5-21-2010

State v. Kling Respondent's Brief Dckt. 37322

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE LICENSE SUSPENSION OF MATILDA K. KLING,	Supreme Court No. 37322
STATE OF IDAHO, Plaintiff/Appellant/ Cross-Respondent, *v.* MATILDA K. KLING, Defendant/Respondent/ Cross-Appellant.	

RESPONDENT'S BRIEF

Appeal from the District Court of the
Fifth Judicial District of the State of Idaho,
in and for the County of Blaine

HONORABLE R. TED ISRAEL, Magistrate Judge
HONORABLE ROBERT J. ELGEE, District Judge

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A. NATURE OF THE CASE

This case involves the question as to whether the "NOS Form"[1] is ambiguous as applied to out-of-state licensed drivers who refuse to submit to evidentiary testing under Idaho Code § 18-8002. Since 1998, the Blaine County Magistrate Court has held that the NOS Form is ambiguous, violates a driver's due process rights, and fails to comply with I.C. §18-8002.[2] For the first time in 12 years, the State now appeals that lineage of decisions.

In this particular case, the Respondent, Matilda Kling's ("Kling") vehicle that she driving was stopped on December 8, 2007 by a City of Sun Valley Police officer. On the night of this incident, a vigorous snow storm was covering the roads in Sun Valley with a blanket of snow when Kling was stopped for traveling approximately 10 miles per hour, in a 35 mph zone, as she proceeded west on Elkhorn Road towards Highway 75. According to his Probable Cause Affidavit, Officer Cunningham believed that Kling's vehicle was traveling westbound in the eastbound lane whereupon Officer Cunningham activated his overhead lights and made a motor vehicle stop on Kling's vehicle.[3]

Kling was ultimately arrested for driving while under the influence of alcohol in violation

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[1]The "NOS Form" as referred to in this Respondent's Brief is the "NOTICE OF SUSPENSION for failure of evidentiary testing (advisory for Sections 18-8002 and 18-8002A, Idaho Code)", R., 9-10.

[2]*See,* R., pp. 72 - 104

[3]*See,* R., p. 57

of Idaho Code § 18-8004 ("DUI") whereupon she was transported to the Sun Valley Police Department and requested to submit to a breath test to determine blood alcohol concentration. Kling ultimately refused to submit to the breath test.

B. THE COURSE OF THE PROCEEDINGS IN THE TRIAL COURT AND ITS DISPOSITION

Kling was issued an Idaho Uniform Citation for, in Violation #1 DUI, and in Violation #2 she was actually charged with what purports to be a misdemeanor for "refusal to submit to evidentiary testing" in violation of Idaho Code § 18-8002(3) (hereinafter referred to as the "BAC Refusal").[4] Kling was also issued the NOS Form with a date of service on December 8, 2007. However, Kling's Washington driver's license was not seized by the police officer nor were temporary driving privileges issued.

On December 11, 2007 Kling, through her attorney, timely filed a Special Notice of Appearance and Conditional Request for Hearing under Idaho Code § 18-8002(4)(b).[5] Once discovery was received from the State, Kling filed a Motion to Dismiss BAC Refusal Hearing dated January 2, 2008.[6]

Kling's motion to dismiss the BAC refusal hearing was based upon two theories: (1) that the NOS Form violated Kling's due process rights as guaranteed by the U. S. and Idaho constitutions and violated case precedent decided by the Blaine County Magistrate Court on the basis that the NOS Form was ambiguous as applied to out-of-state licensed drivers; (2) that the

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[4]*See,* Defendant's Exhibit A; Tr., p. 5, L. 6. It is not a criminal offense to refuse to submit to a BAC test.

[5]R., pp. 3-4

[6]R., pp. 11-28

arresting officer failed to file an Affidavit of Refusal within seven days of the service of the NOS Form based upon prior Blaine County Magistrate Court precedent.

Following the hearing on January 9, 2008, the Magistrate Court dismissed the BAC refusal proceeding and made its ruling from the bench (for the trial court's reasoning, *see* Tr. pp. 10-15) and issued a one page form order named Amended Order Dismissing Refusal Proceeding. R., p. 33. In a Notice of Appeal to the district court dated January 23, 2008 the State raised two issues, questioning whether the magistrate erred when it found that the NOS Form "did not provide adequate notice and due process to the defendant" and, secondly, whether the magistrate erred when it "[required] the State to file an Affidavit of Refusal within seven (7) days."

The underlying DUI case was ultimately resolved when the State agreed to amend the charge to inattentive driving to which the Defendant pled guilty and was sentenced to suspended jail and fines and Court costs.[7]

When no action was taken by the State for nearly eight months after filing its Notice of Appeal, Kling filed a Motion to Dismiss the Appeal which was denied by this Court.[8] When the State failed to file a Reply Brief, or set the matter for oral argument before the district court, after another 4 ½ months, Kling again filed a motion to dismiss the appeal for failure to prosecute and, again, the motion was denied by the district court.[9] The parties submitted the matter to the district court on the briefs and the district court affirmed the magistrate.[10] However, the district

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[7]R., p. 58

[8]R., pp. 44-45

[9]R., pp. 121-125

[10]*See*, Order on Appeal, R., pp. 126-138

court denied Kling's request for attorney's fees. The Parties timely appealed those rulings to this Court.

C. STATEMENT OF THE FACTS

With respect to the issues on appeal, most of the pertinent facts have already been recited in the previous paragraphs. In addition, as shown at R., p. 15, a copy of Kling's driver's license is depicted and was issued by the State of Washington. Kling gave her license to the arresting officer when he made initial contact with her at the scene of the stop. After her arrest, Kling was transported to the Sun Valley Police Department where the information contained in the NOS Form was played to Kling through an audio recording of the NOS Form. Kling ultimately refused the BAC test and, as noted on the NOS Form, her Washington driver's license was not seized nor was a permit issued for temporary driving privileges.

Officer Cunningham's Probable Cause Affidavit in Support of Arrest And/or Refusal to Take Test was not filed with the court until December 18, 2007. *See,* R., p. 127 where the district judge noted in his opinion that the affidavit was filed on said date.

II. ADDITIONAL ISSUES ON APPEAL

A. WHETHER THE NOS FORM IS AMBIGUOUS AS APPLIED TO OUT-OF-STATE LICENSED DRIVERS AND VIOLATES THE STATUTE AND DUE PROCESS GUARANTEES.

B. WHETHER, ON A BAC REFUSAL PROCEEDING, THE ARRESTING OFFICER SHOULD BE REQUIRED TO FILE AN AFFIDAVIT OF REFUSAL WITHIN SEVEN DAYS OF THE SERVICE OF THE NOS FORM.

C. WHETHER THE RESPONDENT SHOULD BE AWARDED ATTORNEY'S FEES AND COSTS AND WHETHER THE DISTRICT COURT ERRED IN DENYING KLING'S REQUEST FOR ATTORNEY'S FEES AND COSTS.

III. ARGUMENT

A. THE NOS FORM IS AMBIGUOUS AS APPLIED TO OUT-OF-STATE LICENSED DRIVER, DOES NOT CONFORM TO THE STATUTE AND VIOLATES DUE PROCESS GUARANTEES.

Under Idaho's Implied Consent Law (§18-8002), before a driver can be penalized for refusing to submit to evidentiary testing for alcohol concentration, the driver *must* be advised of the required information set forth in Idaho Code[11] § 18-8002(3). § 18-8002 provides in relevant part that:

> (1) Any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol as defined in section 18-8004, Idaho Code, and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code.
>
> (2) Such person shall not have the right to consult with an attorney before submitting to such evidentiary testing.
>
> (3) At the time evidentiary testing for concentration of alcohol, or for the presence of drugs or other intoxicating substances is requested, the person *shall be informed* that *if he refuses to submit* to or if he fails to complete, evidentiary testing:
>
> (a) He is subject to a civil penalty of two hundred fifty dollars ($250) for refusing to take the test;
>
> (b) *His driver's license will be seized* by the peace officer *and a temporary permit will be issued*; provided, however, that no peace officer shall issue a temporary permit pursuant to this section to a driver whose driver's license or permit has already been and is suspended or revoked because of previous violations, and in no instance shall a temporary permit be issued

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[11]Unless otherwise noted, all references to statutory code sections will be Idaho statutes.

> to a driver of a commercial vehicle who refuses to submit to or fails to complete an evidentiary test;
>
> (c) He has the right to request a hearing within seven (7) days to show cause why he refused to submit to, or complete evidentiary testing;
>
> (d) If he does not request a hearing or does not prevail at the hearing, his driver's license will be suspended absolutely for one year if this is his first refusal and two (2) years if this is his second refusal within ten (10) years; and
>
> (e) After submitting to evidentiary testing he may, when practicable, at his own expense, have additional tests made by a person of his own choosing. (Emphasis added.)

Also, § 18-8002(4)(a) provides that if the driver refuses to submit to BAC testing "his driver's license or permit *shall* be seized by the peace officer and forwarded to the court and a temporary permit *shall* be issued by the peace officer which allows him to operate a motor vehicle until the date of the hearing . . . ." (Emphasis added.)

Under subsection (4)(b), if a person refuses, he must request a show-cause hearing within seven days or the driver suffers a one-year driver's license suspension and a $250 civil penalty. If a hearing is requested by the driver, then the burden of proof is on the "defendant" and the hearing is limited to the question of why the "defendant" did not submit to, or complete, evidentiary testing.

According to subsection (5) of the statute, any "sustained civil penalty or suspension of driving privileges ... shall be a civil penalty separate and apart from any other suspension imposed for a violation of other Idaho motor vehicle codes or for a conviction of an offense pursuant to this chapter . . . ." A BAC Refusal Hearing under §18-8002 is a "civil hearing." *See*, IMCR 9.2(e).

However, this language spelled out in § 18-8002 is much different when compared to the

language in the NOS Form. For example, under paragraph 4(B) on the NOS Form it reads:

> Your *Idaho driver's license* or permit will be *seized* if you have it in your possession, and if it is current and valid you will be issued a temporary permit. *Nonresident licenses will not be seized* and *will be valid in Idaho for 30 days* from the service of the Notice of Suspension unless modified or restricted by the court, provided the license is valid in the issuing state. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind. (Emphasis added.)

However, in paragraphs 4(D) and (C), the advisory does not distinguish between an Idaho driver's license and nonresident licenses.

Those paragraphs read:

> (C) You have the right to submit a written request within seven (7) days to the Magistrate Court of [Blaine] County to show cause why you refused to submit to or complete evidentiary testing and why your driver's license should not be suspended.
>
> (D) If you do not request a hearing or do not prevail at a hearing, the court will sustain the civil penalty and your license will be suspended with absolutely no driving privileges for one (1) year if this is your first refusal; and two (2) years if this is your second refusal with ten (10) years.

Similar language is found in paragraph 5(a) of the NOS Form, with respect to taking and failing the test which does not track the language in § 18-8002A. Neither statute makes a distinction between Idaho licensed drivers and nonresident licensed drivers. The statutes simply provide that the driver's license shall be seized by the peace officer and a temporary permit issued. The license seized by the arresting officer is to then be forwarded to the court and a temporary permit shall be issued.

To add to the matter, further confusing language is found toward the bottom of the NOS Form: "**THIS SUSPENSION FOR FAILURE OR REFUSAL OF EVIDENTIARY TEST(S) IS SEPARATE FROM ANY OTHER SUSPENSION ORDERED BY THE COURT.**"

(Emphasis in capitals and bold, in original.) *See,* R., p. 9. That language fails to track §18-8002(5) and fails to impart to a driver, especially an nonresident, the different suspensions tha could be imposed in the civil area *vis-a-vis* the criminal action.

Plus, in the bottom section of the NOS Form, it purports to provide "... Temporary Driving Privileges" then, in parenthesis right below the bold heading, excepts out drivers of commercial vehicles, *but not* out-of-state licensed drivers. That section of the NOS Form goes on to read:

> If issued, this permit grants the same driving restrictions and privileges as those granted by the license/permit seized (except as indicated above),[12] and shall be valid for thirty (30) days from the date you were served this *Notice of Suspension* for failure or refusal of the evidentiary test(s), unless it is canceled or restricted by the court.

Id.

Then below the above quoted paragraph, the NOS Form indicates that a permit was issued; then crossed out, then the box is checked "No" and the license was not surrendered because the license was "Issued by Another Jurisdiction." *Id.*

To put this issue into historical perspective in Blaine County, since 1998 then Blaine County Magistrate Court has ruled that the NOS Form was ambiguous and violated due process. Understandably, the magistrate in this case did not issue a written opinion analyzing the issue (*see,* R., p. 33, Amended Order Dismissing Refusal), nor was there much colloquy when the court made its ruling from the bench (*see,* Tr., p. 10, Ls. 8-15; pp. 13-14). Thus it is helpful to understand the history of this matter when focusing on the magistrate's rational and order

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[12]Which above? The one indicated right above in parenthesis - that applies to drivers of commercial vehicles - or further above in paragraph 4(B) of the NOS Form. R., p. 9

dismissing the BAC Refusal proceedings. The Honorable Robert J.Elgee was the original magistrate to consider the issue and later became the Blaine County District Court Judge. *See,* the Order on Appeal affirming the magistrate decision to dismiss. *See,* R., pp. 126 - 138.

The first case that was decided by then Blaine County Magistrate Judge Robert J. Elgee was *State of Idaho v. Joseph M. Stanton,* Blaine County Case No. CR-98-8267, R., pp 72-74, where the court held that:

> The language of Idaho Code § 18-8002(3) must be strictly adhered to. That language requires that the driver be told that "his driver's license will be seized." The statute does not distinguish between Idaho driver's licenses and out-of-state driver's licenses. The advisory form's statement that "I will seize your Idaho's driver's license" therefore does not strictly adhere to the language of the statute.
>
> . . .
>
> In this instance, the section of the advisory form providing for temporary driving privileges reinforces the impression that the refusal will not affect the driver's out-of-state driver's license or privileges by stating that the driver's license was not seized and a permit not issued because the license was issued by another state.

See, R., p. 73

Similar things happened in the *Kling* case. The NOS Form has a section that provides temporary driving privileges but it indicates that a permit was not issued, nor was her license surrendered, because it was "Issued by Another Jurisdiction." However, § 18-8002(3) provides that not only would a person's driver's license be seized, but also that a temporary permit will be issued - again, not making a distinction between Idaho driver's licenses and nonresident driver's licenses.

The next case considered by the Blaine County Magistrate was in the *Matter of the Suspension of the Driver's License of Scott Anthony Moss,* Blaine County Case No. CR-99-9247

(SP-99-1873) filed January 7, 2000, R., pp. 76-82. In *Moss*, the court adopted the reason and decision from *Stanton* and made this observation:

> Aside from being advised that a temporary permit cannot be issued to a driver operating a commercial vehicle or to a nonresident, *there is nothing in the form to communicate to an out-of-state driver that his license is suspended if he refuses to take the test or fails the test.* (Emphasis added.)

See, R., p. 79

Even with the minor modifications of the NOS Form that have occurred over the years, paragraph 4(B) of the NOS Form still provides that nonresident licenses will not be seized, and the form is not absolute in its directives to communicate to an out-of-state driver that his license will be suspended if he refuses.

The *Moss* decision further provides:

> Accordingly, the Court draws two conclusions. First, that the form fails to follow the statutes enacted by the legislature, and second, the advisory form creates an unwarranted ambiguity with regard to out-of-state drivers by failing to advise them of the consequences of a refusal. Regarding the ambiguity, this is further reinforced by the bottom section of the form, where the form indicates that a permit was not issued, and that the defendant's license was not surrendered or taken by the police officer because it was "issued by another state."

R., p. 79.

As the magistrate observed in *Moss,* the Idaho Court of Appeals' decision issued in the *Matter of Beem,* 119 Idaho 289, 805 P.2d 495 (Ct. App. 1991) requires that the information required by § 18-8002 be set forth "in no uncertain terms." Also the *Beem* court emphasized that "Our Supreme Court has emphatically discountenanced interjection of judicial gloss upon the legislature's license suspension scheme."

Four years later, the Idaho Court of Appeals again analyzed § 18-8002 and stated that

"Idaho law requires *strict adherence"* to the statutory language of Idaho Code § 18-8002(3)." *Matter of Virgil,* 126 Idaho 946, 895 P.2d 182 (Ct. App. 1995) (emphasis added).

The *Moss* decision concludes with this language:

> This court concludes that the provisions of the Advisory Form relating to the seizure of only Idaho licenses are ambiguous because the form could reasonably be interpreted to mean a refusal might or might not be applicable to out-of-state licenses. By telling a defendant in paragraph 4(C) that his "license will be suspended by the court if he does not request a hearing or does not win at the hearing," the form does not correct the other ambiguities created by the form. In short, the form does not clearly advise a nonresident defendant what is going to happen with his license or his driving privileges.

R., pp. 80-81.

In 2002, the Blaine County magistrate issued its order in *State of Idaho v. Hansen,* Blaine County Case No. SP-02-2808, which affirmed the *Stanton* and *Moss* decisions. R., pp. 85-89.

Lastly, and to provide a full understanding of the magistrate's dismissal in the *Kling* matter, the current Blaine County Magistrate Judge issued its own order dismissing a BAC refusal case *In the Matter of the Suspension of the Driver's License of Green,* Blaine County Case No. CV-08-160, filed March 17, 2008. In that case, the Blaine County magistrate considered the impact of the additional language put in paragraph 4(B) in the NOS Form which previously had only appeared in paragraph 5(A) of the form, *to-wit*: "Nonresident license will not be seized and will be valid in Idaho for 30 days . . . ." R., pp. 20-25.

This additional language in paragraph 4(B) arguably confuses the matter further. While it states that nonresident licenses will not be seized and will remain valid in Idaho for 30 days, it does not indicate what happens after 30 days or what happens in the issuing state.

Even though Blaine County magistrates have been ruling on this issue since 1998, the

matter has not been appealed by the State until this case. This Court is no stranger to reviewing ambiguities in the NOS form with the requirements of the statute. As first stated in the *Matter of Griffths,* 113 Idaho 364 744 P.2d 92 (1987): "[t]he license of a driver who refuses to submit to a requested test will be reinstated if he can establish at the show cause hearing that he was not *completely* advised of his rights and duties under the statute." *Id.,* 113 Idaho at 370, 744 P.2d at 98 (1987) (emphasis added). Not only does the NOS Form fail to technically and strictly comply with the statutory scheme in place at the time it was conveyed to Kling, but it was also misleading and completely incorrect such that the imposition of the license suspension would be "unjust or inequitable," to the use the language in *Griffiths. Id.,* 113 Idaho at 372, 744 P.2d at 100.

The closest case on point from the Idaho Supreme Court, however, would foreclose any of the State's arguments. *In* the *Matter of Druffel,* 136 Idaho 853, 41 P.3d 739 (2002) the Idaho Supreme Court reviewed an administrative license suspension ("ALS") ruling where the Idaho Transportation Department ("ITD") would not issue restricted driving privileges to nonresident drivers that suffered a license suspension under § 18-8002A even though the statute said that restricted driving privileges would be issued. *Druffel* worked its way through the court system by way of a petition for judicial review that was pursued by ITD and the Idaho Supreme Court held that "ITD erred in refusing to allow the nonresident to apply for a restricted driving permit." 136 Idaho at 854. The Idaho Supreme Court agreed with the district court that the ITD exceeded its statutory authority by prohibiting nonresidents from applying for restricted driving privileges when § 18-8002A *does specifically allow* restricted driving privileges.

The *Druffel* case highlights the conflict that has been created by ITD where the statute

does not distinguish between resident and nonresident licenses but ITD, in its NOS Form, does: again, contrary to the mandates of the statute. The Idaho Supreme Court clearly held that ITD exceeded its authority when it chose to do that.

The issue in *Druffel* revolved around whether a nonresident who was suspended under § 18-8002A was entitled to restricted driving privileges. The statute provides that he was entitled to them, but ITD took the position that he was not.

Druffel was a Washington resident but frequently drove in Idaho in the course of business and was arrested in Nez Perce County on June 6, 1999 for driving while under the influence of alcohol. He agreed to submit to an Intoxilyzer test, which he failed, and the officer issued and served a NOS Form on Druffel. As allowed by Idaho law, Druffel requested an ALS hearing and in his request for hearing Druffel alleged, *inter alia,* that the NOS Form was "deficient, vague, ambiguous and insufficient as to constitute proper notice as to what was expected, is to [sic] expected or could happen to an out-of-state driver as regards to the penalty/possibilities as a result of subscribing to the BAC test and blowing .08 or more." *Id.* at 854. The ALS hearing officer sustained the suspension apparently finding that the NOS Form complied with the statute.

Druffel then filed a Petition for Judicial Review with the district court and the district court held that ITD had exceeded its statutory authority by disallowing restricted driving privileges to a nonresident. The district court set aside the administrative license suspension and ITD appealed to the Idaho Supreme Court.

On appeal, ITD argued that it had the power to decide who was eligible for restricted driving privileges on ALS suspensions and ITD even had a regulation that specifically stated that a nonresident was unable to apply for restricted driving privileges, clearly contrary to what the

statute says. In that regard, the Idaho Supreme Court held:

> The language of I. C. § 18-8002A(9) does not allow ITD to differentiate between a resident's and nonresident's ability to apply for restricted driving privileges. . . . The statute as a whole envisions the suspension of nonresident driving privileges. Nonresidents can apply for restricted driving privileges under I. C. § 18-8002A(9) so long as the nonresident applicant meets one of the circumstances listed in subsection (9).

136 Idaho at 857.

Even though *Druffel* was decided in 2002, the ambiguities and blatant inconsistencies between the statute and the NOS Form remain. *Druffel* implicitly holds that the NOS Form is ambiguous and a misstatement of the law when comparing the NOS Form to the statute. It therefore seems axiomatic when the Court considers *Matter of Beem, supra,* and *Matter of Virgil, supra,* - which requires "strict adherence" to the language of § 18-8002 - that the magistrate is correct in ruling that the present edition of the NOS Form still violates the statute and the due process rights of nonresident drivers. Or as observed in the *Matter of Brink*, 117 Idaho 55, 785 P.2d 619 (1990), the Idaho Supreme Court said: "Appellate courts do not have the authority to perform the type of open sentence surgery that the State requests." *Id.,* 117 Idaho at 56.

B. THE MAGISTRATE CORRECTLY RULED THAT THE POLICE OFFICER FAILED TO TIMELY FILE HIS AFFIDAVIT OF REFUSAL.

The Court can dispose of this case by ruling that the NOS Form does not comply with the statute and the due process clauses of the Idaho and the United States constitutions. If the Court so rules, the Court does not have to reach the next issue on whether the State should be required to file an affidavit of refusal within 7 days of the service of the NOS Form. But even if the Court does, there is likewise long line of decisions issued by the Blaine County magistrates, that the police are required to timely file the affidavits of refusal within seven days after service of the NOS Form or seizure of the driver's license.

It is true, and Kling concedes, that § 18-8002 does not specifically indicate that a police

officer file his affidavit of refusal within seven days of the seizure of the driver's license or service of the NOS Form. However, the police officer is required to file it with the court at some point. Also, Kling concedes that the statute does not specifically say that the time requirements for the police officer to file his affidavit start when the NOS Form is served: the triggering event under the statute is when the driver's license is seized. This highlights the confusion and ambiguity created by the State's failure to comply with § 18-8002 through its NOS Form. The statute provides that "a driver's license will be seized by the peace officer and a temporary permit will be issued . . . ." However, as we have seen, for nonresident drivers, the police officer did not seize Kling's license but served a notice of suspension. It is from that event, under § 18-8002(3)(c) that the driver has seven days to request a hearing for a show cause hearing.[13]

In *Kling's* case, the affidavit of refusal was filed on December 18, 2007 but she was arrested on December 8, 2007 and served the NOS Form on that day. The affidavit of refusal, if one applies a seven-day requirement, was required to be filed no later than December 17, 2007. *See*, IRCP 6(a).

On December 11, 2007, Kling timely filed her Special Notice of Appearance and Conditional Request for Hearing which was filed under I.R.C.P. 4(i) and 12(b)(2). *See,* IMCR 9.2(e) which provides that the Idaho Rules of Civil Procedure apply to a BAC Refusal hearing except for certain exceptions not applicable here. Kling's Special Notice of Appearance specifically indicated that "[t]his request is conditioned upon the arresting officer timely

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[13]Also, under § 18-8002(4)(b) it states that a "written request may be made within seven (7) calendar days for a hearing before the court; if requested, the hearing must be held within thirty (30) days of the *seizure* unless the period is . . ." Thus, under this subsection, the triggering event is the "seizure" of the driver's license but what happens if the driver's license is not seized? If not seized, does the court have to have a show cause hearing within 30 days? If so, 30 days from what?

submitting an affidavit of refusal and in the event the arresting officer fails to timely submit said affidavit of refusal, the Petitioner requests that this matter be dismissed."

I.R.C.P. 4 sets forth how a party may make a general appearance or a special appearance. Under I.R.C.P. 4(i)(2) a party may make special appearance in a civil proceeding and as Kling did reserved the right to object to the arresting officer's failure to comply with the rules and statutes that deal with filing an affidavit of refusal and issues of "insufficiency of process" or "failure to state a claim" under I.R.C.P. 12(b). These rules allowed Kling to make a special appearance in the matter to contest the timeliness of the filing of the officer's affidavit.

This Special Notice of Appearance employed by Kling, made *Matter of Hansen*, 121 Idaho 507, 826 P.2d 468 (1992) "inapposite" as that word was used by the Blaine County magistrate. *See,* R., p. 115. In *Hansen*, not cited by the Appellant, the Idaho Supreme Court held that once a request for a BAC Refusal hearing is made by the driver, then there is no need to file an affidavit of refusal. The issue in *Hansen* was a matter of jurisdiction and the Court held that the affidavit was not a condition precedent to confer jurisdiction to the court. Here, however, the *Kling* case was not decided on jurisdictional grounds but more in line with the effective administration of the court's business and the inherent timeliness of these type of proceedings as evidenced by the legislature's specific time limits set forth in §§18-8002 and 18-8002A; or to use the magistrate's words "what is good for the goose is good for the gander, i.e., if the Defendant has a seven day time limit, the State should have the same time limit." R., p 27. Counsel for Kling drafted the Special Notice of Appearance and Conditional Request for Hearing in specific response to *Hansen.*

§ 18-8002(4)(c) does state that the court must receive a sworn statement (the affidavit of

refusal) indicating the circumstances of the refusal before it can suspend driving privileges of a person who has not requested a hearing. Additionally, Idaho Misdemeanor Criminal Rule 9.2(a)(1) provides that: "The court shall not accept a license seized under Section 18-8002, Idaho Code, without an accompanying affidavit . . . ."

The rationale and the basis on the lineage of Blaine County decisions dismissing the BAC Refusal hearings where the police officer failed to file an affidavit of refusal within seven days from the incident, is based upon a recognition of the court's insistence that these matters be processed in a timely fashion and under the "effective administration of the Court's business." *See*, R., p. 119.

An Ada County magistrate who considered this issue found that the seven-day time requirement could be implied when §§ 18-8002 and 18-8002A were considered *in pari materia* where the latter statute required that the police officer submit documents to ITD within five days of the service of the NOS Form while under that same statute, the driver had seven days to request a hearing. Judge Sellman's Memorandum Decision and Order is set forth at R., pp. 105-108, *State of Idaho v. Mark Pasta,* Ada County Case No. M-05-04307. Judge Sellman wrote:

> Nevertheless, there is a limitation implicit in § 18-8002 that requires that said affidavit must be filed within the same seven-day time limit imposed on the driver. As Judge Elgee, formerly magistrate and now district judge in Blaine County in the Fifth District, stated, in several opinions, one of the court's duties is to ensure the effective administration of justice. The failure of an officer to submit an affidavit within the seven-day period set forth in Idaho Code § 18-8002 affects the court's ability to set a timely hearing. Any delay by the officer in submitting the affidavit presents the problem of conducting a hearing within a shortened period of time.

See, R., p. 107.

Also, the current Blaine County Magistrate in other decisions, has adopted the seven-day

time requirement for filing an affidavit of refusal based upon the precedents established by this its predecessor and current Blaine County District Court Judge. For example, *see* R., pp. 26-28, attached to Kling's Motion to Dismiss entitled *State of Idaho v. Brian Watts,* Blaine County Case No. CR-05-769. There the magistrate also noticed the symmetry between Idaho Code §§ 18-8002 and 18-8002A where the latter statute requires affidavits filed within five days.[14] The magistrate also alertly noticed that I.R.C.P. 6(c)(2) requires an affidavit for verified complaint before a court can issue an order to show cause in any civil action. A BAC refusal hearing is, under the language of the statute, a show cause hearing and is a civil proceeding.

Another keen observation by the magistrate is what happens in the situation where the driver refuses, never requests a hearing and the police never submit an affidavit which would cause no suspension of the defendant's driving privileges "even though that possibility exists *ad infinitum.*[15]

The Blaine County Magistrate also observed in the next paragraph that "If there is not a time limit on when the affidavit can be filed, a person could file a timely request for a hearing and then be required to show cause when there is no evidentiary basis to believe that he refused." R., p. 18. Those types of situations in fact occurred in Blaine County.

For example, *see* R., 110-112, *Matter of Haney,* Blaine County Case No. SP-98-1637, where the arresting officer failed to file an affidavit of refusal and forward the petitioner's driver's license with the Court. *See, also,* R., pp. 114-116, *Matter of Powers,* Blaine County Case No. SP-03-3218, where the arresting officer failed to file an affidavit of refusal. *See, also*, R., pp. 117-120, *In the Matter of Burke*, Blaine County Case No. CR 00-10242, where the driver was arrested on December 31, 1999 and it was alleged that she refused to submit to a BAC test whereupon she timely filed a Special Notice of Appearance and Conditional Request for Hearing. The matter was set for a show-cause hearing on January 19, 2000 and still, at that point, the arresting officer's citation, affidavit of refusal and NOS Form had not been filed with the court.

Then, in subsequent decisions, the beam began to focus and narrow in to where, even if

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[14]*See,* R., Footnote 3 in *State v. Watts.*

[15]*See,* R., p., 18, *State v. Watts.*

the affidavit of refusal was filed within 8 to 11 days after the incident and the court was dismissing BAC refusal hearings. As illustrated in *State v. Watts,* R., pp. 26-28, the affidavit of refusal was filed one day late and the Blaine County magistrate nevertheless dismissed for being untimely.

Accordingly, if the Court determines that it must address this issue, Kling urges the Court to follow the rationale and policy considerations established through the case law decided in Blaine County in that affidavits of refusal need to be filed within seven days of the incident or they are untimely and can provide a basis to dismiss BAC Refusal hearings. Consider what happens when the roles are reversed when the driver fails to request a hearing within 7 days: it is a "ministerial" act to enter an order suspending driving privileges for one year. No relief under IRCP 60(b) for such grounds as excusable neglect or mistake by the driver's attorney. *Ausman v. State*, 124 Idaho 839, 864 P.2d 1126 (1993); *Hansen v. State*, 138 Idaho 865, 71 P.3d 464 (Ct.App. 2003)(*rev. denied,* June 2003).

C. KLING IS ENTITLED TO ATTORNEY'S FEES AND COST S

Pursuant to Idaho Appellate Rule (IAR) 41 and IAR 35(b)(5), Kling requests that she be awarded her attorney's fees and costs incurred in this appeal and that the district court's decision denying Kling's request for attorney's fees and costs, be reversed. The basis for the request for attorney's fees is authorized by IRCP 54(e)(1) and §12-117(1), 12-121. Attorney's fees and costs may be assessed against the State under §12-121. *Averett v. City of Coeur d'Alene,* 100 Idaho 751, 605 P.2d 515 (1980). Attorney's fees may be awarded against the State pursuant to §12-117(1). *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 160 P.3d 438 (2007).

The district court erred when it found that no state agency was a party to this proceeding as, under the terms of §12-117(1), it applies to a "civil judicial proceeding involving as adverse parties a state agency or political subdivision...." This proceeding was originally initiated by the police officer when he charged Kling in the Sun Valley Police Department Uniform Citation filed in this matter with Refusal to Submit to Evidentiary Testing, citing §18-8002(3). *See*, Defendant's Exhibit A. The City of Sun Valley Police Department is a political subdivision under 12-117(1). The prosecution in this matter - both the DUI and BAC Refusal - were

assumed from the political subdivision by the State.

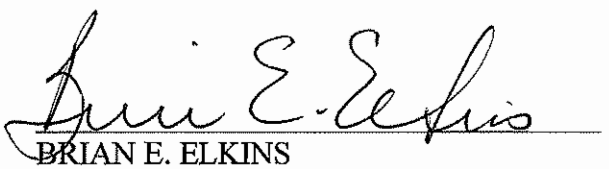
In her Special Notice of Appearance the case heading was named Kling as the Petitioner and the State of Idaho as the Respondent. Before this Court the "State of Idaho" is the Plaintiff/Appellant/Cross-Respondent. Certainly the State is a party to this action and the district court also erred when it found that §§12-117(1) and 12-121 did not apply.

Under §12-117(1) Kling would be the prevailing party and under §12-121 this Court can find that the State's actions in this matter were pursued and defended frivolously, unreasonably or without foundation. Especially when one considers that *Druffel* was decided in 2002 and noted that ITD did not have the authority to differentiate between resident and nonresident drivers when drafting the NOS Form. Notwithstanding that, another five years went by before Kling was charged with a BAC Refusal and the NOS Form was basically unchanged from the time of *Druffel*.

IV. CONCLUSION

Based upon the foregoing, Kling respectfully requests that the magistrate's order be affirmed and that the district court's decision denying Kling her attorney's fees and costs, be reversed and that she be awarded her attorney's fees and costs.

RESPECTFULLY SUBMITTED this 20 day of May, 2010.



BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of May, 2010, I caused two true and correct copies of the foregoing document to be delivered to the following in the method marked herein:

✓ Mailed
_____ Hand-Delivered
_____ Faxed to 208-_____
_____ Faxed and mailed

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