

NOT DESIGNATED FOR PUBLICATION

No. 124,261

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STEVE HICKLES,
Appellant,

v.

KANSAS DEPARTMENT OF REVENUE,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; ROBERT J. WONNELL, judge. Opinion filed October 7, 2022.
Affirmed.

Conrad Miller Jr., of Miller Law Firm of Kansas, P.A., of Overland Park, for appellant.

Nhu Nguyen, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before WARNER, P.J., GREEN and HILL, JJ.

PER CURIAM: Steve Hickles appeals the trial court's decision affirming the suspension of his driver's license by the Kansas Department of Revenue (KDOR) for driving under the influence (DUI) of alcohol. Hickles contends that we should reverse his driver's license suspension because the trial court "issued an erroneous ruling when it found that [he] refused to submit to the tests required by K.S.A. 8-1001." Nevertheless, because there are multiple flaws with Hickles' argument, we affirm the trial court's decision affirming Hickles' driver's license suspension.

BACKGROUND

On October 22, 2017, around 8 p.m., Officer Nicholas Lowther stopped Hickles' car after seeing Hickles make an illegal U-turn. During the traffic stop, the officer smelled an odor of alcohol on Hickles' breath. He saw that Hickles had watery eyes. He saw that Hickles had difficulty getting his insurance information out of his glove box. Also, when he asked Hickles if he had consumed any alcohol that day, Hickles told the officer that he had a shot of vodka with water around lunchtime.

Given Hickles' demeanor and admission to drinking alcohol earlier in the day, Officer Lowther suspected that Hickles was driving under the influence of alcohol. As a result, the officer asked Hickles to perform some "pre-exit field sobriety testing." The first pre-exit field sobriety test Officer Lowther asked Hickles to perform required Hickles to say the alphabet backwards. But Hickles refused to perform this test. He told the officer that "the alphabet screw[ed] him up" because he suffered from multiple sclerosis (MS). The second pre-exit field sobriety test Officer Lowther asked Hickles to perform required Hickles to count backwards. Although Hickles willingly performed this test, twice Hickles counted forward instead of backwards. The third pre-exit field sobriety test that Officer Lowther asked Hickles to perform was a finger dexterity test. Although Hickles made no mistakes on the physical part of the test, he counted backward instead of forward when requested.

Next, because he was unsatisfied with Hickles' pre-exit field sobriety tests, Officer Lowther asked Hickles to get out of his car for further field sobriety testing. Each time the officer asked Hickles to complete the walk-and-turn test, Hickles refused, citing his MS diagnosis. Similarly, each time that Officer Lowther asked Hickles to complete the one-leg stand test, Hickles told the officer that he could not because of his MS diagnosis. Additionally, when Officer Lowther asked Hickles to take a preliminary breath test (PBT) under K.S.A. 2017 Supp. 8-1012(b), Hickles refused to take the PBT.

After Hickles refused to take the PBT, Officer Lowther arrested Hickles for DUI of alcohol and asked Hickles to complete an evidentiary breath test under K.S.A. 2017 Supp. 8-1001(a), (b). But Hickles refused to complete the evidentiary breath test too. Based on this refusal, Officer Lowther told Hickles that KDOR would suspend his driver's license for a year unless he appealed the suspension by asking for an administrative hearing on his driver's license suspension. See K.S.A. 2017 Supp. 8-1002; K.S.A. 2017 Supp. 8-1014.

Hickles appealed. But according to the hearing officer's order, she affirmed Hickles' driver's license suspension because Hickles refused to complete the evidentiary breath test after Officer Lowther had reasonable grounds to arrest him for DUI of alcohol. Notably, the hearing officer's order is the only document from Hickles' administrative level appeal included in our record on appeal. And in affirming Hickles' driver's license suspension, the hearing officer never mentioned that Hickles suffered from MS or any other medical condition.

Hickles then petitioned the trial court for judicial review of KDOR's suspension of his driver's license. In his petition for judicial review, Hickles alleged that he suffered from MS and gastroesophageal reflux disease (GERD). He alleged that his MS or GERD were the reasons why he either failed or refused the "[s]tandard field sobriety tests." He asserted that Officer Lowther's "probable cause" determination hinged on his errant belief that his questionable "behaviors and mannerisms" while completing the field sobriety tests resulted from alcohol consumption rather than "a medical condition." Then, relying on this contention, he asked the trial court to reverse KDOR's suspension of his driver's license because Officer Lowther lacked probable cause to arrest him. Although Hickles never explicitly said so in his petition for judicial review, Hickles implicitly argued that Officer Lowther lacked reasonable grounds to ask him for an evidentiary breath test under K.S.A. 2017 Supp. 8-1001(b)(2).

As evidence that he suffered from MS, Hickles attached a letter from his doctor to his petition. In this letter, Hickles' doctor confirmed that Hickles suffered from MS. Also, in this letter, Hickles' doctor described MS as a "disability" that negatively affected a person's "[b]alance, concentration, and limb coordination." Yet, his doctor did not address Hickles' alleged GERD diagnosis. The only evidence within Hickles' petition supporting his GERD diagnosis was his own contention that he suffered from it.

The trial court later held an evidentiary hearing on Hickles' appeal. At this hearing, Hickles relied on a video of his traffic stop and his own testimony as evidence that KDOR wrongly suspended his driver's license. When testifying, Hickles admitted that he made an illegal U-turn before Officer Lowther stopped his car. In addition, he admitted that the following occurred after Officer Lowther stopped his car: (1) that he told Officer Lowther that he drank a vodka with water at lunchtime; (2) that he could not find his insurance information inside his glovebox when requested; (3) that he had difficulty physically performing the field sobriety tests that he attempted; (4) that he had difficulty verbally performing the field sobriety tests that he attempted; and (5) that he had watery eyes during the traffic stop. He also testified that his professed incoordination resulted from his MS, which weakened his muscles. He explained that stressful situations worsen his MS symptoms. So, he suggested that any cues of impairment that Officer Lowther saw were his exaggerated MS symptoms. Likewise, he testified that he always had watery eyes because of his MS.

As for refusing to take the PBT, Hickles testified that he told Officer Lowther he could not take the PBT because of his GERD. He alleged that during the traffic stop, he was suffering from acid reflux. Because of this, he "felt like everything that [he] had taken in that day was still in [his]—it wasn't in [his] stomach so it would show up in a breathalyzer." Still, he agreed that he never told Officer Lowther that he was refusing to take the PBT because his GERD "would affect [his] test results." Rather, he merely told the officer that he had GERD.

KDOR's counterevidence consisted of Officer Lowther's testimony about the traffic stop. Officer Lowther testified that he did not suspect Hickles of DUI of alcohol until he smelled the odor of alcohol on Hickles' breath at the start of the traffic stop. Regarding Hickles' medical conditions, the officer testified that he did not know the symptoms of MS when he stopped Hickles. Even so, he explained that because Hickles told him about his MS, he considered that Hickles "had a disability" when determining whether to arrest him for DUI of alcohol. Meanwhile, Officer Lowther could not specifically remember if Hickles told him that he had GERD. Instead, he testified that it was possible that Hickles told him that he could not take the PBT because he suffered from GERD. Also, Officer Lowther explicitly testified that he arrested Hickles after he refused to take the PBT based on Hickles' illegal U-turn, breath smelling like alcohol, admission of alcohol consumption, fumbling for insurance information, and "performance on the pre-exit tests."

The trial court later affirmed KDOR's suspension of Hickles' driver's license. In its ruling from the bench, the trial court stressed that it "fully reviewed" the parties' filings and the video of Hickles' traffic stop. Afterwards, it found that Hickles presented sufficient evidence establishing that he had MS, which negatively affected his muscle coordination. As a result, it stressed that it would not consider Hickles' physical mistake on the finger dexterity test as evidence that he was driving under the influence of alcohol. All the same, it found that Officer Lowther had reasonable suspicion to request the PBT because the evidence supported the following: (1) that Hickles had committed an illegal U-turn; (2) that Hickles had admitted to drinking a shot of vodka at lunch; (3) that Hickles had fumbled through his glovebox when trying to find his insurance information; (4) that Hickles had failed the pre-exit field sobriety tests involving counting; (5) that Hickles had an odor of alcohol on his breath; and (6) that Hickles had watery eyes.

Next, citing Hickles' MS diagnosis, the trial court explained that it would not consider Hickles' refusal to perform the walk-and-turn and one-leg stand tests as evidence

that he was driving under the influence of alcohol. Yet, as for refusing the PBT, the trial court found that Hickles presented insufficient evidence "indicat[ing] a medical condition prevented [him] from taking the PBT." In making this finding, it emphasized that when Hickles refused to take the PBT, he never told Officer Lowther that some medical condition prevented him from taking the PBT. So, it found that Hickles' failed to prove (1) that he suffered from GERD or (2) that GERD caused people who are not under the influence of alcohol or drugs to fail a PBT. It found that Hickles' PBT refusal supported Officer Lowther's belief that Hickles was driving under the influence of alcohol. Also, it found that Officer Lowther had "reasonable grounds" under the totality of the circumstances to arrest Hickles for DUI of alcohol based on the factors giving the officer Lowther reasonable suspicion to request the PBT as well as Hickles' refusal to take the PBT.

Hickles now appeals the trial court's decision affirming KDOR's suspension of his driver's license to our court.

ANALYSIS

The Kansas Judicial Review Act (KJRA) controls appeals involving KDOR's suspension of a person's driver's license. K.S.A. 2021 Supp. 8-259(a); see K.S.A. 77-601 et seq. Under the KJRA, because Hickles appeals his driver's license suspension, he carries the burden of establishing error. K.S.A. 77-621(a)(1) (stating that the party alleging error carries the burden of proof).

When reviewing the trial court's factual findings in a driver's license suspension case, we consider whether the trial court's factual findings were supported by substantial competent evidence. *Swank v. Kansas Dept. of Revenue*, 294 Kan. 871, 881, 281 P.3d 135 (2012). Substantial competent evidence is legal and relevant evidence that a reasonable person might accept as sufficient to support the disputed conclusion. *Forrest*

v. Kansas Dept. of Revenue, 56 Kan. App. 2d 121, 125, 425 P.3d 624 (2018). As long as substantial competent evidence supports the trial court's factual findings, we must defer to those factual findings. 56 Kan. App. 2d at 125. But when considering questions of law, we exercise de novo review. *Swank*, 294 Kan. at 881. Questions involving statutory interpretation are questions of law over which we exercise unlimited review. *In re Joint Application of Westar Energy and Kansas Gas and Electric Co.*, 311 Kan. 320, 328, 460 P.3d 821 (2020).

K.S.A. 2017 Supp. 8-1012(b) states that a law enforcement officer (LEO) may ask someone who operated or attempted to operate a vehicle "to submit to a preliminary screening test of the person's breath or saliva, or both, if the officer has *reasonable suspicion* to believe the person has been operating or attempting to operate a vehicle while under the influence of alcohol or drugs or both alcohol and drugs." (Emphasis added.) A preliminary screening test of a person's breath under K.S.A. 2017 Supp. 8-1012(b) is commonly called a preliminary breath test or a PBT. And reasonable suspicion exists if an LEO has "a particularized and objective basis for suspecting the person stopped is involved in criminal activity." *City of Wichita v. Molitor*, 301 Kan. 251, 257, 341 P.3d 1275 (2015). So, to request a PBT under K.S.A. 2017 Supp. 8-1012(b), an LEO must have a particularized and objective basis that the driver operated or attempted to operate a car while under the influence of alcohol or drugs.

On the other hand, K.S.A. 2017 Supp. 8-1001 provides that an LEO may ask a driver "to submit to one or more tests of the person's blood, breath, or urine or other bodily substance" "[i]f at the time of the request, the officer has *reasonable grounds* to believe that the person was operating or attempting to operate a vehicle under the influence of alcohol or drugs, or both." (Emphasis added.) K.S.A. 2017 Supp. 8-1001(a)-(b). A breath test described under K.S.A. 2017 Supp. 8-1001 is commonly called an evidentiary breath test. Additionally, our Supreme Court has held that the existence of reasonable grounds to request an evidentiary breath test under K.S.A. 2017 Supp. 8-

1001(b)(2) is equivalent to whether probable cause existed to arrest someone. *Swank*, 294 Kan. at 881. To have probable cause to arrest someone, an LEO must have reasonably trustworthy information that would cause a person of ordinary caution to believe that the suspect committed a crime or was committing a crime under the totality of the circumstances. 294 Kan. at 881; see *Fischer v. Kansas Dept. of Revenue*, 55 Kan. App. 2d 225, 228, 410 P.3d 933 (2017). So, to request an evidentiary breath test from a driver under K.S.A. 2017 Supp. 8-1001(b)(2), an LEO must have reasonably trustworthy information that would warrant a reasonable person to believe that the driver operated or attempted to operate his or her car while under the influence of alcohol or drugs. Also, because the existence of reasonable grounds to request an evidentiary breath test under K.S.A. 2017 Supp. 8-1001(b)(2) is equivalent to whether probable cause existed to arrest someone, it follows that an LEO cannot ask a driver for an evidentiary breath test unless the LEO has probable cause to arrest the driver for DUI.

Under K.S.A. 2017 Supp. 8-1001(q), a driver's refusal to take the evidentiary breath test is treated like failing the evidentiary breath test. If the driver fails or refuses a properly requested evidentiary breath test, K.S.A. 2017 Supp. 8-1002 requires the LEO to complete and give the driver certification of his or her driver's license suspension. See K.S.A. 2017 Supp. 8-1002(a)(1) (stating that an LEO cannot give the driver certification of suspension unless "reasonable grounds" supported that the driver operated or attempted to operate a car while driving under the influence of alcohol or drugs). Still, K.S.A. 2017 Supp. 8-1001(q) says that a driver cannot be penalized for failing an evidentiary test requested under subsection (b) if his or her "failure was due to a physical inability caused by a medical condition unrelated to any ingested alcohol or drugs."

On appeal, Hickles' argument hinges on the statutory language of K.S.A. 2017 Supp. 8-1001. Indeed, K.S.A. 8-1001 is the only statute involving driver's license suspensions that Hickles cites in his appellant's brief. According to Hickles, the trial court erred when it found that he refused to submit to the tests required by K.S.A. 8-1001. He

contends that because Officer Lowther knew of his "medical condition it would have been reasonable for [Officer Lowther] to request an alternative sample," like asking him for a blood sample. As a result, Hickles seemingly asks us to reverse the trial court's ruling affirming KDOR's suspension of his driver's license because Officer Lowther should have given him the opportunity to complete some other evidentiary test under K.S.A. 2017 Supp. 8-1001(b)(2) upon learning of his medical condition.

KDOR responds that Hickles raises his argument for the first time on appeal. Alternatively, it contends that Hickles' underlying complaint is baseless. In short, we agree.

We begin our analysis by pointing out that our review of Hickles' argument indicates that he fundamentally misunderstands K.S.A. 2017 Supp. 8-1001 and our standards of review. As indicated by our earlier discussion of the applicable law, if Officer Lowther had reasonable grounds to ask Hickles for an evidentiary breath test under K.S.A. 2017 Supp. 8-1001(b)(1), the officer also had probable cause to arrest Hickles for DUI. Rather it seems that Hickles does not understand this. Also, his arguments never distinguish between PBTs and evidentiary breath tests. His arguments indicate that he believes an LEO needs probable cause, rather than reasonable suspicion, to make a traffic stop. See *State v. Arceo-Rojas*, 57 Kan. App. 2d 741, 749, 458 P.3d 272 (2020) (explaining that an LEO may perform a traffic stop whenever he or she has reasonable suspicion that the driver committed a traffic infraction). Also, as discussed below, Hickles concedes that Officer Lowther had "probable cause under [K.S.A.] 8-1001(b)(1) to administer the test."

Notwithstanding the preceding shortcomings, before the trial court, Hickles argued that his MS or GERD were the reasons why he either failed or refused the "[s]tandard field sobriety tests." He relied on MS and GERD to challenge Officer Lowther's decision that there was "probable cause . . . to arrest [him] for suspicion of driving under the

influence of alcohol or drugs." Thus, before the trial court, Hickles argued that Officer Lowther lacked probable cause to arrest him.

Initially, Hickles argues that Officer Lowther wrongly ignored that his medical conditions caused him to fail or refuse the standard field sobriety tests, including the PBT. Nevertheless, under K.S.A. 2017 Supp. 8-1001(q), Hickles needed to show that his failure to furnish an adequate breath sample was caused by a medical condition. As a result, K.S.A. 2017 Supp. 8-1001(q) imposes a condition precedent on him to show that he was unable "to provide an adequate breath sample or samples as directed" because of a medical condition. "A *condition precedent* is something that must occur before something else can occur." Garner, *A Dictionary of Modern Legal Usage*, p. 197 (2d ed. 1995). Here, Hickles testified that he did not attempt to take the breath test that was requested at the police station. Also, Hickles provided no medical evidence or expert testimony that his alleged physical inability to complete the test was caused by a medical condition unrelated to any ingested alcohol or drugs.

Because K.S.A. 2017 Supp. 8-1001(q) places the burden on the motorist to show his or her refusal was based on a physical inability of a medical nature, Hickles' statements, standing alone, were insufficient to meet this burden. See *Call v. Kansas Dept. of Revenue*, 17 Kan. App. 2d 79, 84, 831 P.2d 970 (1992). And so, Hickles' argument fails.

Also, before the trial court, Hickles implicitly argued that Officer Lowther lacked reasonable grounds to ask him for the evidentiary breath test. In contrast, Hickles' argument before us focuses on K.S.A. 2017 Supp. 8-1001's procedures and why he refused to complete the evidentiary breath test under K.S.A. 2017 Supp. 8-1001(b)(2). In fact, in explaining why the trial court erred by finding that he refused to submit to the tests required by K.S.A. 2017 Supp. 8-1001, he states that he is not challenging whether Officer Lowther had "probable cause under [K.S.A.] 8-1001(b)(1) to administer the test." Hence, although Hickles' arguments before the trial court concerned whether Officer

Lowther made a proper probable cause determination based on his field sobriety testing before his arrest, his current appeal focuses on whether Officer Lowther violated K.S.A. 2017 Supp. 8-1001 when asking him to complete the evidentiary breath testing following his arrest. Clearly, Hickles' new argument is disingenuous.

First, it is a well-known rule that absent certain exceptions, an issue not briefed before the trial court cannot be raised for the first time on appeal. *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016); *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, 698, 763 P.2d 317 (1988); see also K.S.A. 77-617 (limiting arguments on judicial review to those raised before the agency). Also, Kansas Supreme Court Rule 6.02(a)(5) (2022 Kan. S. Ct. R. at 35) requires a party raising an argument for the first time on appeal to explain why the new argument was not raised below. By violating Rule 6.02(a)(5), a party inadequately briefs the new argument for appeal. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018) (explaining that violating Rule 6.02[a][5] is fatal to an appeal). Here, because Hickles raises a new argument about whether Officer Lowther violated K.S.A. 2017 Supp. 8-1001 when asking him to take the evidentiary breath test following his arrest without ever acknowledging that he is raising a new argument on appeal, we hold that Hickles has neither preserved this argument for appeal nor adequately briefed this argument for appeal. Simply put, we reject Hickles attempt to sandbag the trial court's decision affirming KDOR's suspension of his driver's license based on an argument that he never raised before the trial court. See *Finnegan v. Commissioner of Internal Revenue*, 926 F.3d 1261, 1272-73 (11th Cir. 2019) (characterizing raising new argument on appeal as sandbagging and declining to consider argument); *Raich v. Gonzales*, 500 F.3d 850, 868 n.18 (9th Cir. 2007).

Second, a party waives and abandons any issue that it raised before the trial court but fails to raise before us. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). Again, in his appellant's brief, Hickles explicitly states that he is not challenging whether Officer Lowther had probable cause to ask him to take the evidentiary breath test.

Nevertheless, by stating that he is not challenging whether the officer had probable cause to request the evidentiary breath test, it necessarily follows that Hickles has explicitly waived the sole argument that he raised before the trial court—whether Officer Lowther had probable cause to arrest him for DUI of alcohol based on field sobriety testing, including his refusal to take the PBT. So, we also affirm KDOR's suspension of Hickles' driver's license based on Hickles' express waiver of the only argument that he could have properly raised before this court.

Third, a party claiming error has the burden to designate an adequate record on appeal. *City of Mission Hills v. Sexton*, 284 Kan. 414, 435, 160 P.3d 812 (2007). When the party fails to include critical evidence in the record on appeal establishing his or her claimed error, we must reject the party's claimed error because the record on appeal is inadequate. 284 Kan. at 435. In this case, both the hearing officer and the trial court relied on the video of Hickles' traffic stop and arrest to affirm his driver's license suspension. At least before the trial court, Hickles admitted this video into evidence. In addition, in affirming KDOR's suspension of his driver's license, the trial court explicitly stated that it had "spent a lot of time going through the videos." It referenced Hickles' responses to Officer Lowther's questioning as shown in the video of his traffic stop as the basis for certain fact-findings supporting its decision that the officer had probable cause to arrest Hickles for DUI of alcohol regardless of his MS or alleged GERD. Nevertheless, Hickles has not included this video in the record on appeal. Thus, even if we ignored that Hickles is raising his current argument about Officer Lowther violating K.S.A. 2017 Supp. 8-1001's procedures for the first time on appeal, it is readily apparent that the video of Hickles' traffic stop played an important role in the trial court's decision. As a result, we also affirm the trial court based on Hickles' failure to include the video of his traffic stop in the record on appeal.

Finally, we stress that Hickles' underlying appellate argument is unpersuasive. Hickles seemingly believes that because K.S.A. 2017 Supp. 8-1001 discusses multiple

evidentiary tests—breath, blood, urine, or other bodily substance—Officer Lowther should have asked him to complete an alternative evidentiary test after he refused to take the evidentiary breath test. Yet, this argument ignores the plain statutory language of K.S.A. 2017 Supp. 8-1001. The combined language of K.S.A. 2017 Supp. 8-1001(a) and (b) provides that an LEO may ask a driver "to submit to *one or more tests* of the person's blood, breath, urine *or* other bodily substance to determine the presence of alcohol or drugs" if the LEO has reasonable grounds to believe that the driver was operating a vehicle under the influence of alcohol or drugs and the LEO has arrested the driver for some crime. (Emphasis added.) And K.S.A. 2017 Supp. 8-1001(m) provides that "[*t*]he *selection of the test or tests shall be made by the officer.*" (Emphasis added.) Thus, despite Hickles' apparent argument otherwise, K.S.A. 2017 Supp. 8-1001's plain statutory language clearly provides that the LEO has the discretion (1) to choose what type of evidentiary test to administer to the driver and (2) to choose whether to administer one or more evidentiary tests to the driver.

In summary, we reject Hickles' request to reverse the trial court's decision affirming KDOR's suspension of his driver's license because Hickles raises a new, unsupported, and unpersuasive argument on appeal, in which he also waives the only argument that he made before the trial court.

Affirmed.