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Utah Court of Appeals

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Randall Gaither; attorney for appellant.
David L. Wilkinson; attorney general; Bruce M. Hale; assistant attorney general; attorneys for respondent.

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UTAH COURT OF APPEALS
BRIEF
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DOCKET NO. 870272-CA

IN THE UTAH COURT OF APPEALS

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MICHAEL JENSEN,

Plaintiff-Appellant,

vs.

FRED C. SCHWENDIMAN, Chief, Drivers License Services, State of Utah,

Defendant-Respondent.

Case No. 870272-CA

Priority #15

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BRIEF OF APPELLANT

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Appeal from an order revoking the plaintiff-appellant's driving privileges in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, presiding.

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RANDALL GAITHER, #1141
Attorney for Plaintiff-Appellant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 322-5678

DAVID L. WILKINSON
Utah Attorney General
BRUCE M. HALE, JR.
Attorney for Defendant-Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7627

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IN THE UTAH COURT OF APPEALS

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| MICHAEL JENSEN,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>FRED C. SCHWENDIMAN, Chief, Drivers License Services, State of Utah,<br><br>Defendant-Respondent. | ) | Case No. 870272-CA |

BRIEF OF APPELLANT

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RANDALL GAITHER, #1141
Attorney for Plaintiff-Appellant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 322-5678

DAVID L. WILKINSON
Utah Attorney General
BRUCE M. HALE, JR.
Attorney for Defendant-Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7627

TABLE OF CONTENTS


| | Page |
|---|---|
| ISSUES PRESENTED ON APPEAL | 1 |
| STATEMENT SHOWING JURISDICTION | 1 |
| STATEMENT SHOWING NATURE OF PROCEEDINGS | 2 |
| DETERMINATIVE STATUTORY PROVISIONS | 2 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 6 |
| POINT I: THE TRIAL COURT ERRED IN RECEIVING INADMISSABLE HEARSAY WHICH CONSISTED OF THE OUT-OF-COURT DECLARATIONS OF THE PERSON IDENTIFIED AS STEVEN PANDLE IN ENTERING THE FINDINGS IN THIS MATTER | 6 |
| POINT II: THE COURT ERRED IN DENYING THE MOTION TO DISMISS ON THE GROUNDS THAT EXHIBIT NO. 1, ENTITLED DUI REPORT FORM DOES NOT COMPLY WITH THE UTAH STATUTES WHICH REQUIRES A SPECIFIC REPORT OF REFUSAL | 8 |
| CONCLUSION | 11 |
| ADDENDUM | 13 |

# TABLE OF AUTHORITIES

## CASES


| | Page |
|---|---|
| Berry v. Arizona State Land Department, 651 P.2d 853 (Ariz., 1982) | 11 |
| Blackburn v. Motor Vehicles Division, 576 P.2d 1267 (Ct.App.Ore., 1978) | 10 |
| Colman v. Schwendiman, 680 P.2d 29 (Utah, 1984) | 10 |
| Harry v. Schwendiman, 740 P.2d 1344 (Utah App., 1987) | 6 |
| Helsten v. Schwendiman, 668 P.2d 509 (Utah, 1983) | 9,10 |
| Kehl v. Schwendiman, 735 P.2d 413 (Utah App., 1987) | 6,7 |
| Williams v. Schwendiman, 740 P.2d 1354 (Utah App., 1987) | 6 |


## OTHER AUTHORITIES


| | |
|---|---|
| §41-6-44.10, Utah Code Annotated | 2,7,8,10 |
| §41-6-44.10(b), Utah Code Annotated | 7 |
| §78-2(a)-3, Utah Code Annotated | 1 |
| Rule 802, Utah Rules of Evidence | 2,7 |
| Rule 803(b), Utah Rules of Evidence | 7 |

IN THE UTAH COURT OF APPEALS

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| MICHAEL JENSEN,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>FRED C. SCHWENDIMAN, Chief, Drivers License Services, State of Utah,<br><br>Defendant-Respondent. | ) | Case No. 870272-CA |

BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the Court err in receiving inadmissable hearsay evidence which consisted of the out-of-court declarations of the person identified as Steven Pandle in entering the Findings in this matter?

2. Did the Court err in denying the Motion to Dismiss on the grounds that Exhibit No. 1, entitled DUI Report Form, does not comply with the Utah statutes, which requires a specific sworn report of a refusal?

STATEMENT SHOWING JURISDICTION

Under the §78-2(a)-3, Utah Code Annotated (effective December 31, 1987), the Court of Appeals has jurisdiction on the grounds that this case involves an appeal from a final order of a District Court review of a state agency, the Drivers License Services Division of the Department of Public Saftey for the State of Utah.

## STATEMENT SHOWING NATURE OF PROCEEDINGS

This is an appeal from the Findings of Fact Conclusions of Law and Order entered by the Honorable Raymond S. Uno after the hearing held on June 1, 1987. In that order the District Court sustained the decision of the Drivers License Services Division of the Department of Public Safety and continued the suspension of the plaintiff-appellant's driving privileges which was first entered on April 30, 1987.

## DETERMINATIVE STATUTORY PROVISIONS

The plaintiff-appellant submits that this case can be determined under the statutory provision set forth in §41-6-44.10, U.C.A. (1953, as amended) and Rule 802 of the Utah Rules of Evidence.

## STATEMENT OF THE CASE

At the hearing held on June 1, 1987, in front of Judge Raymond S. Uno, the State called as their first witness Dave Ailler, a Salt Lake City Police Department employee (T. 4). He testified that he had been a police officer on April 7, 1987, and he heard a call come over the air about a subject vehicle which was being chased by Sargeant Stocking and Officer Shoup. He testified that he responded to an area where the vehicle was stopped and there was no one present in the vehicle, a red pick-up truck, which had stopped at a location just below the Utah State Capitol in the area that runs along the top edge of Memory Grove (T. 6). After receiving information from other police officers as to the description of the suspect, he got out of

his car and began searching the area. He went down into the wooded area off the east-side of the Capitol building into a grove and searched in the scrub oak where he found a person hiding. He identified that person as Michael G. Jensen (T. 8). At that time he handcuffed Mr. Jensen and took him up the hill over to the scene where the pick-up truck had stopped. He asked him if that was his truck to which he testified Mr. Jensen said yes. He then indicated that he said how did it get there and the officer testified that Mr. Jensen said that he drove it there. He did not indicate when he drove it there (T. 8).

He said he parked it there

The officer indicated that he observed that the defendant seemed to be intoxicated and had the odor of alcoholic beverages about his person. The officer testified that he informed Mr. Jensen of his suspicions that he had been driving under the influence and read the admonition on the DUI report form and asked him if he would take the breath test. He testified that Mr. Jensen told him that he would not take the test and after giving Mr. Jensen the admonition again, he wrote on his report that Mr. Jensen had refused to take the test and proceeded to book him into jail. He identified his signature on the DUI report form which was received into evidence.

On cross-examination the officer indicated that he never saw Mr. Jensen driving the vehicle and that Mr. Jensen had initially said, when first confronted at the scene concerning the vehicle, that he had parked it there instead of having driven there as he first testified (T. 16). The officer also indicated

that when Mr. Jensen was under arrest that he told the officer, when questioned if he understood that he was under arrest for driving under the influence of alcohol or drug, that 'I wasn't driving'. The officer indicated that the first thing Mr. Jensen told him after he was placed under arrest for driving under the influence was that he was not driving.

The next witness that was called to testify at the hearing was David Hendricks, a Salt Lake City Police officer. He indicated that he saw a red Chevrolet vehicle in the parking lot next to Counsel Hall and after he had backed out onto 300 North and proceeded eastbound, he saw a male white individual running across East Capitol drive into the Memory Grove area. He testified that he had given a description of that person to Officer Ailler and he assisted in bringing the individual that he had observed running across the street out of Memory Grove and he identified that person as Mr. Jensen.

The next witness was Donald Shoup, a Salt Lake City Police officer. Officer Shoup indicated that he had observed a red pick-up truck at First Avenue and State Street which crossed the median from the southbound lanes going northbound and that he chased said vehicle northbound on State Street. He testified that when he first observed the vehicle he saw what appeared to be two people in the vehicle, a driver and a passenger. He indicated that after he found the vehicle parked in the parking lot near the Capitol, he searched the immediate area and found an individual hiding under the bushes on the

northeast side corner of Hillside Avenue and East Capitol Boulevard (T. 28). He indicated that that person identified himself as 'Steven Pandle'. Over objection of counsel the officer was allowed to testify that he had some discussions at the scene with this individual and that person stated that the driver was the owner of the truck and that he was a 'white dude' (T. 32). On cross-examination the officer admitted that the person found was not taken into custody or arrested.

The next witness was Lawrence N. Stocking, a Salt Lake City Police officer, who indicated that he saw the vehicle when it crossed over the median at First Avenue and State Street and apparently struck a sign as it crossed back into the northbound lane of traffic on State Street.

The final witness called by the State was Eugene Berner, a representative of the Drivers License Division, State of Utah (T. 39). He was asked on cross-examination concerning the place on the Uniform DUI form that the officer would report that a person had refused to take the test. He indicated that there was no place on the form where it asked the officer to state under oath that the person refused to take the test. He testified that when the form was received agents of the Drivers License Department would make a determination as to whether the matter would be characterized as a per se drivers license matter involving cases where the test was taken or a refusal on the basis that there was no test taken under the circumstances (T. 42).

## SUMMARY OF ARGUMENT

Did the Court err in receiving inadmissable hearsay evidence which consisted of the out-of-court declarations of the person identified as Steven Pandle in entering the Findings in this matter? Did the Court err in denying the Motion to Dismiss on the grounds that Exhibit No. 1, entitled DUI Report Form, does not comply with the Utah statutes, which requires a specific sworn report of a refusal?

## ARGUMENT

### I

THE TRIAL COURT ERRED IN RECEVING INADMISSABLE HEARSAY WHICH CONSISTED OF THE OUT-OF-COURT DECLARATIONS OF THE PERSON IDENITIFIED AS STEVEN PANDLE IN ENTERING THE FINDINGS IN THIS MATTER.

In Harry v. Schwendiman, 740 P.2d 1344 (Utah App., 1987), this Court ruled that the Drivers License Department's decision to suspend a drivers license based only upon a "DUI Report Form" was improper; then followed the case of Kehl v. Schwendiman, 735 P.2d 413 (Utah App., 1987), where it was ruled at the administrative hearing that the reports were inadmissable evidence. In both of these cases the Court applied the Utah Rules of Evidence in finding that evidence offered before the administrative tribunal was hearsay and not within any exception. (See also Williams v. Schwendiman, 740 P.2d 1354, Utah App., 1987)

The breathalyzer test results and a portion of the DUI Report Form were held inadmissable in Harry. In Kehl

officer testified here

the Court found that the entire DUI Report was not admissable under the business records exception to the hearsay exception under Rule 803(b).

In this case the trial court was holding a de novo hearing under §41-6-44.10(b), U.C.A. (1953, as amended). However, the ruling of Kehl should apply to the "refusal" type of administrative hearing as well as the "per se" type of hearing.

In the present case, the evidence related by officer Shoup concerning out of court statements of "Steve Pandle" the declarant, were clearly inadmissable hearsay under Rule 802 of the Rules of Evidence. The evidence was offered to prove the truth of the oral assertions of Steve Pandle that he was not the driver but that the "white dude" was the driver. Nothing can be more inherently unreliable than a report from a person found in the bushes and not arrested. At that point in time, such admission is in that person's best interest in order to avoid prosecution.

The Court expressly relied on the inadmissable hearsay in ruling in this matter and stated:

> Based on arguments of counsel, the Court is of the opinion that the testimony and evidence that has been introduced is sufficient to sustain the findings of the driver's license revocation. In this case here we have an individual who is driving a pickup truck, his identification is initially not known, but was seen and pursued by several police officers while crossing over a dividing island going up toward the Capitol, traveling at a high rate of speed.

> The vehicle is lost sight of and eventually found in the parking lot of white chapel unoccupied with a weapon found inside. After a brief search, one indiviudal was found hiding, I guess, in the weeds or cover, brought out.
>
> Another one is found after a person living in the neighborhood notifies police there's someone hiding behind the bushes. Certain statements were elicited from both; one stating that he was the owner and the other from a purported Steven Pandle, stating that the driver is the owner of the car and "he's the white dude."
>
> This being a civil case, I believe that the State has met its burden of preponderance of the evidence and the Court so finds. (See Transcript p. 47-48)

Therefore, the evidentiary ruling should be reversed, the petitioner's motion to directed verdict granted and the ruling of the trial court reversed.

II

> THE COURT ERRED IN DENYING THE MOTION TO DISMISS ON THE GROUNDS THAT EXHIBIT NO. 1, ENTITLED DUI REPORT FORM, DOES NOT COMPLY WITH THE UTAH STATUTES WHICH REQUIRES A SPECIFIC REPORT OF A REFUSAL.

Section 41-6-44.10, U.C.A. (1953, as amended) states as follows:

> Within 20 days after receiving a sworn report from a peace officer to the effect that such person has refused a chemical test or tests that department shall notify such person of a hearing before the department. If at said hearing the department determines that the person was granted the right to submit to such test or tests, or if such person fails to appear before the department as required in the notice, the department shall revoke for one year his license or permit

> to drive. Any person whose license has been revoked by the department under the provisions of this section shall have the right to file a petition within 30 days thereafter for a hearing in the matter in the district court in the county in which such person shall reside. Such court is hereby vested with jurisdiction, and it shall be its duty to set the matter for trial de novo upon 10-days' written notice to the department and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner's license is subject to revocation under the provisions of this act. (emphasis added)

In this case the Drivers License Department received as a "sworn report", required by the statute, the DUI Report Form. This form was received as Exhibit No. 1 for the limited purpose of the testimony admitted at the hearing. (T. 42)

On cross-examination, Gene Berner, records manager of the Drivers License Division, State of Utah, testified that there was no place on the form where the officer states under oath that the driver "refused" to take the test. He said that the Department considers the case as a "refusal" as opposed to a "per se" case, merely because there are no results under the section entitled chemical tests and an agent categorizes the matter as a "per se" case.

In the case of Helsten v. Schwendiman, 668 P.2d 509 (Utah, 1983), the Utah Supreme Court held that in Utah an officer's report that initiates the administrative revocation proceeding is a mandatory requirement of the statutes. In that case the Court found that the officer's report was not signed in the presence of a notary and was not a sworn report.

Therefore, the Court ruled that the document failed to satisfy the statutory requirement of §41-6-44.10, U.C.A., and the Driver License Division revocation proceedings based thereon were invalid and the revocation of the person's driving privileges was a legal nullity.

In the Utah decision of Helsten, the Court cited the Oregon case of Blackburn v. Motor Vehicles Division, Department of Transportation, 576 P.2d 1267 (Ct.App.Ore., 1978). In the Blackburn decision, the Oregon Court stated that the entire process toward suspension for refusal to take a breathalyzer test is initiated by the "sworn report". The Oregon court said that without this report the Oregon Motor Vehicle Division had no authority to commence the suspension process. The Court said the sworn report is in essence the basis of the Division's authority to consider suspension. The Court held that the sworn report is a jurisdictional requirement.

In Blackburn the Court went on to state that it would be unnecessary for the Court in the appeal to define the outer limits of the scope of the de novo review in the lower court of the Division's suspension order because of the irregularity of the jurisdictional document. In the case of Colman v. Schwendiman, 680 P.2d 29 (Utah, 1984), the Utah Supreme Court followed the decision in Helsten and held that the sworn report is required to show the validity of the revocation proceedings and that if the report is not sworn, the subsequent proceedings would be void. In Colman they found that the revocation

proceedings were a legal nullity because the officer did not follow the essential requirements to constitute the taking of an oath as required by the statute.

In matters where the District Court jurisdiction is based upon review of the action of an agency, even if the matter is on trial for a de novo review, the jurisdiction of the District Court is based upon whether or not the agency had subject matter jurisdiction. Berry v. Arizona State Land Department, 651 P.2d 853 (Ariz., 1982) The District Court in an appeal de novo has only the subject matter jurisdiction which could be asserted in the administrative hearing from which the appeal was taken. It is clear under the statute that if the report was not a sworn report or was not submitted within five days, the Driver License Division would not have jurisdiction to take away the plaintiff-appellant's driving privileges; therefore, the District Court would not have the jurisdiction to proceed over the subject matter at issue.

Therefore, the Driver License Division and the District Court did not have jurisdiction because no "sworn report" was timely filed.

## CONCLUSION

On the basis of the foregoing brief, the petitioner-appellant requests that the Court enter an order finding that the trial court erred in failing to grant the motion for directed verdict and that the petition should have been granted.

Dated this _____ day of December, 1987.

RANDALL GAITHER
Attorney for Plaintiff-Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid, to Bruce M. Hale, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this _____ day of December, 1987.