STATE OF IDAHO)
County of KOOTENAI) ss

FILED _____

AT _____ O'Clock ___ M
CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

RAYMOND V. SMITH,

Plaintiff,

VS.

STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION,

Defendants.

Case No. **CV 2010 10093**

MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW

I. PROCEDURAL HISTORY AND BACKGROUND.

Petitioner, Raymond Smith (Smith), seeks judicial review of the administrative hearing officer's Findings of Fact and Conclusions of Law and Order, issued on October 19, 2010. Smith asserts the administrative hearing officer's Order sustaining his license suspension was based on erroneous findings and conclusions, unsupported by substantial evidence, because the officer(s) who contacted Smith lacked legal cause for the stop. Petitioner's Brief in Support of Amended Petition for Judicial Review, p. 8. On August 13, 2011, Idaho State Police Dispatch "aired an unknown injury crash on State Highway 53, near Curley's Bar (milepost 01)." A.R., p. 8. Approximately ten minutes later, at 1:00 p.m., Idaho State Police Commercial Vehicle Specialist Kevin Murphy (Murphy) contacted Smith, who was at the Hauser Smoke Shop in Hauser Lake, Idaho, where Smith was parked and was putting air into one of his tires.

Petitioner's Brief in Support of Amended Petition for Judicial Review, p. 3. Corporal M. Lininger (Lininger) wrote in his report, "[t]he vehicle's left front tire was also flattened." A.R., p. 8. Prior to Murphy's contact with Smith, the Hauser Lake Fire Chief arrived and parked approximately ten to fifteen feet behind Smith, but did not make any contact with Smith. *Id.* Smith was parked facing a portable restroom, which blocked his exit forward, and with the Hauser Lake Fire Chief several feet behind him. *Id.* Murphy then "pulled in behind Smith with his blue lights activated further blocking Smiths [sic] ability to leave and, by doing so, relaying to Smith to [sic] he was not free to leave." *Id.* Murphy, upon contacting Smith, told Smith to remain where he was; approximately twenty minutes later, Lininger of the Idaho State Police arrived. Respondent's Brief, p. 2. Lininger was told by Murphy that Smith smelled of alcohol, but had denied having any alcoholic beverages. A.R., p. 8. Lininger then spoke briefly with the Fire Chief who informed Lininger that an unidentified party had informed the Fire Chief that a white pickup truck, matching the description of Smith's vehicle, had traveled westbound on Highway 53. Petitioner's Brief in Support of Amended Petition for Judicial Review, p. 5. Lininger asked Smith whether he had been in an accident, to which Smith replied he had driven off the roadway and into a ditch; an inspection of Smith's vehicle revealed left front corner damage, "including the parking light assembly hanging out of the vehicle." A.R., p. 8. Based on the odor of alcohol coming from Smith, and the officer's observation of Smith's glassy bloodshot eyes and slurred speech, Lininger performed field sobriety tests, which Smith failed. Respondent's Brief, p. 2. "Smith was read the ALS advisory notice and Smith was then given an evidentiary breath test. Smith's results were .298/.308…Smith was arrested and transported to the jail." *Id.*

A notice of suspension of driving privileges was provided to Smith on August 13, 2010. A.R., p. 1. Smith requested a hearing, which was held on October 13, 2010,

following which the hearing officer sustained the suspension of Smith's driving privileges via written Order on October 19, 2010. A.R., p 57. Smith timely appealed the Order on November 16, 2010. A.R., p. 61-62. This Court entered its Order staying Smith's license suspension pending his appeal on February 8, 2011.

Smith now seeks an Order of this Court reversing the suspension of his driver's license, arguing the hearing officer made incorrect findings of fact and conclusions of law because the hearing officer incorrectly concluded legal cause existed to stop Smith. Petitioner's Brief in Support of Amended Petition for Judicial Review, p. 6.

II. STANDARD OF REVIEW.

Review of decisions to deny, cancel, suspend, disqualify, revoke, or restrict driver's licenses is governed by the Idaho Administrative Procedures Act (IDAPA). *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. Reviewing Courts review the agency record on appeal independently. *Marshall v. Idaho Dep't of Transp.,* 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App. 2002). But reviewing courts do not substitute their judgment for that of the agency as to weight of the evidence presented. I.C. § 67-5279(1); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. An agency's findings of fact are deferred to unless they are clearly erroneous. *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial, competent evidence in the record. *Fischer v. City of Ketchum,* 141 Idaho 349, 109 P.3d 1091, 1094 (2005).

Courts may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed

the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. Of County Comm'rs,* 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

III. ANALYSIS.

A. Review of Administrative License Suspension.

Idaho Code § 18-8002A, the administrative license suspension statute, requires ITD to suspend the license of a driver who has failed a blood alcohol concentration (BAC) test. I.C. § 18-8002A(4). A hearing before a hearing officer designated by the ITD to contest such a suspension may be requested and, at this hearing, the burden of proof rests on the driver to prove any of the grounds sufficient to vacate suspension. I.C. § 18-8002A(7); *Kane v. State, Dep't of Transp.,* 130 Idaho 596, 590, 83 P.3d 130 134 (Ct.App. 2003). The hearing officer must uphold the decision to suspend a license unless the driver has shown: (a) the peace officer did not have legal cause to stop the person; (2) the officer did not have legal cause to believe the person was in driving or in actual physical control of the vehicle while under the influence; (c) the test results do not show an alcohol concentration or presence of substances in violation of the statute; (d) the tests for alcohol concentration, drugs or other substances administered were not conducted in conformance with statutory requirements; or (e) the person was not informed of the consequences of submitting to evidentiary testing as required. I.C. § 18-8002A(7); *Archer v. State Dept. of Transp.,* 145 Idaho 617, 610, 181 P.3d 543, 546 (Ct.App. 2008). At issue in the present case is the officer's legal cause for stopping Smith. Smith argues:

> …[S]ince Cpl. Lininger's report was deficient as to the facts, one must further speculate that the Fire Chief, upon finding a white truck in the general location, called to Dispatch which led to [sic] Specialist Murphy and Cpl. Lininger to the Hauser Smoke Shop and the immediate arrest of citizen Smith by telling him he was not free to leave both by Specialist Murphy's blue lights and then verbally.
>
> When all government officials approached the area, there was no injury accident which would have confirmed the initial call by the unidentified RP nor visible damage to Smith's vehicle. Furthermore, Cpl. Lininger only learned of Smiths [sic] driving onto the shoulder of the road (a non-reportable incident) after having required Specialist Murphy move his vehicle to the side of Smith's vehicle and then placing his own vehicle directly behind Smith's which further confirmed the seizure of Smith. There is no corroborating evidence leading to a nexus between the initial call and citizen Smith.

Petitioner's Brief in Support of Amended Petition for Judicial Review, pp. 5-6. Smith cites at length to this Court's decision in *State v. Bowmer,* CR 2008 7648 (Idaho Dist. May 26, 2009) in support of his contention that Murphy's seizure of Smith was improper because Smith was not perceived to be in need of immediate assistance from a community caretaking standpoint, and "there is absolutely no nexus between the initial call…and citizen Smith." *Id.,* pp. 9-10. Smith goes on to argue that he was not free to leave once Murphy arrived on the scene with his emergency lights activated and parked behind Smith. *Id.,* p. 12.

In response, ITD argues Murphy's contact with Smith, pursuant to Murphy's community caretaking duties, was entirely proper. Respondent's Brief, p. 11.

> …[T]he Specialist's contact with Smith was due to a report of an unknown injury car crash in the immediate area. Smith's vehicle was stopped, parked and disabled due to a flat tire. The Specialist's contact with Smith did not intrude on Smith's freedom to leave, Smith's inability to leave was due to his flat left front tire. Therefore, there was no seizure of Smith at that time because the public interest in conducting a status check outweighed the minimal intrusion involved. (citation omitted)

Id. And, ITD continues, even if the community caretaking function were not applicable, no seizure within the meaning of the Fourth Amendment occurred until Lininger

requested Smith's driver's license. *Id.,* pp. 11-13. Further, ITD argues the contact between Murphy and Lininger on the one hand and Smith on the other did not amount to a detention in light of the factors cited by the Idaho Court of Appeals in *State v. Jaborra,* 143 Idaho 94, 137 P.3d 481 (Ct.App., 2006), because: law enforcement contact with Smith occurred during the day; the contact was cordial; there was no traffic stop as Smith's vehicle was disabled; Smith's driver's license was not taken during the initial contact; and no officer "touched Smith, displayed a weapon or exhibited other intimidating behavior that indicated that Smith was not free to simply discontinue the initial contact and walk away." *Id.,* p. 16. Finally, ITD notes Smith's argument that no nexus between the injury accident call and Smith existed is without merit. *Id.* ITD points to evidence in the record which amply supports the hearing officer's finding of a nexus between Smith's vehicle and the reported automobile accident. *Id.,* citing A.R., p. 53. This evidence includes the location of Smith's vehicle being in close proximity, both temporally and physically, to the reported accident, Smith's inflating a tire at the time he was contacted by law enforcement, the damage to Smith's vehicle, and Smith's admission that he had driven into a ditch. *Id.,* p. 17. The Court agrees with ITD's arguments. First of all, there is a nexus…Smith's truck was found with a flat tire not far from the area of the reported accident. Second, even if there was no nexus, law enforcement had every right to start a conversation with Smith since he was stopped of his own volition trying to fill up his flat tire. Even if there had been no call into dispatch reporting an accident, it simply would not have mattered because law enforcement had the ability to initiate a discussion with Smith.

B. Community Caretaking.

The Fourth Amendment prohibits unreasonable searches and seizures; its

purpose is to impose a standard of reasonableness on the discretion exercised by government agents. *Delaware v. Prouse,* 440 U.S. 648, 653-54, 99 S.Ct. 1391, 1396 (1979); *State v. Maddox,* 137 Idaho 821, 824, 54 P.3d 464, 467 (Ct.App. 2002). Investigative detentions may be constitutionally permissible when they are based on reasonable suspicion, derived from articulable facts, that the individual involved has committed or is about to commit a crime. *State v. Salato,* 137 Idaho 260, 264, 47 P.3d 763, 767 (Ct.App. 2001). "Nevertheless, reasonable suspicion of criminal activity is not the only justification for a limited seizure of a person. [Citations omitted]. A detention may also be reasonable under the officer's community caretaking function." *State v. Cutler,* 143 Idaho 297, 302, 141 P.3d 1166, 1171 (Ct.App. 2006) (citing *State v. Maddox,* 137 Idaho 821, 824, 54 P.3d 464, 467; *State v. Mireles,* 133 Idaho 690, 692, 991 P.2d 878, 880 (Ct.App. 1999). Reasonableness in community caretaking cases is determined by balancing public need for the police conduct against the degree and nature of the intrusion on citizens' privacy. *State v. Page,* 140 Idaho 841, 844, 103 P.3d 454, 457 (2004). "Among the core community caretaking activities are the responsibilities of police to search for missing persons, mediate disputes, aid the injured or ill, and provide emergency services." *State v. Cutler,* 143 Idaho 297, 302, 141 P.3d 1166, 1171, citing *State v. Diloreto,* 180 N.J. 264, 850 A.2d 1226, 1236 (2004). For the community caretaking function analysis to be applicable, officers must have a subjective belief that an individual is in need of immediate assistance, "although the officer may harbor at least an expectation of detecting or finding evidence of a crime." *Schmidt,* 137 Idaho 103, 304, 47 P.3d 1271, 1274.

As conceded by the parties, contact between law enforcement and individuals only triggers the Fourth Amendment where such contact is non-consensual. *Florida v.*

Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386 (1991). Contact is deemed consensual if a reasonable person would feel free to disregard the officer and go about his or her business. *Id.* Further, the Fourth Amendment is not implicated if independent factors prevent an individual from departing. *State v. Nickel,* 134 Idaho 610, 613, 7 P.3d 219, 222 (2000) citing *State v. Jordan,* 122 Idaho 771, 773-74, 839 P.2d 38, 40-41 (Ct.App. 1992) (no seizure occurred where an officer questioned a driver stopped at a red light, although the red light prevented the driver from leaving.) Although an officer's activating his overhead lights does not amount to a *de facto* seizure requiring a driver to stop and remain stopped pursuant to I.C. § 49-625 (Operation of Vehicles on Approach of Authorized Emergency or Police Vehicles) where a vehicle is stationary and not upon a highway, overhead lights are a significant factor for the Court to consider in the totality of the circumstances. *State v. Willoughby,* 147 Idaho 482, 487, 211 P.3d 91, 96 (2009). And, a law enforcement officer's action to block a vehicle's exit route is yet another factor for the Court to consider in determining whether a seizure has occurred. *Id.,* 147 Idaho 482, 488, 211 P.3d 91, 97 (citing W. LAFAVE, SEARCH AND SEIZURE § 9.2(h) at 413-14 (2d. ed. 1987)).

Here, however, Smith's vehicle was disabled via a flat tire, which he was attempting to inflate at the time Murphy contacted him. *Jordan* holds that the Fourth Amendment is not implicated where factors outside the actions of law enforcement prevent a driver from leaving. Jordan was stopped on a public street when law enforcement asked him questions through his open window. 122 Idaho 771, 773-74, 839 P.2d 38, 40-41. Examples from other jurisdictions were given where being stopped at a traffic light, stopped at a stop sign, stopped to pick up a passenger and stopped at a toll booth were all held to be instances where the defendant was stopped of his own

volition, and not at the direction of law enforcement. *Id.* Thus, even if Smith felt he was not free to disregard Murphy, and later Lininger, he was nonetheless unable to leave because of his immobile vehicle. It was Smith's own vehicle which restricted Smith's movement, not the actions of law enforcement. *Cf. State v.Maland,* 140 Idaho 817, 820, 103 P.3d 430, 433 (2004) (a seizure is initiated through the words and/or actions of law enforcement conveying to a reasonable person that the officer is ordering him to restrict his movement). Additionally, as Smith was unquestionably seized at the time he was told to remain where he was, the Court is faced with the question of the overall reasonableness in Lininger's and Murphy's seizure of Smith. Seizure of an individual may be reasonable in light of an officer's community caretaking function; the Court must balance the need for police conduct against the degree and intrusion on a citizen's privacy. *Page*, 140 Idaho 841, 844, 103 P.3d 454, 457. In the instant matter, law enforcement received a call regarding an injury accident and made contact with Smith, whose vehicle was parked while Smith was inflating a tire. The Court is thus balancing the intrusion of Murphy's and Lininger's contact with Smith against the need for police conduct in investigating the injury accident call. As discussed *supra,* Smith's inability to exit the scene was in large part due to his flat tire. Investigation of a possible injury accident when weighed against the intrusion of Murphy, and later Lininger, interacting with Smith, is reasonable. Upon making contact with Smith, Murphy "could smell the obvious and distinct odor of an intoxicating beverage", and was informed by Smith that Smith had not consumed any alcohol, but was a diabetic. A.R., p. 8. It follows that the initial, unobtrusive contact between Murphy and Smith gave rise to an articulable, reasonable suspicion that Smith had consumed alcohol and operated a motor vehicle, driving it into a ditch, once Murphy smelled alcohol on Smith. In *State v. Wigginton,*

142 Idaho 180, 125 P.3d 536 (Ct.App. 2005), the Court of Appeals cited with approval foreign jurisdiction case law holding the smell of alcohol alone or in conjunction with other factors is sufficient for probable cause to search a vehicle to exist. 142 Idaho 180, 183, 125 P.3d 536, 539.

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Alabama v. White, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416 (1990). Hence, the smell of alcohol coming from Smith certainly gave rise to a reasonable suspicion on the part of law enforcement. This reasonable suspicion was only bolstered by the proximity, temporally and geographically, of Smith's vehicle to the reported accident and Smith's statement to Lininger that he had driven off the roadway and into a ditch. Further investigation by the officers, as found by the hearing officer, was both reasonable and appropriate. *See* A.R., p. 53.

At oral argument, counsel for Smith urged the Court to review the DVD of the events recorded from within Lininger's vehicle. The DVD provided to the Court only had partial audio, and Smith's counsel's contention that the Court would hear a colloquy between Murphy and Lininger pertaining to their reasons for interacting with Smith was simply not borne out. The DVD provided to the Court only properly played audio while Lininger was en route to the Hauser Smoke Shop. Counsel for Smith also unequivocally stated Smith was told to remain where he was by Murphy, effectively resulting in a seizure, *before* Murphy smelled any alcohol on Smith. Again, this was not supported by the DVD, as Murphy's interaction with Smith took place before Lininger's arrival on the scene, and it was Lininger's vehicle from which the video was shot.

Substantial evidence in the record, via Lininger's police report, indicated Murphy interacted with Smith closely enough to have smelled alcohol on him prior to Lininger's arrival.

Importantly, there are three categories of encounters between citizens and police: (1) full-scale arrests for which the Fourth Amendment requires probable cause be present; (2) *Terry* Stops which require reasonable suspicion of criminal activity; and (3) voluntary consensual encounters which fall outside the purview of the Fourth Amendment. *State v. Knapp,* 120 Idaho 343, 346, 815 P.2d 1083, 1086 (Ct.App. 1991) (citing *State v. Zapp,* 108 Idaho 723, 701 P.2d 671 (Ct.App. 1985)). As conceded by Smith, law enforcement may approach individuals and speak with them, regardless of the presence or absence of any reasonable suspicion that criminal activity is afoot. Petitioner's Brief in Support of Amended Petition for Judicial Review, p. 11. The Court is to focus on whether police conduct would have communicated to a reasonable person that they were not free to ignore police presence and go about his business. *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 2387 (1991). Here, as noted *supra,* Smith was unable to go about his business due to his immobile vehicle, not because of any detention. Upon contacting him, Murphy's observing the strong smell of alcohol on Smith gave rise to at least a reasonable suspicion that Smith was engaging in the criminal activity of driving under the influence.

C. Anonymous Tip

Smith's concerns regarding an arguably uncorroborated anonymous tip are of little import here. Smith was not the subject of a traffic stop, but rather, was contacted by law enforcement while outside his disabled vehicle. An uncorroborated anonymous tip is generally insufficient to justify an investigative stop because "an anonymous tip

alone seldom demonstrates the informant's basis of knowledge or veracity." *Alabama v. White,* 496 U.S 325, 329, 110 S.Ct. 2412, 2416. But, here, there was no traffic stop, and, as found by the hearing officer, a nexus existed between the reported injury crash and Smith's vehicle in light of facts including Smith's location, Smith's vehicle being immobile due to a flat tire, and Smith's conceding he had driven off the roadway and into a ditch.

D. Attorney Fees.

Smith moves this Court for an award of attorney fees under I.C. § 12-121 and I.A.R. 41. Petitioner's Brief in Support of Amended Petition for Judicial Review, pp. 13-14. Smith argues in unsupported, conclusory fashion that ITD defended the appeal frivolously, unreasonably, or without foundation. *Id.* In response, ITD notes it acted with a reasonable basis in fact or law, and I.C. § 12-117 prohibits this Court from awarding attorney fees against an agency on a petition for review. Respondent's Brief, p. 17.

ITD's arguments are well-taken in this regard. Idaho Code § 12-117, amended by the Idaho legislature in 2010, no longer permits the Court to award fees in an appeal from an administrative decision. *Smith v. Washington County,* 150 Idaho 388, ___, 247 P.3d 615, 617-19 (2010) (attorney fees pursuant to I.C. § 12-117(1) are not available on petitions for review because a petition for review is neither an "administrative proceeding" nor a "civil judicial proceeding.") And, in light of the foregoing, Smith has not demonstrated ITD acted frivolously, unreasonably, or without foundation in defending his petition for review.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED the Findings of Fact, Conclusions of Law and Order entered by the Hearing Officer is AFFIRMED in all aspects. Smith's Petition for Review is DENIED. Smith's request for attorney fees is DENIED.

IT IS FURTHER ORDERED THAT the stay entered on February 8, 2011, by this Court is RESCINDED; Smith's license is suspended effective immediately.

Dated this 28th day of June, 2011.

_____
John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of June, 2011 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Henry D. Madsen Susan K. Servick

By _____
Jeanne Clausen, Secretary