IN THE SUPREME COURT OF MISSOURI

DAVID T. DOUGHTY,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	Case No. SC92261
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

APPELLANT'S REPLY BRIEF

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POINT I

In the Brief of Respondent, the Director of Revenue (hereinafter "Director") states, "[t]his court has previously addressed the right to cross-examine police officers at the administrative hearing stage in *Collins vs. Director of Revenue*, 621 *sic* S.W.2d 246, 254-55 (Mo. banc 1985)[1] ...". (Respondent's Brief, pg. 13, last ¶). This statement while true is inapplicable to this case. ***Collins, Supra.***, was a consolidated appeal of two individuals, Lester Collins and Naomi Johnson (hereinafter "Johnson"), each arrested for driving while intoxicated and served with notice of license suspension, pursuant to § 302.520, RSMo Cum.Supp.1983. ***Collins, Supra. at 250***. Both suspensions were upheld in subsequent administrative hearings and trials de novo in circuit court. ***Id***. Johnson claimed she was denied her right of cross-examination **at her administrative hearing when the hearing officer merely took judicial notice of the agency case file and heard no testimony**. ***Id***. Johnson, subsequently had a trial de novo. Doughty, did not have an administrative hearing ever. Doughty sued in the Circuit Court of Vernon County, Missouri to have his driving privileges reinstated. The judge in Doughty's case did not take "judicial notice" of the agency case file, he admitted the records of the Director into evidence, pursuant to ***§ 302.312 RSMo***.

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[1] The correct cite is 691 S.W.2d 246.

The Director goes on to say,

> [i]n 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). (Respondent's Brief, pg. 12, last ¶; pg. 13, 1st ¶ & 1st full ¶).

Obviously the Director is simply wrong. Doughty didn't have an administrative hearing, nor did he receive a trial de novo. In a refusal case such as this the Director simply suspended Doughty's driving privilege and Doughty sued in the Circuit Court to regain his driving privileges. Therefore the *Collins, Wei*, and *Manzella* cases aren't applicable. Also the officer in this case was subpoenaed to testify, but knowingly ignored the subpoena.

It appears to be a theme of the Director's argument that if Doughty wanted to cross-examine the officer he could have subpoenaed the officer. The officer was subpoenaed to testify, but knowingly ignored the subpoena. It doesn't matter who

subpoenaed the officer. Once subpoenaed, the officer is required to attend the trial from time to time, and from term to term, until the case is disposed or the witness is finally discharged by the court. ***§ 491.090.2 RSMo***.

> 1. In all cases where witnesses are required to attend the trial in any cause in any court of record, a summons shall be issued by the clerk of the court wherein the matter is pending, or by some notary public of the county wherein such trial shall be had, stating the day and place when and where the witnesses are to appear.
>
> 2. The witness shall be required to attend a trial from time to time, and from term to term, until the case be disposed of or the witness is finally discharged by the court. The witness shall be liable to attachment for any default or failure to appear as a witness at the trial and adjudged to pay the costs. Costs shall not be allowed for any subsequent recognizance or subpoena for the witness. ***§ 491.090 RSMo***.

"A subpoena is 'a writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.' Black's Law Dictionary 1440 (7th Ed.1999)." ***Division of Labor Standards, Department of Labor and Indus. Relations vs. Chester Bross Const. Co., 42 S.W.3d 637, 640 (Mo.App. E.D.,2001)***. A writ is an order issued from a court requiring the performance of a certain act, or giving authority to have it done. ***Black's Law Dictionary 1441 (5th***

Ed.1979). The officer didn't attend trial as required by the subpoena, and, he wasn't discharged by the court. The subpoena is an order to the officer by the court that he is not allowed to ignore. It doesn't matter who requests the subpoena and serves it on the officer, a subpoena is an order from the court. Judge Quitno didn't discharge the officer from the subpoena. The Director is in charge of an executive agency of the State of Missouri. The prosecuting attorney in this case is employed either by the State of Missouri or a political subdivision thereof, Vernon County, Missouri and the officer ignoring the subpoena is an employee of the City of Nevada, Missouri, also a political subdivision of the State of Missouri. Everyone, other than Doughty and his attorney, were employed by and representatives of the State of Missouri.

> If a party, on being duly summoned, refuse to attend and testify, either in court or before any person authorized to take his deposition, besides being punished himself as for a contempt, his petition, answer or reply may be rejected, or a motion, if made by himself, overruled, or, if made by the adverse party, sustained. ***§ 491.180 RSMo***.

The State of Missouri was the party and the witness. A state can act only through its agents. ***State vs. Kerr, 509 S.W.2d 61, 66 (Mo. 1974)***. A municipality is created by the state sovereign and is an extension of the state. ***State v. Rotter, 958 S.W.2d 59 (Mo.App. W.D.,1997)***. The officer in this case was a police officer of the municipality of Nevada, Missouri. As such, he is an agent and extension of the State

of Missouri. A court is justified in striking the pleadings of a party and entering a judgment against them if after being subpoenaed, they fail to appear and testify at trial. ***Snyder v. Raab, 40 Mo. 166 (Mo. 1867)***.

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. ***Lassiter vs. Department of Social Services of Durham County, N. C., 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981)***.

Due Process required Judge Quitno to sustain Doughty's objection to the admission of the officer's reports. Otherwise, the legislature of the State of Missouri enacted § 302.312 RSMo which allows police officers to ignore subpoenas.

The Director also claims the admission into evidence of reports without the right of cross-examination of the author of the reports, does not violate Doughty's right to due process, citing *Richardson vs. Perales*, 402 U.S. 389, 402 (1971). The *Richardson* case was a claim for social security disability benefits before an administrative tribunal. Congress provided the Secretary of Health, Education and Welfare the power by regulation to establish hearing procedures for social security disability benefits and eliminate strict rules of evidence, applicable in the courtroom, for social security hearings so as to bar the admission of evidence otherwise pertinent. ***Richardson v. Perales, 402 U.S. 389, 400 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971)***. This was a trial in the Circuit court and the Missouri legislature did not give Judge Quitno permission to establish hearing procedures, or eliminate the rules of evidence.

The issue in the *Richardson* case was not whether the admission of doctor's reports violated the claimant's right to due process, but whether such reports constituted substantial evidence necessary to support a judgment. ***Richardson v. Perales, 402 U.S. 389, 390 & 402, 91 S.Ct. 1420, 1422 & 1428, 28 L.Ed.2d 842 (1971)***. The reports, the authors of which were not subject to cross-examination, admitted by the court in *Richardson* were from doctors, hired as neutral, independent expert witnesses to evaluate the claimant for social security benefits. Police officers are not neutral or independent in any manner, see ***Miranda v. Arizona, 384 U.S. 436, 440-459 86 S.Ct. 1602, 1610-19, 16 L.Ed.2d 694 (1966)***. However, § 302.312

RSMo gives police officers the ability to override the court's order (i.e., subpoena) and make their own determination of whether or not they will appear in person to testify or simply submit their testimony in the form of their reports. This is fundamentally unfair. If Doughty took this approach and simply submitted a written statement, it would not be admitted into evidence. The court would simply strike his pleadings and enter judgment against him. ***§ 491.180 RSMo***.

In each of the cases cited by the Director, the party had an opportunity to subpoena the witness, but didn't. In Doughty's case the officer was subpoenaed, but simply ignored the subpoena. The Director seems to suggest that a subpoena requested by Doughty has greater power than the subpoena requested by the prosecuting attorney. Since all subpoenas are orders from the court, they are inherently equal. A suggestion that a subpoena requested by Doughty carries more weight is nonsensical.

The Director suggests this is not a question of what process is due, but who has to pay for it. (Respondent's Brief, pg. 18, 1st 4 lns.). Nothing could be further from the truth. It costs the Director nothing to serve the subpoena. The Director is represented by the prosecuting attorney who simply has the sheriff's office walk the subpoena over to the local police station. There is no cost involved to the Director and the cost to Doughty is minimal. The Director goes on to say, "Doughty made no argument ... 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." Doughty is not arguing the Director must produce the officer in each and every case, but instead once the officer is subpoenaed to testify, he must appear and be available for cross-examination before his reports can be admitted into evidence.

The Director maintains the admission of the hearsay reports is not a violation of due process, so long as the driver is permitted to subpoena the officer to the trial *de novo* (Respondent's Brief, pg.19, 1st full ¶). This would seem to support Doughty's contention because there is no trial *de novo* in a refusal case such as this. There is a trial before the Circuit Court and then this appeal. The Director also argues that requiring the officer to appear to testify in every case imposes a great fiscal and administrative burden with little protection for the driver from the risk of an erroneous deprivation of their driving privilege. (Respondent's Brief, pg.19, 1st full ¶). Despite the fact that 1 erroneous deprivation of someone's driving privilege is too great a cost to tolerate, Doughty is not arguing the officer has to appear to testify in every case. The compelling reason why the right to subpoena the officer does not afford Doughty a meaningful opportunity to confront and cross-examine the officer is the officer was permitted to ignore the subpoena. The fundamental fairness required by Due Process is offended when the officer is subpoenaed to testify, but fails to appear and do so.

The Director argues the case of *Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)* withdrew the right to confront and cross-examine

witnesses for persons denied disability benefits. (Respondent's Brief, pg. 20, middle of the page). The issue in Eldridge was whether the Due Process Clause of the Fifth Amendment requires an opportunity for an evidentiary hearing prior to the termination of Social Security disability benefit payments. ***Mathews v. Eldridge, 424 U.S. 319, 323, 96 S.Ct. 893, 897, 47 L.Ed.2d 18 (1976)***.

> In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U.S.C. s 423(d)(1)(A). To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," s 423(d)(3), that he has a physical or mental impairment of such severity that "he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." § 423(d)(2)(A). The principal reasons for benefits terminations are that the worker is no

longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases.[FN15]

FN15. Because the continuing-disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the post-termination evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however, in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cutoff of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) s 6705.2(c). ***Eldridge, Supra., at 336 & 903***.

The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail in which case

he is sent a detailed questionnaire or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM s 6705.1; Disability Insurance State Manual (DISM) s 353.3 (TL No. 137, Mar. 5, 1975).

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM s 353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician. [FN17] Ibid. Whenever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. He also may respond in writing and submit additional evidence. Id., s 353.6.

FN17. All medical-source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM s 353.4C.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U.S.C. s 421(c); CM ss 6701(b), (c).[FN19] If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency. 20 CFR ss 404.907, 404.909 (1975) [FN20] Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred. 42 U.S.C. (Supp. III) s 423(a) (1970 ed., Supp. III).

FN19. The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of the SSA's views. The agency is free to reaffirm its original assessment.

FN20. The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, Social Security Disability and Mass Justice 32

(1973). Both the recipient and the agency may adduce new evidence. ***Eldridge, Supra., at 337-38 & 904***.

If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR ss 404.917, 404.927 (1975). The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. s 404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, s 404.945, and finally may obtain judicial review [FN21]. 42 U.S.C. s 405(g); 20 CFR s 404.951 (1975).

FN21. Unlike all prior levels of review, which are de novo, the district court is required to treat findings of fact as conclusive if supported by substantial evidence. 42 U.S.C. s 405(g). ***Eldridge, Supra., at 339 & 905***.

The court held the administrative procedures for terminating social security disability benefits fully complied with due process and an evidentiary hearing is not

required prior to their termination. ***Eldridge, Supra., at 349 & 910***. The court based its decision on,

> the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," Richardson v. Perales, 402 U.S., at 404, 91 S.Ct., at 1428, concerning a subject whom they have personally examined. [FN28] In Richardson the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." Id., at 405, 407, 91 S.Ct., at 1428, 1430. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in Goldberg.
>
> FN28. The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any . . . substantial gainful work

> which exists in the national economy . . . ." 42 U.S.C. s 423(d)(2)(A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. K. Davis, Administrative Law Treatise s 7.06, at 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.
>
> ***Eldridge, Supra., at 344-45 & 907***.

The *Eldridge case* had absolutely nothing to do with the right of confrontation and cross-examination under the due process clause of the 14th Amendment. It simply said the procedures the claimant for disability benefits received complied with due process.

Conversely, Doughty's case involved a civil trial, in the Circuit Court, with all of the protections of due process guaranteed by the 14th Amendment, which includes the right to confront and cross-examine the witnesses against him. ***Goldberg vs. Kelly, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970)***; ***Willner vs. Committee on Character and Fitness, 373 U.S. 96, 103-04, 83 S.Ct. 1175,***

1180, 10 L.Ed.2d 224 (1963); Greene vs. McElroy, 360 U.S. 474, 496-97, 79 S.Ct. 1400, 1413-14, 3 L.Ed.2d 1377 (1959); ***Interstate Commerce Commission vs. Louisville & Nashville Railroad Company, 227 U.S. 88, 93-94, 33 S.Ct. 185, 187-88, 57 L.Ed. 431 (1913); Valter vs. Orchard Farm School District, 541 S.W.2d 550, 557 (Mo 1976); Mueller vs Ruddy, 617 S.W.2d 466, 475 (Mo.App. E.D. 1981); Coyler vs. State Board of Registration for the Healing Arts, 257 S.W.3d 139, 146 (Mo.App. W.D. 2008)***.

Additionally, ***§ 302.312.1, RSMo*** simply says,

> Copies of all papers, documents, and records lawfully deposited or filed in the offices of the department of revenue or the bureau of vital records of the department of health and senior services and copies of any records, properly certified by the appropriate custodian or the director, shall be admissible as evidence in all courts of this state and in all administrative proceedings.

Nowhere does it say the officer is not subject to cross-examination upon what they wrote in the reports or records, or, that the officer can refuse to appear and testify after they were subpoenaed to do so and the court hasn't discharged them from their subpoena.

Conclusion

Wherefore, for the foregoing reasons, the court should reverse the trial court's admission of the evidence pursuant to § 302.312, RSMo, declare the trial court's judgment suspending Doughty's driving privileges void, remand the case to the Circuit Court with directions to enter a judgment reinstating Doughty's driving privileges retroactive to the date of the suspension, Order the Director of Revenue to remove from Doughty's driving record the revocation for a chemical test refusal and provide Appellant such other and further relief as the court deems just and proper.

CERTIFICATION

I hereby certify:

1. the claims, defenses, requests, demands, objections, contentions, or arguments contained herein are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
2. the brief complies with the limitations contained in Rule 84.06(b) and the number of words in the brief is 4,179 according to the word count in WordPerfect X4 which is the word processing system used to prepare this brief.
3. The electronic copy of this brief filed with the court has been scanned for viruses and it is virus free.

Respectfully Submitted,

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Certificate of Service

I hereby certify on August 16, 2012 I served the foregoing on John Winston Grantham, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102, attorney for Respondent, electronically, by uploading it to the electronic case file.

/s/ R. Todd Wilhelmus
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