



4-12-2013

DEPARTMENT OF SAFETY vs. One 1998
Dodge Durango, VIN:1B4HS28Y4W211160,
Seized From: Norman F. Chesser, Jr., Date of
Seizure: October 26, 2012, Claimant: Norman F.
Chesser, Jr., Lien Holder: None

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**BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT
OF SAFETY AND HOMELAND SECURITY**

IN THE MATTER OF:

DEPARTMENT OF SAFETY

v.

**One 1998 Dodge Durango
VIN: 1B4HS28Y4WF211160
Seized From: Norman F. Chesser, Jr.
Date of Seizure: October 26, 2012
Claimant: Norman F. Chesser, Jr.
Lien Holder: None**

**DOCKET NO: 19.05-120840J
D.O.S. Case Nos. N2424, N2425**

INITIAL ORDER

This matter was heard on April 12, 2013, at the Highway Patrol Headquarters in Fall Branch, Tennessee before Steve R. Darnell, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Department of Safety and Homeland Security (Department). Attorney Nina Harris represented the Department. Petitioner was present for the hearing and not represented by counsel.

ISSUES FOR DETERMINATION

1. Did the Department show that Petitioner operated this vehicle while his license was in a revoked status due to a prior DUI conviction?
2. Did the Department show that Petitioner operated this vehicle while intoxicated when he had previously driven drunk within the previous five years?

SUMMARY OF DETERMINATION

It is **DETERMINED** that the Department showed, by a preponderance of the evidence, that on the date of this seizure Claimant was operating this vehicle while he was intoxicated and also while his license was suspended due to a previous DUI. Either of these events is sufficient to seize and forfeit the vehicle. This determination is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Claimant was convicted of first offense DUI on May 30, 2012 in Carter County, Tennessee. His license was revoked due to this DUI conviction for one year.
2. On October 26, 2012, a Trooper with the Tennessee Highway Patrol observed Claimant driving the seized vehicle. The Trooper knew Claimant's license was revoked due to his DUI conviction in Carter County, Tennessee. The Trooper had previously stopped Claimant for a seatbelt violation **after** his DUI conviction, but **prior** to the Department's revocation of his license. Since the Department had not revoked Claimant's license at the time, the Trooper did not cite him.
3. On October 26, 2012, a traffic stop of Claimant was initiated by the Trooper. Claimant smelled of an alcoholic beverage. The Trooper believed Claimant to be impaired. Claimant was administered and failed a standardized battery of field sobriety tests. The Trooper transported Claimant to a local hospital and secured a blood sample. Claimant was arrested and charged with second offense DUI. Claimant's BAC was .13.
4. On the date of the seizure, Claimant's license was suspended due to his May 30, 2012, DUI conviction in Carter County. Additionally, Claimant was driving while intoxicated with a BAC of .13.

5. The Department showed, by a preponderance of the evidence, that Petitioner was driving the seized vehicle while his license was revoked for a previous DUI conviction, and also that he was driving the seized vehicle while he was intoxicated. Either of these circumstances is sufficient to seize and forfeit Claimant's vehicle.

CONCLUSIONS OF LAW

1. The Department 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. 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. Tennessee Code Annotated § 40-33-210 provides as follows:

(a) In order to forfeit any property or any person's interest in such property pursuant to §§ 39-14-307, 47-25-1105, 53-11-451, **55-10-403(k)**, 55-50-504(h), 57-3-411, 57-5-409, 57-9-201, 67-4-1020 and 70- 6-202, the state shall have the burden to prove by a preponderance of evidence that:

(1) The seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture under the sections set out in this subsection (a); and

(2) The owner or co-owner of the property knew that such property was of a nature making its possession illegal or was being used in a manner making it subject to forfeiture, or, in the case of a secured party, that the standards set out in subsection (f) are met.

(b)(1) Failure to carry the burden of proof shall operate as a bar to any forfeiture and the property shall be immediately returned to the claimant.

(2) Notwithstanding that the hearing officer found that the state carried its burden of proof and recommended forfeiture of the property, the administrative head of the applicable agency may, in the interests of justice, order that the seized property be returned to the claimant.

It is **CONCLUDED** that the Department has carried its burden of proof and established, by a preponderance of the evidence, that Claimant operated the above described vehicle in violation of both T.C.A. §§55-50-504(h)(1) and §40-10-403(k)(1), and the vehicle is subject to forfeiture to the seizing agency.

IT IS THEREFORE ORDERED that the above described vehicle be forfeited to the seizing agency.

This Initial Order entered and effective this 26 day of April, 2013

Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 26
day of April, 2013

A handwritten signature in cursive script that reads "Thomas G. Stovall". The signature is written in black ink and is positioned above a horizontal line.

Thomas G. Stovall, Director
Administrative Procedures Division