No. SC92260

In the Supreme Court of Missouri

NORMAN C. DOUGHTY,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Appeal from Vernon County Circuit Court
Twenty-Eighth Judicial Circuit
The Honorable Neal Robert Quitno, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant, Norman C. Doughty, appeals from a Vernon County Circuit Court judgment denying his petition for review of the decision of the Director of Revenue to revoke Doughty's driving privilege for one year after Doughty, who was under arrest for DWI, refused to submit to chemical testing upon the request of the arresting officer. *See* § 577.041, RSMo. Cum. Supp. 2009. On appeal, Doughty claims that the circuit court violated his right to due process when it admitted the records of the Department of Revenue, because doing so permitted the introduction of hearsay without giving Doughty an opportunity to confront and cross-examine the witnesses against him. App. Br. 5.

On April 24, 2011, Defendant was arrested for DWI after he performed poorly on field sobriety tests and a portable breath test indicated that his blood-alcohol content was 0.120%. (L.F. 3, Respondent's Exhibit 1). Upon request of the arresting officer that Doughty submit to a breathalyzer, Doughty agreed, but then would not provide a sufficient sample of breath for analysis. (Respondent's Exhibit 1). As a result, the Director of Revenue revoked Doughty's driving privilege for a period of one year pursuant to § 577.041.3, RSMo Cum. Supp. 2009. (State's Exhibit 1).

Doughty filed a petition for review in Vernon County Circuit Court. (L.F. 3-6). On October 24, 2011, the case was tried before the Honorable Neal Robert Quitno. (Tr. i). Citing section 302.312, RSMo 2000, the prosecutor,

representing the Director, moved to admit the certified records of the Department of Revenue, including the police report, the alcohol influence report, and Doughty's driving record. (Tr. 2). The prosecutor informed the court that it had notified the arresting officer of the hearing date and had "invit[ed]" him to be present, but that he did not appear. (Tr. 2). Doughty objected that the admission of the documents on the grounds that § 302.312, which permits the Director to introduce certified records of the police report and other documents, violated due process in that it prevented him from confronting and cross-examining the witnesses against him. (Tr. 3). The court took Doughty's objection under advisement, but provisionally admitted the Director's exhibits as Respondent's Exhibit 1. (Tr. 4). On November 1, 2011, the trial court denied Doughty's petition for review. (L.F. 16).

ARGUMENT

The trial court did not err in admitting the Director's records nor finding that the Director's decision was supported by the evidence as the procedures set forth in the statutes and followed by the trial court do not violate due process.

On appeal, Doughty argues that the admission of the Director's records, including the police report and the alcohol incident report, violated his right under the Due Process Clause of the Fifth and Fourteenth Amendments to confront and cross-examine adverse witnesses. Because Doughty had the right to subpoena the arresting office to the hearing, his due process rights were not violated.

I. The standard of review

Whether a statute is constitutional is reviewed de novo. *State v. Vaughn,* 2012 WL 1931225 *at* *1 (Mo. banc 2012) (citing *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008). Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. *Id.* (citing *State v. Pribble*, 285 S.W.3d 310, 313 (Mo. banc 2009). "The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations." *Id.* at *2 (quoting *Franklin Cnty. ex rel. Parks v. Franklin Cnty. Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008)).

II. Due process requirements.

As this Court has recognized, due process applies to the suspension of drivers' licenses by the state. *Jarvis v. Director of Revenue,* 804 S.W.2d 22, 24 (Mo. banc 1991) (citing *Dixon v. Love,* 431 U.S. 105, 112 (1977). However, the process that is due in any particular case depends on the governmental function involved and the interest of the private person that is at stake in the litigation.[1] *Goldberg vs. Kelly,* 397 U.S. 254, 263 (1970) (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). Due process requires, at a minimum, notice – which is not at issue in this case – and an opportunity to be heard. *Conseco Fin Servicing Corp v. Missouri Dept. of Revenue,* 195 S.W.3d 410 (Mo. banc 2006). But otherwise, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The United States Supreme Court has "generally . . . declined to establish rigid rules and instead ha[s] embraced a framework to evaluate the sufficiency

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[1] "Missouri's due process provision parallels its federal counterpart, and in the past this Court has treated the state and federal due process clauses as equivalent." *Jamison v. State*, 218 S.W.3d 399, 404 n. 7 (Mo. banc 2007) (citing *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996) and *Belton v. Bd. of Police Comm'rs*, 708 S.W.2d 131, 135 (Mo. banc 1986)).

of particular procedures." *Wilkinson v. Austin*, 505 U.S. 209, 224 (2005). When considering what process is due to protect against erroneous deprivation of a protectable property interest, courts consider three factors:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mackey v. Montrym, 443 U.S. 1, 10 (1979) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). "By weighing these concerns, courts can determine whether a State has met the 'fundamental requirement of due process' - 'the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *City of Los Angeles v. David,* 538 U.S. 715, 716 (2003) (quoting *Eldrige*, *supra*).

"The first step in the balancing process mandated by *Eldridge* is identification of the nature and weight of the private interest affected by the official action challenged." *Mackey*, 443 U.S. at 13-15. The United States Supreme Court has held that the private interest in a driver's license is a substantial one. *Id.* (citing *Dixon v. Love*, 431 U.S. 105, 113 (1977). However, the Court has also held that a one-year suspension of driving privileges, as was at stake in the present case, was not so onerous that a state could impose such a

suspension before granting the driver an evidentiary hearing so long as proper post-deprivation review was available. *Id.* (citing *Dixon,* 431 U.S. at 113).

"Because a primary function of legal process is to minimize the risk of erroneous decisions . . . the second stage of the *Eldrige* inquiry requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used." *Mackey,* 443 U.S. at 13. However,

> the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectable "property" or "liberty" interest be so comprehensible as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations.

Id.

In Missouri, the procedures used to review the Director's decision to revoke a license for failure to submit to chemical testing reduce the chances of an erroneous decision to a reasonable minimum given the relative importance of the deprivation of driving privileges for a year. First, pursuant to section 577.041.4, RSMo Cum. Supp. 2008, the driver is provided with a hearing in front of a circuit court or assistant circuit court judge, a detached and neutral magistrate. *See Concrete Pipe and Products of California, Inc. v. Construction*

Laborers Pension Trust for Southern California, 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge . . .'"). The circuit court's neutrality and detachment is further enhanced by the nature of the hearing, which is not merely a review of some prior decision for procedural error, but is a *de novo* trial of both the legal and factual issues. *McCarthy v. Director of Revenue,* 120 S.W.3d 760, 761 (Mo. banc 2010).

Moreover, at the hearing, the Director bears both the burden of producing evidence to support the suspension, and the burden of persuasion. *Id.* The director must prove by a preponderance of the evidence that (1) the driver was arrested, (2) there was reasonable grounds to believe that the driver was operating a motor vehicle in an intoxicated condition, and (3) the driver refused to submit to chemical testing. § 544.041.4, RSMo. Cum Supp. 2008. If the Director fails to prove any of these three issues by a preponderance of the evidence, the court must order the Director to reinstate the license. § 544.041.6, RSMo. Cum Supp. 2008. Allocating the burden of proof to the Director may actually exceed what is required under due process, as one court has found that it permissible to require the driver, as the litigant seeking judicial redress, to bear at least the initial burden of making a *prima facie* case that the basis for revocation was invalid before the burden of persuasion shifts to the state to show that the revocation was valid. *People v. Orth,* 124 Ill.2d 326, 336 125 Ill.Dec. 182, 187 (Ill. 1988) ("[T]he interest in a driver's license, while

undoubtedly important, is not quite so important as those private interests which have previously been held indefeasible absent the satisfaction by the State of a specified burden of proof.")

Furthermore, while the Director can meet her burden of production by introducing certified copies of the police report and other documents supporting the revocation, the Director bears the risk of failing to persuade the circuit court that she has proven her case by a preponderance of the evidence. *Wei v. Director of Revenue,* 335 S.W.3d 558 (Mo. App. S.D. 2011) (citing *Zummo v. Director of Revenue*, 212 S.W.3d 236 (Mo. App. S.D. 2007); *Burk v. Dir. of Revenue*, 71 S.W.3d 686, 687 (Mo. App. S.D. 2002); *Lyons v. Dir. of Revenue*, 36 S.W.3d 409, 411 (Mo. App. E.D. 2001). The Director's risk of non-persuasion may increase when the *prima facie* case is made on documentary evidence alone. *See e.g. Mapes v. Director of Revenue*, 361 S.W.3d 29, 36 (Mo. App. W.D. 2011) (affirming trial court's reinstatement of license where Director presented only documentary evidence); *Richardson v. Director of Revenue,* 165 S.W.3d 236, 238 (Mo. App. S.D. 2005) (same).

This Court has previously addressed the right to cross-examine police officers at the administrative hearing stage in *Collins v. Director of Revenue*, 621 S.W.2d 246, 254-55 (Mo. banc 1985) (overruled on other grounds by *Sellenreik v. Director of Revenue*, 826 S.W.2d 338, 341 (Mo. banc 1992). In that case, this Court stated that had the driver "desired to confront the arresting officer, she

needed only to request that the officer appear at the hearing." *Id.* at 255. This Court further stated that "[t]he existence of this unbridled subpoena right undercuts any argument that the administrative hearing procedure was unfair." *Id.*

The Missouri Court of Appeals has held that a driver's due process rights to confront and cross-examine the witnesses are satisfied at a trial *de novo* because he has a right to subpoena the arresting officer. *Wei*, 335 S.W.3d at 566; *Manzella v. Director of Revenue*, 363 S.W.3d 393, 396 (Mo. App. E.D. 2012). This procedural protection is sufficient to reduce the likelihood of an erroneous deprivation of driving privileges. Often a petition for review will not focus on a particular lacking element of the Director's case for revocation, but will contest several, if not, reasonably contestable facts.

Doughty's petition is a perfect example, as he denied that the officer had reasonable grounds to arrest him, that he was advised of his right to contact an attorney, and that he was advised that his refusal result would in a one-year suspension of his driving privilege. (L.F. 3). Thus, petitions for review give the Director very little guidance as to what factual issues, if any, will be at issue in the case. The driver is usually in the best to know whether the outcome of the case will hinge on a question of law or fact. Permitting the driver to subpoena the officer—if cross-examination of the officer is needed to ensure the reliability

of the proceedings given the contested issues in the case—is sufficient to protect against erroneous deprivations of driving privileges.

The finding by the Court of Appeals that Missouri's statutory process for the review of driver's license under the Implied Consent law does not violate due process is congruent with the United States Supreme Court's holding in *Richardson v. Perales,* 402 U.S. 389, 402 (1971). There, the court held that in a hearing regarding the denial of disability benefits, the admission of a report of a physician who did not testify at the hearing could be admitted without violating due process where the claimant had not exercised his right to subpoena the reporting physician and "thereby provide himself with the opportunity for cross-examination . . . ." *Id.* The court also held that the report "despite its hearsay character and an absence of cross-examination . . . may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant . . . ." *Id.*

Several other jurisdictions have found that the admission of out-of-court statements, and the use of those statements as substantial evidence supportive of a finding adverse to the objecting party does not violate the due process right to confront and cross-examine adverse witnesses as long as the party has the right to subpoena the witness. *See e.g., Van Harken v. City of Chicago,* 103 F.3d 1346, 1352 (7th Cir. 1997) (holding that, in cases regarding adjudication of parking tickets, the ability to subpoena the reporting officer provided a "safety

valve for those cases . . . in which fair consideration of the respondent's defense would require, as a constitutional imperative, the recognition of a right of confrontation."); *Snelgrove v. Department of Motor Vehicles,* 194 Cal. App. 3d 1364, 1377, 240 Cal. Rptr. 281, 289 (1987) ("When the arresting officer fails to appear, the licensee who wants a chance to confront and cross-examine the officer has every right to obtain a postponement and subpoena the witness. Due process concerns are thus satisfied."); *Walker v. Regehr*, 41 Kan. App. 2d 353, 366, 202 P. 3d 712, 721 (2009) (holding that medical malpractice plaintiffs, who were not denied the opportunity to subpoena court-appointed panel experts, were not denied due process by the introduction of the panel's report); *Dombrowski v. City of Chicago,* 363 Ill. App. 3d 420, 842 N.E.2d 302 (2005) (administrative procedures permitting a building inspector's affidavit to be admitted as evidence did not violate due process right of confrontation because the procedures permitted the building owner who had been fined for code violations to subpoena the building inspector); *South Carolina DSS on Behalf of State of Texas v. Holden,* 319 S.C. 72, 78-79, 459 S.E.2d 846, 849-850 (1995) (father's due process rights were not violated by the introduction of mother's affidavit in action to collect pas due child support where father had six-month continuance in which he failed to depose her); *Case v. Shelby County Civil Service Merit Bd.,* 98 S.W.3d 167, 175 (Tenn. Ct. App. 2002) (due process rights of terminated employee were not violated where he had the opportunity to

subpoena adverse witnesses to civil service board review hearing); *State Dept. of Revenue and Taxation v. Hull,* 751 P.2d 351, 355 (Wyo. 1988) (driver's due process rights were protected in a hearing to review the revocation of his license where the hearing officer afforded he driver an opportunity to secure the attendance of the arresting officer). At least one other state has reached the same result, by declaring that a litigant who fails to subpoena an adverse witness waives any due process right to confront and cross-examine that witness. *Alabama State Personnel Bd. V. Miller,* 66 So. 3d 757 (Ala. Civ. App. 2010) (state mental health worker waived the opportunity to confront patient whose testimony provided basis for termination when he failed to call him as a witness at the hearing).

Doughty argues that the officer's reports should not have been admitted unless the Director procured the officer's appearance in court. App. Br. 10. But, considering this evidence under the second step in the *Eldridge* analysis, it is not clear how this additional "procedural safeguard" would add any value to the process in terms of decreasing the risk of an erroneous deprivation of a protectable interest. *See Eldridge,* 424 U.S. at 335. In many cases, the facts are not even at issue because the parties are arguing over only the legal consequences of undisputed facts. *See e.g., Harlan v. Director of Revenue,* 334 S.W.3d 673, 678 (Mo. App. S.D. 2011). The question raised by Doughty's objection to the admission of the Directors records—whether the Director must

procure the officer's appearance in court to make a *prima facie* case or whether the driver must subpoena the officer if he wished to cross-examine him—becomes "a question not necessarily of what process is due, but one of who has to pay for it." *Hull,* 751 P.2d at 355 (citing *Snelgrove,* 240 Cal. Rptr. at 289). Doughty made no argument in the trial court, and makes no argument in his brief, to support the contention that requiring the Director to produce the officer in each and every case, rather than permitting both parties to subpoena the officer on an as-needed basis, would result in a more reliable process. Therefore, he has failed to meet his burden of establishing that the statute permitting the introduction of the Director's records is clearly unconstitutional. *See Vaughn,* 2012 WL 1931225 at *2.

The last step of the *Eldridge* balancing test requires the government's interest, including the function involved in the deprivation of the private interest, and the fiscal and administrative burdens that the additional procedures would entail. *Eldridge,* 424 U.S. at 335. The United States Supreme Court has recognized the importance of states' rights to protect the safety of their citizens from the dangers of drunken drivers. *Mackey,* 443 U.S. at 17-18 (citing *Love,* 431 U.S. at 114-115). Moreover, requiring the Director to ensure the officer's availability at every hearing on a petition for review would entail great fiscal and administrative burdens, including the time and expense of serving the subpoenas. Moreover, when a police officer spends the time traveling to and

from court and testifying, in addition to delay in the start of the proceedings, the officer cannot perform his duties protecting the public.

While the privilege to drive is an important private interest, an examination of the second and third *Eldridge* factors compels a conclusion that permitting the Director to admit police reports and alcohol incident reports to make her *prima facie* case does not violate due process as long as the driver is permitted to subpoena the author of the reports to the trial *de novo*. Requiring the officer to testify in every case would impose great fiscal and administrative burdens with little resulting protection for the driver from the risk of an erroneous deprivation of his driving privilege. Because the driver is able to subpoena the officer for cross-examination, and to present any other evidence he wishes at a hearing in which the trial court is considering all factual issues *de novo*, he is provided with an opportunity to be heard "at a meaningful time and in a meaningful manner," which is the fundamental requirement of due process. *Eldridge,* 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Citing *Goldberg,* 397 U.S. at 267-268, and other cases, Doughty argues that, as a matter of due process, he is entitled to an effective opportunity to confront and cross-examine adverse witnesses. App. Br. 7-8. Further, argues that the "opportunity to confront and cross-examine witnesses" means that out-

of-court statements cannot be admitted unless the declarant is made available for him to cross-examine. But Doughty's argument fails for three reasons.

First, there is no absolute right of confrontation in civil cases. *Van Harken,* 103 F.3d at 1352 (citing *Richardson*, 402 U.S. at 402 (1971).

> In particular cases, live testimony and cross-examination might be so important as to be required by due process, although the principal case so holding-*Goldberg v. Kelly*, 397 U.S. 254, 268 [parallel citations omitted] (1970)-may not have much life left after *Mathews v. Eldridge, supra*, 424 U.S. at 334-35, [parallel citations omitted]; cf. *Cholewin v. City of Evanston*, 899 F.2d 687, 689-90 (7th Cir.1990). *Goldberg* granted a right of confrontation to persons denied welfare benefits; *Mathews* withdrew it for persons denied disability benefits.

Id.

Second, Doughty fails to examine the admission of the out-of-court statements in context with the rest of the procedural protections provided him. In *Richardson,* the court considered a claim regarding the admission and use of hearsay statements during a hearing to determine disability benefits by using the *Eldridge* balancing test and looking at the entire procedure to determine if it was reasonably sufficient, in light of the importance of the private interest, to reduce the risks of erroneous deprivation. 402 U.S. at 401-403. Doughty's analysis, which looks at the admission of the statements in isolation from the

rest of the procedures, is more appropriate to a claim under the Confrontation Clause of the Sixth Amendment. *See e.g. Davis v. Washington,* 547 U.S. 813, 821-832 (2006) (focusing solely on the admissibility out-of-court statements without regard to other procedures afforded a criminal defendant). However, the Confrontation Clause is explicitly limited to criminal cases: "In all *criminal* prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const, amend VI (emphasis supplied); *Kreig v. Director of Revenue,* 39 S.W.3d 574, 576 (Mo. App. E.D. 2001) (holding that the introduction of the Director's records under § 302.312, RSMo 2000 does not violate the Confrontation Clause which applies only to criminal prosecutions) (citing *Hannah v. Larche*, 363 U.S. 420, 440 n. 16 (1960)). "Any right that a civil litigant can claim to confrontation and cross-examination is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments." *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974, 982 (Kan. 2007) (citing *Willner v. Committed on Character*, 373 U.S. 96, 103 (1963). As demonstrated above, an examination of the whole process afforded to drivers in Missouri who have had their driving privilege revoked for failing to submit to chemical testing demonstrates that the procedures do not violate the right to confront and cross-examine witnesses under the Due Process Clause.

Third, Doughty conflates a "meaningful opportunity to confront and cross-examine" a witness with the proposition that the witnesses out-of-court

statements cannot be admitted at a proceeding unless the party offering the statements procures the witness's attendance. But, in *Richardson*, the United States Supreme Court held that any due process right to confront and cross-examine witness, in the context of a hearing on disability benefits, is not the right to have hearsay evidence excluded, nor is it the right to have any adverse ruling supported by non-hearsay evidence. 402 U.S. at 402-403. Rather, the "opportunity for cross-examination" in that case meant the right to subpoena the witness. *Id.*

Doughty offers no compelling reason why the right to subpoena the arresting officer to a hearing on the revocation of his license does not likewise afford him a meaningful opportunity to confront and cross-examine adverse witnesses. The procedures set forth in the Implied Consent Law are sufficient to reasonably reduce the risks of erroneous deprivation of driving privileges and to permit driver's adversely affected a meaningful opportunity to be heard at a meaningful time. Doughty's right to due process was not violated and his claim is without merit.

CONCLUSION

The trial court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 4,043 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 16th day of July, 2012, to:

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