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UTAH SUPREME COURT

BRIEF

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BRIGHAM YOUNG UNIVERSITY
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IN THE SUPREME COURT OF THE

STATE OF UTAH

RONALD C. ELLIOTT,

Plaintiff-Appellant,

-vs-

Case No.
14388

EARL N. DORIUS, Director,
Driver License Division,
Department of Public Safety,

Defendant-Respondent.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, IN AND FOR UTAH
COUNTY, STATE OF UTAH, THE HONORABLE
H. MAURICE HARDING, JUDGE, PRESIDING

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FILED

SEP 23 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

RONALD C. ELLIOTT,	:	
Plaintiff-Appellant,	:	
-vs-	:	Case No. 14388
EARL N. DORIUS, Director, Driver License Division, Department of Public Safety,	:	
Defendant-Respondent.	:	

BRIEF OF RESPONDENT

NATURE OF THE CASE

The appellant, Ronald C. Elliott, appeals from the affirmation by the Honorable Judge Maurice Harding in the Fourth District Court for Utah County, of two orders given by respondent revoking appellant's driver's license pursuant to Utah's Implied Consent law, Utah Code Ann. § 41-6-44.10 (1953), as amended (hereinafter all references to Utah Code Ann. or U.C.A. are to the Utah Code Annotated (1953), as amended).

DISPOSITION IN THE LOWER COURT

The two orders of revocation dated October 28, 1975, in this case, were consolidated for trial since they were both similar in facts. The revocations were for the failure of appellant to take a sobriety test as provided under Utah's Implied Consent law. Utah Code Ann. § 41-6-44.10.

The District Court with the Honorable Maurice Harding presiding upheld the revocation and found that appellant refused to submit to a chemical test as required in the statute and as provided by the officer.

RELIEF SOUGHT ON APPEAL

Respondent submits that the judgment of the Fourth Judicial District in and for Utah County should be affirmed.

STATEMENT OF FACTS

The respondent agrees with the facts as set forth in the appellant's brief with the following additions and/or corrections. (Note that the references in this brief are made to the original record of transcript as counsel for the appellant in stating his facts has provided no references to the record anywhere in his brief.)

First, counsel for the appellant stipulated that there was probable cause for the officers to arrest the appellant in the first incident for driving under the influence (R.7). This stipulation occurred just as officer Durrant was about to describe appellant's attempt at taking the field sobriety tests.

Second, officer Durrant informed the appellant that the blood test was not available "after the implied consent law was read and before his reply" (R.12).

Third, as pointed out on page three of appellant's brief, the appellant was at the intersection in the second incident which occurred less than four hours after the first. The appellant's car lights were one, the engine was running, and the radio was on. Officer Storrs testified that he had to "yell at him approximately four time before he even looked up at us, and he . . . we asked him to shut his engine off and he reached over to put it in gear, and officer Burnham reached in and pushed it back into park so he couldn't drive off." (R.17). Officer Storrs finally turned the car off (R.18). Later, at the police station, officer Storrs administered some field tests to the appellant. Officer Storrs testified, "His balance was real poor" (R.18).

Finally, appellant's counsel stated on page three of his brief that appellant "could not contact a lawyer." There is no showing from the record that appellant made an effort to call a lawyer. He did not request one. He did not ask that one be present. The record shows only that he made some calls (R.21).

ISSUES PRESENTED FOR REVIEW

1. Whether or not the arresting officer complied with the statutory requirements concerning the advice of rights under Utah's implied consent law.

2. Whether or not the appellant refused a reasonable and proper request to submit to a chemical sobriety test, thereby making the revocation order proper.

ARGUMENT
POINT I

THE ARRESTING OFFICER FULLY COMPLIED WITH THE STATUTORY REQUIREMENTS WHEN INFORMING APPELLANT OF HIS RIGHTS UNDER UTAH'S IMPLIED CONSENT LAW.

Utah Code Ann. § 41-6-44.10 provides for revocation of a driver's license for refusal to submit to a sobriety test. The applicable statutory provisions are:

> "(a) Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath or blood for the purpose of determining

the alcoholic content of his blood, provided that such test is administered at the direction of a peace officer having reasonable grounds to believe such person to have been driving in an intoxicated condition. The arresting officer shall determine within reason which of the aforesaid tests shall be administered.

* * *

(c) If such person has been placed under arrest and has thereafter been requested to submit to any one of the chemical tests provided for in subsection (a) or (b) of this section and refuses to submit to such chemical test, the test shall not be given and the arresting officer shall advise the person of his rights under this section. Within twenty days after receiving an affidavit from the arresting officer to the effect that such person has refused a chemical test the department shall notify such person of a hearing before the department. If at said hearing the department determines that the person was granted the right to submit and without reasonable cause refused to submit to such test, or if such person fails to appear before the department as required in the notice, the department shall revoke for one year his license or permit to drive. Any person whose license has been revoked by the department under the provisions of this section shall have the right to file a petition within thirty days thereafter for a hearing in the matter in the District court in the county in which such person shall reside. Such court is hereby vested with jurisdiction, and it shall be its duty to set the matter for trial de novo upon ten days' written notice to the department and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner's license is subject to revocation under the provisions of this act."

Appellant's counsel relies on Gassman v. Dorius, 543 P.2d 197 (1975), for the position that a person's "implied consent rights" must be given to him after his refusal. Other jurisdictions have decided contra on this point. State v. Twiss, 192 Neb. 402, 222 N.W.2d 108 (1974); State v. Hill, 221 S.E.2d 398 (1976).

Also, the fact situation in Gassman, supra, differed greatly from the case in chief. In Gassman, after the officer read Gassman his rights, both the officer and Gassman chose the blood test. They both agreed that the blood test be administered. It was chosen contemporaneously with the reading of the rights. No explanation of the breathazlyzer was given. One and one half hours later when Gassman's physician could not be reached the officer requested the breath. There was no reading of his rights with this request for the breath. Gassman assumed he could still take the blood test when the technicians arrived. In the instant case, only the breathalyzer was offered the appellant. It was offered immediately upon and contemporaneous with the recitation of appellant's implied consent rights. It is evident that appellant understood his rights since they were read to him again during the second incident by Officer Storrs who had been a witness when the rights were read to

the appellant in the first incident. In fact, after the rights were read to the appellant in the second incident, he said, "we have already gone through this before" (R.20).

POINT II

THE APPELLANT REFUSED A REASONABLE AND PROPER REQUEST TO SUBMIT TO A CHEMICAL SOBRIETY TEST THEREBY MAKING THE REVOCATION ORDER PROPER.

The 1967 amendment to Utah Code Ann. § 41-6-44.10(a) included inter alia: "The arresting officer shall determine within reason which of the tests shall be administered." This was inserted explicitly to contravene the effects of Ringwood v. State, 8 Utah 2d 287, 333 P.2d 943 (1959); and Bean v. State, 12 Utah 2d 76, 362 P.2d 750 (1961), which gave the choice to the driver.

It was entirely reasonable for the officers in the case in chief to request a breath test only. Wayne R. McTague, administrator for the American Fork Hospital, testified that American Fork Hospital was not drawing blood for chemical tests during the time in question. This fact was explained to appellant before he requested a blood test. The breath test was the only test available. The American Fork Police would be out of their jurisdiction in going to Provo, and it would have been unreasonable for them to leave their post to do so.

It has been construed in many jurisdictions that the purpose of a choice of tests is to select one that is reasonably available. The North Dakota statute, N.D.C.C. § 39-20-01 contains almost identical language as Utah Code Ann. § 41-6-44.10(a) with regards to giving the officer the determination of which test should be administered. In Clairmont v. Hjelle, 234 N.W.2d 13, at 15 (1975), the Supreme Court of North Dakota declared that the purpose of the statutory provision that the arresting officer shall determine which test for intoxication shall be used is "to permit the use of whichever test is readily available at the time (often late at night) and place (often rural areas) where the arrest is made." Even in jurisdictions where there is no specific choice given to the driver or the officer as which test should be used, the key in the selection of the test is that it be one that is "reasonably available." State v. Mastaler, 130 Vt. 44, 285 A.2d 776 (1971). In the instant case, the officer's request for appellant to take the breath test was entirely reasonable as it was the only available test.

In addition, appellant requested the blood test only after the officers informed him that it was not available. Even in states where the motorist has the choice as in Maine, the state may suspend a person's license who requests a test not available and refuses to take any other available test.

Opinion of the Justices, 255 A.2d 643 (Me. 1969).

Appellant seems to imply that the officers had a duty to provide him with a blood test if he so requested. This view is plainly not supported by the statute. Utah Code Ann. § 41-6-44.10(g) provides:

> "The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the peace officer." (Emphasis added.)

This opportunity was given appellant on several occasions but he did not avail himself of the opportunity. The statute puts no duty on the arresting officers or the state to procure a physician for the driver. Furthermore, as pointed out in Smith v. State, Registrar of Motor Vehicles, 40 Ohio App.2d 208, 69 Ohio Ops.2d 195, 318 N.E.2d 431 (1974) (a case strikingly similar to the case in chief), the right of a motorist to have a person of his own choosing administer chemical tests for blood alcohol level in addition to the test administered at the direction of an officer is a statutory and not a constitutional right; thus, a refusal to allow a motorist to go to the hospital to obtain a blood test after he had refused to

take a breathalyzer test offered by an officer did not preclude the suspension of the operator's driver's license.

There is no showing in the case in chief that appellant ever got in touch with a doctor, and he made no request for the officers to wait for a doctor. In fact, as admitted by the appellant, he never even tried to call his doctor (R.40,41).

In Peterson v. Dorius, No. 13981 (Utah Supreme Court, March 19, 1976), relied on by the appellant, this Court pointed out "there might be reasonable causes to refuse to submit to a chemical test. . . ." There is no showing that appellant's refusal was reasonable. In fact, the test requested by the officers was the only reasonable one under the circumstances, and appellant's refusal to submit to it was belligerent and unreasonable. The reasonable cause for refusal in Peterson, supra, was that she wanted to wait for her lawyer.

Counsel for appellant further misconstrues Gassman, supra. On page 7 of his brief, the reference by this Court that the breath test may well be thrown out was mere conjecture, obviously given as dicta by this Court. The breath test is fully authorized by statute and case law in this state. The plaintiff in Gassman, supra, did

not challenge the validity of the test generally. In fact, as pointed out at 543 P.2d, at 198: "He actually did not refuse even the breath test. . . ." He just refused to take it from the officers for the reason that he did not feel they would be impartial. The appellant in the instant case gave no reason to the officers for refusing the test except to refer to it as an expletive deleted. His reasons in fact for refusing the breath test were that the officers had informed him that it was the only test available, and they could not offer him the blood test.

In addition, appellant's interpretation of Gibbs v. Dorius, 533 P.2d 299 (Utah 1975), is entirely out context. That case dealt solely with the qualifications of the person administering the blood test when that particular test is used. It sheds no light on the determination of which test should be used in a given circumstance. The quotation from Gibbs on page 7 of appellant's brief beginning "there are situations, . . ." is obviously intended by this Court to be only hypothetical in nature and not an insistence on the blood test in any particular instance.

POINT III

THE LANGUAGE OF GASSMAN V. DORIUS SHOULD BE RE-EXAMINED BY THE COURT TO RESOLVE AN APPARENT CONFLICT WITH UTAH CODE ANN. § 41-6-44.10(c) (1953), AS AMENDED, WITH REFERENCE TO THE DUTY APPELLANT SEEKS TO IMPOSE ON THE ARRESTING OFFICER IN ADVISING APPELLANT OF HIS RIGHTS UNDER THE AFORESAID SECTION.

Utah Code Ann. § 41-6-44.10(c) (1953), as amended, contains directions to an arresting officer in the event that a person arrested for driving under the influence refuses to submit to a chemical test of his breath or blood, in the following language:

> "If such person has been placed under arrest and has thereafter been requested to submit to any one of the chemical tests provided for in subsections (a) or (b) of this section, and refuses to submit to such chemical test, the test shall not be given and the arresting officer shall advise the person of his rights under this section." (Emphasis supplied.)

In Gassman v. Dorius, 543 P.2d 197 (Utah 1975) (as noted in Appellant's brief at page 6), this Court indicated that the statute required an arresting officer to read one's rights under the Implied Consent Law after the refusal to take the test. This ruling, at least insofar as it may require a "reading" of one's rights,

is in direct conflict with the statute which, as noted above, only requires that the arresting officer "advise" a person charged with driving under the influence of his rights under the Implied Consent law.

The word "advise" is defined as "to give advice to; to recommend (a course of action) to; to counsel; warn. To give information to; to apprise; inform." Webster's Unabridged Dictionary. Ballentine's Law Dictionary, Third Edition (1969), says that "advise" means "to give advice; to offer an opinion as worthy or expedient to be followed; to counsel."

A review of the word "advise" in Words and Phrases, Permanent Edition, Vol. 2A, indicates the following court constructions:

> ". . .'advise' means to give advice; to counsel; it is different in meaning from 'instruct' or 'persuade'." Hughes v. Van Bruggen, 44 N.M. 534, 105 P.2d 494 (1940).
>
> "In an instruction that all persons concerned in the commission of a crime, whether they directly committed the act constituting the offense, or aided or abetted in its commission, or even if not present at its commission, have advised or encouraged its commission, or principles in the crime so committed, the word 'advise' means 'to give counsel; to offer an opinion to as worthy or expedient to be followed; to recommend

> as wise and prudent; or to suggest as the course of action' and the term 'encourage' means 'to give courage to; to excite to action or perserverance'." State v. Allen, 34 Mont. 403, 87 Pac. 177.

In Hunter v. Adams, 4 Cal.Rptr. 776, 781, 180 C.A.2d 511, the Court said that advise means to warn, to give notification or notice to, to apprise, to inform.

Based on the foregoing, it is respectfully suggested that in the instant case the individual was given advice and was advised of his rights contemporaneously with his refusal to take the chemical test and therefore the statute was followed.

Furthermore, it is suggested that to the extent that Gassman v. Dorius, op. cit., purports to require a literal reading of the Implied Consent law to one who refuses to submit to a chemical test as opposed to advising one of one's rights under the act, it should be overruled. Great confusion has already resulted in the courts of this State in considering implied consent refusal trials de novo under Utah Code Ann. § 41-6-44.10(c) (1953), as amended, as such lower courts have sought and

often applied this part of the Gassman decision literally and even in cases where it was shown that the officer had informed and advised a person as to the affect of the refusal, the courts have refused to uphold the suspension of a driver license by the defendant-respondent on the grounds that Gassman requires a reading of rights rather than the advice spoken of in the statute. Such a revision of the Gassman decision is necessary to eliminate the conflict between the statutory language and that decision.

CONCLUSION

McCall v. Dorius, 527 P.2d 647 (Utah 1974), and Peterson, supra, do point out what this Court has stated many times--that findings of the trial court, supported by substantial competent evidence, will not be disturbed on appeal.

As pointed out in this brief, it is not the officer's duty to obtain the additional blood test requested by the appellant besides the test the officers requested him to take. The officers offered him the only reasonable test under the circumstances. The officers clearly reiterated to the appellant his rights on separate occasions. The officers in short fully administered the requirements of the statute.

The appellant was patently unreasonable in refusing the breath test in light of his knowledge that it was the only one available. He gave no reason at the time he was arrested for refusing the breath test. Utah Code Ann. § 41-6-44.10 is aimed specifically at the problem of the recalcitrant inebriate who refuses to take a sobriety test. The conduct of the appellant during the time in question comes squarely within the purview of this statute. He was picked up two times in less than four hours. Three different police officers testified of his inebriated condition giving them probable cause to make an arrest.

During the second incident the appellant was at the intersection slumped over the wheel with the lights on, the motor running, and the radio playing. Officer Storrs had to shout at him four times to get his attention. Yet, the appellant was unable to give any explanation other than drinking for his behavior.

The lower court correctly upheld the statute in affirming the revocation. Appellant's appeal should therefore be denied, and the order affirming appellant's driver's license revocation should be sustained.

Respectfully submitted,

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