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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

OCT 31 2014

Wendy F Jones

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.

REPLY BRIEF

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SUMMARY

The Appellant should not be seen as abandoning an argument merely because it does not make repetitious argument in this reply brief.

Myron Yepa is an alcoholic who has received costly, but unsuccessful residential treatment at state expense. **[7-23-13 3 Tr. 16:21; 16:24, RP 00012].** Mr. Yepa lost his driver's license in 2007, on an implied consent revocation after he tested with a BAC of over three times the presumptive level of intoxication of 0.08%. **[7-23-13 3 Tr. 16:5]**. Mr. Yepa went through the state-financed stay in residential alcohol rehabilitation. Mr. Yepa later became eligible for a driver's license without necessity of an interlock license first, in March, 2009, **[7-23-13 3 Tr. 13:2; RP 00039]**, but procrastinated in getting a license for approximately 3 months. **[7-23-13 3 Tr. 13:2].** In July 2009, the law changed requiring those with DWI-related suspensions and revocations to hold an interlock driver's license for at least six months before getting an unrestricted driver's license. NMSA 1978 § 66-5-33.1 (2009). By the time Mr. Yepa got around to getting his driver's license back the law had changed. Mr. Yepa was turned away when he tried to get his driver's license reinstated without first having an interlock license. **[7-23-13 3 Tr.13:18]**. Mr. Yepa eschewed a hearing before an administrative hearing officer concerning his turn-down afforded us by

NMSA 1978 § 66-5-17 (A). Mr. Yepa resorted to this lawsuit instead. While this case was pending, Mr. Yepa was arrested and convicted in a drunk and disorderly incident, where he had consumed at least 18 cans of malt liquor and poured five cans of beer on the shoes of the investigating police officer. **[7-23-13 3 Tr. 21:1]**.

Mr. Yepa bypassed the state's administrative review procedure in favor of a declaratory judgment proceeding against the state alleging that the licensing statute was unconstitutional on its face. After the court took jurisdiction however, Mr. Yepa's arguments almost entirely turned to arguments that the statute is unconstitutional as applied to him. Specifically, Mr. Yepa alleges that he has, in effect, a vested right to the most favorable driver's licensing law in effect during his lifetime, that he should be excused from the statute because he cannot afford to rent an interlock device even with a state subsidy, that unless the state provides him with a free car, in addition to the subsidized interlock device, he is unconstitutionally discriminated against because of his poverty **(AB. 9)** and that out-of-state drivers seeking clearance of their New Mexico driver's license in their new home states are exempt from the statute. Additionally, Mr. Yepa adds a new argument that the *ex post* facto issue was waived. **(AB. 37.)**

I. The Appellee Relies on an Overruled Case to Argue that Appellee Need not Exhaust his Administrative Remedies

The University of New Mexico law clinic relies on an overruled case, *Glynn v. State Taxation & Revenue Dep't, Motor Vehicle Div.*, 2011-NMCA-031 (N.M. Ct. App. 2011) for the proposition that the Department's hearing officers cannot consider constitutional issues. In fact, the New Mexico Supreme Court overruled *Glynn* in *Schuster v. State Dep't of Taxation and Revenue Motor Vehicle Div.* 2012-NMSC-025 ¶ 1. Moreover, the Supreme Court specifically overruled *Glynn* on precisely the point for which it is offered by the law clinic, that MVD hearing officers may not consider the fourth amendment constitutionality of a traffic stop because of the constitutional nature of the issue. *Id.* Since *Schuster* was cited in the State's brief-in-chief, the law clinic has no excuse for having overlooked *Glynn's* overruling by the Supreme Court.

The difficulty is compounded in this case, because the Appellee relied on a theory that the statute was void on its face to support District Court Jurisdiction, but after the District Court took jurisdiction, relies entirely, or almost entirely, on a theory that the statute is unconstitutional as applied to the Appellee given his peculiar situation. The Court should hold that the appellee failed to exhaust his administrative remedies.

II. The Issue of Whether the Law was *ex post facto* Was Not Waived

The Appellee argues **(AB. 37)** that "the state failed to present any arguments regard the merits of Mr. Yepa's constitutional Ex Post Facto Issues." The issue was raised at the trial level in the answer. **[RP 00053-56],** Brief In Opposition, **[RP 00138]** and by oral argument before the court. **[7-23-13 3 Tr. 00049-56].** In fact, the state's arguments regarding *ex post facto* law are contained in its BIC, starting at pg. 5 under the heading entitled, not surprisingly, "**Argument as to whether amendment to NMSA 1978 § 66-5-33.1 is *Ex Post Facto*"** Under this heading, the state cites to often-cited New Mexico case law on whether a statute is *ex post facto, Howell v. Heim,* 1994-NMSC-103 (Statute not impermissibly retroactive because it relies on condition existing before effective date); *State v. Druktenis*, 2004-NMCA-032 (mandatory sex-offender registration not ex post facto law); *c.f. Johnson v. Sanchez,* 1960-NMSC-29 (revocation based on excessive traffic violations not a violation of due process). Other jurisdictions have held to the same effect. *Frederick v. Commonwealth Dep't of Transportation, Bureau of Driver Lic.,* 802 A.2d 701, 704 (Pa. Commw. 2002) (upheld Pennsylvania interlock licensing law against a charge that the law was *ex post facto).* *Gordon v. Registry of Motor Vehicles,* 912 N.E. 2d 9 (Mass. App. 2009) (mandatory interlock law for

those convicted of DWI not double punishment). To the extent the court's holding on retroactivity is couched as a finding, the rule is that a statement of the court is misclassified as either a finding of fact or a conclusion of law, is not determinative of the reviewability of the underlying decision. No legal significance attaches to mislabeling a finding of fact as a conclusion of law. *Sheraden v. Black,* 1988-NMCA-016 ¶ 13 (the affixing of the percentage of comparative negligence in the "conclusions of law" section instead of the "findings of facts" section of the order not error). "It is the duty of a reviewing court, if possible, to harmonize the findings of fact and conclusions of law and arrive at the real intention of the trial court." *Id.*

III. There is no Constitutional Violation by virtue of the Fact that New Mexico does not Require Alcohol Ignition Interlock Licenses For Licensees who Establish Residency Out-of-State

The Appellee complains in passing that the law is unconstitutional because the law does not apply to former New Mexico driver's license holders who have moved out of state. **(AB 20.)** This is a mischaracterization of the law. Under NMSA 1978 § 66-5-5 (E), a non-resident driver who has a DWI conviction received in an out of state jurisdiction after 2005 shall not receive a New Mexico driver's license without first having an interlock device. In other words, those who, for example, are convicted of a DWI in

2006 while living in another state, will be forced to have a New Mexico interlock license on their move to New Mexico ten years post conviction. *Id.*

That New Mexico does not seek to impose its licensing requirements on residents who have left the state is of no importance. The Driver's License Compact, NMSA 1978 § 66-5-49 et. seq. constrains the choice-of-law rules that pertain to driver's licensing to keep the inquiry in practical and also constitutional bounds. New Mexico as the originating state may either provide clearance to relicense the driver in his new home state or not, based on its internal laws—it does not have independent authority to otherwise impose additional conditions on the relicensing requirements in the driver's new home state. Far from being a violation of equal protection, the division of power contemplated in the Driver's License Compact protects the due process interest of the drivers. An extraterritorial application of the state's licensing requirement to the departed driver other than a requirement that the driver obtain this clearance from his original state, would be questionable under the due process clause of the fourteenth amendment, given the fact that the driver does not live in the state anymore, and otherwise has no contacts with New Mexico as the originating state. The fact that New Mexico as the originating state is the forum for obtaining this clearance is not by itself enough to justify the application of the rest of New Mexico

licensing law on the now-departed driver. *Phillips Petroleum v. Shutts,* 472 U.S. 797 (1985) (law of Oklahoma could not be automatically applied to multi-state class action merely because it was the forum for the case). *Home Ins. Co. v. Dick*, 281 U.S. 397 (1931) (Texas could not apply its statute of limitations to a contract merely because it was the forum for the lawsuit). Of course it is almost always permissible from a constitutional standpoint to apply the law of the home state of the litigant to that litigant. *Clay v. Sun Insurance Office, Ltd.* 377 U.S. 179 (1964). The home state can apply its driver's licensing law to its new residents without additional provisos from New Mexico. New Mexico in turn can structure its DWI laws to facilitate this approach. If they wish, other states are free to impose an interlock requirement on newly arrived residents with past DWIs, just as New Mexico does through § 66-5-5(E).

IV. The Appellee Makes Inappropriate Use of Statutory History in Support of its Argument that the Law *is Ex Post Facto;* the Statutory History does Not Support the Argument

The Appellee resorts to what may loosely be described as legislative history in support of its argument that the law is meant to be *ex post facto* punishment. **(AB 26-28.)** This is not permitted in New Mexico. New Mexico does not have a method for systematically and reliably collecting statutory history regarding a statute and therefore it is not appropriate to cite

to legislative history to determine the intent of a statute. *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, (Regents),* 1998-NMSC-020 ¶ 29-33. In any case, the history offered is not helpful to the Appellee. That a legislator suggested that all cars in New Mexico be equipped with interlock devices cuts strongly against the idea of a punitive intent. Another statement by a prominent non-legislator that the intent is to prevent people from getting behind the wheel with too much ingested alcohol is also not an expression of intent to punish.

V. The Law Requires an Implied Consent Revocation not a Mere Accusation

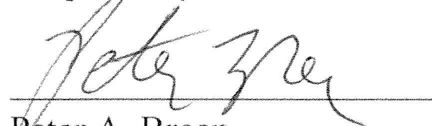
The appellee complains that the law requires an interlock license for those merely "accused" of DWI. **(AB 28.)** In fact, the law requires either an implied consent violation, or a DWI conviction, not a mere accusation. NMSA 1978 § 66-5-33.1 (B). The two operate independently. While Appellee makes much of the fact that his criminal case was dismissed, this is of no moment considering that he would have been exactly the same position if his implied consent violation was not alcohol-based DWI at all. There need only be a rational relationship between the implied consent violation and the interlock requirement. *State v. Valdez,* 2013-NMCA-16

(interlock requirement for narcotics-based DWI conviction permissible). Given that an interlock license is permissible for a narcotics conviction, it logically would be equally permissible for an alcohol-based implied consent violation if the driver fails to successfully defend the implied consent revocation. *Id.*

CONCLUSION

There could not be any better argument for New Mexico's interlock requirement than Mr. Yepa's arrest, and later conviction, in August, 2012 while this case was pending, for disorderly conduct after consuming eighteen or more cans of malt liquor and pouring five more cans on the arresting police officer's shoes and police car. Thanks to NMSA 1978 § 66-5-33.1 (B), Mr. Yepa was on foot when this happened. **[7-23-13 3 Tr. 20:11]**. The case should be reversed with orders to dismiss the Petition for failure to exhaust administrative remedies, or alternatively, on the merits.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed by first class U.S. Mail, postage prepaid, a true and correct copy of the foregoing *Reply* Brief on this 31st day of October, 2014 to:

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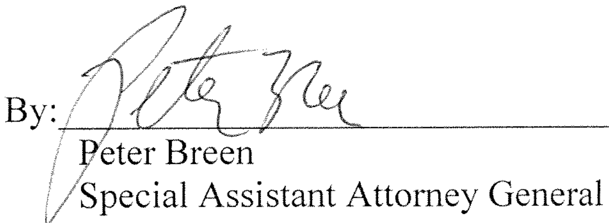

By: ____________________
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