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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RONALD MERLE THEOBALD,

Plaintiff and Respondent,

v.

GEORGE VALVERDE, as Director, etc.,

Defendant and Appellant.

G044686

(Super. Ct. No. 30-2010-00374958)

O P I N I O N

Appeal from a judgment and an order of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Reversed and remanded with directions.

Kamala D. Harris, Attorney General, Alicia M. B. Folwer, Assistant Attorney General, Jerald L. Mosley and Gabrielle H. Brumbach, Deputy Attorneys General, for Defendant and Appellant.

William A. Hinz for Plaintiff and Respondent.

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The Department of Motor Vehicles (DMV) suspended respondent Ronald Merle Theobald's license for driving with a measurable amount of alcohol in his system while on probation for driving under the influence of alcohol, a zero tolerance law. (Veh. Code, § 23154, subd. (a); all statutory references are to this code unless otherwise stated.) The superior court granted Theobald's petition for a writ of mandate and directed George Valverde, the Director of the DMV, to set aside the suspension. We reverse and remand.

## I

### FACTS

Theobald was on probation for driving under the influence of alcohol (§23152, subd. (a)) when he was pulled over by Brea Police Officer J. Morouse on November 7, 2009. Theobald had been speeding on Brea Boulevard for over half a mile with his right turn signal on. On three occasions the left tires of the vehicle crossed the left lane markings. Upon contacting Theobald, the officer noticed Theobald's eyes were bloodshot and watery. Morouse noticed an odor of an alcoholic beverage and asked Theobald if he had been drinking. Theobald said he bought a small bottle of scotch and drank it just prior to being pulled over.

Within eight minutes of the stop Morouse gave Theobald the first of two preliminary alcohol screening (PAS) tests. A second test was performed three minutes later. The results, 0.037 and 0.045 blood-alcohol levels, demonstrated Theobald had alcohol in his system. Theobald surrendered his license. Morouse gave him written notice his license would be revoked/suspended in 30 days and of his right to request a hearing to show why the revocation/suspension is not justified.

On April 21, 2010, Theobald and his attorney appeared before a DMV hearing officer for a hearing on the suspension. Theobald objected to the administrative officer considering Morouse's sworn statements contained in DMV form DS 367, arguing the form had not been forwarded to the DMV within the time prescribed by section 13380. He also objected to admission of the printout of the PAS tests and the

calibration record of the PAS device used in this matter. He argued the PAS test results were inadmissible because Title 17 of the California Code of Regulations, sections 1215 et seq. (Title 17), had not been complied with in as much as the officer had not observed Theobald for 15 minutes before administering the tests, and the calibration records of the PAS device indicated the device had last been calibrated 77 days before Theobald's tests.

Glen Eastman, the jailer for the Brea Police Department, maintained the police department's PAS devices for more than four years. He was trained on their maintenance over a two-day period by a former sworn police officer. Pursuant to a DMV subpoena, Eastman provided the maintenance log on the PAS device used in this matter. Prior to the date Theobald was given the PAS tests, the last time the device needed calibration was 77 days earlier when it tested outside the department's acceptable variance, which is more restrictive than Title 17's requirements for evidentiary devices used to test blood-alcohol content. The device tested within acceptable limits on the numerous other occasions Eastman checked the accuracy of the device. The last accuracy check was made on October 30, 2009, eight days before it was used to test Theobald.

The hearing officer asked Eastman if the PAS device was "a Title 17 device." Without objection, Eastman said it was not. When asked on cross-examination why Eastman concluded the device was not covered by Title 17, he said it was because the device is not the evidentiary device used by the department once an individual is arrested.

Theobald's counsel objected to admission of the maintenance log and Eastman's testimony after Eastman testified. Counsel admitted he had been given notice Eastman would be present at the hearing. He had not, however, been provided a copy of the log. The administrative officer accepted the log into evidence.

The DMV notified Theobald of its decision to suspend his license effective May 1, 2010 through April 30, 2011. On May 24, 2010, Theobald filed a petition for a

writ of mandate/review (see § 13559) in the superior court. The superior court granted the petition and directed DMV to set aside the suspension.

## II

### DISCUSSION

Section 23154, a zero tolerance law (see *Coniglio v. Department of Motor Vehicles* (1995) 39 Cal.App.4th 666, 673), makes it unlawful for an individual on probation for a violation of section 23152 or section 23153 to drive a motor vehicle “with a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test or other chemical test.” (§ 23154, subd. (a).) Violation is not a crime. Rather, a civil penalty is imposed: the individual’s driving privilege is suspended. (§ 13353.2, subd. (a)(4).) At the time of violation, the officer issues the individual a notice of suspension and a temporary driver’s license valid for 30 days from the date of the violation. (§ 13389, subd. (b)(2).) “The DMV automatically reviews the initial suspension decision or, if the driver so requests, conducts an administrative hearing on the suspension. [Citations.]” (*Morgenstern v. Department of Motor Vehicles* (2003) 111 Cal.App.4th 366, 371.) The DMV bears the burden of supporting a suspension and the suspension is upheld only if it determines by a preponderance of the evidence that the driver was lawfully detained, the officer had reasonable cause to believe the driver violated section 23154, and the driver had a blood-alcohol level of 0.01 percent or higher. (§§ 13557, subs. (a) & (b)(2), 13558, subd. (c)(2).)

A superior court reviewing a DMV order of suspension on a petition for a writ of mandate “is required to determine, based on its independent judgment, “whether the weight of the evidence supported the administrative decision.” [Citations.]” (*Lake v. Reed* (1997) 16 Cal.4th 448, 456-457.) On appeal from a trial court’s issuance of a writ of mandate, “[o]ur task . . . is to determine ‘whether the evidence reveals substantial support, contradicted or uncontradicted, for the trial court’s conclusion that the weight of the evidence does not’ support DMV’s suspension order. [Citation.] In making this

determination, we must draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.]” (*Bell v. Department of Motor Vehicles* (1992) 11 Cal.App.4th 304, 309.) When a trial court's evidentiary ruling is challenged, we review that ruling under the deferential abuse of discretion standard. (*Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1217-1218.) Lastly, we exercise independent judgment on questions of law. (*Kreeft v. City of Oakland* (1998) 68 Cal.App.4th 46, 53.)

The trial court's ruling in this matter is not entirely clear. As best we understand, the court excluded Eastman's testimony about the calibration log and the accuracy of the PAS device because Eastman testified the PAS device need not comply with Title 17 as (1) it is not the evidentiary device used by the police department when once a person is arrested, and (2) a driver has the right to refuse to take a PAS test. The court stated Eastman's conclusion about Title 17's applicability raised a question as to whether he could lay a proper foundation to show the PAS device was in working order. It further appears the court concluded the administrative officer precluded Theobald from demonstrating noncompliance with Title 17. The court also appears to have concluded Theobald was prejudiced by not having been previously informed Eastman would testify as an expert. Ultimately, the court found the administrative decision to suspend Theobald's license was not supported by substantial evidence.

Title 17 regulates the administration of chemical tests. Specifically, section 1221.4 of Title 17 sets forth the procedures to be followed for “breath alcohol analysis.” Title 17 “appl[ies] to PAS tests that determine the *concentration* of alcohol in the blood.” (*People v. Williams* (2002) 28 Cal.4th 408, 414, fn. 2; *People v. Bury* (1996) 41 Cal.App.4th 1194, 1202; see also *Coniglio v. Department of Motor Vehicles, supra*, 39 Cal.App.4th at pp. 677-681 [Title 17 does not apply to PAS tests aimed at detecting mere presence of alcohol].) Eastman testified the PAS device need not comply with Title 17 because the device is not an “evidentiary” test and a driver has the right to refuse a PAS

test.<sup>1</sup> His opinion was indeed a legal opinion he was not competent to make. (See *Pond v. Ins. Co. of North America* (1984) 151 Cal.App.3d 280, 289 [legal opinion of lay witness inadmissible]; Evid. Code § 800.)<sup>2</sup> However, Eastman’s opinion could not have prejudiced Theobald because, as will be discussed below, noncompliance with Title 17 does not affect admissibility of the test result. “[A]dmissibility depends on the reliability and consequent relevance of the evidence, not the precise manner in which it is collected. Compliance with regulations is sufficient to support admission, but not necessary. Noncompliance goes only to the weight of the evidence, not its admissibility. [Citation.]” (*People v. Williams, supra*, 28 Cal.4th at p. 414 & fn. 2.)

There is no evidence in the record to support the superior court’s conclusion “Eastman’s testimony was not challenged because of the inability of counsel to have notice of the expert in order to voir dire him as to his qualifications, giving rise to that, . . . Eastman could not recall the name of the officer who trained him regarding his calibration expertise . . . .” Theobald’s counsel cross-examined Eastman. Counsel cross-examined Eastman about Title 17 requirements, as well as the manufacturer’s guidelines for the device. The hearing officer did not restrict cross-examination.

Theobald was given notice Eastman would testify and there is nothing in the record indicating Theobald made a written request of the DMV for relevant statements from Eastman, or for the calibration logs (see Gov. Code, § 11507.6), which

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<sup>1</sup> Although a driver generally has the right to refuse to take a PAS test (§ 23612, subd. (i)), a driver on probation for driving under the influence of alcohol does not. (§ 13389, subd. (b).)

<sup>2</sup> The hearing officer asked Eastman if the PAS device was “a Title 17 device.” Eastman said the device did “not fall under Title 17.” Theobald did not object to the question or request the answer be stricken. Eastman’s statement that the device is not covered by Title 17 because it is not an evidentiary test used when a suspect is arrested and an individual may refuse a PAS test was made in response to a question asked by Theobald’s attorney on cross-examination.

the DMV obtained only when Eastman appeared for the hearing. Additionally, counsel did not request a continuance to permit him to further prepare to meet Eastman's testimony. (Gov. Code, 11524; see also *Petrus v. Department of Motor Vehicles* (2011) 194 Cal.App.4th 1240, 1244.)

Moreover, contrary to the trial court's conclusion, any failure to name Eastman as an expert in the discovery process did not result in Eastman being unable to recall the name of the officer who trained him on the PAS device and its maintenance. The court's conclusion is based on a factual misperception. Eastman was *not* unable to recall the name of the officer who trained him. The transcriber of the electronic recording of the administrative hearing indicated Eastman said the name of the officer, but the transcriber could not make out the name and Eastman stated he did not know how to spell the officer's last name.

#### *A. Admissibility of the PAS Test Results*

PAS test results are admissible if (1) the device was shown to be reliable, (2) the test was properly administered, and (3) the operator was competent. (*People v. Adams* (1976) 59 Cal.App.3d 559,567, cited with approval in *People v. Williams, supra*, 28 Cal.4th at p. 414.) All three requirements were met in this case.

##### *1. The PAS Device Was Shown To Be Reliable*

Eastman testified he maintained the PAS device for over four years, after he was trained by a former officer. He kept a log showing the performance of the device used in this case. That log showed the device was tested more than 25 times in the months leading up to its use in this case. The longest time between any of the tests appears to have been eight days. In every test but one, including the test performed after the device was used with Theobald, the machine operated within what the Brea Police Department considers to be acceptable limits. In fact, the tolerance permitted by the

police department is more restrictive than that permitted by Title 17. Whereas Title 17 permits “a spread of [0.]10 in either direction” on a known test sample, the police department will recalibrate the machine if the test results vary by 0.05.<sup>3</sup> On the one occasion the device tested outside the department’s standards – the device showed a test result of 0.094, merely 0.001 outside the department’s more demanding standards, Eastman recalibrated the device. It did not need recalibration on any other occasion. The device was tested on October 30, 2009, and on the date of the incident. Each time the results were within acceptable limits. Eastman’s testimony established the reliability of the PAS device used in this matter. To the extent the trial court found the foundation lacking, the court abused its discretion.

## 2. *A Competent Operator Properly Administered the Test*

When Morouse took Theobald’s license and gave him notice his license would be suspended in 30 days, the officer was required to “immediately forward to the [DMV] a sworn report of all information relevant to the enforcement action . . . .” (§ 13380, subd. (a).) The statute defines “immediately” as “on or before the end of the fifth ordinary business day following the arrest . . . .” (*Ibid.*) The sworn report – the DS 367 form – is competent evidence to be considered in an administrative hearing on the suspension. (*McDonald v. Gutierrez* (2004) 32 Cal.4th 150, 153; § 13557.) The DS 367 form submitted to the DMV contained the arresting officer’s declaration that he (1) performed the test in accordance with the manufacturer’s guidelines and instructions, (2) received training in administering the test, (3) is competent to perform the test, and (4) the device functioned properly at the time of the test.

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<sup>3</sup> Eastman said he tests the PAS devices with a solution containing 0.100 percent alcohol. Rather than accept a test result of 0.090 or 0.110, the department recalibrates the devices if the result is lower than 0.095 or higher than 0.105.

Theobald contends the DS 367 form in this matter should not have been considered because it was not forwarded to the DMV in a timely fashion. In support of this contention he asserts the box on the form marked “For DMV Use Only” contained a stamped date of December 7, 2009, and the form bears a second stamped date of November 23, 2009, both of which fall outside section 13380’s time frame. Additionally, he points to the Brea Police Department report indicating the arresting officer’s supervisor reviewed the report on November 12, 2009, and a notation on the report stating a copy was sent to the DMV on November 14, 2009. He concedes the latter notation supports a reasonable inference the document was forwarded to DMV on November 14, 2009.

There are two flaws with Theobald’s argument. First, the statute requires the information to be forwarded to DMV by the end of the fifth “ordinary business day” following notice of an order of suspension. (§ 13380, subd. (a).) Although the Vehicle Code does not appear to contain a definition of “ordinary business day,” the Civil Code defines a business day as every day other than Sundays and holidays as provided by the Government Code. (Civ. Code, § 7 [holidays include every Sunday and such other holidays as provided by the Government Code]; Civ. Code, § 9 [all days other than those mentioned in § 7 are business days]; Gov. Code, § 6700 [list of holidays; Saturdays are not included in the list].) Theobald was arrested on Saturday, November 7, 2009. At the latest, the DS 367 form appears to have been sent to DMV on November 14, 2009, seven *actual* days after the incident. As one of those seven days was a Sunday and another was a holiday,<sup>4</sup> the form appears to have been sent to DMV on the fifth ordinary business day after the incident and was therefore timely.

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<sup>4</sup> We granted the DMV’s request that we take judicial notice of the fact that November 7, 2009 was a Saturday, November 8 was a Sunday, and Veteran’s Day was on November 11, 2009.

Second, even if the form was sent to DMV beyond the time prescribed by section 13380 Theobald cites no authority for the proposition that a late filing renders the statements contained in the form inadmissible. In *Spitze v. Zolin* (1996) 48 Cal.App.4th 1920, a case involving the untimely transmission of a chemical test result to the DMV (see former § 23157; now renumbered as § 23612, subd. (g)(1) [Stats. 1999, ch. 22, §18.4, eff. May 26, 1999]), the appellate court found noncompliance did not render the test result inadmissible. “First, no penalty or consequence is specified in the statute for breach of the time limit. Second, the Legislature has not clearly expressed an intent that the time limit imposed upon testing laboratories be mandatory instead of directory. Finally, . . . a holding that ‘shall’ in [the statute] is mandatory in effect would defeat the underlying purposes sought to be achieved by the implied consent law, which goals are entitled to preference over the interests of persons facing suspension of their driving privileges.” (*Spitze v. Zolin, supra*, 48 Cal.App.4th at pp.1927-1928.) We agree. Moreover, given the fact the form is to be sent to the DMV when a police officer notifies an individual that his or her driving privilege will be suspended in 30 days, the Legislature likely intended the transmittal requirement to provide the DMV adequate time to review the documentation prior to the date of the scheduled suspension.

Absent some indication the Legislature intended suppression when the DS 367 form is forwarded to the DMV more than five business days after notice of the impending suspension, we find suppression is not warranted. Even were we to assume the Legislature imposed the time restriction to assure the individual adequate time to prepare for his or her administrative hearing – if requested – Theobald cannot demonstrate prejudice. The officer notified him of the suspension on November 7, 2009. The administrative hearing on the suspension was held on April 21, 2010. Whether the DS 367 form was forwarded to the DMV within five days of his arrest or some date shortly thereafter, it was submitted to the DMV more than five months prior to

Theobald's hearing. He had more than sufficient time to review the documentation and prepare his case.

To the extent the timely forwarding of the DS 367 form to the DMV may have been intended to assure the form was prepared at a time when the facts were fresh in the officer's mind, the form in this matter was prepared by the officer on the same day he stopped Theobald and administered the PAS tests. Accordingly, the DS 367 form was properly considered at the administrative hearing and established the second and third requirement for admission of the PAS test results. (*People v. Adams, supra*, 59 Cal.App.3d at p. 567.)

*B. The Evidence Supports the Suspension and Does Not Support the Trial Court's Contrary Conclusion.*

The DMV record of Theobald's license showed he was on probation for a violation of section 23152. Morouse filled out the DMV approved DS 367 form (§ 13380, subd. (a)) on the date of the charged incident. The certified statement constituted admissible evidence. (Gov. Code, § 11513, subd. (c); see *Lake v. Reed, supra*, 16 Cal.4th at pp. 457-458.) That evidence demonstrated Morouse detained Theobald after observing him speeding with his right turn signal on and crossing the lane marking on the left side of the vehicle three times. Upon contacting Theobald, the officer noticed objective symptoms of intoxication: bloodshot, watery eyes, and an odor of alcohol. Theobald admitted having consumed a small bottle of scotch. Morouse had received training on the proper operation of the PAS device and was competent and qualified to operate the device. Eastman's testimony showed the device was maintained and consistently tested within the police department's regulations, regulations stricter than Title 17. Morouse administered two tests and the device functioned properly each time. The first test resulted in a 0.037 blood-alcohol content reading and the second test, administered three minutes later, resulted in a reading of 0.045 blood-alcohol content.

This evidence demonstrated the officer had a reasonable suspicion Theobald was driving under the influence or at least driving with alcohol in his system, in violation of section 23154. The PAS test corroborated Theobald's admission he had been drinking just prior to being contacted by Morouse. The 0.037 and 0.045 blood-alcohol content test results demonstrated Theobald had alcohol in his system while driving. There is no evidence to support the trial court's conclusion that the order of suspension was not supported by substantial evidence. Accordingly, we reverse.<sup>5</sup>

### III

#### DISPOSITION

The judgment is reversed. The case is remanded to the trial court with directions to enter a new order denying Theobald's petition for a writ of mandate and reinstating the DMV's suspension order.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.

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<sup>5</sup> Our decision in this matter makes it unnecessary to determine whether the trial court erred in considering Theobald's unverified petition for a writ of mandate. (See Code of Civ. Proc., §§ 1086, 1094.5.)