Summary Driver's License Suspensions

R. George Wright*

In *Ruge v. Kovach*,[1] the Indiana Supreme Court rejected a procedural due process challenge to the Indiana statutory[2] procedures providing for pre-hearing suspension of the driver's license of any person arrested after being found by chemical testing to have been driving with a blood alcohol level of .10 percent or greater.[3] The court held, largely in view of the statutory requirement of a pre-suspension independent judicial determination of probable cause[4] and a "prompt" post-suspension judicial hearing,[5] that the statute afforded all the process that was due.

The supreme court set the standard of review in *Ruge* by determining that the Code chapter involved[6] was administrative or civil in nature, and not criminal,[7] and that while the "entitlement" of a driver's license rose to the level of a protectible property interest,[8] no fundamental right was implicated by the statute.[9]

The court was then able to resolve the due process question by examining the United States Supreme Court's analyses in *Mackey v. Montrym*[10] and *Dixon v. Love*[11] and applying the well-known balancing test mandated by *Matthews v. Eldridge*.[12] While the driver's interest in

---

* Bigelow Fellow and Instructor of Law, University of Chicago School of Law. A.B., University of Virginia, 1972; Ph.D., Indiana University, 1976; J.D., Indiana University School of Law—Indianapolis, 1982.

[1]467 N.E.2d 673 (Ind. 1984).

[2]Ind. Code §§ 9-11-1-1 to -4-15 (Supp. 1985).

[3]A pretrial license suspension may also stem from a driver's refusal to submit to a chemical test for alcohol, but this circumstance was not presented in *Ruge*. A refusal to submit to testing was instead present in the leading pre-hearing license suspension case, Mackey v. Montrym, 443 U.S. 1 (1979), which rejected a due process challenge against a Massachusetts statute. *Id.* at 19.

[4]*See* 467 N.E.2d at 676-77.

[5]*See id.* at 681. *See also* Roberts v. State, 474 N.E.2d 144, 147 (Ind. Ct. App. 1985) (interpreting *Ruge* in the context of a refusal to submit to testing).

[6]Ind. Code § 9-11-4 (Supp. 1985).

[7]467 N.E.2d at 677 (citing prior Indiana cases). *See also* Szczech v. Comm'r of Pub. Safety, 343 N.W.2d 305, 306 (Minn. Ct. App. 1984) (holding a comparable Minnesota statute to be remedial and nonpenal on the grounds that it was intended for the public protection).

[8]467 N.E.2d at 678 (citing cases). *See also* Illinois v. Batchelder, 463 U.S. 1112 (1983).

[9]467 N.E.2d at 677-78 (citing cases). *See also* Hernandez v. Dep't of Motor Vehicles, 30 Cal. 3d 70, 634 P.2d 917, 177 Cal. Rptr. 566 (1981).

[10]443 U.S. 1 (1979).

[11]431 U.S. 105 (1977) (holding constitutional an Illinois statute allowing pre-hearing license suspensions upon a showing of repeated traffic offense convictions).

[12]424 U.S. 319 (1976). *Eldridge* balancing requires a judicial consideration of:

operating his vehicle pending a full hearing was recognized as substantial,[13] a prompt post-suspension review[14] and the statutory provision for granting of a "hardship license"[15] minimized the weight of the driver's interest.[16]

The risk of an erroneous deprivation of a driver's property interest in his license under the Indiana statutory procedure was then held to be acceptable. In particular, the court held that "the chemical test required by our statute represents a 'reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.' "[17]

Finally, the court determined the governmental interest underlying the challenged statute to be a "most compelling interest in highway safety and public welfare,"[18] specifically, the interest "in keeping its highways safe by removing drunken drivers from [Indiana's] roads."[19] On this basis, the supreme court reversed the trial court and held the summary license suspension statute constitutional.[20]

In its reasoning and result, *Ruge* is clearly within the mainstream of the developing constitutional law.[21] Particularly in view, though, of

---

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

[13]467 N.E.2d at 678-79.

[14]*Id.* at 679.

[15]*Id.* (citing IND. CODE § 9-5-2-1 (1982)).

[16]467 N.E.2d at 679.

[17]*Id.* at 680 (quoting Mackey v. Montrym, 443 U.S. 1, 13 (1979)).

[18]467 N.E.2d at 681.

[19]*Id.*

[20]*Id.*

[21]In addition to those cases cited in *Ruge*, at least general support for *Ruge* can be found, under varying facts and statutes, in Gonzales v. Franklin County Mun. Court, 595 F. Supp. 382, 388 (S.D. Ohio 1984) (upholding Ohio pre-hearing license suspension statute on due process challenge in posture of request for preliminary injunction against its enforcement); McCracken v. State, 685 P.2d 1275 (Alaska Ct. App. 1984) (conviction for refusal to take breathalyzer test upheld under constitutional challenge); Hernandez v. Dep't of Motor Vehicles, 30 Cal. 3d 70, 634 P.2d 917, 177 Cal. Rptr. 566 (1981) (upholding on minimum scrunity basis California statute authorizing six-month license suspension for refusal to submit to a chemical test); Garrett v. Dep't of Pub. Safety, 237 Ga. 413, 228 S.E.2d 812 (1976) (upholding constitutionality of Georgia implied consent law permitting license revocation upon refusal to submit to chemical intoxication test); *In re* Application of Ventura, 108 Misc. 2d 281, 437 N.Y.S.2d 538 (1981) (rejecting due process challenge to pre-hearing suspension of driver's license for refusal to submit to chemical test; hearing required within fifteen days of suspension); Kobilansky v. Liffrig, 358 N.W.2d 781 (N.D. 1984) (upholding pre-hearing license suspension against due process challenge); State v.

the popular interest that has recently developed in policy issues implicated in *Ruge*,[22] it is important to retrace the logical steps taken by the *Ruge* court.

There is ample support, first, for the court's view of implied consent and summary license suspension procedures as civil or administrative in nature, and not criminal.[23] This support in the law, however, does not make the distinction less obscure. It should be obvious that a statute that is deemed civil because intended for public protection may just as easily be classified as criminal in nature because it is aimed at deterring the commission of crime or apprehending lawbreakers. Certainly the stigma and gravity of consequences attached to the loss of one's driver's license may well exceed that attached to being found in violation of, for example, building code requirements in an administrative hearing. The courts, therefore, should not rely too heavily on this distinction.[24]

The court concluded its analysis of the appropriate standard of review by determining that there exists no fundamental right to drive, nor a fundamental right to drive based either upon a fundamental right of employment or on the fundamental right of interstate travel.[25] The court's finding of no burdening of the acknowledged fundamental right to travel[26] was perhaps unduly facilitated by its imposing a literally

---

Locke, 418 A.2d 843 (R.I. 1980) (similarly upholding statute); City of Columbus v. Adams, 10 Ohio St. 3d 57, 461 N.E.2d 887 (1984) (denying immediate appellate review of pretrial suspension of driver's license due in part to perceived social benefit of early elimination of the risk of harm if defendant is ultimately convicted). Apparently, no currently viable reported precedent is inconsistent with the holding in *Ruge*.

[22]For a noteworthy instance of potential trial ramifications, see State v. Franklin, 327 S.E.2d 449, 454-55 (W. Va. 1985) (conspicuous trial attendance of anti-drunk driving group members led to reversal of conviction).

[23]*See supra* note 7. *See also* Reese & Borgel, *Summary Suspension of Drunken Drivers' Licenses—A Preliminary Constitutional Inquiry*, 35 Ad. L. Rev. 313, 317 n.26 (1983).

[24]The administrative-criminal dichotomy is employed in Davis v. State, 174 Ind. App. 433, 367 N.E.2d 1163 (1977) (proceeding to revoke driver's license is administrative, and not criminal; therefore, there is no right to counsel). *See also* Steward v. State, 436 N.E.2d 859 (Ind. Ct. App. 1982) (no right to counsel until arrest for refusal to take chemical test or failing test for alcohol); Dep't of Pub. Safety v. Gates, 350 N.W.2d 59 (S.D. 1984) (no constitutional right to consultation with an attorney prior to decision to take blood test). *But see* Heddan v. Dirkswager, 336 N.W.2d 54, 57 (Minn. 1983) (en banc) (judicial requirement of reasonable opportunity to consult counsel before deciding whether to take test). Relatedly, it has been held that there is no constitutional mandate to advise a driver of the possibly severe legal consequences of his failure to consent to a breathalyzer test. *See* People v. Honaker, 127 Ill. App. 3d 1036, 469 N.E.2d 1120 (1984). *Cf.* South Dakota v. Neville, 459 U.S. 553, 564 (1983) (no infringement of right against self-incrimination in admission into evidence of defendant's refusal of blood alcohol test). *But cf.* Heddan v. Dirkswager, 336 N.W.2d 54, 57 (Minn. 1983) (en banc) (statutory requirement that police notify driver of the consequences of submitting or not submitting to test).

[25]467 N.E.2d at 677-78. *See also supra* note 9.

[26]The leading case is the well-known Shapiro v. Thompson, 394 U.S. 618 (1969).

undemanding test — specifically, that the license suspension "not necessarily curtail" the licenseholder's freedom of interstate movement.[27] Of course, few constitutionally illegitimate infringements of fundamental rights would fail this test; certainly, the welfare regulations struck down in *Shapiro v. Thompson* did not "necessarily curtail" any given individual's freedom to move to Illinois.[28]

Ultimately, though, there is no objection to finding no fundamental constitutional rights to be at issue in this case, as long as it is appropriately recognized that the "entitlement" of driving is often fundamental in a practical sense. The United States Supreme Court has recognized that "[a]utomobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities."[29] This unquestionable premise should be given due weight in any balancing of individual and social interests.

In addition, the interest balancing undertaken by the court should recognize that because of the nature of the interests identified, summary suspension cases must inevitably tend to be difficult. To maximize the social interest in safe highways, it is alleged, drunken drivers must quickly and uniformly be denied access to the highways.[30] But to carry out this policy is simultaneously to maximize the individual driver's stake in the outcome, and hence his due process interest. Indiana recognizes this individual interest by providing for a "hardship license."[31] But any accommodation of the driver's practical interests tends to undercut the certainty and uniformity of preventing drunken driving.[32] In its plainest form, the dilemma is that providing temporary or hardship licenses does not assist in "removing drunken drivers" from the roads.[33]

The second interest-balancing factor, the "likelihood of an erroneous deprivation of the private interest involved,"[34] is better conceived as a comparative inquiry into the difference in the likelihood of error under pre- and post-deprivation systems. What is crucial is not whether the hearing occurs pre- or post-deprivation, but the opportunity to prepare for the hearing, to marshal arguments, and to compel the attendance of and cross-examine witnesses. If the quality of the hearing is unrelated to its pre- or post-deprivation character, there is probably no harm done

---

[27]467 N.E.2d at 678.

[28]*See* Shapiro v. Thompson, 394 U.S. 618 (1969).

[29]Delaware v. Prouse, 440 U.S. 648, 662 (1979).

[30]467 N.E.2d at 681.

[31]*Id.* at 679 (citing IND. CODE § 9-5-2-1 (1982)). *Cf.* Heddan v. Dirkswager, 336 N.W.2d 54, 60 (Minn. 1983) (en banc) (providing for an automatic seven-day temporary license at the time of license revocation).

[32]*See, e.g.*, Reese & Borgel, *Summary Suspension of Drunken Drivers' Licenses—A Preliminary Constitutional Inquiry*, 35 AD. L. REV. 313, 324 n.65 (1983).

[33]467 N.E.2d at 681.

[34]*Id.* at 679.

by the court's holding, on the risk of erroneous deprivation factor, merely that "the chemical test required by our statute represents a 'reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.' "[35]

The third and final balancing factor considered in *Ruge* was the nature and magnitude of the public interest at stake.[36] The error that courts should avoid in this regard is conceiving of the public interest as, along with avoiding administrative and fiscal costs, the generalized importance of safe highways or "removing drunken drivers" from the roads.[37] This approach loses sight of the comparative nature of the due process balancing. The issue is the relative merit of pre- and post-suspension hearings. Even if it is assumed that the post-suspension hearing system contributes in some measure toward achieving the safety goal, this does not by itself establish the degree of superiority of the post-suspension system over the pre-suspension hearing procedure with respect to improving highway safety.

The court in *Ruge* cited the Supreme Court decision in *Mackey* for the view that the pre-hearing suspension procedure was "critical" to achieving the public interest at stake.[38] *Ruge* quoted *Mackey* to the effect that " '[s]tates surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or

---

[35]*Id.* at 680 (quoting Mackey v. Montrym, 443 U.S. 1, 13 (1979)). While infallibility is not a requirement of due process, both the factual determinations that a given driver has failed the breathalyzer test, and the apparently more clear-cut determination that he has refused to take the test, are often subject to some question. The reliability of the breathalyzer in this context is defended in Commonwealth v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Heddan v. Dirkswager, 336 N.E.2d 54 (Minn. 1983) (en banc); Romano v. Kimmelman, 96 N.J. 66, 474 A.2d 1 (1984); State v. Suping, 312 N.C. 421, 323 S.E.2d 350 (1984). Some of the risks associated with at least the most commonly used breathalyzer models are referred to in Walker v. State, 454 N.E.2d 425, 428 (Ind. Ct. App. 1983) (discussing literature indicating susceptibility of Smith & Wesson Model 900A to radio interference); Denman v. State, 432 N.E.2d 426, 430 (Ind. Ct. App. 1982) (discussing degree of complexity of breathalyzer operational checklist). *See also* Hampton v. State, 468 N.E.2d 1077, 1079 (Ind. Ct. App. 1984) (discussing case of defendant who could not coherently answer questions of police, appeared unsteady on his feet, and who smelled of alcohol, but registered .00 on his breathalyzer test).

Even the question of whether a person has refused a breathalyzer examination is often not free from doubt. The courts are split, for example, on whether the refusal to submit must be express, or may be inferred under the circumstances. *See* People v. Carlyle, 130 Ill. App. 3d 205, 209, 474 N.E.2d 9, 11-12 (1985) (citing cases). *See also* Thacker v. State, 441 N.E.2d 708 (Ind. Ct. App. 1982) (verbal consent to test vitiated by driver's belligerent behavior impeding or threatening to impede test) (decided under prior "knowing refusal" statute).

[36]467 N.E.2d at 680.

[37]*See id.* at 680-81.

[38]*Id.* at 681 (citing Mackey v. Montrym, 443 U.S. 1, 17-18 (1979)).

destroying spoiled foodstuffs.' ''[39] Finally, *Mackey* was quoted for a number of empirical arguments for the deterrence value, or the superior deterrence value, of summary suspensions, and for the cost and delay of a pre-suspension hearing procedure.[40]

Troublesome here is that questions of deterrence, or of whether a given procedure is a significantly better deterrent than a different procedure, are inescapably empirical questions, to be resolved by evidence and statistical analysis of at least an informal sort, and not by appeal to Supreme Court text or by judicial notice. The court in *Ruge* discussed the public interest factor with no explicit attention to such matters as which party bore the burden of production and of proof, or how such burdens could be discharged, or the degree of deference owed the trial court.

It is at least conceivable that the extent of drunken driving does not significantly depend upon whether the required hearing takes place prior to the suspension or within twenty days thereafter. It is entirely plausible that a far more crucial factor is the perceived probability of being caught and receiving any significant sanction at all, perhaps in conjunction with the severity of the punishment inflicted, independent of the timing of the punishment.[41]

The evidence in support of the empirical conclusions adopted by the court in *Ruge* is tenuous at best.[42] This is not to suggest that the state should not be accorded wide latitude to experiment reasonably with techniques to reduce the level of drunken driving.[43] But the state should be encouraged to maximize the quality of its evidentiary presentation, lest the due process balancing be an entirely intuitive, arm-chair process.[44]

---

[39]467 N.E.2d at 681 (quoting Mackey v. Montrym, 443 U.S. 1, 17-18 (1979)).

[40]467 N.E.2d at 681 (quoting Mackey v. Montrym, 443 U.S. 1, 18 (1979)).

[41]*See* L. Ross, Deterring the Drinking Driver 102-15 (1982). Professor Ross is able to conclude, based on a thorough examination of the available scientific literature, that "[c]hanges in the law promising increased certainty or combined certainty and severity of punishment reduce the amount of drinking and driving." *Id.* at 102-03. With implications for summary suspension procedures, Ross concludes that "virtually no evidence illustrates, one way or the other, the effect of celerity or swiftness of punishment." *Id.* at 104.

The evidence clearly shows that the probability of an accident while driving impaired is minimal, and that the probability of arrest is also minuscule. The probability of arrest has been put at 0.00044. *Id.* at 107. As long as this probability remains vanishingly small, manipulating the timing of the suspension hearing may be futile.

[42]*See supra* note 41.

[43]*Mackey*, 443 U.S. at 17.

[44]By contrast, consider the attention to quality of evidence and placement of the burden of production in State v. McLaughlin, 471 N.E.2d 1125, 1136-38, 1141-42 (Ind. Ct. App. 1984). Drawing analogies to mislabeled drug and spoiled foodstuff cases, as the United States Supreme Court and the court in *Ruge* have done, merely suppresses the difficulties inherent in predicting driver response. *Ruge*, 467 N.E.2d at 681 (citing *Mackey*, 443 U.S. at 17-18). In particular, spoiled food remains spoiled after a prehearing seizure.

The judicial aim should be to make the due process balancing as thoroughly informed as reasonably possible.[45]

A drunken driver may not drive drunk again between his arrest and any subsequent judicial proceeding, or he may do so despite his suspended license.

[45]It should also be noted that the United States Supreme Court's statement of its due process balancing test appears to vary subtlely, depending perhaps on context. In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), the Court applied the *Eldridge* balancing and determined that a pre-termination hearing was required before the utility could discontinue residential utility service for alleged non-payment. *Id.* at 17-18. *Memphis Light* focused on the status of utility service as "a necessity of modern life," the risk of erroneous deprivation as "not insubstantial," and the utility's interests as "not incompatible" with granting a pre-deprivation hearing. *Id.* at 18. *Memphis Light* is also interesting for its analysis of Dixon v. Love, 431 U.S. 105 (1977), which upheld an Illinois statute providing for a pre-hearing suspension of a driver's license upon a showing of his repeated convictions for certain traffic offenses. While both *Mackey* and *Ruge* rely upon *Dixon*, *Memphis Light* points out the driver's obvious opportunity for a full judicial hearing on the merits at each of the trials resulting in the underlying traffic convictions. *Id.* at 19-20 n.24.