

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Siskiyou)

RANDALL J. HABERMAN,

Plaintiff and Appellant,

v.

JEAN SHIOMOTO, as Chief Deputy Director, etc.,

Defendant and Respondent.

C069788

(Super. Ct. No.
SC SC CV PT 10-0000601)

Plaintiff Randall J. Haberman appeals from a trial court judgment denying his mandamus petition challenging Department of Motor Vehicles' (DMV) suspension of his driving privilege under the "administrative per se" statutes (Veh. Code, § 13353.2 et seq.)¹ for driving with a prohibited blood alcohol concentration (BAC). He contends the trial court erred in denying his petition for writ of mandate because (1) he was not lawfully arrested, a prerequisite for administrative license suspension, and (2) he "could

¹ Further undesignated statutory references are to the Vehicle Code.

not reasonably have been found to have been driving with a prohibited BAC because both elements were not concurrently established.” We shall conclude that Haberman’s arrest was lawful, and that there is ample evidence to support the trial court’s conclusion he drove with a BAC of 0.08 percent or higher. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 2:00 a.m. on September 6, 2009, California Highway Patrol Officer Monday observed a pick-up truck parked along the right shoulder of Big Meadows Road in Quartz Valley. He pulled along side the truck, saw that it was occupied, and got out of his patrol car to conduct a welfare check. As he approached the truck, he noticed that the hood was warm to the touch. Haberman was seated in the driver’s seat and appeared to be asleep. The driver’s side window was partially down, and when Officer Monday looked inside the cab area, he saw a nearly empty bottle of rum in the passenger seat and a full glass of liquid (later determined to be rum) in the center console. Officer Monday knocked on the window several times to wake Haberman, and Haberman finally opened his eyes and stared straight ahead. When asked if he knew where he was, Haberman initially responded that he was in his driveway. When Officer Monday explained that he was not in his driveway, Haberman said he was somewhere in Quartz Valley and later stated he was on Big Meadows Road. When asked what he was doing there, he said he had a fight with his wife and had gone for a drive. When asked how long he had been at that location, he asked what time it was. When Officer Monday told him it was about 2:00 a.m., Haberman said he had been there approximately 30 minutes. Haberman appeared intoxicated -- his speech was slurred, his eyes were bloodshot, and he smelled of alcohol. Officer Monday asked Haberman to exit the truck and instructed him to stand next to it. As Haberman did so, Officer Monday noticed that he was unsteady on his feet and detected the odor of alcohol on his breath. Haberman said he had a couple of drinks at a bar in Fort Jones and later had more to drink at his home. He said he had his last drink at 11:30 p.m. He denied having anything

to drink while parked at that location. He also stated that he arrived at the location alone and remained alone.

Officer Monday administered a series of field sobriety tests, which Haberman failed to perform in a satisfactory manner. Officer Monday arrested Haberman for driving under the influence (DUI) (§ 23152, subds. (a),(b))² pursuant to section 40300.5, which, among other things, allows a warrantless arrest for DUI when the officer has reasonable cause to believe that a person has been driving while under the influence of alcohol and may destroy or conceal evidence of the crime unless immediately arrested.³

Haberman submitted to a breath test at 3:27 a.m. and 3:30 a.m., which revealed a BAC of 0.13 and 0.12 percent, respectively. Officer Monday served a “Suspension/Revocation Order” to suspend Haberman’s driver’s license based on his arrest for DUI and test showing a prohibited BAC.

Haberman requested an administrative hearing, which was held on November 18, 2009, before a hearing officer appointed by the DMV Director, with Haberman and his counsel present. At the hearing, Haberman said he had been drinking in his car. He denied doing so when questioned by Officer Monday because he was afraid he would get into trouble if he said he had been sitting there drinking. He and his wife had been at a

² Section 23152 provides in pertinent part: “(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle. [¶] (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.”

³ Section 40300.5 provides in part: “In addition to the authority to make an arrest without a warrant pursuant to paragraph (1) of subdivision (a) of Section 836 of the Penal Code, a peace officer may, without a warrant, arrest a person when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage or any drug . . . when any of the following exists: [¶] . . . [¶] (e) The person may destroy or conceal evidence of the crime unless immediately arrested.”

local bar earlier that evening from about 9:00 p.m. until 11:00 p.m., during which time he had two rum and Cokes. They returned home around 11:15 p.m., got into an argument, and Haberman left around 11:45 p.m. On his way out, he grabbed a bottle of Captain Morgan rum from the kitchen cabinet and drove down to Big Meadows Road, about a seven-minute drive. Once there, he drank the rum and fell sound asleep. While he could not recall exactly how much he had to drink, he remembered the bottle was nearly half-full when he left his house. He denied having anything to drink at home.

The hearing officer issued an “Administrative Per Se - .08% BAC Notification of Findings and Decision,” concluding the license suspension was proper. The hearing officer found (1) Officer Monday had reasonable cause to believe Haberman was driving a motor vehicle in violation of section 23152, (2) Haberman was lawfully arrested, and (3) Haberman was driving a motor vehicle when he had 0.08 percent or more by weight of alcohol in his blood. The finding of lawful arrest was based on section 40300.5.

DMV issued a notice of decision of department review suspending Haberman’s driver’s license for four months effective December 27, 2009.

In April 2010, Haberman filed in the trial court a petition for review of the DMV determination. (§ 14401.) After a hearing, the trial court denied the petition, finding that Officer Monday’s “conclusion that [Haberman] had driven the vehicle to its ultimate location while under the influence of alcohol was reasonable” given that Haberman “admitted he had driven the vehicle to its location approximately one-half hour earlier, denied consuming alcohol after parking the vehicle and the engine, while off, was still warm.” The trial court rejected the notion that “actual observation of driving” is required for DMV action, where, as here, “from all of the circumstances, the officer had reasonable cause to believe that the vehicle had been operated by a person who was at the time in violation of § 23152.” The court entered judgment denying the petition.

Haberman appeals.

DISCUSSION

I

Standard of Review

On appeal of a trial court decision concerning administrative suspension of a driver's license, the appellate court reviews the record to determine whether the trial court's findings are supported by substantial evidence. (*Lake v. Reed* (1997) 16 Cal.4th 448, 457.) We may overturn the trial court's factual findings only if the evidence is insufficient as a matter of law to sustain those findings. (*Ibid.*) However, we review questions of law under a de novo standard. (*Corrigan v. Zolin* (1996) 47 Cal.App.4th 230, 234.)

II

Statutory Framework

Under what is often called the "administrative per se" law (§ 13353.2 et seq.), a person arrested for DUI, and who is determined to have a prohibited BAC, shall have his or her driving privileges suspended prior to an actual conviction for a criminal offense, regardless of whether or not there is evidence that the person's driving ability was actually impaired. (*Lake v. Reed, supra*, 16 Cal.4th at p. 454.)

When a person is arrested for DUI and is determined to have a prohibited BAC, the arresting officer or the DMV serves the person with a notice of order of license suspension, advising that the license will be suspended in 30 days and that the person has the right to an administrative hearing. (§§ 13353.2, 13353.3.) The arresting officer takes possession of the person's driver's license and issues a temporary license. (§ 13382.)

The DMV automatically reviews the merits of the suspension, under a preponderance of evidence standard, with the burden of proof on the department. (§ 13557; *Lake v. Reed, supra*, 16 Cal.4th at p. 455.) "For drivers 21 years of age and older, the sole issues are whether: '(A) . . . the peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of Section . . . 23152 or 23153. [¶] (B) . . . the person was placed under arrest . . . [and] [¶] (C) . . . the person was driving

. . . [¶] [w]hen the person had 0.08 percent or more, by weight, of alcohol in his or her blood.” (Lake v. Reed, supra, at pp. 455-456, citing § 13557.) The department may dispense with the automatic review if the driver requests an administrative hearing. (§ 13557, subd. (e).)

The administrative hearing is usually held before a department hearing officer. (Lake v. Reed, supra, 16 Cal.4th at p. 456.) The only issues at the hearing on an order of suspension pursuant to section 13353.2 are whether the arresting officer had reasonable cause to believe the person was driving, the driver was arrested, and the person was driving with 0.08 percent BAC or higher. (§§ 13557, subd. (b)(3); 13558, subd. (c)(2).)

If the hearing officer finds the evidence proves these three statutory prerequisites by a preponderance of the evidence, the driver’s license will be suspended for four months if the driver had a clean driving record, or one year if the driver had a prior conviction or prior specified administrative action regarding BAC. (§ 13353.3.)

In ruling on an application for a writ of mandate following an order of suspension, the trial court is guided by section 13559, which provides: “If the court finds [upon review of the record of the administrative hearing] that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is not supported by the evidence in the record, the court may order the department to rescind the order of suspension or revocation and return, or reissue a new license to, the person.” (§ 13559, subd. (a).) The trial court exercises its independent judgment in determining whether the weight of the evidence supported the administrative decision. (Lake v. Reed, supra, 16 Cal.4th at p. 456.)

As indicated above, we apply a substantial evidence standard to the trial court’s factual findings, and a de novo standard to questions of law. (Lake v. Reed, supra, 16 Cal.4th at p. 457; Corrigan v. Zolin, supra, 47 Cal.App.4th at p. 234.)

III Analysis

A. *Haberman was lawfully arrested for DUI.*

Haberman contends that Officer Monday could not lawfully arrest him for DUI in violation of section 23152 where Haberman's vehicle was "lawfully parked and neither the officer, nor any other witnesses . . . observed the vehicle move." We disagree.

"Under the administrative per se statutes, in order for the DMV to validly suspend a person's driver's license, 'the underlying arrest must have been lawful.'" (*Dyer v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 161, 168; see also *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 760.)

Penal Code section 836 generally prohibits warrantless arrests for misdemeanors not committed in the officer's presence. An exception is provided, however, where the officer has reasonable cause to believe a person has been DUI and certain circumstances exist, e.g., the person may destroy or conceal evidence of the crime if not immediately arrested. (§ 40300.5, subd. (e), fn. 3, *ante.*) This exception has been extended to the metabolic destruction of alcohol and/or drugs in the body by the simple passage of time. (*People v. Schofield* (2001) 90 Cal.App.4th 968, 975, cited with approval in *Troppman v. Valverde* (2007) 40 Cal.4th 1121, 1136, fn. 11.) "[S]ection 40300.5, subdivision (e) creates an exception to the presence requirement of Penal Code section 836 because evidence will be destroyed by the simple passage of time unless the person is immediately arrested." (*People v. Schofield, supra*, 90 Cal.App.4th at p. 975.)

Here, Haberman's arrest was lawful because had he not been immediately arrested his body would have metabolized the alcohol over time, thereby destroying evidence he

was DUI.⁴ That Officer Monday did not observe Haberman drive while intoxicated is of no consequence.

B. Substantial evidence supports the trial court's finding that Haberman actually drove with a BAC of 0.08 percent or above.

Haberman also contends “[t]here simply was no substantial and credible evidence that established the time of driving in relation to the level of alcohol in [his] blood after arrest.” Again, we disagree.

Officer Monday discovered Haberman asleep in his truck at approximately 2:00 a.m. Haberman told Officer Monday that he had driven to that location around 1:30 a.m. He admitted drinking prior to driving to that location and denied drinking while at that location. At 3:27 a.m. and 3:30 a.m., Haberman’s BAC was 0.13 and 0.12, respectively. Based on these facts, we have no trouble concluding that substantial evidence supports the trial court’s finding that Haberman drove with a BAC of 0.08 percent or above. That the record contained evidence that would support a contradictory finding does not undermine our conclusion. (See *Lake v. Reed, supra*, 16 Cal.4th at p. 457; *Jones & Matson v. Hall* (2007) 155 Cal.App.4th 1596, 1607.)

⁴ We do not understand Haberman to contend that Officer Monday lacked probable cause to believe he was driving under the influence. To the extent he does so contend, the contention lacks merit because, as we shall discuss, Haberman admitted drinking prior to driving to the location where he was found sitting in his car and denied drinking after he arrived.

DISPOSITION

The judgment is affirmed. DMV shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

BLEASE _____, Acting P. J.

We concur:

HULL _____, J.

DUARTE _____, J.