

NO. 71219-5-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

YURI PROSTOV,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal arises from the superior court's de novo review of the Department of Licensing's (Department) suspension of Yuri Prostov's driver's license for using a false name in a license application in violation of RCW 46.20.0921(1)(e). The superior court upheld the Department's suspension order, finding a preponderance of the evidence showed Yuri Prostov presented himself to the Department as his brother, Geirman Prostov, and obtained a driver's license under that name.¹ A visual comparison of the contested licensing photos confirmed that the license issued under Geirman's name contained the photo of Yuri Prostov. Yuri invites the Court to reweigh the evidence and make new factual determinations, which is inappropriate on appeal.

The superior court correctly applied the preponderance of the evidence standard of proof to find Yuri used a false name to obtain a license, rather than the reasonable doubt or clear, cogent, and convincing standards, as Yuri argues. The Department's civil administrative action is not a criminal matter subject to a criminal standard of proof. Further, if the government deprives a person of a property interest, the relevant due process inquiry for determining the standard of proof is the interest at stake, not the underlying reason for administrative action. The

¹ Because the Appellant, Yuri Prostov, and his brother, Geirman Prostov, have the same last name, this brief often refers to them by their first names only.

preponderance standard for suspension of a person's driving privilege satisfies due process. Because the superior court applied the appropriate standard of proof, and substantial evidence supports the superior court's findings, the Court should affirm the one year driver's license suspension.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. The reasonable doubt standard is only required in criminal matters. Did the superior court correctly conclude the reasonable doubt standard was inappropriate for a civil administrative license suspension proceeding?
2. Does application of the preponderance standard satisfy due process in a civil driver's license suspension proceeding where one's interest in driving is a privilege subject to reasonable regulation, the licensee receives a full adjudicative proceeding and de novo review in superior court, and the state has a significant interest in the authenticity of drivers' licenses?
3. Under RCW 46.20.291, the Department is authorized to suspend a driver's license upon a showing of its records that a driver "use[d] a false or fictitious name in any application for a driver's license." Does substantial evidence support the superior court's finding that Yuri Prostov obtained a driver's license using a false or fictitious name where the photo on the license obtained by Yuri and bearing his brother Geirman Prostov's name contains the same identifiable facial scar and nose structure shown in the Department's other true and correct photos of Yuri?
4. Did the superior court correctly conclude Mr. Prostov was not entitled to fees under the Equal Access to Justice Act because license suspension proceedings are expressly excluded from coverage under the Act and, even if the Act applied, Mr. Prostov did not prevail?

III. COUNTERSTATEMENT OF THE CASE

On October 26, 2010, the Department conducted a routine facial recognition scrub as part of its efforts to prevent individuals from obtaining multiple licenses or attempting to obtain a license in the name of another Washington resident. Verbatim Report of Proceedings (VRP) 18-19. The Department has facial recognition software that creates a digital template of a driver's facial features from the person's driver's license photo. In a "scrub," the system then compares the template to all other photos in the Department's database for possible matches. VRP 18-19. The facial recognition program flagged Appellant Yuri L. Prostov's record for additional review based on a possible photo match to his brother, Geirman L. Prostov.^{2,3} VRP 27-28; Clerk's Papers (CP) 17; Finding of Fact (FF) 5.

The file was referred for investigation to Jessica Bullock, an investigator within the Department's Licensing Integrity Unit. VRP 29; CP 17; FF 6. Ms. Bullock obtained all photos, licenses, and identification cards of Yuri Prostov in the Department's records. VRP 29-30; CP 17; FF

² The VRP misspells Geirman as Jermaine.

³ The court considered the flag solely as background information on how the investigation originated, not as evidence that Mr. Prostov violated RCW 46.20.0921(1)(e). VRP 167; CP 17; FF 5.

6. Ms. Bullock also obtained the newest and oldest photos of Geirman Prostov in the Department's records.⁴ VRP 32-33.

Ms. Bullock compared the true and correct photos of Yuri Prostov (Ex. K, R & S) and the true and correct photos of Geirman Prostov (Ex. L & V) with the flagged photos (Ex. N, T, & U) for possible matches. When making a visual comparison between photos, Ms. Bullock pays particular attention to facial features that do not change over time: scars or birth marks; ears; nose; eyes; eye shape; and lips. VRP 25.

At the conclusion of her investigation, Ms. Bullock determined Yuri Prostov obtained a driver's license under his brother's name on two separate occasions. VRP 33, 36. Namely: on June 25, 2001, Yuri obtained a duplicate driver's license under the name Geirman Prostov at the Kirkland Licensing Center, (Ex. N) VRP 33; and, on January 28, 2009, Yuri also obtained a renewal driver's license under the name Geirman Prostov at the Kirkland Licensing Center. (Ex. T & U) VRP 35-36.

The Department issued an order suspending Yuri's license for 364 days pursuant to RCW 46.20.291(7) for using a false name in a driver's license application, which is prohibited by RCW 46.20.0921(1)(e). Yuri requested an administrative hearing, and the hearing officer upheld the Department's suspension. Yuri appealed his license suspension to

⁴ For privacy reasons, the Department does not obtain or include all photos of the victim in the investigative file. VRP 30, 55-57.

superior court and requested a de novo hearing pursuant to RCW 46.20.334.

At trial, Ms. Bullock testified regarding her investigative process and the authenticity of the Department's licensing photos. VRP 18-64. The court ruled that Ms. Bullock could not testify regarding the specific visual comparison she made between Yuri and Geirman to conclude that Yuri obtained a license under Geirman's name because "the characteristics from the photographs are something the court can itself ascertain, and certainly the parties can make argument on it." VRP 43.

Lori Provoe, a Department hearing examiner's manager, testified regarding driver's license application procedures and the public's interest in having authentic driver's licenses. She explained that the Department will only issue a duplicate or renewal license if a driver makes an affirmative request for one. VRP 65-66. When a driver appears at a licensing service center for a renewal or duplicate license, the driver does not submit a paper or hard copy application. VRP 66-67. Rather, the driver orally requests a renewal or duplicate license. VRP 66-67.

The oral application process requires the driver to present the licensing service representative with photo identification or inform the representative of his or her name, date of birth, and address. VRP 68-70. The driver also must sign his name on a signature card and provide the

card to the driver's license camera operator, who then takes the driver's picture and superimposes the signature on the driver's license. VRP 69-70. The driver receives a temporary license containing his or her digital photograph and signature prior to leaving. VRP 74. Ms. Provoe also testified that driver's licenses are recognized as one of the most secure forms of identification, and that making sure drivers' licenses are authentic is a consumer protection and public safety issue. VRP 74-75.

Yuri also testified, admitting that Exhibits K, R, and S were true and correct photos of himself and that Exhibits L and V were true and correct photos of his brother, Geirman. VRP 84-89; CP 17; FF 8. Yuri further admitted that he has a scar on the right side of his face that extends from his upper lip to his right nostril and that he has had this scar since at least 2001. VRP 101-04; CP 17; FF 7. Geirman does not have any facial scars. VRP 106; CP 17; FF 7.

The trial court upheld the Department's order of suspension, finding the Department had proven by a preponderance of the evidence that "the driver's license issued 1/28/2009 and identified as Exhibit T is the product of a false or fictitious name given by Yuri Prostov." VRP 173; CP 16-20; FF 2, 7-9. While the Department submitted evidence alleging Mr. Prostov obtained a license in his brother's name in 2001 and 2009, the court upheld the Department's order of suspension based only

on the 2009 license renewal. VRP 170; CP 18; FF 3. The court further concluded the preponderance standard was appropriate because a heightened standard of proof was not required by statute or due process. VRP 159-66; CP 18-19; Conclusion of Law (CL) 5.

The court noted Yuri's own testimony and the court's visual observations of the licensing photos at issue confirmed that the license issued under the name Geirman Prostov on January 28, 2009, contains the photograph of Yuri Prostov. CP 17-18; FF 7-9. The court found the quality of the color photos were "quite good" and that the photo contained on the license issued under Geirman's name in Exhibits T and U is "significantly different" from the true and correct photo of Geirman in Exhibit V. VRP 171-72; CP 17-18; FF 7-9. Specifically, the photos in Exhibits T and U contain the same identifiable scar and nose structure present in the photos of Yuri found in Exhibits R and S. VRP 169-72; CP 17-18; FF 7-9.

Although the Department's order of suspension was affirmed, Mr. Prostov requested attorney fees under the Equal Access to Justice Act, RCW 4.84.340 (EAJA). CP 21-26. The court denied Mr. Prostov's request, and this appeal followed. CP 60-61.

IV. STANDARD OF REVIEW

After a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether the findings of fact are supported by substantial evidence and whether those findings support the conclusions of law. *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560 (2008). Substantial evidence is evidence that is “sufficient to persuade a rational, fair-minded person of the truth of the finding.” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). As the challenging party, the burden is on Mr. Prostov to show the findings are not supported by the record. *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 108, 86 P.3d 1175 (2004).

“In determining the sufficiency of the evidence, an appellate court need only consider evidence favorable to the prevailing party.” *Endicott*, 142 Wn. App. at 909. The court “will not substitute its judgment for the trial court even though it might have resolved a factual dispute differently.” *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). It “must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Questions of law and conclusions of law are subject to de novo review. *Sunnyside Valley*, 149 Wn.2d at 879. Thus, Yuri's challenge to the standard of proof at trial is reviewed de novo. However, courts grant substantial weight to an agency's interpretation of statutory language and legislative intent of a statute the agency administers. *Pub. Util. Dist. No. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002).

V. ARGUMENT

The superior court properly determined that suspension of a driver's license pursuant to RCW 46.20.291(7) and RCW 46.20.0921(1)(e) requires a preponderance of the evidence. The Department's suspension of a driver's license is a civil administrative proceeding, and the agency has no authority to impose imprisonment in a civil administrative license suspension. Applying the criminal reasonable doubt standard is not appropriate.

Yuri alternatively argues that clear, cogent, and convincing evidence is required because the Department alleged he engaged in "conduct tantamount to common law fraud." Br. of Appellant at 2, 18. This argument is also unfounded. The due process inquiry is not dependent on the reason the Department takes action. Regardless, the Department did not allege, and it was not required to prove, common law fraud. Rather, in balancing Yuri's conditional privilege in his license, the

minimal risk of erroneous deprivation, and the state's significant interest in public safety and welfare, the preponderance standard satisfies due process.

Substantial evidence supports the trial court's findings that Yuri applied for and obtained a license under the name Geirman Prostov. Yuri's own testimony and a visual comparison of the photographic evidence support these findings.

Further, Yuri waived any right to a jury trial because he did not comply with the civil rules or adequately preserve the issue with the trial court. Finally, Yuri is not entitled to attorney fees because driver's license suspensions are excluded from coverage under EAJA. Even if EAJA applied, Yuri did not prevail, and the Department's action was substantially justified.

This Court should affirm the trial court's orders suspending Yuri's driver's license and denying attorney fees.

A. A Civil Administrative License Suspension Hearing Is Not Subject To The Reasonable Doubt Standard

The Department is authorized "to suspend the license of a driver upon a showing by its records or other sufficient evidence" that the licensee "[h]as committed one of the prohibited practices relating to

drivers' licenses defined in RCW 46.20.0921." RCW 46.20.291(7). One such prohibited practice is to:

use a false or fictitious name in any application for a driver's license or identicard *or* to knowingly make a false statement *or* to knowingly conceal a material fact *or* otherwise commit a fraud in any such application.

RCW 46.20.0921(1)(e) (emphasis added).

As with all Departmental driver license suspension proceedings, the suspension undertaken pursuant to RCW 46.20.291 is a civil proceeding. *Fritts v. Dep't of Motor Vehicles*, 6 Wn. App. 233, 240, 492 P.2d 558 (1971) (recognizing that a driver's license revocation proceeding is not a criminal proceeding). Because the license suspension is a civil proceeding, the reasonable doubt standard does not apply. "[T]he Court has never required the 'beyond a reasonable doubt' standard to be applied in a civil case." *California ex. Rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 93, 102 S. Ct. 172, 70 L. Ed. 2d 262 (1981). While a state may, on its own, require proof beyond a reasonable doubt in a particular non-criminal matter, "that choice is solely a matter of state law," not a requirement of the Fourteenth Amendment. *Mitchell Bros*, 454 U.S. at 93. The Washington Legislature has not raised the burden of proof for administrative driver's license suspensions. Rather, "civil license suspension proceedings . . . have a lower burden of proof and run on a

parallel track to any criminal proceedings.” *Ingram v. Dep’t of Licensing*, 162 Wn.2d 514, 518, 173 P.3d 259 (2007).

The Department’s civil administrative suspension is not converted into a criminal proceeding merely because a parallel criminal penalty exists or the regulatory statute cites to the criminal code. Yuri asserts that the cross-reference in RCW 46.20.291(7) to the prohibited practices provided by RCW 46.20.0921(1)(e) converts the administrative action to a criminal proceeding. Br. of Appellant at 12-14. He is mistaken.

“The Legislature may provide for both civil and criminal penalties in the same act without converting the civil penalty scheme into a criminal or penal proceeding.” *State v. Von Thiele*, 47 Wn. App. 558, 561, 736 P.2d 297 (1987). “A statute is criminal or penal in nature when a violation of its provisions can be punished by imprisonment and/or a fine.” *Id.* at 562. On the other hand, “[a] statute is remedial when it provides for the remission of penalties and affords a remedy for the enforcement of rights and redress of injuries.” *Id.* Conduct that leads to a remedial sanction only needs to be proven by a preponderance of the evidence. *Id.* at 564-65. RCW 46.20.291 enables the Department to suspend a driver’s license for violations of RCW 46.20.0921, but it does not allow the Department to impose imprisonment or fines as a punishment. Accordingly,

RCW 46.20.291 is inherently remedial, rather than criminal in nature. It is not subject to the reasonable doubt standard.

Moreover, the civil and remedial nature of RCW 46.20.291(7) is not altered by the use of the term “committed.” The fact that “committed” may have criminal connotations is incidental because the statute only authorizes a license suspension as a sanction and this makes it non-criminal. Regardless, as Yuri points out, the first rule of statutory construction is to give effect to the legislature’s intent, which is primarily derived from the plain meaning of the statute. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Plain meaning “is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Id.* at 526 (citation omitted). The ordinary dictionary definition of “committed” is to “DO, PERFORM <convicted of *committing* crimes against the state> <*committing* an even greater folly>.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 457 (2002). Thus, although “committed” can be used in reference to a crime, the term is not restricted to that context.

Mr. Prostov also incorrectly asserts this is a case of a “civil label-of-convenience,” where the statute masks an underlying effort by the state

to prosecute criminal activity. Br. of Appellant at 16-18. The term has been applied in contexts where the punishment involved incarceration, or other involuntary commitment proceedings, but never to an administrative license revocation. See e.g., *In re Winship*, 397 U.S. 358, 365–66, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (involuntary commitment of juvenile for act which, if committed by an adult, would be a crime). Under RCW 46.20.291, the Department has no authority to impose imprisonment, nor does the statute authorize a criminal proceeding or other quasi-criminal sanction. The statute is not a “civil label of convenience.” The statute authorizes nothing more than a civil license suspension proceeding, and the fact that a parallel criminal proceeding exists is of no consequence. *Fritts*, 6 Wn. App. at 240.

RCW 46.20.291 is consistent with other statutory frameworks outside of the driver’s license context that make available criminal and civil penalties for the same conduct. Licenses for motor vehicle dealers and manufacturers may be denied, suspended, or revoked by the director of the Department of Licensing upon a finding by the director “that the applicant or licensee . . . [h]as committed any act in violation of RCW 46.70.180 relating to unlawful acts and practices.” RCW 46.70.101(1)(b)(vii). These unlawful practices include false statements under RCW 46.70.180(1) and (2)(a)(i), failure to properly complete a

license permit under RCW 46.70.180(8), and other fraudulent acts under RCW 46.70.180(5). A violation of any provision of the chapter, unless otherwise stated, is a misdemeanor. RCW 46.70.170. Even so, actions brought under RCW 46.70.101 and RCW 46.70.180 have been addressed under a preponderance of the evidence standard. *See e.g., Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 722, 225 P.3d 266 (2009).

Thus, the criminal reasonable doubt standard is not imported into the Department's civil administrative suspension proceedings simply because the regulatory statute cites the criminal code. RCW 46.20.291 is a purely remedial statute, and a criminal standard of proof is not warranted.

B. Preponderance Of The Evidence Is The Appropriate Standard For Driver's License Suspensions Regardless Of The Reason For Suspension

The trial court properly concluded that preponderance of the evidence is the appropriate standard for suspension of a personal driver's license. The preponderance standard ensures due process consistent with *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Nevertheless, Mr. Prostov alternatively asserts that clear, cogent, and convincing evidence was required to suspend his driver's license because the Department alleged he engaged in conduct tantamount to civil fraud. Br. of Appellant at 2, 18. He is mistaken. When the government

deprives a person of a property interest, the nature of the right at stake determines the appropriate evidentiary standard, not the underlying conduct that leads to disciplinary action. However, even assuming the standard of proof stems from the underlying conduct, the Department's suspension action is not based on, and RCW 46.20.0921(1)(e) does not require proof of, common law fraud. The trial court's decision should be affirmed.

1. The preponderance of the evidence standard of proof for suspension of a personal driver's license ensures due process consistent with *Mathews v. Eldridge*.

A driver's license is a property interest protected by due process. *City of Redmond v. Bagby*, 155 Wn.2d 59, 62, 117 P.3d 1126 (2005). Thus, "revocation of a driver's license must comply with procedural due process." *State v. Storhoff*, 133 Wn.2d 523, 527, 946 P.2d 783 (1997) (citation omitted). Procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Storhoff*, 133 Wn.2d at 527.

Due process is a flexible standard designed to balance the needs of the public and the individual and arrive at the minimum acceptable process that safeguards the interests of all involved. *Mathews*, 424 U.S. at 334. The procedures required by the U.S. Constitution are not rigidly set,

but reflect the nature of the proceeding.⁵ *Id.* at 334. In order to determine the process due in a given case, the Court balances (1) the private interest affected by the government action, (2) the risk of erroneous deprivation of that interest under existing procedural protections, and (3) the countervailing government interest, including the function involved and the fiscal and administrative burdens additional procedures would entail. *Id.* at 335. Applying the *Mathews* factors, the preponderance of the evidence standard satisfies due process when suspending a personal driver's license under RCW 46.20.291(7).

a. Yuri Prostov's private interest in his personal driver's license is a conditional privilege subject to reasonable regulation.

A driver's interest in his personal driver's license, while important, is not "fundamental" in the constitutional sense. *See U.S. v. Kras*, 409 U.S. 434, 444, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973); *see also State v. Clifford*, 57 Wn. App. 127, 130, 787 P.2d 571 (1990) (requiring a driver's license does not unconstitutionally infringe on freedom of movement). A license to drive on public highways is a state-granted "privilege," which has an expiration date and is "always subject to such reasonable regulation

⁵ Mr. Prostov only asserts his due process rights were violated under the Fourteenth Amendment of the U.S. Constitution and not the Washington Constitution. In any event, Washington courts have consistently used the federal standard in analyzing due process claims, and "Washington's due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution." *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

and control as the legislature may see fit to impose under the police power in the interest of public safety and welfare.” *State v. Scheffel*, 82 Wn.2d 872, 880, 514 P.2d 1052 (1973).

“The significance of the private interest at stake directly corresponds to the rigor of the burden placed on the State.” *Hardee v. Dep’t of Soc. & Health Servs.*, 172 Wn.2d 1, 8, 256 P.3d 339 (2011). Courts have required a higher standard of proof under the Due Process Clause only when the private interest involved a fundamental right or personal liberty—such as avoiding confinement. *See, e.g., In re Winship*, 397 U.S. 358 (1970) (subjecting juvenile delinquent to detention is a “complete loss of personal liberty” that requires proof beyond a reasonable doubt); *Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984) (commitment to psychiatric hospital requires clear and cogent evidence); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (termination of parental rights, i.e., complete destruction of fundamental right of parent to raise child, requires clear and convincing evidence). However, when a fundamental right or liberty interest is not at stake, the Court has held a preponderance of the evidence standard satisfies due process for private interests that are even more significant than a person’s interest in their driver’s license.

For example, in *Rivera v. Minnich*, the Court upheld a state statute requiring a preponderance of the evidence to establish paternity. 483 U.S. 574, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987). The Court acknowledged an alleged father’s significant interest in “avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child.” *Id.* at 580. Nonetheless, the Court held the interest does not rise to the level of the liberty interest in maintaining parental rights, and thus due process does not compel a higher standard. *Id.* Similarly, in *Vance v. Terrazas*, the Court held due process does not require a standard beyond a preponderance of the evidence at an expatriation hearing. 444 U.S. 252, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980). The Court recognized the importance of citizenship as the “highest hope of civilized men” but nevertheless reasoned a heightened standard was not required because “expatriation proceedings are civil in nature and do not threaten a loss of liberty.” *Id.* at 266.

Washington courts have also concluded the preponderance standard traditionally applies in other license revocation proceedings, regardless of the type of license at issue. *E.g.*, *In re Disciplinary Proceeding Against Petersen*, No. 88513-3, slip op. at 8-9 (Wash. Jul 3, 2014) (certified professional guardian); *Hardee*, 172 Wn.2d 1 (family

home child care facility); *Islam v. Dep't of Early Learning*, 157 Wn. App. 600, 238 P.3d 74 (2010) (home child care provider); *Brunson v. Pierce County*, 149 Wn. App. 855, 205 P.3d 963 (2009) (exotic dancers); *Kabbae v. Dep't of Soc. & Health Servs.*, 144 Wn. App. 432, 192 P.3d 903 (2008) (adult-home caregiver); *Edison v. Dep't of Licensing*, 108 Wn. App. 712, 32 P.3d 1039 (2001) (real estate agent).

In fact, the only instance in which our Supreme Court has found due process requires a heightened standard of proof in a license suspension hearing was *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001).⁶ There the court held due process required the state to present clear and convincing evidence prior to taking disciplinary action against a physician's license. *Id.* at 534. In distinguishing a physician's license from other licenses subject to the preponderance standard, the court has noted that "[t]he unique education, investment, and personal attachment of a physician's license indicates that a physician holds a greater property interest" than other licensee holders.⁷ *Hardee*, 172 Wn.2d at 13. Mr. Prostov's interest

⁶ In *Ongom v. Dep't of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006), the Supreme Court also held clear and convincing evidence was required for revocation of a nursing assistant license. However, the court explicitly overruled *Ongom* four years later. *Hardee*, 172 Wn.2d at 18.

⁷ Although not yet overruled, four Washington Supreme Court justices have signaled their disagreement with *Nguyen* in dissenting and/or concurring opinions. *Hardee*, 172 Wn.2d at 22-27; *Ongom*, 159 Wn.2d at 144-162. *Nguyen* was wrongly decided, and is harmful. At least four states have now expressly rejected *Nguyen*, and

in his driver's license is not comparable to the unique interest a physician has in a medical license, and a heightened standard is not warranted.

Further, the preponderance standard applies when the Department suspends a driver's license based on conduct other than RCW 46.20.0921(1)(e). *O'Neill v Dep't of Licensing*, 62 Wn. App. 112, 116, 813 P.2d 166 (1991) (preponderance of evidence required to suspend a driver's license under the Implied Consent Statute, RCW 46.20.308); *State v. Malone*, 9 Wn. App. 122, 130-31, 511 P.2d 67 (1973) (preponderance of the evidence required to revoke driver's license of habitual traffic offender). Because one's interest in a driver's license does not change based on the conduct at issue, requiring the Department to prove a violation of RCW 46.20.0921(1)(e) by clear, cogent, and convincing evidence to suspend a driver's license when the preponderance standard applies for all other driver's license suspensions would be illogical.

Mr. Prostov fails to confront this established precedent. Instead, he contends that the stigma associated with the revocation of his license, and the impact a suspension could have on his financial consulting

hold the preponderance standard satisfies due process for disciplinary action against a physician's license. See *In re Miller*, 989 A.2d 982 (Vt. 2009); *State Bd. Of Med. Exam'rs-Investigative Panel B v. Hsu*, 726 N.W.2d 216 (N.D. 2007); *Uckun v. State Bd. Of Med. Practice*, 733 N.W.2d 778 (Minn. Ct. App. 2007); *Granek v. State Bd. Of Med. Exam'rs*, 172 S.W.3d 761 (Tex. App. 2005).

business warrants a heightened standard of proof. Br. of Appellant at 18, 20. However, courts have previously rejected higher standards of proof based on the incidental stigma that may result from an adverse decision. *See, e.g., Paul v. Davis*, 424 U.S. 693, 712, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) (“[W]e hold that the interest in reputation asserted in this case is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.”); *Rivera*, 483 U.S. at 585 (Brennan, J., dissenting) (noting the Court rejected the argument that the “social stigma resulting from an adjudication of paternity” should compel a higher standard of proof). The incidental impact a license suspension may have on Mr. Prostov’s economic circumstances does not warrant a higher standard of proof. The Constitution does not protect or create a fundamental right to pursue a particular profession. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571, 577 (2006) (citation omitted).

The preponderance standard is appropriate because the civil suspension of Mr. Prostov’s driving privilege does not curtail his personal liberty or implicate a fundamental right. The preponderance standard is consistent with the standard of proof required in other license suspension proceedings and satisfies due process for interests even more significant

than Mr. Prostov's interest in his driver's license. The first *Mathews* factor, therefore, does not weigh in favor of a heightened standard.

b. The risk of an erroneous deprivation is slight in light of the extensive procedural protections already in place.

The second *Mathews* factor examines the risk of erroneous deprivation based on the existing procedural safeguards and the probable value of any additional procedural protections. Due process does not mandate procedures "that assure perfect, error-free determinations." *Mackey v. Montrym*, 443 U.S. 1, 17, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979). In Washington, a driver's license holder enjoys significant procedural protections that are sufficient to guard against erroneous revocation.

Prior to suspension or revocation under RCW 46.20.0921(1)(e), a driver's license holder is entitled to a driver improvement interview where the licensee may file a written statement, present evidence, and make arguments regarding the proposed sanction. RCW 46.20.322; RCW 46.20.327. The Department issues written findings, and if they are adverse to the driver, the driver may then request a formal hearing to contest the Department's action. RCW 46.20.328.

Once a driver requests a formal hearing, any decision by the Department suspending or revoking a person's driving privilege is stayed

pending the outcome of the formal hearing *and* any subsequent appeal to superior court. RCW 46.20.329. At the formal hearing, a driver may have counsel, introduce evidence, subpoena witnesses, present argument, and receive a written ruling stating the basis in law and fact for the decision. RCW 46.20.332. The driver then has the right to appeal the Department's decision to superior court for a de novo trial. RCW 46.20.334.

These current procedures, including two full evidentiary hearings, are more than sufficient to protect against erroneous suspensions. The second *Mathews* factor, therefore, also does not support a heightened standard of proof.

c. The government has a strong interest in the authenticity of drivers' licenses which further supports the preponderance standard.

As to the third *Mathews* factor, the government's interest in regulating health, safety, and welfare concerns within its borders is accorded great weight. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975).

Here, ensuring a driver's license is authentic is a public safety and consumer protection concern because licenses are used as official identification. VRP 74-75. For example, RCW 46.20.017 requires drivers to have a valid driver's license in their "possession at all times when operating a motor vehicle" and to "display the same upon demand to any

police officer” if required by law. RCW 70.155.090 requires retailers or agents selling tobacco to request a purchaser present, among other options, a “driver’s license” which “shows the purchaser’s age and bears his or her signature and photograph.” The legislature has also explicitly found “the falsification of cards and licenses is a serious social problem creating economic hardship and problems which impede the efficient conduct of commerce and government.” Laws of 1977, 1st Ex. Sess., ch. 27, § 1; *see also* Purpose *in* RCW 46.20.114. The interest of the state and public in ensuring the authenticity of the driver’s licensing system supports the preponderance standard, and this standard does not deny due process.

2. The Department’s standard of proof is dependent on the private interest at stake, not the underlying conduct alleged.

Mr. Prostov alternatively asserts the clear, cogent, and convincing standard is required because the Department alleged he engaged in conduct tantamount to common law civil fraud. Br. of Appellant at 18. He is mistaken. If the government deprives a person of a liberty or property interest, the relevant due process inquiry is the interest at stake, not the underlying reason for the suspension. *See supra* Part V.B. Thus, the preponderance standard is appropriate for suspension of a driver’s license regardless of the reason the Department takes administrative action.

When analyzing due process challenges to driver's license suspensions, Washington courts have never indicated the underlying reason the Department seeks a suspension affects the due process inquiry. Rather, the court focuses on drivers' interest in their licenses. For example, in *City of Redmond v. Bagby*, 155 Wn.2d 59, 66, 117 P.3d 1126 (2005), the Supreme Court of Washington upheld a statute requiring mandatory license revocation without a pre-deprivation hearing when a driver is convicted of certain criminal traffic offenses, including vehicular homicide. The court analyzed the drivers' due process rights to a pre-deprivation hearing by examining their interest in their drivers' licenses. *Bagby*, 155 Wn.2d at 62-65. The seriousness of the underlying criminal conviction was not considered. *Id.* And in *Amunrud*, the court held that suspending a commercial driver's license for failure to pay child support did not violate due process. *Amunrud*, 158 Wn.2d at 218. The court analyzed the process due based on the interest in the driver's license, not that the deprivation was for unpaid child support. *Id.* at 217-18.

Similarly, in *Herman & MacLean v. Huddleston*, the United States Supreme Court held purchasers of stock seeking recovery for fraudulent misrepresentations under § 10(b) of the Securities Act of 1933 need to prove their cause of action only by a preponderance. 459 U.S. 375, 390-91, 103 S.Ct. 683, 74 L. Ed. 2d 548 (1983). The Court rejected the lower

court's reliance on the traditional use of a heightened standard proof in common law civil fraud actions. *Huddleston*, 459 U.S. at 388-89. Instead, the Court determined the appropriate evidentiary standard based on the interests at stake. Although fraud was alleged, the Court acknowledged that clear and convincing evidence was only required "where particularly important individual interests or rights were at stake." *Id.* at 389; *see also SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355, 64 S. Ct. 120, 88 L. Ed. 88 (1943) (action by SEC to establish fraud under Section 17(a) of the Securities Act requires preponderance of the evidence).

Accordingly, the reason the Department suspends a driver's license is not relevant in determining the process a driver is due. Instead, due process is determined by balancing the private interest at stake, the risk of erroneous deprivation, and the governmental interest. As outlined above, the preponderance standard satisfies due process in connection with the suspension of a person's driving privilege.

3. Even if the evidentiary standard were dependent on the underlying conduct alleged by the Department, the Department did not suspend Mr. Prostov's driver's license for fraud.

Even if the standard of proof were dependent on the underlying conduct alleged by the Department, the Department suspended Mr. Prostov's license pursuant to RCW 46.20.0921(1)(e), not based on an

allegation of common law fraud. Because RCW 46.20.0921(1)(e) lists the grounds for suspension in the alternative, the Department was only required to show that Mr. Prostov used a false or fictitious name in any application for a driver's license or identicard. As a result, common law fraud elements and standards of proof do not apply. This Court should give deference to the Department's interpretation of RCW 46.20.0921.

“The legislature is presumed not to include unnecessary language when it enacts legislation.” *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). Thus, “[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). The term “or” is a “‘function word’ indicating ‘an *alternative* between different or unlike things.’” *Lake*, 169 Wn.2d at 528 *citing* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1585 (2002) (emphasis in original).

The Department “is authorized to suspend the license of a driver upon a showing by its records” that the licensee has committed one of the prohibited practices defined in RCW 46.20.0921. RCW 46.20.291(7). One such prohibited practice is to:

use a false or fictitious name in any application for a driver's license or identicard *or* to knowingly make a false

statement *or* to knowingly conceal a material fact *or* otherwise commit a fraud in any such application.

RCW 46.20.0921(1)(e) (emphasis added). Mr. Prostov emphasizes that RCW 46.20.0921(1)(e) contains the word “fraud,” without discussion of the context in which that word appears. Br. of Appellant at 19-20; *State v. Flores*, 164 Wn.2d 1, 12, 186 P.3d 1038 (2008) (A “single word in a statute should not be read in isolation.”).

The statute is written in the disjunctive. The legislature did not restrict the Department’s authority to suspend a driver’s license to situations where the Department can prove “a fraud.” The Department is authorized to suspend Mr. Prostov’s license pursuant to RCW 46.20.0921(1)(e) based on several distinct actions, including, as in this case, where the court finds by a preponderance of the evidence that he “used a false or fictitious name in any application for a driver’s license or identicard.” CP 16-18; FF 2, 7-9.

When a statute does not require proof of all elements of common law fraud, the preponderance standard is appropriate.⁸ For example, in *Kirkham v. Smith*, 106 Wn. App. 177, 23 P.3d 10 (2001), the court held that a misrepresentation claim under the Franchise Investment Protections

⁸ In order to prove common law fraud, the plaintiff must establish: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (7) the latter’s reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage.

Act (FIPA) should be evaluated under a preponderance standard as opposed to the more stringent clear, cogent, and convincing standard required to prove common law fraud. The court reasoned that common law fraud requires proof of a knowing and intentional misrepresentation, and “[t]his level of requisite culpability corresponds directly to the use of a clear, cogent, and convincing standard in common law fraud claims.” *Id.* at 183. Unlike a common law fraud action, a FIPA misrepresentation claim does not require proof of scienter.⁹ *Id.* Rather, the language of the FIPA misrepresentation provision may apply to an unintentional misrepresentation or omission. *Id.* Because the plaintiff was not required to prove all elements of common law fraud, preponderance of the evidence was the appropriate standard. *Id.*

Like the FIPA misrepresentation claim in *Kirkham*, RCW 46.20.0921(1)(e) does not require the Department to prove all elements of common law fraud. The statute only requires the Department to prove a driver “use[d] a false or fictitious name.” 46.20.0921(1)(e). The Department does not have to prove the driver used the false or fictitious name with knowledge or intent, that the Department relied on

⁹ RCW 19.100.170(2) makes it “unlawful for any person in connection with the offer, sale, or purchase of any franchise or subfranchise in this state directly or indirectly: To sell or offer to sell by means of any writer or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading.”

this representation, or that the Department was damaged. Because the Department does not have to prove all elements of common law fraud, the preponderance standard is appropriate.

Further, although the last phrase of RCW 46.20.0921(1)(e) uses the word “fraud,” there is no indication the legislature intended to incorporate common law fraud requirements into the statute or create a heightened standard of proof. Contrary to Mr. Prostov’s assertion, the trial court did not conclude the phrase “otherwise commit a fraud in any such application” met the definition of civil fraud. Br. of Appellant at 19. It concluded the opposite:

Nor do I think that actually the definition of fraud is used in the same fashion here as it is in the civil arena, because it makes no sense that the department would not only have to prove all of the first eight elements of civil fraud, but also have to prove damages. The Department of Licensing doesn’t suffer damages . . . it’s not a tort action. So I don’t think we’re really talking about civil fraud in this instance.

VRP 162. This conclusion is legally sound.

When a plaintiff seeks to recover damages under a common law fraud tort action, the measure of damages is the “benefit of the bargain” or, alternatively, all losses proximately caused by the defendant’s fraud. *McRae v. Bolstad*, 32 Wn. App. 173, 646 P.2d 771 (1982). In the context of the license application process, the Department does not suffer damages in the same sense as a plaintiff in a common law fraud action. Therefore,

if a court construed the term “fraud” or any other provision within RCW 46.20.0921(1)(e) to be synonymous with common law fraud, the Department would be unable to take administrative action under this statute because it could never prove common law damages. The Legislature could not have intended, and this Court should not construe the statute to reach such an absurd and strained result. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (“The Court must also avoid constructions that yield unlikely, absurd or strained consequences.”). Accordingly, it does not follow that common law fraud requirements would apply under these circumstances.

Finally, the Department’s interpretation that RCW 46.20.0921(1)(e) does not require proof of all the elements of common law fraud for administrative action is entitled to deference. When an agency is charged with the administration and enforcement of a statute, the agency’s interpretation of the statute is accorded “great weight in determining legislative intent.” *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). The Legislature has given the Department broad authority and responsibility for carrying out the regulation of Washington drivers’ licenses. RCW 46.01.011, .030(1)-(4), .040(13); *see also* chapter 46.20 RCW. Specifically, the Department is charged with administering and enforcing

the state's licensing statutes related to vehicles and vehicle operators.
RCW 46.01.011.

Administrative action pursuant to RCW 46.20.0921(1)(e) does not require proof of fraud, and requiring a heightened standard of proof is unfounded. The Department's interpretation is not only entitled to deference, but is reasonable and consistent with case law and the statutory language.

C. Substantial Evidence Supports The Finding That Mr. Prostov Used A False Or Fictitious Name In Any Driver's License Application

Substantial evidence supports the trial court's finding that Yuri "use[d] a false or fictitious name in any application for a driver's license" by presenting himself to the Department as Geirman Prostov and requesting a license under that name, in violation of RCW 46.20.0921(1)(e). The Court should decline Mr. Prostov's invitation to reweigh the evidence on appeal.

1. Mr. Prostov used a false or fictitious name.

Substantial evidence supports the trial court's finding that Yuri Prostov used the false name of Geirman Prostov to obtain a driver's license on January 28, 2009. CP 16; FF 2. The court specifically found Mr. Prostov's own testimony and the court's visual observations of the licensing photos at issue confirmed that the license issued under the name

of Geirman Prostov on January 28, 2009 (Ex. T, U) contains the photograph of Yuri Prostov. CP 17-18; FF 7-9.

Yuri acknowledged that Exhibits K, R, and S were true and correct photos of himself and that Exhibits L and V were true and correct photos of his brother Geirman. VRP 84-89; CP 17; FF 8. Yuri further admitted that he has a scar on the right side of his face that extends from his upper lip to his right nostril, and that he has had this scar since at least 2001. VRP 101-04; CP 17; FF 7. His brother does not have a facial scar. VRP 106; CP 17; FF 7.

The court considered Mr. Prostov's admissions in conjunction with the photographic evidence. The court found the quality of the color photos was "quite good" and that Yuri's facial scar is "apparent" in all of the true and correct photos of him. VRP 171-72. The court further noted the true and correct photo of Geirman in Exhibit V is "significantly different" from the photo contained in the license issued on January 28, 2009, under Geirman's name in Exhibit T and U. VRP 171-72; CP 17-18; FF 7-9. Rather, the court pointed out the photos in Exhibit T and U contain the same visible scar and nose structure present in the true and correct photos of Yuri found in Exhibits R and S. VRP 169-72; CP 17-18; FF 7-9. Thus, substantial evidence supports the finding that Yuri used the false name of Geirman Prostov to obtain a driver's license.

Nevertheless, Mr. Prostov's brief spends significant time challenging the quality of the photographic evidence to imply the trial court gave too much weight to the licensing photos. Br. of Appellant at 22-25. However, this Court must defer to the trier of fact regarding the weight and persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75. Further, in a bench trial, the judge "is expected to bring his or her opinions, insights, common sense, and everyday life experiences" into the fact-finding process. *State v. Carlson*, 61 Wn. App. 865, 878, 812 P.2d 536 (1991).

Mr. Prostov also claims there is not substantial evidence in the record to support the findings because the Department did not offer facial or handwriting experts. Br. of Appellant at 22-25. An expert was not needed in this case because the trial court determined the photos speak for themselves. *See Harris v. Robert C. Groth, M.D. Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (expert testimony generally only required when essential element of case is beyond the expertise of a layperson). Based on the judge's own visual observations, the court was able to identify "significant" differences between the true and correct photos of Geirman and the photo found on the falsely obtained license. VRP 172; CP 17-18; FF 9. The trial court found the quality of the photographs to be "quite good," and noted Yuri's facial scar was "apparent" in the photos at issue.

VRP 171-72; CP 17-18; FF 9. Once the Department satisfied its burden, it had no duty to call additional witnesses.

Yuri further implies that the trial court impermissibly shifted the burden of proof when the court noted during its oral ruling that he did not call Geirman to testify on his behalf. Br. of Appellant at 12-14; VRP 172-73. However, it is clear in the context of the entire oral ruling that the trial court had determined the Department had met its burden, and Mr. Prostov had then presented no evidence to rebut the Department's case. VRP 159-73. Once the Department had met its burden, it was permissible for the court to consider Mr. Prostov's failure to call his brother to testify. *Krieger v. McLaughlin*, 50 Wn.2d 461, 464 n.8, 313 P.2d 361 (1957) (“[W]here the plaintiff makes a prima facie case, the failure of the defendant to produce any evidence warrants the inference that the testimony would be unfavorable to him . . . and may be considered by the jury.”). There is substantial evidence in the record to support the finding that Yuri represented himself as Geirman Prostov to the Department in order to obtain a license issued under his brother's name.

2. Mr. Prostov submitted a driver's license renewal application.

Substantial evidence also supports the finding that Yuri submitted an application with the Department by appearing in person at the Kirkland

Licensing Center and requesting a license under the name of Geirman Prostov. VRP 167-68; CP 16; FF 2; CL 6, 7. The January 28, 2009, driver's license issued to Yuri under the name of Geirman Prostov was renewed in person at the Kirkland Licensing Center, and the Department only issues a renewal license if a driver requests one. VRP 35; 65-66.

Yuri contends the Department failed to submit a *physical* application into evidence and, therefore, did not prove he provided false information *in an application*. Br. of Appellant at 26-27. However, RCW 46.20.0921(1)(e) makes it a violation to use a false or fictitious name in "*any application*," and renewal applications are submitted orally when done in person. VRP 66-67. Further, Chapter 46.20 RCW does not define application, and nothing in the plain language of RCW 46.20.0921(1)(e) limits the Department to proving Yuri provided the false information in a *physical* application. Rather, an application includes any "request or petition" by a driver to the Department seeking to obtain an original, duplicate, or renewal driver's license. BLACK'S LAW DICTIONARY 115 (9th ed. 2009) (defining "application").

When a driver appears at a licensing service center for a renewal license, the driver does not submit a paper application. VRP 66-67. Rather, the driver orally applies for a renewal license. VRP 66-67. The driver must present the license service representative with photo

identification or inform the representative of his or her name, date of birth, and address. VRP 68-70; CP 17; FF 4. The driver also must sign his or her name on a signature card and provide the card to the driver's license camera operator, who then takes the driver's picture and superimposes the signature on the driver's license. VRP 69-70.

The superior court found the 2009 license with Geirman's name bore Yuri's photo. CP 16; FF 2. The investigator testified that the Department's records showed that this license was renewed in person at the Kirkland licensing center. VRP 35-36; CP 16; FF 2. Because a licensee who renews in person has his or her photograph taken at the time of renewal, there is substantial evidence that Yuri, whose photo is on the 2009 renewal license, orally applied for the 2009 license. Thus, the fact the Department did not provide a hard copy application as evidence is of no consequence.

There is substantial evidence in the record to support the finding that Mr. Prostov submitted an oral application to the Department in order to obtain a license in the name of Geirman Prostov.

D. Mr. Prostov Did Not Have A Constitutional Right To A Jury Trial

Mr. Prostov further alleges he was deprived of a right to a jury trial. Br. of Appellant at 27-28. However, a de novo review under

RCW 46.20.334 consists “of a full and independent judicial, evidentiary, and factual review embracing, *on appropriate demand*, a jury trial.” *Dep’t of Motor Vehicles v. Andersen*, 84 Wn.2d 334, 340, 525 P.2d 739 (1974) (emphasis added). Mr. Prostov did not appropriately demand a jury trial.

Civil Rule 38 requires a party seeking a jury trial to serve a written demand on the other parties, file the demand with the clerk, and pay the jury fee required by law. CR 38(b). “[F]ailure of a party to” take any of these actions “constitutes a waiver by him of trial by jury.” CR 38(d). Here, Mr. Prostov satisfied none of the requirements of CR 38(b). He did not file a written demand with the clerk, serve a copy on the Department, or pay the jury fee.¹⁰ Accordingly, any right Mr. Prostov had to a jury trial was waived. *See Sackett v. Santilli*, 47 Wn.2d 948, 290 P.2d 465 (2002) (CR 38(d) is a constitutional exercise of the court’s rule making authority).

Even if Mr. Prostov had a constitutional right to a jury, he waived that right because he did not raise the issue with the trial court. *See State v. Wicke*, 91 Wn.2d 638, 646, 591 P.2d 452 (1979) (when CrR 6.1(a) written waiver of right to jury trial in criminal matter is overlooked, it is obligation of counsel to raise issue at trial court to preserve issue for

¹⁰ Acting as a pro se, Mr. Prostov faxed the Department a letter entitled “Petition For A Jury Trial.” However, this doesn’t constitute adequate service under CR 5(b)(1). In any event, Mr. Prostov never filed a demand with the clerk or paid the jury demand fee.

appeal).¹¹ Either way, any legal right Mr. Prostov had to a jury trial was waived.

E. Mr. Prostov Is Not Entitled To Attorney Fees Under EAJA

The trial court did not err in denying Mr. Prostov's request for attorney fees because his appeal stems from a suspension of his driver's license, a proceeding expressly excluded from judicial review under the Administrative Procedure Act (APA) and, therefore, from coverage under EAJA. RCW 4.84.350(1); RCW 34.05.030(2)(b). Even if EAJA applied, Mr. Prostov would not be entitled to fees because he did not prevail below and should not prevail on appeal.

1. Driver's license proceedings are excluded from coverage under the EAJA.

By its plain language, EAJA applies only to "judicial review" of proceedings arising from agency action. RCW 4.84.350(1). EAJA defines the term "judicial review" to mean "a judicial review as defined by [the APA]." RCW 4.84.340(4); *see* RCW 34.05. Mr. Prostov's appeal did not arise under the APA. He appealed his driver's license suspension under

¹¹ At any rate, Mr. Prostov did not have a constitutional right to a jury trial under the Sixth Amendment because he was not being criminally prosecuted. U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."). And it is unlikely that he had any right to a jury trial under article 1, section 21 of the Washington State Constitution because driver's license suspension did not exist at common law. *See Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 884, 224 P.3d 761 (2010) (whether there is a state constitutional jury trial right depends on whether the action is the type of action that was "within the jury's province in 1889.")

chapter 46.20 RCW. And the APA explicitly excludes “the denial, suspension, or revocation of a driver’s license by the department of licensing” from its judicial review coverage. RCW 34.05.030(2)(b). In arguing that EAJA applies, Mr. Prostov asks the Court to rewrite a decade of EAJA cases with an expansive reading of *Costanich v. Dep’t of Soc. and Health Servs.*, 164 Wn.2d 925, 194 P.3d 988 (2008). His reliance is misplaced.

The court in *Costanich* acknowledged that the use of the term “judicial review” in EAJA is ambiguous, but only with respect to whether the attorney fee cap applies separately to each level of review *under the APA* or all levels collectively. *Costanich*, 164 Wn.2d at 929–30; RCW 4.84.340(4). It did not overrule established case law holding that actions expressly excluded from the APA do not qualify for fees under EAJA. *E.g., Cobra Roofing Servs., Inc. v. Dep’t of Labor & Indus.*, 157 Wn.2d 90, 98, 135 P.3d 913 (2006) (claimant not entitled to fees under EAJA because industrial insurance appeals are specifically excluded from APA judicial review under RCW 34.05.030(2)(a)).

No ambiguity exists here because this case does not involve judicial review of agency action under the APA. As a result, Mr. Prostov is not entitled to attorney fees under EAJA.

2. Even if EAJA applied to Mr. Prostov's claim, he would not be entitled to attorney fees because he did not prevail.

Even if EAJA applied to Mr. Prostov's claim, he would not be entitled to attorney fees because EAJA authorizes them only for a "party that prevails." RCW 4.84.350. Mr. Prostov did not prevail below and should not prevail on appeal.

To have prevailed, a party must have "obtained relief" that achieved "some benefit" that the party sought. RCW 4.84.350. The agency action in this case was the Department's 364 day suspension of Mr. Prostov's driver's license. Mr. Prostov appealed this action, seeking a reversal of the Department's decision and a lift of the suspension. The trial court *upheld* the Department's decision and ordered suspension of Mr. Prostov's license for the full 364 days. As a result, Mr. Prostov obtained no relief and did not achieve the benefit he sought. He is not a prevailing party, and is not entitled to attorney fees.

Even in cases where EAJA applies and a party prevails, attorney fees and other expenses cannot be obtained if the agency action was substantially justified. RCW 4.84.350. An agency action is substantially justified when it "would satisfy a reasonable person" and "had a reasonable basis in law and fact." *Raven v. Dep't of Soc. & Health Servs.*,

177 Wn.2d 804, 832, 306 P.3d 920 (2013) (internal citations omitted).

There is no requirement that the action be correct. *Id.*

Here, the Department's facial recognition system flagged Mr. Prostov's record for additional review. VRP 27-28. An investigator with the Department's Licensing Integrity Unit independently investigated the issue, obtaining all of Mr. Prostov's photos, licenses, and identification cards on record with the Department, as well as photos of the flagged match, Geirman Prostov. VRP 29-30, 32-33; FF 6. Following a visual comparison, focusing on facial features that do not change over time, the investigator determined that Mr. Prostov had obtained driver's licenses in his brother's name on two separate occasions. VRP 25, 33, 66. Doing so constituted a prohibited act under RCW 46.20.0921, for which suspension is authorized by RCW 46.20.291, and mandated by WAC 308-104-075. As a result, the suspension of Mr. Prostov's license was reasonably based in law and fact, and would satisfy a reasonable person, making it a substantially justified agency action. For these reasons, the trial court did not err in denying Mr. Prostov's request for attorney fees.

3. Mr. Prostov is not entitled to attorney fees and costs on appeal

Because Mr. Prostov should not prevail on appeal, he is not entitled to attorney fees on appeal under RAP 18.1.

VI. CONCLUSION

For the foregoing reasons, the trial court's orders upholding Mr. Prostov's 364 day license suspension and denying attorney fees should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of August, 2014.

ROBERT W. FERGUSON
Attorney General



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Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Roxanne Immel, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 11th day of August 2014, I caused to be served a copy of **Brief of Respondent** as follows:

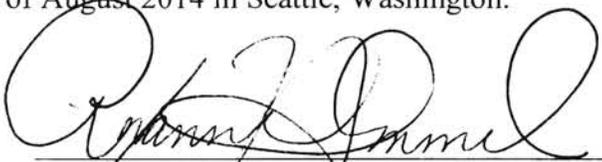
ABC Legal messenger
Gregory A. McBroom
Livengood Fitzgerald & Alskog
121 3rd Ave
Kirkland, WA 98083-0908

Original + 1 copy sent via ABC Legal messenger
Richard D. Johnson, Clerk
Court of Appeals Division I
600 University Street
Seattle, WA 98101-4170

2014 AUG 11 PM 2:51
COURT OF APPEALS
STATE OF WASHINGTON

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 11th day of August 2014 in Seattle, Washington.


Roxanne Immel, Legal Assistant