

62371-1
RECEIVED
COURT OF APPEALS
DIVISION ONE

SEP 01 2009

No. 62371-1-I

62371-1
SEP 01 2009
THE DEFENDER ASSOC

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE,
Respondent,

vs.

TIFFANY O'CONNOR,
Appellant.

2009 SEP 01 10:00 AM
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA
[Handwritten signature]

BRIEF OF RESPONDENT

THOMAS A. CARR
SEATTLE CITY ATTORNEY

Richard Greene
Assistant City Attorney
WSBA #13496

Attorneys for Respondent

Seattle City Attorney
Community and Public Safety Division
P.O. Box 94667
Seattle, Washington 98124
telephone: (206) 684-8538

TABLE OF CONTENTS

A.	<u>RESPONSE TO ASSIGNMENTS OF ERROR</u>	1
1.	Sufficient evidence was presented to support defendant's conviction for Driving While License Revoked 1 st degree.	
2.	The revocation of defendant's driving privilege complied with due process.	
B.	<u>ISSUES PRESENTED FOR REVIEW</u>	1-2
1.	Where the Department of Licensing (DOL) revokes defendant's driving privilege as an Habitual Traffic Offender and stays that revocation on condition that she comply with alcohol/drug treatment, defendant enters into not alcohol/drug treatment but mental health treatment, DOL consequently reinstates the revocation and defendant drives during the period of revocation, does the evidence support defendant's conviction for Driving While License Revoked 1 st degree?	
2.	Where the revocation of defendant's driving privilege is stayed on condition that she comply with alcohol/drug treatment and defendant enters into not alcohol/drug treatment but mental health treatment, does DOL's reinstatement of the revocation at a hearing at which defendant is present and mailing of notice to defendant at her last known address comply with due process?	
C.	<u>STATEMENT OF THE CASE</u>	2-5

D.	<u>ARGUMENT</u>	
1.	Sufficient evidence was presented to support defendant's conviction for Driving While License Revoked 1 st degree.	6-11
2.	The revocation of defendant's driving privilege complied with due process	12-16
E.	<u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Table of Cases

<i>Department of Licensing v. Ramirez</i> , 34 Wn. App. 430, 661 P.2d 1009 (1983)	13
<i>State v. Barrington</i> , 52 Wn. App. 478, 761 P.2d 632 (1988), <i>review denied</i> , 111 Wn.2d 1033 (1989)	6
<i>State v. Heath</i> , 85 Wn.2d 196, 532 P.2d 621 (1975)	10
<i>State v. Joy</i> , 121 Wn.2d 333, 851 P.2d 654 (1993)	6
<i>State v. Nelson</i> , 158 Wn.2d 699, 147 P.3d 553 (2006)	15
<i>State v. Rogers</i> , 127 Wn.2d 270, 898 P.2d 294 (1995)	9 & 13
<i>State v. Smith</i> , 144 Wn.2d 665, 30 P.3d 1245 (2001)	12 & 15
<i>State v. Storhoff</i> , 133 Wn.2d 523, 946 P.2d 783 (1997)	11
<i>State v. V.J.W.</i> , 37 Wn. App. 428, 680 P.2d 1068, <i>review denied</i> , 102 Wn.2d 1001 (1984)	7

Statutes

RCW 46.20.205(1)	9
RCW 46.20.205(1)(b)	8
RCW 46.65.060	7, 10 & 12
RCW 46.65.065	10 & 12

Regulations and Rules

WAC 308-104-170(2)	8
--------------------	---

A. RESPONSE TO ASSIGNMENTS OF ERROR

1. Sufficient evidence was presented to support defendant's conviction for Driving While License Revoked 1st degree.

2. The revocation of defendant's driving privilege complied with due process.

B. ISSUES PRESENTED FOR REVIEW

1. Where the Department of Licensing (DOL) revokes defendant's driving privilege as an Habitual Traffic Offender and stays that revocation on condition that she comply with alcohol/drug treatment, defendant enters into not alcohol/drug treatment but mental health treatment, DOL consequently reinstates the revocation and defendant drives during the period of revocation, does the evidence support defendant's conviction for Driving While License Revoked 1st degree? (Assignment of Error 1)

2. Where the revocation of defendant's driving privilege is stayed on condition that she comply with alcohol/drug treatment and defendant enters into not alcohol/drug treatment but mental health treatment, does DOL's reinstatement of the revocation at a hearing at which defendant is present and mailing of notice to defendant at her

last known address comply with due process? (Assignments of Error 1 & 2)

C. STATEMENT OF THE CASE

Defendant was convicted of Driving While License Revoked (DWLR) 1st degree. She appealed, contending that the evidence was not sufficient to support the conviction, the revocation of her driving privilege violated due process and she established that she committed this crime unwittingly. Defendant's conviction was affirmed on RALJ appeal and this court granted discretionary review.

On December 17, 2001, the Department of Licensing (DOL) mailed to defendant an order revoking her driving privilege for seven years because she had been determined to be an Habitual Traffic Offender. CP at 30. The order informed defendant of her right to a hearing, which she exercised. On January 2, 2002, DOL mailed to defendant a letter regarding her request for a hearing, which informed her that the revocation of her driver's license could be stayed if, *inter alia*, she completes treatment at a state approved alcohol/drug facility. CP at 35. At a March 7 hearing, a DOL

hearing examiner upheld the revocation. CP at 37. On April 23, DOL mailed to defendant an order indicating that the revocation had been upheld. CP at 39. On June 26, DOL stayed the revocation of defendant's driving privilege on certain conditions, including that defendant remain in complete compliance with a certified alcohol/drug treatment program. CP at 42. This agreement indicated that any breach or violation of the terms would cause DOL to cancel the stay and revoke defendant's driving privilege for the original seven year period. CP at 42. The agreement did not require a hearing regarding defendant's breach of the agreement nor any particular type or form of notice that DOL was canceling the order based on defendant's beach of the agreement. CP at 42.

On July 30, the DOL hearing examiner met with defendant regarding her participation in treatment and discovered that defendant had enrolled not in alcohol/drug treatment, but mental health treatment. CP at 44. Also on July 30, DOL mailed to defendant a letter indicating that her participation in mental health treatment did not satisfy the requirement of the agreement that she

remain in compliance with a certified alcohol/drug treatment program. CP at 46.

On June 15, 2007, a Seattle police officer stopped a car being driven by defendant for committing a traffic violation and ultimately arrested her for DWLS 1st degree. CP at 96-97. Defendant was charged as follows:

Commit the crime of Driving While License Suspended or Revoked in the First Degree by driving a motor vehicle while an order of revocation issued under RCW Chapter 46.65, as a result of being found to be an habitual traffic offender, prohibiting such operation is in effect.

Prior to trial, defendant moved to dismiss the charge on the ground that the revocation of her driving privilege did not comply with due process because she never received the July 30, 2002 letter from DOL telling her that her mental health treatment did not satisfy the conditions of the stay and thus she never had an opportunity for a hearing regarding her compliance with the conditions of the stay. CP at 24-28. Neither in her motion nor at the hearing did defendant present any evidence that she was not present at the July 30, 2002 hearing or that she did not receive the July 30, 2002 letter from DOL.

See CP at 24-28; CP at 76-78. The trial court denied the motion to dismiss as defendant presented no evidence that she did not receive the July 30, 2002 letter from DOL and, moreover, was not entitled to another hearing. CP at 84-86.

At trial, defendant did testify that she did not receive the July 30, 2002 letter from DOL because she had left the address to which it was sent because of a domestic violence situation there. CP at 91-92. She also testified that she had not been involved in alcohol/drug treatment at the time. CP at 93. The trial court found that DOL revoked defendant's license on April 23, 2002, a stay was granted on June 26 and a hearing was held on July 30 that was adverse to defendant. CP at 97-98. The trial court also found that DOL suspended defendant's driver's license in November for making a false statement. CP at 98. Each of these orders was mailed to defendant at a different address. CP at 97-98. The trial court found not credible defendant's claim that she did not know that her driver's license was suspended. CP at 98-99.

D. ARGUMENT

1. Sufficient evidence was presented to support defendant's conviction for Driving While License Revoked 1st degree.

Defendant contends that the evidence was not sufficient to prove every element of DWLR 1st degree, in particular that the order revoking her driving privilege was in effect on June 15, 2007. The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; any challenge to the sufficiency of the evidence admits the truth of the prosecution's evidence and all inferences that can reasonably be drawn therefrom.¹ The standard for sufficiency of the evidence requires the evidence to be interpreted most strongly against the defendant.² The existence of a hypothetical explanation

¹ *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989).

² *State v. Joy*, 121 Wn.2d 333, 342, 851 P.2d 654 (1993).

consistent with innocence does not mean that the evidence is insufficient to support the conviction.³

DOL revoked defendant's driving privilege as an habitual traffic offender pursuant to its authority under RCW 46.65.060.⁴

That statute also authorizes DOL to stay the revocation:

PROVIDED, That the department may stay the date of the revocation if it finds that the traffic offenses upon which it is based were caused by or are the result of alcoholism and/or drug addiction as evaluated by a program approved by the department of social and health services, and that since his or her last offense he or she has undertaken and followed a course of treatment for alcoholism and/or drug treatment in a program approved by the department of social and health services; such stay shall be subject to terms and conditions as are deemed reasonable by the department. Said stay shall continue as long as there is no further conviction for any of the offenses listed in RCW 46.65.020(1). Upon a subsequent conviction for any offense listed in RCW 46.65.020(1) or violation of any of the terms or conditions of the original stay order, the stay shall be removed and the department shall revoke the operator's license for a period of seven years.

³ *State v. VJW*, 37 Wn. App. 428, 433, 680 P.2d 1068, review denied, 102 Wn.2d 1001 (1984).

⁴ RCW 46.65.060 provides, in pertinent part, that "[i]f the department finds that such person is not an habitual offender under this chapter, the proceedings shall be dismissed, but if the department finds that such person is an habitual offender, the department shall revoke the operator's license for a period of seven years."

The statutory requirement for a stay that the person “follow[] a course of treatment for alcoholism and/or drug treatment in a program approved by the department of social and health services” means exactly what it says. WAC 308-104-170(2) provides that “[t]he term ‘program approved by the department of social and health services,’ as used in Title 46 RCW, shall mean an alcohol or drug abuse treatment program meeting the requirements of chapter 388-305 WAC.” Defendant plainly was not and had not been in such a program. She admitted that she was not in alcohol/drug treatment.⁵ Viewed in the light most favorable to the City, the evidence shows that defendant violated the conditions of the stay.

At the July 30, 2002 hearing regarding the treatment requirement, the hearing officer correctly determined that defendant’s mental health treatment did not satisfy the statutory requirement. DOL also mailed to defendant notice that her mental health treatment did not satisfy the statutory requirement for the stay. That defendant did not receive this mailed notice is unfortunate, but immaterial. RCW 46.20.205(1)(b) provides:

⁵ See CP at 93.

Any notice regarding the cancellation, suspension, revocation, disqualification, probation, or nonrenewal of the driver's license, commercial driver's license, driving privilege, or identicard mailed to the address of record of the licensee or identicard holder is effective notwithstanding the licensee's or identicard holder's failure to receive the notice.⁶

Defendant chose to leave the address where she was receiving mail and also chose not to provide DOL with a new mailing address. Under RCW 46.20.205(1),⁷ a person holding a driver's license has an obligation to notify DOL of any address change. No evidence was presented that the July 30, 2002 letter was returned to DOL so the agency would have absolutely no way of knowing that defendant had not received it. The DOL determination that defendant had violated the conditions of the stay, which reinstated the revocation, was effective notwithstanding that defendant did not receive the July

⁶ *State v. Rogers*, 127 Wn.2d 270, 898 P.2d 294 (1995), rejected a due process challenge to this statute.

⁷ RCW 46.20.205(1) provides, in pertinent part:

Whenever any person after applying for or receiving a driver's license or identicard moves from the address named in the application or in the license or identicard issued to him or her, the person shall within ten days thereafter notify the department of the address change. The notification must be in writing on a form provided by the department and must include the number of the person's driver's license. The written notification, or other means as designated by rule of the department, is the

30, 2002 letter. The revocation was in effect when defendant drove on June 15, 2007.

Defendant's contention that the reinstatement of the revocation was not effective until DOL sent her a new order of revocation by certified mail is not supported by the statute. RCW 46.65.065⁸ requires that the original order of revocation be sent by certified mail, but RCW 46.65.060, which governs a stay of that original order, the conditions of a stay and the consequences of violating those conditions, does not require that notice of violation of the conditions of the stay and the reinstatement of the revocation be sent by certified mail. A court will not read into this statute a requirement not included in its express language.⁹ The July 30, 2002

exclusive means by which the address of record maintained by the department concerning the licensee or identicard holder may be changed.

⁸ RCW 46.65.065(1) provides, in pertinent part:

Whenever a person's driving record, as maintained by the department, brings him or her within the definition of an habitual traffic offender, as defined in RCW 46.65.020, the department shall forthwith notify the person of the revocation in writing by certified mail at his or her address of record as maintained by the department.

⁹ *State v. Heath*, 85 Wn.2d 196, 199, 532 P.2d 621 (1975) (notice of stay need not be issued contemporaneously with the revocation order as such is not required by language of statute).

letter from DOL was effective notwithstanding that it was not sent by certified mail.

Defendant also contends that the July 30, 2002 letter did not expressly state that her driving privilege was revoked. That letter plainly indicated that her participation in mental health treatment was not sufficient to stay the habitual traffic offender revocation. The only reasonable conclusion from this letter is that the stay of the revocation was no longer in effect. Moreover, inasmuch as defendant never received or read this letter,¹⁰ its exact wording hardly seems relevant. In *State v. Storhoff*,¹¹ the court held that an order of revocation that erroneously stated the deadline for requesting a hearing did not violate due process because the defendant never received the order and, thus, was not prejudiced by the error. Similarly, any error in the precise language used in the July 30, 2002 letter to defendant was not prejudicial.

¹⁰ CP at 92.

¹¹ 133 Wn.2d 523, 527-29, 946 P.2d 783 (1997).

2. The revocation of defendant's driving privilege complied with due process.

Defendant also contends that the revocation of her driving privilege violated due process.

When prosecuting a person for driving with a revoked license, the State has the burden of proving the revocation of the defendant's license complies with due process. However, to establish a violation of due process, the defendant must at least allege DOL failed to comply with the statute and this failure deprived the defendant of notice or the opportunity to be heard.¹²

As discussed previously, DOL complied with RCW 46.65.065 in initially revoking defendant's driving privilege as an habitual traffic offender and with RCW 46.65.060 in reinstating that revocation when defendant violated the conditions of the stay. In doing so, DOL provided notice reasonably calculated to inform defendant of the revocation of her driver's license and, thus, satisfied due process.¹³

Defendant claims she was not provided notice of the July 30, 2002 hearing at which DOL determined that she had violated the

¹² *State v. Smith*, 144 Wn.2d 665, 677, 30 P.3d 1245 (2001) (citations omitted).

conditions of the stay and reinstated the revocation of her driver's license. In *Department of Licensing v. Ramirez*,¹⁴ the court held that a person requesting a stay under RCW 46.65.060 was not entitled to a formal hearing. The court noted that the stay is purely a matter of legislative grace that goes beyond the constitutional requirements of due process.¹⁵ Defendant had no due process right to a hearing regarding the conditions of the stay.

Moreover, the evidence rather strongly suggests that defendant was present at that hearing. The DOL order entered on July 30, 2002¹⁶ is essentially identical to that entered on April 17, 2002¹⁷ with two additions. First, the following sentence was added to the "ARGUMENTS BY PETITIONER" section:

A further meeting with Ms. Gilmore-Balayev revealed that she had entered a treatment program.

Second, the following paragraph was added to the "FINDINGS & SUMMARY" section:

¹³ See *Rogers*, 127 Wn.2d at 279 (DOL's compliance with statutory requirements for driver's license revocation satisfies due process)

¹⁴ 34 Wn. App. 430, 435, 661 P.2d 1009 (1983).

¹⁵ *Ramirez*, 34 Wn. App. at 435.

¹⁶ CP at 44.

¹⁷ CP at 69.

The second meeting with Ms. Gilmore-Balayev revealed that she was in a treatment program. Ms. Gilmore-Balayev's counselor submitted a blue form indicating that she was in compliance with her treatment. However, the treatment program was at Seattle Mental Health. RCW 46.65.060 states that the revocation may be stayed if the individual has undertaken and followed a course of treatment for alcoholism and/or drug treatment in a program approved by the department of social and health services. Mental health treatment will not satisfy the statute in regards to the type of treatment required for the stay of the revocation.

One of the conditions of the June 26, 2002 conditional stay order agreement that defendant signed was that she "remain in complete compliance with an approved and certified alcohol/drug treatment program." Defendant knew of this condition and further knew that she was not in such treatment. Her knowledge of this violation of the conditional stay order and her presence at the July 30, 2002 meeting with the DOL hearing officer satisfied the notice requirement of due process.

To the extent that defendant is complaining that she did not receive the July 30, 2002 letter from DOL, she does not explain where DOL was supposed to mail that letter. At trial, she seemed to agree that DOL mailed that letter to the address where she had been

living.¹⁸ At that time, she was “couch-surfing” and did not get any mail at all.¹⁹ She did not have an address until a few months later.²⁰ No evidence was presented that the letter was returned to DOL, and defendant makes no claim that DOL knew that she did not receive it or that DOL could have provided her with notice by mailing the letter to a different address. DOL certainly had no obligation to track down defendant as she went from couch to couch. In *State v. Nelson*,²¹ the court declined to impose on DOL an obligation to conduct an “open-ended search for a new address” even where it had actual knowledge that a driver’s license suspension order was not received.

In *State v. Smith*,²² the court held that merely alleging that the prosecution had not met its burden of proving compliance with due process was insufficient to raise a due process challenge. Defendant does little more than that – she does not identify any additional action that DOL could have taken that would have provided more or

¹⁸ CP at 91-92.

¹⁹ CP at 92 & 94.

²⁰ CP at 94.

²¹ 158 Wn.2d 699, 701-05, 147 P.3d 553 (2006).

better notice. The trial court properly denied defendant's motion to dismiss based on her claim that the revocation of her driving privilege violated due process. The superior court correctly affirmed that decision.

E. CONCLUSION

Based on the foregoing argument, the superior court's decision affirming defendant's conviction for DWLR 1st degree should be affirmed and the case remanded to Seattle Municipal Court for reimposition of sentence.

Respectfully submitted this 1st day of September, 2009.

THOMAS A. CARR
SEATTLE CITY ATTORNEY

Richard Greene

Richard Greene
Assistant City Attorney
WSBA #13496

²² 144 Wn.2d at 677-78.