

For docket see 10-0321

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Supreme Court of Texas.
Texas Department of Public Safety
v.
Stephen Joseph Caruana.
No. 10-0321.

September 14, 2011.

Appearances:

Kevin M. Givens, of the Texas Department of Public Safety, for petitioner.
Brian L. Baker, Attorney at Law, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court's ready to hear argument in the first cause 10-0321, Texas Department of Public Safety v. Caruana.

MARSHAL: May it please the Court, Mr. Givens will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF KEVIN M. GIVENS ON BEHALF OF THE PETITIONER

ATTORNEY KEVIN M. GIVENS: May it please the Court, we're asked today to decide whether it is reasonable to admit an unsworn officer's report under Rule 803(8) in the absence of any statutory or administrative language prohibiting its admissibility. Because there is no statutory or administrative language prohibiting the admissibility of the unsworn peace officer's report, the report is admissible under Rule 803(8). The Rule 803(8) permits the admissibility of matters observed pursuant to a duty imposed by law or factual findings resulting from an investigation made pursuant to an authority granted by law.

JUSTICE DEBRA H. LEHRMANN: May I ask you a question, please?

ATTORNEY KEVIN M. GIVENS: Yes.

JUSTICE DEBRA H. LEHRMANN: Under that rule, the duty is to report a sworn statement. Correct? So would it really apply?

ATTORNEY KEVIN M. GIVENS: Absolutely it does because the officer has a duty to make a report. Whether or not the report is sworn is incidental to the duty to file the report.

JUSTICE DEBRA H. LEHRMANN: So are you saying there's a duty in addition to the duty created under the Administrative Code 159?

ATTORNEY KEVIN M. GIVENS: There is. There is a duty in addition to what's under 159. The officer also, as I pointed out I think in our brief to the court, that in certain cases, officers are also required to file reports detailing any stop that they make for purposes of racial classifications or anything like that. Also, the officer may have a duty within his police department to file a report on any stop that he makes.

JUSTICE DEBRA H. LEHRMANN: Okay.

CHIEF JUSTICE WALLACE B. JEFFERSON: So your position would be an unsworn report is admissible whether or not the officer is present to testify.

ATTORNEY KEVIN M. GIVENS: The position of the Department is that that's not correct if the officer has been subpoenaed. If the officer has been subpoenaed to appear and he does not appear, then the unsworn report is not admissible.

CHIEF JUSTICE WALLACE B. JEFFERSON: But if the officer has not been subpoenaed to appear, then the unsworn report is admissible.

ATTORNEY KEVIN M. GIVENS: That's correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: What's the purpose of swearing? What's the purpose for a sworn oath?

ATTORNEY KEVIN M. GIVENS: The purpose for having a sworn report, the Court of Criminal Appeals in *State v. Smith*, which is a case that's 207 S.W.3d 787, talks about the purpose of an oath; - and the purpose of an oath is to bring into mind of the person making the report and of the person who's reading the report, the seriousness of the report.

CHIEF JUSTICE WALLACE B. JEFFERSON: So it's to impress upon the person who is testifying that what facts that he or she is relating are presented under penalty of punishment or perjury. Isn't that correct?

ATTORNEY KEVIN M. GIVENS: That's correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: So if an unsworn report is admissible, what incentive does the officer have to be truthful about the facts that he or she is reporting?

ATTORNEY KEVIN M. GIVENS: Well, as it turns out in Texas, whether or not the report is actually sworn to doesn't make a difference as to whether or not it's punishable by criminal sanctions. If the officer files a false report, even though that report is not sworn, that report is still and that peace officer files a false report, that report, the peace officer is still subject to criminal sanctions and so even though he doesn't swear to the report, he can still be subject to criminal sanctions and so the report maintains it's indicia of truthfulness and reliability and that's one of the important things to remember--

JUSTICE NATHAN L. HECHT: But the Court of Appeals was worried that if you read the rule, the administration rule to whom it referred to sworn reports, then you can't exclude it if the officer doesn't appear. That's not the department's position.

ATTORNEY KEVIN M. GIVENS: That's not the Department's position, no. I think there's a, the State Office of Administrative Hearings, I believe there's evidence that they have read the word sworn report to be a term of art that includes any report whether it is sworn or not. If you look at the Texas Register, the State Office of Administrative Hearings has pointed out that the Legislature has basically defined what a sworn report is. It is a report that identifies the person who's arrested. It provides the basis for the reason why they're arrested. It provides the analysis of the specimen and it provides a copy of the criminal complaint, if one has been filed. So basically, the Legislature has come down with a definition of what a sworn report is and the State Office of Administrative Hearings has acknowledged that there is a term of art created by that legislative definition of what a sworn report is.

JUSTICE EVA M. GUZMAN: Do the criminal sanctions that attach support or buttress this notion that even though it's not sworn, it is as if it was sworn because the failure to be truthful carries with it such a severe penalty on the criminal side?

ATTORNEY KEVIN M. GIVENS: Absolutely. Yes, Your Honor.

JUSTICE NATHAN L. HECHT: Why does Chapter 524 require a sworn report and Chapter 724 doesn't or vice versa, whichever it is--

ATTORNEY KEVIN M. GIVENS: I am sure that the Legislature had a reason for doing that, but I do not know what it is. I think--

JUSTICE NATHAN L. HECHT: They were enacted at very different periods of time, right?

ATTORNEY KEVIN M. GIVENS: They were enacted at different periods of time and--

JUSTICE NATHAN L. HECHT: One came a whole lot earlier than the other one.

ATTORNEY KEVIN M. GIVENS: Pardon?

JUSTICE NATHAN L. HECHT: One came a whole lot earlier than the other one.

ATTORNEY KEVIN M. GIVENS: That's correct, that's correct.

JUSTICE NATHAN L. HECHT: But there's no indication why, you don't think it has to do with the contents of the report?

ATTORNEY KEVIN M. GIVENS: I don't think it has to do with the contents of the report. I think it has to do with, again, the Legislature wanting to impress upon the officer and to impress upon the administrative court the seriousness of the report.

JUSTICE NATHAN L. HECHT: The Rule of Evidence, Rule 803, has another component to it, which is there's an exception if the sources of information or other circumstances indicate a lack of trustworthiness. Do you think the administrative law judge has the discretion to exclude the report?

ATTORNEY KEVIN M. GIVENS: I think the administrative law judge has the discretion to exclude the report if there is evidence that the report is untrustworthy. Now, I think--

JUSTICE NATHAN L. HECHT: Is the officer's failure to follow the law an indication that it's untrustworthy?

ATTORNEY KEVIN M. GIVENS: I don't think so not in this case anyway.

JUSTICE NATHAN L. HECHT: In this case, the judge admitted it, but--

ATTORNEY KEVIN M. GIVENS: Pardon?

JUSTICE NATHAN L. HECHT: In this case, the judge admitted it.

ATTORNEY KEVIN M. GIVENS: That's correct.

JUSTICE NATHAN L. HECHT: But if the judge had excluded it, it might be within the judge's discretion and could the judge take into consideration the fact that it was unsworn?

ATTORNEY KEVIN M. GIVENS: That's a possibility, I think.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, we know that the law provides for a sworn oath and requires the officer to sign it. Wouldn't it be an easier rule of law for us to say that's the law period and if you want it to be admissible, then officers need to comply with their obligations under the law and if they don't, then it's not. What's wrong with taking that bright-line approach?

ATTORNEY KEVIN M. GIVENS: Well, the problem with that is that Rule 15923(c)(7) applies both in ALR cases that are failure cases and refusal cases and if you say that the rule applies that way in refusal cases, then in refusal cases, the statute does not even require the officer to file a sworn report. So in all of those cases where an officer is not required to file a sworn report, the reading of the rule in that manner would exclude the officer's report in those cases and I think that's clearly not what either the Legislature or the State Office of Administrative Hearings intended.

JUSTICE DALE WAINWRIGHT: But 724 in refusal cases does not require a sworn report, just a written report.

ATTORNEY KEVIN M. GIVENS: That's correct.

JUSTICE DALE WAINWRIGHT: There's different language as Justice Hecht pointed out in 724 versus 524.

ATTORNEY KEVIN M. GIVENS: That's correct, but Rule 15923(c)(7) applies to both failure cases and refusal cases. So if you say that 15923(c)(7) controls and it requires a sworn report even though the statute 724 does not require a sworn report, then you've created a conflict between the rule and the statute and it's not necessary to create that conflict.

JUSTICE DALE WAINWRIGHT: Why would an officer not sign the report? An officer prepared the report, completed the report and at the bottom, it takes five seconds to sign it. Right?

ATTORNEY KEVIN M. GIVENS: He did sign the report, Your Honor. He did sign the report. He took it in and had it notarized, but he did not raise his hand and swear that everything in there was true and correct so that's the problem in this particular case and that's one of the things that I wanted to point out to the court is that the officer in this case and he also came to the administrative hearing and testified that everything in his report was true and correct. So there's nothing in here that would disparage the credibility of the report or the contents of the report. This is merely a procedural matter as to whether or not the officer had the report sworn to.

JUSTICE DEBRA H. LEHRMANN: Do you know why there wasn't more testimony as to the substance of what went on rather than just testifying that what was in the report was correct?

ATTORNEY KEVIN M. GIVENS: Absolutely, Your Honor. Once the report was offered and admitted into evidence, having the officer testify to everything that was in the report would have been a waste of the court's time, would have been a waste of the officer's time and would have been a waste of time for both counsel.

JUSTICE DEBRA H. LEHRMANN: Do you know if that was attempted?

ATTORNEY KEVIN M. GIVENS: Whether or not, what was attempted?

JUSTICE DEBRA H. LEHRMANN: To get into the substance.

ATTORNEY KEVIN M. GIVENS: There was -- no, there was no attempt to elicit the substance of the report.

JUSTICE DALE WAINWRIGHT: Not a bad policy from a belt-and-suspenders approach though is it?

ATTORNEY KEVIN M. GIVENS: That's true.

JUSTICE DEBRA H. LEHRMANN: And how important is it though for a police officer to have reports that are thoracoscopic given that they may arrest 40 people a month and have these hearings come up two years later? How important is that report and would they really be able to recall?

ATTORNEY KEVIN M. GIVENS: That's correct. The report, it is important that the officer file a report quickly after the arrest and although even in that sense, even though the statute requires that the officer file a report within five days, that provision has been held to be directory and like the provision just shortly afterwards that the officer file a sworn report, the statute does not prevent it from - does not provide any sanctions if the officer doesn't file a report within five days and the statute doesn't provide any sanctions if the officer doesn't file a sworn report and there's no reason to treat one of those requirements differently than the other. They're both in the same exact statute and the same exact provision and so that's why the Court should not consider the directive to file a sworn report to be controlling in this case. Aside from that, the 524.011 doesn't actually address the admissibility of a report at all. If you look further along in the Transportation Code 524.038 does address admissibility of some affidavits and 524.039 discusses when those affidavits are not admissible. So the Legislature clearly knew how to make an affidavit admissible and how to make it inadmissible and they demonstrated that ability, but when you were talking about the peace officer's report, they chose not to address that situation at all and so what we have there is the Legislature looking to the common law, which is to say that this report would be admissible and saying that that's what they intend because if they wanted to make a report, a peace officer's report admissible, they knew how to do that and would have written the statute that way. They chose not to.

JUSTICE DALE WAINWRIGHT: You said, earlier that there is a criminal penalty for making a false statement in a report that is not sworn.

ATTORNEY KEVIN M. GIVENS: Yes.

JUSTICE DALE WAINWRIGHT: Is that different from the criminal penalty that applies for making a sworn false statement in a court of law?

ATTORNEY KEVIN M. GIVENS: I don't think so--

JUSTICE DALE WAINWRIGHT: In other words, in one instance, so there are two criminal penalties and then the other instance, one?

ATTORNEY KEVIN M. GIVENS: Under 3702, which is the Perjury Statute, that's a Class A misdemeanor and under 37.10, which I believe is the -- making a false entry in a government report, that's also a Class A misdemeanor. So the penalties are the same either way.

JUSTICE NATHAN L. HECHT: Did SOAH knew about this problem before 2008 when they changed the rules or not do you think?

ATTORNEY KEVIN M. GIVENS: I think SOAH certainly has known that there has been a conflict about whether or not these reports are admissible under 803(8) for quite some time. That's been one of the fights all along is whether or not the reports are admissible under a Rule 803(8), but SOAH has pointed out in the Texas Register that the courts have addressed this issue and they've made no change in their administrative rules in that respect. The fact that SOAH has specifically addressed this issue twice in the Texas Register, I think is certainly something that is to be considered because SOAH has relied on the courts in this particular instance to when the courts have said that, these reports are as public records, SOAH has relied on the courts in that and I think it's important that SOAH continue to be able to rely on the courts and to be able to rely on the fact that they're admissible as public records.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is there any difference between this case and the Casper case? Are you familiar with that?

ATTORNEY KEVIN M. GIVENS: I am familiar with the Casper case?

CHIEF JUSTICE WALLACE B. JEFFERSON: Is the legal issue exactly the same?

ATTORNEY KEVIN M. GIVENS: The legal issue, as far as the admissibility of the record - or the report, is very similar if not the same. The only difference is that in this case, the officer actually testified on the stand that everything in his report was true and correct. In the Casper case, the officer was not actually called, to testify in that case and so the report was admitted without any testimony. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The court is ready to hear argument from the Respondent.

ORAL ARGUMENT OF BRIAN L. BAKER ON BEHALF OF THE RESPONDENT

ATTORNEY BRIAN L. BAKER: Thank you. May it please the Court, opposing counsel. My name is Brian Baker. I have the pleasure of representing Stephen Caruana on this matter. The first question that I heard from you all was, isn't there a duty created by law to make a sworn report. That is really the most important part about this case. If you look at the Texas Transportation Code in Chapter 524, which applies to breath test failure cases and which applies to this case being a breath test failure case, it says, the officer must submit a sworn report. That is the form of the public record that the officer has a duty to create and under 803(8)(b), we see that's matters observed pursuant to a duty imposed by law, that being the Transportation Code to which matters as there was a duty to report.

JUSTICE DEBRA H. LEHRMANN: Well, let me ask you, if the report is independently admissible as a public record, then what language are you referring to that says that, an unsworn report is not admissible. In other words, the dissent talks about this being a rule of inclusion not exclusion, and so you could please talk about that.

ATTORNEY BRIAN L. BAKER: Sure. The duty is created by the statute 524.011 that it must be a sworn report. That --

JUSTICE DEBRA H. LEHRMANN: But that's talking about inclusion. It's not saying that an unsworn report is not admissible.

ATTORNEY BRIAN L. BAKER: True, true. If -- you cannot find in the statutes a concise statement that says, an unsworn report is not admissible.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY BRIAN L. BAKER: Okay? What you have to do is look at is there a duty created to create this report and there is, undoubtedly it's in 524.011.

JUSTICE EVA M. GUZMAN: In the dissent, it discusses the Fourteenth Court of Appeals case Cortinas where there was an error in timing. It wasn't file within the five days and that did not preclude admission. What is the difference between the error in form and the error in timing? Why should we treat those differently?

ATTORNEY BRIAN L. BAKER: In that case and in other cases where they said, well, the officer didn't submit it within five days. That's not the essence of the thing to be done. Or years ago, people would object. Hey, we didn't get an ALR hearing within 40 days. That's different.

JUSTICE EVA M. GUZMAN: But it's not the essence, but timing is critical because memory lapses. If you don't write it down within five days, then you can understand why the trustworthiness or the credibility of that report might be as impacted as it would be if it wasn't sworn to following your line of reasoning. So tell me why we should treat it differently.

ATTORNEY BRIAN L. BAKER: Well, because the report is the essence of the thing to be done. I think that the Legislature requires a sworn report because we're going to take away a person's driver's license based on the information that's provided by the officer. We're not going to live in a hypertechnical world where we're going to cut someone loose that when the officer didn't turn it within five days or something like that.

JUSTICE EVA M. GUZMAN: Okay, but if he turned it in six months later and swore that he remembered precisely what happened that day, here are the facts. Is that really any different in terms of trustworthiness and the circumstances of creation is I guess what we're looking at. How is that different?

ATTORNEY BRIAN L. BAKER: Well, you know, it may not be. In the day and age of my cases, everything is video recorded and the officer could probably watch a video and rewrite a report and he may have the benefit of doing that and many years ago, I'm sure that if they didn't write it down and six months later they tried to generate a report, they'd have a heck of a difficult time doing that. Now I think it's different.

JUSTICE EVA M. GUZMAN: So that wouldn't require exclusion, but even though we have a videotape and a report, and he didn't -- he cited, he just didn't, that requires exclusion. Tell me why. What's the policy rationale that -- takes that result?

ATTORNEY BRIAN L. BAKER: I think the Legislature required a sworn report because we're going to take someone's license away based on the facts of the case. Now that is the important part.

JUSTICE PHIL JOHNSON: Well, couldn't the officer just have testified without a report?

ATTORNEY BRIAN L. BAKER: He could have testified without a report and he should have testified without a report and that would be entirely acceptable because that testimony would have been sworn and we could have avoided this appeal.

JUSTICE PHIL JOHNSON: Well, what if he simply took notes at the scene, kept them in a drawer at the house and brought those when he came to testify and he said, you know, here are my notes and everything I remember is in these notes. And the State says, we offer Exhibit 1 and they're admitted.

ATTORNEY BRIAN L. BAKER: I would have objected because it wasn't a sworn report as required by the Legislature.

JUSTICE PHIL JOHNSON: They didn't -- yeah, but he didn't even offer it as a report or a sworn report. It's just

his notes.

ATTORNEY BRIAN L. BAKER: I don't think there's a provision for the admission of that law and that's something that the justices--

JUSTICE PHIL JOHNSON: Is there anything to exclude that? Can you point to a rule of evidence excluding that that should have been excluded?

ATTORNEY BRIAN L. BAKER: It's not a public record. There's no exception to that document being admissible as an exception to the hearsay rule.

JUSTICE PHIL JOHNSON: What about a doctor who brings in his or her notes from treating a patient and says, here are my notes and they tell how it treated a patient minute by minute, hour by hour and everything is correct and offer those as an exhibit and the court admits it. Is there something to exclude that document from evidence that you don't want?

ATTORNEY BRIAN L. BAKER: Well, I don't know that that is going to fit in with the ALR rules that we already have, which are -- SOAH has rules as well as the Department's rules and the Transportation Code rules, so I think that would be a little different in that instance.

JUSTICE DON R. WILLETT: What significance should we attach to the SOAH comments in the register?

ATTORNEY BRIAN L. BAKER: Well, I think you should attach a lot to the SOAH rule. Here is the argument: When I started out, I did want to make the point that there's a duty created by law under the statute to submit a sworn report and it's explicit in a failure case. There is a duty created by the Department to submit these reports, submit sworn reports in the case of a failure, a breath test refusal or a minor detectable amount, okay? And it is even more explicit in the case of a failure in their rules. If you look at 17.4, I believe it's two. They have like an extra statement. You got to make sure this is sworn officers. So if you look at those two rules, you see the form of the report must be sworn and if you look at and you tie them into Rule 803(a), the duty requirement must be there. That's where the duty's created and that's what makes it admissible. My argument here is that SOAH looked at this, all the statutes, all the rules and they made up their own rule and they said, a peace officer's sworn report of relevant information, no matter what the forum, they didn't say an offense report, a narrative report or something like that. They say a report of relevant information. In other words, that to me would seem to suggest that anything the officer generates or [inaudible]. Call it what you want.

JUSTICE DON R. WILLETT: So you don't think SOAH's comments are some indication that they intend for unsworn reports to be admissible under the rules of evidence?

ATTORNEY BRIAN L. BAKER: I do not think that's the way you interpret the rules, absolutely not. Here's why. There's an unambiguous statement that says, a peace officer's sworn report is admissible as a public record period. It is not designed to exclude the officer's report if he doesn't testify. That's not the sole purpose of the rule and that's what the department would have you believe. That's not correct. What SOAH did is said, the form of the report is specified by law and that's what's admissible as a public record. What it does is it makes an unsworn report, a report that does not comply with the statutory duties, it makes it inadmissible. Why?

JUSTICE NATHAN L. HECHT: You say, in 724 cases too?

ATTORNEY BRIAN L. BAKER: Yes. Here's why.

JUSTICE NATHAN L. HECHT: So you disagree with Pruett?

ATTORNEY BRIAN L. BAKER: I disagree with Pruett; and I would like to address that in a moment. I really

would like to discuss that with Pruett, but let me answer your question first. SOAH's rule and people will say well how can it be different in a refusal and a failure. Does that even make sense? Why would we require some more convincing proof in a failure and a refusal case? That's a head-scratcher for me and all of my colleagues that do what I do. I think SOAH came up with this rule because it is duty-bound to require no less than sworn report in a failure case. In other words, they couldn't say in a failure case unsworn reports are okay because they're limited only to sworn reports. What SOAH can do is say we do require a sworn report in a refusal case because it's not excluded by the Statute 724. 724 doesn't say, you know, any report will do. They just say, submit a written report and the detail that you see in 724, there's much less than there is 524. And you asked the question, what's up with the Legislature? Why did they do that? No one here knows. I think it was just an aberration, but I think SOAH is free to make a rule that says, all these reports must be sworn to be admissible as public records and that's not inconsistent with 724.032. Also, if you look at 724.032 and 724.031 and you read the statute, it's kind of a weird statute. It says, a refusal report and it doesn't really seem to jive with the description that you get in 524.011(b)(4) about, you know, explain the reasons for this person's license suspension and so when you look at the SOAH rule, I think that you can reasonably conclude that SOAH interpreted this rule to require sworn reports in any case because you couldn't say that SOAH would find it reasonable to write a rule that unsworn reports are okay when the Legislature says, they got to be sworn in failure cases. So that's the one point I wanted to make. To answer your question about the comments, we're going to disagree about what the comments say until the cows come home. There's going to be no agreement to that and that's why we're here. If you look at the previous rules and the comments, they've always required a sworn report or probable cause affidavit and that's the theme that you've seen throughout this case. If you look at the comments, we have one person that said, Rule 159.23(c)(7), which governs the admissibility of a sworn report. They said, the commenter who said that, violates the person's right to confront the witness. We disagree as to is that a sidebar from SOAH or is that what the commenter said? I think if you read the comments, the commenter didn't say SOAH 159.23(c)(7), which governs the admissibility of sworn reports violates our right to confront the witnesses against you. They said, 159.23(c)(7) violates our right to confront the witness if he doesn't appear. SOAH's sidebar that says, this governs the admission of the documents. If you look at some of the cases cited in the briefs in Walter, Manley, Gratzner, Samuels, Wickham and Struvie, those five cases all credit 159.23(c)(6), which is the predecessor to (c)(7) or (c)(7) as the way that these reports get admitted. They say that's how it's admitted and you may look back at some other cases kind of a string cite in both of our briefs that say, 159 -- they credit 803(8) for the rule. They say now these sworn reports are admissible under 803(8). I don't necessarily disagree with that. I think if they're in the form that they are required, then they are admissible under 803(8), but if they're not in that form, then they're not admissible. And so that's why you don't see a case that says, an unsworn report is admissible under 803(8) except for Pruett. But let's --

CHIEF JUSTICE WALLACE B. JEFFERSON: Yeah, I want you to get to Pruett, then I will ask a question.

ATTORNEY BRIAN L. BAKER: 803(8), let's talk about Pruett. Why is Pruett, why am I critical of Pruett? Why are my colleagues critical of Pruett? Well, because bad lawyers make bad law. The proper objection in Pruett would have been to raise a SOAH 159.23(c)(6) or (c)(7) objection. That objection was never made in that case. The attorney said, Objection, hearsay. If you assume what I say is right, that is not enough. If you follow what the Legislature says -- say you all say, I don't why the Legislature did what they did, but we got to follow it because they made it clear in a case over refusal, it doesn't have to be sworn. In the case of a failure it does and we just got to go with what they said, because that's our duty. You may not agree with it, but that's your duty. If that's the case, then that unsworn report was in the form required by law, correct? Refusal case, not sworn, didn't have to be sworn. It was in the form required by law and admissible under 803(8), right? Because there was no objection made under 159.23(c)(7). If there was, maybe the San Antonio Court of Appeals would have heard an argument like mine.

JUSTICE NATHAN L. HECHT: Well, then -- but your bottom line is you can't get the report in, in a 724 case.

ATTORNEY BRIAN L. BAKER: My bottom line is, let's look at the SOAH rule and I think SOAH--

JUSTICE NATHAN L. HECHT: Well, but is that true? You can't get it in, -in the 724 case?

ATTORNEY BRIAN L. BAKER: An unsworn report?

JUSTICE NATHAN L. HECHT: Yes.

ATTORNEY BRIAN L. BAKER: That's my opinion, yes. I think you look at the SOAH rule, but even if you didn't. Even if you all say I don't believe it--

JUSTICE NATHAN L. HECHT: So, the only way to get any substantive testimony is to use the report to refresh the officer's recollection or hope that he's got some independent recollection. That's all you can do at the 724 case in your view?

ATTORNEY BRIAN L. BAKER: Fair enough. I mean if it's unsworn, have the officer come and testify or he can refresh his recollection as there was nothing prohibiting the Department of Public Safety from eliciting that information and they said, we didn't want to waste the time. They didn't want to waste my time. I've been through a couple of appellate courts when they could have just asked about 10 questions and--

JUSTICE DALE WAINWRIGHT: And so why is Chapter 724's written reports, why are they not public records?

ATTORNEY BRIAN L. BAKER: 724 written reports?

JUSTICE DALE WAINWRIGHT: That are not sworn.

ATTORNEY BRIAN L. BAKER: If you look at them under the analysis that they don't have to be, then I think they are public records. In a refusal case, like I said, in Pruet, if you say I don't believe the SOAH rule; but you say I will follow 803(8) and I will look to the duty created by law.

JUSTICE DALE WAINWRIGHT: And I don't know that you have an option.

ATTORNEY BRIAN L. BAKER: Okay.

JUSTICE DALE WAINWRIGHT: In the court of law, the rules of evidence govern.

ATTORNEY BRIAN L. BAKER: Uh-huh.

JUSTICE DALE WAINWRIGHT: So if it's a public report under Chapter 724, whether it's sworn or unsworn, then 803(8) will govern whether it's admissible. Correct? Absent some legislative indication to the contrary.

ATTORNEY BRIAN L. BAKER: My argument would be 159.23(c)(7) should bar the admission of an unsworn report. I think SOAH's rule--

JUSTICE DALE WAINWRIGHT: So the administrative provision trumps the rule of evidence in that case in your view?

ATTORNEY BRIAN L. BAKER: I think that the SOAH rule was reasonable as a reasonable construction of the case and I think it's unreasonable to construe one has to be sworn and one doesn't.

JUSTICE DALE WAINWRIGHT: Okay. Let me make sure I understand. I'm just going to presume from your demeanor and statements that you don't have a question about the veracity of the officers or their integrity across the board generally trying to do their job to protect the public. Your question is, whether the technical re-

quirements of the statute and the regs have been complied with in needing a specific document.

ATTORNEY BRIAN L. BAKER: With respect, sir, I question the veracity of police officers and the statements that they make every week in court and so I don't take as a document saying that it's sworn or sworn "to and subscribed before me" or that it has a title that says, "Police Officer's Sworn Report." I don't accept that and in this case, I think when you look at it and you see that this officer has essentially faked a document and maybe it wasn't intentional. It was at least negligent and he had been caught doing it before. I have a problem with that because when you start to cheat a little bit or you start to fake it just a little bit, you kind of go down a slippery slope.

JUSTICE DEBRA H. LEHRMANN: So you're saying--

CHIEF JUSTICE WALLACE B. JEFFERSON: But it gets to the point of where -- but it gets to the question that we explored earlier, and that is what is the purpose of the oath. Is it to impress on the person testifying that what I'm about to swear to if it is inaccurate might subject me to criminal penalties and so I'd better be accurate about it--

ATTORNEY BRIAN L. BAKER: Absolutely.

CHIEF JUSTICE WALLACE B. JEFFERSON: --and if that's the case, then why is the Department's argument that there are sanctions whether or not the document is sworn, criminal sanctions that can attach for inaccurate testimony enough to decide the case?

ATTORNEY BRIAN L. BAKER: Well, because I think those criminal sanctions are really, they're an illusion and it doesn't matter whether it's tampering with a government document and it doesn't matter whether it's perjury. Nothing has happened in this case because the officer submitted a document that was not truly sworn. I mean, I have a problem as a lawyer offering a piece of evidence that, I would act as if it was a sworn document and it wasn't and if I did that, I would think that someone would take my bar card away.

JUSTICE DALE WAINWRIGHT: But documents that are unsworn are admitted properly every day in a court of law. A contract between parties in a breach of contract action. Many, many documents, a letter written in an attorney's fee case, many documents are properly admitted that are not sworn in courts of law every day, criminal and civil. Chapter 724 reports don't have to be sworn. Your answer previously surprised me. I start with a strong presumption that these officers are acting with veracity and integrity.

ATTORNEY BRIAN L. BAKER: Uh-huh.

JUSTICE DALE WAINWRIGHT: And I think we have to in our system just as we start with the presumption that attorneys are acting with veracity and that the courts are acting with respect and veracity and then if there's an exception, we deal with it here. I guess I go back to Justice Guzman's question about what's the policy reason to exclude this document if there's no indications of untrustworthiness? If you've got some evidence that shows that, then you could bring that before a judge to be considered, but what's the general policy reason? Because it almost seems as the dissent in the Court of Appeals raised that we're looking for technical, I think maybe the dissent say hypertechnical reasons to exclude something. So what's the policy reason here?

ATTORNEY BRIAN L. BAKER: I think that a Texas driver deserves nothing less than a sworn statement of the facts that are going to use to take his privilege to operate a motor vehicle.

JUSTICE PAUL W. GREEN: Well, what about a death penalty defendant. Why wouldn't they be entitled to the same thing?

ATTORNEY BRIAN L. BAKER: Everyone should be entitled to it as much.

JUSTICE PAUL W. GREEN: But the fact of the matter is, every day in courts in capital murder cases, documents are into evidence that are not sworn, and are perfectly relevant and probative of evidence.

ATTORNEY BRIAN L. BAKER: Well, there's certainly some rules that prohibit all documents being admitted into evidence and it's not just like everything comes in. I mean these things have to be sworn and I think a Texas driver deserves nothing less than having that sworn report submitted into evidence and you do have the indication of trustworthiness. When I asked the police officer, I said, you know, this document purports that you said that, it was sworn and he said, I didn't. That never happened and to me, I've got a problem. We should have a bright-line rule like Justice Jefferson suggested. It's swear to the report. Submit it to DPS and let's go have a hearing. What's wrong with that? The problem is is that now we have officers based on Government Code 602.002 part 16, they're just swearing to anything and that's not the case and I've done enough of these hearings and I'm sure my colleagues have too where you discover things that are in reports and they're just not true and they ought to be sworn. And I don't think that we presume regularity or that things are exactly as they purport to be 99% of the time and so for that reason, I think that 803(8) says, this is the duty. You have to follow what the Legislature said. If it's not in the form that is required by the Transportation Code or the Department's rules, which all unquestionably require sworn reports and it's not admissible under 803(8) and for that reason, I think that the ALJ erred in admitting that document into evidence and but for the admission of that document, there's no evidence that there was reasonable suspicion to stop Mr. Caruana, no evidence that's there's probable cause to arrest him and the subsequent swearing to after it was already admitted is just, it's too late.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Baker. Are there any further questions? Thank you, Counsel.

ATTORNEY BRIAN L. BAKER: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The court will hear rebuttal.

REBUTTAL ARGUMENT OF KEVIN M. GIVENS ON BEHALF OF PETITIONER

ATTORNEY KEVIN M. GIVENS: May it please the Court, there's one point that I wanted to address right off the bat. Counsel said that, it's important that we have sworn reports because we're going to take away someone's license, but in the majority of cases, we take away a person's license without a sworn report. The majority of cases are refusal cases and a sworn report is not required in those cases and we take away a person's driver's license every day based on a report in 724 that does not have to be sworn. That's why having a sworn report does not go to the essence of the thing to be done. The essence of the thing to be done is to inform the Department that a person's license should be suspended. That's why the report requires that the officer notify the Department of the person's name, of the grounds for the arrest, of the results of the test and whether or not there was a criminal complaint filed. Those are the elements.

CHIEF JUSTICE WALLACE B. JEFFERSON: This -- is an indication in a report that, "I have sworn to it taken the oath" when I have not, subject to criminal sanction under the penal code provision you mentioned earlier?

ATTORNEY KEVIN M. GIVENS: I'm sorry. I don't understand that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay, so I sign a document that says, at the top "I swore to this document. And I raised my hand and took the oath and I signed yes I did." And then a lawyer asked me, "Did you actually swear to it?" I said, "No, I did not." I'm asking is that a false public official report subject to criminal sanctions?

ATTORNEY KEVIN M. GIVENS: No, it's not, because the question is, whether or not there's anything subs-

tantive that's false. That's what the issue on 37.10 is whether or not there's any substantive thing in the report that's false. Whether the officer and the officer by signing the report does affirm that everything in there is true and correct. It's just a question of whether or not the jurat was properly applied.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, what we're trying to understand, I mean there are statutes and rules that require swearing, no question about it--

ATTORNEY KEVIN M. GIVENS: Absolutely.

CHIEF JUSTICE WALLACE B. JEFFERSON: -- that require that and we're looking at comparing that rule of law with conduct that is inconsistent with it and you said, a moment ago that there are ways that would subject somebody who signs one of these documents maybe not to perjury, but at least to some other form of criminal sanction and now we're supposed to look at whether it's substantive or not. Or -- I mean, how do you make that determination?

ATTORNEY KEVIN M. GIVENS: The penal code is very specific about that. It's 37.10 and that's how you make that determination and you look through 37.10. It explains what is filing a false report and what is not and it depends, again, as I said, on the substantive. Whether or not the substantive, if the officer makes a substantive misrepresentation in that report, that's what makes it a criminal violation. Again, the question of whether or not the officer actually raises his hand and swears to a document is a procedural issue and that's not a substantive. The report itself, but what's contained within the report, the facts of the case, that's what we're concerned about and the fact that you can always go back and clean up the swearing part is the part that makes that not an issue. As I stated in this particular case, the officer while testifying swore that everything in his report was true and correct. He was under oath at that point in time. So if the--

JUSTICE NATHAN L. HECHT: But it's bound to give a judge some pause that if the law's not being complied with in one respect, maybe it's not being complied with at all.

ATTORNEY KEVIN M. GIVENS: Certainly, it may give the judge cause to question the credibility of the officer, but in this case, there were no other questions raised about the credibility of the officer and so I think the ALJ was within his discretion to credit the officer's credibility. Again, he came and appeared and that's really the function of the rule again. The function of the rule when read as a whole is to make sure that if the officer is subpoenaed, he does appear and he is subject to cross examination and the officer was subject to cross examination. He was present at the hearing and--

CHIEF JUSTICE WALLACE B. JEFFERSON: But in many of these cases, the defendant will not be represented by counsel, won't know to subpoena an officer, won't know the procedures and so might be convicted based on a report that is not sworn according to law because the officer's not present or hasn't been asked to be present.

ATTORNEY KEVIN M. GIVENS: Well, again the fact that it's not sworn is not the important part because the essence of the thing to be done that's not the essence of the thing to be done and the important thing, the report that's required from the Department in many cases, in all 724 cases, is not required to be a sworn report. So there's still an indicia of reliability attached to this report whether or not it's sworn or not.

JUSTICE DALE WAINWRIGHT: Is there any downside to never swearing to these reports?

ATTORNEY KEVIN M. GIVENS: The downside is that the ALJ may not give them credit. He may weigh that against the officer, but I think--

JUSTICE DALE WAINWRIGHT: So?

ATTORNEY KEVIN M. GIVENS: Pardon me?

JUSTICE DALE WAINWRIGHT: I mean if we rule as you're arguing, can officers from here hence forward just not swear to the reports, sign them but not swear to them? And what's the downside?

ATTORNEY KEVIN M. GIVENS: The downside to that is, again, that the ALJ may determine that they're not trustworthy and especially if the--

JUSTICE DALE WAINWRIGHT: Under the 803(8) exception.

ATTORNEY KEVIN M. GIVENS: Under the 803(8) exception.

JUSTICE DALE WAINWRIGHT: Anything else?

ATTORNEY KEVIN M. GIVENS: The other, I think that's probably--

JUSTICE DALE WAINWRIGHT: Does the Department policy make it required that these be sworn?

ATTORNEY KEVIN M. GIVENS: The Department's policy does require that they swear to their report.

CHIEF JUSTICE WALLACE B. JEFFERSON: And what's the penalty or what's the consequence at all to the officer for not complying with Department policy?

ATTORNEY KEVIN M. GIVENS: I'm sure there are probably -- each agency would probably have their own internal policies for not complying with their own policies. And so I'm sure every agency has a policy that requires their officers to comply with the law in filing their reports and so each agency would then be responsible for administering any punishments if an officer did not file a report properly.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Givens. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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