

A07-2413

STATE OF MINNESOTA
IN COURT OF APPEALS

Mark Alan Johnson,

Appellant,

vs.

**APPELLANT'S BRIEF AND
APPENDIX**

Commissioner of Public Safety,

Respondent.

Richard Kenly
Attorney Reg. No. 0253108
P.O. Box 31
Backus, Minnesota 56435
(218) 947-3000

Attorney for Appellant

Jeffery F. Lebowksi
Assistant Attorney General
1800 NCL Tower
445 Minnesota Street
St. Paul, Minnesota 55101

Attorney 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).

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LEGAL ISSUE

- I. CAN THE MINNESOTA COMMISSIONER OF PUBLIC SAFETY REVOKE A DRIVER'S LICENSE UNDER MINNESOTA'S IMPLIED CONSENT LAW WHEN THE CERTIFICATION BY THE PEACE OFFICER DOES NOT INDICATE THAT THE DRIVER REFUSED TO TEST OR TESTED WITH AN ALCOHOL CONCENTRATION OF 0.08 OR MORE?

The District Court ruled that although the implied consent statute had been technically violated, certification of a test result was submitted in paperwork to the Commissioner of Public Safety.

Apposite Authority:

MINN. STAT. § 169A.52, Subd. 4.

MINN. STAT. § 169A.52, Subd. 7(c)(3).

STATEMENT OF THE CASE

This appeal arises from a petition for judicial review of the Commissioner of Public Safety's revocation of Appellant Mark Alan Johnson's driver's license pursuant to the provisions of MINN. STAT. § 169A.53.

The matter was heard on September 27, 2007 before the Cass County District Court, the Honorable David F. Harrington presiding. This appeal follows the District Court's ruling dated October 25, 2007 wherein the Appellant's petition was denied.

STATEMENT OF THE FACTS

On May 8, 2007 the Appellant, Mark Alan Johnson, was stopped by law enforcement for speeding and crossing the centerline. District Court Order and Memorandum page 2, Appendix page 3 (DCO&M p. 2, A p. 3). After the initial encounter the Appellant submitted to a preliminary breath test. Id. Because the preliminary breath-testing machine was not functioning properly a valid sample was not obtained. Id. The Appellant refused to take other field sobriety tests and was arrested for DUI. Id.

After transporting Appellant to the Cass County Jail the arresting law enforcement officer, Officer Hastings, invoked the Implied Consent Advisory and the Appellant agreed to take a breath test. Id. The result of the breath test was .25. Id. Officer Hastings, filled out a Peace Officer's Certificate and on question number 6 checked the boxes "DWI arrest" and "Failed PBT with AC of .08 or more." Id.; A 8. Officer Hastings did not check a box at question 9 of the Peace Officer's Certificate to indicate that Appellant refused to test or provided a sample over .08 or provided a blood or urine sample which indicated the presence of a hazardous substance or schedule I or II controlled substance. Id. p. 3, A p.4; A p. 8.

ARGUMENT

I. **THE MINNESOTA COMMISSIONER OF PUBLIC SAFETY MAY NOT REVOKE A DRIVER'S LICENSE UNDER MINNESOTA'S IMPLIED CONSENT LAW WHEN THE CERTIFICATION BY THE PEACE OFFICER DOES NOT INDICATE THAT THE DRIVER REFUSED TO TEST OR TESTED WITH AN ALCOHOL CONCENTRATION OF 0.08 OR MORE.**

A. **STANDARD OF REVIEW**

“Deprivation of the continued possession of a driver’s license is subject to the due process clause of the Fourteenth Amendment. Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).” Goldsworthy v. State Dept. of Pub. Safety, 268 N.W.2d 46, 48 (Minn. 1978).

B. **ANALYSIS**

Minnesota Statute § 169A.52, Subd. 4(a) specifically states that

[u]pon certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the person submitted to a test and the test results indicate an alcohol concentration of 0.08 or more or the presence of a controlled substance listed in schedule I or II or its metabolite, other than marijuana or tetrahydrocannabinols, then the commissioner shall revoke the person's license or permit to drive

Minnesota Statute § 169A.52 Subd. 7(c)(3) requires that the “certificate” required by MINN. STAT. § 169A.52 Subd. 4(a) be sent to the Commissioner of Public Safety.

Minnesota law clearly dictates that Officer Hastings was required to certify the results of the test by Appellant and send that certification to the Commissioner of Public Safety. Officer Hastings did not do that. The District Court found Officer Hastings’ failure to do that a technical violation of the implied consent law. See DCO&M p. 5, A

p. 6. However, the law does not allow the Commissioner of Public Safety to act against a license without the certification. There is good reason why the legislature enacted the law the way it did. That good reason is often termed due process. Without due process there can be no taking by the government.

A pre-printed form was provided for Officer Hastings just for the purpose of certifying the test result. It is on the back of the implied consent advisory form. A revocation of a driver's license cannot be the result of mere anecdotal information. It must be certified to be true and the officer so certifying must sign the form. It also must be certified *after* the officer knows it is true and not *before*. Officer Hastings failed to certify as required by Minnesota law. Further the certification that was completed by Officer Hastings was partially false in that the Appellant never failed a PBT. This false certification was sent to the State to be used against the Appellant and his driver's license.

Since the Commissioner of Public Safety may not revoke a driver's license unless the test result is certified to be .08 or greater, containing a hazardous substance, schedule I or II controlled substance or a refusal and since this particular revocation is not based on Officer Hastings certifying any of these, the revocation as it stands cannot be sustained. See Godderz v. Commissioner of Public Safety, 369 N.W.2d 606 (Minn. App. 1985)(Court limited to sustaining or rescinding the existing Order of Revocation, the intoxilyzer statute and the rule promulgated by the commissioner was unambiguous requiring two adequate breath samples to establish alcohol concentration in excess of legal limit, one was not enough and order rescinding revocation was proper.).

Officer Hastings did not follow the procedure set forth under Minnesota law to revoke a driver's license. He signed a certificate that failed to certify any test result and included a falsehood that the Appellant failed a PBT.

CONCLUSION

“A driver's license is an important property interest and is subject to due-process protections. Kleven v. Commissioner of Pub. Safety, 399 N.W.2d 153, 156 (Minn. App. 1987).” State v. Polsfuss, 720 N.W.2d 1, 4 (Minn. App. 2006). The Appellant respectfully requests that his petition to rescind the revocation of his driver's license be granted because law enforcement failed to certify a test result or test refusal to the Commissioner of Public Safety as required by Minn. Stat. § 169A.52 Subd. 4(a).

Respectfully Submitted,



Rich Kenly
Kenly Law Office
Atty. Reg. No. 0253108
P.O. Box 31
Backus, MN 56435
(218) 947-3000