

APPELLATE COURT CASE NO: A06-2291

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Harold Andrew Riehm,

Petitioner-Appellant,

vs.

State of Minnesota,
Commissioner of Public Safety,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

LORI SWANSON

Minnesota Attorney General and
Peter D. Magnuson
1800 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
Tel: 651-296-1352

AYERS & RIEHM, P.A.

David L. Ayers
Attorney ID: 3621
Suite 100, Riverwood Place
880 Sibley Memorial Highway
Mendota Heights, MN 55118
Tel: 651-552-8400

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR APPELLANT

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

LEGAL ISSUE INVOLVED.....iii

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS.....1

ARGUMENT.....2

I. APPELLANT'S DRIVER'S LICENSE REVOCATION MUST
BE RESCINDED BECAUSE RAMSEY COUNTY'S
SYSTEM FOR SCHEDULING A JUDICIAL REVIEW
HEARING IN HIS IMPLIED CONSENT PROCEEDING
DENIED APPELLANT HIS STATUTORY AND
CONSTITUTIONAL RIGHTS TO PROMPT JUDICIAL
REVIEW

CONCLUSION.....15

CERTIFICATE OF BRIEF LENGTH.....16

INDEX TO APPELLANT'S APPENDIX.....17

TABLE OF AUTHORITIES

Minnesota Statutes	<u>Page(s)</u>
Minn. Stat. §169.123, sudbs. 5 and 5a.....	11
Minn. Stat. §169.123, subd. 5c.....	11
Minn. Stat. §169.123, subd. 6.....	11
Minn. Stat. §169A.50, et. seq.....	1
Minn. Stat. §169A.52, subds. 3 and 4.....	3
Minn. Stat. §169A.52, subd. 6.....	3
Minn. Stat. §169A.53, subd. 3.....	4,8,9,13
Minn. Stat. §169A.53, subd. 3(a)	3, 4,13,14
Minnesota Cases	
<u>Bendorf v. Commissioner of Public Safety</u> , 727 N.W.2d 410 (Minn. 2007)	5,6,7,8,12,13
<u>Fedziuk v. Commissioner of Public Safety</u> , 696 N.W.2d 340 (Minn. 2005)	4,6,7,9,11,13,14,15
<u>Heddan v. Dirkswager</u> , 336 N.W.2d 54, 61 (Minn. 1983)	11
<u>Heller v. Wolner</u> , 269 N.W.2d 31 (Minn. 1978)	9
<u>Lord v. Frisby</u> , 108 N.W.2d 769 (Minn. 1961).....	10
<u>Szczech v. Commissioner of Public Safety</u> , 343 N.W.2d 305 (Minn. Ct. App. 1984)	8,9

LEGAL ISSUE INVOLVED

DID THE TRIAL COURT ERR IN CONCLUDING THAT APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY RAMSEY COUNTY'S POLICY, WHICH CAUSED HIS IMPLIED CONSENT CASE TO BE SCHEDULED FOR TRIAL, INITIALLY, 172 DAYS AFTER FILING THE PETITION FOR JUDICIAL REVIEW?

The trial court held: The trial court issued an order sustaining the Commissioner's Order of Revocation.

Most Apposite Cases

Fedziuk v. Commissioner of Public Safety, 696 N.W.2d 340 (Minn. 2005)

Bendorf v. Commissioner of Public Safety, 727 N.W.2d 410 (Minn. 2007)

STATEMENT OF THE CASE

This appeal arises from an order of the Ramsey County District Court, the Honorable James H. Clark, Jr., presiding, upholding the Commissioner of Public Safety's revocation of appellant's driving privileges, under the implied consent statute, Minn. Stat. 169A.50, et seq.

STATEMENT OF FACTS

On October 27, 2005, appellant was arrested for DWI and issued a Notice and Order of Revocation. On November 17, 2005, Appellant filed a petition for judicial review of driver's license and privileges with the court, challenging the revocation of his driver's license. On November 21, 2005, Ramsey County Court Administration sent a letter to appellant's attorney informing him that the implied consent case would not be scheduled for trial until after the criminal case was resolved; however, appellant could apply for a stay of the balance of the driver's license revocation. Accompanying the letter was an unsigned "standing order." Both of these documents were received as "stipulated evidence" at trial. Appellant did not seek a stay.

Appellant's case was subsequently scheduled for hearing, for the first time, on May 8, 2006, 172 days after he filed his petition for judicial review. Ultimately, the case was heard on July 17, 2006, 243 days after he filed his petition for judicial review.

Appellant's driver's license record was also received as "stipulated evidence" at trial. As verified by the driver's license record, appellant's driver's license was revoked for 90 days; his driver's license & privileges were fully reinstated at the time of the initial hearing.

ARGUMENT¹

Appellant's driver's license revocation must be rescinded because Ramsey County's system for scheduling a judicial review hearing in his implied consent proceeding denied appellant his statutory and constitutional rights to prompt judicial review.

Introduction

Appellant's driver's license was revoked under the implied consent law. Appellant petitioned for review of that revocation in Ramsey County District Court. Rather than scheduling a hearing, the court administrator sent a letter to appellant's lawyer stating that a hearing would not be scheduled until after appellant's criminal DWI proceeding was concluded. This letter was sent to appellant pursuant to a procedure governed by a standing order in Ramsey County that forbids scheduling a judicial review hearing in any implied consent case until after the related criminal case is resolved. Appellant's revocation must be rescinded, however, because Ramsey County's standing order is unlawful

¹ This appellate brief is a collaborative effort of several lawyers (David L. Ayers, Roger A. Gershin, Peter J. Timmons and David Valentini), all of whom are active members of the Minnesota Society for Criminal Justice (MSCJ). The issues are identical; therefore, the substantive body of the briefs are identical. Only the caption of the case, Statement of the Case and Statement of Facts will vary. Some of the lawyers have more than one case on appeal. All appeals arise out of district court decisions in either Ramsey or Hennepin counties. This collaborative approach is presented in an effort to maximize both client and judicial economy.

and denied appellant his statutory and constitutional rights to prompt judicial review.

Minn. Stat. § 169A.53, subd. 3(a), provides in relevant part that:

[An implied consent] hearing must be held at the earliest practicable date, **and in any event no later than 60 days** following the filing of the petition for judicial review. The judicial district administrator shall establish procedures to ensure efficient compliance with this subdivision. To accomplish this, the administrator may, whenever possible, consolidate and transfer review hearing among the locations within the judicial district where terms of district court are held.

(emphasis added).

In this case, under the authority of a “standing order” implemented by the Chief Judge of the Ramsey County District Court, appellant’s hearing was scheduled for the first time 172 days after he filed his petition for judicial review. This was clearly well outside the time permitted by the implied consent statute, and violated appellant’s right to prompt judicial review under both the implied consent statute and the Due Process Clause.

Statutory and Due Process Requirements

The implied consent law grants to the Commissioner of Public Safety the extraordinary power to revoke a driver’s license on nothing more than a police officer’s “certification” that, in the officer’s opinion, the driver violated the DWI law. Minn. Stat. § 169A.52, subds. 3 and 4. The revocation occurs immediately at the conclusion of the officer’s investigation. Minn. Stat. § 169A.52, subd. 6. But because drivers have a constitutionally protected property interest in their

licenses, the state's ability to revoke a license before a meaningful hearing depends entirely on whether the state has adequate procedural protections in place before the taking. Fedziuk v. Comm'r of Pub. Safety, 696

N.W.2d 340 (Minn. 2005). One of those **required** protections is a guarantee that a meaningful hearing on the propriety of the revocation will be held promptly. Id.

In 2003, the legislature amended the implied consent statute by removing the prompt hearing language from Minn. Stat. § 169A.53, subd. 3. But the Minnesota Supreme Court held that the 2003 version of the implied consent statute was unconstitutional because it did not provide a statutory requirement for prompt judicial review of a license revocation. Id. at 348-49 (construing Minn. Stat. § 169A.53, subd. 3(a) (2004)). The court then revived the previous version of the statute, which provided that the hearing must be held at the earliest practicable date, and in any event no later than sixty days after the filing of the petition. Id. at 349.

In response to the Fedziuk decision, the legislature amended the judicial review statute to conform to the supreme court's order as follows: "The hearing must be held at the earliest practicable date, and in any event, no later than 60 days following the filing of the petition for review." Minn. Stat. § 169A.53, subd. 3(a) (2005). **In addition, the statute provides that the "judicial district administrator shall establish procedures to ensure efficient compliance with this subdivision."** Id.

Ramsey County's standing order procedure, however, does not comply with either the statutory requirement that the review hearing be held at the earliest practicable date and in any event no later than sixty days or with the constitutional requirement of a prompt hearing. In fact, the procedure, which specifically forbids the scheduling of a review hearing until after the related criminal case is resolved, virtually ensures that the hearing will **not** occur until later than sixty days and completely ignores any consideration of "earliest" practicability in scheduling. Such a process clearly violates the current statutory requirements and the supreme court's holding and thereby violates petitioner's right to prompt judicial review.

Statutory Violation

Under Ramsey County's standing order procedure, petitioner's driving privileges were temporarily reinstated for the period during which he was forced to wait for the deliberately delayed hearing. But the county's policy of temporary reinstatement does not cure the violation of the implied consent statute. Nor does the supreme court's recent decision in Bendorf v. Comm'r of Pub. Safety, 727 N.W.2d 410 (Minn. 2007).

In Bendorf, the supreme court held that the driver's due process rights were adequately protected by temporary reinstatement. Id. at 417. But the driver in that case had not been subjected to a blanket order denying prompt judicial review. Id. at 417, n.10. Therefore, the supreme court did not address the

question of whether a county-wide policy **that virtually guarantees no driver will have a hearing within the time required by law** violates a driver's rights under the implied consent statute. Id.

Although the supreme court held that under the facts of the case, the driver was not prejudiced by the lack of prompt judicial review, the Bendorf decision does **not** stand for the proposition that district courts do not even need to **try** to schedule hearings on license revocation challenges at the earliest practicable date and in any event within sixty days. Likewise, the decision does **not** stand for the proposition that a stay of revocation is an acceptable routine alternative to compliance with the requirement that hearings be held at the earliest practicable date.

Both the implied consent statutes and the supreme court's holding in Fedziuk require that the court administrator establish procedures to ensure prompt judicial review. The statutory provision for the stay of a revocation is clearly intended only as a safety net for those petitioners whose cases **could not** be heard at the earliest practicable date and in any event no later than sixty days. It is not intended as an automatic alternative for those court administrators who decide they **will not ever** schedule prompt hearings.

In Bendorf, the supreme court recognized the temporary reinstatement provision of the implied consent statute as a remedy for petitioners whose cases could not be heard at the earliest practicable date. Id. at 416. But the Bendorf case did not involve a situation like the present one in Ramsey County, where

the chief judge has essentially ordered the court administrator to refuse to schedule hearings at the earliest practicable date.

The driver in Bendorf had his driver's license revoked in 2005, when the governing statute provided no time period for conducting the review hearing and while the supreme court was considering, in Fedziuk, the constitutionality of the absence of a statutory time period. Bendorf, 727 N.W.2d at 412. That is, he was not subject to a standing order depriving all drivers of swift hearings. Id. Rather, he was subject to a statute that was subsequently held unconstitutional, and the supreme court held that he was not prejudiced by the statute because his revocation was stayed until a hearing was held. Id. at 415-17.

The situation in appellant's case is entirely different, however, because Ramsey County has implemented a system in which no driver gets a hearing at the earliest practicable date. Instead of scheduling revocation hearings at the earliest practicable date, the Ramsey County system does not schedule a hearing at all, and then automatically stays license revocations for every driver who petitions for judicial review until after the related criminal case is resolved.

But even a policy of automatic temporary reinstatement does not absolve the court administrator of the statutory obligation to schedule every review hearing as soon as practicable and in no event later than sixty days. Rather, the statutory remedy of temporary reinstatement is a remedy for those cases in which a speedy hearing simply was not possible, despite the court administrator's best efforts.

Scheduling license revocation hearings at the earliest practicable date is mandatory under the implied consent statute. The safety net of a stay of revocation recognizes that in some instances, despite everyone's best efforts, a speedy hearing is just not possible. But it does not obviate the requirement that the court administrator make every effort to schedule a prompt hearing or the requirement that the court administrator implement procedures to ensure prompt hearings. The statute simply cannot be read as condoning the planned refusal to schedule prompt hearings. **Speedy review is not something to which courts should aspire; it is something courts must guarantee.** And in this case, Ramsey County did not even aspire to comply with the legislature's and the supreme court's commands.

The supreme court did not address in Bendorf the question of whether the statutory requirement that hearings be held at the earliest practicable date and in any event no later than sixty days was "mandatory," focusing instead on whether the driver was prejudiced because he did not have a prompt hearing. Bendorf, 727 N.W.2d at 415. But the issue in this case is whether the county has the authority to flout the explicit mandate of the implied consent statute for prompt judicial review. Accordingly, the interpretation of Minn. Stat. § 169A.53, subd. 3, is at stake and therefore this court must address the issue of whether the requirement in the statute is mandatory rather than directory.

In Szczzech v. Comm'r of Pub. Safety, 343 N.W.2d 305, 305-306 (Minn. Ct. App. 1984), this court held that the failure to conduct a hearing within sixty days

was not a basis to rescind the revocation of the driver's license because the statute did not specify a remedy for the failure to hold a timely hearing. Id. Because no remedy was listed in the statute, the court ruled that the prompt hearing language in the statute was "directory" rather than "mandatory." Id. at 308. This holding, however, was based on the holding in a previous supreme court decision, Heller v. Wolner, 269 N.W.2d 31 (Minn. 1978). Id. at 308-309. But in Fedziuk, the court distinguished Heller v. Wolner: "We believe that the language removed from Minn. Stat. § 169A.53, subd. 3, is distinguishable from the language we called 'directory' in Heller v. Wolner . . . because of the due process requirement of promptness involved in this case." Fedziuk, 696 N.W.2d at 347, n.9.

Thus, the holding in Szczech that the statutory time period for review hearings is directory, not mandatory, was implicitly rejected in Fedziuk, at least with respect to cases involving the due process requirement of process.

Moreover, the statute itself could not contain a clearer statement that prompt review, or at the very least, every effort at prompt review, is required: the hearing "**must** be held at the earliest practicable date;" "in any event not later than 60 days;" the court administrator "**shall** establish procedures ..." (emphasis added). A standing order that forbids even an attempt at compliance with this clear statutory language offends the mandate of the statute itself. And even if, by any stretch of the imagination, the statute's language could be construed as directory, Ramsey County certainly does not have the authority to blatantly,

purposefully, systematically ignore that direction. See State by Lord v. Frisby, 260 Minn. 70, 77, 108 N.W.2d 769, 773 (1961) (even when a statute is “directory,” a duty nevertheless exists for comply with it as nearly as possible).

Here, the policy adopted by the Ramsey County District Court does not even attempt to ensure that hearings are set “as soon as practicable.” Rather, the entire system depends on the scheduling and completion of a completely separate criminal proceeding, the outcome of which has no bearing on the individual merits of the implied consent case. Ironically, the standing order procedure itself concedes that earlier dates are available, because a driver can have an implied consent hearing at the earliest practicable date as long as no criminal case is pending. But the statute does not tie the prompt hearing requirement to a criminal case, and the Commissioner of Public Safety and the court are obligated to comply with the statute, not defy it.

Additionally, the Ramsey County system does not comport with the clear intent of the legislature that revoked licenses should remain revoked unless and until a judge rescinds the revocation after a full and fair hearing. In fact, the “earliest practicable date” requirement was added to the implied consent statute when the legislature abolished the process of automatic temporary license reinstatement for all drivers pending review of their challenges.

The implied consent statute used to provide that any driver who challenged a license revocation received a stay of revocation when a petition for judicial review was filed. Under the system in effect before July 1, 1982, a driver was

given a thirty-day temporary license with the notice of revocation. Minn. Stat. § 169.123, subd. 5a (1980). The driver had the right to challenge the license revocation by requesting a judicial hearing. Id. If the driver requested a hearing, a temporary license was issued until the judicial review process was complete. Id.

In 1982, the legislature amended the implied consent statute to reduce the time between an implied consent violation and the imposition of license revocation from thirty days to seven days. Minn. Stat. § 169.123, subds. 5 and 5a (1982). The amendment also provided that “[t]he filing of the petition [for judicial review] shall not stay the revocation or denial.” Minn. Stat. § 169.123, subd. 5c (1982). Thus, under the 1982 amendments, temporary reinstatement was not allowed while judicial review was pending, a clear indication that the legislature intended to prevent alleged drunk drivers from driving unless and until a reviewing body determined revocation was inappropriate.

The supreme court upheld the 1982 statute in part because it required that hearings occur at the earliest practicable date or in any event no later than sixty days. Heddan v. Dirkswager, 336 N.W.2d 54, 61 (Minn. 1983) (citing Minn. Stat. § 169.123, subd. 6 (1982)). When the legislature removed the swift hearing requirement from the implied consent statute, however, the supreme court held that the prehearing revocation scheme violated due process. Fedziuk, 696 N.W.2d at 348-49).

Obviously, the 2005 legislature added back the earliest practicable date requirement to the implied consent statute to comply with the holding in Fedziuk.

By doing so, the legislature reaffirmed its intent to maintain a prehearing revocation scheme. The legislature clearly did not intend by that amendment to condone automatic temporary reinstatement of all challenging drivers instead of swift hearings.

The prompt review requirement mandates the district court's best efforts at getting implied consent cases heard at the earliest practicable date and mandates the establishment of procedures to ensure this happens, both to protect drivers' due process rights and to protect the public's safety. Ramsey County's system for handling implied consent cases blatantly flouts the policy underlying the prompt review requirement: to avoid having to reinstate alleged drunk drivers pending review. More importantly, subjecting appellant to that policy violates his right under the implied consent statute to prompt judicial review.

Due Process Violation

In Bendorf, the supreme court held that the driver's right to procedural due process was not violated because the temporary reinstatement of his license while his case was pending meant he had not been prejudiced by the court's failure to conduct his hearing within sixty days. 727 N.W.2d at 415-17. But the court explicitly distinguished the due process problem of delayed judicial review, where temporary reinstatement may be able to cure any prejudice, from broad attacks on systematic court procedures that ***deliberately*** do not comply with the statutory requirement of a prompt hearing. The court addressed the former

situation, the one the driver in Bendorf faced, where the court **could** not schedule a hearing within sixty days. In such situations, due process likely will be satisfied if the court temporarily stays the balance of the revocation. Id. at 417.

But here, petitioner faced the latter situation: it was not that the court **could not** schedule a timely hearing, it was that the court, under the county's standing order procedure, **would not** even try to do so. The court in Bendorf specifically held that it was not addressing that issue:

Bendorf advanced arguments concerning the procedures being used in counties other than the one in which his case was processed and he contends that these procedures violate the Due Process Clause and Minn. Stat. § 169A.53, subd. 3, because there is no effort made in these counties to schedule hearings on petitions for judicial review within 60 days. Because these facts are not before us, we do not address them in this case.

Id. at 417, n.10. Because those facts are before this court now, that issue must be directly addressed.

The Ramsey County standing order system, under which appellant's request for judicial review was processed, replaced the constitutional process provided by the implied consent statute with the very process the supreme court found unconstitutional in Fedziuk v. Commissioner of Public Safety. As noted above, in 2003, the legislature removed the requirement for a prompt judicial review of a prehearing revocation from the implied consent law. Fedziuk, 696 N.W.2d at 345-46 (citing Minn. Stat. § 169A.53, subd. 3a (2003)). The 2003 amendments retained authority for the district court to temporarily stay a license revocation if the hearing was not held in sixty days, but deleted the requirement

that the hearing be held at the earliest practicable date and in any event no later than sixty days. Id. at 346.

The question before the court in Fedziuk, then, was whether “the now unspecified period for judicial review,” coupled with immediately available administrative review and the opportunity for a temporary stay of revocation, sufficiently protected drivers’ due process rights. Id. The court held that the 2003 amendments rendered the implied consent law unconstitutional as violative of due process because the amendments did not provide for prompt and meaningful post-revocation review, despite the availability of temporary reinstatement. Id. at 342.

In response to this decision, the legislature amended the implied consent statute by adding back the provision that a judicial review hearing must be held at the earliest practicable date and in any event no later than sixty days after the filing of a petition for review. Minn. Stat. § 169A.53, subd. 3(a) (2005). In addition, the amended statute directs that the “judicial district administrator **shall** establish procedures to ensure efficient compliance with this subdivision.” Id. (emphasis added).

Instead of complying with the supreme court’s Fedziuk decision and the mandates of the amended statute, however, Ramsey County District Court has effectively replaced the amended statute with a post-revocation hearing procedure that looks **exactly** like the procedure found to violate due process. This standing order system, like the statutory system the supreme court struck

down in Fedziuk, violates drivers' due process because it lacks prompt post-revocation review. Fedziuk, 696 N.W.2d at 347-48. And worse yet, it affirmatively and explicitly *prevents* prompt post-conviction review. **This court cannot allow Ramsey County to do by judicial fiat what the legislature cannot do by statute.** Clearly, then, subjecting petitioner to a county-wide policy the supreme court found unconstitutional beyond a reasonable doubt, when it was enacted as legislation, violates due process.

CONCLUSION

For the reasons set forth above, appellant respectfully requests that this court reverse the district court's decision to uphold the revocation of his driving privileges, because the revocation resulted from a process that violated the statutory and constitutional mandates for a hearing to be scheduled at the earliest practicable date.

Dated: this 25th day
of April, 2007.

Respectfully submitted,

AYERS & RIEHM, PA.



DAVID L. AYERS
Suite 100, Riverwood Place
880 Sibley Memorial Highway
Mendota Heights, MN 55118
651-552-8400

**Attorney for Appellant
Attorney ID# 3621**

STATE OF MINNESOTA
IN COURT OF APPEALS

Harold Andrew Riehm,)
)
Petitioner - Appellant,)
)
)
vs.)
)
)
State of Minnesota,)
Commissioner of Public Safety,)
)
Respondent.)

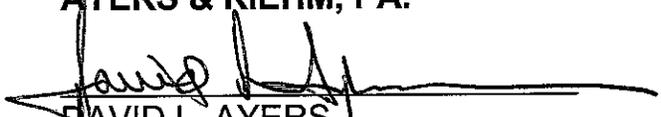
APPELLATE COURT CASE
NUMBER: A06-2291

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. Rules of Civil Appellate Procedure 132.01, subds. 1 and 3, for a brief produced with a monospaced font. The length of this brief is 3,660 words. This brief was prepared using Microsoft Word.

Dated: this 25th day
of April, 2007.

AYERS & RIEHM, PA.



DAVID L. AYERS
Suite 100, Riverwood Place
880 Sibley Memorial Highway
Mendota Heights, MN 55118
651-552-8400

**Attorney for Appellant
Attorney ID# 3621**