Argudo v New York State Dept. of Motor Veh.
2014 NY Slip Op 32357(U)
June 30, 2014
Sup Ct, Nassau County
Docket Number: 14258/13
Judge: F. Dana Winslow
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3

NASSAU COUNTY

HUGO ARGUDO

Petitioner,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 2/19/14

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, and BARBARA J. FIALA, as New York State Commissioner of Motor Vehicles,

INDEX NO.: 14258/13

Respondents.

The following papers having been read on the motion (numbered 1-3):

Notice of Petition.....1
Verified Answer with Objections.....2
Memorandum of Law.....3

Application by petitioner in this hybrid Article 78 proceeding/declaratory judgment action seeking return of his driver's license and a determination, *inter alia*, that respondent Department of Motor Vehicles and Commissioner of Motor Vehicles (DMV) acted unconstitutionally, arbitrarily and capriciously in excess of authority in improperly denying his application for relicensure is determined as follows.

15 NYCRR Part 136, as amended is neither unconstitutional nor illegal. The decision by respondent DMV to deny petitioner's application for relicensure based on the amended regulation was rationally based and neither arbitrary nor capricious.

Predicated on the grounds, *inter alia*, that respondent DMV improperly applied amended Part 136, effective September 25, 2012 to his application for relicensure which was made in or about October 2012, petitioner, a repeat DWI

(driving while intoxicated) offender, seeks a declaration, *inter alia*, that the respondent acted unconstitutionally, illegally, arbitrarily and capriciously in denying his application; and that 15 NYCRR Part 136 as amended is unconstitutional.

BACKGROUND

Petitioner's driving history[1] establishes that, prior to his application for relicensure, his driver's license was revoked in 2005 for six months for refusing to take a chemical test in connection with a DWAI (driving while ability impaired) conviction (alcohol related driving conviction #1); in 2009 for driving with a blood alcohol content .08% or more (alcohol related driving conviction #2); and in 2011 for driving with a BAC of .08% or more, approximately fifteen months after respondent DMV had approved, for a second time, an application by petitioner for relicensure (alcohol related driving conviction #3). By letter dated March 9, 2013, petitioner's application for a driver's license, *i.e.*, relicensure, was denied by the Driver Improvement Bureau of respondent DMV which noted that petitioner's

> "driving history suggests that your failure to observe the rules and regulations governing the operation of a motor vehicle constitutes a serious lack of regard on your part for the safety and welfare of other users of the highway, and forms the basis of our decision to deny your application for a driver license."

The denial letter advised petitioner that, if he believed his case involved unusual, extenuating or compelling circumstances, he had the opportunity to request that the Driver Improvement Bureau reconsider its decision within thirty days. His request for reconsideration was denied (April 8, 2013) and petitioner proceeded with his appeal to the Appeals Board. Petitioner argued on appeal, *inter alia*, that: enactment of the new law as it pertained to him was patently unfair.

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[1]Petitioner's driver's license was most recently revoked, effective August 4, 2011. The revocation remained open at the time he initiated this declaratory judgment action/Article 78 proceeding as did two license suspensions: one suspension for failing to make a driver responsibility assessment mandated by Vehicle and Traffic Law § 1199 and a second for failing to answer a traffic ticket. (Affirmation of Dinah M. Crossway, Assistant Counsel, DMV, Respondent DMV's Answer).

Petitioner stated that he pled to a violation of Vehicle and Traffic Law 1192 on or about April 7, 2011, fully aware of the consequences of such a plea. At that time, however, the new regulations did not exist and he had no way of knowing that a plea would affect his ability to receive a driver's license in the future. Petitioner's conviction of a violation of Vehicle and Traffic Law 1192 carried with it certain penalties, including a suspension of driving privileges. With the enactment of the new regulations, the DMV assessed additional penalties as a result of which petitioner might no longer be eligible for a driver's license. Had these regulations existed at the time of petitioner's plea, he argued that he would not have pled guilty to any violations of Vehicle and Traffic Law 1192. Petitioner noted that he was in need of a license in order to earn a living and meet family obligations. Without a licence, he would be unable to visit his three children who live in New Jersey on the weekends. Petitioner represented that he was aware of his past actions and did not intend to repeat his past driving "indiscretions."

Petitioner's appeal of the decision was denied by the Administrative Appeals Board of respondent DMV on July 29, 2013. Given petitioner's driving history, including:

> three alcohol or drug related incidents or convictions;
>
> four convictions for operating without a license; and
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> the assessment of 27 points against his driving record within the twenty-five years preceding the date of the revocable offense,

the Administrative Appeals Board found that the denial of his application was rationally based, and mandated by the Commissioner's Regulations which the Board found had been fairly applied.

In support of the instant application, petitioner argues that his request for relicensure should have been processed under the laws and regulations that were in effect on the date of his latest DWI offense, which occurred on April 7, 2011, prior

to the enactment of the new/amended regulations of the amended 15 NYCRR Part 136 to his application.

Notwithstanding petitioner's assertions to the contrary, respondent DMV has not, *inter alia*, acted arbitrarily and capriciously in denying his relicensure application. The amended regulations, under which petitioner's application was decided, are neither unconstitutional nor in conflict with Vehicle and Traffic Law § 1193 [2][b][12] or violative of the *Ex Post Facto* Clause of the United States Constitution (Article 1 § 10, cl 1) and were properly applied to petitioner's application.

Pursuant to Vehicle and Traffic Law §§ 215[a], 501[1], 510[6] [a] and 1193[2][b][12][b], and 1193 [2][c][3], the Commissioner of Motor Vehicles is authorized to use his/her discretion to establish criteria and methodology for relicensing after revocation of a drivers license. The Commissioner has been granted broad, explicit and exclusive administrative authority over the issuance of driver licenses and the authority to adopt the rules and regulations to carry out its functions. Part 136 of the Regulations does not restrict the Commissioner's authority to review each application on a case-by-case basis and to consider unusual extenuating and compelling circumstances (15 NYCRR § 136.5[b]).

In evaluating whether an administrative agency has exceeded the authority delegated to it, the Court of Appeals observed that:

> "[t]he cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation. Indeed, the difficulty and complexity of most of these policy determinations mandates that the legislative body be permitted to provide for the implementation of basic policy through the use of specialized agencies concentrating upon one

particular problem at a time" (*Matter of Nicholas v Kahn*, 47 NY2d 24, 31 [1979] [citations omitted]).

Given the respondent DMV's statutory policy of insuring highway safety by keeping recidivist drunk drivers off the road (*Matter of Quealy v Passidimo*, 124 AD2d 955, 956 [3d Dept 1986]), the Commissioner's authority to enact specific regulations regarding revocation of a license, and the reissuance thereof, is consistent with the Commissioner's statutory power to license a driver (*Matter of Barton Trucking Corp. v O'Connell*, 7 NY2d 299, 307 [1959]).

As pointed out in *In re Acevedo v New York State Dept. of Motor Vehicles*, 2014 WL 771233, 2014 N.Y. Slip Op 30422(U) [Sup Ct New York 2014], Part 136 falls squarely within the policy and purposes of the provisions of the Vehicle and Traffic Law to protect public safety and welfare and carries out the Commissioner's legislatively delegated authority.

ANALYSIS

It is well settled that the ability to drive and possess a driver's license is a privilege, subject to reasonable regulation, not a right. Since the issuance of a driver's license is a privilege granted by the State, and not a right, the State can condition receipt of it, or absolutely revoke it (*People v Walters*, 30 Misc 3d 737, 750 [N.Y. City Ct. 2010]; *People v Sukram*, 142 Misc 2d 957, 959-960 [Nassau County Dist. Ct. 1st Dist. 1989]).

The suspension or revocation of a driver's license is a civil sanction (*Matter of Brady v Department of Motor Vehs.*, 278 AD2d 233 [2d Dept 2000], *affirmed* 98 NY2d 625 [2002]). The suspension or revocation of the privilege of operating a motor vehicle is essentially civil in nature having as its aim the chastening of the errant motorist and protection of the public (*Matter of Barnes v Tofany*, 27 NY2d 74, 78 [1980] [citations and quotation marks omitted]). Once revoked, a driver's license may be restored only at the direction of the Commissioner of Motor Vehicles (Vehicle and Traffic Law § 510[5]).

The Court's review of a discretionary administrative action, such as the issuance of a license, is limited to finding whether there was a rational basis for the administrative action (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]). Here the issue for consideration is whether the challenged determination, *i.e.*, the denial of petitioner's relicensure application, was arbitrary and capricious or an abuse of discretion (*Matter of Arrocha v Board of Educ. Of City of N.Y.*, 93 NY2d 361, 363 [1999]). The Court may not substitute its judgment for that of the administrative body unless the decision under review is arbitrary and capricious and constitutes an abuse of discretion (*Matter of Boatman v New York State Dept. of Educ.*, 72 AD3d 1467, 1468 [3d Dept 2010]). An action is arbitrary if it is without sound basis in reason and is taken without regard to the facts (*Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 230, 231 [1974]). Once a rational basis for the administrative determination is shown, the judicial review function is complete and the agency's determination must be upheld even if the court may have reached a contrary result (*Matter of Sullivan County Harness Racing Assn v Glasser, supra* at p. 276).

Petitioner has failed to establish that the respondent DMV's decision to deny relicensure was not made in accordance with lawful procedure; was effected by an error of law; or was arbitrary/capricious or an abuse of discretion.

Where, as here, an agency's determination is rationally based, it will be upheld by the Court which will defer to an agency's interpretation of its own regulations which is not manifestly irrational or unreasonable (*Marzec v DeBuono*, 95 NY2d 262, 266 [2000]). On the record presented:

Violation Date	Incidents/Convictions/Accidents
04/07/2011	Driving with .08% alcohol
05/17/2008	Driving with .08% alcohol
09/16/2007	Speed in zone 70/45
12/24/2006	Speed in zone 75/45

09/06/2004	Driving While Ability Impaired/refusal to submit to a chemical test
09/06/2004	Operating without a license
06/27/2004	Operating a motor vehicle while using a mobile phone
02/04/2004	Speed in zone 78/50
11/10/2003	Driving on shoulder
04/13/2003	Leaving the scene of a property damage incident
11/26/2002	Disobeyed traffic device
11/20/2002	Operating without a license
07/26/2002	Operating a motor vehicle while using a mobile phone
07/26/2002	Operating without a license
04/17/2002	Disobeyed traffic device
04/17/2002	Operating without a license
05/17/2008	Personal injury accident
08/12/2003	Personal injury, property damage accident
04/13/2003	Personal injury, property damage accident

it cannot be said there was no rational basis to deny petitioner's application for relicensure or that the respondent DMV's actions were arbitrary or capricious.

Despite petitioner's assertions to the contrary, nothing within the Vehicle and Traffic Law prohibits respondent DMV from imposing additional requirements upon an applicant seeking to regain his license after multiple alcohol or drug related convictions, provided they have a rational basis. The Commissioner's authority to enact specific regulations, including defining when and under what circumstances, an applicant may permanently be denied a license after revocation of a license is consistent with her power to license a driver *(Matter of Carney v NYS Dept. of Motor Vehicles*, 982 NYS 2d 298, 301, 2014 WL 1031496, 2014 NY Slip Op 24061 [N.Y. Sup. Mar 17, 2014] [citations and quotation marks omitted]).

The Court rejects petitioner's contention that the denial of his application for relicensure pursuant to revised 15 NYCRR §§ 136.5[a][3] and 136.5[b][3][i], instead of pursuant to the regulation in effect at the time of petitioner's last DWI offense on April 7, 2011, was an impermissible retroactive application of said regulations and constitutes an impermissible *ex post facto* penalty.

The *Ex Post Facto* Clause of Article 1, §10 cl 1of the United States Constitution[2] prohibits states from enacting laws that retroactively alter the definition of a crime or increases the punishment for criminal acts (*People v Parilla*, 109 AD3d 20, 23 [1st Dept 2013], *lv to appeal denied* 21 NY3d 865 [2013]). A statute will be considered an *ex post facto* law if it punishes as a crime an act previously committed, which was innocent when done, makes more burdensome the punishment for a crime, after its commission, or deprives one charged with crime of any defense available according to law at the time when the act was committed (*People v Foster*, 87 AD3d 299, 306 [2d Dept 2011] [citations and quotation marks omitted]).

Importantly the constitutional prohibition against *ex post facto* laws, however, applies only to penal statutes which disadvantage the offender affected by such laws (*Kellogg v Travis*, 100 NY2d 407, 410 [2003] [citations omitted]) and not to civil remedies which seek to protect the public as here (*People v Parilla*, *supra* at p. 23).

The revocation provisions of the amendments to 15 NYCRR Part 136 are not subject to the *ex post facto* prohibition which applies only to statutes which are punitive in nature as opposed to civil penalties (*Matter of State of New York v Nelson*, 89 AD3d 441 [1st Dept 2011]). The *Ex Post Facto* Clause does not apply to administrative regulations (*Matter of Robinson v Bennett*, 300 AD2d 715, 716 [3d Dept 2002]). A statute, or regulation, which is enacted for non-punitive purpose, and is not so punitive in effect as to negate the non-punitive intent, may

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[2]Article 1, § 10 cl 1 of the United States Constitution provides, in part, that "No State shall . . . pass any . . . *ex post facto* law."

be retroactively applied without violating the *Ex Post Facto* Clause (*People v Foster*, *supra* at p. 306).

Laws or regulations are not retroactive where they apply to future transactions merely because they will require consideration of antecedent events (*Matter of Miller v DeBuono*, 90 NY2d 783, 790 [1997]). The regulations at issue do not criminalize conduct that was innocent at the time it was committed, or aggravate a crime beyond its level when committed.

Inasmuch as revised 15 NYCRR §136.5 is sufficiently precise so as to put drivers on notice that their application for relicensing may be denied based on three alcohol related offenses, the regulations at issue are neither unconstitutional nor violative of due process *(Matter of Hauptman v New York State Dept. of Motor Vehicles*, 158 AD2d 600, 601 [2d Dept 1990]).

Moreover, respondent DMV's alleged decision to hold petitioner's application, and those of other problem drivers, until the enactment of the new regulations, does not constitute a violation of the right to due process. The time to contest the timeliness of the determination was by *writ of mandamus* to compel, seeking an order requiring an agency to render a decision (*Matter of Hamptons Hosp. & Med. Ctr. Inc. v Moore*, 52 NY2d 88, 96 [1981]; *Matter of Funes v New York State Dept. of Motor Vehicles*, 2013 NY Slip Op 31082[U] [N.Y. Sup. Ct. May 15, 2013]), which petitioner did not do. As stated in *Gaebel v New York State Dept. Of Motor Vehicles,* 43 Misc 3d 185, 976 NYS2d 816, 824, 2013 NY Slip Op 23404 [Sup Ct Sullivan County 2013],

> "any due process claim is now moot . . . the sought after determination has been rendered, and the issue of prompt administrative determination has been rendered academic by the adverse determination."

With deference to the special expertise of respondent DMV, and the discretionary authority granted to the Commissioner of Motor Vehicles by statute to refuse to reissue a license after a mandatory minimum period of revocation

(Vehicle and Traffic Law § 1193[2][c]; § 1193[2][b][12]; and § 510[6]), it cannot be said that respondent DMV exceeded its authority in issuing amendments to 15 NYCRR Part 136. The promulgation of the regulations at issue is within the broad grant of discretion afforded to the Commissioner by statute. The retroactive application of the revised regulations to petitioner's application for relicensure did not violate the *Ex Post Facto* Clause of Article 1, § 10 cl 1 of the Constitution.

The objections raised by petitioner regarding the new regulations contained in 15 NYCRR Part 136 lack merit. The record is devoid of any basis to conclude that respondent DMV exceeded its legislative authority and/or invaded an area preempted by the Legislature in adopting new Part 136. Respondent DMV has been granted exclusive administrative authority over the revocation/issuance of driver's licenses and the authority to adopt rules and regulations to carry out its responsibilities. Petitioner points to no provision in the Vehicle and Traffic Law which expressly precludes or limits the Commissioner's promulgation of rules regarding the reissuance of driver licenses. Nor does the statute prohibit the adoption of laws governing lifetime review of an applicant's driving history. Moreover, Vehicle and Traffic Law § 1193[2][b][12][c] states that:

> "For revocations imposed pursuant to clause [a] of this subparagraph, the commissioner may adopt rules to permit conditional or restricted operation of a motor vehicle . . . after a mandatory revocation period of not less than three years subject to such criteria, terms and conditions as established by the commissioner."

"When a person is convicted of driving while intoxicated under Vehicle and Traffic Law § 1192[2],

> 'the court may sentence such person to a period of imprisonment . . . and shall sentence such person to a period of probation or conditional discharge in accordance with [Penal Law § 65.00) and shall order the installation and maintenance of a functioning ignition interlock device (Penal Law §

60.21).' " *People v Barkley*, 113 AD3d 1002 [3d Dept 2013]).

The administrative imposition of an ignition interlock device requirement, and the ignition interlock device provisions set forth in Part 136, is a rational extension of the foregoing policy and within the discretion of respondent DMV.

Accordingly, petitioner's request, *inter alia*, to declare amended 15 NYCRR Part 136 illegal, violative of the *Ex Post Facto* and Due Process Clauses of the United States Constitution, and to annul the denial of his application for relicensure by respondent DMV as arbitrary and capricious is **denied.** The hybrid proceeding is **dismissed.**

This constitutes the Order of the Court.

Dated: June 30, 2014

J.S.C.

ENTERED

JUL 17 2014

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COUNTY CLERK'S OFFICE