STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Case Type: Implied Consent

Court File No. [redacted]

Judge Nancy E. Brasel

[redacted]

Petitioner,

ORDER RESCINDING REVOCATION

v.

Commissioner of Public Safety,

Respondent.

The above-entitled matter came before the undersigned Judge of District Court on February 16, 2017 on Petitioner [redacted] ("[redacted]s request that this Court rescind the cancellation of his driving privileges pursuant to Minn. Stat. § 171.19. Jay S. Adkins, Esq., appeared on behalf of Petitioner [redacted] Assistant Attorney General, [redacted] appeared on behalf of the Respondent, the Commissioner of Public Safety.

At the hearing, the issue before the Court was limited to whether [redacted] violated his abstinence restriction of the Ignition Interlock agreement by consuming alcohol. At the hearing, the Court heard testimony from the Petitioner's wife, [redacted] Karin Kierzick, a forensic scientist with the Bureau of Criminal Apprehension ("BCA"), and Petitioner [redacted]

Prior to the hearing, Respondent submitted exhibits along with its response to [redacted] Petition for Judicial Review Pursuant to MINN. STAT. § 171.19.[1] Those exhibits included: Petitioner's Certified Driving Record Summary (Exhibit 1), a Notice of Cancellation dated September 16, 2011 from the Department of Public Safety (Exhibit 2), the Register of Actions for

[1] Respondent also submitted an affidavit from Jill Freudenwald, Ignition Interlock Program Administrator of the Driver and Vehicle Services Division of the Minnesota Department of Public Safety and an affidavit from Tami Bartholomew, Administrative Supervisor of the Driver and Vehicle Services Division of the Minnesota Department of Public Safety. Exhibits 1-9 were attached to Tami Bartholomew's affidavit.

Court File No. 43-CR-13-1438 (Exhibit 3), a Notice of Cancellation dated November 1, 2013 from the Department of Public Safety (Exhibit 4), Petitioner's Ignition Interlock Participation Agreement (Exhibit 5), Petitioner's signed Last Use Statement (Exhibit 6), photographs taken from Petitioner's Ignition Interlock device on December 20, 2016 (Exhibit 7), an Ignition Interlock Abstinence Violation Cancellation Notice dated December 22, 2016 (Exhibit 8), and an Administrative Review Notice. (Exhibit 9) At the February 16, 2017 hearing the Court took into evidence logs of Petitioner's AlcoLock device from December 20, 2016 (Exhibit 10), a receipt from Anthony's Pipe and Cigar Lounge dated December 20, 2016 (Exhibit 11), excerpts from Petitioner's AlcoLock logs with entries from March 11, 2016 (Exhibit 12), and Petitioner's phone records (Exhibit 13).

Based on the file, record, and proceedings herein, the Court makes the following:

ORDER

1. Petitioner's driver's license revocation is **RESCINDED**.
2. The attached Memorandum is hereby incorporated into this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 17, 2017

BY THE COURT:

Nancy E. Brasel
Judge of District Court

MEMORANDUM

FACTS

Petitioner has multiple convictions for Driving While Intoxicated ("DWI"), the last of which occurred in August 2011. (Exhibit 1.) As a result of these convictions, Petition's driver's license was cancelled, effective September 3, 2011. (Exhibit 2.) Following the revocation of his driving privileges, Petitioner was required to participate in an Ignition Interlock program. (Exhibit 1.) [redacted] [redacted] Petitioner's wife, and Petitioner both testified credibly that following the arrest for the August 2011 DWI, Petitioner said that he was done drinking alcohol.[2]

On October 17, 2011, Petitioner signed an Ignition Interlock Participation Agreement, allowing him to drive so long as he had an Ignition Interlock device installed in his vehicle and followed the program requirements. (Exhibit 5.) On the same day, Petitioner signed a Last Use Statement attesting that he had last consumed "any drink or product containing alcohol or controlled substances" on August 27, 2011. (Exhibit 6.) On September 13, 2013, Petitioner was cited and charged with driving a motor vehicle without the ignition interlock device. (Exhibit 3.) Though driving a vehicle without a device is a violation of the program, the charge did not allege that Petitioner had consumed alcohol. As a result of this violation, the revocation of Petitioner's driving privileges was extended an additional 180 days; thus, the revocation is to conclude on May 14, 2018. (Exhibit 4.)

The issue now before the Court centers around events that took place on December 20, 2016. Petitioner and his wife, [redacted] [redacted] both testified that on that day, they decided to go to a tobacco shop to purchase a humidor for their son. A breath sample was submitted to the AlcoLock device at 6:49:12 p.m. and returned a 0.00% BAC. (Exhibit 10.) [redacted] [redacted]

[2] [redacted] [redacted] also testified credibly that she has noticed a positive change in Petitioner since his final DWI arrest, that she has not seen him consume alcohol since, and that, now, "life is good."

testified credibly that she was not in the car at the time this breath sample was given and that it was Petitioner who provided the sample. Thus, the vehicle started, and Petitioner and his wife drove to Anthony's Pipe and Cigar Lounge to purchase a humidor. Both Petitioner and his wife testified that the drive took about ten to fifteen minutes to complete. This timeline is confirmed by the AlcoLock log which shows that the vehicle's ignition was turned off at 7:09:44 p.m. (*Id.*)

Petitioner and his wife both testified that they were in the store for only a short time, around ten minutes. A receipt dated December 20, 2016 from Anthony's Pipe and Cigar Lounge with a timestamp of 7:15 p.m. shows that a humidor was purchased, and the receipt corroborates the timeline to which Petitioner and [redacted] testified. (Exhibit 11.) [redacted] testified credibly that, after purchasing the humidor, he and his wife exited the cigar shop and he went to the vehicle while his wife waited on the sidewalk. [redacted] and Petitioner both testified that [redacted] remained on the sidewalk because built up snow blocked the passenger's side door of the vehicle and Petitioner decided to go to the vehicle himself, start the car, and then pick up his wife. [redacted] testified that upon entering the vehicle, he provided a breath sample into the AlcoLock device which registered a BAC of 0.024%. This constitutes a failure, and the car would not start. (Exhibits 10, 5) This breath sample was provided at 7:17:04 p.m., only two minutes after the humidor had been purchased. (Exhibits 10, 11)

[redacted] testified that, because the device would not allow him to start the vehicle and would lock him out for about five minutes, he signaled for his wife to come to the car and she ultimately got into the back seat of the vehicle. [redacted] testified that he then continued to provide breath samples into the AlcoLock device in an attempt to get it to work and testified that he gave between ten and twelve samples—a fact which is corroborated by the AlcoLock log.[3] (Exhibit 10.)

[3] There were actually a total of 16 samples given between the time of the first failed test—7:17:04 p.m. and the last failed test which was registered at 7:38:22 p.m. (Exhibit 10) [redacted] testified that he continued to provide breath

While Petitioner's face is not visible in the pictures taken immediately prior to him giving the breath samples that registered as a failed test (Exhibit 7) Petitioner testified credibly that the position of the device and where he must provide the breath sample necessitates that he bend down sometimes out of the camera's view. [redacted] also testified that the position of the device requires Petitioner to bend down and that she did not blow into the device at that time. Moreover, the Court notes that the picture taken at 7:38:11 p.m., right before the last failed test at 7:38:22 p.m., depicts a person leaning forward from the back seat of the vehicle which is consistent with Petitioner's testimony that his wife entered the back seat of the vehicle when the AlcoLock device initially registered a failed test and prevented the vehicle from starting. (*Id.*)

Due to the failure of the device, Petitioner telephoned the company that manufactures the AlcoLock device to discuss the repeated failed tests. (Exhibit 13) The phone call lasted nine minutes and Petitioner testified that during this phone call, the person he spoke with asked Petitioner if he had used the windshield wiper fluid in the car recently to which Petitioner stated that he had.[4] [redacted] also testified that Petitioner had used the windshield wipers and wiper fluid during the drive to the tobacco store. The company representative then told Petitioner that using the wiper fluid in the car could cause a false positive and show the presence of alcohol erroneously. Petitioner and [redacted] testified that the company representative suggested that Petitioner roll down the windows and let the device air out before trying again. The vehicle's ignition was turned off at 7:38:39 p.m. and entered sleep state at 7:43:40 p.m. (Exhibit 10.)

Petitioner and [redacted] both testified that, in light of the suggestion from the company representative, they exited the vehicle and went to a nearby CVS store to allow the device

samples because he did not know that a failed test result necessary meant that alcohol had been detected by the device, but believed that such a result could also be registered where there was a malfunction of the device.

[4] Petitioner testified that he had used the wiper fluid and his windshield wipers on the drive to the tobacco shop.

time to "air out." Both witnesses testified that they were in the store for about ten minutes and [redacted] testified that Petitioner had the AlcoLock device in his pants pocket at that time.

Petitioner and [redacted] testified that they then returned to the vehicle to attempt to start the car again. A breath sample was provided at 7:47:46 p.m. and registered a BAC of 0.00%, just about nine minutes after the last failed test which registered a BAC of 0.02%. (Exhibit 10.) The picture taken at 7:47:43 p.m., just prior to the sample which registered no alcohol and allowed the vehicle to start, clearly shows Petitioner to be the one providing the breath sample.[5] (Exhibit 7.) Given that no alcohol registered in the device, the vehicle started and Petitioner and [redacted] proceeded to drive back to their residence.

[redacted] testified that once on the drive home the device buzzed signaling that Petitioner needed to give a breath sample. A picture showing Petitioner blowing into the device was taken at 7:54:00 p.m. and a sample was provided at 7:54:13 p.m. which registered a BAC of 0.026%, about seven minutes after the test registering no alcohol. (*Id.*) Another picture was taken at 7:54:51 p.m. again depicting Petitioner and a sample was provided at 7:55:02 p.m. and registered a BAC of 0.015%, about eight minutes after the test registering no alcohol and less than one minute after the test which registered a BAC of 0.026%. (*Id.*)

Following the events of December 20, 2016, Petitioner received a letter from the Department of Public Safety notifying him that the failed tests constituted a violation of the total abstinence restriction and cancelling and denying his driving privileges "as inimical to public safety." (Exhibit 8.) Petitioner also received a letter dated January 1, 2017 from the Department of Public Safety informing him that an administrative review was conducted following his request

[5] [redacted] again testified credibly that Petitioner was the only one to provide a breath sample for the device and that she had been with Petitioner the entire night and she did not see him consume any alcohol or enter any establishment that sold alcohol.

that one be done and stated that "the action taken was correct" and the cancellation of his driver's license was sustained. (Exhibit 9.) Thereafter Petitioner filed this action seeking to have this Court rescind the revocation of his driver's license.

A hearing was held on February 16, 2017 wherein evidence in the form of testimony and documents were provided to the Court. Following the hearing, the parties were given a briefing schedule. Petitioner submitted a memorandum of law on February 28, 2017. Respondent submitted its memorandum of law on March 16, 2017. The Court thereafter took the matter under advisement.

ANALYSIS

I. Legal Standard.

MINN. STAT. § 171.19 states that "[a]ny person whose driver's license has been refused, revoked, suspended, canceled, or disqualified by the commissioner...may file a petition for a hearing in the matter in the district court in the county wherein such person shall reside." This section goes on to dictate that, upon request for such a hearing, the district court shall "take testimony and examine into the facts of the case to determine whether the petitioner is entitled to a license...and shall render judgment accordingly." *Id.*

At this hearing, the district court is to conduct a trial *de novo*. *See Madison v. Comm'r of Pub. Safety*, 585 N.W.2d 77, 81-82 (Minn. Ct. App. 1998) (applying *de novo* review and finding that a district court sitting pursuant to MINN. STAT. § 171.19 "acts as a court of first impression when it considers new evidence at the hearing. We conclude that since the Commissioner of Public Safety is not required to make any kind of formal record when it exercises its power to cancel and deny, the district court conducts a trial de novo and independently determines whether a driver is entitled to license reinstatement under MINN. STAT. § 171.19 when the driver petitions pursuant to

the statute"); *Igo v. Comm'r of Pub. Safety*, 615 N.W.2d 358, 361 (Minn. Ct. App. 2000), *Constans v. Comm'r of Pub. Safety*, 835 N.W.2d 518, 523 (Minn. Ct. App. 2013).

In *Madison*, the court emphasized that "[i]t is not enough for the district court to conclude that the Commissioner of Public Safety had 'sufficient cause'" and stated that the district court "did not make an independent finding that [Petitioner] consumed alcohol or that [Petitioner] had not consumed alcohol. Without that specific finding, and the reason for it, we cannot give meaningful appellate review to the decision denying [Petitioner]'s petition for reinstatement." 585 N.W.2d at 83. *See also Loeffler v. Comm'r of Pub. Safety*, 1999 WL 55658 (Minn. Ct. App. Feb. 9, 1999) (reaffirming *Madison* and ultimately reversing and remanding because the district court applied the arbitrary and capricious standard.) A petitioner has the burden of proving entitlement to resinstatement. *McIntee v. State, Dep't of Pub. Safety*, 279 N.W.2d 817, 821 (Minn. 1979) The district court may reverse the Commissioner's licensure determination only if it was fraudulent, arbitrary, unreasonable, or not within the jurisdiction and power of the Commissioner. *Constans v. Comm'r of Pub. Safety*, 835 N.W.2d 518, 523 (Minn. Ct. App. 2013)

II. Petitioner Did Not Violate His Abstinence Restriction.

The Court finds that Petitioner has met his burden and that the decision by the Commissioner was arbitrary and unreasonable, because the evidence in this case demonstrates that Petitioner did not consume alcohol on the night of December 20, 2016 and that the failed tests were due to device malfunction which registered false positives. As such, the revocation of Petitioner's driver's license must be rescinded.

First, Petitioner has been on the Ignition Interlock Program since 2011. In that time, he has had one violation for driving a vehicle that did not have the device installed. However, Petitioner has had no alcohol-related violations and testified credibly to remaining sober since 2011.

Moreover, [redacted] also credibly testified that Petitioner, to her knowledge, has remained sober. Second, as discussed extensively in the fact section of this Memorandum, Petitioner and his wife [redacted] were both credible in their testimony regarding the events that took place on December 20, 2016. Moreover, their testimony was corroborated by the evidentiary documents provided to the Court. For example, the receipt from the tobacco shop corroborated the timeline Petitioner and Ms. [redacted] testified to and a picture taken by the Alco-Lock device at 7:38:11 p.m. shows a person in the backseat of the car with is consistent with both Petitioner and Ms. [redacted] testimony that Ms. [redacted] entered the back seat of the vehicle.

With respect to the failed tests now at issue, the Court finds that the evidence demonstrates that these resulted because of device malfunction, not because Petitioner consumed alcohol. The evidence shows that Petitioner provided a breath sample at 6:49:12 p.m. which registered a 0.00% BAC and which allowed the vehicle to be started. Petitioner and his wife then drove to the tobacco shop and purchased a humidor. Both witnesses testified that they were in the store only a short time and a receipt from the transaction shows that the humidor was purchased at 7:15 p.m. Then, a breath sample was provided at 7:17:04 p.m. which registered a BAC of 0.024% just two minutes after the purchase of the humidor.

To believe that the test was accurate, the Court would need to find that Petitioner had consumed alcohol while in the tobacco shop. However, the Commissioner provided no evidence that Petitioner consumed alcohol while in the store and both Petitioner and his wife credibly testified that Petitioner did not consume any alcohol or products containing alcohol on the night in question. Moreover, to make this assumption would be plainly illogical. This test was the result of device malfunction.

After this initial test, Petitioner provided several breath samples that registered the presence of alcohol. Petitioner's phone record corroborates the testimony of Petitioner and his wife that he then placed a call to the help line of the manufacturer of the device in question. Petitioner and [redacted] testified that during this phone call the company representative provided an explanation for the failed tests—the presence of wiper fluid. Moreover, Petitioner and [redacted] both testified under oath that Petitioner had in fact used the wiper fluid and windshield wipers during the drive to the tobacco store because the weather conditions were "sloppy." Petitioner then followed the suggestion of the company representative and allowed the device time to "air out" by going to a nearby drug store for several minutes.

When Petitioner returned to his vehicle, he provided another breath sample which registered a BAC of 0.00% at 7:47:46 p.m. This test came only nine minutes after the last failed test which registered a BAC of 0.02% at 7:38:22 p.m. The fact that this was caused by device malfunction was bolstered by the testimony of Karin Kierzick, a forensic scientist with the BCA. Kierzick testified that, while she works with the DataMaster DMT device and not the ignition interlock device, during her seventeen years with the BCA her work has included determining the measurement of alcohol in someone's breath and her department has developed an average burn-off rate for individuals—that is, the rate at which alcohol concentration decreases with metabolism. Kierzick testified that to see two breath tests only nine minutes apart with the first showing a BAC of 0.02% and the second showing a BAC of 0.00% would not be consistent with the burn-off rate calculated by her and her department at the BCA. This supports a finding that Petitioner did not consume alcohol on December 20, 2016 and that the failed tests were a result of device malfunction.

Finally, with respect to the two failed tests registered at 7:54:13 p.m. with a BAC of 0.026% and at 7:55:02 p.m. registering a BAC of 0.015%, the Court again finds that these were the result of device malfunction, not alcohol consumption on the part of Petitioner. Again, Petitioner and [redacted] both credibly testified that Petitioner had not consumed alcohol or any product containing alcohol that night and these results would mean that Petitioner would have needed to be drinking in the car during the drive home. The Commissioner did not offer any evidence that this happened and in the face of credible witness testimony that this did not happen, the Court is inclined to follow credible testimony.

The Court also finds the Commissioner's submitted memorandum unpersuasive. It does nothing more than pose rhetorical questions to the Court concerning the cause of the failed tests, without pointing to any evidence to support the Commissioner's theory that Petitioner actually consumed alcohol. The Commissioner asks,

> If using the fluid caused false positive readings, why did it not register on the retest at 6:55 p.m.? If the car is to 'air out' for 10 minutes, why was from 7:09 p.m. to 7:38 p.m., the time the car was initially shut off to when they left the car, not sufficient amount of time to clear the air in the car? If the fluid had caused the initial readings, but the vehicle had 'aired out' then why were there two more positive readings?

(Commissioner's Br., p. 4) Petitioner presented testimony to the Court that an AlcoLock representative suggested that wiper fluid could cause false positives. When faced with this—along with testimony from two credible witnesses that Petitioner did in fact use the wiper fluid in the car and did no consume alcohol—the Commissioner presented no evidence contradicting the theory that the wiper fluid may have been the cause of the false positives.

The Commissioner also presented no evidence concerning how long it might take after the use of wiper fluid for it to register a false positive or, for that matter, how long it would take for the wiper fluid to dissipate in the device enough to stop registering false positives. The

Commissioner offered no witnesses concerning the mechanics of the device in question or any witnesses to testify about the events of the night in question that rebutted Petitioner's theory of the case.[6] Most importantly, the Commissioner presented no evidence that Petitioner actually consumed alcohol on the night in question other than the failed tests which Petitioner rebutted. Now, the Commissioner poses rhetorical questions to the Court that it had every chance to address during the hearing held on February 16, 2017. The Court was presented with credible testimony and corroborating evidence that wiper fluid caused the failed tests. The Commissioner offered nothing to rebut this evidence. As such, Petitioner has met the burden placed upon him and rescission of the revocation is proper.

The AlcoLock representative's explanation for the false positives—the use of wiper fluid, the testimony of Karin Kierzick regarding the average burn-off rate, the very credible testimony offered by Petitioner and his wife, [redacted] and generally applying logic to the evidence now before the Court all support a finding that the failed tests registered on December 20, 2016 were due to device malfunction and not alcohol consumption on the part of Petitioner. The Court finds that Petitioner did not consume alcohol on December 20, 2016 and, as such, Petitioner has met his burden of proving that the Commissioner's decision was arbitrary and unreasonable and that Petitioner is entitled to the rescission of the revocation. Thus, the revocation of Petitioner's driver's license is properly rescinded.

CONCLUSION

For the foregoing reasons, Petitioner's driver's license revocation is rescinded.

N.E.B.

[6] The Court acknowledges that the Commissioner states in its brief that it first heard of this theory of the case at the February 16, 2017 hearing. (Commissioner's Br., p. 2) However, this does not change the fact that the Commissioner offered no evidence or argument to sufficiently rebut Petitioner's theory. Petitioner has met his burden.