9-20-2010

Buell v. Idaho Dept. of Transp. Appellant's Brief Dckt. 37404

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES KEVIN BUELL,

Appellant,

v.

THE IDAHO TRANSPORTATION DEPARTMENT,

Respondent.

SUPREME COURT DOCKET NO. 37404

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.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the disqualification of Appellant's, James Kevin Buell's (hereafter called "Buell") commercial driving privileges for one year following entry of a plea of guilty to a violation of Idaho Code § 18-8004, Driving While Under the Influence of Alcohol.

B. Course of the Proceedings

On October 21, 2006, Buell was arrested and charged with DUI; on December 22, 2006, Buell pled guilty to the DUI in consideration of the prosecution's dismissing a Refusal matter.

On February 27, 2007, the parties stipulated to a continuance of the sentencing.

On July 10, 2007, a judgment was entered and the driving privileges were backdated to October 21, 2006.

On July 19, 2007, Buell was served with a notice of disqualification by the Transportation Department.

On August 31, 2007, a hearing was held relative to said disqualification.

On August 31, 2007, Findings of Fact and Conclusions of Law and Preliminary Order were issued sustaining the 1 year disqualification of operation of a commercial motor vehicle.

On September 7, 2007, the Idaho Transportion Department moved for reconsideration of the retroactivity aspects of the Order by Officer Howell.

On October 5, 2007, ITD notified Buell's counsel that the disqualification commenced July 10, 2007.

On October 10, 2007, Buell filed a petition for Judicial Review.

On December 29, 2009, the District Court filed an Opinion and Order Regarding Appeal denying relief.

On February 5, 2010, Buell filed an appeal with the Idaho Supreme Court.

II.

STATEMENT OF FACTS

On October 21, 2006, Buell was arrested and charged with DUI in Bonner County, Idaho. ALS Hrg. Transcr. 6:10-13 (Aug. 31, 2007). He refused the breath test. *Id.* at 7:2-6. *See also* Notice of Suspension, attached to Buell's Second Motion for Addition/Correction to Agency Record.

On November 15, 2006, in Buell's civil refusal case, CV-2006-1861, the parties stipulated to a continuance of the BAC/Refusal Hearing and

stipulated that Buell would retain his driving privileges until a BAC/Refusal hearing was held. *See* Supplemental Agency Record, dated August 23, 2008. However, said stipulation did not indicate whether it was referring to regular driving privileges, commercial driving privileges, or both.

On December 22, 2006, Buell pled guilty to the DUI. ALS Hrg. Transcr. at 11:9-17. He agreed to plead guilty in exchange for the prosecuting attorney dismissing the refusal matter and requesting that the Court relate the suspension back to the date of arrest. Buell likely would not have pled guilty under any other circumstances. *Id.* at 8:5 – 9:5.

On February, 27, 2007, the parties stipulated to a continuance of Buell's DUI sentencing to give Buell additional time to make arrangements with his employer so as not to jeopardize his employment. *See* Supplemental Agency Record, dated August 23, 2008.

On July 10, 2007, a Judgment was entered in Buell's DUI matter, Bonner County Case No. CR-2006-6261. The Court did suspend Buell's driving privileges for 90 days but, in accordance with the parties' agreement, backdated the suspension to October 21, 2006. *See* Judgment, attached as Exhibit A to Buell's Motion for Addition/Correction to Agency Record.

Following entry of the Judgment, the Idaho Transportation Department served Buell with a Notice of Disqualification dated July 19,

2007. *See* Supplemental Agency Record, dated August 23, 2008. Said notice stated that Buell would be disqualified from operating a commercial vehicle for one year beginning August 6, 2007, based on his July 10, 2007 DUI conviction.

Buell requested an administrative hearing, which was conducted by Hearing Examiner Michael B. Howell (hereafter "Howell") on August 31, 2007. During that hearing, Buell testified that the reason he agreed to plead guilty was because the prosecuting attorney agreed to dismissal the refusal action and to request that the Court backdate Buell's DUI license suspension to October 21, 2006. ALS Hrg. Transcr. at 8:5 – 9:5.

During the ALS hearing, Buell's counsel argued that:

1. When the judge in the underlying DUI matter relates a suspension back to an earlier date, ITD must also relate back any administrative suspension to that earlier date;

2. I.C. § 49-335 is unduly punitive (i.e. it violates double jeopardy); and

3. I.C. § 49-335 violates due process by depriving drivers with commercial licenses, who were not driving a commercial vehicle at the time of the arrest, of an important property interest.

Id. at 13:9 – 16:23. Also, it was explained that Buell was without any driving privileges from November 21, 2006 (which was 30 days after his arrest) to July 10, 2007. *Id.* at 11:4 – 12:25. Further, it was explained that, at the time of the administrative hearing, Buell still did not have commercial privileges because of the notice from ITD. *Id.* at 12:25 – 13:4.

On August 31, 2007, Howell issued his Findings of Fact, Conclusions of Law and Preliminary Order. Howell sustained Buell's one-year disqualification from operating a commercial motor vehicle. However, he found that Buell had ceased having commercial driving privileges on November 21, 2006, and recommended that the administrative disqualification be made retroactive to that date.

On October 3, 2007, Buell's counsel was speaking with Howell on another matter, and Howell mentioned that ITD had filed a Motion for Reconsideration of the recommendation that Buell's suspension be made retroactive. Counsel wrote ITD requesting a copy of said Motion for Reconsideration. A copy of that Motion was then received by counsel on October 5, 2007, although it was dated September 7, 2007. *See* Supplemental Agency Record dated August 23, 2008.

The ITD Motion requested reconsideration of retroactive application of the disqualification because it contended that Buell had not undergone

any commercial or non-commercial suspension or disqualification. Counsel was also served with a letter dated October 5, 2007 from ITD to Howell withdrawing its Motion for Reconsideration because it had determined that the backdating of the disqualification was merely a recommendation and, therefore, the department had determined that it was not bound to comply with that recommendation. *Id.*

In an October 5, 2007 letter from ITD to Buell's counsel, Driver Services Manager, Edward Pemble, advised that ITD had backdated Buell's non-commercial suspension to the date of arrest in accordance with the DUI Judgment. However, it was ITD's position that, based on the Federal Motor Carrier Safety Administration rules and regulations, the start of Buell's commercial disqualification must coincide with his July 10, 2007 DUI conviction date.

Buell then filed his Petition for Judicial Review on October 10, 2007. On October 15, 2007, this Court issued an Exparte Order staying Buell's commercial disqualification pending judicial review.

III.

ISSUES ON APPEAL

1. Whether a commercial disqualification under I.C. § 49-335 violates double jeopardy principles because, although it is civil in nature,

under the multi-factored *Hudson* analysis, it is so punitive in effect that it is transformed into a criminal penalty.

2. Whether Buell's commercial disqualification should be retroactive to November 21, 2006 because the statutes are ambiguous as to when his commercial disqualification began running, because Buell believed he did not have commercial privileges as of November 21, 2006, and because imposing an additional disqualification as of his DUI conviction date would subject him to a commercial disqualification of nearly 20 months.

IV.
ARGUMENT

I. Administrative License Suspensions/Disqualifications Pursuant to I.C. § 49-335 Violate Double Jeopardy Principles Because, Although Civil in Nature, Under the Multi-Factored *Hudson* Analysis, They are so Punitive in Form and Effect that they are Transformed into Criminal Punishments.

The double jeopardy analysis used in *State v. Talavera* was improper. Under the correct, multi-factored analysis, license suspensions under I.C. § 49-335(1) do violate double jeopardy.

In 1995, the Idaho Supreme Court held that an administrative driver's license suspension under I.C. § 18-8002A does not violate double jeopardy. *State v. Talavera*, 127 Idaho 700 (1995). Although the present case involves an administrative disqualification of a commercial license under I.C. § 49-

335(1), *Talavera* would be applicable, at least in part, given that it also dealt with an administrative license suspension.

Two years after *Talavera*, the United States Supreme Court in large part disavowed the cases and analysis relied on in *Talavera* and reverted to the prior long-standing multi-factored double jeopardy analysis. *Hudson v. United States*, 522 U.S. 93 (1997). Since the *Hudson* decision, the Idaho Supreme Court has not reconsidered whether an administrative license suspension violates double jeopardy.

In *Talavera*, the Court relied heavily on *U.S. v. Halper*, 490 U.S. 435 (1989), and its progeny. *Talavera*, 127 Idaho at 703-705. In doing so, the Court held that a 90-day administrative license suspension, with the possibility of a restricted permit after 30 days, is not disproportionate to the remedial goal of the statute. *Id.* at 705.

In *Hudson*, the United States Supreme Court stated that *Halper*'s "deviation from longstanding double jeopardy principles was ill considered." 522 U.S. at 101. Further, the Court cited several problems with the *Halper* double jeopardy analysis:

1. The analysis bypassed the threshold question of whether the sanction was intended to be civil or criminal in nature;

2. The analysis wrongfully assessed the character of the actual sanction imposed rather than evaluating the statute on its face to determine whether it amounted to a criminal sanction;

3. The analysis elevated one factor (proportionality) to dispositive status when no one factor should be controlling; and

4. The analysis had proven unworkable.

Id. at 101-102.

Therefore, the *Hudson* Court re-established that the correct double jeopardy analysis was the analysis that existed prior to *Halper* and as outlined in *U.S. v. Ward*, 448 U.S. 242 (1980) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Hudson*, 522 U.S. at 96. That analysis involves the following steps:

1. Determining whether the sanction is criminal or civil by evaluating statutory construction and both express and implied legislative intent; and

2. Where the legislature has indicated an intention to establish a civil penalty, a multi-factored inquiry is used to determine whether the statutory scheme is so punitive either in purpose or effect that it transformed what was clearly intended as a civil remedy into a criminal penalty.

See Hudson, 522 U.S. at 99 (citing *Ward*; *Kennedy*; and *Rex Trailer v. U.S.*, 350 U.S. 148 (1956)).

Two recent Idaho cases have used the multi-factored *Hudson* analysis rather than the truncated *Halper/Talavera* analysis. *See State v. McKeeth*, 136 Idaho 619 (Ct. App. 2001; *State v. Gragg*, 143 Idaho 74, 137 P.3d 461 (Ct. App. 2005)). Although *Gragg* was an ex post facto case rather than a double jeopardy case, the same analysis applies to both doctrines. *Gragg*, 137 P.3d at 465. Therefore, the previous double jeopardy analysis set forth in *Talavera* should be re-evaluated in light of current precedent.

Hudson involved administratively imposed monetary penalties and occupational debarment sanctions for violations of federal banking statutes against petitioners who were later criminally indicted for the same conduct. 522 U.S. at 95. In evaluating whether the statute allowing for the monetary penalties and debarment violated double jeopardy, the Court first analyzed whether Congress had intended the statute to be criminal or civil in nature. *Id.* at 103. The Court noted that the statute contained no language explicitly denominating the sanctions as civil. *Id.* However, the Court held that the fact that the legislature conferred authority on an administrative agency to impose the sanctions was prima facie evidence that Congress intended to provide for a civil sanction. *Id.* Therefore, the Court then turned to the

second step of the Double Jeopardy analysis to determine whether the statutory scheme was so punitive either in purpose or effect that it transformed what was clearly intended as a civil remedy into a criminal penalty. *Id.* at 104-105.

Based on *Hudson*, conferring authority on an administrative agency is prima facie evidence that the legislature intended the penalties to be civil. Therefore, because ITD has been given the authority to suspend, disqualify, and revoke regular and commercial driving privileges, the court should undertake the second prong of the *Hudson* analysis, that is whether the statutory scheme is so punitive either in purpose or effect that what was intended as a civil remedy was transformed into a criminal punishment.

Citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), *Hudson* reiterated the following list of factors to be used as guideposts during the second prong of the inquiry:

1. Whether the sanction involves an affirmative disability or restraint;

2. Whether it has historically been regarded as punishment;

3. Whether it comes into play only on a finding of scienter;

4. Whether its operation will promote the traditional aims of punishment – retribution and deterrence;

5. Whether the behavior to which the sanction applies is already a crime;

6. Whether an alternative purpose to which it may rationally be connected is assignable for it; and

7. Whether the sanction appears excessive in relation to the alternative
purpose assigned.

522 U.S. at 99-100. However, "these factors must be considered in relation to the statute on its face" and must provide "the clearest proof" in order to override legislative intent and transform the sanction into a criminal penalty. *Id.* at 100.

With regard to the present case, four of the seven factors indicate that suspensions under 18-8002A are so punitive in form and effect that they have been transformed into a criminal punishment.

A. Whether Driver's License Suspensions have been Historically Regarded as Punishment.

This inquiry differs from determining the legislative intent regarding a particular sanction under the first prong of the analysis. Rather, sanctions can serve more than one purpose. *See Talavera*, 127 Idaho at 704 (quoting *Austin v. U.S.*, 509 U.S. 602 (1993). Therefore, this factor requires looking beyond the legislative intent inquiry to an inquiry of how this type of sanction has been viewed historically.

In *Hudson*, the Court stated that "revocation of a privilege voluntarily granted . . . is characteristically free of the punitive criminal element." 522

U.S. at 104. The Court held that a banking industry debarment fell within that category. *Id.* However, such a debarment is very different from a driver's license suspension in Idaho. Idaho courts have recognized a driver's license as a right, not a mere privilege. Idaho's Constitution, Article I, Section 1, states as follows:

> All men are by nature free and equal, and have certain inalienable rights, among them are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.

Further, due process analysis requires courts to "first determine whether there has been State action" and then "determine whether that State action deprives a person of a right enumerated in the Fourteenth Amendment." *State v. Gilpin*, 132 Idaho 643, 649 (Ct. App. 1999). Therefore, in order for a state action to violate due process, it must violate a **right** of an individual.

In *State v. Ankney*, 109 Idaho 1 (1985), the Court found that:

> Because the suspension of issued driver's licenses involves State action that adjudicates important interests of the licensee, driver's licenses may not be taken away without procedural due process.

Id. at 3 (emphasis added). In his concurring opinion, Justice Shepard wrote:

> I suggest that neither of those cases provide any authority for the validation of a statute which authorizes the preemptory seizure by a field police officer of a **valuable property right** without action by a neutral and detached official, be it judicial or otherwise.

Id. at 6 (emphasis added). Therefore, the *Ankney* Court recognized that a driver's license was a fundamental and valuable property right. Thus, state action taking away that right was subject to due process constraints. Because Idaho recognizes a driver's license as a right, under *Hudson*, the suspension of a driver's license has a punitive criminal element. Further, in the case of the suspension/disqualification of a commercial driver, there is the added impact on the driver's ability to make a living.

Even the *Talavera* Court accepted that an administrative driver's license suspension does have a punitive criminal element. There, the Court pointed out that punishment "serves the twin aims of retribution and deterrence" and then went on to acknowledge the deterrent aspects of an administrative license suspension. *Id.* at 703, 705 (quoting *Halper*).

Suspensions of drivers' licenses have long been criminal punishment for driving under the influence of alcohol and/or drugs, driving without privileges, vehicular homicide, and minor in possession of alcohol. Therefore, based on the fact that a driver's license is considered a valuable property right and that driver's license suspensions clearly serve a deterrent purpose and have been historically utilized as criminal punishments, this factor weighs in favor of a finding that I.C. § 49-335 suspensions violate the Double Jeopardy Clause.

B. Whether the Operation of a Driver's License Suspension Promotes the Traditional Aims of Punishment (Retribution and Deterrence).

It is clear that a driver's license suspension promotes retribution and deterrence. As discussed above, *Talavera* acknowledged that suspensions under 18-8002A promote the traditional goals of punishment. 127 Idaho at 703-705. In addition, the Court stated that the Idaho Department of Transportation had acknowledged the deterrent effect of license suspensions. *Id.* The suspension/disqualification of commercial privileges promotes retribution and deterrence, as well, and perhaps even more so given the added impact on the driver's ability to earn a living. Therefore, this factor weighs in favor of finding a double jeopardy violation.

C. Whether the Behavior to Which the Driver's License Suspension Applies is Already a Crime.

Suspensions/disqualifications under I.C. § 49-335(1) are to be imposed if the driver is convicted under state or federal law of several crimes, including driving under the influence of alcohol. Therefore, the behavior to which the suspension/disqualification applies is already a crime under 18-8004, 18-8004A, and 18-8004C, and this factor also weighs in favor of finding a double jeopardy violation.

D. Whether an Alternative Purpose to Which the Suspension May Rationally be Connected is Assignable to it and Whether the Suspension is Excessive in Relation to that Alternative Purpose.

This discussion combines the last two factors in the *Hudson* analysis, which are the only two factors evaluated in *Talavera*. Although *Talavera* was evaluating suspensions under I.C. § 18-8002A, it is still relevant to this discussion since both 18-8002A and 49-335 deal with administrative license suspensions.

In *Talavera*, the Court held that I.C. § 18-8002A had the remedial purpose of expeditiously removing from the highways drivers who have been driving with a blood alcohol content exceeding the legal limits provided in 18-8004. *See Talavera*, 127 Idaho at 705. Similarly, SB 1001, which became I.C. 49-335, stated that one of the purposes of the statute was to remove problem drivers from the road by disqualifications. Further, the *Talavera* Court held that a 90-day driver's license suspension, with the possibility of a restricted permit after the first 30 days, was not disproportionate to the remedial purpose. *Talavera*, 127 Idaho at 705.

The *Talavera* Court's analysis was flawed for two reasons. First, as discussed above, it relied on the truncated *Halper* analysis, which the *Hudson* Court later disavowed.

Second, *Talavera* focused on the specific sanction that was imposed in that case, that is a 90-day suspension. However, in *Hudson*, the Court instructed that it was improper to "assess the character of the actual

sanctions imposed." 522 U.S. at 101 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)). This method of analysis is unworkable because it will never conclusively resolve whether a particular statutory scheme is punitive:

> It will not be possible to determine whether the Double Jeopardy Clause is violated until a defendant has proceeded through a trial to judgment. But in those cases where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even attempting a second time to punish criminally.

Hudson, 522 U.S. at 102 (internal quotations omitted). In *Seling v. Young*, the Court reiterated that an "as applied" analysis is improper because the nature of a sanction cannot be altered "based merely on vagaries in the implementation of the authorizing statute." 531 U.S. 250, 263 (2000).

Rather, the proper method of analysis is to consider the second prong factors "in relation to the statute on its face" and not in relation to how the statute was implemented with regard to a specific individual. *Hudson*, 522 U.S. at 100. Therefore, in looking at whether the sanctions set forth in I.C. § 49-335 are disproportionate to the remedial purpose of the statute, we must look at more than just the possibility of a one year disqualification, such as the one Petitioner faces. Rather, we must look at **all** potential suspensions provided for in the statute and **all** the possible circumstances under which

they could be imposed. In addition to one year disqualifications, I.C § 49-335 also provide for scenarios under which a driver may be disqualified for life. Further, the statute provides for commercial disqualification without regard for whether the driver was operating a commercial or non-commercial vehicle. This disqualification without regard for whether the driver actually using his commercial privileges at the time and the potential for lifetime disqualification clearly cross the line into the punitive realm and are disproportionate to the remedial purpose of the statute.

In *Hudson*, the Court found that the civil sanction at issue there was not so punitive in purpose and effect that it had been transformed into a criminal penalty. 522 U.S. at 104-105. However, there, the Court found that only two of the seven factors weighed in favor of the sanction being a criminal penalty. *Id.* Those two factors were those discussed under subparagraphs (b) and (c) above. The Court stated that those two factors, alone, were insufficient to render a sanction criminal. *Id.* at 105. *See also State v. McKeeth*, 136 Idaho 619 (Ct. App. 2001).

However, in the present case, four out of the seven factors support a finding that the effect of commercial suspensions/disqualifications under I.C. § 49-335 are so punitive that they are transformed into criminal penalties. These four factors, as discussed above, provide the clear proof

needed to justify overriding legislative intent: 1) generally, driver's license suspensions have been viewed historically as punishment; 2) the operation of a driver's license suspension promotes the traditional goals of punishment; 3) the underlying behavior to which the suspension applies is already a crime; and 4) the various suspension possibilities are disproportionate to the remedial purpose of the statute.

Therefore, under the correct analysis re-adopted in *Hudson*, I.C. § 49-335 is punitive and violates the Double Jeopardy Clause.

II. Due Process and Estoppel Principles Require that Buell's Commercial Disqualification be Retroactive to November 21, 2006 Because I.C. §§ 18-8002, 18-8002A, and 49-335 are Ambiguous as to When the disqualification of Buell's Commercial Privileges Began, Buell Believed his Disqualification Began on November 21, 2006, and Imposing an Additional Disqualification as of his Conviction Date Would, Therefore, Subject Buell to a Commercial Disqualification of Nearly Twenty Months.

In the present case, the entire statutory scheme involving refusing or taking and failing an evidentiary test is ambiguous as applied to commercial drivers such as Buell. Because of the ambiguous nature of the statutes related to refusing an evidentiary test, Buell believed his commercial license was suspended as of November 21, 2006. Therefore, ITD should be required to backdate the administrative disqualification of his license to that date.

As explained above, Idaho courts have recognized that drivers have a valuable property right in their licenses. *See State v. Ankney*, 109 Idaho 1 (1985). Therefore, commercial drivers have an even greater property interest in their commercial licenses because they provide a source of livelihood. As such, deprivation of ability to operate a commercial vehicle is subject to due process constraints. *See Id.* at 3 (holding that driver's licenses may not be taken away without procedural due process).

In both the civil and criminal contexts, statutes are ambiguous and violate due process when they do not adequately advise citizens of the law. *See State v. Korsen*, 138 Idaho 706, 711 (2003) (a statute defining criminal conduct must be "worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited); *see also Cowan v. Bd. of Commrs. of Fremont County*, 143 Idaho 501, 148 P.3d 1247, 1259-60 (2006) (in a civil context, a statute violates due process "where its language is such that men of common intelligence must necessarily guess at its meaning).

In the present case, the entire statutory scheme involving refusing or taking and failing an evidentiary test is ambiguous as applied to commercial drivers. I.C. §§ 18-8002 and 8002A provide that, if a driver refuses the evidentiary test, the peace officer will seize the driver's license, and issue a

temporary permit allowing driving privileges until the date of a refusal hearing but, in no event for more than 30 days. The statutes also provide that no temporary permit will be issued to "a driver of a commercial vehicle who refuses to submit to or fails to complete an evidentiary test."

The wording of this statute, and therefore of the suspension advisory form, is confusing because, while it mentions that drivers of commercial vehicles will not be issued temporary permit if they refuse the test, it does not affirmatively specify what happens to commercial drivers who were driving non-commercial vehicles.

I.C. § 49-335(2) states:

> Any person who operates a commercial motor vehicle or who holds a class A, B or C driver's license is disqualified from operating a commercial motor vehicle for a period of not less than one (1) year if the person refuses to submit to or submits to and fails a test to determine the driver's alcohol, drug or other intoxicating substances concentration while operating a motor vehicle.

However, unlike 18-8002/8002A, I.C. § 49-335(2) does not provide for any 30-day temporary permit period. Rather, from reading the plain language of 49-335(2), it appears a driver's commercial privileges may be suspended for one year from the moment they refused the test.

Citizens are presumed to have knowledge of laws. Therefore, Buell is presumed to have knowledge of § 49-335(2) which seems to indicate that he

was disqualified from operating a commercial vehicle from the moment he refused the evidentiary test. Further, the law stated in §§ 18-8002 and 8002A and contained in the Notice of Suspension advisory form, is ambiguous because did not affirmatively advise Buell that his commercial privileges were not suspended as soon as he refused the evidentiary test. It would violate due process to presume a citizen knows the law when statutes addressing similar topics appear to be contradictory.

Although Buell's commercial disqualification by ITD is based on § 49-335(1) and his conviction for DUI, rather than on § 49-335(2) and his refusal of the evidentiary test, such distinctions are confusing to the average citizen. The subtle nuances and various reasons for potential administrative suspensions aside, Buell believed his commercial license was suspended because of the fact that he refused the evidentiary test. Therefore, at the time of the administrative hearing, Buell believed he had already served a nine month suspension of his commercial privileges. This belief was caused by the confusing and ambiguous statutory scheme.

The confusing and ambiguous nature of the statutory scheme is evidenced not only through the testimony at the administrative hearing that Buell thought his commercial privileges were suspended as of November 21, 2006 and were still suspended at the time of the August 31, 2007 hearing,

but also by the Hearing Examiner's finding that Buell had been without commercial driving privileges since November 21, 2006.

Buell believed his commercial privileges were suspended beginning 30 days following his refusal. Therefore, if ITD imposes another full year of commercial disqualification beginning on his July 10, 2007 DUI conviction date, Buell will effectively have undergone a 19 1/2 month disqualification (7 1/2 months from November 21, 2006 through July 10, 2008, plus the additional one year beginning July 10, 2008).

Buell believed his commercial privileges were suspended from November 21, 2006, through the hearing date of August 31, 2007. He continued under the assumption that his privileges were suspended until October 15, 2008, when this Court stayed his commercial disqualification pending the outcome of judicial review. Therefore, ITD should be estopped on due process grounds from imposing any additional disqualification against Buell and, at the most, should only be allowed to impose an additional 36 days disqualification against Buell.

V.

CONCLUSION

Appellant respectfully requests relief in accord with the above-listed argument.

DATED this 15 day of September, 2010.

James E. Siebe
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of September, 2010, I served a true and correct copy of the foregoing document by the method indicated and addressed to the following:

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