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Bezdicek v. Idaho Transp. Dept. Appellant's Brief Dckt. 42608

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRYAN ALLEN BEZDICEK, JR.) Supreme Court Docket No. 42608-2014
)
Plaintiff-Appellant,)
) **APPELLANT'S OPENING BRIEF**
STATE OF IDAHO DEPARTMENT)
OF TRANSPORTATION,)
)
Defendant-Respondent)

APPELLANT'S OPENING BRIEF

**Appeal from the District Court of the Second Judicial District of the State of Idaho,
in and for the County of Nez Perce (Case No. CV14-00982)**

THE HONORABLE JAY GASKILL

District Judge

DAVID J. BAUMANN

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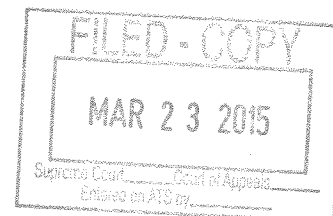


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STATEMENT OF THE CASE

Nature of the Case

Mr. Bezdicek appeals the Idaho Department of Transportation's suspension of his driving privileges for failing an evidentiary test for alcohol concentration.

Statement of Facts

On March 18, 2014, at approximately 2:30 a.m., Mr. Bezdicek was stopped by Lewiston Police Department Officer Mowery for driving without headlights. R. p. 36. From the time the officer first observed the headlight violation until the time the stop was made, the officer did not observe Mr. Bezdicek violate any other traffic laws nor drive in a manner suggestive of a person driving under the influence of alcohol. R. p. 146, Ls. 9-12. Mr. Bezdicek used his turn signals when making turns; he stayed within his lane of travel; he did not wander within his lane of travel; he did not engage in erratic driving; and, he pulled over within a reasonable time after Officer Mowery activated his emergency lights. R. p. 146, L. 9 - p. 147, L. 6. Mr. Bezdicek did not lose his balance when he got out of his vehicle and did not have any slurred speech. R. p. 146, Ls. 7-15.

Mr. Bezdicek admitted to having consumed a couple of beers with the last drink about an hour prior to the stop. R. P. 36, ¶4. Officer Mowery observed that Mr. Bezdicek's eyes were bloodshot and watery. R. P. 36, ¶2. Further, he smelled a moderate odor of an alcoholic beverage coming from Bezdicek when standing, face to face and in close proximity to Bezdicek. R. p. 36, ¶6. Officer Mowery "then explained to Bezdicek that [he] would be conducting sobriety tests on

his person to make sure that he was safe to drive.” *Id.*

Officer Mowery then administered three standardized field sobriety tests; namely the horizontal gaze nystagmus, the walk and turn and the one leg stand test. R. p. 147, Ls. 17 - 24. The officer observed four indicators on the HGN which met the threshold number of indicators indicating a failure of the eye test. However, Mr. Bezdicek passed the walk and turn test and the one leg stand test. Officer Mowery observed **none** of the eight indicators on Mr. Bezdicek’s walk and turn test and only one indicator on the one-leg stand. R. P. 37, ¶ 3-4. The threshold number of indicators of being under the influence for each test is two indicators. R. p. 157, Ls. 13-20.

Despite passing the two field sobriety tests, Officer Mowery arrested Mr. Bezdicek. Subsequent to the arrest, the officer administered a breath test. The initial test was invalidated due to radio frequency interference error. R. p. 62. The next two breath tests produced .155 and .147 BrAC results. *Id.*

Course of Proceedings

Mr. Bezdicek requested an ALS hearing on March 21, 2014. R. p. 45- 48. The request for hearing sought subpoenas which were issued on March 24, 2014. R. pp. 51- 54. On March 24, the date the subpoenas were issued, the hearing officer also issued a show cause letter extending the hearing date to “allow time for the receipt of subpoenaed evidence requested by the petitioner.” R. p. 72. The subpoenas were actually served on March 24th and March 25th. R. pp 55-58. The materials requested in the Subpoena Duces Tecum had been provided to the Petitioner by March 31,

2014. R. pp. 17-18, ¶12.

The hearing was held on April 17, 2014. The Findings of Fact and Conclusions of Law and Order were issued on April 30, 2014, wherein the suspension was sustained. The Petition for Judicial Review was timely filed on May 12, 2014. The honorable Judge Gaskill filed the Memorandum Opinion and Order on Petition for Judicial Review on August 29, 2014. Bezdicek timely filed his Notice of Appeal on October 10, 2014.

ISSUES PRESENTED ON APPEAL

1. Did the Hearing Officer Commit Error in Determining That the Officer Had Legal Cause to Arrest Mr. Bezdicek and to Request That He Submit to an Evidentiary Test?
2. Did the District Court Commit Error in Finding that the ALS hearing was held timely in accordance with Idaho Code Section 18-8002A?

STANDARD OF REVIEW

The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *See* I.C. §§49-330, 67-5201(2) and 67-5270. In an appeal from the decision of the district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court's decision. *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App.2002). 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 and competent evidence in the record. *Urrutia v. Blaine Cnty., 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.

The 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); *Peck v. State, Dept. of Transp.*, 153 Idaho 37, 42, 278 P.3d 439, 444 (Idaho App. 2012)

ARGUMENT

I. The Hearing Officer Committed Error in Finding That the Officer Had Legal Cause to Arrest Mr. Bezdicek and to Request him to Submit to Evidentiary Testing.

Officer Mowery did not possess probable cause to arrest Mr. Bezdicek for Driving Under the Influence and, thus, the arrest and subsequent evidentiary test were done in violation of Mr. Bezdicek's Fourth Amendment rights against unreasonable search and seizures. An individual may be arrested without affront to Fourth Amendment protections only if there exists probable cause to believe that the subject has committed an offense. *State v. Pannell*, 127 Idaho 420, 425, 901 P.2d 1321, 1326 (1995). Probable cause for an arrest exists where the officer possesses information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. *State v. Alger*, 100 Idaho 675, 603 P.2d 1009 (1979); *State v. Loyd*, 92 Idaho 20, 23, 435 P.2d 797, 800 (1967).

In this case, Officer Mowery did not possess reasonable suspicion, let alone probable cause, to believe that Mr. Bezdicek was driving in violation of I.C. §18-8004. The facts in the record leading up to the arrest eliminated any legitimate notion that Mr. Bezdicek was operating a vehicle while impaired. More particularly, in contrast to an impaired driver, Mr. Bezdicek used his turn signals when required; he stayed within his lane of travel; he did not weave within his lane of travel; he did not drive in an erratic manner; and he stopped in a reasonable time after the officer initiated his emergency lights. R. p. 146, L. 9 - p. 147, L. 6. When the officer had him exit the vehicle, Mr. Bezdicek did not lose his balance. Further, he did not have slurred speech. R. p. 146, Ls. 13-14. Most importantly, he passed the two key field sobriety tests; namely, the one leg stand and walk and turn tests.

Field sobriety tests are used to either confirm or dispel an officer's reasonable suspicion that a driver is under the influence of alcohol. *State v. Martinez-Gonzalez*, 152 Idaho 775,780 (2012); see also, *State v. Ferreira*, 133 Idaho 474, 484, 988 P.2d 700, 710 (Ct. App. 1999). “[P]erforming poorly on such tests can raise the level of suspicion to probable cause...” *Martinez-Gonzalez*, 152 Idaho at 780. By parity of reasoning, performing well on such tests would dispel any reasonable suspicion and would eliminate any legal cause to arrest. This is especially true since the HGN test, standing alone, has been deemed insufficient as evidence of a person being under the influence. Instead, the HGN is only relevant when considered with the other field sobriety tests. *State v. Gleason*, 123 Idaho 62, 66 (1992). The Court in *Gleason*, stated that “Garrett allows the use of HGN test evidence **only in conjunction with evidence from other field sobriety tests.**” *Id.*, citing *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991)(emphasis added).

Since Mr. Bezdicek passed the two key field sobriety tests the hearing officer should have vacated the license suspension since there was no legal cause to arrest Mr. Bezdicek nor to request that he submit to an evidentiary test.

A review of the record finds that both the hearing officer and the district court in the judicial review hearing, mistakenly determined that there was “competent evidence of impaired memory and difficulty in Mr. Bezdicek following directions. (See R. p. 12 and p. 187). Such findings are simply not supported by the record. Instead, the impaired memory and difficulty in following directions was attributed by the Officer to the passenger, Leslee Grubb and not to Mr. Bezdicek. As noted by the

officer in his narrative, “While Bezdicek was retrieving his documentation, I asked Grubb if she had any identification on her. *I noticed that Grubb’s movements were slow, lethargic, and she had a hard time staying focused at the task of retrieving her identification for me.*” R. p. 36 ¶3 (emphasis added); “*Grubb continued to lose focus* and turn her attention back to her own cell phone while I was waiting.” R. p. 37 ¶6 (emphasis added) Neither the police narrative nor the officer’s testimony during the ALS hearing presented evidence that Bezdicek had impaired memory or difficulty in following directions. Moreover, the video recording of the field sobriety tests (Exhibit E) affirmatively establishes Mr. Bezdicek did not display any signs of being under the influence. While the officer’s report states that during the HGN, Mr. Bezdicek seemed to have some difficulty focusing upon the officer’s finger that was used as a stimulus. The video, however, disproves this claim. The video reveals that any difficulty in focusing on the stimulus was caused by the officer administering the test. In the video, Mr. Bezdicek comments that the officer’s finger was shaking and Officer Mowery conceding that fact and claims it was because of the cold.

The evidence before the hearing officer established that Officer Mowery did not have legal cause to arrest Mr. Bezdicek nor require him to submit to the evidentiary test. The hearing officer’s conclusion to the contrary is not supported by the evidence and runs contrary to the law concerning the level of significance that can be attached to the HGN. As such, the license suspension should be vacated.

II. The ALS Hearing Was Not Timely Held in Violation of Idaho Code Section 18-8002a.

The license suspension hearing was not held in a timely manner as required by Idaho Code 18-8002A and, thus, the suspension should be vacated. Idaho Code 18-8002A states,

If a hearing is requested, the hearing shall be held within twenty (20) days of the date of the hearing request was received by the department unless this period is, for good cause shown, extended by the hearing officer for one ten (10) day period. Such an extension shall not operate as a stay of the suspension, notwithstanding an extension of the hearing date beyond such thirty (30) day period.

In the case at bar, the request for hearing was made on March 21, 2014. As such, the ALS hearing was required to be held within 20 days or by April 10, 2014. On March 24, 2012, however, the hearing officer issued a show cause letter extending the hearing date to “allow time for the receipt of subpoenaed evidence requested by the petitioner.” Based upon this decision, the hearing was scheduled for April 17, 2014. R. p. 11, ¶6. Without question, the hearing officer did not have good cause to extend the hearing date simply because subpoenas were requested as there was nothing to suggest information sought would not be provided to Mr. Bezdicek before the twenty days for a hearing expired. Clearly, the legislature contemplated the issuance of subpoenas when it established the twenty-day limitation for the hearing to be held. Therefore, the hearing officer’s finding of good cause based solely upon the Petitioner’s request for subpoenas is contrary to the legislature’s intent.

Had there been an issue with the timeliness of securing the documents requested then the Petitioner could have requested that the hearing to be extended. Here, the officer made a preemptive determination which was proven incorrect given that the subpoenas were served by March 25, 2015

and the evidence was received by the Petitioner by March 31, 2014 . R. p. 17, ¶¶ 7, 11)

Since good cause did not exist to allow for the hearing date to extend beyond the twenty day period mandated by law the hearing officer's determination that the hearing was held in accordance with Idaho Code §18-18-8002A was in error.

This Court heard a similar argument in *Peck v. Dept. Of Transp.*, 153 Idaho 37, 278 P.3d 439 (2012) wherein the driver challenged the notice and procedure of the hearing. In *Peck*, the driver claimed reversible error as result of the ALS hearing being held after the twenty day time period. The Court disagreed and found that the driver had failed to establish that the hearing officer lacked good cause for holding the hearing outside the twenty days. No such deficiency exists in this case. Clearly, good cause for extending a hearing beyond the twenty days cannot exist on day one simply because subpoenas were requested.


The driver in *Peck* also failed because he did not articulate how any substantial right was prejudiced. Again, in the case at bar, there is no such shortcoming since Mr. Bezdicek's substantial rights were clearly prejudiced because the delayed hearing resulted in him losing his right to drive without any decision having been made. Given the facts of this case, the hearing was held in violation of Idaho Code Section 18-8002A such that the hearing officer should have vacated the license suspension.

CONCLUSION

Based upon the above, Mr. Bezdicek respectfully requests this Court set aside the agency's decision.

DATED this 20th day of March, 2015.

BLEWETT MUSHLITZ, LLP

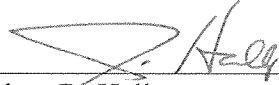
By:  _____
Jonathan D. Hally, a member of the firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2015, I caused to be served two copies of the foregoing document by the method indicated below, and addressed to the following:

Edwin L. Litteneker
Special Deputy Attorney General
Idaho Transportation Department
PO Box 321
Lewiston, ID 83501

- | | |
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By:  _____
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