

1986

Kirsling v. Schwendiman : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 860164-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

BEN A. KIRSLING,

Petitioner-Appellant,

-v-

FRED. C. SCHWENDIMAN, Chief
Driver's License Services,
Utah Department of Public
Safety,

Respondent-Respondent.

:

:

:

:

:

:

860164-CA

Case No. 21061

Category No. 13

BRIEF OF APPELLANT

Appeal from the Decision of the
Second Judicial District Court of
Davis County, State of Utah,
Honorable Douglas L. Cornaby

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FILED
JUN 5 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

BEN A. KIRSLING,	:	
Petitioner-Appellant,	:	
-v-	:	Case No. 21061
FRED. C. SCHWENDIMAN, Chief	:	Category No. 13
Driver's License Services,	:	
Utah Department of Public	:	
Safety,	:	
Respondent-Respondent.	:	

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Utah Code Ann. 1953, §41-2-19.6 give the arresting officer authority to take appellant's driver's license in conjunction with an alleged city ordinance violation or only in conjunction with an alleged violation of Utah Code Ann. 1953, §41-6.44?
2. May a penalty be imposed before conviction?
3. May an arrest be made on mere suspicion and not probable cause?
4. Is an arrest illegal if made on probable cause based on illegally obtained evidence?

STATEMENT OF THE CASE

NATURE OF THE CASE

This appeal stems from a drunk driving case wherein the appellant was charged with having violated a city ordinance. Yet, his driver's license was suspended for having violated a state statute.

COURSE OF PROCEEDINGS

These proceedings now before this court involve only the matter of a per se hearing before the respondent and not the issue of the companion drunk driving case.

DISPOSITION IN THE LOWER TRIBUNALS

The appellant was afforded an administrative per se hearing before Hearing Officer LaMar Smith of the office of the respondent under Utah Code Ann. 1953, §41-2-19.6 to determine if

the appellant's driver's license should be suspended on the ground that the arresting officer believed the appellant had been operating a motor vehicle while under the influence of alcohol in violation of Utah Code Ann. 1953, §41-6-44.

The respondent suspended the appellant's driver's license for a period of 4 months effective June 2, 1985.

That order was appealed and affirmed by the lower court.

Both orders are now before this court on this appeal.

STATEMENT OF RELEVANT FACTS FOR REVIEW

At about 7:28 p.m. on the 2nd day of May, 1985 (T.8), the arresting officer received a call from his dispatcher that a citizen (appellant's wife) had reported that there was an intoxicated person coming down 18th South in a silver Lincoln automobile (T.9).

The arresting officer saw the appellant driving the somewhat described vehicle (color and make) traveling westbound on 1800 South at about 350 West in Bountiful, Utah (T.4). He observed nothing illegal which would have caused him to write a ticket (T.4 and T.10). Neither did his companion officer (T.13).

The only reason he pulled him over was the dispatcher's call (T.10 and T.13). It was not until later, after he smelled the odor of alcohol and observed bloodshot eyes, that he had reason to believe the appellant was under the influence of alcohol.

The arresting officer did not form his opinion that the appellant was driving while under the influence of alcohol until

after the field tests.

The appellant was then arrested for "DUI .08", in violation of Bountiful City Code No. 8-4-501 (Citation No. 024674), not Utah Code Ann. 1953, §41-6-44, as provided for under Utah Code Ann. 1953, §§41-2-19.6 and 41-2-20.

SUMMARY OF ARGUMENT OF THE CASE

Utah Code Ann. 1953, §41-2-19.6 is unconstitutional because it imposes a criminal penalty before conviction.

Even if constitutional, it should be strictly applied only as to a charge under Utah Code Ann. 1953, §41-6-44 and not a city ordinance.

American Fork City v. Cosgrove, Utah, 701 P.2d 1069 (1985), cannot be applied retroactively.

ARGUMENT

POINT I

RESPONDENT DENIED APPELLANT CONSTITUTIONAL DUE PROCESS AND EQUAL PROTECTION OF LAW BY ITS ARBITRARY AND CAPRICIOUS ORDER OF SUSPENSION.

Before the respondent can rely on Utah Code Ann. 1953, §41-2-19.6 as authority for its order of suspension, the arresting officer must have reasonable grounds to believe the appellant was in violation of Utah Code Ann. 1953, §41-6-44; and, therefore, at the time of arrest, take the appellant's driver's license and issue him a temporary license as the first step toward the administrative per se hearing and ultimate order of suspension.

The appellant was not even arrested for having violated Utah Code Ann. 1953, §41-6-44. The only applicable test for the officer having had reason to believe the appellant should be arrested for "DUI .08" was whether or not he had violated Bountiful City Code No. 8-4-501.

Utah Code Ann. 1953, §41-2-19.6 does not give the arresting officer authority to take the appellant's license in conjunction with an alleged city ordinance violation; instead, only in conjunction with an alleged violation of Utah Code Ann. 1953, §41-6-44.

Grants of powers to cities are strictly construed to the exclusion of implied powers not reasonably necessary in carrying out the purposes of the express powers granted. (Layton City v. Seth, Utah, 578 P.2d 828 (1978), citing Nasfell v. Ogden City, Utah, 249 P.2d 507, 508 (1952).)

Without the express statutory authority to suspend a driver's license on the ground that the arresting officer had reason to believe the driver was in violation of a city ordinance, the respondent's order of suspension was unconstitutionally arbitrary and capricious, in violation of due process and equal protection of the law under United States Const., Amends. V and XIV; and Utah Const., Art. I, §7.

POINT II

UTAH CODE ANN. 1953, §41-2-19.6 IS
UNCONSTITUTIONAL BY IMPOSING PENALTY
BEFORE CONVICTION.

Assuming without admitting that Utah Code Ann. 1953, §41-6-19.6 is statutory authority for the respondent's order of suspension, it is, nevertheless, unconstitutional in that it imposes the same driver's license penalty as if convicted of drunk driving even before conviction. (See State v. Neely and State v. Belt, 19 Utah Adv. Rep. 15, filed September 26, 1985, citing United States v. Motlow, 10 F.2d 657, 662 (7th Cir. 1926), wherein it was held that "no one shall be required to suffer imprisonment for crime before determination of his case in the court of last resort.")

In the instant case, if the order of suspension were upheld, the appellant would have suffered for a crime (drunk driving) for which he had not yet been tried, nor finally convicted after appeal. In fact, he would have so suffered even if he had not even been charged with drunk driving. All Utah Code Ann. 1953, §41-2-19.6 requires is only that the arresting officer has reason to believe the driver was driving while under the influence of alcohol.

Such action would constitute a presumption of guilt rather than the constitutional right to the presumption of innocence. (See Nasfell, supra.)

POINT III

APPELLANT'S CONSTITUTIONAL RIGHTS TO
DUE PROCESS AND EQUAL PROTECTION OF
LAW WERE DENIED BY ILLEGAL ARREST
MADE ON MERE SUSPICION AND NOT
PROBABLE CAUSE.

The arresting officer admitted the sole reason for stopping the appellant was because of the dispatcher's call (T.10, T.13, and T.14), which was based on double hearsay evidence from a third person.

This sole reason is evidenced by the hearing officer's verbatim question and the arresting officer's verbatim answer:

Question (T.13 and T.14):

Okay, I'm, I'm at a little, ah, I have,
I, I've got in the back of my mind,
I'm wondering, ah, why you stopped.
Was it solely because of the dispatcher's
call? Why you stopped this individual?
Ah ...
(Emphasis added.)

Answer (T.14):

The, ah, to be on the lookout, we did
watch for the person because of the
color, yes.
(Emphasis added.)

Mere suspicion is not enough to constitute probable cause for arrest without a warrant. (Mallory v. U.S., 166 F.2d 557 (6th Cir. 1948).

Further, an investigative stop or detention predicated on mere curiosity, rumor, or hunch is also unlawful. Such arrest remains unlawful even though the officer was acting in complete good faith. (People v. McGaughran, 25 Cal.3rd 577, 159 Cal. Rptr. 191 (1979).)

All the arresting officer had in the instant case was the hearsay rumor from the third person to the dispatcher to the

arresting officer.

This does not meet the level of required probable cause for a lawful arrest. Nor does it meet the level of required probable cause for a lawful order of suspension.

POINT IV

APPELLANT'S CONSTITUTIONAL RIGHTS TO
DUE PROCESS AND EQUAL PROTECTION OF
LAW WERE DENIED BY ILLEGAL ARREST
MADE ON PROBABLE CAUSE BASED ON
ILLEGALLY OBTAINED EVIDENCE.

The illegally obtained evidence is the results of the field sobriety tests, which were the alleged basis for the arrest, and the results of the intoxilyzer, which were considered by the hearing officer to determine the sole issue at the hearing, i.e., did the arresting officer have reason to believe the appellant had violated Utah Code Ann. 1953, §41-6-44, before he took his driver's license at the time of arrest.

At the time of arrest (May 2, 1985), at the time of the taking of the appellant's driver's license before the hearing (May 2, 1985), and at the time of the respondent's order of suspension (June 2, 1985), Hansen v. Owens, Utah, 619 P.2d 315 (1980), was the law of the State of Utah. There it was held that an accused could not be compelled to perform any affirmative acts which could be used as "evidence" against him. All would concede that field sobriety tests and breath tests would constitute affirmative acts. Therefore, the results of both would timely have been inadmissible in a criminal case of drunk driving against

the appellant.

It is conceded that argument can be made that the Implied Consent Law, Utah Code Ann. 1953, §41-6-44.10, as it applies to refusal, has civil application only. However, Utah Code Ann. 1953, §41-2-19.6, the alleged authority for the order of suspension, referring to Utah Code Ann. 1953, §41-6-44, has criminal application as applied to drunk driving.

In the instant case, the appellant submitted to the intoxilyzer test. Otherwise, he would have had his driver's license revoked for a year. So, the only ground for the respondent's order of suspension was the issue of probable cause for drunk driving, a criminal charge.

Therefore, the respondent cannot hide behind the facade of civil procedure when in fact criminal sanctions are imposed, the suspension of driver's license on probable cause, rather than on proof beyond a reasonable doubt.

It is recognized that this court overruled Hansen, supra, by its decision in American Fork City v. Cosgrove, Utah, 701 P.2d 1069 (1985). There it was decided there was no distinction between the self-incrimination clause of the federal constitution, which pertains only to testimonial evidence, and our state constitution which previously pertained to all types of evidence.

Nevertheless, American Fork City, supra, was not, nor could not be, made retroactive.

Consequently, the appellant had the constitutional right

not to be compelled to take the field sobriety tests or the intoxilyzer test. The arresting officer did not so advise him, so he could not intelligently, knowingly, and voluntarily waive those rights.

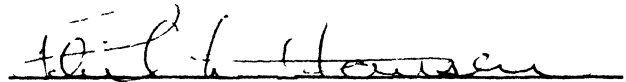
CONCLUSION

Any one, and especially all four, of the foregoing points, as related to the facts of the instant case, would dictate that the respondent's order of suspension be reversed and the appellant's driver's license reinstated.

REQUEST FOR ORAL ARGUMENT

Oral argument is hereby requested under Category No. 13.

RESPECTFULLY SUBMITTED this 5th day of June, 1986.

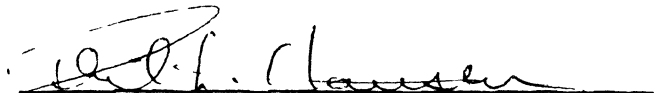


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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 1986, I caused four (4) copies of Brief of Appellant to be served on the Office of the Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114.



PHIL L. HANSEN
-9- Attorney for Appellant

ADDENDUM

In the District Court of the Second Judicial District

IN AND FOR THE

County of Davis, State of Utah

 BEN A. KIRSLING,)
 Plaintiff,) RULING ON APPEAL
 vs.) Civil No. 37545
 DEPARTMENT OF PUBLIC SAFETY,)
 Defendant.)

This case came to this court as an appeal from the decision of the Drivers License Services hearing officer. Oral argument on the appeal was heard on October 22, 1985, with Phil L. Hansen appearing for Ben A. Kirsling and Bruce M. Hale appearing for Driver License Services. After oral argument, the court took the case under advisement to give Mr. Hale time to file a brief. The court now rules on the case.

This case is an appeal from a hearing officer of Drivers License Services. The hearing officer found that Mr. Kirsling had violated U.C.A. 41-2-19.6 in that a police officer found that he was driving a motor vehicle while under the influence of alcohol. This court does not find the decision of the hearing officer to be arbitrary or capricious and affirms the decision of suspension of license.

I will not restate the facts. They are sufficiently set out in the documents in the file and have been highlighted by counsel.

Mr. Kirsling first argues that he was arrested for violation of the Bountiful City DUI law and that the suspension of license found in U.C.A. 41-2-19.6 applies only to arrests for DUI under U.C.A. 41-6-44. This court believes that U.C.A. 41-6-43 and U.C.A. 41-6-16 authorizes cities to pass DUI laws not inconsistent with state law. This court assumes Bountiful City has done so, since that ordinance has not been challenged here. U.C.A. 41-2-19.6 then is appropriate for both state statute and city ordinance.

Second, Mr. Kirsling claims U.C.A. 41-2-19.6 is punitive in nature and imposes penalties before conviction of a crime. The Supreme Court has ruled many times that a drivers license is a privilege and not a right and that an action involving the suspension or revocation of that license is a civil proceeding and not a criminal prosecution.

Third, Mr. Kirsling claims the arrest was made on mere suspicion and not probable cause. The facts do not bear this out. A citizen had complained. The police had a right and a duty to investigate. Part of the investigation involved stopping the defendant's vehicle. The police were not required to ignore the citizen's complaint simply because they lacked sufficient personal evidence. After stopping the defendant, police obtained sufficient evidence to justify the arrest.

Lastly, Mr. Kirsling claims the intoxilyzer test was an infringement of his right against self-incrimination. First, Mr. Kirsling voluntarily took the test. Second, the Utah Supreme Court ruled in American Fork City vs. Crosgrove, filed June 4, 1985, that a breath test requirement does not violate either the federal or state constitutional privilege against self-incrimination.

The action of the hearing officer is affirmed. The suspension of Mr. Kirsling's drivers license was appropriate.

Mr. Hale is directed to draw a formal order in conformity to this decision.

Dated November 7, 1985.

BY THE COURT:


JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Phil L. Hansen, 800 Boston Building, Salt Lake City, Utah 84111 and Bruce M. Hale, Room 236 State Capitol, Salt Lake City, Utah 84114 on November 8, 1985.



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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS LAKE COUNTY, STATE OF UTAH

BEN A. KIRSLING,)	
)	FINDINGS OF FACT
Petitioner,)	CONCLUSIONS OF LAW
)	AND ORDER
vs.)	
)	
FRED C. SCHWENDIMAN, Chief,)	Case No. 37545
Driver License Services,)	Judge Douglas Cornaby
Department of Public Safety,)	
State of Utah,)	
)	
Respondent.)	

The above-entitled matter having come before the Court pursuant to Utah Code Ann. § 41-2-20 on October 22, 1985, and the parties being represented by counsel, the Court makes the following Findings and Conclusions based upon the record and arguments.

FINDINGS OF FACT

1. The Court finds that there is evidence of substance in the record that shows that the petitioner received an opportunity for a hearing, was not prejudiced, and the hearing examiner was not arbitrary or capricious.

2. The practical and legal effect of the prior computerized printed order did not practically or legally effect or prejudice the rights of the petitioner.

Having made the foregoing Findings of Fact, the Court now makes its:

CONCLUSIONS OF LAW

1. The Court concludes that, there being no prejudice or arbitrariness or capriciousness, the petition should be dismissed.

2. The Court finds that U.C.A. § 41-6-43 and U.C.A. § 41-6-16 authorizes cities to pass DUI laws not inconsistent with state law. This Court assumes Bountiful City has done so, since that ordinance has not been challenged here. U.C.A. § 41-2-19.6 then is appropriate for both state statute and city ordinance.

ORDER

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that the petition is dismissed.

DATED this 2nd day of December ~~November~~, 1985.

15/ Douglas H. Cornaby
HONORABLE DOUGLAS CORNABY
District Court Judge

the results indicate a blood alcohol content of .08% or more, or if the officer makes a determination, based on reasonable grounds to believe that the determination is correct, that the person is otherwise a 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 department, immediate notice of the department's intention to suspend the person's privilege or license to drive. If the officer serves that immediate notice on behalf of the department he shall take the Utah driver license or certificate or permit, if any, of the driver, issue a temporary license effective for only 30 days, and supply to the driver, on a form to be approved by the department, basic information regarding how to obtain a prompt hearing before the department. A citation issued by the officer may, if approved as to form by the department, serve also as the temporary license.

(4) The peace officer serving the notice shall send to the department within five days after the date of arrest and service of the notice the person's license along with a copy of the citation issued regarding the offense, and a sworn report indicating the chemical test results, if any, and any other basis for the officer's determination that the person has violated section 41-6-44, and the officer's belief regarding the person's violation of section 41-6-44. Each such report shall be on a form approved by the department and shall be endorsed by the police chief or his equivalent or by a person authorized by him, other than the officer serving the notice.

(5) Upon written request of a person who has been issued a 30-day license, the department shall grant to the person an opportunity to be heard within 30 days after the date of arrest and issuance of the 30-day license, but the request must be made within 10 days of the date of the arrest and issuance of the 30-day license. A hearing, if held, shall be before the department in the county in which the arrest occurred, unless the department and the person agree that the hearing may be held in some other county. The hearing shall be documented and its scope shall cover the issues of whether a peace officer had reasonable grounds to believe the person to have been operating a motor vehicle in violation of section 41-6-44, whether the person refused to submit to the test, and the test results, if any. In connection with a hearing the department or its duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers. One or more members of the department may conduct the hearing, and any decision made after a hearing before any number of the members of the department shall be as valid as if made after a hearing before the full membership of the department. After the hearing, the department shall order, either that the person's license or privilege to drive be suspended or that it not be suspended. A first suspension, whether ordered or not challenged under this subsection, shall be for a period of 90 days, beginning on the 31st day after the date of the arrest. A second or subsequent suspension under this subsection shall be for a period of 120 days, beginning on the 31st day after the date of arrest. The department shall assess against a person, in addition to any fee imposed under subsection 41-2-4(7), a fee of \$25, which must be paid before the person's driving privilege is reinstated, to cover administrative costs, and which fee shall be canceled if the person obtains an unappealed department-

hearing or court decision that the suspension was not proper. A person whose license has been suspended by the department under this subsection may file a petition within 30 days after the suspension for a hearing in the matter which, if held, shall be governed by the provisions of section 41-2-20.

1983

41-2-20. Judicial review of license cancellation, revocation or suspension - Scope of review.

Any person denied a license or whose license has been canceled, suspended or revoked by the department except where such cancellation or revocation is mandatory under the provisions of this act unless the suspension occurred pursuant to section 41-2-19.6 shall have the right to file a petition within thirty days thereafter for a hearing in the matter in a court of record in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon ten days' written notice to the department. The court's jurisdiction is limited to a review of the record to determine whether or not the department's decision was arbitrary or capricious.

1983

41-2-21. New license after revocation.

(1) Any person whose license has been revoked under this act shall not be entitled to apply for or receive any new license until the expiration of one year from the date such former license was revoked or longer as provided in sections 41-2-18 and 41-2-19. Licenses which have been revoked may not be renewed, but application for a new license must be filed as provided in section 41-2-8, and a license so issued shall be subject to all of the provisions of an original license. The department shall not grant the license until an investigation of the character, abilities and habits of the driver has been made to indicate whether it will be safe to again grant him the privilege of using the highways.

(2) Any resident or nonresident whose operator's license to operate a motor vehicle in this state has been suspended or revoked as provided in this act shall not operate a motor vehicle in this state under a license, permit, or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and as permitted under this act.

1983

41-2-22. Owner liable for negligence of minor.

Every owner of a motor vehicle causing or knowingly permitting a minor under the age of eighteen years to drive such vehicle upon a highway, and any person who gives or furnishes a motor vehicle to such minor, shall be jointly and severally liable with such minor for any damages caused by the negligence of such minor in driving such vehicle.

1953

41-2-23. Violation of license provisions.

It shall be unlawful for any person to commit any of the following acts:

(1) To display or cause or permit to be displayed or to have in possession any operator's license knowing the same to be fictitious or to have been canceled, revoked, suspended or altered;

(2) To lend to, or knowingly permit the use of, by one not entitled thereto, any operator's license issued to the person so lending or permitting the use thereof;

(3) To display or to represent as one's own any operator's license not issued to the person so displaying the same;

(4) To fail or refuse to surrender to the department

or property shall be consistent with the provisions of this code which govern those matters. 1983

41-6-43.10. Negligent homicide - Death occurring within one year - Penalty - Revocation of license or privilege to drive.

(1) When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide.

(2) Any person convicted of negligent homicide shall be punished by imprisonment in the county jail for not more than one year or by fine of not less than \$100 nor more than \$1,000, or by both such fine and imprisonment.

(3) The department shall revoke the license or permit to drive and any nonresident operating privilege of any person convicted of negligent homicide. 1983

41-6-44. Driving under the influence of alcohol or drug or with high blood alcohol content - Criminal punishment - Arrest without warrant - Suspension or revocation of license.

(1) It is unlawful and punishable as provided in this section for any person with a blood alcohol content of .08% or greater by weight, or who is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely driving a vehicle, to drive or be in actual physical control of a vehicle within this state. The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug does not constitute a defense against any charge of violating this section.

(2) Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood.

(3)(a) Every person who is convicted the first time of a violation of Subsection (1) shall be punished by imprisonment for not less than 60 days nor more than six months, or by a fine of \$299, or by both the fine and imprisonment. But if the person has inflicted a bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner, he shall be punished by imprisonment in the county jail for not more than one year, and, in the discretion of the court, by a fine of not more than \$1,000.

(b) For the purposes of this section, the standard of negligence is that of simple negligence, the failure to exercise that degree of care which an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(4) In addition to the penalties provided for in Subsection (3), the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours nor more than ten days, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than two nor more than ten days and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility.

(5)(a) Upon a second conviction within five years after a first conviction under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1), the court shall, in addition to the penalties provided for in

Subsection (3), impose a mandatory jail sentence of not less than 48 consecutive hours nor more than ten days, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than ten nor more than 30 days and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility. The court may, in its discretion, order the person to obtain treatment at an alcohol rehabilitation facility.

(b) Upon a subsequent conviction within five years after a second conviction under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1), the court shall, in addition to the penalties provided for in Subsection (3), impose a mandatory jail sentence of not less than 30 nor more than 90 days with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work project for not less than 30 nor more than 90 days and, in addition to the jail sentence or work in the community-service work program, order the person to obtain treatment at an alcohol rehabilitation facility.

(c) No portion of any sentence imposed under Subsection (3) may be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation of this section or a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1) may not be terminated and the department may not reinstate a license suspended or revoked as a result of the conviction, if it is a second or subsequent conviction within five years, until the convicted person has furnished evidence satisfactory to the department that all fines and fees, including fees for restitution and rehabilitation costs, assessed against the person have been paid.

(6)(a) The provisions in Subsections (4) and (5) that require a sentencing court to order a convicted person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility, obtain, in the discretion of the court, treatment at an alcohol rehabilitation facility, or obtain, mandatorily, treatment at an alcohol rehabilitation facility, or do any combination of these things, apply to a conviction for a violation of Section 41-6-45 that qualifies as a prior offense under Subsection (7), so as to require the court to render the same order regarding education or treatment at an alcohol rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 41-6-45 that qualifies as a prior offense under Subsection (7), as he would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections 41-6-44(4) and (5).

(b) For purposes of determining whether a conviction under Section 41-6-45 which qualified as a prior conviction under Subsection (7), is a first, second, or subsequent conviction under this subsection, a previous conviction under either Section 41-6-44 or 41-6-45 is deemed a prior conviction. An alcohol rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Social Services.

(7)(a) When the prosecution agrees to a plea of

guilty or no contest to a charge of a violation of Section 41-6-45 or of an ordinance enacted pursuant to Subsection 41-6-43(b) in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense. The statement shall be an offer of proof of the facts which shows whether or not there was consumption of alcohol or drugs, or a combination of both, by the defendant, in connection with the offense.

(b) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of Section 41-6-45 as follows: If the court accepts the defendant's plea of guilty or no contest to a charge of violating Section 41-6-45, and the prosecutor states for the record that there was consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense, the resulting conviction is a prior offense for the purposes of Subsection (5).

(c) The court shall notify the department of each conviction of Section 41-6-45 which is a prior offense for the purposes of Subsection (5).

(8) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

(9) The Department of Public Safety shall suspend for 90 days the operator's license of any person convicted for the first time under Subsection (1), and shall revoke for one year the license of any person otherwise convicted under this section, except that the department may subtract from any suspension period the number of days for which a license was previously suspended under Section 41-2-19.6 if the previous suspension was based on the same occurrence upon which the record of conviction is based.

41-6-44.2. Repealed.

41-6-44.3. Standards for chemical breath analysis - Evidence.

(1) The commissioner of public safety shall establish standards for the administration and interpretation of chemical analysis of a person's breath including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or driving with a blood alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions or events to prove that the analysis was made and the instrument used was accurate, according to standards established in subsection (1) shall be admissible if:

(a) The judge finds that they were made in the regular course of the investigation at or about the time of the act, condition or event; and

(b) The source of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness.

(3) If the judge finds that the standards established under subsection (1) and the conditions of subsection (2) have been met, there is a presumption that the test results are valid and further foundation

for introduction of the evidence is unnecessary.

41-6-44.5. Admissibility of chemical test results in actions for driving under the influence or with a prohibited blood alcohol content - Weight.

(1) In any action or proceeding in which it is material to prove that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or with a blood alcohol content statutorily prohibited, the results of a chemical test or tests as authorized in section 41-6-44.10 shall be admissible as evidence.

(2) If the chemical test was taken within two hours of the alleged driving or actual physical control, the blood alcohol level of the person at the time of the alleged driving or actual physical control shall be presumed to be not less than the level of the alcohol determined to be in the blood by the chemical test.

(3) If the chemical test was taken more than two hours after the alleged driving or actual physical control, the test result shall be admissible as evidence of the person's blood alcohol level at the time of the alleged driving or actual physical control, but the trier of fact shall determine what weight shall be given to the result of the test.

(4) The foregoing provisions of this section shall not prevent a court from receiving otherwise admissible evidence as to a defendant's blood alcohol level at the time of the alleged driving or actual physical control.

41-6-44.8. Municipal attorneys authorized to prosecute for driving while license suspended or revoked.

Alleged violations of section 41-2-28, which consist of the person driving while his operator's or chauffeur's license is suspended or revoked for a violation of section 41-6-44, a local ordinance which complies with the requirements of section 41-6-43, section 41-6-44.10, section 76-5-207, or a criminal prohibition that the person was charged with violating as a result of a plea bargain after having been originally charged with violating one or more of those sections or ordinances, may be prosecuted by attorneys of cities and towns as well as by prosecutors who are empowered elsewhere in this code to prosecute those alleged violations.

41-6-44.10. Implied consent to chemical tests for alcohol or drug - Refusal to allow - Warning, report, revocation of license - Court action on revocation - Person incapable of refusal - Results of test available - Who may give test - Evidence.

(1) Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug as detailed in section 41-6-44, so long as the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug as detailed in section 41-6-44. A peace officer shall determine which of the aforesaid tests shall be administered,

No person who has been requested under this