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Due Process—Revocation of Driver's License: *Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2.d 218 (1972)

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Casenote

DUE PROCESS—REVOCATION OF DRIVER'S LICENSE

Stauffer v. Weedlun, 188 Neb. 105, 195 N.W.2d 218 (1972)

In *Stauffer v. Weedlun,*[1] the Nebraska Supreme Court held revocation of a driver's license upon accumulation of twelve or more traffic violation points meets due process requirements despite the absence of statutory provisions for prior hearing and notice to the driver. The decision merits further consideration in light of an earlier case, *Bell v. Burson,*[2] in which the United States Supreme Court held due process was violated when a driver's license was suspended pursuant to a financial responsibility law, because of lack of a prior notice and an opportunity for a hearing on the driver's possible liability. This casenote will consider the grounds on which the Nebraska Supreme Court distinguished revocation of a driver's license for traffic violations from suspension pursuant to financial responsibility laws. Specifically, analysis will focus on the Nebraska Supreme Court's reliance on the "emergency doctrine"[3] and the court's decision that a judicial stay of the order of revocation pending judicial review affords the licensee due process.

I.

In the Nebraska case, the Director of the Nebraska Department of Motor Vehicles notified[4] Stauffer his license was revoked. The

1. 188 Neb. 105, 195 N.W.2d 218, *appeal dismissed* 401 U.S. 972 (1972). Cases from other jurisdictions involving due process and driver's license revocation include Reese v. Kassab, 334 F. Supp. 744 (W.D. Pa. 1971); Carter v. Department of Pub. Safety, 290 A.2d 652 (Del. Super. 1972); Broughton v. Warren, 281 A.2d 625 (Del. Ch. 1971); Commonwealth v. Thomas, 467 S.W.2d 335 (Ky. Ct. App. 1971).
2. 402 U.S. 535 (1971).
3. Justice Brennan, in Bell v. Burson, 402 U.S. 535 (1971), wrote "it is fundamental that except in emergency situations (and this is not one) due process requires . . . 'notice and opportunity for a hearing appropriate to the nature of the case' *before* the termination becomes effective." *Id.* at 542. In Broughton v. Warren, 281 A.2d 625, 629 (Del. Ch. 1971), the court referred to the due process exceptions for emergencies stated in *Bell* as the "emergency doctrine."
4. NEB. REV. STAT. § 39-7,130 (Reissue 1968). "Within twenty-four hours after the revocation provided for by section 39-7,129, the Director of the Department of Motor Vehicles shall notify in writing the person whose license or privilege has been revoked that such license or privilege has been revoked."

revocation was based on the accumulation of fourteen traffic violation points and was effective the day the order was signed.[5] Following statutory provisions,[6] Stauffer appealed the revocation to the Lancaster County District Court. The court issued a restraining order and a stay of revocation until the judicial hearing. At the hearing, the court affirmed the revocation and reinstated the order revoking Stauffer's license.

Stauffer appealed to the Nebraska Supreme Court, alleging that the district court erred in upholding the constitutionality of the driver's license revocation statutes.[7] He argued the statutes violated both the due process clause of the Nebraska Constitution and the fourteenth amendment of the United States Constitution in failing to provide the licensee with pre-revocation notice and the opportunity for a hearing.

The Nebraska Supreme Court affirmed the revocation on two grounds: First, public interest in removing drivers with an excessive number of traffic violations from the highways outweighed the need for notifying the driver and providing an opportunity for a hearing prior to revocation (the "emergency doctrine").[8] Sec-

5. NEB. REV. STAT. § 39-7,129 (Reissue 1968):
   Whenever it shall come to the attention of the Director of Motor Vehicles that any person has, as disclosed by the records of such director, accumulated a total of twelve or more points within any period of two years, as set out in section 39-7,128, the director shall summarily revoke (1) the license and privilege of such person to operate a motor vehicle in this state or (2) the privilege, if such operator is a nonresident, of operating a motor vehicle within this state. Such revocation shall be for a period of one year from the date of the signing of the order of revocation or one year from the date of the release of such person from the jail or the Nebraska Penal and Correction Complex, whichever is later, unless a longer period of revocation was directed by the terms of the certified abstract of the judgment of conviction forwarded to the director by the trial court.
6. NEB. REV. STAT. § 39-7,130 (Reissue 1968):
   Any person, who feels himself aggrieved because of such revocation, may appeal therefrom to the district court in the county wherein such person resides or, in the case of a nonresident, to the district court of Lancaster County, in the manner prescribed in section 60-420. Such appeal shall not suspend the order of revocation of such license unless a stay therefore shall be allowed by a judge of said court pending a final determination of the review; *Provided,* the license of any person claiming to be aggrieved shall not be restored to such person, in the event the final judgment of a court finds against such person, until the full time of revocation, as fixed by the department, shall have elapsed.
7. NEB. REV. STAT. §§ 39-7,128 to -7,133 (Reissue 1968).
8. 188 Neb. at 114, 195 N.W.2d at 224. The Nebraska Supreme Court did not recognize the "emergency doctrine" per se, but recognized a

ondly, the district court's stay of the order of revocation pending judicial review afforded Stauffer due process.[9]

Procedural due process has been traditionally interpreted as requiring notice and the opportunity for a hearing before taking a person's property interest.

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense.[10]

Due process provides not only standards of notice and hearing,[11] but also determines *when* the notice and opportunity for a hearing must be given. This temporal aspect of due process has been read as requiring notice and the opportunity for a hearing before the deprivation of a property interest. The United States Supreme Court has said:

> Many controversies have raged about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case.[12]

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public interest prevailing over the individual's due process interest which is, in effect, the "emergency doctrine" developed in *Bell*. See note 3 *supra*.

9. 188 Neb. at 104, 195 N.W.2d at 222. As recognized in the subsequent case of State v. Lessert, 188 Neb. 243, 196 N.W.2d 166 (1972), the court in Stauffer v. Weedlun overruled Bradford v. Rees, 167 Neb. 338, 93 N.W.2d 17 (1958), which had been construed as limiting judicial review of the license revocation to the records of the Motor Vehicle Dep't. The court said in *Lessert* the *Stauffer* decision established a broader scope of judicial review, including challenging of void judgments, and fraudulent records, in the *de novo* review of the revocation order. 188 Neb. at 246, 196 N.W.2d at 168.

   The *Stauffer* decision, following *Bell's* lead, specifically overruled Hadden v. Aitken, 156 Neb. 215, 55 N.W.2d 620 (1952), which held that a driver's license, being a privilege and not property, was not subject to the due process clause. *Bell* held driver's licenses to be "important interests . . . . [T]he license is not to be taken away without procedural due process." 402 U.S. at 539.

10. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864). Grannis v. Ordean, 234 U.S. 385, 394 (1914); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900); Windsor v. McVeigh, 93 U.S. 274, 277 (1876).

11. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

12. *Id.* (emphasis added). Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Goldberg v. Kelly, 397 U.S. 254, 261 (1970); Snaidach v. Family Finance, 395 U.S. 337, 342 (1969); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 152-53 (1941); United States v. Illinois

While the due process norm is prior notice and opportunity for a hearing, exceptions have been established. These exceptions, referred to as "extraordinary situations,"[13] arise primarily where the governmental (public) interest is greater than the individual's interest in receiving prior notice and opportunity for a hearing.[14] Examples of such "extraordinary situations" are governmental interest in collecting revenue promptly,[15] protection of the public in securities transactions,[16] exigencies of a national war effort,[17] protection of the public from food not fit for consumption[18] and misbranded items,[19] and preservation of a court's integrity through summary contempt proceedings.[20]

Recently, the United States Supreme Court, after balancing the competing governmental and personal interests, struck down summary deprivations of personal interests where prior notice and opportunity for a hearing were not provided. The cases include termination of welfare benefits,[21] child dependency proceedings,[22] garnishment of wages,[23] and prejudgment replevin.[24]

In *Bell v. Burson*,[25] the Court declared the Georgia financial responsibility law unconstitutional. The statutory infirmity was that

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Cent. R.R., 291 U.S. 457, 463 (1934); Londoner v. City & County of Denver, 210 U.S. 373, 385-86 (1908).

13. Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971). The Court explained:

> That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Id. at 378-79.

14. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (governmental security interest found greater than individual interest of working at a particular defense plant).
15. Phillips v. Commissioner, 283 U.S. 589 (1931); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).
16. R.A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 911 (1962).
17. Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414 (1944); Stoehr v. Wallace, 255 U.S. 239 (1921); Central Union Trust Co. v. Garvan, 254 (1921).
18. North Am. Cold Storage v. City of Chicago, 211 U.S. 306 (1908).
19. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).
20. Cooke v. United States, 267 U.S. 517 (1925); *Ex parte* Savin, 131 U.S. 267 (1889); *In re Terry*, 128 U.S. 289 (1888).
21. Goldberg v. Kelly, 397 U.S. 254 (1970).
22. Stanley v. Illinois, 405 U.S. 645 (1972).
23. Snaidach v. Family Finance, 395 U.S. 337 (1969).
24. Fuentes v. Shevin, 407 U.S. 67 (1972).
25. 402 U.S. 535 (1971).

a driver's license could be suspended for failure to post security covering damages claimed by other parties involved in an accident, without a prior hearing on liability.[26] A hearing was provided by Georgia statute,[27] but admissable evidence contained nothing related to liability.[28] The Court held state interest in preventing additional expenses for an expanded hearing and public interest in protecting another claimant from an unrecoverable judgment did not outweigh the individual's right to a prior hearing under the fault-oriented Georgia statute.[29] Finally, the Court noted this was not an emergency situation which necessitated summary proceedings.[30]

The Nebraska Supreme Court in *Stauffer* refused to analogize driver's license revocation for traffic violations with driver's license suspension for failure to comply with financial responsibility laws. Rather, it used the "emergency doctrine" exception recognized in *Bell*.[31] The court said:

> The compelling public interest in removing from the highways those drivers whose records demonstrate unsafe driving habits outweighs the need for notice and hearing prior to the order. . . . In this connection the matter must be viewed not as an isolated case but in the collective aspect, that is, the removal of many such drivers from the highway . . . . [I]n our case the Legislature has determined, and we believe reasonably so, that a habit of repeated traffic violations has a definite relationship to the fitness of the driver to operate a motor vehicle and hence to the compelling public interest in safety on the highways.[32]

The public interest is probably more directly served by a summary revocation of a driver's license for repeated traffic violations than by a summary suspension for failure to comply with financial responsibility laws. The latter protects the public against judgment-proof drivers, a monetary consideration which is an insufficient basis for grounding an "emergency doctrine" exception to due process.[33] Point system revocation statutes protect the public from the repetitive traffic violators who threaten the public's physical safety—an interest more in line with "extraordinary situations." Public interest in summarily removing the repetitive violator from the highway based on safety outweighs the violator's right to pre-revocation notice and hearing. Therefore, the ab-

26. *Id.* at 541.
27. GA. CODE ANN. § 92A-602 (Reissue 1972).
28. 402 U.S. at 537-38.
29. *Id.* at 540-41.
30. *Id.* at 542. *See* note 3 *supra.*
31. *Id.*
32. 188 Neb. at 114, 195 N.W.2d at 224.
33. 402 U.S. at 540-41.

sence of pre-revocation notice and hearing would not be unconstitutional under the "emergency doctrine."[34]

Also, *Stauffer* differentiated the point violation law and the Georgia law based on natures of the statutes. Pursuant to the Georgia financial responsibility law, the license was suspended without prior hearing on the possible liability of the licensee. This was the fatal defect.[35] However, the driver's license of the Nebraska traffic violator is revoked based on the violator's record.[36] The statute provides "the director shall summarily revoke"[37] the license upon accumulation of twelve or more violation points, the points being assigned after, and based upon, judicial determination of guilt.

II.

The Nebraska Supreme Court upheld Stauffer's license revocation not only on the basis of the "emergency doctrine," but also on the ground that Stauffer was afforded due process by the district court's stay of the revocation order.[38]

The justification was the United States Supreme Court's per curiam decision in *Jennings v. Mahoney*,[39] decided after *Bell*. Jennings was notified by the Director of the Financial Responsibility Division of the Utah Department of Public Safety that unless she proved financial responsibility, her license would be suspended under the financial responsibility statute. The Utah law did not

34. The court's reliance on the "emergency doctrine" as justifying summary license suspension upon the accumulation of 12 traffic violation points may be criticized. The court did not prove a driver with 12 points creates a greater "emergency" than the driver with 11. For instance, a driver could have his license suspended for 12 convictions of being 3 miles over the speed limit on 12 clear, dry, sunlit days on isolated highways in the Sandhills. Simultaneously, another driver could be convicted of reckless driving as a result of an accident and 2 other separate convictions involving being 25 miles over the speed limit during the rush hour on a rainy day in Omaha on Interstate 80. Clearly, the latter creates the greater public emergency, yet his license is not automatically suspended.

    While such examples may be polar extremes, the legislative decision to suspend a license after accumulation of 12 traffic violation points is arbitrary line drawing. Therefore, the court might be criticized for holding an emergency exists which justifies taking of an individual's license by summary procedure when such emergency is based on the accumulation of an arbitrary number.

35. 402 U.S. at 541.
36. 188 Neb. at 112, 195 N.W.2d at 223.
37. NEB. REV. STAT. § 39-7,129 (Reissue 1968). *See* note 5 *supra*.
38. 188 Neb. at 109, 195 N.W.2d at 222.
39. 404 U.S. 25 (1971).

provide for a prior administrative hearing as to driver liability;[40] however, the Utah district court stayed the order of suspension pending judicial review.

The Supreme Court noted that, although the Utah financial responsibility law might violate due process as required by *Bell*, the question need not be answered in *Jennings*.[41] Instead, the court held "the district court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review . . . ."[42] No explanation was given as to why a stay of the suspension afforded the licensee due process.

The Nebraska court was incorrect in placing such broad reliance on *Jennings*. The suspension in *Jennings* was never effective *prior* to the judicial stay of the order. The Utah statute provided notice of the suspension be sent to the licensee "not less than ten days prior to the effective date of such suspension."[43] Since the Utah driver also must file a petition for judicial review within ten days after notice of suspension,[44] the suspension of Jennings' license apparently was not effective before the stay pending judicial review. Jennings was afforded due process consistent with *Bell* as she received a judicial hearing *before* her license was effectively suspended.

Because the Nebraska statute differs from Utah's, the holding in *Jennings* can be distinguished from *Stauffer*. The order of revocation in Nebraska is effective on the date of its signing.[45] The district court's stay of the order pending judicial review occurred *after* the revocation was in effect, as opposed to *Jennings* where the stay came *before* the suspension order took effect. *Bell* and *Jennings* seem to require a judicial stay before the effective suspension. In *Stauffer*, the judicial stay occurred *after* the revocation was effective. Therefore, Stauffer was not afforded due process by the judicial stay of the revocation.

Fuentes v. Shevin,[46] a 1972 Supreme Court case, casts further doubt on the *Stauffer* decision. *Fuentes* held prejudgment replevin statutes violated due process if they denied the possessor the opportunity for a hearing prior to being deprived of a chattel.[47] The

40. UTAH CODE ANN. § 41-12-5(b) (Repl. 1970).
41. 404 U.S. at 26.
42. *Id.*
43. UTAH CODE ANN. § 41-12-5(b) (Repl. 1970).
44. UTAH CODE ANN. § 41-12-2(b) (Repl. 1970).
45. NEB. REV. STAT. § 39-7,129 (Reissue 1968). *See* note 3 *supra*.
46. 406 U.S. 67 (1972).
47. *Id.* at 86.

Supreme Court noted while replevin is a nonfinal taking, "a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in terms of the Fourteenth Amendment."[48] *Bell* was cited for this proposition. The court added although the length of deprivation may be a consideration in determining the form of hearing, it does not preclude the right to prior hearing, no matter how quickly the property can be recovered.[49]

Applying this rule, *Fuentes* seems to require a different conclusion on this ground of the *Stauffer* decision. A nonfinal deprivation was involved in *Stauffer* as an effective suspension could be stayed pending ultimate judicial determination. *Fuentes* appears to say provisions for a stay in the revocation are not sufficient for due process. Rather, a prior hearing is required regardless of the period or nonfinality of deprivation. Therefore, the Lancaster County District Court's stay of the revocation order failed to afford Stauffer due process for there was a taking without prior notice and hearing.

This ground of *Stauffer* retains some limited vitality. *Fuentes,* while requiring a prior hearing in cases of nonfinal deprivations, recognized the "emergency doctrine" exceptions to prior notice and hearing.[50] Therefore, the second ground of *Stauffer* is viable, but not as an independent basis for holding the statutory procedure constitutional. A stay in the order of revocation does provide the licensee due process but is acceptable only in cases where the "emergency doctrine" exceptions are applicable (the alternative ground in *Stauffer*).

In conclusion, the Nebraska Supreme Court held summary revocation of Stauffer's driver's license was constitutional on two grounds. First, such suspension did not violate due process under the "emergency doctrine" and was distinguishable from financial responsibility suspension. The court's second and seemingly independent ground, that a stay in the order of revocation pending judicial review provides the licensee due process, is not as constitutionally broad as it appears. The Nebraska court misinterpreted *Jennings,* for, in that case, the Supreme Court held a judicial stay in a driver's license suspension satisfies due process only where the stay comes *before* the suspension is effective. In *Stauffer,* the stay came *after* the suspension was effective. *Fuentes* holds due process requires prior notice and hearing wherever deprivation is non-

48. *Id.* at 85.
49. *Id.* at 86.
50. "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing." *Id.* at 90-92.

final. *Fuentes* did, however, reaffirm the "emergency doctrine" exceptions to due process recognized in *Bell.* Therefore, a stay of the order of revocation pending judicial review, although absent prerevocation notice and hearing, may afford the licensee due process, but only in those limited situations where the "emergency doctrine" applies.

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