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Peterson v. State of Idaho Department of Transportation Appellant's Reply Brief Dckt. 43374

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE DRIVING) SUPREME COURT NO. 43374
PRIVILEGES OF)
) Nez Perce County No. CV-2014-01995
TONY EUGENE PETERSON,)
)
Petitioner-Appellant.)
)
v.)
)
STATE OF IDAHO, DEPARTMENT)
OF TRANSPORTATION,)
)
Respondent.)

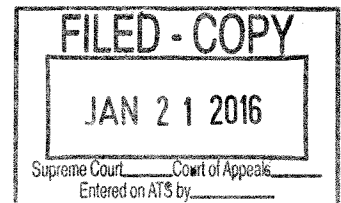
APPELLANT'S REPLY BRIEF

THE HONORABLE JEFF M. BRUDIE
District Judge

IDAHO TRANSPORTATION DEPARTMENT HEARING OFFICER,
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ARGUMENT IN REPLY

THE DISTRICT COURT ERRED IN FINDING THE RECORD CONTAINED SUBSTANTIAL EVIDENCE TO SUPPORT THE HEARING OFFICER'S DETERMINATION WHERE THE RECORD SHOWS TONY PETERSON SUFFICIENTLY ESTABLISHED THAT THE TEST FOR ALCOHOL CONCENTRATION WAS NOT CONDUCTED IN ACCORDANCE WITH THE REQUIREMENTS OF IDAHO CODE SECTION 18-8004(4) AND THAT AS SUCH THE HEARING OFFICER'S DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT WAS BASED UPON THIS UNLAWFUL PROCEDURE.

A. Introduction

Appellant, Tony Peterson (hereinafter "Mr. Peterson") argues the district court erred when it concluded that the Record contained sufficient evidence to support the hearing officer's determination where Trooper Montgomery's report merely stated "The Tests Were Performed in Compliance With the Standards and Methods Adopted by the Department of Law Enforcement," and said standards and methods are arbitrary and capricious where they were established without adequately guaranteeing they meet an applicable standard for reliability. Reliability is an issue here because the standards and methods purported to be used by Trooper Montgomery have been the subject of numerous and unsubstantiated revisions over time and all without evidence that the revisions were based on science. Trooper Montgomery's self-serving, conclusory affidavit was insufficient to overcome the evidence provided by Mr. Peterson that the test for alcohol concentration was not done as required by Idaho Code § 18-8004(4). (See generally Appellant's Opening brief.) In response, Idaho State Department of Transportation (hereinafter "ITD") argues that the hearing officer's decision is based on sufficient evidence in the Record and that Mr.

Peterson failed to meet his burden to show the hearing officer's determination was not arbitrary or capricious. (See generally Respondent's brief.) A review of the record and relevant case law reveals that ITD's argument fails and that the district court erred.

B. Tony Peterson Established That The Test For Alcohol Concentration Was Not Conducted In Accordance With the Requirements Of Idaho Code Section 18-8004(4) And The Hearing Officer Was Required to Consider The Reliability of the Testing Procedure Prior To Making A Decision Based On That Procedure

ITD Hearing Officer Skip Carter was required to vacate Mr. Peterson's administrative license suspension because at the Administrative License Suspension ("ALS") hearing, Mr. Peterson sufficiently established that the results from the alcohol breath test were an invalid basis for a license suspension where the test for alcohol concentration given to him was based upon an unscientific and arbitrary "recommended" testing procedure outlined by the Idaho State Police ("ISP") and ones in which ISP knows, or should know, do not ensure the accuracy and reliability of the test results. As such, the test was not conducted in accordance with the requirements of Idaho Code § 18-8004(4). Under the facts of this case, the taking of Mr. Peterson's driver's license was made upon an unlawful procedure and is arbitrary, capricious and an abuse of discretion. See I.C. § 67-5279. In State v. Breed, 111 Id. 497, 725 P.2d 202 (Ct. App. 1986), the Court of Appeals stated:

"The purpose of Section 18-8002, as we read it, is to provide an incentive for motorists to cooperate in determining levels of blood-alcohol content by a **reasonable precise scientific method.**" (emphasis added)

at. p. 501.

In its responsive brief, ITD argues that in order for Mr. Peterson to advance this argument, the Idaho State Police must be a party to the proceeding. (Resp't Br. P. 13.) ITD further states that its hearing officer does not have the authority to determine the reliability of the testing procedure and that a "collateral attack" on the Breath Alcohol Testing SOPs cannot be made upon judicial review of an action by ITD. (Resp't Br. P. 14.) The ISP was granted express statutory authority to make rules with regard to alcohol testing through an enabling statute. Specifically, Idaho Code Section 18-8002(A)(3) is the enabling statute for the Idaho State Police's rulemaking authority with regard to alcohol concentration testing. The State of Idaho Transportation Department was granted express statutory authority to to make rules or to determine contested cases. (Idaho Code § 49-101, *et. seq.*, see also, I.C. §§ 67-5201(1), (7)). ITD is expressly defined in I.C. § 49-105 as "*[d]epartment means the Idaho transportation department acting directly or through its duly authorized officers and agents. . .*" Idaho Code Section 18-8002(A) is also the enabling statute for ITD's authority for formal adjudication where it is expressly given the authority to make decisions that affect the personal or property rights of individuals. An administrative license suspension is an a formal adjudication insomuch that it is a decisional procession involving an adversarial hearing mandated by a statute. A decision made by hearing officer acting within the adjudicatory capacity given to ITD must still follow the proper analysis for decision making, which includes the authority to decide if the foundation upon which the decision is based is procedurally flawed or unlawful. Notably, when faced with evidence that shows that the legislature passed I.C. § 18-8004(4) to require valid methods

of breath testing and ISP makes rules that weaken the breath testing standards so that any reading is admissible, the hearing officer must take that into consideration when formulating a decision. If he does not, the issue is available for judicial review. Moreover, through the authority granted to it by the legislature, ITD is tasked with the adjudication function regarding the license suspension of intoxicated drivers. And under this granted authority, ITD's hearing officers must scrutinize the basis for which its decision is made, including looking into the actions or non-action of ISP when formulating and promulgating the BATSOPs under I.C. § 18-8004(4). Again, Mr. Peterson's argument is not a collateral attack on the breath testing standards; it's an attack pursuant to: I.C. § 67-5279(3); I.C. § 18-8002A(3); I.C. § 18-8002A(7)(c)(d); and I.C. § 18-8004(4).

As Mr. Peterson contend a hearing officer's decision based upon deficient SOPs would be a decision made upon unlawful procedure. Further, a hearing officer's decision made upon unlawful procedure is ripe for judicial review, especially when IDAPA Rule 11.03.01.003 does not provide an appeal and Idaho Code § 62-5270 statutorily affords review. (See Idaho Code § 67-5279(3)(c)) An administrative rule will not trump a statutory provision. Therefore, the Idaho State Police does not need to be a party to this proceeding as ITD contends. And, the hearing officer may absolutely determine the reliability of the testing procedure prior to making a decision based on that procedure that would result in an agency action.

C. The Hearing Officer's Decision Is Not Supported By Substantial Evidence On The Record When The Hearing Officer's Findings Of Facts and Conclusions Of Law Are In Direct Conflict With The Proffered Evidence That Calls Into Question The Reliability Of The Standard Operating Procedures That The Hearing Officer's Decision Is Based Upon

Mr. Peterson contends that the hearing officer's findings of fact and conclusions of law and order are not supported by substantial evidence on the record when the record contains evidence in conflict with the hearing officer's findings and said findings fail to address the uncontroverted evidence of Dr. Anstine. As discussed above, the hearing officer may absolutely determine the reliability of the testing procedure prior to making a decision based on that procedure that would result in an agency action, and in this case, Mr. Peterson contends that the hearing officer failed to do so. Due to this error, the hearing officer's decision is not supported by substantial evidence in the record.

Based upon the testimony of Dr. Astine and the documents provided by Mr. Peterson which outline the lax approach undertaken by ISP when creating its breath testing standards, it is clear that the breath testing system was not "a reasonable precise scientific method" as the Breed court found the statute to require. Moreover, the Court of Appeals in State, ITD v. Gibbar interpreted Idaho Code § 18-8002A(7)(c) and (d) "as permitting [administrative license suspension] petitioners to challenge the results of their BAC test by proving that the testing equipment was inaccurate or was not functioning properly because the State has adopted procedures that do not ensure accuracy and proper functioning." State, ITD v. Gibbar, 143 Idaho 947, 155 P.3d 1186 (Ct. App. 2007). As such, ISP violated the requirements of I.C. §§ 18-8004(4) and 18-8002A(7). The Court of Appeals was

able to recognize the scientific shortcomings of the procedures created by ISP. The testimony offered by Mr. Peterson's expert witness, Dr. Anstine, was a scientific explanation of why the procedures created by ISP are deficient and unreliable. It is not a stretch for the hearing officer to conclude that the SOPs for breath alcohol testing are invalid for failure to establish a reasonable precise scientific method, and that as such any decision made on this SOP would result in an agency action resting upon that must be set aside.

ITD argues that Dr. Anstine's testimony did not amount to a showing that the particular test administered to Mr. Peterson was not reliable. (See generally Resp't Brief). Dr. Anstine's testimony showed that not only was the particular test administered to Mr. Peterson unreliable, but that the entire BATSOP scheme is unscientific and unreliable. Reliability is a fundamental requirement in general, but is especially required when the legislature has allowed the expedited introduction of breath test results in DUIs and ALS matters. Without a method of ensuring reliability the results of a breath test cannot serve as the foundation for an agency's decision that affects a personal or property right of an individual. Through the testimony of Dr. Anstine, there was sufficient evidence to show that the standard operating procedures for the administration of breath tests lack the scientific rigor to produce reliable results. And just as a law cannot ignore the rules of scientific procedure, neither can the ISP when it formulates procedural standards based upon science. ISP cannot circumvent the standards of reliability established by the scientific community, which is exactly with the SOPs are attempting to do. The laissez-faire approach currently adopted by the ISP

cannot ensure reliability to the required standard necessary for the constitutional application of I.C. § 18-8004(4).

Here, because the hearing officer dismissed the significance of reliability, based his decision upon a breath test result and the record is filled with substantive evidence directly related to the lack of scientific reliability of test results, there did not exist sufficient evidence in the record to support the hearing officer's decision.

CONCLUSION

For the reasons stated herein, Petitioner-Appellant Tony Peterson, again respectfully requests that this Court reverse the findings of the Hearing Officer and remand the matter back to ITD with instructions to vacate the suspension of Mr. Peterson's driving privileges.

DATED this 19 day of January, 2016.

CLARK and FEENEY

By  _____


Paul Thomas Clark, a member of the firm.

Attorneys for Petitioner-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of January, 2016, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Edwin L. Litteneker Special Deputy Attorney General Idaho Transportation Department 322 Main Street P.O. Box 321 Lewiston, ID 83501	U.S. Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy
--	---

By:  _____
Attorney for Petitioner-Appellant