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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Larimer County District Court
Honorable Gregory Lammons, Judge
Case No. 2022CV30214

MAGGIE JANSMA,

Appellant,

v.

COLORADO DEPARTMENT OF REVENUE, MOTOR VEHICLE DIVISION,

Appellee.

▲ **COURT USE ONLY** ▲

Case No. 22CA761

PHILIP J. WEISER, Attorney General
DANNY RHEINER, Assistant Attorney General, 48821*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 8th Floor
Denver, CO 80203
Telephone: (720) 508-6570
FAX: (720) 508-6038
E-Mail: danny.rheiner@coag.gov
*Counsel of Record

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g).

It contains 2184 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Danny Rheiner

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Signature of attorney or party

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INTRODUCTION

Under Colorado's Express Consent Law, if a driver refuses a chemical test when suspected of driving under the influence, the Department of Revenue must revoke their driving privileges. § 42-2-126(3)(c), C.R.S. Here, the uncontradicted evidence—in the form of a police officer's affidavit—was that Maggie Jansma refused to take a chemical test. Ms. Jansma did not testify, did not call the officer to testify, and failed to introduce any contradictory evidence whatsoever. Given the evidence before it, the Department was required to revoke Ms. Jansma's license. This Court should affirm that decision because the affidavit provided sufficient evidence to support the revocation.

STATEMENT OF THE CASE AND FACTS

This case arose from Ms. Jansma rear-ending another vehicle. EX, p 14. Officer Jeremiah Wood responded and contacted Ms. Jansma. *Id.* She was slurring her words and could not complete a sentence. *Id.* Officer Wood smelled a strong odor of an unknown alcoholic beverage on her breath. *Id.* After talking with Ms. Jansma, Officer Wood instructed

her to exit the vehicle. *Id.* When she exited the vehicle, Ms. Jansma was unsteady and had trouble maintaining balance. *Id.* Officer Wood took Ms. Jansma into custody and placed her in his patrol vehicle. *Id.* Officer Erik Contino, who had arrived on the scene after Officer Wood, then took custody of Ms. Jansma and transported her to the Loveland Police Department. *Id.*

About two weeks after the accident, Officer Contino completed an Express Consent Affidavit and Notice of Revocation. *Id.* at p 1. Officer Contino checked a box stating that the "Colorado Express Consent Law [was] read or explained to" Ms. Jansma. *Id.* Directly below that, he checked a box stating that Ms. Jansma had "refused" to take a chemical test. *Id.* He also checked a box stating that because Ms. Jansma had "refused to take or complete, or to cooperate with any testing or tests of [he]r blood, breath, saliva, and/or urine," her driving privileges were revoked. *Id.* Officer Contino swore, under penalty of perjury, that the facts in the Affidavit were true to the best of his knowledge. *Id.*

The Department then contacted Ms. Jansma and informed her that her driving privileges had been revoked for one year. CF, p 109.

Ms. Jansma requested a hearing to challenge the revocation. *Id.* at p 46. At the hearing, she argued that the Express Consent Affidavit did not provide facts showing that she had refused a chemical test. *Id.* at pp 47-48. She did not object to the admission of the Affidavit. *Id.* at 46. She did not call any witnesses. *Id.* at p 47. And she did not introduce any evidence that contradicted Officer Contino's sworn statements that he had explained the Express Consent Law to her and that she had refused to take a chemical test. *Id.*

Relying on the Express Consent Affidavit, the hearing officer found that "[l]aw enforcement advised [Ms. Jansma] of Colorado's express consent statute and [she] refused to take or complete, or to cooperate in the completing of a chemical test of breath or blood." *Id.* at p 37. Because Ms. Jansma had refused the chemical test, the hearing officer sustained the revocation of her license. *Id.* at p 38.

Ms. Jansma appealed the hearing officer's ruling to Larimer County District Court. *Id.* at p 143. The District Attorney for the Eighth Judicial District represented the Department in the district court case. *Id.* at p 51. The District Attorney argued that "[b]y strategically waiving

Officer Contino's appearance at the DOR hearing, Ms. Jansma attempt[ed] to carefully curate the available record and obscure readily verifiable facts." *Id.* at p 57. Specifically, the District Attorney asserted that "the body worn camera footage of both officers shows the invocation of Colorado's Express Consent immediately after she is placed in the back of Officer Wood's patrol car, to which she responded that she would take neither offered test and when the advisement continued interrupted 'Yeah, I'll lose my license for a year.'" *Id.*

The district court affirmed the hearing officer's decision. *Id.* at p 178. It noted that the Affidavit, which Officer Contino had signed under penalty of perjury, supported the hearing officer's conclusion that Ms. Jansma had refused to take a chemical test. *Id.* at p 177. The court also noted that Ms. Jansma made a strategic decision not to subject Officer Contino to cross-examination. *Id.*

Ms. Jansma appealed the district court's order.

SUMMARY OF ARGUMENT

The hearing officer properly relied on the uncontradicted factual assertions made by Officer Contino in the Express Consent Affidavit to find that Ms. Jansma had refused a chemical test. These factual assertions were sworn to be true under penalty of perjury. And Ms. Jansma made a strategic decision not to call witnesses to rebut the assertions. For these reasons, the assertions were "sufficiently reliable and trustworthy to support the hearing officer's factual findings." *Baldwin v. Huber*, 223 P.3d 150, 153 (Colo. App. 2009).

ARGUMENT

I. The hearing officer's decision was not arbitrary or capricious.

A. Preservation and Standard of Review

While the opening brief does not address preservation, the Department acknowledges that Ms. Jansma preserved her argument that there was insufficient evidence for the hearing officer to find that she refused a chemical test. CF, p 48.

The Department agrees that for a reviewing court to set aside a decision by an administrative agency on the ground that it is arbitrary or capricious, the court must find that there is no competent evidence supporting the agency's decision. *Dolan v. Rust*, 195 Colo. 173, 175-76, 576 P.2d 560, 562 (1978). Determinations about the weight to be given to the evidence are factual matters solely within the province of the hearing officer to decide as the trier of fact. *Baldwin*, 223 P.3d at 152.

B. There was sufficient evidence for the hearing officer to find that Ms. Jansma refused a chemical test.

Factual assertions made by an arresting officer in documentary evidence can constitute sufficient support for a hearing officer's finding. *Baldwin*, 223 P.3d at 153. In *Baldwin*, the driver did not subpoena or otherwise request the presence of any police officers at her hearing. *Id.* at 151. But documents filled out by the arresting officer were admitted, without objection, at the beginning of the hearing. *Id.* These documents, which were signed under penalty of perjury, asserted that the driver was stopped for weaving. *Id.* The hearing officer found that the driver had been weaving, and so, the initial stop was proper. *Id.* at 151-52. In

making this finding, the hearing officer credited the factual assertions made by the arresting officer in the documentary evidence. *Id.* at 152.

On appeal, the driver argued that the revocation of her license must be reversed because there was "no reliable trustworthy evidence" in the record to support the hearing officer's conclusion that the initial stop was proper. *Id.* A division of this court rejected that argument. *Id.*

The division acknowledged that the officer's written assertions were conclusory. *Id.* at 153. It also noted that there was no indication whether the officer's assertions were based on his own observations or information from fellow officers. *Id.* Nonetheless, it concluded that the assertions were sufficiently reliable and trustworthy to support the hearing officer's finding. *Id.*

In reaching this conclusion, the division noted that the officer's assertions were "signed and sworn." *Id.* It also noted that the driver had the right to subpoena the officer, or any other officers involved, but failed to do so. *Id.* For these reasons, the officer's written assertions met the "test to be considered sufficiently reliable and trustworthy to support the hearing officer's factual findings." *Id.* (citing *Colo. Dep't of*

Revenue v. Kirke, 743 P.2d 16, 21-22 (Colo. 1987); *Colo. Div. of Revenue v. Lounsbury*, 743 P.2d 23, 25-26 (Colo. 1987)).

This case is analogous to *Baldwin*. The hearing officer relied on factual assertions made by Officer Contino in documentary evidence to find that Ms. Jansma had refused a chemical test. CF, p 37. These factual assertions were sworn to be true under penalty of perjury. EX, p 1. Ms. Jansma did not object to the admission of the documentary evidence at the hearing. CF, p 46. Nor did she subpoena Officer Contino, or any officers involved, despite having the ability to do so. *Id.* at 47. Indeed, she presented no evidence whatsoever at the hearing that would suggest Officer Contino's statement about her refusal was inaccurate. This represented a strategic decision not to call witnesses to rebut Officer Contino's assertions. For these reasons, the assertions were "sufficiently reliable and trustworthy to support the hearing officer's factual findings." *Baldwin*, 223 P.3d at 153.

Ms. Jansma argues that there was insufficient evidence to support the hearing officer's finding for three reasons. None are persuasive.

First, she argues that because Officer Contino did not describe what he "saw or heard" that constituted a refusal, his assertions in the Affidavit were insufficient to support the hearing officer's finding. OB, pp 15-16. *Baldwin* forecloses this argument. Ms. Jansma is correct that Officer Contino did not fill out the portion of the Affidavit asking him to describe what he "saw or heard." EX, p 1. But he did check the boxes saying that Ms. Jansma had refused a chemical test. *Id.* Checking these boxes constituted an assertion that Ms. Jansma refused testing. True, this assertion was conclusory. But conclusory assertions, when made under penalty of perjury, are sufficiently reliable and trustworthy to support a hearing officer's finding. *Baldwin*, 223 P.3d at 153. Thus, the hearing officer did not err in relying on Officer Contino's Affidavit to find that Ms. Jansma refused a chemical test.[1]

[1] "In deciding whether there was a refusal to submit to a chemical test, the trier of fact should consider the driver's words and other manifestations of willingness or unwillingness to take the test." *Dolan*, 195 Colo. at 175, 576 P.2d at 562. But unlike *Dolan* and the other cases cited in the opening brief, Ms. Jansma failed to present any evidence showing that she had attempted to cooperate with a request for a chemical test. So, the only evidence of Ms. Jansma's "manifestations of

Second, Ms. Jansma argues that because the Notice of Revocation was not personally served on her, the record does not show whether she was asked to take a chemical test within two hours of driving or what she did or said in response to any request. OB, pp 21-22. This argument ignores key facts from the record.

Officer Contino checked a box on the Affidavit stating that the "Colorado Express Consent Law [was] read or explained to" Ms. Jansma. EX, p 1. The Express Consent Law requires a person to take a chemical test at the request of a law enforcement officer who has probable cause to believe that the person was driving under the influence. § 42-4-1301.1(2)(a)(I), C.R.S. The law also states that the test must be completed within two hours. *Id.* at (2)(a)(III). Because Officer Contino asserted that the Express Consent Law was explained to Ms. Jansma, there was sufficient evidence for the hearing officer to conclude that the officers followed the law by asking Ms. Jansma to take a chemical test within two hours of driving.

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willingness or unwillingness to take the test" came from the Affidavit. *Id.* The hearing officer properly relied on this uncontroverted evidence.

Officer Contino also checked the boxes saying that Ms. Jansma had refused a chemical test. True, he did not describe the test request or Ms. Jansma's statements or behavior in response. But the hearing officer could have reasonably inferred from the Affidavit that the officers asked Ms. Jansma to take a chemical test and that she said or did something to indicate her refusal. *See Clark v. People*, 232 P.3d 1287, 1292 (Colo. 2010) ("In applying the substantial evidence test, we must give the prosecution the benefit of every reasonable inference which may be fairly drawn from the evidence."). After all, if Ms. Jansma had not been asked to take a chemical test and refused to do so, there would have been no logical reason for Officer Contino to assert, under penalty of perjury, that she had refused the test.

Finally, Ms. Jansma argues that if checking boxes on the Affidavit alone was sufficient evidence of refusal to take a chemical test, "[t]here would be no need for even a hearing." OB, p 22. This argument fails to consider the hearing's purpose. A hearing provides a driver with the opportunity to present evidence and argue why their license should not be revoked. If Ms. Jansma has concerns about the accuracy of the

Affidavit, she could have called Officer Contino as a witness and questioned him about whether he had asked her to take a chemical test and what she did in response. She chose not to. Her strategic decision not to put on evidence rebutting the assertions in the Affidavit does not render the hearing process useless.

CONCLUSION

Because there was sufficient evidence in the record for the hearing officer to find that Ms. Jansma refused a chemical test, the Department's revocation of her driver's license should be affirmed.

PHILIP J. WEISER
Attorney General

/s/ Danny Rheiner

DANNY RHEINER, 48821*
Assistant Attorney General
Revenue & Utilities Section
Attorneys for Department of Revenue,
Motor Vehicle Division
*Counsel of Record

CERTIFICATE OF SERVICE

I certify that on September 8, 2022, I served this ANSWER BRIEF on all parties to this case, as identified below, using Colorado Courts E-Filing System.

Sarah Schielke The Life & Liberty Law Office 1209 Cleveland Avenue Loveland, CO 80537	

s/Jennifer Duran