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STATE OF MINNESOTA

IN COURT OF APPEALS

Daniel Joseph Reeves,

Appellant,

vs.

Commissioner of Public Safety,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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Full Court Press (Fourth Judicial District, Minn.), October, 2006, at 5, available at:
http://www.mncourts.gov/documents/4/Public/News/October_06_public_web_copy.pdf
..... 7, 25, 27

Webster's Ninth New Collegiate Dictionary
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LEGAL ISSUES

I. Does the scheduling of implied consent hearings pursuant to the Hennepin County Fast-Track Program violate either the implied consent statute or procedural due process?

The lower court ruled in the negative.

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

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

Szczech v. Commissioner of Public Safety, 343 N.W.2d 305 (Minn. Ct. App. 1984)

Minn. Stat. § 169A.53, subd. 2(c) (2005).

II. Whether Trooper Klawitter had sufficient probable cause to arrest Appellant for DWI?

The lower court ruled in the affirmative.

Toth v. Arason, 722 N.W.2d 437 (Minn. 2006);

State v. Hanley, 363 N.W.2d 735 (Minn. 1985);

Eggersgluss v. Commissioner of Public Safety, 393 N.W.2d 183 (Minn. 1986).

STATEMENT OF THE CASE AND FACTS

This is an appeal from a trial court order sustaining the revocation of Appellant Daniel Joseph Reeve's driver's license under Minn. Stat. §§ 169A.50-.53, the implied consent law. It arises out of Appellant's September 16, 2006, DWI arrest in Hennepin County, and his subsequent blood test which revealed an alcohol concentration of 0.08 or more. *See* Findings of Fact made by the trial court in its Order filed April 18, 2007, a copy of which is reproduced in Respondent's Appendix at RA1-RA8. Appellant was issued a Notice of Revocation, and Appellant's driver's license revocation took effect on November 1, 2006. *See* Findings of Fact made by the trial court in its Order filed April 18, 2007, reproduced in Respondent's Appendix at RA3.

The relevant facts are not in dispute. At approximately 3:38 a.m. on Saturday, September 16, 2006, Trooper Kyle Klawitter of the Minnesota State Patrol observed a vehicle driving westbound on I94 near downtown Minneapolis make a lane change without signaling. T. 4.[1] Trooper Klawitter then observed the vehicle weaving within its lane on several occasions within a mile, to the point that the vehicle's tires touched the lane dividing lines several times. T. 4-5.

Trooper Klawitter stopped the vehicle and approached it to speak with Appellant who was the driver. T. 6-7. While speaking with Appellant, Trooper Klawitter smelled an odor of alcohol coming from the vehicle and he observed that Appellant's eyes were

[1] "T." references are to the pages of the transcript of the implied consent hearing held on March 19, 2007 before the Honorable Tony N. Leung, Judge of Hennepin County District Court, Fourth Judicial District.

bloodshot and watery. T. 7-8. After Appellant admitted consuming alcohol, Trooper Klawitter asked him to exit the vehicle for field sobriety testing. T. 8. As Appellant exited his vehicle, Trooper Klawitter observed that Appellant was swaying a little bit. T. 9.

Trooper Klawitter then had Appellant perform the Horizontal Gaze Nystagmus Test, which involves looking for an involuntary twitching of the eyes. T. 10. Trooper Klawitter looked for, and observed the first four clues but he did not look for the last two clues. T. 10, 18. During this test, Trooper Klawitter observed that Appellant was swaying back and forth. T. 11.

Trooper Klawitter then had Appellant perform the One-Legged Stand Test, which is a test designed to check an individual's balance, as well as their divided attention skills. T. 11. During this test, Trooper Klawitter observed that Appellant swayed, put his foot down, and used his arms for balance. T. 12.

Trooper Klawitter next asked Appellant to submit to a Preliminary Breath Test ("PBT"). T. 13. Appellant did not blow long and hard into the PBT as instructed by Trooper Klawitter. T. 13. Instead, Appellant blew extremely lightly into the PBT. T. 13. Trooper Klawitter testified that deep breaths will produce deep lung air, which is more indicative of the amount of alcohol in an individual's system, but that such a sample requires a breath "lasting probably five seconds." T. 14. Trooper Klawitter testified that he was not able to capture a five second breath sample from Appellant, but he was able to manually capture two small samples. T. 14-15. Trooper Klawitter described a "manual capture" as "a manual override of the machine so that I can trigger whatever air, whatever

small amount of air is in the machine, I can have the machine analyze that breath sample instead of the larger sample that it's looking for, which would be a better sample." T. 14. These two manually captured samples indicated an alcohol concentration of .067 and .077, respectively. T. 14-15. Trooper Klawitter then placed Appellant under arrest. T. 15.

On November 9, 2006, Appellant filed a Petition for Judicial Review with Hennepin County Court Administration, challenging the license revocation, and he also requested a stay of the balance of his license revocation, pursuant to the Fourth Judicial District's DWI Fast-Track Program ("Fast-Track Program"). *See* Letter to the Honorable Lucy Wieland dated November 8, 2006, reproduced in Respondent's Appendix at RA9. On November 13, 2006, the court thereafter issued an order directing the Respondent Commissioner of Public Safety to stay the balance of Appellant's license revocation. *See* Order dated November 13, 2006, reproduced in Respondent's Appendix at RA10. Respondent thereafter stayed the balance of Appellant's driver's license revocation on November 14, 2006, 13 days after Appellant's license revocation went into effect. *See* Findings of Fact, reproduced in Respondent's Appendix at RA3.

Also consistent with the Fast-Track Program, once Appellant had first resolved his criminal DWI case on January 12, 2007, Hennepin County Court Administration scheduled the present implied consent matter for trial on March 19, 2007, a date 130 days after the filing of the initial Petition for Judicial Review. *See* Findings of Fact, reproduced in Respondent's Appendix at RA3.

This matter eventually came on as scheduled for hearing on the merits before the Honorable Tony N. Leung, Judge of District Court, on March 19, 2007, at the Hennepin County Courthouse, Division I, in Minneapolis, Minnesota. *See* Trial Court Order, reproduced in Respondent's Appendix at RA1-RA7. Appellant waived all issues except for: (1) whether the arresting officer had sufficient probable cause to place Appellant under arrest; and (2) whether Appellant's license revocation should be rescinded because his implied consent hearing did not take place within 60 days of the filing date of his Petition for Judicial Review. *See* Trial Court Order, reproduced in Respondent's Appendix at RA2.

After the hearing, the trial court took the matter under advisement for briefing by the parties. The trial court subsequently issued an order dated April 18, 2007, rejecting Appellant's claims and sustaining his license revocation. *See generally* Trial Court Order, reproduced in Respondent's Appendix at RA1-RA8. As part of its analysis, the trial court concluded: (1) that the arresting officer did have sufficient probable cause to arrest Appellant, and (2) that Court Administration's failure to schedule a hearing within 60 days of the filing date of Appellant's Petition for Judicial Review did not violate either the implied consent statute or Appellant's procedural due process rights. *See* Trial Court Order, reproduced in Respondent's Appendix at RA3-RA8. From that Order, Appellant has taken this appeal.

ARGUMENT

I. STANDARD OF REVIEW.

In the instant case, Appellant challenges the trial court's conclusion that the scheduling of his implied consent hearing, under the requirements of the Fast-Track Program, did not violate either procedural due process or the implied consent statute. *See generally* Appellant's Brief at 5-15. Appellant essentially challenges the scheduling practices employed by the trial court pursuant to its Fast-Track Program. *See* Appellant's Brief at 5-15. In general, a district court has considerable discretion in scheduling matters and in furthering what it has identified as the interests of judicial administration and economy. *See Rice Park Properties v. Robins, Kaplan, Miller & Ciresi*, 532 N.W.2d 556, 556 (Minn. 1995). A district court's scheduling decision will therefore be reversed only upon a showing that the court abused its discretion. *See id.*

To the degree that Appellant attempts to establish an abuse of discretion in this case based upon claims that the scheduling of hearings under the Fast-Track Program violates either procedural due process or the implied consent statute itself, both questions involve the application of law to undisputed facts, which is subject to *de novo* review. *See Bendorf v. Commissioner of Public Safety*, 727 N.W.2d 410, 413 (Minn. 2007) (constitutional questions); *Berge v. Commissioner of Public Safety*, 374 N.W.2d 730, 732 (Minn. 1985) (statutory questions).

Appellant also challenges the legality of his arrest. Probable cause to arrest exists "where all the facts and circumstances would warrant a cautious person to believe that the suspect was driving or operating a vehicle while under the influence." *Johnson v.*

Commissioner of Public Safety, 366 N.W.2d 347, 350 (Minn. Ct. App. 1985). A court's determination of probable cause is a mixed question of law and fact. *Clow v. Commissioner of Public Safety*, 362 N.W.2d 360, 363 (Minn. Ct. App . 1985) *rev. denied* (Minn. April 26, 1985). Where the facts are not in dispute, the reviewing court's role is to simply analyze the testimony of the officer and determine if, as a matter of law, the officer was justified in doing what they did. *See State v. Storvick*, 428 N.W.2d 55, 58 n.1 (Minn. 1988).

II. OVERVIEW OF THE HENNEPIN COUNTY FAST-TRACK PROGRAM.

On appeal, Appellant launches a broad attack against the Fast-Track Program, arguing generally that his license revocation must be rescinded because his implied consent hearing was not properly scheduled under the Fast-Track Program. Specifically, Appellant argues that the scheduling of his hearing under the Fast-Track Program violates both the implied consent statute, and Appellant's procedural due process rights. Accordingly, given the standard of review applicable here, which requires Appellant to demonstrate that the trial court clearly abused its discretion when it scheduled his implied consent hearing, an historical overview of the Fast-Track Program is essential.

The Fast-Track Program, which began in the summer of 2000, was originally conceived as a means to promptly resolve alcohol-related traffic offenses. *See* Honorable Chief Judge Lucy Wieland, *DWI Fast-Track Program Six Years Later*, Full Court Press (Fourth Judicial District, Minn.), vol. 14, issue 3, October 2006, at 5; *also available at http://www.mncourts.gov/documents/4Public/News/October_06_public_web_copy.pdf;* reproduced in Respondent's Appendix at RA11-RA23. The Fast-Track Program's

ultimate goals are: (1) "to expedite the education and treatment of alcohol offenders"; and (2) to "enhance public safety." *Id.*, reproduced in Respondent's Appendix at RA12. The program tries to achieve these goals by requiring that every DWI criminal case be scheduled for trial within 45 days of the first appearance. *See id.*

The Fast-Track Program also seeks to "conserve court resources," because experience has shown that "resolution of the criminal case resolves the majority of implied consent petitions without the need for a hearing." *Id.* (noting that only 27% of the implied consent petitions filed in 2000 were actually litigated). Accordingly, the Fast-Track Program tries to conserve court resources by postponing the scheduling of implied consent hearings until after the criminal matter has been resolved, because in most cases an implied consent hearing will not be necessary. *See id.* As part of the Fast-Track Program, all implied consent petitioners are informed that they may seek a stay of the balance of their license revocations immediately, pending resolution of the criminal and implied consent cases. *See id.* If an implied consent petition has been filed, but no criminal case has been filed, the implied consent hearing is then set on for a hearing. *See id.* By instituting the Fast-Track Program, "the court has been successful in advancing the goal of public safety by a prompt response to DWI offenders and has conserved judicial resources while also protecting the due process rights of drivers." *Id.*

III. CONSISTENT WITH THE SUPREME COURT'S CONTROLLING DECISION IN *BENDORF*, THE TRIAL COURT CORRECTLY FOUND THAT THE HENNEPIN COUNTY FAST-TRACK PROGRAM VIOLATES NEITHER THE IMPLIED CONSENT STATUTE NOR PROCEDURAL DUE PROCESS.

Appellant frames his entire argument as an outright challenge to the scheduling of all hearings under the Fast-Track Program. *See* Appellant's Brief at 5-15. Specifically, Appellant argues that:

> [i]n 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.

Appellant's Brief at 5-6.

Respondent submits that Appellant's arguments are without merit for several reasons. Initially, Appellant lacks standing because he has failed to demonstrate any injury-in-fact as a result of the scheduling of his implied consent hearing. On the merits, Appellant's arguments fail because they are based upon flawed premises. With respect to Appellant's statutory argument, the Implied Consent statute does not require a hearing within 60 days, rather the statute requires that *either* a hearing is set within 60 days (§ 169A.53, subd. 3(a)), *or* a stay of the revocation is made available for hearings set beyond 60 days (§ 169A.53, subd. 2(c)). As will be discussed more fully in Section III. B. below, § 169A.53, subd. 3(a)'s 60-day hearing timeframe has previously has been found to be directory, not mandatory because the statute offers an alternative means by which to protect a driver's private interest in his license through § 169A.53, subd. 2(c)'s

provision allowing for a stay of the revocation pending a hearing on the merits. *See Szczech v. Commissioner of Public Safety*, 343 N.W.2d 305, 307 (Minn. 1984).

Similarly, with respect to Appellant's due process argument, procedural due process does not require a hearing within 60 days. Instead, procedural due process requires that *either* a hearing is set within 60 days, *or* a stay of the revocation is made available for hearings set beyond 60 days. As will be discussed more fully in Section III. C. below, the Minnesota Supreme Court recently held that the availability of a stay of the balance of the revocation where a hearing is not scheduled within 60 days of the filing of the petition minimizes any prejudice caused by the delay, and thereby "compels the conclusion that the driver's right to procedural due process has not been violated." *Bendorf v. Commissioner of Public Safety*, 727 N.W.2d 410, 416-17 (Minn. 2007).

Accordingly, Appellant's arguments fail as they cannot be reconciled with prior controlling precedents holding that a stay of the balance of the revocation adequately protects a driver's private interest by providing an acceptable alternative remedy for both statutory and constitutional purposes. *See Szczech*, 343 N.W.2d at 307; *Bendorf*, 727 N.W.2d at 416-17. For these reasons, Respondent submits that the trial court properly concluded that Appellant failed to establish either a due process violation or a statutory violation where Appellant requested and received a stay of the balance of his license revocation pending a hearing on the merits.

Respondent further submits that the decision below is consistent with established canons of statutory construction, judicial administrative discretion, and procedural due process jurisprudence. Moreover, the decision below is a reasonable interpretation of law

which fairly balances the competing interests of individual motorists (maintenance of driving privileges pending a hearing), with public safety (maintenance of the proven effective pre-hearing revocation process) and efficient court administration (maintenance of judicial economy despite increased court filings and limited judicial resources). The trial court's order should therefore be affirmed.

A. Because He Has Failed To Demonstrate Any Injury-In-Fact Resulting From The Scheduling Of His Implied Consent Hearing Under The Hennepin County Fast-Track Program, Appellant Lacks Standing To Challenge That Program In General.

Despite the fact that it is elementary that a litigant must base his or her claims on his or her own particular facts, and not hypothetical injuries that might someday be suffered by people in other cases, Appellant nonetheless devotes his entire argument to an attack on the Fast-Track Program in general, notably ignoring any analysis of his own specific facts. *See* Appellant's Brief at 5-15. Respondent submits that Appellant lacks standing here because he cannot demonstrate that he has suffered any injury-in-fact as a result of the delay in scheduling his hearing under the Fast-Track Program.

It is well-established that a party needs to demonstrate standing before he may invoke the jurisdiction of the court to decide a question. When a party does not have standing, a court does not have jurisdiction to hear the matter. *See Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989); *see also* Minnesota Rule of Civil Procedure 12.08(c) (stating that the court shall dismiss an action whenever it appears that the court lacks subject matter jurisdiction). "Because it goes to the existence of a cause

of action, standing is essential to the court's exercise of jurisdiction and may be raised at any time...." *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45, 49 (Minn. 1989).

Minnesota has adopted an "injury-in-fact" test for standing. *See Snyder's Drug Stores, Inc. v. Minnesota State Board of Pharmacy,* 301 Minn. 28, 32, 221 N.W.2d 162, 165 (1974). The litigant must have a direct interest in the litigation and must articulate more than a mere abstract concern. *See State by Humphrey v. Philip Morris Inc.,* 551 N.W.2d 490, 495 (Minn. 1996). The litigant also must demonstrate an injury or imminent threat of such injury via prejudice to a legally recognized interest. *See Envall v. Independent School District No. 704,* 399 N.W.2d 593, 596 (Minn. Ct. App. 1987), *review denied* (Minn. Mar. 25, 1987). Moreover, the litigant must be attempting to "do more than vindicate [his] own value preferences through the judicial process." *Sierra Club v. Morton,* 405 U.S. 727, 740, 92 S. Ct. 1361, 1369 (1972) (footnote omitted).

Here, Appellant cannot identify any injury-in-fact which he has suffered as a result of his hearing being scheduled under the Fast-Track Program.[2] There was no evidence presented to the trial court indicating that the alleged delay in having his hearing resulted in any relevant testimony on the issues before the trial court being lost, or that Appellant was otherwise handicapped in his ability to present evidence. On appeal, Appellant can point to no prejudice suffered by him. In fact, any attempt by Appellant to claim otherwise would be without merit because Appellant received a stay of the balance of his

[2] Appellant seems to assume that, but for the Fast-Track Program, his hearing would have been scheduled sooner. There is, however, no evidence in the record supporting such an assumption.

license revocation, which resulted in all references to his revocation being removed from his driving record pending the hearing.

It is obvious that Appellant strongly disagrees with the dictates of the Fast-Track Program. But while Appellant may not like the Fast-Track Program, his dislike does not constitute an injury-in-fact, and instead is merely an "abstract concern" insufficient to establish standing. *Philip Morris,* 551 N.W.2d at 495. Indeed, Appellant seeks to use the judicial process to substitute his own scheduling preferences for the administrative discretion of the trial court in scheduling hearings pursuant to the Fast-Track Program. However such mere individual desire for another practice, in the absence of a prejudicial injury-in-fact, is insufficient to establish standing and invoke the court's jurisdiction. *See Sierra Club,* 405 U.S. at 740, 92 S.Ct. at 1369.

B. The Fast-Track Program Does Not Violate The Implied Consent Statute.

In general, Appellant argues he has been harmed because his implied consent hearing was not scheduled within 60 days, which Appellant characterizes as a statutory violation that requires rescission of his revocation. More specifically, Appellant points out that the implied consent statute provides that implied consent hearings "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." Appellant's Brief at 6 (quoting Minn. Stat. § 169A.53, subd. 3(a) (2005)). Appellant then concludes that the Fast-Track Program does not comply

with the statute because it "no driver gets a hearing at the earliest practicable date."[3] Appellant's Brief at 9.

As will be discussed more fully below, Respondent submits that Appellant's statutory violation argument is fatally flawed in that it conflicts with both this Court's controlling decision in *Szczech v. Commissioner of Public Safety*, 343 N.W.2d 305 (Minn. Ct. App. 1984), and also established canons of statutory construction. Accordingly, Appellant's statutory violation argument lacks merit and should be rejected.

1. *Szczech* remains controlling and the 60-day language is directory, not mandatory.

The most obvious problem with Appellant's argument is that it does not comport with the express language of this Court's controlling decision in *Szczech*. In *Szczech*, this Court was asked to construe language in the 1982 version of the implied consent statute which provided that implied consent hearings "shall be held at the earliest practicable date, and in no event no later than 60 days following the filing of the petition for review." *Id.* at 306-07. The motorist argued that if the hearing is held outside the 60-day timeframe, the revocation must be rescinded. *See id.* This Court disagreed, in large part based on the fact that the statute provided for a stay of the balance of the license revocation should the hearing not be held within 60 days. *See id.* at 307-08. Specifically, this Court held that a stay of the revocation, rather than rescission, was better public policy:

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[3] Again, Appellant provides no evidence supporting his blanket assumptions. In contrast, Hennepin County's scheduling statistics from May, 2006, reveal that the median time frame from filing to disposition of implied consent petitions was 59 days.

> If revocations are to be automatically rescinded whenever a court, for whatever reason, schedules a hearing more than sixty days after a petition is filed, the effectiveness of the statute is largely nullified, with adverse consequences to public safety. By suggesting ways for district administrators to hold hearings quickly, the Legislature indicated the intent was to secure order, uniformity, system and dispatch.

Id. at 308-09. Respondent submits that the Fast-Track Program, which is designed to expedite education and treatment for DWI offenders, while also protecting public safety and conserving limited court resources, is entirely consistent with this Court's rationale from 1984.

In response, Appellant attempts to sidestep *Szczech* by arguing that "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 promptness." Appellant's Brief at 10.

The Supreme Court in *Bendorf*, however, explicitly put an end to that argument when it observed that, in *Fedziuk*, "[w]e did not, however, discuss, much less overrule, *Szczech* or hold that the 60-day timeframe in Minn. Stat. § 169A.53, subd. 3, is mandatory." *See also Rubey v. Vannett*, 714 N.W.2d 417, 421-22 (Minn. 2006) (holding that the 60-day timeframe set forth in Minnesota Rule of Civil Procedure 59.03 for conducting a hearing on a motion for new trial was a directory, procedural timeframe). In short, the holding in *Szczech*, that the 60-day language is directory not mandatory, remains good law, and Appellant's arguments to the contrary are without merit.[4]

[4] Appellant's reliance on *Lord v. Frisby*, 260 Minn. 70, 77, 108 N.W.2d 769, 773 (1961), is similarly misplaced. *See* Appellant's Brief at 11. *Lord* stands only for the general
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2. Appellant's statutory violation claim is directly contrary to established canons of statutory construction.

In addition to lacking support in the *Fedziuk* and *Bendorf* decisions themselves, Appellant's argument alleging a statutory violation is also contrary to the rules of statutory construction. For example, Appellant's position directly conflicts with Minn. Stat. § 645.16 (2006), which states that:

> The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to *all* its provisions.

Id. (*emphasis added*).

Appellant's argument alleging a statutory violation here would thus create a result opposite to that required by law. By focusing exclusively upon the implied consent statute's 60-day hearing timeframe provision (§ 169A.53, subd. 3(a)), while giving no effect to the stay of the balance of the revocation provision (§ 169A.53, subd. 2(c)), Appellant's argument directly conflicts with the rule requiring that laws be interpreted to give effect to *all* their provisions. *See* Minn. Stat. § 645.16 (2006); Minn. Stat. § 645.17(2) (2006); *see also State v. Larivee,* 656 N.W.2d 226, 229 (Minn. 2003) (denying motorist's claim of statutory entitlement to an additional, independent alcohol concentration test because motorist's proposed construction of statute gave no effect to

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proposition that courts should try to comply with the directory language of statutes, and should be particularly mindful of directory timeframes where the delay beyond the timeframe results in some prejudice to the parties. *See id.* That general holding is consistent with the more specific applications in *Szczech* and *Bendorf*, thus *Lord* actually supports Respondent's position, rather than Appellant's.

provision requiring that such a "second test" is only available *after* first submitting to a state-administered test, thus conflicting with the rule that, "[a] statute should be interpreted, whenever possible, to give effect to all of its provisions, and 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant.'") (*internal citations omitted*). In fact, this is exactly what the Supreme Court did in *Bendorf* when it construed the 60-day timeframe in § 169A.53, subd. 3(a), in conjunction with the stay provision contained in § 169A.53, subd. 2(c). *See Bendorf*, 727 N.W.2d at 416-17.

Appellant's argument also affronts Minn. Stat. § 645.17 (5), as it favors the private interest of the individual motorist over the public interest of the public at large by mandating rescission for all cases scheduled pursuant to the Fast-Track Program without regard to the merits of the individual case. *See id.* This last point is further supported by ample case law recognizing that statutes intended for the protection of the public are remedial in nature and are to be liberally construed to that end. *See Szczech*, 343 N.W.2d at 305-306. In this regard, the public interest in eliminating the dangers posed by impaired drivers compels a nonrestrictive construction of the implied consent statute so that it can be an effective tool for the removal of those drivers from our highways. *See id.* The implied consent laws must therefore be liberally construed in favor of protecting the driving public and must be given, "the broadest possible effect." *State, Department of Public Safety v. Juncewski*, 308 N.W.2d 316, 319 (Minn. 1981).

Given the obvious conflicts between Appellant's statutory violation claim and the established rules of statutory construction discussed above, Appellant's argument lacks

merit and must be rejected. Respondent submits that the trial court did not err in reaching its decision, and the Order should therefore be affirmed.

C. The Fast-Track Program Does Not Violate Procedural Due Process.

Appellant also claims that the Fast-Track Program violates procedural due process. *See* Appellant's Brief at 6-7, 13-15. As will be discussed more fully below, Respondent submits that Appellant's arguments in this regard are contrary to both the Supreme Court's controlling decision in *Bendorf* and the well-recognized administrative discretion possessed by trial courts to schedule cases and otherwise manage their own dockets. Accordingly, the trial court correctly concluded that Appellant failed to establish a procedural due process violation, and its Order should be affirmed.

1. Appellant's procedural due process claim is impossible to reconcile with the Supreme Court's decision in *Bendorf.*

Appellant argues that the Fast-Track Program, "does not comply with... ...the constitutional requirement of a prompt hearing." Appellant's Brief at 7. Respondent submits that, despite Appellant's attempt to frame his argument as an attack on the Fast-Track Program in general, Appellant cannot assert a procedural due process claim without first establishing that he has suffered a "direct and personal harm" resulting from the alleged denial of his constitutional rights. *Davis v. Commissioner of Public Safety,* 509 N.W.2d 380, 391 (Minn. Ct. App. 1993), *aff'd* 517 N.W.2d 801 (Minn. 1994) (quoting *City of Minneapolis v. Wurtele,* 291 N.W.2d 386, 392 (Minn. 1980)). Here, Appellant cannot show any such harm or prejudice, as any prejudice associated with the

delay in receiving a hearing was alleviated upon Appellant's request for a stay of the revocation.

Moreover, even assuming Appellant could establish that he has suffered a direct and personal harm, any claim that Appellant's specific procedural due process rights were violated must fail as it cannot be reconciled with the Supreme Court's recent controlling decision in *Bendorf.* Indeed, as will be discussed more fully below, Appellant's constitutional challenge is conceptually identical to the one rejected in *Bendorf*, which found no procedural due process violation on facts materially similar to Appellant's own. *See Bendorf*, 727 N.W.2d at 417.

It is well-settled that procedural due process, "'is flexible and calls for such procedural protections as the particular situation demands.'" *See id.* at 415 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, S. Ct. 2593, 2600 (1972)). In light of this flexibility, the Supreme Court in *Bendorf* noted that the "appropriate inquiry" in a procedural due process case is, "what level of prejudice has the driver suffered?" *See Bendorf,* 772 N.W.2d at 417. Respondent submits that examination of *Bendorf*, and other similar cases involving prehearing takings, reveals that Appellant here has failed to demonstrate a level of prejudice sufficient to constitute a procedural due process violation. [5]

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[5] Rather than address the problems posed by the *Bendorf* decision head-on, Appellant instead bases his arguments on the decision in *Fedziuk. See* Appellant's Brief at 5-6. Unfortunately, Appellant's reliance on *Fedziuk* is procedurally misplaced. While *Bendorf* involved the question of whether an individual driver was so prejudiced as to warrant a due process violation, *Fedziuk* involved two certified questions arising from a
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In *Bendorf*, the motorist did not receive a hearing until 94 days after the filing of his petition. *See Bendorf*, 727 N.W.2d at 412. The motorist had to file a motion and pay a $55 motion filing fee in connection with his request for a stay of the balance of his revocation. *See id.* The motorist suffered 9 days of license revocation before he was able to receive the stay. *See id.* In weighing the motorist's private interest against the public and governmental interests, the Supreme Court in *Bendorf* concluded that:

> Bendorf was deprived of his driving privileges for only nine days, and he availed himself of relief by obtaining a stay that allowed him to maintain his driving privileges throughout the process of judicial review. This minimal impact does not outweigh the state's compelling interest in maintaining an administrable system to keep its highways free from impaired drivers. We hold that the prejudice Bendorf suffered does not rise to the level of a violation of his right to procedural due process.

Bendorf, 727 N.W.2d at 417.

Respondent submits that, just as in *Bendorf*, balancing Appellant's private interest in maintaining his driver's license against the relevant public and governmental interests likewise reveals only a "minimal impact" that does not rise to the level of a procedural due process violation. In fact, Appellant in at least one respect is actually in an even better position than the motorist in *Bendorf*: Appellant obtained a stay of his license revocation upon mere request to the court, without need to file a motion or pay a motion filing fee.

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declaratory judgement action, and there was no examination of whether the individual driver there suffered prejudice sufficient to violate procedural due process. *Bendorf* thus controls because it is not only the more recent of the two decisions, but it is also factually more similar.

Accordingly, Appellant's attempts to distinguish the Supreme Court's decision in *Bendorf* fail on the merits because the same stay of the balance of the revocation that operated in *Bendorf* to result in only minimal prejudice associated with the delayed hearing in that case was also available to Appellant here. *See Bendorf*, 727 N.W.2d at 417. Accordingly, Appellant's procedural due process claim must fail because Appellant here suffered no more than the "minimal prejudice" which the Supreme Court found insufficient to violate procedural due process in *Bendorf*. *See id.*

The trial court's conclusion, that a stay of the revocation pending a hearing on the merits satisfies procedural due process, is also consistent with a prior decision of the United States Supreme Court. In *Jennings v. Mahoney*, 404 U.S. 25, 92 S. Ct. 180 (1971), after a motorist was involved in a motor vehicle collision, the State of Utah immediately suspended the motorist's driver's license prior to a hearing based on a state law requiring motorists to either carry liability insurance or post security to show financial responsibility. *See id.*, 404 U.S. at 25, 92 S. Ct. at 181. On appeal, the motorist argued that the statutory scheme did not afford sufficient procedural due process protections because it: (1) did not require an automatic stay of the suspension pending hearing on the merits; and (2) did not provide a sufficiently meaningful hearing by failing to mandate a trial at which the motorist could offer evidence and cross-examine witnesses. *See id.* The United States Supreme Court rejected these claims, noting that the motorist simply could not establish that a procedural due process violation occurred in that case, since, "[the district] court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which [the motorist] was

afforded the opportunity to present evidence and cross-examine witnesses." *Id.* at 404 U.S. 26-27, 92 S. Ct. at 181.

A similar conclusion was previously reached by this Court even in a case involving a significantly longer delay between filing the petition and the judicial hearing. In *State v. Johnson*, 356 N.W.2d 388 (Minn. Ct. App. 1984), this Court concluded that even a delay of *4 years* did not violate procedural due process, because the driver in that case, "retained his driver's license throughout the long delay." *See id.* at 390. Accordingly, as Appellant here had the opportunity to regain his driving privileges and have all references to the revocation removed from his driving record by merely requesting a stay of the revocation from the Court, it is impossible to reconcile Appellant's claim--that a delay of 70 days beyond the 60-day statutory timeframe violated due process--with this Court's prior holding that even a four-year delay does not violate due process so long as the motorist keeps his license. *See Johnson*, 356 N.W.2d at 390.

Indeed, even the *Fedziuk* decision itself specifically noted that, in a situation where drivers facing license revocations retained their licenses while awaiting hearing, the delay in the hearing did not cause prejudice sufficient to violate procedural due process. *See Fedziuk*, 696 N.W.2d 340, 347, n. 9 (citing to *Heller v. Wolner,* 269 N.W.2d 31 (Minn. 1978)); s*ee also Neal v. Fields*, 429 F.3d 1165, 1167 (8th Cir. 2005) (holding that licensing board did not deprive nurse of procedural due process because she retained her nursing license during investigative process). Just like the individuals in *Bendorf*, *Jennings*, *Johnson*, *Heller*, and *Fields*, Appellant here was not deprived of procedural due

process because he obtained a stay of the balance of his revocation pending his hearing on the merits.

Moreover, in addressing what due process protections are necessary in the implied consent context, the Supreme Court has repeatedly discussed the availability of hardship relief in the form of a limited license as being a critical factor. *See Bendorf*, 727 N.W.2d at 416; *Fedziuk*, 696 N.W.2d 340, 344-45; *see also* Minn. Stat. § 171.30, subd. 2a(1) (2006) (setting forth 15-day limited license waiting period for first-time DWI offenders). But here, Appellant obtained a stay of his revocation upon mere request to the district court, thereby having all references to the revocation removed from his driving record. Accordingly, Appellant must reconcile how the availability of a *limited license* fifteen days after a revocation satisfies due process, but receipt of a *full license* in only seven days does not. Respondent submits that Appellant cannot establish prejudice here, and therefore Appellant's due process claim should be rejected.

By attempting to distinguish his constitutional claim from the one rejected in *Bendorf*, Appellant tries to draw a legal distinction where none exists. Indeed, Appellant even acknowledges *Bendorf's* holding that temporary reinstatement relieves any prejudice associated with the delayed hearing. *See* Appellant's Brief at 13. Despite this concession, Appellant nonetheless tries to distinguish his own case by relying exclusively upon footnote 10 in *Bendorf*, in which the Supreme Court indicated that it was not addressing arguments concerning the procedures used in other counties which allegedly did not make any effort to schedule hearings within 60 days, because those facts were not

before the Court in that case. *See* Appellant's Brief at 13-14, citing *Bendorf*, 727 N.W.2d 410, 417, n.10.

Appellant further tries to distinguish the holding in *Bendorf* from his own facts by claiming that, "[t]he statutory remedy of temporary reinstatement is a remedy for those cases for those cases in which a speedy hearing simply was not possible, despite the court administrator's best efforts." Appellant's Brief at 9. Appellant thus in effect argues that the Legislature and the Supreme Court intended that it was *only* appropriate for a trial court to *occasionally* use a stay of the balance of the revocation to remedy any prejudice associated with a delayed hearing; and this *only* after the trial court has exhausted all other possible alternatives to delaying the hearing date.

Respondent submits that, contrary to Appellant's arguments, nowhere in either *Fedziuk* or *Bendorf* does it say that a hearing cannot be postponed beyond 60 days without being rescinded *unless* the stay is only used infrequently, or *unless* all other attempts to schedule the hearing within 60 days have failed. *See Fedziuk,* 696 N.W.2d at 340-349; *Bendorf,* 727 N.W.2d at 410-417. In fact, established case law has long indicated that the proper remedy for scheduling hearings more than 60 days after filing of the petition is a temporary stay of the balance of the revocation period. *See id*; *see also Szczech*, 343 N.W.2d at 307-08.

Nor does the implied consent statute contain any language limiting a court's ability to grant a stay when a hearing is delayed. Indeed, Minn. Stat. § 169A.53 subd. 2(a) (2005), instead provides that, "[t]he judicial district administrator shall establish procedures to ensure efficient compliance with this subdivision." *Id.* Since the term

"efficient" is not defined in the statute, it is given its ordinary meaning, which is "productive without waste." *See* Minn. Stat. § 645.08 (1) ("words and phrases are construed according to rules of grammar and according to their common and approved usage"); *Webster's Ninth New Collegiate Dictionary* 401 (9th ed. 1988) (defining "efficient" as "productive without waste"). Thus, contrary to Appellant's arguments, the implied consent statute specifically authorizes courts to establish scheduling policies which take judicial economy into consideration. Hennepin County has done just this as part of its Fast-Track Program. In fact, by scheduling implied consent hearings after resolution of the related criminal DWI case, Hennepin County in 2005 avoided having to hold duplicative hearings in 1,117 out of 1,540 cases, or 73% of the total cases resolved that year, thus fulfilling its statutory duty to develop scheduling policies that protect the rights of litigants, promote public safety and are "productive without waste." *See* Honorable Chief Judge Lucy Wieland, *DWI Fast-Track Program Six Years Later*, Full Court Press (Fourth Judicial District, Minn.), vol. 14, issue 3, October 2006, at 5; *also available at http://www.mncourts.gov/documents/4Public/News/October_06_public_web_copy.pdf;* reproduced in Respondent's Appendix at RA11-RA23.

Respondent submits that if, as Appellant suggests, the Supreme Court had intended a stay of the revocation to be used only sparingly and as a last possible resort, then at the very least the Court would have made mention of its intent and discussed the policies and authorities justifying such a requirement. Given the notable absence of any such discussions in *Fedziuk* and *Bendorf*, and the contrary indications contained in the

implied consent law itself, Appellant cannot convincingly argue that the Supreme Court and the Legislature intended to veer from over 20 years of settled case law holding that a stay of the revocation may be used to satisfy the flexible concept of procedural due process in favor of a requirement that a stay can only be used sparingly and as a last resort when a hearing cannot be held within 60 days. Appellant cannot demonstrate such an intent, and has thus failed to distinguish his case from *Bendorf*.

2. The scheduling of hearings pursuant to the Fast-Track Program is within the sound administrative discretion of the trial court.

Appellant's procedural due process claim also ignores the fact that "the district court has considerable discretion in scheduling matters and in furthering what it has identified as the interests of judicial administration and economy." *Rice Park Properties v. Robins, Kaplan, Mille & Ciresi*, 532 N.W.2d 556, 556 (Minn. 1995); *see also* Minnesota Rule of Civil Procedure 40 ("[t]he judges of the court may, by order or by rule of court, provide for the setting of cases for trial upon the calendar, the order in which they shall be heard, and the resetting thereof."). One appellate court has aptly noted the broad discretion which must be afforded to trial courts trying to manage their complex dockets:

> We realize that a court must not let its zeal for a tidy calendar overcome its duty to do justice... ...Nonetheless, the fact remains that the calendars of the Southern District court are clogged and justice is being delayed or perhaps impaired as a result. In order to reduce this choking congestion, the district courts must be permitted to exercise their discretion in appropriate ways that will ensure justice to all who seek it. We will not interfere with the conscientious judge who will not accept the *status quo* of calendar congestion. The task of updating calendars is arduous, complicated and burdensome. Since the trial judge must be entrusted with the power to

> alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment wisely in achieving the desired goal.

Davis v. United Fruit Co., 402 F.2d 328, 331-332 (C.A.N.Y. 1968).

The Minnesota Supreme Court has likewise long recognized that trial courts are empowered with broad discretion to address their congested dockets:

> In these times of overcrowded court calendars, excessive and inexcusable delays in the disposition of a case seriously affect the disposition of other cases ready for trial and, in many other ways, disrupt the fair administration of justice. Thus a broad measure of discretion must be left to trial judges to enforce calendar rules, to prevent unnecessary and inexcusable delays, and to promote the public interest in keeping court dockets free of stale claims.

Firoved v. General Motors Corporation, 277 Minn. 278, 152 N.W.2d 364 (1967).

Indeed, the same concerns about crowded calendars and wasteful use of limited court resources remain present today. *See* Honorable Chief Judge Lucy Wieland, *DWI Fast-Track Program Six Years Later*, Full Court Press (Fourth Judicial District, Minn.), vol. 14, issue 3, October 2006, at 5; *also available at http://www.mncourts.gov/documents/4Public/News/October_06_public_web_copy.pdf;* reproduced in Respondent's Appendix at RA11-RA23.

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT TROOPER KLAWITTER HAD AMPLE PROBABLE CAUSE TO BELIEVE APPELLANT WAS DRIVING WHILE IMPAIRED.

With respect to the probable cause issue, after hearing the testimony of Trooper Klawitter, the trial court made findings of fact which are well supported in the record and are not in dispute. Based on these findings, the trial court concluded that Trooper Klawitter had ample probable cause to arrest Appellant for DWI. *See generally* RA2-

RA5. Respondent submits that the trial court's conclusion is consistent with controlling authority and should be affirmed.

Probable cause is determined by looking at the totality of all the circumstances. *See Eggersgluss v. Commissioner of Public Safety,* 393 N.W.2d 183, 185 (Minn. 1986). Many telltale signs of alcohol impairment may exist independently or in combination with others and an officer need only one objective indication of alcohol impairment to form probable cause to believe the person is under the influence. *See Holtz v. Commissioner of Public Safety,* 340 N.W.2d 363, 365 (Minn. Ct. App. 1983); *Martin v. Commissioner of Public Safety,* 353 N.W.2d 202, 204 (Minn. Ct. App. 1984). These articulable facts, otherwise known as "indicia of intoxication," commonly include "an odor of alcohol, bloodshot and watery eyes, slurred speech and an uncooperative attitude". *State v. Kier* , 678 N.W.2d 672, 678 (Minn. Ct. App. 2004). An admission of drinking is also an indicia of intoxication. *See Groe v. Commissioner of Public Safety*, 615 N.W.2d 837, 841 (Minn. Ct. App. 2000) *rev'w denied*, (Minn. September 13, 2000). Poor driving conduct and the time of day can also be factors. *See State v. Storvick*, 428 N.W.2d 55, 60 (Minn. 1988). The court of appeals has also held that an officer's observations "are not to be evaluated from a remote vantage point of a library, but rather from the point of view of a prudent and cautious *officer* on the scene at the time of the arrest." *State v. Olson* 342 N.W.2d 638, 640 (Minn. Ct. App. 1984) (quoting *State v. Harris*, 265 Minn. 260, 121 N.W.2d 327, 331 (1963) (emphasis in original)).

Here, numerous facts would cause a "cautious person" to form the belief that Appellant was driving under the influence of alcohol, including: Appellant's driving

conduct, the odor of alcohol, his bloodshot and watery eyes, the stop occurring at 3:38 a.m. on a Saturday morning, as well as Appellant's admission of consuming alcohol. In addition, Trooper Klawitter testified that Appellant failed the HGN test as well as the One-Legged Stand Test. Under the totality of the circumstance, the trial court correctly concluded that Trooper Klawitter had more than a sufficient basis upon which to arrest Appellant for DWI and thereafter invoke the Implied Consent Advisory. *See Martin v. Commissioner of Public Safety*, 353 N.W.2d 202, 205 (Minn. Ct. App. 1984) (odor, "excited state" and speeding); *Holtz v. Commissioner of Public Safety* , 340 N.W.2d 363 (Minn. Ct. App. 1983) (bloodshot/watery eyes, slurred speech, odor of alcohol, and an uncooperative attitude); *Holm v. Commissioner of Public Safety*, 416 N.W.2d 473 (Minn. Ct. App. 1984) (odor of alcohol, bloodshot/watery eyes, slurred speech, and deliberate and slow movements); and *Hager v. Commissioner of Public Safety*, 382 N.W.2d 907 (Min. Ct. App. 1986) (odor of alcohol and bloodshot/watery eyes).

In response, Appellant does not challenge any of the trial court's findings of fact regarding Trooper Klawitter's observations. Instead, Appellant argues that all of Trooper Klawitter's observations were negated in their totality when Appellant provided two PBT sample of less than .08. *See* Appellant's Brief at 16-17. However, Appellant cannot cite to any controlling authority in support of his argument. Instead, he simply argues that "[i]t is logical and appropriate that passing two PBT tests should eliminate any basis for arrest under §169A.41 and 169A.51". Appellant's Brief at 16 (emphasis in original). Respondent submits that Appellant's argument is without merit for two reasons. First, there is no evidence indicating that Appellant passed two PBT tests; and second, even

assuming Appellant passed the PBT tests, Trooper Klawitter could still arrest Appellant for driving while under the influence.

A. There Is No Evidence In The Record Supporting Appellant's Claim That He "Passed" The PBT.

Respondent submits there is no evidence in the record supporting Appellant's claim that he "passed" the PBT. In fact, the evidence contradicts such an assumption.

As noted above, Trooper Klawitter testified that a proper PBT required a five second breath sample in order to produce a sufficient amount of deep lung air for the instrument to evaluate, and that this deep lung air is "more indicative of the alcohol that is in the person's system at that time." T. 14. Unfortunately, Trooper Klawitter was unable to obtain such a five second air sample, forcing him to instead manually capture two weak breath samples from Appellant. Accordingly, to the extent that Appellant is arguing that Appellant's two weak breath samples conclusively established that his alcohol concentration was below .08 prior to his arrest, that assumption has no support in the record, and instead is contradicted by the record.

B. Even Assuming That Appellant Passed The PBT, Trooper Klawitter Still Had A Sufficient Basis To Arrest Appellant For Driving While Under The Influence Instead Of For Driving With An Excess Alcohol Concentration.

Even assuming Appellant's argument that his PBT results accurately demonstrate that Appellant's alcohol concentration prior to his arrest was below .08, Trooper Klawitter still had probable cause to arrest Appellant for DWI. By statute, a motorist can be charged with driving with an alcohol concentration of 0.08 or more. *See* Minn. Stat. § 169A.20, subd. 1(5) (2006). But a motorist can also be charged of driving while under

the influence of alcohol. *See* Minn. Stat. § 169A.20, subd. 1(1) (2006). These are two separate charges, and a motorist can be convicted of one offense while also being acquitted of the other. *See State v. Parker*, 417 N.W.2d 643, 646-47 (Minn. 1988) (upholding verdict where motorist was convicted of driving with an excess alcohol concentration but acquitted of driving while under the influence); *State v. Shepard*, 481 N.W.2d 561, 562 (Minn. 1992) (upholding verdict where motorist was convicted of driving under the influence but acquitted of driving with an excess alcohol concentration.).

In fact, the two charges have little in common apart from the requirement of driving. For example, a motorist's lack of impairment is irrelevant as to whether the motorist is guilty of driving with an excess alcohol concentration. *See State v. Horning*, 535 N.W.2d 296, 298-99 (Minn.. 1995) (holding that evidence indicating lack of impairment was irrelevant to a charge of driving with an excess alcohol concentration.). Conversely, the fact that a motorist may have an alcohol concentration of less than the legal limit has little bearing on whether a motorist is under the influence. *See Shepard*, 481 N.W.2d at 562 (holding that a motorist may be convicted of driving under the influence "even if the driver's blood alcohol concentration was less than .10 provided the state shows that the driver had drunk enough alcohol so that the driver's ability or capacity to driver was impaired in some way or to some degree.").

Accordingly, even if Appellant could argue persuasively that his alcohol concentration was below .08 prior to his arrest, Trooper Klawitter still had ample probable cause to arrest Appellant for driving while under the influence. In fact, this

Court has so held on at least two separate occasions on very similar facts. *See State v. Casler*, Court File No. C9-98-2025 (Minn. Ct. App. April 20, 1999) unpublished opinion[6] (holding that odor of alcohol, failed HGN test, and failed one-legged stand test, gave officer sufficient probable cause to arrest even where PBT indicated an alcohol concentration of between .04 and .08); *State v. Salonek*, Court File No. C9-98-2249 (Minn. Ct. App. Aug. 3, 1999) unpublished opinion[7] (holding that poor driving conduct, odor of alcohol and failed field sobriety tests gave officer sufficient probable cause to arrest even where motorist did not fail the PBT.).

Similarly here, even accepting the argument that Appellant passed the PBT, the trial court correctly looked to the totality of the circumstances before determining that Trooper Klawitter had probable cause to arrest Appellant for DWI. The trial court's decision should therefore be affirmed.

CONCLUSION

Respondent submits that the trial court properly applied prior controlling precedent to the undisputed facts, and correctly determined that the 60-day statutory directive is not mandatory, and found that Appellant's statutory and procedural due process rights were sufficiently protected by the availability of a stay of the revocation pending a hearing on the merits.

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[6] Pursuant to Minn. Stat. § 480A.08(3), a copy of this unpublished opinion is reproduced in Respondent's Appendix at RA9-RA11.

[7] Pursuant to Minn. Stat. § 480A.08(3), a copy of this unpublished opinion is reproduced in Respondent's Appendix at RA5-RA11

Similarly, the trial court correctly concluded that based on the totality of the circumstances, Trooper Klawitter had sufficient probable cause to arrest Appellant for DWI based on the driving conduct he observed, the time of day, the odor of alcohol, admission of consuming alcohol, swaying, the failed HGN test, and the failed One-Legged Stand Test.

For the foregoing reasons, Respondent respectfully asks that the decision of the trial court below be affirmed.

Respectfully submitted,

Dated: Sept. 10, 2007

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