

1969

State of Utah v. Lavell Robinson : Brief of Respondent

Utah Supreme Court

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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent

vs.

LAVELL ROBINSON,

Defendant-Appellant.

BRIEF OF RESPONDENT

Appeal from the Judgment of the District Court

County, State of Utah

The Honorable Leonard W. Elton, Judge

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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent

vs.

LAVELL ROBINSON,

Defendant-Appellant.

} Case No.
11191

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Lavell Robinson, appeals from a conviction for driving under the influence of intoxicating liquor rendered by the Honorable Judge Leonard W. Elton in the Third District Court for Salt Lake County.

DISPOSITION IN THE LOWER COURT

The District Court found the appellant guilty of driving while under the influence of intoxicating liquor.

RELIEF SOUGHT ON APPEAL

Respondent submits that the judgment of the Third Judicial District Court in and for Salt Lake County should be affirmed.

STATEMENT OF THE FACTS

The appellant was arrested for driving while under the influence of intoxicating liquor. The officer explained to the appellant that the appellant had the right to three chemical tests, which are blood, breath and urine, but he did have the right to refuse these tests, but upon refusal, he may lose his driving privileges for one year. The appellant consented to take the breath test (R.12), which was administered and the results were admitted into evidence by the lower court.

The appellant was tried before a Justice of the Peace and found guilty. He appealed to the Third Judicial District Court in and for Salt Lake County, State of Utah. The District Court also found the defendant guilty of driving while under the influence of intoxicating liquor.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT IS FINAL ON ALL MATTERS DECIDED BY THE DISTRICT COURT EXCEPT WHETHER OR NOT THE STATUTE INVOLVED IN THIS CONVICTION IS VALID OR UNCONSTITUTIONAL.

In his brief the appellant urges three points on appeal. The first point goes to the lack of proper foundation for the admission of the results of the breathalyzer test.

The second point goes to the extrapolation of the results of the test back to the time of the driving of the automobile. Neither of these points question the validity or constitutionality of the provision of Utah law which denotes the breathalyzer

as a test which can be used to determine blood alcohol content, nor do these points question the validity or constitutionality of the provision of Utah law which provides for the implied consent of any person operating a motor vehicle within this State.

It is well settled in this State that decisions of a District Court in appeals from a Justice of the Peace Court are final "except in cases involving the validity or constitutionality of a statute." Section 9, Article VIII, Utah Constitution; *Salt Lake City v. Granieri*, 16 Utah 2d 245, 398 P.2d 888 (1965) and *Salt Lake City v. Peters*, _____ Utah 2d _____, 449 P.2d 652 (1969).

Therefore, the respondent respectfully submits that Points I and II of appellant's brief cannot be considered on this appeal.

POINT II

THE LEGISLATURE HAS THE POWER TO REQUIRE THAT PERSONS OPERATING A MOTOR VEHICLE UPON THE PUBLIC HIGHWAYS OF THIS STATE CONSENT TO THE CHEMICAL TESTS TO DETERMINE BLOOD ALCOHOL CONTENT AND THE PROMULGATION OF THE UTAH STATUTE DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES.

It is a fortiori that the State has the power to require that drivers be licensed before operating a motor vehicle upon a public highway. It is likewise a fortiori that the power thus vested in the State carries with it the right to prescribe regulations. The regulations concerning the drivers and their licenses constitutes a valid exercise of the police power to regulate the use of highways in the interest of public safety and welfare. *Sheehan v. Division of Motor Vehicles*, 140Cal.App 200, 35 P.2d 361 (1934).

The Legislature of the State of Utah has enacted Section 41-6-44.10, U.C.A. 1953 (as amended). This statute provides as follows:

“(a) Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath, blood or urine for the purpose of determining the alcoholic content of his breath,”

The constitutionality of the foregoing section has been raised before the Utah Supreme Court on at least three occasions. *Bean v. State*, 12 Utah 2d 76, 362 P.2d 750 (1961); *Ringwood v. State*, 8 Utah 2d 287, 333 P.2d 943 (1959) and *Salt Lake City v. Perkins*, 9 Utah 2d 318, 343 P.2d 1106 (1959). In each of these cases the court stated that it was not necessary to consider the validity or constitutionality of this statute unless it was necessary to the determination of the case. For that reason the constitutionality of this statute has not been decided in Utah.

Other states have enacted statutes similar to Section 41-6-44, U.C.A. 1953, (as amended). The validity of such statutes has been upheld as against the contention that they violate due process of law and the guarantee against self-incrimination.

The Supreme Court of the State of Kansas in *Lee v. State*, 187 Kan. 566, 358 P.2d 765 (1961) states as follows:

“The statute does not compel one in plaintiff’s position to submit to a blood test, and does not require one to “incriminate himself” within the meaning of constitutional provisions, and neither is it violative of due process. It gives the driver the right of choice of the statutory suspension of his license, and further gives him the right to a hearing on the question of the reasonableness of his failure to submit to the test.”

The California Supreme Court in *People v. Duroncelay*, 312 P.2d 690 (1957) said

"It is settled by our decision in *People v. Haeussler*, 41 Cal.2d 252, 260 P.2d 8, that the admission of the evidence did not violate defendant's privilege against self incrimination because the privilege relates only to testimonial compulsion and not to real evidence.

The New York Supreme Court in the case of *Ballou v. Kelly*, 12 Misc.2d 178, 176 N.Y.S.2d 1005 (1958) upheld a similar provision and stated that submission under the circumstances provided in the statute seem to the Court a reasonable condition precedent to the right to drive upon the highway.

In rejecting plaintiff's arguments, the court in *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75, 88 A.L.R.2d 1055 (1961) said in essence that the implied consent law is that by driving a motor vehicle on the public highway the operator consents to the taking of a chemical test to determine the alcoholic content of his body fluids. By the act of driving his car he has waived his constitutional privilege of self-incrimination which has always been considered to be a privilege of a solely personal nature which may be waived.

While not directly in point, the case of *Schmerber v. California*, 384 U.S. 757 (1966) held that the admission into evidence of the results of a blood alcohol test taken over the objection of the driver and his counsel was not a violation of (1) the person's Fifth Amendment right against self-incrimination, (they reasoned that that right embodied a communication from the person to the State or the Court), (2) his right to have counsel, and (3) his Fourth Amendment right to be protected

against unreasonable searches and seizure. It would seem apparent from the implication of this decision that not even the United States Supreme Court is prepared to hold the right of a State to prescribe for the use of the tests to determine the blood alcohol content or the implied consent laws such as the one in this matter unconstitutional.

In this case, the requirements of Section 41-6-44.10, U.C.A. 1953, as amended, were fully complied with by the officer:

"It is my policy generally to explain, when I place them under arrest, they have the right to three chemical tests, which is blood, breath and urine, and also that they have the right to refuse these tests. But upon refusal, that they have the possibility of losing their driver's privileges, or driver's license, for a period of one year, upon refusal, and this, and also in discussing this with Mr. Robinson at my car, he agreed to take a breath test which we had available at the Redwood Station (T.12).

Thus, it is clear that the defendant was given his choice of the chemical tests and is equally clear that the defendant by driving his automobile gave his consent to the chemical test. It is equally clear under the authorities cited herein that Section 41-6-44.10, U.C.A. 1953, (as amended), is a valid and constitutional expression by the legislature.

CONCLUSION

The respondent has restricted his argument to the constitutionality of the Section questioned, as the writer set forth in Point I of this brief, there is but that issue before the Court. Unless this Court is prepared to rule that the breathalyzer and the Section which provides for the use of the breathalyzer is

in and of itself unconstitutional, the appellant has no grounds for this appeal and the decision of the District Court must be affirmed.

Respectfully submitted,

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