353 P.3d 472 (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Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation.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.

CITY OF WICHITA, Appellee,
v.
Jarad A. JONES, Appellant.

No. 111502.
|
July 31, 2015.

Appeal from Sedgwick District Court; Phillip B. Journey, judge.

Attorneys and Law Firms

Roger L. Falk, of Law Office of Roger L. Falk, P.A., of Wichita, for appellant.

Jan Jarman, assistant city attorney, Sharon L. Dickgrafe, interim city attorney, and Derek Schmidt, attorney general, for appellee.

Before SCHROEDER, P.J., GREEN, J., and JOHNSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Jarad A. Jones appeals the district court's decision denying his motion to suppress his breath alcohol test (BAT) result of. 111. The district court subsequently convicted Jones of DUI on stipulated facts. On appeal, Jones claims the investigating officers misled him with incorrect information about the impact of a BAT failure or refusal on his commercial driver's license (CDL), vitiating his subsequent consent to take the test and requiring suppression of the result. We disagree and affirm. Jones also argues that his BAT result should have been suppressed because he was not given opportunities to obtain independent testing and consult counsel. Because Jones has designated an inadequate record for our review of those claims, we again affirm.

FACTUAL AND PROCEDURAL BACKGROUND

According to the parties' stipulations, on December 16, 2009, at approximately 11:54 p.m., a witness observed a white van leave its lane, strike a bridge guard rail, then continue on down the road. The witness phoned 911 to report the incident and followed the van until it pulled into a gas station. Wichita police officer J.C. Wannow happened to be at that location. The witness told Officer Wannow what had happened. Officer Wannow then made contact with the driver of the van, Jarad A. Jones.

Officer Wannow detected an odor of alcohol coming from Jones, Jones' speech was slurred, and Jones fumbled when attempting to locate his license and insurance. Officer Wannow had Jones exit his vehicle and undergo standardized field sobriety tests, which Jones failed. Officer Wannow took Jones into custody on suspicion of DUI. The City's mobile BAT van arrived, in which the City maintained an Intoxilyzer 8000 staffed by a testing officer. The BAT van contained internal video and audio recording equipment. All of the officers' interactions with Jones in the BAT van were recorded. Jones eventually submitted to breath testing. Jones' breath alcohol content (BAC) was .111, an amount greater than the legal limit of .08.

The City of Wichita charged Jones with a DUI that was the equivalent of an A misdemeanor because Jones had a prior conviction. Jones was convicted of that DUI in municipal court and appealed to the Sedgwick County District Court.

In his de novo appeal Jones moved to suppress the breath test result. Jones challenged the admissibility of that result on narrow grounds: he argued that the investigating officers gave him incorrect information about his CDL which influenced his decision to take the breath test, vitiating his consent to the testing. The district court conducted an evidentiary hearing on the motion.

Jones testified that, when he asked about his CDL prior to testing, Officer Wannow told him he did not possess a CDL. The City acknowledged that Jones did possess a CDL and

Officer Wannow was mistaken. As a second-time offender, Jones was exposed to a lifetime revocation of his CDL if he failed or refused the breath test even though he had been operating a noncommercial vehicle. Jones testified that he relied on the CDL misinformation he was given when he decided to take the BAT. However, when the prosecutor pressed Jones on whether he would have taken the test had he known the CDL ramifications of a test failure or refusal, Jones admitted that he did not know what he would have done. He just said he would have liked to have had the information.

***2** The BAT van recording was admitted into evidence and is part of the record on appeal. The recording commenced, according to the date and time stamp, at 12:40 a.m. on December 17, 2009, and ended at 1:28 a.m. The recording verifies that, at 12:41 a.m., Officer Wannow provided Jones a copy of the DC–70 form and then read to Jones the implied consent advisories mandated by K.S.A.2009 Supp. 8–1001(k). Jones was initially hesitant about breath testing, so the officers began the deprivation period and advised Jones that he could decide whether to take test once that 20–minute period had passed.

At 12:55:17 a.m., unprompted by anything audible or visible on the recording, Jones brought up the fact that he possessed a CDL.

> "Jones: So J.C. [Officer Wannow], here's the other deal, on my CDL ...
>
> "Officer Wannow: Yeah?
>
> "Jones: I got that 12 years, 13, 14 years ago, maybe ...
>
> "Officer Wannow: OK.
>
> "Jones: ... for a specific job and I don't really need it ...
>
> "Wannow: OK.
>
> "Jones: ... and when I renewed my license they said do you want to keep your CDL and
>
> I said I guess.
>
> "Wannow: OK. I'll tell you right now ...
>
> "Jones: I don't need it.
>
> "Wannow: ... the computer is not showing that you have a CDL ...
>
> "Jones: Really.
>
> "Wannow: ... they're showing that you have a class C driver's license.
>
> "Jones: Which is just regular?
>
> "Wannow: Just a regular plain Jane driver's license." (Emphasis added.)

The discussion regarding the CDL lasted a total of 45 seconds, ending at 12:56:02 a.m. Again, the recording continued until 1:28 a.m. There is no further audible mention of Jones' CDL or any impact on it that could arise from the testing process.

At 1:06 a.m. Jones completed the breath test, which yielded a BAC result of. 111. Officer Wannow informed Jones that he tested over the legal limit. Jones asked if he could take the test one more time. At 1:08 a.m. the testing officer informed Jones that if he wanted another test it needed to be done at a hospital at Jones' expense and asked Jones if he wanted such a test. Jones said nothing in response and said nothing more about additional testing for the duration of the recording. At 1:12 a.m. Officer Wannow administered the Miranda warnings. Jones did not ask for counsel then or for the duration of the recording.

In support of suppression Jones argued that, even though Jones had not been operating a commercial vehicle, the officers should have informed him that his CDL could be permanently revoked if he failed or refused the breath test. Jones' attorney contended that Jones submitted to the BAT in reliance on the erroneous and incomplete CDL information provided by the officers. According to counsel, Jones' consent to testing was not knowing and voluntary, requiring suppression of the BAT result.

The district court denied Jones' motion. It found that the officer properly administered the implied consent advisories mandated by K.S.A.2009 Supp. 8–1001(k). The court determined that, although the officers may have provided Jones inaccurate information about the collateral CDL matter, "They did comply with the basis of the statute for someone who is operating a motor vehicle that is not a commercial

vehicle....” In denying suppression, the district court found that the facts required the application of K.S.A.2009 Supp. 8–1001(s), which provided: “No test results shall be suppressed because of technical irregularities in the consent or notice required pursuant to this act.”

***3** The parties subsequently agreed to submit the case to the district court for trial on a set of written stipulated facts, Jones' motion hearing testimony, and the BAT van recording. Jones properly preserved his challenge to the district court's denial of the above suppression motion. Apparently Jones had also filed a separate motion to suppress the BAT result in which he claimed he was denied the opportunity to consult counsel and obtain additional testing. The stipulated facts for the bench trial refer to this motion but it is not in the record on appeal, and nothing in the record indicates that the court actually considered it. The district court convicted Jones of DUI. Jones timely appealed, contending the district court erred in denying each of his suppression motions.

ANALYSIS

The inaccurate information provided by the officers did not vitiate Jones' consent to breath alcohol testing

On appeal, Jones first argues the district court erred by denying the motion to suppress based on the erroneous CDL information provided him by law enforcement officers. He then pivots from that case-specific claim to a far broader claim, *i.e.,* that any holder of a CDL must be given both the implied consent advisories for noncommercial vehicle operators as well as for commercial vehicle operators before the CDL holder's consent to a BAT can be valid. The City acknowledges that Officer Wannow made a factual error in that Jones did actually possess a CDL, but it argues that the mistake did not prejudice Jones. It points out that Jones' arguments regarding collateral misinformation from officers and his claimed entitlement to CDL consequence advice from investigating officers have been advanced in prior appellate cases and rejected.

We review a district court's decision on a motion to suppress applying a bifurcated standard. We first consider the district court's factual findings to determine whether they are supported by substantial competent evidence. Our review of the ultimate legal conclusion drawn from those facts is unlimited. In reviewing the factual findings, we do not reweigh the evidence or assess the credibility of witnesses. *State v. Reiss,* 299 Kan. 291, 296, 326 P.3d 367 (2014). If the material facts underlying a district court's decision are not in dispute, the question of whether to suppress is a question of law over which our review is unlimited. *State v. Stevenson, 299* Kan. 53, 57, 321 P.3d 754 (2014).

The parties agree Jones had provided the officers a Kansas driver's license which was clearly marked as a CDL. Regarding the factual evidence from the suppression hearing, the stipulated facts for the bench trial included the following:

> “Mr. Jones asked both Officer Wannow and the BAT Van operator what effect his taking or refusing the test might have on his commercial driving privileges. Mr. Jones was advised by Officer Wannow that his Kansas Driver's License was not a commercial driver's license, and that it would, therefore, have no effect on his commercial driving privileges.”

***4** Specifically, Jones argues that the only way his consent to the breath test could have been valid in light of his possession of a CDL would have been for the officers to have apprised him in advance of testing of the effect a refusal or test failure would have on that CDL. Jones contends that he was entitled to the CDL advisories provided in K.S.A. 8–2,145 because, even though he was not driving a commercial vehicle, the DUI investigation pursuant to K.S.A.2009 Supp. 8–1001 implicated his CDL rights.

To advance his argument Jones cites at great length from *Cuthbertson v. Kansas Dept. of Revenue,* 42 Kan.App.2d 1049, 220 P.3d 379 (2009), *rev. denied* 291 Kan. 910 (2010). There our court detailed the legislative history of the advisories mandated for drivers licensed to operate noncommercial vehicles and drivers licensed to operate commercial vehicles. The court noted that the legislature decided in 2003 to impose CDL license sanctions on CDL drivers not only for blood alcohol test failures or refusals arising from their operation of their commercial vehicles but

also from their operation of noncommercial vehicles. See K.S.A.2003 Supp. 8–2,142(a)(2)(B). However, the legislature did not modify the mandatory notices contained in the implied consent advisories, *e.g .,* those in K.S.A.2009 Supp. 8–1001(k), to require that officers advise such CDL license holders of those sanctions before requesting a BAT.

This is what actually aggrieves Jones, according to his brief. He submits that the legislature and/or KDOR should have modified the DC–70 to provide a specific warning to CDL holders about the CDL consequences of breath test failures and refusals when operating noncommercial vehicles. The fact is, though, that the legislature did not mandate such a new implied consent advisory, nor did it authorize KDOR to add such an advisory to the DC–70. K.S.A.2009 Supp. 8–1001(k) set out the only mandatory advisories that had to be given to a CDL driver like Jones, suspected of DUI while operating a noncommercial vehicle, before a breath test request. Jones does not deny that he was given those required advisories.

The City is correct when it points out that Jones' argument, at least in essence, has been advanced and rejected by our appellate courts. For example, in *State v. Becker,* 36 Kan.App.2d 828, 145 P.3d 938 (2006), *rev. denied* 283 Kan. 932 (2007), Becker, a CDL holder, was stopped for DUI while operating a noncommercial vehicle. Becker, like Jones, was given the implied consent advisories but was not given any separate information on the CDL consequences of a test failure or refusal. Becker failed his breath test and was charged with DUI. He then learned that, since this was his first violation, his CDL would be administratively suspended for a year rather than the 30–day suspension of a regular license he had been advised of from the DC–70. Becker moved to suppress the test result in his DUI case, arguing that the State's failure to advise him of the separate CDL consequences of testing over the legal limit denied him substantive due process.

***5** Our court determined that there was no substantive due process violation inherent in the lack of specific notice in the implied consent advisories regarding the CDL consequences of a test failure. The court then held:

> "K.S.A. 8–2,145 provides that an officer must inform a driver that the individual's commercial driver's license will be suspended for 1 year following a failure to submit to testing or a test result indicating an alcohol concentration of .04 or greater for the first offense. K.S.A.2005 Supp. 8–1001(g) only requires an officer to provide this notice regarding a commercial driver's license when the 'officer has reasonable grounds to believe that the person has been driving a commercial motor vehicle.' Otherwise, the officer need only provide the notices applicable to a noncommercial driver's license, which are contained in K.S.A.2005 Supp. 8–1001(f). K.S.A.2005 Supp. 8–1001(g) also provides that '[a]ny failure to give the notices required by K.S.A. 8–2,145 and amendments thereto shall not invalidate any action taken as a result of the requirements of this section.' " *Becker,* 36 Kan.App.2d at 832.

Jones does not specifically invoke substantive due process in his challenge. He bases his argument, though, on the same contentions the *Becker* court rejected and just changes the label of his challenge from lack of due process to lack of informed consent to submit to testing. The effect of the statutes remains the same, regardless of the label attached to the challenge, and the officer here complied with the statute by reading Jones the DC–70 advisories. Jones, under the statutes, was not entitled to the CDL notice he asserts should have been given. *Becker,* 36 Kan.App.2d at 832. It is up to the legislature to change the statute and not up to us to read into it what is simply not there.

Jones acknowledges the *Becker* and related hurdles but argues that the U.S. Supreme Court has issued a "game-changer" opinion that impacts implied consent statutes. Citing *Missouri v. McNeely,* 569 U.S. ——, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), Jones contends that the constitutional underpinnings for implied consent statutes are now infirm. This reading of McNeely is too expansive. In *McNeely* the

Supreme Court considered the admissibility of a warrantless, nonconsensual blood draw, purportedly justified only by the claimed exigency that blood alcohol would dissipate before a search warrant could be obtained. The Court found that the natural dissipation of alcohol from the bloodstream does not constitute, in and of itself, an exigent circumstance that falls within an exception to the Fourth Amendment's search warrant requirement. *McNeely* specifically acknowledges but does not challenge the viability of statutes like K .S.A.2009 Supp. 8–1001 intended to coerce consent (consent is a wellestablished exception to the search warrant requirement) to chemical testing of suspected drunk drivers. 133 S.Ct. at 1566; see *Furthmyer v. Kansas Dept. of Revenue,* 256 Kan. 825, 835, 888 P.2d 832 (1995).

***6** Finally, Jones' brief returns its focus to the mistake Officer Wannow made when he told Jones he did not have a CDL. Jones argues, citing as authority *Dodge City v. Webb,* 50 Kan.App.2d 393, 329 P.3d 515 (2014), the following: "If a threat can invalidate consent, then surely providing inaccurate information to an accused *in order to gain their consent* should be equally suspect." (Emphasis added.)We agree that a baseless threat could result in impermissible coercion. However, we note that in *Webb* the officer extracted Webb's consent to a breath test by telling Webb that, if he did not consent, the officer would get a search warrant for a blood draw. Webb, fearing needles, took the breath test, but then claimed he was coerced. This court found that the officer had probable cause to obtain the warrant he told Webb he would obtain. The threat was not baseless, Webb's consent was deemed voluntary, and Webb suffered no prejudice.

In *Cuthbertson,* the case heavily quoted from by Jones, prejudice was also a key factor in the court's analysis. Cuthbertson had a CDL but was driving a noncommercial vehicle when he was arrested for DUI. When Cuthbertson asked the officer what effect a test failure would have on his CDL, the officer responded: "It's going to affect your license the same way." 42 Kan.App.2d at 1052. The information was incorrect because it was Cuthbertson's second offense, and his CDL was subject to lifetime revocation if he refused the test or he failed it. This court held that, when an officer gives incorrect information in an area collateral to the mandated implied consent advisory realm, *e.g.,* nonmandated CDL information, the driver must demonstrate prejudice from the misinformation to obtain relief. Cuthbertson did not demonstrate prejudice because the only way he could have avoided a lifetime CDL revocation was by taking the breath test and passing it. The fact that he failed the test, causing the CDL revocation, was not the result of the officer's misinformation but, rather, Cuthbertson's violation of the law. 42 Kan.App.2d at 1056.

Like Cuthbertson, even if Jones had been provided accurate CDL information, the only way for him to avoid exposure to lifetime revocation of his CDL was to take and pass the breath test. Moreover, under the *Webb* analysis Jones has proposed, there is no evidence that Officer Wannow made his erroneous CDL statement in a calculated strategy to extract from Jones consent to a breath test he otherwise would have refused. The officer made a mistake collateral to the mandated advisories. Jones knew he had a CDL. Jones repeated that he did not need a CDL. Although Jones claimed that he relied on the officer's misinformation, he candidly acknowledged that, even if he had accurate CDL information, he did not know that he would have refused the breath test.

Jones has shown no prejudice from the officer's erroneous information. We agree with the district court. By operating a motor vehicle in Kansas, Jones impliedly consented to alcohol testing. K.S.A.2009 Supp. 8–1001(a). At most Officer Wannow's mistake was in the nature of an irregularity in obtaining Jones' statutorily implied consent. The district court did not err when it followed K.S.A.2009 Supp. 8–1001(s) and refused to suppress Jones' test result.

Jones has failed to designate a proper record on his claims that the City denied him independent testing and consultation with counsel

***7** On appeal, Jones argues the district court erred by denying his motion to suppress based on his claims that he was not allowed additional testing upon request and/or given a post-testing opportunity to consult with an attorney. The City claims this issue has not been properly preserved. Additionally, the City argues Jones never asked to speak with an attorney, nor did he request additional testing.

The parties acknowledged the following in their stipulated facts: "A second Motion to Suppress was filed but never heard at the decision of the defense." We are a reviewing court, but we have no enunciated decision to review. We can infer from the fact Jones was convicted that the district court at least tacitly denied suppression. The stipulated facts include

both the City's evidence that Jones did not request counsel or additional testing and Jones' evidence that he did. The stipulated facts thus left it to the district court to choose a version to believe. It appears that the district court found the City's evidence more credible than Jones' evidence because the test result was admitted at trial. However, Jones fails to brief any claim that such a factual finding favoring the City was not supported by substantial competent evidence. See *Reiss,* 299 Kan. at 296.

An appellant has the burden to designate a proper record on appeal that affirmatively shows the prejudicial error asserted. Without such a record, an appellate court presumes the action of the trial court was proper. *State v. Bridges,* 297 Kan. 989, 1001, 306 P.3d 244 (2013). Jones has failed to designate a record that affirmatively shows that the district court erroneously accepted the City's proof and admitted the breath test. We must presume the implicit denial of suppression was proper.

Affirmed.

All Citations

353 P.3d 472 (Table), 2015 WL 4716240