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Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

IN THE UTAH COURT OF APPEALS

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DOCKET NO. 980340-CA

STEPHEN LYNN MORGAN, PETITIONER/APPELLANT, v. G. BARTON BLACKSTOCK, BUREAU CHIEF, DRIVERS' LICENSE DIVISION, RESPONDENTS/APPELLEES.	*PRIORITY NO. 14* **CASE NO. 980340-CA**

BRIEF OF APPELLEES

APPEAL FROM A TRIAL DE NOVO REVIEW OF AN INFORMAL ADJUDICATIVE PROCEEDING BEFORE THE DRIVERS' LICENSE DIVISION OF THE UTAH DEPARTMENT OF PUBLIC SAFETY IN THE SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE RODNEY M. PAGE, PRESIDING

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FILED
Utah Court of Appeals
FEB 18 1999
Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

NATURE OF THE PROCEEDING AND JURISDICTIONAL BASIS 1

ISSUES ON APPEAL AND STANDARDS OF REVIEW 2

RELEVANT PROVISIONS 2

STATEMENT OF THE CASE 2

Procedural History 2
Statement of Facts 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. BECAUSE MORGAN'S LICENSE SUSPENSION ENDED ON AUGUST 23, 1998, THE RELIEF HE REQUESTS, I.E., LIFTING OF THE SUSPENSION, IS NO LONGER MEANINGFUL OR PRACTICAL; CONSEQUENTLY, HIS APPEAL SHOULD BE DISMISSED AS MOOT. 5

II. SHOULD THIS COURT DECIDE TO REACH THE MERITS, MORGAN'S APPEAL SHOULD BE DISMISSED BECAUSE HE FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES AND, THEREFORE, THIS COURT LACKS SUBJECT MATTER JURISDICTION. 6

III. EVEN IF MORGAN DID NOT WAIVE ANY OBJECTION HE MAY HAVE HAD TO THE TRIAL COURT'S REFUSAL TO HEAR CLOSING ARGUMENT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING. 10

A. Morgan waived his objection when he told the court "that's okay" in response to the court's statement that it would not hear closing argument. 10

B. Because Morgan does not even state in his brief what those "significant issues" were, this Court cannot tell if the trial court would have changed its decision had it heard them. 10

C. The trial court did not abuse its discretion in refusing to hear additional argument. 11

CONCLUSION 13

ADDENDA

Addendum A — *Utah Code Ann. § 53-3-224 (1996)*
Utah Code Ann. § 63-46b-14 (1996)

Addendum B — *Order Affirming Suspension and Findings of Fact*

TABLE OF AUTHORITIES

Utah Cases

Black v. Alpha Financial Corp., 656 P.2d 409 (Utah 1982) 6

Cullimore v. Schwendiman, 652 P.2d 915 (Utah 1982) 5

Gabbard v. Beach, 736 P.2d 1047 (Utah App. 1987) 5

Hom v. Utah Dep't of Public Safety, 962 P.2d 95 (Utah App. 1998) 9

Jones v. Schwendiman, 721 P.2d 893 (Utah 1986) 5

Kehl v. Schwendiman, 735 P.2d 413 (Utah App. 1987) 6

Kunz & Company v. State, 913 P.2d 765 (Utah App. 1996) 8

Moon v. Schwendiman, 740 P.2d 822 (Utah App. 1987) 5

Phillips v. Schwendiman, 802 P.2d 108 (Utah App. 1990) 5

State v. Kiriluk, slip op. Case No. 971200-CA (Utah App. Feb. 11, 1999) 10

State v. Preece, 358 Utah Adv. Rep. 41 (Utah App. Dec. 17, 1998) 11

State Farm Mutual Ins. Co. v. Industrial Comm'n, 904 P.2d 236 (Utah 1995) 8

Cases from Other Jurisdictions

Crestwood Hospital & Nursing Home, Inc. v. State Health Planning Agency, 670 So.2d 45 (Ala. 1995) 9

Fairway Development Co. v. Bannock County, 804 P.2d 294 (Idaho 1990) 9

Korbelik v. Staschke, 596 N.E.2d 805 (Ill. App. 1992) 12

Lopiano v. City of Stamford, 577 A.2d 1135 (Conn. App. 1990) 9

Stallings v. Oklahoma Tax Comm'n, 880 P.2d 912 (Okla.1994) 10

Thompson v. Peterson, 546 N.W.2d 856 (N.D. 1996) 10

Statutes and Rule

Utah Code Ann. § 53-3-223 (1996) 6

Utah Code Ann. § 53-3-224 (1996) . . . . passim

Utah Code Ann. § 63-46b-14 (1996) . . . . passim

Utah Code Ann. § 78-2a-3 (1998) 1

Utah R.App. P. 37 (1998) 6

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IN THE UTAH COURT OF APPEALS

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NATURE OF THE PROCEEDING AND JURISDICTIONAL BASIS

Morgan appeals from a trial de novo review of an informal adjudicative proceeding before the drivers' license division (R. 58). After a trial, the court concluded that Morgan was driving while under the influence and, consequently, "affirm[ed] the one year suspension of driving privileges" (R. 63). This Court has original appellate jurisdiction under Utah Code Ann. § 78-2a-3(2)(a) (1996).

Issues on Appeal and Standards of Review

1. Given that Morgan's one-year license suspension has expired, is his appeal moot?

2. Assuming the appeal is not moot, did Morgan fail to satisfy a jurisdictional prerequisite to judicial review by failing to request an administrative hearing? This issue is a matter of law and the Court gives no deference to the trial court's decision.

3. Has Morgan waived any error the trial court may have committed in allegedly failing to allow him closing argument by not objecting or claiming plain error on appeal? Because this issue was not before the trial court, there is no standard of review.

Relevant Provisions

Relevant statutes are included in Addendum A.

Statement of the Case

Procedural History

Appellant Morgan was served with a citation after being stopped for DUI on July 25, 1997 ((Tr. Hearing, *Morgan v. Blackstock*, Case No. 970700374, Jan. 20, 1998, at 5, 22).[1] That citation informed him that he had 10 days to ask for a hearing before the drivers' license division; however, he never made such a request (R. 17). Consequently, the division suspended his license in an order dated August 17, 1997 (*Id.*). Less than 30

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[1]The transcript has not been indexed.

days later, on September 16, 1997, Morgan filed a petition for judicial review under the Utah Administrative Procedures Act for a trial de novo (R. 1).

Because Morgan failed to request an administrative hearing, the division moved in the trial court to dismiss the case for failure to exhaust administrative remedies (R. 20). The trial court denied the motion and the case went to evidentiary hearing, after which the court concluded that Morgan was properly stopped for suspicion of driving under the influence, that he was, in fact, under the influence, and that his license should be suspended (R. 60). The suspension began August 23, 1997 and lasted for one year (R. 17). The record does not indicate that the suspension was ever stayed.

Statement of Facts[2]

At the end of the division's case, both parties engaged in lengthy arguments about admission of exhibits (Tr. at 43-51). Afterward, the trial court began to state its ruling when Morgan's counsel interrupted and the following colloquy ensued.

> Mr. Oliver: Your Honor, I don't mean to interrupt the court. We'd at least like to be given the opportunity to either present evidence or not present evidence. I have not been asked that.
>
> The Court: Excuse me. Do you wish to present evidence?
>
> Mr. Oliver: We'd also like to make closing argument.
>
> The Court: Do you wish to present evidence?

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[2]Because Morgan does not challenge the trial court's ruling that he was, in fact, driving while under the influence, the division will not restate those evidentiary facts.

Mr. Oliver: At this time we do not desire to put Mr. Morgan on and we're not going to present any evidence. I do have closing argument.

The Court: I think I've heard all your arguments I want to hear. That's my ruling. I'll make my ruling now. You've argued the legal aspects of the case. I think I know what your other arguments will be. I'll make a ruling in the matter. I'll proceed now, thank you.

(Tr. at 51-52).

At the conclusion of the ruling, the court asked Morgan's counsel if he had any additional matters, and the following discussion took place.

The Court: Are there any other matters, Mr. Oliver, you wish to bring to the court's attention?

Mr. Oliver: The court doesn't mean by way of argument, does it?

The Court: No, I don't.

Mr. Oliver: There's some significant issues, but that's okay.

The Court: I don't think there are any that haven't been treated, Mr. Oliver. . . .

(Tr. at 56).

SUMMARY OF THE ARGUMENT

Mootness: Morgan's appeal should be dismissed as moot because his suspension is no longer in effect, having ended on August 23, 1998, and he does not even claim that any of the exceptions to the mootness doctrine apply.

Subject-Matter Jurisdiction: Morgan failed to request an administrative hearing before the division but went straight to district court. By failing to request a

hearing, Morgan failed to exhaust his administrative remedies and this Court lacks subject matter jurisdiction.

Waiver and No Abuse of Discretion: The trial court acted within its discretion when it refused to hear additional argument from Morgan's counsel because he had, in fact, already given lengthy argument on the merits and the testimony was straightforward and uncomplicated. Additionally, Morgan waived the claimed error by not objecting and by not telling this Court, in his brief, what issues he would have raised had he been given closing argument. Consequently, Morgan cannot show prejudice.

ARGUMENT

I. BECAUSE MORGAN'S LICENSE SUSPENSION ENDED ON AUGUST 23, 1998, THE RELIEF HE REQUESTS, I.E., LIFTING OF THE SUSPENSION, IS NO LONGER MEANINGFUL OR PRACTICAL; CONSEQUENTLY, HIS APPEAL SHOULD BE DISMISSED AS MOOT.

Due to Morgan's drunken driving, a fact not challenged on appeal, the division suspended his license for one year, beginning August 23, 1997 (R. 17). That one-year period, which was unstayed, expired on August 23, 1998. "Utah courts have consistently refused to hear the merits of driver's license revocation appeals rendered moot because the revocation period has expired." *Phillips v. Schwendiman*, 802 P.2d 108, 110 (Utah App. 1990); *see also Jones v. Schwendiman*, 721 P.2d 893, 894 (Utah 1986); *Cullimore v. Schwendiman*, 652 P.2d 915 (Utah 1982); *Moon v. Schwendiman*, 740 P.2d 822 (Utah App. 1987); *Gabbard v. Beach*, 736 P.2d 1047 (Utah App. 1987).

Though a court can decide a technically moot case if the issue it presents significantly affects the public interest and is capable of evading future appellate review, *Kehl v. Schwendiman*, 735 P.2d 413, 415 (Utah App. 1987), Morgan makes no claim that his appeal fits within that narrow category. Consequently, deciding this matter on the merits would result in an advisory opinion, which "judicial policy dictates against." *Black v. Alpha Financial Corp.*, 656 P.2d 409, 410-11 (Utah 1982). The appeal should be dismissed for mootness. Utah R.App. P. 37 (1998) (requiring parties to notify court when case appears moot).

II. SHOULD THIS COURT DECIDE TO REACH THE MERITS, MORGAN'S APPEAL SHOULD BE DISMISSED BECAUSE HE FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES AND, THEREFORE, THIS COURT LACKS SUBJECT MATTER JURISDICTION.

Morgan did not request a hearing before the division, as he could have under Utah Code Ann. § 53-3-223(6)(a) (1996). By failing to do so, he also failed to exhaust his administrative remedies, a necessity under the Utah Administrative Procedures Act. Utah Code Ann. § 63-46b-14(2)("A party may seek judicial review **only** after exhausting all administrative remedies available ... .") (emphasis added).

In his trial court memorandum opposing dismissal, Morgan claimed that he only failed to request "reconsideration" of the division's final order (R. 33). This is incorrect. The hearing that Morgan did not request was one in which he could have called and cross-examined witnesses, including the officer who stopped him, not merely a

"reconsideration" where the original hearing officer re-evaluates his decision. Utah Code Ann. § 53-3-223(6)(a) (1996).[3]

The trial court's denial of the division's motion to dismiss sends an unfortunate message: that the division's administrative process, carefully established by the legislature, can be ignored at will. In its order denying the motion, the trial court relied on the part of section 63-46b-14(2)(a) that says exhaustion is not mandated when a statute says it is not required[4] (R. 48). It ruled that Utah Code Ann. § 53-3-224 (1996) is such a

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[3] (6) (a) Upon written request, the division shall grant to the person an opportunity to be heard within 29 days after the date of arrest. The request to be heard shall be made within ten days of the date of the arrest.

(b) A hearing, if held, shall be before the division in the county in which the arrest occurred, unless the division and the person agree that the hearing may be held in some other county.

(c) The hearing shall be documented and shall cover the issues of:

(i) whether a peace officer had reasonable grounds to believe the person was driving a motor vehicle in violation of Section 41-6-44 or 41-6-44.6;

(ii) whether the person refused to submit to the test; and

(iii) the test results, if any.

(d) (i) In connection with a hearing the division or its authorized agent:

(A) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers;

(B) may issue subpoenas for the attendance of necessary peace officers.

(ii) The division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section 21-5-4.

(e) One or more members of the division may conduct the hearing.

(f) Any decision made after a hearing before any number of the members of the division is as valid as if made after a hearing before the full membership of the division.

(g) After the hearing, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

(h) If the person for whom the hearing is held fails to appear before the division as required in the notice, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

[4] The specific provision reads: "[A] party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required."

statute. To the contrary, that statute merely states: "a person denied a license or whose license has been canceled, suspended, or revoked by the division may seek judicial review of the division's order." The trial court stated that this statute fulfilled the no-exhaustion requirement of section 63-46b-14 by "specifically omitting a need to exhaust any administrative remedies first" (R. 48).

The trial court's interpretation requires that the legislature expressly command exhaustion. To the contrary, Subsection 63-46b-14(2)(a) makes exhaustion the default; if the petitioner wants to avoid exhaustion, the statute must contain an affirmative statement that exhaustion is **not** required. The driver's license provision to which Morgan refers is no such statement. It merely gives a petitioner authority to file for judicial review. In this way, it is similar to statutes Utah's appellate courts have interpreted in two previous cases, rejecting interpretations like the trial court's as "disingenuous."

Statutory language giving district courts jurisdiction to review formal and informal adjudicative proceedings from the Department of Transportation did not allow Kunz & Company to ignore administrative proceedings and go directly to court. *Kunz & Company v. State*, 913 P.2d 765, 770 (Utah App. 1996). Similarly, the Utah Supreme Court ruled in *State Farm Mutual Ins. Co. v. Industrial Comm'n of Utah*, 904 P.2d 236, 238 (Utah 1995) that UAPA "does not create the option of seeking either administrative relief or judicial review." Indeed, UAPA "embodies the general principle that a party

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Utah Code Ann. § 63-46b-14(2)(a) (1996).

must exhaust its administrative remedies prior to obtaining judicial review." *Id.* This Court, in *Hom v. Utah Dep't of Public Safety*, 962 P.2d 95, 99 (Utah App. 1998), held that exhaustion of administrative remedies was mandatory in order to "allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own error so as to moot judicial controversies." Absent exhaustion, states *Hom*, the courts have no jurisdiction to do anything other than dismiss the case. *Id.* at 101.

Consequently, contrary to the trial court's view, the provision in UAPA at Subsection 63-46b-14(2) requiring exhaustion is mandatory and it sets forth a jurisdictional prerequisite. It allows judicial review **only** after exhausting available administrative remedies. The two exceptions for exhaustion do not apply here and, in any event, Morgan has not alleged that his failure to exhaust is excusable. He simply has ignored the prerequisite. Courts from other states also recognize that exhaustion of administrative remedies is a jurisdictional prerequisite. *Crestwood Hospital & Nursing Home, Inc. v. State Health Planning Agency*, 670 So.2d 45, 47 (Ala. 1995) (failure to file notice of appeal to administrative board precluded judicial review); *Lopiano v. City of Stamford*, 577 A.2d 1135, 1136 (Conn. App. 1990) ("well settled principle of administrative law that a party may not bring a matter to the Superior Court without first exhausting available administrative remedies"); *Fairway Development Co. v. Bannock County*, 804 P.2d 294, 297 (Idaho 1990) (district court does not acquire subject matter

jurisdiction until all administrative remedies have been exhausted); *Thompson v. Peterson*, 546 N.W.2d 856, 860 (N.D. 1996) ("Failure to exhaust administrative remedies generally precludes making a claim in court."); *Stallings v. Oklahoma Tax Com'n*, 880 P.2d 912, 915 (Okla. 1994) (court cannot dispense with statutorily-imposed jurisdictional prerequisites).

III. EVEN IF MORGAN DID NOT WAIVE ANY OBJECTION HE MAY HAVE HAD TO THE TRIAL COURT'S REFUSAL TO HEAR CLOSING ARGUMENT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING.

A. Morgan waived his objection when he told the court "that's okay" in response to the court's statement that it would not hear closing argument.

At the conclusion of the ruling, the court asked Morgan's counsel if he had any other matters (Tr. at 56). Informed that the court was not interested in hearing argument, counsel nevertheless said "[t]here's some significant issues, but that's okay" (*Id.*). Never did counsel tell the court even the essence of what those "significant issues" were or how they had not been previously discussed. Consequently, Morgan waived any error that may have occurred by the trial court's refusal to hear more argument. *State v. Kiriluk*, slip op., at 7-8, Case No. 971200-CA (Utah App. Feb. 11, 1999).

B. Because Morgan does not even state in his brief what those "significant issues" were, this Court cannot tell if the trial court would have changed its decision had it heard them.

Nowhere in Morgan's brief does he present the "significant issues" that the trial court purportedly refused to hear. Consequently, it is impossible to determine the true effect of the court's "refusal." Indeed, Morgan's silence, and his failure to allege that he was, in fact, not driving while intoxicated, indicates that there are no other issues yet to be argued. *Cf. State v. Preece*, 358 Utah Adv. Rep. 41, 43 (Utah App. Dec. 17, 1998) (proffer necessary at trial court level to show evidence that would have been excluded).

C. The trial court did not abuse its discretion in refusing to hear additional argument.

Morgan fails to mention that he, in fact, argued the merits of the case. He claimed that the evidence established procedural failures in service of the citation (Tr. at 49-50) and the meaning of prior case law (Tr. at 50). The alleged failure of the peace officer to mail his copy of the citation within five days of the arrest was the heart of Morgan's case. His counsel extensively argued that the five-day rule was mandatory and stripped the division of jurisdiction. Given Morgan's failure to challenge the evidence about the stop or his intoxication, this procedural challenge was the sole issue. He was allowed to argue. Simply because neither Morgan nor the court categorized it as "closing argument" makes no difference.

In any event, this was a civil, non-jury trial and Morgan cites to no cases that hold closing argument is a right in these proceedings. *Nelson v. Jacobsen*, 669 P.2d 1207, 1209 (Utah 1983), to which Morgan also refers for support is of no real help to him. It merely "demand[s] procedure appropriate to the case and just to the parties involved." *Id.* The trial court is in the best position to determine what procedures are appropriate. Here, the court had just heard evidence in a trial that took 43 pages to transcribe. Morgan had called no witnesses of his own. The court made a detailed, oral ruling that went on for four transcript pages (Tr. at 52-56). The situation was close to that described in *Korbelik v. Staschke*, 596 N.E.2d 805, 808 (Ill. App. 1992), where the Illinois Court of Appeals upheld a trial court's refusal to hear closing argument. There, in a colloquy remarkably similar to the one that occurred here, the Illinois trial court told defendant it did not need closing argument.

> The Court: I think we can save some time, gentlemen. I don't think closing argument is needed. . . .
>
> Plaintiff's Counsel: Your Honor, could I – could I speak to the Court to summarize.
>
> The Court: I tell you, I got about 10 pages here, and I have been writing down, and I think I am pretty well aware of the testimony that has been given in this case.
>
> Plaintiff's Counsel: Okay.

The trial court here did not abuse its discretion. As evidenced by its detailed ruling, it had been listening to the testimony, which was uncomplicated and

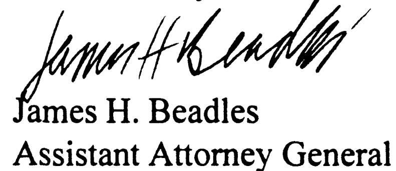
straightforward. Further, it had, in fact, listened to Morgan make lengthy argument about alleged procedural failures on the part of the division. There was no abuse of discretion.

CONCLUSION

Morgan's appeal should be dismissed as moot. But if the Court chooses to reach the merits, it should dismiss it for lack of subject matter jurisdiction as discussed in point **II.**

RESPECTFULLY SUBMITTED THIS 18 February 1999.

Jan Graham
Utah Attorney General



James H. Beadles
Assistant Attorney General

CERTIFICATE OF MAILING

On 18 February 1999, I mailed, by U.S. Mail, postage prepaid, a copy of this

BRIEF OF APPELLEE to:

D. BRUCE OLIVER
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1490

ADDENDA

ADDENDUM A

53-3-223. Chemical test for driving under the influence -- Temporary license -- Hearing and decision -- Suspension and fee -- Judicial review.

(1) (a) If a peace officer has reasonable grounds to believe that a person may be violating or has violated Section 41-6-44, prohibiting the operation of a vehicle with a certain blood or breath alcohol concentration and driving under the influence of any drug, alcohol, or combination of a drug and alcohol or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6, the peace officer may, in connection with arresting the person, request that the person submit to a chemical test or tests to be administered in compliance with the standards under Section 41-6-44.10.

(b) In this section, a reference to Section 41-6-44 includes any similar local ordinance adopted in compliance with Subsection 41-6-43 (1).

(2) The peace officer shall advise a person prior to the person's submission to a chemical test that a test result indicating a violation of Section 41-6-44 or 41-6-44.6 shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a motor vehicle may, result in suspension or revocation of the person's license to drive a motor vehicle.

(3) If the person submits to a chemical test and the test results indicate a blood or breath alcohol content in violation of Section 41-6-44 or 41-6-44.6, or if the officer makes a determination, based on reasonable grounds, that the person is otherwise in violation of Section 41-6-44, the officer directing administration of the test or making the determination shall serve on the person, on behalf of the division, immediate notice of the division's intention to suspend the person's license to drive a motor vehicle.

(4) (a) When the officer serves immediate notice on behalf of the division he shall:

(i) take the Utah license certificate or permit, if any, of the driver;

(ii) issue a temporary license certificate effective for only 29 days; and

(iii) supply to the driver, on a form to be approved by the division, basic information regarding how to obtain a prompt hearing before the division.

(b) A citation issued by the officer may, if approved as to form by the division, serve also as the temporary license certificate.

(5) The peace officer serving the notice shall send to the division within five days after the date of arrest and service of the notice:

(a) the person's license certificate;

(b) a copy of the citation issued for the offense;

(c) a signed report on a form approved by the division indicating the chemical test results, if any; and

(d) any other basis for the officer's determination that the person has violated Section 41-6-44 or 41-6-44.6.

(6) (a) Upon written request, the division shall grant to the person an opportunity

to be heard within 29 days after the date of arrest. The request to be heard shall be made within ten days of the date of the arrest.

(b) A hearing, if held, shall be before the division in the county in which the arrest occurred, unless the division and the person agree that the hearing may be held in some other county.

(c) The hearing shall be documented and shall cover the issues of:

(i) whether a peace officer had reasonable grounds to believe the person was driving a motor vehicle in violation of Section 41-6-44 or 41-6-44.6;

(ii) whether the person refused to submit to the test; and

(iii) the test results, if any.

(d) (i) In connection with a hearing the division or its authorized agent:

(A) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers;

(B) may issue subpoenas for the attendance of necessary peace officers.

(ii) The division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section 21-5-4.

(e) One or more members of the division may conduct the hearing.

(f) Any decision made after a hearing before any number of the members of the division is as valid as if made after a hearing before the full membership of the division.

(g) After the hearing, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

(h) If the person for whom the hearing is held fails to appear before the division as required in the notice, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

(7) (a) A first suspension, whether ordered or not challenged under this subsection, is for a period of 90 days, beginning on the 30th day after the date of the arrest.

(b) A second or subsequent suspension under this subsection is for a period of one year, beginning on the 30th day after the date of arrest.

(8) (a) The division shall assess against a person, in addition to any fee imposed under Subsection 53-3-205(14) for driving under the influence, a fee under Section 53-3-105 to cover administrative costs, which shall be paid before the person's driving privilege is reinstated. This fee shall be cancelled if the person obtains an unappealed division hearing or court decision that the suspension was not proper.

(b) A person whose license has been suspended by the division under this subsection may file a petition within 30 days after the suspension for a hearing on the matter which, if held, is governed by Section 53-3-224.

63-46b-14. Judicial review -- Exhaustion of administrative remedies.

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13 (3) (b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

ADDENDUM B

MAR 5 1998

LORENZO MILLER - 5761
Assistant Attorney General
JAN GRAHAM - 1231
Attorney General
Attorney for Defendant
160 East 300 South
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Salt Lake City, Utah 84114-0857
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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR

DAVIS COUNTY, STATE OF UTAH

STEPHEN LYNN MORGAN, Petitioner, vs. G. BARTON BLACKSTOCK, BUREAU CHIEF, DRIVER LICENSE DIVISION, Respondents.	**ORDER AFFIRMING ADMINISTRATIVE SUSPENSION** Civil No. 970700374 Judge Rodney S. Page

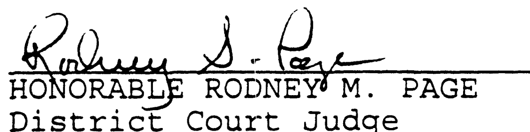
The above-entitled matter having come before the Court for hearing on Friday, January 20, 1998, the Honorable Rodney M. Page, District Court Judge presiding, the Petitioner appearing in person and through counsel, D. Bruce Oliver, the Respondent appearing through counsel, Lorenzo K. Miller, Assistant Attorney General, and the Court having previously made and entered its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that the action taken by the Respondent suspending the Petitioner's driving privileges for

a period of one year commencing August 23, 1997, shall be and is hereby affirmed.

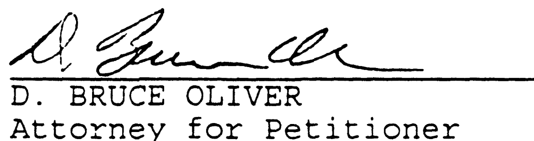
DATED this 11th day of ~~February~~ March, 1997.

BY THE COURT:



HONORABLE RODNEY M. PAGE
District Court Judge

Approved as to form:

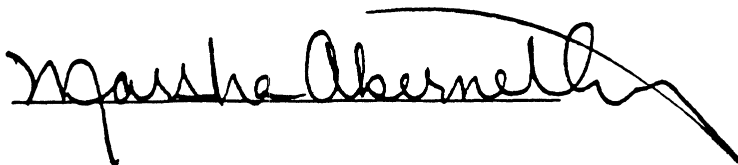


D. BRUCE OLIVER
Attorney for Petitioner

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true and correct copy of the foregoing **ORDER AFFIRMING ADMINISTRATIVE SUSPENSION**, to the following this 23rd day of February, 1998.

D. BRUCE OLIVER
180 SOUTH 300 WEST, STE 210
SALT LAKE CITY UT 84101-1218



RECEIVED

LORENZO MILLER - 5761
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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR

DAVIS COUNTY, STATE OF UTAH

STEPHEN LYNN MORGAN, Petitioner, vs. G. BARTON BLACKSTOCK, BUREAU CHIEF, DRIVER LICENSE DIVISION, Respondents.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 970700374 Judge Rodney S. Page

The above-entitled matter having come before the Court for hearing on Friday, January 20, 1998, the Honorable Rodney S. Page, District Court Judge presiding, the Petitioner appearing in person and through counsel, D. Bruce Oliver, the Respondent appearing through counsel, Lorenzo K. Miller, Assistant Attorney General, the Court having heard the testimony presented by the parties and argument of counsel, and being fully advised in the premises, hereby makes and enters its

FINDINGS OF FACT

1. On July 25, 1997, Officer Travis Lyman was flagged down by a citizen regarding an intoxicated individual leaving a bar.

2. The officer pulled the Petitioner over after seeing the Petitioner drive under the speed limit and that Petitioner's vehicle had a large crack in the windshield in the driver's line of vision.

3. The officer arrested the Petitioner for driving under the influence based upon the strong odor of alcohol which the officer detected combined with the Petitioner's poor balance, his inability to perform field sobriety tests and his admission that he had been drinking.

4. The Petitioner's driving privileges were subject to a one year suspension for his driving a motor vehicle with a breath alcohol content in excess of .08% for a second violation.

The Court having made and entered its Findings of Fact now makes and enters its

CONCLUSIONS OF LAW

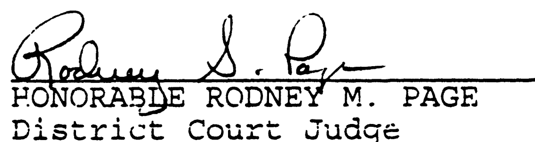
1. The Petitioner was operating a motor vehicle while under the influence of alcohol in violation of Utah Code Ann. §41-6-44.

2. The Petitioner was lawfully arrested, the initial stop being justified by the officer's reasonable suspicion and the arrest being supported by probable cause.

3. The Court should enter an order affirming the one year suspension of the Petitioner's driving privileges.

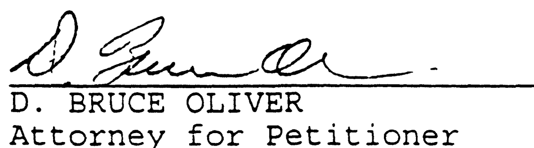
DATED this 11th day of March ~~Februar~~y, 1998

BY THE COURT:



HONORABLE RODNEY M. PAGE
District Court Judge

Approved as to form:



D. BRUCE OLIVER
Attorney for Petitioner

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to the following this 23rd day of February, 1998:

D. BRUCE OLIVER
180 SOUTH 300 WEST, STE 210
SALT LAKE CITY UT 84101-1218