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Hamilton v. State of Idaho, Department of Transportation Appellant's Reply Brief Dckt. 43510

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IN THE SUPREME COURT OF THE STATE OF IDAHO

PATRICK GLEN HAMILTON,)
)
Appellant/Petitioner,) Docket Number No. 43510
)
vs.)
)
State of Idaho,)
Department of Transportation,)
)
Respondent.)

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho,
in and for the County of Nez Perce regarding a judicial review of an ALS hearing officer
decision.

The Honorable Chief Justice and Associate Justices of the Idaho Supreme Court

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Supreme Court _____ Court of Appeals _____
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COMES NOW the Appellant, Patrick Glen Hamilton, by and through his attorney of record, CHARLES M. STROSCHEIN of the law firm of Clark and Feeney, and responds to the State's brief.

III.
ARGUMENT

A.
**THE SOPS ARE VOID AND THEREFORE THE BREATH TEST
RESULTS CANNOT BE USED TO SUPPORT A LICENSE SUSPENSION**

The State in its Respondent's Brief states: "The Administrative Procedures Act permits the Idaho State Police to adopt a temporary rule effective upon its publication in the Idaho Administrative Bulletin, I.C. § 67-5226. The Governor's finding clearly justifies ISP's temporary rulemaking." Respondent's Brief at p. 16. Mr. Litteneker attached to his Respondent's Brief a copy of the section Idaho Administrative Bulletin that sets out the temporary rule. That Administrative Bulletin is dated October 1, 2014. Based on the State's argument, the IDAPA rules regarding breath testing would have been effective on October 1, 2014, not on September 7, 2014.

Idaho Code § 67-5226(1) states: "(1) If the governor finds that: (a) Protection of the public health, safety, or welfare; ...". There is nothing in this record that indicates that the Governor made any findings that justifies ISP's temporary rulemaking. The language from the legislature is quite clear that the Governor has to make a finding that the temporary rulemaking is justified. Based on Mr. Litteneker's argument, the temporary rule would not have been effective until October 1, 2014, which doesn't justify the finding made by the hearing officer in Mr. Hamilton's case. The State, in its briefing, does not cite to the hearing officer's specific finding. The hearing officer noted:

“4. WAS THE EVIDENTIARY TEST PERFORMED IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN IDAHO CODE AND ISPFS SOP? 1. Senior Trooper Talbott’s sworn statement states the evidentiary test was performed in compliance with Idaho Code and ISPFS SOP. 2. Hamilton’s evidentiary test was performed in compliance with Idaho Code and ISPFS SOP.

Findings and Conclusions, p. 6, Exhibit to Clerk’s Record, p. 363

The hearing officer goes on to note:

5. DID THE EVIDENTIARY TESTING INSTRUMENT FUNCTION PROPERLY WHEN THE TEST WAS ADMINISTERED? ... 2. The valid performance verification check approved the instrument for evidentiary testing in accordance with ISPFS SOP.

Findings and Conclusions, p. 6, Exhibit to Clerk’s Record, p. 363

The arresting officer’s declaration states as follows:

“Defendant was tested for alcohol concentration, drugs, or other intoxicating substances. The test(s) was/were performed in compliance with Section 18-8003 & 18-8004(4), Idaho Code, and the standards and methods adopted by the Department of Law Enforcement.”

Exhibit to Clerk’s Record, p. 6

The Department of Law Enforcement did not exist in September 2014. The Trooper cited to standards and methods that haven’t been in existence for several years. There may be an argument that the Department of Law Enforcement is now ISP Forensic Services but why doesn’t the Declaration cite to ISP Forensic Services. The Declaration is specific to the standards and methods adopted by the Department of Law Enforcement. The hearing officer was very specific in his findings that he used ISP Forensic Services’ SOP; not administrative rules. In *Hern v. State of*

Idaho, Department of Transportation, Court of Appeals, Docket No. 42287, Opinion No. 87 (Ct. App. 2015) and *Ewing v. State of Idaho, Department of Transportation*, Docket No. 42599, Unpublished Opinion No. 777 (Ct. App. 2015), the Court of Appeals determined the SOPs were void. Clearly, rulemaking did not take effect until after Mr. Hamilton's breath test, therefore, the application of *Hern* and *Ewing*, to Mr. Hamilton's case is appropriate. See also *State v. Haynes*, 159 Idaho 36, 355 P.3d 1266 (2015), *State v. Riendeau*, 159 Idaho 52, 355 P.3d 1282 (2015), *State v. Nauert*, Kootenai County Case No. CR 2013-10176, Supreme Court. No. 0042441-2014 (dismissed upon motion of the State). Mr. Hamilton's initial briefing was submitted to the Court prior to the decisions issued by the Court of Appeals in *Hern* and *Ewing*.

The hearing officer, in Mr. Hamilton's case, did comment on the argument regarding IDAPA rulemaking and simply noted that: "On September 2, 2014, ISP Forensic Services adopted the SOP into the IDAPA rules." The hearing officer then cites to websites. ISP Forensic Services did not "adopt the SOP" into the administrative rules. The SOP is void. Based on the Attorney General's statement in his brief, the IDAPA rules did not become effective until October 1, 2014. However, there is no evidence in this record of compliance with I.C. § 67-5226(1). The Governor did not making a finding.

As this Court is aware, the arresting trooper avoided being subpoenaed so he could not be questioned regarding his outdated Declaration and his knowledge of any newly drafted IDAPA rules. Common sense would probably dictate that Trooper Talbott would not have had any knowledge of

any IDAPA rules regarding breath testing in the State of Idaho since nothing was published until October 1, 2014.

At no time, during the hearing on October 1, 2014, did hearing officer Eric Moody, note for the record that he was considering any IDAPA Rules regarding breath testing. He does say that he is going to take judicial notice of the Idaho Administrative Procedures Act, the Idaho State Police Forensic Website, relevant city or county ordinances, Idaho statutes, Court decisions and the National Highway Traffic Safety Administration Manual for field sobriety testing. Counsel had previously filed an objection to judicial type notice. Exhibit to Clerk's Record, p. 39, Tr., pp. 7-8.

The District Court in Mr. Hamilton's case used his decision regarding the SOPs from *Hern v. ITD* to justify his *Hamilton* decision. As this Court is aware, Judge Brudie's decision in *Hern v. ITD* was overturned on December 30, 2015. The District Court's analysis was wrong on the issue of the SOPs. The SOPs are void and not a basis for breath testing. The hearing officer used the SOPs for his finding proper breath testing.

Mr. Hamilton has met his burden, as did Mr. Hern and Mr. Ewing, regarding the argument of the SOPs. The State noted: "Mr. Hamilton offers nothing more than the same unsubstantiated argument consistently rejected by the Court." Respondent's Brief, p. 17. This is the same sort of argument the State made with regard to Mr. Ewing and Mr. Hern's cases. The argument regarding the SOPs was "substantiated" in *Hern* and *Ewing* and Mr. Hamilton has met his burden pursuant to I.C. § 18-8002A(7)(d). Therefore, the Court must determination that the breath test does not support the license suspension.

B.
**THERE WAS NO LEGAL CAUSE TO STOP MR. HAMILTON'S
MOTOR VEHICLE PURSUANT TO I.C. § 18-8002A(7)(a)**

The State's Brief fails to take into account the fact that I.C. § 49-456(1) must be construed with the rest of the provisions in the chapter dealing with registration. "Language of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as to determine the legislature's intent." *Lockhart v. Dep't of Fish and Game*, 121 Idaho 894, 897, 828 P.2d 1299, 1302 (1992)". *State v. Neal*, 159 Idaho 439, 362 P.3d 514 (2015). The District Judge in *Hamilton* did not discuss or construe I.C. § 49-456(1). The State simply says the statute doesn't apply but doesn't explain why I.C. § 49-456(1) doesn't apply. Again, let's be clear, Mr. Hamilton did not have an improper registration sticker as was determined by the hearing officer. The hearing officer said: "I.C. § 49-428(2) clearly notes a vehicle is not properly registered if the registration sticker is not located on the license plate as set forth in I.C. § 49-443(4)." I.C. §49-428(2) does not "clearly" note that a vehicle is "not properly registered" if the registration sticker is outside the rectangle box. This finding is not the reason Mr. Hamilton was pulled over. Mr. Hamilton was pulled over because the registration sticker was not in the rectangle box. The hearing officer's decision is based on an improper registration or improper registration sticker, which is not found on this record. The only thing that is found on this record is the fact that the registration sticker was not in the rectangle box. Findings and Conclusion, pp. 4-5, Exhibit to Clerk's Record, pp. 361-362.

Idaho Code § 49-456 and I.I.R. 9(b)(16) are applicable to the analysis in this case. Of course the State ignores I.I.R. 9(b)(16) which states:

Operating vehicle without registration. Section 49-456(1), Idaho Code. (Fixed penalty \$44.50, court costs \$16.50, county justice fund fee \$5.00, peace officers training fee \$15.00, court technology Fund fee \$10.00, and emergency surcharge fee \$10.00).

There is no Infraction Rule for I.C. § 49-443. The bottom line for the Court is: What is the intent or purpose of I.C. § 49-456(1); and how is the driving public to interpret such a statute?

C.

THE APPLICATION OF I.C. §§ 49-428, 49-443 and 49-456 ARE VAGUE

The State argues: “To be successful, Mr. Hamilton must demonstrate that I.C. §§ 49-428 and 49-443 are impermissibly vague in all of their applications.” Respondent’s Brief, p. 11. The State ignores the U.S. Supreme Court Case, *Johnson v. United States*, 135 S.Ct. 2551, 2560-61, 192 L.Ed.2D 569 (2015). *Johnson* was cited in the first brief filed by Mr. Hamilton but will be noted again because the State failed to realize that this U.S. Supreme case trumps Idaho case law. The U.S. Supreme noted in *Johnson*:

In all events, although statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp. For instance, we have deemed a law prohibiting grocers from charging an “unjust or unreasonable rate” void for vagueness – even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. *L. Chen Grocery Co.*, 255 U.S. at 89, 41 S.Ct. 298. We similarly have deemed void for vagueness a law prohibiting people on sidewalks from “conduct[ing] themselves in a

manner annoying to persons passing by” – even though spitting in someone’s face would surely be annoying. *Coates v. Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). These decisions refute any suggestions that the existence of *some* obviously risky crimes establishes the residual clause’s constitutionality.

Johnson v. United States, 135 S.Ct. 2551, 2560-61, 192 L.Ed.2D 569 (2015)

The State, in its brief, goes on to argue as follows:

“Mr. Hamilton also fails to advise the Court of a recent decision interpreting I.C. § 49-808, where the Court of Appeals found that I.C. § 49-808 was not unconstitutionally vague as applied, *State v. Colvin*, 151 Idaho 881, 341 P.3d 589 (Ct. App. 2014).”

Respondent’s Brief, p. 12

This argument seems odd considering that Mr. Hamilton, in his initial brief specifically went head on against the holding in *Colvin*. See Appellant’s Brief, p. 25. The Court would be right to be suspect of the State’s argument in Mr. Hamilton’s case.

The State also indicates that somehow Mr. Hamilton failed to analyze the effect of *State v. Martin*, 148 Idaho 31, 218 P.3d 10 (Ct. App. 2009). Respondent’s Brief, p. 12. Mr. Hamilton’s Appellant’s Brief does address *State v. Martin* as the *Martin* Court failed to apply I.C. § 49-456(1) in its decision.

The State also argues that Mr. Hamilton failed to preserve vagueness for judicial review by failing to argue vagueness before the hearing officer. Mr. Hamilton already addressed this point in his opening Appellant’s Brief by noting the argument was made to the hearing officer. The District

Court obviously thought that the issue was properly before it on judicial review because the District Court wrote a decision specifically addressing the issue. R., at p.106.

The State simply wants to ignore the record in this case regarding vagueness. The hearing officer commented on I.C. § 49-456. The District Court decided to ignore I.C. § 49-456 in violation of case law that instructs courts to look at all relevant statutes when trying to analyze the intent of a statutory scheme. *State v. Neal*, 159 Idaho 439; 362 P.3d 514 (2015).

Due process requires that a driver be informed as to what the State commands or forbids and that persons of ordinary intelligence not be forced to guess at the meaning of the law. As a result, criminal statutes must plainly and unmistakably provide fair notice of what is prohibited and what is allowed in language persons of ordinary intelligence will understand. In addition, a statute is void for vagueness if it invites arbitrary and discriminatory enforcement. See *State v. Bitt*, 118 ID 584, 798 P.2d 43 (1990) and *State v. Cobb*, 132, ID 195, 969 P.2d 244 (1198) In *Hamilton*, a person of ordinary intelligence would believe that I.C. § 49-456(1) applies to what is unlawful with regard to registration issues because that is was the statute actually says. What are the standards law enforcement is to use to pull someone over when the registration sticker is not in the rectangle box? The State ignores this portion of the argument regarding vagueness.

The photos of the other license plate clearly show the registration sticker not totally in the rectangle box. Would law enforcement have the right to pull this vehicle over because the registration sticker was not totally in the rectangle box. How is one to know how far in, how far out,

how straight, how crooked the sticker has to be? No one knows. Judge Schwartzman filed a concurring opinion in *State v. Dewbre*, 133 Idaho 663, 991 P.2d. 388 (Ct. App. 2010) in which he wrote in a footnote:

[1] My empirical, but thoroughly unscientific, study on this observation was fully vindicated on my trip North over Highway 55/95. With the *possible* exception of myself, now fully cognizant of the impending oral argument in this case, I can attest that no signals were given by the general travelling public within my line of vision, excluding one slow-moving vehicle dutifully moving to the right. Had I.S.P. Officer Yount been with me, he could have had a *field day* handing out tickets for alleged 49-808 violations. (emphasis original)

The same can be said for Mr. Hamilton's counsel's observation of the parking lot at the Idaho Supreme Court building regarding placement of registration stickers on vehicles parked next to the Idaho Supreme Court building. One will assume that the vehicles in said parking lot were driven and owned by individuals who worked in the Supreme Court Building.

The Court cannot ignore the application of I.C. § 49-456(1) in the determination of the vagueness challenge in this case. The Court cannot ignore the issue of how law enforcement might determine who they can stop for not having the registration sticker totally in the rectangle that has been placed in the lower right hand corner of Idaho license plates. The statutory scheme found in Chapter 4 of Title 49 is vague.

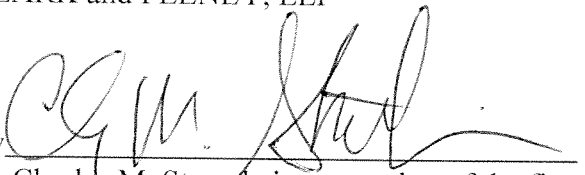
VI. **CONCLUSION**

ISPFS has failed to follow the statutory mandate of I.C. § 18-8002A and § 18-8004(4) regarding "rule" making and thus the breath testing for Mr. Hamilton can not be used to suspend his

license. I.C. § 67-5279 mandates a reversal because this action of the agency was unconstitutional, as beyond statutory authority and was arbitrary. Additionally, there was no legal cause to stop Mr. Hamilton. The three statutes noted above when read together are vague. The Court must set aside the hearing officer's decision and send the matter back to the Department with instructions to set aside the suspension.

DATED this 22nd day of February, 2016.

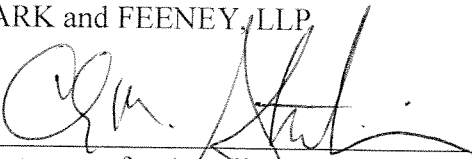
CLARK and FEENEY, LLP

By 
Charles M. Stroschein, a member of the firm
Attorneys for Appellant

I hereby certify on the 22nd
day of February 2016, a two (2) true
copies of the foregoing instrument
was: Mailed
 Faxed
 Hand delivered to:

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Special Deputy Attorney General
Idaho Transportation Department
P.O. Box 321
Lewiston, ID 83501

CLARK and FEENEY, LLP

By 
Attorneys for Appellant