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COURT OF APPEAL-4TH DIST. DIV. 3

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NOT TO BE PUBLISHED
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE


Plaintiff and Appellant,

v.

STEVEN GOURLEY, as Director, et al.,

Defendant and Respondent.

0027334

(Super. Ct. No. 814729)

OPINION

Appeal from a judgment of the Superior Court of California, County of Orange, H. Warren Siegel, Judge. Reversed and remanded.

Law Offices of Barry T. Simons and Barry T. Simons for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Laura Lee Gold and Anne Hunter, Deputy Attorneys General, for Defendant and Respondent.

* * *

After his drunk driving arrest, the DMV sought to suspend Richard ██████ license in an administrative hearing. At the hearing, ██████ presented evidence that the lab which performed the alcohol test was out of compliance with certain state regulations.¹ The hearing officer rejected the contention, and ██████ then filed this writ proceeding in the superior court. The trial judge went outside of the administrative hearing to allow the DMV to show compliance.

We must be consistent in applying Vehicle Code section 13319. The statute plainly says, "The review shall be on the record of the hearing and the court shall not consider other evidence." (Emphasis added.) The statute is not a one-way street, which keeps a motorist from relying on material extrinsic to the hearing, but allows the DMV to do what a motorist can't.

Here, the trial court did consider other evidence, and therefore we must reverse. *Coomb v. Pierce* (1991) 1 Cal.App.4th 568, 576-578, is on point. Specifically, there the trial court erred in taking judicial notice of a page from the Federal Register, which indicated that a particular type of "intoximeter" was licensed by the state. The time to establish that fact, said the court, was at the administrative hearing, not in a court proceeding later. (See *id.* at p. 587.)

We need only note that the instant case involves the small irony that the DMV hearing officer at least thought of doing something to establish the reliability of the blood test: In early May, after ██████ submitted his evidence that the lab's new procedures had not been approved by the Department of Health Services, the hearing officer announced he would continue the hearing to allow the lab's supervising criminalist to respond. But when the hearing was reconvened in August, the hearing

¹ The applicable regulation, section 1120 of title 17 of the California Code of Regulations, at the very least requires that new testing procedures be "filed" with the state Department of Health Services. Whether this regulation implicitly requires approval of any new procedures is a matter with which we need not deal.

officer had not gotten around to having the criminalist subpoenaed, and took the matter under submission then and there. He ruled the same day, ordering a year's suspension.

Just because a lab is out of compliance with state regulations does not mean that its test results must be ignored in any administrative proceeding by the DMV to suspend or revoke a motorist's drivers license. The case law is clear that if a lab is shown to be out of compliance, the DMV has the burden of showing that any given blood test result is indeed reliable. (E.g., *Robertson v. Zolte* (1996) 44 Cal.App.4th 147, 150.) Because the DMV did nothing to carry that burden at the administrative hearing, this case must be reversed. The matter is remanded to the trial court to enter a new order reinstating the license suspension.

██████████ has also made a motion for sanctions on appeal, based on the charge that the on-site survey that the DMV submitted to the trial court misled the trial judge into thinking that the lab's procedures had been "approved" by the Department of Health Services. The on-site survey, together with its cover letter, omitted a certain "Attachment A." Under the heading "Approved Written Descriptions of the Forensic Alcohol Analysis Methods on File with the Department" was this statement: "The Department provided the laboratory with a summary (Attachment A) of the required and recommended revisions to the July 1996 submission during the present on-site survey."

██████████ lawyer could not obtain a copy of this attachment until after the trial court had made its ruling, but having now obtained a copy, he asserts that one of its requirements was that the lab must specify the volume of blood to be collected. The requirement is important, he notes, because if the sample is too small, the predetermined amount of preservative will overstate the alcohol level. He claims that in this case an unusually small amount of blood was drawn (4 ml. when it should have been 10 ml.).

For its part, the DMV argues the merits of the proposition that it was enough that the lab's procedures were on file with the Department of Health Services. It contends there is no requirement that those procedures be approved.

We need not be drawn into the "on file" versus "approved" controversy. At the administrative hearing -- where it might have made a difference -- the department didn't even attempt to show compliance with the textual requirement that procedures be on file with the Department of Health Services, much less formal approval of those procedures. The DMV's belated attempt to show "approval" at the trial level is therefore academic.

The upshot is that the DMV's omission of the attachment was irrelevant. Under Vehicle Code section 13539 ██████████ was destined to prevail anyway. Therefore we deny the motion for sanctions. ██████████ will, however, recover his costs on appeal.

SILLS, P. J.

WE CONCUR:

OLEARY, J.

ARONSON, J.*

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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Defendant and Respondent.

G027534

(Super. Cl. No. 814729)

ORDER MODIFYING OPINION;
NO CHANGE IN JUDGMENT

Appellant is correct in his request filed November 13, 2001. The opinion should have said, on page 3, "[t]he matter is remanded to the trial court to enter a new order *revoking* the license suspension" instead of "reinstating" the "license suspension. The opinion is hereby modified to so read. Obviously, this modification does not entail any change in the judgment.

SILLS, P. J.

WE CONCUR:

OLEARY, J.

ARONSON, J