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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

| | | |
|---------------------------------|---|------------------------------------|
| THAD EUGENE KERN, an individual |) | |
| |) | |
| Petitioner/Respondent, |) | Supreme Court No. 45798-2018 |
| |) | Twin Falls County No. CV42-17-1820 |
| vs |) | |
| |) | |
| IDAHO DEPARTMENT OF |) | Supreme Court No. 45799-2018 |
| TRANSPORTATION, |) | Twin Falls County No. CV42-17-3425 |
| |) | |
| Respondent/Appellant. |) | |

APPELLANT’S REPLY 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.
LAW AND ARGUMENT

1. The District Court improperly shifted the burden of proof to IDT.

Respectfully, the District Court improperly held that the license suspensions should be vacated. The general rule relative to a license suspension is that there must be evidence that the presence of drugs in the driver's system caused impairment. *Feasel v. Idaho Transp. Dep't*, 148 Idaho 312, 316, 333 P.3d 480, 484 (Idaho 2009). The District Court ultimately held that there was no "substantial and competent evidence on the record as a whole showing that Kern was impaired by drugs in violation of IC 18-8004." R Vol. I, p. 261.¹ As stated in *Appellant's Brief*, it was not Idaho Department of Transportation's ("IDT's") burden to prove there was substantial and competent evidence of the impairment. *See* Appellant Br. at 8-11.

At the Hearing, pursuant to Idaho Code section 18-8002A(2)(b), Kern had the burden of disproving that he was not impaired by intoxicating drugs. Kern presented the following evidence in an attempt to disprove that he was not impaired by drugs on the day of the accident:

- Kern's dosage was last updated in February 2016, and in his view his dosage amount does not affect his ability to drive properly. Tr Vol. I, p. 10, L. 24–25 - p. 11, L. 1–6.
- Kern is an owner of a trucking company and has driven vehicles for many years while on the drugs. *Id.* at 11 L. 7–10.
- Kern has not had any other accidents or run-offs before this accident since he has been on the medications. *Id.* at L. 11–13.
- Kern "simply went off the road." *Id.* at L. 18.
- The jail video showed he was stable and able to walk. *Id.* at p. 12, L. 9–13.
- Kern does not feel this medication impairs his ability to drive. *Id.* at p. 17, L. 4–6.
- Kern has not been cited for a DUI since he has been on pain meds. *Id.* at L. 21–23.
- When Kern's medications changed he took a few days off from driving to see how it affected him. *Id.* at L. 16–25 - p. 22, L. 1–2.

Hearing Officer considered the evidence Kern proffered to invalidate the license suspensions. Ultimately, Hearing Officer found that Kern presented no evidence the drugs were not

¹ All references to the Record are to the Clerk's Record, not the sealed record.

intoxicating drugs. R Vol I, p. 99. Further, Hearing Officer found that “Kern failed to present the requisite affirmative evidence to meet his burden, but rather his challenge to the suspension consisted solely of a technical attack” *Id.* at 99. Because Kern failed to meet his burden Hearing Officer sustained the suspension. *Id.* at 100.

At the judicial hearing, the District Court completely reversed the decision finding that Hearing Officer’s decision was not supported by substantial and competent evidence. *Id.* at 261.

The District Court made the following determinations to support its decision:

- The accident occurred because Kern was distracted by his cell phone. *Id.* at 256;
- Kern was not evaluated by a drug recognition expert at the time of the blood draw. *Id.*;
- Officer did not have a legal basis to believe Kern was driving in violation of Idaho Code section 18-8004. *Id.* at 260;
- The video evidence showed Kern was walking well and he was responding appropriately. *Id.*;
- “While the speech is a bit slurred, and his cognition may be somewhat slow, neither indicates a person who is necessarily impaired.” *Id.*;
- “No evidence establishes Kern’s baseline speech or cognitive function.” *Id.*;
- “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.” *Id.* at 261;
- “Without a showing that Kern’s impairment was caused by drugs, the license suspension and disqualification cannot stand.” *Id.*; and
- “IDT’s determination is not supported by substantial and competent evidence.” *Id.*

With respect to the District Court, the court pried into the facts to make a determination completely opposite than the factfinder. Ultimately, the court held that IDT did not meet its burden of providing substantial and competent evidence that Kern’s impairment was caused by intoxication drugs. *Id.* at 261. But, it was Kern’s burden to disprove the evidence.

What happened both factually and procedurally in this case is similar to what happened in *IDT v. Van Camp. Idaho Transp. Dep’t v. Van Camp*, 153 Idaho 585, 288 P.3d 802 (Idaho 2012). In *Van Camp*, a driver was pulled over after making an illegal U-turn. *Id.* at 586, 803. The officer noted that the driver had slurred speech, red and watery eyes and a dry mouth. *Id.* The driver also

appeared confused and disoriented and was unable to locate his wallet, registration, or proof of insurance. *Id.* After failing standardized field sobriety tests, the officer subjected the driver to a breath test, which resulted in a BAC of zero. *Id.* The driver did admit to taking two prescription drugs: Cyclobenzaprine and Seroquel. *Id.* A urine test confirmed the presence of Cyclobenzaprine. *Id.* The driver's license was suspended and the driver challenged the suspension arguing that IDT had the burden to demonstrate that the drug found in his system was intoxicating. *Id.* After IDT affirmed the suspension, the driver sought judicial review. *Id.* The district court vacated the suspension and IDT appealed to the Supreme Court of Idaho. *Id.*

On appeal, the Court first noted it was the driver's burden to prove his suspension should be vacated and that the only bases upon which the driver's suspension could be vacated were found in Idaho Code section 18-8002A(7). *Id.* at 587, 804. The Court observed that the driver "presented no evidence that cyclobenzaprine is not an intoxicating drug." *Id.* The Court viewed the driver's argument as trying to change the burden of proof: "Essentially, he contends that the absence of evidence demonstrating that cyclobenzaprine is intoxicating is sufficient to prove that the drug is not intoxicating. This is inconsistent with the plain language of subsection 7(c), which requires the licensee to affirmatively prove that the drug was not intoxicating." *Id.*

Similar to *Van Camp*, and as noted above, Kern presented no evidence whatsoever that the drugs were not intoxicating. As with *Van Camp*, Kern was found with a BAC of zero and Kern admitted to taking prescription drugs.² Tr Vol. I, p. 19, L. 20–23. Further, Officer noted that Kern was very slow to answer his questions and had a hard time removing his Driver's License from his wallet. *Id.* at 37. A blood test revealed that Kern had intoxicating prescription drugs in his system. *Id.* at 43. Kern requested a hearing wherein his suspension was affirmed. *Id.* at 92–105. The

² Kern also admitted to drinking alcohol. Tr Vol. I, p. 18 L. 17-22.

District Court, as it did in *Van Camp*, overturned the suspension here. *Id.* at 165. Like *Van Camp*, the decision of the District Court should be overturned as Kern did not “affirmatively prove that the drug[s] were not intoxicating.” *See Van Camp*, 153 Idaho at 587, 288 P.3d at 804 (Idaho 2012).

There are two conflicting rulings here: Hearing Officer found that Kern provided no evidence that the drugs were not intoxicating whereas the District Court held that IDT provided no substantial and competent evidence that Kern’s impairment was caused by intoxicating drugs. This Court must reconcile these two decisions. It is the position of IDT that, considering Kern’s burden of proof at the Hearing, if Kern provided no evidence to prove the drugs were not intoxicating, then Kern failed to satisfy his burden and the suspensions should be reinstated.

To sum up Kern’s arguments, he was not intoxicated because he used the drugs as prescribed and he did not have any prior accidents while using the drugs. That does nothing to disprove that on the drugs found in his system were not intoxicating. All three of the drugs found in Kern’s system have side effects that cause dizziness or drowsiness.³ In an analogous comparison, this is like a person caught drinking and driving who uses the defense that they have done it before and have not been caught yet. Kern merely attempts to poke holes at Officer’s affidavit and justify Kern’s use of the medication. Since this does nothing to prove the drugs were not intoxicating, Hearing Officer could not vacate the suspension. Because Kern failed to carry his burden to prove one of the five bases upon which the Hearing Officer could vacate a suspension, the Hearing Officer’s decision is supported by substantial and competent evidence.

2. The decision of Hearing Officer was not arbitrary, capricious, and/or an abuse of discretion because Kern failed to satisfy his burden.

³ *See* R. at 45–65; *Carisoprodol Side Effects*, WEBMD (Aug. 9, 2018), <https://www.webmd.com/drugs/2/drug-8625/carisoprodol-oral/details>; *Meprobamate Side Effects*, WEBMD (Aug. 9, 2018), <https://www.webmd.com/drugs/2/drug-8187/meprobamate-oral/details>; *Oxycodone HCL Solution Side Effects*, WEBMD (Aug. 9, 2018), <https://www.webmd.com/drugs/2/drug-1025-5278/oxycodone-oral/oxycodone-oral/details>.

Kern is asking this Court to reweigh the evidence and give more weight to Kern's testimony since the District Court held that IDT failed to meet its burden. However, a Court sitting in an appellate position "does not substitute its judgment for that of the agency as to the weight of the evidence presented." *Feasel*, 148 Idaho at 314, 222 P.3d at 482 (Idaho 2009). Instead, it is to "defer to the agency's findings of fact unless they are clearly erroneous." *Id.* Note that in this case the District Court never mentioned that Hearing Officer's facts were clearly erroneous.

The decision by Hearing Officer was not arbitrary. The State has an interest in ensuring that the roadways are protected from intoxicated drivers. *Peck v. State, Dep't of Transp.*, 156 Idaho 112, 117, 320 P.3d 1271, 1276 (Idaho Ct. App. 2014). That interest is rationally related to the disqualification of a driver's license for driving offenses occurring while driving a non-commercial vehicle. *Id.* Thus, a decision by a hearing officer to suspend a license is not arbitrary as long as the driver's conduct was rationally related to operating a motor vehicle while intoxicated. *See generally Id.* In other words, as long as Hearing Officer found that Kern had intoxicating drugs while operating a motor vehicle, his decision to suspend Kern's license was not arbitrary.

Kern further argues that Hearing Officer abused his discretion by dismissing irrelevant evidence and relying too heavily on Officer's *Affidavit of Probable Cause*. However, Kern's perception misplaces the burden of proof and overlooks his failure to prove one of the bases for vacating a suspension. Kern's perception and argument is summed up in his brief: ". . . 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.'" Resp't Br. p. 21. However, re-paraphrasing Kern's argument with the actual law, it should state, "I'm going to affirm the suspension of your license unless you prove, by the preponderance of the evidence, one of the bases of vacating that suspension under Idaho Code section 18-8002A(7)." Kern failed to prove any of those bases for vacating the suspension,

and therefore the Hearing Officer's decision was not arbitrary, capricious, or an abuse of discretion as he was statutorily obligated to render the decision he made.

3. Kern's due process rights were not violated since he was given the opportunity for a fair hearing before and impartial tribunal.

Kern argues that his due process rights were violated. Specifically, Kern argues that while he was presented with a forum, there was no video or audio of the stop itself which denied Kern the opportunity to rebut Officer. Resp't Br. pp. 23–24. However, Kern's due process allegation is not about the nature of the proceeding, but simply an inaccurate perception of what a fair hearing would look like in a case where the evidence is overwhelmingly against him.

Due process does not entitle a person to a favorable result, only the "opportunity upon reasonable notice for a fair hearing before an impartial tribunal." *Elias-Cruz v. Idaho Dep't of Transp.*, 153 Idaho 200, 204, 280 P.3d 703, 707 (Idaho 2012). "The minimum constitutional due process requirements for administrative hearings are timely and adequate notice and an opportunity to be heard that is meaningful and appropriate to the nature of the case." *Hawkins v. Idaho Transp. Dep't*, 161 Idaho 173, 177, 384 P.3d 420, 424 (Idaho Ct. App. 2016) (no subsequent history). IDT is unaware of any case law indicating that due process requires entitlement to a favorable result.

Kern's perception that he was in a no-win situation, and thereby could not get a favorable result at the hearing, is a product of the circumstances he created and does not render the hearing unfair. Kern asks, "Is there anything Kern could have presented that would have overcome the officer's bare allegations?" as though he is entitled to overcome the evidence regardless of what the evidence is. Resp't Br. p. 24. The short answer to his question is probably no, but that is not a result of the hearing—it is because of the overwhelming evidence against him. Kern could have produced a blood test result that had no substances in it—but he did not. He produced the opposite.

Kern could have pointed to the videos and said that he admitted nothing about taking drugs or alcohol—but he did not. In fact, the video shows him admitting to taking an alarming amount of Oxycodone and Soma. Kern could have produced evidence of him speaking clearly and responding within a normal timeframe. He did the opposite. Kern does point to instances where he did not fall over on the day of the accident as though that should be sufficient to show he was not intoxicated. Simply put, Kern is in denial and does not realize that he could not overcome the “officer’s bare allegations” because those allegations were supported by the other overwhelming facts such as his accident, his blood test, his admission to using an alarming amount of drugs, and his speech/actions in the video. In essence, and to analogize Kern’s argument, his argument is like a DUI case where the driver’s BAC is tested at .25 and the driver alleges that the hearing is unfair to him because “there is nothing that he could present that would have overcome the allegations.”

Kern received due process as he asked for a hearing and received one. The fact that the evidence was overwhelmingly against him does not render that hearing unfair or a violation of his due process rights.

4. Attorney Fees should not be awarded since IDT acted with a reasonable basis.

Kern is not entitled to attorney fees. In an appellate proceeding, costs may be awarded to a “prevailing party unless otherwise provided by law or order of the Court.” I.A.R. 40(a). The Court “in its decision on appeal shall include its determination of a claimed right to attorney fees, but such ruling will not contain the amount of attorney fees allowed.” I.A.R. 41(c). Attorney’s fees are awarded only if the nonprevailing party acted without a reasonable basis in fact or law. Idaho Code section 12-117.

This Court has held that this statute does not allow a court to award attorney fees on judicial review of an administrative decision. *St. Luke's Magic Valley Reg'l Med. Ctr., Ltd. v. Bd. of Cnty.*

Comm'rs of Gooding Cnty., 248 P.3d 735, 742, 150 Idaho 484, 490 (Idaho 2010). The Idaho Appellate Court has specifically held that attorney fees are not awarded on license suspension hearings. *Peck v. Dep't Transp.*, 153 Idaho 37, 278 P.3d 439 (Idaho Ct. App. 2012). Notwithstanding the above, IDT recognizes that a change was made to the language of the statute after these cases were decided.⁴

Even if this Court finds that attorney's fees may be awarded in this case, it still must determine that the nonprevailing party acted without a reasonable basis. Idaho Code section 12-117. By example, where an agency "has no authority to take a particular action, it acts without a reasonable basis in fact or law." *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 159 Idaho 813, 367 P.3d 208, 226 (Idaho 2016). Further, an agency acts without a reasonable basis if its claims are frivolous or without foundation. *See Mendez v. Univ. Health Serv. Boise State Univ.*, 163 Idaho 237, 409 P.3d 817, 827 (Idaho 2017). This Court has held that insofar as a party advances complex arguments in good faith, then it acts with a reasonable basis. *See United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 408 P.3d 52, 61 (Idaho 2017).

Kern provided no argument for this Court to consider that IDT acted without a reasonable basis. In actuality, IDT provided complex arguments in good faith. This case stemmed from Officer having sixteen (16) reasons why Kern was intoxicated, including Kern admitting he drank alcohol. R Vol I, p. 97. Based on Officer's probable cause, Officer conducted an investigation which led to the finding of intoxicating drugs. From these facts IDT properly suspended Kern's license. Hence,

⁴ The Court's reasoning in this holding stems from *Smith v. Washington Co.* In *Smith*, the Court held that the then-phrasing of Idaho Code section 12-117—"in any administrative proceeding or civil judicial proceeding"—did not apply to an agency hearing. *Smith*, 247 P.3d at 620, 150 Idaho at 393 (Idaho 2010). In response to this holding, the statute was revised by legislation to say "in any proceeding." S.L. 2012, ch. 149, § 1, eff. March 27, 2012. Nonetheless, the purpose of this revision was "to require government agencies to only begin lawsuits where they have a reasonable probability of winning." H. Jud., R. & Admin. Comm., *S1335*, March 7, 2012. It was not the legislative intent to award attorney's fees at an administrative hearing where the government did not begin the lawsuit. Therefore, it is the position of IDT that *Peck* is still good law, and the statute awarding attorney's fees does not apply to this case.

the claims of IDT were not frivolous. In all aspects of these proceedings IDT had a reasonable basis to believe Kern was driving under the influence of intoxicating drugs and it was justified to defend its position. Because IDT acted with a reasonable basis, this Court should deny the request for attorney fees in the matter.

II.

CONCLUSION

Hearing Officer held that Kern provided no evidence the drugs were not intoxicating whereas the District Court held IDT did not provide substantial and competent evidence that Kern's impairment was caused by intoxicating drugs. This Court should reconcile these two conflicting decisions by overturning the decision of the District Court since the court erroneously placed a higher burden on IDT. Attorney's fees should be denied since IDT acted with a reasonable basis by advancing complex arguments in good faith.

DATED this 17th day of August, 2018.



Timothy J. Stover

CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of August, 2018, he caused a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to be served upon the following persons in the following manner:

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