

11-21-2014

# Wernecke v. State, Idaho Transp. Dept. Respondent's Brief Dckt. 42040

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IN THE SUPREME COURT OF THE  
STATE OF IDAHO

IN THE MATTER OF THE DRIVING )  
LICENSE PRIVILEGES OF )  
KEVIN RICHARD WERNECKE )

\_\_\_\_\_  
KEVIN RICHARD WERNECKE, )

Petitioner-Appellant, )

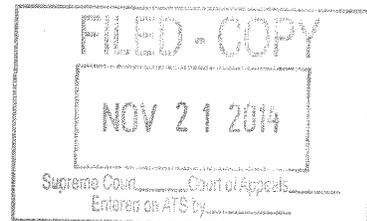
v. )

STATE OF IDAHO, )  
TRANSPORTATION DEPARTMENT, )

Respondent. )  
\_\_\_\_\_

SUPREME COURT NO. 42040

RESPONDENT'S BRIEF



APPEAL FROM SECOND JUDICIAL DISTRICT, LATAH COUNTY

THE HONORABLE JOHN R. STEGNER, PRESIDING

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## **I. STATEMENT OF THE CASE**

### **a. Nature of the Case.**

Kevin Richard Wernecke initially asked the District Court to review the decision of the Idaho Department of Transportation's Hearing Examiner, Eric G. Moody. The Department's Hearing Examiner determined that the requirements for suspension of Mr. Wernecke's driving privileges set forth in I.C. § 18-8002A were complied with and Mr. Wernecke should have his driving privileges suspended for ninety days as a result of failing an evidentiary test for alcohol concentration.

The District Court upon entertaining written briefs and Oral Argument determined that Mr. Wernecke had not met his burden to show that any basis to set aside the suspension existed pursuant to I.C. § 18-8002A(7). Further, the Court determined that a sufficient basis existed for the Hearing Examiner's decision, affirming the decision to suspend Mr. Wernecke's driving privileges.

### **b. Party References.**

The Idaho Transportation Department is referred to as the "Department" for purposes of this argument. Mr. Wernecke is specifically referred to by name. Where "driver" is used, it is in reference to drivers generally.

### **c. Reference to the Administrative Record.**

The references to the Department's Administrative Record are made to the Appellate Record page number not the Administrative Record page number. The Transcript of the Administrative hearing is included in the Record on Appeal as an exhibit. The transcript (Tr.) of that hearing is referred to as the Administrative License Suspension (ALS) Tr. by page and number.

**d. Factual Statement and Procedural History.**

On July 6, 2013 at approximately 8:15 p.m. Latah County Sheriff's Deputy Douglas Fairley stopped a blue and white Dodge pickup with Idaho license plate 1LA3693 for driving left of center in the 800 block of Larch Street in Potlatch, Idaho. Deputy Fairley had began following the Dodge pickup on 10<sup>th</sup> Street, observed the Dodge to be driving in the middle of the road, then observed the pickup to turn right onto Larch Street making a wide turn and driving in the left lane for approximately one-half of a block (R. p. 000025).

Deputy Fairley could smell a strong odor of an alcoholic beverage coming from the vehicle. Mr. Wernecke's eyes were red and glassy and Mr. Wernecke's speech was slurred. Mr. Wernecke admitted to having a couple of beers and explained the strong odor of alcohol coming from the pickup by stating that his coworker had spilled beer in the vehicle (R. p. 000025).

Mr. Wernecke performed several standardized field sobriety evaluations, failing the horizontal gaze nystagmus examination (R. p. 000025). Deputy Fairley detained Mr. Wernecke for DUI based on the results of the field evaluation and the strong smell of alcoholic beverage (R. p. 000025).

Deputy Fairley played the ALS advisory recording and obtained breath samples from Mr. Wernecke. Mr. Wernecke would not blow into the Lifeloc FC20 as instructed and the first breath sample offered was insufficient. Deputy Fairley explained the directions to Mr. Wernecke a second time and Mr. Wernecke blew and provided a breath sample indicating an alcohol content of .167. The third time, Mr. Wernecke blew into the Lifeloc briefly and then stopped blowing, resulting in the report of a second insufficient

breath sample (R. p. 000025).

Deputy Fairley arrested Mr. Wernecke for driving under the influence and transported Mr. Wernecke to the Latah County Jail. (R. p. 000025).

Deputy Fairley provided Mr. Wernecke with the Advisory Notice explaining the consequences of the failed evidentiary test (R. pp. 000021-000022).

Mr. Wernecke timely requested a hearing with the Idaho Department of Transportation's Hearing Examiner on the proposed Administrative License Suspension resulting from the breath test failure (R. pp. 000030-000033).

The Administrative License Suspension hearing was held telephonically on July 29, 2013 (R. p. 000023). The Department's Hearing Examiner entered Findings of Fact, Conclusions of Law and Order sustaining the Administrative Suspension of Mr. Wernecke's driving privileges on August 9, 2013 (R. pp. 000050-000059).

Mr. Wernecke timely filed a Petition for Judicial Review (R. pp. 000061-000063) and the suspension was stayed pending the Court's review (R. pp. 000064-000065).

The Court entertained briefing and heard Oral Argument on two separate occasions.

The District Court determined that Mr. Wernecke had not met his burden pursuant to I.C. § 18-8002A(7), affirming the decision of the Department's Hearing Examiner in its Memorandum Opinion of March 21, 2014 (R. pp. 0000187-0000197).

Mr. Wernecke timely filed his Notice of Appeal of the District Court's decision and the suspension of Mr. Wernecke's driving privileges have been stayed pending the Appeal.

## II. ISSUES ON APPEAL

Mr. Wernecke addresses three issues on appeal which for purposes of the Department's response are characterized consistent with Mr. Wernecke's burden pursuant to I.C. § 18-8002A(7).

Issue 1: The tests for alcohol concentration were conducted in accordance with the requirements of I.C. § 18-8004 and the breath alcohol testing equipment was properly functioning, I.C. § 18-8002A(7)(d).

Issue 2: Legal cause existed for the stop of Mr. Wernecke's vehicle, I.C. § 18-8002A(7)(a).

Issue 3: Legal cause exists for requesting Mr. Wernecke to submit to evidentiary testing, I.C. §18-8002A(7)(b).

Mr. Wernecke does not list his issue No. 3 in the identification of issues, but includes an analysis of the circumstances of Mr. Wernecke being requested to submit to evidentiary testing in the Appellant's Initial Brief on Appeal.

Mr. Wernecke does not address in his opening brief and therefore has waived any challenge to the Department's Hearing Examiner's decision that the test result shows an alcohol concentration in excess of .08 in violation of I.C. § 18-8004, I.C. § 18-8002A(7)(e). Additionally, Mr. Wernecke does not challenge that he was not informed of the consequences of submitting to evidentiary testing, I.C. § 18-8002A(7)(e). *Kugler v. Drowns*, 119 Idaho 687, 809 P.2d 1116 (1991), *Wheeler v. IDHW*, 147 Idaho 257, 207 P.3d 988, 996 (2009).

### III. STANDARD OF REVIEW

Idaho Code § 18-8002A(7) sets out the burden of the driver to demonstrate to the Hearing Officer that driving privileges should be reinstated because:

- (a) The peace officer did not have legal cause to stop the person; or
- (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (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; or
- (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.

The burden of proof rests on the driver to prove any of the grounds to vacate the suspension of I.C. § 18-8002A(7), *Kane v. State, Dept. of Transp.*, 139 Idaho 586, 83 P.3d 130 at 143 (Ct. App. 2003).

The review of disputed issues of fact must be confined to the agency record for judicial review, I.C. § 67-5277.

Idaho Code § 67-5279(1) sets out the scope of review. “The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” *Howard v. Canyon County Bd. of Com’rs*, 128 Idaho 479, 915 P.2d 709 (1996).

Idaho Code § 67-5279(3) provides:

When the agency was required by the provisions of this chapter or by other provision of law to issue an order, the court shall affirm the agency

action unless the court finds that the agency's findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

The appropriate remedy pursuant to the Idaho Administrative Procedures Act is:

“. . . if the agency action is not affirmed, it shall be set aside, in whole or in part and remanded for further proceedings as necessary.” Idaho Code § 67-5279(3).

The decision of the Transportation Department must be affirmed unless the order violates statutory or constitutional provisions, exceeds the agency's authority, is made upon unlawful procedure, is not supported by substantial evidence or is arbitrary, capricious or an abuse of discretion. *Marshall v. Department of Transp.*, 137 Idaho 337, 48 P.3d 666 (2002). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in Idaho Code § 67-5279(3) and that a substantial right of that party has been prejudiced. *Druffel v. State, Dept. of Transp.*, 136 Idaho 853, 41 P.3d 739 (2002).

Appellate review of the District Court's decision requires the Court to review “the agency record independently of the District Court's decision”, *Marshall v. Dept. of Transp.* 137 Idaho 337, 340, 48 P.3d 666,669 (Ct. App. 2002).

Mr. Wernecke only argues that the Hearing Examiner's decision is “clearly erroneous”, a standard of review not found in I.C. § 67-5279(3) and fails to cite any authority for that Standard of Review. Further, Mr. Wernecke fails to cite for the Court any of the numerous Idaho Court of Appeals or Idaho Supreme Court's Appellate decisions considering the Department's Administrative License Suspension process.

## IV. ARGUMENT

### ISSUE 1

*The tests for alcohol concentration were conducted in accordance with the requirements of Idaho Code § 18-8004 and the breath alcohol testing equipment was properly functioning.*

Mr. Wernecke without considering the District Court's complete and thorough analysis of the Department's Administrative License Suspension process just argues that Mr. Wernecke met his burden to show that the Lifeloc breath alcohol test administered to him did not comply with the Idaho State Police for breath alcohol testing.

One evidentiary test result indicating breath alcohol content in excess of .08 is sufficient evidence of a violation of Idaho Code § 18-8004 for purposes of an Administrative License Suspension pursuant to Idaho Code § 18-8002A(7). Idaho Standard Operating Procedures, Breath Alcohol Testing, 6.2.4.<sup>1</sup>

Mr. Wernecke argues again without a factual basis, that Deputy Fairley is responsible for the breath test results which indicated an initial insufficient air sample, a blood alcohol of .167 and a second insufficient air sample (R. p. 000023).

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1

6.2.4 If a subject/individual fails or refuses to provide a duplicate, adequate sample as requested by the Operator, the results obtained are still considered valid by the ISPFS, provided the failure to supply the requested samples was the fault of the subject/individual and not the Operator.

6.2.4.1 Failure to provide a complete breath test due to the lack of 0.020 correlation in the samples provided needs to be clearly articulated that the lack of sample correlation was the fault of the subject and not of the instrument or of the samples themselves. The officer's observations of the subject need to be clear enough to explain any discrepancies. Refer to 6.2.2.2 for some examples of 0.020 correlation deficiencies.

Idaho Breath Alcohol Standard Operating Procedure, p. 16, Revision 4 Effective 1/16/2013.

Mr. Wernecke does not call Deputy Fairley to testify to the circumstances of breath testing in the original Administrative License Suspension hearing. Wernecke only argues that there is “some question” in the administration of the breath testing by Deputy Fairley. Mr. Wernecke does not indicate what the “question” is and why a “question” about the administration of the Lifeloc breath alcohol test satisfies his burden to demonstrate that the breath alcohol test was not properly administered. The raising of a question does not meet Mr. Wernecke’s burden pursuant to I.C. § 18-8002A(7).

Mr. Wernecke did not testify any differently to the circumstances of breath testing than as reported in Deputy Farley's report (R. pp. 000024-000027) or in the video recording made part of the Record by Mr. Wernecke.<sup>2</sup>

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2

At approximately 2048 hours, I asked Wernecke to provide a breath sample in the Lifeloc FC20 (Serial Number 90205837). I explained how Wernecke should blow into the Lifeloc FC20. Wernecke put his lips on the tube but did not blow. I told him to start blowing and he did not. I pulled the Lifeloc FC20 from his mouth and told him he was not blowing. I explained again how he needed to blow into the Lifeloc FC20. Wernecke blew into the Lifeloc FC20 very quickly and quit blowing. The Lifeloc FC20 gave an insufficient sample reading. I explained again how Wernecke needed to blow into the Lifeloc FC20. Wernecke gave a good breath sample on the second breath with a reading of .167. Wernecke started blowing into the Lifeloc FC20 and slowly quit blowing. The Lifeloc FC20 gave another insufficient sample reading.

Deputy Fairley's Probable Cause Affidavit, R. p. 000026.

Compare Mr. Wernecke's testimony:

- 12 Q. Now, did he have you perform an alcohol test in  
13 his car?  
14 A. Yes.  
15 Q. And did that involve blowing into a machine?  
16 A. Yes.  
17 Q. Now, the test result indicates that you had one  
18 complete test and three insufficient - - or, two insufficient  
19 samples. Did you blow the same amount each time?  
20 A. Far as I know, yes.  
21 Q. Okay. Did he ever tell you you weren't blowing  
22 correctly?  
23 A. He did the first time, so I blew harder the  
24 second time.  
25 Q. Okay. And then the third time, did you blow  
  
1 hard?  
2 A. Yes.  
3 Q. Okay. And so the net result was you had two  
4 insufficient samples and one supposedly sufficient sample.  
5 Correct?  
6 A. Right.

ALS Tr. p. 11 LL. 12-25 and p. 12 LL. 1-6.

Mr. Wernecke simply asks contrary to I.C. § 67-5279(1) that the Court substitute its judgment as to whether Mr. Wernecke offered sufficient breath samples for testing emphasizing different facts than those found by the Department's Hearing Examiner. The Court has consistently rejected that argument in the Administrative License Suspension cases.<sup>3</sup>

Since Mr. Wernecke has the burden of proving that the evidentiary test was not properly performed, Mr. Wernecke is responsible for creating a sufficient record.<sup>4</sup>

Mr. Wernecke has to do something more to demonstrate that Deputy Fairley's operation of the Lifeloc FC20 caused Mr. Wernecke to produce two insufficient air samples, contrary to the requirements of I.C. § 18-8004.

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<sup>3</sup>

We decline the invitation to simply substitute our view of the evidence for that of the hearing officer. However, we still review the evidence in the Record to determine whether the hearing officer's factual findings are supported by substantial and competent evidence, *Trottier v. ITD*, 155 Idaho 17, 340 P.3d 292, 298 (2013).

<sup>4</sup> For example, simply placing an exhibit in the Record and then arguing that the exhibit should mean something is insufficient to meet his burden, *In re Mahurin*, 140 Idaho 656, 99 P.3d 125 (Ct. App. 2004).

Deputy Fairley accurately describes the circumstances under which Mr. Wernecke provided air samples (See FN 2). Further, the Hearing Examiner had the benefit of the video recording of the administration of the breath alcohol test to Mr. Wernecke. The Hearing Examiner's conclusions as to Mr. Wernecke's conduct are supported by the video recording ALS R. Exhibit A. Mr. Wernecke can be observed to stop blowing air on both occasions resulting in the report of an insufficient air sample (See ALS R. Exhibit A at the running time stamp 33:20 thru 38:00).

The Hearing Examiner's conclusion that the test for alcohol concentration administered to Mr. Wernecke was conducted in accordance with the requirements of I.C. § 18-8004 and that the testing equipment was functioning properly is based upon a sufficient Record.

Mr. Wernecke makes no argument that the breath alcohol testing equipment was not in working order. Mr. Wernecke only argues that Deputy Fairley in some questionable fashion administered the breath alcohol evidentiary test. Without calling Deputy Fairley and examining him as to the circumstances of his administration of the test, there is an insufficient record to conclude that Deputy Fairley did not properly conduct the breath alcohol evidentiary tests consist with the Idaho State Police Standard Operating Procedures.

Mr. Wernecke argues that *Helfrich v. State*, 131 Idaho 349, 955 P.2d 1128 (Ct. App. 1998) should be dispositive of the issue of Mr. Wernecke meeting his burden. *Helfrich* is simply inapplicable to the Court's review of the Department's Administrative License Suspension as a result of the failure of an evidentiary test for breath alcohol.

*Helfrich* is a refusal case pursuant to I.C. §18-8002 not I.C. § 18-8002A.

Pursuant to the then existing provisions of I.C. § 18-8002(3)(b), a driver was entitled to show cause as to why the driver refused to submit to or complete evidentiary testing. Idaho Code §18-8002(4)(b) limited the question at the Refusal Hearing to why the Defendant did not submit or complete evidentiary testing. One way for the driver to show that the evidentiary test was not refused was to demonstrate that the driver could not physically perform the breath alcohol evidentiary test.

Ms. Helfrich advised the police officer in the field that she was doing the best she could and was physically unable to complete the Intoxilyzer breath test. The police officer concluded that she was faking her inability to complete the test, ceased testing and treated Ms. Helfrich's action as a refusal to submit to evidentiary testing. At the refusal hearing, Helfrich testified that she suffered from bronchitis which frustrated her ability to successfully complete the test and that she had informed the police officer that she was on medication and that she was doing the best that she could.

The focus of the burden of the driver in a refusal case based on the then existing statute was whether the actions of the driver declining to submit to an evidentiary test for alcohol concentration should be considered a refusal. The analysis of the circumstances of the evidentiary breath test refusal pursuant to I.C. § 18-8002 is not applicable to the analysis of a driver's failure of an evidentiary test of breath alcohol pursuant to I.C. § 18-8002A(7). The burden of the driver in that refusal case is substantially different than the driver's burden in an Administrative License Suspension case.

Specifically the burden of the driver in the Administrative License Suspension case is to demonstrate that the driver did not fail the evidentiary breath test, that there was a problem in the administration of the breath test, or the breath testing equipment was not

in proper working order. Mr. Wernecke's burden here looks at what Deputy Fairley did or the functioning of the breath testing equipment, I.C. § 18-8002A7(c) & (d). While the Refusal Hearing pursuant to the then existing Idaho Code provisions may have permitted the driver to show cause as to why the evidentiary breath test was refused, the Administrative License Suspension requires Mr. Wernecke to show that Deputy Fairley or the functioning of the breath testing equipment contributed to the failed evidentiary breath test.

Clearly the Idaho Breath Alcohol Testing Standard Operating Procedures anticipate that one sample can be considered valid "if the subject/individual fails or refuses to provide a duplicate adequate sample as requested by the operation" 6.2.4 (See FN 1). If this is a factual question, then deference is extended to the Department's Hearing Examiner's determination, I.C. §67-5279.

Mr. Wernecke's argument as to the effect of his age or lack of breath may have prior to the Legislature's amendment of I.C. § 18-8002 been a sufficient basis to conclude he had met his burden if his actions had been considered a refusal by Deputy Fairley.

Additionally, Mr. Wernecke did not testify before the Department's Hearing Examiner that he had a difficult time breathing, that he was a smoker or that there was any other physical condition which impeded his ability to offer sufficient breath samples, again not creating a sufficient record.

However, the Legislature no longer permits an inquiry into *why* the driver refused to submit to an evidentiary test (emphasis mine).<sup>5</sup>

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<sup>5</sup> Idaho Code §18-8002(4)(b) now provides that the driver has the burden to demonstrate that the peace officer did not have legal cause to stop and request that the test be taken or that the request violates his civil rights. Such an analysis would now be consistent with I.C. § 18-8002A(7).

The *Helfrich* decision would no longer be applicable in a refusal case. A thorough review of the Court's Administrative License Suspension cases clearly indicates that the analysis of the driver's burden in a refusal case under I.C. §18-8002 has never been applied in an Administrative License Suspension case under I.C. § 18-8002A.

There is no legal basis to apply an analysis no longer appropriate given the present language of I.C. § 18-8002(4)(b) to the driver's burden in an Administrative License Suspension Hearing pursuant to I.C. § 18-8002A(7).

Clearly, the Court's decision in *Helfrich* and the dicta contained therein has no relevance and no application to the Administrative License Suspension resulting from a failed evidentiary test for breath alcohol.

The District Court here correctly determined after entertaining additional argument and briefing that the refusal analysis of *Helfrich v. State* does not apply in the Administrative License Suspension setting (R. p. 0000195-0000196).

Additionally, the Department's Hearing Examiner makes specific findings as to the proper functioning of the Lifeloc FC20 supported by the Record.<sup>6</sup>

Finally, Mr. Wernecke argues that the Hearing Examiner would have or should have taken notice of the Lifeloc Manufacturer's Referenced Manual (Appellant's initial Brief p. 10). Mr. Wernecke did not move the District Court to supplement the

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<sup>6</sup>

- 5.1 Exhibit C demonstrated the Lifeloc FC20 evidentiary breath-testing instrument used to test Wernecke's breath sample completed a valid performance verification check at 2338 hours on July 06, 2013.
- 5.2 The valid performance verification check approved the instrument for evidentiary testing in accordance with ISPFS SOPs.
- 5.3 The Lifeloc FC20 evidentiary breath-testing instrument functioned properly when the test was administered.

Findings of Fact and Conclusions of Law and Order, R. p. 000055.

Administrative Record to include the Lifeloc Manufacturer's Reference Manual pursuant to I.C. § 67-5276 nor does Mr. Wernecke indicate how it is that the Department's Hearing Examiner should have considered the application of the Lifeloc Manufacturer's Reference Manual. There may have been a time when individual breath testing instrument manuals were referenced in the Idaho State Police Standard Operating Procedures. However, the Lifeloc Manufacturer's Reference Manual is no longer part of the Idaho Breath Alcohol Standard Operating Procedures.

Nor does Mr. Wernecke provide any authority for the Court's use of the Lifeloc Manufacturer's Reference Manual and offers no factual or expert basis demonstrating any relationship between the Lifeloc Manufacturer's Reference Manual and the Idaho State Police Standard Operating Procedures.

The Department's Hearing Examiner's findings are based on substantial and competent evidence in the Record and are not arbitrary and capricious.

## **ISSUE 2**

*Legal cause existed for the stop of Mr. Wernecke's vehicle.*

Deputy Fairley reported that he stopped a blue and white 1995 Dodge 3500 driven by Mr. Wernecke for "driving left of center in the 800 block of Larch Street, Potlatch, Latah County, Idaho." Deputy Fairley reports that the Dodge was driving in the middle of the road after having turned right onto Larch Street. The Dodge made a wide turn and drove in the left lane for approximately one half of a block (R. p. 000025).

Mr. Wernecke does not dispute Deputy Fairley's observations. Mr. Wernecke acknowledges that he drove consistent with Deputy Fairley's observation. Nor does Mr. Wernecke dispute Deputy Fairley's report of Mr. Wernecke's driving.<sup>7</sup>

Mr. Wernecke argues that there is an explanation for his driving pattern which might not justify the conviction of the underlying motor vehicle violation or for operating a motor vehicle under the influence.<sup>8</sup>

Mr. Wernecke is simply asking the Court to substitute its judgment for that of the Hearing Examiner. Clearly, the Hearing Examiner's factual determinations are binding on the Court even where there is conflicting evidence before the Hearing Examiner, so

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7

2       A.       Well, on the corner of Tenth Street, it's a  
3 narrow corner. It veers to the left and there's a - - it's got  
4 a great-big, huge pothole right on the right side, and to miss  
5 the pothole you've either got to veer to the left or you can  
6 veer to the right. If go to the right, you'd be off the  
7 edge of the pavement to miss the pothole.

8       Q.       So in other words, in order to miss the pothole  
9 and stay on the road surface, you had to come to the left of  
10 center on that roadway?

11      A.       Right.

ALS Tr. p. 7 LL. 2-11.

21      A.       Yes. As a matter of fact, the car really is  
22 illegally parked. It's - - the front of that car is basically  
23 on the edge of Tenth Street. So in other words, for me to get  
24 around the car without hitting that car, I've got to - - I've  
25 got to veer to the - - I've got to hang wide to the left to make

1      that right-hand turn.

2       Q.       Okay. And did you, in fact, do that that night?

3       A.       Yes, I did.

ALS Tr. P. 8 LL.24-25 p. 9 LL.1-3.

<sup>8</sup> The District Court's analysis here is appropriate:

In this case Wernecke admits that he made a wide turn and does not contest that he drove left of the center lane. While he offers alternative explanations for the reasons he was engaging in his driving behavior it does not follow that the Hearing Examiner, as the finder of fact or Deputy Fairley as the officer making the stop had to accept that alternative explanation as true.

Memorandum Decision, p. 5, R. p. 000191.

long as those determinations are supported by substantial and competent evidence in the Record, *In re Trottier*, 155 Idaho 17, 304 P.3d 292 (Ct. App. 2013).

There is substantial and competent evidence in the Record supporting the Hearing Examiner's conclusion that a reasonable and articulable suspicion exists that Mr. Wernecke's vehicle is being driven contrary to traffic laws.<sup>9</sup>

Whether a statute is frequently violated does not make that driving within the normal range of driving behavior, *In re Beyer*, 155 Idaho 40, 304 P.3d 1206 at 1210 (Ct. App. 2013). Mr. Wernecke's failure to turn into the curbside lane of travel or his failure to drive on his side of the road cannot be characterized as driving within the range of normal driving behavior.

The Department's Hearing Examiner carefully considered the arguments of Mr. Wernecke.<sup>10</sup>

The Hearing Examiner also considered Mr. Wernecke's testimony of his driving

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The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer. *Id.* An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training. *State v. Montague*, 114 Idaho 319, 321, 756 P.2d 1083, 1085 (Ct.App.1988). Suspicion will not be found to be justified if the conduct observed by the officer fell within the broad range of what can be described as normal driving behavior. *Atkinson*, 128 Idaho at 561, 916 P.2d at 1286.

*In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 943, 155 P.3d 1176, 1182 (Ct. App. 2006).

10

- 1.1 While Wernecke was driving on 10<sup>th</sup> Street. Deputy Fairley observed Wernecke drive in the middle of the road, a violation of Idaho Code § 49-630.
- 1.2 When Wernecke made a right turn from 10<sup>th</sup> Street onto Larch Street. Wernecke made a wide turn and drove in the left lane for approximately ½ of a block, a violation of Idaho Code § 49-644(1) and Idaho Code § 49-630.
- 1.3 **Wernecke argued due to the size of his vehicle, the width of the road, and vehicles parked on the side of the road, there was no legal cause for the traffic stop. (Emphasis in original).**

Findings of Fact, Conclusions of Law and Order, R. p. 000052.

in light of Mr. Wernecke agreeing with Deputy Fairley's observations.<sup>11</sup>

Mr. Wernecke does not offer any evidence of "normal driving behavior." Mr. Wernecke does not indicate how it is that the Hearing Examiner's decision is not supported by substantial evidence in the Record or is arbitrary and capricious. Mr. Wernecke simply offers an alternative explanation of the meaning of his driving behavior at the time of the stop of his motor vehicle by Deputy Fairley.

The Hearing Examiner appropriately concludes that legal cause exists to stop Mr. Wernecke's vehicle.

The decision of the Department's Hearing Examiner is based on substantial evidence on the Record and is not arbitrary or capricious. The Department's Hearing Examiner sets out the circumstances of the information before him, what information was relied upon in making his decision and the basis for the conclusion.

Mr. Wernecke fails to meet his burden to demonstrate that legal cause does not exist for the stop of Mr. Wernecke's vehicle.

### ISSUE 3

*Legal cause exists for requesting Mr. Wernecke to submit to evidentiary testing, Idaho Code § 18-8002A(7).*

Mr. Wernecke's burden here is to demonstrate that there is insufficient legal cause to believe that he was not operating or was not in actual physical control of a motor

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<sup>11</sup>

- 1.11 Further, Idaho Code §49-644(1) and Idaho Code §49-630 do not contain exemptions for any vehicle to turn wide and drive down the center of a road.
- 1.12 Wernecke's statements to Deputy Fairley on the day of this incident are more credible than his subsequent testimony at this ALS hearing. See *State v. Mahurin 140 Idaho 656 (App 2004)*.
- 1.13 Based upon Exhibit A, Wernecke's failure to submit any evidence to support his position, and the record as a whole, Deputy Fairley had legal cause to stop the vehicle driven by Wernecke.

Findings of Fact, Conclusions of Law and Order, R. p. 000053.

vehicle while under the influence of alcohol.

There is no factual question as to Mr. Wernecke's operation and being in actual physical control of the motor vehicle.

Neither does there appear to be any factual question as to Mr. Wernecke displaying an odor of an alcoholic beverage, acknowledging consuming an alcoholic beverage, demonstrating slurred speech, and having glassy and bloodshot eyes.<sup>12</sup>

Further, Mr. Wernecke acknowledges that there is a reasonable basis to conclude that he was influenced by the alcohol that he had consumed.<sup>13</sup>

Mr. Wernecke simply focuses on his performance of the field sobriety tests and does not consider the remaining substantial evidence indicating legal cause for Deputy Fairley's belief that Mr. Wernecke was under the influence of alcohol, I.C. § 18-8002A(7)(b).

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<sup>12</sup> Mr. Wernecke is asked:

15 Q. Okay. And so did you still feel safe to drive?

16 A. Oh, yes.

17 Q. And did you tell the officer how much you had had  
18 to drink?

19 A. Yes.

ALS Tr. p. 9. LL. 15-19.

<sup>13</sup>

11 Q. Did you go in to a nurse to get an evidentiary  
12 test of any type: A blood or urine test or another blood?

13 A. No, I didn't. **I wasn't thinking squarely.** After  
14 I got bailed out, I should have went to the hospital, I guess,  
15 and had a test.

ALS Tr. p. 13. LL. 11-15. (emphasis added)

The Department's Hearing Examiner sets out the factual basis for his conclusion, particularly since there is no factual question as to Mr. Wernecke's actual physical control of a motor vehicle.<sup>14</sup>

Mr. Wernecke has failed to meet his burden to demonstrate that Deputy Fairley did not have legal cause to believe that Wernecke had operated a motor vehicle under the influence of alcohol in violation of I.C. § 18-8004.

## V. CONCLUSION

Mr. Wernecke does not meet his burden pursuant to I.C. § 18-8002A(7) to demonstrate that the Hearing Examiner's Decision was arbitrary or capricious or that the Hearing Examiner's Decision was not supported by substantial evidence in the Record.

The Hearing Examiner's decision to suspend Mr. Wernecke's driving privileges should be sustained and Mr. Wernecke's driving privileges should be suspended for ninety days.

DATED this 19 day of November, 2014.



Edwin L. Litteneker  
Special Deputy Attorney General

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- 2.1 Deputy Fairley established Wernecke's actual physical control of a motor vehicle.
- 2.2 Wernecke exhibited the following behaviors:
  - a. Smelled of an alcoholic beverage
  - b. Admitted to consuming alcoholic beverages
  - c. Slurred speech
  - d. Impaired memory
  - e. Glassy eyes
  - f. Bloodshot eyes
- 2.3 Wernecke met the decision point on the HGN SFST.
- 2.4 Wernecke did not want to perform the walk and turn (WAT) and the one leg stand (OLS) SFSTs.
- 2.5 Wernecke argued there was no legal cause to request an evidentiary test.
- 2.6 Although Wernecke did not perform the WAT and OLS SFSTs, Wernecke driving a motor vehicle contrary to Idaho Code, Deputy Fairley's observation of Wernecke as noted in Exhibit 3's DUI NOTES, and Wernecke failing the HGN SFST, as a whole, gave Deputy Fairley sufficient legal cause to arrest Wernecke and request an evidentiary test.

Findings of Fact and Conclusions of Law and Order, R. p. 000053.

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To:

Danny Radakovich  
Attorney at Law  
1624 G Street  
Lewiston, Idaho 83501

On this 19 day of November, 2014.



Edwin L. Litteneker