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10-4-2011

TENNESSEE DEPARTMENT OF SAFETY vs.  
One 2000 INFINITI I30 VIN #  
JNKCA31A4YT101344, SEIZED FROM:  
TATIANA FINASHKINA, SEIZURE DATE:  
JUNE 16, 2011 CLAIMANT: TATIANA  
FINASHKINA LIENHOLDER: N/A

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**BEFORE THE COMMISSIONER OF THE  
TENNESSEE DEPARTMENT OF SAFETY**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>TENNESSEE DEPARTMENT OF SAFETY,</b>	)	<b>Docket No. 19.05-114281J</b>
	)	
<b>v.</b>	)	<b>Department of Safety</b>
	)	<b>Case No. L7767</b>
<b>one 2000 INFINITI I30</b>	)	
<b>VIN# JNKCA31A4YT101344</b>	)	
<b>SEIZED FROM: TATIANA FINASHKINA</b>	)	
<b>SEIZURE DATE: JUNE 16, 2011</b>	)	
<b>CLAIMANT: TATIANA FINASHKINA</b>	)	
<b>LIENHOLDER: N/A</b>	)	
	)	

**INITIAL ORDER**

This matter came on to be heard on October 4, 2011, in Knoxville, Tennessee before Joyce Grimes Safley, Administrative Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Safety. Mr. Jacob Wilson, Attorney for the Department of Safety, represented the State. The Claimant, Tatiana Finashkina, was present, and was represented by counsel, Mr. Travis McCarter, attorney, of the Sevierville, Tennessee Bar.

The subject of this hearing was the proposed forfeiture of the above referenced 2000 Infiniti I30 automobile, VIN # JNKCA31A4YT101344, for Claimant's alleged use of this vehicle in violation of T.C.A §55-50-504 (driving a vehicle on a revoked license).

After consideration of the evidence offered, the arguments of counsel, and the entire record in this matter, it is **ORDERED** that the seized vehicle shall be returned to Claimant forthwith.

This decision is based upon the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. The State's witness, Officer Lucas Atchley, of the Pigeon Forge, Tennessee, Police Department, testified that on June 16, 2011 at 1:41 a.m. he stopped a silver sedan driven by the Claimant because he observed the vehicle exceeding the posted speed limit and failure to maintain its lane.

2. Officer Atchley determined that Claimant was driving 45 mph in a 30 mph speed zone by "pacing" her vehicle with his patrol car.

2. When Officer Atchley performed the traffic stop and checked the data base for Claimant's driving history, vehicle registration, etc., he learned that Claimant's driver's license had been revoked for a DUI conviction.

3. However, Officer Atchley also learned that Claimant had been issued a restricted license which allowed her to drive to and from work. The restricted license did not allow Claimant to drive after 11:30 p.m.

4. Claimant was employed at the Olive Garden restaurant. At the time Claimant received the restricted license, she worked different hours than the hours she was assigned to work at the time Officer Atchley conducted his June 16, 2011 traffic stop.

5. Officer Atchley charged Claimant with the misdemeanor charge of driving without a valid driver's license. He also seized Claimant's vehicle pursuant to a forfeiture warrant under the provisions of Tennessee's Forfeiture and Driving on a Revoked License -DUI statutes.

6. Claimant testified, credibly, that she worked six (6) days per week. At the time her work hours were changed by her employer, she had not yet had a day off to go to the Department of Safety and have the hours on her restricted license changed.

7. In Claimant's new job with new hours, she was responsible for "closing" the Olive Garden restaurant in Sevierville, Tennessee.

8. Claimant received her DUI conviction with revocation of her license on August 20, 2010.

9. Thereafter she applied for and received a restricted license allowing her to drive to and from work.

10. Claimant was eligible for restoration of her driving privileges on August 20, 2011.

11. The district attorney declined to prosecute the misdemeanor citation (driving without a valid driver's license) against Claimant. Accordingly, the misdemeanor charge was dismissed.

12. When Claimant became eligible to obtain a regular unrestricted driver's license, Claimant applied for her driver's license during August, 2011, and was issued a driver's license with no restrictions.

13. Officer Atchley and Claimant's testimony differed about the traffic stop of June 16, 2011.

14. Officer Atchley testified that Claimant told him she was "on her way to see her boyfriend."

15. Claimant testified, credibly, that she informed Officer Atchley she had gotten off from work at the Olive Garden restaurant and was driving home.

16. It is noted that Claimant is originally from another country. With all due respect to Claimant, her spoken English and her accent is very different from colloquial English spoken in East Tennessee with a regional Tennessee accent. It was difficult for the undersigned to understand Claimant at times during the hearing. It was also apparent that Claimant did not always understand everything that was said during the hearing by the attorneys or this Judge...at least not the first time it was spoken. The Court Reporter had difficulty understanding Claimant at times, and had to ask her to repeat things.

17. More likely than not, there was a language barrier which prevented Officer Atchley and Claimant from communicating clearly with each other. Particularly if Claimant was upset and talking rapidly, it would have been difficult for Claimant to be understood by Officer Atchley, or for Officer Atchley to be understood by Claimant.

18. For this reason, the undersigned does not believe that either Officer Atchley or Claimant misrepresented the conversation they had during the traffic stop. Rather, the evidence preponderates that there was a language

barrier which led Officer Atchley to conclude Claimant was *not* driving home from work. Claimant credibly denied that she told Officer Atchley she was “going to see her boyfriend.”

19. Officer Atchley testified that he did not remember reciting Claimant’s *Miranda* rights to her.

19. There was some discussion and disagreement during the hearing with regard to whether or not Claimant was driving in the direction of her boyfriend’s residence, or toward her home. The State did not show, by a preponderance of the evidence, that Claimant was taking a route home from her place of employment which was inconsistent with her returning home from work.

### **CONCLUSIONS OF LAW**

1. T.C.A. §55-10-401 provides as follows:

**Driving under the influence of an intoxicant, drug or drug producing stimulant effect prohibited---  
Alcohol concentration in blood or breath.**

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while

(1) under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or

(2) The alcohol concentration of such person’s blood or breath is ten-hundredths of one percent (.10%) or more.

(b) For the purpose of this section, “drug producing stimulating effects on the central nervous system” includes the salts of barbituric acid, also known as

malonyl urea, or any compound, derivatives, or mixtures thereof that may be used for producing hypnotic or somnifacient effects, and includes amphetamine, desoxyephedrine or compounds or mixtures thereof, including all derivatives of phenoethylamine or any of the salts thereof, except preparations intended for use in the nose and unfit for internal use. (Emphasis added.)

2. T.C.A. § 55-50-504 (h)(1) and (2) provide that:

(1) *The vehicle used in the commission of a person's violation of §55-50-504, when the original suspension or revocation was made for a violation of §55-10-401<sup>1</sup>, or a statute in another state prohibiting driving under the influence of an intoxicant, is subject to seizure and forfeiture in accordance with the procedure established in title 40, chapter 33, part 2. The department designated as the applicable agency, as defined by §40-33-020, for all forfeitures authorized by this subsection.*

(2) *For purposes clarifying the provisions of this subsection and consistent with the overall remedial purpose of the asset forfeiture procedure, a vehicle is subject to seizure and forfeiture upon the arrest or citation of a person for driving while such person's driving privileges are cancelled, suspended or revoked. A conviction for the criminal offense of driving while such person's driving privileges are cancelled, suspended or revoked is not required.*

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<sup>1</sup> T.C.A. §55-10-401 **Driving under the influence of an intoxicant, drug or drug producing stimulant effect prohibited—Alcohol concentration in blood or breath.** (a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while  
(1) under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or  
(2) The alcohol concentration of such person's blood or breath is ten-hundredths of one percent (.10%) or more.  
(b) For the purpose of this section, "drug producing stimulating effects on the central nervous system" includes the salts of barbituric acid, also known as malonyl urea, or any compound, derivatives, or mixtures thereof that may be used for producing hypnotic or somnifacient effects, and includes amphetamines, derivatives of phenoethylamine or any of the salts thereof, except preparations intended for use in the nose and unfit for internal use.

(Emphasis added.)

4. T.C.A. §40-33-201 provides that property, including conveyances, shall be subject to forfeiture under the provisions of T.C.A. §55-10-403(k) and T.C.A. §55-50-504(h).

5. Pursuant to T.C.A. §40-33-210, in order to forfeit any property or a person's interest in property, the State has the burden to prove by a preponderance of evidence that:

(1) The seized property was of a nature making its possession illegal or was being used in a manner making it subject to forfeiture[...].

6. Claimant argues that she did not violate the Restricted License she was using in June, 2011, because she was driving home from her employment at the Olive Garden restaurant.

7. The State responds that Claimant *did* violate the Restricted License because she was driving after 11:30 pm, and she was not going home.

8. It is determined, by a preponderance of the evidence, that Claimant was, in fact, driving home from her place of employment at the time of the traffic stop.

9. The question then becomes whether or not Claimant's driving her vehicle after 11:30 pm violates her restricted license.

10. Claimant testified that after she got off work at 11:00 p.m., and helped to "close", she stayed to help other employees finish their work, and talked with other employees for a while before she left to go home.

11. Claimant admits that she not returned to the Department of Safety and had her restricted license time restrictions changed to reflect her new employment.

### **Excessive Fines/ Proportionality Test**

12. Lastly, Claimant argues that the “proportionality rule” applies in this proceeding, such that Claimant’s vehicle should not be subject to forfeiture.

13. Tennessee case law supports that in certain circumstances forfeiture of a vehicle violates the “excessive fines” clause of the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution. See Taylor v. Greene, 2002 WL 75929 (Tenn. Ct. App. 2002); Hawks v. Greene, 2001 WL 1613889 (Tenn. Ct. App. 2001).

14. A vehicle is subject to seizure and forfeiture when the driver is arrested or cited for driving while the driver’s driving privileges are cancelled, suspended, or revoked. See T.C.A. § 55-50-504.

15. In the Taylor v. Greene case, the court ruled that the seizure and forfeiture of Mr. Taylor’s vehicle violated the “excessive fines” prohibitions of the U.S. Constitution and the Tennessee Constitution *because of the length of time between the revocation of his driver’s license and the offense of driving on a revoked license*. Taylor v. Greene, 2002 WL 75929 (Tenn. Ct. App. 2002). Mr. Taylor was convicted of driving under the influence of an intoxicant in April 1986, and his driver’s license was revoked for one (1) year. More than eleven years later, in 1997, Mr. Taylor was involved in a minor traffic accident. Mr.

Taylor had failed to obtain a new license at the end of his revocation period in 1987. Mr. Taylor was cited with “driving on revoked due to DUI”. His vehicle was seized and forfeiture was ordered.

16. Similarly, in Hawks v. Greene, 2001 WL 1613889 (Tenn. Ct. App. 2001), Ms. Hawks was convicted of driving under the influence on March 28, 1996, with a one year revocation of her driver’s license. Ms. Hawks became eligible to apply for a new license in April 1997. Ms. Hawks did not apply for a new license at the end of the one year revocation. Around sixteen months after her conviction for DUI and the revocation of her license, Ms. Hawks was stopped for speeding, and her vehicle was seized and ordered forfeited.<sup>2</sup>

17. In the Taylor case and the Hawks case, the Court of Appeals determined that forfeiture of the vehicles violated the “excessive fines” prohibitions of the U.S. Constitution and the Tennessee Constitution because in both cases the drivers’ periods of license revocation had expired and the drivers were eligible to apply for a new license.

18. In determining that forfeiture was not appropriate due to constitutional limitations in the Taylor case and the Hawks case, the court applied a “proportionality test” which considered the following:

- (1) the harshness of the penalty compared with the gravity of the underlying offense;
- (2) the harshness of the penalty with the culpability of the claimant; and
- (3) the relationship between the property and the offense, including whether use of the property was (a) important to the success of the crime, (b) *deliberate and planned* or

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<sup>2</sup> Neither Ms. Hawks or Mr. Taylor was stopped *for DUI* following revocation of their licenses.

*merely incidental and fortuitous*, and (c) extensive in terms of time and spatial use.

Taylor v. Greene, 2002 WL 75929 \*4 (Tenn. Ct. App. 2002)

19. The court in the Hawks and Greene cases determined that forfeitures in those cases failed the “proportionality test” because the only injury to the state *was the failure of the drivers to apply for new driver’s licenses at the end of their revocation period.*

20. It is determined that Claimant’s failure to have her restricted driver’s license hours changed to reflect her new hours of employment, and her driving home from work at 1:41 a.m. was not a deliberate, planned violation of her driving time restrictions.

21. Claimant was eligible to obtain a regular, unrestricted driver’s license two months later.

22. Rather, Claimant’s driving home after work at 1:41 a.m. was “incidental” and done without giving it any thought. Claimant had fulfilled the state’s financial responsibility requirements and showed Officer Atchley proof of insurance. There was no “injury” to the State.

23. The seizure and forfeiture of Claimant’s vehicle does not pass the “proportionality test” under the facts and circumstances of this case.

24. After weighing all the “proportionality test” factors, and the facts and circumstances of this case, and considering the harshness of the penalty (forfeiture of Claimant’s vehicle) compared with the gravity of the underlying offense, and the harshness of the penalty (forfeiture of Claimant’s vehicle) when

Claimant's offense was not taking the time to have her restricted license's operating hours changed, the undersigned agrees with Claimant that the forfeiture of Claimant's vehicle violates the "Excessive Fines" clause of the U. S. and Tennessee Constitutions.

25. Had Claimant been driving under the influence of alcohol, or had she clearly been driving outside the restrictions of her restricted license, i.e., headed out of state on a vacation, going on a shopping trip, etc., this case would have a different outcome.

26. For all the above reasons, it is **ORDERED** that the seized vehicle be returned to Claimant forthwith.

It is so ordered.

This Order entered and effective this \_\_\_\_day of November, 2011.

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Joyce Grimes Safley  
Administrative Judge