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Peck v. State, Dept. of Transp. Appellant's Reply Brief Dckt. 38542

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IN THE SUPREME COURT OF THE
STATE OF IDAHO

RAYMOND SCOTT PECK,)	DOCKET NO. 38542-2011
)	
Petitioner/Appellant,)	
)	
v.)	Bonner County Case
)	No. CV-2010-0047
)	
STATE OF IDAHO, DEPARTMENT OF)	
TRANSPORTATION,)	APPELLANT'S REPLY BRIEF
)	
Respondent/Respondent.)	
)	

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District of
the State of Idaho, in and for the County of Bonner

THE HONORABLE STEVE VERBY, DISTRICT JUDGE, PRESIDING

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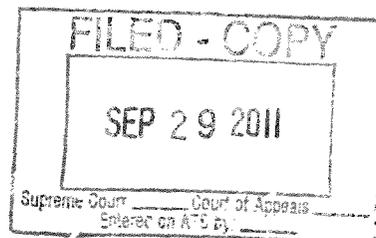


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TABLE OF CASES AND AUTHORITIES

CASES

Bennett v. State, Dept. of Transp., 147 Idaho 141, 206 P.3d 505, (Idaho Ct. App. 2009) 4

Dabestani v. Bellus, 131 Idaho 542, 961 P.2d 633 (1998) 3

Wanner v. State, Dept. of Transp., 150 Idaho 164, 244 P.3d 1250 (2011) 1

STATUTES

Idaho Code § 18-8002A(2) 1

Idaho Code § 49-105(11) 3

Idaho Code § 49-335(2) 1

Idaho Code § 49-654(2) 3

RULES

None

TYPOGRAPHIC ERRORS IN RESPONDENT'S BRIEF STATEMENTS

In the Respondent's Brief on page 1, in Part I. Statement of the Case, Sub-Part A. Nature of the Case, reference is made to "...after Burton's failure of an evidentiary test...." This reference is likely a typographical error. Also, in the Respondent's Brief on page 1 in Part II. Statement of the Facts in the second paragraph, reference is made to "Officer Schneider served Peck...." This reference is also likely a typographical error.

REPLY ARGUMENT ON APPEAL

I. THE STATUTORY ADVICE IS DEFICIENT

In the Appellant's Brief, Part III. of the Argument, commencing on Page 8, the Appellant asserts that the lack of notice in the Notice of Suspension advisory form (Agency R., pgs 1-2) of the consequences of Idaho Code § 49-335(2) fails to satisfy the notice requirements for implied consent of Idaho Code and of due process, as it fails to give notice of the provisions and consequences of Idaho Code § 49-335(2). The Respondent ITD merely sets forth the statutory provision for notice in Idaho Code § 18-8002A(2). The Respondent ITD fails to address in its Respondent's Brief the due process arguments, including the recent cases regarding the statutory and constitutional requirements. The Respondent ITD fails to address the concern raised in Wanner v. State, Dept. of Transp., 150 Idaho 164, 244 P.3d 1250, 1252 (2011), that the Notice of Suspension advisory form does "...not address the situation presented by ... the consequences of refusing or failing evidentiary testing for the holder of a CDL who was not operating a commercial vehicle at the time of contact

with law enforcement. This is significant because I.C. § 49-335(2) provides that a motorist who fails evidentiary testing is disqualified from operating a commercial vehicle for not less than one year." The Respondent ITD appears to ignore that implied consent is the basis for the notice provisions being in the statute and does ignore Peck's substantial right to be free of search or seizure. Implied consent requires notice of one's rights and the consequences. As no notice is given of the disqualification provisions of Idaho Code § 49-335(2), there is no implied and no informed consent.

II. THE AFFIDAVIT AND TEST RESULTS ARE LACKING

In the Appellant's Brief, Part IV. of the Argument, commencing on Page 10, the Appellant asserts three specific deficiencies in the Affidavit and test results used to sustain the suspension (Agency R., pgs 3-8). The Respondent ITD only seeks to address the jurisdictional deficiency of showing that the acts occurred in the State of Idaho. The caption of the affidavit and the location where the officer signed the affidavit are not evidence of facts of the underlying conduct that is the subject of the affidavit. The inability of the Respondent ITD to point to any evidence other than the caption shows that the affidavit is defective to identify the alleged acts as occurring in the State of Idaho.

In addition, when taken as a whole, the credibility of the affidavit and test results are lacking on their face. The Respondent ITD fails to even attempt to argue otherwise. The

credibility necessary for the affidavit testimony is too lacking to support the alleged facts and/or suspension.

III. THERE WAS NO PROBABLE CAUSE

In the Appellant's Brief, Part V. of the Argument, commencing on Page 11, the Appellant asserts that the speed limit in effect at the location was not 35 miles per hour based upon statute. The Respondent ITD attempts to rely upon the officer's general statement that the speed limit was posted at 35 miles per hour. The Respondent ITD fails to understand the provisions of Idaho Code § 49-654(2) and Idaho Code § 49-105(11). The allegation of a posted sign contrary to the actual speed limit is insufficient to show probable cause.

The Respondent ITD fails to understand the statutory provision which would authorize an incorporated city to act. Further, the Respondent ITD also tries to dismiss the holding in Dabestani v. Bellus, 131 Idaho 542, 549, 961 P.2d 633, 638-640 (1998), that a posted speed limit sign not in conformance with the actual speed limit is of no force and effect. The Respondent ITD indicates that the holding concerns a jury instruction, but the jury instruction involved was as to what the actual speed limit was (which was different than the speed limit sign which was posted).

It cannot be presumed or even assumed that a posted speed limit sign controls what statutory District exists. The posting must comply with the District, as defined by statute, to be valid and enforceable. The Respondent ITD and its hearing officer cannot "assume" matters not in the record and contrary to the

statutory scheme establishing speed limits.

IV. THE BAC TESTING DID NOT MEET THE APPLICABLE PROCEDURES

In the Appellant's Brief, Part VI. of the Argument, commencing on Page 14, the Appellant asserts that Peck's testimony that he belched during the second 15 minute monitoring period meets his burden of proof to overcome the officer's probable cause form affidavit which only provides generalized statements regarding employment of proper procedures. The Respondent ITD attempts to characterize consistent evidence presented in the form affidavit and with the consistent evidence presented by Peck that there were two 15 minute observation periods, as somehow presenting evidence from the office that no belch occurred to controvert Peck's testimony. The facts of the belch are uncontroverted. The Respondent ITD fails to recognize that the holding in Bennett v. Idaho Dept. of Transportation, 147 Idaho 141, 144-145 (Idaho App. 2009) is not limited to just circumstances where the officer leaves the room during the observation period. The hearing officer's findings and conclusion as to the belch are not support by any evidence in the record and are clearly erroneous.

CONCLUSION

As set forth in the Petitioner's Brief and as set forth above, the decision of the Hearing Examiner sustaining the Notice of Suspension should be vacated, as well as the District Court's decisions sustaining the suspension. The relief sought is to reverse the Findings of Fact and Conclusion of Law and Order by

denying and/or vacating the suspension of the Peck's driving privileges, to reinstate the driving privileges, and if applicable, for an award to Peck of attorney fees and costs against the Respondent.

RESPECTFULLY SUBMITTED this 27th day of September, 2011.


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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2011, two (2) true and correct copies of the foregoing, were served by deposit in the U.S. Mail, postage prepaid, and were addressed to:

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