**Reversed and Rendered; Opinion filed September 27, 2001 Withdrawn and Corrected Opinion Filed October 18, 2001.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-00-01208-CV**

**TEXAS DEPARTMENT OF PUBLIC SAFETY, Appellant**

**V.**

**SANJEET SAIKIA, Appellee**

**On Appeal from the County Civil Court at Law No. 4**
**Harris County, Texas**
**Trial Court Cause No. 733,144**

## C O R R E C T E D  O P I N I O N

We withdraw our opinion of September 27, 2001 and issue this corrected opinion.

Appellant Texas Department of Public Safety ("DPS") brings this appeal from the trial court's order reversing the administrative decision authorizing the suspension of appellee Sanjeet Saikia's driving privileges.[1] The DPS asserts on appeal that the trial court

[1] Under *Tex. Dep't. of Pub. Safety v. Barlow*, we have jurisdiction to entertain this appeal. 48 S.W. 3d 174 (Tex. 2001). Our constitution vests jurisdiction over appeals from final judgments of district and county courts in the courts of appeals, subject to any restrictions and regulations prescribed by law. TEX. CONST. art. V, § 6. The legislature has limited courts of appeals' jurisdiction to cases in which the amount

erred in holding that: (1) there was no reasonable suspicion to stop or probable cause to arrest appellee; and (2) the administrative finding that appellee was properly asked to submit a breath specimen was not supported by substantial evidence. Saikia did not file a brief. For the reasons discussed below, we find there was substantial evidence to support the administrative decision. Therefore, we reverse the trial court's order and render judgment in accordance with the decision of the administrative law judge.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Sergeant Devore of Harris County Precinct Eight stopped Sanjeet Saikia after observing him fall over on his motorcycle and cross a double yellow line into oncoming traffic. After the traffic stop, Sergeant Devore noticed that Saikia's breath smelled of alcohol, his eyes were red and watery, and he was unsteady on his feet. Sergeant Devore called for backup and Deputy Hockett arrived on the scene a few minutes later. After observing that Saikia manifested several signs of intoxication, Deputy Hockett performed various field sobriety tests, all of which Saikia failed. The officer then arrested Saikia and brought him to the Clear Lake substation.

At the station, Deputy Hockett requested a breath specimen and gave Saikia the standard statutory warnings. The analytical results of the breath specimens disclosed alcohol concentrations of 0.224 and 0.219. The officers then informed Saikia that his driver's license would be suspended and that he had fifteen days to request a hearing to contest the suspension.

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in controversy or the judgment exceeds $100. *See* TEX. GOV'T CODE ANN. § 22.220(a) (Vernon 1988); TEX. CIV. PRAC. & REM.CODE § 51.012 (Vernon 1997). The Texas Supreme Court held in *Tune v. Tex. Dep't. of Pub. Safety,* the amount of money that a citizen is willing to pay for a privilege is some evidence of its value. 23 S.W.3d 358, 362 (Tex. 2000). Therefore, the statute at issue here, which requires payment for a person to be afforded particular driving privileges establishes a minimum value. *Id.* The Department charges a $24 fee for issuing or renewing a driver's license. TEX. TRANS. CODE ANN. § 521.421 (Vernon 1999). Furthermore, a driver whose license has been suspended must pay "a fee of $100 in addition to any other fee required by law" to be reinstated or to obtain another driver's license. TEX. TRANS. CODE ANN. § 524.051(a) (Vernon 1999). These amounts indicate a minimum value that a driver such as Saikia is willing to pay for the privilege of driving and together meet the minimum jurisdictional threshold.

Saikia timely requested an administrative hearing pursuant to Chapter 524 of the Texas Transportation Code contesting the suspension of his driver's license. At the conclusion of the hearing, the administrative law judge ("ALJ") upheld the suspension. Saikia appealed the ALJ's decision to the county court at law. After hearing oral argument from both sides and reviewing the transcript of the administrative hearing, the county court reversed the administrative order upholding the suspension. It is from this order that the DPS appeals.

## II. STANDARD OF REVIEW

Judicial review of a decision made by an ALJ under chapter 524 of the Texas Transportation Code is governed by section 2001.174 of the Administrative Procedures Act. *Tex. Dep't. of Pub. Safety v. Monroe*, 983 S.W.2d 52 (Tex. App.–Houston [14th Dist.] 1998, no pet.); *Tex. Dep't. of Pub. Safety v. Mendoza*, 956 S.W.2d 808, 810 (Tex. App. –Houston [14th Dist.] 1997, n.w.h. no pet.). This section provides that a reviewing court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion and shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (A) in violation of a constitutional or statutory provision; (B) in excess of the agency's statutory authority; (C) made through unlawful procedure; (D) affected by other error of law; (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. TEX. GOV'T CODE ANN. § 2001.174. (Vernon 2000); *see Tex. Dep't. of Pub. Safety v. Cantu*, 944 S.W.2d 493, 495 (Tex. App.– Houston [14th Dist.] 1997, no writ) Review of an ALJ's suspension of driving privileges is taken under a substantial evidence review. *Mireles v. Tex. Dep't. of Pub. Safety*, 9 S.W.3d. 128, 131 (Tex. 1999).

Under a substantial evidence review, the reviewing court cannot substitute its

judgment for that of the ALJ and must affirm if the ALJ's decision is supported by more than a scintilla of evidence. *R. R. Comm'n of Tex. v. Torch Operating Co.,* 912 S.W.2d 790, 792 (Tex. 1995). In determining whether the ALJ reached the correct conclusion, the issue is whether the record contains some reasonable basis for the decision. *Id.* If there is evidence that supports either a negative or affirmative finding on a specific issue, the ALJ's decision must be upheld. Thus, we review the trial court's judgment under a substantial evidence review *de novo. Tex. Dep't. of Pub. Safety v. Valdez,* 956 S.W.2d 767, 769 (Tex. App.–San Antonio 1997, no writ).

Furthermore, the appeal is limited to the record of the administrative hearing; however, the statute provides for a procedure whereby the appellant can apply to present additional evidence and, if granted, the case will be remanded to the ALJ with instructions. TEX. TRANS. CODE ANN. § 524.043 (Vernon 1999).

## III. ANALYSIS

### A. Reasonable Suspicion to Stop and Probable Cause to Arrest

In its first point of error, the DPS contends that the trial court erred by holding that there was neither reasonable suspicion to stop nor probable cause to arrest Saikia. We agree. Deputy Hockett testified at the administrative hearing that Sergeant Devore, prior to stopping Saikia, noticed that he was falling over on his motorcycle and observed him crossing the double yellow line into oncoming traffic. Deputy Hockett further testified that Saikia demonstrated multiple signs of intoxication, including breath that smelled of alcohol, red and watery eyes, and difficulty standing.

Crossing a double yellow line constitutes a traffic offense. *See* TEX. TRANS. CODE ANN. § 545.051 (Vernon 1999). After observing a traffic violation, an officer may stop and detain that person. *Tex. Dep't. of Pub. Safety v. Bell,* 11 S.W.3d 282, 284 (Tex. App.–San Antonio 1999, no pet); *see Tex. Dep't. of Pub. Safety v. Chang,* 994 S.W. 2d 875, 878 (Tex. App.–Austin 1999, no pet). In *Gajewski v. State*, this court held that reasonable suspicion

to stop is based on the totality of the circumstances. 944 S.W.2d 450, 452 (Tex. App.–Houston [14th Dist.] 1997, no writ). Thus, it is not even necessary for a particular statute to be violated in order to give rise to reasonable suspicion. *Id*. In *Gajewski*, where the appellant's weaving vehicle crossed the center line three different times, this court found, "[b]y his own behavior, appellant was telling the officer that he was unable to safely operate a motor vehicle, and that if he continued to operate the vehicle appellant was a danger to himself or others." *Id*. at 453. Under the facts of that case, the officer had reasonable suspicion to stop appellant. Similarly, we find the ALJ correctly held that observing Saikia nearly falling over and crossing a double yellow line provided Sergeant Devore with the requisite reasonable suspicion to make a traffic stop. The trial court erred in impliedly finding that no reasonable suspicion existed to stop Saikia.

The DPS further contends the ALJ correctly decided probable cause existed in order to arrest Saikia. Again, we agree. Deputy Hockett had probable cause to arrest Saikia for DWI based on Saikia's manifestation of several signs of intoxication and his dismal performance on the field sobriety tests. "Probable cause exists where the police have reasonably trustworthy information sufficient to warrant a reasonable person to believe a particular person has committed or is committing an offense." *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). "Probable cause deals with probabilities; it requires more than mere suspicion but far less evidence than that needed to support a conviction or even that needed to support a finding by a preponderance of the evidence." *Id*. at 87. A person commits the offense of DWI if he is intoxicated while operating a motor vehicle in a public place. TEX. PEN. CODE ANN. § 49.04 (Vernon 1999). Intoxication means (1) not having the normal use of mental or physical faculties by reason of introduction of alcohol or other substances in the body; or (2) having an alcohol concentration of 0.10 or more. *Id*.§ 49.01.

In his written and sworn report, Deputy Hockett noted that Saikia's breath smelled of alcoholic beverages, he was unsteady on his feet, his speech was slow and deliberate, and his eyes were red and watery. The officer, certified to administer field sobriety tests, further

noted that Saikia performed poorly on the one-leg stand and step and turn sobriety tests. Saikia also performed poorly on the Horizontal Gaze Nystagmus test. The officer observed lack of smooth pursuit, nystagmus at maximum deviation, and nystagmus onset prior to thirty degrees. Therefore, the trustworthy information Deputy Hockett received from Sergeant Devore when he arrived on the scene, coupled with his own observations, provided him with the probable cause to arrest Saikia for driving while intoxicated. *See, e.g., Tex. Dep't. of Pub. Safety v. Cortinas,* 996 S.W. 2d 885, 888-89 (Tex. App.–Houston [14th Dist.] 1998, no pet).

Finally, the Breath Test Technical Supervisor's Affidavit affirmatively states that Saikia's blood alcohol concentration exceeded 0.10. Deputy Hockett arrested Saikia at approximately 1:58 a.m. and administered two breath tests immediately following the arrest. The test results showed intoxication levels of 0.224 and 0.219. Based on Deputy Hockett's observations at the scene, Saikia's poor performance on the field sobriety tests, and the breath test affidavit, we find a reasonable basis exists in the record for the ALJ's finding that Saikia was driving in a public place while intoxicated. Because substantial evidence supports the administrative finding that Saikia drove while intoxicated, the county court at law erred in reversing the order suspending Saikia's license on that ground. Accordingly, we sustain the DPS's first point of error.

**B. Substantial Evidence Supporting Administrative Finding**

In its second point of error, the DPS contends the trial court erred by holding that there was not substantial evidence to support the administrative finding that Saikia was properly warned when requested to submit a breath specimen. In his petition to the trial court, Saikia alleges the required statutory warnings were not given to him until after he was requested to provide a breath specimen.

Saikia alleged at the trial court that he was not properly warned or tested based on the time stated on the intoxilyzer printouts, which indicate that the Deputy Hockett administered

the test before the time of the arrest indicated on the Peace Officer's Sworn Report. The Sworn Report states that Saikia was arrested at approximately 1:58 a.m. The intoxilyzer printouts indicate that the tests were administered at approximately 1:37 a.m. and 1:43 a.m.

The implied consent statute provides that a person arrested for an offense alleged to have arisen out of acts committed while operating a motor vehicle while intoxicated is deemed to have consented to the taking of samples for a breath or blood test. *See* TEX. TRANS. CODE ANN. § 724.011 (Vernon 1999). Before an officer may request a breath specimen from a person arrested for DWI, the officer must inform the person of two consequences of refusing to submit a specimen: "(1) the refusal may be admissible in a subsequent prosecution; and (2) the person's driver's license will be automatically suspended." *See id*.§ 724.015. The DPS alleges that notwithstanding the time indications on the machine printout, the evidence in the record is sufficient to show that the officers informed Saikia of the consequences of passing and failing the intoxilyzer test.

The record reflects substantial evidence that Deputy Hockett properly administered the statutory warnings, both orally and in writing, prior to requesting a breath specimen from Saikia. First, Deputy Hockett testified at the administrative hearing that he asked Saikia to provide a breath specimen by reading to him the standard statutory warnings. He further testified that he was with Saikia from the time of the arrest to the time of the breath test and that he personally observed Saikia after reading him the warnings for fifteen minutes before administering the intoxilyzer test. Moreover, after being given the proper statutory warnings, Saikia gave voluntary consent to the taking of his breath specimen.

Next, Vicki Baker, a certified technical supervisor of the Intoxilyzer 5000, testified at the administrative hearing that she understood the scientific theory and operation of the Intoxilyzer 5000. Baker testified that she periodically inspected the Intoxilyzer 5000 in question and that the instrument was certified and working properly at the time of the tests were administered to Saikia. She further testified that the clock on the intoxilyzer was not correct and had not been correct for two months prior to Saikia's arrest. The reliability of

an instrument used to take or analyze a specimen to determine alcohol concentration may be attested to by a certified breath test technical supervisor. TEX. TRANS. CODE ANN. § 524.038 (Vernon 1999). Baker's testimony clarifies any discrepancy between Deputy Hockett's testimony that he read Saikia the statutory warnings after he arrested Saikia, but before administering the test, and the times that are displayed on the intoxilyzer printouts.

If an appellant fails to file a brief on appeal, the court of appeals may: (1) dismiss the appeal for want of prosecution unless the appellant reasonably explains the failure and the appellee is not significantly harmed by appellant's failure to file a brief; or (2) decline to dismiss the appeal and give further direction to the case as it considers proper. TEX. R. APP. P. 38.8(a). Either way, if the appellant fails to file a brief, and a brief is filed by appellee, the court of appeals may regard the appellee's brief as correctly presenting the case and may affirm the trial court's judgment upon that brief without examining the record. *Id.* However, such a rule does not exist regarding appellee's failure to file a brief. Therefore, as part of our review, we consider the entire record.

Because the record from the administrative hearing demonstrates a reasonable basis for the ALJ's decision, the trial court should have affirmed the ALJ's decision. There was evidence that (1) reasonable suspicion or probable cause existed to stop or arrest Saikia, (2) probable cause existed to believe that Saikia was operating a motor vehicle in a public place while intoxicated, and (3) Saikia was placed under arrest by the officer and, after being given the proper statutory warnings, was requested to submit to the taking of a breath specimen. *See* TEX. TRANS. CODE ANN. § 524.035 (Vernon 1999).

When there is substantial evidence to support an administrative finding, the finding must be left undisturbed, notwithstanding that the agency "may have struck a balance with which a reviewing court may differ." *See Fireman's and Policemen's Civil Serv. Comm'n v. Brinkmeyer,* 662 S.W.2d 953, 956 (Tex. 1984). Furthermore, the ALJ was the sole judge of the credibility of the witnesses and was free to accept the testimony of any witness or even accept "part of the testimony of one witness and disregard the remainder." *Ford Motor Co.*

*v. Motor Vehicle Dep't. of Transp.*, 21 S.W.3d 744, 757 (Tex. App.–Austin 2000, pet. denied) (citing *S. Union Gas Co. v. R. R. Comm'n*, 692 S.W.2d 137, 141-42 (Tex. App.–Austin 1985, writ ref'd n.r.e.). By finding the testimony of both Deputy Hockett's and Vicki Baker credible, the ALJ had the substantial evidence necessary to uphold the license suspension. Because the ALJ's holding is supported by substantial evidence and there is some reasonable basis for the decision, that holding shall remain undisturbed.

## IV. CONCLUSION

Because the record contains substantial evidence to support the administrative decision, the trial court erred in reversing the ALJ's decision. Accordingly, we reverse the trial court's order and render judgment upholding the administrative decision.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Corrected Opinion filed October 18, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).