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State v. Riendeau Respondent's Brief Dckt. 41982

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. JESSE CARL RIENDEAU, Defendant-Appellant.	)	No. 41982 Kootenai Co. Case No. CR-MD-2013-5363

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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HONORABLE JOHN R. STEGNER, District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jesse Carl Riendeau appeals from the district court's intermediate appellate decision affirming his conviction for misdemeanor driving under the influence of alcohol (DUI).

Statement of Facts and Course of Proceedings

At approximately 1:00 a.m. on March 31, 2013, Coeur d'Alene City Police Officer Mario Rios contacted Riendeau after observing him fail to maintain his lane of travel while driving. (Mag. Div. Tr.,[1] p.5, Ls.18-23, p.7, L.22 – p.13, L.2, p.48, L.2 – p.49, L.1, p.93, L.14 – p.95, L.1.) Riendeau's speech was slurred, his movements were slow and lethargic, and he failed field sobriety testing. (Mag. Div. Tr., p.13, L.3 – p.13, L.19, p.14, L.12 – p.23, L.6, p.49, L.1 – p.50, L.11, p.95, L.2 – p.97, L.6.) Officer Rios arrested Riendeau for DUI and transported him to the Kootenai County Jail. (Mag. Div. Tr., p.23, Ls.8-12, p.50, Ls.12-13, p.97, Ls.7-8.) There, the officer checked Riendeau's mouth for foreign substances, instructed Riendeau not to belch, burp or vomit, and monitored Riendeau for 15 minutes. (Mag. Div. Tr., p.24, L.11 – p.25, L.18, p.50, Ls.15-21, p.97, L.9 – p.98, L.2.) During the 15-minute observation period, Officer Rios read Riendeau the standard Idaho administrative license suspension (ALS) advisories. (Mag. Div. Tr., p.25, L.21 – p.26, L.9, p.50, Ls.22-24, p.98, Ls.3-5.) At the end of the 15-minute observation period, the officer asked Riendeau to

[1] The transcripts of the hearings conducted at the magistrate level (cited herein as "Mag. Div. Tr.") appear at pp.283-390 of the Clerk's Record.

take a breath alcohol test on an Intoxilyzer 5000 breath test machine. (Mag. Div. Tr., p.26, L.23 – p.27, L.5, p.30, Ls.21-23.) Riendeau took the test without objection. (Mag. Div. Tr., p.30, L.24 – p.31, L.9, p.51, Ls.8-10, p.98, Ls.5-9.) The results of the test showed Riendeau had a breath alcohol content (BAC) of .17/.18. (Mag. Div. Tr., p.31, Ls.12-13, p.51, L.11, p.99, Ls.18-20; R., p.10.)

The state charged Riendeau with misdemeanor DUI. (R., p.6.) Riendeau filed a motion to suppress the breath test results, contending they were the fruit of an unlawful traffic stop and, alternatively, that the reading of the ALS advisories rendered his consent to the breath test invalid. (R., pp.25-37, 150-57.) He also filed a motion *in limine* to exclude his breath test results, contending the failure of the Idaho State Police (ISP) to comply with the rulemaking requirements of the Idaho Administrative Procedures Act (IAPA) in adopting Standard Operating Procedures (SOPs) and other methods for breath testing "makes all such testing too unreliable for use at a criminal trial under I.C. §18-8004." (R., pp.140-49; see also R., pp.38-139 (supplemental materials filed in support of motion in limine).) After a series of hearings, the magistrate denied Riendeau's motions. (R., pp.158-67, 172-73; see generally Mag. Div. Tr.)

Riendeau entered a conditional guilty plea, reserving the right on appeal to challenge the denial of his pretrial motions. (R., pp.174, 177-80.) The magistrate accepted Riendeau's plea, entered judgment, and placed Riendeau on probation. (R., pp.180-82.) Riendeau timely appealed to the district court (R., pp.183-86), which affirmed (R., pp.264-76). Riendeau again timely appeals. (R., pp.277-80.)

ISSUES

Riendeau states the issues on appeal as:

I. Whether the Idaho State Police have properly promulgated rules for the administration of breath testing.

II. Whether the Idaho State Police have promulgated rules that ensure accuracy as required by I.C. § 18-8002A and I.C. § 18-8004(4).

III. Whether *State v. Besaw*, 306 P.3d 219 (Idaho Ct.App.2013), is manifestly wrong and should be overruled.

IV. Whether the Administrative License Suspension advisory coerces and invalidates the defendant's consent to providing a breath sample under the Fourth Amendment of the United States Constitution and Article I § 17 of the Idaho Constitution.

(Appellant's brief, p.5.)

The state rephrases the issues as:

1. Has Riendeau failed to show error in the district court's determination that the magistrate correctly applied the law to the facts in denying Riendeau's motion *in limine* to exclude the breath test results?

2. Has Riendeau failed to show error in the district court's determination that the magistrate correctly applied the law to the facts in denying Riendeau's motion to suppress the breath test results based on Riendeau's assertion that the mere reading of the ALS advisories rendered his consent to the breath test invalid?

ARGUMENT

I.
Riendeau Has Failed To Show Error In The District Court's Determination That The Magistrate Correctly Applied The Law To The Facts In Denying Riendeau's Motion *In Limine* To Exclude The Breath Test Results

A. Introduction

Riendeau challenges the denial of his motion *in limine* to exclude the results of his breath test, arguing as he did to the magistrate and district courts below that the accuracy of those results is inherently unreliable for two reasons.

First, he argues that the breath test results were inadmissible because ISP has failed to comply with its statutory duty to establish methods to ensure the reliability of breath test results in general. (Appellant's brief, pp.6-11.) The Idaho Court of Appeals recently considered and rejected this precise argument in State v. Besaw, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013), *review denied.* Riendeau has presented no cogent reason why Besaw should be overruled, nor has he demonstrated from the record that the testing procedures utilized in his case actually produced an unreliable result. Having failed to do so, Riendeau has failed to show error in the denial of his motion to exclude the test results on this basis.

Second, Riendeau argues that the failure of ISP to comply with the rulemaking requirements of the IAPA in creating SOPs and manuals for breath alcohol testing renders those SOPs and manuals void and all BAC testing based on those standards too unreliable for use at a criminal trial. (Appellant's brief, pp.11-20.) This argument fails for several alternative reasons. First, nothing in I.C. § 18-8004(4) requires formal rulemaking as a prerequisite to the admissibility

of results of breath tests performed pursuant to methods approved by ISP. Second, if ISP's creation of the SOPs is agency action governed by the requirements of the IAPA, Riendeau's exclusive means for challenging such action was through the judicial review provisions of the IAPA; he has no standing to raise, and neither the lower courts nor this Court have jurisdiction to consider, a challenge to the validity of the SOPs as a basis for excluding breath test results in a criminal case. Finally, even if this Court reaches the merits of Riendeau's argument, correct application of the law shows the SOPs are not rules and, as such, no compliance with the formal rulemaking requirements of the IAPA was required.

B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The appellate court "examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." Id. "If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, [the appellate court] affirm[s] the district court's decision as a matter of procedure." Id. (citing Losser, 145 Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).

"When a decision on a motion addressing the admissibility of evidence is challenged, [the appellate court] defer[s] to the trial court's findings of fact supported by substantial and competent evidence." State v. Besaw, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013), *review denied*. Questions of law, including whether the state has satisfied the foundational requirements for the admission of breath test results in a DUI prosecution, are subject to free review. State v. Carson, 133 Idaho 451, 452, 988 P.2d 225, 226 (Ct. App. 1999); State v. Remsburg, 126 Idaho 338, 339, 882 P.2d 993, 994 (Ct. App. 1994).

C. Riendeau Has Failed To Show Any Basis For Reversal Based On His Claim, Already Rejected In *State v. Besaw*, That ISP Has Failed To Establish Methods To Ensure The Reliability Of BAC Test Results

In order to have the results of a breath test admitted as evidence at trial, the state must make a foundational showing that the administrative procedures which ensure the reliability of the test have been met. State v. Healy, 151 Idaho 734, 736, 264 P.3d 75, 77 (Ct. App. 2011); State v. Mazzuca, 132 Idaho 868, 979 P.2d 1226 (Ct. App. 1999) (citing State v. Utz, 125 Idaho 127, 129, 867 P.2d 1001, 1003 (Ct. App. 1993)). To satisfy this foundational requirement, "the state may rely on I.C. § 18-8004(4), which provides an expedient method for admitting BAC test results into evidence when the analysis is conducted pursuant to [Idaho State Police ("ISP")] standards." State v. Uhlry, 121 Idaho 1020, 1022, 829 P.2d 1369, 1371 (Ct. App. 1992) (citations omitted); accord Healy, 151 Idaho at 737, 264 P.3d at 78; State v. Nickerson, 132 Idaho 406, 411, 973 P.2d 758, 763 (Ct. App. 1999). Specifically, that statute provides:

> Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in a proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

I.C. § 18-8004(4). "If the State elects to proceed under § 18-8004(4), it must not only show that the test equipment was approved by [ISP] but also that the equipment was operated and the test administered in conformity with [ISP] standards." Nickerson, 132 Idaho at 411, 973 P.2d at 763 (citing State v. Bell, 115 Idaho 36, 39-40, 764 P.2d 113, 116-17 (Ct. App. 1988)).

Riendeau acknowledges that, pursuant to I.C. § 18-8004(4), breath test results are admissible if they were obtained in conformity with ISP methods meant to ensure the reliability of the results. He argues, however, that no such methods actually exist because ISP has, in several instances, modified its SOPs for breath alcohol testing by replacing what were once mandatory testing procedures with testing recommendations that need not be uniformly complied with, thereby "render[ing] the SOPs incapable of ensuring accuracy" of breath test results, generally. (Appellant's brief, pp.6-11.) Riendeau's argument fails because it is merely a rehashing of the argument already considered and rejected by the Idaho Court of Appeals in State v. Besaw, 155 Idaho 134, 142-44, 306 P.3d 219, 227-29 (Ct. App. 2013), *review denied*.

Like Riendeau, Besaw argued "that although ISP is charged by statute with adopting alcohol concentration *standards* meant to ensure the reliability of test results, the agency has abdicated this responsibility by replacing standards with testing *recommendations* that are not meant to ensure the accuracy of test results but, rather, to facilitate the admissibility of test results." Besaw, 155 Idaho at 143, 306 P.3d at 228 (emphases original). Specifically, he argued that because ISP had "changed a number of former 'must' testing requirements to 'should' recommendations within the SOPs," the SOPs effectively fail to set forth *any* standards for breath testing. Id. at 143-44, 306 P.3d at 228-29.

The Idaho Court of Appeals disagreed and, in so doing, rejected Besaw's argument, which was based on the dissenting opinion in Wheeler v. Idaho Transp. Dept., 148 Idaho 378, 223 P.3d 761 (Ct. App. 2010), *review denied*, that "nonmandatory standards [are] tantamount to no standards at all." Besaw, 155 Idaho at 144, 306 P.3d at 229. Although the Court was troubled by some of the information Besaw presented "about the manner in which the SOPs for breath testing have been developed or amended," the Court was not persuaded by any evidence before it "that the SOP procedures are incapable of yielding accurate tests." Id. Because Besaw failed to present any evidence "establish[ing] that the test procedures actually authorized by the SOPs and applied in Besaw's case [were] incapable of producing reliable tests," the Court found "no error in the magistrate court's denial of Besaw's motion to exclude the test results from evidence." Id.

The reasoning and result of Besaw are controlling in this case. Like Besaw, Riendeau argues that ISP has replaced the word "must" with the word "should" in several provisions of the SOPs.[2] (Appellant's brief, p.10.) And, like Besaw, Riendeau contends that the replacement of what were once mandatory breath testing methods with nonmandatory methods has resulted in there being no "method" at all to ensure the accuracy of breath test results. (Appellant's brief, pp.7-11.) Like Besaw, however, Riendeau has failed to present any evidence to demonstrate the SOPs, as amended, are incapable of yielding accurate results. Nor has he even argued, much less demonstrated, that Officer Rios failed to comply with any of the "recommended" procedures in administering the breath test in this case or that any such failure actually affected the accuracy of his test results.[3] Because he has failed to do so, Riendeau, like Besaw, has failed to show any basis for exclusion of the breath test results in his case.

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[2] Although failure to follow a procedure that "should" have been followed would not have prevented the admission of the test result, Riendeau would have been free to argue that any such failure affected the weight the jury should give the evidence.

[3] Riendeau identifies only two "instances" in which "the SOPs have been modified so that the word 'must' has been replaced by the word 'should'": "1. The necessity to have the correct acceptable range limits and performance verification standard lot number set in the instrument prior to evidentiary testing"; and "2. The need to monitor the subject for fifteen minutes prior to the test to ensure there is no alcohol being regurgitated or in the mouth." (Appellant's brief, p.10 (citations omitted).) Riendeau does not contend Officer Rios failed to perform either of these procedures, nor does he challenge the magistrate's findings that Officer Rios properly calibrated the breath testing instrument and that he monitored Riendeau for the recommended 15-minute period before administering the test. (Mag. Div. Tr., p.97, L.20 – 98, L.2, p.99, Ls.5-20.)

Riendeau acknowledges the holding of Besaw but asks this Court to overrule it. (Appellant's brief, pp.10-11.) As support for his request, Riendeau merely repeats the arguments that were presented to and rejected by the Court in Besaw. (Compare Appellant's brief, pp.10-11 with Besaw, 155 Idaho at 142-44, 306 P.3d at 227-29.) That Riendeau believes Besaw was wrongly decided does make it so. Riendeau has not presented any new argument and has not otherwise pointed to anything in the record to demonstrate that Besaw has proven over time to be unjust or unwise. Having failed to do so, Riendeau has failed to demonstrate any basis why Besaw should be overruled. See State v. Koivu, 152 Idaho 511, 518, 272 P.3d 483, 490 (2012) (controlling precedent will not be overruled "unless it is shown to have been manifestly wrong, or the holding in the case has proven over time to be unwise or unjust" (citations omitted)). The district court's decision affirming the magistrate's denial of Riendeau's motion to exclude the breath test results (on the claimed basis that there exist no methods to ensure the reliability of the results) must therefore be affirmed.

D. Riendeau Has Failed To Show Any Basis For Excluding His Breath Test Results Based On His Claim That ISP Did Not Comply With The Formal Rulemaking Requirements Of The IAPA In Adopting The SOPs For Breath Alcohol Testing

1. Nothing In I.C. § 18-8004(4) Requires Compliance With The Rulemaking Requirements Of The IAPA As A Prerequisite To The Admissibility Of Results Of BAC Testing Performed Pursuant To Methods Approved By ISP

Idaho's DUI statute states it is unlawful for a person with "an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as

shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle" on a road or place open to the public. I.C. § 18-8004(1)(a). Subsection (4), in turn, sets forth a formula of grams of alcohol per 210 liters of breath upon which upon which "an evidentiary test for alcohol concentration shall be based" and states that such breath tests shall be performed by an approved laboratory or "by any other method approved by the Idaho state police." I.C. § 18-8004(4). That subsection continues:

> Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

I.C. § 18-8004(4).

As contemplated by I.C. § 18-8004(4), ISP has approved certain methods for breath alcohol testing and standards for the administration of such tests, and those approved methods have been set out by ISP in the form of "Standard Operating Procedures" and training manuals (hereinafter collectively "SOPs"). (See R., pp.); State v. Besaw, 155 Idaho 134, 140, 306 P.3d 219, 225 (Ct. App. 2013), *review denied.* Riendeau does not contend that, in administering his breath test, Officer Rios failed to comply with any of the methods or procedures set forth in the SOPs. Rather, he argues the methods themselves are invalid because there is nothing in the record indicating that ISP complied with the rulemaking procedures of the IAPA, I.C. § 67-5201 *et seq.*, in adopting the SOPs. (Appellant's brief, pp.11-20.) Riendeau's challenge to the *manner* in

which ISP approved the methods for breath alcohol testing does not show any basis for exclusion of his breath test results because nothing in the governing law requires compliance with the rulemaking requirements of the IAPA as a prerequisite to the admissibility of results of BAC testing performed pursuant to methods approved by ISP.

Promulgation of rules is required under the IAPA only where "specifically authorized by statute." I.C. § 67-5231(1). The plain language of I.C. § 18-8004(4) states that, "[n]otwithstanding any other provision of law or rule of court," results of BAC testing "shall be admissible," without the necessity of producing expert testimony, if the test was "performed by a laboratory operated or approved by the Idaho state police *or by any other method approved by the Idaho state police*." (Emphasis added). Nothing in this statute authorizes or requires ISP to comply with the rulemaking requirements of the IAPA in approving the methods for determining an individual's breath alcohol concentration, nor does the statute make compliance with the IAPA a condition precedent to the admissibility of BAC test results in a criminal proceeding. To the contrary, the statute provides that such results are admissible if the test was performed by "any ... method approved by" ISP. I.C. § 18-8004(4). Because Riendeau has never argued, much less demonstrated, that Officer Rios failed to comply with any of the methods set out in the SOPs in administering his breath test, he has failed to show any basis for exclusion of his test results in the criminal case.

The state recognizes the legislature *has*, in a related statute, conferred rulemaking authority upon ISP for purposes of administrative license suspension proceedings. Specifically, I.C. § 18-8002A provides:

> (3) Rulemaking authority of the Idaho state police. The Idaho state police may, pursuant to chapter 52, title 67, Idaho Code, prescribe by rule:
>
> (a) What testing is required to complete evidentiary testing under this section; and
>
> (b) What calibration or checking of testing equipment must be performed to comply with the department's requirements. Any rules of the Idaho state police shall be in accordance with the following: a test for alcohol concentration in breath as defined in section 18-8004, Idaho Code, and subsection (1) (e) of this section will be valid for the purposes of this section if the breath alcohol testing instrument was approved for testing by the Idaho state police in accordance with section 18-8004, Idaho Code, at any time within ninety (90) days before the evidentiary testing. ...

I.C. § 18-8002A(3). By its plain language, however, the rulemaking authority granted by I.C. § 18-8002A does not extend to the approval of methods for breath alcohol testing contemplated by I.C. § 18-8004(4). To the contrary, the statute *limits* what ISP may prescribe by rule to the determinations of "[w]hat testing is required to complete evidentiary testing *under this section* [18-8002A]" and "[w]hat calibration or checking of testing equipment must be performed to comply with the department's requirements." The statute also mandates that any rule so prescribed recognize that, for purposes of the license suspension provisions of I.C. § 18-8002A, a test for breath alcohol concentration is valid "if the breath alcohol testing instrument was approved for testing by the Idaho state police *in accordance with section 18-8004*." In so doing, the legislature clearly indicated that the approval of breath testing equipment and methods required

under I.C. § 18-8004 is not itself subject to the rulemaking requirements of the IAPA.

Idaho Code § 18-8004 does not require that ISP approve BAC testing methods by formal rulemaking. Therefore, Riendeau's argument that the SOPs were not adopted pursuant to the formal rulemaking requirements of the IAPA is irrelevant to the admissibility of his breath test results under this section.

2. If ISP's Creation Of The SOPs Is Agency Action Governed By The Requirements Of The IAPA, Riendeau's Exclusive Means For Challenging Such Action Was Through The Judicial Review Provisions Of The IAPA

Riendeau argues that, because administrative license suspension hearings "held per I.C. § 18-8002A are agency action controlled by [the IAPA]," ISP's approval of methods for BAC testing for purposes of admissibility of test results under I.C. § 18-8004(4) must also be "agency action falling under the requirements of [the IAPA]." (Appellant's brief, p.16.) For the reasons set forth in Section I.D.1, *supra*, Riendeau has failed to show that ISP's compliance or lack thereof with the formal rulemaking requirements of the IAPA is at all relevant to the determination of the admissibility of his breath test results under I.C. § 18-8004(4). If Riendeau is correct, however – and ISP's approval of BAC testing methods for purposes of I.C. § 18-8004(4) is agency action governed by the IAPA – Riendeau had no standing to bring, and neither the lower courts nor this Court have jurisdiction to consider, a challenge to the manner in which ISP approved BAC testing methods as a basis for excluding the breath test result in the criminal case.

"Actions by state agencies are not subject to judicial review unless expressly authorized by statute." Laughy v. Idaho Dept. of Transp., 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010) (citing I.R.C.P. 84(a)(1)); Johnson v. State, 153 Idaho 246, 250, 280 P.3d 749, 753 (2012) (same). Idaho Code § 67-5270 permits judicial review of final agency actions, including the failure of an agency to "issue a rule" or "to perform, any duty placed on it by law." See I.C. § 67-5201(3) (definition of "Agency action"); Laughy, 149 Idaho at 871, 243 P.3d at 1059 (summarizing "types of agency actions that could be reviewed by a court"). However, in order to be entitled to such review, the "person aggrieved by final agency action" must comply with the procedural requirements of I.C. §§ 67-5271 through 67-5279. I.C. § 67-5270(2); BV Beverage Co., LLC v. State, 155 Idaho 624, 627, 315 P.3d 812, 815 (2013); Laughy, 149 Idaho at 870, 243 P.3d at 1058. Where, as here, the aggrieved person is challenging the validity of a "rule," compliance with the procedural requirements necessary to obtain judicial review requires the person to, among other things: exhaust all available administrative remedies (I.C. § 67-5271), institute proceedings for review or declaratory judgment by filing a petition in the district court of the county in which the final agency action was taken or where the aggrieved person resides (I.C. § 67-5272(1)), file the petition within two years of the adoption of the rule being challenged (I.C. §§ 67-5231 and 67-5273), and make the agency a party to the action (I.C. § 67-5278). Riendeau did not comply with any of these procedural requirements, nor could he ever have done so in the criminal case.

From the beginning of this case, Riendeau has sought a judicial ruling invalidating the SOPs for BAC testing based on ISP's failure to have complied with the formal rulemaking requirements of the IAPA in approving the testing methods contained in the SOPs. But Riendeau himself did not comply with the judicial review provisions of the IAPA. To the state's knowledge, he did not attempt to pursue any available administrative remedies.[4] I.C. § 67-5271. Nor did he "institute" any "proceedings for review or declaratory judgment" by filing a timely petition in the district court of the appropriate county and naming ISP as a party to the action. I.C. §§ 67-5272, 67-5273, 67-5278. Instead, Riendeau has attempted to have the SOPs invalidated as a basis for excluding his breath test result in the criminal case. Nothing in the IAPA or in any other statute, including I.C. § 18-8004, enables Riendeau to challenge the validity of ISP's action in this forum and in this manner. Riendeau's attempt to do so is, in his own words, nothing more than an attempt to make "an end-run around the requirements" of the IAPA. (Appellant's brief, p.12.)

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[4] The state confesses is not aware of any specific administrative remedy by which Riendeau could challenge the validity of ISP's adoption of the SOPs and methods for BAC testing contained therein. Although I.C. § 18-8002A(7) allows for an administrative hearing when a person's driver's license has been suspended as a result of failing a BAC test, failure of ISP to comply with the rulemaking requirements of the IAPA in approving the methods for BAC testing is not one of the grounds upon which the license suspension may be vacated. In addition, I.C. § 67-5278 appears to contemplate that the validity of an agency rule may be challenged in an action for declaratory judgment, without the necessity of exhausting administrative remedies. See also Asarco, Inc. v. State, 138 Idaho 719, 69 P.3d 139 (2003) (mining companies did not have to exhaust administrative remedies before seeking judicial review of validity of state agency's action in issuing a total maximum daily load limit without complying with rulemaking requirements of the IAPA).

Because there is no statute that authorizes Riendeau to raise ISP's alleged noncompliance with the rulemaking requirements of the IAPA as a defense in the criminal case, Riendeau lacked standing to bring the challenge and both the lower courts and this Court are without jurisdiction to consider it. See Laughy, 149 Idaho at 870, 243 P.3d at 1058 ("Without an enabling statute, the district court lacks subject-matter jurisdiction" to review agency action.). If the IAPA applies to ISP's actions in approving methods for breath testing, it also applies to bar Riendeau's attempt to challenge those actions in the criminal case.

3. Even If This Court Entertains The Merits Of Riendeau's Challenge To ISP's Approval Of BAC Testing Methods, Correct Application Of The Law Shows The SOPs Are Not Rules And, As Such, No Formal Rulemaking Was Required

The legislature has given ISP authority to prescribe by rule "[w]hat testing is required to complete evidentiary testing" for alcohol concentration under I.C. § 18-8002A and "[w]hat calibration or checking of testing equipment must be performed to comply with the department's requirements." I.C. § 18-8002(3)(a), (b). Pursuant to this authority, ISP has promulgated administrative "Rules Governing Alcohol Testing." See Idaho Administrative Code (IDAPA) 11.03.01, *et seq.* Relevant to this appeal is IDAPA 11.03.01.14.03, which governs the administration of breath alcohol testing. Specifically, the rule provides:

> **03. Administration**. Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing instrument used in Idaho, and such standards shall be issued in the form of analytical methods and standard operating procedures.

IDAPA 11.03.01.14.03. Pursuant to its plain language – and consistent with the requirements of I.C. §§ 18-8002A and 18-8004(4) – this rule leaves to ISP the task of developing standards for the administration of breath tests and of issuing such standards "in the form of analytical methods and standard operating procedures." Nowhere in this rule or in the legislative mandate of I.C. §§ 18-8002A and 18-8004(4) is there any requirement that the SOPs themselves be established as rules in compliance with the IAPA.

On appeal, Riendeau does not challenge the validity of IDAPA 11.03.01.14.03 or contend that that rule, which expressly authorizes ISP to establish methods for breath testing and issue them in the form of SOPs, was improperly promulgated. Instead, he argues that the SOPs themselves meet the legal definition of an agency "rule" and, therefore, compliance with the formal rulemaking requirements of the IAPA was required. (Appellant's brief, pp.11-20.) For the reasons set forth in Sections I.D.1 and I.D.2, *supra*, this Court should decline to entertain the merits of Riendeau's argument. Even if this Court does consider Riendeau's challenge to the validity of ISP's action in adopting the SOPs without engaging in formal rulemaking beyond that which occurred in adopting IDAPA 11.03.01.14.03, the challenge fails because the SOPs are not agency "rules" under the applicable law.

An agency action is a rule only where the action in question meets all of six characteristics. Asarco, Inc. v. State, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003). Those characteristics include that the action in question "prescribes a legal standard or directive not otherwise provided by the enabling statute,"

"expresses agency policy not previously expressed," and "is an interpretation of law or general policy." Id.; see also I.C. § 67-5201(19) (definition of "Rule"). Where an agency merely carries forth its assigned task without creating additional legal requirements or interpreting law or general policy it does not create rules subject to the procedures of the IAPA. See Sons and Daughters of Idaho, Inc. v. Idaho Lottery Comm'n., 142 Idaho 659, 663-64, 132 P.3d 416, 420-21 (2006) (Gaming Update not a rule where it did not prescribe a legal standard but merely explained existing rules); Idaho State Tax Comm'n v. Beacom, 131 Idaho 569, 570-72, 961 P.2d 660, 661-63 (1998) (adoption of tax form to carry out required function of self-reporting taxes not rulemaking function).

Applying the above principles, the Idaho Court of Appeals has already concluded that the rulemaking requirements of the IAPA do "*not* apply when the Idaho state police approves the methods for determining an individual's alcohol concentration." State v. Alford, 139 Idaho 595, 597, 83 P.3d 139, 141 (Ct. App. 2004) (emphasis added). In Alford, the defendant sought to exclude his BAC test result on the basis that ISP did not comply with the rulemaking requirements of the IAPA when it approved the use of the Alco-Sensor III, the breath-testing device used in Alford's case. Id. at 597-98, 83 P.3d at 141-42. Citing the characteristics of agency rules identified by the Idaho Supreme Court in Asarco, *supra*, the Court of Appeals determined "the Idaho state police action approving the use of the Alco-Sensor III was not rulemaking" because it neither prescribed any new legal standard or agency policy nor interpreted any law. Id. The Court reasoned:

> The DUI statute already prescribes the legal standard limiting an individual's alcohol concentration. Alford has failed to demonstrate that any Idaho state police policy was expressed, or that any law or policy was interpreted, by the approval of the Alco-Sensor III. Instead, the Idaho state police properly carried out a statutory duty to authorize the use of certain breath-testing equipment by law enforcement agencies. In doing so, it identified equipment that it found to be suitable for such purpose. It did not create additional legal requirements. Thus, the state was not required to provide evidence of Idaho state police compliance with IAPA in approving the use of the Alco-Sensor III.

Id. at 598, 83 P.3d at 142.

Riendeau acknowledges Alford but argues the reasoning and holding therein are inapposite because that case "merely rul[ed] on the approval of the Alco-Sensor III for breath testing" and did not address the approval of the breath-testing procedures set forth in the SOPs. (Appellant's brief, p.18.) Riendeau's attempt to distinguish Alford is unavailing. Just as the approval of breath-testing equipment is not rulemaking, neither is the approval of methods to conduct such testing according to the standards of I.C. § 18-8004(4). As correctly observed by the Court of Appeals in Alford, I.C. § 18-8004 "already prescribes the legal standard limiting an individual's alcohol concentration." Alford, 139 Idaho at 598, 83 P.3d at 142. The methods for BAC testing set forth in the SOPs do not prescribe any new legal standard for DUI, nor do they interpret any existing law or policy. To the contrary, the state police action in adopting the SOPs was merely the carrying out of the legislative directive to approve methods for BAC testing pursuant to the statute. While compliance with the methods so approved is a prerequisite to the admissibility of breath test results in the absence of expert

testimony, this legal requirement exists by virtue of the enabling statute itself, see I.C. § 18-8004(4), not because of any action on the part of ISP.

The methods for BAC testing set forth in the SOPs do not create any binding law or policy; they are merely procedural standards that, if followed by law enforcement, permit a BAC test result to be introduced in a criminal proceeding with the necessity of expert testimony pursuant to I.C. § 18-8004(4). Because the SOPs do not themselves prescribe or interpret any law, they are not "rules" to which the formal rulemaking requirements of the IAPA apply. Riendeau's arguments to the contrary are without merit and do not establish any basis for reversal of the magistrate's order denying his motion *in limine* to exclude his BAC test results from trial.[5]

II.
Riendeau Has Failed To Show Error In The District Court's Determination That The Magistrate Correctly Applied The Law To The Facts In Denying Riendeau's Motion To Suppress The Breath Test Results

A. Introduction

Riendeau moved to suppress his breath test results, arguing that his consent to the BAC testing was not voluntary because it was obtained after Officer Rios read the ALS advisories that informed him of the administrative

[5] Even if compliance with the rulemaking requirements of the IAPA in approving the methods for BAC testing contained in the SOPs were a prerequisite to the *expedient* admissibility of BAC test results under I.C. § 18-8004(4), the inability of the state to show such compliance would not, by itself, be grounds for excluding the test result. "Rather, the State, as a second option, may call an expert witness to establish the reliability of the test, thereby making test results admissible." State v. Healy, 151 Idaho 734, 737, 264 P.3d 75, 78 (Ct. App. 2011) (citation omitted); see also I.C. § 18-8004(4).

license suspension that would attach if he refused the test. (R., pp. 25-37, 150-57.) The magistrate denied the motion, and the district court affirmed, ruling that Riendeau's consent was constitutionally valid. (Mag. Div. Tr., p.98, Ls.8-24; R., pp.273-75.)

Riendeau challenges the lower courts' rulings, arguing as he did below that the U.S. Supreme Court's opinion in Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552 (2013), invalidated Idaho's implied consent law. (Appellant's brief, pp.21-30.) He also argues his actual consent was not voluntary because it was obtained only after being read the ALS advisories that informed him he was "required by law" to take the test. (Id.) Neither of Riendeau's arguments have merit. Correct application of the law shows that implied consent is still a valid exception to the warrant requirement and that Riendeau impliedly consented to breath test in this case. To the extent Riendeau's actual consent is relevant, the mere fact that the officer advised Riendeau of the actual consequences that would result if Riendeau refused the test was not unconstitutionally coercive. Riendeau has failed to establish any basis for reversal of the magistrate's order denying his motion to suppress.

B. Standard Of Review

The standard of review applicable to a decision rendered by a district court in its intermediate appellate capacity is set forth in Section I.B., *supra*, and is incorporated herein by reference.

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the

trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006).

C. Implied Consent Is A Viable Exception To The Warrant Requirement And Justified The Warrantless Evidentiary Test In This Case

The Fourth Amendment prohibits unreasonable searches and seizures. "A warrantless search is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement." State v. Kerley, 134 Idaho 870, 873, 11 P.3d 489, 492 (Ct. App. 2000) (citing Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); see also State v. Ferreira, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999).) Consent is such an exception to the warrant requirement, and may be implied under Idaho's implied consent statute, I.C. § 18-8002(1). State v. Diaz, 144 Idaho 300, 302-03, 160 P.3d 739, 741-42 (2007); State v. LeClercq, 149 Idaho 905, 907-08, 243 P.3d 1093, 1095-96 (Ct. App. 2010). Under that statute "the State is entitled to conduct blood or breath-alcohol concentration tests of drivers suspected of DUI, and neither a suspect's Fifth Amendment right against self-incrimination nor his Fourth Amendment right against unreasonable searches is violated by such testing if it is conducted in a reasonable manner." State v. Green, 149 Idaho 706, 709, 239 P.3d 811, 814 (Ct. App. 2010); see also State v. Wagner, 149 Idaho 268, 270, 233 P.3d 199, 201 (Ct. App. 2010) (citing I.C. § 18-8002(1)).

By accepting the privilege of driving on Idaho's roadways, Riendeau impliedly consented to evidentiary testing to determine his alcohol concentration,

provided such "testing [was] administered by a peace officer with reasonable grounds for suspicion of DUI." LeClercq, 149 Idaho at 909, 243 P.3d at 1097 (citing State v. DeWitt, 145 Idaho 709, 712, 184 P.3d 215, 218 (Ct. App. 2008); I.C. § 18-8002(1)). It is undisputed that, at the time Officer Rios administered the breath test to Riendeau in this case, he had reasonable suspicion that Riendeau was driving under the influence. (Mag. Div. Tr., p.95, L.22 – p.96, L.2, p.97, Ls.7-9.) It is also undisputed that the officer conducted the evidentiary testing in a reasonable manner. (Mag. Div Tr., p.97, L.9 – p.98, L.22.) Because the officer had reasonable suspicion of DUI and acted reasonably in administering the evidentiary testing, the warrantless testing was justified by Riendeau's implied consent to submit to such testing as a condition of driving on Idaho's roads.

Riendeau argues otherwise. Specifically he argues that, after the U.S. Supreme Court's decision in Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552 (2013), implied consent is no longer a recognized exception to the warrant requirement. (Appellant's brief, pp.21-30.) Riendeau's assertion that McNeely – a case addressing the exigent circumstances exception to the warrant requirement – did away with the implied consent exception to the warrant requirement, or re-wrote Idaho's implied consent statute, does not withstand scrutiny.

The Idaho Supreme Court has clearly stated that consent and exigent circumstances are *different exceptions* to the warrant requirement. Diaz, 144 Idaho at 302, 160 P.3d at 741 ("Exigency, however, is not the lone applicable exception here; consent is also a well-recognized exception to the warrant

requirement."). The Supreme Court of the United States recognized this as well in McNeely. In that case the only question before the Court was "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." McNeely, 133 S.Ct. at 1556. The Court held that "exigency in this context must be determined case by case based on the totality of the circumstances." Id. Thus, the issue was limited to "*nonconsensual* blood testing" (emphasis added) and the holding was limited to the exigent circumstances exception. Thus, consensual breath tests, such as at issue in this case, were not within the scope of either the issue or the holding in McNeely.

In arguing that implied consent is no longer a valid exception to the warrant requirement, Riendeau summarizes the McNeely holding as follows: "[A] warrantless evidentiary test in a DUI case is presumptively unconstitutional, and a person does have the right to refuse to do the test until a warrant has been secured or an exception to the warrant requirement exists." (Appellant's brief, pp.24-25.) Even assuming, without conceding, that McNeely overruled Idaho precedent holding that a driver has no right to *revoke* his or her implied consent to warrantless evidentiary testing, it did not invalidate the implied consent exception *in toto*. To the contrary, in addressing whether a case-by-case analysis under the exigency exception would "undermine the governmental interest in preventing and prosecuting drunk-driving offenses," the Court specifically observed that states would still "have a broad range of legal tools to

enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws," including "implied consent laws." McNeely, 133 S.Ct. at 1565-66. The Court also cited with approval its prior decision in North Dakota v. Neville, 459 U.S. 553 (1983), which held that evidence of a defendant's refusal to take a blood test under implied consent laws is constitutionally admissible evidence of his guilt. McNeely, 133 S.Ct. at 1566. Thus, far from holding that the state may not legally imply consent by a motorist, the Court apparently endorsed implied consent laws.

In addition, to the extent McNeely compels the conclusion that a driver may revoke his or her implied consent to warrantless BAC testing, such conclusion is irrelevant under the facts of this case. Unlike McNeely, who refused to submit to evidentiary testing, Riendeau submitted without objection to the breath test in this case. (Mag. Div. Tr., p.98, Ls.3-22.) Having done so, and having otherwise impliedly consented to evidentiary testing as a condition of using Idaho's roads, Riendeau cannot successfully complain that the warrantless testing violated his constitutional rights. This is true despite Riendeau's assertions that his actual consent to the breath test was not voluntary.

Implied consent is an exception to the warrant requirement different than actual consent, such that the state does not have to prove that a motorist who submitted to a BAC test under implied consent gave actual consent. State v. Nickerson, 132 Idaho 406, 409-10, 973 P.2d 758, 761-62 (Ct. App. 1999) (argument that "consent ... was involuntary is of no consequence because [motorist] had impliedly consented"). The argument that implied consent must

also meet the requirements of actual consent such as voluntariness has been "roundly rejected." LeClercq, 149 Idaho at 911-12, 243 P.3d at 1099-100. It is quite clear in the law that application of the implied consent exception is not contingent upon the motorist having provided actual consent as well. Because the breath test in this case was justified by Riendeau's implied consent, the state did not have to demonstrate that Riendeau's actual consent was voluntary. The district court's appellate decision affirming the magistrate's order denying Riendeau's motion to suppress should therefore be affirmed on this basis.

D. To The Extent Riendeau's Actual Consent Is Legally Relevant, The Mere Fact That The Officer Advised Riendeau Of The License Suspension Consequences That Would Result If Riendeau Refused The Test Did Not Render That Consent Involuntary

Riendeau acknowledges he actually consented to take the breath test in this case. He argues, however, that his consent was involuntary because it was obtained only after Officer Rios read the ALS advisories that informed Riendeau of the license suspension consequences that would result if he refused to take the test. (Appellant's brief, pp.27-30.) For the reasons set forth in Section II.C, *supra*, the validity of Riendeau's actual consent is irrelevant because Riendeau impliedly consented to BAC testing as a condition of driving on Idaho's roads. Even if Riendeau's consent argument were legally relevant, it still fails because he has failed to show his actual consent was involuntary.

A warrantless search conducted pursuant to valid consent does not violate the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citations omitted); State v. Hansen, 138 Idaho 791, 796, 69 P.3d 1052,

1057 (2003); State v. Varie, 135 Idaho 848, 852, 26 P.3d 31, 35 (2001). Consent is valid if it is free and voluntary. Bustamonte, 412 U.S. at 225-26 (citations omitted). In order to be voluntary, consent cannot be the result of duress or coercion, either direct or implied. Id. at 248. Merely informing a suspect that the "officer intends to do something that the officer is legally authorized to do under the circumstances ... does not amount to coercion." LeClercq, 149 Idaho at 911, 243 P.3d at 1099 (citing State v. Garcia, 143 Idaho 774, 779-80, 152 P.3d 645, 650-51 (Ct. App. 2006)).

In this case, the officer obtained Riendeau's consent to breath testing after he read Riendeau the ALS advisories that informed him of the license suspension penalties he faced if he refused the test. (Mag. Div. Tr., p.98, Ls.3-5.) Specifically, the ALS advisories informed Riendeau that he was "required by law to take one or more evidentiary test(s) to determine" his alcohol concentration and that, if he "refuse[d] to take or complete any of the offered tests," he would be subject to the license suspension penalties set forth in I.C. § 18-8002. (R., p.391.) Riendeau argues that, under McNeely, *supra*, he had the right to refuse evidentiary testing and, therefore, the reading of the ALS advisories that advised him he had no such right necessarily coerced his consent. (Appellant's brief, pp.27-30.) Riendeau's argument is without merit.

Although the ALS advisory informed Riendeau he was required by law to submit to BAC testing, the advisory also specifically informed Riendeau of the consequences of a *refusal.* That Riendeau was advised he would face civil penalties if he did not submit to the test did not render his consent to the test

involuntary. "The voluntariness of consent is not impaired simply because one is faced with two unpleasant choices." Garcia, 143 Idaho at 779, 152 P.3d at 650, quoted in LeClercq, 149 Idaho at 911, 243 P.3d at 1099. Because the ALS advisories accurately informed Riendeau of the penalties he faced if he refused to submit to BAC testing, those advisories did not themselves amount to coercion rendering Riendeau's consent involuntary. LeClercq, 149 Idaho at 911, 243 P.3d at 1099. Riendeau has failed to show any basis for reversal of the denial of his motion to suppress.

CONCLUSION

The state respectfully requests that this Court affirm the district court's intermediate appellate decision affirming Riendeau's conviction for misdemeanor DUI.

DATED this 20th day of October, 2014.

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of October, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JAY LOGSDON
Deputy Public Defender
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