

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STONE V. NETH

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

JOSHUA S. STONE, APPELLEE,
V.
BEVERLY NETH, DIRECTOR, NEBRASKA DEPARTMENT
OF MOTOR VEHICLES, APPELLANT.

Filed June 5, 2012. No. A-11-827.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Appeal dismissed.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellant.

Radley E. Clemens for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

INBODY, Chief Judge.

INTRODUCTION

Beverly Neth, the director of the Department of Motor Vehicles (the Department), appeals the determination of the district court dismissing the revocation of Joshua S. Stone's driver's license.

STATEMENT OF FACTS

On February 22, 2011, officers with the Papillion Police Department received a well-check dispatch call regarding an individual in a vehicle parked in a hospital parking lot. According to officer testimony, the driver of the vehicle was sitting in the driver's side of the vehicle, with the vehicle running, and was sleeping or passed out. Officers were eventually able to wake the driver, later identified as Stone. Officers observed an open beer container in the vehicle and that Stone once awake had slurred speech, difficulty standing, and an odor of alcoholic beverage on his person. Stone admitted to officers that he had consumed alcohol, but

refused to cooperate with any type of testing both on the scene and at the police department. Stone was arrested for driving under the influence.

The two arresting officers completed the sworn report, notice of revocation, and temporary license on the same day, which was received by the Department on February 28, 2011. Stone timely filed a petition for a hearing, which was held on March 15, 2011. After the hearing, the Department entered an administrative order revoking Stone's license for a period of 1 year.

On April 13, 2011, Stone appealed the order to the district court and served summons upon the director of the Department at the Department's offices. On May 23, the Department filed a motion to dismiss, alleging that there had been no proper and valid service of process pursuant to Neb. Rev. Stat. §§ 84-917 and 25-510.02 (Reissue 2008). The motion alleges that the summons was issued upon the director of the Department and served directly to her, but not to the Attorney General's office as required by statute. On May 24, Stone issued a second summons upon the director, but this time service was directed in care of "John Brunning [sic], Attorney General."

On July 6, 2011, the district court entered an order overruling the motion to dismiss. On September 12, the matter came on for a hearing on the merits of the appeal. The district court found that the officers' sworn report provided sufficient information to establish a prima facie case, but, because the hearing officer's report was signed on March 14 despite the fact that the hearing was not conducted until March 15, "this Court agrees with Appellant that the hearing officer had already decided the matter herein, on the day prior, to receiving the evidence. Thus, the hearing officer had no jurisdiction to hear testimony at the revocation hearing on March 15, 2011, and her findings and conclusions must be reversed." The district court reversed the findings and conclusions of the hearing officer and the revocation of Stone's license. The Department has timely appealed to this court. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

The Department assigns that the district court erred in finding that it had jurisdiction to hear Stone's appeal and in finding that the hearing officer had predetermined Stone's case and lacked jurisdiction to conduct the hearing.

STANDARD OF REVIEW

Under the Administrative Procedure Act (APA), Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record. *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010). When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Murray v. Neth*, *supra*.

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008).

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *O'Hara v. Department of Motor Vehicles*, 14 Neb. App. 709, 713 N.W.2d 508 (2006).

ANALYSIS

District Court Jurisdiction.

The Department argues that the district court was without jurisdiction to hear Stone's appeal because of Stone's failure to serve summons upon the Attorney General within 30 days after filing his petition pursuant to §§ 84-917 and 25-510.02.

Section 84-917(2)(a) of the APA requires in part that "[s]ummons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in section 25-510.02." Section 25-510.02 provides that summons be left at the office of the Attorney General "with the Attorney General, deputy attorney general, or someone designated in writing by the Attorney General, or by certified mail service addressed to the office of the Attorney General." See, also, *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997) (when § 25-510.02 applies, summons must be served on Attorney General in order to institute judicial review under APA). Although § 25-510.02 provides a petitioner some discretion as to the mode of service, it grants no discretion as to the entity to be served. *Concordia Teachers College v. Neb. Dept. of Labor*, *supra*; *Nebraska Methodist Health Sys. v. Dept. of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996). Therefore, when § 25-510.02 applies, as it does in the present case, a summons must be served on the Attorney General in order to institute judicial review under the APA. *Concordia Teachers College v. Neb. Dept. of Labor*, *supra*. See *Twiss v. Trautwein*, 247 Neb. 535, 529 N.W.2d 24 (1995). See, also, *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994).

In this case, the record reveals that the order revoking Stone's license was signed and adopted by the director on March 21, 2011. On April 13, Stone filed his petition for further review with the district court and a praecipe for summons on "direct personal service on the Defendant or any agent in the office," who can be found employed at the following:

Beverly Neth
Director Dept. of Motor Vehicles
State Capitol Bldg.
Lincoln, Neb., 68509[.]

On May 24, 2011, Stone issued a second summons to the following:

Neth, Beverly
%John Brunning [sic], Attorney General
State Capital Bldg
Lincoln, NE 68509[.]

Therefore, it is clear that Stone did not obtain service of process on the Attorney General until May 24, 2011, more than 30 days after the petition for review was filed with the district court. Stone failed to invoke the subject matter jurisdiction of the district court by failing to serve the proper summons within 30 days of filing his petition for review. Thus, the district court did not have the authority to review the Department's revocation of Stone's driver's license.

*Jurisdiction for Administrative
License Revocation Hearing.*

The Department also contends that the district court erred by finding that the hearing officer had predetermined Stone's case and therefore lacked jurisdiction to conduct the hearing; however, having determined that the district court was without jurisdiction to hear Stone's petition for review, we do not reach any further issues on appeal. Where the court from which the appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

CONCLUSION

The district court did not obtain jurisdiction over Stone's petition for review of the Department's revocation of his driver's license, and therefore, we dismiss Stone's appeal for lack of jurisdiction. Given that the district court was without jurisdiction to reverse the Department's revocation of Stone's driver's license, the Department's revocation of Stone's driver's license for a period of 1 year is reinstated.

APPEAL DISMISSED.