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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CODY CLAPP, Plaintiff and Respondent, v. DEPARTMENT OF MOTOR VEHICLES, Defendant and Appellant.	B343964 (Los Angeles County Super. Ct. No. 24STCP00925)

APPEAL from an order of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Reversed and remanded.

Rob Bonta, Attorney General, Chris A. Knudsen, Assistant Attorney General, Gabrielle H. Brumbach and Roza Patterson, Deputy Attorney General, for Defendant and Appellant.

Criminal Defense Heroes and Donald R. Hammond for Plaintiff and Respondent.

The Department of Motor Vehicles (DMV) appeals from the trial court's issuance of a peremptory writ of mandate directing the DMV to set aside its four-month suspension of Cody Clapp's driver license for driving with a blood alcohol content above the legal limit of 0.08 percent. In issuing the writ, the trial court concluded that the DMV's Administrative Per Se (APS) hearing violated defendant's due process rights because the hearing officer acted as an advocate for the DMV by deciding which documents to use and move into evidence. We conclude that the hearing officer in this case did not act as an advocate but rather collected, developed, and admitted the evidence without violating defendant's due process rights. We therefore reverse and remand with directions to the trial court to enter an order denying Clapp's petition for writ of mandate and reinstating the DMV's suspension order.

FACTUAL AND PROCEDURAL BACKGROUND

I. Clapp's Arrest for Driving Under the Influence

In July 2022, California Highway Patrol officers initiated a traffic stop of Clapp's vehicle along the I-710 Freeway after observing Clapp traveling 85 miles per hour in a 65-mile-per-hour zone, weaving, braking irregularly, and nearly colliding with a semi-truck. Upon contact, one officer noticed Clapp exhibited signs of intoxication—he smelled of alcohol, had red watery eyes, slurred his speech, and moved with an unsteady gait. Clapp initially denied drinking but later admitted he had consumed a small amount of alcohol. Officers conducted field sobriety tests, and Clapp showed signs of impairment, including difficulty balancing and following instructions.

A preliminary alcohol screening test revealed that Clapp had blood alcohol levels between 0.21 and 0.23 percent. After his arrest, a search of the vehicle revealed open and unopened alcoholic beverages. At the Long Beach Police Department, a breath test confirmed Clapp's blood alcohol level was 0.21 percent.

II. The DMV's APS Hearing to Suspend Clapp's License

In February 2024, the DMV held a telephonic hearing to suspend Clapp's license. DMV Hearing Officer Brenda Meneses and Clapp's attorney attended; the DMV did not have a separate representative at the hearing.

Hearing Officer Meneses said that she had been "appointed by the Director of the DMV to hear" the matter and that she would "be acting as a neutral factfinder." Hearing Officer Meneses stated: "I am prohibited from and will not act as an advocate for the DMV or law enforcement. My role is to review the evidence provided, ask clarifying questions if necessary, and make legal rulings and determinations under the relevant statutes as necessary. And the scope of the hearing is limited to the following issues: Did the officer have reasonable cause to believe that respondent had been driving a motor vehicle in violation of Section 23152 or 23153 of the Vehicle Code? Was respondent lawfully arrested? And was respondent driving a motor vehicle when he had .08 percent or more by weight of alcohol in his blood?"

Clapp's attorney objected to the single-hearing-officer format as violating Clapp's constitutional rights to due process pursuant to *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2022) 77 Cal.App.5th 517 (*DUI Lawyers*). Hearing Officer Meneses responded that she had no authority to

rule on the objection and that he could file a writ with the court to raise that issue.

Hearing Officer Meneses then marked four documents from the DMV's file as exhibits: (1) the arresting officer's sworn statement (Form DS 367), (2) the arresting officer's unsworn arrest report, (3) the "intoxilyzer precautionary checklist," which documented a control test and Clapp's blood alcohol concentrations for two preliminary screening breath tests, and (4) Clapp's driving record. Clapp's counsel objected to all the exhibits, asserting, among other things, that the documents were inadmissible hearsay and lacked foundation. Counsel also argued that there was no admissible evidence of Clapp's blood alcohol content. Hearing Officer Meneses acknowledged counsel's arguments and took the matter under submission.

A month later, the hearing officer issued a "notification of findings and decision," suspending Clapp's driving privilege for four months. Hearing Officer Meneses overruled counsel's objections and explained her reasoning.

III. Petition for Writ of Mandate

Clapp filed a petition for writ of mandate challenging the suspension of his driving privileges. Clapp argued that the APS hearing violated his due process rights because Hearing Officer Meneses acted as an advocate for the DMV by deciding which documents to use and moving those documents into evidence. Clapp also argued that Hearing Officer Meneses erroneously

admitted exhibits over his objections. Clapp sought an award of attorney fees per Government Code section 800.[1]

In response, the DMV argued that Clapp's rights were not violated because Hearing Officer Meneses acted as a neutral fact finder and never engaged in advocacy. The DMV asserted that by admitting the sworn statement, arrest report, and other documents into evidence, Hearing Officer Meneses was collecting and developing evidence, which is permissible under *DUI Lawyers*, *supra*, 77 Cal.App.5th 517, and other cases discussing the constitutionality of APS hearings. The DMV also argued that Hearing Officer Meneses relied on admissible evidence.

After considering the parties' arguments and the administrative record, the court concluded that the hearing officer properly admitted the DMV's evidence and that the evidence supported the finding that Clapp had been driving a motor vehicle with a blood alcohol content in excess of 0.08 percent. The trial court nonetheless determined that the APS hearing violated Clapp's due process rights. Citing *DUI Lawyers*, *supra*, 77 Cal.App.5th 517, the court concluded that an unacceptable risk of bias existed in the structure of the DMV hearing because "the APS process is adversarial, and the court does not believe that the hearing officer can both present evidence and decide the case" without violating the driver's due process rights. The trial court entered an order granting Clapp's

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[1] Under Government Code section 800, attorney fees may be awarded "if it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity."

petition, remanded the matter for a new APS hearing, and awarded Clapp attorney fees.

The DMV timely appealed.

DISCUSSION

The DMV argues Clapp was afforded due process at his APS hearing and that we should reverse the writ of mandate. We review the issue de novo. (*Knudsen v. Department of Motor Vehicles* (2024) 101 Cal.App.5th 186, 210 (*Knudsen*) [" ' "A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law." ' "].)

I. Due Process in APS Hearings

"In California, the DMV must immediately suspend the driver's license of a person who is driving with [a blood alcohol content (BAC)] of 0.08 percent. (§ 13353.2, subd. (a)(1).) However, drivers have a right to an administrative hearing before the suspension of a license takes effect. At the hearing, which is known as an APS hearing, a public hearing officer determines: whether an arresting officer had reasonable cause to believe the driver was driving, whether the driver was lawfully arrested, and whether the driver was driving with a BAC of 0.08 percent or greater. (*Evans v. Gordon* (2019) 41 Cal.App.5th 1094, 1101.)" (*Knudsen*, *supra*, 101 Cal.App.5th at p. 195.)

At the APS hearing, the driver has a due process right to an impartial adjudicator. (*DUI Lawyers*, *supra*, 77 Cal.App.5th at p. 524; *Knudsen*, *supra*, 101 Cal.App.5th at p. 198*; Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212 (*Today's Fresh Start*).) However, the

California Supreme Court has held that an administrative agency may assign the same person to "develop[] the facts and render[] a final decision." (*Today's Fresh Start*, at p. 220.) Proceedings where the decisionmaker merely develops the facts " 'are inquisitorial rather than adversarial' " and do not violate due process. (*Ibid.*) "To prove a due process violation based on overlapping functions thus requires something more than proof that an administrative agency has investigated and accused, and will now adjudicate. '[T]he burden of establishing a disqualifying interest rests on the party making the assertion.' [Citation.] That party must lay a 'specific foundation' for suspecting prejudice that would render an agency unable to consider fairly the evidence presented at the adjudicative hearing [citation]; it must come forward with 'specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias' [citations]. Otherwise, the presumption that agency adjudicators are people of ' "conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances" ' will stand unrebutted." (*Id.* at pp. 221–222.)

In *DUI Lawyers*, a lawyers' association brought a taxpayer action against the DMV, claiming the agency was wasting public funds by operating an APS system that violated drivers' procedural due process rights because the hearing officer served simultaneously as advocate and adjudicator. (*DUI Lawyers*, *supra*, 77 Cal.App.5th at p. 523.) The Court of Appeal held that the DMV's practice of having one person act as both the DMV's *advocate* and the APS hearing officer violated due process because the dual-role arrangement created an unacceptable risk of bias and therefore violated the Fourteenth Amendment of the

United States Constitution and article I, section 7 of the California Constitution. (*Id.* at pp. 532–533.) However, the *DUI Lawyers* court stated that "the DMV may task the same person with both *collecting and developing the evidence* and rendering a final decision." (*Id.* at p. 533, fn. 5 (italics added), citing *Today's Fresh Start*, *supra*, 57 Cal.4th at p. 220.) The court remanded the matter with directions to the trial court to grant summary judgment in favor of the lawyers' association and to include language in its judgment permanently enjoining and restraining the DMV "from having its APS hearing officers function as advocates for the position of the DMV in addition to being finders of fact in the same adversarial proceeding." (*DUI Lawyers*, at p. 538.)

Since *DUI Lawyers*, appellate courts reviewing due process challenges to APS hearings have applied its holding by examining "the administrative record and the revocation decision to see if the public hearing officer actually acted as both an adjudicator *and* an advocate, or merely acted as an adjudicator and a collector and developer of evidence." (*Knudsen*, *supra*, 101 Cal.App.5th at p. 193.) For instance, in *Knudsen*, at pages 209 to 213, the appellate court concluded that the hearing officer acted as an advocate and thus violated the driver's due process rights because the hearing officer asked the defense expert questions aimed at undermining the expert's testimony, and issued a written decision that mischaracterized the expert's testimony, relied on irrelevant weaknesses, and contained an obvious legal error favoring the DMV. (See *Romane v. Department of Motor Vehicles* (2025) 110 Cal.App.5th 1002, 1015 (*Romane*), review granted August 13, 2025, S291093 [discussing *Knudsen*].) Similarly, in *Clarke v. Gordon* (2024) 104

Cal.App.5th 1267 (*Clarke*), the Court of Appeal held that the hearing officer acted as both advocate and adjudicator by "rigorously cross-examining" the driver—repeatedly questioning him about whether the arresting officer told him he had no right to an attorney and twice interrupting his answers. (*Id.* at pp. 1277, 1273–1274.) *Knudsen* and *Clarke* illustrate how hearing officers impermissibly step outside of their adjudicatory role and into the shoes of an advocate.

On the other hand, in *Kazelka v. Department of Motor Vehicles* (2025) 109 Cal.App.5th 1239 (*Kazelka*) and *Romane*, *supra*, 110 Cal.App.5th 1002, two cases decided earlier this year, hearing officers maintained neutral roles in APS hearings. In *Kazelka*, at pages 1245 to 1246, the hearing officer issued two subpoenas to law enforcement in advance of the APS hearing, seeking records about the maintenance of the preliminary alcohol screening device. (*Id.* at pp. 1245, 1255.) At the hearing, the officer admitted those records, which the appellate court characterized as the type of evidence "that would likely be entered into evidence in any APS hearing." (*Id.* at pp. 1255–1256.) The officer did not mischaracterize any evidence, ask leading questions of the sole witness, or otherwise display bias. (*Id.* at p. 1255.) On that record, the court held no due process error occurred. (*Id.* at p. 1256.)

Likewise, in *Romane*, *supra*, 110 Cal.App.5th at pages 1015 to 1021, the Court of Appeal found no due process violation where the hearing officer introduced and admitted into evidence the driver's driving record and a standard chemical test admonishment form without objection from the driver (*id.* at p. 1015), and "the sworn DS 367 form and the unsworn arrest report over [the driver]'s objection" (*id.* at p. 1016). The hearing

officer also admitted the driver's evidence before taking the matter under submission. (*Id*. at p. 1019.) The court stated that "these documents are appropriately and routinely admitted into evidence at APS hearings." (*Id*. at p. 1016.) The court explained that the "Supreme Court has long held that this statutory scheme allows a hearing officer to consider an arresting officer's sworn statement (the DS 367 form) as well as an unsworn police report from an arresting or nonarresting officer at an APS hearing" (*id*. at p. 1017) and that it was well established these documents are admissible at APS hearings under the public records exception (*id*. at p. 1018). The *Romane* court concluded, "where, as here, a hearing officer merely introduces the documents that law enforcement duly forwarded to the DMV, which are routinely admitted into evidence at APS hearings, the officer is merely collecting and developing evidence, not advocating for the DMV." (*Ibid*.)

With these distinctions between advocacy and development of evidence in mind, we turn to the facts of the case before us.

II. No Due Process Violation

Here, Hearing Officer Meneses began the APS hearing by stating she was a neutral factfinder. She then admitted into evidence four documents from the DMV's file. Unlike the hearing officers in *Knudsen* and *Clarke*, Hearing Officer Meneses listened to and noted counsel's evidentiary objections and did not argue, question, or do anything to undermine Clapp's case. Hearing Officer Meneses took the matter under submission and subsequently issued a statement of decision, ruling on the evidentiary objections and making factual findings based on the evidence. Like the hearing officers in *Romane* and *Kazelka*, Hearing Officer Meneses did not advocate for the DMV but

merely admitted documents typically admitted in APS hearings and reviewed the evidence.

Clapp argues that the DMV here used the same hearing format as prohibited by *DUI Lawyers*. We disagree. *DUI Lawyers* proscribed the DMV from allowing the same person to act as advocate and adjudicator. (*DUI Lawyers*, *supra*, 77 Cal.App.5th at p. 538.) That was not the case here. Hearing Officer Meneses did not advocate on behalf of the DMV. Unlike *Knudsen* and *Clarke*, she did not cross-examine witnesses, mischaracterize evidence, display bias, or seek to undermine the driver's case. What Hearing Officer Meneses did do was admit and develop evidence, which is clearly permitted by *DUI Lawyers*.

Clapp contends that choosing documents to rely on "is the role of an advocate." We disagree. This constitutes the permissible development of evidence in an administrative hearing. (See *Today's Fresh Start*, *supra*, 57 Cal.4th at p. 220.) Adjudicators routinely determine which evidence offered by the parties is persuasive, and this situation is no different. Here, Hearing Officer Meneses simply admitted into evidence certain public records the DMV provided for the case.

Clapp argues Hearing Officer Meneses exhibited bias by admitting the DMV's documents over his counsel's objections. Yet, as explained in *Romane*, admitting documents that "are appropriately and routinely admitted into evidence at APS hearings," even over the driver's objection, is not advocacy. (*Romane*, *supra*, 110 Cal.App.5th at p. 1016.) The officer's sworn and unsworn statements, the intoxilyzer results (breath test results), and Clapp's driving record are all the types of documents routinely admitted at APS hearings. (See *Romane*, at pp. 1010, 1016 [admitting driving record; concluding routine admission of

the sworn and unsworn police reports is not advocacy]; see *Burge v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 384, 390 [intoxilyzer test result is "exactly the type of report" admissible at DMV hearing]; see e.g. *Clarke*, *supra*, 104 Cal.App.5th at p. 1272 [admitting driving record].)

In sum, we "detect no evidence of advocacy on the record before us." (*Romane*, *supra*, 110 Cal.App.5th at p. 1019.) We thus conclude that Hearing Officer Meneses did not violate Clapp's due process rights at the APS hearing.[2] We reverse the trial court's order issuing the writ of mandate and corresponding award of attorney fees.

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[2] Clapp argues in the alternative that we should affirm the writ of mandate because Hearing Officer Meneses admitted and relied on inadmissible evidence. "A respondent who fails to file a cross-appeal cannot urge error on appeal." (*Kardly v. State Farm Mut. Auto. Ins. Co.* (1995) 31 Cal.App.4th 1746, 1748, fn. 1.) As Clapp did not file a protective cross-appeal, we do not consider his contentions of evidentiary error on appeal. (*Ramirez v. Superior Court* (2023) 88 Cal.App.5th 1313, 1336 [declining to address driver's argument regarding APS hearing where "the appeal in this matter was filed by DMV" and "[n]o protective cross-appeals were taken"]; see *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 910 ["Because defendant has failed to file a protective cross-appeal, reinstatement of the judgment will automatically be final"].)

DISPOSITION

The superior court's order granting Clapp's petition for writ of administrative mandate and awarding attorney fees is reversed. The trial court is directed to enter an order denying Clapp's petition for writ of mandate and reinstating the DMV's suspension order. The DMV is awarded its costs on appeal.

. **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

EGERTON, J.

ADAMS, J.