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No. 67831-1-I

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

RUSSELL CLARKE,
ROBERT BERGESON,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Respondent,

2012 JUL 29 AM 10:07
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

APPELLANTS REPLY BRIEF

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**I. APPELLANT'S REPLY TO ISSUES RAISED IN
RESPONDENT'S BRIEF**

1. Disparate Treatment Of Drivers Affected By IIDL Appeal Waiver Provision Has Been Established To Merit Equal Protection Review.
2. Respondent Has Failed To Articulate How IIDL Appeal Waiver Provision Is Rationally Related To The State's Goals Supporting The IIDL Statute.
3. This Court Should Consider Merits of Due Process Argument.

II. ARGUMENT

1. Disparate Treatment Of Drivers Affected By IIDL Appeal Waiver Provision Has Been Established To Merit Equal Protection Review.

Respondent is correct that the IIDL statute applies to several types of drivers. See RCW 46.20.385(1)(a). However, the appeal waiver provision applies only to drivers subject to a revocation of driving privileges pursuant to the Implied Consent Law. See RCW 46.20.385(1)(b). It is this provision which is the focus of this appeal.

Both the Court of Appeals and the Supreme Court have addressed equal protection challenges under minimal scrutiny (rational basis) focusing on the rational basis behind the law and whether the law is wholly irrelevant to the achievement of a legitimate state objective, and not focusing on the degree of

disparate treatment received by members of the applicable class. See State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992); State v. Danis, 64 Wn. App. 814, 826 P.2d 1096 (1992), review denied 119 Wn.2d 1015 (1992). As the Court in Danis noted a law may single out a particular class of individuals; the question being whether the law “is a legitimate one.” Danis, at 821.

In Coria, the Court reviewed a sentencing provision adding an enhancement to drug crimes occurring within 1,000 feet of school bus stops. Applying minimal scrutiny review, the Court stated;

“This Court has sometimes used a 3-part test when applying the rational basis test to equal protection challenges. [*Internal citations omitted.*] We believe the 1-part test more meaningfully captures the inquiry required here. Cf. State v. Danis, [*supra*].” Coria, at 172.

Certainly, the enhancement had a discriminatory effect on defendants who chose to sell drugs near bus stops as opposed to those who sold drugs elsewhere.¹ But the primary inquiry of the

¹ The Court of Appeals applied an intermediate scrutiny analysis, which the Supreme Court held was improper. State v. Coria, 62 Wn. App. 44, 813 P.2d 584 (1991). Interestingly, the Court found the 1,000 ft. enhancement applied equally to all persons affected by it. At 51.

Court was the underlying reasons justifying the law, and whether the law furthered these goals. Coria, at 172-174.

In Danis, the Court elaborated on the 1-part test approved by the Court in Coria. Danis challenged a sentencing provision related to convictions for vehicular assault and vehicular homicide based upon victims found inside a single vehicle. Applying minimal scrutiny review, the Court stated;

“We note that our Supreme Court has at different times set forth different formulations of the rational relation test which is to be applied under minimal scrutiny. In Yakima County Deputy Sheriff's Association v. Board of Comm'rs, 92 Wn.2d 831, 601 P.2d 936 (1979), the Court enunciated a three-part inquiry: (1) does the classification apply alike to all members within the designated class? (2) are there reasonable grounds to support the classification's distinction between those within and without the class? and (3) does the classification have a rational relation to the purpose of the statute? Recently, in Omega National Ins. Co. v. Marquardt, 115 Wn.2d 416, 431, 799 P.2d 235 (1990),² the court stated the test more simply:

‘A legislative classification will be upheld ... unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.’

The Yakima formulation does not appear a helpful guide to analysis, and indeed, it appears to

² Reversed on other grounds. Neah Bay Chamber of Commerce v. Dept. of Fisheries, 119 Wn.2d 464, 832, P.2d 1310 (1992).

unnecessarily segregate the inquiry. The first prong as to applying alike to members of the class seems always to be answered in the affirmative; the question always is whether the class is a legitimate one. Nor is it clear how to determine whether reasonable grounds exist to support the distinction under the second prong without referring to the purposes of the statute. We believe that *Omega* presents the better formulation, but the statute satisfies either analysis.” *Danis*, at 821. [Emphasis added]

Respondent offers two arguments why the appeal waiver provision treats drivers alike. First, citing to *Guardianship Estate of Keffeler, ex rel. v. State*, 151 Wn.2d 331, 88 P.3d 949 (2004), Respondent claims that the mere fact different groups of individuals may be identified within a statutory scheme does not create disparate treatment. (BOR, pg. 14) *Keffeler* is distinguishable. State law established two types of “representative payees” for children under state custody overseeing any benefits the children may receive; state and private. While Keffeler claimed regulations permitted the State to favor children with private representative payees, the Court found no preferential treatment. *Keffeler*, at 340-341. Instead, regulations established a single standard for disbursement of benefits that applied equally to all children. *Id.*

Here, a single law creates very different treatment. Drivers may obtain a State issued privilege to drive during the course of a license revocation or they may retain their right to appeal the basis for the revocation, but cannot do both. Therefore, unlike Keffeler, the operation of the law creates distinct groups of drivers receiving different treatment.

Second, Respondent claims that the appeal waiver provision is similar to the choice offered defendants to accept a plea bargain. (BOR, pg. 14) Inherent within a guilty plea is the waiver of the right to appeal. This is a poor choice for analogy. A criminal defendant does not barter away appellate rights. Instead, a guilty plea constitutes an admission of guilt, and any claim (on appeal) that would be inconsistent with guilt is waived by the plea. United States v. Negron, 75 Fed. Appx. 83, 84 (3rd Circ. 2003); citing United States v. Broce, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Mr. Clarke and Mr. Bergeson have never admitted any guilt or wrongdoing under the Implied Consent Law; nor can any admission be imputed by seeking an IIDL.

The plea bargain analogy is also faulty because different considerations motivate decision-making. In Brady v. United States,

397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the Court noted that in the plea bargain process defendants may be motivated to start the correctional process immediately following a criminal act, and the State may be motivated to impose punishment quickly to ensure its deterrent effect. *Brady*, at 752. *Brady* also conditioned the “mutuality of advantage” found within a plea on the fact defendants are ready and willing to admit to their crimes and accept punishment. *Brady*, at 753. The plea bargain does not solely address conservation of resources.

Finally, Respondent claims the appeal waiver provision carries no discriminatory consequences for drivers. (BOR, pg. 18) This argument is unsupportable. Respondent claims that drivers choosing to appeal and forego the IIDL maintain the “status quo” of a license revocation.³ This ignores the fact the State provides similarly situated drivers with a privilege to drive with the IIDL. Our Supreme Court has already acknowledged that the loss of the driving privilege can significantly impact a person’s ability to earn a living, and the State cannot make whole a driver who has suffered

³ Prior to 2009, all drivers subject to a license revocation were eligible for an Occupational Driver’s License regardless whether an appeal was filed. RCW 46.20.391 (2008).

an erroneous license revocation. City of Redmond v. Moore, 151 Wn.2d 664, 670-671, 91 P.3d 875 (2004). It ignores this fundamental reality to claim that the choice of appeal versus IIDL does not produce a discriminatory outcome.

2. Respondent Has Failed To Articulate How IIDL Appeal Waiver Provision Is Rationally Related To The State's Goals Supporting The IIDL Statute.

Respondent offers a myriad of justifications for the appeal waiver provision: (1) conservation of resources; (2) maintaining a deterrent effect; and (3) seeking finality in the administrative appeal process. (BOR, pg. 22) Respondent then argues that the IIDL statute is not an economic statute allocating state resources, but is a public safety statute. (BOR, pg. 26)

Under rational basis review the rationality of a classification does not require production of evidence to sustain the classification, and can be supported on rational speculation.

DeYoung v. Providence Med'l Center, 136 Wn.2d 136, 147-148, 960 P.2d 919 (1998). However, the relationship of the classification to its goal must not be so attenuated as to render the distinction arbitrary. Nordlinger v. Hahn, 505 U.S. 1, 11, 112 S.Ct. 2326, 120

L.Ed.2d 1 (1992). Courts retain the authority to determine whether any conceivable facts reasonably justify the law. Tunstall v. Nielsen, 141 Wn.2d 201, 226-227, 5 P.3d 691 (2000). Rational basis review is not toothless. Matthews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976).

In DeYoung, the Court looked at whether the impact of a law limiting certain medical malpractice claims had any actual chance of affecting malpractice premiums. At 148-149. The Legislature passed an eight year statute of repose foreclosing malpractice claims unless certain exception applied. At the time of its passage, the legislature was concerned with the affect “long tail” claims would have on the calculation of insurance premiums. DeYoung, at 147. The legislature hoped to protect insurance companies, yet limit the number of claimants who would be barred from compensation. DeYoung, at 147.

The Court found the law unconstitutional. Specifically, the Court found that the law “could not rationally be thought to have any chance of actuarially stabilizing the insurance industry” DeYoung, at 148. [Emphasis added]. The law at best would affect less than 1 percent of claims and account for less than .2 percent of

payments made on such claims. At 149. Therefore, a Court's deference to legislative enactments has its limit.

The State is correct that Plyler v. Doe⁴ and Graham v. Richardson⁵ address equal protection issues using a heightened standard. However, our Supreme Court in Conklin v. Shinpoch, 107 Wn.2d 410, 730 P.2d 643 (1986)⁶, adopted the position that under minimal scrutiny (rational basis) review, the scarcity of public funds cannot stand as the sole basis to create classifications that deny distribution of state benefits. At 420-421.

“We conclude that while an economic classification involving finite state funds must be treated with deference, the finitude of the fund is not, in itself, a sufficient reason for upholding the classification. This analysis is not only consistent with the case law, but it is the most sensible approach. If the finitude of a fund were the sole reason for upholding a classification excluding persons from the fund, any such classification involving a state fund would be valid, since all funds are finite. *[Internal citation omitted]*. Thus, although we must treat the challenged classification in this case deferentially, it cannot be justified solely on the ground that state public assistance funds are finite. Some other legitimate reason for the classification must exist.” Conklin, at 420-421. [Emphasis added]

⁴ 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

⁵ 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

⁶ See also, Keffeler, at 350 (J. Sanders, dissenting.); State v. Mills, 85 Wn. App. 286, 296, 932 P.2d 192 (1997).

Respondent alleges the appeal waiver provision conserves resources and promotes finality. Respondent's reliance on Brady, supra, as stated earlier, is misplaced. Respondent has presented no argument that the parties to a Department of Licensing proceeding share the same motivations as parties addressing a criminal prosecution. Further, it is clear from Brady that preservation of resources was not the sole basis for supporting the plea bargain process in criminal cases. Criminal cases also address incarceration and rehabilitation of offenders. Brady acknowledged the importance of these factors; not just issues of conserving state resources.

Consistent with Conklin, Respondent must assert a rational basis other than preservation of state resources. Consistent with DeYoung, Respondent's claims that the appeal waiver provision provides a deterrent effect and is a public safety statute must fail.

Respondent argues the appeal waiver provision prevents drivers from "completely evading" the consequences of driving under the influence. (BOR. pg. 27) However, our Supreme Court has ruled that administrative actions against the driving privilege are not punishment, and serve no deterrent effect. State v.

McClendon, 131 Wn.2d 853, 863-864, 935 P.2d 192 (1997). Even so, Respondent fails to state what deterrent effect of the DUI laws is evaded. Any driver seeking the IIDL must pay additional insurance and install an ignition interlock device in their vehicle. RCW 46.20.385(1)(c); (2). The existence of the underlying revocation and requirement for an IIDL exist on the driver's record. These consequences would apply equally to drivers who appeal and to drivers who do not. To say that drivers who appeal a revocation and seek to drive with an ignition interlock device in their vehicles are evading any consequences of their actions is a statement not borne in reality. The "trade-off" of appeal for IIDL is utterly arbitrary towards achieving any goal of promoting deterrence of drinking and driving.

Likewise, Respondent fails to state how the appeal waiver provision promotes public safety. The IIDL protects the public from alcohol impaired drivers by the simple fact the ignition interlock device prevents ANY driver from operating a motor vehicle after consuming alcohol.⁷ None of the committee reports related to this legislation addressed a single concern that drivers who appeal

⁷ (See BOR, pg. 23); Clarke CP 41-64; Bergeson CP 37-60.

license revocations are more dangerous to the community than drivers who do not appeal. All parties would agree that the IIDL promotes public safety, but the exclusion of appealing drivers from receiving this privilege to drive fails in any conceivable fashion to promote public safety.

The present case is indistinguishable from DeYoung. Despite the deference due the legislature in drafting this law, the appeal waiver provision stands no chance of actually furthering the asserted justifications for the law. The flaw in Respondent's reasoning is that its arguments (deterrence and public safety) apply equally to drivers who may appeal and drivers who may not. Drivers who do not appeal and obtain the IIDL are also evading the consequences of their license revocation. They are also a threat to public safety but for the installation of the ignition interlock device. Therefore, limiting the IIDL to drivers who do not appeal and requiring a waiver of the right to appeal as means to obtain the IIDL is an arbitrary and irrational classification.

3. This Court Should Consider Merits of Due Process Argument.

Respondent claims Appellants have failed to comply with RAP 2.5(a)(3). (BOR, pg. 29) In citing to State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011), Respondent claims Appellants have not identified any error related to specified constitutional rights, or that any error is manifest.

In analyzing the asserted constitutional interest, Courts do not assume the alleged error is of constitutional magnitude, but look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error.

State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Appellants have asserted a violation of constitutional rights. Even case law cited by Respondent establishes that claims raised pertaining to the State's revocation of the driving privilege and the State's denial of a right to appeal implicate due process. See State v. Nelson,⁸ 158 Wn.2d 699, 147 P.3d 53 (2006); Ford Motor Co. v. Barrett,⁹ 115 Wn.2d 556, 800 P.2d 367 (1990). If correct, Appellants will have established that a law that precludes the right

⁸ BOR, pg. 31.

⁹ BOR, pg. 32.

of appeal as consequence of receiving a privilege to drive is not rationally related to the justifications supporting the law; a violation of equal protection and due process of law. Therefore, the first part of the test was satisfied.

Appellants have asserted manifest error. According to Bertrand, error is manifest where it is established it had “practical and identifiable consequences” in the trial below. At 400. The focus of actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. At 400; citing to State v. O’Hara, 167 Wn.2d at 99. Here, error is obvious and had practical and identifiable consequences below. First, as stated in the opening brief, the due process argument rests on the same facts and same standards as the equal protection claim. The claimed constitutional errors implicate rational basis review. Appellants’ rational basis review argument was fully developed before the superior court and this Court. Second, a ruling on rational basis review favoring Appellants is dispositive. Appellants’ case is distinguishable from Bertrand, where the defendant failed to articulate how an erroneous instruction affected the verdict in her

trial. Bertrand, at 402. Here, enforcement of the appeal waiver provision led to the dismissal of Appellants' appeals.

The State never directly addresses the due process claim. (BOR, pg. 33) Appellants do not contend a fundamental right is affected by the appeal waiver provision. According to Amunrud v. Bd. Of Appeals, 158 Wn.2d 208, 143 P.3d 571 (2006), due process claims not affecting fundamental rights are reviewed using rational basis review. Amunrud, at 222. A challenged law must be rationally related to a legitimate state interest. Amunrud, at 222. In determining whether a rational relationship exists, a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest. Amunrud, at 222.

For the same reasons expressed earlier, the appeal waiver provision is wholly irrelevant to the stated goals supporting the law. Respondent argues again that the provision is a deterrent against drinking and driving and that allowing appealing drivers to obtain the IIDL allows these drivers to evade punishment. (BOR, pg. 34) Administrative suspensions are not punishment. McClendon, supra.

Furthermore, Respondents argument fails to take into account the fact that if the IIDL permits any driver to evade punishment, then all drivers who obtain the IIDL evade punishment. Denying the license to drivers who appeal cannot further any justification based on a perceived deterrent effect.

III. CONCLUSION

For the reasons submitted herein and in their opening brief, Mr. Clarke and Mr. Bergeson ask this Court to reverse the Superior Court decisions and reinstate their appeals.

RESPECTFULLY SUBMITTED this 25th day of July, 2012.

RYAN B. ROBERTSON
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A handwritten signature in black ink, appearing to read 'R. B. Robertson', written in a cursive style.

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**STATE OF WASHINGTON,
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NO. 67831-1-1

DECLARATION OF SERVICE

I certify that on the 25th day of July, 2012, I caused the following documents to be served on the Court of Appeals and below parties in the manner indicated below:

- 1. APPELLANTS REPLY BRIEF

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7 **I swear under penalty of perjury under the laws of the State of
8 Washington the foregoing is true and correct.**

Signed in Seattle, WA the 25th day of July, 2012.

9
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11 Ryan B. Robertson, WSBA #28245
12 Attorney for Mr. Clarke / Mr. Bergeson