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Dabrowski v. State Appellant's Brief Dckt. 40201

IN THE SUPREME COURT OF THE STATE OF IDAHO

THEODORE D. DABROWSKI, Petitioner-Appellant, vs. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent.	)	Docket No. 40201-2012

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

HONORABLE JEFF M. BRUDIE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Theodore D. Dabrowski (hereinafter "Appellant") appeals from the District Court's decision on appeal affirming the Administrative Court's denial of Motions for Reconsideration and to reopen the Administrative Court's suspension of Appellant's driving privileges for one (1) year.

Statement of Facts and Course of Proceedings

On May 2, 2011 Petitioner was found unconscious behind the steering wheel of a car which had just rear ended another vehicle in the parking lot of Sandpoint Super Drug, a pharmacy in downtown Sandpoint, Idaho at approximately 1:00 p.m. A prescription bottle for morphine was found in the driver's seat. Appellant was immediately transported to Bonner General Hospital, where he consented to a blood draw. [1] On July 28, 2011 the blood draw analysis was completed with results showing the following drugs were detected: Carboxy-THC, morphine, carisprodol, meprobamate, diazepam and mordiazepam. On August 8, 2011 ITD issued a Notice of Administrative License Suspension for one year, commencing September 10, 2011 with a date of service of August 11, 2011, thereby requiring Petitioner to request a hearing on or before August 18, 2011. [2] On August 17, 2011 Petitioner, acting without an attorney, faxed a request for an administrative license suspension hearing to ITD. ITD failed to conduct a timely hearing within 20 days, filing a Show Cause Letter stating there was a conflict in the

[1] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 5 through 9.

[2] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 15 through 20.

hearing officer's schedule. [3] On September 8, 2011 a telephone hearing was conducted wherein the Petitioner represented himself. On Petitioners request, the record was held open for an additional 60 days but his suspension was not stayed and therefore commenced on 9/10/11. On November 22, 2011 David J. Baumann, hearing examiner, issued Findings of Fact, Conclusions of Law and an Order sustaining Petitioner's one year suspension. [4]

On November 16, 2011 Counsel for Petitioner, Fred R. Palmer, appeared on his behalf and faxed a motion requesting that the record remain open until December 5, 2011. Request was made for the issuance of Subpoenas Duces Tecum and for all pertinent documents. These motions were denied by Mr. Bauman on November 22, 2011. On December 5, 2011 counsel for Petitioner faxed a motion to hearing officer Baumann requesting that he reconsider his Order Suspending Driving Privileges and further moving to re-open the case to receive additional evidence, to alter or amend and to set aside officer Baumann's Findings, Conclusions and Order. The motion identifies, as an offer of proof, additional evidence addressing whether Petitioner was impaired by drugs detected in his blood sample or an ongoing medical impairment unrelated to drugs and whether these drugs were "intoxicating". The Motion is supported by documentation establishing that the Petitioner, at the time of the incident, suffered from post-traumatic stress syndrome and head injuries, causing him to lose consciousness, related to his two combat tours as a Marine in Iraq. It further stated that Petitioner's failure to present the

[3] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 23, 54 and 55.

[4] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 23, 29 through 41.

appended evidence with the 60 day deadline was due to his medical impairment and unavailability of his attorney, who was out of state until November 28, 2011.[5]

On December 21, 2011 Appellant's Motions were denied by Mr. Baumann.

On December 19, 2011, Appellant filed a Petition for Judicial Review in the District Court, First Judicial District. On June 25, 2012 the Honorable Jeff M. Brudie, District Judge, filed his Opinion and Order Affirming the License Suspension of Appellant. On July 25, 2012 Appellant timely filed his Notice of Appeal from the June 25, 2012 Opinion and Order of the Honorable Jeff M. Brudie, District Judge.

ARGUMENT

A.

Due Process Entitled Appellant to Reopen his Hearing.

A request to reconsider the order suspending Appellant's driving privileges and to reopen the suspension hearing to receive additional evidence was supported by new evidence challenging the finding that Appellant's impairment was caused by intoxicating drugs. Specifically, the pro-offered evidence questioned whether these drugs were "intoxicating substances". The only evidence supporting this finding was a print out from an unknown web-site identified as "Drugs.com." [6] The statement of Richard D. Barclay, PHD, toxicologist found that the Idaho State Toxicology Laboratory Report listing the presence of several drugs without quantification was insufficient to support a finding that Appellant was under the influence of

[5] See Supreme Court Order granting augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 47 through 64.
[6] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 19 and 35.

these drugs when driving. The statement of Michelle Anderson, FNP, finds that when taken, medications prescribed by Anderson including morphine and soma, create no functional difficulty when taken as prescribed. The statement of Tory Straley-McFarland, who was with Appellant the entire evening up to two to three hours before his arrest (approximately 1:00 o'clock p.m. the following day) indicates Appellant took no prescription medication during that period of time and, when they parted, he was going to the local pharmacy to refill his prescriptions. [7]

The pro-offered evidence further sought to explain why Appellant, who up to this point had been representing himself, failed to submit this new evidence within the 60 day period preceding examiner Baumann's ruling. An Affidavit attached to Appellant's Motions states that Appellant suffers from post-traumatic stress syndrome, having completed two combat tours as a Marine in Iraq over eight years and having lost consciousness repeatedly due to multiple IED explosions. As a result, Appellant's ability to present a defense at the time of his ALS hearing was impaired as was his ability to comply with the Examiners sixty (60) day deadline to produce additional evidence. The Affidavit also states that Appellant was, at the time the Motions were made, under a full and absolute driving suspension. [8]

Examiner Baumann denied Appellant's Motions without explanation. On Appeal, in finding due process was not violated, the court stated Appellant submitted no evidence indicating the drugs present in Appellant's blood sample could not cause impairment, but rather that the evidence merely indicated Appellant takes his medication as prescribed and suffers from post-traumatic stress disorder. The court goes on to find that the evidence presented failed to fall in *Rule 60 (b). R. pp 55-56.*

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[7] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 50 through 53.

[8] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 48 through 49.

The court must consider three factors in procedural due process challenges:

First, the privacy intersect will be affected by the official action; Second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional substitute procedural safe guards; and finally, the government's interests, including the function involved in the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Bell v. Idaho Department of Transportation, 151 ID 659, 665.

Appellant contends the first of these elements is satisfied by the absolute suspension of his driving privileges for a full year; the second is satisfied by depriving him the opportunity to present the pro-offered evidence; and, the third is satisfied by the relatively minor burden on the government of a second telephone hearing balanced against the absence of public safety since Appellant's absolute license suspension would remain in effect pending reconsideration.

It is the second of these three factors upon which the court focused in its ruling. In effect, the court found no basis to believe, given the pro-offered evidence, that this could be an erroneous suspension. The hearing officer may vacate a suspension if the licensee proves, by preponderance of the evidence, that:

The test did not show an alcohol concentration or presence of drugs or other intoxicating substances in violation of *Section 18-8004, 18-8004C, or 18-8006.*

I.C. 18-8002A(7)

Appellant acknowledges the Idaho courts have rejected requiring a direct causal link between driving, drug ingestion and impairment *(Feasel v. ITD, 148 ID 312)* and it has declined to rule that it is the burden of ITD to show that a drug present in the driver's urine is "intoxicating". *ITD v. VanCamp, 12.23 ISCR 1.* Neither of these arguments are being advanced. Rather, Appellant contends that his pro-offered evidence entitled him the opportunity to present evidence to meet his burden of showing that those drugs found in his blood were not intoxicating. The only evidence of intoxication in the record is a document from an unknown

source stating that those drugs found "may impair thinking or reactions...be careful if you drive or do anything that requires you to be awake or alert."[9] It is contended that the pro-offered evidence refuted the examiner's finding that these were intoxicating substances and that the courts finding that Appellant failed to supplement the record with rebutting evidence was an error. *R. p.59.*

Having pro-offered evidence of a meritorious defense, the question thus becomes whether or not Appellant was entitled to a new hearing and reconsideration of his suspension. *Idaho Code 67-5246(4)* authorizes a Motion to reconsider if filed within 14 days. Appellant complied with this statute.

Appellant's also contends request for a new hearing fell within the provisions of *Rule 60(b) I.R.C.P.* The court found that Appellant failed to present any evidence that any of the *Rule 60(b)* factors were met. In particular, the court found that there was no reason explaining why the newly discovered evidence could not have been discovered within the 60 day window the hearing officer allowed prior to making his decision.

First, guidance on the *Rule 60(b)* due diligence test is provided in *Rule 59(d)*, which has a deadline of 14 days "after entry of judgment," as opposed to the 60 day window prior to entry of judgment referenced in the courts opinion. *R. pp. 55-56.* One might ask, rhetorically, how a party could be expected to submit evidence supporting a motion to reconsider and/or to relieve a party from a final judgment before that final judgment is entered.

Second, Appellant presented evidence through the sworn statement of his attorney that, due to medical conditions consisting of post-traumatic stress syndrome and multiple head injuries caused by multiple exposures to IED explosions while on duty as a marine in Iraq,

[9] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 19 and 35.

Appellant's ability to present a defense and comply to a 60 day deadline was impaired. The affidavit also states that further testimony will be presented, if given the opportunity, regarding Appellant's ongoing medical complications arising from IED related concussions. [10] Pro-offered evidence, coupled with Appellant's attempt to represent himself, established that Appellant should at least be allowed to present evidence on whether or not he may be entitled to relief based upon the Rule 60(b) factors of "excusable neglect" and/or "other reasons justifying relief."

B.

The Evidence did not Show the Presence of Drugs or other Intoxicating Substances.

The evidence presented at Appellant's hearing addressing the cause of his impairment were his blood test results and an unsigned statement from an unknown source, apparently downloaded from the web-site "drugs.com. "[11] An examiner may take official notice of facts that could be judicially noticed in state courts and or which are generally recognized technical or scientific facts within the agency's specialized knowledge. *Idaho Code 67-5251(4).* The court found that the "drug.com" document fell within the official notice provisions of *Idaho Code 67-5251* and that Appellant has not shown through pro-offered evidence that the "drugs.com" information is not a reliable source. *R. p. 58.*

Appellant claims there was no basis whatsoever to find the "drugs.com" information could be judicially noticed under *Rule 201, IRE* and/or that the information is generally recognized technical or scientific facts within the agency's specialized knowledge. To satisfy the

[10] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, pages 48 through 49.
[11] See Supreme Court Order Granting Augmentation dated 2/25/13 adding Agency Record, Case No. CV-2011-267, filed 1/11/12, page 19.

"presence of drugs or other intoxicating substances" requirement of *Idaho Code Section 18-8002(A)*, the record must contain evidence that drugs were not only present, but also that they were "intoxicating substances". *Reisenhauer v. ITD, 145 Id. 948, 951.* The drugs.com printout does not identify the source of its statement that the identified drugs "may impair your thinking or reactions." It is not, therefore, capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. While *Idaho Code 67-5251* relaxes the rules of evidence, it still requires that the evidence be of a type "commonly relied upon by prudent persons" and, in the case of taking official notice, that the evidence be "generally recognized as technical or scientific facts within the agency's specialized knowledge." *Idaho Code 67-5251(1) and (4)(b).* It is submitted that a prudent person would not rely on statements set forth from a web-site without that statement identifying its source. This statute also authorizes official notice of facts which would be judicial noticed under the Idaho Rules of Evidence. If there was a scientific basis for the statements set forth in this printout, the underlying reliability of scientific tests are required. *State v. Van Sickle, 120 Idaho 99.* Even under the relaxed standards recognized in administrative proceedings, a hearsay document of scientific origin must, at a minimum, identify its author.

CONCLUSION

Suspension of Appellant's driving privileges should be vacated because evidence failed to support a finding that his impairment was due to intoxicating substances. Suspension of Appellant's driving privileges should be vacated and this matter remanded to receive additional evidence.

RESPECTFULLY SUBMITTED this 13 day of March, 2013.

Fred R. Palmer
Attorney for Petitioner-Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of March, 2013, two true and correct coipes of the foregoing Brief of Appellant were mailed, postage prepaid, by U.S. Mail, addressed to:

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