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Dabrowski v. State Respondent's Brief Dckt. 40201

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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

BONNER COUNTY CASE
NO. CV-2011-2267

RESPONDENT'S BRIEF

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 Court Judge

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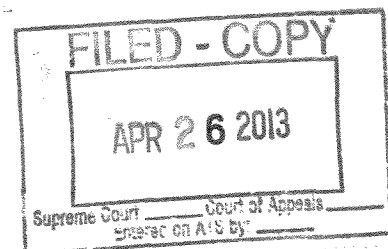


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I.

STATEMENT OF THE CASE

A. Nature of the Case

Idaho Department of Transportation (ITD) requests this Court to uphold the decision of District Court and the Department's Hearing Officer, who determined that the requirements of Idaho Code Section 18-8002A were met and that Dabrowski's driving privileges should be suspended for one (1) year.

B. Course of Proceedings

ITD agrees with the "Course of Proceedings" as described in the brief filed by the Appellant.

II.

STATEMENT OF THE FACTS

On May 2, 2011, the vehicle driven by Theodore David Dabrowski (Dabrowski) rear ended another vehicle at 604 North 5th Street in Sandpoint, Idaho. A witness, Linsey Henderson, told Officer Joshua Van Dyke that when she exited the Sandpoint Super Drug Store she saw that Dabrowski's vehicle had rear ended her vehicle. *R.*, p.6. She also observed Dabrowski in the driver's seat, and he appeared to be passed out at the steering wheel. Dabrowski was transported to the Bonner General Hospital. *R.* p.6.

Officer Van Dyke went to the hospital and found that Deputy Deal was already there with Dabrowski. Dabrowski told the officers he had a back injury and could not perform field sobriety tests. Other field sobriety tests were given to him including a gaze nystagmus test and an alphabet test. *R.*, pages 5-14. Dabrowski consented to a blood draw for a Drug Recognition Evaluation.

Prior to the blood draw, Dabrowski was notified of consequences of refusing or failing the test and was provided with a Notice of Suspension. *R.*, page 6. The blood test results indicated the presence of several drugs in Dabrowski's system, including: Carboxy-THC, morphine, carisprodol, meprobamate, diazepam and nordiazepam. *R.*, page 17.

On August 8, 2011, ITD sent Notice of an Administrative License Suspension (ALS) to Dabrowski. *R.*, page 20. Dabrowski requested an administrative hearing on the proposed license suspension. *R.*, page 23. The administrative hearing was held on September 8, 2011 before Hearing Officer David J Baumann. *R.*, page 28. During the hearing, Dabrowsik testified and the law enforcement officer did not testify. *Id.* At the conclusion of the hearing, the hearing officer left the record open for 60 days (or until October 8, 2011) to permit supplementation of the record by Dabrowski. *R.*, page 28.

On November 16, 2011, attorney Fred Palmer wrote to ITD on behalf of Dabrowski and requested that the record be left open until December 5, 2011. *R.*, page 42. On November 25, 2011, the hearing officer issued an Order denying the request to keep the record open. *R.*, page 28.

On November 22, 2011, the hearing officer issued his decision which sustained the one (1) year license suspension. *R.*, pages 29-41. In summary, the hearing officer found:

- (1) Officer Van Dyke had legal cause to stop and contact Dabrowski;
- (2) Officer Van Dyke had legal cause to believe Dabrowski had violated Idaho Code Section 18-8004;

- (3) That the evidentiary tests indicated that Dabrowski was in violation of Idaho Code Section 18-8004;
- (4) That the evidentiary tests were performed in compliance with all requirements set forth in Idaho Code and ISP Forensic Services Standard Operating Procedures;
- (5) That Dabrowski was advised of the possible suspension of his Idaho Driver's privileges; and
- (6) That Officer Van Dyke followed the procedures and requirements set forth in Idaho Law and ISP Standard Operating Procedures.

Id., pages 29-38.

On December 5, 2011, through his attorney, Dabrowski filed a motion to reconsider with the hearing officer. *R.*, page 47. On December 21, 2011 the hearing officer issued an order denying the motion to reconsider. *R.*, page 63.

On December 19, 2011, Dabrowski filed a Petition for Judicial Review and a Motion to Stay the Driver's License Suspension. *R.*, page 65-70. On January 6, 2012, Honorable Judge Steve Verby issued an Order Staying the driver's license suspension pending this appeal.

The appeal was transferred to the Honorable Jeff Brudie and oral argument on the petition was held on June 14, 2012. The Opinion and Order on the Petition for Judicial Review was issued by the Court on June 25, 2012.

III. THE ISSUES ON APPEAL

1. Did the hearing officer error by failing to conduct a re-hearing on the relevant issues?

2. Was the evidence sufficient to prove that Dabrowski's impairment was caused by an intoxicating drug?

IV.

ARGUMENT

A. LEGAL STANDARD

The administrative license suspension (ALS) statute, I.C. § 18-8002A, requires that the ITD suspend the driver's license of a driver who has failed a BAC test administered by a law enforcement officer. *Bennett v. State, Dept. of Transp., 147 Idaho 141, 206 P.3d 505 (Idaho App. 2009)*. The period of suspension is ninety days for a driver's first failure of an evidentiary test and one year for any subsequent test failure within five years. I.C. § 18-8002A(4)(a). A person who has been notified of an ALS may request a hearing before a hearing officer designated by the ITD to contest the suspension. I.C. § 18-8002A(7). At the administrative hearing, the burden of proof rests upon the driver to prove any of the grounds to vacate the suspension. I.C. § 18-8002A(7); *Kane v. State, Dep't of Transp., 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct.App.2003)*. The hearing officer must uphold the suspension unless he or she finds, by a preponderance of the evidence, that the driver has shown one of several grounds enumerated in I.C. § 18-8002A(7) for vacating the suspension. Those grounds include:

- (a) The peace officer did not have legal cause to stop the person; or
- (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or

- (d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or
- (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.

I.C. § 18-8002A(7). The hearing officer's decision is subject to challenge through a petition for judicial review. I.C. § 18-8002A(8); *Kane*, 139 Idaho at 589, 83 P.3d at 133.

The Idaho Administrative Procedures Act (I.D.A.P.A.) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. See I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. Recently, in *Bennett v. State Department of Transportation*, 147 Idaho 141, 206 P.3d 505 (Ct App 2009), the Court of Appeals restated the necessary standard of review for the Court. The Court stated, in pertinent part:

This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67-5279(1); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. This Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Urrutia v. Blaine County, ex rel. Bd. of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall*, 137 Idaho at 340, 48 P.3d at 669.

A court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. If the agency's

decision is not affirmed on appeal, "it shall be set aside . . . and remanded for further proceedings as necessary." I.C. § 67-5279(3).

Id., at 506-507. Therefore, the burden is on the Petitioner to establish that ITD erred in a manner specified in Idaho Code Section 67-5279(3), and then establish that a substantial right has been prejudiced.

B ARGUMENT

1. THE MOTION TO RECONSIDER WAS PROPERLY DENIED BY THE HEARING OFFICER

Dabrowski argues that the hearing officer was in error by failing to re-open, reconsider, set aside and/or alter or amend the decision upholding the license suspension. This argument is also with legal or factual support.

Summary of the Factual Background. The administrative hearing was held on September 8, 2011 before Hearing Officer David J Baumann. *R.*, page 28. During the hearing, Dabrowski testified. *Id.* At the conclusion of the hearing, the hearing officer left the record open for **60 days** to permit supplementation of the record by Dabrowski to include additional evidence in the form of affidavit and medical records. *R.*, page 30.¹ The hearing officer noted that "as of November 21, 2011 Dabrowski failed to supplement the record with any additional evidence." *R.*, page 30. The decision of the hearing officer was issued on November 22, 2011.

On November 16, 2011, attorney Fred Palmer wrote to ITD on behalf of Dabrowski and requested that the record be left open until December 5, 2011. *R.*, page

¹ His 60 days would expire on November 8, 2011.

42. On November 25, 2011, the hearing officer issued an Order denying the request to keep the record open. *R.*, page 28.

On December 5, 2011 the hearing officer received a Motion for Reconsideration from Dabrowski. *R.*, page 63. The Motion was extensive and included: (1) A letter from Dabrowski's attorney, Fred Palmer; (2) an Affidavit for Fred Palmer which included a letter from Richard Barclay, Ph.D., letter from Torrie Straley-McFarland, and letter from Michelle Anderson, RNP.

On December 21, 2011, the hearing officer issued another Order in this case in which he stated in part:

The Hearing Examiner, **having reviewed the record and considered the Motion to Reconsider** and be advised in the premises and the law, denies the Motion to Reconsider and affirms the Findings of Fact, Conclusions of Law and Preliminary Order previously entered.

R., page 63[emphasis added].

Discussion. Here, after the ALS hearing, Dabrowski was invited to submit to the hearing officer additional medical records and/or affidavits to support his defense. He was given 60 days to submit this additional evidence. Apparently, he declined the invitation because failed to submit any evidence within the time permitted by the hearing officer.

As a general rule, after the issuance of a Decision and Order, the petitioner has the right to move for reconsideration. Idaho Code Section 67-5246(4) provides in part:

Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of any final order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

Consistent with Idaho Code Section 67-5246(4), IDAPA 39.02.72.600 provides:

The Hearing Officer shall make Findings of Fact, Conclusions of Law and Order either sustaining or vacating the license suspension in question. The Findings of Fact, Conclusions of Law and Order shall be the final order of the Department. A request for reconsideration must be made within fourteen (14) days of the issuance of the Findings of Fact, Conclusions of Law and Order. The request for reconsideration shall contain a request to submit new evidence if the party wishes the hearing officer to consider any new evidence. (3-19-99)

Here, a comprehensive Motion for Reconsideration was submitted to the hearing officer. Consistent with the requirements of Idaho law, the hearing officer considered the new evidence. *See Order, dated December 21, 2011, R., page 63.* However, ultimately the arguments raised by the Motion for Reconsideration were reviewed and rejected by the hearing officer. *Id.* Therefore, the hearing officer acted within his discretion, by considering and then rejecting the arguments in the Motion to Reconsider.

2. THE EVIDENCE SUPPORTING THE DECISION OF THE HEARING OFFICER WAS LEGALLY SUFFICIENT AND SUPPORTED BY THE RECORD

Dabrowski contends that the evidence was insufficient that Dabrowski's impairment was caused by an intoxicating drug. This argument is also without legal or factual merit.

Burden of Proof. During the ALS proceeding, the burden of proof was on the petitioner to establish that he was entitled to have the suspension vacated. Therefore, it was up to Dabrowski to establish that the factual evidence did not support a finding that the impairment that caused Dabrowski to pass out and run into another vehicle was not caused by an intoxicating drug. He did not sustain his burden of proof.

In recognition of this element of proof, the hearing officer made the following findings of fact:

14. Dabrowski has the burden to affirmatively show by a preponderance of the evidence that the drug, in fact, was not intoxicating and that he was not driving under the influence.

15. Dabrowski did not present or submit any affirmative evidence to support the argument.

R., page 35. The hearing officer's analysis was correct, in that there was a lack of evidence to sustain the burden of proof placed on Dabrowski.

Idaho Law On Impairment and the Findings of the Hearing Officer. Dabrowski argues that the hearing officer's use of a document from "drug.com" was in error because the document was not reliable. ITD does not agree with that analysis and further the record shows that the hearing officer's findings were based upon much more evidence than the "drug.com" document. Here, the hearing officer reviewed the record before him after the ALS hearing and made factual findings which included the following:

9. **Presence of Drugs:** Dabrowski's blood test detected the following drugs: Carboxy-THC, Morphine, Carisoprodol, Meprobamate, Diazepam and Nordiazepam.
10. **Driving pattern:** Motor Vehicle Crash
11. **Competent evidence of impairment caused by the drugs:**
12.
 - a. Confusion
 - b. Morphine bottle located inside driver's vehicle
 - c. Slurred speech
 - d. Impaired memory
 - e. Glassy eyes

- f. Bloodshot eyes
- g. Slow to respond to questions
- h. Body tremors
- i. Slow speech
- j. Deliberate speech
- k. Eyes slowly reacted to light
- l. Admitted to consuming alcoholic beverages-beer and whiskey
- m. Admitted taking Morphine and Soma
- n. Drowsiness
- o. Dizziness
- p. Failed the Horizontal Gaze Nystagmus field sobriety test
- q. Failed the Alphabet evaluation

13. Exhibit 10 provides that the drug Carisoprodol may cause the following intoxicating/impairing effects on the user: Dizziness and Drowsiness.

* * *

16. Because of the presence of Carboxy-THC, Morphine, Carisoprodol, Meprobamate, Diazepam and Nordiazepam detected and the competent evidence of impairment caused by those drugs, it is proper to conclude that Dabrowski is in violation of I.C. Section 18-8004.

17. Officer Van Dyke possessed legal cause to believe Dabrowski was driving while under the influence of alcohol, drugs and intoxicating substances in violation of I. C. Section 18-8004, and legal cause to request Dabrowski submit to evidentiary testing.

See R., pages 35-36.

As correctly cited by the hearing officer, Idaho Code Section 18-8004(1)(a) provides as follows:

It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, . . . as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

This section has been interpreted to establish one crime--driving under the influence. *State v. Barker*, 123 Idaho 162, 845 P.2d 580 (Ct. App. 1992). In *Barker*, the court further explained that:

[T]here are two ways of proving a violation: first, by showing under a totality of the evidence that a defendant was driving under the influence. *Koch*, 115 Idaho at 180, 765 P.2d at 691. A totality of the evidence has been defined to encompass "circumstantial evidence of impaired driving ability or other observable symptoms of intoxication." *Knoll*, 110 Idaho at 682, 718 P.2d [at] 593. The second method requires the state to establish that the defendant drove with an alcohol level tested to be .10 percent ^[2] or more. "Either method of proof is permissible; neither of them is exclusive."

Id., pages 163-4. Therefore, the law does not require an evidentiary test result showing a certain quantitative level of drugs or alcohol. In *State v. Lesley*, 133 Idaho 23, 981 P.2d 748 (Ct. App. 1999) the court held:

Idaho Code § 18-8004 does not require that a driver have a certain quantity of drugs in his or her system in order to be guilty of driving under the influence. That section, as in effect at the time of Lesley's offense, made it a crime for a person to drive or be in actual physical control of the motor vehicle if the person "is under the influence of any ... drug or any combination of alcohol and any drug to a degree which renders him incapable of safely driving a motor vehicle." I.C. § 18-8004(5) (1994). **A violation turns upon the effect that the drugs or combination of drugs and alcohol have on the individual's ability to safely operate a vehicle, not upon any quantification of the amount of a drug in the bloodstream.**

Id., page 751 (emphasis added).

The case of *Feasel v. Idaho Transportation Department*, 148 Idaho 312, 222 P.3d 480 (Ct. App. 2009), is instructive because the issue involved an Administrative License Suspension. The facts in *Feasel* indicate the following:

Feasel was arrested for driving under the influence after he rear-ended a vehicle at the intersection of Broadway and Front Street in Boise. An officer at the scene submitted an affidavit indicating that Feasel admitted to having taken multiple medications including Ambien CR, Lithium, Prozac, and Wellbutrin at some

point prior to the accident. The officer also noted that Feasel had slurred speech, appeared sleepy, and exhibited an impaired memory. The officer performed field sobriety tests including the gaze nystagmus, walk and turn, and one leg stand tests, all of which Feasel failed. Feasel submitted to a breath alcohol test which showed no trace of alcohol, and a urine test which detected the presence of fluoxetine (Prozac).

Id., page 312. Feasal argued that the evidence was not sufficient to establish that there was legal cause believe Feasel was driving under the influence of drugs or other intoxicating substances. The District Court agreed and ordered that the action be remanded to reinstate Feasel's driving privileges. ITD appealed seeking reversal of the district court's decision. The Court of Appeals rejected Feasel's arguments and overturned the District Court and held:

Here, Feasel's urine test results indicated that Prozac was present in his system at the time of the accident. The label on the Prozac indicated it may cause drowsiness, it may impair or lessen the ability to drive or operate a car and the user should be familiar with the effects before driving. Feasel also admitted to taking other prescription medications having similar effects just prior to the accident. The officer observed, and the video tape of the encounter shows, Feasel had slurred speech, an impaired memory, seemed sleepy and failed the field sobriety tests. **Based on the evidence presented at the suspension hearing, it was proper for the hearing officer to infer that Prozac, in combination with the other drugs ingested, caused intoxication and consequently impaired Feasel's ability to drive safely.** Moreover, pursuant to I.C. § 18-8004(7), it is not a defense that a person charged with a violation of this statute has a history of past use of the drug or carries a valid prescription for the drug. *See also State v. Goerig*, 121 Idaho 108, 113, 822 P.2d 1005, 1010 (Ct.App.1991) (The fact that Goerig was legally entitled to take lithium because it had been prescribed to him was not a defense to a charge of driving under the influence of intoxicants.). Accordingly, any of Feasel's claims that he had a valid prescription or had been using the medications together for some time without experiencing any problems are not defenses. By the statute's plain language, only the presence of drugs, not the quantity, must be established along with other competent evidence of impairment caused by the drugs.

Id., page 484. Likewise, based upon the evidence presented at the ALS hearing, it was proper for the hearing officer to infer that the presence of Carboxy-THC, Morphine,

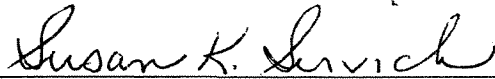
Carisoprodol, Meprobamate, Diazepam and Nordiazepam impaired the ability of Dabrowski to drive safely.

V.

CONCLUSION

For the reasons stated above, ITD respectfully requests this Court to affirm the decision of the hearing officer, vacate the driver's license stay and uphold the suspension of Dabrowski's driver's license.

Dated April 24, 2013.



Susan K. Servick,
Attorney for the State of Idaho, Department of
Transportation


CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the **RESPONDENT'S BRIEF** was transmitted, this 25 day of April, 2013 by the following method, to:

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