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Platz v. State Appellant's Reply Brief 1 Dckt. 39805

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**IN THE SUPREME COURT OF THE
STATE OF IDAHO**

**IN THE MATTER OF THE DRIVING)
LICENSE PRIVILEGES OF CHAUNCEY)
JACK PLATZ)**

CHAUNCEY JACK PLATZ,

Petitioner-Respondent,

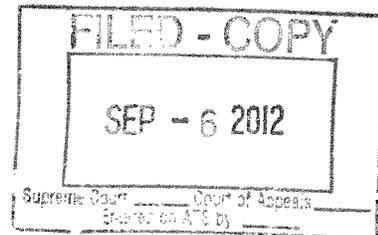
v.

**STATE OF IDAHO, DEPARTMENT)
OF TRANSPORTATION,)**

Respondent-Appellant.)
_____)

Supreme Court No. 39805-2012

APPELLANT'S REPLY BRIEF



APPEAL FROM SECOND JUDICIAL DISTRICT, LATAH COUNTY

THE HONORABLE JOHN R. STEGNER, PRESIDING

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I. STATEMENT OF THE CASE

This is the reply brief of the Idaho Department of Transportation, (hereinafter referred to as “the Department”). The Department has appealed District Court Judge John R. Stegner’s decision setting aside an Administrative License Suspension (ALS) of Chauncey Jack Platz’s driving privileges.

II. ISSUES ON APPEAL

Mr. Platz accepts the Department’s Characterization of the Issues on Appeal and does not add any additional issues for the Court’s consideration.

The issues on appeal are:

1. The District Court did not have jurisdiction to grant Mr. Platz’s Motion for a Stay.
2. Mr. Platz failed to meet his burden to show that the evidentiary tests were not administered in accordance with I.C. § 18-8004 pursuant to I.C. § 18-8002A(7).

III. ARGUMENT

1. The District Court’s jurisdiction to grant a stay.

It is important to consider the chronology of this matter before the Department.

On June 26, 2011 Mr. Platz received notice of a pending suspension to be effective in thirty days (R. p. 042).

On July 18, 2011 an ALS Hearing was held before the Department’s Hearing Examiner. Also on July 18, 2011 the Department’s Hearing Examiner granted an extension of the time to submit evidence to be considered by the Hearing Examiner based upon the driver’s request. The Hearing Examiner sets out the circumstances under which Mr. Platz can submit additional evidence and advises that this extension does not extend the thirty days of temporary driving privileges (R. p. 082).

On July 26, 2011 Mr. Platz files a Motion for a Stay before the Department's Hearing Examiner as well as delivers the additional information for the Record. The Department's Hearing Examiner denies the stay of the Administrative License Suspension.

On August 1, 2011 Mr. Platz applies to the District Court for an ex parte stay by Motion (R. p. 08).

On August 4, 2011 the Ex Parte Motion is heard telephonically and the Court enters an order issuing a stay (R. pp. 023-025). Additionally on August 4, 2011 the Department's Hearing Examiner enters an order suspending Mr. Platz's driving privileges (R. p. 086-093).

The Department's reply has two elements, first there is no jurisdiction for the District Court to consider the Stay prior to the Hearing Examiner entering a final order and specifically in response to Mr. Platz's argument that the District Court abused its discretion in entering a stay based upon the motion of Mr. Platz.

Mr. Platz contends that based upon the "reality and gravity of the situation" the District Court appropriately entered a stay based on the Motion for an Ex Parte Stay.

The District Court's ability to review the administrative action of the Department is limited to the circumstances set out in the Idaho Administrative Procedure Act.¹

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If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made. The existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review. 'A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.*, 147 U.S. 525. It is an exercise of judicial discretion. The propriety of this issue is dependent upon the circumstances of the particular case." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672-73; see *Merchants Warehouse Co. v. United States*, 283 U.S. 501, 513-14.

Scripps-Howard Radio, Inc. v. FCC, 316 US 4, 62 S.Ct. 875 (1942).

It is only a final decision of the Department that is reviewable, I.C. § 67-5271(2). The Department's Hearing Examiner's Order denying a Stay is not a final order, it is an interim order. However, Mr. Platz did not seek review of the Hearing Examiner's interim order, Mr. Platz instead sought a stay of the Department's Suspension of Mr. Platz's driving privileges pending the Hearing Examiner's decision (R. pp. 008-013).

It is clear that the entry of a Stay is among the powers that the District Court has upon on the filing of a Petition for Review, I.C. § 67-5274.² The Idaho Administrative Procedures Act clearly contemplates that the District Court is vested with jurisdiction upon becoming the "reviewing" Court to consider a Stay, I.C. § 67-5274.

However here, there is no review requested by Mr. Platz of the Department's Hearing Examiner's denial of a Stay. Mr. Platz requests a Stay of the ultimate decision of the Department's Hearing Examiner, anticipating that the Hearing Examiner will in the future enter an order suspending Mr. Platz's driving privileges. The District Court is not sitting in its role as a reviewing Court when asked by Motion to grant a stay pending the Department's Hearing Examiner's final order.

There is no jurisdiction for the District Court issue a Stay under these circumstances since a Petition for Judicial Review was not filed, I.C. § 67-5274. Since Mr. Platz does not seek review of an order of the Department and does not set out a basis for the Court's exercise of jurisdiction other than the Administrative Procedures Act, the Court does not obtain jurisdiction to Stay the interim order of the Department's Hearing Examiner denying a stay of the suspension of Mr. Platz's driving privileges, *In re Johnson*, 153 Idaho 246, 280 P.3d 739 (Ct. App. 2012).

² I.C. § 67-5274 provides:

The filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

The Department's Hearing Examiner's interim Order denying a Stay does not become a final order simply based on an the allegation of the 'gravity' of the situation. Mr. Platz unsubstantiated factual claims about the effect of the denial of the Stay does not provide a basis for the Court to exercise its jurisdiction. There is no factual affidavit from Mr. Platz or his employer, nor is there a sworn statement of the circumstances of Mr. Platz employment. Mr. Platz does not verify the Motion for a Stay, in fact Mr. Platz only sets out the presumption that his driving privileges are suspended in his Motion (R. p. 09). However, the Department did not contest that presumption.

Mr. Platz argues that the Stay was issued upon appropriate grounds consistent with I.C. § 67-5274. However, if the specific language of the District Court's Stay Order issued August 4, 2011 is considered, the Ex Parte Stay ended on the day that it was issued since that was the same day that the Hearing Examiner's Findings, Conclusions and Decision were entered.³

Since the Hearing Examiner's determination was made on August 4, 2011, the District Court's Ex Parte Stay ended by its terms on that day. Had the District Court declined to exercise its discretion the Department's Hearing Examiner's decision would have provided the Petitioner with an appropriate basis to immediately file a Petition for Judicial Review and request a stay of the Hearing Examiner's decision suspending Mr. Platz's driving privileges. The District Court should not involve itself in the interim orders entered by the Department, particularly since the

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It is ordered that the Petitioner's Motion for Stay of his driving privileges pending findings of fact and appeal of such findings is granted. The Petitioner's Driving Privileges are hereby reinstated pending the Hearing Officers determination of the appeal below.

Order for Stay Pending Judicial Review, August 4, 2011, R. p. 030.

same day that the Court grants the Stay pending the Hearing Examiner's Decision is the day that the Hearing Examiner's decision is entered.⁴

It is this hindsight review of the circumstances of the Stay having been issued, that the reviewing Court should consider the propriety of the issuance of a Stay without a final administrative Order being issued by the District Court. The District Court should decline to issue a Stay when the court is not asked to review an underlying decision of the Department.

Mr. Platz has clearly not exhausted his administrative remedies when he seeks to have an interim order of the Hearing Examiner set aside by the Court without asking for review of the Hearing Examiner's order denying the Stay, I.C. § 67-5271(a).

A review of the Department's Hearing Examiner's decision dated August 4, 2011 would have provided an adequate remedy to Mr. Platz under these facts, I.C. § 67-5271(b).

The issuance of a Stay is clearly discretionary ("the agency may" or "the reviewing court may", I.C. § 67-5274). Here, the District Court should have declined to exercise its discretion to enter a stay based on this Record.

There has been no demonstration that there was any "irreparable damage" to Mr. Platz only an unsubstantiated allegation of potential injury to Mr. Platz. The District Court's review of the Department's Hearing Examiner's order of August 4, 2011 would have provided an adequate remedy under these facts, I.C. § 67-5271(1).

Additionally, on the 22nd day of 30 days of temporary driving privileges Mr. Platz asked the Hearing Examiner to keep the Record open for an additional fifteen days (R. p. 059). The time for the submission of additional evidence would clearly exceed the term of the thirty day temporary driving privileges (R. p. 042).

⁴ The Hearing Examiner's decision was effective August 4, 2011 the Petition for Judicial Review was not filed until August 11, 2011 and the order staying the Hearing Examiner's decision suspending Mr. Platz's driving privileges was not entered until August 16, 2011.

Mr. Platz should have been aware that there would be an issue about the circumstances of the Stay when he requested the opportunity to submit additional information to the Hearing Examiner. In fact when Mr. Platz requested the opportunity to submit additional information to the Hearing Examiner, Counsel had not reviewed that information prior to determining whether it would be submitted to the Hearing Examiner (ALS Tr. p. 5 LL. 3-5).

The resulting delay of the Hearing Examiner's decision does not implicate procedural due process when the person "requesting the administrative proceedings contributed to the delay", *Bell v. Idaho Transp. Dept., 151 Idaho 659; 262 P.3d 1030 (Ct. App. 2011)*. The short delay involved in the issuance of the Hearing Examiner's decision, after Mr. Platz supplied additional information to the Record, should not form the basis for a stay of the suspension prior to the entry of the Department's Hearing Examiner's Order.

The Court did not have jurisdiction to issue a stay and abused its discretion when it did so.

2. *Mr. Platz failed to meet his burden.*

Mr. Platz argues that the Court should sit in an Appellate capacity as to matters of fact (Respondent's Brief p. 11). It is precisely that argument that misstates the role of the Court on judicial review.⁵

In making that argument Mr. Platz clearly acknowledges that the District Court should be entitled to make factual findings different than the Hearing Examiner looking at the same evidence. That is not the role of the District Court on Judicial Review, I.C. § 67-5279. The role of the District Court on Judicial Review is to determine whether there is substantial evidence in the Record to support the Hearing Examiner's conclusions, *Masterson v. Idaho Dept. of Transp.*,

⁵ It is clear that the District Court inappropriately sees itself in an appellate role, see Order for Stay Pending Judicial Review FN 3.

150 Idaho 126, 244 P.3d 625 (Ct. App. 2010). Instead the District Court here considered the same evidence as the Hearing Examiner and then instead of deferring to the Hearing Examiner makes factual findings different from the Hearing Examiner.

Mr. Platz further objects to the Department’s Hearing Examiner’s choice of language to make his decision. It is clear that the language chosen by the Hearing Examiner is consistent with Mr. Platz having the burden pursuant to I.C. § 18-8002A(7).

Mr. Platz does not demonstrate that the Hearing Examiner relied upon information not part of the Record (see *Masterson Id. at p. 129*) or that the evidence relied upon by the Hearing Examiner was not credible (*Bennett v. State, Dept. of Transp., 147 Idaho 141 at p. 145, 206 P.3d 505 at p. 509 (Ct. App. 2009)*). Instead Mr. Platz attached significance to the Hearing Examiner’s choice of words about what it was that Mr. Platz had to show.⁶

Mr. Platz does not demonstrate how the term “definitely” inaccurately describes Mr. Platz’s burden to show by a preponderance of evidence that he has met his obligation pursuant to I.C. § 18-8002A(7). To have demonstrated by the weight of the evidence is not a significantly different standard than to “clearly or precisely” demonstrate how it was Mr. Platz met his burden (*American Heritage Dictionary of the English Language 2000*).

The Hearing Examiner does not create a new standard, clearly the Hearing Examiner finds that Mr. Platz did not meet his burden by a preponderance of the evidence (R. p. 090 ¶ 7),

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6. ... Based on the record and a review of the video/audio recording of the investigation, it has not been definitively shown that Officer Montgomery did not follow the requisite procedures regarding the 15-minute observation period. Brief conversations by Platz with a backup officer did not significantly impede the ability of Officer Montgomery to monitor Platz at the scene.
Brief conversations by Platz with a backup officer did not significantly impede the ability of Officer Montgomery to monitor Platz at the scene.
7. The Petitioner, Platz, did not affirmatively show by a preponderance of the evidence that the test was not performed in compliance with Idaho Law and ISP Standard Operating Procedure.

Findings of Fact and Conclusions of Law and Order, p. 5, R. p. 090.

specifically the Hearing Examiner indicated that Trooper Montgomery was not distracted and conducted a sufficient pretest observation (R. p. 090 ¶6).

It is clear from a review of the video tape that no event occurred which would have introduced the mouth alcohol into Mr. Platz's breath sample (IBASOP ¶ 6.1). The specific purpose of the pretest monitoring is to eliminate circumstances where mouth alcohol would affect the evidentiary test result for alcohol concentration. Not only does the Hearing Examiner have no evidence of such an event occurring, the breath test results correlated within .02 indicating that mouth alcohol did not affect the test result (R. p. 090 ¶5) (IBASOP ¶ 6.2.2.2), *Peck v. State, Dept. of Transp., 153 Idaho 37, 278 P.3d 439 (Ct. App. 2012)*.

Mr. Platz makes an unsubstantiated policy argument that without further Court control over the circumstances of the pretest monitoring some hypothetical injustice may occur. Such a policy argument is not appropriate based upon this Record, *Bell v. Idaho Transp. Dept., 151 Idaho 659, 262 P.3d 1030 (Ct. App. 2011)*.

Neither are the statements of Trooper Montgomery challenged in any way. Mr. Platz does not submit any testimony as to the circumstances of the pretest monitoring. Mr. Platz does not provide the Hearing Examiner with any contrary evidence to consider whether Trooper Montgomery's statements were not credible. Mr. Platz simply offers a video recording of the circumstances of the pretest monitoring and asks the Hearing Examiner to make his own factual findings from the video recording, Compare *Bennett* at pp. 144-145 and *Peck* at pp. 450-451.

The Hearing Examiner made those factual findings considering Trooper Montgomery's sworn statement, the video recording of the circumstances of the pretest monitoring and the correlation of the breath test results. The Hearing Examiner had more than a scintilla of evidence that the circumstances of the pretest monitoring were sufficient, *Masterson* at p. 128.

There is substantial evidence in the Record as a whole to support the Hearing Examiner's decision, I.C. § 67-5279, *Marshall v. Department of Transp.* 137 Idaho 337, 48 P.3d 666 (Ct. App. 2002).

Mr. Platz does not meet his burden to demonstrate that any basis under I.C. § 18-8002A(7) to set aside the suspension was present.

IV. CONCLUSION

Mr. Platz was not entitled to a Stay of the License Suspension pending the Hearing Examiner's final Order.

Mr. Platz failed to meet his burden pursuant to I.C. § 18-8002A(7).

Mr. Platz's driving privileges should be suspended as ordered by the Department's Hearing Examiner.

DATED this 4 day of September, 2012.



Edwin L. Litteneker
Special Deputy Attorney General

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