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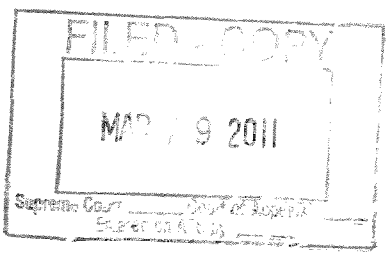
IN THE SUPREME COURT OF THE STATE OF IDAHO

In the Matter of the Driving Privileges of: Hamish Allen Bell	)	
HAMISH ALLEN BELL, Petitioner-Appellant,	)	S. Ct. No. 37865
vs.	)	
IDAHO DEPARTMENT OF TRANSPORTATION, Respondent-Respondent on Appeal.	)	



REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE KATHRYN A. STICKLEN
District Judge

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II. ARGUMENT IN REPLY

In his Opening Brief, Hamish Bell set forth how his right to procedural due process was violated throughout the administrative hearing proceedings and established the Hearing Officer erred by sustaining his driver's license suspension. In response, the Department first confuses the applicable standard of review in this matter. The Department suggests this Court review the district court's decision affirming the Idaho Transportation Department's ("ITD") decision upholding the administrative suspension of Mr. Bell's driving privileges for an abuse of discretion. Respondent's Brief, p.11. Although certain discretionary decisions by the Hearing Officer are reviewed for an abuse of discretion, as pointed out in Mr. Bell's Opening Brief, this Court is tasked with "review[ing] the agency record independently of the district court's decision." *In re Druffel*, 136 Idaho 853, 855, 41 P.3d 739, 741 (2002) (citations omitted). Specifically:

> This Court instead defers to the agency's findings of fact unless they are clearly erroneous. 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.
>
> [This] 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. 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. If the agency's decision is not affirmed on appeal, "it shall be set aside . . . and remanded for further proceedings as necessary."

In re Gibbar, 143 Idaho 937, 941-42, 155 P.3d 1176, 1180-81 (Ct. App. 2006) (citations omitted).

1. The Hearing Officer's Subpoenas Denied Mr. Bell Due Process

As explained in his Opening Brief, the subpoenas issued by the Hearing Officer violated Mr. Bell's procedural due process rights. The subpoenas issued in this matter were constitutionally unsound because they prevented Mr. Bell from presenting a defense and carrying his statutory burden. *See* I.C. § 18-8002A(7). Subpoenas with a compliance date of June 29, 2009, for a hearing scheduled for June 30, 2009, especially when the subpoenaed materials are not produced directly to the petitioner, thus resulting in a further delay in production, deprived Mr. Bell from a fair proceeding.

The Department argues that since neither the Idaho Administrative Procedures Act or the Idaho Code prescribe a time frame for when a petitioner should be provided relevant material there was not a due process violation in this case. Simply because the adopted procedures and statutes do not have a time frame does not cure the constitutional defect. Put differently, the mere absence of a statutory requirement does not exempt the Department from the due process guarantees of the United States and Idaho Constitutions.

Both parties acknowledge that to determine whether a due process violation exists, three factors must be considered:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In re Gibbar, 143 Idaho at 946, 155 P.3d at 1185 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33(1976)).

First, there is little dispute, and the Department agrees, that Mr. Bell has a substantial interest in maintaining his driver's license. With regard to the second factor, under the current procedures, providing a petitioner with the requested materials with very little or no time to adequately review them actually increases the risk that there could be an erroneous deprivation of a petitioner's driving privileges. And third, though there is a compelling interest in keeping Idaho roads free from intoxicated drivers, substitute procedural requirements would have little if any fiscal or administrative burdens on the ITD. The ITD could easily issue subpoenas that require the requested materials to be provided directly to a petitioner and/or with a compliance deadline sufficient enough to provide for a meaningful review of the materials.

The Court of Appeals provided some insight on this issue in *In re Gibbar* when it found the discovery process in that case constitutionally sufficient because it had "enabled Gibbar to receive, *a few days in advance of the hearing*, the logsheet for the breath testing instrument used in this case as well as all materials forwarded to the ITD by the Clearwater County Sheriff's Office . . . ." 143 Idaho at 948, 155 P.3d at 1187 (emphasis added).

Unlike Mr. Gibbar, the time frame for discovery in this case was not "long enough to provide him with discovery responses in sufficient time that he could utilize them for the hearing." *Id.* Accordingly, subpoenas which permit disclosure of documentary evidence only hours before the hearing, and actually permit disclosure of audio recordings after the hearing has occurred, are the definition of unconstitutional.

2. The Hearing Officer Impermissibly Extended the Hearing Process

Originally scheduled for June 30, 2009, the Hearing Officer extended Mr. Bell's hearing until July 9, 2009. As permitted by Idaho Code § 18-8002A(7), this one-time continuance was permitted if good cause was established. What is not authorized by the statute, is a second

continuance. Thus the decision by the Hearing Officer to continue the hearing a second time, this time until July 23, 2009, all while Mr. Bell was denied a meaningful hearing even though his driving privileges had already been suspended, was an abuse of the Hearing Officer's discretion.

The Department asserts Mr. "Bell can point to no authority providing that vacating a suspension is required if the administrative suspension hearing is extended for more than ten (10) days." Respondent's Brief, p.14. The Department also asserts the "hearing officer acted in accordance with Idaho Code in deciding to reschedule the hearing." *Id.* In fact, the Hearing Officer acted inapposite of Idaho Code and improperly extended the hearing beyond what is authorized by Section 18-8002A(7) of the Idaho Code. Moreover, the authority for vacating the suspension is premised in the procedural due process guarantees of the United States and Idaho Constitutions which preclude the suspension of an issued license without first conducting a meaningful and fair hearing. The statute permits the Hearing Officer *one* 10-day extension. Nothing more.

The Department continues though, arguing the *Mathews v. Eldridge* factors justify the suspension of Mr. Bell's license. Respondent's Brief, p.16-17. The Department again concedes Mr. "Bell's interest in his driver's license is substantial." *Id.* at16. Then, the Department argues the risk of an erroneous deprivation is minimal because "[t]he risk of erroneous observation or deliberate misrepresentation by the reporting officer of the facts forming the basis for the suspension is insubstantial." Respondent's Brief, p.16 (quoting *Mackey v. Montrym*, 443 U.S. 1, 2, 99 S.Ct. 2612, 2613 (1979)). First, the Department fails to address the entirety of the second *Mathews* factor – the risk of erroneous deprivation of such interest through the procedures used, *and the probable value, if any, of additional or substitute procedural safeguards.* Nowhere in

Respondent's Brief is the latter portion even discussed. Moreover, the "risk of erroneous observation or deliberate misrepresentation by the reporting officer" is actually very real in this case. As Mr. Bell pointed out in his Opening Brief, Officer White, the reporting officer in this case and whose affidavit was relied upon to uphold Mr. Bell's suspension, was terminated from the Boise Police Department because of credibility issues. The Department omits this crucial fact from its analysis.

3. The Hearing Officer Wrongfully Refused Mr. Bell's Request for Subpoenas Regarding Officer White's Certification

Mr. Bell had a right to substantiate whether the officer conducting the breath test was currently certified to use the breath testing machine. *See In re Masterson*, 150 Idaho 126, 244 P.3d 625 (Ct. App. 2010). This was confirmed by the district court – "the hearing officer erred in concluding Officer White's certification was irrelevant." R.164. Still, the Department argues the Hearing Officer's denial of Mr. Bell's request for a copy of Officer White's certification was not an abuse of discretion because Officer White's sworn statement indicated that he was properly certified and was therefore sufficient evidence on this issue.

This argument however makes little sense. If a petitioner were unable to obtain materials relating to information contained within an officer's sworn statement then the administrative hearing process would be truly illusory. Apparently, according to the Department, a petitioner should never be able to obtain materials or challenge the suspension of their driving privileges so long as a law enforcement's boiler-plate sworn affidavit adequately addresses the provisions contained in Idaho Code § 18-8002A(7). If the Department's argument prevails, then upon receipt of the officer's sworn statement there would be no reason to have a hearing at all.

Here, Mr. Bell was denied the opportunity to challenge relevant evidence at his hearing.

The certification card sought by Mr. Bell is mandated by IDAPA and/or the SOP's to be kept by the officer and/or the agency maintaining the breath testing device. *See* IDAPA § 11.03.01.013.04 (requiring operator certification); and SOP § 1.6 ("It is the responsibility of each individual agency to store calibration records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments and to maintain a current record of operator certification."). Failing to issue the requested subpoena impaired Mr. Bell's right to present a defense and is contrary to the protections afforded by the Due Process Clause of the United States and Idaho Constitutions.

4. The Hearing Officer Wrongfully Refused Mr. Bell's Requests for Subpoenas Regarding Calibration Checks

In response to Mr. Bell's argument that he was entitled to the requested log sheets and calibration checks, the Department first concedes Mr. Bell was permitted to challenge the breath test results but then suggests producing the requested documents approximately one hour before a rescheduled hearing is good enough. Respondent's Brief, p.19. More specifically, the Department argues since Mr. Bell received the log sheets for April 28, 2009 through June 6, 2009 sixty-three (63) minutes before the rescheduled hearing his argument is "moot." *Id.*

The Department's argument fails to recognize the circumstances leading up to the last minute disclosure of these log sheets. Mr. Bell's first subpoena request was effectively denied when it was limited in scope to merely four days of log sheets. Then, no subpoena was ever issued in response to Mr. Bell's second request for a subpoena. Ex.1, pp.27-28. Instead, approximately half of what was sought by Mr. Bell was randomly produced approximately one hour before the rescheduled hearing. Undeniably Mr. Bell was given insufficient time to utilize these materials at the July 9th hearing. As a result, and as discussed above, the Hearing Officer

impermissibly continued the hearing a second time. Still, the Hearing Officer never issued a subpoena for log sheets spanning more than 4 days.

In sum, the Hearing Officer's refusal to issue a subpoena for anything other than log sheets spanning June 3, 2009 through June 6, 2009 was not only an abuse of discretion but also deprived Mr. Bell of his right to procedural due process under the United States and Idaho Constitutions.

5. The Hearing Officer Erred in Finding the Boise Police Department Complied with the ITD Subpoena

In his Opening Brief Mr. Bell set forth how at least two of the Hearing Officer's findings of fact are not supported by any evidence in the record. The Department argues in response that Mr. "Bell obviously believes that the hearing officer is not being truthful. There is no reason to believe, and no evidence proving, that the hearing officer is lying." Respondent's Brief, p.21. Interestingly, the Department does not point to anywhere in the record supporting the contested findings of fact. Nonetheless, the Department is correct in that there is no evidence the Hearing Officer lied. Mr. Bell has no idea whether the Hearing Officer is a truthful person. What Mr. Bell is certain of, however, is whatever the reason, there is absolutely no evidence in the record supporting the following findings of fact:

1. The Boise Police Department *timely complied* with the Subpoena Duces Tecum; and

2. The subpoenaed material *got misplaced* at the Idaho Transportation Department.

Ex.1, p.297 ¶ 8 (emphasis added).

The only subpoena ever issued by the Hearing Officer for log sheets required the production of log sheets for June 6, 2009 through June 9, 2009 with a compliance date of June 29, 2009. Ex. 1, p.18. As of June 25, 2009 the Records Custodian of the Boise Police

Department confirmed even this subpoena had not yet been complied with. Ex. 1, p.69. The only log sheets Mr. Bell was provided with in this matter were provided to him the morning of the July 9th hearing, well after the June 29th compliance date. There is no evidence in the record as to when these log sheets were received by ITD or who provided the them to ITD. Nor was there a cover letter with them as the Records Custodian of the Boise Police Department had previously provided with the other subpoenaed materials. Moreover, the produced log sheets are not responsive to the subpoena in that they are well beyond the scope of the subpoena. Simply put, the record is devoid of any evidence supporting a factual finding that the Boise Police Department timely complied with the subpoena at issue or that the log sheets were misplaced by ITD. There is no evidence that the Boise Police Department provided log sheets for June 6, 2009 through June 9, 2009 on or before June 29, 2009. Similarly, there is no evidence that these log sheets were timely received yet misplaced by ITD.

6. The Hearing Officer Incorrectly Concluded the Breath Testing Instrument Had Been Maintained in Accordance with IDAPA and the Standard Operating Procedures

In his Opening Brief, Mr. Bell spent considerable time setting forth how the evidence presented to the Hearing Officer affirmatively showed the State failed to comply with both IDAPA and the SOP's. In response the Department first argues that the Calibration Checklist showing that a 0.08 calibration check was not performed on June 25, 2009 and that the State inappropriately waiting twice as long to conduct the statutory required calibration checks are "irrelevant." Respondent's Brief, p.24. The Department argues Mr. Bell does not "know[] for certain" what the Calibration Checklist means and that it "is not conclusive evidence that the State waited twice as long to conduct the required checks." *Id.* Fortunately for Mr. Bell, he is not required to prove "for certain" that either IDAPA or the SOP's were not complied with.

Rather, as he established before the Hearing Officer, Mr. Bell must only prove by a *preponderance of the evidence* that the procedures for the maintenance and operation of breath testing equipment was not complied with. *See* I.C. § 18-8002A(7); and *In re Mahurin*, 140 Idaho 656, 659-60, 99 P.3d 125, 128-29 (Ct. App. 2004).

The remainder of the Department's argument is that notwithstanding the various procedural failures by the State, since a calibration check was performed on June 3, 2009, two (2) days prior to Mr. Bell's arrest, compliance with IDAPA and the SOP's was acheived. Respondent's Brief, pp.24-26. In order for this Court to conclude as the Department suggests, it would need to find that there exists an implied provision in both the IDAPA and the SOP's – that so long as the calibration check closest to, or just prior to, a petitioner's breath test is okay then the State is in compliance with its own procedures. There is no such provision however. Instead, the IDAPA, SOP's, and the Department's admission that "0.08 calibration checks are required every 100 samples" makes subsequent calibration checks *relevant*.

7. The State's Adopted Procedures for the Breath Testing Device Do Not Ensure Accuracy and Proper Functioning

As explained in Mr. Bell's Opening Brief, through the numerous revisions, the Idaho State Police have promulgated SOP's that fail to require an exacting standard by which a Hearing Officer or any Court can determine as a matter of fact whether the State has complied with or violated its own standards. As such, the standards have become illusory recommendations at best and are essentially no standards at all. In response the Department asserts that even if the SOP's are illusory it is irrelevant and if the procedures adopted by the State are meaningless there is no authority to vacate a suspension under these circumstances. Respondent's Brief, p.26.

To the contrary, the State either failed to comply with its own standards, as previously

discussed, or its standards are so vague and unenforceable that they have become meaningless. The State's illusory standards are most certainly relevant. Moreover, the Department's argument that there is no authority to vacate a suspension even if the procedures adopted are meaningless is simply wrong. It hardly seems necessary to explain that a hearing to adjudicate, among other things, whether a breath testing instrument was functioning properly must include meaningful and substantive standards by which to determine compliance and accuracy. "Because the suspension of issued driver's licenses involves state action that adjudicates important interests of the licensees, drivers' licenses may not be taken away without procedural due process." *In re Gibbar*, 143 Idaho 937, 945, 155 P.3d 1176, 1184 (Ct. App. 2007) (citations omitted). In Idaho, this involves a pre-suspension hearing pursuant to Idaho Code § 18-8002A. In order to satisfy due process requirements this hearing must be "meaningful." *Bell v. Burson*, 402 U.S. 535, 541-42, 91 S.Ct. 1586, 1590-91 (1971) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965)). A hearing is anything but meaningful if it involves procedures that are illusory and inadequate to determine the accuracy of the breath testing instrument.

8. The Hearing Officer Incorrectly Concluded the Simulator Solutions Came From An "Approved" Provider in Accordance with IDAPA and the Standard Operating Procedures

Mr. Bell argued to the Hearing Officer and again set forth in his Opening Brief that the simulator solution used in the calibration checks was not provided by the Department or by a source approved by the Department as required by IDAPA and the SOP's. In response the Department urges this Court to uphold the Hearing Officer's findings even though it acknowledges these findings were premised upon a "reasonable inference" and not direct evidence. Respondent's Brief, p.28.

The fact that the Hearing Officer needed to rely upon a "reasonable inference" to

conclude the simulator solution was provided by an approved source highlights the due process violation that occurred when the Hearing Officer denied Mr. Bell's subpoena to identify the source of the simulator solution(s). Ex.1, p.20.

> A licensee's right to request the issuance of subpoenas to support a defense is a significant factor in avoiding a due process violation when a revocation element is established solely by hearsay evidence.
>
> Thus, reversal of a revocation on review may be warranted if the Department's conduct in failing to issue requested subpoenas has sufficiently impaired a licensee's substantial rights to present a defense.

Gilbert v. Julian, 230 P.3d 1218, 1222 (Colo. Ct. App. 2009) (citations omitted).

Here, the Hearing Officer refused to allow Mr. Bell access to the very information he needed to meet his burden and impaired his right to present a defense. Furthermore, the issues before this Court are whether the Hearing Officer's findings that the simulator solutions used in this case were submitted by an approved provider was clearly erroneous, and whether the Hearing Officer's decision exceeded his authority, was made on unlawful procedure, was not supported by substantial evidence in the record, and was arbitrary, capricious, and an abuse of discretion.

9. The Hearing Officer Incorrectly Concluded Mr. Bell Was Completely and Properly Informed of the Consequences of Submitting to Evidentiary Testing

In response to Mr. Bell showing he was not properly advised of the consequences of submitting to evidentiary testing and that Officer White's conduct constituted trickery and deceit thus rendering Mr. Bell's implied consent unreasonable, the Department attempts to justify Officer White's trickery based upon case law which has absolutely no application to obtaining one's consent.

The cases relied upon by the Department authorize certain, purposeful misstatements by

police officers during police interrogation, *Frazier v. Cupp*, 394 U.S. 731 (1969), in order to gain access to a person's home in an undercover capacity, *Lewis v. United States*, 385 U.S. 206 (1966), in order to safely have an occupant answer the door in executing a search warrant, *United States v. Contreras-Ceballos*, 999 F.2d 432 (9th Cir. 1993) and *United States v. Salter*, 815 F.2d 1150 (7th Cir. 1987), and in order to safely enter a residence to execute a valid arrest warrant, *Leahy v. United States*, 272 F.2d 487 (9th Cir. 1960). However, none of those cases authorize obtaining one's consent through the threat of force or through misstatements of the law.

Here, Officer White was seeking Mr. Bell's physical consent to submit to evidentiary testing. Idaho is an implied-consent state, but the Idaho Supreme Court has clearly stated the implied-consent law does not permit the State to force an individual to submit to evidentiary testing. "By implying consent, the statute removes the *right* of a licensed driver to lawfully refuse, but it cannot remove his or her *physical power* to refuse. *State v. Woolery*, 116 Idaho 368, 372, 775 P.2d 1210, 1214 (1989) (emphasis in original) (quoting *State v. Newton*, 636 P.2d 393 (Or. 1981)).

However, such refusal does not permit the police to obtain an evidentiary sample through whatever means they deem necessary. *State v. DeWitt*, 145 Idaho 709, 714, 184 P.3d 215, 220 (Ct. App. 2008) (holding blood draws must be done in a medically accepted manner and without unreasonable force), *citing Schmerber v. California*, 384 U.S. 757, 771-72 (1966). In fact, the Idaho Court of Appeals has clearly stated that force – or the threat of force – is not to be used to gather such evidence:

> The purpose of a warning of license suspension following a refusal . . . is to overcome an unsanctioned refusal by threat instead of force. It is not to reinstate a right to choice, but rather to *nonforcibly* enforce the driver's previous implied consent. []*Rather than condone a physical conflict*, the legislature provided for the administrative revocation of the license of an individual who refuses to comply

with his previously given consent.

Id. at 713, 184 P.3d at 219 (emphasis added).

Of course, constitutional protections prohibit the police from attempting to convince an individual to physically consent to evidentiary testing through coercion or duress. *See Scheckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) ("the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force"); *see also Florida v. Bostick*, 501 U.S. 429, 438 (1991) ("'Consent' that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."). Thus, an individual's "consent" is involuntary if his will has been overborne and his capacity for self-determination critically impaired. *State v. Garcia*, 143 Idaho 744, 778, 152, P.3d 645, 649 (Ct. App. 2006); *State v. Jaborra*, 143 Idaho 94, 97, 137 P.3d 481, 484 (Ct. App. 2006).

And in any event, the advisory information is *statutorily mandated* and cannot be circumvented. I.C. § 18-8002A(2); *In re Cunningham*, 2011 WL 310371 (Ct. App. 2011); *In re Virgil*, 126 Idaho 946, 947, 895 P.2d 182, 183 (Ct. App. 1995). Even if consent could be constitutionally obtained through coercion or duress, it would not allow the State to circumvent the advisory in this manner.

10. The Hearing Officer Erred in Relying On Officer White's Affidavit Because the State Had Constructive Knowledge Officer White Had Been Deemed Not Credible and Terminated by the Boise Police Department

The Department argues it did not have constructive knowledge of Officer White's veracity issues. Respondent's Brief, p.36-37. Mr. Bell respectfully disagrees.

The State of Idaho had actual knowledge of Officer White's veracity issues. Thus, ITD had constructive knowledge of this information. It should have been disclosed to Mr. Bell and

the Hearing Officer should have taken this into account when resolving factual and legal disputes. The entire administrative hearing process is based upon an officer's sworn affidavit which the Hearing Officer accepts as truthful. In this case, the Hearing Officer should not have relied upon the statements of an officer with known credibility issues.

III. CONCLUSION

For all the reasons set forth above and in Mr. Bell's Opening Brief, this Court should set aside the Hearing Officer's decision and order that Mr. Bell's driving privileges be reinstated.

Respectfully submitted this 29 day of March, 2011.

Jeffrey Brownson
Attorney for Hamish Bell

CERTIFICATE OF SERVICE

I CERTIFY that on March 29, 2011, I caused a true and correct copy of the foregoing document to be:

X mailed

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