COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MYRON G. YEPA,
Petitioner-Appellee,

vs.

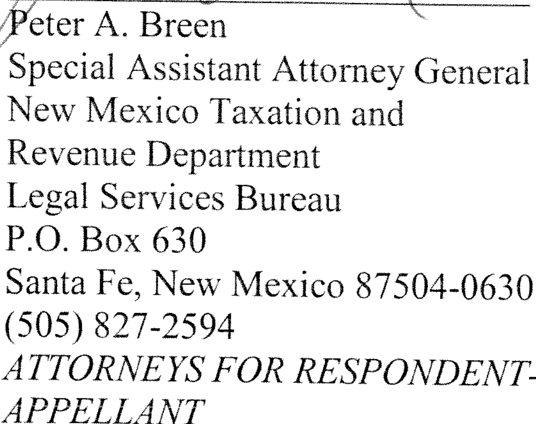
COA No. 33,101
Sandoval County
D-1329-CV-2009-02978

STATE OF NEW MEXICO ex. rel.
DEPARTMENT OF TAXATION
AND REVENUE,
Respondent-Appellant.

COURT OF APPEALS OF NEW MEXICO
FILED
AUG 25 2014
Wendy F Jones

Appeal from the District Court of the Thirteenth Judicial District Court
Sandoval County
The Honorable Louis P. McDonald, District Judge

BRIEF-IN-CHIEF



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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

In 2009, the legislature amended NMSA 1978, § 66-5-33.1 (2009). The amendment required drivers who have had a revocation either through a DWI conviction or through an implied consent revocation to obtain an ignition interlock license for at least six months before being eligible to apply for reinstatement from the revocation period. The law went into effect July 1, 2009. 2009 N.M. Laws, Ch. 254 § 1. The Appellee's driving privileges were revoked from September 27, 2008 to March 27, 2009, **[RP 00039],** or until all conditions for reinstatement were met, whichever occurs later. The Appellee was eligible for reinstatement from the revocation in March 2009, a few months before the law changed. The Appellee approached MVD to get his license back shortly after the law changed and was told he had to get an ignition interlock license. **[7-23-13 3 Tr. 13:18]**

After a trial on the merits, the district court declared NMSA 1978, § 66-5-33.1(B)(4) to be impermissibly retroactive and an *ex post facto* law. **[RP 00162]**. The Department appeals.

B. Course of Proceedings and Summary of Facts and Disposition Below

The Appellee has an admitted drinking problem**. [7-23-13 3 Tr. 16:21]**. He was arrested for aggravated drunk driving in New Mexico in 2008. **[7-23-13 3 Tr. 11:25]**. The Appellee was too drunk to perform field sobriety tests. **[*Verified***

Petition exhibit "C" **RP 00034]**. Pursuant to the Implied Consent Act, NMSA 1978, §§ Section 66-8-105 through 112 (2005), the Appellee consented to a breath test and the results indicated he had an alcohol concentration (BAC) of 0.28. **[7-23-13 3 Tr. 16:19]**. The arresting police officer did not appear for trial and the DWI case against the Appellee was dismissed. **[7-23-13 3 Tr. 7:24, RP 00034]**. The Appellee did not seek a hearing on the Implied Consent revocation and his driver's license was revoked. **[7-23-13 3 Tr. 8:23]**.

New Mexico allows drivers who have lost their license due to a revocation to immediately obtain an ignition interlock license to allow the individual to lawfully drive during the revocation period. **[7-23-13 3 Tr. 27:5]**. This option is an innovation of New Mexico. **[7-23-13 3 Tr. 26:12; Tr. 27:5]**. Although the Appellee was eligible for an ignition interlock driver's license immediately after his revocation started, **[7-23-13 3 Tr. 27:5]**, the Appellee instead elected to surrender his new automobile to the dealership **[7-23-13 3 Tr. 16:12]**, and to rely on his sister, a single mother, to drive him around. **[7-23-13 3 Tr. 24:19 – Tr. 25:1]**. The Appellee sometimes took the bus, **[7-23-13 3 Tr. 24:20]**. Sometimes he hitchhiked. **[7-23-13 3 Tr. 19:3]**.

The Appellee has been unemployed since before his move to New Mexico from Oklahoma in 2008. **[7-23-13 3 Tr. 15:9, 23:1, 12:21, 45:4-5]**. By the time the Appellee became eligible to apply for reinstatement from the revocation in

March 2009, the law had not yet changed to require six months use of an interlock license, but Appellee could not afford the $100 license reinstatement fee, **[7-23-13 3 Tr. 13:2, 9 14:17-19]**, nor an automobile. **[7-23-13 3 Tr. 16:12]**. The Appellee still cannot afford the $100 fee to have his driver's license reinstated even after receiving a favorable ruling from the district court. **[7-23-13 3 Tr. 15:7]**. The state offers subsidies for the installation and monthly rental of the interlock device in the range of $360 to $500 per year. **[7-23-13 3 Tr. 27:17]**. However, New Mexico, like all states, does not offer subsidized cars to indigent drivers. **[7-23-13 3 Tr. 28:5]**.

The Appellee continues to struggle with his addiction following his 2008 Implied Consent revocation. The Appellee checked into a thirty day residential treatment center run by the New Mexico Department of Health, Yucca Lodge, near Silver City in 2009. **[7-23-13 3 Tr. 16:24, RP 00012]**. However, most recently, in August, 2012, a little less than a year before the trial on this cause, the Appellee admitted at trial that he got drunk on at least eighteen bottles of malt liquor. **[7-23-13 3 Tr. 20:11]**. The Appellee then hitchhiked to the Lotaburger hamburger stand on highway 550 in Bernalillo. **[7-23-13 3 Tr. 19:6]**. The police were called, and the Appellee emptied five unopened bottles of the malt liquor that he had on him on the shoes of the police officer and the patrolman's police car. **[7-23-13 3 Tr.**

21:1]. The Appellee was arrested and was combative while he was being booked. **[7-23-13 3 Tr. 21:9]**.

The Appellee testified that he had been sober for only a little more than a month at the time of trial, almost five years from the aggravated DWI arrest that resulted in his Implied Consent Act license revocation. **[7-23-13 3 Tr. 14]**. The interlock requirement is primarily to protect the public, and to allow drivers to be productive members of society. **[7-23-13 3 Tr. 30:18]**. When an ignition interlock is on a driver's car, recidivism is considerably reduced. **[7-23-13 3 Tr. 29:20]**. The longer the interlock is on the car, the lower the recidivism rate after removal. **[7-23-13 3 Tr. 29:22]**. A person who struggles with alcoholism might find the interlock device useful. **[7-23-13 3 Tr. 30:1]**.

Following trial, the Court declared NMSA 1978, § 66-5-33.1(B)(4) to be an *ex post facto* law illegal under the state and federal constitutions and an impermissibly retroactive state statute. The district court enjoined the state from enforcing the six month ignition interlock requirement on the Appellee as a prerequisite to giving the Appellee the ability to apply for reinstatement from the revocation period. **[RP 00162]**. This case presents two issues; whether the Appellee can proceed directly to district court to press his claims without first seeking an administrative hearing before the Department; and whether the law is impermissibly retroactive.

II. STATEMENT OF THE ISSUES

A. Is NMSA 1978 § 66-5-33.1(B)(4) Invalid As An *Ex Post Facto* Law?

1. How the Issue was Preserved for Appeal

The issue of whether the statute was an *Ex Post Facto Law* was preserved by an answer to the amended petition filed by Appellant on Aug. 22, 2012. **[RP 00053-00056]**; *Brief in Opposition* March 21, 2013 **[RP 00138]**. ("The fact that Appellee is being compelled to bear a burden which he dislikes does not make the legislation an *ex post facto* law..."). *Id.* The point was also preserved by a trial on the merits where the point was argued. **[7-23-13 3 Tr. 00049-00056]**.

2. Standard of Review

The standard of review is *de novo* for legal error. *Bounds v. State,* 2011-NMCA-011,¶ 8. (district court challenge that a statute requiring domestic well permits be issued without regard to law of prior appropriation reviewed *de novo* for legal error).

a. Argument as to whether amendment to NMSA 1978, § 66-5-33.1 is *Ex Post Facto*

The statute before the amendment read:

> A. Whenever a driver's license or registration is suspended or revoked and an application has been made for its reinstatement, compliance with all appropriate provisions of the Motor Vehicle Code [66-1-1 NMSA 1978] and the payment of a fee of twenty five dollars ($25.00) is a

> prerequisite to the reinstatement of any license or registration.
>
> B. If a driver's license was suspended or revoked for driving while under the influence of intoxicating liquor or drugs, for aggravated driving while under the influence of intoxicating liquor or drugs or for a violation of the Implied Consent Act [66-8-105 NMSA 1978], an additional fee of seventy-five dollars ($75.00) is required to be paid to reinstate the driver's license....

The statute after the amendment read:

> A. Whenever a driver's license or registration is suspended or revoked and an application has been made for its reinstatement, compliance with all appropriate provisions of the Motor Vehicle Code [66-1-1 NMSA 1978] and the payment of a fee of twenty five dollars ($25.00) is a prerequisite to the reinstatement of any license or registration.
>
> B. If a driver's license was suspended or revoked for driving while under the influence of intoxicating liquor or drugs, for aggravated driving while under the influence of intoxicating liquor or drugs or for a violation of the Implied Consent Act [66-8-105 NMSA 1978], the following are required to reinstate the driver's license:
>
> (1) an additional fee of seventy-five dollars ($75.00);
>
> (2) completion of the license revocation period;
>
> (3) satisfaction of any court-ordered ignition interlock requirements; and
>
> (4) a minimum of six months of driving with an ignition interlock license with no attempts to circumvent or tamper with the ignition interlock device.

Hence, the statute required those seeking reinstatement after July 1, 2009 to have an interlock license for at least six months. That the statute relies on a

circumstance in effect before passage, does not make the law *ex post facto*. *Howell v. Heim,* 1994-NMSC-103. (statute not impermissibly retroactive when applied to condition existing before its effective date). When the legislature amended the law effective July 1, 2009, it left the criteria for reinstatement intact. 2009 N.M. Laws, Ch. 254 § 1. The state provides subsidized interlock devices and in the Appellee's case, residential alcohol rehabilitation services showing that the intent is not punitive. Moreover, the record below is replete with evidence of the non-punitive, but highly remedial purpose of the change in the law requiring an interlock license.

The Appellee's argument, on the other hand, amounts to little more than an assertion that he has a constitutional right to a driver's license no matter what his driving record and a vested right to the benefit of the most favorable driver's licensing law that existed during his lifetime. No other state has accepted the Appellee's argument that alcohol ignition interlock requirements for drivers with a history of alcohol abuse while driving are impermissibly retroactive, *ex post facto* or a violation of due process. For example, in *Frederick v. Commonwealth Dep't of Transportation, Bureau of Driver Lic.,* 802 A.2d 701, 704 (Pa. Commw. 2002), Pennsylvania passed a law after the driver's DWI arrest, requiring drivers convicted of DWI to have at least six months on an interlock device before having full driving privileges restored. The Pennsylvania court upheld the statute against a challenge that the interlock law was *ex post facto*. The court in *Frederick*

recognized that the statute was not penal given the remedial purpose to protect the public. *Frederick* at 704. The Pennsylvania court reasoned that the statute was meant to achieve a legitimate government purpose to protect the public against drivers with a documented history of alcohol abuse while driving. *Id.* In *Gordon v. Registry of Motor Vehicles,* 912 N.E. 2d 9 (Mass. App. 2009), the court similarly held that mandatory alcohol ignition interlock requirements for those convicted of DWI were not double punishment nor *ex post facto* law, nor a violation of due process, citing the remedial purposes of the statute. *Gordon* at 51.

The case here illustrates much better than either *Frederick* or *Gordon* the wisdom and remedial purpose of the legislature's policy. The Appellee was arrested less than a year before trial, in a drunk and disorderly-type incident. The arresting officer, Jeff McGinnis, was present in the courtroom under subpoena, **[RP 00157]**, so the Appellee had strong incentive to testify completely. With Officer McGinnis present, the Appellee admitted under oath that he continued to have a drinking problem nearly five years after his DWI arrest, implied consent revocation and stay at state expense in residential rehabilitation:

> "Q. Mr. Yepa, do you think you have a drinking problem?
>
> A. Yes."
>
> **--[7-23-13 3 Tr. 16:21].**

The Appellee continues to drink heavily. The Appellee admitted to eighteen bottles of malt liquor consumed in the disorderly conduct-type incident less than a

year before trial, **[7-23-13 3 Tr. 20:11]**, that culminated in the Appellee pouring five cans of malt liquor on Officer McGinnis' shoes and police car, and being combative while being booked at the police station.

Q. " And not to drag this out too much, it ended up that you emptied your unopened malt liquor cans on the police car and also on Officer McGinnis's shoes that day?
A. That's what the police report stated.
Q. And that was true; is that right?
A. I don't remember, but I believe the report."

--[7-23-13 3 Tr. 21:1].

- * * * *

" Q. You were combative when you were brought back to be booked at the police station?
A. I guess I was, that's what they said."

---[7-23 13 3 Tr. 21:9].

The Appellee has other indicia showing a condition of poorly controlled alcoholism; he lacks substantial attachment to the workforce, having not worked for nearly five years since his license revocation. **[7-23-13 3 Tr. 23:1]**. He attends Alcoholic Anonymous meetings, but approximately five years after his implied consent hearing, his best evidence of sobriety was merely a self-report that he had been sober for a little over a month before trial. **[7-23-13 3 Tr. 17:24]**. The Appellee therefore has strong incentive to resist use of an ignition interlock license for reasons that do not involve cost or inconvenience.

In *State v. Druktenis,* 2004-NMCA-032, the defendant challenged the requirement that he register as a sex offender because at the time of his convictions he was not required to register under the then existing sex offender law. The New Mexico Court of Appeals rejected his argument that requiring he register was an *ex post facto* violation. *Druktenis* ¶ *35* ("The United States Supreme Court held that 'the Ex Post Facto Clause does not preclude a state from making reasonable categorical judgments that convictions of specified crimes should entail particular regulatory consequences.' " [Internal citations omitted]). The state has a well-accepted interest in regulating driver's licenses for safety. *Dixon v. Love,* 431 U.S. 105 (1977). (state may revoke driver's license on points without affording a hearing first); *Johnson v. Sanchez,* 1960-NMSC-29 ¶ 15. ("The automobile is a dangerous instrumentality and the improper use thereof creates a serious menace to public safety and authorizes the most stringent use of the government's police power.")

As Pennsylvania, Massachusetts and New Mexico recognize, ignition interlock laws for drivers with a documented history of alcohol abuse while driving are remedial statutes that do not violate the *ex post facto* clause. The Appellee's underlying implied consent revocation was itself not punitive but remedial. *State ex. rel. Schwartz v. Kennedy,* 1995-NMSC-069 ¶ 35 (Implied consent statute fulfills remedial, more than punitive, purpose). Logically, the same remedial

purposes at work in a "hard revocation" are, if anything, even more present in a regime of ignition interlock licenses, where a driver can regain mobility immediately through New Mexico's innovative mechanism of the ignition interlock license **[7-23-13 3 Tr. 27:5]** and state subsidies for an interlock device are available for the impoverished driver, **[7-23-13 3 Tr. 27:17]**. In addition to those state benefits afforded the Appellee, the Appellee was provided, at state expense, a month's worth of residential alcohol treatment **[RP 00012]**. A large amount of state resources has been devoted to, or are available to, rehabilitate the Appellee and give him mobility. These facts cut very strongly against the idea that the state pursues a punitive purpose with the statute. The Appellee is a demonstrable hazard to the motoring public. This is manifested through his alcohol-related license suspension. To require such a driver to have at least six months on an ignition interlock license before receiving an unrestricted license is non-punitive and not an *ex post facto* law.

B. Did the District Court Have Power to Offer Declaratory and Injunctive Relief Against the Operation of NMSA 1978, § 66-5-33.1(B)(4) where the Appellee Had Not Brought His Claim For An Administrative Hearing?

1. Standard of Review

As failure to exhaust administrative remedies is a jurisdictional fault, the standard of review is *de novo* for legal error. *State Racing Comm'n v. McManus,*

1970-NMSC-134 § 6 (suspended jockey must exhaust administrative remedies with racing commission before seeking district court relief). *State Human Rights Comm'n v. Accurate Mach. & Tool Co.*, 2010-NMCA-107 ¶ 4. (collateral attack on finding of discrimination on attempted enforcement of the order impermissible as respondent failed to exhaust administrative remedies by failing to appeal the original action).

2. How the Issue Was Preserved for Appeal

The issue was preserved through a written motion to dismiss and the Department's answer. **[RP 00053-00056].** The motion to dismiss for failure to exhaust administrative remedies was orally argued to the court. **[12-10-2012 2 Tr. 5-13]**. The district court ruled against the motion to dismiss in a written order filed December 20, 2012. **[12-10-2012 2 Tr. 13:3; RP 00105]**. The Department reiterated that it was not waiving the motion to dismiss before the beginning of the trial. **[7-23-13 3 Tr. 6:6-11]**.

III. ARGUMENT

The legislature specifically prohibits the kind of review sought here by the Appellee: "***Unless a more specific provision for review exists,*** any person may dispute the denial of...any license...by filing with the secretary a written protest against the action...." NMSA 1978 § 66-2-17(A). [Emphasis added] This provision means what it says. An immediate resort to the district court under a

generalized declaratory judgment statute is unavailable. A declaratory judgment action is not a "more specific provision for review." While it is true that the statute uses the permissive "may" this is merely to express the idea that the protesting drivers are not required to administratively appeal the over-the-counter denials, but that they "may" administratively appeal these denials. In *Alvarez v. State Taxation & Revenue Dep't*, 1999-NMCA-6, the drivers sued claiming that long-term revocations were illegal because some of their cases had been plead as first offenses. The court held that the drivers had to exhaust their administrative remedies through an administrative hearing. *Id.*

Adherence to the MVD's administrative appeal statute is a matter of the separation of powers. *New Energy Economy Inc. v. Shoobridge,* 2010-NMSC-049 ¶ 101 (district court challenge to the adoption of an administrative rule in advance of rulemaking unavailable). By the plain terms of the statute, the only applicable method for administrative review of any "over-the-counter" denials of driver's licenses, is this administrative review, followed by an on-the-record review through the district court under the Rule 1-074 NMRA 2014. NMSA 1978 § 66-2-17 (H). That the Appellee casts his litigation as a facial attack on the statute, or a challenge to the constitutionality of the statute is unavailing, because the legislature has, as it may, commit initial determination of such constitutional issues as well as factual issues and sub-constitutional legal issues to the administrative

agency. *Smith v. City of Santa Fe,* 2007-NMSC-55 ¶ 15. *US Xpress, Inc. v. N.M. Taxation and Rev. Dep't.* 2006-NMSC-17. (facial challenge to tax statute as violative of commerce clause committed to administrative review). Similarly, the legislature entrusted to the same hearing officers the power to determine as an initial matter Fourth Amendment search and seizure law in the context of implied consent proceedings. *Schuster v. State Dep't of Taxation and Revenue, Motor Vehicle Div.,* 2012-NMSC-25 (hearing officers must consider the constitutionality of the initial stop and arrest by police before ordering suspension of driver's license). There is no reason to think that the legislature thought the same hearing officers were competent to hear constitutional arguments related to the commerce clause, and Fourth Amendment search and seizure law, but inexplicably incompetent to hear constitutional argument that a statute is an unconstitutional *ex post facto* law.

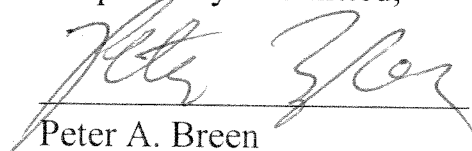
The Appellee cannot have it both ways. The Appellee cannot argue on the one hand that the statute is facially invalid and thereby escape an administrative review then, after the district court takes jurisdiction, argue that given his particular personal circumstances of extreme poverty, the statute, as applied to him, is a constitutional violation. *(See, First Amended Complaint For Declaratory and Injunctive Relief,* ***RP 00027****)*

The concern is particularly apposite here, because there are sub-constitutional and fact-based issues that could have been determined in the administrative proceedings. The failure of the Appellee in delaying in getting applying for reinstatement during the three months he was eligible before the law changed **[7-23-13 3 Tr. 8:3-5]**, presents at least a mixed question of law and fact as to whether the Appellee is unlicensed as a matter of his own procrastination or of the institution of the new reinstatement criteria. These issues are best committed to the findings of fact of the Department's hearing officers, rather than a factual hearing on the merits in the guise of a petition seeking a declaratory judgment that the statute is supposedly unconstitutional on its face.

IV. CONCLUSION

The matter should be reversed for failure to exhaust administrative remedies, or in the alternative on the grounds that the statute is not *ex post facto.*

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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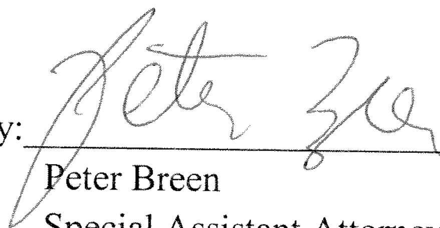

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