

NOT DESIGNATED FOR PUBLICATION

No. 125,096

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MICHAEL ROLLAND KELLOGG,  
*Appellee,*

v.

KANSAS DEPARTMENT OF REVENUE,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Crawford District Court; KURTIS I. LOY. Opinion filed March 17, 2023. Reversed and remanded with directions.

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

No appearance by appellee.

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

PER CURIAM: Michael Kellogg's driver's license was suspended for one year after he refused to take a breath test when he was arrested for driving under the influence of alcohol. Kellogg challenged the suspension in an administrative hearing but was unsuccessful. He then petitioned the district court for judicial review of the suspension, claiming the notice he received explaining the consequences of a test refusal was ambiguous and misleading. The district court agreed and reversed the suspension of Kellogg's license.

The Kansas Department of Revenue now appeals the district court's decision, claiming the notice was accurate and legally enforceable. We agree. Although the language of the notice could have been clearer, that is not the touchstone of our analysis. The notice accurately stated the consequences for refusing a breath test, and the district court erred when it found otherwise. We therefore reverse the district court's ruling and remand the case with directions to reinstate Kellogg's driver's-license suspension.

#### FACTUAL AND PROCEDURAL BACKGROUND

In the early morning of August 19, 2018, a Crawford County Sheriff's deputy stopped Kellogg for crossing left of the center line and failing to maintain his lane. The deputy observed signs of impairment and began conducting field-sobriety tests. While this scene unfolded, Kellogg suggested to the deputy that he was intoxicated. The deputy then arrested Kellogg for driving under the influence.

When they arrived at the jail, the deputy presented Kellogg with written and oral implied-consent notices that discussed the ramifications of failing or refusing a breath test. The written notice was on a form called a DC-70. Kellogg received the 2018 version of the form, which stated: "If you refuse to submit to and complete the test or tests, or if you fail a test, your driving privileges will be suspended for a period of at least 30 days and up to one year." After receiving this notice, Kellogg refused a breath test. His refusal triggered a one-year suspension of his driver's license by the Department. See K.S.A. 2018 Supp. 8-1014(a).

Kellogg requested an administrative hearing on his suspension. The hearing officer affirmed the suspension, finding the deputy presented Kellogg with proper oral and written notices under Kansas law. Kellogg then petitioned for judicial review in district court. The district court considered whether the deputy had reasonable suspicion to stop Kellogg and whether the implied-consent notices properly stated the law.

After a bench trial, the district court ruled that the stop was lawful, but it found that the written and oral notices did not substantially comply with Kansas law. The court found that while the deputy gave Kellogg the implied-consent notices from the 2018 DC-70, that form incorrectly stated the law. The district court thus dismissed the administrative order suspending Kellogg's driver's license. The Department appeals.

#### DISCUSSION

The Department challenges the district court's finding that the notice the deputy provided Kellogg from the 2018 DC-70 misstated the law, arguing that the notice sufficiently informed Kellogg that a breath-test refusal would lead to a one-year driver's-license suspension. Kellogg did not file a brief. Appellate courts exercise unlimited review over whether implied-consent notices comply with statutory requirements. *Shrader v. Kansas Dept. of Revenue*, 296 Kan. 3, 6, 290 P.3d 549 (2012).

When a law enforcement officer requests that a driver submit to a breath test, the driver must first receive notice that a refusal or failure will lead to his or her license being suspended "for a period of at least 30 days and up to one year." K.S.A. 2018 Supp. 8-1001(c)(2). K.S.A. 2018 Supp. 8-1014(a) elaborates that refusing a test will lead to a one-year suspension, while failing a test can carry a 30-day or 1-year suspension, depending on whether the person has failed a breath test before.

An implied-consent notice need not mirror statutory language. *Creecy v. Kansas Dept. of Revenue*, 310 Kan. 454, 472, 447 P.3d 959 (2019). Rather, it must substantially comply with the statute or communicate the "essentials of the statute." 310 Kan. at 472. "It shall not be a defense that the person did not understand the written or oral notice authorized by this section." K.S.A. 2018 Supp. 8-1001(q).

This court has recently considered the same issue that Kellogg raises, twice finding that the implied-consent warnings in the 2018 DC-70 form accurately stated the relevant law. See *Mitchell v. Kansas Dept. of Revenue*, No. 123,534, 2022 WL 497187, at \*2-3 (Kan. App.) (unpublished opinion), *rev. denied* 316 Kan. 758 (2022); *Anderson v. Kansas Dept. of Revenue*, No. 122,564, 2021 WL 300080, at \*4-5 (Kan. App.) (unpublished opinion), *rev. denied* 314 Kan. 854 (2021). We agree with the reasoning in these decisions and reach the same conclusion here.

The disputed language in the 2018 DC-70 states: "If you refuse to submit to and complete the test or tests, or if you fail a test, your driving privileges will be suspended for a period of at least 30 days and up to one year." This mirrors the language in K.S.A. 2018 Supp. 8-1001(c)(2) and accurately warns the driver that the range of penalties for refusing or failing a breath test is a 30-day to 1-year license suspension.

While K.S.A. 2018 Supp. 8-1014 states that a test *refusal* will trigger a 1-year suspension—and only a first-time test *failure* will lead to a 30-day suspension—this difference does not mean the 2018 DC-70 misleads the notice's recipient about the consequences of either outcome or otherwise misstates the law. As we observed in *Anderson*, the notice "provided a range of possible consequences that covered test failures and test refusals." 2022 WL 300080, at \*4. It would be unreasonable to read the 2018 DC-70 to confine any suspension length to a test refusal or a test failure. And the range provided was accurate. The 2018 DC-70 stated that failing or refusing a breath test would result in a driver's-license suspension "up to one year." Consistent with K.S.A. 2018 Supp. 8-1014, Kellogg's license was suspended for one year.

In finding that Kellogg's notice misstated the law, the district court noted that the language in the DC-70 changed in 2019—along with similar changes to K.S.A. 8-1001(c)—to more clearly specify that a test refusal would lead to a one-year suspension. But this later clarification did not apply to Kellogg. And more importantly

here, the later clarification does not mean that the 2018 notice misstated the law. The 2018 notice merely stated the consequences of a refusal in broader language than what is now included in the amended notice. See *Mitchell*, 2022 WL 497187, at \*2; *Anderson*, 2022 WL 300080, at \*5.

The district court also relied on *Meigs v. Kansas Dept. of Revenue*, 251 Kan. 677, 840 P.2d 448 (1992), where the Kansas Supreme Court found a DC-70 misstated the law regarding the consequence of a test refusal. In that case, the notice said a test refusal would lead to a suspension of "at least 180 days," but the corresponding statute stated that refusal triggered a suspension of "at least one year." 251 Kan. at 681. The court found that the DC-70 at issue there did not "convey an accurate impression of the actual risk" of refusal—someone might find a 180-day suspension acceptable but be unwilling to risk a 1-year suspension. 251 Kan. at 681.

But Kellogg's situation is different. *Meigs* dealt with different notices that only related to a test refusal, with a clear difference between the notice in the DC-70 and the notice in the corresponding statute. The notice Kellogg received from the DC-70 included "the combined notices for refusal and failure" of tests. See *Mitchell*, 2022 WL 497187, at \*3. And unlike in *Meigs*, the notice Kellogg received mirrored the relevant statutes.

The district court erred by finding that the notice Kellogg received did not substantially comply with Kansas law. Law enforcement sufficiently informed Kellogg of the potential consequences for refusing or failing a breath test. We thus reverse the district court's decision and remand the case with directions to reinstate Kellogg's driver's-license suspension.

Reversed and remanded with directions.