NOT DESIGNATED FOR PUBLICATION

No. 117,035

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MICHAEL CREECY,
Appellant,

v.

KANSAS DEPARTMENT OF REVENUE,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed December 15, 2017. Affirmed.

Jay Norton, of Norton Hare, L.L.C., of Overland Park, for appellant.

Adam D. King, of Kansas Department of Revenue, for appellee.

Before HILL, P.J., ATCHESON and SCHROEDER, JJ.

PER CURIAM: The Kansas Department of Revenue suspended Michael Creecy's driver's license because he refused to take a breath test to measure his blood-alcohol level immediately after he was arrested for driving under the influence. The Johnson County District Court affirmed the suspension following a bench trial. Creecy has appealed on multiple grounds. We find no error in the district court's determination and uphold the suspension.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal, Creecy does not dispute that Gardner Police Officer David Rollf had a reasonable suspicion to stop him for driving under the influence in violation of K.S.A. 2014 Supp. 8-1567 shortly before midnight on October 8, 2014, and then developed reasonable grounds to arrest him and, thus, to request a breath test to measure his blood-alcohol level.

After being transported to the Gardner police station, Creecy displayed symptoms of what Rollf characterized as a panic attack. Rollf has EMT training and has worked as a first responder in that capacity. Creecy declined medical attention. But Rollf then decided to request a paramedic team for Creecy. The paramedics checked Creecy and offered to take him to the hospital. He declined.

Rollf then went over the implied consent advisory with Creecy and asked whether he would submit to a breath test. After looking over the form, Creecy ostensibly agreed to the test. Creecy blew several times into the breath test machine, but the machine recorded the air sample as insufficient. Rollf restarted the testing sequence to permit Creecy another try. Creecy again blew several times, and the machine again recorded an inadequate sample. At trial, Rollf testified he believed Creecy was not trying to provide a sufficient sample, since he took shallower breaths during the testing than he otherwise did. Rollf informed Creecy that he considered the insufficient breath samples a test refusal. Creecy replied that he was not refusing to take the test. Rollf and Creecy had differing accounts of whether Creecy requested a third chance. We discuss that evidence in our analysis of the issues on appeal.

Rollf certified a test refusal on the Department of Revenue's DC-27 form and notified Creecy that his driving privileges were suspended. As Creecy stood up to go to the jail, he fell, apparently unconscious, and began having a seizure. Rollf made a second

call for medical assistance. Creecy regained consciousness in a few minutes and was briefly disoriented. When medical personnel arrived, Rollf insisted Creecy be taken to the hospital notwithstanding his protests. Rollf offered Creecy the opportunity to submit to an evidentiary blood test, using a sample drawn by the paramedics, as a substitute for the breath test. According to Rollf, Creecy refused. At trial, Creecy disclaimed any recollection of refusing a blood test.

The Department of Revenue suspended Creecy's driver's license based on a refusal to take the breath test. Creecy requested and received a hearing on the suspension in front of an administrative law judge in late 2014. The ALJ upheld the suspension. Creecy filed a petition for judicial review in March 2015, which entails a de novo trial in the district court. The district court heard the matter about 15 months later. Rollf and Creecy testified, and the district court reviewed the administrative record and video recordings of various relevant events, including the circumstances of the breath testing at the police station. After receiving briefs, the district court issued a written decision and journal entry of judgment in late 2016 upholding the suspension of Creecy's driver's license. Creecy has appealed.

LEGAL ANALYSIS

We take up the points on appeal essentially as Creecy has raised them.

•At trial, Creecy offered evidence that he suffers from asthma and asserted he could not provide an adequate breath sample because he was having an asthma attack at the police station. If correct, that likely would be a defense to the suspension. See K.S.A. 2014 Supp. 8-1001(q) (failure to provide adequate breath sample may be excused if result of medical condition unrelated to ingestion of intoxicants). The point presents a factual dispute entrusted to the district court's determination. The district court decided against Creecy, and we review only to determine if substantial evidence supports that conclusion.

See K.S.A. 2014 Supp. 60-252(a)(5) (in bench tried case, district court's findings of fact may be set aside only if clearly erroneous, giving due regard to credibility determinations).

Significant evidence supported the district court's determination that Creecy did not have an asthma attack at the police station. Creecy never said as much at the time. Rollf testified that he suffers from asthma. Based on that background and his EMT training, Rollf said he did not assess Creecy as having an asthma attack. None of the paramedics who responded to the police station treated Creecy for an acute asthma flare-up. Rollf also testified that Creecy noticeably diminished his breathing as he took the breath test, undercutting a medical explanation for the inadequate air samples. Finally, on this issue, the district court found that Rollf expressly offered Creecy the opportunity to take a blood test and Creecy refused. Creecy's refusal of the blood test circumstantially supports the conclusion he believed he would fail the test. In turn, that also supports a conclusion Creecy deliberately refused to produce a sufficient air sample because he similarly believed he would fail the breath test. Cf. *Chambers v. Kansas Department of Revenue*, No. 115,141, 2017 WL 1035442, at *4 (Kan. App. 2017) (unpublished opinion) (refusal to take preliminary breath test or to perform standard field sobriety tests properly considered as evidence driver believes he or she is intoxicated and would fail tests).

The district court properly rejected Creecy's claim he was suffering from a medical condition that prevented him from completing the breath test.

•At trial, Creecy asserted he immediately rescinded his implied refusals based on giving insufficient breath samples and then offered to take a third breath test. An initial test refusal may be rescinded if certain conditions are met. See *Standish v. Department of Revenue*, 235 Kan. 900, 902, 683 P.2d 1276 (1984).

"To be effective, the subsequent consent must be made:

"(1) within a very short and reasonable time after the prior first refusal;

"(2) when a test administered upon the subsequent consent would still be accurate;

"(3) when testing equipment is still readily available;

"(4) when honoring the request will result in no substantial inconvenience or expense to the police; and

"(5) when the individual requesting the test has been in the custody of the arresting officer and under observation for the whole time since arrest." *Standish*, 235 Kan. at 902-03.

The right to rescind an initial test refusal has been extended to an implied refusal based on deliberately providing a deficient sample. See *State v. May*, 293 Kan. 858, 866-67, 269 P.3d 1260 (2012).

This, too, presents a fact issue. Creecy testified that he "believed" he told Rollf that he would take a third breath test after Rollf said he was going to treat the first two failures as a refusal. Rollf testified he did not recall if Creecy offered to do so. The district court did not directly resolve this conflict. But the district court adopted the Department of Revenue's proposed findings and conclusions, as presented in the agency's pretrial brief. Those findings do *not* include a determination that Creecy asked to take a third breath test after Rollf informed him he was being treated as having refused. The omission effectively amounts to a finding against Creecy, since he bore the burden of proof. K.S.A. 2014 Supp. 8-1020(q)

A contrary finding that Creecy did make the request also would be inconsistent with his position that he could not provide a sufficient breath sample because of his asthma—there would be no reason for him to presume he could do better on a third attempt in the midst of an asthma attack. An offer to take a third breath test, likewise, would be inconsistent with Creecy's refusal to take a blood test.

There was sufficient evidence to support the district court's implicit finding incorporated from the Department's pretrial submission that Creecy did not ask to take a third breath test. Creecy has failed to show he rescinded the statutory refusal based on his deliberate failure to provide adequate air samples.

• Creecy contends the standard DC-70 form Rollf used to inform him of his rights and obligations associated with testing of his blood-alcohol level failed to substantially conform to K.S.A. 2014 Supp. 8-1001 because the form refers to an "evidentiary" test and that term doesn't sufficiently distinguish between a preliminary breath test and a postarrest breath test. A law enforcement officer must inform a driver arrested for DUI of statutorily designated aspects of the Kansas Implied Consent Law, as outlined in K.S.A. 2014 Supp. 8-1001(k), and certain legal ramifications associated with blood-alcohol testing. *City of Overland Park v. Lull*, 51 Kan. App. 2d 588, 591, 349 P.3d 1278 (2015). Although the requirement that law enforcement officers inform drivers is mandatory, the content of the notice is legally sufficient if it substantially conforms to the governing statutes. *Barnhart v. Kansas Dept. of Revenue*, 243 Kan. 209, 213, 755 P.2d 1337 (1988); *Lull*, 51 Kan. App. 2d at 591.

This issue requires us to construe statutory language and the wording of the DC-70 form and, therefore, presents a question of law.

Creecy questions that portion of the DC-70 form outlining penalties attached to a test refusal. The term "evidentiary test," as used in that part of the DC-70, sufficiently distinguishes a postarrest blood-alcohol test from a preliminary breath test. The latter might be fairly termed an "investigatory test," since it is used to establish grounds for a DUI arrest and can be admitted in pretrial proceedings only for that limited purpose. It is off-limits as evidence in a DUI trial in contrast to the results of a postarrest test. Another panel of this court has drawn that distinction with respect to the same DC-70 language. *Chalfant v. Kansas Dept. of Revenue*, No. 112,863, 2015 WL 6620554, at *2 (Kan. App.

2015) (unpublished opinion). We suppose, too, we might invoke the axiom that everyone is presumed to know the law. See *State v. Cook*, 286 Kan. 766, 775, 187 P.3d 1283 (2008). Buoyed by that admittedly fictive presumption, we can say that a person would recognize the term "evidentiary test" to mean a postarrest blood-alcohol test rather than a preliminary breath test.

Even if the term were otherwise less than crystal clear, the DC-70 still substantially conformed to the law. The form's language isn't so much incorrect as it tends toward the obscure. Creecy's complaint here is the failure of the form to correctly state the law. The form substantially complies on that score. If he were complaining that the language can't be characterized as plain English, he would have a valid point, although not necessarily one with any legal significance in this case.

Creecy relies on *Meigs v. Kansas Dept. of Revenue*, 251 Kan. 677, 840 P.2d 448 (1992), to bolster his argument, but the case is distinguishable. There, the officer used an advisory form that failed to take into account a recent statutory amendment and patently misinformed the driver that the penalty for a test refusal was a 180-day suspension of driving privileges rather than a one-year suspension. The court recognized the clear legal error might induce drivers to refuse a test in light of the understated consequences for that decision. 251 Kan. at 678-80. As we have explained we have no comparable deficiency here.

The *Meigs* court indicated that even substantial compliance might be inadequate if the driver could show actual prejudice as a result of a technically errant representation in the DC-70 form. 251 Kan. at 682. But Creecy premises his position on the lack of substantial compliance and, not surprisingly, doesn't argue actual prejudice. The purported deficiency he attributes to the DC-70 would impermissibly expand the applicability of the penalty for refusing a blood-alcohol test, presumably inducing more

drivers to consent to blood-alcohol testing. But Creecy repeatedly refused any testing, so he would not have been disadvantaged by the purported error in the form's language.

Creecy is not entitled to any relief based on the content of the DC-70 form.

• Creecy asserts the DC-27 form, certifying the test refusal, was not personally served on him. As provided in K.S.A. 2014 Supp. 8-1002(c), the law enforcement officer directing that a blood-alcohol test be done must serve a copy of the DC-27 on the driver. We review the issue using a bifurcated standard crediting the district court's resolution of any disputed facts and then determining whether the factual findings lend substantial support to the ultimate legal conclusion on service. *Gudenkauf v. Kansas Dept. of Revenue*, 35 Kan. App. 2d 682, 683, 133 P.3d 838 (2006). We review that legal conclusion without limitation in light of the factual findings. 35 Kan. App. 2d at 683.

Based on a legislative amendment to K.S.A. 8-1001 providing that the statutes governing testing are to be treated as remedial and, therefore, should be given a liberal construction "to promote public health, safety[,] and welfare," this court has repeatedly held that substantial compliance with the requirements for serving a DC-27 form is legally sufficient. See, e.g., *Byrd v. Kansas Dept. of Revenue*, 43 Kan. App. 2d 145, 153-54, 221 P.3d 1168 (2010), *aff'd* 295 Kan. 900, 287 P.3d 232 (2012); *Pappan v. Kansas Dept. of Revenue*, No. 112,677, 2016 WL 1545650, at *5 (Kan. App. 2016) (unpublished opinion) (relying in part on *Byrd*); *Fraser v. Kansas Department of Revenue*, No. 110,817, 2014 WL 7152337, at *6-7 (Kan. App. 2014) (unpublished opinion); *Kugler v. Kansas Dept. of Revenue*, No. 106,410, 2012 WL 2045379, at *3-4 (Kan. App. 2012) (unpublished opinion); *Snyder v. Kansas Dept. of Revenue*, No. 103,767, 2011 WL 1196917, at *2-3 (Kan. App. 2011) (unpublished opinion). Consistent with those cases, we apply a substantial compliance test here.

The evidence showed that Rollf gave Creecy a copy of the DC-27 form, and Creecy looked the form over with some deliberation. Rollf then retrieved the form, so that it could be included among Creecy's belongings during the booking process. But because of the medical emergency, Creecy was never booked into jail and, instead, was transported to a hospital. A video recording introduced at trial shows an unidentified police officer placing the DC-27 in the ambulance next to Creecy, along with his personal property, just before the trip to the hospital. Under the circumstances, service of the DC-27 form on Creecy substantially complied with K.S.A. 2014 Supp. 8-1002(c).

•Creecy contends the $50 fee drivers must pay to get administrative hearings on their license suspensions amounts to a categorical deprivation of their constitutionally protected due process rights. As we understand Creecy's argument, he submits that a fee in any amount and most certainly a fee of $50 offends the Due Process Clause of the Fourteenth Amendment to the United States Constitution and imposes an impermissible burden on a property right. We do not find the fee to be unconstitutional in the way framed by Creecy's argument.

Under K.S.A. 2014 Supp. 8-1020(d)(2), the Legislature requires anyone requesting an administrative hearing challenging the suspension of his or her driver's license to pay a $50 fee. The fee must be submitted with the hearing request within 14 days after the Department of Revenue issues the suspension order. The statute provides neither any exceptions to the payment nor any mechanism for refunding the fee to a successful challenger. An administrative hearing is a mandatory prerequisite for judicial review of a suspension order, as Creecy obtained here. Creecy paid the $50 fee and does not claim to be indigent, such that the fee imposed an undue financial hardship on him

Although the Kansas Supreme Court has characterized a driver's license as a privilege, it recognizes the privilege to be of sufficient magnitude and importance in a mobile, modern society to entail a right triggering constitutional due process protections.

Kempke v. Kansas Dept. of Revenue, 281 Kan. 770, Syl. ¶ 2, 133 P.3d 104 (2006) (due process protections attach to driver's license suspension proceedings); *State v. Bowie*, 268 Kan. 794, Syl. ¶ 1, 999 P.2d 947 (2000) (driving deemed a privilege). In *Kempke*, the court held that a prompt, if somewhat limited, administrative hearing combined with the opportunity for a broader de novo trial in the district court satisfies the Fourteenth Amendment, especially since the driver retains a temporary license during those proceedings. 281 Kan. at 791-97.

The Kansas appellate courts have been circumspect about whether a driver's license reflects a property right or a liberty interest for purposes of Fourteenth Amendment due process protections. See *Kempke*, 281 Kan. 770, Syl. ¶ 2 (driver's license confers "important interests" to which procedural due process protections apply); see also *DeLong v. Kansas Dept. of Revenue*, 45 Kan. App. 2d 454, 458, 252 P.3d 582 (2011) (noting ambiguity in judicial characterization of driver's license as property right or liberty interest). The United States Supreme Court has treated driver's licenses to be in the nature of property rights, likening them to welfare benefits for due process purposes. *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) (recognizing due process rights attach to driver's licenses and likening the protected interest to wages seized through garnishment proceedings, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341-42, 89 S. Ct. 1820, 23 L. Ed. 2d 349 [1969] [property interest], and termination of welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8, 90 S. Ct. 1011, 25 L. Ed. 2d 287 [1970] [property interest]).

The question for us, then, is whether a fee assessment of $50 for the initial administrative hearing in and of itself rises to the level of a constitutional violation by impermissibly burdening Creecy's due process rights to be heard in a meaningful way before losing his driver's license. See *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" [Citation

omitted.]); *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (The Due Process Clause "at a minimum" requires that "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). The parties have identified no controlling authority addressing this particular issue. The Kansas appellate courts have not considered the administrative hearing fee in K.S.A. 2014 Supp. 8-1020(d)(2). The United States Supreme Court has occasionally weighed the constitutionality of different kinds of fee assessments, but none of those cases is legally identical or even tightly analogous to the fee assessed in K.S.A. 2014 Supp. 8-1020(d)(2).

For example, in *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), the Court held that a state could assess a court filing fee for divorce actions only if it included an exemption or waiver for indigent litigants. The Court recognized marriage and the dissolution of marriage to be components of a fundamental right. And a court action offered the only means to end a civil marriage. The process, therefore, could not be closed to citizens simply because of an inability to pay a filing fee for access to the courts. 401 U.S. at 382-83. Similarly, in *M.L.B. v. S.L.J.*, 519 U.S. 102, 106-07, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996), the Court held a Mississippi statute requiring parties to pay for hearing transcripts as a condition of appealing the termination of their parental rights violated due process protections of indigent litigants by impermissibly burdening their fundamental right to parent their children. Given the nature of the right, Mississippi had to provide a bypass for indigent parties to obtain the transcripts without cost.

The Court came to a different conclusion in considering filing fees for personal bankruptcies. *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973). At the time, those fees had to be paid before a person could obtain a final discharge of debts in bankruptcy court. The Court found the fees comported with the Due Process Clause because citizens have no constitutional right to shed their debts through judicial proceedings and there are alternative ways of curtailing or adjusting financial

obligations with creditors. 409 U.S. at 444-45. The fees, therefore, did not have to be excused for indigents wishing to file for bankruptcy.

Those cases are distinguishable based on the interests at stake. The decisions in both *Boddie* and *M.L.B.* depend heavily on the fundamental character of the rights burdened by the fees. A driver's license does not reflect a right of that dimension. But a driver's license, particularly as a grant of authority or permission from the government, arguably commands greater due process protection than contractual rights commonly at play in personal bankruptcies. And there are no means apart from the mandated administrative and judicial review to preserve driving privileges in the face of a suspension order. So *Kras* seems inapposite.

The Court came closer to the mark in *Ortwein v. Schwab*, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973), holding that Oregon's general filing fee of $25 for appeals could be applied to indigents challenging reductions in their welfare benefits. The Court pointed out that a given appellant had already received an administrative hearing at no cost to contest the reduction of his or her benefits. The Court also recognized the right at stake to be substantially less important than the fundamental interest in *Boddie* and more akin to the interest in *Kras*. *Ortwein*, 410 U.S. at 658-60. For due process purposes, a person's rights in a driver's license may be comparable to those a recipient has in welfare benefits, especially since the Court itself has analogized them. But the fee in *Ortwein* was imposed on an appellate review. The welfare recipients were afforded a cost-free administrative hearing to initially challenge the loss of benefits. Drivers receive no comparable opportunity under K.S.A. 2014 Supp. 8-1020(d)(2).

In light of Creecy's specific constitutional challenge, our detailed analysis of this precedent is, however, largely an academic exercise. Creecy argues that any fee impermissibly burdens his Fourteenth Amendment due process rights. That proposition cannot be squared with the United States Supreme Court cases. None of them—including

those involving fundamental rights—suggests filing fees or related costs are categorically unconstitutional. The constitutional problems arise when the fees or costs fence out indigents and deprive them of access to hearing processes designed to prevent the deprivation of a substantive property right or liberty interest. We take our lead from that strong negative implication and reject Creecy's argument.

We close with a pair of observations about what we don't decide in this case. First, a mandatory fee in some large amount would violate due process protections, even for those persons who could pay. At argument, the Department of Revenue agreed with that proposition. We have nothing to suggest the $50 fee crosses that threshold. The record is bereft of evidence as to the actual costs of an administrative hearing, so we cannot say the fee is grossly disproportionate to those costs. Nor does $50 on its face appear confiscatory in the way $5,000 might. Second, as we have said, K.S.A. 2014 Supp. 8-1020(d)(2) contains no waiver or exemption of the fee for an indigent person wishing to dispute a suspension order. The constitutionality of the lack of a bypass for indigents is not before us. We offer no opinion on the merits of that issue. The need for a bypass based on inability to pay a fee implicates both equal protection and due process rights, invoking a broader constitutional calculus. See *M.L.B.*, 519 U.S. at 120. Accordingly, we have neither considered nor rejected such a challenge in turning aside the more limited due process argument Creecy actually has presented.

Affirmed.