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5-21-2008

Bradley W. H1313 Zeller, 1989 Buick Regal, V.I.N
2G4WB14TXK1484261, Seized from: Bradley W.
Zeller, Seizure date: February 17, 2008, Claimant:
Bradley W. Zeller

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

IN THE MATTER OF:

**Bradley W. (H1313) Zeller
1989 Buick Regal
V.I.N 2G4WB14TXK1484261
Seized from: Bradley W. Zeller
Seizure date: February 17, 2008
Claimant: Bradley W. Zeller**

DOCKET NO: 19.05-099158J

INITIAL ORDER

This matter was heard on May 21, 2008 before Joyce Carter-Ball, Administrative Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Safety. Nina Harris, attorney for the Department of Safety, represented the State. Claimant Bradley W. Zeller (hereafter Claimant) represented himself.

The subject of this hearing was the proposed forfeiture of the subject property for its alleged use in violation of Tennessee Code Annotated §55-50-504 and §40-33-201 et seq.

After consideration of the record in this matter and arguments of the parties, it is **DETERMINED** that the subject vehicle in this case should be **forfeited** to the seizing agency.

This conclusion is based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Officer Lynn Campbell testified that on February 16, 2008 he observed a 1989 Buick Regal traveling west on Highway 11W, Hawkins County, Tennessee at a high rate of speed.
2. A traffic stop was conducted and Claimant was the driver.
3. A check on Mr. Zeller's driver's license through NCIC showed it to be revoked for a DUI conviction in Jefferson County, Tennessee on April 18, 2007, with an event date of December 22, 2006.
4. Claimant was arrested for driving while revoked.
5. Claimant's eligibility date was April 18, 2007.
6. Claimant testified that he has gone through probation, has lost his job and is unable to purchase another vehicle.

CONCLUSIONS OF LAW

1. The State of Tennessee as the moving party in this case has the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in its favor. **Rule 1360-4-1-.02.**
2. **Tennessee Code Annotated §55-10-401 provides:**
 - (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 in such person's blood or breath is eight-hundredths of one percent (.08%) 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 phenylethylamine or any of the salts thereof, except preparations intended for use in the nose and unfit for internal use.

3. Tennessee Code Annotate §40-10-403 provides in part as follows:

(a)(1) Any person or persons violating the provisions of §§ 55-10-401-- 55-10-404 shall, upon conviction thereof, for the first offense be fined not less than three hundred fifty dollars (\$350) nor more than one thousand five hundred dollars (\$1,500), and such person or persons shall be confined in the county jail or workhouse for not less than forty-eight (48) hours nor more than eleven (11) months and twenty-nine (29) days; **and the court shall prohibit such convicted person from driving a vehicle in the state of Tennessee for a period of time of one (1) year.** In addition to the other penalties set out for a first offense violation, if at the time of such offense the alcohol concentration in such person's blood or breath is twenty hundredths of one percent (.20%) or more, the minimum period of confinement for such person shall be seven (7) consecutive calendar days rather than forty-eight (48) hours....

(b) – (c)

(d)(1)(A) Except as provided in subdivision (d)(2), if a person's motor vehicle operator's license has been revoked pursuant to subsection (a), such person may apply to the **trial judge for a restricted driver license.** The trial judge may order the issuance of a restricted motor vehicle operator's license in accordance with § 55-50-502, if based upon the records of the department of safety:

(i) The violation resulting in the person's present conviction for driving under the influence of an intoxicant occurred on or after **July 1, 2000;**

(ii) The person does not have a prior conviction for a violation of § 39-13- 106, § 39-13-213(a)(2), or § 39-13-218, in this state or a similar offense in another state; and

(iii) The person does not have a prior conviction for a violation of § 55- 10-401 or § 55-10-418 within ten (10) years of the present violation in this state or a similar offense in another state.

(iv) The trial judge may issue such order allowing the person so convicted to operate a motor vehicle for **the limited purposes** of going to and from:

(a) Such person's regular place of employment and any **work-related driving;**

(b) A court-ordered alcohol safety program;

(c) A college or university in the case of a student enrolled full time in such college or university;

- (d) A scheduled interlock monitoring appointment; and
- (e) A court-ordered outpatient alcohol or drug treatment program.

.....

(e) – (j)

(k)(1) The vehicle used in the commission of a person's second or subsequent violation of § 55-10-401, or the second or subsequent violation of any combination of § 55-10-401, and a statute in any other 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 of safety is designated as the applicable agency, as defined by § 40-33-202, for all forfeitures authorized by this subsection (k).

(2) In order for the provisions of subdivision (k)(1) to be applicable to a vehicle, the violation making the vehicle subject to seizure and forfeiture must occur in Tennessee and at least one (1) of the previous violations must occur on or after January 1, 1997, **and the second offense after January 1, 1997, occurs within five (5) years of the first offense occurring after January 1, 1997.**

(3) It is the specific intent that a forfeiture action under this section shall serve a remedial and not a punitive purpose. The purpose of the forfeiture of a vehicle after a person's second or subsequent DUI violation is to prevent unscrupulous or incompetent persons from driving on Tennessee's highways while under the influence of alcohol or drugs. **Driving a motor vehicle while under the influence of alcohol or drugs endangers the lives of innocent people who are exercising the same privilege of riding on the state's highways.** There is a reasonable connection between the remedial purpose of this section, ensuring safe roads, and the forfeiture of a motor vehicle. While this section may serve as a deterrent to the conduct of driving a motor vehicle while under the influence of alcohol or drugs, it is nonetheless intended as a remedial measure. Moreover, the statute serves to remove a dangerous instrument from the hands of individuals who have demonstrated a pattern of driving a motor vehicle while under the influence of alcohol or drugs.

(4) Only P.O.S.T.-certified or state-commissioned law enforcement officers will be authorized to seize such vehicles under this section.

4. Tennessee Code Annotated §55-50-504 provides as follows:

(a)(1) A person who drives a motor vehicle within the entire width between the boundary lines of every way publicly maintained which is open to the use of the public for purposes of vehicular travel, or the premises of any shopping center, manufactured housing complex or apartment house complex or any other premises frequented by the public at large at a time **when the person's privilege to do so is cancelled, suspended, or revoked commits a Class B misdemeanor.** A person who drives a motor vehicle within the entire width between the boundary lines of every way publicly maintained which is open to the use of the public for purposes of vehicular travel, or the premises of any shopping center, manufactured housing

complex or apartment house complex or any other premises frequented by the public at large at a time when the person's privilege to do so is cancelled, suspended or revoked because of a conviction for vehicular assault under § 39-13-106, vehicular homicide under § 39-13-213, or driving while intoxicated under § 55-10-401 shall be punished by confinement for not less than two (2) days nor more than six (6) months, and there may be imposed, in addition, a fine of not more than one thousand dollars (\$1,000).

(2) A second or subsequent violation of subdivision (a)(1) is a Class A misdemeanor. A person who drives a motor vehicle within the entire width between the boundary lines of every way publicly maintained which is open to the use of the public for purposes of vehicular travel, or the premises of any shopping center, manufactured housing complex or apartment house complex or any other premises frequented by the public at large at a time when the person's privilege to do so is cancelled, suspended or revoked because of a second or subsequent conviction for vehicular assault under § 39-13-106, vehicular homicide under § 39-13-213, or driving while intoxicated under § 55-10-401 shall be punished by confinement for not less than forty-five (45) days nor more than one (1) year, and, in addition, may be subject to a fine of not more than three thousand dollars (\$3,000).

(b) The department, upon receiving a record of the conviction of any person under this section upon a charge of driving a vehicle while the license of such person was suspended, shall extend the period of such suspension for an additional like period and, if conviction was upon a charge of driving while a license was revoked for a violation of § 39-13-213, § 55-10-101, § 55-10-102 or § 55-10-401, the department shall extend the revocation for an additional period of one (1) year.

(c) No person shall cause or knowingly permit such person's child or ward under eighteen (18) years of age to drive a motor vehicle upon any highway when such minor is not authorized hereunder or in violation of any of the provisions of this chapter.

(d) No person shall authorize or knowingly permit a motor vehicle owned by such person or under such person's control to be driven upon any highway by any person who is not authorized hereunder or in violation of any of the provisions of this chapter.

(e) No person shall employ as a chauffeur of a motor vehicle any person not then licensed as provided in this chapter.

(f) No person charged with violating the provisions of this section for a violation of § 39-13-213, § 55-10-101, § 55-10-102 or § 55-10-401 shall be eligible for suspension of prosecution and dismissal of charges pursuant to the provisions of §§ 40-15-102--40-15-105 and 40-32-101(a)(3)-(c)(3) or for any other pretrial diversion program, nor shall any person convicted under this section for a violation of § 39-13-213, § 55-10-101, § 55-10-102 or § 55-10-401 be eligible for probation, or any other provision of law authorizing probation, until such time as such person has fully served day for day at least the minimum sentence provided

by law.

(g) If the court suspends the prosecution and dismisses the charges pursuant to the provisions of §§ 40-15-102--40-15-105, and 40-32-101(a)(3)- (c)(3) or for any other pretrial diversion program, the court shall forward to the department a record of such dismissal or diversion action. Such person will then be required to meet the financial responsibility requirements pursuant to chapter 12 of this title prior to the reinstatement of any driving privileges.

(h)(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, 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 is designated as the applicable agency, as defined by § 40-33-202, for all forfeitures authorized by this subsection (h).

(2) For purposes of clarifying the provisions of this subsection (h) 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.

(i) **Notwithstanding any other provision of law to the contrary, revocation or suspension of a license shall not take effect until ten (10) days after notice has been sent to the last known address of the driver.** The notice requirement in this subsection (i) shall not apply to a driver whose license has been revoked or suspended by a court of competent jurisdiction or who has surrendered the license to such a court.

(j)(1) Notwithstanding any other rule of evidence or law to the contrary, in the prosecution of second or subsequent offenders under this section the official driver record maintained by the department of safety and produced upon a certified computer printout shall constitute prima facie evidence of the prior conviction.

(2) Following indictment by a grand jury, the defendant shall be given a copy of the department of safety printout at the time of arraignment. If the charge is by warrant, the defendant is entitled to a copy of the department of safety printout at the defendant's first appearance in court or at least fourteen (14) days prior to a trial on the merits.

(3) Upon motion properly made in writing alleging that one (1) or more prior convictions is in error and setting forth the error, the court may require that a certified copy of the judgment of conviction for such offense be provided for inspection by the court as to its validity prior to the department of safety printout being introduced into evidence.

5. The Department of Safety bears the burden of proof in forfeiture proceedings and must prove, by a preponderance of the evidence, (1) that the seized property was used in a manner making it subject to forfeiture . . . and (2) that the owner or co-owner of the property knew that the property was being used in a manner making it subject to forfeiture [see T.C.A. §40-33-210(a).] Failure to carry the burden of proof operates as a bar to the proposed forfeiture. §T.C.A. 40-33-210(b)(1) and Department of Safety Rule 1340-2-2-.15.

6. The State proved by a preponderance of the evidence that the vehicle was used in a manner making it subject to forfeiture in that it was **driven by a person who was driving on a revoked license** when the **original** revocation was made for a violation of the **DUI law**, §55-10-401.

7. It is **CONCLUDED** that the State of Tennessee has carried its burden of proof and established by a preponderance of the evidence that the subject 1989 Buick Regal was operated in violation of the above statutes.

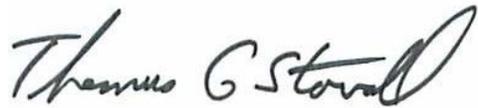
8. It is therefore **ORDERED** that the subject 1989 Buick Regal be **forfeited** to the Seizing Agency, to be disposed of as provided by law.

IT IS SO ORDERED.

This Initial Order entered and effective this 3rd day of June, 2008.

Joyce Carter-Ball
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 3rd day of June, 2008.



Thomas G. Stovall, Director
Administrative Procedures Division