IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

TERRIN D. DRAPEAU, Petitioner, vs. STATE OF IDAHO DEPARTMENT OF TRANSPORTATION, Respondent.	CASE NO. CV-10-4806 MEMORANDUM DECISION AND ORDER ON APPEAL

PROCEDURAL AND FACTUAL HISTORY

On January 15, 2010, Mr. Drapeau was arrested for driving under the influence of alcohol. (AR 4). Also on January 15, 2010, after failing his intoxilyzer tests, Mr. Drapeau was issued a Notice of Suspension. (AR 1-3).

On or about January 20, 2010, Mr. Drapeau sent a request for an administrative license suspension hearing. (AR 16-18). On or about May 10, 2010, the hearing examiner issued Findings of Fact, Conclusions of Law and Amended Order, which sustained Mr. Drapeau's driver's license suspension. (AR 82). On June 4, 2010, Mr. Drapeau filed this appeal of the Findings of Fact, Conclusions of Law and Amended Order.

One of the issues presented to the hearing examiner concerned whether the involved

officer's sworn statement was deficient pursuant to I.C. § 18-8002A. (AR 47-48). This argument was premised on the fact that the officer's sworn statement arguably failed to comply with I.C. § 18-8002A(5) which, in part requires the peace officer to include, within his or her sworn statement, the legal cause to stop the person. (AR 47-48). In this case, the officer's sworn statement simply said "SEE ATTACHED REPORT" in the section of the statement asking the officer to set forth the probable cause for the stop and arrest. (AR 5). The sworn statement was prepared and notarized on January 15, 2010. (AR 5). However, the "attached report" is dated January 16, 2010, at 1:31, and was approved on January 16, 2010 at 1:54. (AR 10). Thus, it is undisputed that the "attached report" was not in existence at the time the sworn statement was prepared, signed and notarized. (AR 10).

The hearing examiner considered this argument and concluded the following:

1. Officer DeWitt appeared before a notary and swore that the information in his report was true.

2. Drapeau's argument that because the narrative had not yet been typed out the information was not part of the sworn statement.

3. Drapeau's argument fails.

4. Officer Dewitt can swear that the information he is going to provide in a report is true.

5. The narrative is properly incorporated into the sworn statement, the narrative is admissible and the information contained therein is sworn testimony.

6. The sworn statement is not fatally deficient.

(AR 80-81).

Petitioner appeals, claiming that the hearing examiner erred when finding that the officer's sworn statement was not deficient pursuant to I.C. § 18-8002A, and consequently upholding the suspension of Mr. Drapeau's driver's license.

The Court heard oral argument pertaining to this appeal on August 9, 2011. Following

oral argument, the Court took the matter under advisement. The Court has reviewed the files and records herein and now being fully advised in the premises, and good cause appearing therefore, hereby renders its Memorandum Decision and Order.

MEMORANDUM DECISION

I. STANDARD OF REVIEW

I.C. § 18-8002A(8) specifically grants judicial review to an aggrieved party by the decision of a hearing officer, in a manner prescribed by chapter 52, title 67, Idaho Code. Judicial review of disputed issues of fact must be confined to the record. I.C. § 67-5277. The statutory provisions outlining the scope of review recite, "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). Further statutory guidance reveals:

> When the agency was required by the provisions of this chapter or by other provisions 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.
>
> If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

I.C. § 67-5279(3). Even if one or more of the requirements of I.C. § 67-5279(3) are met, "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). The burden is on the party contesting an agency decision to show how the agency erred in a manner specified under this section and to establish that a substantial right has been prejudiced. *Wheeler v. Idaho Dep't of Health & Welfare*, 147 Idaho 257, 207 P.3d 988

(2009).

II. DISCUSSION

1. Mr. Drapeau's Substantial Rights Were Prejudiced By The Hearing Examiner's Actions.

As set forth above, the party contesting an agency decision must first establish prejudice to a substantial right. Under Idaho law, the loss of one's license to drive implicates a substantial right. *Matter of McNeeley*, 119 Idaho 182, 190, 804 P.2d 911, 919 (Ct. App. 1990) ("It is well recognized that an individual's interest in a driver's license is substantial") (citing *Mackey v. Montrym*, 443 U.S. 1, 18, 99 S. Ct. 2612, 2621, 61 L.Ed.2d 321 (1979)). Therefore, this Court may reverse the hearing examiner's decision should the Court find an adequate basis for doing so pursuant to I.C. § 67-5279(3).

2. The Officer's Sworn Statement Is Fatally Deficient Under Idaho Code § 18-8002A.

Petitioner claims that the peace officer's sworn statement is fatally deficient because the officer swore to the truthfulness of statements within a police report that did not yet exist.[1] Petitioner also claims that the notary acted improperly when notarizing the officer's sworn statement without the attachment of the officer's report. § 18-8002A(5) requires a peace officer to submit a sworn statement, which may incorporate any arrest or incident report, but which must set forth the following:

> (i) The identity of the person;
>
> (ii) Stating the officer's legal cause to stop the person;
>
> (iii) Stating the officer's legal cause to believe that the person had been driving or was in actual physical control of a motor 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;

[1] This Court was presented with a virtually identical argument in *Magnuson v. State of Idaho, DOT*, Kootenai County Case No. CV-10-1445.

(iv) That the person was advised of the consequences of taking and failing the evidentiary test as provided in subsection (2) of this section;

(v) That the person was lawfully arrested;

(vi) That the person was tested for alcohol concentration, drugs or other intoxicating substances as provided in this chapter, and that the results of the test indicated an alcohol concentration or the presence of drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code.

The officer's sworn statement bears a date of January 15, 2010, while the report referenced within the sworn statement was not completed until 1:31 on January 16, 2010. Thus, at the time the sworn statement was created and incorporated the officer's report, there was no report yet drafted which set forth a basis for probable cause to stop and arrest Mr. Drapeau.

The Department of Transportation ("ITD") argues that Mr. Drapeau's argument ignores the plain language of I.C. § 18-8002A(7), which sets forth the exclusive grounds upon which a hearing officer may vacate a license suspension**.** I.C. § 18-8002A(7) provides, in pertinent part:

> The burden of proof shall be on the person requesting the hearing. The hearing officer shall not vacate the suspension unless he finds, by a preponderance of the evidence, that:
>
> (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 . . .
>
> (c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances . . .
>
> (d) The tests of 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.

ITD further argues that *Kane v. State of Idaho, Dept. of Transportation*, 139 Idaho 586, 83 P.3d

130 (2003) supports its argument.[2] In *Kane*, the defendant was pulled over for running a red light, and the officer suspected that the defendant was intoxicated. *Id.* at 588, 83 P.3d at 132. The defendant admitted to consuming alcohol, but had also been exposed to paint fumes that day. As a result, the officer suggested a blood test rather than a breathalyzer, to which the defendant agreed to submit. *Id.*

On the day of the arrest, October 27, 2001, the officer filled out an "Affidavit Supporting Initial Determination of Probable Cause Pursuant to I.C.R. 5(c), and forwarded it to the ITD to comply with the reporting requirements of I.C. § 18-8002A(5)(b). *Id.* at 589, 83 P.3d at 133. The lab results eventually confirmed that defendant's blood alcohol level was more than double the legal limit, and these results were also forwarded to the ITD. *Id.* They were received by the ITD on December 22, 2001. *Id.* Thereafter, defendant's license was suspended, and he requested a hearing. *Id.* At that hearing, and also on subsequent appeal to the district court, the suspension was upheld, and defendant appealed to the Idaho Court of Appeals. *Id.*

Defendant argued to the Court of Appeals, among other things, that the officer's sworn statement did not comply with the requirements of I.C. § 18-8002A(5). *Id.* at 589-90, 83 P.3d at 133-34. Although the case does not specify why or how the sworn statement failed to comply with I.C. § 18-8002A, it appears that the argument was based upon the failure of the officer to submit the results of the defendant's blood test within 5 days. The Court of Appeals recognized the statutory requirement that officers provide the ITD, within 5 business days, a sworn statement which includes information showing the person was tested for intoxicating substances and that the results of the test indicated the presence of some intoxicating substance in violation of applicable statutes. *Id.* at 590, 83 P.3d at 134. Even so, the Court of Appeals held that the

[2] ITD also cited an unpublished opinion in support of this argument, which was not considered by the Court.

defendant's argument must fail because his argument erroneously presumed that a hearing officer could vacate a suspension, under I.C. § 18-8002A(7), based upon technical flaws in the documentation delivered to the ITD. *Id.* Thus, the Court found that the hearing officer was not authorized, under this section of the statute, to vacate the suspension. *Id.*

This Court finds *Kane* distinguishable for two reasons. First, in *Kane*, the blood-alcohol test was not available within the statutory five-day period. The officer's decision to request a blood draw was well-founded based upon the defendant's assertion that he had been exposed to paint fumes earlier that day. The results of the blood testing, through no apparent fault of the officer, were nevertheless submitted to the ITD for testing when they became available. Second, *Kane* contained no indication that the evidence, although submitted late, was otherwise unreliable or failed to meet the statutory requirements pertaining to the submissions required by law enforcement.

Here, the officer signed a sworn statement which did not contain, by attachment or otherwise, each statutorily required item. The officer here swore to the truthfulness of a report that did not exist. The statement in existence, at the time he swore to the statement, failed to include probable cause for the stop and arrest. This, unlike *Kane*, was not a "technical violation" which nevertheless, albeit late, presented the ITD with the statutorily required materials with which to make a suspension determination. Here, the documents ultimately submitted to the ITD for a determination as to Mr. Drapeau's potential suspension were inadequate—the sworn statement did not include any evidence regarding the probable cause for the initial stop. This is more than a mere technical violation, but is rather a specifically enumerated statutory requirement.

ITD further argues that Mr. Drapeau's argument, here, misperceives the burden of proof at the administrative hearing. *Kane*, *supra*, also recognized the defendant's burden of proof. As

stated therein:

> It was not the ITD's burden at the administrative hearing to prove legal cause for the stop, to prove the reliability of the blood alcohol tests, or to disprove any of the possible grounds for challenging a suspension under § 18-8002A(7) . . . [I]t was [defendant's] 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. This burden is not met by merely showing that documents in the hands of the ITD are inadequate or inadmissible to reveal whether legal cause existed or whether the blood test was conducted properly. [The defendant] presented no evidence to meet his burden; his challenge to the suspension consisted solely of a technical attack upon the adequacy of the ITD's documentation.

Id. at 590, 83 P.3d at 134. Even so, as explained by this Court, above, the adequacy of the documentation does not reflect a "technical" flaw, but rather reflects a failure on the part of law enforcement to submit, to the ITD, a sworn statement containing the legal cause for the stop. Further, as also noted by Mr. Drapeau, the burden does not shift to the petitioner/defendant until officers have provided, among other things, an adequate sworn statement:

> The arresting officer observed Druffel's erratic driving pattern, noticed Druffel's speech was slurred and smelled a strong odor of alcohol coming from Druffel, and watched Druffel fail the field sobriety tests. Druffel then consented to the Intoxilyzer test, which produced BAC results greater than the legal limit. **In addition, the calibration, certification and quality control of the Intoxilyzer test all met the required standards thus the affidavit of the arresting officer was sufficient to shift the burden to Druffel.** Although the actions of ITD were found to be in contravention of the statute, the record supports that Druffel was in violation of I.C. § 18-8004.

Druffel v. State, Sept. of Transportation, 136 Idaho 853, 856, 41 P.3d 739, 742 (2002) (emphasis added). Here, the sworn statement of the arresting officer did *not* meet all the required statutory standards. Because it did not meet statutory standards, the burden of proof did not shift to Mr. Drapeau, thereby requiring him to prove that, *in fact*, the officer lacked legal cause to stop his vehicle.

Lastly, Mr. Drapeau cites *Farm Bureau Fin. Co., Inc. v. Carney*, 100 Idaho 745, 605 P.2d 509 (1980) to support his assertion that the officer's sworn statement is defective, and the acts of the notary who signed the sworn statement were improper. This Court also cited *Farm Bureau*

Fin. Co. in its *Magnuson* decision, stating the following:

> The Court has a difficult time finding that it is an affidavit if you are going to attach the factual basis later, because, No. 1, the notary has sworn that the person signed it under oath and they did what they said they did. *Farm Bureau* . . . at page 70 recites as follows: A notary betrays a public trust when he signs a certificate of acknowledgement with knowledge that the blanks will be filled in later or when he signs a completed certificate of acknowledgement without requiring a personal appearance of the acknowledger. There is no doubt but what the notary had to verify and sign the affidavit without it being attached, because the document didn't exist. The case goes on to state, in taking acknowledgements, a notary properly discharges his duty only when the persons acknowledging execution personally appear and the notary is satisfied by satisfactory evidence, either on his personal knowledge or oath or affirmation of a credible witness, that the acknowledgers are who they say they are and did what they say they did.

Magnuson Transcript, August 31, 2010, at pp. 18-19.

Based upon the foregoing, this Court finds that the officer could not have sworn to the assertions made in his police report when the sworn statement was signed and notarized because the report was not in existence at the time.

This holding is in accordance with *Magnuson*, which is now First District precedent. This Court heard the *Magnuson* appeal, and ruled from the bench regarding the same, on August 31, 2010. At that hearing, this Court held that an officer's report, which was created after the officer's sworn statement was signed and notarized, failed to meet the requirements of a sworn statement pursuant to § 18-8002A(5). Further, the Court held that it relied, in part, on the notary statutes at I.C. § 51-100 *et seq.*, including § 51-112.

Thus for the foregoing reasons, the Court holds that the officer's sworn statement was fatally defective.

ORDER:

The Court, being fully advised in the premises and good cause appearing therefore, IT IS HEREBY ORDERED as follows:

1. The Decision of the Hearing Examiner is REVERSED and the matter is hereby REMANDED for proceedings consistent with this opinion.

DATED: The ___ day of August, 2011.

_____
Benjamin R. Simpson
District Judge # 1001

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of August, 2011, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

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