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Bobeck v. Idaho Transp. Dept. Respondent's Brief Dckt. 42682

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IN THE SUPREME COURT
OF THE
STATE OF IDAHO

JONNA LYNN BOBECK, Petitioner-Appellant, v. STATE OF IDAHO, TRANSPORTATION DEPARTMENT, Respondent.	SUPREME COURT NO. 42682

RESPONDENT'S BRIEF

APPEAL FROM SECOND JUDICIAL DISTRICT, NEZ PERCE COUNTY

THE HONORABLE JEFF M. BRUDIE, PRESIDING

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I. STATEMENT OF THE CASE

a. Nature of the Case.

This is an Appeal of the District Court's decision that an Idaho Transportation Department Hearing Examiner had correctly determined that Ms. Bobeck had not met her burden to demonstrate a basis existed under I.C. § 18-8002A(7) to set aside the Department's Administrative License Suspension of Ms. Bobeck's driving privileges.

b. Party References.

The Idaho Transportation Department is referred to as the "Department" for purposes of this argument. Ms. Bobeck 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 Department's Administrative hearing is included in the Record on Appeal as an exhibit. The transcript of that hearing is referred to as the Administrative License Suspension Transcript (ALS Tr.) by page and number.

d. Factual Statement and Procedural History.

On December 4, 2013 at approximately 2157 hours, Idaho State Trooper Travis Hight responded to a two vehicle non-injury automobile accident that preceded a one vehicle injury crash and a short, low speed pursuit by Lewiston Police Department. The pursuit ended with the second crash at 9th Street in Lewiston when the pursued vehicle struck a stationary Lewiston Police unit with activated overhead lights at the intersection of Idaho and 9th Streets. The original one vehicle accident occurred on Idaho Street near

13th Street approximately 4 blocks away.

The driver was identified as Jonna Lynn Bobeck. Ms. Bobeck was transported to St. Joseph Regional Medical Center.

Trooper Hight met Ms. Bobeck at the hospital and played the recording of the ALS I.C. §18-8002 Advisory Form. A blood sample was obtained from Ms. Bobeck and Trooper Hight transported the blood to ISP District Headquarters, placing the blood sample into evidence for testing purposes.

The blood tests results showed the presence of Zolpidem and Trazodone (R. pp. 055-059).

Ms. Bobeck was notified of the Administrative License Suspension on February 12, 2014 (R. p. 60.

Ms. Bobeck timely requested a hearing with the Idaho Department of Transportation's Hearing Examiner to consider the proposed Administrative License Suspension (R. pp. 048-052).

A hearing was held telephonically on March 12, 2014 (R. p. 124). The Hearing Examiner entered Findings of Fact and Conclusions of Law and Order sustaining the Administrative Suspension of Ms. Bobeck's driving privileges on March 25, 2014 (R. pp. 146-155).

Ms. Bobeck timely filed a Petition for Judicial Review and the suspension was stayed pending the District Court's review (R. pp. 159-161).

The District Court entered its Opinion and Order on Petition for Judicial Review on October 24, 12014, affirming the Hearing Examiner's decision suspending Ms. Bobeck's driving privileges.

Ms. Bobeck timely filed a Notice of Appeal of the District Court's decision. The suspension of Ms. Bobeck's driving privileges has been stayed pending the conclusion of the Appellate Court's judicial review.

II. ISSUES ON APPEAL

Ms. Bobeck characterized the issues for the Court's review as follows:

I. The District Court erred when it found the Hearing Officer's Order was supported by substantial evidence when the record is devoid of facts to support a finding that Mrs. Bobeck was informed pursuant to Idaho Code Section §18-8002A(2) where unconverted testimony was presented that the ALS Advisory Form was read to Mrs. Bobeck while she was asleep.

II. The District Court erred when it relied on *State v. DeWitt, 145 Idaho 709, 184 P.3d 215 (Ct.App. 2008)* where the Holding was overruled and otherwise not applicable to this case.

III. The District Court erred when it based its decision on the applicability of the implied consent statute but the status was overruled and Mrs. Bobeck did not consent to the evidentiary blood draw.

For purposes of the Department's response the issues are characterized consistent with Ms. Bobeck's burden pursuant to I.C. § 18-8002A(7).

1. Did Ms. Bobeck meet her burden to show that she was not informed of the consequences of submitting to evidentiary testing as required by I.C. § 18-8002A(7)(e)?

2. Whether Ms. Bobeck withdrew her implied consent to submit to evidentiary testing making the evidentiary testing a forced warrantless blood draw does not impact the use of the evidentiary test result in the Administrative License Suspension?

Any other issues pursuant to I.C. § 18-8002A(7)(a-d) have not been raised by Ms. Bobeck and are waived. *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 I.C. § 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).*

IV. ARGUMENT

1.
Did Ms. Bobeck meet her burden to show that she was not informed of the consequences of submitting to evidentiary testing as required by I.C. § 18-8002A(7)(e)?

Ms. Bobeck contends that she has met her burden to demonstrate that she was not informed of the consequences of submitting to an evidentiary test. Ms. Bobeck argues that she could not understand the I.C. § 18-8002A(2) Advisory provided her based upon her drug induced semi-conscious state.

Ms. Bobeck contends that the District Court's characterization of her argument should not require an analysis of whether she could comprehend the consequences of submitting to evidentiary testing as required by I.C. § 18-8002A(2).[1]

[1] I.C. § 18-8002A(2) provides:

> (2) Information to be given. At the time of evidentiary testing for concentration of alcohol, or for the presence of drugs or other intoxicating substances is requested, the person shall be informed that if the person refuses to submit to or fails to complete evidentiary testing, or if the person submits to and completes evidentiary testing and the test results indicate 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, the person shall be informed substantially as follows (but need not be informed verbatim):
>
> If you refuse to submit to or if you fail to complete and pass evidentiary testing for alcohol or other intoxicating substances:
>
> (a) The peace officer will issue a notice of suspension;
>
> (b) You have the right to request a hearing within seven (7) days of the notice of suspension of your driver's license to show cause why you refused to submit to or to complete and pass evidentiary testing and why your driver's license should not be suspended;
>
> (c) If you refused or failed to complete evidentiary testing and do not request a hearing before the court or do not prevail at the hearing, your driver's license will be suspended. The suspension will be for one (1) year if this is your first refusal. The suspension will be for two (2) years if this is your second refusal within ten (10) years. You will not be able to obtain a temporary restricted license during that period;
>
> (d) If you complete evidentiary testing and fail the testing and do not request a hearing before the department or do not prevail at the hearing, your driver's license will be suspended. This suspension will be for ninety (90) days if this is your first failure of evidentiary testing, but you may request restricted noncommercial vehicle driving privileges after the first thirty (30) days. The suspension will be for one (1) year if this is your second failure of evidentiary testing within five (5) years. You will not be able to obtain a temporary restricted license during that period;
>
> (e) However, if you are admitted to a problem solving court program and have served at least forty-five (45) days of an absolute suspension of driving privileges, you may be eligible for a restricted permit for the purpose of getting to and from work, school or an alcohol treatment program; and
>
> (f) After submitting to evidentiary testing you may, when practicable, at your own expense, have additional tests made by a person of your own choosing.

Ms. Bobeck would seem to argue that there is some difference in the District Court's analysis of whether Ms. Bobeck could comprehend the evidentiary test advisory provided her and whether she understood the advisory. This argument would appear to make a distinction without a difference.

Ms. Bobeck clearly solicits her husband's testimony as to what Ms. Bobeck could "understand" at the time of Trooper Hight's providing her the Evidentiary Testing Advisory.[2]

Ms. Bobeck does not argue that the test results are incorrect or that she wasn't under the influence of the reported drugs, instead Ms. Bobeck argues that because she was semi-conscious or asleep, that she has met her burden to show that she was not informed of the consequences of submitting to evidentiary testing as required by I.C. § 18-8002A(7)(e). It

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[2] ALS TR. p. 30 LL. 16-24, p. 31 LL. 9-22

Q. Okay. In the little bit of time you were there, including the time Officer Hight was there, based on your observations of her, even if she had been awake when the form was read, would she have been able to understand what was being read to her?
A. Absolutely not.
Q. And why do you say that?
A. Quite Honestly, just she was out of it due to the – that – that situation.

Q. And one of the things that the statute requires under 18-8002A is that prior to submitting to an evidentiary test, that the – in this case that your wife be informed of the information that's on the form that Officer Hight read to her. And in your opinion, was she informed of that information?
A. No.
Q. And why do you say she was not informed of that information?
A. Because she was asleep, other than being aroused by somebody's voice directly. If you touched her or asked her specifically her name, that she would wake up. So my memory, once he started reading the form start to finish, you know, it's like reading a child story time (inaudible).

Transcript of Administrative Hearing, p. 30 LL. 16-24, p. 31 LL. 9-22.

is clear that Ms. Bobeck was informed pursuant to I.C. § 18-8002A(2) of the Evidentiary Test Advisory Information required to be given.

There is no challenge that Ms. Bobeck was physically presented the I.C. § 18-8002A Advisory Form by Trooper Hight or that the Advisory Form was not properly read to her, instead Ms. Bobeck simply argues that there is a previously unknown and apparently implicit requirement in the provisions of I.C. § 18-8002A(7)(e) that the State must demonstrate that Ms. Bobeck was conscious and could understand the consequences of evidentiary testing.[3]

Ms. Bobeck cites no authority for this proposition. Clearly the record reflects that the requirements of I.C. § 18-8002A(7)(e) were met. Ms. Bobeck was read the Advisory Form and provided a properly executed copy of Advisory form (R. p. 39). Ms. Bobeck was then administered an evidentiary test to determine if she was under the influences of drugs, alcohol or other intoxicating substances. Based upon those evidentiary test results Ms. Bobeck failed an evidentiary test for drugs or other intoxicating substances (R. p. 043).

Early in the review of the Administrative License Suspensions by the Department's Hearing Examiners, the Idaho Court concluded that the Department of Transportation and correspondingly Trooper Hight has no burden to show or disprove any of the grounds for challenging a suspension under I.C. § 18-8002A(7), *Kane v. State, Dept. of Transp., 139 Idaho 586, 83 P.3d 130 (Ct. App. 2003)*. However, that is exactly what Ms. Bobeck argues

[3] The District Court properly analyzed Ms. Bobeck's characterization of the issue. "Law officers are required under I.C. § 18-8002A(3) to inform drivers of the consequences of failing or refusing evidentiary testing. They are not required to first ensure that a driver comprehends the information." [FN] In the foot note the District Court properly elaborates: "If law enforcement officers were required to ensure driver's comprehend the ALS warning in order to comply with I.C. § 18-8002(3), drivers could avoid suspension by simply asserting they were too intoxicated to understand or remember the information." (R. p. 252).

here, that because she was asleep or semi-unconscious that she had met her burden to show that she was not informed of the consequences of submitting to evidentiary testing.

Ms. Bobeck argues that I.C. § 18-8002A(7)(e) permits her to meet her burden by demonstrating that she was in a drug induced state of semi-unconsciousness. I.C. § 18-8002A(7)(e) does not require a determination of what Ms. Bobeck might have been thinking or what she might have understood.

The Idaho Court has rejected a challenge to sufficient legal cause where the driver operates a motor vehicle under factual circumstances which the arresting officer believes demonstrates legal cause by the driver simply offering an alternative explanation of that behavior, "...and his alternative explanations for his appearance and driving do not overcome the evidence possessed by the officer that Gibbar was under the influence of alcohol" *In re Suspension of Driver's License of Gibbar, 143 Idaho at 944, 155 P.3d 1176 (Ct. App. 2006).*

Instead consistent with Ms. Bobeck's burden pursuant to I.C. § 18-8002A(7) Ms. Bobeck is required to show Trooper Hight did not demonstrate the existence of legal cause or demonstrate a lack of compliance with evidentiary alcohol testing protocols or applicable here by reading and providing to Ms. Bobeck the Evidentiary Testing Advisory Form.

Idaho Code §18-8002A(7)(e) is not ambiguous. However, Ms. Bobeck attempts to create an ambiguity by suggesting that word *informed* used in this context means that Ms. Bobeck is "knowledgeable, enlightened, up to date", using *informed* as an adjective instead

of using *informed* in this context as a verb indicating that Ms. Bobeck was "told, notified or advised" by Trooper Hight of the consequences of submitting to evidentiary testing.[4]

It is clear that Ms. Bobeck was indeed informed of the consequences of evidentiary testing.

Consistent with the Court's decision in *Kane v. State, Dept. of Transp.*, it is Ms. Bobeck's burden to present evidence affirmatively showing that one of the grounds for relief enumerated in I.C. 18-8002A(7) is met. Here, that means that Ms. Bobeck is required to show *in fact* that Trooper Hight did not inform her of the advisory as required by I.C. § 18-8002A.[5]

Clearly Ms. Bobeck's argument suggests that because she apparently could not understand the advisory being read to her because of her substantial impairment she should not suffer an Administrative License Suspension. It is clear that the Administrative License Suspension pursuant to I.C. §18-8002A is intended for a driver to suffer a consequence for the operation of a motor vehicle with an unlawful blood chemistry.

As the District Court cautioned, in every Administrative License Suspension case, any driver could argue that their intoxicated or drug induced condition prohibited their understanding of the consequences of submitting to an evidentiary test (R. p. 252). Such

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[4] http://dictionary.referenced.com/browse/informed

[5]

> Thus, it was Kane's burden to present evidence affirmatively showing one or more of the grounds for relief enumerated in § 18–8002A(7). That is, it was his burden to prove that, *in fact,* the officer lacked legal cause to stop Kane's vehicle or that the blood test was, *in fact,* not conducted in accordance with legal requirements.

Kane v. State, Dep't of Transp., 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct. App. 2003).

Given Ms. Bobeck's burden pursuant to I.C. § 18-8002A(7), it is clear that "informed" is intended to be used as a verb not an adjective.

an interpretation tears at the fabric of the Administrative License Suspension process consistently upheld by the Idaho Courts and leads to an absurd statutory construction.[6]

There is no requirement that the State demonstrate the particular mental or physical condition necessary for the driver to be notified of the consequences of participating in evidentiary testing. The circumstances of Ms. Bobeck's driving are unfortunate, however Ms. Bobeck does not contend that the results of the test were not accurate, she simply argues that her inability to understand the Evidentiary Test Advisory being read to her is the basis to avoid the Administrative License Suspension resulting from the failed evidentiary test.

Ms. Bobeck does not argue that there was any consequence or prejudice to her based upon her apparent inability to comprehend the effect of a failed evidentiary test.[7]

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[6]

> If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial. *In re Estate of Miller, 143 Idaho 565, 567, 149 P.3d 840, 842 (2006).* The interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. *State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)* (citations omitted). We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature. *City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993) at 893.*

Verska v. Saint Alphonsus Regional Medical Center, 151 Idaho 889, 265 P.3d 502 (2011).

[7] Trooper Hight does not treat Ms. Bobeck's condition as a refusal. Instead and respectfully Trooper Hight only conducts an evidentiary test to determine whether Ms. Bobeck's condition was as a result of the ingestion of drugs or other intoxicating substances.

2.

Whether Ms. Bobeck withdrew her implied consent to submit to evidentiary testing making the evidentiary testing a forced warrantless blood draw does not impact the use of the evidentiary test in the Administrative License Suspension.

The admissibility of the results of the evidentiary testing before the Hearing Examiner is not at issue in the Administrative License Suspension setting, I.C. § 18-8002A(7).[8]

The Administrative License Suspension is an intentionally separate and unrelated proceeding from any criminal prosecution which may result from a failed evidentiary test, I.C. § 18-8002A(7).[9]

The Hearing Examiner acknowledged the circumstances of Ms. Bobeck's physical condition, correctly analyzed the then existing state of the Idaho Law acknowledging that there are no other reported cases other than criminal cases or refusal cases.

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[8] Idaho Code § 18-8002A(7) provides:

> The sworn statement of the arresting officer, and the copy of the notice of suspension issued by the officer shall be admissible at the hearing without further evidentiary foundation. The results of any tests for alcohol concentration of the presence of drugs or other intoxicating substances by analysis of blood, urine or relating to calibration, certification, approval or quality control pertaining to equipment utilized to perform the tests shall be admissible as provided in section 18-8004(4), Idaho Code.

[9] Idaho Code § 18-8002A provides:

> The facts as found by the hearing officer shall be independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect the suspension required to be imposed under the provisions of this section.

It is clear that Trooper Hight issued a Notice of Suspension containing the Evidentiary Test Advisory language (R. pp. 036-037). It is clear that Ms. Bobeck timely requested a hearing (R. pp. 048-052). It is clear that Ms. Bobeck suffered no consequence as a result of her apparent inability to understand the Evidentiary Test Advisory appropriately provided to her by Trooper Hight. Ms. Bobeck's timely request for an evidentiary hearing suggests that Ms. Bobeck understood the importance and significance of the evidentiary test advisory provided to her. There is no showing that Trooper Hight's reading of the Advisory Form mischaracterized or misstated the Advisory Form requirements, neither is there a showing that the form presented to Ms. Bobeck did not comply with I.C. § 18-8002A(2).[10]

Ms. Bobeck's alleged inability to consent to an evidentiary test was not treated as a refusal. Any analysis of I.C. § 18-8002 is not helpful here. Neither was Ms. Bobeck's blood drawn over her or her husband's objection. This was not a forced blood draw after a known refusal.

An examination of the circumstances of implied consent on a forced blood draw following a refusal to consent to evidentiary testing is not necessary here. The Idaho Court's application of the US Supreme Court (SCOTUS) decision in *Missouri v. McNeely, 133 S.Ct. 1552, 185 L.Ed.2d 696, 81 USLW 4250 (S.Ct. 2013)* does not implicate Idaho's

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"Thus the advisory form that was read to Kling differentiated between resident driver's licenses and non-resident licenses while the statute does not."

State v. Kling, 150 Idaho 188, 245 P.3d 499 (Ct. App. 2010).

This analysis also suggests that "informed" is a verb and not an adjective. Additionally, there is no suggestion here that the advisory provided did not "substantially inform" Ms. Bobeck of the consequences of submitting to evidentiary testing, I.C. § 18-8002A(2).

Administrative License Suspension process, *State v. Wulff, 157 Idaho 416, 337 P.3d 575 (Idaho 2014).* The *McNeely* decision dealt with the very narrow issue of whether a per se exemption to the requirement of a search warrant exists in drunk driving cases based on the State of Missouri's argument that the metabolization of alcohol and the resulting loss of evidence provided a basis for a warrantless blood draw.[11]

Clearly the SCOTUS *McNeely* decision does not in any way address the Idaho Administrative License Suspension based on a failed evidentiary test pursuant to I.C. § 18-8002A. The Idaho Supreme Court in *State v. Wulff, id.* appropriately limits it's decision to the narrow issued raised by SCOTUS in *McNeely.*

Applicable here is *Wulff's* analysis of the cases relied upon by the Department's Hearing Examiner and the District Court:

> "Thus, we overrule *Diaz,* and *Woolery* to the extent that they applied Idaho's implied consent statute as an irrevocable per se rule that constitutionally allowed *forced* warrantless blood draws. We hold the district court properly concluded that Idaho's implied consent statute was not a valid exception to the warrant requirement." (Emphasis added) *State v. Wulff, 157 Idaho 416, 337 P.3d 575, 582 (2014).*

The Idaho Court substantially limits its decision in *Wulff* to forced warrantless blood draws in criminal prosecutions. The analysis of the *Wulff* Court certainly doesn't apply in the Administrative License Suspension setting. The Hearing Examiner and District Court's reliance upon *State v. DeWitt, 145 Idaho 709, 184 P.3d 215 (Ct.App. 2008)* and *State v. Woolery, 116 Idaho 368, 775 P.2d 1210 (1989)* prior to the *Wulff* Court's

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[11]

> "In drunk driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."

Missouri v. McNeely, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

limited overruling of those decisions does not diminish the legal basis for the Hearing Examiner and the District Court's confirmation of that decision. [12]

The Hearing Examiner's Findings and Conclusions applying *DeWitt* *id.*, and *Woolery* *id.*, were accurate statements of the law then and continue to be accurate given the *Wulff* Court's restraint in overruling *State v. Diaz, 144 Idaho 300, 160 P.3d 739 (S.Ct. 2007)* and *Woolery, id.*.[13]

The issue framed by Ms. Bobeck suggests that Ms. Bobeck refused to take the evidentiary test offered by Trooper Hight and therefore she was in some way physically

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5.1 Bobeck was substantially informed of the Idaho Code §18-8002A advisory form when Trooper Hight read the Notice of Suspension advisory form to her at the Saint Joseph's Regional Medical Center where she had been transported following the crashes.

5.2 Idaho Code, §18-8002(1) provides that any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that the person has been driving or is in actual physical control of a motor vehicle in violation of Idaho Code, §18-8004.

5.3 *State v. DeWitt*, 146 Idaho 709 (App.2008), set forth the proper analysis for the factual scenario presented in this matter. In *DeWitt*, the driver/defendant argued that his implied consent was nullified because he was unconscious when he was "informed" of the consequences of refusal. The Idaho Court of Appeals upheld the ruling in *State v. Woolery*, 116 Idaho 368 (1989), with the following analysis:
"The [Woolery] Courts stated that a drunken driver has no legal right to resist or refuse evidentiary testing. The Court noted that in recognition of the driver's physical ability to refuse to submit, the legislature enacted the license suspension statute to discourage and civilly penalize such a refusal."

5.4 Trooper Hight substantially informed Bobeck of the Notice of Suspension advisory that asserts in part that the driver is requested by law to take one or more evidentiary tests to determine the concentration of alcohol in the body.

5.5 The advisement is accurate and consistent with policy and law.

5.6 Based on the "Implied Consent" law referred to hereinabove, Trooper Hight's decision to request a blood test was lawful and permissible.

5.7 The advisory form includes the following information: "After submitting to the test(s) you may, when practicable, at your own expense, have additional tests made by a person of your own choosing."

5.8 Bobeck was advised of the consequences of refusing or failing evidentiary testing as required by Idaho Code § 18-8002 and Idaho Code § 18-8002A.

Findings of Fact, Conclusions of Law and Order, R. pp. 014-015.

[13] Neither is it necessary to retroactively apply *McNeely* based on the *Wulff* decision, see *Rhoades v. State, 149 Idaho 130, 233 P.3d 61 (S. Ct. Idaho 2010).*

forced to submit to a blood test. There is no evidence in the record that Ms. Bobeck refused to submit to evidentiary testing. Ms. Bobeck's argument that she refused to submit to an evidentiary test is not supported by the record. Just as Ms. Bobeck could not "understand" the consequences of submitting to evidentiary testing as she argues, Ms. Bobeck was not able to revoke her implied consent and refuse the evidentiary testing.[14]

Ms. Bobeck has the burden pursuant to I.C. § 18-8002A and I.C. § 67-5279 to provide a factual basis for the Court's review, unfortunately an argument well made without anything else is not sufficient.[15]

It is simply not necessary to address the question of implied consent or a forced warrantless blood draw based upon this record to determine whether Ms. Bobeck met her burden pursuant to I.C. § 18-8002A.[16]

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[14] Even if it were to be argued that the District Court's decision was based on an erroneous analysis, the appellate court may affirm the District Court's correct decision by applying the correct theory, *McKinney v. State, 133 Idaho 695, 992 P.2d 144 (S. Ct. 1999).*

[15]

> "We note initially that under I.C. §18-8002A(7) it was Gibbar's burden to produce evidence affirmatively showing...."

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

[16] The District Court also correctly concluded that Ms. Bobeck did not express a refusal to the evidentiary test to determine if she was under the influence of drugs or other intoxicating substances (R. p. 252).

V. CONCLUSION

Ms. Bobeck has not met her burden pursuant to I.C. § 18-8002A(7).

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

DATED this 6 day of May, 2015.

Edwin L. Litteneker
Special Deputy Attorney General

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On this 6 day of May, 2015.

Edwin L. Litteneker