

STATE OF MICHIGAN
COURT OF APPEALS

FRASER POLICE OFFICERS,

Petitioners-Appellants,

v

CHANTAL CHARLOTTE REA,

Respondent-Appellee.

UNPUBLISHED

December 17, 2002

No. 236230

Macomb Circuit Court

LC No. 01-001956-AV

Before: Owens, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Petitioners appeal by leave granted from circuit court orders denying their petition for review of a decision by the Drivers License Appeal Division (DLAD) and denying their subsequent motion for reconsideration. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Respondent was arrested for drunk driving. Pursuant to the implied consent law, she was advised of her chemical test rights and eventually consented to a breath test. The DataMaster machine registered both attempts as refusals, but the ticket showing the results of the first test was lost. Because respondent “refused” the test, her license was subject to suspension. MCL 257.319b; MCL 257.625a(6)(b)(v); MCL 257.625d. Respondent requested a hearing as provided by MCL 257.625e. The hearing officer found in her favor and the circuit court denied petitioners’ petition for review.

At the implied consent hearing, the hearing officer is to consider only four issues: (1) whether the police officer had reasonable grounds to believe that the person had committed a crime described in MCL 257.625c(1); (2) whether the person was arrested for the crime; (3) whether the person was advised of his or her chemical test rights as provided by MCL 257.625a(6); and (4) if the person refused to submit to the test on request of the officer, whether the refusal was reasonable. MCL 257.625f(4); *Johnson v Secretary of State*, 171 Mich App 202, 206; 429 NW2d 854 (1988). At the hearing, “[t]he rules of evidence as applied in circuit court shall be followed as far as practicable, but the hearing officer may admit, and give probative effect to, evidence of a type that is commonly relied upon by reasonably prudent persons in the conduct of their affairs.” 1992 AACCS, R 257.310(3).

If the hearing officer finds in favor of the driver, the police officer may, with the prosecutor’s consent, seek review in the circuit court. MCL 257.323(1); MCL 257.625f(8). On

review, the circuit court determines, in part, whether the hearing officer's findings were supported by substantial, material, and competent evidence on the record as a whole and whether the hearing officer's decision was affected by substantial and material errors of law. MCL 257.323(4); *Johnson, supra* at 208. This Court must then determine whether the circuit court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the hearing officer's factual findings. *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).

The first three issues were resolved in petitioners' favor at the DLAD hearing, and the hearing officer's findings on those points were certainly supported by the evidence. The hearing officer apparently found that respondent did not have reasonable grounds for refusing the breath test but also found that petitioners had failed to prove that respondent had in fact refused the test because they could not produce the ticket issued by the DataMaster machine after the first test. He ruled that the officers' testimony as to the test results was akin to hearsay and inadmissible.

The circuit court correctly ruled that the hearing officer committed an error of law in rejecting petitioners' testimony as hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). A declarant is a person who makes a statement, MRE 801(b), and a statement is an oral or written assertion or nonverbal conduct of a person intended as an assertion. MRE 801(a). Courts from other jurisdictions have ruled that computer-generated information, as opposed to printouts of information entered into a computer by a person, is not hearsay because a machine is not a declarant. See, e.g., *Oregon v Weber*, 172 Or App 704, 708-709; 19 P3d 378 (2001) (photo radar inscription of vehicle's speed is not hearsay); *Stevenson v Texas*, 920 SW2d 342, 343-344 (Tex App, 1996) (breath test results are not hearsay). See also 2 Robinson, Longhofer & Ankers, Michigan Court Rules Practice, Evidence, § 801.3, p 10 ("When . . . a 'fact' is 'asserted' by a non-human entity, such as a clock 'telling the time' or a tracking dog following a scent, the 'statement' is not hearsay because the 'declarant' is not a 'person.'"). If the computer-generated results are not statements of a declarant, then petitioners' testimony as to the results is not hearsay. Therefore, the hearing officer's finding that petitioners' testimony was inadmissible hearsay was an error of law.

However, the trial court committed an error of law when it ruled that petitioners' testimony was barred by the best evidence rule. That rule provides that to prove the content of a writing, the original is required except as otherwise provided by the rules of evidence or by statute. MRE 1002. The rules of evidence excuse production of an original writing and permit other evidence of its contents if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. MRE 1004(1). The record showed that Officer Baranski put the first ticket aside and it disappeared. There was no evidence that he or Officer Witkowski purposely destroyed or disposed of it, and the hearing officer never made such a finding. Therefore, the court erred in finding that the evidence was inadmissible under MRE 1002.

On reconsideration, the court apparently recognized that it erred in affirming the DLAD by relying on MRE 1002 without considering MRE 1004(1) and instead affirmed on the ground that the hearing officer may have found petitioners' testimony incredible. A court's decision cannot rest on speculation or conjecture. *Clements v Clements*, 2 Mich App 370, 374; 139 NW2d 918 (1966). While it is apparent from the record that the hearing officer considered

petitioners' testimony, there is nothing in the record to suggest that he found their testimony incredible on any point. To the contrary, he apparently accepted their testimony that the first test registered as a refusal, but ruled as a matter of law that such testimony was inadmissible hearsay. Therefore, the circuit court applied incorrect legal principles, as did the hearing officer, and there was no evidentiary basis to support the hearing officer's or the circuit court's decision.

Reversed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Mark J. Cavanagh