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KENNETH G. FREEMAN, APPELLEE, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

790 N.W.2d 218

Filed October 19, 2010. No. A-09-1159.

1. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Motor Vehicles: Jurisdiction: Proof: Appeal and Error.** Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on the Department of Motor Vehicles is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Police Officers and Sheriffs: Proof.** An arresting officer's sworn report triggers the administrative license revocation process by establishing a prima facie basis for revocation.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Proof.** In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004) in order to confer jurisdiction.
6. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time: Jurisdiction.** The 10-day time period for submitting a sworn report under Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2004) is mandatory, and if the sworn report is submitted after the 10-day period, the Department of Motor Vehicles lacks jurisdiction to revoke a person's driver's license.
7. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
8. **Administrative Law: Drunk Driving: Blood, Breath, and Urine Tests: Time.** For purposes of Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2004), the test results are "received" on the date they are delivered to the law enforcement agency by which the arrest was effectuated and the arresting peace officer has 10 days thereafter to forward the sworn report to the director of the Department of Motor Vehicles.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellant.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

In this administrative license revocation appeal, we must answer the following question: Under Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2004), when does a peace officer receive the results of a chemical test to trigger the 10-day time period for submitting a sworn report to the director of the Nebraska Department of Motor Vehicles (Department)? In this case, the peace officer was on vacation when the chemical test results were delivered to the police department and the peace officer did not submit the sworn report to the director of the Department, Beverly Neth, until after his return, which submission was more than 10 days after the test results were received by the police department. We find that the sworn report was not timely submitted and that the director lacked jurisdiction to revoke the driving privileges of Kenneth G. Freeman. Therefore, we affirm the order of the district court for Buffalo County, which reversed the order of revocation.

BACKGROUND

On July 8, 2009, Officer Dustin Strode of the Ravenna, Nebraska, police department stopped a vehicle driven by Freeman to inquire about the registration status of the vehicle. Strode knew that the vehicle belonged to Freeman and that Freeman had resided in Ravenna for more than 30 days, so Strode stopped the vehicle to speak with Freeman about the failure to license the vehicle. Upon contact with Freeman, Strode smelled a strong odor of alcohol emitting from the vehicle. Freeman admitted to Strode that he had been drinking that night. Strode asked Freeman to complete field sobriety tests, which Freeman failed. Freeman also showed impairment on a preliminary breath test. Based on his investigation, Strode

then placed Freeman under arrest for driving under the influence of alcohol.

Following the arrest, Freeman agreed to submit to a chemical blood test, and the test result indicated that Freeman's blood alcohol content was .12 of 1 gram of alcohol per 100 milliliters of blood.

Strode completed a sworn report detailing the incident and signed the sworn report in the presence of a notary. The sworn report shows that the blood test results were received on July 25, 2009, and that the sworn report was received by the Department on July 30. The sworn report was admitted into evidence at the administrative license revocation hearing on August 26, along with a copy of the blood test results and testimony from both Strode and the technician who tested the alcohol content of Freeman's blood. The sworn report shows that Freeman was arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004) and that the handwritten reasons for the arrest were as follows: "Freeman was stopped for failing to register his vehicle in Nebraska, strong odor of alcohol, admission to consuming alcohol, impaired field sobriety, impaired PBT." (Emphasis omitted.) The report also shows that Freeman was directed to submit to a chemical test and that the result of the test was a blood alcohol content of .12 of 1 gram of alcohol per 100 milliliters of blood.

The evidence at the hearing shows that a blood sample was taken from Freeman on July 8, 2009, and was subsequently tested in a hospital laboratory. Upon completion of the testing, the technician faxed the results to the police department in Ravenna. Strode testified that the police department received the test results on July 17. Strode was on vacation on July 17 and did not return from vacation until July 25, at which time he completed the sworn report.

Following the hearing, the hearing officer issued proposed findings of fact and conclusions of law and recommended an order of revocation. The hearing officer considered Freeman's argument that the sworn report was not received by the director in a timely manner as required by § 60-498.01(5)(a). The hearing officer determined that on July 25, 2009, the report was received within the meaning of the statute when Strode

returned from vacation, as opposed to July 17, when the report was faxed to the police department, and was thus timely. The director adopted the hearing officer's recommendations on September 1 and revoked Freeman's driving privileges for 90 days effective September 2.

Freeman appealed to the district court, and on October 30, 2009, the court entered an order reversing the order of revocation. In considering the timeliness of the sworn report, the court stated that § 60-498.01(5)(a) requires an arresting officer to forward a sworn report to the director "within 10 days after receipt of the results of the chemical test by the officer." The court defined the issue before it as whether the arresting officer "received the testing reports . . . on the day he returned from vacation or the day that his office received the results." The court stated:

> Frankly[,] the Nebraska Statutes offer no assistance in defining the statutory phrase and the meaning of "after receipt of the results."[ ]The court having no statutory assistance finds that the plain meaning of words contained in a statute should be applied in determining the meaning of the statute. The word receipt is simply defined as the act or process of receiving. Receiving is defined as coming into possession of an item of property. Possession is defined as the act of taking control of property. The court finds that . . . Stro[de] received the test results when [they] came into his control. That occurred on the date the test results were placed on his desk at the police department. As such the test results were received on July 17th and it was necessary that the sworn report be received by the [Department] not later than July 28th.
>
> In considering the definition of receipt the court is not unmindful that . . . subparagraph (5)(b) of the same statute provides that in order to effectuate an appeal of the administrative order of revocation that the driver must complete the appeal petition form and deliver it to the [D]epartment or have it post marked within 10 days after receipt of the notice of revocation or the person's right to a hearing to contest the revocation is foreclosed. In its rules and regulations the [D]epartment arbitrarily establishes

> that an individual is deemed to have received the notice of revocation, which starts the appeal clock running, within 3 days after the mailing by certified or registered mail of the revocation notice. The [D]epartment allows no discussion concerning whether the arrested person was on vacation or in some way incapacitated and unable to receive his or her mail. The definitions of receipt used in favor of the [Department] having no latitude for the motorist, it would seem incongruous to allow vacation latitude to the [Department].

The director subsequently perfected an appeal to this court.

ASSIGNMENT OF ERROR

The director asserts that the district court erred in determining that the sworn report was untimely under § 60-498.01(5)(a) and thus insufficient to confer jurisdiction on the director to revoke Freeman's license.

STANDARD OF REVIEW

[1,2] Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record. *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on the Department is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

ANALYSIS

[4,5] The director asserts that the district court erred in determining that the sworn report was untimely under § 60-498.01(5)(a) and thus insufficient to confer jurisdiction on the director to revoke Freeman's license. An arresting officer's sworn report triggers the administrative license revocation

process by establishing a prima facie basis for revocation. *Murray v. Neth, supra*. In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the statute in order to confer jurisdiction. *Id.* See § 60-498.01(3).

[6] Section 60-498.01(5)(a) provides:

> If the results of a chemical test indicate the presence of alcohol in a concentration specified in section 60-6,196, the results are not available to the arresting peace officer while the arrested person is in custody, and the notice of revocation has not been served as required by subsection (4) of this section, the peace officer shall forward to the director a sworn report containing the information prescribed by subsection (3) of this section within ten days after receipt of the results of the chemical test. If the sworn report is not received within ten days, the revocation shall not take effect.

This court has held that § 60-498.01(5)(a) requires that a sworn report include the date the officer received the blood test results "because without this information as a requirement of the sworn report, there is no way for the Department to determine, in any given case, whether the officer in fact submitted the sworn report within 10 days after obtaining the blood test results." *Stoetzel v. Neth*, 16 Neb. App. 348, 352, 744 N.W.2d 465, 468 (2008). The 10-day time period for submitting a sworn report under § 60-498.01(5)(a) is mandatory, and if the sworn report is submitted after the 10-day period, the director of the Department lacks jurisdiction to revoke a person's driver's license. *Stoetzel v. Neth, supra*. Accordingly, in this case, if Strode received the test results for purposes of § 60-498.01(5)(a) on July 17, 2009, when they were delivered to the police department, rather than on July 25, when he returned from vacation, the sworn report was untimely, and the director lacked jurisdiction to revoke Freeman's license.

As observed by the district court, the word "receipt" is used elsewhere in § 60-498.01. For example, subsection (6)(a) states in part, "The arrested person shall postmark or return to the director a petition within ten days after the *receipt* of the

notice of revocation if the arrested person desires a hearing." (Emphasis supplied.) Subsections (4) and (5)(b) both state that the petition form provided to the arrested person "shall clearly state on its face that the petition must be completed and delivered" to the Department or "postmarked within ten days after *receipt* or the person's right to a hearing to contest the revocation will be foreclosed." (Emphasis supplied.) The Department has defined "receipt" in connection with the receipt of the petition by the arrested person. The relevant administrative code provision provides:

> The date of *receipt* of the petition form shall be the date the arresting officer provides notice of revocation and the petition form to the [arrested person]. If the Director rather than the arresting officer provides the notice of revocation and petition form to the [arrested person], the *receipt* of the petition form shall be deemed to be *received* three (3) days after mailing of the petition by certified mail by the Director to the [arrested person]. If the petition form and notice is returned unclaimed, the Director may proceed as though no petition were filed.

247 Neb. Admin. Code, ch. 1, § 013.04 (2006) (emphasis supplied). In contrast, the Department has not defined "receipt" in connection with the time for the sworn report to be submitted by the peace officer to the Department.

The director draws our attention to the fact that under § 60-498.01, the sworn report must be submitted by the "arresting peace officer." See, *Arndt v. Department of Motor Vehicles*, 270 Neb. 172, 699 N.W.2d 39 (2005); *Connelly v. Department of Motor Vehicles*, 9 Neb. App. 708, 618 N.W.2d 715 (2000). The director argues that because the sworn report must be submitted by the arresting peace officer, actual, physical receipt by this officer is necessary to trigger the 10-day period for submission of the report to the Department. The director observes that an arresting officer has no control over when the motorist's blood sample is tested or when the results are delivered to him or her and asserts that the arresting officer cannot be reasonably expected to schedule vacations or other absences around the unknown arrival date of a blood test result from a laboratory. The director argues that the district

court's interpretation of § 60-498.01(5)(a) is unreasonable and undermines the effectiveness of the administrative license revocation statutes by allowing some motorists to escape an otherwise valid revocation based upon purely fortuitous circumstances, such as the vacation, offsite training, or illness of the arresting officer.

We are not persuaded by the director's arguments. The Department has chosen to define "receipt" with certainty without consideration of exigent circumstances that may face the driver in connection with the driver's deadline to file a petition. We can find no justification for recognizing exigent circumstances, such as a peace officer's absence for vacation, to extend the deadline for delivering the sworn report to the Department.

[7] Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Schuyler Apt. Partners v. Colfax Cty. Bd. of Equal.*, 279 Neb. 989, 783 N.W.2d 587 (2010). The language of § 60-498.01(5)(a) requires the peace officer to forward to the director a sworn report "within ten days after receipt of the results of the chemical test." The statute does not say that the receipt must be an actual, physical receipt by the peace officer, and we decline to read that meaning into the statute. Nor has the Department defined "receipt" as it suggests in the administrative code. The Nebraska Supreme Court has stated more than once that because of the significant procedural benefit the Legislature has conferred on the Department under § 60-498.01, strict compliance with the applicable rules and regulations is required. See, *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005), quoting *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002). Further, to determine that "receipt" under this statute means an actual, physical receipt by the arresting officer creates uncertainty and the potential for abuse.

[8] We hold that for purposes of § 60-498.01(5)(a), the test results are "received" on the date they are delivered to the law enforcement agency by which the arrest was effectuated and

the arresting peace officer has 10 days thereafter to forward the sworn report to the director.

Although the sworn report recites that the blood test results were received on July 25, 2009, evidence was adduced at the hearing to rebut this averment and to indicate that the test results were received by the police department on July 17 and by Strode himself on July 25. Based upon the application of § 60-498.01(5)(a), the submission of the sworn report to the Department on July 30 was untimely. For this reason, we affirm the decision of the district court which reversed the revocation of Freeman's license by the director.

CONCLUSION

The sworn report was not timely submitted to the Department as required by § 60-498.01(5)(a), and therefore, the director of the Department did not have jurisdiction to administratively revoke Freeman's license. We affirm the decision of the district court, which reversed the order of revocation.

AFFIRMED.

RICHARD C. SCOTT, PERSONAL REPRESENTATIVE OF THE BRANDI J. BLOCK ESTATE, APPELLANT, V. SHAHBAZ KHAN, M.D., APPELLEE.

790 N.W.2d 9

Filed October 19, 2010. No. A-10-099.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
3. **Malpractice: Physician and Patient: Proof: Proximate Cause.** To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.