

8-15-2008

# Bennett v. State, Dept. of Transp. Respondent's Brief Dckt. 35150

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE DRIVING LICENSE )  
PRIVILEGES OF STACIE DAWN BENNETT. )  
STACIE DAWN BENNETT, )

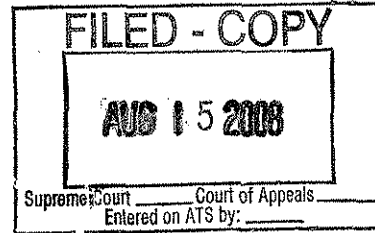
Petitioner-Respondent, )

vs. )

STATE OF IDAHO, DEPARTMENT OF )  
TRANSPORTATION, )

Respondent-Appellant. )

Supreme Court No: 35150



**RESPONDENT'S BRIEF**

-----  
Appealed from the District Court of the Second Judicial District in the State of Idaho,  
In and For the County of Nez Perce.  
-----

The Honorable Jeff M. Brudie, District Judge Presiding  
-----

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**STATEMENT OF THE CASE**

A. NATURE OF THE CASE

The Appellant, the State of Idaho Department of Transportation (hereafter "Department") has appealed the *Memorandum Opinion and Order on Petition for Judicial Review* entered by District Court Judge Brudie on March 10, 2008, in which that court vacated the order entered by Michael Howell, Hearing Officer for the Department, on November 3, 2007, sustaining the suspension of the Respondent's driving license privileges for 90 days.

B. COURSE OF PROCEEDINGS AND STATEMENT OF RELEVANT FACTS

The relevant facts of this case are simple, straightforward, and not in dispute. On October 14, 2007, Moscow Police Officer Krasselt arrested the Respondent (hereafter "Ms. Bennett) for the crime of driving under the influence of alcohol pursuant to I.C. 18-8004 and transported her to the Latah County Jail. (R. pp. 21-23) At the Latah County Jail, Ms. Bennett submitted to Intoxilyzer 5000 breath test administered by Officer Krasselt. The results of said test were .090 and .095, and based on the results, Ms. Bennett was charged with driving under the influence and faced an Administration License Suspension for 90 days pursuant to I.C. 18-8002A. *Id.*

Ms. Bennett filed a timely request for a hearing on the Administration License Suspension and on November 2, 2007, a telephonic hearing was held before Hearing Officer Michael Howell. (R. pp. 28-32, 37-38)

1 At the Administrative License Suspension Hearing, Ms. Bennett testified that when she was  
2 given the test for alcohol concentration in this matter and she had a sinus infection. See Transcript  
3 Of Administrative License Suspension Hearing (hereafter "Tr.") pg. 13 ln. 11. This sinus infection  
4 required Ms. Bennett to use an Albuterol inhaler. Tr. pg. 13 ln. 13. As a result of the sinus infection,  
5 Ms. Bennett coughed a lot, and was coughing during the 15 minute waiting period ("I was coughing  
6 pretty much the whole time I was in there."). Tr. pg. 13 ln. 17-19, pg. 15 ln. 9-13. Due to chronic  
7 bronchitis, Ms. Bennett's cough is very deep. Tr. pg. 15 ln. 15-16.

8  
9 Ms. Bennett also testified that during the fifteen minute waiting period prior to Ms. Bennett  
10 submitting to the breath test, the officer administering the test left the room on at least two occasions.  
11 See Tr. pg. 14-15. When leaving the room, the officer went through a doorway, down a hallway, and  
12 into another room. *Id.* During these times, Ms. Bennett was the only person in the room. *Id.*

13  
14 In the *Findings of Fact and Conclusions of Law and Order* dated November 3, 2007, Hearing  
15 Officer Howell sustained the Petitioner's license suspension. The Hearing Officer concluded that:

16 All procedures and requirements were followed by the reporting officer pursuant to  
17 I.C. 18-8002A or I.C. 18-8004.

18 (R. p. 49)

19 With regards to the issue in this appeal, the Hearing Officer stated:

20 VII.

21 The officer certified that he administered the breath test in compliance with the  
22 standards and methods adopted by the Department of Law Enforcement for the  
23 administration of breath tests which standards include specific directions on a 15

1 minute observation period prior to the test administration. While the driver testified  
2 that the officer was in and out of the room during the waiting period, no specific  
3 testimony was produced to show that the 15 minute waiting period was not present.  
4 The driver had the burden to do so if she were to successfully challenge the officers  
5 statement that he had properly observed the waiting period.

6 VII.

7 The driver testified that she was coughing repeatedly prior to taking the breath test.  
8 However, she did not say that she had vomited or regurgitated any substance from her  
9 stomach that could have affected the test. According to the Standard Operating  
10 Procedures for Breath Alcohol Testing, if “ ... the subject vomits or is otherwise  
11 suspected of regurgitating material from the stomach, the 15 minute waiting period  
12 must begin again.” The testimony of the driver that she “coughed” is insufficient to  
13 invalidate the test or to rebut the statement of the officer that the test was properly  
14 conducted.

15 VIII.

16 Proper procedures and standards were followed by the peace officer to insure the  
17 operation of the test machine to be reliable, with the results of .90 and .95.

18 (R. pp. 47-48)

19 Ms. Bennett timely filed a Petition for Judicial Review. (R. pp. 54-55) After briefing by the  
20 parties and oral argument, District Court Judge Brudie entered the *Memorandum Opinion and Order*  
21 *for Petition on Judicial Review* on March 10, 2008, in which the court vacated the order entered by  
22 Hearing Officer Howell sustaining the suspension of Ms. Bennett’s driving license privileges for 90  
23 days. (R. pp. 70-76)

24 In support of its decision, the court stated:

25 “The [Standard Operating Procedures] manual requires that the breath test subject be  
26 monitored for a period of fifteen minutes immediately prior to administration of the

1 breath test to assure that the subject did not smoke, ingest any substance, vomit, or  
2 belch, which actions could render the breath test inaccurate. In the absence of a  
3 validly conducted fifteen-minute wait required by the manual, the hearing officer  
4 should vacate the license suspension because the breath test was not conducted in  
5 accordance with requirements of I.C. 18-8004(4), I.C. 18-8002A(7)(d).” *In re*  
6 *Gibbar*, 143 Idaho at 944.

7 Idaho’s Court of Appeals has held that the fifteen minute observation period does not  
8 require the officer to “stare fixedly” at the subject but does, however, require the  
9 officer to remain in close physical proximity to the subject so that the officer may use  
10 all of his senses to determine whether a subject, has belched, burped or vomited  
11 during the monitoring period. In *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct.  
12 App. 1999) and *State v. DeFranco*, 143 Idaho 335, 144 P.3d 40 (Ct. App. 2006), the  
13 Court held the fifteen minute monitoring requirement was not met where the facts  
14 showed the officers had failed to stay in sufficient physical proximity to the test  
15 subject so as to allow them to use their sense of sight, smell and hearing to monitor  
16 the subject.

17 The instant case is analogous to *Carson* and *DeFranco*. The evidence before the  
18 Administrative Hearing Officer was that Officer Krasselt left the room twice, going  
19 down a hall and into another room. The only evidence to the contrary was a  
20 computer generated form affidavit signed by the Officer that included boiler plate  
21 language stating, “The test(s) was/were performed in compliance with Section 18-  
22 8003 & 18-8004(4) Idaho Code and the standards and methods adopted by the  
23 Department of Law Enforcement.”

24 The fifteen-minute monitoring period is not an onerous burden, and  
25 it is “a precaution that is necessary to insure the validity of the test  
26 results.” *Id.* This foundational standard ordinarily will be met if the  
officer stays in close physical proximity to the test subject so that the  
officer’s senses of sight, smell and hearing can be employed. If an  
officer deviates from that practice, without beginning the fifteen-  
minute period anew, which is always an alternative in cases of  
uncertainty, the officer risks that the breath test results will be  
rendered inadmissible.

*State v. DeFranco*, 143 Idaho 335, 338, 144 P.3d 40 (Ct. App. 2006).



1 In the instant case, the Petitioner testified the Officer left the Petitioner alone in the  
2 room at least twice during the fifteen-minute observation period, going into another  
3 room down the hall. There was no credible evidence contradicting that specific fact.  
4 Idaho's Court of Appeals has clearly stated that a breath test has not been conducted  
5 in compliance with required procedural standards when an officer fails to stay in  
6 close physical proximity to the test subject during the fifteen-minute observation  
7 period. In the instant case, the Hearing Officer's finding that the breath test was  
8 conducted in compliance with procedural standards is not supported by substantial  
9 evidence on the records as a whole. As a result, Petitioner Bennett's driver's license  
10 suspension should have been vacated by the Hearing Officer.

11 (R. pp. 73-75).

12 Subsequently the Department has filed this appeal. (R. pp. 77-80).

### 13 ISSUES PRESENTED ON APPEAL

14 The Department has identified two issues regarding this appeal:

15 1. Whether or not the Department's Hearing Officer's Decision is supported by  
16 substantial competent evidence.

17 2. Whether or not Ms. Bennett's driving privileges should be suspended pursuant to the  
18 decision of the Department's Hearing Officer.

### 19 ARGUMENT

#### 20 A. STANDARD OF REVIEW

21 The Idaho Administrative Procedures Act (IDAPA) governs the review of department  
22 decisions to deny, cancel, suspend, disqualify, revoke or restrict a person's driver's license. *In the*  
23 *Matter of the Suspension of the Driver's License of Gibbar*, 143 Idaho 937, 941, 155 P.3d 1176,  
24 1180 (Ct. App. 2006) (citations omitted). In an appeal from the decision of the district court acting

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1 in its appellate capacity under IDAPA, the Court reviews the agency record independently of the  
2 district court's decision. *Id.* at 941, 155 P.3d at 1180. The Court does not substitute its judgment  
3 for that of the agency as to the weight of the evidence presented, instead the Court defers to the  
4 agency's findings of fact unless they are clearly erroneous. *Id.* at 941, 155 P.3d at 1180. The  
5 agency's factual determinations are binding on the reviewing court, even where there is conflicting  
6 evidence before the agency, so long as the determinations are supported by substantial competent  
7 evidence in the record. *Id.* at 941, 155 P.3d at 1180.

8  
9 However a court may overturn an agency's decision where its findings, inferences,  
10 conclusions or decisions are:

- 11 (a) in violation of constitutional or statutory provisions;  
12 (b) in excess of statutory authority of the agency;  
13 (c) made upon unlawful procedure;  
14 (d) not supported by substantial evidence on the record as a whole; or  
15 (e) arbitrary, capricious, or an abuse of discretion.

16  
17 *Id.* at 941-42, 155 P.3d at 1180-81 (citing I.C. 67-5279(3)).  
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1 B. THE DEPARTMENT'S HEARING OFFICER'S DECISION IS NOT SUPPORTED BY  
2 SUBSTANTIAL COMPETENT EVIDENCE.

3 1. The Hearing Officer was required to vacate Ms. Bennett's license suspension if a  
4 preponderance of the evidence establishes that the test for alcohol concentration was not conducted  
5 in accordance with the procedures and standards established by the Idaho State Police.

6  
7 The burden of proof at an administrative hearing regarding an administrative license  
8 suspension is on the person requesting the hearing and that person must prove her case by a  
9 preponderance of the evidence if the administrative license suspension is to be vacated. *See* I.C. 18-  
10 8002A(7).

11 I.C. 18-8002A(7)(d) requires the hearing officer to vacate a suspension upon a showing that  
12 the tests for alcohol concentration were not conducted in accordance with the requirements of 18-  
13 8004(4), Idaho Code.

14  
15 2. Ms. Bennett's license suspension should have been vacated because the breath test was not  
16 performed in accordance with the procedures and standards adopted by the Idaho State Police.

17 I.C. 18-8004(4) provides in pertinent part as follows:

18 "...Analysis of blood, urine or breath for the purpose of determining the alcohol  
19 concentration shall be performed by a laboratory operated by the Idaho Department  
20 of Law Enforcement or by a laboratory approved by the Idaho Department of Law  
21 Enforcement under the provisions of approved and certification standards to be set  
22

1 by the department, or by any other method approved by the Idaho Department of Law  
2 Enforcement...”

3 The Idaho State Police has adopted Alcohol Testing Regulations (herein referred to as the  
4 ATR’s) set forth and cited as IDAPA 11.03. The ATR’s require (i.e. see IDAPA 11.03.01.013.03)  
5 that tests be administered in conformity with standards established by the Idaho State Police in the  
6 form of policy statements and training manuals.  
7

8 The Idaho State Police has adopted Standard Operating Procedures (hereafter “SOP”) for  
9 breath alcohol testing. On page eight, said SOPs provide in pertinent that:

10 3. Testing Procedure

11 Proper testing procedure by certified operators is necessary in order to provide  
12 accurate results that will be admissible in court.

13 3.1 **Prior to evidential breath alcohol testing, the subject must be monitored**  
14 **for fifteen (15) minutes.**

15 3.1.4 If, during the 15-minute waiting period, the subject vomits or is  
16 otherwise suspected of regurgitating material from the stomach, the  
17 15-minute waiting period must begin again.

(Emphasis original.)

18 The Idaho State Police has also adopted the Operator’s Training Manual for the Intoxilyzer  
19 5000. The Operator’s Training Manual addresses the fifteen minute waiting period on page 8 and  
20 instructs in part:

21 Monitor the subject for 15 minutes. During this time, the subject may not smoke,  
22 consume alcohol, eat, belch, vomit, use chewing tobacco, or have gum or candy in

1 the mouth. If belching or vomiting does occur or something is found in the mouth,  
2 have it removed and wait an additional 15 minutes.

3 At the Administrative License Suspension Hearing, Ms. Bennett testified that during the  
4 fifteen-minute observation period prior to Ms. Bennett submitting to the breath test, the officer  
5 administering the test left the room on at least two occasions, and during these times, Ms. Bennett  
6 was the only person in the room.

7 The Idaho State Police has determined that prior to a breath test, a person must be observed  
8 for fifteen-minutes. Idaho Courts have addressed the fifteen-minute observation period and have  
9 held that a valid observation period requires the officer to remain in close physical proximity to the  
10 subject so that the officer may use all of his senses to determine whether a subject has belched,  
11 burped or vomited during the monitoring period. *See State v. Remsburg*, 126 Idaho 338, 882 P.2d  
12 993 (Ct. App. 1994); *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999); and *State v.*  
13 *DeFranco*, 143 Idaho 335, 144 P.3d 40 (Ct. App. 2006). In *Carson* and *DeFranco*, the Courts held  
14 the fifteen-minute observation period was not met where the facts showed the officers had failed to  
15 stay in sufficient physical proximity to the test subject so as to allow them to use their sense of sight,  
16 smell and hearing to monitor the subject.  
17  
18

19 As the District Court pointed out, this case is analogous to *Carson* and *DeFranco*. The  
20 evidence before the Hearing Officer was that during the fifteen-minute observation period the officer  
21 left the room on at least two occasions, that the officer went through a doorway, down a hallway, and  
22 into another room, and that Ms. Bennett was left alone during these times. The officer in this case  
23

1 failed to stay in sufficient physical proximity to Ms. Bennett during the fifteen-minute observation  
2 period and thus the breath test was not performed in accordance to the procedures and standards  
3 adopted by the Idaho State Police and the Hearing Officer should have vacated Ms. Bennett's license  
4 suspension. "In the absence of a validly conducted fifteen-minute wait required by the manual, the  
5 hearing officer should vacate the license suspension because the breath test was not conducted in  
6 accordance with the requirements of I.C. 18-8004(4). I.C. 18-8002A(7)(d)." *Gibbar*, 143 Idaho at  
7 944, 155 P.3d at 1183.

8  
9 3. The Department's positions are without merit.

10 The failure to follow proper procedure is a perfect defense in an administrative license  
11 suspension proceeding. Ms. Bennett's only burden is to establish by a preponderance of the evidence  
12 that her breath test was not performed in accordance to the procedures and standards adopted by the  
13 Idaho State Police - she does not have to establish that the test was subsequently deficient because  
14 of the noncompliance. *See* I.C. 18-8002A(7)(d). Ms. Bennett does not have to show that the breath  
15 test was somehow tainted because of the a failure to conduct a valid fifteen-minute observation  
16 period.  
17

18 Ms. Bennett's testimony is not ambiguous. Ms. Bennett testified that during the fifteen-  
19 minute observation period the officer left the room on at least two occasions, that the officer went  
20 through a doorway, down a hallway, and into another room, and that she was left alone during these  
21 times. There is nothing ambiguous about this testimony.  
22

1 Nor did the District Court make a different factual determination than the Hearing Officer  
2 and place more weight on Ms. Bennett's testimony. The question of whether or not a fifteen-minute  
3 observation period was validly conducted is a question of law based on the facts. In this case, there  
4 is no evidence to contradict Ms. Bennett's testimony. While the officer certified that he administered  
5 the breath test in compliance with the standards and methods adopted by the Idaho State Police, this  
6 certification, at the very best, is a legal conclusion that is not admissible as evidence. Furthermore  
7 this certification was a computer generated form affidavit signed by the officer that included boiler  
8 plate language stating, "The test(s) was/were performed in compliance with Section 18-8003 & 18-  
9 8004(4) Idaho Code and the standards and methods adopted by the Department of Law  
10 Enforcement." Whether or not the test was properly administered is a conclusion of law that the  
11 officer is not qualified to make. Finally, the Hearing Officer in this case misidentifies the issue. In  
12 his *Findings of Fact and Conclusions of Law and Order*, the Hearing Officer states "While the driver  
13 testified that the officer was in and out of the room during the waiting period, no specific testimony  
14 was produced to show that the 15 minute period was not present. The driver had the burden to do  
15 so if she were to successfully challenge the officer's statement that he had properly observed the  
16 waiting period." (R. p. 47) Contrary to the Hearing Officer, the issue is not whether the fifteen-  
17 minute observation period was present, the issue is whether or not the fifteen-minute observation  
18 period was validly conducted, and as set forth above, it was not in this case because during the  
19 fifteen-minute observation period the officer left the room on at least two occasions, that the officer  
20  
21  
22  
23


1 occasions, that the officer went through a doorway, down a hallway, and into another room, and that  
2 she was left alone during these times. As such the fifteen-minute observation period was not validly  
3 conducted and the Hearing Officer's conclusion to the contrary is not supported by substantial  
4 evidence on the record as a whole and should be overturned.

5  
6 **CONCLUSION**

7 Based on the foregoing, Ms. Bennett respectfully requests that this Court vacate the Hearing  
8 Officer's decision to suspend Ms. Bennett's driving privileges.

9 DATED this 13th day of August, 2008.


10 CLARK AND FEENEY

11  
12 By:   
13 Paul Thomas Clark, a member of the firm.  
14 Attorneys for Respondent

15 **CERTIFICATE OF SERVICE**

16 I HEREBY CERTIFY that on the 13th day of August, 2008, I caused to be served a true and correct  
17 copy of the foregoing document by the method indicated below, and addressed to the following:

18 Edwin L. Litteneker 19 Special Deputy Attorney General 20 322 Main Street PO Box 321 Lewiston, Idaho 83501	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy
---	---

21  
22 By:   
23 Attorneys for Respondent

24 RESPONDENT'S BRIEF

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