

IN THE SUPREME COURT OF THE STATE OF IDAHO

JASMINE REAGAN, )  
 ) Case No. CV-47865-2020  
 )  
 ) Petitioner/Respondent, )  
 ) **APPELLANT'S REPLY BRIEF**  
 )  
 vs. )  
 )  
 ) STATE OF IDAHO TRANSPORTATION )  
 ) DEPARTMENT, )  
 )  
 ) Respondent/Appellant. )  
 )  
 \_\_\_\_\_ )

REPLY BRIEF OF APPELLANT

JUDICIAL REVIEW FROM THE IDAHO DISTRICT COURT

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## **I. ISSUES PRESENTED BY THIS REPLY BREIF**

- A. Legal Cause to Stop and the Right to Privacy
- B. Reagan Right to Due Process and the Subpoena
- C. Attorney Fees and Costs

## **II. ARGUMENT**

### **A. LEGAL CAUSE TO STOP and LEGAL CAUSE TO BELIEVE REAGAN WAS DRIVING UNDER THE INFLUENCE**

As explained in ITD's Brief, the findings of the hearing officer regarding the statutorily mandated criteria of Idaho Code Section 18-8002A(7) were supported by substantial and competent evidence. The hearing officer determined, in pertinent part: (1) that the driver did not meet her burden of proof; (2) that the arrest was lawful; and (3) that there was legal cause to believe that Jasmine was driving under the influence of alcohol.

It was not arbitrary or capricious for the hearing officer to find that Corporal Deal had legal cause to stop Jasmine. The findings of the hearing officer included the following:

20. In this case, Cpl. Deal was responding to a reckless driving complaint filed by a known and identifiable witness.

21. Based on the reckless driving complaint, a reasonable inference is drawn that Reagan had committed a crime which required law enforcement response and action.

22. Further, a call into dispatch for law enforcement response to a reckless driving complaint satisfies the reasonable articulable suspicion standard, justifies Cpl. Deal's legal cause for contact and ultimate detainment, and legal cause for Reagan's seizure for further investigation.

\* \* \*

26. Reagan's driving behavior was illegal and not what is expected by the everyday Idaho licensed vehicle operator, thus providing reasonable articulable suspicion, and justifying legal cause for the contact, detainment and seizure.

27. Upon contact at Reagan's residence, Exhibit D, Cpl. Deal's body cam, depicts Cpl. Deal standing outside the porch and conversing with Eric Blomdahl.

28. The video further depicts Cpl. Deal asking Blomdahl "can I talk to her" and "could you get her for me".

29. Both of those statements are requesters, and not commands.

30. At this point in time, Cpl. Deal possessed reasonable articulable suspicion and the authority to arrest Reagan for reckless driving.

\* \* \*

36. In conclusion, Cpl Deal possessed legal cause, reasonable suspicion, and the authority for Reagan's lawful arrest outside the residence, thus the arrest warrant was not required.

\* \* \*

40. Reagan violated I.C. §§49-1401, 49-637 and 49-630.

41. Based upon substantial evidence through conflicting argument, Cpl. Deal possessed legal cause to contact Reagan, and the seizure was lawful.

*R. Vol. 1, Exhibits, p. 80-82.*

It was not arbitrary or capricious for the hearing officer to find that Corporal Deal has legal cause to believe that Reagan was driving under the influence. The finding of the hearing officer included the following:

10. In this case, Reagan admitted to Cp. Deal of driving and being in actual physical control of the motor vehicle.

11. Reagan displayed multiple signs of intoxication/impairment and failed all standardized field sobriety tests.

12. Consequently, Reagan submitted to evidentiary testing for determination of her alcohol concentration.

13. The documentary record setting forth the facts as shown above is clear and undisputed that Cpl. Deal detained Reagan on suspicion of driving under the influence of alcohol, she was in the custody of police, and she was requested to submit to an evidentiary test to determine if any crime had been committed.

*R. Vol. 1, Exhibits, p. 84.*

This is a civil proceeding to review the decision of a hearing officer and to determine if the hearing officer followed the statutory mandates of Idaho Code Section 18-8002A(7).

Administrative license suspension are remedial and regulatory exercises of the State's police power; they are not criminal proceedings resulting in criminal punishments. See *State v*

*Reichenberg*, 128 Idaho 452, 457, 915 P.2d 14, 19 (1996). See also *Buell v. Idaho Dep't of*

*Transp.*, 151 Idaho 257, 262-64, 254 p.3d 1253, 1258 (Ct. App. 2011). The rules and standards

that apply to an ALS proceeding are specific and statutory, this is not a criminal matter and is not a motion to suppress evidence. See Idaho Code Section 18-8002A(7).

*The Right of Privacy is Irrelevant.* Jasmine also argues that the actions of law enforcement violated her right to privacy. The hearing officer found to the contrary, stating:

33. Based on Cpl. Deal's knowledge of the situation and his personal observations of Reagan after she had initially exited her residence, the intrusion of Reagan's privacy was a diminished one.

*R., Vol. 1, Exhibits, p. 81.*

Further that is not a ground to reverse an administrative license suspension. The right of privacy is a defense to a criminal charge. It is irrelevant to an administrative license suspension action, which is not a criminal proceeding with a criminal punishment. In fact, if the hearing officer had found that a violation of the right of privacy could overturn a license suspension, such a finding would be in excess of the hearing officer's statutory authority.

#### **B. DUE PROCESS AND THE FAILURE TO ISSUE A SUBPOENA DUCES TECUM**

Jasmine argues that she was denied due process when the hearing officer refused to issue a subpoena for a recording of the informant's communication with law enforcement and that this lack of evidence was prejudicial. This argument is without legal basis and does not state a valid ground upon which the hearing officer could vacate an administrative license suspension.

On March 6, 2019 the attorney for Jasmine wrote to the hearing officer requesting various information including "audio recordings of all communication related to and including informant contacts with law enforcement related to probable cause to seize custody." *R. Exhibits Vol. 1, p.62.* On March 11, 2019 the hearing officer issued a subpoena duces tecum which did not include information regarding the informant and the hearing officer issued an Order that the hearing officer issued a subpoena for "the evidence he deemed relevant". *R. Exhibits, Vol. 1, p.*

67-68. On March 18, 2019, the attorney for Jasmine emailed the hearing officer requesting the audio recordings related to the informant contacts. *R. Exhibits, Vol 1, p.70*. The hearing officer did not respond to this request.

The ALS statute does not provide rules of discovery in ALS hearings. *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176, (App. 2006). But I.C. § 18-8002A(10) authorizes the ITD to adopt rules deemed necessary to implement the provisions of the ALS statute. *Id.* Pursuant to ITD rules, the hearing officer assigned to the matter may, upon written request, issue subpoenas requiring the attendance of witnesses or the production of documentary or tangible evidence at a hearing. IDAPA 39.02.72.300.01; see also *In re Mahurin*, 140 Idaho 656, 659 n. 2, 99 P.3d 125, 128 n. 2 (Ct.App.2004).<sup>1</sup> This Rule states:

01. Request. The Hearing Officer assigned to the matter may, upon written request, issue subpoenas requiring the attendance of witnesses or the production of documentary or tangible evidence at a hearing. (10-1-94)

Under the administrative discovery rules, the hearing officer has broad discretion in the extent of discovery that he or she orders. *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176, (App. 2006). Courts review discretionary decisions of hearing officers for an abuse of discretion. I.C. § 67-5279(3)(e). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the

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<sup>1</sup> Although this was not done in this case, petitioners may also seek documents through a request or motion for production of documents pursuant to IDAPA 39.02.72.400.01, which states: "To obtain a photocopy of a document which is public record, relates to the petitioner hearing, and is in the possession of the Department, petitioners shall make a written request to the Department. The Department shall attempt to provide the requested copies prior to the hearing date, but failure to do so shall not be grounds for staying or rescinding a suspension."

lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). Accordingly, the multi-tiered inquiry of *Sun Valley Shopping Ctr.* also applies to a court's review of the discretionary decisions of an ALS hearing officer. *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176, (App. 2006).

Therefore, the decision to grant or deny a request for a subpoena is clearly discretionary. In *Bell v ITD*, 151 Idaho 659, 262 P.3d 1030 (2011), the petitioner challenged the hearing officer failure to grant his subpoena requests. The Court stated:

In this case, Bell requested several subpoenas in order to challenge the suspension of his driver's license. As noted above, the hearing officer granted some of Bell's requests and denied others. Bell contends that the subpoenas not issued were necessary to obtain relevant information to challenge Officer White's certification; to challenge the accuracy and proper functioning of the breath testing machine, the Intoxilyzer 5000; and to establish that the hearing officer can vacate a driver's license suspension solely for subpoena non-compliance. ITD asserts that the requested information had no bearing on the actual evidence and was irrelevant to the outcome.

*Id.*, p. 666-7; 262 P.3d at 1037-8. Bell requested Officer White's certification to operate the breath testing equipment which was denied. On this issue the Court stated:

While the hearing officer denied Bell's subpoena request to obtain the officer's certification, several of Bell's other requests were granted. As such, the hearing officer recognized that it had discretion to grant or deny Bell's requests. In denying Bell's request, the hearing officer determined that the officer's certification card was not clearly relevant. That determination was premised upon the fact that Officer White had already submitted a sworn affidavit indicating that his certification expired in December 2010. Had the hearing officer determined that any information regarding Officer White's certification was not clearly relevant, the hearing officer's conclusion would have been clearly erroneous. However, the hearing officer recognized that, although ALS petitioners have the ability to challenge their driver's license suspension through a number of different avenues, it does not give them carte blanche to demand all potentially relevant or confirmatory information. In this context, the record contained affirmative evidence regarding Officer White's certification and the hearing officer was within his discretion to



deny the subpoena in the absence of any evidence in the record or from Bell that might suggest the existence of contrary information. As the hearing officer stated, the certification card was not "clearly relevant," in the face of the sworn statement and the absence of some indication that the certification card may provide more than simply cumulative evidence. A hearing officer "may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds." I.C. § 67-5251(1). Thus, the hearing officer correctly perceived the issue as one of discretion, acted within the boundaries of such discretion, and reached his decision by an exercise of reason. See *Sun Valley Shopping Center*, 119 Idaho at 94, 803 P.2d at 1000. Bell has not established a due process violation.

*Id.*, 151 Idaho 659 at 667-8, 262 P.3d 1030 at 1038-9. Bell also requested 60 days of log sheets and instead the hearing officer issued a subpoena for a four day period of log sheets. The Court held the following:

The hearing officer found that Bell " was provided with the subpoenaed Instrument Operations Log albeit untimely (just prior to the scheduled hearing time), but a continuance was granted to allow Bell's legal counsel the opportunity to timely and properly prepare for the rescheduled hearing date." The hearing officer further found that " Bell submitted to evidentiary testing June 5, 2009, with the .08 and .20 solutions changes and calibration checks performed June 3, 2009, two days prior to Bell's evidentiary test, thus the Subpoena Duces Tecum issued by the Hearing Officer for the period of June 3, 2009, through June 6, 2009, provided all the relevant information Bell needed." Indeed, Bell received log sheets for more than thirty days prior to his test. As discussed below, Bell has failed to demonstrate that the log sheets for any time period after June 6, 2009, are relevant to a determination of the proper functioning of the equipment at the time of his test and, thus, the hearing officer neither abused its discretion in denying the subpoena nor violated Bell's due process rights. See *In re Mahurin*, 140 Idaho 656, 659, 99 P.3d 125, 128 (Ct.App.2004) (upholding refusal to provide documents " absent any explanation of a need for records covering a more extended period" ).

*Id.*, 151 Idaho 668-9, 262 P.3d 1039-40.

Here, the hearing officer recognized that he had the discretion to grant or deny the requests from the Petitioner. In fact, some of Jasmine's requests were granted. See *the Subpoena Duces Tecum R. Exhibits, Vol 1, p.67*. Significantly, Jasmine presented no affirmative evidence that the audio recordings of the informant were relevant. In denying the requests for the audio of the informant, the hearing officer found the requested items were denied based upon "relevancy,

necessity, insufficient information, and/or being unduly repetitious based on the existing record.”

*R. Exhibits, Vol 1. p. 68.* In this case, the record contained affirmative evidence of the statement of Tracey L. Dubey in the police report which stated:

“ I was advised the reporting party was Tracey L. Dubay who was reporting the following in summary. Dubay was following a Black Subaru with an Idaho license plate of SHRED7B. This vehicle showed the owner to be Jasmine K. Reagan. As Dubay was following the vehicle down Schweitzer Mountain Road the vehicle almost went into the ditch, into on-coming traffic multiple times. A female was the driver of the vehicle and she was wasted impaired. Dubay advised the female looked like she was crying as her face was pale and her eyes were red. Dubay did not see the female drinking. Dubay was willing to sign a citation (go to court), and continued to follow the vehicle after the female pulled into the gas station parking lot (Schweitzer Conoco) and back out. Dubay advised the vehicle was all over the road. Dubay followed the female driving the Subaru to 210 Seven Sisters in Kootenai Idaho, Bonner County. Dubay was advised by dispatch to continue on for safety since law enforcement had the license plate and address.”

*R. Exhibits, Vol. 1 p. 49.* Therefore, the hearing officer was within his discretion to deny the subpoenas due to the absence of any evidence in the record or from the Petitioner that might suggest the existence of contrary information.

*Prejudice.* Assuming that this argument is a proper basis to vacate an ALS action, in order to establish a due process violation, Jasmine must also demonstrate that the hearing officer acted improperly and actual prejudice resulted. In *Hawkins v. ITD*, 161 Idaho 173, 384 P.3d 420 (Ct. App. 2016) the court stated:

However, in the case at hand, we need not reach the issue of the purported due process violation or whether Hawkins invited the error, as Hawkins has failed to establish that he was prejudiced by the agency's actions. To challenge the agency's decision, Hawkins was required to demonstrate that the agency acted improperly pursuant to I.C. § 67-5279(3) and that he was prejudiced as a result. See *Price*, 131 Idaho at 429, 958 P.2d at 586. Claims of prejudice must be specific and particularized, as error will not be presumed, but must be affirmatively shown. See *Beyer*, 155 Idaho at 48, 304 P.3d at 1214. To establish prejudice in the context of a party's challenge to an administrative license suspension, a party must allege more than the mere possibility that evidence might have revealed something incriminating or discrediting or would have been helpful for preparation. See *id.*

In *Hawkins*, the driver argued that he was prejudiced by not having the video recording before the administrative hearing and therefore did not have sufficient ability to prepare for the hearing.

This argument was rejected by the Court of Appeals:

Similar to Beyer, Hawkins asserts he was harmed by not having sufficient ability to prepare for the hearing due to not having received the subpoenaed video recording. Hawkins argues that by not having the video prior to the hearing, he was deprived of key evidence that could have been used to challenge any claims that the officer had legal cause to believe Hawkins was driving under the influence. Hawkins appears to contend that because the hearing officer found the testimony of the arresting officer to be more credible than Hawkins' testimony, he was prejudiced by not being able to use the video recording to discredit the officer. This basis for prejudice is bare and conclusory. Hawkins makes no mention of how the video would have discredited the officer's sworn testimony. To accept Hawkins' claim of prejudice, we would be required to assume that the video recording contradicts the arresting officer in a manner significant enough to discredit the veracity of his testimony. The mere possibility that the video recording might have revealed facts that would discredit the arresting officer is not sufficient to establish actual prejudice. The only hint in the record at a possible contradiction between the video and the officer's testimony came from Hawkins' request to the hearing officer that, before rendering his decision, he "review [the video recording] to see whether or not the officer was following behind [Hawkins] or did a U-turn to go after him." However, Hawkins makes no argument as to why such a distinction is significant or damaging to the credibility of the arresting officer. Just as Beyer's assertion that he was unable to adequately prepare a defense was insufficient to establish prejudice, Hawkins' identical assertion is likewise insufficient.

Moreover, based upon our review of the record, we find no evidence of actual prejudice. Prior to the hearing, Hawkins had been provided the arrest and incident reports relevant to the traffic stop and breath test, as required under IDAPA 39.02.72.200.01(b). During the hearing, Hawkins was able to cross-examine the arresting officer about the events leading up to the traffic stop as well as the arresting officer's observations of Hawkins during the encounter. Both inquiries were relevant to the hearing officer's determination that Hawkins did not meet his burden of showing that the arresting officer lacked cause to justify the stop or his belief that Hawkins was driving under the influence.

*Id.*, at 177-178. Here, the hearing officer recognized that known citizen informants are generally deemed reliable. Tracy L. Dubay provided the police with specific information and confirmed that she was willing to sign a citation and go to Court. *R. Exhibits, Vol. p.49*. The hearing officer found:

12. In *State v. Larson*, 135 Idaho 99, the court held where the information comes from a known citizen information rather than an anonymous tipster, the citizen's disclosure of her identity, which carries the risk of accountability, if the allegation turns out to be fabricated, is generally deemed adequate to show veracity and reliability.

*R. Exhibits, Vol. 1, pp. 79-80.* The factual findings by the hearing officer are entitled to deference by the reviewing court.

Here, to accept Jasmine's claim of prejudice, one would have to assume that the audio recording from Dubay would contradict the statements of Jasmine where she "denied that her driving was poor on the road...". *R. Exhibits, Vol. 1, p. 49.* The mere possibility that the audio recording would have presented facts contrary to the police report and which would discredit the report by Dubay is not sufficient establish actual prejudice.

### **C. ATTORNEY FEES AND COSTS SHOULD BE DENIED**

Reagan's motion for attorney fees before the District Court was denied. The Court held that even though Reagan was the prevailing party:

... the record does not establish that the non-prevailing party acted without reasonable basis in fact or law, in light of the issuance of *State v. Clarke*, 165 Idaho 393, 3446 P.3d 451 (2019) in the months after the Findings of Fact and Conclusions of Law and Order were issued.

According to the motion for attorney fees, Jasmine is demanding attorney fees based upon I.C. 12-117. I.C. 12-117 provides in part:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the non-prevailing party acted without a reasonable basis in fact or law.


Even if Jasmine prevails, ITD acted in all respects with a reasonable basis in law and in fact. The *Clarke* decision did not exist at the time of the arrest or at the time the hearing officer

issued his findings of fact and conclusions of law. Further, all the findings of the hearing officer were based upon substantial evidence in the record.

**III. CONCLUSION**

ITD respectfully requests that this Court uphold the decision of the hearing officer and vacate the decision of the district court.

DATED this 8 day of Sept 2020


  
Susan K. Servick  
Special Deputy Attorney General  
Idaho Transportation Department

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 of Sept. 2020, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Susan K. Servick