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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ENOC VERDIN,

Plaintiff and Respondent,

v.

GEORGE VALVERDE, as Director, etc.,

Defendant and Appellant.

G045333

(Super. Ct. No. 30-2010-00357346)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Linda S. Marks, Judge. Affirmed.

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 Appellant.

Law Offices of Chad R. Maddox and Chad R. Maddox for Plaintiff and
Respondent.

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INTRODUCTION

Defendant George Valverde, as Director of the Department of Motor Vehicles (the DMV), appeals after the trial court issued a writ of mandamus commanding the DMV to set aside the suspension of plaintiff Enoc Verdin's driving privilege. The DMV contends Verdin produced insufficient evidence to rebut the presumption established under Vehicle Code section 23152, subdivision (b), that he had driven with a blood alcohol concentration of at least 0.08 percent. (All further statutory references are to the Vehicle Code.) Section 23152, subdivision (b) provides a blood test result from a blood sample taken within three hours after driving that shows a blood alcohol concentration of 0.08 percent or more creates the rebuttable presumption the driver had a blood alcohol concentration of 0.08 percent or more at the time of driving. Testing conducted on a blood sample taken from Verdin about one hour after he stopped driving showed he had a blood alcohol concentration of 0.08 percent. The DMV also argues insufficient evidence otherwise supported the issuance of the writ of mandamus.

We affirm. For the reasons we will explain in detail *post*, substantial evidence supported the trial court's determination that Verdin's expert witness's testimony at the administrative hearing rebutted the presumption of section 23152, subdivision (b). The DMV did not present any evidence responding to Verdin's expert witness's testimony and that testimony was also sufficient to support the issuance of the writ of mandamus.

FACTS

At 2:03 a.m. on July 12, 2008, a Costa Mesa police officer, identified in the record as Officer M. Balsis, was on patrol when he saw a white truck run through a red light. Balsis conducted a traffic stop and contacted Verdin, the driver of the white truck. Balsis noticed Verdin showed "objective symptoms of intoxication," including bloodshot and watery eyes and slurred speech. Balsis smelled the odor of an alcoholic beverage on Verdin's breath and noted nystagmus was present.

In light of the signs of intoxication Verdin demonstrated, Balsis requested the assistance of the Costa Mesa Police Department's driving under the influence team; two officers, identified in the record as Officer Rieckhof and Officer Dibble, responded to the location of the traffic stop. Rieckhof similarly observed that Verdin's eyes appeared bloodshot and watery and his breath smelled of an alcoholic beverage. He noticed Verdin spoke with a slight slur and Verdin's movements were slow and sluggish. Rieckhof conducted a horizontal gaze nystagmus test on Verdin's eyes and noted Verdin lacked "smooth pursuit" in both eyes. Rieckhof also administered standardized field sobriety tests to Verdin.

Verdin admitted he drank three 12-ounce beers that night. He stated he began drinking at 7:00 p.m. and stopped drinking at 10:00 p.m. Verdin agreed to blow into a preliminary alcohol screening (PAS) device. The first test showed Verdin had a 0.08 percent blood alcohol concentration at 2:38 a.m. and the second test showed a 0.08 percent blood alcohol concentration at 2:42 a.m.

Rieckhof concluded Verdin had been driving under the influence of alcohol and placed him under arrest. After Verdin submitted to a blood test, a blood sample was taken from him at 3:09 a.m. The analysis of Verdin's blood sample showed blood alcohol concentrations of 0.085 percent and 0.088 percent, which were averaged to determine a final blood alcohol concentration of 0.08 percent. Verdin surrendered his driver's license.

BACKGROUND

The DMV held an administrative review hearing at which the following documents were admitted into evidence: (1) Rieckhof's sworn statement and the suspension order and temporary driver license; (2) Rieckhof and Dibble's arrest report; (3) the forensic alcohol examination report; and (4) Verdin's driving record. Verdin requested that the hearing be continued because his expert witness, Leo Summerhays, had

not yet reviewed the breath test results and was not available to appear at the scheduled hearing.

On the date scheduled for the continued hearing, Verdin requested another continuance because Summerhays was under subpoena to testify in court in a criminal case. Verdin's continuance request was denied and the hearing officer issued the decision suspending Verdin's driving privilege. Verdin filed a petition for writ of mandate challenging the hearing officer's denial of his request for a further continuance of the hearing. The trial court granted Verdin's petition and directed the DMV to reopen the hearing to permit Summerhays to testify.

The administrative hearing was reopened and Summerhays was permitted to testify as Verdin's expert witness. Summerhays's qualifications to testify as an expert witness were not questioned at the hearing. Summerhays testified that his opinion was based on his review of the DMV's documentary evidence. Summerhays could not state with a scientific certainty Verdin's exact blood alcohol concentration at the time Verdin stopped driving at 2:03 a.m. on July 12, 2008, but, based on the breath test and blood test results, it was Summerhays's expert opinion that Verdin's blood alcohol concentration was less than 0.08 percent at that time. Summerhays explained that as the alcohol absorption and elimination processes "continue[d], there's less and less [alcohol] left to be absorbed." He explained that consequently, the rate at which an individual's blood alcohol concentration rises slows down and eventually plateaus for 15 to 30 minutes.

Summerhays testified: "[T]he time gap between the [breath tests] and the blood [test] is approximately 30 minutes. Okay? So that would—and since you have .08s and the high .08s for the blood—let me say that again. At the time of the [breath tests] you got a pair of 08s. At the time of the blood draw the level was 085/.088. So you have .08s all along there. So over a half an hour period of time, [breath tests] to blood [test], it's .08. That's what—since you have the same level, it would suggest that the .08 value is the plateau level since there's that 30-minute time gap that happens to match

nicely with—with what a typical plateau duration is. [¶] And so that means that if you're highest level is a .08, let's say a mid .08, .08 and change, the question is, if you go back 35 minutes prior to the [breath] test[s], what is the blood alcohol level doing? Well, if the—if the duration of the plateau is only 30 minutes, then that means the plateau began when the [breath] test[s] w[ere] given. And so prior to that what's happening? The blood alcohol level's going up. That means the blood alcohol level was going up for a good 35 minutes prior to that, from 2:03 to 2:38. [¶] Okay. So, in 35 minutes, the question is, would the blood alcohol level, given that it was going up, would it have gone up at least a half or a full point. And the answer is yes. Okay? Because that's a very slow rate of rise. One lousy point, meaning a .01, in 35 minutes is a very slow rate of rise. So, therefore, it's clear to me that the blood alcohol level would have had to have risen at least that much. And so that's why I can be very confident that the level was below .08 at 2:03, 35 minutes prior to the [breath] test[s].”

The hearing officer determined that Summerhays's expert testimony was insufficient to rebut the presumption under section 23152, subdivision (b) that Verdin's blood alcohol concentration was at least 0.08 percent because blood drawn within three hours after driving showed a blood alcohol concentration of 0.08 percent. The hearing officer reimposed the suspension of Verdin's driver's license.

Verdin filed a petition for a peremptory writ of mandamus commanding the DMV to set aside and revoke its order reimposing the suspension of Verdin's driving privilege. The trial court granted Verdin's writ petition.

The trial court's minute order stated: “Court reviews the evidence presented at the administrative hearing using its independent judgment. The DMV bears the burden of proof that a driver operating a vehicle with blood alcohol level of .08% or higher. While Petitioner exhibited some objective signs of intoxication, his test results were .08% on the [breath] test[s] and .08% on the subsequent blood test which renders this a very close case on the issue of whether Petitioner was .08% when he was driving.

Petitioner’s expert testified that based on the [breath] and blood test results, it was his opinion that Petitioner was less than .08% at the time of driving. [¶] While Petitioner’s expert admitted in response to the hypothetical presented by the hearing officer that a person who stops drinking at 10 p.m. and tested .08% on a chemical test at 3:09 a.m. would have been .09 or .10 at 2 a.m. (time of driving), the hypothetical omitted the [breath test] results in the field. Therefore, the hypothetical is not persuasive. [¶] No expert testimony refuting conclusions of Petitioner’s expert was presented, and based on the preponderance of evidence the Court will grant the Petition for Writ of Mandate. Petitioner’s request for attorney fees is denied as the actions of the [DMV] were not arbitrary or capricious. Petitioner is awarded his costs.”

Judgment was entered. The DMV appealed.¹

DISCUSSION

The trial court exercises its independent judgment when ruling on a writ petition that challenges an order suspending a driver’s license. (*Lake v. Reed* (1997) 16 Cal.4th 448, 456.) “On appeal, we ‘need only review the record to determine whether the trial court’s findings are supported by substantial evidence.’ [Citation.] ““We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court’s decision. [Citations.] . . . We may overturn the trial court’s factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings. [Citation.]”” (*Id.* at p. 457; see *Glatman v. Valverde* (2006) 146

¹ In his respondent’s brief, Verdin cites a California appellate court opinion that has not been certified for publication, in support of his argument the presumption under section 23152, subdivision (b) “disappeared when [the expert] testified and provided another way to interpret [plaintiff’s] blood test.” Verdin’s citation to this unpublished opinion violates rule 8.1115(a) of the California Rules of Court, which states: “[A]n opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.”

Cal.App.4th 700, 703, fn. 2; *Borger v. Department of Motor Vehicles* (2011) 192 Cal.App.4th 1118, 1121 [“An appellate court ordinarily reviews the record to determine whether the trial court’s findings concerning BAC [(blood alcohol concentration)] are supported by substantial evidence”].) We review questions of law de novo. (*Borger v. Department of Motor Vehicles, supra*, at p. 1121.)

In the opening brief, the DMV argues the trial court erred by granting Verdin’s writ petition because Summerhays’s expert testimony was insufficient to rebut the presumption set forth in section 23152, subdivision (b), that Verdin drove with a blood alcohol concentration of at least 0.08 percent on July 12, 2008. The DMV further argues that in any event, Summerhays’s “conclusive and speculative expert testimony did not rise to the level of ‘substantial evidence’” to support the judgment. For the reasons we will explain, the DMV’s arguments lack merit in light of the applicable standard of review and the record before us.

“‘When a chemical test shows a driver has a blood-alcohol level of 0.08 percent or more within three hours of driving, section 23152, subdivision (b) establishes a rebuttable presumption that the driver also exceeded the permissible blood-alcohol level when driving. This presumption applies in administrative license suspension proceedings. [Citations.]’ [Citation.]” (*Borger v. Department of Motor Vehicles, supra*, 192 Cal.App.4th at p. 1121.)²

² Section 23152, subdivision (b) provides: “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. [¶] For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person’s blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. [¶] In any prosecution under this subdivision, 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.”

At the hearing, the DMV was required to prove Verdin's blood alcohol concentration was 0.08 percent or higher at the time he was driving. (*Lake v. Reed*, *supra*, 16 Cal.4th at p. 462.) At the administrative hearing, the DMV produced documentary evidence showing (1) Officer Balsis saw Verdin driving a truck at 2:03 a.m. on July 12, 2008; (2) breath tests conducted at 2:38 a.m. and 2:42 a.m. on July 12, respectively, showed Verdin had a blood alcohol concentration of 0.08 percent; and (3) tests conducted on a blood sample taken from Verdin at 3:09 a.m. on July 12 showed blood alcohol concentrations of 0.085 percent and 0.088 percent. The DMV's blood test evidence showed Verdin had a blood alcohol concentration of at least 0.08 percent within three hours after driving, and thus triggered the rebuttable presumption set forth in section 23152, subdivision (b) that Verdin had at least a 0.08 percent blood alcohol concentration at the time he was driving.

At the hearing, Verdin did not challenge the methodology, instrumentality, or integrity of the breath and blood tests, or the results of those tests.³ Instead, Verdin produced the testimony of expert witness Summerhays, explaining how the breath and blood test results showed Verdin's blood alcohol concentration was rising at the time he was driving. Summerhays explained that as the breath tests administered at 2:38 a.m. and 2:42 a.m. each showed Verdin had a blood alcohol concentration of 0.08 percent, Verdin's blood alcohol concentration had to be less than 0.08 percent at the time he was stopped more than 30 minutes earlier, at 2:03 a.m.

Summerhays's expert opinion constituted sufficient evidence to rebut the presumption under section 23152, subdivision (b) that Verdin had driven with a blood

³ This case is therefore distinguishable from *Borger v. Department of Motor Vehicles*, *supra*, 192 Cal.App.4th 1118, in which the appellate court held the trial court erred in ruling "that the presumptive validity of the BAC [(blood alcohol concentration)] test results could be rebutted by testimony that all 'Intoxilyzer 5000' results have an inherent margin of error and might give a high BAC reading" (*id.* at p. 1123) and "effectively remove this breath testing device from the Department of Motor Vehicle's 'approved instrument' list" (*id.* at p. 1122).

alcohol concentration of 0.08 percent. The DMV did not produce any expert witness testimony disputing Summerhays's expert opinion. The DMV did not otherwise produce evidence explaining how the results of the breath tests, taken over 30 minutes after Verdin stopped driving, and of the blood test, performed on a sample of Verdin's blood drawn an hour after he was driving, show that he had a blood alcohol concentration of at least 0.08 at the time he was driving.

The record does not show Summerhays's expert opinion was incredible or inherently unreliable. Summerhays explained his expert opinion was solely based on the DMV's evidence of the breath and blood test results. Summerhays's expert opinion that Verdin's blood alcohol concentration was still rising at the time he was driving and at least up until the breath tests were administered is particularly significant in light of the fact that Verdin was at the blood alcohol concentration threshold of 0.08 over 30 minutes after he stopped driving.

The trial court was permitted to rely on Summerhays's testimony as substantial evidence in concluding the DMV failed to carry its burden, by a preponderance of the evidence, that Verdin drove with a blood alcohol concentration of at least 0.08 percent. The court did not err by granting the writ petition.

In the opening brief, the DMV argues Summerhays's expert testimony was "conclusive and speculative" and thus did not rise to the level of substantial evidence. As discussed *ante*, Summerhays relied on the DMV's evidence of breath and blood test results in forming his expert opinion that Verdin's blood alcohol concentration was rising when he was driving and for some time period thereafter. An expert may rely upon the scientific tests performed by other experts in forming his or her opinion. (See *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 863; *People v. Carpenter* (1997) 15 Cal.4th 312, 403 ["An expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose"].)

The DMV also argues: “In formulating his opinion, Summerhays misconstrued the significance of the PAS test result of .08%. . . . But a PAS device is to be used, ‘. . . to detect the presence of alcohol, rather than a particular blood-alcohol concentration.’” The DMV, however, failed to produce evidence refuting Summerhays’s testimony that breath test results can be relied upon to determine whether a blood alcohol concentration was in the rising stage.

The DMV also challenges Summerhays’s expert opinion because he had not interviewed or performed any physical tests on Verdin. But Summerhays’s expert opinion was based on the breath and blood alcohol concentration test results and that the duration of a plateau falls within the range of 15 to 30 minutes. He did not need to rely on any other factors or circumstances to opine that Verdin’s blood alcohol concentration was in the rising stage.

We emphasize that the DMV did not present any evidence challenging Summerhays’s expert opinion. On this record and applying the standard of review, we must affirm.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.