

LibertyBell Law Group
Richard Wagner, CA Attorney Bar No. 198699
245 E. Olive Ave., 4th Floor
Burbank, California 91502
Telephone: (818) 563-2355
Facsimile: (818) 748-1515

Attorneys for Respondent

STATE OF CALIFORNIA
DEPARTMENT OF MOTOR VEHICLES

In the Matter of:) Driver License No. XXXXXXXX
)
) Respondent=s Memorandum of Points and
Innocent Driver,) Authorities in Support of Objections to The
) Department=s Evidence
Respondent.)
_____)

MEMORANDUM OF POINTS AND AUTHORITIES

§ **THE DMV HAS THE BURDEN TO PROVE THAT THE SUSPENSION IS JUSTIFIED.**

When the DMV initiates an action to suspend a license, the burden of proving the facts necessary to support the action rests with the DMV. AUntil the DMV meets its burden of going forward with the evidence necessary to sustain a finding, the licensee has no duty to rebut the allegations or otherwise respond. . . .@ *Furman v. Department of Motor Vehicles*, 100 Cal. App. 4th 416, 420 (2002) .

§ **OBJECTIONS TO THE DEPARTMENT=S EVIDENCE:**

§ **THE DS-367 IS INADMISSIBLE HEARSAY.**

1 The only way the DMV can admit the DS-367 into evidence over the driver=s hearsay
2 objection is through Evidence Code ' 1280 B the public records exception to the hearsay
3 rule.

4 California Evidence Code ' 1280 states:

5 Evidence of a writing made as a record of an act, condition, or event is not
6 made

7 inadmissible by the hearsay rule when offered in any civil ... proceeding to
8 prove the act, condition, or event if all of the following applies:

9 (a) The writing was made as a record of an act, a condition, or an event,
10 and is offered to prove the occurrence of that act, condition, or event,

11 (b) The writing was made within the scope of the duty a public employee,

12 (c) The writing was made at or near the time of the act, condition or event.

13 (d) The sources of information for the entries in the writing, the method of
14 preparing the writing, and the time the writing was prepared were all such as to
15 indicate the writing=s trustworthiness.

16 For the DS-367 to be admissible, the writing must comply with **all** the elements of '
17 1280. Without the DS-367, the DMV cannot meet its burden of proof. It should be clear that
18 when the cop has not correctly reported all the facts in the DS-367 (sworn statement) , the
19 trustworthiness element is not established.

20 Also, Vehicle Code Section 13380, subdivision (a) , requires the cop who arrests a
21 person for DUI to "immediately forward to the DMV a **sworn** report of **all** information relevant
22 to the enforcement action, including information that adequately identifies the person, a
23 statement of the officer's grounds for belief that the person violated Section . . . 23152, . . .
24 **and a report of the results of any chemical tests that were conducted on the person"**

25 The DMV bears the burden of proving by a preponderance of the evidence that the
26 driver has violated section 23152. (' 13557, subd. (b) (2) ; Lake v. Reed (1997) 16
27 Cal.4th 448, 455 [65 Cal. Rptr. 2d 860, 940 P.2d 311].)

28 However, in this particular case the Department=s evidence is deficient to uphold the
suspension because the officer did not forward all of the information relevant to the
enforcement action. Section 13380. Therefore, the suspension must be set aside.

1 § **NO REASONABLE CAUSE TO BELIEVE THE PERSON WAS DRIVING A MOTOR**
2 **VEHICLE DRIVING A MOTOR A VEHICLE.**

3 § **Insufficient evidence to support the driving sub-issue.**

4 The need to prove actual driving applies both to chemical test refusal cases and
5 excessive BAC cases. In most cases, reasonable cause to believe the person was driving is
6 established by the observation of officer who witnessed the driving and made the arrest.

7 In this case, Officer Rascal #12345 did not witness the driving. Officer Rascal
8 completed the DS-367. The Department must establish driving using only the DS-367,
9 which Officer Rascal states under penalty of perjury:

10 Driving: [x] the observer shown in the shaded area on the second page, [x] admitted
11 to driving. However, in the shaded area on the second page, there is NO INFORMATION.
12 Other than checking the box next to admitted to driving, the DMV has no other *admissible*
13 evidence to prove driving. Even the hearsay statements on page 2 of 6 of the unsworn CHP
14 202, that indicate Officer Rascal asked the Respondent questions about driving show there
15 was no admission to driving:

16 Were you driving the vehicle? [] yes [] no [x] n/a.

17 Where did you start driving? Refused

18 Where were you going? Refused

19 § **THE DMV CANNOT RELY ON THE UNSWORN ARREST REPORTS.**

20 These reports are inadmissible under Government Code 11513 and MacDonald v. Gutierrez
21 (2004) 32 Cal. 4th 1150. The California Supreme Court said the unsworn report is
22 admissible provided:

23 1. The sworn report (DS-367) contains all or nearly all of the information necessary
24 to remove the offender=s license;

25 2. so long as a sworn report is filed, technical omissions of proof can be
26 corrected an unsworn report filed by the arresting officer.

27 However, these conditions do not exist in this case.

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§ **THE UNSWORN REPORT BY RASCAL #12345 IS INADMISSIBLE HEARSAY**

Because the DS-367 is not admissible, Rascal=s unsworn arrest report cannot be admitted. Rascal cannot use his unsworn arrest report to correct the DS-367's failure to establish driving. Rascal=s unsworn arrest report has absolutely no evidence Respondent was driving. Officer Rascal=s unsworn report says he was contacted by the L.A. Communications Center about a Sergeant with a possibly intoxicated driver. This is triple hearsay. In fact, Rascal=s unsworn report contradicts his own sworn report (DS-367) .

§ **THE UNSWORN REPORT BY L. MISTAKEY #010101 IS INADMISSIBLE HEARSAY**

According to Chapter 12 of the DMV Driver Safety Manual, the hearing officer should make a *negative finding* on the reasonable cause issue because there is insufficient evidence to establish the officer=s belief that driving took place. With negative findings, a set-aside is warranted.

1. Officer Rascal did not observe driving.
2. The Respondent did not admit to driving.
3. The Probable Cause Section on page 2 was not written by Officer Rascal #12345.
4. The Probable Cause Section on page 2 was Acut and pasted@ from another report. The driving observations are not Officer Rascal=s. There is no evidence Officer Rascal had this knowledge at the time of the arrest.

"In proceedings to suspend or revoke a driver's license, the facts necessary to justify suspension can be established by the use of the sworn statement of the arresting officer, attesting to matters within the officer's personal knowledge, even though the officer does not personally appear and the licensee offers contrary proof." [Citations.] *Coniglio v. DMV* (1995) 39 Cal. App. 4th 666.

1 There is no evidence Officer Rascal (second officer) was informed of the basis for
2 L. Mistakey=s (first officer) belief the driver was actually driving and/or DUI so that a
3 proper transfer of reasonable cause may take place. There is no evidence the first officer
4 told the second officer what he had seen, no description of the driving observations and no
5 other evidence that led to the stop or contact. Reasonable cause must exist at the time of
6 stop or arrest. *According to Chapter 12 of the DMV Driver Safety Manual*, what the officer
7 learns *later* cannot create reasonable cause if it did not exist earlier.®

8 Further, hearsay evidence may not be used to support a necessary finding. Lake v.
9 Reed (1997) 16 Cal.4th 448; Government Code 11513 (d) ¹. The arrest reports are not
10 admissible to provide evidence which is necessary to support a finding.

11 § **THERE IS NO EVIDENCE TO SUPPORT A LAWFUL ARREST**

12 There is insufficient evidence to establish Officer Rascal had probable cause to
13 contact the driver.

14 *According to Chapter 12 of the DMV Driver Safety Manual:*

15 Probable Cause: Conclusionary Statements in Officer Rascal=s unsworn report says he was
16 contacted by the L.A. Communications Center about a Sergeant with a *possibly* intoxicated
17 driver. This is triple hearsay. This is insufficient to support a finding. The officer has not
18 provided observational facts which the hearing officer can use to independently judge.
19 *According to Chapter 12 of the DMV Driver Safety Manual*, the hearing officer has a duty to
20 independently evaluate the facts in a DUI arrest to determine whether statutory issues are
21 satisfied. The officer=s observed facts are necessary because PC to stop/investigate is a

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23 1

24 (d) Hearsay evidence may be used for the purpose of supplementing or explaining other
25 evidence but over timely objection shall not be sufficient in itself to support a finding unless it
26 would be admissible over objection in civil actions. An objection is timely if made before
27 submission of the case or on reconsideration.

1 component of the lawful arrest issue. Section 664 of the Evidence Code specifically
2 precludes using the official duty presumption to support the lawfulness of an arrest.

3 § **Objection to HGN results being entered into evidence at the hearing.**

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7 § **Objection to PAS results being entered into evidence at the hearing. There is no**
8 **foundation to establish the admissibility of the PAS.**

9 In *Coniglio v. DMV* (1995) 39 Cal. App. 4th 666 the court determined the
10 foundational requirements for the admissibility of a PAS result are:

- 11 1. The particular apparatus utilized was in proper working order.
12 2. The test used was properly administered, and
13 3. The operator was competent and qualified.
14

15 **CONCLUSION**

16 For the foregoing reasons, there is insufficient evidence to support the
17 suspension. Therefore, the suspension order should be set aside.

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19 Dated: July 8, 2010

Respectfully submitted,

LibertyBell Law Group

21 By: _____

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Richard Wagner
Attorneys for Respondent
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