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Brewer v. Motor Vehicle Div., Dep't of Revenue

SUPREME COURT, STATE OF COLORADO

Case No. 84 SA 252

ANSWER BRIEF
Appeal from the District Court of Jefferson County
Honorable ANTHONY F. VOLLACK, Judge

HUGH BREWER,

Plaintiff-Appellant,

v.

MOTOR VEHICLE DIVISION, DEPARTMENT OF REVENUE,
STATE OF COLORADO,

Defendant-Appellee.

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RULES AND REGULATIONS

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STATE OF COLORADO,

Defendant-Appellee.

The Motor Vehicle Division of the Department of Revenue (department), through the office of the attorney general, respectfully submits its answer brief.

ISSUES PRESENTED FOR REVIEW

1. Whether the hearing officer's finding that Brewer drove a vehicle is supported by substantial evidence and is a correct interpretation of the law?

2. Whether the hearing officer's finding that Brewer's breath-alcohol level was 0.15 or more grams of alcohol per 210 liters of breath is supported by substantial evidence?

3. Whether, for the purposes of section 42-2-122.1, C.R.S. (1984), a driver must be "advised" before he can be asked to submit to a chemical test under section 42-4-1202(3), C.R.S. (1984)?

4. Whether Brewer is precluded from raising certain issues because he failed to raise them before the district court?

5. Whether section 42-2-122.1, C.R.S. (1984) is constitutional?

STATEMENT OF THE CASE

References to the record on review will be to the page number of volume I, i.e., (p. 1).

The department held a hearing, after notice, on September 9, 1983 to determine whether Brewer's driver's license should be revoked pursuant to section 42-2-122.1, C.R.S. (1984) (p. 27). At the conclusion of the hearing, the department's hearing officer found that Brewer drove a vehicle with 0.15 or more grams of alcohol per 210 liters of breath, as shown by chemical analysis performed within one hour of the alleged offense (p. 39). She therefore revoked Brewer's license as required by section 42-2-122.1, C.R.S. (1984) (pp. 39, 21).

Brewer filed a petition for judicial review of the revocation on September 16, 1983 (p. 1). The petition contained a

motion for stay of the revocation (p. 3). The district court denied the stay on October 3, 1983 (p. 71). The district court also denied two subsequent requests for stay (p. 71).

On April 27, 1984 the district court affirmed the hearing officer's findings and the revocation of Brewer's license (pp. 62-66). Brewer filed his notice of intent to seek appellate review of the district court's order on May 25, 1984 (p. 67). Brewer appeals the district court's order affirming the order of revocation.

STATEMENT OF THE FACTS

Officer Dale T. Sarno of the Broomfield Department of Public Safety testified at the hearing held on September 9, 1983 (p. 28). He said that exhibits A-G (pp. 8-16) were documents that he prepared with regard to his arrest of Brewer (p. 31). The exhibits were entered in evidence after Brewer's attorney stated that he had no objections to the documents (p. 32).

Sarno testified that the police department had gotten a call from someone complaining about a car parked in the middle of the street. Sarno went to the scene and found a vehicle in the middle of the street (p. 32). Brewer was behind the steering wheel, asleep (pp. 32-33). The car's lights were on and its motor was running (p. 33). The gearshift was in park (p. 33).

Sarno woke Brewer and Brewer got out of the car. Brewer smelled of alcohol. He couldn't stand on his feet without assistance (p.32) Sarno arrested Brewer and took him to the police station (p. 32).

Brewer agreed to take an intoxilyzer breath test on the machine located at the police station (p. 33). Sarno performed the test (p. 33), using a checklist outlining the procedure used in performing the test (p. 16, 31-32). Sarno testified that he was certified by the Colorado Department of Health (Department of Health) to operate the intoxilyzer (pp. 33-34); that the standard solution tested before Brewer's breath was tested was prepared by one of two officers at the police department (p. 35); and that if the intoxilyzer machine is broken or due for recertification by the Department of Health, it is not used (p. 35). The test results were 0.178 (pp. 15-16, 32, 33).

Brewer neither offered nor presented any evidence.

Based on this evidence, the hearing officer found that Brewer drove a vehicle with 0.15 or more grams of alcohol per 210 liters of breath, as shown by chemical analysis performed within one hour of the alleged offense (pp. 38-39). She therefore revoked Brewer's driver's license under section 42-2-122.1, C.R.S. (1984).

SUMMARY OF THE ARGUMENT

1. Introduction.

2. The hearing officer's finding that Brewer drove a vehicle is supported by substantial evidence and is a correct interpretation of the law.

3. The hearing officer's finding that Brewer's breath-alcohol level was 0.15 or more grams of alcohol per 210 liters of breath is supported by substantial evidence.

4. Warnings or advisements about chemical tests are irrelevant for the purposes of section 42-2-122.1, C.R.S. (1984).

5. Brewer is precluded from raising certain issues because of his failure to raise them before the district court.

6. Even if all issues are properly before this court, the order of revocation must be affirmed.

ARGUMENT

I.

INTRODUCTION

The drunk driver presents a great risk to public safety. State governments have attempted to penalize drunk driving through criminal prosecution and to prevent drunk driving in the future by revoking the license of a driver who was convicted of an alcohol-driving offense. Colorado utilized this procedure for

many years. See, e.g., sections 42-4-1202 and 42-2-123(1)(a) and (5)(b), C.R.S. (1973). These measures addressed the problem created by drunk-drivers, but they did not substantially reduce the risk of death or injury presented by drunk drivers.

The drunk driving problem received national attention when President Reagan established the Presidential Commission on Drunk Driving in 1982. Exec. Order No. 12,358, 3 C.F.R. 179 (1983). Citing 25,000 alcohol-related traffic deaths per year and many other serious problems, the United States Congress acted to assist the states in removing drunk drivers from the highways. 23 U.S.C. sec. 402 (1984 Supp.); H.R. Rep. No. 97-867, 97th Cong., 2d Sess., reprinted in (1982) U.S. Code Cong. and Ad. News 3367. Grants are available to states which have enacted administrative per se revocation statutes. 42 U.S.C. sec. 402(k)(4) (1984 Supp.).

Colorado is one of several states which have taken bold steps to punish drunk driving and prevent the incidence of drunk driving. In 1983 the Colorado legislature amended or adopted several statutes in its attempt to preserve human life that might be jeopardized by drunk drivers. 1983 Colo. Sess. Laws 1631. The legislature increased the penalties for drunk driving, made driving with .15 or more grams of alcohol per specified amounts of blood or breath illegal, established alcohol programs for drunk drivers and, of importance here, established a summary pro-

cedure directing the department to revoke a driver's license before a driver is convicted of an alcohol-related driving offense. Section 42-2-122.1, C.R.S. (1984). See generally "The New Colorado Per Se DUI Law," 12 Colo. Lawyer 1451 (1983).

A copy of section 42-2-122.1, C.R.S. (1984) is attached hereto as attachment A. Subsection (1)(b) requires the department to determine whether a driver's license should be revoked on the basis of a sworn report provided by a law enforcement officer under subsection (2). If the driver requests a hearing on the revocation, the department is to review the report and evidence presented at the hearing under subsection (2) and make a determination based upon this evidence. Subsection (8)(c) directs the department to limit the hearing to the issue of whether the driver drove when his blood or breath alcohol level exceeded certain limits, as shown by chemical analysis.

If a driver's license is revoked, the driver can ask a district court to review the matter under subsection (9) and determine whether, among other things, the revocation order is supported by the evidence in the record or the department made an erroneous interpretation of the law. The State Administrative Procedure Act applies to the hearing and judicial review if it is consistent with the section. Section 42-2-122.1(10), C.R.S. (1984).

Section 42-2-122.1, C.R.S. (1984) is based in large part on

the Model Revocation on Administrative Determination Law published by the United States Department of Transportation. See States Laws on Early License Revocation for Driving While Under the Influence, published by the United States Department of Transportation, DOT HS 806 481 (February, 1984). The concept of early per se revocation was first used by Minnesota and the model law is based on Minnesota's experience. Therefore, the Minnesota courts' interpretation of its early revocation statute should be specially pursuasive.

Section 42-2-122.1, C.R.S. (1984) is not penal in nature, but many people will argue that it is. The statute is not intended to penalize drivers for the unsafe conduct that lead to the revocation. Rather, it is intended to prevent repetition of drunk driving in the future. The statute is designed to remedy the grave problem of numerous injuries and deaths caused by drunk drivers by not allowing known drunk drivers to continue driving. Because section 42-2-122.1, C.R.S. (1984) is remedial, rather than penal, in nature it should be construed liberally in favor of the public interest. See Rude v. Commissioner of Public Safety, 347 N.W.2d 77, 81 (Minn. App. 1984); Szczech v. Commissioner of Public Safety, 343 N.W.2d 305 (Minn. App. 1984); Holtz v. Commissioner of Public Safety, 340 N.W.2d 363 (Minn. App. 1983).

II.

THE HEARING OFFICER'S FINDING THAT BREWER DROVE A VEHICLE IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS A CORRECT INTERPRETATION OF THE LAW.

Sections 42-2-122.1(1)(a)(I) and (8)(c), C.R.S. (1984) both provide that the department shall revoke a driver's license where it finds that the driver "drove a vehicle" with breath-alcohol level in excess of specified limits. The word "drove" is not defined in title 42, C.R.S. (1984). The court should not, however, rely on the common definition of the word "drove" because title 42, C.R.S. (1984) provides other specific guidance. Section 42-1-102(22), C.R.S. (1984), which applies to 42-2-122.1, C.R.S. (1984), tells us that "driver":

> means any person, including a minor driver under the age of eighteen years and a provisional driver under the age of twenty-one years, who drives or is in actual physical control of a motor vehicle upon a highway.

Since the department must make its determination under section 42-2-122.1, C.R.S. (1984), after the driving has taken place, it was logical for the legislature to use the past-tense for the word "drive," or "drove." A "driver" is a person who "drives,", therefore, the court should use the definition of "driver" in determining the meaning of the word "drive" and its counterpart in the past-tense, "drove." Section 2-4-101, C.R.S. (1980). If a person "drove," he was a "driver" at the time.

Therefore, a person drove if he was either driving or was in actual physical control of a vehicle.

Brewer was in actual physical control of a vehicle. He was seated in the driver's seat behind the steering wheel (pp. 32-33). The car's motor was running and the headlights were on (p. 33). The car was located in the middle of the street (p. 32). This evidence supports the hearing officer's finding.

Cases abound in which courts have found people situated exactly like Brewer to have been in actual physical control of a vehicle. See, e.g., 1 R. Erwin, Defense of Drunk Driving Cases, sec. 1.01/1/ at 1-10 (3rd ed. 1984 & 1984 Supp.); State v. Ruona, 133 Mont. 243, 321 P.2d 615 (1958); City of Kansas City v. Troutner, 544 S.W.2d 295 (Mo. App. 1976); City of Cincinnati v. Kelley, 47 Ohio St.2d 94, 351 N.E.2d 85 (1976); Hughes v. State, 535 P.2d 1023 (Okla. App. 1975).

> An intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving, but it does exist. While at the precise moment defendant was apprehended he may have been exercising no conscious volition with regard to the vehicle, still there is a legitimate inference to be drawn that defendant had of his own choice placed himself behind the wheel thereof, and had either started the motor or permitted it to run. He therefore had the "actual physical control" of that vehicle, even though the manner in which such control was exercised resulted in the vehicle's remaining motionless at the time of his apprehension.

State v. Webb, 78 Ariz. 8, 274 P.2d 338, 340 (1954). Distinguished in Arizona v. Zavala, 136 Ariz. 356, 666 P.2d 456 (1983).

This construction is in the public interest and furthers the legislature's intent that people who are known to pose a threat to public safety be removed from the roads.

Brewer points out his nobility in stopping the car in the middle of the road. He argues that revoking his license will prompt others to drive. However, the construction of section 42-2-122.1, C.R.S. (1984) should not encourage people to stop after they have driven, it should encourage people to avoid getting into cars after drinking, except as passengers. The construction Brewer argues encourages drunks to drive, because as long as they stop, regardless of where they are, before they are caught or before they kill someone, they need not worry about any repercussions. The construction that encourages people who drink not to get behind the wheel should be adopted. See Zaba v. Motor Vehicle Division, 183 Colo. 335, 516 P.2d 634 (1973). The hearing officer correctly held that Brewer was driving within the meaning of sections 42-2-122.1 and 42-1-102(22), C.R.S. (1984). Her finding is supported by substantial evidence and should therefore be affirmed.

Marin v. Department of Revenue, 41 Colo. App. 557, 591 P.2d 1336 (1978) is inapplicable to this matter. The implied consent statute under which it was decided was repealed and replaced with

an express consent statute in 1983. 1983 Colo. Sess. Laws 1631. Moreover, the court of appeals dealt extensively with how the implied consent law dealt with a driver, but did not look to section 42-1-102(22), C.R.S. (1973) to determine whether Marin was a driver. 591 P.2d at 1338. If the court had read the definition of driver, its conclusion would certainly be different.

III.

THE HEARING OFFICER'S FINDING THAT BREWER'S BREATH-ALCOHOL LEVEL WAS 0.15 OR MORE GRAMS OF ALCOHOL PER 210 LITERS OF BREATH IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The department is required to determine whether a driver's license should be revoked on the basis of a detailed, sworn report submitted by a law enforcement officer under section 42-2-122.1(2), C.R.S. (1984). If a hearing is requested and held, the department is required to review the matter and make a final determination based upon evidence presented at the hearing. Section 42-2-122.1(1)(b), C.R.S. (1984). The legislature designed this procedure to allow a driver the opportunity to show the department that the law enforcement officer's report is wrong. However, the legislature limited the hearing only to the issues specified in section 42-2-122.1(8)(c), C.R.S. (1984).

To review the department's initial determination, the hearing officer must rely on the report filed by the law enforcement

officer. In the absence of a report, there is nothing to review. If the licensee presents no evidence at the hearing to show that the report is wrong, the hearing officer may rely solely on the report in making a final determination. This procedure does not violate any notion of fairness because the driver may examine the report at any time before the hearing, section 42-1-206, C.R.S. (1984); may discover any facts he desires through depositions and interrogatories, and may require the attendance of any witness or record he may need for his defense. Section 42-2-122.1(8)(b), C.R.S. (1984). See, Mackler v. Alexis, 130 Cal. App. 3d 44, 181 Cal. Rptr. 613 (1982); Burkhart v. Department of Motor Vehicles, 124 Cal. App. 3d 99, 177 Cal. Rptr. 175 (1981).

Brewer cites many criminal cases to advance his proposition that the due process and confrontation clauses require witnesses and evidence to establish to absolute certainty that there are no errors in the law enforcement officer's report. However, these cases are not persuasive because more process is due in a criminal case than in a civil license revocation proceeding. The scheme adopted by the legislature in section 42-2-122.1, C.R.S. (1984) provides at least the minimal amount of process required to protect against an erroneous revocation of a driver's license. See Mackey v. Montrym, 443 U.S. 1, 61 L. Ed. 2d 321, 99 S. Ct. 2612 (1979).

A.

Assuming, however, that more evidence than the law enforcement officer's report is required to support the final determination after hearing, the record contains substantial evidence to support the hearing officer's finding that Brewer's breath-alcohol level was 0.15 or more grams of alcohol per 210 liters of breath. In criminal cases, where the standard of proof is much higher than in this matter, breath-test results may be relied upon if the state shows that the machine was operated by a qualified person using procedures which are designed to ensure that the test results are accurate. The department is not aware of any decisions from this court which specifically address this subject, however, cases from other jurisdictions are persuasive.

People v. Drumm, 122 Misc.2d 1051, 472 N.Y.S.2d 989 (Co. Ct. 1984) is persuasive because it makes sense. Drumm was convicted of alcohol driving offenses. He moved the court to set aside the verdict because, in part, he claimed that the people failed to show that the breath-testing machine used to test his breath was in proper working order. The court refused to consider documents showing that the machine had been regularly calibrated because of their hearsay nature. Nevertheless, the court held that the jury could properly rely on the breath-test results.

The important question should be whether or

> not the testing device was properly functioning at the time of the test. Although this may involve proof of a physical inspection and/or adjustment by an outside agency, this court is of the opinion that the fact that the instrument is in proper working order, and, therefore, accurate, may also be inferred from the kind of test performed, utilizing a solution containing a known alcohol value.

472 N.Y.S.2d at 992. The court also relied on the methods used by the Intoxilyzer Model 4011 AS to ensure accuracy. The same type of machine was used in this matter (pp. 16, 32).

The simulator test, using a sample with known alcohol content, demonstrates that the machine works properly at the time of the test, if the results are within prescribed error limits. A certificate from the Department of Health adds little, if any, proof that the machine worked properly when Brewer's breath was tested. See People v. Freeland, 118 Misc.2d 486, 460 N.Y.S.2d 907 (Co. Ct. 1983); State v. Livati, 1 Hawaii App. 625, 623 P.2d 1271, 1279 (1981).

The police officer showed the hearing officer that Brewer's breath-test was reliably administered and that the results are trustworthy. The policeman was certified to use the machine (p. 34); he administered the test to Brewer (p. 33); he used a checklist to ensure that Brewer's breath was properly tested (pp. 16, 31-32); the machine printed the test results (p. 15) and the police department did not use the machine if it was due for

recertification or was not working (p. 35). The operational checklist conforms to the requirements of the Department of Health (p. 16). 5 CCR 1005-2, p. 11 (2-84). This evidence demonstrated that the test results are trustworthy. State v. Habisch, 313 N.W.2d 13 (Minn. 1981); State v. Bush, 595 S.W.2d 386 (Mo. App. 1980). Questionsabout whether the standard solution was properly prepared affect only the weight to be accorded the test results. People v. Freeland, supra; Beck v. State, 651 S.W.2d 827 (Tex. App. 1983).

The police officer can certainly testify that he was certified. Clarke v. State, 170 Ga. App. 852, 319 S.E.2d 16 (1984); State v. Doggett, 41 N.C. App. 304, 254 S.E.2d 793 (1979). To hold otherwise would be similar to deciding that a person could not testify that he held a diploma or a driver's license. The court should note that the Department of Health does not issue any type of "certificate" to the police officer when he is recertified. 5 CCR 1005-2, p. 7 (2-84).

Brewer relies heavily on section 42-4-1202(3)(a), C.R.S. (1984), which, he claims, requires the state to show that the breath-test was administered in accordance with the regulations of the Department of Health. Sections 42-2-122.1(1)(a)(II) and (8)(c), C.R.S. (1984) direct otherwise. These sections make clear that section 42-4-1202, C.R.S. (1984) has no application to this case. They direct the department to look to section 42-4-

1202, C.R.S. (1984) only when it revokes a driver's license for the driver's refusal to submit to a chemical test. In Brewer's case, the department's only concern is whether he drove with an excessive breath-alcohol content. To hold otherwise would allow a driver to pick through each specific point of the Department of Health's regulations and argue that the regulations were not complied with. The legislature did not intend this absurd procedure when it adopted the summary suspension system of section 42-2-122.1, C.R.S. (1984). The Department of Health's regulations are intended for its own internal operating procedure and not for the driver or the Department of Revenue. People v. Hedrick, 192 Colo. 37, 557 P.2d 378, 380 (1976).

IV.

WARNINGS OR ADVISEMENTS ABOUT CHEMICAL TESTS ARE IRRELEVANT FOR THE PURPOSES OF SECTION 42-2-122.1, C.R.S. (1984).

Section 42-2-122.1, C.R.S. (1984) provides no review of whether the arresting officer advised the driver of his rights or the probable consequences of refusing a chemical test. The only determination to be made by the department is whether the person drove with an excessive blood-alcohol level, or refused to submit to a chemical test. Sections 42-2-122.1(1)(a) and (8)(c), C.R.S. (1984).

There is no right under either the Fourth or Fifth Amendments to the United States Constitution to refuse a chemical test. South Dakota v. Neville, 459 U.S. 553, 74 L. Ed. 2d 748, 103 S. Ct. 916, 921 n. 10 (1983); Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966). This court has recently held that the driver's rights to choose the type of chemical test to be taken or to refuse all tests, are provided by statute and not by constitution. People v. Gillett, 629 P.2d 613 (Colo. 1981).

This court answered Brewer's argument that he must be advised of his rights under the Express Consent Law, section 42-4-1202(3), C.R.S. (1984), in Vigil v. Motor Vehicle Division, 184 Colo. 142, 519 P.2d 332 (1974).

> Vigil does not argue that constitutional due process requires that the advisement form must inform the licensee of the probable consequences of the failure to take the test. In fact, we note that other jurisdictions have upheld implied consent statutes which provided for no warning. See Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (1955); Hazlett v.Motor Vehicle Department, 195 Kan. 439, 407 P.2d 551 (1965).
>
> The requirements of due process in relation to the warnings are satisfied by the notice which is given licensees through publication of the statutes. A licensee to operate a motor vehicle on public highways is presumed to know the law regarding his use of the public highways.

519 P.2d at 334. South Dakota v. Neville, supra, did outline

very specific procedures incorporated in the law in question in that case. However, South Dakota's implied consent law required an arresting officer to inform a driver of his various rights under that law, 459 U.S. ___, 74 L. Ed. 2d 756, 103 S. Ct. 921. The advisement was not in issue in the case and the court did not address whether due process required such an advisement. The court addressed only whether Neville's refusal to submit to a chemical test could be introduced in evidence without violating the Fifth Amendment.

Brewer knew that he could refuse a chemical test, that he could request or refuse a blood test, and that his license could be revoked if he took the test or refused it. Vigil v. Motor Vehicle Division, supra. Brewer agreed to take a breath-test (p. 33). There is no evidence in the record that Brewer requested a blood test, nor is there any evidence that a request for a blood test was refused. Absent a request for a blood test, the driver cannot complain that his statutory rights have been violated. Section 42-4-1202(3), C.R.S. (1984) directs no preference in tests. It clearly allows the driver to request a blood test in the first instance.

V.

BREWER IS PRECLUDED FROM RAISING CERTAIN ISSUES BECAUSE OF HIS FAILURE TO RAISE THEM BEFORE THE DISTRICT COURT.

Brewer raises two issues before this court that he failed to raise before the district court. First, he argues that section 42-2-122.1, C.R.S. (1984) is inconsistent and vague. Opening brief of plaintiff-appellant, pp. 8-11. Second, he argues that the department has violated his right to due process of law because the department has not promulgated rules to govern hearings held pursuant to section 42-2-122.1, C.R.S (1984).

Brewer did not raise these issues before the district court (pp. 43-49), nor did the district court address either of these issues in its order (pp. 62-66). Brewer's failure to properly preserve the issues precludes their review. Matthews v. Tri County Water Conservancy District, 200 Colo. 202, 613 P.2d 889 (1980); Board of Adjustment of Adams County v. Iwerks, 135 Colo. 578, 316 P.2d 573 (1957).

VI.

EVEN IF ALL ISSUES ARE PROPERLY BEFORE THIS COURT, THE ORDER OF REVOCATION MUST BE AFFIRMED.

Section 42-2-122.1(1)(a), C.R.S. (1984) requires the department to revoke a driver's license if it finds that the person

had excessive blood-alcohol at the time he drove or within an hour after he drove. This subsection provides the authority for the department to revoke the driver's license. All other parts of section 42-2-122.1, C.R.S. (1984) define the procedure that the department is to use in exercising this authority. Section 42-2-122.1(8)(c), C.R.S. (1984) may appear at first to provide a different standard for the department to use in revoking a license, but close analysis reveals that the subsection regulates procedure only and does not conflict with subsection (1).

Section 42-2-122.1(8), C.R.S. (1984) deals with the procedural elements of the hearing. It directs where the hearing will be held, who will hear the matter and who will regulate the course of the hearing. It sets forth a standard of proof and limits the issues to those which are to be determined by the department under section 42-2-122.1(1), C.R.S. (1984). It is unnecessary and repetitious to require the legislature to restate the department's authority in this subsection dealing with procedure. The failure of subsection (8)(c) to state exactly the same terms as subsection (1)(a)(I) may make the entire section ambiguous, but does not make the section vague.

If section 42-2-122.1, C.R.S. (1984) is ambiguous because of this inconsistency, the court may consider the legislature's objective in enacting the statute, the consequences of particular constructions and the department's construction in giving meaning

to the statute. Section 2-4-203, C.R.S. (1980). As was stated earlier, section 42-2-122.1, C.R.S. (1984) is a remedial statute designed to prevent known drunk drivers from injuring and killing people by repeating the actions that lead to their arrest. It should be liberally construed in favor of the public interest. The court should construe the section to allow the department the fullest authority granted it by the legislature in subsection (1). To hold that the department's authority is less simply because the driver requests a hearing would defeat the legislature's objective to protect the public safety.

The consequence of construing section 42-2-122.1(8)(c), C.R.S. (1984) as a limit on the department's authority would be to decrease the department's authority simply because the driver asks for a hearing. It is absurd to hold that the legislature granted the department the broad authority of section 42-2-122.1(1)(a)(I), C.R.S. (1984) only as to those drivers who do not exercise their right to a hearing.

The department has interpreted section 42-2-122.1, C.R.S. (1984) to require it to revoke a driver's license if the driver's blood alcohol level exceeds the prescribed limit within one hour of driving regardless of whether a hearing is held. Its construction of the ambiguity of section 42-2-122.1, C.R.S. (1984) is entitled to great weight. Traveler's Indemnity Company v. Barnes, 191 Colo. 278, 552 P.2d 300 (1976); Davis v. Conour, 178

Colo. 376, 497 P.2d 1015 (1972).

Section 42-2-122.1, C.R.S. (1984) is not vague. It tells everyone precisely when the department may revoke their driver's license. It is difficult to imagine how anyone could misunderstand the specific acts detailed in section 42-2-122.1(1)(a), C.R.S. (1984) which require the department to revoke a driver's license.

Similarly, it is ridiculous to say that section 42-2-122.1, C.R.S. (1984) does not specify what evidence might be considered material to a decision rendered under that section. Elizordo v. State, 194 Colo. 113, 570 P.2d 518 (1977) required the department to promulgate rules which would guide a hearing officer in using his discretion whether to grant a probationary driver's license. Section 42-2-122.1, C.R.S. (1984) gives the hearing officer no such discretion. If the hearing officer finds facts that require revocation, he must revoke the license.

Everyone knows what evidence will be material to his decision. Evidence which is probative of the issues set forth in section 42-2-122.1, C.R.S. (1984) will be material to the decision. Therefore, the statute itself provides notice of what evidence will be material to the hearing officer's decision and no further specification is required. Brewer's failure to offer evidence and preserve the offer in the record precludes his due process claim. Blood v. Industrial Commission, 165 Colo. 532,

440 P.2d 775 (1968).

CONCLUSION

The hearing officer's finding that Brewer drove a vehicle with 0.15 or more grams of alcohol per 210 liters of breath is supported by substantial evidence and is a correct interpretation of the law. Brewer's argument that he must be advised of his rights under the Express Consent Law before his license may be revoked is without merit. Brewer is precluded from raising the issues of vagueness and regulation requirements because they are raised before this court for the first time. Even if those issues are properly before the court, they are without merit.

The order of revocation is supported by substantial evidence and must be affirmed. The district courts order affirming the order of revocation is correct and must therefore be affirmed.

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42-2-122.1. Revocation of license based on administrative determination.

(1) (a) The department shall revoke the license of any person upon its determination that the person:

(I) Drove a vehicle in this state when the amount of alcohol in such person's blood was 0.15 or more grams of alcohol per hundred milliliters of blood or 0.15 or more grams of alcohol per two hundred ten liters of breath at the time of the commission of the alleged offense or within one hour thereafter, as shown by chemical analysis of such person's blood or breath; or

(II) Refused to submit to a chemical analysis of his blood, breath, saliva, or urine as required by section 42-4-1202 (3).

(b) The department shall make a determination of these facts on the basis of the report of a law enforcement officer required in subsection (2) of this section, and this determination shall be final unless a hearing is requested and held. If a hearing is held, the department shall review the matter and make a final determination on the basis of evidence received at the hearing.

(c) The determination of these facts by the department is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect any revocation under this section.

(2) (a) A law enforcement officer who arrests any person for a violation of section 42-4-1202 (1.5) shall forward to the department a verified report of all information relevant to the enforcement action, including information which adequately identifies the arrested person, a statement of the officer's grounds for belief that the person violated section 42-4-1202 (1.5), a report of the results of any chemical tests which were conducted, and a copy of the citation and complaint filed with the court.

(b) When a law enforcement officer requests a person to submit to chemical tests as required by section 42-4-1202 (3) and such person refuses to submit to such tests, the officer shall forward to the department a verified report of all relevant information, including information which adequately identifies such person and a statement of the officer's grounds for requesting such person to submit to the tests.

(c) The report required by this section shall be made on forms supplied by the department or in a manner specified by rule

or regulation of the department.

(3) (a) Upon receipt of the report of the law enforcement officer, the department shall make the determination described in subsection (1) of this section. If the department determines that the person is subject to license revocation and if notice of revocation has not already been served upon the person by the enforcement officer as required in subsection (4) of this section, the department shall issue a notice of revocation.

(b) The notice of revocation shall be mailed to the person at the last-known address shown on the department's records and to the address provided by the enforcement officer's report if that address differs from the address of record. The notice is deemed received three days after mailing, unless returned by postal authorities.

(c) The notice of revocation shall clearly specify the reason and statutory grounds for the revocation, the effective date of the revocation, the right of the person to request a hearing, the procedure for requesting a hearing, and the date by which that request for a hearing must be made.

(4) (a) Whenever the chemical analysis results are available to the law enforcement officer while the arrested person is still in custody and where the results, if available, show an alcohol concentration of 0.15 or more grams of alcohol per one hundred milliliters of blood as shown by chemical analysis of such person's blood or 0.15 or more grams of alcohol per two hundred ten liters of breath as shown by chemical analysis of such person's breath or whenever a person refuses to submit to chemical tests as required by section 42-4-1202 (3), the officer, acting on behalf of the department, shall serve the notice of revocation personally on the arrested person.

(b) When the law enforcement officer serves the notice of revocation, the officer shall take possession of any driver's license issued by this state which is held by the person. When the officer takes possession of a valid driver's license issued by this state, the officer, acting on behalf of the department, shall issue a temporary permit which is valid for seven days after its date of issuance.

(c) A copy of the completed notice of revocation form, a copy of any completed temporary permit form, and any driver's license taken into possession under this section shall be forwarded to the department by the officer along with the report required in subsection (2) of this section.

(d) The department shall provide forms for notice of revo-

cation and for temporary permits to law enforcement agencies.

(5) (a) The license revocation shall become effective seven days after the subject person has received the notice of revocation as provided in subsection (4) of this section or is deemed to have received the notice of revocation by mail as provided in subsection (3) of this section. If a written request for a hearing is received by the department within that same seven-day period, the effective date of the revocation shall be stayed until a final order is issued following the hearing; except that any delay in the hearing which is caused or requested by the subject person or counsel representing that person shall not result in a stay of the revocation during the period of delay.

(b) The period of license revocation under this section shall be one year.

(c) (I) Where a license is revoked under subsection (1) (a) (I) of this section and the person is also convicted on criminal charges arising out of the same occurrence for a violation of section 42-4-1202 (1) (a) or (1.5), both the revocation under this section and any suspension, revocation, cancellation, or denial which results from such conviction shall be imposed, but the periods shall run concurrently, and the total period of revocation, suspension, cancellation, or denial shall not exceed the longer of the two periods.

(II) Where a license is revoked under subsection (1) (a) (II) of this section and the person is also convicted on criminal charges arising out of the same occurrence for a violation of section 42-4-1202 (1) or (1.5), any suspension, revocation, cancellation, or denial which results from such conviction and is imposed shall run consecutively with the revocation under this section.

(6) (a) The periods of revocation specified by subsection (5) of this section are intended to be minimum periods of revocation for the described conduct. No license shall be restored under any circumstances and no probationary license shall be issued during the revocation period.

(b) Upon the expiration of the period of revocation under this section, if the person's license is still suspended or revoked on other grounds, the person may seek a probationary license as authorized by sections 42-2-122 (4) and 42-2-123 (13) subject to the requirements of paragraph (c) of this subsection (6).

(c) Following a license revocation, the department shall

not issue a new license or otherwise restore the driving privilege unless it is satisfied, after an investigation of the character, habits, and driving ability of the person, that it will be safe to grant the privilege of driving a motor vehicle on the highways.

(7) (a) Any person who has received a notice of revocation may make a written request for a review of the department's determination at a hearing. The request may be made on a form available at each office of the department. If the person's driver's license has not been previously surrendered, it must be surrendered at the time the request for a hearing is made.

(b) The request for a hearing must be made within seven days after the person received the notice of revocation as provided in subsection (4) of this section or is deemed to have received the notice by mail as provided in subsection (3) of this section. If written request for a hearing is not received within the seven-day period, the right to a hearing is waived, and the determination of the department which is based upon the enforcement officer's report becomes final.

(c) If a written request for a hearing is made after expiration of the seven-day period and if it is accompanied by the applicant's verified statement explaining the failure to make a timely request for a hearing, the department shall receive and consider the request. If the department finds that the person was unable to make a timely request due to lack of actual notice of the revocation or due to factors of physical incapacity such as hospitalization or incarceration, the department shall waive the period of limitation, reopen the matter, and grant the hearing request. In such a case, a stay of the revocation pending issuance of the final order following the hearing shall not be granted.

(d) At the time the request for a hearing is made, if it appears from the record that the person is the holder of a valid driver's license issued by this state and that the driver's license has been surrendered as required, the department shall issue a temporary permit which will be valid until the scheduled date for the hearing. If necessary, the department may later issue an additional temporary permit or permits in order to stay the effective date of the revocation until the final order is issued following the hearing, as required by subsection (5) of this section.

(e) The hearing shall be scheduled as soon as possible, but in no event later than sixty days after the filing of the request for a hearing. The department shall provide a written notice of the time and place of the hearing to the party request-

ing the hearing at least twenty days prior to the scheduled hearing, unless the parties agree to waive this requirement.

(8) (a) The hearing shall be held in the district office nearest to where the arrest occurred, unless the parties agree to a different location.

(b) The presiding hearing officer shall be the executive director of the department or an authorized representative designated by the executive director. The presiding hearing officer shall have authority to administer oaths and affirmations; to examine witnesses and take testimony; to receive relevant evidence; to issue subpoenas, take depositions, or cause depositions or interrogatories to be taken; to regulate the course and conduct of the hearing; and to make a final ruling on the issue.

(c) The sole issue at the hearing shall be whether by a preponderance of the evidence the person drove a vehicle in this state when the amount of alcohol in such person's blood was 0.15 or more grams of alcohol per hundred milliliters of blood or 0.15 or more grams of alcohol per two hundred ten liters of breath at the time of the commission of the alleged offense, as shown by chemical analysis of such person's blood or breath, or refused to submit to a chemical analysis of his blood, breath, saliva, or urine as required by section 42-4-1202 (3). If the presiding hearing officer finds the affirmative of the issue, the revocation order shall be sustained. If the presiding hearing officer finds the negative of the issue, the revocation order shall be rescinded.

(d) The hearing shall be recorded. The decision of the presiding hearing officer shall be rendered in writing, and a copy will be provided to the person who requested the hearing.

(e) If the person who requested the hearing fails to appear without just cause, the right to a hearing shall be waived, and the determination of the department which is based upon the enforcement officer's report becomes final.

(9) (a) Within thirty days of the issuance of the final determination of the department under this section, a person aggrieved by the determination shall have the right to file a petition for judicial review in the district court in the county of the person's residence.

(b) The review shall be on the record without taking additional testimony. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported

by the evidence in the record, the court may reverse the department's determination.

(c) The filing of a petition for judicial review shall not result in an automatic stay of the revocation order. The court may grant a stay of the order only upon motion and hearing and upon a finding that there is a reasonable probability that the petitioner will prevail upon the merits and that the petitioner will suffer irreparable harm if the order is not stayed.

(10) The "State Administrative Procedure Act", article 4 of title 24, C.R.S., shall apply to this section to the extent it is consistent with subsections (7), (8), and (9) of this section relating to administrative hearings and judicial review.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 14th day of February 1985, addressed as follows:

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