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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CLARENCE STEADMAN,

Plaintiff and Appellant,

v.

DIRECTOR OF THE DEPARTMENT OF
MOTOR VEHICLES,

Defendant and Respondent.

D058567

(Super. Ct. No. 37-2010-00052549-
CU-WM-NC)

APPEAL from a judgment of the Superior Court of San Diego County, David G. Brown, Judge. Affirmed.

Clarence Steadman appeals from a judgment denying his petition for writ of mandate challenging the suspension of his driving privilege by the Department of Motor Vehicles (DMV). Steadman does not dispute that the DMV made a prima facie showing that he drove with a blood alcohol level of .08 percent or more, which requires license suspension. However, he argues that he presented evidence that rebutted the DMV's showing, and the trial court erred in rejecting this evidence. We find no reversible error.

OVERVIEW

A preliminary alcohol screening (PAS) breath test administered to Steadman about one-half hour after he stopped driving showed a blood alcohol level of .086 percent, and a blood test administered to him about one hour after he stopped driving showed a blood alcohol level of .10 percent. To refute the DMV's showing that he drove with at least a .08 percent blood alcohol level, Steadman presented expert testimony to support a rising blood alcohol level defense. Based on a comparison of the results from the PAS test and the blood test, the expert opined that Steadman's blood alcohol level at the time of driving was .06 or .07 percent. The DMV hearing officer rejected the expert's opinion, finding there was an insufficient foundational basis to support the reliability of the PAS test result relied upon by the expert. Exercising its independent review, the trial court reached essentially the same conclusion.

Steadman argues the trial court's rejection of his expert's testimony was improper because when evaluating the foundational basis for the PAS test result the court failed to apply the presumption that an official duty is regularly performed (Evid. Code, § 664), and, alternatively, the court failed to recognize that an expert's opinion may properly be based on inadmissible matters.

We conclude that even assuming *arguendo* there was error in the court's ruling, the error was not prejudicial. The DMV made a convincing showing that Steadman drove with a blood alcohol level of .08 percent or more, and there are strong grounds to support rejection of Steadman's contrary evidence. As we detail below, the regulations governing administration of breath alcohol tests include a requirement that the test be performed

twice (17 Cal. Code Regs., § 1221.4, subd. (a)(1)); here, the PAS breath test was administered only once. Although this irregularity did not defeat the admissibility of the PAS test result or conclusively establish its unreliability, the irregularity provides ample support for the trial court's finding that Steadman's expert's extrapolated calculation of Steadman's blood alcohol level at the time of driving was insufficient to rebut the DMV's showing. Steadman has not shown that there is a reasonable probability the outcome would have been more favorable to him absent the asserted error. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

*The DMV Hearing*¹

At the administrative hearing, the DMV relied on reports from the arresting officers to show that Steadman was driving with a blood alcohol level of .08 percent or more. According to the officers' statements, at about 10:46 or 10:49 p.m. on June 2, 2008, Officer Eric Oberndorfer observed Steadman driving at a visual speed higher than the 35 miles per hour posted speed limit. When following Steadman's vehicle, Oberndorfer estimated that Steadman was driving about 65 miles per hour. Steadman also repeatedly drifted in and out of lanes. Officer Oberndorfer activated his patrol

¹ There were actually two DMV hearings and two writ of mandate proceedings before the superior court. At the first DMV hearing, the hearing officer found that Steadman had not provided a sufficient reliability foundation for the PAS test result relied upon by his expert. In the first mandamus ruling the trial court remanded the case back to the DMV for further proceedings because the DMV had included the PAS test result in its evidentiary showing. In this appeal, the relevant proceedings are the second DMV hearing and the second mandamus proceeding, and we confine our factual summary to these latter proceedings.

vehicle's emergency lights, and Steadman pulled over and stopped his car. As Steadman exited his car, Officer Oberndorfer observed that Steadman was swaying. Oberndorfer smelled a strong odor of alcohol on Steadman's breath and person. When Oberndorfer asked Steadman if he had drunk alcohol before being stopped, Steadman answered, "Yes. I had on[e] nightcap at [a bar.]"

Officer Mark Stephens arrived at the scene at 11:05 p.m. Stephens observed that Steadman "appeared to have a long blank stare in his eyes and appeared to be swaying from side to side"; he had a strong alcohol odor emitting from his breath and clothing; and his eyes were "bloodshot, watery and glazed." During field sobriety testing, Steadman's eyes were "jerky"; he almost fell over during the one-leg stand test; he did not count correctly during counting tests; he had difficulty keeping his eyes closed during a counting test; and he was visibly swaying during all the tests.

When questioned by Officer Stephens, Steadman stated that he drank only "one martini" at a bar "right up the street." Steadman said he ordered the drink at about 10:00 p.m. and finished it at about 10:30 or 10:45 p.m. When asked if he drank any alcohol within the last hour, he responded, "No I have not." When asked what time it was, Steadman said it was about 10:45 p.m. (the actual time was 11:12 p.m.). When asked if the alcohol affected his driving, he answered, "No, I don't think so." When asked what effects he felt from the alcohol, he said, "I mean I feel buzzed but who wouldn't?"

Officer Stephens administered the PAS breath test at 11:23 p.m., which showed a .086 blood alcohol level. At 11:30 p.m., Stephens arrested Steadman for driving under

the influence. At 11:55 p.m., a blood test performed by a lab technician showed a blood alcohol level of .10 percent.

To refute the DMV's showing, Steadman presented the testimony of forensic toxicologist Darrell Clardy, who opined that at the time of driving Steadman's blood alcohol level was .06 or .07 percent. Clardy testified that his opinion was based on the time of driving at 10:49 p.m.; the .08 PAS test result at 11:23 p.m.; and the .10 percent blood test result at 11:55 p.m. Clardy explained the test results showed that during the 32-minute period between 11:23 p.m. and 11:55 p.m., Steadman's blood alcohol level rose .02 percent (i.e., from .08 to .10 percent). According to Clardy, this showed that Steadman was absorbing alcohol at the rate of .02 percent during the 32-minute time period. Using this absorption rate, Clardy opined that at the time of driving (34 minutes before the .08 percent test result), Steadman's blood alcohol level would be .06 percent (i.e., .02 percent less than .08 percent). Clardy stated he was relying on Steadman's actual metabolism and rate of absorption as shown by the two test results. Because Clardy was relying on an actual absorption rate shown by two test results (not just an estimated rate based on one test result), he stated he did not need to conduct further studies concerning Steadman's metabolism and he did not need to speculate about averages or ranges of absorption in different individuals.

Further, Clardy testified that Steadman's statement to the officer that he finished his drink within 15 minutes or less before driving was consistent with the rising blood alcohol level shown by the test results. However, Clardy stated his opinion was based on the actual scientific measurement of Steadman's absorption, not on his drinking pattern.

To establish the reliability of the PAS breath test result relied upon by his expert, Steadman called Officer Stephens as a witness. Stephens testified that he had received training on the maintenance and calibration of PAS devices; he was certified to administer the PAS test in the field; he had properly maintained and calibrated the device used to perform the PAS test on Steadman; the device was in proper working order on the date the test was administered to Steadman; and he administered the test to Steadman.

In its ruling suspending Steadman's driver license, the DMV hearing officer found that the preponderance of the evidence showed Steadman was driving with a blood alcohol level at or above .08 percent. The hearing officer rejected Steadman's claim that he had shown, based on his expert's testimony concerning his rising blood alcohol, that he was not driving with a .08 percent or more blood alcohol level. The hearing officer specifically rejected the expert's reliance on the PAS test result to form his opinion, finding that although Officer Stephens's testimony laid a proper foundation for the accuracy of the PAS device and his qualifications to administer it, Officer Stephens did not testify he had properly administered the PAS test. Accordingly, the hearing officer concluded there was an insufficient foundation to support Steadman's expert's opinion.

Additionally, the hearing officer found there was no credible information to support the expert's reliance on Steadman's statement that he had finished his last drink 15 minutes or less before driving. The hearing officer noted the inconsistencies in Steadman's statements to the police officer about his alcohol consumption and the current time and his admission to the police officer that he was " 'buzzed' " from the effects of alcohol, and found that Steadman's representations concerning his alcohol consumption

were not reliable. The hearing officer concluded the expert's testimony did not establish a rising blood alcohol defense because his sources of information were unreliable; i.e., two of the elements relied upon by the expert "are either not credible or lack[] the proper foundation to support the opinion."

Petition for Writ of Mandate in Superior Court

In his writ of mandate petition before the superior court, Steadman argued that based on his expert's testimony he had rebutted the DMV's showing he drove with a blood alcohol level of .08 percent or greater. Steadman argued the hearing officer unreasonably concluded that he had not shown the PAS test was properly administered. In support, Steadman cited Officer Stephens's testimony that the device was operating properly and he was a trained operator, and he argued the official-duty presumption under Evidence Code section 664 applied to establish that Officer Stephens properly administered the test.

The trial court denied the mandamus petition, finding the hearing officer's findings were supported by the weight of the evidence and were not arbitrary or capricious. The court found that the 11:55 p.m. blood test, which was taken about one hour and six minutes after driving and showed a blood alcohol level of .10 percent, created a rebuttable presumption that Steadman was driving with .08 percent or more blood alcohol level. The trial court noted it was free to disregard an expert's testimony even if that testimony was uncontroverted, and concluded Steadman's expert testimony had not rebutted the DMV's showing. The court found the expert's testimony about Steadman's rising blood alcohol level was speculative and was properly disregarded by the hearing

officer because the expert had presumed the PAS reading was accurate even though there was no foundational basis showing the PAS test was properly administered; it was based on an incorrect assumption that the PAS test result was .08 percent rather than .086 percent; and it took Steadman's statements about his alcohol consumption at face value whereas they were internally inconsistent.

When rejecting the foundational basis for the PAS test result, the court found that Officer Stephens's testimony did not establish that he properly administered the test. The court reasoned that Officer Stephens did not describe his "method of administration and no assurance [was] made that the test was properly administered."

Concerning Steadman's alcohol consumption, the court noted that Steadman's statements to the officer about when he was drinking were "contradictory and nonsensical"; i.e., he told the officer he had not drunk alcohol within the last hour and that he stopped drinking at 10:45 p.m., whereas he also stated that the current time was 10:45 p.m. which meant he stopped drinking at that precise moment.

DISCUSSION

I. *General Legal Principles*

Under Vehicle Code section 13353.2, subdivision (a)(1)², the DMV is required to suspend the driving privilege of a person who operated a vehicle with a blood alcohol level of .08 percent or more. At an administrative hearing challenging the suspension, the DMV has the burden to show by a preponderance of the evidence that the person was

² Subsequent unspecified references are to the Vehicle Code.

driving with a blood alcohol level of at least .08 percent. (§ 13557, subd. (b); *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1232.)

When a chemical test performed within three hours of driving shows a blood alcohol level of at least .08 percent, there is a rebuttable presumption that the person had the requisite level of .08 percent or more at the time of driving. (§ 23152, subd. (b); *Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730, 740.) In addition to chemical test results, other circumstantial evidence, including the person's observed symptoms of intoxication, may be considered to establish the proscribed blood alcohol level at the time of driving. (*Jackson, supra*, at p. 741; *McKinney v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 519, 526, fn. 6; see *Baker v. Gourley* (2002) 98 Cal.App.4th 1263, 1273.) Once the DMV establishes its prima facie case, the driver must produce affirmative evidence to refute the DMV's showing and shift the burden of proof back to the DMV. (*Manriquez v. Gourley, supra*, 105 Cal.App.4th at p. 1233.)

In ruling on a writ of mandate petition challenging a DMV suspension order, the trial court exercises its independent judgment. (*Garcia v. Department of Motor Vehicles* (2010) 185 Cal.App.4th 73, 81-82.) The trial court weighs the evidence and makes its own determination as to whether the weight of the evidence supports the administrative decision. (*Ibid.*) The trial court is not bound by the agency's evidentiary rulings but makes its own evidentiary determinations. (*Dare v. Board of Medical Examiners* (1943) 21 Cal.2d 790, 799.) However, even when exercising its independent judgment, "[t]he administrative findings come before the superior court with a 'strong presumption of

correctness,' and the burden rests on the petitioner to establish administrative error." (*Hildebrand v. Department of Motor Vehicles* (2007) 152 Cal.App.4th 1562, 1568.)

On appeal from a trial court's denial of a mandamus challenge to a DMV suspension order, we determine whether the trial court's findings are supported by substantial evidence. (*Lake v. Reed* (1997) 16 Cal.4th 448, 457.) We resolve all evidentiary conflicts and draw all reasonable inferences in favor of the trial court's decision; we do not substitute our deductions for the trial court's; and we overturn the court's factual findings only if the evidence before the court is insufficient as a matter of law to sustain those findings. (*Ibid.*) When reviewing the trial court's evidentiary rulings, we apply the deferential abuse of discretion standard and do not disturb the court's ruling unless there is a clear showing of abuse. (*Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 986, 1000.)

II. Analysis

Steadman does not dispute that the record supports the DMV made a prima facie showing he drove with at least a .08 percent blood alcohol level. This showing includes Steadman's .10 percent blood test result about one hour and six minutes after he was observed driving; the officers' observations of his excessive speed and lane drifting while driving; his physical manifestations of intoxication when stopped; and his poor performance on the field sobriety tests. However, Steadman claims his expert's testimony concerning his rising blood alcohol level rebutted the prima facie showing, and the trial court erred in finding there was an insufficient foundational basis for the PAS test result upon which his expert relied.

PAS breath tests are generally used as an investigative tool to establish reasonable cause to arrest (§ 23612, subd. (h)), and the courts recognize that PAS tests are not the scientific equivalent of postarrest tests and may be less accurate and reliable than postarrest tests. (*People v. Wilson* (2003) 114 Cal.App.4th 953, 959-960; *Roze v. Department of Motor Vehicles* (2006) 141 Cal.App.4th 1176, 1189.) Nevertheless, PAS test results may be admitted as affirmative evidence of blood alcohol level upon a sufficient foundational showing of reliability. (*People v. Williams* (2002) 28 Cal.4th 408, 414; *People v. Bury* (1996) 41 Cal.App.4th 1194, 1198, 1201-1202; *Molenda v. Department of Motor Vehicles, supra*, 172 Cal.App.4th at p. 1000.) In *Williams*, our California Supreme Court held that the foundational reliability requirements may be satisfied by two alternative means: (1) presenting evidence showing compliance with the regulatory requirements governing the test, or (2) presenting independent proof of three elements, to wit: properly functioning equipment, a properly administered test, and a qualified operator. (*People v. Williams, supra*, 28 Cal.4th at pp. 414-417.) *Williams* rejected the contention that a PAS test administered without compliance with the relevant regulatory requirements is automatically inadmissible. (*Ibid.*) Rather, the court held that where there is independent proof of the three reliability elements, any deviation from the regulatory requirements can diminish the weight of the evidence but does not defeat the foundational requirement of reliability. (*Id.* at p. 414.)

Here, Steadman did not attempt to show the reliability of the PAS test results by presenting evidence of compliance with specific regulatory requirements. Instead, he presented Officer Stephens's testimony indicating the PAS device was operating properly,

he was a trained operator of the device, and he administered the test to Steadman. The trial court noted that Officer Stephens did not explicitly state that he properly administered the test and he did not describe precisely how he administered the test. Steadman argues the trial court should have applied the Evidence Code section 664 presumption that official duty is regularly performed to supply this missing factor and to establish that the test was properly administered.

Evidence Code section 664 sets forth a rebuttable presumption "that official duty has been regularly performed." The presumption applies "where a person has an 'official duty' to perform an act." (*Furman v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 416, 422.) The courts recognize that the presumption generally applies to the performance of duties by police officers. (*Roelfsema v. Department of Motor Vehicles* (1995) 41 Cal.App.4th 871, 880 [official duty to properly set up and operate sobriety checkpoint]; *McKinney v. Department of Motor Vehicles, supra*, 5 Cal.App.4th at pp. 522, 525 [official duty to properly perform intoxilyzer breath test]; see *Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 142.) When the presumption is applied to support an officer's proper administration of a test measuring blood alcohol level, the burden is on the opponent of the evidence to show there is some irregularity in the administration of the test that affects the reliability of the evidence. (*McKinney v. Department of Motor Vehicles, supra*, 5 Cal.App.4th at p. 525.)

When delineating the means of establishing the foundational reliability of PAS test results in *Williams* (a criminal case), the court did not discuss the potential applicability of the official-duty presumption; thus, the *Williams* case sheds no light on this issue.

However, when addressing evidentiary issues in the context of DMV hearings, the California Supreme Court has recognized that there is a "relaxation of evidentiary rules." (*Lake v. Reed, supra*, 16 Cal.4th at p. 467.) Consistent with this standard, the courts have frequently applied the Evidence Code section 664 official-duty presumption to support the reliability of evidence presented by the DMV. (See, e.g., *McKinney v. Department of Motor Vehicles, supra*, 5 Cal.App.4th at p. 525; *Poland v. Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1137; *Arthur v. Department of Motor Vehicles* (2010) 184 Cal.App.4th 1199, 1206-1207.)

Steadman asserts that because the DMV's evidentiary showing is afforded the benefit of the official-duty presumption, principles of fairness dictate that it should also be applied to a licensee's evidentiary showing. Although Steadman's argument on this point appears persuasive, we note the trial court's order does not explicitly state it was rejecting application of the presumption. When read in its entirety, the order reflects the court ultimately found Steadman's expert evidence unpersuasive on several grounds, one of which included the unreliability of the PAS test result upon which the expert relied. Although the court stated in broad fashion that the foundational basis for the PAS test was insufficient, the order does not reflect that this finding was necessarily premised on a failure to apply the official-duty presumption. For example, it is undisputed the PAS test was only administered once, whereas (as we shall discuss shortly), the regulations require that it be administered twice. The court reasonably could have concluded the presumption of regularity was rebutted at least in part, and Officer Stephens needed to

have presented additional testimony concerning how he administered the single test to ensure its reliability.

In any event, even assuming arguendo the trial court erred by rejecting the foundational reliability of the PAS test result without applying the official duty presumption, Steadman has not shown a reasonable probability that the outcome would have been more favorable to him absent the error. (See *Rappaport v. Gelfand* (2011) 197 Cal.App.4th 1213, 1229 [reversal for evidentiary error requires reasonable probability of more favorable result]; *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480.)

First, the DMV made a strong showing that Steadman was driving with at least a .08 percent blood alcohol level. Steadman admitted he had been drinking at a bar; an officer observed him driving at a speed greatly exceeding the posted speed limit and drifting in and out of lanes; and when he was stopped by the police he smelled strongly of alcohol and displayed numerous indicia of intoxication (i.e., swaying, bloodshot and glazed eyes, and poor performance on field sobriety tests). His .10 percent blood test result about one hour and six minutes after driving created a strong inference that he had imbibed a significant amount of alcohol before driving, and the .10 percent test result met the statutorily-defined standard to create a presumption of .08 percent or more at the time of driving.

Second, the record firmly supports the court's finding that Steadman did not persuasively rebut the DMV's showing on the .08 percent blood alcohol level issue. A trier of fact may properly reject an expert's opinion that is based on unreliable

information. (See *Borger v. Department of Motor Vehicles* (2011) 192 Cal.App.4th 1118, 1122.) Drawing all reasonable inferences in favor of the court's decision, the court could reasonably conclude that Steadman's expert testimony on his rising blood alcohol level was not based on reliable material. (See *People v. Thompson* (2006) 38 Cal.4th 811, 826 [recognizing that blood alcohol level evidence based on extrapolations can be speculative]; *Commonwealth v. Friedl* (Pa. Super. Ct. 2003) 834 A.2d 638, 644-645 [trial court free to disbelieve expert's extrapolation testimony on blood alcohol level which was "far from conclusive"]; see generally *Borger v. Department of Motor Vehicles, supra*, 192 Cal.App.4th at p. 1122.)

The DMV regulations require that a breath alcohol test be performed twice. (17 Cal. Code Regs., § 1221.4, subd. (a)(1).) The fact that the PAS breath test was administered only once can reasonably be deemed to lessen the probative force of a time-of-driving blood alcohol level extrapolated from the PAS breath test result. (See *Roze v. Department of Motor Vehicles, supra*, 141 Cal.App.4th at pp. 1187-1188 [substantial evidence supported trier of fact's decision to afford little weight to PAS test evidence because of officer's failure to comply with regulation governing PAS administration].) That is, although the PAS test in combination with the blood test showed Steadman's blood alcohol level was *rising*, the court could reasonably conclude the accuracy of the *numerical values* calculated by the expert were not firmly established absent a more definitive showing of the accuracy of the PAS test result.

Additionally, the court could reasonably conclude the expert's opinion was not based on any reliable information concerning Steadman's drinking pattern. As noted by

the trial court, Steadman himself presented conflicting statements about his alcohol consumption, at one point stating that he had not consumed alcohol within the last hour, and at another point indicating that he had stopped drinking at the same time or within 15 minutes of what he thought was the current time. The expert did not address whether the possibility that Steadman had stopped drinking an hour earlier could alter the expert's calculations concerning Steadman's blood alcohol level at the time of driving.

In short, the DMV presented strong evidence that Steadman drove with the required .08 percent blood alcohol level, and the record fully supports the trial court's conclusion that Steadman's expert's testimony was not persuasive. There is no reasonable probability the court would have reached a different result absent any error in its ruling concerning the foundational basis for the PAS test result.

For the same reasons, Steadman's alternative argument that an expert may present an opinion based on inadmissible matters is unavailing. Regardless of the admissibility of the material that forms the basis of an expert's opinion, the expert's opinion may be rejected based on a finding that the material relied upon was unreliable. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618.) As stated, the record supports the court's rejection of Steadman's expert opinion based on the unreliability of the matters that formed the basis for the opinion.

Steadman has not shown reversible error in the trial court's decision denying his petition for mandamus relief.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.