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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ROBERT BRENDZA,

Plaintiff and Appellant,

v.

DEPARTMENT OF MOTOR VEHICLES,

Defendant and Respondent.

A135022

(San Mateo County
Super. Ct. No. CIV507001)

The Department of Motor Vehicles (DMV) suspended appellant Robert Brendza's driver's license following a hearing at which it was determined he was operating a motor vehicle with a blood alcohol level of .08 percent. On appeal from a trial court order denying his challenge to the DMV's suspension order, Brendza argues the trial court erred in admitting the arresting officer's sworn statement. He also contends the DMV failed to make a prima facie showing he was driving with a blood alcohol level of at least .08 percent because there is a theoretical possibility the breath test device used to measure blood alcohol level, even though in compliance with regulations governing instrument accuracy, overstated his blood alcohol level by up to .01 percent. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At around 1:30 a.m. on December 31, 2009, officer S. Valencia of the San Mateo police department pulled over a vehicle for a violation of Vehicle Code section 24601,¹ which requires a vehicle's rear license plate to be illuminated at night. Upon making contact with the vehicle's driver, Brendza, the officer detected an odor of alcohol and

¹ All further statutory references are to the Vehicle Code unless otherwise indicated.

noticed that Brendza had bloodshot, watery eyes. Brendza admitted drinking “a couple” beers before driving. Officer Valencia proceeded to administer field sobriety tests, at which Brendza performed poorly. Brendza exercised his right to refuse to submit to a preliminary alcohol screening test. Officer Valencia arrested Brendza at 1:53 a.m. for driving under the influence.

After he was arrested, Brendza submitted to a breath test to measure his blood alcohol level. The testing, which was performed in compliance with title 17 of the California Code of Regulations, resulted in a reading of .08 percent at 2:23 a.m. and another reading of .08 percent at 2:26 a.m. Officer Valencia personally served an order on Brendza indicating that his driver’s license would be suspended in 30 days unless he challenged the basis for the suspension.

Brendza requested an administrative hearing before the DMV to challenge the license suspension. At the hearing conducted May 4, 2010, the DMV introduced into evidence officer Valencia’s sworn statement, the non-sworn arrest report, the suspension order and temporary license, Brendza’s driving record, and the discovery list. Brendza’s counsel objected to the sworn statement, arrest report, and suspension order on the grounds they constituted inadmissible hearsay and lacked foundation. In addition, Brendza’s counsel noted that the actual test results had not been produced. Brendza’s counsel requested “some additional time to - - to actually track down the test result itself, and then see if there’s any issue with the calibration of the machine.” In response to the hearing officer’s inquiry, Brendza’s counsel stated that the process of obtaining this information was underway.

The hearing officer agreed to leave the case open for 20 days to permit Brendza’s counsel to obtain the information he sought relating to the test results and the calibration of the breath testing device. However, the hearing officer also stated that, “if I don’t hear from you within the next 20 days from today, then I will close the case and make my decision on what I have.” There is nothing in the administrative record to indicate that Brendza’s counsel had any further contact with the hearing officer. Accordingly, on June

8, 2010, the hearing officer proceeded to overrule Brendza's objections to the evidence and re-imposed the suspension of his driving privilege.

Brendza filed a petition for a writ of mandate in the trial court seeking to set aside the DMV's order suspending his driving privileges.² The trial court heard argument on the petition on December 15, 2011. At the outset of the hearing, Brendza's counsel argued in effect that the court should disregard the officer's sworn statement because it was contradicted by the arrest report. Specifically, counsel pointed out that the officer indicated in his sworn statement that he conducted three tests, each of which resulted in a .08 percent blood alcohol level, whereas the unsworn arrest report indicated the officer had only conducted a total of two tests, each of which resulted in a .08 percent blood alcohol level. The trial court responded that the test results were "all the same." Counsel also argued that the officer's statement had failed to attach a copy of the test results, although counsel acknowledged he was ultimately able to receive a copy of the test results through discovery in the related criminal action. Notably, Brendza's counsel did not suggest the actual test results differed from what officer Valencia had recorded in his arrest report.

Brendza's counsel further argued the DMV could not satisfy its burden to show that he had a blood alcohol level of at least .08 percent by relying on the presumption that it performed its official duty in administering the blood alcohol tests. Counsel contended that regulations governing testing machine accuracy require that a testing device be accurate within .01 percent of the actual blood alcohol level. Thus, according to Brendza's counsel, even if the DMV complied with the regulations governing testing and testing

² Brendza's counsel did not designate for inclusion in the record on appeal the petition for writ of mandate, the memorandum of points and authorities supporting the petition, the DMV's opposition to the petition, and the DMV's written evidentiary objections, among other things. Aside from the administrative record of the DMV hearing and the transcript of the trial court hearing on the writ petition, the record consists solely of the judgment on appeal, the notice of appeal, the notice designating the record on appeal, and the trial court's docket sheet. Our review is necessarily restricted by the absence of trial court pleadings demonstrating what, if any, issues have been preserved for appeal. Issues not raised in the petition for writ of mandate may be deemed waived on appeal. (See *Noguchi v. Civil Service Com.* (1986) 187 Cal.App.3d 1521, 1540.) Because the DMV does not claim the appellate record is inadequate to address Brendza's contentions, we shall exercise our discretion to consider the issues on their merits.

device accuracy, in light of the allowable margin of error in the accuracy of the testing device, a blood alcohol level test result of .08 percent could be generated by an actual blood alcohol level as low as .07 percent.

Brendza's counsel urged that the court reopen the DMV administrative hearing to permit him to present maintenance records for the breath testing device used to test Brendza's blood alcohol level. Counsel claimed he was able to ascertain the specific device used to test Brendza and that checks of the device's accuracy showed a consistent pattern of the device overstating actual blood alcohol levels.³ The DMV's counsel opposed the request to reopen the hearing on the grounds that section 13559, subdivision (a) limits the trial court's review to the record before the DMV hearing officer. Further, the DMV's counsel argued that even if the court were allowed to consider additional evidence outside the administrative record under Code of Civil Procedure section 1094.5, subdivision (e), Brendza had not met his burden under that statute to show why the evidence could not have been presented in the administrative hearing through the exercise of reasonable diligence.

The trial court granted Brendza's counsel 20 days to file additional briefing on the question of whether the court had authority to reopen the DMV administrative hearing to permit Brendza to offer additional evidence concerning the maintenance records for the testing device. When Brendza's counsel failed to file any further briefing within the prescribed time, the court entered an order denying the petition for a writ of administrative mandate, stating "[t]here is sufficient evidence in the record to support the Department of Motor Vehicle's findings." Brendza timely appealed the trial court's denial order.

DISCUSSION

1. *Legal Framework and Standard of Review*

The administrative per se procedure was enacted to create a prompt and efficient means to remove drunk drivers from the roadway. (See *Lake v. Reed* (1997) 16 Cal.4th 448, 454.) Under this procedure, the DMV is required to immediately suspend the driving

³ Brendza's counsel told the court, "In other words, when [the breath testing device] should have been reading .100, it was reading .101; 102; 103; et cetera, in a consistent pattern"

privilege of any person who drives a motor vehicle with an alcohol concentration by weight in that person's blood of .08 percent or more. (§ 13353.2, subd. (a)(1).) The driver may request an administrative hearing to challenge the suspension. (§ 13558.)

At the administrative hearing before the DMV, the only issues are whether (1) the officer had reasonable cause to believe the person was driving a motor vehicle in violation of laws prohibiting drunk or impaired driving, (2) the person was lawfully arrested, and (3) the person was driving with a blood alcohol concentration of .08 percent or more.

(§ 13557, subd. (b)(2), 13558, subd. (c)(2); see *Lake v. Reed*, *supra*, 16 Cal.4th at p. 456.)

“[T]he DMV bears the burden of proving by a preponderance of the evidence certain facts, including that the driver was operating a vehicle with a blood-alcohol level of .08 percent or higher. [Citations.] The DMV may satisfy its burden via the presumption of Evidence Code section 664. [Citation.] ‘Procedurally, it is a fairly simple matter for the DMV to introduce the necessary foundational evidence. Evidence Code section 664 creates a rebuttable presumption that blood-alcohol test results recorded on official forms were obtained by following the regulations and guidelines of title 17 [of the California Code of Regulations]. [Citations.] . . . The recorded test results are presumptively valid and the DMV is not required to present additional foundational evidence. [Citation.]’ [Citation.] With this presumption, the officer’s sworn statement that the breath-testing device recorded a certain blood-alcohol level is sufficient to establish the foundation, even without testimony at the hearing establishing the reliability of the test. [Citations.]” (*Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1232-1233 (*Manriquez*)).

If the DMV establishes its *prima facie* showing, the burden shifts to the driver to show through cross-examination of the officer or by the introduction of affirmative evidence that official standards were not observed. (*Manriquez, supra*, 105 Cal.App.4th at p. 1233; see also *Brenner v. Department of Motor Vehicles* (2010) 189 Cal.App.4th 365, 370 (*Brenner*)). Once the driver has made such a showing, the burden shifts back to the DMV to prove the test was reliable despite any violation of standards. (*Manriquez, supra*, at p. 1233.)

DMV administrative decisions are subject to judicial review in the trial court by administrative mandate (Code Civ. Proc., § 1094.5) under section 13559, subdivision (a), which provides in relevant part that the “review shall be on the record of the hearing and the court shall not consider other evidence.” (See *Coombs v. Pierce* (1991) 1 Cal.App.4th 568, 575.) When ruling on a petition for a writ of mandate challenging an order suspending a driver’s license, a trial court exercises its independent judgment in determining “ ‘ “whether the weight of the evidence supported the administrative decision.” ’ [Citations.]” (*Lake v. Reed, supra*, 16 Cal.4th at pp. 456-457.) On appeal, our task is to review the record to determine whether substantial evidence supports the trial court’s findings. (*Id.* at p. 457; see also *Brenner, supra*, 189 Cal.App.4th at p. 370.) We resolve all conflicts in the evidence and draw all reasonable inferences in favor of the trial court’s decision. (*Ibid.*)

When a party challenges a court’s evidentiary ruling, a different standard of review applies. “Generally, we review the trial court’s rulings regarding the admissibility of evidence under the deferential abuse of discretion standard. [Citation.]” (*Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 986.) We will disturb a discretionary court ruling “only upon a showing of a clear case of abuse and a miscarriage of justice. [Citation.]” (*Ibid.*) We review issues of law de novo. (*Garcia v. Department of Motor Vehicles* (2010) 185 Cal.App.4th 73, 82.)

2. *Trustworthiness of Officer’s Sworn Statement*

Brendza contends the officer’s sworn statement failed to meet the hearsay exception for official records in Evidence Code section 1280⁴ because the report lacks trustworthiness. He points out that the sworn statement refers to *three* breath test results of

⁴ Evidence Code section 1280 provides: “Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.”

.08 percent blood alcohol level, whereas the officer's unsworn arrest report refers to only *two* breath tests having been administered. According to Brendza, this discrepancy renders the sworn statement untrustworthy and, as such, it should not have been admitted under the hearsay exception for official records. We review the court's ruling on the admissibility of the officer's sworn statement for abuse of discretion. (*Molenda v. Department of Motor Vehicles, supra*, 172 Cal.App.4th at p. 986.)

The trustworthiness requirement of Evidence Code section 1280 is established by showing that the written report is based upon the observations of a public employee who had a duty to observe the facts and record them correctly. (*Gananian v. Zolin* (1995) 33 Cal.App.4th 634, 639; see also *Fisk v. Department of Motor Vehicles* (1981) 127 Cal.App.3d 72, 77.) An officer's sworn statement based upon the officer's firsthand observations is "presumed trustworthy." (*Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 143 (*Davenport*)). Further, Evidence Code section 664 establishes a statutory presumption that the officer prepared the reports in accordance with the officer's official duty. (Evid. Code, § 664; *Snelgrove v. Department of Motor Vehicles* (1987) 194 Cal.App.3d 1364, 1375.) "This presumption, which affects the burden of proof [citations], applies to police officers [citations] and may help lay the foundation for admissibility of evidence. [Citations.]" (*Fisk v. Department of Motor Vehicles, supra*, 127 Cal.App.3d at pp. 77-78.) This presumption "places the burden with respect to the foundational issue of the trustworthiness of the method of preparation of the official report on the licensee instead of the officer." (*Id.* at p. 78.)

Here, because the events described in the sworn statement were all based upon officer Valencia's firsthand observations, the sworn statement is entitled to a presumption of trustworthiness. (*Davenport, supra*, 6 Cal.App.4th at p. 143.) Brendza does not suggest that the "sources of information and method and time of preparation" indicate the sworn statement should be considered untrustworthy. (See Evid. Code, § 1280, subd. (c).) Rather, he claims that a conflict between the sworn statement and the unsworn arrest report calls into question whether the officer faithfully recorded his observations. Although the sworn statement purports to record three test results of .08 percent each, the unsworn arrest

report clarifies that two—not three—tests were performed, each of which established a .08 percent blood alcohol level. It is noteworthy that the first two test results on the sworn statement indicate a time when the test was administered. The third test result does not indicate a time. When the sworn statement and arrest report are considered together, a reasonable inference is that the officer conducted two breath tests, each of which yielded the same test result of .08 percent. A further reasonable inference is that the officer inadvertently wrote an extra “.08” on the sworn statement. The unsworn arrest report is admissible at the administrative hearing provided the sworn statement is also filed. (*MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 159.) As the Supreme Court stated in *MacDonald v. Gutierrez*, “so long as a sworn report is filed, it is consistent with the relaxed evidentiary standards of an administrative per se hearing that technical omissions of proof can be corrected by an unsworn report filed by the arresting officer.” (*Ibid.*) In this case, the trial court could properly conclude that the arrest report supplemented and clarified the sworn statement.

In addition, as the trial court noted, all three test results recorded on the sworn statement were “the same,” so there is no question as to whether any test result was below .08 percent. Thus, the discrepancy between the sworn statement and the arrest report does not suggest the report was not sufficiently trustworthy with regard to the test results. Further, Brendza could have testified if he recalled any error in the administration of the tests. Alternatively, he could have cross-examined officer Valencia regarding the contents and preparation of the sworn statement. He neither testified at the hearing nor cross-examined the officer. Consequently, he failed to meet his burden to show the report was untrustworthy.

Brendza also asserts the DMV failed to introduce a printout of the breath test results. This argument is unavailing because the printout is not a required component of the DMV’s prima facie case—the officer’s report itself provides sufficient non-hearsay evidence of the results of the breath test. (*McKinney v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 519, 525 [“officer himself administered the breath test and the entries therefore constituted his firsthand observations of the intoxilyzer readings”].)

Furthermore, Evidence Code section 664 establishes a presumption that the tests were administered in accord with the officer's official duty. Because the sworn statement and arrest report contained sufficient evidence of the test results, the printout's absence is immaterial.⁵

We conclude the trial court acted within its discretion in admitting the officer's sworn statement under Evidence Code section 1280.

3. Theoretical Possibility that Properly Maintained Testing Device Overstated Brendza's Blood Alcohol Level

Brendza contends the DMV failed to establish by a preponderance of the evidence that his blood alcohol level was at least .08 percent at the time he was driving. He argues the DMV could not rely upon the official duty presumption (Evid. Code, § 664) to establish its prima facie case under the circumstances presented here, where the breath test yielded a result of exactly .08 percent blood alcohol by volume. He claims there is a theoretical possibility the breath testing device used to measure his blood alcohol level could have overstated his blood alcohol level by up to .01 percent, even if all regulations governing testing device accuracy had been followed.

Brendza relies primarily on the regulation specifying the standards for determining whether breath testing devices accurately measure blood alcohol levels—section 1221.4, subdivision (a)(2)(A) of title 17 of the California Code of Regulations. The regulation provides in pertinent part: “Such determination of accuracy shall consist, at a minimum, of periodic analysis of a reference sample of known alcohol concentration *within accuracy and precision limits of plus or minus 0.01 grams % of the true value*; these limits shall be applied to alcohol concentrations from 0.10 to 0.30 grams %. The reference sample shall be provided by a forensic alcohol laboratory.” (Cal. Code Regs., tit. 17, § 1221.4, subd. (a)(2)(A), italics added.) According to Brendza, a testing device that is in full compliance

⁵ In any event, Brendza's counsel stated at the hearing before the trial court that he had ultimately obtained the printout of the breath test. Notably, however, counsel did not assert or suggest the printout was inconsistent with what was recorded in officer Valencia's arrest report. Nor did Brendza's counsel move under Code of Civil Procedure section 1094.5, subdivision (e) to augment the administrative record to include the printout.

with accuracy standards could overstate a person's blood alcohol level by up to .01 percent, such that an actual blood alcohol level of .07 percent could produce a test result of .08 percent. In situations where a breath test produces a result of .08 percent, Brenda would require the DMV as part of its prima facie case to present affirmative evidence of the breath testing device's accuracy checks to establish that any calibration error understates rather than overstates a person's actual blood alcohol level.

Brenda's challenge to the accuracy of the breath test results is purely speculative. The mere theoretical possibility that a properly calibrated testing device may overstate a person's blood alcohol level does not necessarily support a conclusion that a particular testing device is unreliable. Further, Brenda's argument fails because it places an affirmative burden on the DMV to establish the reliability of the tests offered into evidence against the licensee. (See *Davenport, supra*, 6 Cal.App.4th at p. 144 ["due process does not require the Department to have the initial burden of establishing the reliability of chemical tests offered into evidence against the licensee"].) As noted above, compliance with statutory and regulatory standards gives rise to an inference that the reported test results are reliable. (*Ibid.*) It is the driver's burden to rebut the inference that the results are reliable through cross-examination of the officer or the presentation of affirmative evidence. (*Ibid.*; *Manriquez, supra*, 105 Cal.App.4th at p. 1233.) Brenda would turn the presumption on its head and require the DMV to affirmatively prove the accuracy of its test results, instead of shifting the burden to the driver to rebut the presumption.

The argument advanced by Brenda is analogous to a "margin of error" challenge rejected by the court in *Borger v. Department of Motor Vehicles* (2011) 192 Cal.App.4th 1118 (*Borger*). In *Borger*, the driver's expert testified that the particular type of machine used to test the driver—the Intoxilyzer 5000—had an inherent margin of error of plus or minus .02 percent. (*Id.* at pp. 1120-1121.) The expert could not say with scientific certainty that the driver's blood alcohol level—which test results showed was either .09 percent or .08 percent—was actually .08 percent or higher. (*Id.* at p. 1121.) However, the expert had neither examined the specific device used nor offered any opinion that it was not in working order. (*Id.* at pp. 1121-1122.) The trial court credited the expert's analysis

and ordered the DMV to set aside the license suspension. (*Id.* at p. 1121.) The Court of Appeal reversed, reasoning that reliance on the expert’s speculative conclusion would effectively overrule every Intoxilyzer 500 reported result unless it was .10 percent or more. (*Id.* at p. 1122.) The appellate court observed that test results are presumed to be reliable if statutory and regulatory standards are followed. (*Ibid.*) The court concluded: “Were we to affirm and credit [the expert’s] conclusion in this published opinion, we would, in essence, rewrite section 13353.2, subdivision (a)(1) to provide that [blood alcohol concentration] test results of less than .10 percent, as measured by the ‘Intoxilyzer 5000,’ are presumptively invalid even if the machine used is a certified test instrument maintained, calibrated, and operated in compliance with Title 17 [of the California Code of Regulations]. [Citations.] We have no power to rewrite the statute to make it conform to a speculative conclusion.” (*Borger, supra*, 192 Cal.App.4th at p. 1123.)

In this case, if we were to accept Brendza’s legal argument, we would impermissibly rewrite section 23152, subdivision (b), to make a .08 percent blood alcohol level obtained in compliance with applicable regulations presumptively *invalid*.⁶ As the court recognized in *Borger*, we lack the power to rewrite the statute to account for a speculative possibility that a test result may be inaccurate.

This court’s analysis in *Brenner, supra*, 189 Cal.App.4th 365 is instructive. There, a breath testing device gave two identical readings showing a .08 percent blood alcohol level. (*Id.* at p. 368.) At the DMV administrative hearing, the driver presented expert testimony to establish that calibration records for the testing device revealed the device was producing readings that overstated actual alcohol content by .002 percent. Thus, the expert opined that the driver’s actual blood alcohol level was less than the .08 percent shown on his test results. (*Ibid.*) The DMV argued the calibration records were legally irrelevant in light of the fact that the .002 percent deviation fell within the accepted

⁶ Subdivision (b) of section 23152 provides, in relevant part, that “it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.”

variance of .01 percent under the applicable regulations. (*Id.* at pp. 371-372.) This court disagreed and upheld a trial court order granting the driver’s writ of mandate setting aside the driver’s license suspension. (*Id.* at p. 373.) We reasoned that, “[w]hile the regulations require forensic testing agencies to ensure their instruments meet a minimum level of accuracy, nothing in the regulatory scheme precludes a driver from introducing evidence that the instrument used to test his or her [blood alcohol concentration] deviated by some measure less than .01 percent of the true value. Nor does any regulation bar a trial court from considering such a deviation in determining whether an administrative license suspension is supported by sufficient evidence.” (*Id.* at p. 371.)

Of particular relevance here, in *Brenner* we concluded the DMV satisfied its burden to set forth a prima facie case by presenting breath test results showing a .08 percent blood alcohol level. (*Brenner, supra*, 189 Cal.App.4th at pp. 371-372.) We stated that “the arresting officer’s testimony and plaintiff’s [blood alcohol concentration] results were sufficient to establish the [DMV’s] prima facie case” but that the driver had rebutted the DMV’s prima facie case with evidence establishing that the recorded test results were inaccurate. (*Id.* at p. 371.)

In this case, unlike in *Brenner*, Brendza failed to present any evidence at the administrative hearing to rebut the prima facie case put forth by the DMV. On appeal, unlike at the trial court, he does not argue he should be allowed to reopen the administrative hearing to present evidence of the calibration records of the particular device used to test his blood alcohol level. Instead, his argument on appeal is a purely legal contention—that the DMV failed as a matter of law to establish a prima facie case that he had a .08 percent blood alcohol level absent evidence the testing device was properly calibrated. For reasons we have explained, we reject this contention. A test result showing a .08 percent blood alcohol level is entitled to a rebuttable presumption of reliability if testing was performed in compliance with statutory and regulatory standards. It is up to the licensee to rebut the presumption with evidence that the test was inaccurate. (See *Manriquez, supra*, 105 Cal.App.4th at pp. 1232-1233; *Brenner, supra*, 189

Cal.App.4th at pp. 372-373.) Brenda failed to offer any evidence to rebut the presumption.

DISPOSITION

The order denying Brenda's petition for writ of mandate is affirmed. Respondent DMV shall recover its costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.