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Wernecke v. State, Idaho Transp. Dept. Appellant's Reply Brief Dckt. 42040

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IN THE SUPREME COURT OF THE STATE OF IDAHO

KEVIN RICHARD WERNECKE,)
)
 Petitioner- Respondent,)
)
 v.)
)
STATE OF IDAHO, IDAHO)
TRANSPORTATION DEPARTMENT,)
)
 Respondent.)

SUPREME COURT NO. 42040-2014

APPELLANT’S REPLY BRIEF ON APPEAL

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for Idaho.

Honorable John R. Stegner, District Judge, Presiding

Danny J. Radakovich
Residing at Lewiston, Idaho, for Appellant

Edwin Litteneker, Special Deputy Idaho Attorney General
Residing at Lewiston, Idaho, for Respondent

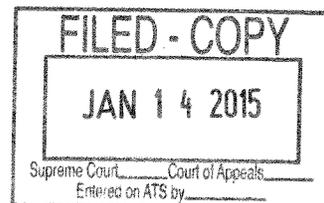


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TABLE OF CASES AND AUTHORITIES

State v. Helfrich, 131 Idaho 349, 955 P.2d 1128 (1998) 3, 4

IDAHO STATUTES

Idaho Code §18-8002A 2

Idaho Code §18-8002A(7) 3

Idaho Code §18-8004(4) 2, 3

STATEMENT OF THE CASE

1. NATURE OF THE CASE

The petitioner-appellant has nothing to add to the Nature of the Case set forth in his initial brief on appeal.

2. COURSE OF PRIOR PROCEEDINGS

The petitioner-appellant has nothing to add to the Nature of the Case set forth in his initial brief on appeal.

3. STATEMENT OF THE FACTS

The respondent has set forth a combination factual statement and procedural history of the case. We do not, generally, have a quarrel with that section of the respondent's brief, but we wish to make a couple of comments.

First, on page 2 of its brief, the respondent asserts that Mr. Wernecke's speech was slurred. Fortunately, the cold, hard videotape pretty well illustrates that the allegation that Mr. Wernecke's speech was slurred is, at the best, an exaggeration by the officer and, at the worst, an outright untruth.

Second, it is interesting to note that, on page 2 of its brief, the respondent evidently does not deny that Mr. Wernecke passed all of the field sobriety tests other than the horizontal gaze nystagmus. Of course, the horizontal gaze nystagmus is the *only* field sobriety test for which the results cannot be independently verified with one's own eyes by reviewing the cold, hard video.

Third, on page 2 of the respondent's brief, there is a rendition of the course of the efforts to obtain sufficient breath samples to constitute a valid breath "test", under the statute. That rendition leaves out a great deal of what occurred during the process and the portion that was left out is directly salient to one of the issues of the current appeal, i.e., whether the officer obtained sufficient samples to constitute a valid breath "test".

ISSUE ON APPEAL

We have no changes or additions in this brief to our issues on appeal, but we wish to make a couple of comments relative to the respondent's commentary as to our issues on appeal.

First, on page 4 of its brief, the respondent noted that Mr. Wernecke has not listed Issue Number 3 in his argument in his identification of issues at the beginning of his appeal brief. That is true and it was an omission but it is hard to see the point of the comment, since the issue is supported by argument in the body of the brief.

Second, the respondent claims on page 2 of its brief that Mr. Wernecke does not mention in his brief and has, therefore, waived any challenge to the hearing examiner's finding that the "test result shows an alcohol concentration in excess of .08 . . ." That is a fascinating argument, but one which ignores the thrust of both the law and the petitioner-respondent's initial brief on appeal. As we noted on page 9 of our initial brief on appeal:

"Idaho Code §18-8002A requires that, in order to initiate the ALS suspension process, the officer must, within five (5) business days following service of the notice of suspension, forward certain things to the department, including "a certified or duplicate original of the results of all tests for alcohol concentration". The administrative hearing officer is then required, as part of his job, to find that the tests were conducted in accordance with the requirements of section 18-8004(4), which section requires that tests be performed in accordance with a method approved by the Idaho State police."

It would seem obvious, to us at least, that a valid administrative license suspension requires proof that a valid breath "test" was performed per a method approved by the Idaho State Police. Equally obvious would be the fact that, if the breath "test" was not validly performed, then the numerical result of the test was not relevant, no matter what the hearing officer determined it to be. The bulk of our initial brief on appeal was devoted to the argument that the testing done on Mr. Wernecke by Deputy Fairley did not comply with the ordained Idaho State Police procedure.

ARGUMENT

We can now proceed with our argument on specific issues. We raised various issues in our initial brief on appeal but this reply brief will deal with our argument under subpart B of Issue No. 1, i.e., that the hearing officer improperly taxed Mr. Wernecke with the effect of the two (2) failed breath samples. In doing so, the petitioner-appellant does not waive or abandon the other issues. We simply have nothing to add to them at this time.

Insofar as subpart B of Issue No. 1 raised by Mr. Wernecke, the respondent went on at length and tried to establish some basis for concluding that there is a sufficient difference between the former refusal statute (which has been amended) and the current statute dealing with alleged failure of breath testing to make the petitioner-appellant's argument invalid in part B of Issue 1 invalid. That position by the respondent is nothing but a red herring of grand proportions and we will show why that is so. Counsel for the respondent has gone on and on about how the statute dealing with refusals has changed and how what happened in the case of State v. Helfrich, 131 Idaho 349, 955 P.2d 1128 (1998) would not happen under the current version of the *refusal* statute. That may or may not be true, but it is irrelevant. What the respondent would prefer that the court not consider is that what has not changed is Idaho Code §18-8002A(7), which sets forth a laundry list of reasons why the suspension of the driver's privileges will be vacated. Subpart (d) states:

“(d) the tests for alcohol concentration, drugs, or other intoxicating substances administered at the direction of the peace officer **were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code**, or the testing equipment was not functioning properly when the test was administered; (emphasis ours)”

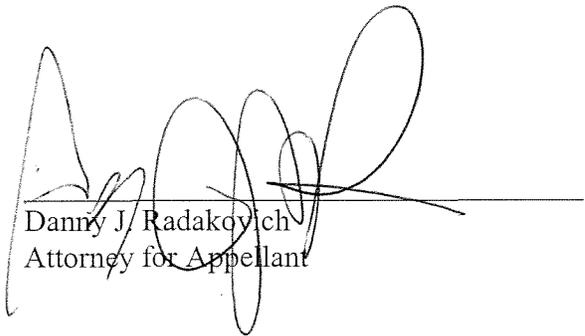
As the Court will recall, Idaho Code §18-8004(4) requires that tests be performed in accordance with a method approved by the Idaho State police and that takes us back to the 6.0 Idaho Standard Operating Procedure Breath Alcohol Testing which is one of the approved manuals on the Idaho State

Police web site. As has been abundantly set forth in our prior briefing, two (2) valid *samples* are required to comprise a complete breath *test*. Thus, it would appear to us that the rationale of Helfrich, supra, as to the inability of a driver to produce two (2) valid samples would be applicable in an ALS suspension case, just as it is in refusal cases. What the respondent refuses to wraps its head around is that we are not relying on Helfrich, supra, as a *refusal* case but, rather, as a case which delves into the mechanism as to how the provisions of the 6.0 Idaho Standard Operating procedure Breath Alcohol Testing decides what are, and are not, valid breath samples and the circumstances where, if the driver enunciates an inability to perform, the officer is required to go beyond just deciding that the driver is faking it or refusing to cooperate.

CONCLUSION

For all of the reasons set forth in this brief and our previous brief, the order sustaining the suspension should be overturned.

DATED this 12th January, 2015.

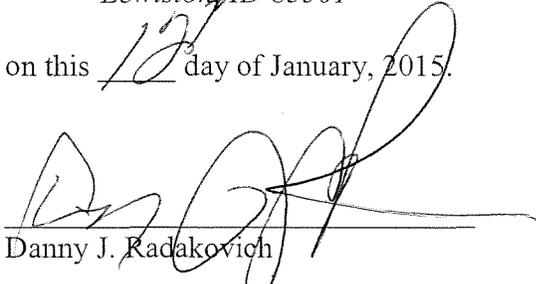


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I hereby certify that two (2) true and correct copies of the foregoing brief were mailed, first-class postage prepaid to:

Edwin Litteneker
322 Main Street
Lewiston ID 83501

on this 12th day of January, 2015.



Danny J. Radakovich