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IN THE SUPREME COURT OF THE STATE OF IDAHO

THAD EUGENE KERN, an
individual,

Petitioner/Respondent,

vs.

IDAHO DEPARTMENT OF
TRANSPORTATION,

Respondent/Appellant.

Supreme Court No. 45798-2018
Twin Falls County No. CV42-17-1820

Supreme Court No. 45799-2018
Twin Falls County No. CV42-17-3425

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho
in and for the County of Twin Falls

Honorable Jon J. Shindurling
District Judge, Presiding

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I.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES	P. 3-4
STATEMENT OF THE CASE	P. 5-9
A. Nature of the Case	P. 5
B. Course of Proceedings	P. 5-7
C. Statement of Facts	P. 7-9
RESTATED AND ADDITIONAL ISSUES PRESENTED ON APPEAL	P. 10
Whether the Department failed to adequately consider mitigating evidence and the suspensions are not supported by substantial evidence on the record as a whole.	
Whether the Department’s decisions were arbitrary, capricious and/or an abuse of discretion.	
Whether the suspensions violate Kern’s rights to due process under the United States and Idaho constitutions and constitute an unlawful taking thereunder.	
Whether Kern is entitled to costs and attorney’s fees on appeal pursuant to Idaho law, including I.A.R. 40 and 41, and/or I.C. § 12-117.	
ARGUMENT	P. 11-26
A. Standard of Review.	P. 11-12
B. Whether the Department failed to adequately consider mitigating evidence and the suspensions are not supported by substantial evidence on the record as a whole.	P. 12-20
C. Whether the Department’s decisions were arbitrary, capricious and/or an abuse of discretion.	P. 20-22

D. Whether the suspensions violate Kern's rights to due process under the United States and Idaho constitutions and constitute an unlawful taking thereunder.	P. 22-26
COSTS AND ATTORNEY'S FEES ON APPEAL	P. 26-27
CONCLUSION	P. 27-28

II.

TABLE OF CASES AND AUTHORITIES

<i>Bell v. Burson</i> , 402 U.S. 535, 91 S.Ct. 1586 (1971)	P. 23
<i>Dixon v. Love</i> , 431 U.S. 105, 97 S.Ct. 1723 (1977)	P. 23
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893 (1976)	P. 22-23, 25
<i>Bell v. Idaho Transp. Dept.</i> , 151 Idaho 659, 262 P.3d 1030 (2011)	P. 23
<i>Castaneda v. Brighton Corp.</i> , 130 Idaho 923, 950 P.2d 1262 (1998)	P. 11
<i>Price v. Payette Cnty. Bd. of Cnty. Comm'rs</i> , 131 Idaho 426, 958 P.2d 583 (1998)	P. 12
<i>Rudd v. Rudd</i> , 105 Idaho 112, 666 P.2d 639 (1983)	P. 22
<i>State v. Rogers</i> , 144 Idaho 738, 170 P.3d 881 (2007)	P. 22
<i>Sun Valley Shopping Center, Inc. v. Idaho Power Co.</i> , 119 Idaho 87 803 P.2d 993 (1991)	P. 20-21
<i>Urrutia v. Blaine Cnty., ex rel. Bd. of Comm'rs</i> , 134 Idaho 353 2 P.3d 738 (2000)	P. 11
<i>Watson v. Joslin Millwork, Inc.</i> , 149 Idaho 850, 243 P.3d 666 (2010)	P. 12, 20
<i>Feasel v. Idaho Transp. Dept.</i> , 148 Idaho 312, 222 P.3d 480 (Ct. App. 2009)	P. 12
<i>In re: Suspension of Driver's License of Gibbar</i> , 143 Idaho 937 155 P.3d 1176 (Ct. App. 2006)	P. 21
<i>Marshall v. Idaho Dep't of Transp.</i> , 137 Idaho 337, 48 P.3d 666 (Ct. App. 2002)	P. 11-12
<i>State v. Jacobson</i> , 150 Idaho 131, 244 P.3d 630 (Ct. App. 2010)	P. 22-23
U.S. CONST. amend. XIV, § 1	P. 22
I.A.R. 40	P. 10, 26
I.A.R. 41	P. 10, 26
I.C. § 12-117	P. 10, 26

I.C. § 49-201	P. 11
I.C. § 49-330	P. 11
I.C. § 67-5201	P. 11
I.C. § 67-5270	P. 11
I.C. § 67-5279	P. 11-12

III.
STATEMENT OF THE CASE

A. Nature of the Case

These consolidated cases concern the administrative suspension of the driver's license and commercial driver's license ("CDL") of Petitioner Thad Kern ("Kern"). Kern sought judicial review of the appellate proceedings of the Idaho Department of Transportation (the "Department") upholding the automatic suspension of Kern's driving privileges in Department File Nos. 694002401216 and 450A06465116 for failing an evidentiary test (collectively, the "Suspension"). The District Court agreed that the Suspension was improper based, primarily, on a lack of substantial and competent evidence of impairment. The Department appealed to this Court and Kern maintains that reversal of the Suspension is proper.

B. Course of Proceedings

Kern's driving privileges were automatically suspended following an alleged failure of an evidentiary test. Kern timely appealed the Suspension. The suspension of his driving privileges was assigned File No. 694002401216 by the Department. The suspension of Kern's CDL was assigned File No. 450A06465116 by the Department. A telephonic hearing was held on March 16, 2017 before David Baumann of the Department in File No. 694002401216. A hearing was also held on March 22, 2017 before Michael B. Howell in File No. 450A06465116 on Kern's CDL, at which time a continuance was granted pending the underlying ALS appeal review.

On April 7, 2017, Mr. Baumann issued his *Findings of Fact and Conclusions of Law and Order* (the "Suspension Order") upholding the suspension of Kern's driving privileges. Based

on that conclusion, Mr. Howell issued his *Findings of Fact and Conclusions of Law and Preliminary Order* on April 17, 2017, upholding the suspension of Kern's CDL.

Kern timely filed a Petition for Judicial Review of both the suspension of his driver's license and his CDL under Twin Falls County Case No. CV42-17-1820. At the request of the Department, the two matters were bifurcated and then consolidated in one action. The appeal of the suspension of Kern's CDL privileges was assigned Case No. CV42-17-3425. While the cases have been bifurcated, Kern has appealed from both and intends that the legal reasoning and requested relief contained herein equally apply to both. The CDL suspension order itself is based on the reasoning and analysis of the Suspension Order. Accordingly, the reversal of the Suspension Order would also mandate the reversal of the CDL suspension order as well.

After briefing and argument below, the District Court reversed the Suspensions. In its Memorandum Opinion, the District Court held following a review of the record, that there was not substantial evidence of impairment justifying imposition of the suspension. The District Court held:

Although the officer voices observations of impairment, when taken into full context, the evidence does not establish whether the observations are due to drugs as opposed to stress of the accident, weather conditions, or confusion of being arrested and interrogated. The accident was caused by texting while driving, the scene was very slick and snowy, the temperature was cold, and the amount of traffic and sheer dangerousness of the situation led to the abandonment of the field sobriety tests. While there is some evidence of speech and cognitive difficulty, there is substantial evidence which shows such may well have been caused not by drugs, but by the conditions of the scene and circumstances of the arrest. Without substantial evidence showing that Kern's impairment was caused by drugs, the license suspension and disqualification cannot stand.

In short, the District Court held that the Suspensions were not supported by the record, when taken as a whole. The Department then filed the present appeal.

The Notice of Appeal filed by the Department asked that the transcript of the telephonic hearing held on March 16, 2017 before Mr. Baumann, *Administrative License Suspension Hearing Transcript*, March 16, 2017, be included in the Clerk's Record on appeal. It appears that this transcript was inadvertently omitted. Kern and the Department filed a Stipulated Motion to Augment the record with this transcript which was granted on July 25, 2018. Pursuant to I.A.R. 30, references to that transcript will be identified throughout this brief as Augmented Record (Aug. R.) followed by the page number of the transcript as attached to the Motion to Augment, beginning with Aug. R. 1, Aug. R. 2, etc.

C. Restatement of Facts

The underlying facts in this matter are relatively straightforward. On December 28, 2016, Kern's truck became stuck in a snowy bank when he ran off the road.¹ According to Kern, he was on his way to assist his daughter and was sending her text messages at the time and veered over the lines.² When his truck hit the deeper snow, he lost control.³

The Twin Falls County Sheriff's Office responded to the scene. The responding officer accused Kern of being under the influence, which Kern denied.⁴ A breathalyzer test was administered and revealed an alcohol concentration of 0.00/0.00.⁵ The officer performed field

¹ Aug. R. at 18.

² Id.

³ Id.

⁴ Id.

⁵ Id at 19; R. at 35, 37.

sobriety tests; however, because of the deep snow, the proximity of passing traffic and Kern's severe back pain, he was not able to complete them.⁶ The officer asked Kern if he was on any prescription medications, which Kern admitted.⁷ Kern has been on these prescription medications continuously for seven to eight years following an accident that left him with serious back injuries and severe chronic pain. The officer placed Kern under arrest for driving under the influence. No audio or video was taken of the encounter by the officer. There are photos of the scene submitted with the record in this case, but, other than for understanding the context of the scene, are not helpful to the determination of this matter.⁸

At the police station, the officer asked Kern to submit to a blood draw, which Kern understood he could not refuse without facing penalties.⁹ He expressed concern over the effect it might have on his commercial driving privileges. The officer told him it would not affect his commercial driving privileges because he was driving his personal vehicle at the time. Kern agreed to the blood draw. Kern was not evaluated by a drug recognition expert at any time.¹⁰ Video footage from the Twin Falls County Jail shows Kern walking, standing, speaking and disrobing without difficulty. This footage was submitted to the Idaho Transportation Department as part of the proceedings below.¹¹

The blood draw was performed at St. Luke's Magic Valley Regional Medical Center and revealed the presence of the same medications (or their metabolites) that Kern initially disclosed

⁶ Aug. R. at 20-21; R. at 37-38.

⁷ Id.

⁸ R. at 91.

⁹ R. at 31-34.

¹⁰ R. at 37-38.

¹¹ R. at 86-90.

to the officer. Following the draw, the officer released Kern to recover his vehicle from towing and drive himself home. He was told to be careful driving his truck because they knew why he had been arrested.¹² After the test results were received, the Department issued an administrative license suspension of Kern's driver's license and CDL on the grounds of a failed evidentiary test.

¹² Aug. R. at 20.

IV.

RESTATED AND ADDITIONAL ISSUES PRESENTED ON APPEAL

Whether the Department failed to adequately consider mitigating evidence and the suspensions are not supported by substantial evidence on the record as a whole.

Whether the Department's decisions were arbitrary, capricious and/or an abuse of discretion.

Whether the suspensions violate Kern's rights to due process under the United States and Idaho constitutions and constitute an unlawful taking thereunder.

Whether Kern is entitled to costs and attorney's fees on appeal pursuant to Idaho law, including I.A.R. 40 and 41, and/or I.C. § 12-117.

V.

ARGUMENT

A. Standard of Review

The Idaho Administrative Procedures Act (IDAPA) governs the review of ITD decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. In an appeal from the decision of the district court acting in its appellate capacity under the IDAPA, this Court reviews the agency record independently of the district court's decision. *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct. App. 2002). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67-5279(1); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. This Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. In other words, the agency's factual determinations are binding upon the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial and competent evidence in the record. *Urrutia v. Blaine Cnty., ex rel. Bd. of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. The Court may overturn an agency's decision where its findings, inferences, conclusions, or decisions violate statutory or constitutional provisions; exceed the agency's statutory authority; are made upon unlawful procedure; are not supported by substantial evidence in the record; or are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner

specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette Cnty. Bd. of Cnty. Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. If the agency's decision is not affirmed on appeal, it shall be set aside and remanded for further proceedings as necessary. I.C. § 67-5279(3).

B. The Department failed to adequately consider mitigating evidence and the Suspensions are not supported by substantial evidence on the record as a whole.

Kern contends that the Department's findings were not supported by substantial evidence on the record as a whole—particularly in light of the mitigating evidence presented to rebut the Department's position. “Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.” *Watson v. Joslin Millwork, Inc.*, 149 Idaho 850, 854, 243 P.3d 666, 670 (2010).

In cases involving prescription medication as opposed to alcohol, there is no quantitative limit that must be established. *Feasel v. Idaho Transp. Dept.*, 148 Idaho 312, 222 P.3d 480 (Ct. App. 2009). However, there must be evidence that the subject had drugs in his system which may cause impairment and that such medication actually caused intoxication and consequently impaired the subject's ability to drive safely. *See id.* (emphasis added). In other words, it is insufficient just to show that the drugs were present, there must be evidence of impairment. This is the standard for driver's license suspension, not criminal DUI.

On appeal, the Department incorrectly asserts that the District Court impermissibly shifted the burden of the license suspension proceeding to the State. That is not the case. The District Court properly observed that, in order to suspend Kern's license, our appellate courts

have held that there must be (1) presence of drugs and (2) impairment – without which, the license cannot be administratively suspended. With no threshold requirement of drugs in a person’s system, this is the only barrier protecting citizens from an overreaching administrative agency. In this day and age of litigation, many medications offer some protective caveat for the manufacturer stating that a drug may cause drowsiness. Since the Department simply relies on the drug facts provided by the manufacturers to prove a substance’s intoxicating ability, that would make many people guilty of DUI throughout the State and primed for administrative license suspension. Even for medications known to cause drowsiness, the effect of the medications is different from individual to individual—which is presumably why there is no numerical threshold for impairment. Instead, impairment must be objectively determined by other substantial and competent evidence. In this case, it is undisputed that Kern had the drugs in his system. However, Kern disputes that he was impaired in the operation of his vehicle.

To establish Kern’s impairment, the Department relied exclusively on the police officer’s *Affidavit of Probable Cause*. That report can be found at pages 36 through 38 of the Clerk’s Record. In the *Affidavit*, the officer reports that:

Upon making contact with Kern I observed him to be very slow in his responses to my questions. I also observed him to have bloodshot eyes and to be talking with a slight slur and very slow and delayed with his speaking. . . . Kern had a very hard time removing his Driver’s License from his wallet. I also was able to get a very faint odor of alcoholic beverage when Kern spoke to me. . . . I had Kern exit his vehicle while doing so Kern had a very hard time keeping his balance and fell to the ground. I then assisted him to the front of my patrol vehicle. . . . The first test that I performed was the Horizontal Gaze Nystagmus. Before beginning the test **I asked Scott [sic]** if he had any problems with his eyes or if he wore contacts which he stated “No”. **I then asked Scott [sic]** to stand with his feet together and his hands at his side. **I observed Scott [sic]** to have a

very hard time walking or to even keep [sic] his balance. Due to safety concerns for Kern I did not complete the SFST's as I was afraid for Mr. Kern's safety.

R. at 37 (emphasis added). Based on that, the officer checked boxes indicating "Yes" for odor of alcoholic beverage, admitted drinking alcoholic beverage, slurred speech, impaired memory, glassy/bloodshot eyes, crash involved and drugs suspected. The officer checked boxes indicating "No" for gaze nystagmus, walk & turn, and one leg stand. However, the officer's narrative never reports his observations during the gaze nystagmus test. Additionally, nothing is ever said of the one leg stand or impaired memory at all. As to the walk & turn test, all we know is that Scott had problems completing the test. There is no Scott involved in this case and it is unknown who that is referring to. Was the officer simply cutting and pasting from another report? No one knows, including the Department. Simply, the *Affidavit* is incomplete and full of inconsistencies and errors. These inconsistencies and errors are enhanced by the officer's questionable accusations regarding the odor of alcohol and Kern having had several drinks, immediately followed by a 0.00/0.00 Breathalyzer result. Clearly, he had a preconceived notion to issue a DUI upon first approaching Kern. After that, all the officer needed to do was create a factual scenario supporting that conclusion. The officer disregards any other explanation as to why Kern may have been slow or unsteady. Namely, having just run off the road and being interrogated by police right off the bat as to whether he had been drinking, in addition to his chronic back pain and instability exacerbated by inclement conditions.

In light of such inconsistencies and errors, it would be helpful to have some evidence supporting the officer's observations. For example, an audio or video recording of the stop.

However, that does not exist. For whatever reason, the officer did not take any. Presumably he had the ability to, but for some reason did not have the audio or video recorder activated, leaving Kern in the logically impossible position of directly disproving the officer's allegations. While there is no case law directly calling this out as an unconstitutional practice, Kern contends that in this day and age that is entirely unacceptable. It strains reason that with such a fact-sensitive determination and the ease and accessibility of recording technology, that the officer in this case failed to take the time to even activate a voice recorder. Nevertheless, the officer did fail to make any other record of the stop and his faulty report is all there is in the record supporting the allegation of impairment. Yet, the level of reliance placed upon the report, evidenced by a review of the Department's initial decision on appeal of the suspension, places an impossible barrier for an aggrieved individual to overcome a suspension.

For his part, Kern does dispute the officer's observations. In opposition to the allegation of impairment, Kern offered his testimony, his medical records, a letter from his treating physician who observes him on a regular basis while on these medications, as well as audio and video footage of Kern's demeanor at the Twin Falls County Jail – all of which belie the officer's allegations of impairment.

In his direct testimony, Kern testified as follows in regard to his history:

Q: Okay. And, then, could you explain to us --- are you on any prescription medications?

A: I am.

Q: How long have you been on those medications?

A: Different medications, for the last eight years – seven, eight years.

Q: And why did you start taking those medications?

A: I had a back injury at work.

....

A: I had two surgeries.

....

A: One was a discectomy where they take – they take the bulged disc out or the ruptured disc out, and they put in, like, a plastic mesh thing to help support it. That didn't work, They had to fuse it.

Q: Okay. And do you have pain, lingering pain, as a result of this injury and surgery?

A: Yes. I have nerve damage.

....

A: In my lower, left back, into my hip. Sometimes it shoots, like a spasming, throbbing down into my leg.

Q: And if you had to rate your pain on a one to ten, how does it feel kind of on a daily basis?

A: It varies from a three or four or up to a nine sometimes.

....

Q: Okay. When you first started taking pain medications, did you notice that the affected you at all?

A: No, not overly. I mean, I took two or three weeks of taking all of them; and I didn't go anywhere at first, just to see how it affected me.

....

Q: Okay. Do you feel that this medication impairs your ability to drive?

A: No, it doesn't.

Q: And what is your profession?

A: Truck driving, equipment operator.

....

Q: Have you ever had an incident where you have run off the road in the past eight years since you have been on pain meds?

A: No.

....

Q: Have you ever had an accident?

A: No.

Q: Over the period of time that you have been on the pain meds, have you been cited for DUI?

A: No.

Aug. R. at 14-17. Then, Kern testified as to the event in question, as follows:

A: To back up to the beginning, I guess, my daughter – well, her car wouldn't start. It was, like, ten below zero outside. She asked me to come help. I got held up at the house.

I finally left and headed over there with jumper cables and stuff, and I was trying to send her a text that I was running late when I run off the road. I got off to the edge, got it with one hand, and I'm looking at my phone, and I got into the snow drift, and it just sucked me into the ditch.

Q: Okay. And then what happened?

A: Well, a cop showed up. He accused me of drinking. I told him I wasn't. He said, "I can smell it. I know you've been drinking."

I said, "No, I haven't."

He said, "I can smell alcohol on your breath."

I said, "Fine. I had one at lunch."

"Let's go blow."

Q: Why did you say you had one at lunch?

A: Because I wanted to get going. I mean, I knew it was going to be zero.

Q: Okay. Do you drink?

A: No.

....

Q: So after the officer said, "You've been drinking; let's go blow," what happened?

A: He also asked me then if I took prescription medication. I told him I did. I told him what I had. He took me in. I blew. It was all zeros. Then he asked me if I would take a blood test.

I told him, "Well, yeah." I don't really have a choice because, if I refuse, then I'm in trouble for that.

I said, "Look. I'm worried about my CDL."

He said, "It won't affect your CDL because you were in your personal car."

So we went to the hospital. I gave blood. We came back and – I don't know. He called my wife – or I called my wife to come and pick me up.

He handed me the paperwork and told me – he thanked me for being cooperative, told me where my pickup was, and told me to be careful leaving there because they knew why I had been arrested. I went and picked up my pickup and drove home.

Q: Okay. And did you perform any roadside tests?

A: One eye test and, like, half of a leg stand before he said it was cold, and I was shivering, and that it was a danger to be on the edge of the road.

Q: So why just half a leg test? So tell the hearing officer what happened and what the circumstances were of the leg test.

A: Well, for one, we were standing right on the edge of the shoulder of the road where the snow is; and I've only got about two or three feet from traffic before we're down in the borrow ditch.

I also stated I couldn't hardly do it because of my back and my leg. And then ... I was shivering and grabbing my arms around myself.

He said, "It isn't safe out here." He said, "Let's go into the jail." \

Aug. R. at 18-21.

Kern's medical records, filed under seal, support Kern's testimony regarding his injuries, his prescribed medications and his level of alertness and cognition under the influence of such medications. These records are buttressed by the opinion of Kern's pain management physician, Dr. Clinton L. Dillé, M.D. who observed as follows:

Mr. Kern is a patient with the Southern Idaho Pain Institute. During our treatment of Mr. Kern, we have prescribed him MS Contin (30 mg), MS Contin (60 mg), Oxycodone (15 mg), Ranitidine (150 mg), and Soma (350 mg). The need for medication stems from an underlying back injury which causes Mr. Kern chronic pain radiating through his back and down his leg. He has been on this medication, at its current dosages, for over a year. In the course of our treatment of Mr. Kern, we examine him at least once a month. At each exam, we evaluate, among other things, his psychiatric condition; i.e. whether he appears to be aware and alert. At times, we also perform simple cognition tests, such as spelling words backwards. While Mr. Kern has been on this medication, at the prescribed dosages, we have consistently observed him to be alert, responsive and cognizant at every examination.

The substances identified above in the laboratory blood test are consistent with the medication which has been prescribed to Mr. Kern. The effect of the medication and the dosages can be different for every person. However, our observation of Mr. Kern does not reveal him to be impaired by the above medications at the prescribed dosages. The prescribed medication is necessary to allow Mr. Kern to function at work and in everyday life. He likely will be on pain medication for the remainder of his life, absent some other resolution of the source of his pain.

R. at 87.

The observations contained in Kern's medical records and those noted by Dr. Dillé, as well as Kern's testimony as to his coordination at the time of the stop, are further supported by

the jail audio and video submitted in the record on DVD. R. at 89-91. If the Court watches that surveillance footage, it will see Kern clearly not falling all over himself as alleged by the *Affidavit of Probable Cause*. Kern is awake, alert, responsive and able to complete all tasks given to him, including walking, standing against the wall, disrobing, etc. At one point, he has some difficulty removing his shoe, which is understandable given his back problems.

So, on one hand, Kern provided the Department with his own testimony that he was not impaired, his medical records confirming that this level of medication does not impair him, his doctor's opinion that this level of medication does not impair him, and the audio/video of the jail showing he was not impaired (which, again, is all of the audio and video available in this case because the officer did not gather any else). On the other hand, the Department had the *Affidavit of Probable Cause* of the officer, with all its defects (cut and paste, inconsistent, incomplete). No audio or video of the stop was taken by the officer. No drug recognition expert was brought in. Just the opinion of the officer. That is what the Department based its conclusion on. It disregarded all else that Kern presented because, according to the hearing officer, the things the officer reported in his *Affidavit* were not consistent with someone who was not impaired and the medical doctor would not know because he was not there. It is true that the medical doctor was not present and no one else can substantiate or refute the officer's allegations because the officer did not take any audio or video of the stop. Nevertheless, the medical doctor is very familiar with Kern and his condition while under the prescribed doses, which he stated were consistent with what was observed in the test results. He has personally observed Kern under these circumstances and opined that he was not impaired.

Viewing the record **as a whole**, the Department's suspension of Kern's driving privileges (both his Class D and CDL privileges) was not supported by substantial evidence. Again, "[s]ubstantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Watson*, 149 Idaho at 854, 243 P.3d at 670. The District Court agreed, holding:

While there is some evidence of speech and cognitive difficulty, there is substantial evidence which shows such may well have been caused not by drugs, but by the conditions of the scene and circumstances of the arrest. Without substantial evidence showing that Kern's impairment was caused by drugs, the license suspension and disqualification cannot stand.

In view of the weight of the evidence to the contrary, including the State's own video footage at the jail, no reasonable mind would accept the officer's conclusion that Kern was impaired at the time of the incident. Every piece of evidence, other than the officer's spotty report, indicates to the contrary. The evidence presented to the Department of non-impairment so outweighs the evidence of impairment as to make reasonable belief impossible. Accordingly, the Department's Suspension is not based on substantial evidence and should be overturned.

C. The Department's decisions were arbitrary, capricious and/or an abuse of discretion.

When a discretionary decision is reviewed on appeal, the reviewing court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Center, Inc. v.*

Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). The multi-tiered inquiry of *Sun Valley Shopping Center* also applies to a court's review of the discretionary decisions of an ALS hearing officer. *In re: Suspension of Driver's License of Gibbar*, 143 Idaho 937, 945, 155 P.3d 1176, 1184 (Ct. App. 2006). “However, in addition to complying with the multi-tiered inquiry of *Sun Valley Shopping Center*, the hearing officer's discretionary decision must comply with the procedural due process guarantees of the United States and Idaho Constitutions.” *Id.*

Section 2 of the Suspension Order lays out the analysis and reasoning for finding that substantial and competent evidence supported the finding of impairment. The hearing officer discusses the officer’s *Affidavit of Probable Cause* and not a whole lot else. He cursorily mentions Dr. Dillé’s opinion, but dismisses it because Dr. Dillé was not there. He does not discuss Kern’s testimony. He does not discuss the audio and video from the jail. He briefly and generally alludes to the errors and inaccuracies in the *Affidavit*, but dismisses that as mere technicalities. He never addresses the lack of audio and video of the stop. He alludes to the fact that Kern’s criminal charges for DUI were dismissed and pled to inattentive driving, but dismisses that by stating that it is not controlling as a result of different evidentiary standards. Kern agrees that there are different evidentiary standards, that is apparent in the hearing officer’s analysis. However, the standard employed seems to be more of “I’m going to affirm the suspension of your license and it really doesn’t matter what you say.” The Department’s order checks the right boxes by providing generalized statements of what was provided and that it considered everything. But, those generalized statements are somewhat belied by the actual analysis. Based on that, and in light of the evidentiary failures highlighted in the preceding

Section, it is apparent that the Department's decisions were arbitrary, capricious and/or an abuse of discretion. Accordingly, the suspension of Kern's driving privileges and CDL should be overturned.

D. The Suspension violates Kern's rights to due process under the United States and Idaho constitutions and constitute an unlawful taking thereunder.

It is fundamental to our legal system that the State shall not deprive "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The due process guarantees derived from the United States and Idaho constitutions are substantially the same. *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983). Due process analysis requires a two-step process to determine due process rights: first, deciding whether a governmental decision would deprive an individual of a liberty or property interest within the meaning of the Fourteenth Amendment's Due Process Clause; and second, if a liberty or property interest is implicated, a balancing test must be applied to determine what process is due. *State v. Rogers*, 144 Idaho 738, 740, 170 P.3d 881, 883 (2007) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18, 32-34 (1976)). "[M]inimum procedural due process requirements ultimately turn on a highly fact-specific inquiry." *State v. Jacobson*, 150 Idaho 131, 135, 244 P.3d 630, 634 (Ct. App. 2010). Courts must consider three factors in procedural due process challenges:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

In the criminal context, due process is violated if an officer refuses to allow a DUI arrestee to contact legal counsel after any alcohol concentration test requested by the officer has been completed or refused. *Jacobson*, 150 Idaho at 135, 244 P.3d at 634 (Ct. App. 2010). That Court acknowledged that the right to due process is, in essence, the fair opportunity to defend against the State's accusations, thereby denying evidence. *Id.* Upon identification of a recognized interest, the court must evaluate the facts to determine if due process was satisfied. *Id.*

The suspension of a driver's license involves state action that adjudicates important interests of the licensee, and therefore a driver's license may not be taken away without procedural due process. *Dixon v. Love*, 431 U.S. 105, 112, 97 S.Ct. 1723, 1727, 52 L.Ed.2d 172, 179-80 (1977); *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90, 94-95 (1971). This interest is especially pronounced in a rural state like Idaho where public transportation, as an alternative to driving a private vehicle, is often unavailable. *Bell v. Idaho Transp. Dept.*, 151 Idaho 659, 262 P.3d 1030 (2011).

The Court must determine whether Kern was afforded the requisite due process. In analyzing this question, the Court should consider, as provided above, whether Kern had a fair opportunity to defend against the State's accusations. Kern contends that he did not. The Department certainly provided a forum for Kern to present his reasons for reversing the suspension of his driver's license and CDL. However, the absence of any audio or video of the

stop itself denied Kern any meaningful opportunity to rebut the contents of the officer's *Affidavit of Probable Cause*. The prejudice to Kern arising from this denial is evident in the substantial weight afforded to the *Affidavit* by the Department to the exclusion of Kern's mitigating evidence. In fact, the Department disregarded the exculpatory opinion of Kern's physician because the physician was not present at the stop and could not assess Kern's state at the time in question. The Department then held that the officer's observations clearly indicate impairment.

The Department may be correct that such observations are sufficient substantiation of impairment. But, there is no evidence to support it and Kern effectively has no opportunity to rebut it because no one was present but Kern and the officer. In essence, is there anything Kern could have presented that would have overcome the officer's bare allegations? Is there anything Kern could have done differently to overcome the suspension? Frankly, other than what Kern did present to the Department, there is nothing else that could have been provided in his view. The Department disregarded a medical doctor's opinion because the medical doctor was not at the scene. Is Kern supposed to travel with his medical doctor in the passenger seat at all times? Is Kern supposed to install a dashcam and/or wear an audio recorder at all times. While that presents a somewhat simplistic test, a process cannot be deemed to be fair if the procedure implemented, as opposed to the facts of the matter, leaves the accused with no chance of success.

The situation in which Kern finds himself is, essentially: an officer says you appeared drowsy, but he's not going to take any audio or video of it (or even a photograph of Kern during the stop, for that matter); there is later audio and video of you at the jail showing you are not impaired, but it is your burden to prove that you were not impaired **at the precise time** the

officer observed you and, unless you can, your driving privileges will be suspended. You provide testimony from a doctor affirming that you could not have been that impaired under those medications, based on his own observations of you under those medications. That testimony is disregarded because the doctor was not there. The only way that such a burden could be overcome, if such weight is going to be afforded to the officer's on-site observations, is to have audio or video footage of the stop. Why is there no audio or video of the stop in this case? Because the officer (the State) did not take any despite being clearly able to do so. The game was rigged from the start, so to speak. That reeks of a procedural due process issue.

Kern is not proposing that a police report is categorically insufficient on its own and that all stops where audio/video are absent are unconstitutional on their face. However, this case involved a highly subjective determination by the police officer. A DUI involving alcohol has a breathalyzer result. The law provides that a BAC over 0.08 conclusively provides for impairment. There is no such protection for one accused of DUI for being under the influence of prescription medication. As applied in this case, Kern was deprived of any meaningful opportunity to rebut the contents of the report. Cross-examination of the officer would not accomplish that. He would simply state the contents of his report. The crux of this case is whether the officer's observation and conclusion of impairment were reasonable. The only way to make that determination is with audio or video recordings of the stop.

Applying the three factor *Mathews* test, Idaho courts have already held that license suspensions invoke a protected private interest. Second, there is a high risk of erroneous deprivation when the officer on the scene is made out to be the investigator and the judge with no

procedural safeguard to ensure his conclusions were reasonable. The probable value of an audio and/or video recording in such circumstances would be extremely high and relevant to the determination. Third, there would be almost no burden placed on law enforcement to require audio or video to be taken of the stop. The use of audio, dash cams and, increasingly, body cams is widespread – or, nearly universal. Kern is simply asking that they turn them on and provide their recordings. Failing to do so is inexplicable. The officer says that Kern was impaired and failed sobriety tests (even though his report contains inconsistencies and inaccuracies). If cross-examined, he would say the same thing (after reviewing his previous report). The Department demonstrated an over reliance upon the officer and his report, to the exclusion of all other exculpatory and contradicting evidence. If the Department is going to rely so heavily upon the officer's evidence, then there must be some objective means to review and rebut his observations and conclusions. The only way to provide that is through audio or video recordings. The failure of the police officer to provide this record was arbitrary and/or unreasonable conduct that denied Kern this protected right. Accordingly, the suspensions of both his driving privileges and CDL should be overturned.

VI. COSTS AND ATTORNEY'S FEES

In the event he is determined to be the prevailing party, Kern respectfully requests an award of his costs and attorney fees incurred in this matter pursuant to I.A.R. 40 and 41, and I.C. § 12-117. Idaho Code Section 12-117 provides, in pertinent part:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency,

political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Kern contends that the Department, both in its initial determination upholding his suspensions and throughout the appellate process, has not acted with a reasonable basis in fact and law. Further, Kern contends that his due process rights were violated and he was not afforded a meaningful opportunity to contest the Department's actions, to the detriment of a substantial interest. In the event he is determined to have prevailed, respectfully requests and award of costs and attorney fees in this matter.

VII.

CONCLUSION

What happened to Kern could happen to anyone who has an illness or injury. The illness or injury does not even have to rise to the severity of Kern's injury. It simply has to motivate that person to seek medical attention and/or medication, either through a doctor or over the counter. In the event that the medication, be it Tylenol, Nyquil, Benadryl or Oxycontin, has any indication on the drug facts that it may cause drowsiness, then this scenario could happen to you. Imagine you are involved in a fender bender or simply pulled over for speeding and the responding officer asks if you have taken any medications. You have a choice at that point to tell the truth or to lie. If you tell the officer that you have taken Nyquil, for example, and he or she subjectively determines that you are impaired, you will be arrested for DUI. A blood test is a foregone conclusion because there is no doubt the medicine is in your system. You are

prosecuted for DUI and your license is administratively suspended. You know you were not impaired so you fight it. Assume you are successful in overcoming the criminal charges, only to then find out that your license is still administratively suspended because you failed an evidentiary test. That does not seem fair to you, so you appeal that too. The suspension is upheld because the officer said you were impaired. You know you were not impaired but you cannot overcome the officer's observations because there is no audio or video of the stop. You testify that you were not impaired. Your doctor testifies that you should not be impaired under those conditions. But, ultimately, the suspension of your license is upheld because the officer said you were impaired, an assertion that cannot be impugned because the officer failed to provide any evidence that could prove otherwise.

Now mix the inequities of this "hypothetical" situation together with a dose of other inaccuracies and flaws in the officer's report upon which the entire suspension is based. If the Court does that, it will arrive at the facts and circumstances of this case. Something about that does not and should not sit well with anyone familiar with the principles of law and justice. Who has not taken such medications at one time or another in their life, for reasons far inferior to Kern's, and, knowing the effect such medication has on them, driven their car?

Kern finds this result troubling. If the Court agrees, Kern respectfully requests that it affirm the order of the District Court overturning the suspensions of Kern's driving privileges and CDL.

Oral argument is requested.

