

A07-1237

STATE OF MINNESOTA
IN COURT OF APPEALS

DANIEL JOSEPH REEVES

Appellant,

vs.

COMMISSIONER OF PUBLIC SAFETY

Respondent.

APPELLANT'S BRIEF AND APPENDIX

PETER J. TIMMONS
Attorney at Law
700 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, MN 55431
(952) 844-2828
License No.: 110140

Attorney for Appellant

LORI SWANSON
Minnesota Attorney General
State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

PETER MAGNUSON
Assistant Attorney General
Suite 1800
445 Minnesota Street
St. Paul, MN 55101
(651) 297-2040
License No.: 0209260

Attorneys for Respondent

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

	<u>Page</u>
TABLE OF AUTHORITIES	1
LEGAL ISSUE	2
STATEMENT OF CASE AND FACTS.....	3
ARGUMENT	5
I. APPELLANTS DRIVER’S LICENSE REVOCATION MUST BE RESCINDED BECAUSE HENNEPIN COUNTY’S SYSTEM FOR SCHEDULING A JUDICIAL REVIEW HEARING IN HIS IMPLIED CONSENT PROCEEDING DENIED APPELLANT HIS STATUTORY AND CONSTITUTIONAL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.	
II. THE TRIAL COURT ERRED IN FINDING PROBABLE CAUSE TO ARREST APPELLANT DESPITE THE FACT THAT HE DID NOT FAIL TWO PBT TESTS DEMANDED OF HIM.	16
CONCLUSION	18
APPENDIX	19

TABLE OF AUTHORITIES

Minnesota Cases:

Page

<u>Bendorf v. Comm’r of Pub. Safety</u> , 727 N.W.2d 410 (Minn. 2007)	4, 7, 8, 9, 10, 13
<u>Fedzuik v. Commissioner of Public Safety</u> , 696 N.W. 2d 340 (2005) ...	4, 6, 8, 10, 12, 14, 15
<u>Heddan v. Dirkswager</u> , 336 N.W.2d 54, 61 (Minn. 1983)	12
<u>Heller v. Wolner</u> , 269 N.W.2d 31 (Minn. 1978). <u>Id.</u> at 308-309	10
<u>State by Lord v. Frisby</u> , 260 Minn. 70, 77, 108 N.W.2d 769, 773 (1961)	11
<u>Szczzech v. Comm’r of Pub. Safety</u> , 343 N.W.2d 305, 305-306 (Minn. Ct. App. 1984)	10

Other Authorities:

Minn. Stat. § 169.123, subds. 5 and 5a (1982)	12
Minn. Stat. § 169.123, subd. 5a (1980)	11
Minn. Stat. § 169.123, subd. 5c (1982)	12
Minn. Stat. § 169A.41, Subd. 2	16
Minn. Stat. § 169A.41, Subd. 3	16
Minn. Stat. § 169A.51	16
Minn. Stat. § 169A.51, Subd. 1(4)	16
Minn. Stat. § 169A.53, subd. 3(a)	5, 6, 10, 14
Minn. Stat. § 169A.52, subds. 3 and 4	4, 6
Minn. Stat. § 169A.52, subd. 6.....	6

LEGAL ISSUES

- I. DID THE SCHEDULING OF PETITIONER'S IMPLIED CONSENT HEARING 130 DAYS AFTER THE FILING OF THE PETITION FOR JUDICIAL REVIEW, UNDER THE HENNEPIN COUNTY DISTRICT COURT "FAST-TRACK" POLICY, CONSTITUTE A VIOLATION OF APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, WHICH REQUIRED PROMPT JUDICIAL REVIEW OF THE LICENSE REVOCATION, THEREBY ENTITLING HIM TO RESCISSION OF THE LICENSE REVOCATION?

Trial Court held: In the negative

- II. DID THE TRIAL COURT ERR IN FINDING PROBABLE CAUSE TO ARREST APPELLANT DESPITE THE FACT THAT HE DID NOT FAIL TWO PBT TESTS DEMANDED OF HIM?

Trial Court held: In the negative

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested for a Misdemeanor DWI on September 16, 2006, in Hennepin County. Petitioner filed a Petition for Judicial Review in the Hennepin County District Court on November 9, 2006. On November 8, 2006, by his counsel, Petitioner sought and received temporary reinstatement of his driver's license on November 14, 2007, pending the results of an Implied Consent Hearing. (AA-1). On November 13, 2006, Petitioner's counsel was sent by mail a letter and an Order concerning Hennepin County District Court's "Fast-Track" Program. The letter stated, essentially, that no Implied Consent Hearing would be held until after the resolution of the underlying criminal case and, further, that the Court required the completion and filing of a Scheduling Order in order to obtain an Implied Consent hearing. (AA-2-3)

On January 12, 2007, Petitioner entered a plea of "guilty" to a misdemeanor Careless Driving charge, which was a charge amended from the original DWI charges. Counsel for Petitioner completed the Scheduling Order required by the Hennepin County District Court and the Implied Consent Hearing was scheduled for March 19, 2007. (AA - 5) The Implied Consent Hearing was held before Judge Tony Leung 130 days after the Petition for Judicial Review was filed with the Hennepin County District Court.

At the Implied Consent Hearing, Petitioner contended that the application of the Hennepin County "Fast-Track" Program to this case and resulting scheduling of a hearing 130 days after the filing of the Petition for Judicial Review was a violation of the 60-day deadline contained in M.S. §169A.53, Subd. 3. Petitioner further contended that the lateness in the scheduling of this Implied Consent Hearing was a direct violation of the due process holding contained in the Minnesota Supreme Court decision in Fedzuik v. Commissioner of Public Safety, 696 N.W. 2d 340 (2005). Finally, Petitioner contended that the temporary reinstatement

claimed by Respondent as a remedy to any alleged due process was ineffective in view of the case law applicable at the time that allowed the use of a pending alcohol-related license revocation and it subject to a requested hearing, as a “prior alcohol-related license revocation” for the purpose of enhancement in the event that Petitioner received a new DWI charge while the license revocation matter herein was pending for hearing.

To be succinct, the trial court found that the decision of Bendorf v. Commissioner of Public Safety, 712 N.W. 2d 221 (Minn. App. 2006) *review granted* (Minn. June 28, 2006), to be controlling and sustained the revocation. Appellant appeals from the trial court decision and asserts in this appellate proceeding that the Hennepin County District Court “Fast-Track” Program violates his statutory and constitutional rights to prompt judicial review of his license revocation.

At the Implied Consent Hearing, the Appellant asserted that there was no probable cause for his arrest because he “passed” two PBT tests by obtaining digital readings under .08 AC on each test. The Appellant asserted that the PBT was a statutorily approved screening device utilized specifically to provide probable cause for an arrest. Consequently, when Appellant passed the PBT, there no longer was sufficient statutory probable cause for his arrest for DWI. (T. 13-15, 21-22). The Trial Court disagreed with that assertion and the Trial Court’s decision in that regard is also the subject of this appeal.

ARGUMENTS

- I. Appellant's driver's license revocation must be rescinded because Hennepin 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 Hennepin 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 Hennepin 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 Hennepin County's standing order is unlawful 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" signed by the Chief Judge of the Hennepin County District Court, appellant's hearing was scheduled for the first time 130 days after he filed his petition for judicial review. This clearly was 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, subs. 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.

Hennepin County’s standing order, 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 order, 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 Hennepin County’s standing order, petitioner’s driving privileges were temporarily reinstated for the period during which he was forced to wait for his 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 Hennepin 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 Hennepin 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 Hennepin 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, Hennepin 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. However, 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 Szczzech 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 promptness.

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.” A standing order that forbids even an attempt at compliance with this clear statutory

language offends the mandate of the statute itself. Even if, by any stretch of the imagination, the statute's language could be construed as directory, Hennepin County certainly does not have the authority to blatantly, purposefully, and 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 Hennepin 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 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. 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 Hennepin 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. § 169.23, 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 reinstated the “earliest practicable date” requirement in 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 holding swift hearings.

The “prompt review” requirement mandates the district court’s best efforts at hearing implied consent cases 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. Hennepin 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 her 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, 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 addressed directly.

The Hennepin 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. 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 postrevocation review, despite the availability of temporary reinstatement. Id. at 342.

In response to this decision, the legislature amended the implied consent statute by reinstating 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.

Instead of complying with the Supreme Court's Fedziuk decision and the mandates of the amended statute, however, the Hennepin 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. Worse yet, it affirmatively and explicitly prevents prompt post-revocation review. This court cannot allow Hennepin County to do by judicial fiat what the legislature cannot do by statute. Thus, subjecting petitioner to a county-wide policy that the Supreme Court found unconstitutional beyond a reasonable doubt when it was enacted as legislation violates due process of law.

II. The Trial Court erred in finding probable cause to arrest Appellant despite the fact that he did not fail the two PBT tests demanded of him.

Under M.S. §169A.41, Subd. 2, a Preliminary Breath Tester (PBT) is used specifically for the purpose of deciding whether or not a DWI arrest should be made and whether or not to require an Intoxilyzer test as required in M.S. §169A.51. The failure of a PBT by a DWI suspect is specifically listed as a reason for requiring an Intoxilyzer test under §169A.51, Subd. 1(4). The Statute states that a PBT with a reading of .08 AC or more is grounds for an arrest. M.S. §169A.41, Subd. 3 states that an additional test may be required of the driver following the screening test – presumably if the driver failed the screening test (PBT). Inasmuch as that did not occur here, Appellant contends that there was no statutory probable cause for his DWI arrest and asks that his license revocation be rescinded.

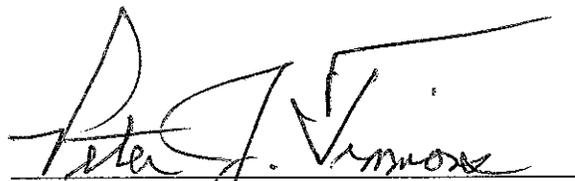
There was absolutely no dispute in this record that Appellant provided two PBT tests, as demanded by the arresting officer. When the arresting officer complained that both samples were “light,” the officer did have to concede that the PBT accepted and read both samples. The first test result provided by the police officer was .067 and the second result was a .077. In all due candor, the first test result should have been sufficient in its purpose to eliminate any basis for arrest. It is rather obvious the police officer simply did not like the result he received and still was not able to obtain a PBT of .08 or more upon a second test request. For many years in the State of Minnesota, test results on the PBT in excess of the applicable legal limit for breath alcohol constituted a basis for arrest and license revocation. It is only logical and appropriate that passing two PBT tests should eliminate any basis for arrest under §169A.41 and 169A.51. If passing a requested PBT does not obviate alleged statutory probable cause for arrest, Appellant contends that the PBT is useless and should be eliminated from the Statute for any use in support or denial of probable cause for DWI arrest. Since the statutory threshold on PBT failure was not

met on this case was the basis for arrest, Appellant's license revocation should be rescinded on the grounds that there was not statutory probable cause for a DWI arrest.

CONCLUSION

This court must 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. Furthermore, this Court must reverse the District Court's decision finding probable cause for the arrest on the basis that Appellant passed two requested PBT tests and, under the statutory scheme utilizing PBT test results for arrest, the fact that Appellant did not fail a preliminary screening test should have eliminated probable cause for his DWI arrest and lead to the rescission of his license revocation.

Dated: 2/6/07


Peter J. Timmons (#110140)
Attorney for Appellant
700 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, MN 55431
(952) 844-2828