349 P.3d 491 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Rodney Edward BULLARD, Appellant,
v.
KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 111,767.
|
May 22, 2015.
|
Review Denied Jan. 25, 2016.

Appeal from Cowley District Court; James T. Pringle, Judge.

Attorneys and Law Firms

Christopher A. Rogers, of Winfield, for appellant.

Ted E. Smith, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before GREEN, P.J., ARNOLD–BURGER, J. and BURGESS, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Rodney Edward Bullard was arrested for driving under the influence of alcohol (DUI). He was processed under the Kansas Implied Consent Law and his driving privileges were suspended. Bullard requested an administrative hearing to challenge the suspension; a hearing was conducted, and a Kansas Department of Revenue (KDOR) hearing officer affirmed the administrative action. Bullard next filed a petition for judicial review of the administrative action in district court. After an evidentiary hearing, the district court affirmed the administrative action and denied Bullard's petition. On appeal, Bullard raises three arguments: (1) The district court erred in finding that the issue of articulable suspicion to support the traffic stop was not a basis for relief in an administrative appeal; (2) the district court erred in barring expert opinion testimony regarding the accuracy of the certified test device; and (3) K.S.A.2012 Supp. 8–1014(b)(2)(A) and K.S.A.2012 Supp. 8–2,142(a)(2)(B) violate the Equal Protection Clause by imposing harsher DUI penalties on the holders of class A commercial driver's licenses (CDLs) than on the holders of regular class C driver's licenses. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 1 a.m. on Saturday, October 6, 2012, Bullard was driving home in his personal vehicle after a night of bowling in Derby, Kansas. Bullard holds a CDL and has been employed as a truck driver for a construction company for almost 20 years. Cowley County Sheriff's Deputy Alice Traffas was on patrol and running routine checks in the area when she saw Bullard's pickup truck pass by on the paved two-lane highway. Bullard's pickup caught Traffas' attention because it appeared to be driving slowly. Traffas pulled onto the highway, caught up to Bullard's pickup, and followed it for at least 2 miles. Traffas later testified that Bullard's tires drifted over onto the yellow center line at least twice, a violation of K.S.A.2012 Supp. 8–1522. In addition to crossing the center line, Traffas said that Bullard "wasn't what I would call maintaining. He was back and forth in his lane."

Traffas' training had taught her that weaving and crossing the center line are clues of impaired driving to be considered as part of the totality of the circumstances with other factors like the time of night and a driver's speed. She was also concerned that Bullard's failure to maintain his lane would endanger oncoming traffic. Traffas activated her emergency lights and initiated a traffic stop. Traffas administered several field sobriety tests during which she observed signs of alcohol impairment in Bullard's performance. Traffas' report detailing the traffic stop and the field sobriety tests is not included in the record on appeal. At one point during the traffic stop, Bullard said to Traffas, "I screwed up, and I got caught."

Traffas issued Bullard warnings for failing to maintain a single lane of traffic and no proof of insurance. Traffas then placed Bullard under arrest for transporting an open container

and took him to the county jail. Once there, Traffas gave Bullard a copy of the implied consent advisory notices as required by K.S.A. 8–1001(k), read them aloud, and requested that Bullard submit to a breath test. Bullard agreed, and a breath test was administered with an Intoxilyzer 8000.

***2** The Intoxilyzer 8000 printout stated that Bullard's breath-alcohol level the night of his arrest was .158. Traffas completed the "Officer's Certification and Notice of Suspension" document, commonly referred to as a DC–27, on October 6, 2012. Traffas identified the following reasonable grounds for her belief that Bullard was under the influence: odor of alcoholic beverages; alcoholic beverage containers found in vehicle; failed field sobriety tests; slurred speech; bloodshot eyes; poor balance or coordination; and Bullard stated that he consumed alcohol.

Pursuant to the instructions on the back of the DC–27 form, Bullard requested an administrative hearing on October 10, 2012. On April 18, 2013, a KDOR hearing officer affirmed the administrative action to suspend Bullard's license for his breath-test failure under the Kansas Implied Consent Law, K.S.A. 8–1001 *et seq.*

On April 29, 2013, Bullard filed a petition for judicial review. In his petition, Bullard claimed that Traffas did not possess reasonable suspicion to initiate the traffic stop of his vehicle or to believe that he was driving under the influence. Bullard asserted that he was wrongfully required to submit to breath-alcohol testing and, as a result, the results of the breath test used were invalid. On May 16, 2013, the KDOR filed an answer to Bullard's petition. It argued that the issue of whether a law enforcement officer has articulable suspicion to initiate a traffic stop is not a basis for reversing the agency action.

On September 6, 2013, the district court filed a pretrial conference order listing the issues to be presented at the upcoming evidentiary hearing. On September 20, 2013, Bullard filed a motion to amend the pretrial order. He claimed that at his administrative hearing, he "preserved his right to contest the findings of reasonable ground [*sic*] to believe he was operating the vehicle under the influence of alcohol" and additionally that he "preserved his right to contest the concentration of the alcohol in his blood as well as the accuracy of the equipment, the testing procedure and the operator of the test." Bullard's motion further asserted that in the presentation of his case before the district court, he would need to rely upon expert testimony to establish the actual testing results and/or the propriety of the testing procedure. He explained that he had inadvertently failed to include in the pretrial order the authority to name such expert witnesses and to ensure that the issue was preserved for review.

The KDOR filed an objection to Bullard's motion to amend the pretrial order, as well as a motion in limine. It argued that the "requested unnamed expert witness testimony will be irrelevant, immaterial and outside the scope" of issues permitted by K.S.A.2012 Supp. 8–1020(h)(2)(A)–(H). The KDOR asked for an order in limine prohibiting Bullard from presenting expert witness testimony regarding the accuracy and reliability of the Intoxilyzer 8000, operator, or existing testing procedures. The KDOR further alleged that Bullard had not made the proper expert witness disclosure pursuant to K.S.A.2012 Supp. 60–226(b)(6).

***3** On October 3, 2013, the district court considered Bullard's motion to amend the pretrial order and endorse an expert witness. After the parties presented their arguments, the district court found that Bullard would not be permitted to offer independent evidence to challenge the accuracy or sufficiency of the breath test to establish that the bloodalcohol test was in excess of .08 but less than .15.

On February 6, 2014, the district court conducted an evidentiary hearing. Before the presentation of evidence, Bullard proffered the statement of an expert witness, Mary Catherine McMurray, regarding his breath sample and how it was taken, as well as its "correctness ." Bullard expressed his disagreement with the district court's prior ruling that the evidence was not admissible "because I think it's a de novo hearing, and that issue is not foreclosed by K.S.A. [2012 Supp. 8–1020]."

For the first time, Bullard also argued that K.S.A.2012 Supp. 8–1014 and its corollary K.S.A.2012 Supp. 8–2,142 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The KDOR pointed out that Bullard had not raised this constitutional issue in the pretrial order. Furthermore, the KDOR countered that the issue was moot because Bullard's breath-test result was .158. The KDOR claimed that this test sample would result in a 1–year license suspension for a person who did not have a CDL, just as it would for a person with a CDL. The district judge ultimately found there was a rational basis for the law:

> "[W]hether I personally think it's fair or not, I can see how a rational person or a legislator could believe that the ability of someone with a commercial license to—whether they drive impaired or not in their noncommercial vehicle may be a similar connection on how they might operate a commercial vehicle, so I think there is some rational basis for treating a commercial driver's license a little bit differently as to the effect on their commercial driver's license for a violation of the alcohol laws as far as BAT, so I'm going to find that it is constitutional."

Bullard called Traffas as a witness and offered into evidence video footage of the traffic stop recorded by the camera in Traffas' patrol car. The district court admitted the video "for the purposes only of addressing any of the issues allowed in K.S.A. 8–1020." Bullard also testified on his own behalf. He said that prior to initiating the traffic stop, Traffas followed his pickup for 3 or 4 miles. Her patrol car gradually drew closer and closer to his pickup until it was only 3 or 4 car lengths behind him, which Bullard said was distracting. "[T]he lights in the rearview mirror, and it just stayed back there behind me the whole way," he said. Bullard denied ever touching or crossing the center line with his tires. He said he did not think he was impaired enough on the night in question that he could not drive.

The district court found that the issue of whether there was reasonable suspicion for Traffas to make the initial traffic stop was "not contestable in an administrative appeal from a driver's license suspension." It cited the Kansas Supreme Court's holding in *Martin v. Kansas Dept. of Revenue,* 285 Kan. 625, Syl. ¶ 2, 176 P.3d 938 (2008), stating that K.S.A. 8–1020(h)(2)(A)–(H)'s list of issues that may be decided in an administrative driver's license suspension hearing is exclusive. The district court rejected Bullard's argument that the Supreme Court's subsequent decision in *Sloop v. Kansas Dept. of Revenue,* 296 Kan. 13, 290 P.3d 555 (2012), overruled *Martin.* The district court noted that the *Sloop* opinion does not even mention *Martin* and remarked that "one would think if their intent was to overrule *Martin,* they would have specifically said, We hereby overrule *Martin.*' "

***4** The district court reiterated that all the KDOR needed to show were the factors listed in K.S.A.2012 Supp. 8–1020(h)(2)(A)–(H). It found that Traffas had reasonable grounds to believe that Bullard was operating a vehicle while under the influence of alcohol or drugs, or both, and that Bullard had been arrested for an alcohol related offense at the time Traffas requested the breath test. The district court further found that Traffas presented Bullard with the oral and written implied consent notices of his rights regarding the requested breath test. It found that the testing equipment was certified by the Kansas Department of Health & Environment (KDHE), as was the person operating the testing equipment. It found that the testing procedures used substantially complied with the procedures set out by the KDHE. Finally, the district court found that the test result showed that Bullard had an alcohol concentration of .08 or greater while operating a motor vehicle. The district court denied Bullard's petition.

Bullard timely appeals the district court's judgment.

ANALYSIS

Did the district court err in finding that the issue of articulable suspicion to support the traffic stop was not a basis for relief in the administrative appeal?

In his first issue raised on appeal, Bullard argues that the district court erred in refusing to admit or consider evidence pertaining to Traffas' grounds for initiating a traffic stop. The KDOR counters that the issue of articulable suspicion to stop a vehicle in administrative license actions has been rendered mostly moot by the Kansas Supreme Court. Alternatively, the KDOR contends that Traffas possessed sufficient articulable facts to comprise reasonable suspicion to support the traffic stop.

When reviewing the district court's ruling in a driver's license suspension case, this court generally employs a substantial competent evidence standard. *Schoen v. Kansas Dept. of Revenue,* 31 Kan.App.2d 820, 822, 74 P.3d 588 (2003). Issues of statutory and constitutional interpretation raise pure

questions of law subject to unlimited review. *Martin,* 285 Kan. at 629.

Bullard argued at the administrative hearing and before the district court that he did not commit any traffic infraction which would create any basis for Traffas to initiate a stop. Bullard maintains that the stop was wrongful, rendering his subsequent arrest invalid. He contends that at both the administrative and district court levels, he was foreclosed from presenting any evidence to support his contentions and the issues he wished to raise were never considered.

At the evidentiary hearing on Bullard's petition for review, the district court found that under *Martin,* 285 Kan. 625, Bullard could not challenge whether Traffas had the requisite reasonable grounds to stop his vehicle or whether Bullard's subsequent arrest was invalid because it resulted from a wrongful stop. The district court ruled that Bullard could only present evidence pertaining to the matters listed in K.S.A.2012 Supp. 8–1020(h)(2)(A)–(H). While "mindful" of our Supreme Court's decision in *Martin,* Bullard seems to argue that the court's more recent decision in *Sloop* overruled it. The KDOR disputes this contention, asserting that *Sloop* did not reverse *Martin* and does not control this case. In order to resolve these competing claims, a closer look at the *Martin* and *Sloop* decisions is necessary.

***5** In *Martin,* our Supreme Court addressed whether, when, and to what effect a Kansas driver may contest an alcohol-based administrative license suspension arising out of a law enforcement traffic stop allegedly violating the Fourth Amendment to the United States Constitution. Martin was pulled over by a Prairie Village police officer. The parties stipulated that Martin was DUI at the time, but there had been nothing about Martin's driving that alerted the officer to this fact. Rather, the officer stopped Martin because of a malfunctioning rear brake light. At the time, the officer believed the malfunctioning light to be in violation of the law, even though two other rear brake lighs on Martin's vehicle were working.

After the stop, the officer became suspicious that Martin had been drinking. Martin failed field sobriety tests, refused a preliminary breath test, and later failed a chemical breath test at the police station. The chemical breath test result led the KDOR to suspend Martin's driver's license. Martin attempted unsuccessfully to argue the unconstitutionality of the traffic stop at his administrative hearing. Martin sought review in the district court, where the judge reversed the license suspension, holding that the officer misinterpreted the law governing brake lights and that this misinterpretation meant he lacked reasonable suspicion to initiate Martin's stop.

On appeal, our Supreme Court found that the propriety of a traffic stop is irrelevant in a driver's license suspension hearing. It characterized K.S.A. 8–1020(h)(2)(A)–(H) as "clear and unambiguous" and found that its list of issues that can be raised at an administrative license suspension hearing is exclusive. 285 Kan. at 631. Furthermore, the court found that the statute's exclusion of Martin's issues from the list that may be decided by the KDOR at an administrative hearing was also consistent with several cases arising out of challenges to Board of Tax Appeals decisions and other agency actions. In those cases, the Kansas Supreme Court repeatedly recognized that administrative agencies are not empowered to decide constitutional questions; rather, courts are. 285 Kan. at 632.

Alternatively, Martin argued that the issue of whether " 'reasonable grounds to believe' " a driver was under the influence under K.S.A. 8–1020(h)(2)(A) was equivalent to the issue of whether " 'reasonable suspicion' existed to support the traffic stop." 285 Kan. at 631. In other words, Martin asserted the issue he wished to address in the administrative hearing was among those the statute permitted to be pursued in that forum. Our Supreme Court rejected this argument, as well, finding that " '[r]easonable grounds to believe' a driver is under the influence and 'reasonable suspicion' sufficient under constitutional law are distinct legal concepts." 285 Kan. at 631.

Several years after *Martin,* our Supreme Court issued its decision in *Sloop.* In that case, Sloop appealed from an administrative action by the KDOR suspending his driving privileges for 1 year under K.S.A.2008 Supp. 8–1014(a)(l). A Topeka police officer noticed Sloop making a left-hand turn. While Sloop committed no traffic violations in making his turn, the officer followed Sloop because he was " 'sitting unusually close to his steering wheel' " and because he had been somewhat hesitant going into his turn. 296 Kan. at 14. The officer followed Sloop for about 8 to 10 blocks. During that time, Sloop did not commit a traffic infraction. But because Sloop's tag light was out, the officer activated his emergency lights and stopped Sloop.

***6** The officer requested Sloop's driver's license, and Sloop handed it over without tumbling it. According to the officer, Sloop smelled of alcohol and his eyes were watery and bloodshot. When the officer asked if he had been drinking, Sloop replied, " 'Nothing really,' " and then said that he had " 'like one beer at a friend's house.' " The officer testified that Sloop's speech was " 'impaired' but not 'slurred.' " 296 Kan. at 14–15.

The officer ordered Sloop out of the car. He did not stumble upon exiting and was steady when walking to the back of the car. Sloop performed a preliminary breath test (PBT), the results of which also were not offered at the hearing because the officer later realized at the police station the test had been administered improperly. After the PBT, the officer arrested Sloop and took him to the station for further testing. On the walk-andturn test, Sloop exhibited two clues, which the officer testified indicated a possibility of impairment. On the one-leg-stand test, Sloop exhibited one clue of impairment—which the officer testified meant that he passed the test. Sloop refused to take the evidentiary breath test with the Intoxilyzer 8000 the officer requested. The district court concluded that a reasonable officer could have believed that it was " 'more than a possibility' " that Sloop operated his vehicle while under the influence of alcohol. 296 Kan. at 16.

On appeal, Sloop argued that his arrest was unlawful, which meant there was no authority to request he take the breath test under K.S.A.2008 Supp. 8–1001(b). Because the officer arrested Sloop and believed he had reasonable grounds to request the later breath test, our Supreme Court found that two of K.S.A.2008 Supp. 8–1001(b)'s conditions applied in the case:

> " '(b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a): (1) if [first] *the officer has reasonable grounds to believe* the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both ... [a]nd [second] one of the following conditions exists: (A) *The person has been arrested* or otherwise taken into custody for any offense involving operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both, ... in violation of a state statute or a city ordinance.' (Emphasis added.) K.S.A.2008 Supp. 8–1001(b)." 296 Kan. at 17.

Sloop challenged the existence of the italicized conditions, both of which the court found were within the scope of the matters allowed at the administrative hearing and within the reviewing court's purview.

> "Under K.S.A.2008 Supp. 8–1020(h)(1), [the applicable] matters are '(A) A law enforcement officer had reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both,' and '(B) the person was in custody or arrested for an alcohol or drug related offense.' "

***7** 296 Kan. at 17.

The court only addressed Sloop's argument that his arrest was unlawful, as the court found this issue to be dispositive. 296 Kan. at 18.

Our Supreme Court found that under the plain language of K.S.A.2008 Supp. 8–1001(b), Sloop's arrest had to be lawful. It found that if it was to interpret the legislature's use of the word "arrest" to include an invalid arrest, the legislature's arrest distinction would become "diluted at best and superfluous at worst." 296 Kan. at 19. The court further found the same problems would occur with a comparable interpretation of the similar language and structure of K.S.A.2008 Supp. 8–1020(h)(1)(B) regarding the permissible scope of the license suspension hearing when the officer has certified that the driver refused the test. 296 Kan. at 19–20. The Supreme Court then concluded de novo from the undisputed facts that there was no probable cause for Sloop's arrest and that the arrest was therefore unlawful. Because a lawful arrest is required before an officer is authorized to request a driver to breathe into an Intoxilyzer 8000 under K.S.A.2008 Supp. 8–1001(b), the court found the officer had no statutory authority to request Sloop to take the test at the police station. 296 Kan. at 23.

> Our Supreme Court's decision in *Martin* held that the propriety of a traffic stop is irrelevant in a driver's license suspension hearing. *Martin,* 285 Kan. at 631. The *Sloop* court did not conduct a Fourth Amendment analysis into the

> lawfulness of the traffic stop that led to Sloop's arrest; rather, the court analyzed whether the officer had probable cause to arrest Sloop after finding that an arrest is a substantive requirement of K .S.A.2008 Supp. 8–1020(h)(1)(A) and (B) for an agency action to suspend. Importantly, K.S.A.2012 Supp. 8–1020(h)(2) has no equivalent requirement that an officer's articulable suspicion to stop be determined at the administrative proceeding. The *Sloop* decision does not even mention *Martin,* which further undermines Bullard's contention that the *Sloop* court intended to overrule *Martin.*

In conclusion, the *Martin* court rejected an argument identical to Bullard's in the context of an administrative license suspension. The Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the Supreme Court is departing from its previous position. *Anderson Office Supply v. Advanced Medical Assocs.,* 47 Kan.App.2d 140, 161, 273 P.3d 786 (2012). The district court did not err in refusing to admit or consider evidence pertaining to Traffas' grounds for initiating the traffic stop.

Did the district court err in barring expert opinion testimony regarding the accuracy of the certified test device?

> As his second issue, Bullard argues that the district court erroneously "failed to permit [him] a trial de novo" as required by K.S.A.2012 Supp. 8–259 and K.S.A.2012 Supp. 8–1020. More specifically, he contends the district court erroneously prohibited the testimony of an expert witness challenging the accuracy and reliability of the Intoxilyzer 8000 breath test. The KDOR responds that the district court's de novo standard of review did not entitle Bullard to raise issues outside of the grounds for relief listed in K.S.A.2012 Supp. 8–1020(h)(2).

***8** As stated previously, when reviewing the district court's ruling in a driver's license suspension case, this court generally employs a substantial competent evidence standard. *Schoen,* 31 Kan.App.2d at 822. Issues of statutory and constitutional interpretation raise pure questions of law subject to unlimited review. *Martin,* 285 Kan. at 629.

After the district court filed its pretrial order in this case, Bullard filed a motion to amend it claiming that he had "preserved his right to contest the concentration of the alcohol in his blood as well as the accuracy of the equipment, the testing procedure and the operator of the test." Bullard further argued that in the presentation of his case on appeal, he would need to rely upon expert testimony "to establish the actual testing results and/or the propriety of the testing procedure." However, Bullard claimed that through inadvertence, he had failed to include the authority to name expert witnesses in the pretrial order and to insure the issue was preserved for review.

The KDOR filed an objection to Bullard's motion to amend the pretrial order and a motion in limine seeking to prohibit Bullard from calling an expert witness to testify about the accuracy and/or reliability of the machine, operator, or existing procedures. The KDOR sought to bar the proposed expert testimony based on the subject matter identified in Bullard's motion and his failure to comply with K.S.A.2012 Supp. 60–226(b)(6)—expert witness disclosures. The KDOR argued that Bullard's "requested unnamed expert witness testimony will be irrelevant, immaterial and outside the scope of statutory issues permitted by this appeal." After hearing the parties' arguments, the district court ruled that Bullard would not be permitted to offer independent evidence to challenge the accuracy or sufficiency of the breath test.

Before calling his first witness at the district court's evidentiary hearing, Bullard proffered McMurray's statement regarding his breath sample and how it was taken, as well as its "correctness." McMurray's curriculum vitae and statement identify her as an expert in the analysis of chemical tests to determine blood-alcohol concentration, including the testing of breath samples using the Intoxilyzer 8000. McMurray was prepared to testify that Bullard's blood-alcohol content was more likely than not to be under the .15 level when tested. Bullard expressed his disagreement with the district court's prior ruling that McMurray's testimony was not admissible, arguing that the issue was not foreclosed by K.S.A.2012 Supp. 8–1020 at the district court's de novo hearing.

As a threshold matter, the KDOR contends that this court "should be hesitant to address the issue of accuracy of

the certified test device because such was not raised in appellant's Petition for Review to the trial court." The KDOR does not discuss what, if any, affect Bullard's subsequent motion to amend the district court's pretrial order has on this preservation issue. Additionally, the KDOR's conclusory one-sentence argument does not include any authority or explanation of why appellate review is precluded in this situation. A point raised incidentally in a brief and not argued therein is deemed waived and abandoned. *Friedman v. Kansas State Bd. of Healing Arts,* 296 Kan. 636, 645, 294 P.3d 287 (2013). "[F]ailure to support an argument with pertinent authority or show why the argument is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue." *State v. Tague,* 296 Kan. 993, 1001, 298 P.3d 273 (2013).

***9** Similarly, the KDOR seems to argue that this court should reject Bullard's argument on this issue because he "failed to comply with K.S.A.2012 Supp. 60–226(b)(6) in providing the trial court and appellee's counsel with notice of the expert witness testimony (proffer) prior to trial." The agency again fails to cite any authority explaining the effect of an appellant's failure to comply with the statutory notice requirements. Therefore, this court considers this argument abandoned, as well. See *Tague,* 296 Kan. at 1001; *Friedman,* 296 Kan. at 645.

Turning to the merits of this issue, Bullard first argues that the purpose of the district court's de novo hearing was to determine whether there were sufficient grounds to suspend his driver's license. He asserts that there is nothing in either K.S.A.2012 Supp. 8–259(a) or K.S.A.2012 Supp. 8–1020(p) that limits the evidence that might be offered at the hearing. Indeed, Bullard argues that "K.S.A. 8–1020(p) specifically excludes the evidentiary restrictions found in K.S.A. 8–1020(1) and directs the court to 'take testimony, examines the facts of the case and determine whether the petitioner is entitled to driving privileges.' "

Bullard is correct that the scope of a district court's review of an administrative order suspending a driver's license is set forth in two separate statutory sections. First, K.S.A.2012 Supp. 8–259(a) provides in pertinent part:

> "The action for review shall be by trial de novo to the court. The court shall take testimony, examine the facts of the case and determine whether the petitioner is entitled to driving privileges or whether the petitioner's driving privileges are subject to suspension, cancellation or revocation under the provisions of this act."

Second, K.S.A.2012 Supp. 8–1020(p) states in almost identical language:

> "The action for review shall be by trial de novo to the court and the evidentiary restrictions of subsection (1) shall not apply to the trial de novo. The court shall take testimony, examine the facts of the case and determine whether the petitioner is entitled to driving privileges or whether the petitioner's driving privileges are subject to suspension or suspension and restriction under the provisions of this act. If the court finds that the grounds for action by the agency have been met, the court shall affirm the agency action."

As the KDOR contends, Bullard seems to misunderstand the meaning of de novo review as contemplated by our legislature. The fact that the district court hearing is conducted under a de novo standard of review does not erase the statutory limitations on the scope of the proceedings imposed by K.S.A.2012 Supp. 8–1020(h)(2). This point is reinforced by this court's decision in *Henke v. Kansas Dept. of Revenue,* 45 Kan.App.2d 8, 13, 246 P.3d 408 (2010), which stated:

> "Although these statutes provide that the hearing before the district court is de novo, K.S.A.2008 Supp. 8–1020(q) specifically states that at the hearing, 'the licensee *shall*

have the burden to show that the decision of the agency should be set aside.' (Emphasis added.) See also K.S.A. 77–621(a)(1) ('The burden of proving the invalidity of agency action is on the party asserting invalidity.'). In other words, the licensee bears the initial burden of putting on evidence showing that at least one of the issues listed in the applicable subsection of K.S.A.2008 Supp. 8–1020(h) has not been satisfied."

***10** Alternatively, Bullard argues that the accuracy and reliability of the breath test administered to him was relevant under K.S.A.2012 Supp. 8–1020(h)(2)(G)–whether the test result determined that he had an alcohol concentration of .08 or greater in his breath. He asserts, (without citation to the record on appeal) that he "was and still is willing to stipulate that the testing result was in excess of .08." Bullard further asserts that the KDOR would not accept his stipulation, but rather it relied upon the Intoxilyzer 8000 reading obtained by Traffas as evidence of Bullard's blood-alcohol concentration. Consequently, Bullard claims the precise concentration level above .08 became the issue thus affording him the right to challenge the accuracy and reliability of the test. He argues that McMurray's testimony may have persuaded the district court to determine that Bullard's blood-alcohol concentration was over .08 but below .15.

Bullard does not cite to any support for his claim that he should be allowed to challenge the accuracy and reliability of his breath test, most likely because this court's caselaw directly contradicts his position. For example, in *Meehan v. Kansas Dept. of Revenue,* 25 Kan.App.2d 183, 959 P.2d 940 (1998), the plaintiffs driver's license was suspended based on a result of .08 on a breath test. Meehan's primary argument before the district court was that the breath-test results were not reliable. He also attempted to submit an expert's testimony at trial, apparently to argue that the district court should have discredited or given little weight to the breath test results because of questions of reliability. This court affirmed the district court's refusal to admit or consider the expert's testimony, stating:

"Kansas appellate courts have repeatedly held that the legislature has expressly found that results from breath tests are sufficiently reliable to be admitted into evidence if the foundation establishes that the testing machine was operated according to the manufacturer's operational manual and any regulations set forth by KDHE and if the equipment and operator are certified. [Citations omitted.]

"According to this clear line of cases, the legislature has deemed alcohol breath tests admissible if the certification requirements are met and if the machine was operated in the manner provided by KDHE. A licensee can challenge, factually, whether the certifications were proper and whether the machine was operated in the manner required by the operations manual. Thus, a licensee can raise inconsistencies in the certification records or whether the testing officer actually followed all operational protocols.

However, it is legislatively established that the results are admissible as a matter of law when the requisite foundation is laid under K.S.A.1997 Supp. 8–1002(i). For these reasons, the district court correctly concluded that under the statutes, Meehan's expert's testimony was irrelevant to determine the *admissibility* of the breathalyzer test results."

***11** 25 Kan.App.2d at 185–86.

Similarly, in *Campbell v. Kansas Dept. of Revenue,* 25 Kan.App.2d 430, 962 P.2d 1150, *rev. denied* 266 Kan. 1107 (1998), the licensee argued the district court erred in concluding as a matter of law that the testing procedure used to determine the alcohol concentration in his breath was reliable. Campbell claimed that the results from a single breath test were not scientifically reliable and, therefore, should not be admitted into evidence. This court found persuasive the reasoning in *Meehan* and concluded that the district court did not err in its determination that as a matter of law the single test procedure authorized under Kansas law is not scientifically unreliable and, therefore, inadmissible. *Campbell,* 25 Kan.App.2d at 431.

Based on this prior caselaw, this court finds that the district court did not err in prohibiting expert testimony challenging the accuracy and reliability of the breath test. The district court's de novo standard of review did not entitle Bullard to raise issues outside of the grounds for relief listed in K.S.A.2012 Supp. 8–1020(h)(2).

Did the application of K.S.A.2012 Supp. 8–1014(b)(2)(A) and K.S .A.2012 Supp. 8–2,142(a)(2)(B) violate the Equal

Protection Clause with regard to holders of commercial driver's licenses?

In his final argument raised on appeal, Bullard contends that K.S .A.2012 Supp. 8–1014(b)(2)(A) and K.S.A.2012 Supp. 8–2,142(a)(2)(B) are unconstitutional when applied to him and similarly situated holders of CDLs.

Determining a statute's constitutionality is a question of law subject to unlimited review. The appellate courts presume statutes are constitutional and must resolve all doubts in favor of a statute's validity. Courts must interpret a statute in a way that makes it constitutional if there is any reasonable construction that would maintain the legislature's apparent intent. *State v. Soto,* 299 Kan. 102, 121, 322 P.3d 334 (2014).

Renewing his argument made before the district court, Bullard argues that K.S.A.2012 Supp. 8–1014(b)(2)(A) and K.S.A.2012 Supp. 8–2,142(a)(2)(A) violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by imposing more severe punishment on one class of citizens, *i.e.,* Bullard and other CDL holders, than is imposed on holders of regular class C driver's licenses for the commission of the same act. Bullard asserts that there is no rational justification for the enhanced punishment as applied to Bullard or the larger class of CDL holders.

Bullard is correct that in this situation, Kansas statutes treat DUI offenders with CDLs differently than those with regular class C driver's licenses. K.S.A.2012 Supp. 8–1014(b)(2)(A) states:

> "(2) Except as provided by subsection (e) and K.S.A. 8–2,142, and amendments thereto, if a person fails a test or has an alcohol or drug-related conviction in this state and the person's blood or breath alcohol concentration is .15 or greater, the division shall (A) On the person's first occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for one year to driving only a motor vehicle equipped with an ignition interlock device."

***12** However, a suspended driver may seek relief under K.S.A.2012 Supp. 8–1015(a)(4), which provides:

> "Whenever a person's driving privileges have been suspended for one year as provided in subsection (b)(2)(A) of K.S.A. 8–1014, and amendments thereto, after 45 days of such suspension, such person may apply to the division for such person's driving privileges to be restricted for the remainder of the one-year suspension period to driving only a motor vehicle equipped with an ignition interlock device and only under the circumstances provided by subsections (a)(1), (2), (3) and (4) of K.S.A. 8–292, and amendments thereto."

K.S.A. 8–292(a)(l)–(4) state that

> "whenever a statute authorizes the court to place restrictions on a person's driving privileges, a district or municipal court may enter an order restricting the person's driving privileges to driving only under the following circumstances: (1) in going to or returning from the person's place of employment or schooling; (2) in the course of the person's employment; (3) during a medical emergency; and (4) in going to and returning from probation or parole meetings, drug or alcohol counseling or any place the person is

> required to go to attend an alcohol and drug safety action program....”

In addition to the statutes discussed above, a CDL holder is also subject to the provisions of the Uniform Commercial Driver's License Act (UCDLA), K.S.A. 8–2,125 *et seq.* K.S.A.2012 Supp. 8–1014(b)(2) expressly incorporates the provisions of K.S.A.2012 Supp. 8–2,142, which provides in pertinent part:

> “(a) A person is disqualified from driving a commercial motor vehicle for a period of not less than one year upon a first occurrence of any one of the following:
>
> “(2) while operating a noncommercial motor vehicle:
>
> (B) the person's test refusal or test failure, as defined in K.S .A. 8–1013, and amendments thereto.”

To the extent that the UCDLA conflicts with general driver licensing provisions, the UCDLA prevails. See K.S.A. 8–2,126(b). Therefore, it would appear that K.S.A.2012 Supp. 8–2,142 does not make the same allowance for a suspended CDL holder to apply for restricted driving privileges under K.S.A.2012 Supp. 8–1015(a)(4). Bullard points out that if he held a regular class C driver's license, he would only be facing a 45–day suspension of his driving privileges. Bullard claims that there is no rational basis for denying the holder of a CDL the same right to operate a private vehicle as the holder of a regular operator's license when the incident giving rise to the suspension stemmed from the operation of a noncommercial vehicle.

The KDOR responds that it is “arguable” whether Bullard, as a CDL holder, is being treated differently than the holder of a regular class C driver's license. It contends that the Equal Protection Clause is not implicated here because Bullard's breath-test result was above .15. The KDOR points out that the 1–year license suspension would result regardless of whether Bullard held a CDL or a regular class C driver's license. Thus, the KDOR argues that Bullard's circumstances do not warrant reversal on equal protection grounds and that this issue is moot.

***13** The KDOR is correct in asserting that because Bullard's breath-alcohol test result was above .15, his driving privileges would be subject to a 1–year suspension regardless of whether he held a CDL or regular class C driver's license. However, Bullard is not concerned with the 1–year suspension period. The crux of Bullard's argument is that after 45 days of suspension, the holder of a regular class C license may apply to the division for restricted driving privileges with an ignition interlock device for the remainder of the 1–year suspension period. See K.S.A.2012 Supp. 8–1015(b)(4). As a CDL holder,

Bullard is subject to K.S.A.2012 Supp. 8–2,142, which makes no such provision. Here lies Bullard's equal protection claim. While the holders of both CDLs and regular class C driver's licenses are subject to a 1–year suspension upon their first occurrence of a breathalcohol test result over .15, only the holders of regular class C driver's licenses are eligible to apply for restricted driving privileges after 45 days.

Bullard asserts that a CDL is an all-inclusive license that authorizes the holder to drive both commercial and noncommercial vehicles. If the CDL is suspended or revoked, the holder has no license to operate a motor vehicle for personal purposes. Bullard claims there are no provisions, statutory or regulatory, for the issuance of temporary licenses or permits or replacement licenses in the event that a holder's CDL is suspended. Bullard states: “Simply put, K.S.A. 8–2,142 prevents the violator from driving commercial vehicles and personal vehicles for the length of suspension.”

“An equal protection analysis has three steps. First, a court must determine the nature of the statutory classifications and examine whether these classifications result in disparate treatment of arguably indistinguishable classes of individuals. [Citation omitted.] If so, the Equal Protection Clause is implicated. In the second step, a court examines which rights the classifications affect because the nature of those rights dictates the scrutiny applied when the statute or regulation is reviewed. There are three levels of scrutiny: (1) the rational basis standard to determine whether a statutory classification bears some reasonable relationship to a valid legislative purpose; (2) the heightened or intermediate scrutiny standard to determine whether a statutory classification substantially furthers a legitimate legislative purpose; and (3) the strict scrutiny standard to determine whether a statutory classification is necessary to serve some compelling state interest. [Citations omitted.] In the final step of analysis, a court determines whether the

relationship between the classifications and the object desired to be obtained withstands the applicable level of scrutiny. [Citations omitted.]" *Village Villa v. Kansas Health Policy Authority,* 296 Kan. 315, 324, 291 P.3d 1056 (2013).

Regarding the first step, Bullard argues that holders of a Kansas driver's license who are first-time violators and whose breath-test results exceed .15 are entitled to have their driving privileges reinstated, albeit with some restrictions. He points out that the only drivers excluded from this class are those who hold CDLs. However, as the KDOR contends, there are significant distinctions between CDL holders and regular class C driver's license holders. To begin with, CDL holders operate motor vehicles at the top end of the weight spectrum for allowable weights on roads. A CDL holder often times drives as part of his or her profession and may be expected to drive for many more average hours a day and for many more miles than a regular class C license holder. Finally, a CDL holder may transport hazardous materials on roads shared with regular class C license holders. However, not all CDL holders are permitted to transport hazardous materials. Such certification must be attained in addition to the CDL license. Bullard testified that he was not certified to transport hazardous materials at the time of his arrest for DUI. Based on all of these factors, CDL holders and regular class C license holders are not indistinguishable classes.

***14** Even if the two classes of license holder were found to be indistinguishable, Bullard's argument fails. To complete the analysis, the next step of the analysis is to determine the level of scrutiny to be applied upon review. The parties agree that the rational basis standard is appropriate in this case. The district court came to the same conclusion and applied rational basis review in rejecting Bullard's equal protection claim.

Under the third and final step of this court's analysis, it must determine whether the relationship between the classifications and the object desired to be obtained withstands the applicable level of scrutiny. Under rational basis review, a court must determine whether a statutory classification bears some reasonable relationship to a valid legislative purpose. *Village Villa,* 296 Kan. at 324.

> "The rational basis standard is a 'very lenient standard.' [Citation omitted.] A classification system violates this test only if it 'rests on grounds wholly irrelevant to the achievement of the State's legitimate objective.' [Citation omitted.] Nevertheless, a classification " 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " [Citations omitted.]" *Hodges v. Johnson,* 288 Kan. 56, 72–73, 199 P.3d 1251 (2009).

Furthermore, "[w]hen a plaintiff attacks a statute as facially unconstitutional under the Equal Protection Clause, the plaintiff must demonstrate that 'no set of circumstances exist' that survive constitutional muster." 288 Kan. at 73 (quoting *Injured Workers of Kansas v. Franklin,* 262 Kan. 840, 850–51, 942 P.2d 591 [1997]). It is not enough to simply point out that a statute might not be rationally related to the state objectives sought under one set of facts. *Hodges,* 288 Kan. at 73 (citing *Injured Workers of Kansas,* 262 Kan. at 850–51). Instead, a plaintiff claiming that a statute is unconstitutional under the rational basis standard has the " ' "burden 'to negative every conceivable basis which might support [the classification]." " [Citations omitted.]" *Hodges,* 288 Kan. at 73.

The UCDLA treats the operators of commercial motor vehicles differently from the operators of private passenger motor vehicles when a conviction or occurrence is reported against the operator. The avowed purposes of the UCDLA are expressed in K.S.A. 8–2,126:

> "(a) The purpose of this act is to implement the federal commercial motor vehicle safety act of 1986 ... and reduce or prevent commercial motor vehicle accidents, fatalities and injuries by:
>
> (1) Permitting commercial drivers to hold only one driver's license;
>
> (2) disqualifying commercial drivers who have committed certain serious traffic violations or other specified offenses; and

(3) strengthening driver licensing and testing standards.

***15** "(b) This act is remedial law and shall be liberally construed to promote public health, safety and welfare."

Bullard contends that the more severe sanctions imposed on CDL holders, but not on all other drivers for the same act under the same circumstances, bears no relationship to any legitimate goal of promoting commercial traffic safety. To begin with, Bullard claims that the commission of an act in a person's personal, noncommercial vehicle on a pleasure outing has no bearing on his ability to perform a licensed job prudently. Furthermore, he contends

> "that to deprive him of the right to operate his own non-commercial vehicles in noncommercial ways which is afforded to all other drivers under the exact same circumstances is discriminatory, grossly unfair and has nothing to do with the promotion of safety in the operation of commercial vehicles or any other state regulatory objective."

Bullard states that he would have no complaints if the statutory scheme merely prevented a CDL holder from operating motor vehicles classified as commercial vehicles. Instead, he seeks the ability to "go to work, church or to the drug or grocery store" or more generally "to drive for the necessities of life" as a regular class C driver's license holder could do. Bullard asserts that our legislature apparently did not feel that letting the holders of regular class C driver's licenses operate personal vehicles equipped with restrictive devices would create highway safety problems. Thus, he concludes there is "no logic or reason" for depriving another person of the right to operate a vehicle for personal use simply because he or she has obtained a CDL.

The KDOR disagrees, contending that it is reasonable to subject the operators of commercial vehicles to stricter DUI sanctions than those imposed upon other drivers in order to implement the State's participation in a federal program and to reduce or prevent commercial motor vehicle accidents.

As persuasive authority, the KDOR points to the Commonwealth Court of Pennsylvania's decision in *Bureau of Traffic Safety v. Huff,* 10 Pa. Commw. 261, 310 A.2d 435 (1973). In that case, Huff received a traffic citation for operating a tractortrailer at the rate of 71 miles per hour in a 55–miles–per–hour zone, in violation of state law. As a result of the citation, Huff received official notice from the Bureau of Traffic Safety advising him that his driving privileges would be suspended for a 15–day period. He received a formal notice of " 'Withdrawal of Motor Vehicle Privileges' " from Pennsylvania's "Secretary of Transportation, advising that under Section 619.1(b) of The Vehicle Code, '(a) mandatory 15 day suspension is imposed based on your conviction of speeding 71 MPH in (a) 55 MPH zone.' " 10 Pa. Commw. at 262–63.

On appeal, Huff claimed that the effect of the applicable sections of The Vehicle Code was to treat drivers differently, *i.e .,* passenger car drivers who are cited for speeding were not subject to the point system while drivers of commercial vehicles are treated under a section subject to the point system. Huff argued that such disparate treatment constituted an equal protection violation. However, the Commonwealth Court disagreed, finding that the section of The Vehicle Code under which an operator was to be charged was not left to the whim of the arresting officer. Therefore, Huff—the operator of a commercial motor vehicle—was properly charged and could not have been charged under the section limited to noncommercial vehicles. 10 Pa. Commw. at 263–64.

***16** The Commonwealth Court recognized that a statutory " 'classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike.' " 10 Pa. Commw. At 264 (quoting *Eisenstadt v. Baird,* 405 U.S. 438, 447, 92 S.Ct. 1029, 31 L.Ed.2d 349 [1972]). The court found that the Pennsylvania Legislature had determined that operators of commercial vehicles and the operators of passenger cars should be treated differently. The *Huff* court concluded:

> "After considering the safety objectives of motor vehicle legislation and the greater risk of harm to persons and property presented by speeding trucks, we conclude that the Legislature, in establishing the classification outlined

above, did not act arbitrarily and that the classification is reasonable and not a denial of the constitutional rights of operators of commercial vehicles. [Citation omitted.]" 10 Pa. Commw. at 264.

The KDOR contends that the same logic adopted by the Pennsylvania court should apply here. It asserts that it is reasonable for the Kansas Legislature to believe that a CDL holder's decision to consume alcohol in excess and then drive a noncommercial motor vehicle may have a bearing on that person's judgment and eligibility to drive larger commercial motor vehicle perhaps thousands of miles per year on public roads. Furthermore, it was made clear at oral argument that the statute Bullard complains of is necessary for the State of Kansas to be in compliance with federal highway regulations. Another valid State's interest.

The legislature's choice to distinguish between holders of CDLs and regular class C driver's licenses in assigning penalties for DUI infractions bears a reasonable relationship to the valid legislative purposes of implementing a federal program and preventing commercial motor vehicle accidents. See K.S.A. 8–2,126(a); *Village Villa,* 296 Kan. at 324. In other words, it cannot be said that suspending CDL holders' driving privileges for a lull year is wholly irrelevant to achieving the State's legitimate objectives. See *Hodges,* 288 Kan. at 72–73. Consequently, Bullard's equal protection claim fails.

Affirmed.

All Citations

349 P.3d 491 (Table), 2015 WL 3514030