SUPREME COURT NO. 88774-8

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES DIDLAKE, et al,

Plaintiffs/Petitioners,

v.

WASHINGTON STATE and WASHINGTON STATE DEPARTMENT OF LICENSING,

Defendants/Respondents.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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(1) NATURE OF THE CASE AND DECISION

Petitioners Didlake, Johnson, Burke, Fischer and Bennett seek direct review of the decision of King County Superior Court Judge Susan Craighead granting Defendant Washington State Department of Licensing's ("DOL") Motion to Dismiss on April 4, 2013. The issue presented for review is whether the statutory requirement that a driver pay a fee in order to obtain a meaningful review of the DOL's decision to suspend a driver's license violates the Due Process Clause of the United States and Washington State Constitutions.

A. The claims and procedural history

This case involves the constitutionality of the statutory requirement that a person whose driver's license is to be suspended or revoked under the Implied Consent Law, RCW 46.20.308 (8), cannot obtain review of that suspension without payment of a fee. In this case, each Petitioner was required to pay a $200[1] fee to the DOL to receive a hearing to defend against the DOL's proposed suspension/revocation[2] of their driving privileges. If the fees were not paid, the suspensions were mandatory and automatic (RCW 46.20.308(7)). The requirement of prepayment of a fee

[1] The Legislature increased this fee to $375 effective October 1, 2012. See Laws of 2012, ch. 80, §12.

[2] Unless required by context, the term "suspension" will be used to signify all state action against the driving privilege.

to obtain review is a violation of Petitioners' and potential class members' procedural due process rights.

Procedural due process constrains governmental actions that deprive individuals of liberty or property interests within the meaning of the due process clause. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Due process is a flexible concept, but an essential principle is the right to notice and a meaningful opportunity to be heard. *Mathews*, 424 U.S. at 334. Determining the type of due process required in a given situation requires consideration of: (1) The private interest involved; (2) The risk that the procedures at issue will erroneously deprive a party of that interest; and (3) The governmental interest involved. *Mathews*, 424 U.S. at 335.

The Federal and State constitutions require the State to provide a driver with due process to challenge a proposed license suspension before it goes into effect. *Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L. Ed.2d 90 (1971); *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979).

Washington voters enacted the Implied Consent law in 1968. This law operates to suspend the driving privileges of any driver following an

arrest for driving under the influence ("DUI").[3] This process is separate from any criminal charges that may follow the arrest. The process for instituting a license suspension is initiated by the arresting officer. Once the officer files his or her report with the DOL alleging the statutory requirements for the suspension, the suspension is mandatory.[4] Unless a driver requests a hearing, the suspension commences with no consideration of whether grounds exist to justify the suspension.

Under the Implied Consent law, the DOL provides drivers with the opportunity to request an administrative hearing before a Department hearing examiner. RCW 46.20.308(8). Initially, **no** fee was required in order to obtain the hearing, but the DOL began charging a $100 fee for this hearing in 1994, which fee has increased over time to its current level of $375.[5] A provision allows indigent drivers to request a waiver of this fee, though no legal process exists for drivers to seek a refund of the fee once paid. RCW 46.20.308(8).

The state of Washington requires licensure for hundreds of different professions, occupations and businesses. Without a valid license, the persons or businesses affected cannot generate revenue for themselves

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[3] RCW 46.20.308 states the procedural steps the officer and Department must take to suspend/revoke a license. There is no dispute in these cases that all procedural steps were followed.

[4] "The department of licensing, upon the receipt of a sworn report ... **shall suspend**, revoke, or deny the person's license ... ." RCW 46.20.308(7) [Emphasis added].

[5] Laws of 1994, ch. 275; Laws of 2012, ch. 80, §12.

or their employees and dependents. The suspension or revocation of a State- issued license is serious matter, and our state recognizes this fact by providing persons and businesses facing such disciplinary action a right to initial review of such decisions without payment of a prehearing fee.[6]

Most reviews of license suspension decisions are governed by procedures set forth in the Administrative Procedure Act ("APA"), Chapter 34.05 RCW. While the APA outlines procedures for commencement and conduct of adjudicative proceedings with respect to matters within an agency's jurisdiction (*See e.g.* RCW 34.05.413), it does not require that the party seeking an adjudicative proceeding pay a fee.[7]

Despite the State's recognition that it cannot suspend state conferred licenses without providing the holders of the licenses with a hearing at State expense, it imposes a fee on Washington citizens whose driver's licenses are suspended based on implied consent. The State does

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[6] Examples of license suspension or revocation proceedings for which no hearing fee is required include: Modification, denial, suspension or revocation of foster home license (WAC 388-148-0110); Revocation of a physician's license (WAC 246-919-522); Suspension, revocation or denial of a licensee for a driver training school instructor (RCW 46.82.370); Suspension of license of home inspectors (RCW 18.280.130); denials and revocations of notary appointments (WAC 308-30-080); Discipline of school bus drivers, including suspension or revocation of their authorizations (WAC 392-144-130 (5)), and many more. Ironically, even the revocation of a habitual offender's driver's license can be challenged via a formal hearing without charge (RCW 46.65.065).

[7] Indeed, the Washington legislature has expressly recognized that provision of administrative hearings is an important governmental duty which must be properly financed. RCW 34.12.130 provides: "The administrative hearings revolving fund is hereby created in the state treasury for the purposes of centralized funding, accounting and distribution of the actual costs of the services provided to agencies of the state government by the office of administrative hearings."

so only to offset the costs of providing due process hearings to which drivers are legally entitled. This is neither rational nor permissible.

All Petitioners named in this suit were arrested for DUI. The arresting officers filed reports with the DOL instituting mandatory license suspensions under the Implied Consent law. Petitioners filed requests for administrative hearings and paid the required fee. All Petitioners prevailed at their hearings.[8] Based upon the Court of Appeals decision in _Downey v. Pierce County_, 165 Wn. App. 152, 267 P.3d 4445 (2011),[9] Petitioners filed suit to seek a refund of these fees for themselves, as well as all others who have paid this fee,[10] and sought class certification pursuant to CR 23.[11]

In response to the Plaintiff's lawsuit, the DOL filed a motion to dismiss under CR 12(b)(6).[12] The parties acknowledged there were no factual disputes; the issue was the constitutionality of the requirement that non-indigent drivers pay a fee for a due process hearing. Judge Susan Craighead of the King County Superior Court granted the DOL's motion

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[8] Petitioner Johnson received two hearings as he was arrested twice for DUI. He prevailed at one hearing, and the suspension was sustained at the other.
[9] Review denied; 174 Wn.2d 1016, 281 P.3d 688 (2012).
[10] *See* Complaint. (Clerk's Papers, p. 4, ¶4.2).
[11] According to a Dec. 1, 2011 Driver and Vehicle Services Fee Study submitted by DOL in support of its Motion to Dismiss, from 2009 to 2011, over 18,000 drivers paid a $200 fee for the administrative hearing. (Clerk's Papers, p. 85)
[12] Department's Motion to Dismiss Under CR 12(b)(6). (Clerk's Papers, pp. 16-94).

to dismiss. Petitioners now seek direct review of Judge Craighead's decision before the Washington Supreme Court.

B. The Decision

The thrust of Petitioners' due process claim arises from *Downey v. Pierce County*, 165 Wn. App. 152, 267 P.3d 445 (2011).[13] There, the Court held a filing fee requirement to receive a due process hearing to challenge the removal of an animal from a home under a Dangerous Animal Declaration (DAD) law violated due process.

Applying the three-part test in *Mathews v. Eldridge*, *supra,* to Petitioners' claims, the Judge Craighead distinguished *Downey* and held that the fee requirement under the Implied Consent law did not violate due process. First, the Court questioned whether possession of a driver's license constitutes as significant a private interest as a "family pet." While the Court initially acknowledged the decision in *Moore*, *supra*[14], the Court

[13] In her memorandum opinion granting the DOL's motion and dismissing Petitioner's suit, Judge Craighead initially questioned whether Petitioners had standing to pursue their claim, suggesting that Petitioners were challenging the statute on behalf of drivers who did not request a hearing or pay the required fee; this was, in fact, not the case. The Court ultimately did not rule on class certification or on the standing of the Petitioners to file suit. Further, DOL did not raise the issue of standing until it filed its reply brief to the Petitioner's response to the DOL's motion. Without citation to the record, the DOL claimed that Petitioners were attempting to raise claims based on the alleged "deterring effect" the fee had on other drivers. The DOL never asserted that any of the Petitioners lacked standing individually to claim a due process violation, nor did it make any standing objections to the motion for class certification.

[14] In *Moore,* this Court described in detail the serious consequences of a suspended license to the individual.

also noted that other forms of transportation exist for individuals to use in lieu of driving. In contrast, family pets were described as "irreplaceable."

Second, the trial court found that the risk of erroneous loss of a license was lower in an Implied Consent proceeding than in the loss of an animal in a DAD proceeding. The Court contrasted the investigative procedures used. Citing to *Mackey v. Montrym*, *supra,* the Court noted that there is a high level of trustworthiness in an arresting officer's sworn report to support a proposed license suspension. Also, the Court reasoned that the arresting officer relies on objective facts such as a blood alcohol content ("BAC") test result or a test refusal. In contrast, the DAD proceedings contained less objectivity, and, thus, a higher risk for error.

Third, the Court held that the DOL has a valid interest in offsetting the cost of providing hearings by charging a fee, and has an interest in controlling the filing of meritless challenges. The Court also found that, while these interests were outweighed in *Downey* by the higher risk of erroneous deprivation of a pet existing in the DAD proceedings, the lower risk of erroneous deprivation in Implied Consent proceedings meant that the state interests weighed in favor of the DOL.

Following the trial court's ruling, Petitioners filed their petition for direct review in the Supreme Court.

(2) <u>ISSUES PRESENTED FOR REVIEW</u>

The sole issue presented for review is whether the statutory requirement that a driver pay a fee in order to obtain a meaningful review of the DOL's decision to suspend a driver's license violates the Due Process Clause of the United States and Washington State Constitutions.

(3) <u>GROUNDS FOR DIRECT REVIEW</u>

RAP 4.2(a) provides that a party may seek direct review of a decision of superior court where "...there is a conflict among decisions of the Court of Appeals..." (RAP 4.2(3)) and where the case involves "....a fundamental and urgent issue of broad public import which requires prompt and ultimate determination..." (RAP 4.2(4)).

A. <u>There are Conflicting Decisions</u>

Two recent Court of Appeals decisions arguably provide conflicting holdings which necessitate this Court's review of the current matter. In *Downey v. Pierce County*, 165 Wn. App. 152, 164, 267 P.3d 445 (2011), Division Two struck down a "fee-for-hearing" requirement to contest Pierce County's issuance of a "Dangerous Animal Declaration," finding it violated procedural due process. 165 Wn.App. at 160-161. In contrast, Division One upheld a filing fee required for a hearing to contest Department of Labor & Industries citations for electrical law violations. *Morrison v. Dept. of Labor & Indus.*, 168 Wn. App. 269, 277 P.3d 765,

rev den, 174 Wn.2d 1016 (2012). Division One found that Morrison's private interest was solely economic and pecuniary, citing *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995), for the proposition that, "Where the interest at stake is only a financial one, the right which is threatened is not considered 'fundamental' in a constitutional sense." *Morrison*, 168 Wn.App at 273.

The distinctions between the facts of *Morrison* and *Downey* are significant. Downey's interests were "more expansive." *Morrison*, at 275. Morrison, by contrast, risked only losing money. *Id.* Morrison faced no loss of property, no added costs to maintain his property, and would not be subject to any criminal liability related to the citations that were issued. In contrast, the *Downey* court recognized a due process violation where the State initiated action affecting non-fungible property and required a fee to contest the deprivation.

Despite the factual differences, the arguable conflict between the two cases creates a conflict that this Court should review, distinguish, and harmonize. In contrast to the mere economic issues in *Morrison*, Petitioners and future drivers cited with DUI may be subject to future criminal liability if they drive while their license is suspended or revoked. RCW 46.20.342. Drivers will also face an increased length of license revocation in the future should they violate the Implied Consent Law.

RCW 46.20.3101. Therefore, like *Downey*, Plaintiffs' interests are not so "negligible" as to require Plaintiffs to pay a fee to protect their licenses from governmental seizure.

B. Public Issues are Involved

In *Eide v. State, Department of Licensing*, 101 Wash. App. 218, 3 P. 3d 208 (2000), a case in which a driver sought judicial review of a decision by DOL revoking his driver's license after he refused to take a breath test following arrest for driving under the influence, the Court of Appeal defined the test for whether discretionary review should be granted on grounds of "public interest." In that case, the Court of Appeal determined the revocation was not appealable as a matter of right and discretionary review was inappropriate, but the Court also defined the test for whether to grant discretionary review because a case involves an issue of public interest. The Court held: "In determining whether an issue involves a sufficient public interest, we consider the public or private nature of the question, the need for further guidance provided by an authoritative determination and the likelihood of recurrence" (*Id.* at 210).

The *Eide* Court decided that, because the question was whether Mr. Eide's specific conduct constituted a refusal to take the breath test as required by law, the need for future guidance was minimal, as was the likelihood of recurrence, so the superior court decision did not involve a

matter of public interest.[15] In the case at bar, when the *Eide* factors are applied to the facts of the case, the opposite conclusion must be reached. Certainly the issue of the due process rights of thousands of Washington citizens whose driver's licenses are suspended under the Implied Consent statute each year is a public and frequently recurring one, and, as is demonstrated by the trial court's decision in this case, lower courts need guidance as to whether the hearing fee creates a due process violation.

The public policy concerns addressed by the *Downey* Court also merit revisiting here. The *Downey* Court found that, while the County had a "strong" interest in protecting the public from dangerous animals, its justification for a fee to offset the cost for the DAD hearings was not sufficient to override a property owner's constitutional right to a hearing before property is taken away. *Id.* Of paramount concern to the Court was the direct impact a fee-for-hearing requirement has on access to due process and the ability to protect property from State action:

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[15] Similarly, moot cases may be decided if they involve "...a matter of continuing and substantial public interest... [considering] the public or private nature of the question, the need for future guidance provided by an authoritative determination, and the likelihood of recurrence." *In Interest of A.D.F.*, 88 Wash App. 21, 22 (1977). In *A.D.F.*, the Court was satisfied that public nature of the issue (whether contempt sanction was criminal so that proceedings violated due process when initiated by a parent as opposed to the state), including its frequency of recurrence, warranted a decision on the merits. *See also In the interest of Rebecca K.*, 101 Wash. App. 309 at 313, 2 P. 3d 501 (2000) and *In re Perkins*, 93 Wash. App. 590 at 593, 969 P. 2d 1101 (1999), citing favorably *In Interest of A.D.F.* public interest test in mootness context.

> Requiring the responding party to pay a fee to access *any* review of a government initiated action could prevent many people from obtaining the review they are legally entitled to before deprivation of a property interest.

Id. (emphasis in original).

This statement cuts to the heart of the public policy issues which are pervasive, public, widespread, and likely to reoccur. A fee-for-hearing requirement violates due process where it relates to the issue of property rights.

In the current matter, the trial court, in analyzing *Downey*, ultimately upheld the imposition of a fee for hearing by suggesting that pets are "unique and irreplaceable," in contrast to Petitioners' driver's licenses. However, *Downey* did not carve out any "pet" exception from established law. Rather, the *Downey* Court stated that even though a pet is non-fungible, it is still mere personal property, citing *Mansour v. King County*, 131 Wn. App. 255, 267, 128 P.3d 1241 (2006) ("although we have recognized the emotional importance of pets to their families, legally they remain in … Washington, property."). Downey had an interest in retaining her personal property because it was unique and difficult to replace. But while a pet may be replaced, a suspended driver's license cannot.

Further, the fee-for-hearing due process violation is no more or less significant because the person whose due process rights are threatened is also indigent. *Downey* held that mere fact that the fee-for-hearing requirement may dissuade someone from requesting a hearing required under due process is enough to create the constitutional violation. If a license holder either does not or cannot pay the fee, the Implied Consent suspension or revocation action will not have been subject to any adversarial or evidentiary testing. *Downey*, at 165-166.

While the Implied Consent Law contains a waiver for indigent drivers, the waiver only applies to the class of drivers who cannot pay the fee. The *Downey* Court was clearly and properly more concerned about the deterrent effect the hearing fee has on all drivers, as this Court should be now. In the context of a state-initiated proceeding to deprive a citizen of a property interest, the degree of due process afforded should not hinge on the citizen's capacity to pay a fee.

Additionally, the need for this Court to provide guidance hinges upon balancing the State's interests in safety and reducing costs against the requirement that "some form of hearing is required before an individual is finally deprived of a property interest." *Downey*, at 166 (emphasis in original). While the State has a strong interest in promoting

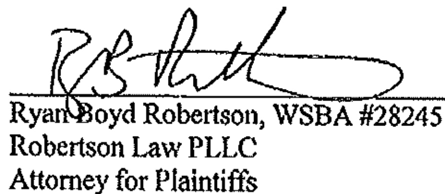
public safety on the highways,[16] Pierce County has an equally compelling duty to protect its citizens from dangerous animals, as was demonstrated in the *Downey* matter.

The need to protect the public from harm must be considered along with, and not to the detriment of, the due process protections afforded holders of Washington driver's licenses. The fee-for-hearing requirement at issue in this case creates the potential result that the State will deprive Washington citizens of their unique property without a hearing that is required by due process. *Downey*, at 166.

(3) CONCLUSION

For the foregoing reasons, this Court should accept review, and provide future guidance on this issue of public interest by holding that a requirement for drivers to pay a fee to obtain a due process hearing is unconstitutional.

Respectfully submitted this 17th day of June, 2013.



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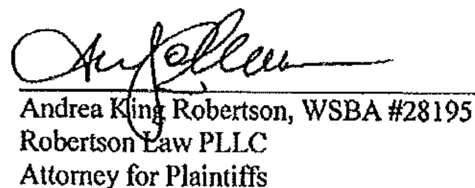

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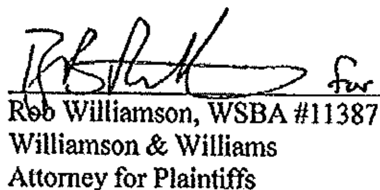

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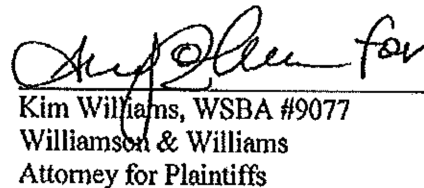

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[16] Motion to Dismiss, p. 13. (Clerk's Papers, p. 29)