

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

In Re:

Charlotte M. Heino,

Respondent,

vs.

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

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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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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written notice of that trial setting on March 27, 2007; (3) the Respondent, by written waiver dated April 6, 2007, requested that the May 1st trial date be set for a later date; and (4) judicial review of that ARA was completed without reversal before the forfeiture trial was held. The District Court erred in its application of the law as stated in the Polsfuss and Dirkswager decisions as the Respondent not only was afforded the opportunity to be heard at a meaningful time and in a meaningful manner regarding the March 7th ARA, she exhausted those rights prior to the forfeiture trial. 12

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STATEMENT OF LEGAL ISSUES

- I. In State v. Wiltgen, 737 N.W.2d 561 (Minn. 2007), the Supreme Court held, in a pre-trial appeal in a criminal case, that government's use of a prior administrative driver's license revocation action (ARA) as an aggravating factor to enhance impaired-driving criminal charges where the trial on the enhanced charges occurs *after* judicial review of the prior ARA is completed without reversal of the ARA will not violate due process of law. Wiltgen at 572, Footnote #7. By holding just the opposite, and in ruling that government's use of the March 7th ARA of the Respondent's driver's license as an aggravating factor to support forfeiture violates due process of law even though the trial on the forfeiture was held after the completion of judicial proceedings to review that ARA without reversal, the District Court erred in its application of law to the circumstances of this case.

Most apposite authority: State v. Wiltgen, 737 N.W.2d 561 (Minn. 2007).

- II. In State v. Polsfuss, 720 N.W.2d 1, 4 (Minn. App. 2006) and cases cited therein, the Court of Appeals held that due process guarantees in civil proceedings are different from those in criminal proceedings. Citing Heddan v. Dirkswager, 336 N.W.2d 54, 59 (Minn. 1983), the Court in Polsfuss held that due process requirements in civil proceedings are "satisfied by the opportunity to be heard at a meaningful time and in a meaningful manner". In the instant case, the District Court ruled that government's use of the March 7th ARA of the Respondent's license as one of the two aggravating factors needed to sustain forfeiture of the vehicle at the forfeiture trial on January 14, 2008, violates due process of law even though: (1) a trial on that ARA was scheduled for May 1, 2007, a date within 60 days of the ARA; (2) the Respondent was given written notice of that trial setting on March 27, 2007; (3) the Respondent, by written waiver dated April 6, 2007, requested that the May 1st trial date be set for a later date; and (4) judicial review of that ARA was completed without reversal before the forfeiture trial was held. The District Court erred in its application of the law as stated in the Polsfuss and Dirkswager decisions as the Respondent not only was afforded the opportunity to be heard at a meaningful time and in a meaningful manner regarding the March 7th ARA, she exhausted those rights prior to the forfeiture trial.

Most apposite authority: State v. Wiltgen, *supra.* and Fedzuik v. Commissioner of Public Safety, 696 N.W.2d 340 (Minn. 2005).

STATEMENT OF THE CASE

This case originates in the Itasca County District Court, Ninth Judicial District, with the Honorable Jon A. Maturi, Judge of the District Court presiding. Appellant appeals from the District Court's Findings of Fact, Conclusions of Law, and Order dated February 3, 2008 (A-9), together with the Order dated February 29, 2008 (A-17), which confirms its Order dated February 3, 2008, and denies the Appellant's motion for amended conclusions of law or alternatively a new trial, and which orders deny and dismiss action to forfeit the named motor vehicle in this matter under Minn. Stat. 169A.63.

STATEMENT OF FACTS

On March 7, 2007, the Respondent engaged in conduct constituting Fourth Degree DWI. Dist. Ct. F. of F. #1 and #8, February 3, 2008; A-9. She was arrested and was given the Implied Consent Advisory. Id. She agreed to a test that showed her alcohol content was 0.16. Respondent's Trial Memorandum, January 29, 2008 at pg. #1. She was given notice at that time of the revocation of her driver's license privileges effective March 14, 2007. Dist. Ct. F. of F. #1. Respondent filed a Petition for Judicial Review (PJR) of her license revocation on March 22, 2007. Id. at F. of F. #2. A hearing on that petition was set for May 1, 2007, before the District Court in Grand Rapids. Id. On April 9, 2007, the Respondent filed a waiver of the requirement that the judicial review hearing be held within 60 days. Id. at F. of F. #4. As a result, the May 1, 2007, hearing was changed to August 7, 2007. Id.

On May 9, 2007, the Respondent engaged in conduct constituting Second Degree Driving While Under the Influence of Alcohol. Id. at F. of F. #5 and #8; Transcript of hearing on January 14, 2008, at pg. #10. The Respondent was arrested, given the Implied Consent Advisory, and charged by the officer with Second Degree DWI based on two aggravating factors on the ticket, to wit: a blood alcohol content of 0.26, and the revocation of her driver's license following her DWI conduct on March 7, 2007. Id. F. of F. #5. The Respondent's motor vehicle was seized and she was also served with a Notice of Intent to Forfeit that vehicle. Id. Appellant's App. A-2. One of the two aggravating factors cited to take that forfeiture action was the March 7, 2007 administrative revocation action (ARA) of the Respondent's license under the Implied

Consent law resulting from her conduct on that date. Id. The other factor was the Respondent's blood-alcohol content of 0.26 while engaging the above-mentioned conduct on May 9th. Id. Hearing of January 14, 2008, T. at pgs. #9 and #10 (Respondent stipulates her BAC was 0.26 at the time of the May 9th incident).

The Respondent filed a timely Complaint and Demand for Judicial Determination of Forfeiture. A-4. She also filed a PJR of the ARA taken May 9, 2007, relative to her loss of driving privileges under the Implied Consent law on that date. Dist. Ct. F. of F. #7.

The Respondent entered guilty pleas to Fourth Degree DWI (March 7, 2007, offense) and Third Degree DWI (May 9, 2007, offense) on July 30, 2007. Id. at F. of F. #8. On September 17, 2007, she withdrew her PJR's of both the March 7 and May 9, 2007, ARA's. Id. at F. of F. #9. Respondent also conceded that under Mastakoski v. 2003 Dodge Durango, 738 N.W.2d 411 (Minn. App. 2003) the legal character of her conduct is determined by reference to her conduct and the applicable statutory provisions of the Impaired Driver Code, and not simply by the charge she ultimately pled guilty to. Jan. 14, 2008, hearing, T. at 10.

The trial on Respondent's Complaint and Demand for Judicial Determination of Forfeiture was held on January 14, 2008. Instead of a trial, a stipulation of facts was entered into by the parties, and the matter was submitted to the District Court for a decision. Transcript of Hearing on January 14, 2008. The Respondent claimed that the March 7th ARA of her driver's license could not be used as an aggravating factor to support forfeiture without violating due process of law because she had made a

timely request for judicial review and because that review had not been completed before her DWI conduct on May 9, 2008. Id. T. at #8-#10. She cited State v. Wiltgen, 737 N.W. 2d 561 (Minn. 2007) in support of her claim. Id.; Respondent's Trial Memorandum, January 29, 2008; and Respondent's Memorandum of Law Opposing Post-Trial Motion dated February 15, 2008.

The Appellant claimed that the March 7th ARA can be utilized as an aggravating factor to support the vehicle's forfeiture without violating due process of law because the Respondent was afforded the opportunity for judicial review of that ARA within 60 days of that ARA. Appellant's Trial Memorandum, January 18, 2008, at pg. #2; and Appellant's Memorandum of Law in Support of Post-Trial Motion dated February 13, 2008, at pgs. #3-#4. Appellant also claimed that the March 7th ARA could be used as an aggravating factor to support forfeiture under the holding in Wiltgen because at the time of the forfeiture trial, the judicial review process concerning that ARA was completed without reversal or other modification to the ARA. Id. The Wiltgen decision is reproduced at A-20 due to its significance.

The District Court denied forfeiture of the vehicle, holding that the Respondent's rights to procedural due process of law would be violated if the March 7th ARA was used as an "aggravating factor" in the circumstances of this case. Dist. Ct. C. of L. #3 and #4; Memorandum of Law dated February 3, 2008; A-9. The Appellant filed a motion for amended conclusions of law, or alternatively for a new trial. A-15. In an Order and Memorandum dated February 29, 2008, the District

Court denied that motion. A-17 Appellant brings the instant appeal from those orders. A-19.

SCOPE AND STANDARDS OF REVIEW

The Appellate Court may fully review construction of a statute, which is a question of law. Grimm v. Commissioner of Public Safety, 469 N.W.2d 746 (Minn. App. 1991). The Court of Appeals is not bound by the trial court's resolution of a question of law. Buchanan v. Dain Bosworth Incorporated, 469 N.W.2d 508 (Minn. App. 1991). Judicial review is restricted by additional standards when the court evaluates the constitutionality of enactments by a co-equal branch of government:

Evaluating a statute's constitutionality is a question of law. Questions of law are subject to de novo review; therefore the reviewing court is not bound by the lower court's decision. Minnesota statutes are presumed constitutional and, as we have said in the past, our power to declare a statute unconstitutional must be exercised with extreme caution and only when absolutely necessary. The party challenging the statute has the burden of demonstrating, beyond a reasonable doubt, that a constitutional violation has occurred.

Hamilton v. Commissioner of Public Safety, 600 N.W.2d 720, 722 (Minn. 1999).

SUMMARY OF ARGUMENT

The purpose of this Brief is to demonstrate why procedural fairness fully protective of the Respondent's rights to due process of law was provided to her in the circumstances of this case; why the District Court erred in concluding otherwise; and why the District Court erred by allowing the Respondent to be excused from the consequences called for under statutory law prohibiting the conduct she chose to engage in.

ARGUMENT

- I. **In State v. Wiltgen, 737 N.W.2d 561 (Minn. 2007), the Supreme Court held, in a pre-trial appeal in a criminal case, that government's use of a prior**

administrative driver's license revocation action (ARA) as an aggravating factor to enhance impaired-driving criminal charges where the trial on the enhanced charges occurs *after* judicial review of the prior ARA is completed without reversal of the ARA will not violate due process of law. Wiltgen at 572, Footnote #7. By holding just the opposite, and in ruling that government's use of the March 7th ARA of the Respondent's driver's license as an aggravating factor to support forfeiture violates due process of law even though the trial on the forfeiture was held after the completion of judicial proceedings to review that ARA without reversal, the District Court erred in its application of law to the circumstances of this case.

A. THE MINNESOTA IMPAIRED DRIVING CODE – PERTINENT PROVISIONS.

The issue of procedural due process in this case must be addressed against the backdrop of the Minnesota Impaired Driving Code. Minn. Stat. 169A.01, Subd. 1. The pertinent sections of that Code are the focus of this section of this Brief.

Minn. Stat. 169A.63, Subd. 6, states:

Vehicle subject to forfeiture (a) A motor vehicle is subject to forfeiture under this section if it was used in the commission of a designated offense or was used in conduct resulting in a designated license revocation.

Minn. Stat. 169A.63, Subd. 1(e), defines the term “designated offense”. That section states in relevant part:

- (e) “Designated offense” includes:
(1) a violation of section... 169A.25 (second degree driving while impaired)....

“Second degree driving while impaired” is defined at Minn. Stat. 169A.25. That section states in pertinent part:

Second-degree driving while impaired.

Subdivision 1. **Degree described.** (a) A person who violates section 169A.20, Subd. 1, (driving while impaired crime) is guilty of second-

degree driving while impaired if two or more aggravating factors were present when the violation was committed.

“Driving while impaired” is conduct defined at Minn. Stat. 169A.20. That section states in pertinent part:

Driving while impaired.

Subdivision 1. **Driving while impaired crime.** It is a crime for any person to drive, operate, or be in physical control of any motor vehicle within this state or on any boundary water of this state:

(1) When the person is under the influence of alcohol;

(5) When the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of a motor vehicle is 0.08 or more....

“Aggravating factor” is a term defined at Minn. Stat. 169A.03. That section states in pertinent part:

Subdivision 3. **Aggravating factor.** “Aggravating factor” includes:

(1) A qualified prior impaired driving incident [hereinafter QPIDI].

A QPIDI is defined in turn at Minn. Stat. 169A.03, Subd. 22. That section states in pertinent part:

Qualified prior impaired driving incident. “Qualified prior impaired driving incident” includes prior impaired driving convictions, and prior impaired driving-related losses of license.

“Prior impaired driving-related loss of license” is a term defined at Minn. Stat. 169A.03, Subd. 21. That section states in pertinent part:

Prior impaired driving-related loss of license. (a) “Prior impaired driving-related loss of license” includes a driver's license suspension, revocation, cancellation, denial or disqualification under:

(1) Section... 169A.50 to 169A.53 (implied consent law);....

Since this case involves an issue of determining the number of aggravating factors applicable to the Respondent, Minn. Stat. 169A.095 is also relevant. That section states in pertinent part:

When determining the number of aggravating factors present for purposes of this chapter, subject to section 169A.09 (sanctions for prior behavior to be based on separate courses of conduct), each qualified prior impaired driving incident within the ten years immediately preceding the current offense is counted as a separate aggravating factor.

B. RESPONDENT'S CONDUCT ON MARCH 7, 2007: FACTS AND STATUTORY LAW.

On March 7, 2007, the Respondent violated the Minnesota Impaired Driving Code by driving a motor vehicle in Itasca County when her alcohol content was .16. She was arrested and her driver's license was revoked under Minn. Stat. 169A.50-.53 (implied consent law) on that date. The revocation of her license on that date is a QPIDI under Minn. Stat. 169A.03, Subd. 22. The revocation of her license on that date is also – for the next ten years – an “aggravating factor” under Minn. Stat. 169A.03, Subd. 3.

C. RESPONDENT'S CONDUCT ON MAY 9, 2007: FACTS AND STATUTORY LAW.

On May 9, 2007, the Respondent violated the Minnesota Impaired Driving Code again. On that date, she unlawfully drove a motor vehicle in Itasca County when her alcohol content was .26. Her conduct violated Minn. Stat. 169A.25, Subd. 1 – Second Degree DWI – based on two “aggravating factors” when the violation was committed. Her QPIDI related loss of license on March 7, 2007, is the first aggravating factor.

Her alcohol content of 0.26 on May 9th is the second. Minn. Stat. 169A.03, Subd. 3. The motor vehicle driven by Respondent on May 9th is – under the statutory law – subject to forfeiture as provided by Minn. Stat. 169A.63, Subd. 6, because it was used in the commission of a “designated offense” under Minn. Stat. 169A.63, Subd. 1(e), to-wit: under circumstances described in section 169A.25 (second-degree driving while impaired).

Also, since the Respondent's first and second “aggravating factors” arise out of separate courses of conduct, the first on March 7th, and the most recent on May 9th, each – under the statutory law – is to be counted as a separate “aggravating factor”. Minn. Stat. 169A.095.

From the foregoing, it is clear that under the plain and express language of the statutory law, the Appellant-vehicle is forfeited as a result of the Respondent's conduct on May 9, 2007. She made no statutory claim to the contrary in the District Court.

The Respondent does claim that because judicial review on her PJR from the March 7th ARA was not completed before May 9th, the date when her next impaired driving incident occurred – the March 7th ARA cannot count as an “aggravating factor”. She claims that to count the March 7th ARA as an “aggravating factor” under these circumstances violates procedural due process. She arms that claim with State v. Wiltgen, 737 N.W.2d 561 (Minn. 2007). Thus, her claim is a direct attack challenging the constitutional validity of the express language in Minn. Stat. 169A.03, Subds. 3, 21, and 22 (“aggravating factor”, “prior impaired driving-related loss of license”, and “qualified prior impaired driving incident” defined respectively) and

Minn. Stat. 169A.095 (determining number of aggravating factors). Because Wiltgen is a criminal case, and the instant matter is a civil one, the first question that must be decided is whether Wiltgen even applies to this matter.

D. WILTGEN ESTABLISHES A RULE OF PROCEDURAL DUE PROCESS FOR CRIMINAL, NOT CIVIL MATTERS.

In Wiltgen, the Supreme Court established a procedural rule applicable to criminal proceedings. The court held that when an element of a criminal charge is a prior QPIDI for which judicial review is pending, government may not utilize that unreviewed QPIDI as a conclusive element to support that charge unless it waits until judicial review is completed. If judicial review is completed, and the prior QPIDI is upheld, the government may then utilize the prior QPIDI to prove the criminal charge without offending procedural due process. Wiltgen, at 572, Footnote 7.

The Respondent argues the Court should expand the procedural rule in Wiltgen by extending it from criminal to civil proceedings. There are three reasons why that argument should be declined.

First, there is no language in Wiltgen supporting the Respondent's argument.

On the contrary, the court in Wiltgen emphasized the narrowness of its ruling:

Given the substantial caseload facing the District Court, we understand the desire to avoid the waste of judicial and party resources in conducting duplicate proceedings, and we recognize that, because the trial of the associated criminal case may result in revocation, it could render the implied consent proceedings moot. But those policy considerations have legal implications in the narrow circumstance where the revocation is sought to be used to aggravate a subsequent offense, during the time when judicial review of the revocation has been prevented by the Standing Order. We turn now to a discussion of those implications.

Wiltgen, at 567-8 (emphasis added).

The procedural rule of due process established in Wiltgen is the product of the high court's synthesis of the legal implications presented by the facts specific to that case, to-wit: (1) the criminal prosecution of the defendant; (2) the defendant's prior QPIDI; (3) the defendant's inability to obtain judicial review of that prior QPIDI before the criminal trial because of a standing order of the District Court; (4) the government's prosecution on the criminal charge, and its attempt to utilize the un-reviewed QPIDI as conclusive evidence of an element of the crime charged, as opposed to waiting until judicial review was completed on that QPIDI; (5) the 60 days of liberty the defendant was faced with losing if the government was permitted to use the prior QPIDI as an element of the criminal charge at trial before judicial review of that QPIDI had been completed. See Wiltgen, 568-72. The holding in Wiltgen, therefore, establishes a rule of procedure governing criminal juris prudence; a rule derived from the balancing of factors found only in criminal proceedings. There is no language in Wiltgen either holding or suggesting the establishment of a rule of procedure governing civil matters. For this reason, the rule of law established in Wiltgen should not be extended to civil proceedings.

The second reason why the Wiltgen ruling governing criminal juris prudence should not be extended to civil matters is because this is not a proper case to do so. First, this is not a case where a standing order precluded judicial review of Respondent's prior QPIDI before the civil trial took place on the forfeiture trial. In

the instant case, the civil trial on the forfeiture took place in January of 2008, a date four months after the judicial review process on Respondent's March 7th QPIDI had been completed, without reversal. See Dist.Ct. F. of F. 9, Feb. 3, 2008 (Respondent's petitions for judicial review of both her March 7th and May 9th implied consent related driver's license revocations were withdrawn on September 17, 2007). If this were a case where the forfeiture trial was held before judicial review of the prior QPIDI was completed, the case would be ripe to decide if the Wiltgen rule should be extended. But that's not the case in the instant matter, and appellate juris prudence warrants restraint. See Leiendecker v. Asian Women United of Minnesota, et. al. 713 NW2d 836, 841 (Minn. App. 2007), (rev. den. Aug. 7, 2007) (Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements; a justiciable controversy must exist for a litigant's claim to be properly before a court; issues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable). Because the Respondent was not faced with the procedural paradox of a civil trial on the forfeiture where government was attempting to use an un-reviewed QPIDI against her, the issue of extending Wiltgen to civil proceedings is not ripe.

Third, because the Respondent was afforded due process of law relative to her March 7th QPIDI, and the same was not reversed, counting that QPIDI as an "aggravating factor" in the instant forfeiture matter is lawful, and no judicial reconstruction of Minn. Stats. 169A.03, Subds. 3, 21, and 22, or 169A.095 is needed. See Appellant's Brief, Part II. A.

E. IF THE PROCEDURAL RULES OF LAW RECOGNIZED IN WILTGEN ARE EXTENDED FROM CRIMINAL TO CIVIL PROCEEDINGS, THE FORFEITURE OF THE MOTOR VEHICLE IN THE INSTANT CASE IS A LAWFUL FORFEITURE UNDER THOSE RULES.

While simple, the facts in Wiltgen are important for understanding the procedural rules of due process enunciated by the Minnesota Supreme Court in that decision. On August 13, 2005, Wiltgen's drivers license was administratively revoked under the implied consent law when she was arrested for DUI. Wiltgen at 565. She filed a timely PJR of that revocation. Id. A District Court's standing order provided that the hearing on her PJR would be scheduled upon disposition of the associated criminal case. Id. She requested, and was granted, a stay of the balance of the revocation period on August 30, 2005. Id. Then, on September 13, 2005, she was again arrested for DUI. She was charged with Second Degree DUI – an offense requiring the presence of two aggravating factors. Id. The government used her August 13th license revocation as one of those aggravating factors to support its charging decision, even though judicial review of her PJR was not completed. Id. at 565-6.

Ms. Wiltgen's Second Degree DUI arising from the September 13th arrest was called for trial on November 22, 2005. As of that date, judicial review had yet to be completed on her PJR of the August 13th revocation. Id. Yet, the government still intended to use her August 13th revocation as a conclusive element of the crime. Id.; and at 569.

As the trial was about to start, Ms. Wiltgen moved to reduce the charge from Second Degree to Third Degree DUI, challenging the use of the August 13th revocation as an “aggravating factor”. Id. at 566. She argued government could not constitutionally charge her with Second Degree DUI by using the unreviewed license revocation as one of the aggravating factors. The District Court granted her motion. Id. Instead of going to trial on the reduced charge of Third Degree DUI, the government appealed that ruling. The Minnesota Court of Appeals reversed, holding that government could lawfully use the unreviewed DL revocation from August 13th as an “aggravating factor” to prove one of the elements of the Second Degree DUI charge. Id. The Supreme Court reversed, and held that procedural due process of law would be violated if government was allowed to use the August 13th revocation as a conclusive element of the Second Degree DUI charge in Wiltgen's criminal trial – a trial scheduled to take place before her PJR was completed on that revocation. This left the government with two options, according to the Supreme Court: (1) proceed with the criminal trial – but be barred from using the August 13th revocation in its case, effectively reducing the Second Degree DUI charge to a Third Degree DUI charge – which the District Court directed; or (2) before proceeding to trial on the criminal charges, government could wait until judicial review on Wiltgen's PJR was completed; then if the revocation was not reversed, the government could use that revocation as an aggravating factor to support its criminal charges without violating Wiltgen's procedural due process rights. See Wiltgen, 572, Footnote 7 (“This result does not seriously prejudice the State because the State can delay the issuance of a

Second Degree DUI complaint until after the implied consent hearing has been conducted and the revocation has been sustained or can charge Third Degree DUI before the implied consent hearing, and amend the complaint to add a Second Degree DUI charge after the hearing”).

In the instant case, the Respondent's driver's license revocation under the implied consent law occurred March 7, 2007. Her subsequent DUI with a BAC of 0.26 occurred May 9, 2007. Judicial review on her PJR from the March 7th revocation was completed on September 17, 2007 – without reversal – when she withdrew her petition on that date. Trial on the issue of forfeiture occurred January 14, 2008. Thus, under the procedural due process rulings in Wiltgen, she was afforded due process on the March 7th revocation and that process was completed prior to the forfeiture trial. The government's use of the March 7th revocation as one of the “aggravating factors” in support of the forfeiture of the vehicle is proper under the express holding in Wiltgen if that holding is extended to civil cases. The Respondent's argument to the contrary along with the District Court ruling that sides with it are affected by error of law, and should be overruled.

II. In State v. Polsfuss, 720 N.W.2d 1, 4 (Minn. App. 2006) and cases cited therein, the Court of Appeals held that due process guarantees in civil proceedings are different from those in criminal proceedings. Citing Heddan v. Dirkswager, 336 N.W.2d 54, 59 (Minn. 1983), the Court in Polsfuss held that due process requirements in civil proceedings are “satisfied by the opportunity to be heard at a meaningful time and in a meaningful manner”. In the instant case, the District Court ruled that government's use of the March 7th ARA of the Respondent's license as one of the two aggravating factors needed to sustain forfeiture of the vehicle at the forfeiture trial on January 14, 2008, violates due process of law even though: (1) a trial on that ARA was scheduled for May 1,

2007, a date within 60 days of the ARA; (2) the Respondent was given written notice of that trial setting on March 27, 2007; (3) the Respondent, by written waiver dated April 6, 2007, requested that the May 1st trial date be set for a later date; and (4) judicial review of that ARA was completed without reversal before the forfeiture trial was held. The District Court erred in its application of the law as stated in the Polsfuss and Dirkswager decisions as the Respondent not only was afforded the opportunity to be heard at a meaningful time and in a meaningful manner regarding the March 7th ARA, she exhausted those rights prior to the forfeiture trial.

A. RESPONDENT WAS AFFORDED PROCEDURAL DUE PROCESS OF LAW RELATIVE TO THE MARCH 7TH ARA OF HER DRIVING PRIVILEGES.

The Respondent claimed, and the District Court ruled that Respondent would be deprived of due process of law if her March 7th ARA is allowed to count as one of the two aggravating factors needed to sustain the vehicle's forfeiture. The District Court identified factors to balance, balanced them, and then concluded that because the Respondent's PJR on her March 7th revocation was still pending when the May 9th violation occurred, her "right to due process had not been satisfied, and the revocation of the March 7, 2007 incident may not be used against her". District Court decision dated February 3, 2008, at Conclusions of Law paragraph #3-4, and Memorandum of Law at 4-6.

In State v. Polsfuss, 720 N.W.2d 1, 4 (Minn. App. 2006), the Court held:

The due process guarantees in a civil implied consent proceeding are different from the due process guarantees in a criminal proceeding. A driver's license is an important property interest and is subject to due process protections. Kleven v. Commissioner of Public Safety, 399 N.W.2d 153, 156 (Minn. App. 1987). In this context, due process requires a hearing before a person may be deprived of a driver's license. Heddan

v. Dirkswager, 336 N.W.2d 54, 59 (Minn. 1983). This requirement is satisfied by “the opportunity to be heard at a meaningful time and in a meaningful manner”.

See also Fedzuik v. Commissioner of Public Safety, 696 N.W.2d 340, 348-9 (Minn. 2005) (where pre-hearing revocation of an individual's driver's license under the implied consent law occurs and the individual seeks judicial review, the post-revocation judicial hearing must be held promptly to meet procedural due process guarantees; also held that statute providing that the implied consent hearing be “held at the earliest practicable date, and in any event not later than 60 days following the filing of the petition for review” satisfies procedural due process requirements).

In the instant case, ARA action on the Respondent's driving privileges under the Implied Consent Law was taken on March 7, 2007. She filed a PJR of that action on March 22, 2007. A trial in district court on that matter was scheduled to begin on May 1, 2007, a date in compliance with the 60-day rule under Fedzuik. She waived her right to have that trial within 60 days by written waiver dated April 6, 2007.

Under these circumstances, the Respondent's due process rights were protected, because she was given the “opportunity to be heard at a meaningful time and in a meaningful manner” relative to the ARA action of March 7, 2007. Specifically, she was afforded a due opportunity to obtain judicial review of her March 7th ARA promptly, and within 60 days; a process meeting procedural due process of law under the express holding in Fedzuik.

The fact that the Respondent elected to waive the May 1st implied consent hearing does not alter due process analysis. Her waiver was the product of her own

decision-making. The postponement of that hearing was not the product of government action. Thus, the Respondent cannot demonstrate a *deprivation* of property rights without due process of law under these circumstances.

In summary, the Respondent was afforded due process of law relative to her March 7th ARA. The District Court's decision to the contrary is refuted and controlled by Fedzuik, Polsfuss and other case law expounding procedural due process of law in the context of civil cases. The District Court's decision is, therefore, affected by error of law, and must be overruled.

B. THE RESPONDENT IS NOT "HOME-FREE" FROM APPLICATION OF THE SUBSTANTIVE LAW TO HER CONDUCT ON MARCH 7TH.

Respondent argued in the District Court that her conduct and the resulting ARA taken on March 7, 2007, cannot be used as an "aggravating factor" against her because judicial review was pending when she engaged in impaired driving with a BAC of 0.26 on May 9, 2007. Her argument, if adopted by this Court, will create a "home-free" rule for repeat impaired driving offenders. Under her reasoning, those who elect to re-offend while their PJR's are pending will escape the consequences which, under the statutory law, are progressively more serious as the number of "aggravating factors" increase. These repeat offenders will be "home-free" from the *full* legal consequences of his/her actions, such as forfeiture consequences. This argument cuts too deeply into the fabric of the statutory law, and should be declined.

It's one thing to ensure procedural fairness to repeat offenders – which the Court did in Wiltgen. It is quite another thing – under the law of procedural due

process – to allow the repeat offender to avert the legal consequences of the substantive law. Anomalies are certain to follow if the Court adopts the Respondent's reasoning. Under that reasoning, Legislative efforts to combat recidivism through enhanced consequences for repeat violators of the impaired driving code will be paralyzed - especially when the subsequent violation(s) occur rapidly after the first. The application of Minn. Stats. 169A.63, Subd. 6 (forfeiture); 169A.03, Subds. 3 (aggravating factor defined), 21 (prior impaired driving-related loss of license defined) and 22 (qualified prior impaired driving incident defined); and 169A.095(determining number of aggravating factors) to repeat offenders will be undercut if the Respondent's reasoning is adopted.

Wiltgen does not support the proposition that the law of procedural due process should be applied to allow repeat offenders to escape "home-free" from the substantive law if a subsequent offense is committed during the time-frame that the PJR on their initial QPIDI is pending. Rather, Wiltgen expressly recognizes the dual tracks which may proceed from the above scenario. The government may either proceed with the lesser criminal charge prior to allowing for completion of the review process; or, after waiver of the petition/completion of the judicial process, proceed with the appropriate charge. The Supreme Court in Wiltgen in fact expressly refused to treat the prior QPIDI as non-existent simply because judicial review was pending at the time Ms. Wiltgen reoffended. See Wiltgen at 571 (“And we do not base our holding on the conclusion that the administrative revocation no longer exists, but only on the grounds that the administrative revocation has not been judicially reviewed”). Thus,

Wiltgen negates a “home-free” interpretation of procedural due process of law. Respondent's argument, and the District Court's ruling which is supportive of it, are affected by error of law, namely, an erroneous interpretation of Wiltgen, and should therefore be overruled.

C. THE RESPONDENT SUFFERED NO RISK OF AN ERRONEOUS DEPRIVATION BECAUSE THE FORFEITURE TRIAL WAS HELD SUBSEQUENT TO THE COMPLETION OF JUDICIAL REVIEW PROCEEDINGS ON HER MARCH 7TH ARA, WITHOUT REVERSAL THEREOF.

If this Court rejects the Appellant's analysis of procedural due process set forth in Part II. A. of this Brief, the Court will then need to decide if the lower court struck the appropriate balance under the 3-part test formulated by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). This Court will also need to decide if the rules of procedural fairness recognized in Wiltgen as passing constitutional muster, fall short of ensuring procedural fairness in civil forfeiture proceedings, thus rendering a constitutional ruling absolutely necessary. In keeping with the principles of appellate review of constitutional issues, the party attacking the constitutionality of legislative enactments, should be expected – at a minimum – to cite the specific statute(s) claimed to be defective, and then be held to his/her burden of proving that/those defect(s) beyond a reasonable doubt. Hamilton v. Comm. Of Pub. Safety, supra.

To cut to the chase, Appellant respectfully submits Respondent cannot demonstrate beyond a reasonable doubt that the procedures approved in Wiltgen –

procedures that ensure due process to repeat criminal offenders who re-offend the Impaired Driving Code while their petitions for judicial review of their prior QPIDI are pending and where “liberty” interests are at stake – are procedures that create an unreasonable likelihood of an erroneous deprivation such that additional or substitute safeguards are needed in civil cases. See Wiltgen, at 569-70, citing Mackey v. Montrym 443 U.S. 1 (1979) . Wiltgen holds that once judicial review is completed without reversal, government can use the *reviewed* QPIDI to carry out the consequences provided for by the Legislature under the substantive law – and due process of law is not violated by doing so. Wiltgen, at 572, fn. 7. As previously discussed, the Court in Wiltgen refuses to treat the conduct giving rise to the prior QPIDI as non-existent. *Id* at 571. Rather, the Court in Wiltgen approached the procedural issue with extreme caution, carefully reviewed applicable statutory sections bearing on the procedural fairness issue, fashioned relief in the form of procedural requirements (see government's options discussed under Part I. E.of this brief), and thereby preserved the statutory law to the full extent possible. See Wiltgen, Parts III and IV, at 570-2.

Respondent, and repeat offenders in her position, are not exposed to a likely risk of an erroneous deprivation in civil forfeiture proceedings when, as in the instant case, the forfeiture trial is held subsequent to completion of the implied consent proceedings. By failing to recognize this point – a point well articulated in Wiltgen at Part IV of that decision and especially fn. 7 – the District Court erred in its interpretation of Wiltgen.

With respect to the the "government interest" factor under Mathews, the United States Supreme Court has traditionally accorded states great leeway in adopting procedures to protect public health and safety. Mackey v. Montrym, 443 U.S.1, 17 (1979). The dangers of drunk drivers have been equated with other commonly-known dangers that states are authorized to respond to summarily:

States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs.

Montrym, Id. It is submitted that Minn. Stat. 169A.63, Subd. 6, which provides for forfeiture of motor vehicles used by the serious repeat offenders of the Impaired Driving Code, (First and Second Degree offenders), serves a valid Minnesota interest, i.e. the removal of repeat drunken drivers and their instrumentalities from Minnesota highways. It is further submitted that interest is as strong as the State's interest in taking summary action to revoke driving privileges under the Implied Consent Law or addressing other known hazards such as those discussed in Montrym. See Wiltgen at 570:

With respect to the third Mathews factor, the government interest, we again emphasize that "drunken drivers pose a severe threat to the health and safety of the citizens of Minnesota". Bendorf, 727 N.W.2d at 416-17 (quoting Heddan, 336 N.W.2d at 63). The State has a compelling interest in highway safety that justifies its efforts to keep impaired drivers off the road, particularly those drivers who have shown a repeated willingness to drive while impaired.

The depth of Minnesota's interest in protecting the motoring public from the dangers posed by drunken drivers and the motor vehicles they operate is reflected in State v. Willis, 332 N.W.2d 180, 186 (Minn. 1983) (Peterson, Amdahl, and Simonette concurring specially), where the concurring justices observed:

The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See Breithaupt v. Abram, 352 US 432 (1957) ("the increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battle field"); Tate v. Short, 401 US 395 (1971) (Blackmun concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our

highways"); Perez v. Campbell, 402 US 637 (1971) (Blackmun concurring) (" the slaughter on the highways of this Nation exceeds the death toll of all our wars"); and Mackey v. Montrym, 443 US 1 (1979) (recognizes the "compelling interests in highway safety").

Minnesota's compelling interest in highway safety warrants restraint by the judiciary in the instant matter. The objective of ensuring procedural due process to repeat impaired driving offenders should go no further than that which is absolutely necessary, lest the Court will intrude upon the legitimate prerogative of the Legislature in its efforts to meet the State's compelling interests in highway safety.

Under Mathews, the private interest affected by the government action needs to be considered. Wiltgen at 568. The loss of a motor vehicle is the private interest affected by forfeiture actions under M.S. 169A.63. That interest is entitled to the procedural protections of the Due Process Clauses of the United States and Minnesota Constitutions.

The fiscal and administrative burdens that additional or substitute procedural requirements would entail, and the probable value of additional or substitute procedural safeguards are also factors to be balanced under Mathews.

The rule of due process espoused by the court below, if adopted by this Court, will require implied consent hearings to be completed and decided before the offender becomes a repeat offender. Under the District Court's ruling, government will not be allowed to count the QPIDI arising from the first offense as an "aggravating factor" under Section 169A.63, Subd. 6 unless the implied consent hearing on that QPIDI is heard and decided by the district court without reversal before he/she re-offends. That rule, if adopted, cuts a swath out of the express language of Minn. Stat. 169A.63, Subd. 6 (vehicle subject to forfeiture), Minn. Stat. 169A.095 (counting "aggravating factors"), Minn. Stat. 169A.03, Subd. 3 ("aggravating factor" defined), Minn. Stat.

169A.03, Subd. 21 (“prior impaired driving – related loss of license” defined, Minn. Stat. 169A.03, Subd. 22) qualified prior impaired driving incident defined) and other provisions of the Impaired Driving Code, especially with respect to those repeat offenders who rapidly repeat their offending conduct. Under the District Court's ruling, those sections will have no application to the Respondent and repeat offenders like her. Combating the repeat offender is a difficult task for the Legislature, and that task will be more difficult if the lower court's ruling is adopted. The scheduling of judicial hearings on implied consent matters will need to be advanced even more on already crowded court dockets so that the hearing can be held and decided before the offender re-offends. Based on these factors, it is submitted the District Court's reasoning and related ruling fail to give appropriate weight to the "government interest" factor, and will add burdens and costs to implied consent proceedings.

Nor does the District Court ruling change or reduce the risk of an erroneous deprivation. If the implied consent hearing on the QPIDI is completed without reversal before the forfeiture trial is held, there is no likely risk that the use of the prior QPIDI will result in an erroneous deprivation of the vehicle. The District Court below dismissed this argument without squarely addressing it (Appellant's Memorandum in support of post-trial motion for amended conclusions of law, pps. 2-4, February 13, 2008; and Order and Memorandum dated February 29, 2008 denying that motion, A-17). Instead, the District Court adhered to the Respondent's mistaken interpretation of the Supreme Court's rulings in Wiltgen.

The ruling below, it is submitted, takes a cut out of Minnesota's efforts to combat repeat offenders – especially those who re-offend rapidly - without adding anything to procedural fairness. Most certainly, offenders who re-offend rapidly are as dangerous as re-offenders in general, and may be more so. The Respondent certainly is in that category. Her alcohol content was twice the legal limit when her first offense occurred, and exceeded three-times that limit when her next offense

occurred - a short eight weeks later and when she was still being prosecuted on the first. But, under the District Court's procedural ruling, the Respondent and those like her who re-offend rapidly will escape the legal consequences of forfeiture under the substantive law.

The Appellant respectfully submits that the rule espoused by the District Court is not necessary to ensure procedural fairness to the repeat offender. It's a rule that cuts too deeply into the authority of the Legislature to combat a serious highway safety problem, and is wanting in procedural fairness justification. A better balance – one that secures procedural fairness to the repeat offender and at the same time preserves the power needed by the Legislature to remove repeat impaired drivers and their instrumentalities from Minnesota roads and highways, is the balance struck in Wiltgen, to-wit: a rule of procedural due process recognizing that a QPIDI can be treated as an aggravating factor at the forfeiture trial when judicial review on that QPIDI is completed without reversal before the forfeiture trial. Such a rule, it is submitted, comports with Mathews, as expounded in Wiltgen. It is a rule that ensures due process of law while preserving the substantive law to the maximum extent possible. See Hamilton, supra, (the power to declare statutes unconstitutional is to be exercised with extreme caution, and only when absolutely necessary). For these reasons, the District Court erred in its application of the law, and its decision should be reversed.

CONCLUSION

The orders of the District Court should be reversed because the record demonstrates that procedural fairness fully consistent with procedural due process of law was provided to the Respondent, and that the District Court erred by concluding otherwise. This Court should order that the Appellant-vehicle is forfeited under Minn. Stat. 169A.63, or alternatively, should remand this matter to the District Court for

entry of an order directing and confirming that the Appellant motor-vehicle is hereby forfeited under Minn. Stat. 169A.63.

Dated this 7th day of May, 2008.

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