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Feasel v. Idaho Transp. Dept. Appellant's Reply Brief Dckt. 35720

IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY ALAN FEASEL, Petitioner-Respondent, vs. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent-Appellant.	)	Supreme Court Case No. 35720 D.C. No. CV OC 0800408

REPLY 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 D. DUFF MCKEE
Sr. District Judge

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TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 1

A. The *Reisenauer* case, to the extent relevant, supports Appellant's position 1

B. The term "competent evidence" is not vague and is not relevant to the analysis 4

C. The Hearing Officer properly considered evidence in determining Respondent Feasel was under the influence of a drug or other intoxicating substance 7

III. CONCLUSION 9

CERTIFICATE OF SERVICE 9

TABLE OF CASES AND AUTHORITIES

Page(s)

CASES:

Curtis v. M.H. King Company, 142 Idaho 383, 128 P.3d 920 (2005) 6

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 38 P.3d 617 (2001) 6

Reisenauer v. State Department of Transportation, 145 Idaho 948, 188 P.3d 890 (2008) 1-4

State v. Andrus, 118 Idaho 711, 800 P.2d 107 (1990) 7

Stolle v. Bennett, 145 Idaho 44, 156 P.3d 545 (2007) 6

State v. Bronnenberg, 124 Idaho 67, 856 P.2d 104 (1993) 6

State v. Gleason, 123 Idaho 62, 844 P.2d 691 (1992) 7

State v. Goerig, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991) 8

State v. Reichenberg, 128 Idaho 452, 915 P.2d 14 (1996) 6

STATUTES

Idaho Code § 18-8002A 1

Idaho Code § 18-8002A(7) 5,6

Idaho Code § 18-8004 6

Idaho Code § 18-8004(1)(a) 1,6

Idaho Code § 18-8004(3) 5

Idaho Code § 67-5279(3) 8

MISCELLANEOUS

Idaho Administrative Procedures Act (IDAPA) 5

I.

INTRODUCTION

The parties generally agree on the facts and procedural history of the case. The parties have phrased the issues on appeal differently, which differences appear to drive the structure and arguments of the briefing. Appellant phrases the issue as whether the district court erred in finding no legal cause to believe that Respondent Feasel was under the influence of drugs or other intoxicating substances.

Respondent phrases the issues on appeal as whether I.C. § 18-8002A holds drug tests to a different, causation based adjudicative standard than drug tests and whether the district court properly concluded there was no causal connection between the drug test results and a violation of I.C. § 18-8004(1)(a). Therefore, Respondent's brief does not directly follow the form or analysis offered by Appellant. This reply brief is limited to addressing those issues raised by Respondent's brief.

II.

ARGUMENT

A. The *Reisenauer* case, to the extent relevant, supports Appellant's position.

Respondent asserts that the scope of the Court's prior holding in *Reisenauer v. State Department of Transportation*, 145 Idaho 948, 188 P.3d 890 (2008) is essential to the present case. In fact, the *Reisenauer* case held that the state must prove the substance is a drug in an ALS hearing. Appellant has satisfied the requirement in *Reisenauer*. The question becomes what is the level of proof needed to establish that the drug was intoxicating as to the driver.

The Idaho Supreme Court noted in *Reisenauer* "the State's test need only demonstrate the mere presence of drugs," not the amount of drugs. *Id.* at 951, 188 P.3d at 893. The Court

held that the drug must be *intoxicating*. The Court did not establish criteria for determining whether a drug was intoxicating. In the present case, the Hearing Officer determined that Respondent Feasel's significant impairments and failure of field sobriety tests provided evidence supporting a conclusion that the drugs were intoxicating as to this driver.

Respondent Feasel contends that, even with evidence of a drug and indicia of impairment, without testimony or scientific proof of the causal link between the drug and the impairment the Department can not suspend an individual's drivers license. Respondent Feasel states "[h]ad the examiner found some causal connection between the 'failed' drug test, or the drug Prozac itself and the driver's impairment, this case might be distinguishable from *Reisenauer*." (Respondent's Brief, pg. 7). The Hearing Officer did not specifically say that the drug caused the impairments. The Hearing Officer did state, however the peace officer had legal cause to believe a violation had occurred "because of an admission by the driver of taking prescription medications, slurred speech, impaired memory, [and] failure of field sobriety tests." (AR 028). The Hearing Officer further noted "a violation for drugs requires a determination of the presence of drugs, combined with indications of impairment." (AR 029). The Hearing Officer found indications of impairment.

It is unclear from the *Reisenauer* decision the extent to which the cases are factually similar. The *Reisenauer* case limited its discussion of the driver's impairments to the following:

> On February 26, 2006, Kyle J. Reisenauer drove to the 6th and Main intersection in Moscow. Officer Dustin Blaker pulled over Reisenauer and observed that Reisenauer's eyes were red and that his vehicle emitted "the odor of burnt marijuana." Officer Blaker then instructed Reisenauer to perform several field sobriety evaluations and Reisenauer subsequently was arrested for driving under the influence of alcohol or drugs and transported to the Latah County Jail. At the jail, Officer Rodney Wolverton performed a Drug Recognition Evaluation on

> Reisenauer and concluded that Reisenauer was not safe to drive, as he was under the influence of cannabis and depressants.

Id. at 949, 188 P.3d at 891.

With this discussion, the *Reisenauer* court noted:

> Neither party contests that there existed legal cause to stop Reisenauer, nor does anyone contend that Officer Blaker lacked legal cause to believe that Reisenauer was driving under the influence of alcohol, drugs or other intoxicating substances in violation of the law. The only issue, therefore, is whether the test results showed the presence of drugs or other intoxicating substances.

Id. at 950, 188 P.3d at 892.

In the present case, given the rearend collision, slurred speech, and failure of multiple field sobriety tests, there was legal cause to stop the vehicle and to believe Respondent Feasel was under the influence of alcohol, drugs, or other intoxicating substances. The tests did show the presence of the drug Prozac. Further, Respondent Feasel conceded he had ingested three (3) other drugs. The drug(s) were intoxicating as to Respondent Feasel. Therefore, under the basic reading of *Reisenauer*, the suspension should be upheld

Respondent Feasel attempts to differentiate between the stage of an ALS proceeding where a probable cause affidavit and automatic suspension issue and the adjudicative phase. Respondent Feasel contends that only when a driver challenges a suspension must the Department prove the drug caused the noted impairments. This argument is counter to the clear statutory provisions that a hearing officer can rely upon the officer's sworn statement and a test result, with the driver bearing the burden of establishing the suspension should be reversed.

Respondent Feasel's interpretation of the statute would effectively render it virtually impossible for the Appellant to suspend a license based on drugs or other intoxicating

substances. Rather than relying on a sworn statement of intoxication and the presence of drugs on a test, the Appellant would be required to obtain the testimony of a toxicologist before a license could even be suspended. This rewriting of the statute is clearly in contravention of the legislature's intent and such an interpretation would lead to absurd results.

Respondent Feasel further contends that the Appellant's view of the statute would lead to suspensions in cases where the test showed the presence of children's Tylenol, caffeine or ibuprofen, an antidepressent, or herbal remedies such as Echinacea. Respondent Feasel's argument fails to consider the component of the officer's sworn statement and field sobriety tests. If, for instance, an antidepressant is consumed which results in a driver's inability to safely travel the roads because the antidepressant is intoxicating as to that particular driver a license suspension should follow. In the present case, Respondent Feasel consumed four (4) different drugs and, although he testified they had not affected him in the past, it was clear they affected him on the date and time in question. At its core, the statute is intended to address safety, which safety is compromised when intoxicated individuals drive. Respondent Feasel was intoxicated. The *Reisenauer* case supports Appellant's argument that field sobriety tests and an officer's sworn statement can be used to establish the intoxicating effects a drug has on a driver, as was done in the present case.

B. The term "competent evidence" is not vague and is not relevant to the analysis.

At an administrative license suspension ("ALS") hearing, the results of any tests for the presence of drugs shall be admissible, as is the sworn statement of the arresting officer and the accompanying documents. The burden of proof is on the party challenging the

license suspension. Idaho Code § 18-8002A(7). ALS appeals are governed by the Idaho Rules of Administrative Procedure of the Attorney General. IDAPA 39.02.72.003.

The rules of evidence as described by Attorney General Rule 600 are as follows:

> Evidence should be taken by the agency to assist the parties' development of the record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 04.11.01.600.

Respondent Feasel asserts that the term "competent evidence" of drug use contained in Idaho Code § 18-8004(3) is unconstitutionally vague. Respondent respectfully submits that the aforementioned subsection is not relevant to the analysis. This is so because on its face the subsection deals with how drug use can be considered when a person's alcohol concentration is less that 0.08 "in determining the guilt or innocence of the defendant." In contrast, the ALS does not concern itself with the guilt or innocence of the defendant. Rather, when a peace officer signs a sworn statement that there is legal cause to believe a person had been driving or was in actual physical control of a motor vehicle while under the influence of drugs, the Department shall suspend the person's driver's license, which only may be vacated upon a demonstration that the peace officer did not have legal cause to stop the person, that the officer did not have legal cause to believe the person had been driving while under the influence of drugs, that the testing was faulty or that the person was not

informed of the consequences of submitting to evidentiary testing. Idaho Code § 18-8002A(7)

This statute has explicitly been found to be remedial in nature and not punitive. *State v. Reichenberg*, 128 Idaho 452, 915 P.2d 14 (1996). Hence, the portion of Idaho Code § 18-8004 dealing with competent evidence to find guilt or innocence has no application.

In any event, the term "competent evidence" is not unduly vague. The Idaho courts on numerous occasions have held that substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001); *Curtis v. M. H. King Company*, 142 Idaho 383, 128 P.3d 920 (2005); *Stolle v. Bennett*, 145 Idaho 44, 156 P.3d 545 (2007). As can be seen, the definition of substantial and competent evidence is virtually identical to that standard of evidence used in administrative hearings as set forth in the Attorney General Rules.

Respondent Feasel argues that evidence of drugs in one's system should not be admitted by the hearing officer absent some demonstration of causation. Otherwise, the argument goes, a person taking a simple pain killer could be prosecuted under the statute. It is submitted that it is not possible to read the statute outlawing driving under the influence in the way Respondent Feasel suggests. In order to be guilty of the crime of driving under the influence, a person must have drugs in his system, must be driving and, most important, must be "under the influence" of the drug. Idaho Code § 18-8004(1)(a). The term "under the influence" means impairment of physical or mental function that relates to one's ability to drive. This may be shown by direct or circumstantial evidence. *State v. Bronnenberg*, 124 Idaho 67, 856 P.2d 104 (1993). No specific degree or state of intoxication is required, but

only a showing that enough of the substance has been ingested as to influence or affect the ability to drive. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992). Impairment may be demonstrated by observation of some type of ascertainable conduct or effect. *State v. Andrus*, 118 Idaho 711, 800 P.2d 107 (1990). Given the relaxed level of evidence that the hearing officer may consider under the rules, it is clear that the hearing officer may take scientific evidence of the presence of a drug into consideration when accompanied by evidence of impairment. That is certainly the case here.

In this matter, Respondent Feasel admitted to ingesting four (4) different drugs, any one of which could reasonably be seen to have affected his driving. As a review of the tape of the conversations with Respondent Feasel will demonstrate, Respondent was nodding off while behind the wheel while the first officer on the scene was speaking to him. Although the tape is painfully unclear in sections, there is enough on the tape to demonstrate that Respondent Feasel was in almost a trance-like state and that he claimed that he had used Ambien approximately eight (8) or nine (9) hours before for the first time. Ambien, as is well known, is a sleep agent. Given the failure of several field sobriety tests, not to mention the rearend collision, causation cannot be seriously challenged.

C. The Hearing Officer properly considered evidence in determining Respondent Feasel was under the influence of a drug or other intoxicating substance.

Respondent Feasel contends the hearing officer ignored the most probative evidence and relied on the least probative evidence in upholding the license suspension. Respondent Feasel states a review of the tapes establishes there was no discussion of Prozac and no admission of impairments made by Respondent Feasel. However, the agency's findings, inferences, conclusions or decisions need only be supported by *substantial evidence* in the

record as a whole. *See* I.C. § 67-5279(3). Although Respondent Feasel may disagree with the amount of weight afforded evidence by the hearing officer, there was substantial evidence to support the conclusions reached by the hearing officer.

Respondent Feasel also asserts that there must be a causation component to the drug testing. Without this, it is asserted, the test is nothing more that junk science. Respondent Feasel essentially argues that, once a toxicologist testified that the presence of Prozac in a person's system alone would not prove intoxication and that a urine test can not be "failed," the hearing officer should have vacated the suspension. The hearing officer did not find that Petitioner "failed" a drug test. Rather, it was found that there were numerous indications that the driver was impaired. Further, Respondent Feasel specifically admitted under oath the ingestion of several drugs.[1]

As previously discussed, Respondent Feasel admitted to ingesting lithium. The Idaho Court of Appeals has previously held that lithium is a "drug" for the purpose of the statute prohibiting driving under the influence of an intoxicant. *State v. Goerig,* 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991). In the present case, the drug(s) taken by Respondent Feasel were intoxicating as to him, as established by the traffic accident, observations of the officer, and the results of the field sobriety test.

[1] The fact that the laboratory test only referred to Prozac is not particularly relevant in this case. It is unknown whether Wellbutrin, Ambien or Lithium were even searched for in the testing, and it is unknown whether the Wellbutrin, Lithium or Ambien had time to metabolize to the point where it could be found in the Petitioner's urine at the time of the taking of the test.

III.

CONCLUSION

For these reasons, it is respectfully submitted that the decision of the district court dismissing the Department's suspension of Mr. Feasel's driver's license should be reversed.

Dated this 20th day of May, 2009.

MICHAEL KANE & ASSOCIATES, PLLC

BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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