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No. 68133-8-I

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

KAI NIELSEN,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Respondent,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case addresses issues of Equal Protection and Due Process under the Washington State and United States Constitutions.

The Ignition Interlock License statute provides a license to drive to drivers if their driving privilege is revoked under the Implied Consent law.¹ This “license” allows a driver to drive with an ignition interlock device installed in their vehicle for the duration of the revocation. This law, however, requires a driver to “waive” his or her right to appeal the basis for the revocation as a condition for receiving the license, and denies this license to any driver who has filed an appeal.²

Kai Nielsen argues below that this law violates his Equal Protection and Due Process rights, and asks this Court to reverse the Superior Court ruling dismissing his appeal because he received this license.

¹ RCW 46.20.385.

² RCW 46.20.385(1)(b).

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in dismissing a RALJ appeal filed by Mr. Nielsen.³

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the Ignition Interlock License statute violate the Equal Protection clause of the State and Federal Constitutions where it provides access to a post-revocation driving privilege (IIDL) only to drivers who do not challenge the underlying revocation and requires drivers to “waive” the right to appeal as a condition for obtaining the license?
2. Does the Ignition Interlock License statute violate the Due Process clause of the State and Federal Constitutions where it provides access to a post-revocation driving privilege (IIDL) only to drivers who do not challenge the underlying revocation and requires drivers to “waive” the right to appeal as a condition for obtaining the license?

IV. STATEMENT OF THE CASE

1. Background

Any driver arrested for Driving Under the Influence (“DUI”) is subject the Implied Consent Law. See RCW 46.20.308. This law regulates how law enforcement obtains breath and blood test evidence to be used in prosecuting DUI crimes. This law also

³ CP 4.

regulates the enforcement of civil license revocations against drivers who violate the Implied Consent Law.

All drivers who violate the Implied Consent Law face a mandatory license revocation. RCW 46.20.308(2); RCW 46.20.3101. A driver may challenge the revocation by requesting a hearing before a Department hearing examiner. RCW 46.20.308(8). If the revocation is upheld, the driver has the right to appeal to a superior court judge. RCW 46.20.308(9).⁴ Filing an appeal does not stay the revocation. RCW 46.20.308(9).

If a driver appeals the revocation he or she may ask a superior court judge to “stay” the revocation pending resolution of the appeal. RCW 46.20.308(9). However, the driver must prove: (1) they are likely to prevail on appeal, and (2) they suffer irreparable injury without a license. RCW 46.20.308(9)⁵. The failure to meet each standard means the revocation will continue until the appeal is finished. Unless the “stay” is granted, no driver may drive until the revocation has either (1) ended, or (2) been reversed.

⁴ The appeal is governed by the Rules of Appeal for Courts of Limited Jurisdiction. (RALJ)

⁵ The judge may impose conditions on the stay, but is not required to. RCW 46.20.308(9).

In 2009 the Legislature enacted the Ignition Interlock License statute. See RCW 46.20.385. Any driver subject to a license revocation under the Implied Consent Law may apply for and receive an “Ignition Interlock Device License” (IIDL) for the duration of the revocation. RCW 46.20.385(1). The requirements are: (1) Pay a fee (currently \$100); (2) Install the ignition interlock; and (3) Maintain insurance. RCW 46.20.385(2).

The new law links eligibility for the license to the right to appeal. The law contains an “appeal waiver” provision which states;

A person receiving an ignition interlock driver's license waives his or her right to a hearing or appeal under RCW 46.20.308. [Emphasis added] RCW 46.20.385(1)(b).

2. Kai Nielsen v. Dept of Licensing

Kai Nielsen (“Nielsen”) was arrested for DUI in Snohomish, County, WA, and asked to submit to a breath test.⁶ He refused, and the Department of Licensing (“Department”) revoked his driving

⁶ CP 154-157.

privilege.⁷ Nielsen requested a hearing to challenge the revocation.⁸ The Department affirmed the revocation.⁹

Nielsen challenged the Department's ruling by filing an appeal in the Snohomish County Superior Court.¹⁰ Before filing the appeal he applied for an IIDL, which was granted.¹¹

In response to the application for the IIDL, the Department filed a motion to dismiss the appeal.¹² Superior Court Judge Wilson granted the motion.¹³ Nielsen appealed this ruling.¹⁴

3. Case Before the Court of Appeals

Nielsen filed a Notice of Appeal seeking review as a matter of right under RAP 2.2(a). A Court Commissioner granted review under both RAP 2.2(a)(3) and RAP 2.3(d)(3).

⁷ CP 154-157.

⁸ CP 144.

⁹ CP 135-139.

¹⁰ CP 211-217.

¹¹ CP 158-159.

¹² CP 91-95.

¹³ CP 4.

¹⁴ CP 1.

V. ARGUMENT

Constitutional challenges are reviewed de novo. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

Mr. Nielsen is asking this Court to find the “appeal waiver” provision of the Ignition Interlock License statute unconstitutional. RCW 46.20.385(1)(b). The remaining provisions of the statute are unaffected by this appeal.¹⁵

A “facial” challenge to a statute is one where a party asserts that under no set of circumstances can a statute be constitutionally applied. Moore, 151 Wn.2d at 669. A facial challenge must be rejected if there are any circumstances where the statute can be constitutionally applied. Moore, at 669. The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative. Id. An “as applied” challenge occurs when a party contends that a statute's application in a specific context is unconstitutional. Id. If a statute is held unconstitutional as applied, it

¹⁵ Title 46 contains a “savings clause.” “If any provision of this title or its application to any person or circumstance is held invalid, the remainder of the title, or the application of the provision to other persons or circumstances is not affected.” RCW 46.98.040.

cannot be applied in the future in a similar context, but it is not rendered completely inoperative. Id.

Nielsen argues below that the provision of the Ignition Interlock License statute requiring drivers to “waive” their right to appeal as a condition to receive the license is both facially and “as applied” unconstitutional. He contends there is no set of circumstances under which this provision can be constitutional. However, as it pertains to the facts of these cases, he contends the law cannot be constitutional as applied.

1. Does the Ignition Interlock License statute violate the Equal Protection clause of the State and Federal Constitutions where it restricts access to a post-revocation driving privilege (IIDL) only to drivers who do not challenge the underlying revocation and requires drivers to “waive” the right to appeal as a condition for obtaining the license?

Washington Constitution Art. I, §12 states:

“No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”

Known as the “Equal Protection Clause,” Washington Courts construe this provision identically with the United States

Constitution.¹⁶ State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). The law must provide similarly situated people with like treatment. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). When the State distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause. Zobel v. Williams, 457 U.S. 55, 60, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982).

In order to determine whether a state action violates equal protection, one of three different standards of review is employed - strict scrutiny, intermediate scrutiny, or rational basis review. State v. Haq, ___ Wn. App. ___, 268 P.3d 997, 1013 (2012). Here, as conceded below and consistent with case law, review falls under rational basis review.¹⁷

Courts apply a three-part test to determine whether a statute survives rational basis scrutiny: (1) Does the classification apply equally to all class members; (2) Does a rational basis exist for distinguishing class members from non-members; and (3) Does the

¹⁶ U.S. Constitution 14th Amendment.

¹⁷ See State v. Shawn P. 122 Wn.2d 563, 560-561, 859 P.2d 1220 (1993); Crossman v. Dept of Licensing, 42 Wn. App. 325, 711 P.2d 1053 (1985).

classification bear a rational relationship to the legislative purpose?

Morris v. Blaker, 118 Wn.2d 133, 149, 821 P.2d 482 (1992).

A. Drivers similarly situated under the Ignition Interlock License law receive disparate treatment based on filing appeal.

To advance an Equal Protection claim a person must demonstrate he or she falls within a class of “similarly situated” persons affected by the statute. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). Few Washington cases address class membership for licensing purposes. These cases are not helpful in this case. In State v. Shawn P., 122 Wn.2d 563, 859 P.2d 1220 (1993), the Court addressed an equal protection claim where the statute clearly stated it applied to juvenile drivers aged 13-18. In Crossman v. Dept of Licensing, 42 Wn. App. 325, 711 P.2d 1053 (1985), the Court addressed an equal protection claim focusing on the impact of the Implied Consent law on all drivers. Last, in Merseal v. Dept of Licensing, 99 Wn. App. 414, 994 P.2d 262 (2000), the Court addressed an equal protection claim involving drivers with a commercial license.

No Washington case clearly defines the criteria for being “similarly situated” with others. In one case involving alleged disparate treatment of juvenile offenders, “similarly situated” meant “near identical participation in the same set of criminal circumstances.” State v. Posey, 130 Wn. App. 262, 270, 122 P.3d 914 (2005).¹⁸ Courts can extract from this statement a definition that “similarly situated” persons must share most, but not all, attributes necessary to identify a common class of persons.

The Seventh Circuit of the Federal Courts has adopted a more articulated test. To be considered “similarly situated,” a plaintiff and his comparators (those alleged to have been treated favorably) must be identical or directly comparable in all material respects. LaBella Winnetka v. Village of Winnetka, 628 F.3d 937, 942 (7th Circ. 2010). The “similarly situated” test is a flexible, commonsense inquiry whose requirements vary from case to case. Barricks v. Eli Lilly & Co., 481 F.3d 556, 560 (7th Circ. 2007). Its purpose is to determine whether there are enough common factors between plaintiffs and a comparator – and few enough confounding ones – to allow for a meaningful comparison in order to divine

¹⁸ Reversed on other grounds, 161 Wash.2d 638, 167 P.3d 560 (2007).

whether discrimination is at play. Barricks, at 560. Courts should therefore focus on whether an Appellant can identify sufficient common factors representing the class of “similarly situated” persons. But class membership does not require absolute identical characteristics.

Reliance on statutory language, as well as legislative history, is key to identify common characteristics shared by “similarly situated” persons. In Samson v. City of Bainbridge Island, 149 Wn. App. 33, 202 P.3d 334 (2009), class membership was identified by reviewing the detailed description of a harbor on Bainbridge Island. The City imposed restrictions on improvements of property around this harbor that did not apply to other harbors on the island. The Court found that Samson, who owned property on the harbor in question, was not similarly situated with landowners on other harbors because the City based its zoning laws on the unique detailed characteristics of the harbor, which distinguished it from the others. Samson, at 63. Therefore, Samson did not share common characteristics with a larger class of property owners. Samson, at 63.

Class identity, however, need not be so closely refined where the Legislature fails to articulate why a statute should apply to only a narrow category of persons. In State v. Berrier, 110 Wn. App. 639, 41 P.3d 1198 (2002), the Court looked more generally at the intent of the law, rather than its specific language, to find class membership. Berrier was convicted of possessing an unlawful firearm, and received a sentencing enhancement because of the type of the firearm he possessed. The enhancement statute however only applied to some, but not all, of the firearms illegal to possess under statute. Rather than take a literal approach and find that the enhancement statute created its own class membership, the Court looked at the purpose of the exemptions which was to prevent double punishment based on the firearm possession statute. Berrier, 650. Therefore, class membership for “similarly situated” persons was those convicted of possessing all listed firearms under the unlawful possession statute, and Berrier should have been exempt from the enhancement. Berrier, at 650.

In State v. Marintorres, 93 Wn. App. 442, 969 P.2d 501 (1999), the Court looked at the overall statutory scheme to determine class membership. A statute required non-English

speaking criminal defendants to pay for in-court interpretative services, but another statute exempted the hearing impaired. While the State argued non-English speaking defendants could be differentiated from the hearing impaired because they could learn English, the Court held that the statutes did not create such fine lines of distinction. Marintorres, at 451-452. Therefore, both groups of defendants needing interpretative services constituted a “similarly situated” class, and Marintorres should not have been required to pay for his interpretative services.

In In re Salinas, 130 Wn. App. 772, 124 P.3d 665 (2005), the Court identified class membership by looking at the State’s capacity to provide the requested remedy sought by the defendant to other persons. Salinas was serving a Washington prison sentence in an out-of-state facility that did not provide earned early release credit. State law did not require the State to calculate the credit for a prisoner if the out-of-state facility did not perform the calculation. However, the Washington Dept of Corrections had the ability to calculate the credit, and under a different statute it was required to make the calculation for prisoners located in out-of-state facilities where the other state was party to a multi-state compact. Salinas,

at 778. Class membership was not determined by the location of the prisoner. Instead, the Court expanded the class of “similarly situated” persons to include all prisoners regardless of location because of the State’s ability to make this calculation for everyone.

The above cases demonstrate that unless the statutory language or legislative history explain otherwise, class membership should be determined by looking at whether persons share common, although not identical, characteristics sufficient enough to determine whether a form of discrimination exists within the class. Courts may look to characteristics determined by related statutes, such as in Berrier and Marintorres, as well as the historical interaction the State has with members of the class. See Salinas.

The plain language, and legislative history, of the Ignition Interlock License statute establishes that the class of “similarly situated” persons subject to the “appeal waiver” provision of the Ignition Interlock License statute (IIDL) is the group of drivers subject to a license revocation under the Implied Consent Law.¹⁹

¹⁹ See RCW 46.20.385(1)(a). Note: Drivers convicted of a DUI crime are also subject to the ignition interlock license requirement. However, those drivers seeking to appeal a criminal conviction automatically have the license revocation

First, this group shares the necessary common characteristics needed to determine whether a form of discrimination occurs under the law. This group exists because drivers challenged the Department's revocation ruling before a hearing examiner and lost. According to the Implied Consent statute, they are all entitled to appeal the decision to a Superior Court judge. RCW 46.20.308(9). According to the Ignition Interlock License statute, they are all entitled to an IIDL.

Second, there is nothing expressed in either the statute or legislative history to justify a narrowing of this group related to filing an appeal. The Ignition Interlock License statute derived from SSHB 3254 in 2008. The legislation was described as, "An act relating to accountability for persons driving under the influence of intoxicating liquor or drugs."²⁰ Certainly, the Legislature's intent was to protect the public from drunk drivers and prevent offenders from operating a vehicle should they drink and drive again by requiring all drivers subject to a license revocation install an ignition interlock device. But what is the justification for requiring drivers to waive the

"stayed" during the appeal. RCW 46.20.270. These drivers are not affected by RCW 46.20.385(1)(b).

²⁰ CP 39.

right to appeal to receive this license? A review of the bill and committee reports related to this legislation fails to disclose any reference to a justification for restricting a driver's eligibility for the IIDL based upon a decision to appeal.²¹

Third, the Department has the ability to respond to all appeals filed by drivers under the Implied Consent law. The appeal process has existed within the Implied Consent Law since its inception. See Metcalf v. Dept. of Licensing, 11 Wn. App. 819, 820, 525 P.2d 819 (1974). The Department responded to the appeal filed by Nieslen. No evidence exists in the record to suggest the Department can no longer respond to appeals, particularly where a driver has obtained the IIDL.

The Ignition Interlock License law treats drivers within this group differently based on whether they file an appeal to challenge the basis for their revocation. If a person files an appeal he or she is disqualified from receiving the IIDL. If a person obtains the IIDL they are precluded from appealing the underlying revocation. What

²¹ In fact, the bill reports fail to state that waiver of the right to appeal would even be a part of the final bill. The only reference to a waiver is that a request for the IIDL would waive a driver's right to the initial hearing before the Department. CP 46-69.

happened to Nielsen is an extension of this disparate treatment. The State is retroactively placing Nielsen into the category of drivers who must forego an appeal in order to receive the IIDL.

B. No rational basis supporting appeal waiver provision has been expressed by State.

Under rational basis review a party challenging the application of a law has the burden of showing that the law is irrelevant to maintaining a state objective or that it creates an arbitrary classification. Harris v. Charles, 171 Wn.2d 455, 463, 256 P.3d 328 (2011). A statutory classification violates equal protection only if no conceivable state of facts reasonably justifies the classification and the classification is purely arbitrary. Tunstall v. Nielsen, 141 Wn.2d 201, 226-27, 5 P.3d 691 (2000). It is the basis for the distinctions created by the law, not the basis for the law itself that must pass rational basis review. Marintorres, 93 Wn. App. at 451; citing State v. Coria, 120 Wn.2d at 171. A party asserting a violation of the equal protection clause must establish its unconstitutionality beyond a reasonable doubt. Forbes v. Seattle, 113 Wn.2d 929, 941, 785 P.2d 431 (1990).

While there is a strong presumption a legislative act is constitutional, rational basis review is not “toothless.” Golinski v. U.S. Office of Personnel Mgmt, ___ F.Supp.2d ___, 2012 WL 569685 (N.D. Calif. 2012) at pg. 21; Matthews v. de Castro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). Even in the ordinary equal protection case calling for the most deferential of standards, Courts must insist on knowing the relation between the classification adopted and the object to be attained. Romer v. Evans, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

A driver's license represents an important property interest and is subject to protection under due process of law. City of Redmond v. Moore, 151 Wn.2d 664, 670-671, 91 P.3d 875 (2004). Courts recognize the importance a license holds in modern society.

“Once licenses are issued ... continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.” Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971):

The right to an appeal is not guaranteed under due process. Ford Motor Co. v. Barrett, 115 Wn.2d 556, 566, 800 P.2d 367

(1990); Ortwein v. Schwab, 410 U.S. 656, 659, 93 S.Ct. 1172, 35 L.Ed.2d 573 (1973). However, having made access to the courts an entitlement or a necessity, the State may not deprive that access unless the balance of state and private interests favors the government scheme. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 n. 5, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

The Implied Consent law provides drivers with the right to appeal a license revocation. RCW 46.20.308(9). This right has existed since the inception of the law in 1969. It is therefore firmly imbedded in our judicial system, and entirely necessary considering the abbreviated and expedited process of the initial hearings held before the Department of Licensing.²² Considering the protected nature of a license under Due Process, as well as the devastating consequences to the driver facing an erroneous license revocation, the State must assert some interest that favors restricting the right to an appeal as a means to obtain the IIDL.

The only expressed rationale supporting the Ignition Interlock License statute is the desire to hold DUI offenders

²² The hearing process is excluded from the protections found under the Administrative Procedures Act; RCW 34.05.030(2)(b).

“accountable” for their conduct of driving while impaired.²³ But this rationale fails to explain why the right to appeal must be waived to get the license. This Court must consider whether any State argument supporting the appeal waiver provision is not so attenuated from this goal of the statute as to render the law arbitrary. See DeYoung v. Providence Medical Center, 136 Wn.2d 136, 149, 960 P.2d 919 (1998).

DeYoung is instructive because the Court was critical of broad, and largely unsubstantiated, rationalizations supporting a statute of limitations imposed on certain medical malpractice claims that was found to have no real effect on the underlying basis for the law. DeYoung, at 147. The Court reviewed the legislative history and concluded that the goal of the statute of limitation, to avoid remedy a perceived medical malpractice insurance crisis, would in fact have little if no impact on the reduction of claims that could affect insurance costs. DeYoung, at 148-149. The Court struck down the law.

Here, the act of denying a driver an IIDL if they pursue an appeal, or of denying a driver an appeal if they obtain an IIDL, is

²³ CP 39.

too far attenuated from the goal of holding DUI drivers “accountable.” The law provides “accountability” in the form of the IIDL. Requiring all drivers, after a finding by the Department affirming a license revocation, to install an ignition interlock device and obtain the IIDL furthers this concept of accountability. The IIDL immediately addresses the driver’s conduct which led to the revocation and is irrelevant to whether a Superior Court judge may in the future reverse the revocation. As it pertains to “accountability,” the appeal process is irrelevant once the IIDL is obtained since the appealing driver must abide by the same rules and regulations regarding the IIDL as the non-appealing driver. Therefore, like DeYoung, the appeal waiver provision of the law has no real effect on this goal of the statute.

C. Appeal waiver provision does not bear a rational relationship to any conceivable state interest supporting Ignition Interlock License law.

The requirement that a driver must waive the right to appeal as a condition to receive a license is purely arbitrary on its face. This law acts as a deterrent against seeking review of the Department’s decision to revoke a license. When viewed in

conjunction with the Implied Consent law's provision for entry of a "stay" of revocation if an appeal is filed, the Ignition Interlock License law unashamedly entices drivers not to file an appeal because once an appeal is filed a driver must prove an "irreparable injury" exists before they can receive the same post-revocation driving privileges given to non-appealing drivers under the Ignition Interlock law.

The arbitrary nature of the Ignition Interlock License statute is made absolutely clear by review of the conditions which must be met to obtain the license. There is no evaluation of public safety. Anyone can get this license regardless if a person commits his or her first DUI or has a history of committing the offense. The government can make no claim that drivers who appeal are somehow more dangerous than those who do not. Any person who drives intoxicated is a danger. The ignition interlock device prevents all drivers from driving if they have consumed intoxicating beverages.²⁴ The State can make no rational, reasonable, or believable claim that denying this license to drivers who appeal the license revocation is based on a public safety argument.

²⁴ The Governor's partial veto message highlights this point. CP 44.

By reducing the number of appeals filed to challenge Department license revocations, the Department may argue that the law's deterrence towards appeals is rationally related to saving State resources. The Supreme Court has recognized that fiscal integrity is a legitimate state interest. Ohio v. Hodory, 431 U.S. 471, 493, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977). However, the Court has been emphatically clear that the concern for the preservation of state resources, alone, is not a legitimate rational basis under equal protection analysis to support arbitrary classifications that allocate state resources. Plyler v. Doe, 457 U.S. 202, 227, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)(Public education for undocumented children.); citing Graham v. Richardson, 403 U.S. 365, 374-375, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)(Public assistance for illegal aliens.). The State must do more than justify its classification with a concise expression of an intention to discriminate. Plyler, at 227.

Washington Courts have adopted this position. In Conklin v. Shinpoch, 107 Wn.2d 410, 730 P.2d 643 (1986), the Supreme Court addressed a case involving the distribution of social security insurance payments to qualifying recipients and spouses. A provision prohibited the distribution to certain non-qualifying

spouses. While the law survived an equal protection challenge, the Court noted;

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.

A corollary of this argument was addressed in Salinas.²⁵

The State argued it was administratively inconvenient to determine earned early release credits for inmates housed in out-of-state facilities. Salinas, at 778. The Court refused to accept such an argument when the State performed the same calculation for other inmates. Id. Here, despite the inconvenience and cost involved in responding to appeals, the Department – through the Attorney Generals' Office – responds to appeals when drivers do not seek

²⁵ 130 Wn. App. 772, 124 P.3d 665 (2005).

an IIDL. Therefore, any desire to reduce the expenditures involved in defending licensing appeals must be coincidental to any actual justification supporting the denial of judicial review as a condition for receiving the IIDL.

D. Chilling effect on exercise of appeal rights is consideration for Equal Protection challenge.

The most disturbing aspect to the Ignition Interlock License law is the chilling effect it has on a driver deciding whether to appeal the license revocation. In three cases from other jurisdictions courts have held similar laws unconstitutional.

In Voyes v. Thorneycroft, 398 F.Supp. 706 (Ariz. 1975), the Court held a similar section of the Arizona Implied Consent Law violated the Equal Protection Clause. Arizona law stated that if a driver subject to a license revocation due to refusing a breath/blood test pled guilty to DUI in court before the revocation went into effect, the Arizona DOL would rescind the license revocation. Thorneycroft, at 707. Drivers who pled not guilty and fought the DUI had their licenses revoked. Id. While the Court acknowledged the State's strong interest in removing drunk drivers from the highway, the Court could conceive of no justification for placing drivers in

such a dilemma as to have to weigh the impact of a license revocation against the assertion of constitutional rights. At 707. The justification of an expeditious means to resolve DUI cases was rejected outright. Id.

The same result was reached in a case involving the civil suspension of a driver's license. In Beazley v. Armour, 420 F.Supp. 503 (Tenn. 1976), the Court held Tennessee's financial responsibility law was unconstitutional under the Equal Protection Clause. Tennessee law stated a driver subject to a license suspension due to involvement in an accident without insurance could get their license reinstated if one of four exceptions existed. Beazley, at 508. Under three of the exceptions the driver had to file additional insurance obligations. Id. Under the remaining exception, based on whether any court action was filed in the twelve months following the accident, the driver did not.

The Court agreed this distinction in the law was a violation of equal protection. At 509. The Court could find no rational basis for treating drivers differently. Id. In particular, the law had the "inevitable effect" of discouraging drivers from seeking vindication of liability through the courts since the simple filing of a claim would

exclude the driver from the exception excluding them from having to file additional insurance. Id.

Finally, the case Knowles v. Iowa, Dept., of Transp., 394 N.W.2d 342 (Iowa 1986), is directly on point. Knowles was arrested for DUI and the Iowa DOL instituted a 120 day license suspension. Knowles, at 343, Due to the facts of the case, Knowles was successful in reversing the suspension on administrative appeal. Id. The State then charged Knowles with DUI, and he was found guilty. Id. As a condition of sentence his license was revoked for one year – *specifically because he successfully challenged the initial administrative suspension.* Id. Had he not challenged the suspension, his license suspension would only have lasted the original 120 days. Id.

The Iowa Supreme Court reversed the one year revocation on equal protection grounds. Knowles, at 344. The State presented two arguments advancing the statutory scheme: (1) The distinction in punishment between civil and criminal proceedings was reasonable; and (2) advancing a law that lowered the length of suspension in court if the person did not challenge the administrative suspension conserved limited state resources. Id.

The Court rejected each argument. First, the State's attempt to distinguish criminal and civil license suspensions failed. The Court clearly agreed that there was only one real class of drivers involved; those who were convicted of DUI. Within this class drivers were arbitrarily distinguished, and subject to disparate suspensions, based only on the fact one group challenged the administrative suspension. Id. Second, the Court rejected any argument that legislation that coerced or enticed drivers to forego challenging an administrative suspension as a means to conserve State resources was lawful stating; "[it] would ... ignore the concepts of constitutional equal protection." Knowles, at 344.

Therefore, in both criminal and civil settings, courts have found an Equal Protection violations under rational basis review where the challenged laws furthered a policy of inducing drivers to not seek judicial review of potentially erroneous actions by the State. The State may not induce drivers to forego legal challenges to license suspensions/revocations by reducing the length of suspension/revocation or offering alternative licenses as an incentive. The State may not claim such laws are reasonable based on an attempt to save financial resources, or to reduce the number

of appeals. For over 40 years people in Washington have had the right to challenge Department of Licensing license revocations on appeal. Asking drivers to waive this right as a means to retain the ability to drive is arbitrary and furthers no legitimate state interest.

2. Does the Ignition Interlock License statute violate the Due Process clause of the State and Federal Constitutions where no legitimate state interest is advanced supporting why the “no appeal” restriction must be placed on the post-revocation Ignition Interlock License?

A. Substantive Due Process argument.

The Due Process clause to the Washington State Constitution states;

“No person shall be deprived of life, liberty, or property, without due process of law.” Washington Constitution, Art. I, §3.

The Washington Due Process clause is co-extensive with that of the Federal Constitution.²⁶ State v. Morgan, 163 Wn. App. 341, 352, 261 P.3d 167 (2011). The purpose of the constitutional guaranty of due process of law is to protect individuals from the arbitrary exercise of government power. State v. Cater’s Motor Freight System, 27 Wn.2d 661, 179 P.2d 496 (1947). For due

²⁶ U.S. Constitution 14th Amendment.

process protections to be implicated, there must be an individual interest asserted that is encompassed within the protection of life, liberty, or property. Wash. State Attorney General's Office v. Wash. Utilities and Transp. Comm'n, 128 Wn. App. 818, 116 P.3d 1064 (2005).

Substantive due process, guaranteed by the State and Federal Constitutions, limits a "state's ability to pass unreasonable or irrational laws which deprive individuals of property rights." Sintra v. City of Seattle, 119 Wn.2d 1, 21, 829 P.2d 765 (1992).

Substantive due process claims require a showing that interference with property rights was irrational or arbitrary. Sintra, 119 Wn.2d at 21. Where a party alleges the State has violated his right to substantive due process, he bears the burden of demonstrating that the governmental action was arbitrary, irrational, or tainted by improper motive. Brown v. City of Seattle, 117 Wn. App. 781, 72 P.3d 764 (2003). A party challenging the constitutionality of a statute must show that the law is wholly unrelated to the achievement of a legitimate state purpose. Seeley v. State, 132 Wn.2d 776, 795, 940 P.2d 604 (1997). A party must prove

unconstitutionality beyond a reasonable doubt. In re Custody of Osborne, 119 Wn. App. 133, 147, 79 P.3d 465 (2003).

When state action does not affect a fundamental right, the proper standard of review is rational basis review. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 220-222, 143 P.3d 571 (2006). A challenge to laws regulating the driving privilege falls under rational basis review. Amunrud, at 220. Courts apply the “rational basis review” standard used with an equal protection challenge. Amunrud, at 220-221.

B. Appeal waiver law not rationally related to any legitimate State interest.

Under this test, the 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.

The State's grant of a license to engage in a trade or occupation may be conditioned by the State as long as there is a

rational connection between the condition and the occupation. Amunrud, at 223; citing In re Kindschi, 52 Wn.2d 8, 319 P.2d 824 (1958). Amunrud addressed the revocation of a commercial driver's license, and Kindschi addressed the revocation of a medical license. In Amunrud, the Court found the State had a legitimate rational basis to revoke a commercial license where the holder of the license had failed to pay child support. Amunrud, at 223. Linking such license with compliance to child support orders furthered State interests promoting adequate child welfare and compliance with court orders. Amunrud, at 223-224. In Kindschi, the Court found the State had a legitimate rational basis to revoke a medical license where the holder of the license had been convicted of a crime involving moral turpitude. Kindschi, at 12. The State had an interest in ensuring doctor's maintained a high level of character and trustworthiness making it appropriate to suspend the medical license when character and trustworthiness were questioned. Kindschi, at 12.

The right to appeal has always existed as a check against erroneous license revocations under the Implied Consent law. RCW 46.20.308(9). The right of appeal constitutes a necessity;

guaranteed under law. Historically, the loss of one's license was immediate following a ruling from the DOL. Barring a court order granting a "stay" after an appeal was filed, the suspension ran until completed or reversed on appeal. On this basis drivers who appealed were treated equally with drivers who did not. At issue, then, is whether the Ignition Interlock License law's restriction on the right of appeal is rationally related towards the achievement of a legitimate state purpose.

As stated above, the only expressed rationale for the law itself is the desire to implement accountability for driving under the influence by requiring drivers to obtain this license. But this alone does not address why drivers who appeal a license revocation should not also be allowed to drive with this license.

There is no public safety component furthered by restricting the IIDL from drivers who appeal. Placing the appeal issue aside, the remaining requirements for receiving the license include: payment of a small fee, installation of the device, and maintenance of insurance. RCW 46.20.385(2). Any other criteria reasonably related to public safety, such as a review of a driving record or review of the facts of the case, are not considered. It is absurd to

think that with the law's utter absence of any criteria for receiving the license related to public safety, it could be implied that the Legislature was concerned that drivers wishing to appeal the license revocation would stand out as drivers unfit for the license.

Nothing in the bill or the bill reports suggests a justification for linking the eligibility for the IIDL with the right to appeal.²⁷ The law itself merely describes the license and the circumstances under which it may be obtained and/or canceled.²⁸ Unlike Amunrud, there are no other public policies identified that would warrant linking the IIDL to the right to appeal. While this Court has the ability to engage in "rational speculation" to develop a rational basis supporting the "waiver" requirement, where such speculation is so attenuated as to render the justification arbitrary, the law must be struck down. DeYoung v. Providence Medical Center, 136 Wn.2d 136, 149, 960 P.2d 919 1998).

²⁷ As stated earlier, the bill reports fail to state that waiver of the right to appeal would even be a part of the final bill. The only reference to a waiver is that a request for the IIDL would waive a driver's right to the initial hearing before the Department. CP 46-69.

²⁸ CP 39-44.

VI. CONCLUSION

The State has created a law which pits two protected interests at odds with one another; the driving privilege versus the right to appeal. The State has yet to advance any argument that denying one at the expense of the other supports a legitimate government interest. The Ignition Interlock License law is an effective tool for promoting public safety. But restricting the right of appeal as a means of obtaining this license fails to further any legitimate interest.

Mr. Nielsen filed an appeal challenging his license revocation. Like all drivers in his class he was eligible for and obtained an Ignition Interlock License. His appeal was dismissed solely because of operation of the Ignition Interlock License law. He asks this Court to find the "appeal waiver" requirement of this law unconstitutional, and reinstate his appeal.

RESPECTFULLY SUBMITTED this 12th day of April, 2012.

A handwritten signature in black ink, appearing to read "R. Robertson", written over a horizontal line.

Ryan B. Robertson, WSBA #28245
Attorney for Mr. Nielsen

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**COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON**

KAI NIELSEN,

Appellant,

vs.

**STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,**

Respondent.

NO. 68133-8-I

DECLARATION OF SERVICE

I certify that on the 12th day of April, 2012, I caused the following documents to be served on the Court of Appeals and below parties in the manner indicated below:

Appellant's Opening Brief

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(Original filed with Court of Appeals)

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

11 Signed in Seattle, WA the 12th day of April, 2012.

12 

13 Ryan B. Robertson, WSBA #28245
14 Attorney for Mr. Nielsen