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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LOLA MAE WILBER, Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, Defendant and Respondent.	G045228 (Super. Ct. No. 30-2010-00365985) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed

Wayne I. McClaskey for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant Attorney General, Michael E. Whitaker and Jasmine K. Bath, Deputy Attorneys General, for Defendant and Respondent.

* * *

Lola Mae Wilber appeals from the trial court's denial of her request for a writ of mandate to direct the Department of Motor Vehicles (DMV) to rescind revocation of her driving privileges after three failed driving tests and a fourth failed test a week after the revocation. Wilber contends that after the DMV revoked her driving privilege and she declined a hearing on the matter, the DMV erred by conducting a revocation review hearing on its own motion and with her appearance and participation, but without providing her 10 days' notice of the hearing. (See Veh. Code, § 14104; all further statutory references are to this code unless noted.) Wilber contends that if she had received 10 days' notice of the hearing, she would have retained an attorney to represent her at the hearing and obtained reinstatement of her driving privilege. We conclude the contention is too speculative on the record presented, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Wilber failed her first driving test on January 5, 2010. The DMV examiner's score sheet showed she committed 27 driving "Maneuver[]" errors during the test. A passing score required no more than 20 such errors and no critical driving errors. The examiner's written comments included: "You need to improve on your visual blind spot check every time you change direction of driving (i.e., lane change turns, merging, pull[ing] in, pull[ing] out . . .)."

Wilber failed her second driving test on January 25, 2010, with a disqualifying critical driving error and more than 20 maneuver errors. The examiner's comments included "unsafe," "does not look back," "too far past limit line," "starts to go

backwards then corrects," "changes lanes w/o signal or look[ing]," and "does not yield to ped." (Original underlining.)

The DMV nevertheless issued Wilber a temporary driver's license for the three-month period of February 9, 2010, through May 9, 2010.

Wilber, however, failed her third driving test on March 2, 2010, with 24 maneuver errors. The examiner's comments included: "Need[s] to slow [down] at freeway off ramp and in residential areas," "Watch out for cars, bikes, kids," "check all cross-traffic BEFORE entering ANY intersection," "check over shoulder before lane-changes," "BLINDSPOTS," and "SIGNAL 100 feet BEFORE turn[s] and check BEFORE turning." Wilber also failed a written DMV examination on that date.

When Wilber failed her third failed driving test on March 2, the DMV personally served Wilber that day with an administrative order immediately "withdraw[ing]" her driving privilege. The order was entitled, "Order of Suspension/Revocation." The order expressly stated, "Your privilege to operate a motor vehicle is withdrawn effective March 2nd, 2010." The order included a check-marked box specifying it constituted a "Revocation" rather than a "Suspension."

The March 2 revocation order advised Wilber in boldface type, "**You have the right to request a hearing**," and specified that because she had been personally served with the order, "To request a hearing you must contact the department within . . . 10 days from the date of this order . . . ." The order also specified, "*For information regarding the hearing process*, please see the reverse side of this form." (Italics added.) The reverse side of the form, however, does not appear in the record on appeal. (See *Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1 (*Estrada*) [burden rests on appellant to provide record on appeal demonstrating error below].)

Wilber concedes she did not request a hearing within the 10-day period. She eventually retained an attorney *after events that we describe below, including a DMV review hearing held on March 9th, 2010*. On appeal, Wilber claims without any citation to the record that her attorney faxed the DMV on March 15, 2010, a request for a hearing *at which she would be represented by counsel*. Even assuming this is true, Wilber submitted the request 13 days after her license had been revoked, just outside the 10-day deadline to request a hearing.

Meanwhile, however, the DMV itself had scheduled an administrative review for March 9, 2010, and mailed Wilber on March 4, 2010, written notice of the hearing. Although Wilber later claimed she did not receive this notice until after the March 9th hearing, she appeared at the hearing on the listed day and time. The written notice of the hearing specified it concerned Wilber's "[Section] 13953 Revocation." (See § 13953 [DMV may for safety of driver or other motorists "forthwith and without hearing suspend or revoke the privilege of the person to operate a motor vehicle"].)

The hearing notice included the following paragraph: "At the hearing, you will have the opportunity to challenge the evidence in the department's records and to present evidence on your behalf. The hearing will be conducted under the authority of the Vehicle Code (commencing with Section 14100) Chapter 3 of Division 6. You are not required to have an attorney represent you; however, one may represent you at your own expense. You may also bring witnesses to testify in your behalf. Send in any evidence you will present prior to the hearing. Although an in-person hearing is scheduled, witnesses may still testify by telephone." As noted, Wilber appeared at the hearing.

As the hearing began, the hearing officer asked Wilber, "So, at this time, do you wish to proceed without legal counsel?" Wilber answered, "Yes," and added nonresponsively, "I didn't know it was necessary." When the officer asked, "[D]o you understand you have hearing rights," Wilber answered affirmatively. She answered, "No," when the hearing officer inquired, "Do you have any questions regarding those rights?" (See, e.g., § 14104 ["The notice of hearing shall . . . include a statement of the discovery rights of the . . . licensee to review the department's records prior to the hearing"].)

The hearing officer proceeded to review Wilber's three failed driving tests and the written test she failed. The hearing officer also commented, based on information in Wilber's DMV file from her opthamologist, that "you should be able to see better" than her DMV field office vision test reflected. Wilber claimed she obtained new glasses before the test, but the hearing officer observed the DMV's vision test results suggested "you're seeing worse" than she should with the corrective lenses specified in her prescription.

In reviewing Wilber's written test, the hearing officer discussed with her "one of the questions you got wrong." The officer posed the question to Wilber to reconsider her answer, and Wilber stated, "I know the answer," but gave the same wrong answer as when she previously took the test. The officer noted Wilber repeated errors on successive driving tests and asked, "[I]f they pointed that out to you on your first one, how come you didn't [correct] it on your second one?" Wilber claimed she corrected the problem on her second test and claimed that on the third test, despite her 24 marked errors, "I would have sworn that I aced that last one. I thought I did everything right."

The hearing officer observed the driving test score sheets reflected recurring problems including Wilber's failure to check over her shoulder for traffic and other safety issues, despite repeated emphasis by successive driving test examiners. Nevertheless, the officer scheduled a fourth driving test for Wilber the next day. Wilber stated, "No," when asked if she had any objection to admission into evidence of the hearing exhibits, including her failed driving test score sheets, the March 2 revocation order, and her driving record. The referral DMV provided for Wilber's fourth driving test specified as the reason for the test, "Lack of skill — Field office revocation."

Wilber failed her fourth driving test on March 10, 2010. Her test score sheet indicated a disqualifying score of 27 maneuver errors in backing up the vehicle, proceeding through intersections, merging, managing vehicle speed while turning, and in other areas of driving skill. The driving test examiner's written summary concluded, "Mrs. Wilber did not demonstrate the ability to drive safely," and the examiner's observations included "turns (right) too wide, ends turn in incorrect lane," "25 mph in a 40 mph area," and "drives 10 mph under the speed limit when traffic/road conditions do not warrant it."

On March 16, 2010, DMV issued a "Notice of Findings and Decision" confirming the field office revocation of Wilber's driving privileges on March 2, 2010. DMV's findings included the following: "A lack of skill renders you incapable of safely operating a motor vehicle," and specified, "Your privilege to operate a motor vehicle is withdrawn because: [¶] your drive test/written test results were unsatisfactory" and "You did not demonstrate the ability to safely operate a motor vehicle on 03-10-2010." The "Decision" portion of the notice stated, "Your privilege to operate a motor vehicle is withdrawn effective March 2, 2010." The notice provided that Wilber was entitled to

further departmental review, but specified: "The review is limited to an examination of the hearing report, any documentary proof submitted at the hearing, and the findings of the hearing officer or board. It will not include a personal interview or review of information not presented at the hearing."

Approximately a month later, on April 20, 2010, DMV issued a notice of decision on its departmental review, affirming that Wilber's license revocation was "proper and required." (Original capitalization modified.) The notice directed Wilber to surrender her driver's license. The notice enclosed a special instruction permit, valid for six months, that allowed Wilber to operate a motor vehicle if accompanied by and under the direct supervision of a driving instructor, provided also that the vehicle was equipped with an additional side view mirror and Wilber wore corrective lenses. The DMV's notice of decision on its departmental review also advised Wilber: "After you complete your driving lessons you may contact your local Driver Safety Office to request an interview regarding possible reinstatement of your driving privilege," conditioned on passing another driving test.

Wilber did not utilize her instruction permit to take lessons, but instead filed this administrative mandate petition in the trial court. The trial court denied the petition, observing in its minute order: "Plaintiff complains of defects in giving her timely notice of the hearing and her right to request discovery. She asserts a violation of due process as a result of these defects. She fails to state how she was prejudiced by these defects or how they affected the fairness of the hearing. On the contrary, the evidence clearly supported the Respondent's action. Granting a writ under these circumstances would amount to a per se rule of reversal for an impropriety which had no

consequence." The trial court entered judgment denying Wilber's administrative writ petition, and she now appeals.

II

DISCUSSION

A. *Wilber's Premise: Her Driving Privilege Was Not Immediately Revoked*

Wilber raises a host of challenges to the revocation of her driving privilege and the trial court's denial of her mandate petition. Her briefing is not a model of clarity, but it appears her challenges arise from a misapprehension of the date on which her driving privilege was revoked. Wilber contends her driving privilege was not revoked until after the hearing on March 9, 2010. She asserts in her opening brief: "In fact, no action of any kind was taken until 7 days after the [March 9th] hearing when on March 16, 2010, the department 'withdrew Petitioner's driving privileges' retroactive to March 2, 2010 [citation]." In other words, Wilber identifies the March 9th hearing as the determinative date on which DMV began a process to revoke her driver's license. Wilber denies the DMV already had revoked her license on March 2, 2010.

Based on this premise, Wilber contends the DMV failed to afford her 10-days' required notice before conducting the revocation hearing on March 9th, failed to provide her notice of her discovery rights for that hearing, and unknown DMV personnel engaged in a conspiracy of underhanded or misleading practices to deprive her of these rights. According to Wilber, these deceptive practices included typing in a smaller typeface near the middle-to-top right side of the notice of the March 9th hearing the words, "Heairing [*sic*] For 13953 Revocation."

According to Wilber, if the DMV had provided her with 10 days' notice of the March 9th hearing, instead of five days' notice via its March 4th mailing, she would

have had "additional time to reflect on the importance and desirability of being represented by an attorney at the hearing" and, if she had retained an attorney for the hearing, the attorney "could and would have cross[-]examined DMV's driving examiners who authored" Wilber's driving test reports. Although Wilber does not say so explicitly, she appears to assume her attorney's cross-examination of the driving examiners would have revealed Wilber was a safe driver and the DMV therefore should not have revoked her driving privilege. Wilber also suggests, but does not argue explicitly, that if she had been advised of a right to review her DMV file before the March 9th hearing, it would have prompted her to contact an attorney, who would have obtained the file and cross-examined the driving examiners concerning Wilber's performance on her driving tests. Again, her underlying assumption is that an attorney would have demonstrated through cross-examination that she was a safe driver and there was no basis to revoke her license.

B. *Wilber Fails to Show Prejudice for Any Violation of DMV's Notice Requirement*

A prominent flaw in Wilber's argument is that the record establishes her license was revoked on March 2, not at or following the hearing on March 9th, which simply confirmed the revocation. Section 13953 provides that *no* notice period, let alone 10 days, is required to revoke the driving privilege of a motorist who poses a danger to his or her own safety "or other persons upon the highways . . . ." Instead, the DMV "shall forthwith and without [a] hearing suspend or revoke the privilege of the person to operate a motor vehicle or impose reasonable terms and conditions of probation which shall be relative to the safe operation of a motor vehicle." (§ 13953.) Wilber complains that the March 2 order does not explicitly identify section 13953 as the basis for the order's immediate revocation of her driving privilege. She notes that the unknown DMV employee who filled out the order did not circle "13953" or any other Vehicle Code

section in a preprinted box labeled "VEHICLE CODE AUTHORITY SECTION." But Wilber acknowledges section 13953 is the *only* provision in the Vehicle Code that provides for immediate suspension or revocation of driving privileges without prior notice and a hearing. Accordingly, the trial court reasonably could infer the DMV relied on section 13953 to revoke Wilber's driving privilege without prior notice or a hearing.

The DMV relies on its unilateral revocation authority under section 13953, coupled with the fact Wilber did not request a hearing within 10 days of being personally served with the revocation order, to argue it was not required to provide Wilber with 10 days' notice when it chose on its own motion to conduct the review hearing it scheduled for March 9th. We disagree. Section 14100 provides for a review hearing after the DMV "has taken . . . action" under section 13953. The statute requires that the DMV "shall" conduct such a hearing if the affected person demands one within 10 days.[1]

Nothing in this statutory authorization for postrevocation hearings precludes the DMV from conducting a review hearing on its own motion, absent a request from the motorist. But nothing in the statute authorizes the DMV to dispense with the requisite notice period to the motorist before holding the hearing. To the contrary, section 14104 provides that "*[i]f*" the department grants a hearing, it "shall" provide notice to the person in a statutorily-prescribed manner, including "10 days' notice of the hearing." (Italics added.) The statutorily-prescribed notice is not dependent

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[1] Specifically, the terms of section 14100 provide, in pertinent part: "(a) Whenever the department has given notice, or *has taken* or proposes to take *action under Section* 12804.15, 13353, 13353.2, 13950, 13951, 13952, or *13953*, the person receiving the notice or subject to the action may, within 10 days, demand a hearing which shall be granted, except [when the DMV's action is mandatory or the person has previously declined a hearing]. [¶] (b) An application for a hearing does not stay the action by the department for which the notice is given." (Italics added.)

on whether the motorist or the DMV initiates the hearing, but rather on the fact a hearing is conducted at all. Once the department "grants a hearing," it must abide by the notice requirement. (*Ibid.*) Specifically, the statute provides: "If the department grants a hearing as provided in this chapter, it shall fix a time and place for the hearing and shall give 10 days' notice of the hearing to the applicant or licensee. The notice of the hearing shall also include a statement of the discovery rights of the applicant or licensee to review the department's records prior to the hearing." (*Ibid.*)

The heart of Wilber's appeal is her complaint the DMV provided her neither with 10 days' notice of the March 9th hearing, nor notice of her right to review the department's records before the hearing. The DMV's March 4th notice of the March 9th hearing obviously did not meet the 10-day requirement. Nor was the 10-day period satisfied even if we assume DMV orally notified Wilber of the hearing on March 2, the day it revoked her license.

Regarding Wilber's right of record review, however, it is axiomatic that on appeal we must make all reasonable inferences in favor of the judgment (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564) and it is the appellant's burden on appeal to provide not only a complete record, but a record that demonstrates error (*Estrada*, *supra*, 71 Cal.App.4th at p. 620, fn. 1). (See, e.g., *Crummer v. Zalk* (1967) 248 Cal.App.2d 794, 796 [an incomplete record is not the same as demonstrating error].) Here, as noted, the March 2 revocation order personally served on Wilber, and which she acknowledged receiving, stated that the reverse side of that form provided the pertinent "information regarding the hearing process." We must infer in support of the judgment that the hearing information on the reverse side of the form included notice of Wilber's right to

review her DMV file before the hearing. (See also Evid. Code, § 664 [presumption that public officials perform their duties].)

In any event, assuming arguendo Wilber did not receive notice of her file inspection right and given she did not receive 10 days' notice of the March 9th hearing, it remained Wilber's burden to demonstrate prejudice from these errors. (Cal. Const., art. 6, § 13.) Wilber claims DMV's failures and omissions constituted a denial of due process, but the purpose of notice and the core requirement of due process is the opportunity to be heard. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) Wilber does not deny *she* declined this opportunity by declining to request a hearing. Additionally, Wilber appeared at the hearing DMV scheduled for her, and she explained there her position regarding the revocation of her license (it was unwarranted because she "did everything right" on her driving tests). She did not raise any objection on notice or other grounds at the March 9th hearing, and "[t]he general rule is that an issue not raised at an administrative tribunal may not be raised in subsequent judicial proceedings." (*Chevrolet Motor Division v. New Motor Vehicle Bd.* (1983) 146 Cal.App.3d 533, 539.)

Wilber suggests she would not have made these missteps and she would have been better represented with an attorney at her side. She contends she would have requested a new hearing with counsel or appeared at the March 9th hearing with counsel if DMV had provided her the full 10 days' notice of the March 9th hearing. Again, however, it is every appellant's burden to demonstrate prejudice, and Wilber's claim borders on speculative. She presents no evidence she attempted to secure an attorney for the March 9th hearing but was unable to do so because of time constraints. Indeed, she expressed surprise at the hearing officer's inquiry at the March 9th hearing about whether she had an attorney, suggesting she was not exploring this avenue and had ignored the

notice in DMV's March 4th advisement that she could, but was not required to, retain one for the hearing.

Finally, Wilber does not establish any likelihood an attorney would have made a difference in the outcome of the proceedings if she had 10 full days to obtain one and also received notice of her right to obtain her DMV file. She argues the attorney could have called and cross-examined her driving test examiners. But the record indicates Wilber failed a written test and four different driving tests with four different examiners, and it is unlikely that discrediting any one examiner or test would have prevented revocation of her license. She repeated the same errors from test to test, and received disqualifying scores on each of the tests, confirming the conclusion in each that she was unsafe driver.

III

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.