

APPELLATE #AO8-0536
STATE OF MINNESOTA
IN COURT OF APPEALS

In Re:

Charlotte M. Heino,

Respondent,

vs.

One (1) 2003 Cadillac
MN Lic. #KFR 615,
VIN #1G6KS54Y83UI31208,

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

Respondent asserts "...Appellant dirties the reviewing waters by attempting to impute to Respondent a constitutional challenge to Minnesota legislation that Respondent never posited, not at the District Court level, nor in the present appeal. The interpretation of a statute is at issue here, not a constitutional challenge thereto". Respondent's Brief, page 4. But the record does not support that assertion:

Mr. Meshbesh: ...it just substantiates what I've been saying all along; that is, forfeiture of a car is a due process violation just like the deprivation of your freedom, and I think the Polfuss decision seems to say that.

T. at 30-31 (Hearing on post trial motion). See also Respondent's Trial Letter – Memorandum dated January 29, 2008, at pages 3-4 (quotes portions of State v. Wiltgen, 732 NW2d 561 (Minn. 2007) expounding the law of procedural due process; then utilizes those quotes to support argument that the Respondent's March 7, 2007, driver's license revocation cannot be counted as an aggravating factor). See also District Court's Conclusions of Law paragraphs 1-4 and Memorandum dated February 3, 2008 ("...the focus of both [parties] is the right to due process"). Appellant's Appendix A10 – A18. Thus, this case indeed involves the Respondent's constitutional challenge to the application of Minnesota Legislation to her conduct. Her argument to the contrary in this appeal, while surprising, is refuted by the record.

The Respondent also argues "The effect of the Supreme Court's holding [in Wilton] is clear: an unreviewed license revocation cannot be used to enhance criminal charges *under any circumstances*". The Respondent's Brief at page 10, emphasis added. But the Supreme Court did not say that in Wiltgen, and the Respondent mistakenly interprets the holding in that case. The fact that Ms. Wiltgen's petition for

judicial review (PJR) concerning the revocation of her license arising from her August 13, 2005, DUI was unreviewed at the time of her September 13, 2005, DUI does not prevent the State from counting that revocation as an aggravating factor with respect to her September 13th conduct, in the Supreme Court's judgment. *Id.* at 572. Rather, the Supreme Court in Wiltgen, expressly recognizes the dual tracks which may proceed in this scenario. The government may either proceed with the lesser criminal charge prior to the completion of the review process on the earlier revocation. Alternatively, after waiver of the PJR or completion of the judicial process, government may proceed with the appropriate charge. *Id.* footnote 7; Appellant's Brief at page 15. Under the latter tract, the prior revocation is allowed to be counted as an "aggravating factor", unless of course it is reversed during the review process. *Id.* Therefore, under Wiltgen, an "aggravating factor" is not automatically converted to a "non-aggravating factor" by the filing of a PJR, or by the fact that review is pending at the time of a subsequent DUI offense. The Respondent's argument coupled and the District Court's ruling below to the contrary misinterprets Wiltgen, and overlooks the portion of the holding in that case that recognizes circumstances where a prior revocation may be counted as an "aggravating factor", even though it was yet to be reviewed judicially at the time of a subsequent DUI offense. For these reasons, the Respondent's interpretation of Wiltgen is faulty as is her reasoning from that interpretation.

CONCLUSION

The orders of the District Court which deny forfeiture in this case should be reversed because:

1. The Supreme Court in Wiltgen recognizes there are circumstances when the revocation of a driver's license under the Implied Consent Law that is unreviewed at the time of a subsequent DUI offense can be counted as an

aggravating factor and used to support enhanced criminal charges and penalties without violating the procedural due process rights of the offender.

2. The principles of due process of law recognized in Wiltgen should, by analogy, be extended to civil forfeiture cases. Thus, even though the Respondent's driver's license revocation on March 7, 2007, was unreviewed by the judiciary as of May 9, 2007, when her second DWI was committed, her March 7th revocation is countable as an aggravating factor in the circumstances of this case because judicial review of her PJR concerning that revocation was completed without reversal before it was used as an aggravating factor at the forfeiture trial.

Dated this 18th day of June, 2008.

Respectfully submitted,
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