under the Transportation Code, if a peace officer arrests a person and he has reasonable grounds to believe that the person is driving while intoxicated, he may request specimens of the person's breath or blood. TEX. TRANSP. CODE ANN.

§ 724.012(a)(1) (Vernon Supp.2009). If the person refuses to submit to the taking of a specimen, the Department must suspend the person's license to operate a motor vehicle on a public highway for 180 days. *Id.* § 724.035(a)(1) (Vernon Supp.2009). If a person's license is suspended under this chapter, she may request a hearing on the suspension. *Id.* § 724.041 (Vernon Supp.2009). At the hearing, the issues, as applicable here, are whether:

(1) reasonable suspicion or probable cause existed to stop or arrest the person;

(2) probable cause existed to believe that the person was:

(A) operating a motor vehicle in a public place while intoxicated;

....

(3) the person was placed under arrest by the officer and was requested to submit to the taking of a specimen; and

(4) the person refused to submit to the taking of a specimen on request of the officer.

Id. § 724.042 (Vernon Supp.2009). Applying the applicable standard of review, then, the reviewing court must uphold the administrative decision if the record contains substantial evidence to support an affirmative finding on each of these issues.

Reasonable suspicion for stop or probable cause for arrest

Officer Vacek's offense report recites that Blezinger identified Potter as the driver and stated that he thought that she had been drinking. When Officer Vacek approached Potter, he observed that Potter had glassy eyes, was crying, and was otherwise behaving very emotionally, which are consistent with intoxication. Contrary to Potter's assertion, a witness does not have to be an expert to testify that a person he observes is intoxicated by alcohol; a police officer's lay opinion testimony that a person is intoxicated is probative. *Henderson v. State*, 29 S.W.3d 616, 622 (Tex.App.-Houston [1st Dist.] 2002, pet. ref'd). Blezinger and Vacek's observations provide more than a scintilla of evidence in support of the ALJ's finding that Vacek had reasonable suspicion for the stop.

Probable cause to believe that the licensee was driving a motor vehicle in a public place while intoxicated

A license suspension is a civil matter, requiring only probable cause to believe the driver was driving while intoxicated. *See* TEX. TRANSP. CODE ANN. § 724.048(a) (Vernon 1999); *Mireles*, 9 S.W.3d at 131; *Tex. Dep't of Pub. Safety v. Butler*, 110 S.W.3d 673, 675 (Tex.App.-Houston [14th Dist.] 2003, no pet). Probable cause to arrest exists when the facts and circumstances that are apparent to the arresting officer support a reasonable belief that an offense has been or is being committed. *Amores v. State*, 816 S.W.2d 407, 413 (Tex.Crim.App.1991). Probable cause requires more than a suspicion but far less evidence than that needed to support a conviction or to support a finding by a preponderance of the evidence. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex.Crim.App.1997).

***4** Potter's statement to Vacek that she lost control of the vehicle while texting constitutes an admission that she was driving the vehicle when it crashed. As for the administrative finding that Potter was intoxicated, evidence of her uncontrollable crying, emotional outbursts, and glassy, red eyes—coupled with evidence that her breath smelled strongly of alcohol and of a beer can with condensation on it found at the scene—constitutes substantial evidence in its support. *See Tex. Dep't of Pub. Safety v. Perkins*, No. 01–04–00093–CV, 2004 WL 2749141, at *6 (Tex.App.-Houston [1st Dist.] 2004, no pet.) (finding probable cause based on officer's report that Perkins's eyes were red and glassy, and his breath had very strong odor of alcohol); *Tex. Dep't of Pub. Safety v. Pruitt*, 75 S.W.3d 634, 640–41 (Tex.App.-San Antonio 2002, no pet.) (finding probable cause for arrest and to believe Pruitt was operating a motor vehicle on a public roadway while intoxicated where Pruitt admitted to officer that he was driving vehicle involved in accident, officer smelled mild odor of alcohol on Pruitt's breath, Pruitt's speech was slurred, and Pruitt admitted to officer that he had been drinking); *see also Tex. Dep't of Pub. Safety v. Varme*, 262 S.W.3d 34, 41 (Tex.App.-Houston [1st Dist.] 2008, no pet.) (holding that officer had probable cause to arrest Varme; officer observed Varme speeding and observed that Varme had strong odor of alcohol and slurred speech; Varme admitted he had been drinking, his balance was “poor,” and his eyes were “bloodshot”). Potter contends that the fact that she was crying and emotional, and had glassy, red eyes is no evidence that she was driving while intoxicated because it equally supports a reasonable inference that she had a natural reaction to the accident as it does the ALJ's finding that there was probable cause that she was driving while intoxicated. Potter, however, does not account for the officer's additional observation that Potter's breath smelled strongly of alcohol,

which renders her benign explanation less plausible. The equal inference rule thus does not apply here. *See Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex.2001) (observing that equal inference rule precludes fact finder from reasonably inferring ultimate fact from meager circumstantial evidence which could give rise to any number of inferences, none more probable than another).

In her appeal of the ALJ's decision to the county court, Potter also contended that the Department failed to prove a temporal link between her driving and intoxication. To the extent the county court relied on that contention as grounds for granting Potter's appeal, it erred. When Officer Vacek appeared at the scene within minutes of the accident report, he noticed condensation on the open can of beer near the vehicle, signs of intoxication, and a strong smell of alcohol on Potter, and Potter herself admitted to Officer Vacek that she had drunk beer earlier that night. These facts and circumstances are sufficient to warrant the belief of a person of reasonable caution that Potter had consumed alcohol close enough in time to the accident to have been impaired by it at the time. We thus hold that substantial evidence supports the ALJ's finding that probable cause existed to arrest Potter and to believe that Potter was operating a motor vehicle on a public roadway while intoxicated.

The licensee refused to perform field sobriety tests or provide a blood or breath specimen for testing

***5** Potter does not dispute that she refused to perform a field sobriety test or provide a blood or breath specimen, but she specifically points to the absence of testing results as supporting her contention that substantial evidence does not support the ALJ's decision. But the fact that Potter refused the testing supports, rather than undermines, an inference that Potter was intoxicated at the time of her arrest. Refusal to submit to testing is a factor that weighs in favor of finding probable cause of DWI. *See Partee v. Tex. Dep't of Pub. Safety*, 249 S.W.3d 495, 501–02 (Tex.App.-Amarillo 2007, no pet.); *Tex. Dep't of Pub. Safety v. Nielsen*, 102 S.W.3d 313, 317 (Tex.App.-Beaumont 2003, no pet).

Conclusion

Substantial evidence supports the ALJ's decision to suspend Potter's driver's license for 180 days under sections 724.042 and 724.035 of the Texas Transportation Code. We therefore reverse the judgment of the county court and render judgment reinstating the suspension of Potter's driving-license privileges. *See* TEX. TRANSP. CODE ANN. § 2001.174(1).

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