FREDERICK SKAGGS, APPELLANT, V. NEBRASKA STATE PATROL, AN AGENCY OF THE STATE OF NEBRASKA, APPELLEE.

804 N.W.2d 611

Filed September 2, 2011. No. S-10-348.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
4. **Judgments: Appeal and Error.** 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.
5. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
6. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

D.C. Bradford and Justin D. Eichmann, of Bradford & Coenen, L.L.C., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

This appeal involves a decision by the Nebraska State Patrol to require the petitioner-appellant, Frederick Skaggs, to register under the Nebraska Sex Offender Registration Act (SORA). After the State Patrol's decision, Skaggs requested a

determination of the applicability of SORA to him, a hearing was held, and a hearing officer determined that Skaggs was required to register. The State Patrol adopted the recommendation of the hearing officer in full, and Skaggs petitioned for judicial review of the State Patrol's decision, but the district court agreed that Skaggs was required to register as a sex offender. Though Skaggs argued before the hearing officer and the district court that SORA was unconstitutional as applied to him, the district court declined to address the issue, noting that Skaggs had failed to raise the issue in his petition for judicial review. Skaggs timely appeals. For the following reasons, we affirm the judgment of the district court.

BACKGROUND

In 1985, Skaggs was convicted in the State of California of attempted forcible rape, kidnapping, robbery, and the unlawful taking of a vehicle. In 1992, Skaggs was paroled from California to Nebraska. Though Skaggs was required to register as a sex offender in California before the transfer of his parole to Nebraska, Skaggs was not required to register in Nebraska in 1992, because Nebraska had not yet enacted a sex offender registry. Skaggs' parole records were not made part of the record here, because they were destroyed per the Nebraska Department of Correctional Services' recordkeeping policy. Skaggs lived and worked in Nebraska for several years following the transfer of his parole.

Skaggs went to Florida some time in 2003, but the parties dispute the extent to which he lived there. Skaggs was arrested in Florida three times during 2003 and 2004. Skaggs was placed on probation in Florida for a misdemeanor in 2004, and at that time, he had a Florida driver's license. At some point, the California Department of Justice contacted Florida authorities to inform them that Skaggs was a convicted sex offender, and on January 31, 2006, Skaggs was arrested for failing to register as a sex offender in the State of Florida. On April 18, Skaggs registered as a sex offender in Florida and signed a registration form which listed his permanent and temporary addresses as two different addresses in Florida. In October, Skaggs updated his address with the Florida sex offender registry to Nuevo

Vallarta, Mexico. But Skaggs then lived at an apartment in Omaha, Nebraska, from December 15, 2006, to July 31, 2007, and although his address after that time is unclear, it appears from the record that he was still in Omaha, and he was found living at another Omaha address in January 2008.

Skaggs was located because the Douglas County sheriff's office had been notified in October 2007 that Skaggs was a Florida-registered sex offender living in Omaha. On January 24, 2008, a Douglas County deputy sheriff arrested Skaggs for violating SORA by failing to register in Nebraska, and Skaggs was later notified by the State Patrol of his obligation to register as a Level 3 sex offender. Skaggs petitioned the State Patrol for a hearing and challenged whether SORA applied to him, challenged his classification as a Level 3 sex offender, and claimed that SORA was unconstitutional as applied to him.

A State Patrol hearing officer determined that Skaggs was required to register under Neb. Rev. Stat. § 29-4003(1)(b) (Reissue 2008). The hearing officer noted that § 29-4003(1)(d) might also require Skaggs to register, but did not make a final determination on that issue. The State Patrol adopted the recommendation of the hearing officer, and Skaggs petitioned for judicial review of the State Patrol's decision. On review, the district court determined that Skaggs' classification as a Level 3 offender was moot, as SORA had been amended on January 1, 2010, to remove the classification system. However, the court determined that Skaggs was still required to register as a sex offender, pursuant to § 29-4003(1)(b) (Reissue 2008). Though Skaggs argued that SORA was unconstitutional as applied to him, the court declined to address the issue, noting that Skaggs failed to raise the issue in his petition for judicial review, as required by Neb. Rev. Stat. § 84-917 (Cum. Supp. 2010). Skaggs appeals pursuant to the Administrative Procedure Act.[1]

ASSIGNMENTS OF ERROR

Skaggs assigns that (1) the State Patrol and the district court erred in determining SORA was applicable to Skaggs, (2) the

[1] See Neb. Rev. Stat. § 84-918 (Reissue 2008).

application of SORA to Skaggs is unconstitutional because it denies him his 14th Amendment right to travel freely between the several states, and (3) the district court erred in refusing to consider Skaggs' constitutional challenge.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[2]

[2-5] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[3] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[4] 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.[5] An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.[6]

ANALYSIS

§ 29-4003

As a preliminary matter, we note that § 29-4003 has been amended twice since Skaggs received notice that he was required to register as a sex offender in Nebraska.[7] Both

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[2] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010), *cert. denied* 560 U.S. 945, 130 S. Ct. 3364, 176 L. Ed. 2d 1256.

[3] *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006).

[4] *Id.*

[5] *Id.*

[6] *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

[7] See 2009 Neb. Laws, L.B. 97 and L.B. 285.

amendments took effect in May 2009.[8] (Section 29-4003 has since been amended again, effective August 27, 2011,[9] but that change is minor and does not affect our reasoning here.) At Skaggs' hearing, in September 2009, § 29-4003 (Cum. Supp. 2010) was in effect, but the hearing officer applied § 29-4003 (Reissue 2008). The district court, on judicial review, also applied § 29-4003 (Reissue 2008). On appeal, Skaggs contends that under § 29-4003 (Cum. Supp. 2010), SORA does not apply to him. The State concedes that the hearing officer and district court applied the wrong version of the statute, but argues that even under the amended statute, SORA still applies to Skaggs.

The State relies upon § 29-4003(1)(a)(iv) (Cum. Supp. 2010), which makes SORA applicable to anyone who, on or after January 1, 1997, "[e]nters the state and is required to register as a sex offender under the laws of another village, town, city, state, territory, commonwealth, or other jurisdiction of the United States." Skaggs makes two arguments in response: that he (1) did not "enter" Nebraska on or after January 1, 1997, and (2) was not required to register under the laws of California or Florida. We find no merit to either argument.

Skaggs argues that he did not "enter" Nebraska after 1997 because he entered the state in 1992, and Nebraska has been his permanent home from 1992 to the present. Though Skaggs admits that he lived in Florida for a period of time, he claims he never broke ties with Nebraska, as he voted and owned property in Nebraska.

Though Skaggs was present in Nebraska before 1997, it is undisputed that Skaggs left Nebraska in 2003 and was present in Florida for a substantial amount of time between 2003 and 2006. And Skaggs' Florida sex offender registration form indicated that both his temporary and permanent addresses were in Florida. The hearing officer determined that the evidence indicated that Skaggs left Nebraska in 2003 and then entered Nebraska in 2006 under the meaning of § 29-4003(1)(b) (Reissue 2008). We agree with that determination and find it

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[8] *Id.*

[9] See 2011 Neb. Laws, L.B. 61, § 2.

equally applicable under the language of § 29-4003(1)(a)(iv) (Cum. Supp. 2010).

[6] Skaggs claims that his permanent residence has remained in Nebraska since 1992, but we determine that § 29-4003(1)(a)(iv) (Cum. Supp. 2010) has no residency requirement. The plain language of the statute merely requires that Skaggs had entered the state after 1997. Evidence in the record certainly supports that Skaggs left Nebraska in 2003 and returned some time in 2006. Though Skaggs characterized his return to Nebraska as "re-entry,"[10] and not "entry" within the meaning of the statute, we find Skaggs' characterization meritless. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[11] The plain language of "[e]nters" within the meaning of § 29-4003(1)(a)(iv) (Cum. Supp. 2010) is satisfied by Skaggs' return to Nebraska in 2006.

We also reject Skaggs' argument that he was not required to register in another state. Skaggs contends that he was not required to register in California, because California vacated his registration requirement when his parole was transferred to Nebraska. We note that the record contains a letter from the office of the Attorney General of California disagreeing with that assertion, stating that Skaggs' conviction requires "lifetime registration" in California. But more important, as noted above, Skaggs was indisputably registered as a sex offender in Florida. Skaggs' argument is a technical one: He contends that although he registered in Florida, he was not "required" to do so within the meaning of § 29-4003(1)(a)(iv) (Cum. Supp. 2010)—instead, he claims that he did so "voluntarily" to avoid legal trouble in Florida, but was not actually "required" to do so under Florida law.[12]

We do not read § 29-4003(1)(a)(iv) (Cum. Supp. 2010) so narrowly. Skaggs was arrested in Florida and charged with

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[10] See brief for appellant at 15.

[11] See *In re Interest of Matthew P.*, 275 Neb. 189, 745 N.W.2d 574 (2008).

[12] Reply brief for appellant at 3-4.

failing to register. He was informed by Florida law enforcement that he was required to register, and he did so. We decline Skaggs' implicit invitation to parse Florida law and determine whether the conclusion of Florida authorities was correct under Florida law, nor are we persuaded that registrants would "voluntarily" register as sex offenders in the absence of a requirement that they do so. Instead, we find that a sex offender registrant's actual registration under another jurisdiction's law is conclusive evidence that the registrant was "required" to register within the meaning of § 29-4003(1)(a)(iv) (Cum. Supp. 2010). Skaggs was required to register as a sex offender in Florida.

In short, the evidence establishes beyond reasonable dispute that Skaggs was required to register as a sex offender in another state and entered Nebraska after January 1, 1997. Therefore, although our reasoning differs somewhat from that of the hearing officer and the district court, we agree with their conclusion that SORA applies to Skaggs.

Skaggs' Constitutional Claims

Skaggs contends that SORA's registration requirement is an unconstitutional violation of his 14th Amendment right to travel between the several states. However, Skaggs failed to raise his constitutional question in his petition for judicial review, as required by § 84-917(2)(b). The district court thus did not decide the 14th Amendment issue. However, Skaggs now argues that his failure to raise the issue in his petition for judicial review should not prevent appellate review of the constitutionality of SORA as applied to Skaggs under § 84-917(5)(b)(i), which reads: "If the court determines that the interest of justice would be served by the resolution of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings." Though § 84-917(5)(b) indeed permits the district court to remand the case back to the agency for further proceedings, that is permissible only where it is necessary in the interest of justice to resolve an issue not raised before the agency. Here, the record reflects that Skaggs raised the constitutional issue during the agency hearing.

Section 84-917(5)(b)(i) permits the district court to review only matters which were not properly raised in the proceedings before the agency. And in any event, the question here is not whether the issue was not properly presented to the agency—it is whether the issue was properly presented *to the district court*. Section 84-917(2)(b) requires that a petition for judicial review set forth, among other things, "the petitioner's reasons for believing that relief should be granted" and "a request for relief, specifying the type and extent of the relief requested." An issue that has not been presented in the petition for judicial review has not been properly preserved for consideration by the district court.[13]

In other words, a party to an administrative appeal who wishes to raise an issue in district court, whether or not that issue was presented to the agency, must still present that issue to the court in its petition for judicial review. Skaggs did not. The district court thus did not err when it refused to address the issue of constitutionality, and because the issue was not properly preserved for judicial review, we too do not address the issue of whether SORA, as applied to Skaggs, was unconstitutional.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

MOORE, Judge, participating on briefs.
WRIGHT, J., not participating.

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[13] See, *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005); *Moore v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 8 Neb. App. 69, 589 N.W.2d 861 (1999).