336 P.3d 922 (Table)
Unpublished Disposition
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Court of Appeals of Kansas.

Jimmy L. STUART, Appellant,
v.
KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 110,528.
|
Oct. 24, 2014.

Appeal from Douglas District Court; Michael J. Malone, Judge.

Attorneys and Law Firms

Michael E. Riling, of Riling, Burkhead & Nitcher, Chartered, of Lawrence, for appellant.

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

Before BRUNS, P.J., PIERRON and POWELL, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Jimmy L. Stuart's driver's license was suspended on December 12, 2009, for refusing to submit to or complete a breath test for driving under the influence (DUI). The Kansas Department of Revenue (KDOR) affirmed the suspension of his license. Stuart alleged the arresting officer, Trooper J.A. Kellerman, provided implied consent advisory notices that failed to substantially comply with the statutory requirements. He appealed the administrative ruling, and the district court initially remanded it to the administrative law judge (ALJ) to determine the extent of Stuart's suspension. Subsequently, Stuart again appealed the suspension of his license. At a bench trial based on agreed facts, the trial court affirmed the administrative ruling. Stuart appeals. We affirm.

Stuart is only contesting the procedures followed in relation to his refusal to submit to or complete a breath test, which resulted in his driver's license suspension.

The facts are that off-duty trooper came upon a one-car accident. The trooper approached the vehicle to check on its occupants and called dispatch. The trooper testified Stuart, the driver, stumbled while getting out of the car. The off-duty trooper did not notice a smell of alcohol on Stuart, but the trooper had consumed beer at dinner. Shortly thereafter Trooper Kellerman arrived on the scene, and the off-duty trooper left. Trooper Kellerman smelled a slight odor of alcohol on Stuart and noted Stuart had bloodshot eyes and slightly slurred speech. Stuart admitted to drinking two beers. Stuart claimed his car went off the road when he missed a left turn and ended up in the ditch. Stuart failed several field sobriety tests. Trooper Kellerman concluded that Stuart was an impaired driver and arrested him.

Trooper Kellerman took Stuart into custody and transported him to the Douglas County Jail for additional DUI testing. Kellerman began the 20–minute deprivation period necessary before a breath test could be administered. During this deprivation period, Trooper Kellerman provided Stuart with the correct written implied consent advisory—the DC–70. Trooper Kellerman correctly read the DC–70 to Stuart. The notices presented to Stuart included the following language, which is from paragraph four of the DC–70:

> "If you do not have a prior occurrence in which you refused or failed a test or were convicted or granted diversion on a charge of driving under the influence of alcohol and/or drugs, and you refuse to submit to and complete any test of breath, blood or urine hereafter requested by a law enforcement officer, your driving privileges will be suspended for 1 year. If you have had one such prior occurrence and *refuse* a test, your driving privileges will be suspended

> for 2 years. If you have had two such prior occurrences and *refuse* a test, your driving privileges will be suspended for 3years. If you have had three such prior occurrences and *refuse* a test, your driving privileges will be suspended for 10 years. If you have had four or more such prior occurrences and *refuse* a test, your driving privileges will be permanently revoked."

***2** After Trooper Kellerman provided the DC–70 notices, Stuart asked Kellerman a series of questions regarding the potential punishment he faced for failing or refusing the requested breath test. Trooper Kellerman informed Stuart that the information provided to him showed Stuart had two prior DUI occurrences. Trooper Kellerman referred Stuart to paragraph four of the DC–70 and reread it in its entirety to Stuart. Trooper Kellerman then told him, "From the way I count it, you've got two on here, '91 and 2000, you could lose your license if you don't take the test for three years, okay, possibly. So, that's what I'm looking at." He reminded Stuart that it was Stuart's decision and allowed him time to think about his decision.

Trooper Kellerman again asked Stuart if he would take a breath test. Stuart continued asking questions. Stuart asked Trooper Kellerman if he was required to take the breath test. Trooper Kellerman reminded Stuart that it was Stuart's decision whether to take the breath test. Trooper Kellerman told Stuart that based on the record Trooper Kellerman had in front of him indicating that Stuart had two prior DUIs, Stuart was facing a possible 3–year suspension for refusing the breath test. Trooper Kellerman underlined the portion of the DC–70 that referenced the penalties for a person with two prior occurrences. Trooper Kellerman informed Stuart that he was not Stuart's attorney and could not give him advice. Stuart decided to take the test.

Stuart made several unsuccessful attempts to blow into the machine. Towards the end of the first 20–minute deprivation period, Stuart burped. Trooper Kellerman deemed this a refusal because he had told Stuart not to burp during the deprivation period. Trooper Kellerman began a new 20–minute deprivation period in order to give Stuart another chance to complete the breath test.

Part of Trooper Kellerman's recording of the second deprivation period is inaudible. He eventually turned off the microphone. The district court found that at the end of the second deprivation period, Stuart began to blow into the machine. This sample was invalid, and Stuart pulled away early and belched again. Trooper Kellerman gave Stuart another breath test without following the protocol of a 20–minute deprivation period. This test resulted in a deficient sample. Trooper Kellerman determined Stuart had refused to submit to or complete requested testing. Trooper Kellerman certified that Stuart had refused a breath test and suspended his license. Stuart received a copy of an officer's certification and notice of suspension.

Trooper Kellerman transported Stuart to Lawrence Memorial Hospital for a mental health screening. Trooper Kellerman testified that Stuart made multiple references to wanting to end it all, his life was over, and he should just commit suicide. Therefore, Trooper Kellerman determined that the hospital, not a jail, was the appropriate place for Stuart. As a part of the mental health screen, the hospital drew Stuart's blood. Three hours after Trooper Kellerman initiated contact with him, Stuart's blood alcohol concentration was 0.210.

***3** On December 15, 2009, Stuart requested an administrative hearing regarding Trooper Kellerman's certification and the ultimate suspension of his license. After a hearing on June 22, 2010, the KDOR affirmed Stuart's suspension. On July 15, 2010, Stuart petitioned the district court for review of KDOR's suspension of his license. On May 19, 2011, the court remanded the issue to the ALJ for consideration of the specific suspension length. The order determining Stuart's suspension cannot be located in the record.

On August 16, 2011, Stuart again petitioned the district court for review of his suspension. Stuart argued the notice he received did not substantially comply with K.S.A.2008 Supp. 8–1001. KDOR indicated it would rely on the driving record Trooper Kellerman had relied upon when it determined Stuart's suspension. Trooper Kellerman had information that Stuart had a DUI diversion in 1991 and a DUI conviction in 2000.

On July 12, 2013, the district court affirmed Stuart's suspension. The court found there was substantial compliance with K.S.A. 8–1001. The court also found Stuart was not prejudiced in the administrative proceeding by the ad hoc statements made by Trooper Kellerman.

Based on the events of December 12, 2009, Stuart was criminally convicted of a fourth or subsequent DUI. Administratively, KDOR relied on the record indicating that Stuart had two prior occurrences. However, he ultimately received a 1–year suspension followed by interlock suspension time.

We will first address whether the oral notice provided by Trooper Kellerman substantially complied with the statutory requirements of K.S.A.2008 Supp. 8–1001.

Standard of Review

"When the district court has a trial on an appeal of an administrative suspension, we generally review the district court's decision under a substantial-evidence standard." *Poteet v. Kansas Dept. of Revenue,* 43 Kan.App.2d 412, 414, 233 P.3d 286 (2010). However, in this case, the facts are not disputed. "When an issue involves a legal determination based on upon undisputed facts, our review must consider those facts and be made without deference to the district court's conclusion." 43 Kan.App.2d at 415, 233 P.3d 286.

"The right to drive a motor vehicle on the public streets is not a natural right, but a privilege, subject to reasonable regulation in the public interest." *Standish v. Department of Revenue,* 235 Kan. 900, 904, 683 P.2d 1276 (1984). Kansas law "deems that all drivers have given consent to chemical tests of blood or breath when arrested for driving while under the influence, and that if the person arrested refuses to submit to the test certain consequences follow." 235 Kan. at 904, 683 P.2d 1276. However, certain statutory notices must be given to the person arrested for DUI prior to the administration of tests. *Barnhart v. Kansas Dept. of Revenue,* 243 Kan. 209, Syl. ¶ 1, 755 P.2d 1337 (1988).

K.S.A.2008 Supp. 8–1001 sets forth the oral and written notices that law enforcement were required to provide suspected impaired drivers prior to the administration of breath, blood, or urine tests as of December 12, 2009. The notice provisions contained in K.S.A. 8–1001 are mandatory. 243 Kan. at 212–13, 755 P.2d 1337. The notices ensure that a person is aware of his or her statutory rights prior to submitting to a breath, blood, or urine test. 243 Kan. at 212, 755 P.2d 1337. Prior to administering any tests to a person suspected of driving while impaired, the person

> ***4** "shall be given oral and written notice that: (1) Kansas law requires the person to submit to and complete one or more tests of breath, blood or urine to determine if the person is under the influence of alcohol or drugs, or both; .... (4) if the person refuses to submit to and complete any test of breath, blood or urine hereafter requested by a law enforcement officer, the person's driving privileges will be suspended for one year for the first occurrence, two years for the second occurrence, three years for the third occurrence, 10 years for the fourth occurrence and permanently revoked for a fifth or subsequent occurrence." K.S.A.2008 Supp. 8–1001(k).

Generally, the notice need not be given in the exact words of the statute, and substantial compliance with the notice provisions is usually sufficient. 243 Kan. at 213, 755 P.2d 1337. "To substantially comply with the requirements of the statute, a notice must be sufficient to advise the party to whom it is directed of the essentials of the statute." 243 Kan. at 213, 755 P.2d 1337. "An officer may deviate from the statutory language so long as the gist of the statute is conveyed." *State v. Edgar,* 296 Kan. 513, 528, 294 P.3d 251 (2013).

In this case, Stuart received the notices required by law. It is undisputed that Trooper Kellerman provided a correct written copy and read the notice correctly, word for word. Trooper Kellerman accurately informed Stuart of the statutory risks of refusing to submit to the test, both orally and in writing. The notices presented to Stuart included the following language, which is from paragraph four of the DC–70:

> "If you do not have a prior occurrence in which you refused or failed a test or were convicted or granted diversion on a charge of driving under the influence of alcohol and/or drugs, and you refuse to submit to and complete any test of breath, blood or urine hereafter requested by a law enforcement officer, your driving

> privileges will be suspended for 1 year. If you have had one such prior occurrence and *refuse* a test, your driving privileges will be suspended for 2 years. If you have had two such prior occurrences and *refuse* a test, your driving privileges will be suspended for 3years. If you have had three such prior occurrences and *refuse* a test, your driving privileges will be suspended for 10 years. If you have had four or more such prior occurrences and *refuse* a test, your driving privileges will be permanently revoked."

Trooper Kellerman even read this entire paragraph correctly a second time.

Stuart cites *Meigs v. Kansas Dept. of Revenue,* 251 Kan. 677, 840 P.2d 448 (1992), and *State v. Branscum,* 19 Kan.App.2d 836, 877 P.2d 458 (1994), for support of his argument that Trooper Kellerman failed to substantially comply with the statute.

In *Branscum,* an officer provided Branscum with an outdated consent form stating that .10 blood alcohol concentration was the legal limit, instead of the current .08 blood alcohol concentration. However, the officer verbally informed Branscum that the form was outdated and advised him that he faced a penalty for an alcohol concentration of .08 or greater. The State appealed the suppression of the blood alcohol test. This court reversed and held the officer's verbal correction brought the notice into statutory compliance even though the written consent contained outdated information.

***5** Similarly, in *Meigs,* an officer read from an outdated consent form and incorrectly advised Meigs that if she refused to submit to testing, she faced a minimum suspension of 180 days, even though the then current form provided for a suspension of at least 1 year. The Kansas Supreme Court noted that the actual suspension a person faced was more than twice as long as what the officer informed Meigs. 251 Kan. at 681, 840 P.2d 448. The court noted the notice Meigs received did " 'not convey an accurate impression of the actual risk to the individual of refusing the testing.' " 251 Kan. at 681, 840 P.2d 448 (quoting *Meigs v. Kansas Dept. of Revenue,* 16 Kan.App.2d 547, 541–42, 825 P.2d 1175 [1992]). Meigs received incorrect written and oral notices of the risks of refusing or failing a test.

Branscum and *Meigs* are factually distinguishable. Both Branscum and Meigs received incorrect notices. Here, Trooper Kellerman provided Stuart with the proper written form and read it to him correctly, accurately advising Stuart of his statutory rights prior to submitting to a breath, blood, or urine test.

The instant case is more analogous to *Cuthbertson v. Kansas Dept. of Revenue,* 42 Kan.App.2d 1049, 220 P.3d 379 (2009), *rev. denied* 291 Kan. 910 (2010). Cuthbertson was arrested for DUI while driving a noncommercial vehicle, although he had a commercial driver's license (CDL). He claimed the police misinformed him that a failure of the breath test would have the same consequences, a 1–year suspension, for both his regular driver's license and his commercial driver's license. In fact, his CDL was suspended for life.

The *Cuthbertson* court rejected the argument that implied consent is invalidated by nonmandatory misinformation. 42 Kan.App.2d 1049, 220 P.3d 379. The *Cuthbertson* court held that the misinformation was harmless error, even though legally incorrect, because Cuthbertson could demonstrate no prejudice based on the misinformation. 42 Kan.App.2d at 1056, 220 P.3d 379. In *State v. Whiteman,* No. 107,335, 2013 WL 195770, at *5 (Kan.Ct.App.2013) (unpublished opinion), this court articulated the three key findings made in *Cuthbertson:*

> "One, the driver received all of the implied consent notices required by law.... [Citations omitted.] Two, although the driver was not entitled to notice of the 'collateral damage' to his CDL, once the officer 'dove into the pool of gratuitous information, his responses [were] required to be correct statements of the law.' [Citation omitted.] And three, a driver who received an incorrect nonmandated notice must demonstrate prejudice to show reversible error. [Citation omitted.]"

Here, Trooper Kellerman correctly gave Stuart all of the implied consent notices required by law. Stuart argues the gratuitous information Trooper Kellerman provided was

part of the mandated notice. Stuart essentially asks us to expand the statutory warnings requirement, which we will not do. Trooper Kellerman's statements about Stuart's driving record were nonmandated notices and not an essential part of the K.S.A. 8–1001. Any nonmandated notice Trooper Kellerman gave Stuart was required to be a correct statement of the law. See 42 Kan.App.2d at 1055, 220 P.3d 379. Trooper Kellerman provided correct information regarding the possible consequences Stuart faced if he refused or failed a test. Stuart argues that he actually had one or two more prior occurrences than Trooper Kellerman indicated, but this argument fails to demonstrate that Trooper Kellerman provided any incorrect statements of the law.

***6** Finally, Trooper Kellerman's gratuitous statements were harmless. Although the record does not include the ALJ's hearing report articulating what suspension Stuart actually received, the remainder of the record indicates Stuart received a 1–year suspension with interlock. His conviction of a fourth or subsequent DUI does not demonstrate prejudice in the administrative proceeding. The 1–year suspension is substantially less than the possible suspension he faced for refusing as either a third offender (3 years) or a fourth offender (10 years). Additionally, Stuart is in the best position to know how many potential prior DUI encounters are on his record. Stuart can demonstrate no prejudice as a result of the information provided by Trooper Kellerman in response to Stuart's questions and from which Stuart received legally correct gratuitous information that was in no way mandated by the implied consent advisories.

We also must determine if the district court erred by affirming the suspension of Stuart's driver's license.

Relying on *Meigs,* Stuart next argues that, because Trooper Kellerman provided insufficient notice, Stuart should escape a suspension of his driver's license. See 16 Kan.App.2d at 542–43, 825 P.2d 1175. For the reasons addressed above, Trooper Kellerman's notice substantially complied with the statute and did not prejudice Stuart. Therefore, the KDOR appropriately suspended Stuart's license.

Affirmed.

All Citations

336 P.3d 922 (Table), 2014 WL 5613654