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Peck v. State Dept. of Trans. Appellant's Reply Brief Dckt. 40808

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IN THE SUPREME COURT OF THE
STATE OF IDAHO

RAYMOND SCOTT PECK,)	DOCKET NO. 40808-2013
)	
Petitioner/Appellant,)	
)	Bonner County Case
v.)	No. CV-2012-0964
)	
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 JEFF M. BRUDIE, DISTRICT JUDGE, PRESIDING

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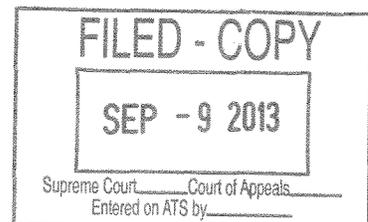


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TABLE OF CASES AND AUTHORITIES

CASE

Wanner v. State, Dept. of Transp., 150 Idaho 164 1, 4
(2011)

REPLY ARGUMENT ON APPEAL

I. THERE IS ONLY ONE DRIVER'S LICENSE INVOLVED

The Petitioner/Appellant Raymond Scott Peck is a resident of Bonner County, Idaho and on December 2, 2009 held an Idaho driver's license, which was a Class A CDL. For the same reasons stated by the Idaho Supreme Court in Wanner v. State, Dept. of Transp., 150 Idaho 164, 168 (2011) Peck "...has only one driver's license, a Class A CDL." The Title 18 ALS suspension that Peck has served was a suspension of Peck's "...driving privileges in toto, while the 49-335 suspension only applies to a particular subset of driving privileges, i.e., [the] right to operate a commercial vehicle." Wanner, 150 Idaho at 170.

II. THE PENALTIES ALL FLOW FROM THE TRAFFIC STOP

The Respondent's Brief is inaccurate in the assertion that "Generally, Idaho Code § 18-8002A prescribes the penalties governing all aspects of a motorist's driving privileges in the event that a motorist submits to, but fails evidentiary testing." P. 6. Both Idaho Code § 18-8002A and Idaho Code § 49-335 govern aspects of a motorists driving privileges when an evidentiary test is failed.

The evidentiary testing itself is solely based upon the suspected criminal conduct. There is no basis for either the § 18-8002A penalty or the § 49-335 penalty other than the suspected criminal conduct. Another way to look at it is that there is no independent basis from the suspected criminal conduct for obtaining the evidentiary testing results upon which Idaho Code §

49-335(2) is dependent. The constitutional protections afforded Peck apply to the evidentiary testing and are the basis for the requirement of implied consent. As set forth in the Appellant's Brief, implied consent requires that the tests be administered after constitutionally required information is provided to the driver, which is informed consent.

III. THERE IS NO CHARGE OR ACTION UNDER FEDERAL LAW

The Respondent asserts in the Respondent's Brief at page 7 that Federal Regulation 49 C.F.R. 383.51 results in the disqualification of Petitioner Peck's CDL. First, the Petitioner Peck was not charged with violating any Federal Regulation and the Respondent admits that the Federal Regulation actually only applies in determining whether a State qualifies for federal highway funding based upon the driving laws the State enacts. Second, when one reads the provision of 49 C.F.R. 383.51 relied upon, the regulation seeks to compel the State of Idaho to adopt legislation in the event of a conviction of driving under the influence. The regulation does not seek to compel the State of Idaho to adopt legislation in the event of taking and failing an evidentiary test. The State of Idaho, in adopting Idaho Code § 49-335, went beyond the conviction provision in the Federal Regulation required for highway funding, and attempted to make the failing of an evidentiary test a grounds for a one year CDL disqualification. In order for evidentiary testing to be used for the CDL disqualification, the testing must meet constitution exception to the warrant requirement of "implied consent" as set forth in the Appellant's Brief.

The Federal Regulation cited and urged is irrelevant to the inquiry in this matter. Idaho Code § 49-335 is the only applicable provision regarding Peck and the CDL disqualification sought by the State.

IV. PRESUMING TO KNOW THE LAW DOES NOT DO AWAY WITH THE CONSTITUTIONAL PROTECTIONS

While the Appellant Peck is presumed to know the consequences of failing and taking an evidentiary test, the constitutional requirements for warrant still apply. If there is no warrant, there must be an exception to the warrant requirement which is met. The exception relied upon by the State of Idaho is implied consent. In order to have implied consent, one must be informed of the consequences (informed consent). The information must accurately notify the driver of the substantive consequences of the testing. Here it is undisputed that the legislative form used does not meet all the substantive consequences of the evidentiary testing. The form only informs of some of the consequences. While the form informs of the substance of the ALS suspension it does not inform of the substance of the CDL disqualification. Therefore, there is no informed consent and therefore no implied consent necessary to impose the CDL disqualification.

If just the presumption of knowing the consequences of taking and failing an evidentiary test was constitutionally sufficient, there would be no need to inform a driver of the ALS suspension consequences to impose and uphold the ALS suspension (18-8002A). While the information given may have been sufficient to sustain

the ALS suspension (18-8002A), the information given to Peck was insufficient to sustain the CDL disqualification (49-335).

The Wyoming authority cited by the District Court and the Respondent is clearly distinguishable. Apparently in Wyoming, implied consent has not been interpreted to require being informed of the consequences for the implied consent to be valid. In Idaho, the legislature's provision for informing the driver is based upon the Idaho cases which hold that the Constitutional provisions require such information be given to meet the warrantless search and seizure exception. The statutory information requirements must meet the constitutional mandates. When the legislature added the Idaho Code disqualification provisions, it did not amend its information requirement provisions. That lack of information is constitutionally defective.

The Notice (which was created when there were only ALS suspension penalties) actually provided to Peck gave contrary statements and information to Peck compared to the CDL disqualification. The Idaho Supreme Court in Wanner, 150 Idaho at 166, framed the issue as follows:

The Notice did not address the situation presented by the underlying facts of this case: 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.

For the ALS suspension to be upheld, Idaho law does require the driver be informed of all the ALS consequences. The Peck appellate decision on the ALS suspension only stands for the

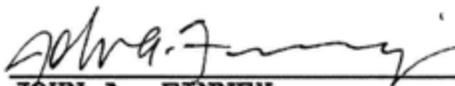
proposition that the CDL disqualification consequences do not need to be given for the ALS suspension to be upheld. Here, the Appellant Peck asserts that for the CDL disqualification to be upheld, he (the driver) must have been informed of the CDL disqualification consequences. This is because the evidentiary testing is based upon implied consent. Without accurate and adequate notice, there is no implied consent. Without implied consent, the evidentiary testing cannot result in a license suspension or a license disqualification.

CONCLUSION

As set forth in the Appellant's Brief, based upon either substantive due process or procedural due process (or both, although not required), the Title 49 Notice of Disqualification ("CDL disqualification") served upon Peck must be vacated and set aside. Both the hearing officer's decision and the District Court's decision should be vacated as the notice of disqualification (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) is made upon unlawful procedure; (d) is not supported by substantial evidence in the record; and/or (e) is arbitrary, capricious, or an abuse of discretion.

The relief sought is to vacate and set aside the disqualification of Peck's CDL driving privileges, to reinstate the driving privileges, and for an award to the Appellant of attorney fees and costs against the Respondent.

RESPECTFULLY SUBMITTED this 5th day of September, 2013.



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Attorney for Appellant PECK

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2013, 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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