

2001

Phillip Edward Miller v. G. Barton Blackstock : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PHILLIP EDWARD MILLER,

Petitioner/Appellant/
Cross-Appellee,

v.

G. BARTON BLACKSTOCK, Bureau
Chief, Driver License Services, State of
Utah,

Respondent/Appellee/
Cross-Appellant.

APPELLANT'S OPENING BRIEF

Case No. 20010306-CA
(Lower Docket 000902138)
Priority No. 15

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE RONALD E. NEHRING

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ORAL ARGUMENT REQUESTED

FILED
Utah Court of Appeals

JUN 25 2001

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

PHILLIP EDWARD MILLER,

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ORAL ARGUMENT REQUESTED

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IN THE UTAH COURT OF APPEALS

<p>PHILLIP EDWARD MILLER,</p> <p>Petitioner/Appellant/ Cross-Appellee, v.</p> <p>G. BARTON BLACKSTOCK, Bureau Chief, Driver License Services, State of Utah,</p> <p>Respondent/Appellee/ Cross-Appellant.</p>	<p>APPELLANT’S OPENING BRIEF</p> <p>Case No. 20010306-CA (Lower Docket 000902138)</p>
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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Utah code Ann. Section 78-2a-3(b)(i), 1953, as amended. In this Appeal the Appellant challenges the legality of the district court’s ruling finding a violation of his due process and statutory rights but fashioning a remedy which only reduced the suspension of his driver’s license by sixty days. A copy of the order and the transcripts of the proceeding are attached hereto as Addendums A and B.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Issue: Did the District Court err in ruling that where there has been notice and a hearing, but prior to the hearing there has been an unlawful deprivation of an important interest, whether such a violation of due process rights is fatal to the revocation.

Standard of Review: The standard of review is the “correction of error” standard. See Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Ut. App. 1990). In addition, the issue concerns statutory interpretation, requiring application of the correctness standard. State v. Arviso, 993 P.2d 894 (Ut. App. 1999).

PRESERVATION OF THE ARGUMENT

The Appellant was represented by counsel at the trial de novo hearing held on December 21, 2000. During the hearing the argument was centered around the issue in this case. At the conclusion of the hearing the judge entered an order ruling in the defendant’s favor, finding that the defendant’s due process and statutory rights had been violated, and fashioning his own remedy of a sixty day reduction in the suspension period. See Addendum A at 5. After orally ruling from the bench, counsel for the Appellant specifically preserved his argument by objection to the Court’s ruling. See Addendum B at 29-30.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following statute and constitutional provision will be determinative of the issue on appeal:

Utah Code Ann. § 41-6-44.10(2)

(2)(a) If the person has been placed under arrest, has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1), and refuses to submit to any chemical test requested, the person shall be warned by the peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of the person's license to operate a motor vehicle.

(b) Following the warning under Subsection (2)(a), if the person does not immediately request that the chemical test or tests as offered by a peace officer be administered a peace officer shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle. When the officer served the immediate notice on behalf of the Driver License Division, he shall:

- (i) take the Utah license certificate or permit, if any, of the operator;
- (ii) issue a temporary license effective for only 29 days; and
- (iii) supply to the operator, on a form approved by the Driver License Division, basic information regarding how to obtain a hearing before the Driver License Division. . .

United States Constitution Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 21, 2000, the Appellant was arrested for Driving Under the Influence of Alcohol. At the time of his arrest, the police officer took the appellant's driver's license for refusing to submit to a breath test. Instead of issuing the appellant a temporary driver's license, the officer deprived the appellant of this important right without a hearing in violation of his Due Process and statutory rights. On December 21, 2000, after a hearing in the Driver's License Division, the Appellant had a trial de novo before the District Court. See Addendum B, Transcripts of Hearing. At that hearing argument was heard and the judge determined that the defendant's rights had been violated by the officer's actions. Addendum A at 5. The Court fashioned its own remedy and reduced the appellant's suspension period by only sixty days. Addendum A at 5.

A final written order was entered and signed by the Court on February 22, 2001. Addendum A. A notice of Appeal was filed on March 9, 2001. The Respondent filed a notice of cross-appeal on March 26, 2001.

STATEMENT OF THE FACTS

The Appellant was arrested for Driving Under the Influence of Alcohol on January 21, 2000, by Officer K. Olsen of the West Valley City Police Department. The officer, acting in behalf of the Respondent, seized the Appellant's driver's license and served the Appellant with a form approved by the Respondent, that notified the Appellant of his right to request a hearing for his driving privilege

within ten (10) days. Addendum A at 2. The form has boxes at the bottom where the officer, acting as an agent of the Respondent, can indicate with a mark that the form is either “VALID” or “NOT VALID” as a driver’s license for up to thirty days. Addendum A at 2-3. The officer marked that the form was “NOT VALID” as a temporary license for the reason that the Appellant refused to take a breath test requested by the officer. Addendum A at 3. The trial court concluded that the action by the officer violated Section 41-6-44.10(2)(b)(ii) 1953 as amended and also violated the Appellant’s due process rights and fashioned a remedy reducing the suspension period by sixty days. Addendum A at 5.

SUMMARY OF THE ARGUMENT

The lower court correctly ruled that the officer’s actions violated the statute and the defendant’s due process rights when the officer deprived the appellant of his driver license privilege without a hearing. The lower court incorrectly ruled that the violation was not fatal to the revocation process and instead fashioned a remedy reducing the suspension period by sixty days.

The ruling of the District Court that the violation of the Appellant’s rights was not fatal to the revocation process has at least two ramifications. First, there would be little deterrent effect to the officers if the driver’s license could be suspended even after their improper conduct. Second, the remedy would be limited to only those who could afford an attorney in the civil matter and who could afford to pursue a trial de novo in the District Court.

ARGUMENT

THE LOWER COURT ERRED IN REFUSING TO FIND THAT THE DUE PROCESS VIOLATION BY THE POLICE OFFICER WAS FATAL TO THE DRIVER'S LICENSE REVOCATION PROCESS.

Discussion

The United States Supreme court and the Utah appellate courts have recognized that a defendant has certain due process rights in connection with the right to possess a driver's license. In Bell v. Burson, 402 U.S. 535 (1971), the United States Supreme Court stated that “[o]nce licenses are issued, as in petitioner’s case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural Due Process required by the Fourteenth Amendment.” Id. at 539; see also Amendment 14 United States Constitution. The Court went on to state that “[t]his is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a ‘right’ or a ‘privilege.’” Id. (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

In Ballard v. State, Motor Vehicle Div., Licensing Dep’t., 595 P.2d 1302, 1304 (Utah 1979), the Utah Supreme Court held that “the right to drive is a

valuable right or privilege and it cannot be taken away without procedural due process.” More recently, the Utah Supreme Court also stated that “[a]t a minimum, timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness.” In re Worthen, 926 P.2d 853, 876 (Utah 1996).

The driver’s license statute at issue in this case recognizes these safeguards and provides for notice in the statute. See Utah code Ann. § 41-6-44.10(2). The statute itself does not explicitly state a remedy for a violation of the due process rights it protects. The Appellant believes that instead of the sixty day reduction in the suspension period ordered by the District Court, the remedy should have been a finding that the violation of the statute was fatal to the revocation process.

The facts of this case are that the officer did not issue the Appellant a temporary license and instead revoked the Appellant’s license without any due process at all. In this case the language of the statute is mandatory using the word “shall” when it comes to issuing a temporary license. Utah Code Ann. 41-6-44.10(2)(b)(ii). In interpreting the very same statute this Court has stated that the term “‘shall’ is usually presumed mandatory and has been interpreted as such in this and other jurisdictions.” Moore v. Schwendiman, 750 P.2d 204, 207 (Ut. App. 1988). The mandatory language makes a violation of the “shall” requirement a violation of the statute.

The violation of the statute is fatal to the revocation process. In a recent case this Court affirmed a lower court holding finding a violation of this very same

statute to be fatal to the revocation process. In Mabus v. Blackstock, 994 P.2d 1272 (Ut. App. 1999), the issue was the failure of the police officer to inform the petitioner of the officer's intent to revoke the petitioner's driver's license and the manner in which the petitioner could obtain a hearing as required in the same statute at issue here only instead of subsection 2(b)(ii) being at issue it was subsection 2(b)(iii). Id.; see also Utah Code Ann. 41-6-44.10(2)(b).

In Mabus, the Court held that the "failure rendered the administrative revocation of appellant's license and the derivative district court review void and the revocation a legal nullity." 994 P.2d at 1275. In comparing the holding in Mabus, to this case the remedy should be the same. The deprivation of the petitioner's right and privilege to drive without first providing the right to have a hearing violates the statute and any subsequent revocation is a legal nullity. In Moore v. Schwendiman, the Court held that a violation of this same statute at issue in this case, by failing to file a police report within five days of arrest, resulted in a finding that the revocation of the driver's license that followed was a legal nullity and the district court review of the revocation was void. 750 P.2d at 207.

The officer in this case, acting as an agent of the Driver's License Division, violated the appellant's statutory rights. Although the statute does not expressly state a remedy, this Court's prior cases support a finding that the subsequent revocation was a legal nullity as the appropriate remedy. See Mabus v. Blackstock, 994 P.2d 1272; Moore v. Schwendiman; 750 P.2d 204.

There are many reasons for finding that the violation of the statutory


requirements by the officer should result in a finding that any subsequent revocation is a legal nullity. If there is no remedy for a violation of this type, or if the remedy still allows for revocation but only allows for a time period reduction, then the Driver's License Division does not have any impetus to properly train its agents (the police officers). There would be little to keep officers from committing this same violation on other drivers, knowing that there is no repercussion to the violation so long as a hearing is made available after the fact. Also, and perhaps most importantly, there are equal protection issues as only those drivers who could afford to challenge their illegal revocation, with both a hearing and a costly trial de novo in the District Court could obtain a remedy for the violation.¹ This is fundamentally unfair to those that cannot afford such services as they would never be able to receive a remedy for the officer's improper actions. The officer's actions were improper. The officer acted as an agent for the Driver License Division and any action that followed the improper conduct should be held to be a legal nullity. The district court's ruling finding a violation but simply reducing the period by only sixty days was improper as the court should have ruled that the violation was fatal to the revocation process.

¹ The cost includes the hiring of an attorney to go to the revocation hearing, a filing fee in the District Court for the trial de novo and the costs of an attorney in the District Court. There would also be additional costs in time away from work and possible child care or many other related expenses.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that this Court reverse the lower court as to the remedy it fashioned after correctly finding a Due Process violation. The Appellant asks this Court to rule that the proper remedy is a finding that the violation of the statute by the police officer is fatal to the revocation process and any suspension of the Appellant's driver's license was improper.

RESPECTFULLY SUBMITTED this 25th day of June, 2001.



Benjamin A. Hamilton
Attorney for Appellant

CERTIFICATE OF SERVICE

I Benjamin A. Hamilton, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, Fifth Floor, 140230, Salt Lake City, Utah 84114-0230 and 2 copies to Rebecca Waldron at the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 25th day of June 2001.



Benjamin A. Hamilton

ADDENDUM A
DISTRICT COURT ORDER

and Conclusions of Law and Order.

FINDING OF FACTS

1. On January 21, 2000, the Petitioner, PHILLIP EDWARD MILLER, (hereinafter the "Petitioner") was arrested for Driving Under the Influence in violation of Utah Code Ann. § 41-6-44, by Officer K. Olsen of the West Valley City Police Department.
2. After the arrest, the Petitioner was transported to the West Valley City Police Department and was read the chemical test admonitions verbatim from the DUI Report Form. The Petitioner was requested to submit to a chemical test to measure the alcohol content of his breath. Officer Olsen, acting in behalf of the Respondent, read The Petitioner the refusal admonition and the Petitioner refused to submit to the chemical test.
3. The arresting officer seized the Petitioner's driver's license and, acting as an agent of the Respondent, personally served the Petitioner a form,¹ approved by the Respondent, that notified the Petitioner of his right to a hearing for his driving privileges if requested within ten (10) days of his arrest.
4. Pursuant to the notice, the Petitioner requested a hearing with the Driver License Division and the hearing was held on February 15, 2000. As a result of the hearing, the Petitioner's driving privileges were revoked for one (1) year for his refusal to submit to a chemical test after an arrest for Driving Under the Influence.
5. The above mentioned form (Exhibit 1) has boxes at the bottom where the officer, acting as an agent of the respondent can mark a box indicating that the form is either "VALID" or "NOT VALID" as a driver's license for up to thirty (30) days.

¹ Petitioner's Exhibit 1.

6. After confiscating the Petitioner's driver's license, Officer Olsen checked the box on the form indicating that the form was "NOT VALID" as a temporary license. The reason stated by the officer for not issuing a temporary license was the Petitioner's refusal to take the requested breath test.

CONCLUSIONS OF LAW

Section 41-6-44.10 Utah Code Annotated (1953 as amended) requires that when a person refuses to submit to a chemical test after an arrest for Driving Under the Influence, the arresting officer

shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Divisions intention to revoke the person's privilege or license to operate a motor vehicle. When the officer serves the immediate notice on behalf of the Driver License Division, he shall:

- (i) take the Utah license certificate or permit, if any, of the operator;
- (ii) *issue a temporary license effective for only 29 days;* and
- (iii) supply to the operator, on a form approved by the Driver License Division, basic information regarding how to obtain a hearing before the Driver License Division.

Utah Code Ann. § 41-6-44.10(2)(b) (1953 as amended)(emphasis added).

The officer, acting on behalf of the Respondent in this case, seized the Petitioner's license and failed to issue a temporary license to the Petitioner. The deprivation of the Petitioner's license violated his statutory and due process rights. The Petitioner was advised of his right to a hearing to challenge the propriety of the deprivation of his driving privilege. The Petitioner exercised that right. The hearing was held and the Respondent revoked the Petitioner's driving privilege for one year. The integrity of the hearing was not compromised by the unlawful suspension of the Petitioner's driving privilege between the arrest of the Petitioner and the hearing.

This court concludes that the nature of the problem presented here is not a systemic

problem in law enforcement but is rather a problem of an isolated nature and one occurring only from time to time infrequently. Therefore, it is this court's responsibility to fashion an appropriate remedy for the violations to the Petitioner's statutory and due process rights. The court has considerable discretion in fashioning a remedy to this type of due process violation. The Petitioner argues that the United States Supreme Court, in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971), held that due process requires notice and a hearing before there can be a deprivation of the interest here involved.

The precise question presented in this case is - where there has been notice and a hearing, but prior to the hearing there has been an unlawful deprivation of an important interest - does the unlawful deprivation of one's driving interest restrict the Driver License Division from taking any further authority to effect a deprivation? Or rather, is the Respondent in this case precluded from revoking the Petitioner's license based on the previous violation of the Petitioner's statutory and due process rights? The answer is no. The Respondent may properly proceed with the process which might result in the further deprivation of the Petitioner's rights. The Respondent's actions, however, are subject to the fashioning of a remedy by the District Court.

The court hereby concludes that the revocation of the Petitioner's driving privilege was appropriate. The court also finds that, given the facts and circumstances of this case, the Petitioner's driving privilege should be reinstated by the Respondent Sixty (60) days prior to the One (1) year revocation previously ordered by the Respondent.

ORDER


Based on the foregoing,


IT IS HEREBY ORDERED that the revocation of the Petitioner's driving privilege be upheld with the modification that the revocation be for a period of One (1) year, less Sixty (60) days to remedy the Petitioner for the violation which occurred to his statutory and due process rights

IT IS FURTHER ORDERED that the revocation be stayed pending an appeal to the Utah Court of Appeals of this Order

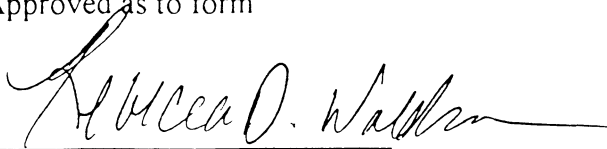
Dated this 22, day of February, 2001

By the court


RONALD E. NEARING
District Court Judge




Approved as to form

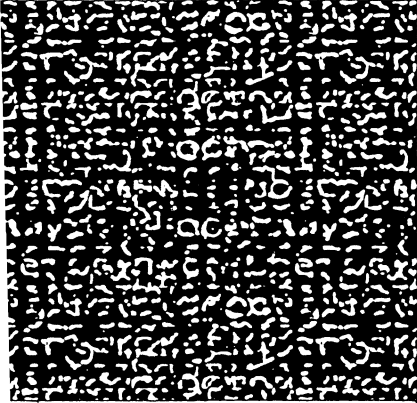

REBECCA D WALDRON
Attorney for Respondent

MAILING CERTIFICATE

I hereby certify that on the 20th day of February, 2000, a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order was mailed to the following

Rebecca Waldron
Assistant Attorney General
P O Box 140857
160 East 300 South
Salt Lake City, Utah 84114-1857



DUI SUMMONS AND CITATION	SUING ENFORCEMENT AGENCY		CASE NO.	CITATION NO. D318373	
	STATE OF UTAH		NAME (Last) (First) (Middle)		DOB
JNTY OF	ADDRESS (City) (State)		Zip		
Y OF	Driver License No.	Class	Expires	State	Restriction
HE DEFENDANT IS HEREBY VEN NOTICE TO APPEAR IN:	Social Security No.		Motorcycle <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
	Height	Weight	Eyes	Sex	Vehicle License No.
OF	Vehicle Make		Year	Color	Accident
AT	Vehicle Type		Comm. Vehicle	Haz. Material	Direction of Travel
an (5) nor more than (14) days after issuance tion.	WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN		SIGNATURE		
	THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:		ON THE _____ DAY OF _____ 19____ MILITARY TIME _____		
	LOCATION: _____ MILE POST NO. _____		VIOLATION(S): _____		
	I CERTIFY THAT A COPY OF THIS SUMMONS AND CITATION WAS DULY SERVED UPON THE DEFENDANT ACCORDING TO LAW ON THE ABOVE DATE AND I KNOW OR BELIEVE AND SO ALLEGE THAT THE ABOVE NAMED DEFENDANT DID COMMIT THE OFFENSE HEREIN SET FORTH CONTRARY TO LAW. I FURTHER CERTIFY THAT THE COURT TO WHICH THE DEFENDANT HAS BEEN DIRECTED TO APPEAR IS THE PROPER COURT PURSUANT TO SECTION 77-7-19, U.C.A.		OFFICER _____ BADGE NO. _____		
	COMPLAINANT _____		DATE OF CITATION _____		
	DEFENDANT COPY		DATE SENT TO DLD	DOCKET NO.	

PENGAD-Bayonne, N.J.

**PLAINTIFF'S
EXHIBIT**

READ CAREFULLY

on is not an information and will not be used as an information without your consent. If an information is filed you will be provided a copy by the court. T appear in court on or before the time set in this citation. IF YOU FAIL TO APPEAR AN INFORMATION WILL BE FILED AND THE COURT MAY ISSUE A T FOR YOUR ARREST.

NOTICE OF INTENT TO DENY, SUSPEND, REVOKE, OR DISQUALIFY

HEREBY NOTIFIED THAT THIRTY (30) DAYS FROM THE DATE OF THIS NOTICE YOUR DRIVING PRIVILEGE IN THE STATE OF UTAH WILL BE:

(ARREST UNDER 41-6-44 OR 41-6-44.6 UCA) suspended pursuant to 53-3-223 UCA for ninety (90) days for a first offense or for one (1) year for subsequent offenses. In addition, commercial drivers in commercial vehicles, your commercial privilege will be disqualified for one (1) year for a first offense and a minimum of ten (10) years for a subsequent offense.

ARREST UNDER 32A-12-209 UCA - UNDER 21 YEARS OF AGE) denied pursuant to 53-3-231 UCA for ninety (90) days for a first offense, or suspended for one (1) year for a subsequent offense within three (3) years, or denied for one (1) year or until age seventeen (17), whichever is longer, if you have not been issued an original operator license. COMPLETION OF AUTHORIZED SUBSTANCE ABUSE PROGRAM REQUIRED FOR REINSTATEMENT.

REFUSAL TO SUBMIT UNDER 41-6-44.10 UCA) revoked for one (1) year for a first refusal to submit to a chemical test or for eighteen (18) months if it is a second or subsequent license withdrawal for an alcohol or drug related driving offense.

COMMERCIAL DISQUALIFICATION 53-3-418 UCA) disqualified, for driving a commercial vehicle, pursuant to 53-3-414 UCA for one (1) year for a first offense and a minimum of ten (10) years for subsequent offense. If you refuse the chemical test the same sanctions apply.

HEARING: This Division will grant you opportunity for a hearing only if you submit a **WRITTEN REQUEST** within **TEN (10) DAYS** of your arrest to Driver License) Box 30560, Salt Lake City, Utah 84130-0560 (ATTN: DUI Section). Upon your timely request you will be notified of the time and place of the hearing. The hearing a purpose of granting a limited license but only to determine if your driving privilege is to be denied, suspended, revoked or disqualified. The administrative hearing iture and does not satisfy the requirement for you to appear in court when required. FAILURE TO REQUEST A HEARING OR FAILURE TO APPEAR FOR A may result in your driving privilege being denied, suspended, revoked or disqualified.

NOT VALID as a temporary license for up to thirty (30) days from the date of this notice

ADDENDUM B
TRANSCRIPTS - TRIAL DE NOVO HEARING

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IN THE THIRD DISTRICT COURT, SALT LAKE CITY
SALT LAKE COUNTY, STATE OF UTAH

-o0o-

PHILLIP EDWARD MILLER,)
)
Plaintiff,) Case No. 000902138
)
vs.) TRIAL
)
G. BARTON BLACKSTOCK,) (Videotape Proceedings)
)
Defendant.)

-o0o-

BE IT REMEMBERED that on the 21st day of
December, 2000, commencing at the hour of 9:29 a.m., the
above-entitled matter came on for hearing before the
HONORABLE RONALD E. NEHRING, sitting as Judge in the
above-named Court for the purpose of this cause, and that
the following videotape proceedings were had.

-o0o-

A P P E A R A N C E S

For the Plaintiff: BENJAMIN A. HAMILTON
Attorney at Law
356 East 900 South 84111
Salt Lake City, Utah

For the Defendant: REBECCA D. WALDRON
Assistant Attorney General
Office of the Attorney General
160 East 300 South
Fifth Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857

COPY



1 PROCEEDINGS

2
3 THE COURT: Let's see, did I take that file or did
4 you?

5 (Inaudible)

6 THE COURT: Let's turn to Miller versus Blackstock,
7 000902138.

8 Counsel, would you please state your appearances?

9 MS. WALDRON: Rebecca Waldron for the respondent.

10 MR. HAMILTON: Ben Hamilton for the petitioner,
11 your Honor.

12 THE COURT: It looks like Mr. Hamilton just handed
13 Ms. Waldron the same case that Mr. Hamilton just gave to me
14 and I--

15 MR. HAMILTON: What I just handed her was, she
16 asked to see a copy of the code.

17 THE COURT: Uh huh. I haven't read--

18 MS. WALDRON: But he previously just handed me a
19 copy of the same case he just handed you.

20 THE COURT: That I haven't read.

21 MR. HAMILTON: Would you like to take a recess
22 before we begin this? We've narrowed the issues
23 significantly and instead of looking at probable cause and
24 having to put on the witness to establish that the officer
25 had sufficient probable cause to make the arrest and perform

1 the field sobriety tests, we're foregoing that and focusing
2 instead on just the one issue.

3 And if the Court would like to hear the issue and
4 then take a recess to read that case, (inaudible)

5 THE COURT: I'm going to accept that invitation.
6 Yeah, I'd like to have you kinda give me some context of the
7 case, then I'll read it and then I may come back and pick it
8 up again.

9 MR. HAMILTON: Sure.

10 THE COURT: Are you comfortable with this, Ms.
11 Waldron?

12 MS. WALDRON: Yeah, I am. My--I'm fine. We had
13 talked--okay. We had talked about it and this is continuing,
14 we had talked about it, you know, about three months ago
15 (inaudible) but the issue is, is usually on these notices,
16 the officer will check the license--that piece of paper is
17 valid for a period of 30 days until the hearing. It didn't
18 happen in this case and the issue is, is that (inaudible) the
19 Driver's License ability to suspend or revoke the license.

20 And I'm right now looking at 41-4-6-44.10. I
21 wonder--you wouldn't happen to have the 53-3 Section, would
22 you?

23 THE COURT: What section should I be looking at?

24 MR. HAMILTON: The relevant section here, your
25 Honor, is--Mr. Miller's driver's license was suspended under

1 41-6-44.10. And--

2 MS. WALDRON: There's two--there's two code
3 sections. That one, and then the 53-3-223.

4 MR. HAMILTON: And the Title 53 section deals with
5 suspension of driver's licenses on what's called per se
6 suspension, based on the probable cause to have arrested the
7 individual in the first place for DUI. And--

8 MS. WALDRON: There should be a similar one under
9 the refusal.

10 MR. HAMILTON: And Title 41, the section under
11 Title 41 deals with whether the individual refused to blow in
12 the machine and the suspension based on that and that's the
13 issue before the Court today because that's what Mr. Miller's
14 license was suspended on.

15 If you'll notice, in the citation--

16 THE COURT: Well, let me make sure I understand.
17 So, your contention is that Title 53 isn't relevant 'cause
18 we're not fighting the battle over probable cause?

19 MR. HAMILTON: Right. But it's virtually identical
20 in terms of what the officer's duties are.

21 THE COURT: All right.

22 MR. HAMILTON: So, it really doesn't matter which
23 one we go off because the language is identical, but I think
24 we should be focusing on the proper section--

25 THE COURT: Which is the 41-6-44.

1 MR. HAMILTON: 44.10, that's right.

2 THE COURT: 44.10.

3 MR. HAMILTON: And--and last--and we--and the
4 petitioner would move at this point to have admitted as
5 evidence Petitioner's Exhibit 1, which is a copy of the
6 citation and form published by the Driver's License Division
7 that is required to be handed to my client and served before
8 any suspension can be done.

9 And you'll notice that the--

10 THE COURT: Well, just a second.

11 Ms. Waldron--

12 MS. WALDRON: Yes.

13 THE COURT: --any objection to Exhibit 1?

14 MS. WALDRON: No objection, your Honor.

15 THE COURT: Exhibit 1's received.

16 MR. HAMILTON: You'll notice at the bottom of that
17 form, it gives the officer the opportunity to check one of
18 two boxes, one box saying, this is valid and the other
19 saying, not valid; has a temporary license for up to 30 days
20 from the date of this notice.

21 THE COURT: Uh huh.

22 MR. HAMILTON: The officer checked that this is not
23 a valid license and I think we can stipulate that the officer
24 confiscated the Utah license from Mr. Miller; is that fair to
25 say?

1 MR. MILLER: Yes.

2 MR. HAMILTON: So, I believe we have a stipulation
3 from the Driver's License Division at this point, that Mr.
4 Miller's license was taken, his physical license, the
5 certificate. He was issued instead this driver--this
6 citation, which is also--should be a permit, assuming he had
7 a valid driver's license and that, we would also ask for a
8 stipulation.

9 THE COURT: All right. So, let me make sure I
10 understand, Mr. Hamilton.

11 The valid/not valid option is present to cover
12 those circumstances in which the person cited does not have a
13 valid operator's license at the time of the arrest?

14 MR. HAMILTON: That's correct.

15 THE COURT: So that there isn't a de facto grant of
16 a--of a temporary license to someone who didn't have one in
17 the first place; is that--

18 MR. HAMILTON: Yes. So, the officer, on--acting--
19 acting on behalf of the Driver's License Division isn't
20 taking authority that he doesn't have--

21 THE COURT: That he doesn't have.

22 MR. HAMILTON: --to give somebody a license when
23 they don't have one in the first place.

24 THE COURT: So, the arresting officer makes an
25 initial determination as to the validity of the driver's

1 license status and based on that determination, checks one
2 box or the other; is that correct?

3 MR. HAMILTON: That's correct.

4 THE COURT: Okay.

5 MR. HAMILTON: And that was in fact done here, but
6 instead of checking that this is a valid license, temporary
7 license, the officer checked that this is not a valid
8 temporary license for up to 30 days.

9 The statute--the reason for the 30-day limitation
10 is because the statute, in meeting due process grounds, has
11 set forth that the hearing must occur on whether they're
12 going to revoke or suspend this individual's license within
13 the 30-day period.

14 THE COURT: Uh huh.

15 MR. HAMILTON: And so--so we're not taking away the
16 individual's driving privileges without affording him the due
17 process of having notice and right to a hearing--

18 THE COURT: Uh huh.

19 MR. HAMILTON: --it's required that the person be
20 granted this temporary driving privilege.

21 THE COURT: Got it.

22 MR. HAMILTON: The--the officer checked for his
23 reason for not issuing a temporary license, at the bottom of
24 the citation, was the refusal of the test.

25 In the refusal statute, which is the 41-6-44.10

1 statute, under Subsection (2)(b)--these are the requirements
2 that the officer is supposed to meet. Following one, under
3 Subsection (a), if the person does not immediately request
4 that the chemical test or tests as offered by a peace officer
5 be administered, a peace officer shall serve on the person on
6 behalf of the Driver's License Division immediate notice of
7 the Driver's License Division's intention to revoke the
8 person's privilege or license to operate a motor vehicle.

9 Now, that was done. On behalf of the Driver's
10 License Division, the officer submitted to Mr. Miller this
11 citation, which is the notice approved of by the Driver's
12 License Division and at the bottom, where it--in bold type,
13 in small type but in bold type, it affords Mr. Miller the
14 notice of his right to a hearing.

15 THE COURT: Uh huh.

16 MR. HAMILTON: So that was complied with.

17 When the officer serves the immediate notice on
18 behalf of the Driver's License Division, he shall do the
19 following:

20 (1) Take the Utah license, certificate or permit,
21 if any, of the operator--which was done;

22 (2) Issue a temporary license effective for only
23 29 days, which was not done and that's our contention; and

24 (3) Supply the operator on a form approved by the
25 Driver's License Division basic information regarding how to

1 request a hearing, which was done; and a citation issued by
2 peace officer may, if approved as to form by the Driver's
3 License Division, serve as a temporary license and that is
4 what was provided. This form, which the Court has before it
5 as Petitioner's Exhibit 1, is the form approved and the
6 officer violated 41-6-41.10, Subsection (2)(b)(ii).

7 THE COURT: Okay. Now, I'm going to ask you what
8 you are going to anticipate from me as the obvious question.
9 I assume that I entered a stay here?

10 MR. HAMILTON: You did.

11 THE COURT: Okay. And so Mr. Miller's driving
12 privileges have been intact to today?

13 MR. HAMILTON: That's not correct.

14 THE COURT: That's not correct?

15 MR. HAMILTON: No.

16 MS. WALDRON: I think he has--

17 MR. HAMILTON: (Inaudible) is--

18 MS. WALDRON: I--I--I was counting it up. He was
19 arrested on January 22nd, something like that, and the stay
20 was granted on March something; so if it was suspended, it--
21 if you count the--

22 MR. HAMILTON: (Inaudible) arrest until we got it
23 through the Driver's License hearing which was--ruled against
24 him--

25 THE COURT: Yeah.

1 MR. HAMILTON: So, he didn't have a license from
2 the time he got arrested through the hearing at the Driver's
3 License Division, which he was supposed to have through that
4 time period and then when they took action to take away his
5 license and revoked his driving privileges for a year, we
6 appealed it. It continued to be lost until the State, or the
7 Driver's License Division requested a continuance--

8 THE COURT: Okay.

9 MS. WALDRON: Well, actually, I think--

10 MR. HAMILTON: --at that time--

11 MS. WALDRON: I'm looking at the file.

12 THE COURT: Well, but the--

13 MS. WALDRON: The stay was signed on March 22nd.

14 THE COURT: Why don't we--why isn't all this moot
15 except for whatever deprivation of Mr. Miller's rights might
16 be proven occurred during that interval of time between the
17 arrest and the administrative hearing?

18 MS. WALDRON: See, that's our argument is that
19 whatever, you know, they had the--the hearing was basically a
20 post-deprivation hearing and it was determined at that point
21 that there was enough--that it made--met the requirements to
22 suspend or revoke his license for a year--

23 THE COURT: Well, Ms. Waldron, what I want to hear
24 from is--actually, that question was directed to Mr. Hamilton
25 since I kind of anticipated that you'd be--

1 MS. WALDRON: Yes, (inaudible) your Honor--

2 THE COURT: --(inaudible) this one--

3 MR. HAMILTON: And that's--that's why I want the
4 Court to read the United States Supreme Court case dealing
5 with a similar issue, dealing with driver's licenses but a
6 different type of issue.

7 The issue in the case that's been presented which
8 is Bell vs. Berson, is whether an individual who was in an
9 accident that was uninsured is entitled to have a hearing
10 before his license is suspended. In Georgia, they didn't
11 have the opportunity to even have a hearing.

12 It's not right on point, but it is persuasive in
13 that the court held that where there is a due process
14 violation such as this, when you take somebody's privilege or
15 right that they have, they've got an interest in this
16 driving, this driving privilege and when you take that away
17 from the driving--by the Driver's License taking it away by
18 having their agent, the officer, issue a form and violate my
19 client's, not only the statute indicating what the officer
20 must do on behalf of the Driver's License Division, but as a
21 result of that, also violating his due process rights to not
22 have these privileges taken away unilaterally without first
23 having a hearing on that.

24 THE COURT: Okay. But here's--here's the--the
25 central question, as near as I can tell: Did the deprivation

1 of his--of his due process rights, in other words, the sus--
2 unilateral suspension in violation of the statute, compromise
3 the integrity of the ultimate hearing?

4 MR. HAMILTON: Your Honor, we feel that--that that
5 is moot, that doesn't matter because it was taken away
6 without him ever having had the chance for the hearing.

7 THE COURT: But just a second.

8 MR. HAMILTON: I understand your question. I
9 understand your question and I think at that point, what you
10 and I think--

11 THE COURT: We're (inaudible) past one another,
12 though.

13 MR. HAMILTON: No. But I--I agree that the Court
14 is--what the Court sees as the issue is: No harm, no foul
15 because he had the hearing and the Driver's License Division
16 took it away based on the hearing. But the Driver's License
17 Division, through this officer, in fact, took it away before
18 the hearing.

19 THE COURT: Okay. Now, we're going to--we're going
20 to come to that piece of the puzzle, but first, it would seem
21 to me that you would have a stronger due process claim if
22 there was a connection between the absence of driving
23 privilege and what happened at the hearing itself. For
24 example, inability to retain counsel or act--or this caused
25 kind of undue influence, inability to gather evidence,

1 something that--that undercuts the legitimacy, the integrity
2 of the hearing itself.

3 MR. HAMILTON: I think what the Court is saying is
4 if there had been some further prejudice against Mr. Miller,
5 that the petitioner's argument would then be strengthened.

6 THE COURT: If it would have affected the--the
7 hearing.

8 Now, let me see if I can--if I can probe a little
9 bit what your point is. And let--first, let me see if I--
10 make sure I understand it, and that is, for the purposes of
11 argument, we'll spot you, Judge, the conclusion that the
12 hearing, one, occurred and was--and two, was an appropriately
13 conducted hearing. But that doesn't matter because there is
14 an independent issue concerning the deprivation of his
15 driving privileges in violation of, one, the statute; two,
16 the Constitution.

17 MR. HAMILTON: That's correct.

18 THE COURT: Okay. So, then that contention raises,
19 among others, the following issue: And that is, first, what
20 remedy do you seek?

21 MR. HAMILTON: The remedy we seek is an order
22 depriving the Driver's License Division the opportunity of
23 taking away his license based on this answer.

24 THE COURT: Because?

25 MR. HAMILTON: Because his due process rights were

1 violated at the get-go. Just as in a criminal case, when
2 your due process rights are violated, the evidence can't come
3 in. And what we're asking for is, this due process right was
4 violated because he was never afforded notice in a hearing
5 before--

6 THE COURT: Uh huh. All right. Mr. Ham--

7 MR. HAMILTON: --driver's license revocation.

8 THE COURT: What's the--what--what would be the
9 result under the following facts? The officer gives Mr.
10 Miller Exhibit 1, gets back to the station, looks it over,
11 light goes on, Oh, my God, I've given him the wrong form,
12 I've checked the wrong box. He then causes a corrected
13 report to go to Mr. Miller. And for my hypothetical, let's
14 say that that occurs three days later.

15 Do you still win? He's been deprived of his right
16 for three days, does that deprive the--the Driver's License
17 Division of proceeding with the hearing?

18 MR. HAMILTON: I think it should but that's not the
19 facts before us and we're only here to decide what facts are
20 before us.

21 THE COURT: I understand, but the principle is to
22 what degree must an individual's driving privileges be
23 unlawfully deprived before that deprivation eliminates the
24 opportunity of the Driver's License Division to revoke the
25 license pursuant to the statute?

1 MR. HAMILTON: Well, I--I would put to the Court
2 that as soon as this individual leaves the custody of the
3 officer and he leaves the custody of that officer who's
4 acting on behalf of the Driver's License Division without a
5 valid driving privilege, which he entered into the custody of
6 that actor, that state actor with, then there's been a
7 violation of the statute and the statute is written to
8 comport with due process, Constitutional due process
9 requirements that if a state actor is going to take away the
10 right or privilege of an individual citizen, they have to do
11 it according to due process requirements; that is, they have
12 to give notice and the right to a hearing previous to the
13 driver's license suspension or revocation.

14 THE COURT: Uh huh. Uh huh. Why can't I fashion
15 an equitable remedy which penalizes the Driver's License
16 Division for the, what turns out to be as a practical matter,
17 a premature deprivation of Mr. Miller's driving privileges by
18 ordering reinstatement of his driver--driving privileges 30
19 days in advance of when it would otherwise be available?

20 MR. HAMILTON: Well, your Honor, if he was without
21 his driving privileges during which--during the time when he
22 should not have been without them, he went all the way
23 through, without having his driving privileges and the issue
24 is not trying to fashion some kind of equitable remedy that
25 penalizes the Driver's License Division, that's not what

1 we're interested in. What we're interested in is a remedy
2 that puts Mr. Miller back in the position that he would have
3 been, not just had the officer complied, but to show the
4 Driver's License Division: You violate somebody's
5 Constitutional due process rights and there will be no
6 authority for you to take action against that person's
7 privilege.

8 And here's why, because if--and this is what the
9 Driver's License Division is currently doing--if this
10 Plaintiff's Exhibit 1 had never been served upon Mr. Miller,
11 that would have been a violation of the same due process
12 rights because he would never have had the notice of a
13 hearing or right to a hearing under his due process
14 Constitutional rights.

15 When that happens, the Driver's License Division
16 says, Well, okay, we are then precluded from taking action.
17 And rightfully so. And here, we have the same type of due
18 process violation, taking away the privilege before hearing.

19 THE COURT: Well, but in the first instance, there
20 is a complete deprivation of the right to notice and hearing.
21 The arrestee has no knowledge that the arrestee has any
22 opportunity to challenge the loss of license.

23 In--in this case, at least there is a communication
24 to the arrestee that the arrestee has a right to challenge
25 the--the suspension of the license.

1 MR. HAMILTON: Then I'd like to change my
2 hypothetical. Let's assume, because the statute requires
3 that the individual submit the request for a hearing within
4 ten days of getting the ticket or the notice provided by the
5 Driver's License Division. If the officer retained that
6 citation and notice from the Driver's License Division,
7 forgetting to serve it upon the individual and served him
8 five days later, still providing ample time for Mr. Miller to
9 then make his request within the ten-day period, there's
10 still such a violation that the Driver's License Division
11 would not take the driving privilege.

12 THE COURT: But that goes to the point that I
13 raised first and that is, are we talking about a violation
14 that compromises the integrity of the hearing? And I agree
15 with you that--that shortening the statutory notice period is
16 a--a substantial violation because it does precisely that.
17 It makes less likely the arrestee's opportunity or that he'll
18 exercise the opportunity to request a hearing. Ten days is
19 ten days. Ten days has been determined to be the reasonable
20 time to request a hearing.

21 And if there's a shortening of that period due to a
22 lapse in the--in the--in law enforcement's procedure, in my
23 opinion, that's something that compromises the right to a
24 hearing, the integrity of the hearing. This--

25 MR. HAMILTON: I feel that the Court is saying--I'm

1 sorry.

2 THE COURT: Oh. Go ahead. I'm done.

3 MR. HAMILTON: (Inaudible)

4 THE COURT: You said you understood it. That's
5 good enough for me so I'm going to--

6 MR. HAMILTON: Okay. I understand what the Court
7 is saying; however, the real issue is whether or not due
8 process rights of the individual have been violated. That's
9 all we need to look at. If there's been a due process
10 violation, then the actor, the State, or a subsidiary
11 thereof, is precluded from taking action.

12 THE COURT: But we have examples, you know what
13 really comes to mind is probably the biggest example I can
14 think of, is Miranda, where the United States Supreme Court,
15 when confronted with a, what it determined to be a huge
16 pandemic problem involving due process, fashioned a remedy
17 that really wasn't--well, that included possibilities of the
18 death penalty in the sense of the exclusionary rule; but was
19 clearly attempting, in my view, to kind of fashion a remedy
20 consistent with the level of egregiousness of the violation
21 of the Constitution.

22 Why shouldn't I do that here?

23 MR. HAMILTON: Because the United States Supreme
24 Court in this case, even though the facts are different and
25 if the Court will turn with me maybe--

1 THE COURT: Did I bring that case in with me or did
2 I decide I was going to take a recess and read it out there?

3 THE CLERK: It should be in the file.

4 THE COURT: It is. Okay.

5 Mr. Hamilton, where do you want me to turn?

6 MR. HAMILTON: Okay. My computer printed this up
7 as Page 5. It's actually Page 539 of the opinion.

8 THE COURT: Got it.

9 MR. HAMILTON: At the very bottom, the last two
10 sentences, it says: Suspension of issued licenses does
11 involve state action that adjudicates important interests of
12 the licensees. And that's what we're dealing with here. In
13 such cases, the licenses are not to be taken away without
14 that procedural due process required by the Fourteenth
15 Amendment.

16 And then in turning a couple more pages to my Page
17 7, Page 542 under the U.S. Reporter. Towards the bottom of
18 that paragraph that indi--that starts with Key Note 7 or Head
19 Note 7.

20 THE COURT: Got it.

21 MR. HAMILTON: Right where Foot Note 5 begins, in
22 the--in the--in the paragraph. Due process requires that
23 when a state seeks to terminate an interest such as that
24 herein involved, and that was the driving privilege, it must
25 afford notice and opportunity for hearing appropriate to the

1 nature of the case before the termination becomes effective.

2 Here, he was given notice and right to a hearing,
3 but that suspension or revocation became effective before he
4 was provided the opportunity for the hearing. They got it
5 backwards. And that's what happened here, they got it
6 backwards, they took away the privilege, then gave the
7 hearing.

8 And the U.S. Supreme Court says no, such a
9 privilege as this, someone's driving privilege, if you're
10 going to take that away, State, first give them the hearing,
11 then you can take it away. Not the other way around.

12 And so we're saying that based on this case and Mr.
13 Miller's due process rights that were here violated and I
14 think that's pretty apparent, and there was a violation of
15 the statute as well and the statute was drafted to afford due
16 process rights under the Constitution. That's the reason it
17 was drafted the way it was so that there would not be a
18 suspension prior to the hearing.

19 And in fact, Driver's License Division, if you want
20 an extension of time for the hearing, if you want to continue
21 it because your attorney or yourself is--has a conflict with
22 that day, in order for you to get that extension, you have to
23 waive your right in writing to have the hearing after they
24 suspend. So, they'll take your license at the end of the 30
25 days, if the hearing has been scheduled after the 30 days and

1 in order for them to even consider continuing it after that
2 30-day period, when this Exhibit 1 is valid as a driver's
3 license, you've got to waive that privilege in writing.

4 And so even though the Driver's License Division in
5 other instances is trying to comport with the statute and the
6 requirements of due process, in this case, they didn't try to
7 do that. Thereafter, the officer took away my client's due
8 process rights by suspending or revoking his privileges
9 before the hearing. And that's all it comes down to.

10 Was there a violation of due process right? If
11 there was, then there can be no action by the Driver's
12 License Division.

13 THE COURT: Uh huh. Well, Ms. Waldron, first, do
14 you concede that--that there was an erroneous failure to
15 provide Mr. Miller with a temporary license?

16 MS. WALDRON: I do concede that. He should have
17 been granted the--the temporary license (inaudible) yes.

18 THE COURT: Okay. Now, what to do?

19 MS. WALDRON: Well, you know, in--in cases where
20 the issue of civil rights is addressed or deprivation of
21 property rights, whether it's--and I don't have any cases to
22 cite, but when there's a post-deprivation hearing, when a
23 person is granted a hearing after the right has been--an
24 individual has been deprived of that right, there has been
25 case law which has said that that is sufficient.

1 And whether--I know there's some with regard to
2 inmates, when they've been deprived of property or whatever,
3 and then after the fact, they've been given a post-
4 deprivation hearing. I believe that the courts have said
5 that that's sufficient to cure the lack of a hearing prior to
6 the deprivation.

7 And as our argument here is because there was a
8 hearing after the fact, there was technically a post-
9 deprivation hearing, even though that hearing dealt with--
10 with respect to the Driver's License Division, the initial
11 revocation, there was evidence presented, the hearing officer
12 heard everything and at that time, determined that his
13 license should be revoked.

14 THE COURT: Okay. I'm spotting you the--that there
15 was an appropriately conducted hearing; but we've still got
16 an individual who was deprived of a privilege, a state-
17 granted privilege of considerable importance and
18 significance. No one--no one is going to seriously debate
19 the importance of driving privileges; after all, that's why
20 the deprivation of that for driving while intoxicated is a
21 serious piece of business. Not only does it protect the
22 citizens from impaired drivers on the road but the driving
23 privilege is something of considerable value to all of us.

24 And so what we've got is Mr. Miller, who has been
25 wrongfully deprived of something that is important for 30

1 days.

2 And so, really, what we're talking about here is,--
3 is one, does it matter? And I--I hear you telling me, well,
4 Judge, it doesn't matter, which isn't--that's a loser. I
5 mean, I--

6 MS. WALDRON: Well, no, it's not that it doesn't
7 matter. It's just that if there was no hearing at all, I
8 think we'd be in real trouble; but the fact that there was a
9 post-deprivation hearing, so there was a hearing, and--at
10 which time his license was revoked, I think we're looking at
11 the remedy. I mean, there was that 30 days--

12 THE COURT: We are--exactly--

13 MS. WALDRON: --we're looking at the remedy here.

14 THE COURT: And so I'm--I'm inviting--

15 MS. WALDRON: And--

16 THE COURT: --you to suggest a remedy for--

17 MS. WALDRON: Well--

18 THE COURT: --me.

19 MS. WALDRON: --I think the most logical remedy
20 from the respondent's point of view is, to whatever days his
21 license was suspended prior to the initial hearing be
22 deducted from the year. So, it would be a total of a year
23 from the ini--would be from the date of arrest.

24 THE COURT: From the date of arrest rather than--

25 MS. WALDRON: From the date of the arrest for a

1 year. And that would be the--the respondent's feeling of
2 appropriate remedy, whereas, because it was--if you look at
3 the case law and I think the post-deprivation hearing cures
4 any due process violation, but you have the--you have to look
5 at that 30 days and factor that in to whatever the revocation
6 is.

7 MR. HAMILTON: May I respond, your Honor?

8 THE COURT: Yeah. Please do.

9 MR. HAMILTON: On--on the bottom of that Page 5
10 that I referred to, referred you to earlier, just as this
11 Court has indicated, it's an important interest, this driving
12 privilege. And as it says, suspension of issued licenses
13 thus involves state action and adjudicates important
14 interests of the licensees.

15 And it goes on to say, In such cases--and that is
16 the suspension of an individual's license--the licensee's
17 are--the licenses are not to be taken away without that
18 procedural due process required by the Fourteenth Amendment.
19 Here, there was a violation of the procedural due process
20 under the Fourteenth Amendment, it was violated and
21 therefore, this individual's license is not to be taken away.

22 THE COURT: Uh huh.

23 MR. HAMILTON: His privilege is not to be taken
24 away. I don't know what cases Counsel's talking about of
25 post-deprivation, a post-deprivation hearing. Clearly,

1 they're not dealing with driver's license which the U.S.
2 Supreme Court has already said, hey, this is an important
3 interest, this driving privilege. If you're going to take
4 that away, you can't take it away unless you comply with the
5 Fourteenth Amendment due process requirements.

6 And here, the State has already admitted that they
7 did not comply with that; therefore, they are precluded or--
8 or this Court is precluded to--from fashioning some other
9 remedy, other than outright granting of the petitioner's
10 petition.

11 THE COURT: Is there any indication that--that this
12 event was anything other than a (sic) isolated oversight on
13 the part of one officer?

14 MR. HAMILTON: I have seen it happen on one other
15 occasion and my client on that occasion did not wish to
16 appeal; but I think the Driver's License Division needs to be
17 aware that this is the same type of due process violation as
18 is service of process. It's the same type, so that they're
19 not--so that when these isolated instances, when officers are
20 less than adequately trained, when they do this, the Driver's
21 License Division should be notified to that. This one person
22 doesn't get his license taken away. If you comply with the
23 procedural due process requirements, yeah, then yeah, at a
24 hearing, you can take it away; but if you don't, you don't
25 get to.

1 It's not happening very often. I do a lot of DUIs
2 as this Court's probably already aware and I see one every
3 two years, maybe.

4 THE COURT: Okay.

5 MS. WALDRON: Your Honor?

6 THE COURT: Ms. Waldron?

7 MS. WALDRON: Just one brief thing. With respect
8 to this case, Bell vs. Berson, it's my understanding--and I
9 haven't read the whole thing, that no hearing was afforded at
10 all in this case.

11 THE COURT: Correct.

12 MS. WALDRON: Is that correct?

13 THE COURT: That's right.

14 MR. HAMILTON: That is right.

15 MS. WALDRON: And I think that is a really big
16 distinguishing factor. You know, if no hearing was afforded,
17 yeah, I think it would be a due process problem; but we did
18 afford a hearing, and so that would distinguish our case
19 extremely from Bell vs. Berson.

20 THE COURT: Okay.

21 MR. HAMILTON: Except that referring to the latter
22 part that I cited to earlier, Notice and opportunity for
23 hearing appropriate to the nature of the case before the
24 termination becomes effective. This termination of driving
25 privileges became effective before the hearing. And so the

1 language in the case is sufficient to say, this is an
2 important enough privilege or right that we're not going to
3 let you take away their license if you try to take it away
4 before the hearing.

5 THE COURT: It's an interesting problem and one
6 which, in my view, merits the following result:

7 First of all, I find that there has been a--a
8 deprivation of Mr. Miller's statutory right and his right to
9 due process by reason of the failure to provide Mr. Miller
10 with a temporary license, as mandated under the statute.

11 I next find that Mr. Miller was advised of his
12 right to a hearing to challenge the propriety of the
13 deprivation of his driving privileges, that he exercised that
14 right, that his driving privileges were in fact revoked for a
15 period of one year pursuant to a hearing, and that the
16 integrity of the hearing wasn't compromised by reason of the
17 unlawful suspension of his driving privileges for the period
18 of time between arrest and the hearing.

19 Next, it's rele--it's relevant, in my view, that
20 the nature of the deprivation here is not a systemic problem
21 in law enforcement or within the Driver's License Division
22 but is one which occurs from time to time. As law
23 enforcement officers share with judges the--the flaw of being
24 fallible from time to time, probably law enforcement less
25 than judges.

1 My task is to fashion an appropriate remedy and I--
2 in my view, I have considerable discretion in fashioning a
3 remedy to a due process violation.

4 Mr. Hamilton has drawn my attention to the case of
5 Bell vs. Berson and I commend Mr. Hamilton for his typically
6 thorough research into these--into these matters. The Bell
7 vs. Berson case has been argued for two principles. Mr.
8 Hamilton argues the language in the lead opinion, might even
9 be the unanimous opinion, for the proposition that there must
10 be notice and hearing before there can be a deprivation of a
11 property interest or any other Constitutionally protected
12 interest.

13 Ms. Waldron urges that I bear in mind that there
14 are important distinguishing characteristics between Bell vs.
15 Berson, to-wit that the driving force in Bell vs. Berson was
16 that there was no provision for any notice of hearing in
17 Georgia prior to the deprivation of driving privileges for
18 failure to provide evidence of insurance.

19 I think the--that Ms. Waldron's analysis of--of
20 what's going on in Bell vs. Berson is more relevant to--to
21 this setting and that the precise question presented in this
22 case, and that is, in a case where there is--there has been
23 notice and hearing but there has also been a pre-notice and
24 hearing deprivation or pre-hearing deprivation of rights,
25 does that deprive the governmental entity of any further

1 authority--authority to effect a deprivation?

2 The answer to that, without the presence of a
3 systemic problem, is no. The State may properly proceed with
4 the process which might result in further deprivation of--of--
5 -of rights or interests subject to the fashioning of a
6 remedy, which I'm about to fashion.

7 I conclude that, one, the administrative revocation
8 was appropriate.

9 Two, that it is appropriate, given the facts and
10 circumstances in this case, to reinstate Mr. Miller's license
11 60 days earlier than it otherwise would have been reinstated.

12 That conclusion is based on my evaluation, based on
13 a totality of the circumstances of the egregiousness of the
14 deprivation.

15 MR. HAMILTON: May I just make a record briefly,
16 your Honor?

17 THE COURT: Please do.

18 MR. HAMILTON: Due process rights inherently
19 individual as opposed to the community and it's our position
20 that the Court holding that it is not a systemic problem is
21 irrelevant to the determination as to whether this
22 individual's due process rights have been violated, because
23 they're individual rights.

24 THE COURT: Yeah, I understand.

25 MR. HAMILTON: And so we would ask the Court at

1 this point to modify its holding and make it appropriate for
2 the individual as opposed to the community, because that's
3 not why we're here.

4 THE COURT: Yeah. Although not articulated, I--I
5 had taken actually what you said into account and I'm going
6 to stand by what I did.

7 MR. HAMILTON: Thank you, your Honor.

8 THE COURT: And thank you, folks. It's always a
9 pleasure to see you.

10 MS. WALDRON: Your Honor, would you like me to
11 prepare the appropriate order and--and--

12 THE COURT: That--that would be great.

13 MS. WALDRON: --show it to counsel?

14 THE COURT: Since, for the most part, you've been
15 able to just kind of sit here and observe this morning.
16 We'll give you something substantive to do.

17 MR. HAMILTON: Your Honor, could we ask for a--an
18 order staying--

19 THE COURT: So you can appeal?

20 MR. HAMILTON: --so we can appeal?

21 THE COURT: Have you got a problem with that?

22 MR. HAMILTON: I think it's an interesting enough
23 issue that--

24 THE COURT: Yeah, I think it's a fascinating issue.

25 MS. WALDRON: I think it's a fascinating issue.

1 I'll agree.

2 THE COURT: Yeah. And I'll grant it.

3 MR. HAMILTON: Thank you, your Honor.

4 THE COURT: So, when--

5 MR. HAMILTON: If there is an order in place right
6 now--

7 THE COURT: Let me just tell you what that's done.
8 That's shifted to you and away from Ms. Waldron the
9 responsibility for drawing the papers.

10 MR. HAMILTON: I'll draw them up and have them
11 approved as to form by Ms. Waldron and submit them to the
12 Court for signature.

13 THE COURT: And I look forward to the result. And
14 you know, because it's going to be appealed, spend some time,
15 you may want to get the videotape, writing down in, I don't
16 know, as comprehensive a form as you think is appropriate,
17 the rationale for what I did. I appreciate that, in fact,
18 can we give Mr. Hamilton a tape? We're going to give you the
19 tape.

20 MR. HAMILTON: On behalf of Mr. Miller, thank you.

21 THE COURT: No problem.

22 (Whereupon, this hearing was concluded.)

23

24

* * *

25

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 : ss.
COUNTY OF SALT LAKE)

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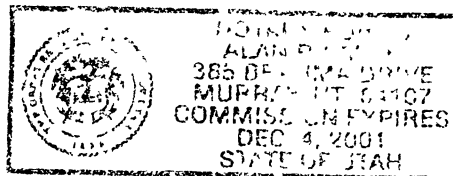
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Dated at Salt Lake City, Utah, this 17th day of April, 2001.

Toni Frye

Transcriber

Subscribed and sworn to before me this 17th day of April, 2001.



Alan P. Smith

Notary Public

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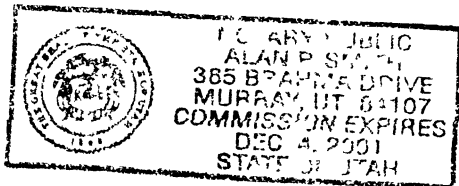
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party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 18th day of
April, 2001.



Alan P. Smith

Notary Public

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