

1986

Willis C. Gabbard v. David A. Beach : Brief of Respondent

Utah Court of Appeals

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David L. Wilkinson; Attorney General; Bruce Hale; Assistant Attorney General; Attorneys for Respondent.

Loni F. DeLand; McRae & DeLand; Attorneys for Appellant.

Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIS C. GABBARD,

:

Plaintiff-Appellant,

:

-v-

:

Case No. 20750

860308-CA

DAVID A. BEACH, Driver
License Services, Department
of Public Safety, State of
Utah,

:

:

:

Defendant-Respondent.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE
LEONARD H. RUSSON, PRESIDING

UTAH COURT OF APPEALS
BRIEF

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DAVID L. WILKINSON
Attorney General
BRUCE M. HALE
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114

LONI F. DeLAND
132 South 600 East
Salt Lake City, Utah 84102

Attorney for Appellant

FILED

OCT 23 1985

Clerk, Supreme Court, Utah

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Plaintiff-Appellant,	:	
-v-	:	Case No. 20750
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License Services, Department	:	
of Public Safety, State of	:	
Utah,	:	
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DAVID L. WILKINSON
Attorney General
BRUCE M. HALE
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114

LONI F. DeLAND
132 South 600 East
Salt Lake City, Utah 84102

Attorney for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIS C. GABBARD, :
Plaintiff and Appellant. :
-v- :
DAVID A. BEACH, Bureau Chief, : Case No. 20750
Driver License Services, :
Defendant and Respondent. :

BRIEF OF RESPONDENT
- - - - -

STATEMENT OF THE FACTS

In addition to the facts as set forth by the appellant, the respondent wishes to include in its statement of facts the departmental records attached in the addendum which were considered by the Hearing Examiner and the District Court. (T-1). In determining whether or not the Hearing Examiner was arbitrary or capricious under U.C.A. § 41-2-20, the Court considered that the Hearing Examiner heard evidence and determined that, there was a DUI summons and citation for the February 21, 1985 arrest at 2325 hours. (T-1, Hearing Officer's Report). That the Hearing Officer also considered the testimony and the DUI Report Form, Operational Checklist, and recorded record of the test from the intoxilyzer machine. Also considered were the affidavits showing the machine to have been checked before the arrest on February 13, 1985 and after on March 2, 1985. (T-3 and Departmental Records).

The arresting officer testified to the driving pattern, (T-5) admissions to drinking, field sobriety tests, (T-6) and the warnings and agreement to take the intoxilyzer examination. (T-7) The certified officer administering the test, Deputy Dial, testified that the Baker Rule had been observed, that he was currently certified to operate the intoxilyzer machine and was "certified at the time," that he followed the nine steps on the checklist, that there were no problems with the machine, and that he obtained a test result of .14. (T-9-10). The Hearing Examiner found in his report "that there was evidence of a chemical test and/or other basis for the officer's determination that the driver was in violation of U.C.A. § 41-6-44." (Report, Finding F). Based on that finding and others, he concluded that the driving privilege should be suspended by authority of U.C.A. § 41-2-19.6.

The District Court in its Memorandum Decision, Findings of Fact and Conclusions of Law also found and concluded that the pre-prepared but subsequently mailed Order of Suspension was not prejudicial, arbitrary or capricious, that there was sufficient evidence besides the intoxilyzer machine test results to sustain the examiner's decision, and that there was also evidence that preponderated that the intoxilyzer was properly presumed to be reliable and in working order and the results were admissible before the administrative department without further foundation as official records of the Department of Public Safety. (Finding 5) The Court further found that the evidence before the agency preponderated that the arresting officer had reasonable grounds

to believe that the plaintiff may have been in violation of U.C.A. § 41-6-44 when he observed him (1) weaving in and out of traffic, (2) driving at a high rate of speed as he approached a stop light, then applying his brakes and skidding through the intersection, (3) and detecting a distinct odor of alcohol emanating from the car as well as the petitioner's person. This was in addition to the test machine results. (R-53-54).

SUMMARY OF ARGUMENT

A computerized notice of suspension was not prejudicial to the petitioner's case where it was admittedly printed prior to the required hearing but actually mailed over two weeks after the hearing. The trial court properly found that the generating of the notice was purely ministerial and did not affect the hearing examiner's decision.

The intoxilyzer results were supported by substantial and competent evidence and the machine was tested in compliance with the Commissioner's requirements and working properly. The machine showed that it was working reliably. Even if there had been some error in the foundation, scientific test results are not requisite to finding a violation of the criminal statute or a license suspension under the civil statute.

Since no substantial or even prejudicial error has been committed and the appellant received an opportunity for a fair hearing the trial court should be upheld. The decision of the hearing officer and the findings of the District Court, that the Departmental decision was not arbitrary or capricious should be upheld by this Court.

ARGUMENT

POINT I

PETITIONER WAS NOT PREJUDICED BY SUSPENSION
LETTER GENERATED PRIOR TO HIS HEARING.

As the suspension letter indicates, the Order of Suspension sent to Mr. Gabbard was computer generated on March 18, 1985. As is indicated by the certificate of mailing, however, the letter was not sent until April 4, 1985; that is, it was not decided and mailed until almost two weeks after Mr. Gabbard's hearing. The fact that the letter was printed in the central office prior to the hearing is of no prejudicial consequence. (The statute requires Departmental notice on the 31st day after arrest and notice of intent to suspend, even if only 15 to 20% of the drivers request hearings). The suspension did not become effective on March 18, 1985. Suspension did not become effective until March 24, 1985, 30 days after Mr. Gabbard's arrest, as is required by Section 41-2-19.6 and as was stated in the letter. The decision to use the computerized generated letter was not made until after the hearing.

Furthermore, there is no evidence that Mr. Gabbard was prejudiced in any way by the ministerial function of preparing the suspension order prior to the hearing. The practice of preparing a notice of suspension is merely done because of time constraints. There is no evidence to indicate that the notice is even in the hearing examiners file prior to or during the hearing. Consequently, the hearing officer is not biased in making his determinations which were based solely on the testimony and the documents.

Another fact showing no prejudice is that the driver was in possession of the driver's permit from the time of his arrest until after the mailing of the suspension order. Had the hearing examiner decided for the driver as is done in many cases, the suspension order would not have been mailed, with no adverse effect upon the drivers license records. (District Courts Memorandum).

Even, if the suspension order were effective and even entered in the computer as of the day generated, the result would be the equivalent to providing drivers with a post suspension hearing. In some states, this is customarily the practice and it has been found to be constitutional. Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612 (1979). In Mackey, the court stated that the governmental interest in removing drunk drivers from the road expeditiously warranted finding the pre-suspension hearing unnecessary. See also id. at U.S. 19 and S.Ct. 2621.

In light of the fact that the preparation of the suspension order after notice of intent to suspend did not have any actual adverse effects upon the appellant, where his driving privilege remained in tact until two weeks after the hearing, and the unbiased hearing examiner took evidence and made the decision, the appellant was not prejudiced at all and the District Court's findings of non-arbitrariness should be upheld.

POINT II

INTOXILYZER AFFIDAVITS WERE PROPERLY ADMITTED,
THOUGH UNNECESSARY.

The Hearing Examiner and the District Court were not arbitrary or capricious in their common decision where they

followed the dictates of Utah's DUI law. In pertinent part, Utah Code Ann. § 41-6-44.3 as amended 1983 states:

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.

The appellant assumes that this statute is the only and exclusive method of admitting test results. Such is not the intent of the Legislature in the wording of the statute and the Legislature clearly also provided in the subsequent statute, U.C.A. § 41-6-44.5 that presumptions could be made by courts and certainly by hearing examiners who were not bound by the formal rules of evidence, (Sandy State Bank, infra), if the chemical test was taken within a specified two-hour period of time. But the Legislature also provided that those presumption provisions

were up to "the trier of fact" to determine what "weight shall be given to the result of the test." (Subsection 3). The Legislature also clearly stated in subsection 4 that the "foregoing provisions of this section shall not prevent a court from receiving otherwise admissible evidence as to the defendants's blood alcohol level at the time of the alleged driving or actual physical control." (U.C.A. § 41-6-44.5(4)) If courts in criminal trials are not precluded from receiving from otherwise admissible evidence or allowing jurors to determine the weight to be given to chemical tests given after two-hour periods of time, surely a hearing examiner who is trained in a specific area may determine the weight and admissibility of test results testified to by a peace officer certified and trained by the Department of Public Safety.

In the case at bar, affidavits of technician Stan Jensen state that the intoxilyzer used was tested "in accordance with standards established by the commissioner of public safety" the tests that were performed showed that the instrument was working properly. One such intoxilyzer check occurred prior to the arrest, and the other test subsequent thereto.

The testimony indicates that nine items were done and checked on the Operational Checklist. This would indicate that the intoxilyzer machine was operated in accordance with the nine requirements set forth on the Operational Checklist. There was no direct testimony as to whether or not this checklist complies with standards set forth by the Commissioner of Public Safety, there is uncontroverted testimony, by the operator of the machine

to the effect that it was working properly without problem at the time of testing.

The certified Deputy Dial testified that in performing the intoxilyzer test, he followed the prescribed nine steps and had no problems with the machine. The test results indicated .14% blood/alcohol. (T-10).

In the "Findings of Fact, Conclusions of Law and Order" submitted by Judge Russon, he specifically found that where the arresting officer had testified to his DUI Report form, was certified to administer the breath test, used a checklist and had no problems with the machine, it was proper to presume that the intoxilyzer was reliable and in working order and no further foundation was required. Memorandum Decision R.30 and Findings of Fact and Conclusions of Law R.56 paragraph 3.

However, even if the foundation would have been found inadequate, it would not be fatal to the action lying against the petitioner. "Test results" are not requisite to finding a violation of U.C.A. § 41-6-44. The relevant statute on administrative restriction of driving privileges and submission to chemical tests, U.C.A. § 41-2-19.6(1), states that "when a peace officer has reasonable grounds to believe that a person may be violating or has violated section 41-6-44 the peace officer may" request a chemical test. It is not mandatory that the police officer use the chemical test and there may be cases where a chemical test, especially in intoxilyzer breath tests, would not be obtained. For example, in the situation where drugs might be involved. Such is the indication and intent of the

Legislature even under the criminal statute referred to in the civil statute. U.C.A. § 41-6-44(1) provides not only that it is unlawful to drive with a blood alcohol content above the statutory level or to be "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." A blood or breath test is not required by either statute. This fact is clear in reading the relevant code sections. For example, Utah Code Ann. § 41-2-19.6(4) states:

The peace officer serving notice shall send...
a sworn report indicating the chemical results,
if any. (emphasis added).

Furthermore, Utah Code Ann. § 41-2-19.6 in pertinent part reads:

(3) If the person submits to that chemical test and 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 in violation of section 41-6-44... .

By reading these statutes it is clear that requiring chemical "test results" in all circumstances would be contrary to legislative intent of quickly removing drivers who are safety hazards from the roads.

41-2-19.5. Purpose of revocation or suspension for driving under the influence.

The legislature finds and declares that a primary purpose of the provision in this code that relate to suspension or revocation of a person's license or privilege to operate a motor vehicle for driving with a blood alcohol content above a certain level or while under the influence of alcohol or any drug, or combination of alcohol and any drug, or for refusing to take a chemical test provided for in section 41-6-44.10, is

safely protecting persons on roads and highways by quickly removing from those roads and highways persons who have shown they are safety hazards by driving with a blood alcohol content above a certain level or while under the influence of alcohol or any drug or combination of alcohol and any drug or by refusing to take a chemical test that complies with the requirements of section 41-6-44.10. (emphasis added).

In light of the foregoing, the issue now becomes one of whether the District Court was reasonable in upholding the Hearing Officer.

First, both proceedings had substantial evidence upon which to base their decision. There was "reasonable grounds to believe" from the arresting officer's testimony of the petitioner's wreckless driving pattern coupled with the smell of alcohol, admissions to drinking and inability of petitioner to pass two field sobriety tests, besides the scientific test.

Second, the breath test results were not lacking in foundation. The checklist was complied with and the officer, who was certified by the Department of Public Safety he testified the machine was working properly and he used the check lists and the "Baker Rule". (T-9-10). The fact that the officer was certified by the Department, infers that the design of the machine was specifically approved by the commissioner, and the results of the test should be admissible. Higginbotham v. State, 316 S.E.2d 181 (Ga.App. 1984).

In summary, the standard procedures for a reliable intoxilyzer test were complied with. Though the Department's published rules and regulations were not introduced, such is not called for in non-technical civil cases administering a regulated

privilege. The "administrative hearer" can presume that a trained officer certified by the Department who complied with its requirements, as did the officer in the present case, obtained an admissible test result.

This being the facts, it is clear that neither the Hearing Officer nor the District Court were arbitrary or capricious as their findings were based on evidence of substance "whatever" and falls within the limits of reasonableness or rationality." Utah Department of Administrative Services v. P.S.C., 658 P.2d 601, 609-610 (Utah 1983).

POINT III

THE INTOXILYZER TEST AFFIDAVITS WERE PROPERLY ADMITTED.

The intoxilyzer test affidavits were properly admitted for two reasons. First, the documents would even be admissible in a criminal trial. Second, even if the documents would not be admissible in a criminal trial, their inherent trustworthiness permits their consideration in civil trials and the administrative proceeding where there is a different burden of proof and less chance of error or prejudice than with a jury.

First, the intoxilyzer affidavits themselves evidence trustworthiness. They are official Departmental records. The Department receives such affidavits through the regular and ordinary course of business. The affidavits are regular on their faces. They have each been signed twice by a trained trooper with a duty to assure their accuracy. Each time, the trooper signed once under the words "breath test technician(s)," indicating that he had met the requirements of a breath test

technician. The trooper also signed under the statement: "I/we, on oath, state that the foregoing is true." This oath increases the reliability of the affidavits, as does the fact that the signatures were notarized.

All the above indicates that the intoxilyzer affidavits are trustworthy and are a properly admissible business entry or official record, and received by the Department as they would be in a criminal trial. These indicia of trustworthiness show that the evidentiary requirements for admissibility imposed by Murray City v. Hall, 663 P.2d 1314 (Utah 1983) and Section 41-6-44.5 and 44.3 have been met.

The affidavits as well as the sworn "DUI Report Form" are also acceptable hearsay business entries admissible under Rule 803(6) of the formal Utah Rules of Evidence and accepted hearsay Public Reports and Records in a civil proceeding with no indication of untrustworthiness under Rule 803(8). See Barney v. Cox, 588 p.2d 696 (Utah 1978), also Yacht Club v. Liquor Commission, 681 P.2d 1227 (1984). Even the if the above were not true, which it is, this Court has held under Rule 103 of the Utah Rules of Evidence that the erroneous exclusion or admission of evidence must effect the substantial right of a party and be prejudicial to warrant a reversal. Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286 (Utah 1978), and Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976). The Court has also indicated that rulings on evidence in bench trials are not as critical as in jury trials. The Court assumes that a trial judge has and will use its superior knowledge as to the competency and effect

with which it should give evidence. Superior Tire Marketing Inc. v. Rollins, 18 Utah 2d 122, 417 P.2d 132 (1966). The same logic is true of administrative hearing examiners.

At least one court has held that in an action to recover property damage and personal injury as a result of a automobile accident, it was not error for the trial court to admit the results of an intoximeter test, although it was unclear whether the officer who administered the test was certified since another officer who was certified was present and witnessed the proceedings and also because this was sufficient in a civil trial to warrant the admission of the evidence. Watson v. Frierson, 613 S.W.2d 824 (Ark. 1981). The admission of the evidence is within the discretion of the trial court even in criminal cases and administrative fact finder. State v. Davis, 469 N.E.2d 83 (Ohio 1983), Minnesota has held in a similar case that even though the defendant objected to the introduction of a blood sample without evidence of the competency of the blood test administerer, the blood sample report comports with the statutory requirements and no additional evidence is required to establish the competence of the administrator. Glick v. Commissioner of Public Safety, 362 N.W.2d 15 (Minnesota 1985). Higginbotham v. State, 316 S.E.2d 181 (Ga.App. 1984). Huff v. State, 242 S.E.2d 361 (Georgia 1978). Oller v. State, 469 N.E.2d 1227 (Ind. App. Ct. 1984).

However, even if the intoxilyzer affidavits would not be admissible in a criminal trial, their admission into evidence in the administrative proceeding was still proper. It has long

been recognized that the formal rules of evidence "do not" strictly apply to administrative hearings like the one at issue here. Sandy State Bank v. Brimhall, 636 P.2d 481 (Utah 1981). Because the strict rules of evidence do not apply, the agency need not meet the formal foundational requirements of evidence to be presented in a criminal case such as Murray City v. Hall, *id.*, but may use common sense and reasonableness.

Murray City v. Hall, *id.*, and corresponding Section 41-6-44.3, as cited by the petitioner, relate only to criminal trials. That is, Murray City v. Hall, *id.*, is a criminal DUI case. In that case, this Court discusses the requirements of Section 41-6-44.3. This statute uses, exclusively, the term "judge" rather than, for instance, "agency" or "hearing officer", thus making it, obviously not exclusively applicable to administrative proceedings. Because Murray City v. Hall and Section 41-6-44.3 relate only to criminal proceedings, they serve mainly as "guideline precedent" for the requirements of this civil, administrative pre-suspension hearing.

As discussed above, the intoxilyzer affidavits had every reasonable indication of trustworthiness, and no contrary indications. They are regular on their faces. They have been signed twice by a trooper--once as a "breath test technician" and once under an oath. The documents are also notarized. Because the strict rules of evidence do not apply to administrative proceedings, such as the one at issue here, and because the intoxilyzer affidavits evidence trustworthiness, they were properly considered and given some weight by the Department.

As the North Carolina said in State v. Smith, 323 S.E.2d 316 (N.C. Sup. Ct. 1985), the exception to the hearsay rule not only does not violate the accused right to confrontation, but the documents presented provide recorded facts that are proved to be reliable as easily by the document itself as by live testimony. It is significant that in today's scientific the science of breath analyses for alcohol concentration and the machines used are increasingly less dependent on human skill of operation that require no opinion testimony with a very little chance of human error.

The exception to the hearsay rule governing public records and reports has been invoked consistently by courts as the basis for admitting into evidence certificates concerning qualifications of the individual calibrating the breathalyzer instrument: calibration, maintenance, inspection, and testing the sample: testing ampules and simulator solutions used in such instruments, including the fact that they contained properly compounded materials; and the results of analysis. See e.g., State v. Huggins, 659 P.2d 613 (Alaska App.1982); (relying on Wester v. State, 528 P.2d 1179 (Alaska 1974), cert. denied, 423 U.S. 836 96 S.Ct. 60, 46 L.Ed.2d 54 (1975); Best v. State, 328 A.2d 141 (Del.1974); Douglas v. State, 145 Ga.App.42, 243 S.E.2d 298 (1978); People v. Black, 84 Ill. App.3d 1050, 40 Ill.Dec.322, 406 N.E.2d 23 (1980); State v. Jensen, 351 N.W.2d 29 (Minn.App.1984); State v. Becker, 429 S.W.2d 290 (Mo.App.1968); State v. Conners, 129 N.J.Super. 476, 324 A.2d 85 (1974); People v. Freeland, 118 Misc.2d 486, 460 N.Y.S.2d 907 (1983); State v. Walker, 53 Ohio St.2d 192, 374 N.E.2d 132 (1978); Brown v. State, 584 P.2d 231 (Okla.1978); State v. Smith, 66 Or.App. 703, 675 P.2d 510 (1984); Commonwealth v. Sweet, 232 Pa.Super. 372, 335 A.2d 420 (1975); State v. Robbins, 512 S.W.2d 265 (Tenn.1974); Murray City v. Hall, 663 P.2d 1314 (Utah 1983). Cf., N.C.G.S. § 20-139,1(b4) (Interim Supp.1984).

In each of the above cases a court was presented with the accused's argument that he was entitled to confront and cross-examine the individual responsible for preparing the document in question. In each case, the court found, explicitly or implicitly, that the document was not primarily testimonial but rather was merely the recordation of a fact as easily and as reliably proved by the document itself as by live testimony. Furthermore, the information contained in the document was of a type which by its mere recordation in the ordinary course of business, would be sufficiently reliable to be accepted as trustworthy evidence.

We recognize that each of these cases rests on its own facts, each contrues statutes and rules of evidence which differ from those of North Carolina, and each involves a breathalyzer procedure unique to the particular equipment used. From these cases, however, emerges one significant fact: the science of breath analysis for alcohol concentration has become increasingly reliable, increasingly less dependent on human skill of operation and increasingly accepted as a means for measuring blood alcohol concentration...

In the present case, N.C.G.S. § 20-139.1(e1) permits the chemical analyst to attest by affidavit to certain objective facts which he or she has a statutory duty to record after complying with certain procedures and guidelines adopted by the Commission for Health Services. The analyst is at no time called upon to render an opinion or to draw conclusions... . The analyst is required at the time of testing to record the alcohol concentration as indicated by the machine, the time of collection, the type of analysis performed, they type and status of his permit, and the date of the most recent preventive maintenance. N.C.G.S. § 20-139.1(e1)(1)-(5). The resulting information is precisely the sort of evidence that the traditional business and public records exceptions to the hearsay rule intended to make admissible... (emphasis added) State v. Smith, supra.

For the same reasons, this court should affirm the admission of the intoxilyzer machine test affidavits, as well as

the sworn DUI Report Form. But, even without the affidavits, the suspension decision should be upheld. The testimony at the hearing was, Mr. Gabbard admitted that he had been drinking (T. at 6). His hazardous and erratic driving pattern, as well as the smell of alcohol about his person and his unsatisfactory performance on the field sobriety tests (T. at 5, 6), all indicated that the petitioner was under the influence. The intoxilyzer test results and supporting test affidavits only confirmed and corroborate this fact.

POINT IV

THE LOWER COURT SHOULD BE UPHELD UNLESS A
SHOWING OF PREJUDICIAL ERROR IS MADE.

This case raises the issue of whether error was committed by the early preparation of a suspension order, among other things. Even if the early preparation of the order was an error, at most it would be a "harmless error". The fact that the error (if considered to be error) is harmless can be readily recognized from the facts.

Mr. Gabbard was at no point prior to the hearing deprived of his driving privilege. He was not even aware of the order. It must also be assumed that the hearing examiner based his findings solely on the facts. As much was concluded by the Honorable Judge Russon in a written statement he made in connection with his "Findings of Fact, Conclusions of Law and Order" paragraph 1 in this case. (R-53). In the case of Joseph v. W.H. Groves Latter-Day Saints Hosp., 10 Utah 2d 94, 348 P.2d 935 (1960), the Supreme Court of Utah stated:

When parties have been afforded an opportunity

to present their claims to a court or jury in a fair trial and a verdict and judgment is entered, all presumptions are in favor of the validity of the verdict and judgment.

Along with the presumption that the verdict is valid, the same court has also required that the parties attacking the verdict must show that the error is substantial and prejudicial to the point that a reasonable likelihood exists that a different result would have occurred in the absence of the error. Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664 (1966).

If the error (if any) cannot be found to be so substantial as to effect the rights of the parties, the Supreme Court of Utah has repeatedly chosen to disregard the error. See Kesler v. Rogers, 542 P.2d 354 (Utah 1975), Redevelopment Agency v. Mitsui Inv. Inc., 522 P.2d 1370 (Utah 1974), Hillyard v. Utah By-Products Co., 1 Utah 2d 143, 263 P.2d 287.

Finally, the Utah Rules of Civil Procedure, Rule 61 states:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (emphasis added)

The presumption of validity by a preponderance must lie in favor of the Hearing Examiner, and the appellant has failed to meet his burden of showing that the findings of the court below was unreasonable or did violence to the facts. Gassman v. Dorius, 543 P.2d 197 (Utah 1975).

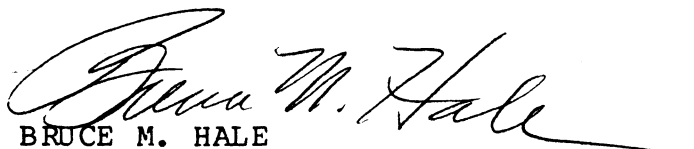
CONCLUSION

The Department did not violate the appellant's right or opportunity to present evidence by having a computerized order of suspension generated prior to his hearing. The hearing was held before an impartial Hearing Examiner who had no knowledge of the order and based his findings on the testimony and documents as well as the corroborative test results evidence.

The admission of the intoxilyzer results into evidence was not prejudicial error where administrative hearings are not governed by the formal rules of especially court evidence. They were proper exceptions to the hearsay rule anyway. Therefore, the District Court's findings and conclusions that the Department Hearing Examiner was not arbitrary or capricious in light of the evidence of substance proponderating a belief that the driver was under the influence and driving were reasonable and should be sustained by this Court.

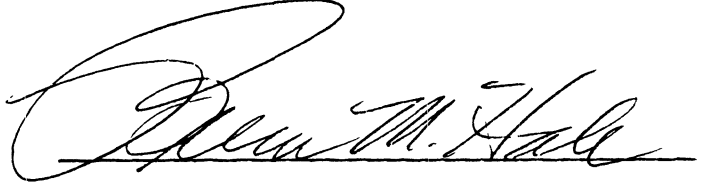
DATED this 25th day of October, 1985.

DAVID L. WILKINSON
Attorney General


BRUCE M. HALE
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Respondent, to Loni F. DeLand, 132 South 600 East, Salt Lake City, Utah 84102, this 23rd day of October, 1985.

A handwritten signature in cursive script, reading "Dean M. Hall", written over a horizontal line.

ADDENDUM



JOHN M. MATHESON
Governor

LARRY E. LUNNEN
Commissioner

07-09-39

UTAH DEPARTMENT OF PUBLIC SAFETY
HIGHWAY SAFETY DIVISION

OFFICE OF DRIVER LICENSE SERVICES

DRIVER IMPROVEMENT SECTION
4501 South 2700 West
Salt Lake City, Utah 84119
965-4437



ROBERT F. PARENTI
Director

FRED C. SCHWENDIMAN, Mgr.
Driver License Services

18 MARCH 1985

WILLIS C GABBARD
10955 SD 1300 WEST
SD. JORDAN, UT. 84065

ORDER OF SUSPENSION

LICENSE NUMBER 003842817

BY AUTHORITY OF TITLE 41, UTAH CODE ANNOTATED 1953, IT IS HEREBY ORDERED THAT YOUR PRIVILEGE TO OPERATE A MOTOR VEHICLE ON THE HIGHWAYS OF THIS STATE IS SUSPENDED FOR A PERIOD OF 3 MONTHS EFFECTIVE 24 MARCH 1985.

IT IS FURTHER ORDERED THAT YOU IMMEDIATELY SURRENDER TO THIS DEPARTMENT YOUR UTAH DRIVER LICENSE NUMBER 003842817 AND ALL OTHER DRIVER LICENSES ISSUED TO YOU.

THE AUTHORITY FOR SUCH ACTION IS U.C.A. 41-2-19.6 AND THAT A PEACE OFFICER HAD REASONABLE GROUNDS TO BELIEVE YOU HAD BEEN OPERATING A MOTOR VEHICLE IN VIOLATION OF U.C.A. 41-6-44 (DRIVING UNDER THE INFLUENCE LAW).

UTAH LAW REQUIRES ANY PERSON WHOSE UTAH DRIVING PRIVILEGE HAS BEEN SUSPENDED OR REVOKED TO PAY A \$25.00 FEE FOLLOWING THE REVOCATION OR SUSPENSION PERIOD TO HAVE THIS PRIVILEGE REINSTATED. IN ADDITION TO THE REINSTATEMENT FEE, A \$25.00 ADMINISTRATIVE SERVICE FEE WILL BE ASSESSED WHEN THE PRIVILEGE TO DRIVE HAS BEEN ADMINISTRATIVELY SUSPENDED FOR BEING ARRESTED FOR DRIVING UNDER THE INFLUENCE.

IF YOU HAVE NOT VOLUNTARILY SURRENDERED UPON DEMAND ALL LICENSES AND PERMITS AND A PICKUP ORDER HAS BEEN ISSUED THESE ITEMS, AN ADDITIONAL \$25.00 FEE WILL BE ASSESSED AT THE TIME OF REINSTATEMENT.

IT IS A MISDEMEANOR TO OPERATE ANY MOTOR VEHICLE UPON THE HIGHWAYS OF THIS STATE WHILE YOUR DRIVER LICENSE IS SUSPENDED OR REVOKED.

YOU MAY APPEAL THIS ACTION IN A COURT OF RECORD IN THE COUNTY OF YOUR RESIDENCE WITHIN THIRTY (30) DAYS.

DATED AT SALT LAKE CITY, UTAH, THIS 18TH DAY OF MARCH 1985.

cc: Lonl F. Deland
Attorney at Law
132 S. 600 E.
S.L.C. UT 84102

VERY TRULY YOURS,

David A. Beach

DAVID A. BEACH, BUREAU CHIEF
DRIVER LICENSE SERVICES

DI 203

I certify that on the below is an employee of the Drivers License Service of the Department of Public Safety. I deposited the original with the original station with postage if his or her last name is not

APR 4 1985

Date

Employee of Department

**OFFICE OF DRIVER LICENSE SERVICES
DRIVER IMPROVEMENT AND CONTROL**

Report of Proceedings of Hearing for Administrative Suspension

(Section 41-2-19.6 UCA 1953 As Amended)

Date of Hearing	Time Set for Hearing	Name and Address of Driver	Hearing Officer
3-22-85	1:30 PM	WILLIS C. GABBARD 10955 So. 1300 W. So. JORD,	DEANIS H. HICKS
Name and Address of Attorney		Date of Birth	Arresting Officer
LONI F. DELAND 132 So. 600 E. SLC.		7-9-39	T.J. BEAM
		DL Number	Agency
		3847817	SLC. SO.
Witness		Date of Arrest	Witness
		2-21-85	WAYNE DIAL SLC SO.
Witness		Location of Hearing	Witness
		WVC	

OPENING STATEMENT

This hearing is being conducted at the driver's request in accordance with Section 41-2-19.6 Utah Code Annotated, following his arrest for driving while under the influence of alcohol or drugs or a combination of alcohol and drugs.

Formal rules of evidence and procedure shall not strictly apply. However, as the Hearing Officer, I will take sworn testimony and consider all relevant evidence presented at this hearing.

If your driving privilege is suspended, you shall have the right to petition a court of record in the county in which you reside within thirty days after the effective date of such suspension for judicial review by the court, as provided for in Section 41-2-20, Utah Code Annotated.

Those testifying will be sworn, and the hearing shall proceed.

Administrative notice is taken of the fact that the Office of Driver License Services is in receipt of the following documents and information which are official records on file with this Department:

- | Yes | No | |
|-------------------------------------|-------------------------------------|---|
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | The officer's report submitted in compliance with UCA 41-2-19.6. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | A citation indicating the driver's arrest for a violation of UCA 41-6-44. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Notice served by the officer of the Department's intent to suspend, and information on how to receive a hearing by the Department. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Receipt of hearing request within ten days. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Test machine record of test results. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Operational checklist of test instrument. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Utah Highway Patrol record of the chemical test machine maintenance test and affidavit pursuant to UCA 41-6-44.3. 2-13-85 AND 3-2-85 |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | Other (ie. Documents and/or information received in behalf of the driver and/or other evidence received which is made official record for the purpose of this hearing).
Explain: |

1. The sworn testimony of Officer: T. J. BEAM

- (a) Facts leading the peace officer to believe the driver had been driving or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, or a combination of alcohol and any drug:

DEPUTY BEAM OBSERVED A VEHICLE DRIVEN BY WILLIS C. GABBARO TRAVELING AT A HIGH RATE OF SPEED APPROACH A RED LIGHT ATTEMPT TO STOP AT THE LAST MOMENT THE VEHICLE CONTINUED THROUGH THE INTERSECTION CONTINUED, MADE A U TURN AND WAS STOPPED. DEPUTY BEAM DETECTED AN ODOR OF ALCOHOL AND FOR BALANCE, FIELD SOBRIETY TESTS WERE ADMINISTERED. DEP. BEAM CONCLUDED MR. GABBARO TO BE IMPAIRED AND ARRESTED MR. GABBARO FOR DUI.

- (b) The driver was placed under arrest: No ☐ Yes ☒
Charge: DUI

(c) The driver submitted to a chemical test as requested by a peace officer which showed a test result of 14 %.

- (d) The driver was advised prior to the chemical test that results could lead to suspension of his/her driving privilege: No ☐ Yes ☒ DEP. BEAM

✓(e) Officer who administered chemical test was certified to do so: No ☐ Yes ☒

- ✓(f) Proper procedure was performed or observed by reporting officer in the administration of the chemical test: No ☐ Yes ☒ (explain procedure):

R/D TESTIFIED HE OBSERVED THE ADMINISTRATION OF INTOXILYZER BY DEPUTY DIAL AND BELIEVED ALL PROCEDURES WERE FOLLOWED WITHOUT ERROR

- ✓(g) Evidence and/or information received indicating the test machine was ☒ was not ☐ in proper working order at the time test was administered (explain):

CHIP INTOX TEST AND AFFIDAVIT 2-13-85 AND 3-2-85
R/D OBSERVED DEP. DIAL FOLLOW PROCEDURE OF OPERATION OF THE INTOXILYZER WITHOUT ANY PROBLEM, THE BAKER RULE WAS OBSERVED

- (h) DUI Report Form was properly notarized: No ☐ Yes ☒ (explain):

R/D TESTIFIED HE SUBSCRIBED AND SWORE THE CONTENT OF THE DUI REPORT TO BE TRUE AND CORRECT

2. Testimony of witness officer or other witness for reporting officer:

DEPUTY DIAL TESTIFIED HE ARRIVED AT THE SCENE SUBSEQUENT TO THE ARREST AND WENT TO SALT LAKE COUNTY TRAFFIC TO ADMINISTER AN INTOXILYZER TEST. THE INTOXILYZER WAS ADMINISTERED BY DEPUTY DIAL, SA DEPUTY BEAM IS NOT CURRENTLY CERTIFIED.

3. Substance of testimony by driver:

MR. GABBARD NOT PRESENT BUT REPRESENTED BY COUNSEL

4. Substance of statements and/or questions by driver's legal counsel:

COUNSEL CONTENDED THAT:

1. THERE IS NO FOUNDATION FOR BA. AND THERE IS NO THIRD DIGIT SHOWN AND THE ACTUAL CALIBRATION CAN NOT BE TESTIFIED TO.
2. ADMISSION OF AFFIDAVITS (FOUNDATION)
3. ALTHOUGH PRESENT AND THERE WAS DIRECT TESTIMONY DEP. DIAL'S SIGNATURE IS NOT AFFIXED TO THE DUI REPORT
4. THE TESTIMONY REGARDING THE INTOXILYZER DUE TO DEP. BEAMS UNFAMILIARITY WITH THE MACHINE
5. INTOX. CHECKLIST USED BY THE S.O. IS NOT CONSISTENT WITH THE MANUFACTURER'S RECOMMENDATION.

.....
HAVING HEARD AND RECEIVED EVIDENCE ADDUCED BY THOSE PRESENT AT THIS HEARING, THE DEPARTMENT NOW MAKES THE FOLLOWING FINDINGS OF FACT:

- A. That the peace officer had reason to believe that the driver was ☒ was not ☐ in violation of UCA 41-6-44.
- B. That the driver was ☒ was not ☐ placed under arrest for a violation under UCA 41-6-44.
- /C. That the chemical test was ☒ was not ☐ administered by an officer certified to do so.
- /D. That all operational procedures and requirements were ☒ were not ☐ met to insure proper working order of the test machine.
- E. That all procedures and requirements were ☒ were not ☐ followed by the reporting officer pursuant to UCA 41-2-19.6. (Explain what procedures were not followed, if any):

That there was ☒ was not ☐ evidence of a chemical test and/or other basis for the officer's determination that the driver was in violation of 41-6-44. Test results 14 % or other (ie. drugs); explain:

INTOXILYZER

i. Other (not covered above); explain:


CONCLUSIONS:

BASED UPON THE FOREGOING FINDINGS OF FACT, IT IS CONCLUDED THAT ALL OF THE STATUTORY PROVISIONS REQUIRED TO SUSPEND THE DRIVING PRIVILEGE PURSUANT TO UCA 41-2-19.6 WERE ☒ WERE NOT ☐ IN PLACE IN THIS CASE, AND THE FOLLOWING DECISION IS RENDERED:

☒ To suspend the driving privilege
by authority of UCA 41-2-19.6

☐ To take no action

Comments by hearing officer:

Hearing Officer: 

FOR CENTRAL OFFICE USE ONLY

Approved by: 

Title: 

Comments:

assigned, being first duly sworn, state that:

Breath testing instrument, INTOXILYZER, serial number 94-001121
located at 4474 S. MAIN ST. was properly checked by me/us in the course
of official duties, on FEB 13 1985 at 1500 P.M.

2. This was done according to the standards established by the Commissioner of
the Utah Department of Public Safety.

3. This is the official record and notes of this procedure which were made at the
time these tests were done.

THE FOLLOWING TESTS WERE MADE:

	YES	NO
✓ Electrical power check: (Power switch on, power indicator light is on)	(✓)	()
✓ Temperature check (Ready light is on)	(✓)	()
✓ Internal purge check: (Air pump works, runs for approximately 35 seconds)	(✓)	()
✓ Zero set, Error indicator, and Printer check:		
(Zero set at .000, .001, .002, .003.)	(✓)	()
(With proper zero set, printer works properly)	(✓)	()
(Printer deactivated when error light is on)	(✓)	()
✓ Fixed absorption calibrator test (if equipped)		
(Reads within $\pm .01\%$ of calibration setting)	(✓)	()
✓ Checked with known sample: (Simulator, 3 tests within $\pm .01\%$)	(✓)	()
✓ Gives readings in percent blood alcohol by weight, based upon grams of alcohol per 100 cubic centimeters of blood.	(✓)	()

REPAIRS REQUIRED NONE () (✓)

(If yes, explain)

The simulator solution was of the correct kind and properly compounded. (✓) ()

✓ The results of this test show that the instrument is working properly. (✓) ()

Last prior check of this instrument was done on Jan 22 19 85

BREATH TEST TECHNICIAN(S)

Alan Jensen

STATE OF UTAH)
COUNTY OF SALT LAKE

One, on oath, state that the foregoing is true.

Alan Jensen

Subscribed and sworn before me this 15th day of February 19 85

Wendy Lane Nelson City of Residence Salt Lake City
Notary Public County of Residence Salt Lake

My commission expires 6-12 19 87.

we the undersigned, being

1. Breath testing instrument, INTOXILYZER, serial number 94-001121 located at 4474 So. MAIN was properly checked by me/us in the course of official duties, on MARCH 2 1985 at 20.37 P.M.
2. This was done according to the standards established by the Commissioner of the Utah Department of Public Safety.
3. This is the official record and notes of this procedure which were made at the time these tests were done.

THE FOLLOWING TESTS WERE MADE:

YES NO

- ☒ Electrical power check: (Power switch on, power indicator light is on) ☒ ()
- ☒ Temperature check (Ready light is on) ☒ ()
- ☒ Internal purge check: (Air pump works, runs for approximately 35 seconds) ☒ ()
- ☒ Zero set, Error indicator, and Printer check:
 - (Zero set at .000, .001, .002, .003.) ☒ ()
 - (With proper zero set, printer works properly) ☒ ()
 - (Printer deactivated when error light is on) ☒ ()
- ☒ Fixed absorption calibrator test (if equipped)
 - (Reads within $\pm .01\%$ of calibration setting) .248 ☒ ()
- ☒ Checked with known sample: (Simulator, 3 tests within $\pm .01\%$) ☒ ()
- ☒ Gives readings in percent blood alcohol by weight, based upon grams of alcohol per 100 cubic centimeters of blood. ☒ ()

REPAIRS REQUIRED NONE

() ☒

(If yes, explain)

- The simulator solution was of the correct kind and properly compounded. ☒ ()
- ☒ The results of this test show that the instrument is working properly. ☒ ()

Last prior check of this instrument was done on Feb 13 1985.

BREATH TEST TECHNICIAN(S)

Max Jensen

STATE OF UTAH

COUNTY OF Salt Lake

I, Max Jensen, on oath, state that the foregoing is true.

Max Jensen

Subscribed and sworn before me this 5th day of March 1985

Wendy Lou Nelson

Notary Public

City of Residence Salt Lake City

County of Residence Salt Lake

My commission expires 6-12 1988.



JOHN M. MATHESON
Governor

HARRY E. LUNNEN
Commissioner

Willis C. Gabbard
10955 South 1300 West
South Jordan, Utah 84065

HIGHWAY SAFETY DIVISION
OFFICE OF DRIVER LICENSE SERVICES

DRIVER IMPROVEMENT SECTION
4501 South 2700 West
Salt Lake City, Utah 84119
(801) 965-4437

March 11, 1985



ROBERT F. PARENTI
Director

FRED C. SCHWENDIMAI
Bureau Chief
Driver License Services

FILE NO. 3842817

DOB 7-9-39

Under Title 41, Utah Code Annotated 1953, a hearing will be held by this Department regarding the items checked below:

- ☒ Your request for an administrative hearing regarding this Department's intention to suspend your driving privileges as a result of your arrest for driving under the influence on 2-21-85
- ☐ We have received notice that on _____ you were arrested on a charge of driving while under the influence and you refused to submit to a chemical test to determine the alcoholic content of your blood. Failure to appear at this hearing will result in revocation of your driving privilege.
- ☐ We have received information that on _____ you were driving while your driving privilege was under revocation/suspension. Failure to appear at this hearing may result in extension of your revocation or suspension.
- ☐ We have received information that on _____ you violated the provisions of your limited license. Failure to appear at this hearing will result in cancellation of your limited license privileges.

Your hearing has been set as follows:

CERTIFICATE OF MAILING
I certify that on the date noted above, a copy of this document was mailed to the addressee at the address shown below.
DATE: March 22, 1985
TIME: 1:30 p.m.
PLACE: 2780 West 4700 South
West Valley, Utah
533-6660
MAR 11 1985
Employee of Department

cc_ Willis C. Gabbard
4707 South 300 West
Salt Lake City, Utah 84107

cc: Loni F. DeLand
Attorney at Law
132 South 600 East
Salt Lake City, Utah 84102

Encl: File copy to attny:
DI 901(A) (P-710) pbj/13-10
4-84

Very truly yours,

Philip G. Himmelberger, Manager
Driver Improvement and Control Section

D.O.B.: 7-9-39



OTT M. MATHESON
Governor

ARRY E. LUNNEN
Commissioner

UTAH DEPARTMENT OF PUBLIC SAFETY
HIGHWAY SAFETY DIVISION

OFFICE OF DRIVER LICENSE SERVICES

DRIVER IMPROVEMENT SECTION
4501 South 2700 West
Salt Lake City, Utah 84119
(801) 965-4422

March 11, 1985



ROBERT F. PARENTI
Director

FRED C. SCHWENDIMAN, Chief
Driver License Services

Deputy T. J. Beam, #586E
Salt Lake Co. Sheriff's Office
Civil Division
437 South 200 East
Salt Lake City, Utah 84111

In reply, please refer to
FILE NO.: 3842817
RE: Willis C. Gabbard
DOB: 7-9-39

This Department has received a Report of Arrest for Driving Under the Influence regarding the above named individual. It is requested that you appear for a hearing on this matter which has been requested by the driver and which has been set as follows:

DATE: March 22, 1985 **PLEASE ADVISE YOUR WITNESSES, OFFICERS
TIME: 1:30 p.m. DALTON, & W. DAIL, OF THE HEARING DATE
 YOU REQUIRE THEIR ATTENDANCE.
PLACE: 2780 West 4700 South
 West Valley, Utah
 533-6660

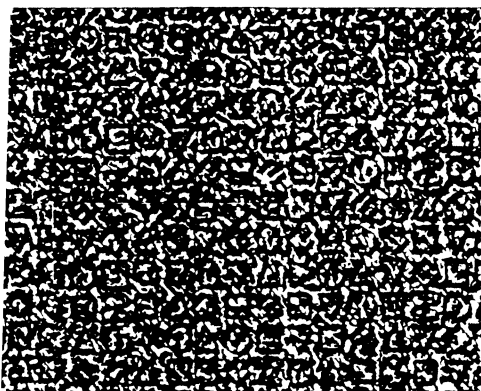
It is important that you appear at this hearing. If you are unable to appear at the time indicated, the hearing will be held and action will be taken accordingly.

Very truly yours,

Philip G. Himmelberger
Manager
Driver Improvement and
Control Section

cc: Hearing Officer

pbj/13-10
Dr 900
3-84

SUMMONS AND CITATION		ENFORCEMENT AGENCY 10-6010-13782-01712	
STATE OF UTAH COUNTY OF <u>Salt Lake</u>		NAME (Last) <u>Gabbaro</u> (First) <u>Willis</u> (Middle) <u>C.</u> DOB <u>7-9-39</u>	
CITY OF _____		ADDRESS (City) <u>4707 S. 300W SLC</u> (State) <u>UT</u> Zip <u>84107</u>	
THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN COURT OF _____		Driver License No <u>3842817</u> License Class <u>E</u> Expires <u>1988</u> State <u>UT</u> Restriction Code <u>0</u> Motorcycle Yes No	
IT OF <u>DUI</u>		Height <u>5'11</u> Weight <u>175</u> Eyes <u>Blue</u> Sex <u>M</u> Vehicle License No <u>WPP424</u> State <u>UT</u> Expires _____	
TED AT <u>3839 S.W. Temple St</u> <u>March 6, 1985 0830</u>		Vehicle Make <u>Chev</u> Vehicle Type <u>Corvette</u> Vehicle Year <u>1985</u> Color <u>Blk</u> Accident Yes <u>0</u> Direction of Travel <u>N S E W</u>	
ss than (5) nor more than (14) fourteen days after issuance of citation		THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING <input checked="" type="checkbox"/> UTAH CODE <input type="checkbox"/> COUNTY CODE <input type="checkbox"/> CITY CODE NO ON THE <u>21st</u> DAY OF <u>Feb</u> 19 <u>85</u> MILITARY TIME <u>2325</u> LOCATION <u>4285 S. State St.</u> MILE POST NO _____ VIOLATION(S) <u>DUI</u>	
		WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN	
		SIGNATURE <u>Booked.</u>	
		I CERTIFY THAT COPY OF THIS SUMMONS AND CITATION WAS DULY SERVED UPON THE DEFENDANT ACCORDING TO LAW ON THE ABOVE DATE AND I KNOW OR BELIEVE AND SO ALLEGE THAT THE ABOVE NAMED DEFENDANT DID COMMIT THE OFFENSE HEREIN SET FORTH CONTRARY TO LAW. I FURTHER CERTIFY THAT THE COURT TO WHICH THE DEFENDANT HAS BEEN DIRECTED TO APPEAR IS PROPER COURT PURSUANT TO SECTION 77-7-19. OFFICER <u>TJ Basm</u> BADGE NO <u>5866</u> COMPLAINANT _____ DATE OF CITATION <u>2-21-85</u>	
PERSE		OFFICE OF DRIVER LICENSE SERVICES	
DATE SENT TO ODLS		DOCKET NO	

FEB 25 1985

Valid

READ CAREFULLY

SURR. LIC.

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

NOTICE OF INTENT TO SUSPEND: You are hereby notified that thirty-one (31) days from the date of this notice your privilege to operate motor vehicles in the State of Utah will be suspended pursuant to Section 41-2-19.6 U.C.A. for a period of ninety (90) days thereafter, or for a period of one hundred twenty (120) days if this is the second occurrence of this offense. You are required by law to surrender to a peace officer all Utah licenses or permits in your possession. **YOU HAVE THE RIGHT TO REQUEST A HEARING ON THIS SUSPENSION.** The department will NOT contact you further regarding a hearing unless you request a hearing in writing. Your WRITTEN REQUEST must be sent WITHIN TEN (10) DAYS of the date of arrest to the Office of Driver License Services at 4501 South 2700 West, Salt Lake City, Utah 84119. Upon your written request for a hearing you will be notified of a time and place to appear. If you fail to appear or request a hearing your driver license suspension will be automatic. The administrative hearing is civil in nature and does not satisfy the requirement for you to appear in court as indicated above.

TEMPORARY DRIVER LICENSE: This entire information ☒ is VALID as a temporary driver license for a period of thirty (30) days from the date of this notice ☐ is NOT VALID as a temporary driver license.

Reason for not issuing temporary license: _____

DUI REPORT FORM

CASE IDENTIFICATION:

Date 2-21-85 Day Thurs Accident NO Case # 85-13782 Time Prepared 2335
 Subject's Name Willis C. Gabbard Address 4707 S. 300 W.
 Place of Employment Western Asphalt Paving Address 4707 S. 300 W.
 Home Telephone Number 262-0051 Work Telephone Number 262-0051
 D.O.B. 7-9-39 Driver License # _____ Time of Arrest ~~0025~~ 2325
 Place of Arrest 4200 S. State St Charges DUI
 Arresting Officer T.J. Bean Assisting Officers B. Dalton, W. Dai
 Arresting Agency St. Co. S.O.

VEHICLE:

Year 1985 Color Black Make Chev Model Corvette
 License# and state WPP 424 Disposition Retained
 Registered Owner Western Asphalt Paving Address 4707 S. 300 W.

WITNESSES: (If passengers, indicate specifically)

Name	Address	Tele. #	Age/DOB
1. Charles Alfred Passenger			
2.			
3.			
4.			
5.			

1. Charles Alfred Passenger

2.
3.
4.
5.

I. ACTUAL PHYSICAL CONTROL:

The facts establishing the subject's actual physical control of a motor vehicle are: Arresting Deputy talked with the arrestee who was sitting in the drivers seat when the vehicle was stopped

I. DRIVING PATTERN:

Subject's location when first observed 4500 S. State St Time: 2318

The facts observed regarding driving pattern: The vehicle was seen approx. 4450 S. State Northbound at a high rate of speed approaching the Red light. The put on the brakes and skidded through the intersection. Then proceed the rest of the way through intersection. The vehicle proceeded to 4200 S. State and made a U-TURN. This time driving very slowly.

II. PRE-ARREST STATEMENTS OF SUBJECT:

When asked if he had been drinking tonight "yes"

II. PHYSICAL CHARACTERISTICS:

Odor of alcoholic beverage YES ON PERSON AND BREATH

Speech Good

Balance POOR

Signs or complaints of injury or illness None

Other physical characteristics Eyes Red AND glassy

RECEIVED BY
DRIVER LICENSE

FEB 25 1985

I. FIELD SOBRIETY TESTS: (Describe subject's actions)

1. Heel to Toe Balance - Standing Heel to Toe while I explained the tests. The driver had to step to the side once to maintain balance.
2. Heel to Toe Steps - Steps were not all heel to toe, took the correct number steps. But lost balance when turning around and stumbled.
3. Balance - With head back swayed back and forth and side to side.
4. One foot and count - had to put other foot down 3 times and was unable to maintain balance.
5. _____

Were tests demonstrated by officer? YES Subject's ability to follow instructions Fair
needed to repeat instructions on 3 of 4 tests.

K. SEARCHES

A. Vehicle:

Was subject's vehicle searched? NO Where? _____
When? _____ Evidence _____

Person who performed the search _____

B. Subject:

Was subject's person searched? YES Where? 4200 S. State
When? 2328 Evidence Found _____

Person who performed the search _____

X. CHEMICAL TESTS:

Mr. or Mrs. Willis E. Gabbard, do you understand that you are under arrest for driving under the influence of alcohol (drugs)? Response, (if any) YES.

I hereby request that you submit to a chemical test to determine the alcohol (drug) content of your blood. I request that you take a Breath test.
(blood-breath-urine)

- ☒ The following admonition was given by me to the subject before the chemical test was administered:

Results indicating .08% or more by weight of alcohol in your blood shall, and the existence of a blood alcohol content or presence of drugs sufficient to render you incapable of safely driving a vehicle can, result in suspension or revocation of your license or privilege to operate a motor vehicle.

What is your response to my request that you submit to a chemical test? Response: OK.

Did subject submit to a chemical test? yes Type of test Breath Intoxilyzer
Test Administered by W. Dail Where? Traffic
Time: 2335 Results .14 Was subject notified of results? yes.

Serial No. of test machine:

(If the subject refuses the test, read the following)

- ☐ The following admonition was given by me to the subject:

If you refuse the test, it will not be given, however I must warn you that if you refuse, your license or permit to drive a motor vehicle can be revoked for one year with no provision for a limited driver's license. After you have taken this test, you will be permitted to have a physician of your own choice administer a test at your own expense, in addition to the one I have requested you to submit to, so long as it does no delay the test or tests requested by me. Upon your request, I will make available to you the results of the test if you take it.

(If the subject claims the right to remain silent or the right to counsel, read the following:)

☐ The following admonition was given by me to the subject:

Your right to remain silent and your right to counsel do not apply to the implied consent law which is civil in nature and separate from the criminal charges. Your right to remain silent does not give you the right to refuse to take the test. You do not have the right to have counsel during the test procedure. Unless you submit to the test I am requesting, I will consider that you have refused to take the test. I warn you that if you refuse to take the test, your driver's license can be revoked for one year with no provision for a limited license.

I. **CONSTITUTIONAL RIGHTS:**

Was subject advised of the following rights? yes When? 2339
By Whom? T. Bean Where? Traffic

- X 1. You have the right to remain silent.
X 2. Anything you say can and will be used against you in a court of law.
X 3. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
X 4. If you decide to answer questions now without having counsel present, you may stop answering questions at any time. Also, you may request counsel at any time during questioning.

Were the following waiver questions asked? yes

- X 1. Do you understand each of these rights I have explained to you?
Response yes
y 2. Having these rights in mind, do you wish to talk to us now?
Response yes

INTERVIEW:

Were you operating a vehicle? yes
Where were you going? North on State St.
What street or highway were you on? State St.
Direction of travel? North
Where did you start from? 4800 S. State St.
When? 2315 Ten minutes before you were picked up What time is it now? 1200
What is today's date? 2-22-85 Date of week? Thurs
(Actual time 2340 Date 2-21-85 Day Thurs)
What city or county are you in now? Salt Lake
What were you doing during the last three hours? Worked until 9 o'clock and then I went over and had three beers.

Have you been drinking? yes
What? 3 Rum & Cokes 3 Beers How much? _____
Where? Club 90 and Frankie & Johnnies
When did you have your first drink? 8:30-9:00 Last drink? 5 minutes before you stopped
Are you under the influence of an alcoholic beverage (drugs) now? NO

Are you taking tranquilizers, pills, medicines or drugs of any kind? NO
(What kind? get sample) _____

When did you have the last dose? —

Are you ill? NO

(If subject was in an accident, ask these questions:)

Were you involved in an accident today? NO

Have you had any alcoholic beverage or drugs since the accident? _____

If so, what? _____ When? _____

How much? _____

RECEIVED BY
DRIVER LICENSE

FEB 25 1985

KII.

OTHER OCCURRENCES OR FACTS:

While talking to passenger of his vehicle he said, I'm really in trouble now. I just messed up.
OK, No sweat you got me cold.
I know you got a cold, I've been drinking. I was just showing off. I just tucked up.

(III. ATTACHED DOCUMENTS

I have attached the following documents to this report:

1. ☒ Copy of citation/temporary license
2. ☒ Subject's Utah driver's license or driver's permit.
3. ☐ Traffic accident report.
4. ☒ Other documents (specify) Intox form & Checklist

(IV.

Date 2-22-85 Time 0230 Report was completed.

ENDORISING SIGNATURE OF THE CHIEF OF POLICE, OR
EQUIVELANT, OR PERSON AUTHORIZED BY HIM:

Dee A. Kautchner

certify and swear under oath that I am a sworn Utah peace officer and that I have prepared the above report form and hat the information on the report form and the attached documents are true and correct to my knowledge and belief and hat the report form was prepared in the regular course of my duties and endorsed by the Chief of Police, or equivelant, or a person authorized by law. It is my belief the subject was in violation of section 41-6-44 U.C.A. at the date, time and place specified in this report.

Timothy J. Bean
Signature of Peace Officer

Law Enforcement Agency: Sh Co. S.O.

Date: 2-22-85 Time: 0350

STATE OF UTAH

COUNTY OF

Salt Lake

SS.

Subscribed and sworn to under oath before me this 22nd day of Feb, 19 85.

Paul B. Robertson

NOTARY PUBLIC

Residing at: 755 Brunton Dr. Midvale

My Commission Expires:

11-1-88

The original of this form must be sent within five (5) days of the arrest of the subject to:

Officer of Driver License Services
4501 South 2700 West
Salt Lake City, Utah 84119

Salt Lake County Sheriff's Office

INTOXILYZER

OPERATIONAL CHECKLIST-C (ASA)

SUBJECT WILLIS C. GABBAR DATE 2/21/85 TIME 2335

INSTRUMENT # 94-001121 LOCATION 4474 So. Main

OPERATOR DEPUTY DIAL DP # 691T

- ✓ 1. POWER SWITCH ON, READY LIGHT ON.
- ✓ 2. CONNECT BREATH TUBE TO PUMP TUBE, INSERT TEST RECORD CARD.
- ✓ 3. PRESS ADVANCE, WAIT FOR LIGHT 2.
- ✓ 4. PRESS ADVANCE, WAIT FOR LIGHT 3.
- ✓ 5. DISCONNECT PUMP TUBE FROM BREATH TUBE, EXTEND BREATH TUBE AND INSERT MOUTHPIECE, TAKE BREATH SAMPLE. (NOTE TIME) LIGHT 4 WILL COME ON AFTER SAMPLE IS TAKEN. 2350
- ✓ 6. REMOVE MOUTHPIECE, HOUSE BREATH TUBE AND CONNECT TO PUMP TUBE, PRESS ADVANCE WAIT FOR LIGHT 5.
- ✓ 7. PRESS ADVANCE, INSERT QUARTZ CALIBRATOR WAIT FOR LIGHT 6 THEN REMOVE QUARTZ CALIBRATOR.
- ✓ 8. PRESS ADVANCE WAIT FOR LIGHT 7. REMOVE TEST RECORD CARD.
- ✓ 9. POWER SWITCH OFF.

CASE # 85-13782

CMI INCORPORATED

INTOXILYZER TEST RECORD

% ALCOHOL IN BLOOD	INTOXILYZER PRINT CODE
•	A -- AIR BLANK
•	B -- BREATH
•	C -- CALIBRATOR (Simulator)
•	OBSERVED SUBJECT
•	FOR REQUIRED OBSERVATION
•	PERIOD AND FOLLOWED
•	CHECK LIST
A • 0 0	<u>WID</u> OPERATOR'S INITIAL
C • 2 4	<u>4474 So. Main</u> INTOXILYZER LOCATION
A • 0 0	<u>94-001121</u> INTOXILYZER SERIAL NUMBER
B • 1 4	<u>2/21/85</u> DATE
A • 0 0	

WILLIS C. GABBAR
SUBJECT'S NAME

2319
TIME FIRST OBSERVED

2335
TIME TEST STARTED

DEPUTY DIAL
OPERATOR

ADDITIONAL INFORMATION AND/OR REMARKS

CASE # 85-13782

FEB 25 1985

RECEIVED BY
JORDAN
1555 SO 1300 WEST
UTAH 84105

ADULT CLASS E

N. 294217

1984

McRAE & DeLAND
ATTORNEYS AT LAW

THE WHITLEY MANSION
132 SOUTH 600 EAST
SALT LAKE CITY, UTAH 84102
TELEPHONE (801) 364-1333

LONI F. DELAND
HERSCHEL P. BULLEN
RUTH J. McCLOSKEY
CONNIE MOWER

HALLS CROSSING, UTAH
TELEPHONE (801) 684-2233 EXTENSION III

209 EAST 100 NORTH
VERNAL, UTAH 84078
TELEPHONE (801) 789-1666

ROBERT M. McRAE
JOANN B. STRINGHAM
L. A. DEVER

March 4, 1985

Driver License Services
4501 South 2700 West
Salt Lake City, UT 84119

Re: Willis C. Gabbard
DOB: 7/9/39

Dear Hearing Officer:

My client requests a hearing before the Driver License Services. Please forward to my Salt Lake office copies of the reports you intend to rely on at said hearing. Thank you.

Sincerely,


Loni F. DeLand

jp

RECORD
3-685 9B

Alcohol rout Slip & worksneel

NAME: Willis Gabbard DATE OF ARREST 2/21/75 FILE # 3842817

☒ Per Se

☐ Refusal Reset

☐ ODR

☐ CPS

☐ DR. Outside Restrictions

License Statues:

Copy To:

Page #

Line#

Reset On:

Place:

Date:

Time :

☐ Entered by Highway Safety

Received By	Date:	Routed By	Date
Quail	2/25	Wadene	2/26
UC	2/26	dry file	2/26
UC	3-7	Peggy	3-7
PO	MAR 11 1985	2-24	MAR 11 1985
UC	4-2	Cindy	4-2
Cindy	4-3	File	4-3
The Person	APR 10 1985	John	APR 10 1985
File Copies to Attorney		Sent By: P2	

Use For Appeals Only

Petition Received: 5-3-85 (Date)

Tape Recording Located

yes

no

(for 3-22-85)^{yes}

[illegible]

E:WILLIS C GABBARO DDB:07/09/84 PLC:11 DGT:1757 1984
R:10955 SO 1300 WEST SO. JORDAN DT 84025 HGT:71 WGT:175 1984
SOC-SEC: 529-46-6314 MED:C
S DT:07/05/84 LIC T:E LIC S:SUSP 90 DAYS PER SE DR ED:
P DT:07/09/88 PTS: 55 OLD L:C 176396
RIG ISS DT:00/00/55 EXT:W STATION:T FIL S:1 BATCH: 10881

RENEWAL:07/01/80 0 EXDT:07/09/80 LIC T:RCD LIC:C 176396 RST:NO RST
STATION: DUF: BATCH:0622712
VIOLATN:12/30/81 0 CONV DT:01/04/82 PTS: 55 AAMVA:SP3 ACC:N SEVRTY:
MPH QV: 16 AGCY:3 MCYC: CITN: 53 COURT:18
JUDGE:UNK CRT CAS: 31 DUF: BATCH:0095703
VIOLATN:03/24/82 0 CONV DT:04/01/82 PTS: 55 AAMVA:SP6 ACC: SEVRTY:
MPH QV: 14 AGCY:1 MCYC: CITN: 2 COURT:25
JUDGE:GINGEE CRT CAS: 15 DUF:A BATCH:0030781
VIOLATN:07/08/83 0 CONV DT:07/24/83 PTS: 55 AAMVA:SP6 ACC:N SEVRTY:
MPH QV: 13 AGCY:1 MCYC: CITN: 47 COURT:25
JUDGE:UNK CRT CAS: 31 DUF: BATCH:3295124
VIOLATN:03/03/84 0 CONV DT:03/12/84 PTS: 55 AAMVA:SP3 ACC: SEVRTY:
MPH QV: 10 AGCY:1 MCYC: CITN: 11 COURT:08
JUDGE:A HUNT CRT CAS: 24 DUF: BATCH:4152097

LETTER :05/11/84 0 LETTER TYPE:DL702 RESULT: FAC
RENEWAL:07/05/84 0 EXDT:07/09/84 LIC T:E LIC:C 176396 RST:NO RST
STATION:T DUF: BATCH:0872838
LETTER :08/09/84 0 LETTER TYPE:DL802 RESULT: C
HEARING:08/22/84 0 ACTION:PROBATION OFFICR:DHH HEARING TYPE:POINTS
CRSE: APPRD: STATN:
NOTE:275 PTS.
DP ACTN:08/22/84 1 EXP DT ACTN:03/03/85 DP ACTN:PROB LIC S:VALID
AAMVA:RVS ACCID: ACC DATE:00/00/00
ACTL REINST DT 03/03/85 REIN LIC STA:VALID
VIOLATN:02/21/85 0 CONV DT:03/24/85 PTS: AAMVA:PS1 ACC: SEVRTY:3
MPH QV: AGCY:2 MCYC: CITN: 58 COURT:18
JUDGE:UNK CRT CAS: 57 DUF: BATCH:6666666
SUBENTR:02/26/85 0 ITEM:DRIV LICENSE LIC: 3842817 APP: RETRN:00/00/00 DL
PLATE NO.
LETTER :03/18/85 0 LETTER TYPE:DL203 RESULT:
HEARING:03/22/85 0 ACTION:SUSPENSION OFFICR:DHH HEARING TYPE:OTHER
CRSE: N/A APPRD: STATN:
NOTE:PERSE SUSP !!!
DP ACTN:03/24/85 0 EXP DT ACTN:06/24/85 DP ACTN:SUSP LIC S:SUSP 90 DAYS PER
AAMVA:PS1 ACCID: ACC DATE:00/00/00
ACTL REINST DT 00/00/00 REIN LIC STA:

NOTE :03/24/85 1 RET-CODE: 4 ORDER SENT 040485/40 FAC
HEARING:04/04/85 0 ACTION:NO ACTION OFFICR:CRT HEARING TYPE:OTHER
CRSE: N/A APPRD: STATN:
NOTE:SP3 081382 DSM
NOTE :05/06/85 0 RET-CODE: 3 PS1 022185 PEND APPEAL
END OF DRIVER HIST