

Reasons to Fight the Implied Consent Revocation – Getting the Judge to Use the “R” Word

Thomas W. Jakway
Thomas W. Jakway, P.A.
Woodbury

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BASICS

Must be filed 30 days from when served in person or 33 days from the notice date if served by U.S. Mail. Will have hearing within 60 days of filing under statute. Service may be made upon Commissioner of Public Safety or Attorney General.

DISCOVERY IS LIMITED UNDER IMPLIED CONSENT STATUTE

You will receive mandatory discovery and disclosure letter from Attorney General's Office, listing all witnesses they may call and offering to provide copies of their reports for \$0.25 a page. Always order this.

Not civil rules, but you may use civil rules to get additional discovery via motion.

Get most discovery from prosecutor and law enforcement offices directly.

Get your own discovery-go to scene take pictures, etc.

Get test information from BCA.

ISSUES FOR HEARING

According to some, limited to those enumerated under statute. **INCORRECT!**

Why would you ever limit your issues for hearing?

DO YOU WANT CLIENT PRESENT/TESTIFY

Only if client can provide winning information.

SUBMISSIONS

Always take the opportunity to write.

KEYS TO WINNING

1. Preparation through discovery and familiarity with case.
2. Practice
3. Using care in framing issues and conducting hearing. No open ended questions and do not ask one too many questions.
4. Learn the issues that are outside the box, look at the statute and procedure.

HOW DO YOU GET BETTER?

Mentors or watching more experienced attorneys work.

Sharing information.

Courtesy.

July 25, 2016

Court Administrator
Civil Division
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033

RE: Client VS. COMMISSIONER OF PUBLIC SAFETY
OUR CLIENT:
OUR FILE NO:
COURT FILE NO:
D.O.B.:
DL#:
DATE OF ALLEGED OFFENSES:
ALLEGED OFFENSE(S):

Dear Court Administrator:

Please be advised that this office represents the Petitioner in the above-entitled case. This incident happened in Hastings.

Enclosed for filing please find originals of the following:

1. Implied Consent Petition/Petition for Judicial Review of License Plate Impoundment.
2. Certificate of Representation.
3. Affidavit of Service.

Please file accordingly. Please schedule this matter for hearing within 60 days. The Petitioner respectfully requests and demands immediate temporary reinstatement while this matter is pending.

Thank you for your courtesy and cooperation. Please contact me if you have any questions.

Sincerely,

Thomas W. Jakway
Attorney at Law
Enc.
cc: Client

July 25, 2016

Commissioner of Public Safety
Bremer Tower, Suite 1000
445 Minnesota St.
St. Paul, MN 55101

RE: Client VS. COMMISSIONER OF PUBLIC SAFETY
OUR CLIENT:
OUR FILE NO:
COURT FILE NO:
D.O.B.:
DL#:
DATE OF ALLEGED OFFENSES:
ALLEGED OFFENSE(S):

Dear Sir or Madam:

Please be advised that this office represents the Petitioner in the above-entitled case.

Enclosed and served upon you please find copies of the following:

1. Implied Consent Petition/Petition for Judicial Review of License Plate Impoundment
2. Certificate of Representation.

The Petitioner respectfully requests and demands immediate temporary reinstatement while this matter is pending.

If you have any questions, please feel free to contact me at 651.731.6680.

Thank you for your courtesy and assistance.

Sincerely,

Thomas W. Jakway
Attorney at Law

Enc.
cc: Client

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

Case Type Six:

Implied Consent

Client,

Petitioner,

vs.

IMPLIED CONSENT PETITION/
PETITION FOR JUDICIAL REVIEW OF
LICENSE PLATE IMPOUNDMENT

Commissioner of Public Safety,

Court File No:

Respondent.

Petitioner requests a hearing pursuant to Minn. Stat. § 169A.53, subd.2 and § 169A.60, subd.10 on the revocation of his driving privileges, and Order of License Plate Impoundment by Respondent arising out of the following incident:

Full name of Petitioner:

Client

Driver's License No:

State of Issue:

Minnesota

Date of Birth:

Date of Incident:

Law Enforcement Agency(ies) Involved:

Name of officer signing Notices of Revocation:

PETITION

PLEASE TAKE NOTICE that the above-named Petitioner, by and through his attorney, Thomas W. Jakway, petitions the Court pursuant to Minn. Stat. §169A.53, subd. 2, and § 169A.60, subd.10 for rescission of the Order of Revocation by Respondent of his driver's license, and Order of License Plate Impoundment issued on or about May 14, 2016, and for such other relief as is specified hereinafter, on the following grounds:

- 1. Petitioner demands that a Judge hear this case.

2. The peace officer who arrested Petitioner did not have reasonable and probable grounds to believe Petitioner violated Minn. Stat. §169A.20.
3. Petitioner was not lawfully placed under arrest for violation of Minn. Stat. § 169A.20 including, but not limited to, insufficient cause for either the initial stop or intrusion, for use of any preliminary screening device, or for the arrest.
4. Petitioner did not drive, operate, or physically control a motor vehicle at the relevant time.
5. The peace officer did not properly inform Petitioner of Petitioner's rights or consequences for taking or refusing a chemical test.
6. The chemical testing method was invalid and/or unreliable.
7. The chemical test results were inaccurately evaluated.
8. Petitioner was unable to complete the test or tests requested, due to his/her physical condition.
9. Petitioner did not refuse testing. If it is deemed a refusal, Petitioner had a reasonable basis, under the circumstances, for refusing to submit to testing.
10. Petitioner's right to a meaningful opportunity to obtain a chemical test or tests of Petitioner's own choosing was prevented or denied by a peace officer.
11. The revocation was not based on a test result certified to the commissioner as true by the officer required to do so.
12. The notice and order of revocation was defective and inadequate. Petitioner was not notified or properly served with a notice of revocation. Petitioner was not Given a proper seven day temporary license or seven days notice prior to the revocation.
13. The officer did not fully vindicate Petitioner's right to consult with an attorney under Minnesota Constitution Article I § 6 and M.S. § 169A.51, subd. 2(4).
14. The officer unlawfully coerced the result of the test request by the officer's actions and advice, violating State and Federal constitutional due process of law.
15. The officer gave advice which did not comport with the information mandated by Minn. Stat. § 169A.51, subd. 2.
16. The Petitioner, after the time of any alleged actual driving, operating, or being in

physical control of a motor vehicle, consumed a sufficient quantity of alcohol to cause Petitioner's blood alcohol concentration to exceed 0.08%.

17. The Minnesota Implied Consent Advisory read to Petitioner violates Petitioner's rights to due process under the United States and Minnesota Constitutions.
18. The Minnesota Implied Consent Laws are unconstitutional in that they violate the Petitioner's right of due process as contained in the Minnesota and the United State's Constitutions as determined in *Fedziuk v. Commissioner of Public Safety*, 696 N.W.2d 340, (Minn. 2005).
19. Petitioner requests a hearing as soon as practicable and within 60 days.
20. Petitioner respectfully requests and demands immediate temporary reinstatement while this matter is pending.
21. The test request was made in violation of Petitioner's Fourth Amendment rights. The Minnesota Implied Consent Advisory read to Petitioner mislead Petitioner by threatening the crime of refusal in violation of the Minnesota and United States' Constitutions. There was no search warrant nor any exceptions to the warrant requirement.
22. Petitioner's equal protection rights were violated through the reading of the implied consent advisory where he was not given the right to refuse that a person asked to take a blood test has under *State v. Trahan* or a urine test under *State v. Thompson*. This also violates the principles of *McDonnell v. Commissioner of Public Safety* (The Moser portion).

PETITIONER RESERVES THE RIGHT TO AMEND THIS PETITION PRIOR TO THE HEARING, OR DURING SAME, TO RAISE ADDITIONAL GROUNDS AND/OR ALLEGE ADDITIONAL FACTS NOT KNOWN AT THE TIME OF FILING, BECAUSE THE 1998 LAW FORBIDS DISCOVERY.

ADDITIONAL RELIEF AND GROUNDS

Petitioner also seeks rescission of the revocation, or such other relief as the court deems appropriate, on the following grounds:

The implied consent procedure violates State and Federal Constitutional provisions for due process of law, equal protection of the laws, the right to redress grievances, separation of powers, double jeopardy, the State constitutional right to consult with an attorney, the court's inherent power to supervise the court process, and the rules of professional conduct for attorneys and for judges, in that:

A. The 1998 changes in the implied consent and DWI laws, including, but not limited to, the use of revocations for enhancement of future criminal charges, the removal of civil discovery, and the removal of the obligation of the government to produce test analysts, even if demanded, have inextricably intertwined an already quasi-criminal arena with a criminal one, so that the government should be required to bring suit to revoke a license, not the other way around; and

B. Because of those same changes in the law, both constitutions require that the trial of the revocation issue must include enhanced due process safeguards of jury trial of twelve, proof beyond reasonable doubt or such higher standard as the cause deems appropriate, the right to be free from compelled self-incrimination, (See, Heddin v. Dirkswager, , 336 N.W.2d 54 (Minn.1983), the right to confront the State's witnesses, and to free counsel if indigent, and the right to be presumed innocent (See, Hepfal v. Bashaw, 279 N.W.2d 342 (Minn. 1979); Davis, et al, v. Commissioner of Public Safety, 509 N.W.2d 380 (Minn. App. 1994), Aff'd 517 N.W.2d 532 (Minn. 1995), and because at the same time the legislature has criminalized the implied consent revocation, they have reduced the due process safeguards afforded drivers who dispute the revocation, contrary to the warnings in Davis v. Commissioner of Public Safety, Supra; and

C. For the same reasons, the government must be estopped from offering any testimony or evidence, including, but not limited to, evidence derived from the Datamaster DMT, or any other new testing machinery, because no discovery is allowed beyond police reports, which, in the future, will contain only what the police arbitrarily choose to volunteer, indeed, even the reports need not be disclosed as the new statute only requires disclosure of the notice of revocation, the test record and the peace officer's certificate and any accompanying documentation submitted by the arresting peace officer to the commissioner of public safety. The only reports Driver's will now be allowed to see will be that information the arresting officer chooses to send the commissioner with the certificate. The police may now insulate the facts from review at their complete discretion. (But, See, Howard v. City of St. Louis Park, 466 N.W.2d 759 (Minn.App.1991);

Moreover, Petitioner cannot negate police claims that there was cause for the seizure or the arrest, or that Petitioner's rights were vindicated, until Petitioner knows what the police assert were the facts giving them cause to make said seizure and/or arrest, or what the police claim occurred when they were obligated to read the advisory and vindicate rights. The revocation is subject to being insulated from any meaningful review by the removal of discovery. As well, the law cannot leave it to the police, who are motivated to uphold their own arrest and post-arrest actions, to decide what information the driver needs or will receive in maintaining his

court action. There is no reason to believe that a party or its agents will supply all an opposing party needs to defend his claim. Discovery is not a gift. It is part and parcel of due process of law and the right to redress grievances; and

D. The 1998 changes in the rules of discovery only for this one type of civil action also violates the separation of powers under both the State and Federal constitutions in that the regulation of discovery in court cases is uniquely or primarily a matter for supervision by those courts; and

E. For the same reasons, the implied consent revocation now violates State and Federal double jeopardy prohibitions against exposure to being put through the process twice and against being twice punished; and

F. For the same reasons, the reading of the implied consent advisory, all discussion of implied consent rights, and any purported waivers thereof, must now be electronically recorded under State v. Scales, 518 N.W.2d 587 (Minn. 1994); and

G. For the same reasons, the new law changes have rendered the State constitutional right to counsel meaningless and impossible to effectuate as the new provisions create an irreconcilable conflict or dilemma between the attorney and his client during calls prior to testing; as well, the lack of a right to free counsel for indigent drivers denies them representation at what is now a critical stage of a criminal proceeding, and denying free counsel to indigents while the time for petitioning is running, or at the hearing, denies them any meaningful opportunity to review license loss, plate loss or vehicle forfeiture because the public defenders generally are forbidden to bring or defend these civil actions and/or will not be paid for same, at a time when the legislature has increased the consequences of license revocation and decreased the procedural safeguards; and

H. In an appropriate case, the revocation must be rescinded because it is now based on the test results only at the time of testing, when the driver may in fact have consumed sufficient alcohol after driving or physically controlling a motor vehicle to raise his or her alcohol concentration above the legal limit, and both State and Federal constitutions provide for fair and rational laws.

Petitioner also seeks reimbursement of all costs, expenses, filing and attorney's fees, and of any and all reinstatement fees, and other expenditures, which have been incurred in pursuing this petition and/or securing a limited license pending the hearing on this matter.

DISCOVERY DEMAND

DEMAND is hereby made for those items submitted to the Commissioner by the peace

officer involved regarding said revocation, regardless of whether these documents support the revocation. Demand is also made for a copy of and the preservation of any and all 911 and dispatch tapes made regarding this incident as well as any and all audio and video recordings made regarding this incident.

DEMAND is also made for all discovery and disclosures that are mandatory under the Implied Consent Statute, specifically Minn. Stat. § 169A.53, subd.2(d).

Dated: _____

Respectfully submitted,

Thomas W. Jakway
Attorney for Petitioner
1805 Woodlane Drive
Woodbury, MN 55125
651.731.6680
Attorney I.D. No: 193732

ACKNOWLEDGEMENT REQUIRED BY
MINN. STAT. § 549.211, SUBD.2

I hereby acknowledge that, pursuant to Minn. Stat. 549.211, subd. 2, costs,

disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find I acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted and unfounded position solely to delay the ordinary course of the proceedings or to harass, or commit a fraud upon the Court.

Thomas W. Jakway
Attorney License No: 193732

STATE OF MINNESOTA)
COUNTY OF WASHINGTON)

AFFIDAVIT OF SERVICE

Thomas W. Jakway of the City of Woodbury, County of Washington, in the State of Minnesota, being duly sworn, says that on the ____ day of _____, 2016, he served the Implied Consent Petition and Certificate of Representation regarding Client v. Commissioner of Public Safety on the following:

Commissioner of Public Safety
Bremer Tower, Suite 1000
445 Minnesota St.
St. Paul, MN 55101

by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at St. Paul, Minnesota, directed to said person at the above stated address, the last known address of said person.

Subscribed and sworn to before me
this _____ day of _____, 2016.

Notary Public

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT

DISTRICT COURT
FIRST JUDICIAL

March 30, 2012

Court Administrator
Civil Division
14949 62nd Street North
P.O. Box 3802
Stillwater, MN 55082-3802

RE: _____ VS. COMMISSIONER OF PUBLIC SAFETY
OUR CLIENT:
OUR FILE NO:
COURT FILE NO:
D.O.B.:
DL#:
DATE OF CANCELLATION:

Dear Court Administrator:

Please be advised that this office represents the Petitioner in the above-entitled case.

Enclosed for filing please find originals of the following:

1. Petition for Reinstatement of Driver's License Pursuant to Minn. Stat. § 171.19.
2. Affidavits of Service.

Please file accordingly. We respectfully request a hearing as soon as possible, allowing fifteen days notice to the Commissioner of Public Safety. Please contact me with any questions or concerns about scheduling a hearing date.

Thank you for your courtesy and assistance. Please contact me if you have any questions.

Sincerely,

Thomas W. Jakway
Attorney at Law
Enc.
cc:

March 30, 2012

Commissioner of Public Safety
445 Minnesota St., Suite 1000
St. Paul, MN 55101

RE: _____ VS. COMMISSIONER OF PUBLIC SAFETY

OUR CLIENT:
OUR FILE NO:
COURT FILE NO:
D.O.B.:
DL#:
DATE OF CANCELLATION:

Dear Sir or Madam:

Please be advised that this office represents the Petitioner in the above-entitled case.

Enclosed and served upon you please find copies of the following:

1. Petition for Reinstatement of Driver's License Pursuant to Minn. Stat. § 171.19.

If you have any questions, please feel free to contact the undersigned at 651.731.6680.

Thank you for your courtesy and assistance.

Sincerely,

Thomas W. Jakway
Attorney at Law

Enc.

cc:

March 30, 2012

Commissioner of Public Safety
Driver Evaluation Office
445 Minnesota St., Suite 170
St. Paul, MN 55101

RE: _____ VS. COMMISSIONER OF PUBLIC SAFETY

OUR CLIENT:
OUR FILE NO:
COURT FILE NO:
D.O.B.:
DL#:
DATE OF CANCELLATION:

Dear Sir or Madam:

Please be advised that this office represents the Petitioner in the above-entitled case.

Enclosed and served upon you please find copies of the following:

1. Petition for Reinstatement of Driver's License Pursuant to Minn. Stat. § 171.19.

If you have any questions, please feel free to contact the undersigned at 651.731.6680.

Thank you for your courtesy and assistance.

Sincerely,

Thomas W. Jakway
Attorney at Law

Enc.
cc:

STATE OF MINNESOTA
COUNTY OF WASHINGTON

DISTRICT COURT
TENTH JUDICIAL DISTRICT
CASE TYPE: #14-OTHER CIVIL

_____,
Petitioner,

vs.

Commissioner of Public Safety,
Respondent.

**PETITION FOR REINSTATEMENT
OF DRIVER'S LICENSE PURSUANT
TO MINN. STAT. § 171.19**

Court File No.

Comes now the Petitioner, and for his Petition for Reinstatement of his Minnesota Driver's License pursuant to Minnesota Statutes §171.19, does state and allege as follows:

1. That Petitioner is a resident of the City of Woodbury, County of Washington, State of Minnesota, and this Court has jurisdiction over this matter pursuant to Minnesota Statutes §171.19.
2. That Petitioner's Minnesota Driver's License number is _____ and Petitioner's date of birth is _____ .
3. That Petitioner's driving privileges were canceled and denied as inimical to public safety due to his third under the influence incident in ten years.
4. That Petitioner completed rehabilitation and received reinstatement of his driving privileges (a restricted license or "B" Card).
5. That Petitioner has not consumed alcoholic beverages since he underwent "rehabilitation" and obtained his restricted license or B-Card.
6. Petitioner's driving privileges were withdrawn or "canceled" on March 5, 2012, for

suspicion of consuming alcohol and thereby violating his restricted license or “B-Card.”

7. Petitioner respectfully requests a hearing before a Judge of this Court.

8. The denial of Petitioner’s driving privileges was arbitrary, capricious and without basis in law or fact.

9. The pre-hearing license revocation procedure applied in this case violated Petitioner’s right to due process of law under the Minnesota and United States Constitutions in that Petitioner has a property interest in his driver’s license and associated driving privileges, and was denied an opportunity for any form of pre-deprivation hearing process.

WHEREFORE, Petitioner seeks the judgment of this Court as follows:

1. The immediate reinstatement of Petitioner's driving privileges pursuant to Minnesota Statute § 171.19; and

2. For such other and further relief as the Court deems just and proper.

Dated: _____

Respectfully submitted,

Thomas W. Jakway
Attorney for Petitioner
1805 Woodlane Drive
Woodbury, MN 55125
651.731.6680
Attorney I.D. No: 193732

**ACKNOWLEDGMENT REQUIRED BY
MINN. STAT. § 549.211, SUBD.2**

I hereby acknowledge that, pursuant to Minn. Stat. 549.211, subd. 2, costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find I acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted and unfounded position solely to delay the ordinary course of the proceedings or to harass, or commit a fraud upon the Court.

Thomas W. Jakway
Attorney License No: 193732

STATE OF MINNESOTA)

AFFIDAVIT OF SERVICE

COUNTY OF WASHINGTON)

Thomas W. Jakway of the City of Woodbury, County of Washington, in the State of Minnesota, being duly sworn, says that on the 30th day of March, 2016, he served the Petition for Reinstatement of Driver's License Pursuant to Minn. Stat. § 171.19 regarding _____

v. Commissioner of Public Safety on the following:

Commissioner of Public Safety
445 Minnesota St., Suite 1000
St. Paul, MN 55101

Commissioner of Public Safety
Driver Evaluation Office
445 Minnesota St., Suite 170
St. Paul, MN 55101

by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at St. Paul, Minnesota, directed to said person at the above stated address, the last known address of said person.

Subscribed and sworn to before me

this _____ day of _____, 2016.

Notary Public

July 25, 2016

Court Administrator
Civil Division
14949 62ND Street North
P.O. Box 3802
Stillwater, MN 55082-3802

RE: Client VS. COMMISSIONER OF PUBLIC SAFETY
OUR CLIENT:
OUR FILE NO:
COURT FILE NO:

Dear Court Administrator:

Please be advised that this office represents the Petitioner in the above-entitled case.

Enclosed for filing please find originals of the following:

1. Notice of Filing of Order.
2. Affidavit of Service by Mail.

Please file accordingly.

Please contact me if you have any questions.

Thank you for your courtesy and assistance.

Sincerely,

Thomas W. Jakway
Attorney at Law

Enc.
cc: Client

July 25, 2016

Assistant Attorney General
445 Minnesota St., Suite 1800
St. Paul, MN 55101

RE: Client VS. COMMISSIONER OF PUBLIC SAFETY
OUR CLIENT:
OUR FILE NO:
COURT FILE NO:

Dear _____:

Please be advised that this office represents the Petitioner in the above-entitled case.

Enclosed and served upon you is a Notice of Filing of Order in the above-entitled matter. This notice limits the time for appeal.

If you have any questions please feel free to contact me at 651.731.6680.

Thank you for your courtesy and assistance.

Sincerely,

Thomas W. Jakway
Attorney at Law

Enc.
cc: Client

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WASHINGTON

TENTH JUDICIAL DISTRICT

Case Type Six: Implied Consent

Client,

Petitioner,

vs.

NOTICE OF FILING OF ORDER

Commissioner of Public Safety,

Court File No:

Respondent.

TO: _____, Assistant Attorney General, Attorney for Respondent Commissioner of Public Safety, 445 Minnesota St., Suite 1800, St. Paul, MN 55101

PLEASE TAKE NOTICE, that an Order rescinding the implied consent license revocation in the above-captioned matter was filed on _____. This Notice is served upon you to limit your time for appeal.

Dated: _____

Respectfully submitted,

Thomas W. Jakway
Attorney for Petitioner
1805 Woodlane Drive
Woodbury, MN 55125
651.731.6680
Attorney I.D. No: 193732

STATE OF MINNESOTA)
COUNTY OF WASHINGTON)

AFFIDAVIT OF SERVICE BY U.S. MAIL

Thomas W. Jakway of the City of Woodbury, County of Washington, in the State of Minnesota, being duly sworn, says that on the 3rd day of July, 2016, he served the Notice of Filing of Order regarding Client v. Commissioner of Public Safety on the following:

Assistant Attorney General
445 Minnesota St., Suite 1800
St. Paul, MN 55101

by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at St. Paul, Minnesota, directed to said person at the above stated address, the last known address of said person.

Subscribed and sworn to before me
this _____ day of _____, 2016.

Notary Public

a. The Arrest Argument

We contend that the State has failed to prove sufficient cause to meet the statutory threshold requirement authorizing the use of a PBT in this case. The legal limitation on the use of PBTs is not just a statutory gift. PBTs are a search for probable cause without probable cause for a search. The limits set in that statute are the very least that must be required before such a search is legal, if it is legal at all.

Our statute authorizes the use of PBTs in limited situations. The statute reads:

169A.41. Preliminary Screening Test

Subdivision 1. When authorized. When a peace officer has reason to believe from the manner in which a person is driving, operating, controlling, or acting upon departure from a motor vehicle, or has driven, operated, or controlled a motor vehicle, that the driver may be violating or has violated section 169A.20 (driving while impaired), 169A.31 (alcohol-related school bus or Head Start bus driving), or 169A.33 (underage drinking and driving), the officer may require the driver to provide a sample of the driver's breath for a preliminary screening test using a device approved by the commissioner for this purpose.

Assuming this is even constitutional, we are not a blow-and-you-may-be-on-your-way state. The law, for good reason, requires that something about the driving, or the behavior after departing the vehicle, indicates one is reasonably likely violating the DWI law.

The police must also look at the totality of the circumstances. To be sure, there may be one good indicator of impairment, and that could be enough. On the other hand, it all depends on what a reasonable person would conclude from what was observed. This is the criticism the court of appeals levied at prosecutors who misused the broad language of *Holtz v. Commissioner of Public Safety*, 340 N.W.2d 363 (Minn. App. 1983). This misuse has been criticized more than once. An example is found in *Martin*

v. Commissioner of Public Safety, 353 N.W.2d 202 (Minn. App. 1984), where the court wrote:

The *Holtz* decision is misread if it is seen as authority to find probable grounds for implied consent testing whenever one objective indication of intoxication is proven. The cases cited in the *Holtz* decision establish that there are numerous signs indicating a person is under the influence of intoxicating liquor, and that an opinion on that condition can be reached without presence of all of the signs. *State v. Hicks, Id.*, 222 N.W.2d at 348. *Holtz* confirms that decision and makes it clear that even a single objective indication of intoxication may be sufficient, depending upon the circumstances in each case. Reiterating the quoted language from *State v. Olson, Id.*, it is fundamental that each case must be decided on its own facts and circumstances and without regard to any formula. [Emphasis added]

I don't want to over argue this point because we do not see any such indicator in this case, and there is positive evidence to the contrary, *i.e.* that what was being smelled had not in fact impaired this driver, based both on the driving, and how he stopped, and how he acted thereafter. But the same is true in assessing the quantum of evidence needed for using a PBT, which is a reasonable suspicion that the driver has violated §169A.20 (the DWI law).

The totality test requires that the inferences that favor the driver be considered as well. In other words, not only didn't Defendant exhibit drunken indicia; he also exhibited behavior that showed he was not impaired by what had been smelled.

He drove well, not at all erratically, merely drifting over his lane line a bit.

He stopped without telltale impairment or sign of guilty state of mind.

He parked without telltale impairment.

He retrieved his license without telltale impairment.

He did not have slurred speech.

He did not reveal cognitive impairment.

He did not have motor skill impairment.

He walked without telltale impairment.

He stood normally, without telltale impairment.

He talked, both in manner and content without telltale impairment.

He did not exhibit bloodshot eyes.

He did not display any drunken attitude or unusual factors.

His reaction to instructions was normal.

He did not display any coordination problems.

Nothing from the manner in which Defendant drove, or the manner in which he acted, authorized a PBT under our limiting statute, in this case. Nearly all the observations showed non-impairment mentally and physically. No slurred speech, telltale denials, cognitive impairment or poor balance existed. This was a blow-and-you-may-go procedure.

Enclosed are district court orders agreeing that there still are teeth in the statute. It limits the use of PBTs,¹ and the state bears a burden of proving they had that quantum of evidence indicating the subject was likely a DWI violator, before requiring the PBT.

We also include the *Robertson* case, because it teaches two crucial things. In that case, the parties and the court all agreed on appeal that there had been an odor of alcohol. Odor alone does not mean what was smelled impaired the driver. It is not illegal simply to drink and then to drive.

In *Robertson*, the court of appeals stated that the district court had applied the wrong standard in concluding that the record evidence did not meet that quantum of evidence needed to invoke a PBT under the limiting statute (probable cause standard).

¹ The Statute begins: “Preliminary Screening Test... **When authorized...**”

They remanded for a ruling applying the “reasonable suspicion” standard. This teaches us two crucial things:

First: there really is a ruling to be made - this statute really does limit the use of PBTs.

Second: odor alone does not meet the required standard. Everyone agreed on appeal there had been an odor. If that alone were enough, there would have been no need to remand the case for a ruling.

We also include the *Knapp* case. There the court of appeals ruled that the stop was illegal because no one had come to the hearing to make the required showing of reasonable suspicion to invoke the PBT when it was used.²

The Supreme Court reversed, not because there is no requirement under the authorizing statute to make a showing before a PBT may be admitted, but because there had been ample other evidence justifying the stop without reliance on the unsupported PBT evidence. There really are teeth to this limiting statute.

This writer will unlikely ever have a more appropriate case to make this argument to the Court, because here we not only have the thinnest showing of cause to use a PBT, indeed, we have a pretty “thick” showing of non-impairment based on the driving and the behavior thereafter, but we also have an HGN test doing exactly what it was designed to do, and alerting this officer that the good driving, the slight odor, the good stopping, and parking, and field tests, and attitude, and speech all were, indeed, confirmed.

² Knapp was PBTed and failed. He was told not to drive. Minutes later a second cop, who knew Knapp had failed the PBT, saw Knapp driving and stopped him. No one came to court to prove the facts justifying us of the PBT in the first place.

Defendant did not fail the HGN test, and that was objective evidence that the 169A.41 did not authorize the peace officer, from the manner in which Defendant drove, or acted on departing the vehicle, to search by PBT.

CONCLUSION

There was insufficient threshold proof of authorization to use a PBT under the statute limiting its use, and this arrest turned on that PBT result. Thus, the State failed to prove probable cause to invoke the implied consent law and the revocation should be rescinded.

ARGUMENT

THE SCOPE OF THE HEARING.

In prior hearings, Respondent has argued that the issues presented to the Court by Petitioner were beyond the scope of review under the implied consent statute. Over the years, the state has routinely argued that several issues raised by various Petitioners should not be considered by the courts if they are not one of the limited issues found in the implied consent statute (presently codified at Minn. Stat. § 169A.53, Subd. 3).

Petitioner maintains that the Court may rescind when required statutory procedure has not been followed by the commissioner or its agents. At the onset, it is apparent from Minnesota case law that the scope of review limitations in Subd. 3 presume that the correct statutory procedure has otherwise been followed.

There is much precedent in Minnesota for the proposition that a revocation may be rescinded based on the merits of an issue that is not found in Subd. 3. Many such cases turned on a failure by the State to follow proper procedure. For example, Minn. Stat. § 169A.51, Subd. 7 requires that the officer not prevent or deny independent testing after a driver in custody has cooperated with the Government's test. Violation of this right requires rescission of the revocation. *Theel v. Commissioner of Pub. Safety*, 447 N.W.2d 472 (Minn.App. 1989), *Pet. Rev. Denied* (Minn. 1/8/90). Yet there is nothing in Minn. Stat. § 169A.53, Subd. 3 that suggests that Mr. Theel could ever have brought the issue before the Court.

Failure to serve a Notice of Revocation, or service of a defective Notice with incorrect information is a justiciable issue, and can result in the rescission of the revocation, yet there is nothing in Subd. 3 alluding to that violation of procedure either. See, e.g., *Godderz v. Commissioner of Pub. Safety*, 369 N.W.2d 606 (Minn.App. 1985). The defense of post-

driving consumption is not found in Subd. 3, but is nevertheless within the scope of the hearing. See *Dutcher v. Commissioner of Pub. Safety*, 406 N.W.2d 333 (Minn.App. 1987).

The scope of review statute limits issue to whether or not an officer had probable cause to believe a violation, yet stops may be attacked by a petitioner to suppress that probable cause. See *Warrick v. Commissioner of Pub. Safety*, 374 N.W.2d 585 (Minn.App. 1985). The officer need only have probable cause to believe the petitioner drove, operated or physically controlled a motor vehicle to win under Subd. 3, but the driver is not precluded from raising the issue of actual driving, operating, or controlling anyway. See *Roberts v. Commissioner of Pub. Safety*, 371 N.W.2d 605 (Minn.App. 1985), Pet. Rev. Denied, (Minn. 10/11/85); *Snyder v. Commissioner of Pub. Safety*, 496 N.W.2d 858 (Minn.App. 1993); *Llona v. Commissioner of Pub. Safety*, 389 N.W.2d 210 (Minn.App. 1986).

When *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991) was decided, that decision was outside the so-called scope of the hearing allowed by Subd. 3. There was nothing in Subd. 6 that allowed a person to argue that one should have a right to an attorney prior to testing. See also, *Heddan v. Dirkswager*, 336 N.W.2d 54 (Minn. 1983), where the driver challenged the pre-adjudicatory taking of a license as a violation of due process. Though the driver did not prevail, the Court never suggested that the issue was not justiciable (although *Heddan* was declaratory relief).

In *Davis v. Commissioner of Pub. Safety*, 509 N.W.2d 380 (Minn.App. 1993), *affirmed*, 517 N.W.2d 901 (Minn. 1994), Minnesota's Court of Appeals and Supreme Court reached the merits of the question regarding whether or not the consequences of the Implied Consent procedure had become so onerous as to require enhanced due process. Neither Court suggested that the issue was not properly before the Court because it did not meet the requirements of

Subd. 3.

Of course, not following certain Court procedures can result in rescission; procedures which have nothing to do with the scope of the hearing statute found in Subd. 3. Sanctions for failure to make disclosures, witnesses not appearing, violations of sequestration orders can all result in rescission, in the Court's discretion, and none of these are found in Subd. 3.

Subd. 3 states that one issue which may be raised is that the officer did not read the Advisory as required by Minn. Stat. § 169A.51 Subd. 2, but nothing else. Yet, in *McDonnell v. Commissioner of Pub. Safety, et al* (the Moser portion) 473 N.W.2d 828 (Minn. 1991), Ms. Moser successfully went beyond the limits of Subd. 3 and argued that the statutorily-mandated Advisory itself violated her rights.

Specifically, Minnesota Courts have addressed the sufficiency of a Notice and Order of Revocation at implied consent hearings. See *LeClair v. Commissioner of Public Safety*, 416 N.W.2d 209 (Minn.App. 1987); *Godderz v. Commissioner of Pub. Safety*, 369 N.W.2d 606 (Minn.App. 1985); *McIntee v. State Dept. of Public Safety*, 279 N.W.2d 817 (Minn.1979) (superseded by statute on other grounds).