

MODIFIED OPINION¹

NOT DESIGNATED FOR PUBLICATION

No. 123,812

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KYLE HEINEKEN,
Appellant,

v.

KANSAS DEPARTMENT OF REVENUE,
Appellee.

MEMORANDUM OPINION

Appeal from Riley District Court; KENDRA LEWISON, judge. Original opinion filed January 28, 2022. Modified opinion filed February 18, 2022. Affirmed.

Jeremiah L. Platt, of Clark & Platt, Chtd., of Manhattan, for appellant.

Jay P. Van Blaricum and *Charles P. Bradley*, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before SCHROEDER, P.J., BRUNS and WARNER, JJ.

¹**REPORTER'S NOTE:** Opinion No. 123,812 was modified by the Court of Appeals on February 18, 2022, to remove the issue of collateral estoppel from the opinion, in response to a joint motion for modification filed by the parties under Supreme Court Rule 7.05.

PER CURIAM: Following the filing of our original opinion in this appeal on January 28, 2022, the parties jointly moved for modification. We hereby grant their request and enter this modified opinion. On appeal, Kyle Heineken contends that the district court erred in upholding the administrative suspension of his driving privileges following his arrest for suspicion of driving under the influence of alcohol. Based on our review of the record on appeal, we do not find that the district court erred in ruling that Heineken's purported request to obtain additional testing was neither unambiguous nor unequivocal. Thus, we affirm the administrative suspension of Heineken's driving privileges.

FACTS

On the evening of September 29, 2018, Clay County Sheriff's Deputy Keith Myers stopped Heineken's vehicle for speeding. Following a series of field sobriety tests, Deputy Myers arrested Heineken for suspicion of driving under the influence of alcohol. At the Clay County Law Enforcement Center, Deputy Myers presented Heineken with a DC-70 implied consent advisory form and read it aloud to him. In so doing, Deputy Myers informed Heineken that he had the right to seek additional testing after he completed the requested breath testing.

Heineken consented to a breath alcohol test, which revealed that his blood alcohol level exceeded the legal limit for driving. However, noticing chewing tobacco flakes on the mouthpiece of the testing machine following the first test, Deputy Myers asked Heineken if he wanted to take a second breath test. Again, Heineken consented. During the second 20-minute deprivation period before the second breath alcohol test, Deputy Myers explained to Heineken that he thought the first test might be invalid because of the chewing tobacco in his mouth.

While they continued to wait, Heineken asked the officer about the possibility of obtaining an additional blood test. In particular, the custodial video recorded the following conversation between Deputy Myers and Heineken:

"Deputy Myers: [If your attorney] says yeah, go ahead [with additional testing], you're going to have to secure testing on your own. That means you'll have to go somewhere and take the test.

"Heineken: That'll be fine.

"Deputy Myers: I mean, there's no place around here that you can take an actual breath test. The only option

"Heineken: What about blood?

"Deputy Myers: The only option would be to go the hospital and have blood drawn. That's something you would have to do on your own.

"Heineken: Under your surveillance?

"Deputy Myers: No . . . at this point, any additional testing that you do is on you, pretty much. So, that means, if you want to go have blood drawn and use that as your defense later down the road, that's . . . totally up to you because my basis for the arrest tonight was based on what I observed out in the field."

Then Deputy Myers handed Heineken his phone. Although it appears from the video that Heineken texted someone, there is no suggestion that he called a physician, hospital, or attorney. Afterward, Heineken took the second breath test without requesting additional testing.

The second test also revealed a blood alcohol level over the legal limit for driving. Before turning Heineken over to the jailer for processing, Deputy Myers asked him whether he had any questions. Heineken responded, "No," and did not request additional

testing. About two and a half hours after the initial stop, Heineken bonded out of jail. There is no indication in the record that Heineken went to a hospital or physician's office to obtain additional testing on his own after being released.

On October 18, 2018, the State charged Heineken with driving under the influence of alcohol and speeding in a separate driving under the influence criminal case. Prior to the trial in his criminal case, Heineken moved to suppress the breath alcohol tests, arguing that the Deputy Myers had denied him a reasonable opportunity to obtain additional testing. Although a district magistrate judge first denied Heineken's motion to suppress, he later reconsidered and entered an order suppressing the breath alcohol test results. Thereafter, the State filed an interlocutory appeal under K.S.A. 22-3603, and a panel of our court held "that Deputy Myers did not deny Heineken 'a reasonable opportunity to have an additional test by a physician of [his] own choosing' as provided by K.S.A. 8-1004." *State v. Heineken*, No. 121,896, 2020 WL 1646805, at *3 (Kan. App.) (unpublished opinion). Accordingly, the panel reversed the district court's suppression of Heineken's breath alcohol testing and remanded the criminal case to the district court for further proceedings. On August 26, 2020, the Kansas Supreme Court denied a petition for review filed by Heineken and a mandate was issued. 312 Kan. 896 (2020).

Meanwhile, while the criminal action was pending, the Kansas Department of Revenue (KDR) administratively suspended Heineken's driving privileges and Heineken filed a petition for judicial review in Riley County District Court. On January 5, 2021, the district court held a de novo hearing on Heineken's petition for review. At the evidentiary hearing, Heineken testified on his own behalf. In addition, the KDR introduced the video that was taken during Heineken's testing at the Clay County Law Enforcement Center on the night of his arrest. The video is the same—with minor edits that are not material to this appeal—to the one previously admitted into evidence at the suppression hearing in

Heineken's criminal case and considered by this court in the interlocutory appeal brought by the State in that case.

During closing arguments in the present action, the KDR pointed out the previous opinion entered by this court in the criminal case regarding the issue of Heineken's purported request for additional testing. In particular, the KDR argued:

"I think the Court of Appeals says it pretty clearly and pretty succinctly in overruling the motion to suppress in *State v. Heineken*. They say 'Similarly, we find Heineken's questions and statements to Deputy Myers to be at most ambiguous and far from an unequivocal request for additional testing. Even if Heineken's questions and statements could be construed as a request for additional testing, we find nothing in the record to suggest that Deputy Myers unreasonably interfered with any attempt by Heineken to secure additional testing. Instead, a review of the record shows that Deputy Myers honestly tried to answer Heineken's questions to the best of his ability and gave him several opportunities to ask questions.'"

On January 6, 2021, the district court entered a journal entry in which it denied Heineken's petition for review. In reaching this decision, the district court concluded that "[Heineken's] request for an independent blood test was not unambiguous nor unequivocal." Thereafter, Heineken filed a timely notice of appeal.

ANALYSIS

The sole issue presented in this action is whether the district court erred in concluding that Heineken's purported request for an independent blood test under K.S.A. 8-1004 was not unambiguous or unequivocal. K.S.A. 8-1004 provides a person suspected of driving under the influence of alcohol "a reasonable opportunity to have an additional test by a physician of the person's own choosing." Heineken continues to contend that he was not given a reasonable opportunity to seek additional testing. In response, the KDR

contends that there was no violation of K.S.A. 8-1004 because Deputy Myers did not refuse to permit Heineken from seeking additional testing.

Appeals from the administrative suspension of driver's licenses are subject to review under the under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. See *Moser v. Kansas Dept. of Revenue*, 289 Kan. 513, 516, 213 P.3d 1061 (2009). Under the KJRA, we review a district court's factual findings for substantial competent evidence while our review of its legal conclusions is unlimited. *Creecy v. Kansas Dept. of Revenue*, 310 Kan. 454, 466, 447 P.3d 959 (2019). On appeal, the burden of proving the invalidity of the agency action rests on the party—in this case Heineken—asserting such invalidity. K.S.A. 77-621(a)(1).

As the KDR correctly points out, the issue presented in this appeal was previously addressed by our court in the interlocutory appeal brought by the State in Heineken's criminal appeal. In this administrative appeal, we must review the record to determine whether the district court's findings are supported by evidence that is substantial when viewed in light of the record as a whole. See K.S.A. 77-621(c)(7), (d); *Swank v. Kansas Dept. of Revenue*, 294 Kan. 871, 881, 281 P.3d 135 (2012). In doing so, we are not to reweigh the evidence, assess the credibility of witnesses, or resolve evidentiary conflicts. *State v. Boggess*, 308 Kan. 821, 825, 425 P.3d 324 (2018).

Under K.S.A. 8-1004, if a law enforcement officer "refuses to permit . . . additional testing," the results of any properly administered tests given by the officer are not to be considered "competent evidence." The purpose of the statute is to allow a person suspected of driving under the influence the ability to procure probative evidence and to prepare a defense. Even so, what is considered to be a "reasonable opportunity to have an additional test" performed depends on the circumstances of each case. *State v. George*, 12 Kan. App. 2d 649, Syl. ¶¶ 1, 2, 4, 754 P.2d 460 (1988).

In the present case, the record reveals that although Heineken asked about the possibility of additional testing, he did not request to call a physician or hospital to arrange for such testing. Likewise, the record shows that Heineken did not request to be taken to a physician's office or hospital. The record also establishes that Deputy Myers accurately told Heineken that any additional testing would be "on your own" and not part of the testing being performed at the law enforcement center. Consequently, we find no violation of K.S.A. 8-1004 under the circumstances presented in this case.

Certainly, a law enforcement officer may not unreasonably interfere with the attempts of a person suspected of driving under the influence to secure additional testing. *George*, 12 Kan. App. 2d at 655; see also *City of Dodge City v. Ibarra*, 35 Kan. App. 2d 643, 648, 133 P.3d 159 (2006). Even so, a suspect's invocation of his or her statutory right to additional testing under K.S.A. 8-1004 must be unambiguous and unequivocal. See *Mitchell v. Kansas Department of Revenue*, 32 Kan. App. 2d 298, 299-302, 81 P.3d 1258 (2004). Here, we do not find evidence in the record to establish that Heineken made an unambiguous and unequivocal request for additional testing.

Like the district court, we find that Heineken's questions and statements to Deputy Myers about the possibility of additional testing were at most ambiguous and were not unequivocal. Even if Heineken's questions and statements could be construed as a request for additional testing, there is nothing in the record to suggest that Deputy Myers unreasonably interfered with Heineken's rights if he desired to secure additional testing. Rather, a review of the record shows that Deputy Myers attempted to answer Heineken's questions to the best of his ability and gave him several opportunities to ask additional questions.

In summary, we conclude that there is substantial competent evidence in the record to support the district court's decision to deny Heineken's petition for review and

uphold the administrative suspension of his driver's license. For these reasons, we affirm the district court's decision.

Affirmed.