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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

1	CORY RAY NUNNALLY,)	
2)	
3)	
4	Petitioner-Appellant,)	Docket No. 48728-2021
5)	(and 48729-2021)
6	vs.)	
7)	Idaho County District Court
8	STATE OF IDAHO,)	CV25-20-0347 and CV25-20-0364
9	DEPARTMENT OF TRANSPORTATION,)	
10)	
11)	
12	Respondent.)	
13	_____)	

APPELLANT’S BRIEF

THE HONORABLE GREGORY FITZMAURICE
District Judge

IDAHO TRANSPORTATION DEPARTMENT HEARING OFFICER,
ROBERT VOGT

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11

12

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19 Black's Law Dictionary, 9th Edition 4

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ISSUES PRESENTED

- 1 Whether the arresting officer accurately gave the information required pursuant to Idaho Code §18-8002A and *Virgil v. State*, 126 Idaho 946, 895 P.2d 182 (Ct. App. 1995).
- 2
- 3 Whether the hearing officer's decision was made upon unlawful procedure.

STATEMENT OF THE CASE

4
5 On July 3, 2020, Petitioner-Appellant Cory Nunnally came into contact with Idaho State
6 Trooper Kyle Kesler hereinto referred to as "Trooper Kesler." Trooper Kesler observed that Mr.
7 Nunnally's vehicle only had one working headlight. Trooper Kesler then approached Mr. Nunnally
8 to ascertain what he was doing at the scene of the vehicle accident that Trooper Kesler was
9 investigating.
10

11 After speaking with Mr. Nunnally, Trooper Kesler began to suspect that Mr. Nunnally had
12 been driving under the influence. Mr. Nunnally refused to participate in any field sobriety tests, but
13 did agree to take the breathalyzer examination. Prior to agreeing to take the breathalyzer
14 examination Trooper Kesler inaccurately provided Mr. Nunnally information that contradicts the
15 Notice of Suspension advisory form and the law. After reading the Notice of Suspension advisory
16 form to Mr. Nunnally, the following dialogue occurred between Trooper Kesler (PO), and the
17 Petitioner-Appellant (Nunnally):
18

19 PO: So this document is what is called the -the license suspension advisory. Okay,
20 it's put out by the Idaho Transportation Department. It only applies to you if you
21 refuse the test that I am about to offer you as it said in paragraph 1 it is a requirement
by law okay.

22 Nunnally: Okay.

23 PO: Um, or if you refuse the test. So if you fail or if you refuse. And if you are
24 under the "illegal" limit, which you might feel like you are over, but I've seen people
25 that have felt like they are over and they blow under. I've seen people who think they
are under and they blow over.

Nunnally: Yeah.

PO: So, that's the only way that this is going to apply to you alright.

Transcript of Arrest, 8.

An administrative license suspension hearing was conducted on July 28th, where the hearing was supplemented with the *Transcript of Arrest* as prepared by the offices of Clark and Feeney. The hearing officer held that since Trooper Kesler provided Mr. Nunnally with a copy of the Notice of Suspension advisory form any inaccurate information given by Trooper Kesler is nullified. *Findings of Fact and Conclusions of Law*, 7. The hearing officer held that Mr. Nunnally was properly advised, and his license was suspended for ninety days. *Id.* at 9. On subsequent appeal to the district court, the Judge there likewise held that Mr. Nunnally was properly advised, and therefore the suspension was sustained. *Memorandum Opinion and Order on Judicial Review*, at 7. Hence, this appeal for relief has been brought to this Court.

STANDARD OF REVIEW

Idaho Code §67-5240 provides that a proceeding by an agency that may result in an order being issued is considered a contested case and is subject to the provisions of the Idaho Administrative Procedure Act (IDAPA). A hearing under I.C. §18-8002A results in an "agency action" and is therefore governed by the IDAPA. The IDAPA governs the review of Idaho Transportation Department decisions that deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *Bennett v. State Dep't of Transp.*, 147 Idaho 141, 142, 206 P.3d 505, 506 (Ct. App. 2009).

"In a subsequent appeal from the district court's decision where the district court was acting in its appellate capacity under the [IDAPA], the Supreme Court reviews the agency record independently of the district court's decision." *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926,

950 P.2d 1262, 1265 (1998). In reviewing an agency's decision, a court may overturn that decision where findings, inferences, conclusions, or decisions (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3).

LAW

I. STRICT ADHERENCE TO THE STATUTORY LANGUAGE OF I.C. §18-8002A IS REQUIRED

Idaho case law has established that the information in I.C. §18-8002A requires a strict adherence to the statutory language. *Virgil v. State*, 126 Idaho 946, 947, 895 P.2d 182, 183 (Ct. App. 1995). In *Virgil*, a man was arrested who refused to submit to evidentiary breath testing, and his license was thereby suspended. *Virgil*, 126 Idaho at 946-947. On appeal, the suspension was reversed as the advisory given to Mr. Virgil was deficient on account of its ambiguity. *Id.* at 947. In doing so, the court in *Virgil*, reaffirmed the idea that Idaho courts have emphatically refused to allow the interjection of judicial gloss upon the legislature's license suspension scheme. *Id.* The statute explicitly requires at the time of the evidentiary testing that the person taking the test is informed substantially of all the ramifications for refusing to submit to or failing the evidentiary testing. *I.C. §18-8002A(2)*. The statute also requires that the officer must properly inform the person to be tested of the ramifications of refusing to take or failure of the evidentiary testing. *Id.*

Where a person is not “*completely* advised of his rights and duties under the statute”, *Virgil* calls for that person to have his ability to drive in Idaho reinstated. 126 Idaho at 947 (Citing *Matter of Griffiths*, 113 Idaho 364, 370, 744 P.2d 92, 98 (1987)). By using the term “rights”, it is important that we are informed of what the term is intended to mean in context of caselaw and the relevant

1 statutes, as one must be “*completely* advised of his rights”. *Virgil*, 126 Idaho at 947. Such rights may
2 be succinctly defined according to a pertinent definition from Black’s Law Dictionary, whereby a
3 right is “[a] power, privilege, or immunity secured to a person by law.” 9th Edition. Extending our
4 understanding from there, a right may manifest as the secured power to opt to undertake an act, or
5 not to undertake an act. Concurrently, a right may also manifest as a secured immunity to be free
6 from certain consequences as a result of an action taken by a person.

7 Like in *Virgil*, *In Re Beem*, stated that “proper warning of the consequences of refusal is an
8 element essential to the suspension of a driver’s license.” 119 Idaho 289, 291, 805 P.2d 495 (Ct. App.
9 1991) (quoting *Daly v. Department of Motor Vehicles*, 187 Cal.App.3d 257 (Cal.App. 4 Dist. 1986)).
10 In *Beem*, a man was arrested and his license administrative suspended after he refused to take any
11 DUI evidentiary test. 119 Idaho at 290. There, Mr. Beem was incorrectly informed as to the amount
12 of time that his license may be administratively suspended, and thereby the court sided with Mr.
13 Beem and found grounds to reverse his suspension. *Id.* Again citing to *Griffiths*, the court in *In Re*
14 *Beem* held that a driver may prevail in a license suspension proceeding where not properly “advised
15 of the information regarding refusal mandated by I.C. §18-8002(3)”, for the reason that a driver has
16 “the right to be correctly advised”. 119 Idaho at 291, 292.

18 Again like *Virgil*, the court in *In re Beem* also held in favor of a strict interpretive scheme
19 when it stated that “[o]ur Supreme Court has emphatically discountenanced interjection of judicial
20 gloss upon the legislature’s license suspension scheme”. 119 Idaho at 292 (Citing *In re Brink’s*
21 *License*, 117 Idaho 55, 785 P.2d 619 (1990). The Court of Appeals affirmed the reinstatement of a
22 driver’s license because the driver has a right to be correctly advised by the officer. *Id.* at 290, 291.
23 When the officer incorrectly informed the driver that his license could be suspended for 120 days
24 for refusing to submit to the testing, instead of the statutory 180 days, the officer deviated from that
25

1 Mr. Nunnally was not properly advised by Trooper Kesler of the information regarding
2 his rights as required under I.C. §18-8002A. Trooper Kesler informed the Mr. Nunnally that the
3 Notice of Suspension advisory form was only applicable if Mr. Nunnally refused to take the
4 breathalyzer examination. By incorrectly informing Mr. Nunnally of his rights and requirements
5 under the statute the Petitioner was not adequately informed. The incorrect information
6 provided by Trooper Kesler rendered the form incomplete and invalidated it. Mr. Nunnally asks
7 the Court for independent judicial review of the Idaho Department of Transportation's decision.
8 Mr. Nunnally also asks this Court to reverse his license suspension.

9 ARGUMENT

10 Mr. Nunnally was was not properly advised of his rights and the ramifications of refusing
11 or failing the breathalyzer examination as required under I.C. §18-8002A. Mr. Nunnally also
12 argues that the Idaho Department of Transportation was incorrect when it held that he was
13 advised properly because that decision was based off of an invalid advisory form.

14 I. MR. NUNNALLY WAS INCORRECTLY ADVISED OF HIS RIGHTS AS 15 REQUIRED UNDER I.C. §18-8002A.

16 Trooper Kesler incorrectly advised Mr. Nunnally of his rights and the requirements under
17 I.C. §18-8002A when he stated to Mr. Nunnally that the Notice of Suspension advisory form only
18 applied if he refused to take the breathalyzer examination.

19 During the interaction in question Trooper Kesler read the Notice of Suspension advisory
20 form to Mr. Nunnally and he stated that “[i]t only applies to you if you refuse this test that I’m about
21 to offer you as it said in paragraph 1 it is a requirement by law okay.” *Transcript*, at 8. Trooper
22 Kesler failed to provide Mr. Nunnally with adequate information that would have made him
23 substantially informed of the ramifications for failure of the breathalyzer examination as required
24
25

1 by the I.C. §18-8002A(2). The conclusive “okay” at the end of the sentence bears the implication
2 that Trooper Kesler has conferred his message to Mr. Nunnally - this message conferred that the
3 Administrative License Suspension only applied where a person refused to take a test, and hence,
4 was a message bearing information that contradicts the language of I.C. §18-8002A(2).

5 The attempt by Trooper Kesler to correct his erroneous statement failed to bring the advisory
6 back within strict adherence of the statute as the damage had largely been done. When Trooper
7 Kesler stated “[u]m, or if you refuse the test. So if you fail or if you refuse”, Trooper Kesler does
8 little to remedy his erroneous statement, as in the same moment he simultaneously affirms his
9 previous erroneous statement with “Um, or if you refuse the test”, and contradicts himself by stating
10 “[s]o if you fail or if you refuse.” *Transcript*, at 6. What would otherwise be an authoritative
11 statement of Mr. Nunnally’s rights by the Trooper was clouded by this contradiction that left
12 uncertainty as to what information was supposed to be derived from Trooper Kesler’s statement.

13 Trooper Kesler seemingly contradicted himself yet again, and did little to help his cause of
14 informing Mr. Nunnally of what Mr. Nunnally’s rights and requirements under the statute were
15 when he additionally stated “[s]o that’s the only way that this is going to apply to you alright.”
16 *Transcript*, at 8. What is confusing about this sentence is that the Trooper had just made the
17 correction that the Administrative License Suspension applies “if you fail or if you refuse”, but then
18 he goes on to state that there is a singular “only way” that the Administrative License Suspension
19 applied to him; a reaffirmation of the erroneous notion that the Suspension only applied in case of
20 a refusal and not a failure as well.

21 By these uncertain, and incorrect statements, Mr. Nunnally was left to unknot what his rights
22 were. If Mr. Nunnally was left with only the notion that only a refusal of testing led to an
23 Administrative License Suspension, then it would also follow that an immunity existed from the
24
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1 consequences of not refusing, and then subsequently failing testing. As is evident from the statute,
2 no such immunity exists. Failure of testing results in the same outcome as a refusal; Mr. Nunnally
3 would receive an Administrative License Suspension. Based on the dialogue with Trooper Kesler,
4 this informational point on rights would not be elucidated to Mr. Nunnally. Mr. Nunnally would
5 potentially have been left thinking that a right to attempt and fail an evidentiary test without
6 administrative consequences existed.

7 Trooper Kesler failed to comply with statutory requirements that required him to properly
8 inform Mr. Nunnally of his rights and duties. When Trooper Kesler advised the Mr. Nunnally that
9 this form was only applicable if he refused the test. By incorrectly instructing Mr. Nunnally of the
10 information contained in the advisory form Mr. Nunnally was not substantially informed of his
11 rights and the ramifications under I.C. §18-8002A if he refused or failed the evidentiary testing.
12 Thus, Mr. Nunnally was not properly informed of the ramifications that followed a failed test.

13 **II. UNLAWFUL PROCEDURES UNDERLAY HEARING OFFICER'S DECISION**

14 Trooper Kesler incorrectly advised Mr. Nunnally of the requirements under I.C. § 18-8002A.
15 Trooper Kesler read the advisory form to Mr. Nunnally and stated after he was done that this form
16 was only applicable if he refused to take the test. This information provided by Trooper Kesler was
17 contradicting since the form also applies to a failure of any evidentiary testing. By providing the
18 incorrect and contradictory information there was a deviation from the statutory language. This
19 deviation from the statutory language caused Mr. Nunnally to be insufficiently informed as required
20 pursuant to the statute.
21

22 The hearing officer determined that even though Trooper Kesler provided incorrect
23 information to the Mr. Nunnally, this information was nullified because Trooper Kesler provided
24 the Mr. Nunnally with a copy of the Notice of Suspension advisory form. *Findings of Fact, 7.* By
25


1 holding so, the hearing officer essentially required Mr. Nunnally to have had detrimentally relied
2 upon the erroneous information provided by Trooper Kesler. *Findings of Fact*, 7-8. Under Idaho
3 law, to provide information that contradicts with the strict requirements of I.C. §18-8002A renders
4 an advisory incomplete, and therefore unlawful, regardless of whether an individual detrimentally
5 relies on that advisory. *Cunningham*, 150 Idaho at 693. As the hearing officer did not adhere to
6 proper standards in determining that the advisory was insufficient, he acted unlawfully. Therefore,
7 the decision of the hearing officer to suspend Mr. Nunnally's license was incorrect, and must be
8 reversed.

9 CONCLUSION

10 The Petitioner-Appellant was incorrectly advised of his rights and the requirements under
11 I.C. §18-8002A when Trooper Kesler provided incorrect information. The advisory was incomplete
12 as Trooper Kesler did not provide Petitioner-Appellant with the correct information. This incorrect
13 information rendered the advisory incomplete thus invalidated the Notice of Suspension advisory
14 form. The statute requires a strict adherence to the statutory language which Trooper Kesler did not
15 follow. Instead, Trooper Kesler provided contradicting information to Petitioner-Appellant.
16 Therefore, the Petitioner-Appellant's license suspension should be vacated because Trooper Kesler's
17 advice did not accurately inform Petitioner-Appellant of his rights and responsibilities under I.C.
18 §18-8002A. This inaccurate and confusing advice made the advisory incomplete and invalidated the
19 Notice of Suspension advisory form.
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DATED This 9 day of July, 2021.


CLARK AND FEENEY, LLP

By: 
Paul Thomas Clark
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9 day of July, 2021, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Susan K. Servick Special Deputy Attorney General	Via Email: susan@servicklaw.com
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By: 
Attorney for Petitioner-Appellant

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