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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRITT COLLEEN BURTON,

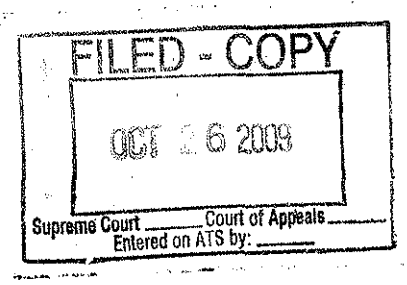
Appellant,

v.

THE IDAHO TRANSPORTATION DEPARTMENT,

Respondent.

SUPREME COURT DOCKET NO. 36540-2009



APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Benewah

HONORABLE FRED M. GIBLER
District Court Judge

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I.

STATMENT OF THE CASE

A. Nature of the Case

The above-named Appellant, Britt Colleen Burton (hereafter called "Burton") was arrested for Driving Under While Under the Influence of Alcohol (DUI) in violation of Idaho Code §18-8004. She was stopped for failing to signal when two uphill lanes merged into one while she continued to travel in the right lane. Burton filed a timely Request for Administrative License Suspension (ALS) Hearing pursuant to Idaho Code §18-8002A. The hearing was held, at which time Burton alleged that Idaho Code §49-808(1) was unconstitutionally void as applied because it failed to provide fair notice that signaling is appropriate when roadway design results in two lanes into one and that the same section is unconstitutionally void as applied because it fails to establish minimum guidelines as to what is an "appropriate signal" to govern enforcement of the statute. The ALS hearing officer sustained the suspension after testimony and argument. Burton filed a Petition for Judicial Review, after which the District Court held that Idaho Code §49-808 was not unconstitutionally vague as applied, and that reasonable cause existed for the underlying traffic stop.

B. Course of the Proceedings

On August 26, 2007, Burton was arrested, charged with DUI and served with an Idaho Code §18-8002A Suspension Advisory.

On August 29, 2007, Burton filed a Request for Administrative Hearing.

On September 17, 2007 an ALS Hearing was held.

On September 20, 2007, Findings of Fact and Conclusions of Law and Order sustaining the proposed suspension of driving privileges was issues by the hearing officer.

On September 27, 2007, Burton filed a Petition for Judicial Review.

On April 13, 2009, the District Court filed an Opinion and Order Re: Appeal, denying Burton's claims that the statute was unconstitutionally applied.

On May 26, 2009, Burton filed a Notice of Appeal with the Idaho Supreme Court.

II.

STATEMENT OF FACTS

On August 26, 2007, at approximately 2:36 a.m., Burton was traveling out of St. Maries, Idaho, on Highway 3. A.L.S. Hrg. Transcr. 9:3-10; R. 29 (Sept. 17, 2007). The highway was essentially a two-way highway. *Id.* at 16-19. At some point, as the highway climbed a hill, the single lane for the direction Burton was traveling expanded to include a left-hand passing lane and the regular right-hand lane in which Burton was

traveling. *Id.* at 9:20-10:3; R. 29-30 As Burton climbed further up the hill, she passed a sign indicating that the lanes were going to merge. *Id.* at 10:18-23; R. 32. The sign did not indicate which lane ended but only that the lanes were merging. *Id.* at 12:5-8. Burton did not signal when she passed that sign because she did not understand that she was required to signal when a passing lane disappears and she is traveling in the regular, right-hand lane going up a hill. *Id.* at 11:5-7; 11:11-15; R.31

Shortly after the left passing lane ended, Burton was pulled over by Deputy Sidney E. Hilton (hereafter "Hilton") of the Benewah County Sheriff's office. *Id.* at 10:15-17; R. 30. Hilton told Burton that he pulled her over because she failed to signal when the two lanes became one. ALS Hrg. Transcr. 10:11-14, 11:8-10; R. 31. At no time did Burton turn or exit the highway. ALS Hrg. Transcr. 11:23-12:4; R. 31.

A subsequent investigation by Hilton led to a charge of DUI, and Burton was served with a Notice of Suspension for Failure of Evidentiary Testing. Court's Exh. 1:5. In accordance with statutory provisions, Burton requested an administrative hearing on August 29, 2007. Court's Exh. 1: 23-25.

The administrative hearing was conducted on September 17, 2007. Court's Exh. 1:50. Burton testified at the hearing as described above. ALS Hrg. Transcr. 6:16-12:10, R. 23-34. Burton offered as exhibits the Motion to Suppress and Memorandum in Support, which she had filed in Benewah County District Court relative to her DUI

charge. ALS Hrg. Transcr. 5:3-6:5; Court's Exh. 1: 36-49. Said motion and memorandum in support argued that I.C. § 49-808(1) is unconstitutionally void as applied to Burton because it fails to provide fair notice that her conducted is proscribed by the statute and it fails to establish minimal guidelines to govern enforcement of the statute. Burton's argument relied on the Memorandum Decision and Order of Fifth District Magistrate Judge Israel, which was attached to the memorandum in support as Exhibit A. Court's Exh. 1: 47-49.

In paragraph 1 of his Findings of Fact, Administrative Hearing Examiner Eric G. Moody (hereafter "Moody") stated that Burton's void for vagueness argument was not one on which an ALS hearing officer could rule and that he could not vacate Burton's license suspension based on that argument. Court's Exh. 1: 50-58. Therefore, he held that Hilton had legal cause to stop Burton and sustained the suspension of her driver's license. R. 048, 051.

III.

ISSUES ON APPEAL

A. Whether I.C. § 49-808(1) is unconstitutionally void as applied to this case because it fails to provide fair notice that signaling is appropriate when roadway design necessitates merging from two lanes into one.

B. Whether I.C. § 49-808(1) is unconstitutionally void as applied to this case because it fails to establish minimal guidelines as to what is an "appropriate signal" to govern enforcement of the statute.

IV.

ARGUMENT

A. Legal Standard

On judicial review, the District or Supreme Court may set aside the administrative hearing officer's decision if the Court determines that the agency's findings, inferences, conclusions, or decisions were, among other things, in violation of constitutional or statutory provisions. I.C. § 67-5279(3). This includes arguments that a statute or ordinance on which the agency's decision relied is void for vagueness. See *Cowan v. Bd. of Commissioners of Fremont County*, Docket No. 30061 (2006); *Dupont v. Idaho State Board of Commissioners*, 134 Idaho 618 (2000).

B. Argument

The due process clause of the Fourteenth Amendment to the U.S. Constitution requires that a statute defining criminal conduct be "worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited" and that it

be "worded in a manner that does not allow arbitrary and discriminatory enforcement." *State v. Korsen*, 138 Idaho 706, 711 (2003).

Therefore, a statute is void for vagueness if it "fail[s] to provide fair notice that the defendant's conduct was proscribed or fail[s] to provide sufficient guidelines such that the police had unbridled discretion" in enforcing the statute. *Id.* at 712. The statute involved in this matter, I.C. § 49-808(1) is unconstitutionally void for both of these reasons.

A statute is facially vague if it is "impermissibly vague in all of its applications," i.e. invalid *in toto*. *Id.* However, even if a statute is not facially vague it may still be vague "as applied" to a particular defendant's conduct. *Id.* Burton is not arguing that I.C. § 49-808(1) is facially void but, rather, that it is void as applied to her conduct.

1. I.C. § 49-808(1) is Unconstitutionally Vague as Applied to This Case Because It Fails to Provide Fair Notice that Signaling is Appropriate When Roadway Design Necessitates Merging from Two Lanes into One.

I.C. § 49-808(1) states:

> No person shall turn a vehicle onto a highway or move a vehicle right or left upon a highway or merge onto or exit from a highway unless and until the movement can be made with reasonable safety nor without giving an appropriate signal.

In *State v. Dewbre*, 133 Idaho 663, 666 (Ct. App. 1999), the court held that failing to signal at the end of a passing lane constituted "movement" and violated this statute. However, as pointed out by Fifth District Magistrate Judge Israel, the court was divided

and its opinion sent mixed signals. *See Memorandum Decision and Order, State v. Dale, Blaine County Case No. CR-2007-0783* dated June 6, 2007, Court's Exh. 1: 47-49.

As Judge Israel's decision points out, the Dewbre court refused to consider whether the statute was unconstitutionally vague because that issue was not raised below. *See Dewbre*, 133 Idaho at 667. Although Chief Judge Perry's opinion states that I.C. § 49-808 is plain and unambiguous, as Judge Israel states, this does not rule out an as applied vagueness argument or there would have been no reason for the court to specifically leave that argument open. *See Memorandum Decision and Order*, R. 043, n. 1.

> Despite Chief Judge Perry's statement, I.C. § 49-808 is hardly plain and unambiguous, or, if it is plain and unambiguous, it can be palpably absurd as applied to many situations. Is weaving within a lane without a turn signal a violation of the statute? Is swerving to avoid a deer without a turn signal a violation of the statute? Is going around a bend in the road without a turn signal a violation of the statute? Consistent with Judge Perry's reasoning, the answer is yes, yet almost no one would apply the statute to these situations.

Id. at 43.

While being required to signal if weaving within a lane or swerving to avoid a deer, are situations that stretch the imagination, going around a bend in the road is not. Proceeding forward on a road that makes anywhere from a 45° - 90° turn is not. Proceeding through the roundabouts that seem to be more and more in vogue is not. In fact, signaling in these latter situations would actually constitute a hazard.

Passing lanes often begin on inclines so slower traffic can stay right. The passing lane then expires at the crest of a grade, where both lanes become one. Thus, it is the lanes that merge and not the driver. It is preposterous to think that a vehicle proceeding forward to the right of a passing lane, who remains in that lane throughout (and may even be passed by other cars) needs to signal to lawfully continue moving forward. In the present case, Burton was proceeding down a two land highway and came upon a passing lane. She stayed in the right-hand land, never changing direction, exiting or merging.

The divided nature of the *Dewbre* opinion, itself, supports Defendant's argument that the statute is unconstitutionally vague as applied to the present case. In the main opinion, Chief Judge Perry states that he is "constrained" to find that the defendant's action violated the statute "until further clarification is provided by the Idaho legislature." *Id.* at 666.

In addition, in his concurring opinion, Judge Schwartzman points out that "many an Idaho driver would, in custom and practice, see no need to operate a turn signal in this hyper-technical situation." *Id.* at 667. Therefore, even Judge Schwartzman would agree that the statute does not give adequate notice to Idaho drivers of "presumably ordinary intelligence" that a signal is required under the circumstances of this case. *See Memorandum Decision and Order*, Court's Exh. 1: 47-49.

This is reiterated in the dissenting opinion of Judge Pro Tem McDermott in which he states that common sense dictates that the word "move" in the statute "does not require a driver to signal where the driver, obeying the posted traffic signs, remains in the right-hand lane until the highway's structure forces the driver to merge" into the remaining lane and that such a requirement "may confuse, rather than alert, other drivers." *Id.* at 667-668.

Further, because the term "appropriate signal" is not defined in the Idaho Code, a person of ordinary intelligence is left to wonder when a signal is appropriate and, therefore, required. The vagueness doctrine does not require every word in a criminal statute to be statutorily defined. *State v. Casano*, 140 Idaho 461, 464 (Ct. App. 2004). However, "a statute must be construed so that effect is given to every word and clause of the statute" and "words and phrases are construed according to the context and the approved usage of the language." *Dewbre*, 133 Idaho at 656. Therefore, effect must be given to the word "appropriate" as it is used in this statute.

"Appropriate" is defined as "suitable or fitting for a particular purpose, person, occasion" (http://www.dictionary.com, accessed Oct. 15, 2009) or "suitable for the occasion or circumstances" (http://www.encarta.msn.com, accessed Oct. 15, 2009). Therefore, inclusion of the word "appropriate" in the statute implies that there are situations in which the use of a signal is not appropriate. The situations quoted above

from Judge Israel's Memorandum and Decision make clear that there are many situations in which a signal is not necessary or appropriate. However, because the statute provides no definition of the term "appropriate signal," (e.g. when other traffic is present and your "movement" could impede or interfere with their "movement"), people of ordinary intelligence are left to wonder when a signal is appropriate. In fact, there are many situations, including the one presently before the court, in which "the appropriate signal under the circumstances was just as likely no signal at all." *See Memorandum Decision and Order*, Court Exh. 1: 49.

Burton was traveling in the right-hand lane of a highway that narrowed from two lanes to one. Therefore, the design of the highway forced Burton to continue forward in the same direction without turning as the two lanes became one. While the lanes *merged* (as a manner of speaking), Burton no more merged or changed lanes by remaining in the reight hand lane than someone in the left hand land in the same place may have merged or changed lanes. Thus, it becomes an issue of who (in the two lanes) becomes the merger, changes direction or changes lanes. The result, according to the Appellee's position would actually require parties in both lanes to signal. Hence, one could envision a situation where a driver in the left-hand lane, in such a situation, would signal a right-hand turn and a driver in the left-hand lane would signal to turn left, even though both continued in the same direction with neither turning . There was no other traffic in the

vicinity at the time whose travel was potentially impeded or interfered with by Burton's action. Therefore, it is likely that the "appropriate signal" in this situation was no signal at all. However, because the statute fails to provide notice to people of ordinary intelligence whether the terms "movement" and "appropriate signal" include such situations, it is unconstitutionally vague as applied to this situation and, therefore, void.

2. I.C. § 49-808(1) is Unconstitutionally Vague as Applied to This Case Because it Fails to Provide Sufficient Guidelines as to When a Signal is Appropriate Thereby Giving Police Unbridled Discretion in Enforcing the Statute.

A law that does not provide minimal guidelines for enforcement "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *State v. Bitt*, 118 Idaho 584, 586 (1990). This failure to provide minimal guidelines for enforcement is often "what tolls the death knell" for a statute. *Id.* at n. 4. This is "perhaps the most meaningful aspect of the vagueness doctrine." *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

In *Bitt*, a city loitering and prowling ordinance was struck down as failing to provide sufficient enforcement guidelines. 118 Idaho at 590. Under the ordinance, a person could not be arrested or convicted unless he failed to identify himself and offer an explanation for his presence and conduct. *Id.* However, the ordinance did not provide any guidelines for what constituted credible and reliable identification and, therefore,

gave police officers complete discretion to make that determination. *Id.* at 589-590. Although that ordinance was found to be facially void, the reasoning is equally applicable in this "as applied" vagueness challenge.

Similar to *Bitt*, I.C. § 49-808(1)'s use of the phrase "appropriate signal" without providing further enforcement guidelines impermissibly gives officers complete discretion to decide who is and who is not violating the statute. Although a facial challenge of I.C. § 49-808(1) might not prevail because there are obvious situations in which a person of ordinary intelligence would understand a signal to be appropriate, the statute is vague as applied to Burton's conduct.

As discussed above, the situations quoted from Judge Israel's Memorandum and Decision demonstrate that there are many situations in which a signal is not necessary. Not only does the statute's failure in defining the phrase "appropriate signal" leave a person of ordinary intelligence wondering when a signal is "appropriate," this failure to provide minimal guidelines provides police with unbridled discretion in determining whether the statute has been violated. As noted by Judge Israel, "the minimal guidelines meant to establish the enforcement of the law are at best in flux." *See Memorandum Decision and Order*, Court's Exh. 1: 47-49.

Therefore, I.C. § 49-808(1) is unconstitutionally vague as applied to Burton because it fails to provide minimal guidelines as to when a signal is appropriate thereby giving police officers unbridled discretion in enforcing the statute.

V.

CONCLUSION

Because I.C. § 49-808(1) is void for vagueness and because Moody relied on that statute in making his decision that the officer had legal cause to stop Burton, his order sustaining the administrative suspension of Burton's driver's license should be vacated.

DATED this 22 day of October, 2009.

James E. Siebe
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of October, 2009, I served a true and correct copy of the foregoing document by the method indicated and addressed to the following:

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