

1986

Lynno Matt Harry v. Fred Schwendiman : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860338
~~IN THE SUPREME COURT OF THE STATE OF UTAH~~

LYNNO MATT HARRY,

:

Appellant,

:

vs.

:

Case No. 19745

860338-CA

FRED SCHWENDIMAN, Director
of Driver's License, State
of Utah,

:

:

Respondent.

:

BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT OF THE
SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH
The Honorable Boyd Bunnell, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

LYNNO MATT HARRY,	:	
Appellant,	:	
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FRED SCHWENDIMAN, Director	:	
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In this case appellant seeks to have §41-2-19.6 U.C.A. (1953 as amended) declared unconstitutional on its face and as applied; to find that the decision of the department of public safety suspending his driver's license for being in actual physical control of a motor vehicle while driving under the influence of alcohol, was arbitrary and capricious; and to hold that an acquittal of the criminal charges against him, bars suspension of his driving privileges by the department of public safety.

The district court denied appellant's Petition for Reinstatement of Driver's License after the Department of Public Safety had suspended his license.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the trial court's decision reversed and for an order reinstating his driving privileges.

STATEMENT OF THE FACTS

Appellant was arrested September 8, 1983, and charged with being in actual physical control of a motor vehicle while under the influence of alcohol. His driver's license was taken and he was issued a temporary license, good for 30 days. (DUI citation R. 12)

He timely requested a hearing before the Department of Public Safety, Office of Driver License Services (hereinafter referred to as "the department"). (Letter from McRae & DeLand, R. 12) He was notified of the hearing to be held September 28, 1983, by notice dated and mailed September 23, 1983. (Letter from Office of Driver License Service dated September 23, 1983, R. 12) Appellant and counsel appeared at the time and place set for hearing, but no hearing examiner from the department was present. (TR. pgs. 19-20)

Appellant was notified of another hearing by oral notification to his counsel (TR. 20) and a per se hearing was held before the department October 5, 1983. (TR. p. 30)

The arresting officer was not present at the hearing, but the hearing examiner considered his notarized statement and the results of the breathalyzer test contained in his statement. (TR. 16) In the officer's report he stated that

the appellant was sitting in the driver's seat, with the keys in the ignition and in the "on" position, and that the vehicle was rolling backward. (R. 12, DUI Report Form)

Appellant was present at the hearing with counsel. The hearing examiner summarized his testimony as follows:

Driver testified that he was sitting in a vehicle within the impound lot at G & L Motors of Roosevelt, Utah. He states that the vehicle was not running and that he was not going to go anywhere, but was waiting for his wife to come and pick him up to take him home. He states that the vehicle was not running, and not registered. (R.. 12 Facts and Findings)

Prior to the hearing held October 5, appellant received a Notice from the Department that his drivers license was suspended for 90 days. (R. 12, Order of Suspension dated October 3, 1983) Counsel for appellant was informed at the hearing that said notice of suspension was the final notice appellant would receive from the department. (TR. 25)

He timely petitioned the district court for an order reinstating his driving privileges, which petition was filed October 17, 1983. (R. 1-5) A hearing was held before the Honorable Boyd Bunnell on November 8, 1983, wherein appellant challenged the constitutionality of §41-2-19.6 U.C.A. on its face and as applied, and requested that if the court upheld the statute, it find the decision of the department to be arbitrary or capricious. Appellant's counsel proffered Exhibits 1 and 2, letters evidencing counsel's attempt to obtain subpoenas at hearings before the department and the

denial of their request. (TR. p. 22, lines 1-9) (TR p.29-30) (Copies of Exhibits 1 and 2 are attached hereto). His Petition was denied. (R. 13) Findings of Fact and Conclusions of Law and Order were signed by Judge Bunnell on November 21, 1983 and filed November 28, 1983 denying appellant's petition. (R. 21-23)

Appellant's Notice of Appeal was filed December 16, 1983. (R. 27-28)

He was found not guilty in his criminal trial held October 31, 1983. (Traffic Docket from Roosevelt Circuit Court and TR. 24) His driving privileges were reinstated on October 17, 1983, by the Honorable Richard C. Davidson, judge of the Seventh Judicial District Court, pending a hearing on his Petition (R. 6-7) and again after the denial of his petition, pending this appeal. (R. 16-17)

ARGUMENT

POINT I

SECTION 41-2-19.6 U.C.A. IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, §7 OF THE CONSTITUTION OF THE STATE OF UTAH.

Section 41-2-19.6 U.C.A. (1953 as amended) with an effective date of August 1, 1983, provides that when a peace officer has reasonable grounds to believe a person has

violated §41-6-44 U.C.A. (driving or being in actual physical control of a motor vehicle while under the influence of alcohol) the officer shall take the Utah's driver's license and issue a temporary license effective for thirty days. If no action is taken by the driver his or her license is automatically suspended for ninety days, with no provision for a restricted license to drive to and from work. If the arrested person requests a hearing within ten days of the date of arrest, a hearing shall be held no later than thirty days from the date of arrest and issuance of the thirty day license.

The statute further provides that:

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

Section 41-2-20 U.C.A. allows a person whose license has been suspended by the department to petition the district court for a hearing. 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.

The Utah legislature has attempted to set up a procedure whereby a driver is given the opportunity to have a hearing prior to the time his suspension becomes final.

Appellant does not challenge the timing of the administrative hearing, but challenges the adequacy of the hearing

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases licenses are not to be taken away without that procedural due process required by the 14th Amendment. (Citations omitted) This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege". Bell v. Burson, 402 US, at 539, 29 L.Ed2d 90, 91 S.Ct. 1586 (1971)

The United States Supreme Court has dealt with the issue of timing, and to what extent due process requires a presuspension hearing. Mathews v. Eldridge, 424 US 319, 333, 47 L.Ed2d 18, 96 S.Ct. 893 (1976) applied a three step analysis which has been followed in Dixon v. Love, 431 U.S. 105, 52 L.Ed2d 172, 97 S.Ct. 1723 (1977) and Mackey v. Montrym, 443 U.S. 1, 61 L.Ed2d 321, 99 S.Ct. 2612 (1979) as being applicable to statutes suspending a driver's license.

In Dixon v. Love, supra, the court upheld a statute against constitutional challenges, which provided for an initial summary decision suspending the motorist's license based on official records that a driver had been convicted of three moving traffic violations within a twelve month period. As early as practicable after the suspension, and prior to the time it became final, a full evidenciary hearing was

available. The case presented an issue of timing of the hearing and not adequacy of the hearing.

Also in Mackey v. Montrym, supra, the question raised was one of timing of the hearing, not adequacy. The court upheld a statute which allowed for suspension of a driver's license, based upon an officer's written report that the driver had refused to submit to a chemical test, without providing for a presuspension hearing. The court noted at page 333 the driver could obtain a prompt hearing to resolve factual disputes. The court also noted at page 328 footnote 5 that the driver could adjourn the hearing to permit the attendance of witnesses, who were then subject to cross-examination.

Although Dixon v. Love, supra and Mackey v. Montrym, supra, have allowed suspensions prior to a hearing in certain circumstances, in both cases, the statutes provided for prompt and full evidenciary hearings prior to the final suspension.

The hearings held before the department are quasi-judicial in that the hearing examiner is empowered to investigate facts, weight evidence, draw conclusions, and exercise discretion of a judicial nature.

In speaking of the necessary administrative due process requirements in quasi-judicial hearings, the United States Supreme Court has held:

All parties must be fully appraised of the evidence submitted or to be considered and must

be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its right or make its defense. In no other way can it test the sufficiency of the facts to support the findings . . . ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88 (1913)

Bell v. Burson, supra is most applicable in this case as it addressed the adequacy of the hearing, rather than dealing with the issue of suspension prior to a hearing being afforded. The hearing required by the Due Process Clause must be "meaningful" and "appropriate to the nature of the case."

The Utah Supreme Court has also recognized that the "right to drive is a valuable right or privilege and it cannot be taken away without procedural due process." Ballard v. State Motor Vehicle Division, 595 P.2d 1302 (1979).

In various state court cases, where the issue of sufficiency of the hearing has been raised, it is generally held that the driver has the right to cross-examine witnesses and to confront his accusers at the hearing. See 60 ALR3d 427 License Revocation - Sufficiency of Hearing §5 and cases cited therein where courts have held that hearings based solely upon officers' written reports, violated the driver's right to be confronted by his accusers and right to cross examination. In Re Sweeney, 257 A2d 764 (Del. 1969) The statute providing for a hearing meant a "fair" hearing and suspension was vacated because officer did not appear at hearing. In Application of Goodwin, 173 Misc 169, 17 NYS2d 426 (1940), substantial rights

of the motorist were violated where the affidavit of the police officer was received and the driver had no chance to be confronted by his accuser.

Therefore, the United States Supreme Court, Utah Supreme Court and courts from numerous other jurisdictions have all held that due process requires a "meaningful" hearing and this in turn requires that a person be allowed the opportunity to confront his accusers, to cross-examine them, and to be empowered to subpoena other witnesses on his behalf.

Appellant's license was revoked by the department solely upon the notarized report of an officer who was not present. The right to cross-examination is vital to insure that procedural requirements set forth in statute and case law are complied with, in addition to ascertaining the truth. Two examples come to mind: The Utah statute requires that the hearing be conducted upon the "sworn" report of the officer. §41-2-19.6(4) U. C. A. Appellant had no opportunity to question the officer as to whether or not he did in fact make an affirmative act of swearing at the time in compliance with the recent case of Colman v. Schwendiman, No. 18652 (Filed Feb. 29, 1984 Utah). There was no evidence he was qualified to operate the breathalyzer machine, or that he complied with the other standards set forth in State v. Baker, 56 Wash.2d 846, 355 P.2d 806, 809 (1960).

Although the state should have the burden of producing the officer, even if a driver wanted to subpoena the officer, or any other witness on his behalf, department policy has been to deny drivers any subpoenas unless they first request the subpoenas in writing and state the anticipated testimony. (Proffered Exhibits 1 and 2) Given the time limitations in these hearings, which is often less than five days, it is impossible for drivers to request the subpoenas in writing and obtain them prior to the hearings and get them served.

The statute only requires that the examiner "may" issue subpoenas for the attendance of witnesses, not that he "must" issue them at the driver's request. In Beatty v. Hults, 22 App.Div.2d 740, 253 NYS2d 327 (NY 1964) the driver's license suspension was reversed for failure of the examiner to issue requested subpoenas.

Also, the statute does not provide what prior notice of the hearing, if any, must be given the motorists. In this case notice of a hearing to be held September 28 was dated and mailed September 23. September 23, 1983, was a Friday. Allowing three working days for mail delivery this would be one day prior notice of the hearing. Although not binding on administration agencies, Rule 6 of the Utah Rules of Civil Procedure require five days prior notice of hearings on motions, excluding weekends and holidays, and allowing for

three days for service by mail. It is questionable whether one day prior notice in appellant's case is adequate under the due process requirements. The statute on its face is silent as to what prior notice is sufficient and could be interpreted to allow for even one hours notice. Due process is an opportunity to be heard and "it is an opportunity which must be granted to a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed2d 62, 85 S.Ct. 1187 (1965)

The statute is unconstitutional on its face in that the hearing is conducted solely upon the sworn report of an absent officers; it does not mandate that the hearing examiner provide the motorists with subpoenas; and it is silent as to what prior notice be given the motorist of the hearing date. For the same reasons, it is unconstitutional as applied in this case in that the officer did not appear; counsel for appellant had previously been denied subpoenas unless first requesting them in writing and given the time limitations (notice mailed on the 23rd for hearing to be held on the 28th) an attempt to request subpoenas would have been futile.

POINT II

THE DEPARTMENT'S DECISION WAS ARBITRARY OR CAPRICIOUS.

The department's decision was based totally on hearsay evidence, inasmuch as the officer did not appear at the hearing, but submitted his sworn report which contained

the results of the breathalyzer test and several statements as to why he believed appellant was in actual physical control of a motor vehicle.

The department has determined that "The hearing officer shall not be bound by formal rules of evidence or procedure in administration of this hearing but shall consider all relevant evidence." (R.1 - Opening Statement of Hearing Examiner)

Although hearsay evidence is generally admissible within the State of Utah, in administrative proceedings, it is well established that the administrative hearing officer cannot base his findings wholly upon hearsay evidence.

In workman's compensation cases before the Industrial Commission, it has been determined that there must be at least a residuum of evidence to support the administrative hearing that would be competent in a court of law. Hackford v. Industrial Commission, 11 Utah 2d 312, 358 P.2d 899 (Utah 1961).

This principal is likewise applicable in hearings before the bank commissioner.

[T]his court has held that hearsay evidence is admissible before the Industrial Commission and the Public Service Commission. However, a finding of fact cannot be based solely upon hearsay evidence, but must be "supported by a residuum of legally competent evidence in a court of law." No sound reason appears why the same rule should not be applicable to proceedings before the bank commissioner. Sandy Bank v. Brimhal, 636 P12d 481 (Utah 1981)

The "legal residuum rule" is firmly established in Utah and widely recognized in jurisdictions throughout this country and in general works of law. See 36 ALR3d 12, Comment Note - Hearsay Evidence in Proceedings Before State Administrative Agencies, 1971. Also see 2 AmJur2d 577-581 Administrative Law, Section 691. That rule requires some residuum of evidence admissible in a court of law.

Clearly the breathalyzer test results are not admissible unless certain foundational requirements are met, none of which were present at appellant's hearing. Murray City v. Hall, No. 17329, (Filed April 13, 1983, Utah) and State v. Baker, supra.

Police reports containing matters observed by police officers are not admissible at a defendant's criminal trial. Rule 803 (8)(B) Utah Rules of Evidence. State v. Bertul, 644 P.2d 1181 (Utah 1983)

There was no "legal residuum" of evidence to support the administrative finding that the officer had reasonable grounds to believe appellant to have been in actual physical control of a vehicle and had a blood alcohol content of .08% or greater. Therefore the decision was arbitrary or capricious.

In Young v. Board of Pharmacy, 462 P.2d 139 (N.Mex. 1969) it was held that an administrative finding based solely on hearsay does not rise to the level of substantial evidence

and hence, is an arbitrary and capricious action.

Appellant was not afforded a "meaningful" hearing that complied with due process (Point I), nor was any evidence legally competent in a court of law offered against him, and therefore the department's decision was arbitrary or capricious.

POINT III

ACQUITTAL BY THE COURT OF THE CRIMINAL CHARGES BARS
SUSPENSION OF APPELLANT'S LICENSE.

As a general rule, acquittal on a criminal charge is not a bar to subsequent civil action arising out of the same facts on which the criminal proceeding was held. Criminal charges require proof beyond a reasonable doubt, whereas proof in civil actions and administrative hearings is of a lesser degree. See 96 ALR2d §612 which dealt with various state court decision.

However, Mackey v. Montyrm, supra, at 328 seems to support the proposition that a finding by a court is binding on the administrative agency. Montyrm received notice his license was suspended for failure to take a breath-analysis test. Rather than obtaining an immediate hearing before the Registrar, he took an appeal to the Board of Appeal. Prior to the time the Board of Appeal was to conduct a hearing, Montyrm's counsel made demand upon the Registrar for return of his license, and stated in the letter that he had been

acquitted of the driving under the influence charge, and asserted that the state court's finding that the officer had refused to administer the test was binding on the Registrar. The court sated:

Had Montrym's counsel enclosed a copy of the order dismissing the drunk-driving charge, the entire matter might well have been disposed of at that state without more.

In analyzing the issue of the necessity of a presuspension hearing, the court reasoned at page 332 the issue reaised by Montrym was not a "factual" one but rather a legal question; that is whether the court's subsequent finding that the police later refused to administer the test was binding on the Registrar as a matter of collateral estoppel.

The issue of collateral estoppel was not directly dealt with in Montrym, as the issue was not raised on appeal, but in the court's analysis of the case it intimated had counsel properly submitted the order dismissing the criminal charge to the Registrar, the matter may have been disposed of.

In appellant's case prior to hearing on his petition before the district court he was acquitted of the criminal charges. However, the trial judge refused to find it a bar to his suspension.

The factual issues were exactly the same in the department's hearing and in the district court, and no specific intent was involved in the criminal case.

The acquittal indicates appellant is not a safety hazard and therefore the purpose of §41-2-19.5 U.C.A. for suspension of licenses has not been fully complied with.

CONCLUSION

A hearing based upon the notarized report of an officer is not a "meaningful" hearing and denies motorists their constitutional rights to confront their accusers and cross-examine them. The department's policy of not allowing a driver's access to subpoenas is also a flagrant violation of constitutional rights.

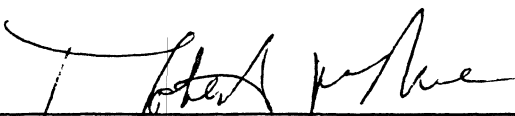
The hearsay report of the officer and improperly considered breathalyzer result do not comply with the 'legal residuum' rule followed in Utah, and standing alone or considered with the constitutional violations, make the decision of the department arbitrary or capricious.

The court's acquittal of the criminal charges should be binding on the department.

Motorists often depend on the ability to drive for their livelihood and this property right is constitutionally directed. The enactment of §41-2-19.6 U.C.A. manifests an intent by the Legislature to relieve the State of Utah of the inconvenience of calling the officer at every hearing before the department. However, expediency must be limited by constitutional protections. The most expedient hearing would be no hearing at all.

RESPECTFULLY SUBMITTED this 17th day of August, 1984.

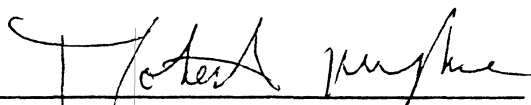
McRAE & DeLAND



ROBERT M. McRAE for
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CERTIFICATE OF MAILING

I do hereby certify that I mailed, postage prepaid, two true and correct copies of the foregoing Appellant's Brief to Bruce M. Hale, Assistant Attorney General, 124 State Capitol, Salt Lake City, Utah 84114 on this 17th day of August, 1984.



Verna Licht
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July 15, 1983

Mr. Phil Himmelberger
Driver License Services
Third Floor South
2501 South 2700 West
Salt Lake City, UT 84119

Dear Phil:

Several weeks ago I asked you to forward to me a supply of blank issued driver's license department subpoenas as contemplated by your statutory authority to issue subpoenas. Please do so immediately.

I also request again at this time a copy of the department rules and regulations pertaining to driver's license matters including, but not limited to, post-arrest hearings and refusal hearings which will be held under House Bill #142, which I believe is the correct designation of the new DUI law which takes effect August 1, 1983.

Sincerely,



Robert M. McRae

RMM:pm

Caena Licht
Clerk of Court



**THE ATTORNEY GENERAL
STATE OF UTAH**

July 22, 1983

ROBERT M. MCRAE
McRae & DeLand
72 East Fourth South, Suite 355
Salt Lake City, UT 84111

RE: Administrative Subpoenas

Dear Bob:

Your telephone conversation and letter to Phil Himmelberger regarding the above have been referred to me for response. Please be advised that under my advice, it is departmental policy to issue subpoenas only in cases where good cause that is relevant is given to the central office in writing. If you will provide the same in a specific case, the Department will grant your request.

The Department rules and regulations have not been implemented yet because they have not had experience with the matter. That will be done pursuant to the proper statutory authority and as soon as it is done we will send you one of the first copies.

Sincerely,

Bruce

BRUCE M. HALE
Assistant Attorney General
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BMH/vlw

cc: Phil Himmelberger

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