

1987

Layton City v. James Bennett : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

LAYTON CITY,

Plaintiff/Respondent

vs.

JAMES BENNETT,

Defendant/Appellant

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Case No. 870038-CA

#2

BRIEF OF APPELLANT

APPEAL, PETITION FOR REVIEW

Appeal from Fourth Circuit Court, State of Utah, Davis County,
Layton Department.
Judge: Judge K. Roger Bean

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COURT OF APPEALS

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A copy of the applicable Regulations of the Commissioner of Public Safety of the State of Utah is attached in the addendum.

JURISDICTION OF THE COURT

This appeal is taken from the Fourth Circuit Court of the State of Utah, Davis County, Layton Department and jurisdiction is conferred upon the Utah Court of Appeals pursuant to the provisions of Utah Code Section 78-2a-3(2)(c) which states, in part, as follows:

The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(c) appeals from the circuit courts;

This is an appeal from a final judgment rendered in the Fourth Circuit Court of Davis County, State of Utah in which the Defendant/Appellant was convicted and sentenced for violating Layton City Code Section 41-6-44.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should all of the evidence obtained by the Layton police from the Appellant have been suppressed?

2. Did the Court improperly deny the Appellant's request that two of the jurors be dismissed for cause?

3. Should the evidence concerning the results of the "intoxilyzer" test have been admitted by the Court at trial and subsequently submitted to the jury?

STATUTES AND RULES FOR REVIEW

*United States Constitution, Fourth Amendment, states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Utah Constitution, Article I, Section 14, states:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

*Utah Constitution, Article VIII, Section 4, states:

The supreme court shall adopt rules of procedure and evidence to be used in the course of the state and shall by rule manage the appellate process. The legislature may amend the rules of procedure and evidence adopted by the supreme court upon a vote of two-thirds of all members of both houses of the legislature. . . .

*Utah Code Section 41-6-44.3, passed into law in 1979 and amended in 1983, states:

(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 the 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.

*Utah Code Section 77-7-15, passed in 1980, reads as follows:

A peace officer may stop any person in a public place when he has reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

*Utah Code Sections 77-35-18(e) (4) & (14), otherwise known as Rule 18 of the Utah Rules of Criminal Procedure, amended in 1980, read as follows:

(e) The challenge for cause is an objection to a particular juror and may be taken on one or more of the following grounds:

(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted to or employed by the state or a political subdivision thereof

(14) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging

Utah Rules of Evidence:

*The Preliminary Note to the Utah Rules of Evidence, paragraph two, reads as follows:

The Committee met . . . and recommended adoption of the Federal Rules of Evidence by the Supreme Court pursuant to the general judicial powers contained in the Constitution of Utah, Article VIII, Section 1 to super-

wise inferior courts, and pursuant to the statutory rulemaking power of the Supreme Court contained in Utah Code Annotated, Section 78-2-4 (1953). It was the view of the Committee that, while the legislature may not enlarge judicial powers beyond those prescribed by the Constitution of Utah, Robinson v. Durand, 36 Utah 93, 104 Pac. 760, (1908), the power to promulgate rules is within the general judicial powers conferred by Article VIII, Section 1. Any existing statutes inconsistent with these rules, if and when these rules are adopted by the Supreme Court, will be impliedly repealed.

*The Advisory Committee Note to Rule 101 of the Utah Rules of Evidence, paragraph three, reads as follows:

The position of the court in State v. Hansen, 588 P.2d 164 (Utah 1978) that statutory provisions of evidence law inconsistent with the rules will take precedence is rejected.

*Rule 801(a) & (c) of the Utah Rules of Evidence read as follows:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

*Rule 802 of the Utah Rules of Evidence reads as follows:

Hearsay is not admissible except as provided by law or by these rules.

*Rule 803(6) & (8) of the Utah Rules of Evidence read as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, or acts, events conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compila-

tion, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in the paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(8) **Public records and reports.** Records, reports statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

ADMINISTRATIVE LAW

18 Utah Advance Reports 3, (1985)

Pursuant to the provisions of Article VIII, Section 4, Constitution of Utah, as amended, the Court adopts all existing statutory rules of procedure and evidence not inconsistent with or superseded by rules of procedure and evidence heretofore adopted by this Court. Effective as of July 1, 1985.

STATEMENT OF THE CASE

This matter is an appeal from a criminal conviction and sentence for driving under the influence rendered in the Fourth Circuit Court, Davis County, Layton Department before a jury.

The material facts of this case show that on August 6, 1986 at the hour of 1:00 a.m., the appellant, Mr. Bennett, was proceeding northbound on Main Street in the City of Layton, Davis County, State of Utah. (Transcript of Trial, p. 44, lines 6-25). Upon arriving at 1100 N. Main, Mr. Bennett turned on his left blinker signal, turned into the left turn lane, and, after sitting in the left turn lane for approximately 20 seconds, turned into a construction site where Mr. Bennett was the construction foreman. (Transcript of Trial, p.45, lines 1-9) There was no other traffic in the area excepting Officer Patterson of the Layton City Police Department who observed that Mr. Bennett undertook his proper left hand turn into the construction site without committing any traffic violations of any nature. (Transcript of Trial, p. 71, lines 15-17).

There was nothing of value on the site which could be readily removed (Transcript of Trial, p. 73, lines 14-18; Transcript of Suppression Hearing, p. 22, lines 23-25 and p. 23, lines 1-2), nor was the site posted with "no trespassing" signs (Transcript of Suppression Hearing, p. 23, lines 16-18). The area was not encircled with a fence (Transcript of Suppression Hearing, p. 21, lines 4-6). There were no reports of burglaries at the site. (Transcript of Suppression Hearing, p. 24, lines 24-25; p. 25, line 1).

Officer Patterson did not observe Mr. Bennett undertake any criminal activity, nor did he suspect Mr. Bennett of criminal activity (Transcript of Trial, p. 74, lines 6-18). In spite of the utter lack of any reasonable suspicion that Mr. Bennett was engaged or had been engaged in any criminal activity, Officer Patterson turned into the construction site, activated his spotlight, and directed the spotlight at Mr. Bennett, (Transcript of Trial, p. 47, lines 16-19).

In response to the police spotlight, Mr. Bennett emerged from his vehicle, approached Officer Bennett, and asked the officer the nature of the problem. (Transcript of Trial, p 48, lines 1-19) The officer then noted the odor of alcoholic beverages on the breath of Mr. Bennett, (Transcript of Trial, p. 49, lines 1-8) administered a series of field sobriety tests, (Transcript of Trial, p. 50. lines 3-4) and later placed Mr. Bennett under arrest for "Driving Under the Influence." (Transcript of Trial, p. 58, lines 12-19).

Mr. Bennett was subsequently administered an "Intoxilyzer" test, (Transcript of Trial, p. 86, lines 1-3) and evidence of the test result was admitted at trial over the objection of counsel. The objections were based on lack of foundation and hearsay. (Transcript of Trial, p. 91, lines 5-12; p. 92, lines 8-25, p. 93, lines 1-17).

In choosing the jury panel, counsel for Mr. Bennett objected to two of the jurors for cause. The Court denied the request, and counsel was forced to use two of his peremptory challenges on the two objectionable jurors. A specific outline of the pertinent facts of the jury selection process is provided:

a. Mr. Hill: The first juror to which Mr. Bennett objected was a Mr. Hill who is a reserve police officer for Kaysville City and is qualified as a Category 2 police officer. (Transcript of trial, page 9, lines 1-6). He was familiar with two of the prosecution witnesses who are police officers with Layton City (Transcript of trial, page 6, line 25; page 7, lines 1-18). When Mr. Hill revealed that he was a part-time police officer, the Court inquired further concerning his attitudes, and asked:

THE COURT: Okay. Would the fact that you had that police training give you a problem in being fair and impartial to both sides here?

MR. HILL: I don't believe so.

THE COURT: All right, thank you. Is there any other response? All right, we have none further.

The Court made no further inquiries into Mr. Hill's ability to be impartial. Subsequently, before taking the opportunity to exercise peremptory challenges, appellant's attorney moved the Court to dismiss Mr. Hill for cause. The dialogue was as follows:

MR. WANGSGARD: I might preface this, it is not my intention to embarrass anyone or otherwise discredit you in any form or fashion. I just believe that because of certain affiliations of certain of the jurors that it would be difficult to get a fair trial with respect to any one of these particular jurors. In particular, Mr. Hill as a Category 2 police officer. I believe that his position and the affiliation with a law enforcement agency would make it difficult and I believe his responses to your questions has indicated that it would perhaps be best that he be excused for cause.

THE COURT: All right, thank you. Mr. Garside. [The prosecutor]

MR. GARSIDE: Your Honor, I think he has been quite candid and he says that he knows the officers, he hasn't worked with any of these officers. He's not a

departmental officer and has indicated he is a reserve officer as opposed to a full-time officer and I think that he has not shown any indications of prejudice one way or another.

THE COURT: Thank you. In light of the statutory criteria by which we select jurors, in light of Mr. Hill's answers, the Court denies the challenge for cause.

Therefore, the Court denied the challenge for cause regarding Mr. Hill, and Mr. Bennett was forced to use one of his peremptory challenges on Mr. Hill (R. p. 35).

b. Mrs. Seamons: During voir dire, Mrs. Seamons asked how to tell the difference between a little drinking and no drinking (Transcript of Trial, p. 13, lines 7-9). The Court indicated that she would have to listen to the evidence and decide (Transcript of Trial, p. 13, lines 10-16) and Mrs. Seamons responded as follows:

MRS. SEAMONS: Okay, that's why I would want to change the law to there could be no drinking because alcohol affects every person differently.

THE COURT: All right. Let me ask you, if you were chosen as a juror in this case, could you apply the law as I have given it to you? Would you apply the law as I have given it to you?

MRS. SEAMONS: I would try to.

(Transcript of Trial, p. 13, lines 17-24)

The Court asked a few other questions, and then asked if "anybody in your household, that is a member of MADD, RIDD, PADD, or any of those organizations similar to that, whose principal or sole objective is to remove drinking drivers from the highway? Mrs. Seamons? (Transcript of Trial, p. 14, lines 24-25; p. 15, lines 1-3). Mrs. Seamons responded that she was a member of MADD, and the Court queried as follows:

THE COURT: All right. Considering your membership, and I assume support with time and effort and so forth in that organization, if you were chosen as a juror, would you be able to be fair and objective in weighing the testimony and be indifferent to other considerations, your general view about drinking and driving, relative to Mr. Bennett? Could you be fair and objective with him?

MRS. SEAMONS: I think so.

(Transcript of Trial, p. 15, lines 5-13)

The Court inquired no further on the ability of Mrs. Seamons to be impartial in her judgment of Mr. Bennett, and did not inquire any further concerning the extent of her involvement in MADD or the strength of her commitment to MADD and its principles.

Counsel for appellant later asked the Court to excuse Mrs. Seamons for cause:

MR. WANGSGARD: Additionally, Your Honor, we would challenge Mrs. Seamons for cause. She has indicated that she doesn't believe that it's correct for anyone to have anything to drink and drive at all. She is a member of MADD. We believe that she should properly be excused for cause.

THE COURT: All right, thank you. Do you want to respond, Mr. Garside?

MR. GARSIDE: Your honor, in light of that I think that even though she said that she -- that that is her opinion and that she is affiliated with that association that indeed she would follow the laws instructed by the Court and I think that's the primary criteria in consideration here.

THE COURT: Thank you. In light of her responses to the Court's questions upon explanation of the issues and Mr. Bennett's position before the Court, the Court denies that challenge for cause.

(Transcript of Trial, p. 32, lines 7-23)

Again, the Court denied appellant's counsel's motion to dismiss a juror for cause based upon the slight examination of the juror. Mrs. Seamons was later dismissed from the panel by

appellant's counsel with one of his remaining peremptory challenges (R. p. 35).

The appellant used all of his peremptory challenges in choosing the jury panel, two of which challenges were for Mr. Hill and Mrs. Seamons. (R. p. 35)

SUMMARY OF ARGUMENTS

A. The trial court below improperly denied the Motion of Mr. Bennett to suppress the evidence gathered by the law enforcement officers on the grounds that the Layton City police had no reasonable suspicion of the commission of any criminal acts by Mr. Bennett. Mr. Bennett did not perform any acts in the presence of the officer which gave grounds for the officer to stop Mr. Bennett and investigate his person.

B. During examination of the jury panel, it was discovered that two of the jurors should have been dismissed for cause. The Court refused to dismiss the jurors for cause, thus forcing Mr. Bennett to use two of his peremptory challenges on the two suspect jurors. The refusal of the Court to dismiss the jurors for cause was prejudicial to the interests of Mr. Bennett.

C. The evidence submitted by the prosecution and accepted by the Court over the objections of Mr. Bennett was hearsay evidence which did not come within the exceptions to the hearsay rule contained within Rule 803 of the Utah Rules of Civil Procedure. Because the evidence was hearsay evidence and should have been rejected by the Court, there was no proper foundation for the testimony elicited with respect to Mr. Bennett's performance on the blood alcohol level test.

ARGUMENT

A. Should the Evidence Obtained by the Layton Police Incident to the Stop and Subsequent Search and Seizure of Mr. Bennett Have Been Suppressed by the Court Below?

1. RECITATION OF THE APPLICABLE FACTS:

At the hearing on Mr. Bennett's Motion to Suppress held by the Court on October 30, 1986 prior to trial of this matter, the Court heard testimony from the City of Layton concerning the "reasonable suspicion" which the police authorities had to stop, search and seize the appellant, Mr. Bennett, in this action. At the hearing, testimony was elicited from Officer David Patterson of the Layton Police Department that he was on patrol in the early morning of August 6, 1986 within the city limits of Layton, Utah.

Officer Patterson testified that he observed Mr. Bennett's vehicle stopped in the left hand turn lane, with its left blinker signaling. (Transcript of Hearing on Motion to Suppress, p. 8, lines 12-18) Although there was no other traffic on the street, Mr. Bennett stayed in the left hand turn lane for approximately 20 seconds before turning into a construction site. (Transcript of Hearing on Motion to Suppress, p. 9, lines 13-15) The Officer did not observe any traffic violation, nor did he observe any criminal activity. (Transcript of Hearing on Motion to Suppress, p. 27, lines 9-12) Upon observing Mr. Bennett turn into the construction site, Officer Patterson turned into the vacant construction site, pulled within four car lengths of Mr. Bennett's vehicle, and directed his spotlight onto Mr. Bennett. (Transcript of Hearing on Motion to Suppress, p. 15, lines 2-9). There was

nothing of value on the site which could be readily removed (Transcript of Hearing on Motion to Suppress, p. 22, lines 8-11, 19-21, 23-25; p. 23, lines 1-2), and there was no gate or fencing or posting against trespassing (Transcript of Hearing on Motion to Suppress, p. 21, lines 4-6, p. 23, lines 15-21).

Mr. Bennett then exited his vehicle, approached the officer, and asked "What is the problem?" (Transcript of Hearing on Motion to Suppress, p. 16, lines 19-20) at which point Officer Patterson testifies that he noticed the odor of alcohol on the breath of Mr. Bennett. (Transcript of Hearing on Motion to Suppress, p. 18, lines 11-14).

On cross-examination, Officer Patterson testified that he had not observed Mr. Bennett engaged in any criminal activity:

Q: (By Mr. Wangsgard) Had you observed Mr. Bennett engage in any criminal activity prior to the time you turned on your spotlight?

A: No.

. . . .

Q: Did you have a reason--okay, you had a hunch, you had a suspicion something might be afoot.

A: Yes.

Q: But nothing you can really pin it to?

A: No, just suspicion.

Q: Okay. Would it be fair to characterize that suspicion as a hunch?

A: Not a hunch, no.

Q: A gut feeling?

A: A hunch or a gut feeling is more than a suspicion.

Q: Is more than a suspicion? So it didn't rise to the level of a hunch in your estimation, or a gut feeling?

A: Not at that point, it was just a suspicion.

(Transcript of Hearing on Motion to Suppress, p. 27, lines 9-12, p. 28, lines 1-14).

Therefore, in summary, Officer Patterson failed to state any reasonable articulable suspicion of criminal activity on the part of Mr. Bennett, and indeed did not have even a "hunch" or a "gut feeling" that any criminal activity was being undertaken or had been undertaken by Mr. Bennett at the time that Officer Patterson stopped his patrol car within four car lengths of Mr. Bennett's vehicle and directed his spotlight in the direction of Mr. Bennett's vehicle.

2. ARGUMENT:

a. Controlling Decisions of the United States Supreme Court:

i. Terry v. Ohio 392 U.S. 1 (1967).

As the parent of numerous interpretive offspring by later Justices of the United States Supreme Court, Terry, Id. stands for the proposition that the rights granted in the Fourth Amendment to the United States Constitution, i.e.,

[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

Article Four, United States Constitution.

shall not be violated.

The facts of Terry concerned a police officer who observed two men walk past and peer into a store window on approximately 24 different occasions over a period a few hours, interspersed with furtive conversations with a third person. Thereafter, with

his suspicion of criminal activity reasonably aroused, the officer questioned the individuals, received illogical responses, and feeling threatened for his safety, searched the men and discovered concealed weapons on their persons. They were subsequently arrested and convicted of possessing concealed weapons.

Before discussing the particulars of the case, the Court discussed the need for enforcement of the Fourth Amendment, and stressed that the Fourth Amendment is the private citizen's protection from "lawless police conduct" Terry, supra at 12 and that of the Fourth Amendment,

[E]xperience has taught that it [The Fourth Amendment] is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere form of words.

. . . .

A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur. Id. at 12, 13.

The Court recognized that a police officer, on the beat, does not necessarily have the time or the predilection to analyze whether he is affecting the constitutional imprimatur, but that the police officer must be aware that whenever a police officer accosts an individual and restrains his freedom to move away, he has "seized" that person and that such seizure may be a violation of the individual's rights under the Fourth Amendment.

Answering a query regarding the limitations of an officer in accosting an individual, the Court established a standard against which the police officer must measure his activities:

[B]alancing the need to search [or seize] against the

invasion which the search [or seizure] entails." [citing Camara v. Municipal Court 387 U.S. 523, 534-535, 536-537, (1967)] And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. (emphasis added).

.

This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.

Terry, supra at 21.

Stated in a different fashion, the Court reiterated the above declaration and stated:

[I]n making that assessment [the reasonableness of the search or seizure] it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. Id at 22.

In spite of the ruling by the Supreme Court in Terry that a search or seizure must be more than inarticulate hunches, the Court below ignored the Terry standard and allowed the admission of evidence gathered by an officer who admittedly did not have even a "hunch" or a "gut feeling" of criminal activity prior to the seizure of Mr. Bennett. By his own admission, the officer did not observe Mr. Bennett engaged in any criminal activity and certainly could not and did not recite any "specific and articulable facts" stated with "specificity" which warranted the officer's intrusion upon Mr. Bennett's person. The officer, in fact, stated his reason for stopping Mr. Bennett did not even rise to the level of an "inarticulate hunch."

ii. Brown v. Texas 443 U.S. 47, (1979):

Another landmark case in the continuing analysis of Fourth Amendment rights, Brown involved two police officers who were cruising the streets of El Paso, Texas in an area known for its drug traffic. The officers observed two men walking away from each other in an alley. The officers stated the situation "looked suspicious," but, as in the instant action, did not claim to suspect Brown of any specific misconduct, but rather that Brown was in an area with a high incidence of drug traffic.

The Court declared that in order for the stop by the officers to be constitutionally valid,

[W]e [the Supreme Court] have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

.

The flaw in the State's case is that none of the circumstances preceding the officers' detention of the appellant justified a reasonable suspicion that he was involved in criminal conduct. . . . The fact that the appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that the appellant himself was engaged in criminal conduct. Brown, supra at 53.

An officer cannot arbitrarily stop an individual without some reasonable suspicion, based on objective facts, that the individual is engaged in criminal activity.

The mere fact that Officer Patterson observed Mr. Bennett in an area (of three miles size) of suspected criminal mischief, does not give rise to a reasonable suspicion, based on objective facts, that Mr. Bennett was engaged in criminal activity. Officer Patterson himself testified that he did not have any reasonable suspicion that Mr. Bennett was engaged or had engaged

in criminal activity, and certainly had observed no supporting facts. The unavoidable conclusion is that the stop seizure by Officer Patterson was impermissible and any evidence garnered as a result of that stop must be suppressed.

b. Controlling Decisions of the Utah Supreme Court:

The Utah Supreme Court has recently reviewed a number of situations involving United States Constitutional Fourth Amendment rights, Utah Constitution, Article 1, Section 14 rights and Utah Code Section 77-7-15. In each instance, the Utah Supreme Court has closely followed the guidelines set out by the United States Supreme Court in the decisions above.

i. State v. Swanigan 699 P.2d 718 (1985).

Two police officers investigated a report of a burglary. While enroute to investigate, they noticed the appellant and another person walking along the road approximately a block from the buglarized residence. The officers reported to dispatch an "attempt to locate" the two individuals. Two hours later, a third officer located the two persons approximately three blocks from the buglarized residence, stopped the two individuals, and asked for identification. After checking for outstanding warrants, the police officer discovered there was an outstanding traffic warrant on the appellant, and arrested the appellant. In searching the appellant after the arrest, certain items taken from the buglarized home were found.

The appellant filed a motion to suppress the evidence as being gathered in violation of his Fourth amendment rights and the trial court denied the motion.

The Utah Supreme Court reversed the subsequent conviction of appellant, stating:

A brief investigatory stop of an individual by police officers is permissible when the officers "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." [T]he officer who stopped defendant and his companion lacked a reasonable suspicion to believe they had engaged in criminal conduct. The stop was based solely on a description by a fellow officer who had observed the two walking along the street at a late hour in an area where recent burglaries had been reported. Neither officer had any knowledge that defendant and his companion had been at the scene of the crime. The officers had not observed the men engaged in any unlawful or suspicious activity. On the facts presented, the stop was based on a mere hunch rather than the constitutionally mandated "reasonable suspicion"; consequently, the confiscated evidence was erroneously admitted at trial. Supra. at 719.

Swanigan is startlingly akin to the case at bar, but even more similar is State v. Carpena 714 P.2d (1986).

ii. State v. Carpena 714 P.2d (1986).

Carpena was driving his automobile with Arizona license plates in a neighborhood where recent reports had been received of a rash of burglaries. The car was moving slowly throughout the neighborhood. After following the car for three blocks, the officer turned on his red lights, at which time the car turned a driveway. The officer searched the car, found an unloaded pistol, removed the keys from the ignition, and opened the trunk to find thirty pounds of marijuana.

The district court sustained the appellant's motion to suppress the evidence, based on the rulings of Brown v. Texas, supra and State v. Swanigan, supra. On appeal, the Utah Supreme Court stated:

The stop was based merely on the fact that a car with out-of-state license plates was moving slowly through a

neighborhood late at night. The officer had no objective facts on which to base a reasonable suspicion that the men were involved in criminal activity. The ruling of the district court is affirmed. Carpena, supra at 675.

Again, the Utah Supreme Court affirmed that before an officer is allowed to stop any person, the officer must have a reasonable suspicion, based on objective facts, that the person is involved in criminal activity.

iii. State v. Constantino 732 P.2d 125 (1987).

In this recent Utah case, the appellant was observed by a police officer driving a car on the public roads. The officer had personal knowledge that appellant's drivers license was suspended and also recognized the passenger from an arrest warrant of which the officer had personal knowledge. Taking these facts into consideration, the officer stopped the automobile, arrested appellant, and impounded the automobile. During an inventory search of the automobile the officer found marijuana in the trunk, and the appellant was charged with possession of a controlled substance.

The appellant moved to suppress the evidence. The district court denied the motion. On appeal, the Utah Supreme Court stated that the police officer did have an articulable, reasonable suspicion of criminal activity, and that the stop by the officer was appropriate due to his knowledge of appellant's suspended driver's license and the outstanding warrant.

In the matter at bar, Officer Patterson claimed no such knowledge at the time of the seizure of Mr. Bennett.

c. **Statutory Provisions of the Utah Code:**

The constitutional protections afforded individuals from

unreasonable searches and seizures as guaranteed by the Fourth Amendment of the United States Constitution and by Article 1, Section 14 of the Utah Constitution have been recognized by the Legislature of Utah and codified in Utah Code, Section 77-7-15 as follows:

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Thus, the legislature has explicitly recognized that peace officers are entitled to stop persons in public places only upon a "reasonable suspicion" of the commission of a public offense. Officer Patterson clearly stated that he did not have a reasonable suspicion of the commission of any criminal offense. Therefore, the stop and seizure of Mr. Bennett was clearly in violation of his statutory and Constitutional rights.

B. Did the Court Improperly Deny Mr. Bennett's Request to Dismiss Two of the Jurors for Cause?

1. FACTUAL BACKGROUND:

During voir dire of the jury panel, Mr. Bennett requested the Court to dismiss two jurors for cause. The Court refused to dismiss either of the two persons, and Mr. Bennett therefore used two of his peremptory challenges to exclude the two persons from the jury.

As is more fully set out in the Statement of the Case, adequate proof of the potential bias of the two jurors was present. The two jurors should have been dismissed for cause. Mr. Hill is a category two police officer who knew two of the City's witnesses, and, by judicial decree, is presumed to implicitly trust the statements of other peace officers. Mrs. Seamons is a member of MADD, or, Mothers Against Drunken Driving, who stated that she did not believe any person should be allowed to consume alcoholic beverages, and did not further qualify her blanket statement against the use of alcoholic beverages.

2. ARGUMENT:

In the Utah case of State v. Bailey, 605 P.2d 765, (1980), the Utah Supreme Court was faced with an appeal of a criminal matter where two jurors were not dismissed for cause as in the instant matter, forcing the appellant to use two of his peremptory challenges. In discussing the matter, the Utah Supreme Court quotes favorably from the case of Reynolds v. U.S. 98 U.S. 145 (1978) as follows:

The United States Supreme Court, considering this subject in Reynolds v. U.S. . . . stated that "The

theory of the law is that a juror who has formed an opinion cannot be impartial." Id. at 155. Chief Justice Marshall, presiding over the trial of Aaron Burr in 1807, defined an impartial jury as one composed of persons who "will fairly hear the testimony which may be offered to them, and bring in their verdict, according to that testimony, and according to the law arising on it." Burr's Trial p. 415. Marshall's test for impartiality, quoted with approval in Reynolds, is:

[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him. Id. at 416.

State v. Bailey, supra at 767.

The United States Supreme Court recognizes the necessity for an impartial jury in any legal matter where a jury is requested. Once the jury is drawn, the examination must be close enough to determine when a juror's impressions and prejudices are strong and deep enough to close the mind against the testimony which may be offered in opposition to the juror's impressions and prejudices. If the juror cannot overcome his or her prejudice or predetermined attitude, then that juror must be dismissed, or the case must be retried by a new jury.

As far back as 1941, the Utah Supreme Court addressed the issue of a juror's prejudice against drinking while driving in the case of State v. Chealy, 116 P.2d 377 (1941). When asked if any juror had any prejudice against a man taking a drink, the questionable juror answered:

I would if an automobile accident was involved, that was relating in any way to an automobile accident, I would be very strong against it, not on religious grounds.
Id. at 378.

Further questioning by the Court elicited a reply from the juror that the juror would not be prejudiced against the Defendant notwithstanding his previous reply. The trial Court did not allow a challenge for cause, and the Defendant appealed.

The Utah Supreme Court agreed with the appellant that the challenge for cause should have been granted, stating that the juror's state of mind indicated that the juror could not act with entire impartiality in the matter. However, the Court ruled that the error in refusing to sustain the challenge for cause was not prejudicial because there was no evidence in the record that the appellant used all of his peremptory challenges.

In 1977, the Court again addressed the issue of a challenge to a juror for cause in the matter of State v. Moore 562 P.2d 629 (1977) where a member of the panel repeatedly stated that he did not know if could honestly be fair in a case involving the sale of narcotics. The appellant's attorney then asked the Court to dismiss the juror for cause.

In spite of the obvious prejudice of the juror, the trial court did not excuse the juror for cause. The appellant then exercised a peremptory challenge on the juror. The appellant subsequently used all of his peremptory challenges.

On appeal, the Court stated:

The defendant was required to exercise one of his peremptory challenges to challenge a juror who clearly stated he was not sure he could be impartial and unbiased in deciding the case. The failure of the trial court to excuse the juror Rock for actual bias as that term is defined in [the predecessor statute to 77-35-18] was prejudicial and in effect it deprived defendant of one of his statutory peremptory challenges in that he was required to exercise one of the peremptory challenges to have Rock excused from serving on the

jury.

.

The trial court erred in refusing to excuse Mr. Rock upon challenge being made by defendant's attorney in accordance with statute and it appearing clearly that Mr. Rock was actually biased, as that term is defined in our statute. Supra. at 631.

The Court found that the trial court's error was fatal, and remanded the matter for a new trial.

This line of reasoning that it is prejudicial error for the trial court to force a party to use a peremptory challenge to remove jurors who should have been removed for cause is supported in all the Utah cases following Moore, supra. See, State v. Bailey 605 P.2d 765, (1980); Jenkins v. Parrish 627 P.2d 533 (1981); State v. Lacey 665 P.2d 1311 (1983); and State v. Hewitt 689 P.2d 22 (1984). The Hewitt case bears some examination, as the defendant appealed on the basis that two jurors should have been excused for cause.

The first juror which the appellant believed should have been excused for cause was a Mr. Holliday who admitted to training in drug abuse while serving in the Army, and that he had numerous friends who were police officers, although he did not know any of the prospective witnesses in the matter. Holliday did state that he could act impartially in the matter.

The Court stated:

A statement made by a prospective juror that he intends to be fair and impartial loses its meaning in light of other testimony or facts that suggest a bias. Id. at 26. [emphasis added].

The Court let the trial court's decision on Holliday stand, but the second juror was unable to clearly state that he would not

favor the police over the defendant. Therefore, the Court found that the second juror had such

[S]trong and deep impressions with regard to the veracity of police officer's testimony [that he] would credit a police officer's testimony to an undue extent. He should have been dismissed for cause. Therefore, forcing defendants to use one of their peremptory challenges to remove [the juror] resulted in prejudicial error. Supra. at 27.

Just as the second juror was dismissed for cause in the Hewitt case because he was of the temperment to give the police officer's testimony undue weight, so should Mr. Hill have been dismissed from the jury panel for cause because of his natural inclination to give a fellow police officer's testimony undue weight. The Utah case of State v. Nielson, 727 P.2d 188, (1986) concerned the validity of a search warrant based on the false information provided by a police officer to the magistrate. The State, arguing in support of the search warrant, reasoned that "warrants may be issued upon even the 'double hearsay' between police officers under the general rule that law enforcement officers are presumed to tell each other the truth. . . ." Id. at 191. The Court agreed with the State's reasoning, and stated: "there is a presumption that law enforcement officers will convey information to each other truthfully." Id. at 192.

If law enforcement officers are presumed to tell each other the truth, then Mr. Hill certainly could not be objective in his evaluation of the testimony of Officer Patterson, for the presumption by Mr. Hill, a law enforcement officer, is that Officer Patterson tells the truth.

Applying the above cases to the instant matter, it is clear

that the predispositions of both Mr. Hill and Mrs. Seamons were tainted by "strong and deep impressions" to the extent that neither Mr. Hill nor Mrs. Seamons were able to offer that clear and untainted mind so necessary for an impartial juror. Mr. Hill admitted he actually knew at least two of the witnesses, and was a police officer himself who presumes that all other officers tell the truth. Mrs. Seamons was a member of MADD, an acronym for Mothers Against Drunk Driving, and stated that she was for the passage of laws banning all alcoholic beverages. Clearly both of the above persons should have been dismissed by the Court for cause. Therefore, Mr. Bennett had to "waste" two of his peremptory challenges on Mr. Hill and Mrs. Seamons which is prejudicial error.

3. STATUTORY PROVISIONS:

Utah Code Section 77-35-18, Utah Rules of Criminal Procedure, Rule 18, states the rules for the selection of a jury in a criminal matter. Subsection (e) provides fourteen grounds for a challenge for cause to be presented to the Court, and the fourth section states as follows:

(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted to or employed by the state or a political subdivision thereof;

The fourteenth section states:

(14) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party

challenging

Without question, Mr. Bennett was entitled to exclude, for cause, both Mr. Hill and Mrs. Seamons on the basis of the above statute and the heavy weight of authority supporting this point.

C. **Should the evidence concerning the results of the "intoxilyzer" test have been admitted by the Court at trial and subsequently submitted to the jury?**

1. FACTUAL BACKGROUND:

During the course of the trial, the prosecution introduced evidence in the form of Exhibits A, B and C for the purpose of establishing that a blood alcohol test had been administered to Mr. Bennett (Exhibit A), that the device for measuring the blood alcohol level of Mr. Bennett was properly tested (No record in transcript) (Exhibit C), that the test was properly administered (Exhibit A and Transcript of Trial, p. 87, lines 5-12). Nowhere is there an explanation to the jury regarding the proper interpretation of Exhibit B.

However, while Mr. Bennett vigorously objected to the introduction of such evidence on the basis of hearsay and lack of foundation, (Transcript of Trial, p. 89, lines 17-24; p. 91, lines 5-12; p. 92, lines 8-25; p. 93, lines 1-13; p. 98, lines 2-10; p. 99, lines 12-14; p. 106, lines 16-25; and p. 107, lines 1-14) the trial court overruled each of the objections and allowed the questionable evidence to be admitted and therefore submitted to the jury.

2. ARGUMENT:

a. **The Evidence Admitted Over Objection Did Not Conform to the Utah Rules of Evidence**

The existing Utah Rules of Evidence were adopted by the Utah Supreme Court on April 13, 1983, and were considered effective

September 1, 1983. The Preliminary Note to the Rules of Evidence indicate that "any existing statutes inconsistent with these rules, if and when these rules are adopted by the Supreme Court, will be impliedly repealed." (Preliminary Note to Utah Rules of Evidence).

The Advisory Committee Notes to Rule 101, entitled "Scope" state in the last paragraph that "[t]he position of the court in State v. Hansen, 588 P.2d 164 (1978) that statutory provisions of evidence law inconsistent with the rules will take precedence is rejected." (Advisory Notes to Rule 101, Utah Rules of Evidence). In addition, 18 Utah Advance Reports 3 states:

Pursuant to the provisions of Article VIII, Section 4, Constitution of Utah, as amended, the Court adopts all existing statutory rules of procedure and evidence not inconsistent with or superseded by rules of procedure and evidence heretofore adopted by this Court. Effective as of July 1, 1985.

Contrary to the Utah Rules of Evidence, Utah Code Section 41-6-44.3 states:

(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 the 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.

Rule 801(c) of the Utah Rules of Evidence states:

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

and Rule 802 of the Utah Rules of Evidence simply states that hearsay is not admissible except when otherwise excepted. The immediately following Rule 803 sets forth the exceptions to the hearsay rule of which Sections 6 and 8 are applicable in this matter.

Section 6 of Rule 803 states that records kept in the regular course of business are an exception to the hearsay rule, but that the custodian of the records must testify that the records were kept in the regular course of business and it was the custom of the business to so keep such records.

Section 8 of Rule 803 allows public records and reports as a exception to the hearsay rule, "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel."

In the instant matter, the prosecution, over the objections of Mr. Bennett, admitted into evidence Exhibits A, B and C which were records of the functioning of the device used to measure the blood alcohol level of Mr. Bennett. The objection of Mr. Bennett to the results of the device are multiple, but center about the fact that the custodian of the records concerning the testing,

operation and calibration of the device was not present, but instead an affidavit under Utah Code 41-6-44.3(b) was admitted to show that the device was accurate.

The fallacy with the use of an affidavit under Section 41-6-44.3(b) is that such section authorizes the use of hearsay evidence, i.e., documents offered as memoranda or records of acts to prove the analysis was made and the instrument was accurate. The Utah Rules of Evidence do not contain any such exception for the use of any such document or affidavit to overcome the hearsay rule.

The two possible exceptions to the hearsay rule in the instant matter listed under Rule 803 are: subsection 6-allows a record of a regularly conducted activity to be admitted if the custodian of the records testifies of the record's accuracy; and, subsection 8-allows a public record to be admitted only if the public record does not involve a criminal case where there has been an observation by a law enforcement officer.

In this matter, there was no custodian to lay a foundation for the admissibility of the questioned exhibits, thus eliminating the possibility of admission under 803(6). And since law enforcement officers witnessed the calibration and operation of the device in question, it was necessary for the officers to be present to testify concerning the calibration and operation of the device, but no such officers were present, eliminating the exception provided by 803 (8).

Absolutely no exception to the hearsay rule exists allowing the proposed affidavits to be admitted into evidence without either the custodian of the records or the actual officer admin-

istering the calibration of the machine to testify. However, the court below disregarded the Utah Rules of Evidence, and chose to admit the questioned exhibits into evidence under the aegis of a statute (Utah Code 41-6-44.3) , which statute should not be considered in light of the advisory notes to the Rules of Evidence, supra given the fact that the statute has been impliedly repealed by Article VIII, Section 4 of the Utah Constitution as interpreted by the advisory notes and the per curium opinion of 18 UAR 3. The statute is patently contrary to the Rules of Evidence as adopted by the Utah Supreme Court.

Such improper admission of the questioned exhibits was clearly prejudicial to the interests of Mr. Bennett. If the exhibits had not been introduced into evidence, no evidence would have been presented regarding the results of the intoxilyzer device.

The introduction of the questioned evidence was clearly prejudicial, and the matter should be dismissed, or remanded for a new trial on such basis.

b. If the Court Finds Some Exception to the Hearsay Rule Applicable to the Questioned Exhibits, the Exhibits Must Nonetheless Conform to the Requirements of Utah Code Section 41-6-44.3 as Interpreted by the Utah Supreme Court in Murray v. Hall

In April of 1983, (prior to the adoption by the Utah Supreme Court of the Utah Rules of Evidence) the Utah Supreme Court handed down the case of Murray v. Hall, 663 P.2d 1314, which holds that in order to admit the affidavit referred to in Utah Code 41-6-44.3, the affidavit had to reflect certain statements,

including an affirmative showing that the calibration and testing for accuracy of the device for measuring the alcohol content of an individual was performed in accordance with the standards established by the Commissioner of Public Safety of the State of Utah.

The law enforcement officers used affidavits which do not fully reflect strict compliance with the standards established by the Commissioner of Public Safety of the State of Utah were followed in the calibrating and testing for accuracy of the Intoxilyzer used on Mr. Bennett.

For the convenience of the Court, a copy of the applicable regulations from the Commissioner of Public Safety is attached for comparison with the actual affidavit which was used by the law enforcement officer conducting the testing of the machine. (See, Trial Exhibit C and appendix).

The affidavit used by Layton City to certify that the Intoxilyzer was properly tested before and after the administration of the breath test to Mr. Bennett does not comply with the Breath Testing Regulations established by the Commissioner of Public Safety. Specifically, the following deficiencies are clearly apparent on the face of the affidavit when compared with the regulations of the Commissioner of Public Safety:

1. The temperature check. (Paragraph 3 of the regulations) The affidavit does not specify whether the machine was warmed.

2. Internal Purge Check. (paragraph 4 of the regulations) The affidavit does not indicate the mode selector

is on the air blank mode.

3. Fixed Absorbtion Calibrator Check. (paragraph 5 of the regulations) The affidavit allows a variance of plus or minus .01% in the calibration setting, while the regulations allow no such variation.

4. Simulator Check. (paragraph 6 of the regulations) The affidavit does not indicate that an air blank is run on the machine between each of the three tests as is required by the regulations.

5. Printer Deactivator Check. (paragraph 7 of the regulations) The affidavit has no detailed checklist for the printer deactivator check as is set out in paragraph 3 of the regulations.

Although the affidavit, paragraph 2, states the testing was performed according to standards, Murray v. Hall footnote 5, states that such an assertion is not sufficient, and a showing must be made that each and every step required in checking and calibrating the instrument was observed. The affidavits on their face clearly fail in that regard.

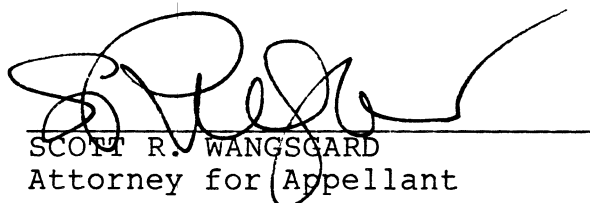
CONCLUSION

In conclusion, Mr. Bennett argues first, the evidence submitted by Layton City should have been suppressed at the trial as being the fruits of an unlawful search and seizure. Second, two jurors should have been excluded by the court for cause, were not excluded for cause, therefore forcing Mr. Bennett to use two of his peremptory challenges on the two persons.

Finally, evidence submitted on the issue of the proper functioning of the Intoxilyzer and Mr. Bennett's blood alcohol level should not have been admitted by the Court for lack of foundation. The documentary evidence offered to establish the requisite foundational basis for admission of the test results is clearly hearsay evidence which does not fit within any of the exceptions to the hearsay rule.

Mr. Bennett prays that judgment of the lower court be reversed with direction to the lower court to enter a dismissal of the case.

Dated this 20 day of April, 1987.


SCOTT R. WANGSGARD
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed four true and correct copies of the foregoing Brief of Appellant to:

Steven Garside
Layton City Prosecutor
437 North Wasatch Drive
Layton, Utah 84041

on the 2nd day of April, 1987, via United States Mail, postage prepaid.

Don B. Bell

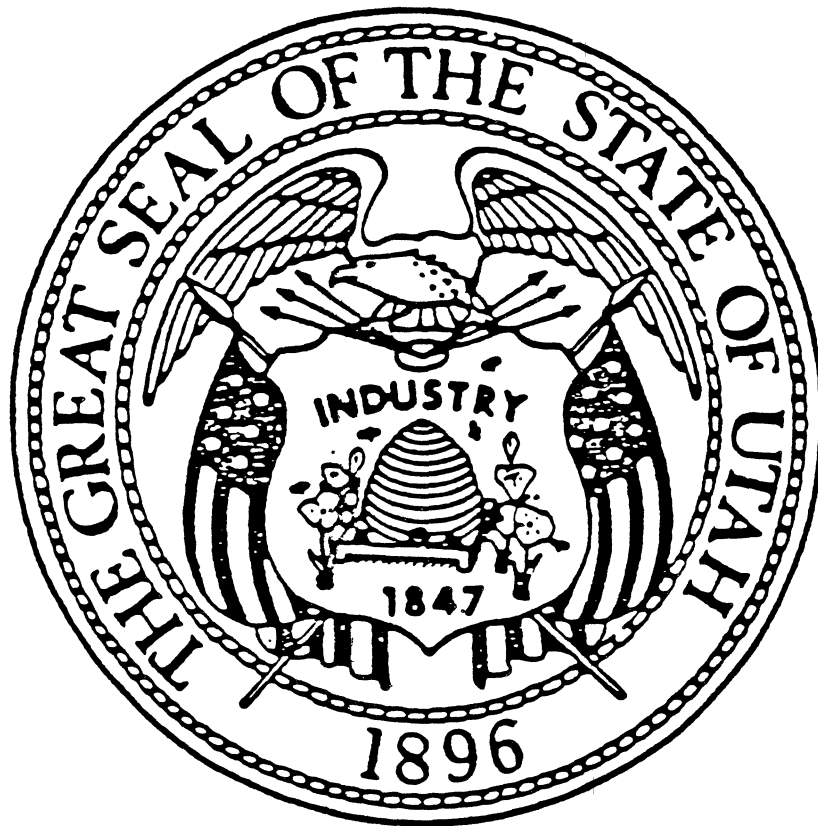
A D D E M D U M

Archives file #3531

Revised: April 1, 1981
Archives file# 4714

BREATH TESTING REGULATIONS

Revised: November 4,,1983
Archives file# 6734



DEPARTMENT OF PUBLIC SAFETY

Jerry E. Luxen
Jerry E. Luxen
Commissioner

I. TECHNIQUES OR METHODS

- A. Tests to determine the concentration of alcohol in a persons blood, may be applied to blood, breath or other bodily substances. Results shall be expressed as equivalent to grams of alcohol per one hundred (100) cubic centimeters of blood. The results of such tests shall be entered in a permanent record book.**
- B. Written check lists, outlining the method of properly performing the tests in use under division A of this regulation, shall be available at each location where tests are given. The check list and the test record shall be retained by the operator administering the test or the arresting officer.**

Definition :

A check list sets forth the steps, in sequence, that a breath test operator must follow. A square is provided by each of the steps for the operator to check each one as it is performed to insure proper operation of the test instrument.

II. BREATH TESTS

- A. Breath samples of alveolar air shall be analyzed with instruments specifically designed for the analysis of breath. The calculation of the blood alcohol concentration shall be on the basis of aveolar air to blood ratio of 2100:1. Breath samples shall be analyzed according to the methods described by the manufacturer of the instrument or instructions issued by the office of the Commissioner of Public Safety.**

III. TESTS FOR CHECKING CALIBRATION

- A. Breath testing instruments must be certified on a routine basis not to exceed forty (40) days.**
- B. Calibration tests must be performed by a technician using appropriate solutions of ethyl alcohol, and using methods and techniques for checking calibration recommended by the manufacturer of the instrument or the office of the Commissioner of Public Safety.**
- C. Results of test for calibration shall be kept in a permanent record book. A report of each calibration test shall be recorded on the appropriate form and sent to the supervisor of the Breath Testing Program. The supervisor of the Breath Testing Program is hereby designated as the official keeper of said records.**

IV. PROCEDURE FOR CERTIFICATION OF INSTRUMENTS

A. Breathalyzer

- 1. Instrument heating properly:**
 - a. between 47 and 53 degrees centigrade**
- 2. Collection chamber output:**
 - a. COLD between 55 and 58 cc's**
 - b. WARM between 50 and 54 cc"s**
- 3. NULL meter functioning properly:**
 - a. Must be able to achieve a balance and swing freely in both directions.**

4. Read light in mechanical center :

Place two ampoules of the same control number in the holders, turn on the read light, balance galvanometer and check for mechanical center. Switch the ampoules, turn on the read light. The null meter should not swing more than $\frac{1}{4}$ inch in either direction.

5. Blood alcohol pointer slippage check :

Balance the instrument with ampoules in the holders. Set the blood alcohol pointer on .20%, or center of the Blood Alcohol scale. Using the light carriage adjustment, and with the read light on, run the B. A. needle to .00% and back to .20%, observing to see that the null meter balances at the same time the B. A. needle reaches .20%. Then run the B.A. needle to .40% and back to .20% observing to see that the null meter balances at the .20% line on the blood alcohol scale.

6. Simulator Check :

At least three (3) simulator checks of a known value shall be run on the instrument. The results must be within .01% plus or minus of the actual value of the known solution.

7. Ampoule Check :

A series of simulator tests with the accumulated total of .60% shall be run on an ampoule from each control number on hand with the instrument. The results of each simulator test must be within .01% plus or minus of the actual value. The ampoule should then be observed to see if there is a slight yellow color, indicating the presence of potassium dichromate. If it meets the above standards, the chemicals are correct or within allowed tolerances.

B. Intoxilyzer

- 1. Place the mode selector switch in the zero set mode.**
- 2. ELECTRICAL POWER CHECK:** With the power switch on, observe to see that the power indicator light comes on, indicating there is electrical power to the instrument.
- 3. TEMPERATURE CHECK:** If the instrument is already warmed up, check to see that the ready light is on. If it is not warmed up, wait approximately 10 minutes to see that the ready light comes on. (This light indicates that the sample chamber is heated to the proper temperature).
- 4. INTERNAL PURGE CHECK:** Put the mode selector in the air blank mode. Place thumb on the end of the pump tube to see that it is pumping air. Time the pumping sequence to see that it pumps for approximately 35 seconds.
- 5. ZERO SET AND ERROR INDICATOR CHECK: (AS Model)**
Set the mode selector in the zero set mode. Depress the zero adjust knob and adjust the digital display to a plus .000, .001, .002 or .003 to see that you can achieve a proper zero set. Re-set the digital display above the acceptable plus .000 to .003. Place the mode selector to the test mode and observe to see that the error light comes on. Repeat, placing the digital display at minus .000 and observe to see that the error light comes on when the mode selector is placed in the test mode.

(ASA Model)

Advance the test cycle to the zero set mode and see that the unit registers a reading of plus .000, .001, .002, or .003. If this reading is not observed, advance to the next cycle and see that the error light comes on.

6. **FIXED ABSORPTION CALIBRATOR CHECK:** With the test card in the printer, run a test on the fixed absorption calibrator to see that the instrument gives the correct reading on the digital display and the printed test card. THIS CHECK NOT REQUIRED ON INSTRUMENTS NOT EQUIPPED WITH THE FIXED ABSORPTION CALIBRATOR.
7. **SIMULATOR CHECK:** Run three tests on a simulator solution of a known value and an air blank before each one. Observe to see that the correct readings, within plus or minus .01% of the actual value is indicated on the digital display and printed on the test card for each simulator test and a .00% reading for each air blank.
8. **PRINTER DEACTIVATOR CHECK: (AS Model)** Run a simulator test with the zero set NOT in the proper zero set range, to see that the printer is deactivated and will not print.

(ASA Model)

This check must be performed before the unit is up to operating temperature. (before the ready lamp is on) Advance the unit to the first purge cycle (air blank). Observe the error light to see that it is lit. At the end of the test cycle (approximately 35 seconds), see that the pump stops and that the printer is deactivated and will not print.

✓. QUALIFICATIONS OF PERSONNEL

A. Breath test shall be performed by a qualified operator who shall have completed the operators course prescribed by the Commissioner of Public Safety. Operators shall use only those instruments which they are certified to operate.

B. Breath test operator certification requirements:

- 1. Must have successfully completed training for each type of instrument and pass the required test, as approved by the Commissioner of Public Safety.**
- 2. Operators must complete an approved recertification training course and pass a test every two (2) years to maintain their certification.**

C. Breath test technician requirements:

- 1. Must comply with one of the following:**
 - a. Must successfully complete the Breath Testing Supervisors course offered by Indiana State University.**
 - b. A manufacturers repair technician course for the breath testing instruments in use in the State of Utah.**
 - c. Be qualified by the nature of his employment or training to maintain and repair the breath testing instrument in question and to instruct in the proper operation of the instrument.**

VI. REVOCATION OF CERTIFICATION

A. The Commissioner of Public Safety may on the recommendation of a technician, revoke the certification of any operator:

1. Who obtains a certification card falsely or deceitfully.
2. Who fails to comply with the foregoing provisions governing the operation of breath test instruments.
3. Who fails to demonstrate satisfactory performance in operating breath testing instruments.

VII. PREVIOUSLY QUALIFIED PERSONNEL

The foregoing regulations shall not be construed as invalidating the qualification of personnel previously qualified as either breath test operators or breath test technicians under programs existing prior to the promulgation of these regulations. Such personnel shall be deemed certified until such time as retraining would have been required were these regulations not in effect.

This provision shall take effect as if enacted contemporaneously with the other Breath Testing Regulations of the Department of Public Safety on June 11, 1979.

In the opinion of the Department of Public Safety, it is necessary to the peace, health and welfare of the inhabitants of the State of Utah that this regulation become effective immediately.

A. Training for original certification is to be conducted by a Breath Test Technician and should include the following:

- 1 hour...Welcome, registration, preview of Alcohol and Traffic Safety.**
- 3 hours...Effects of Alcohol in the Human Body.**
- 3 hours...Operational Principles of Breath Testing.**
- 2 hours...Alcoholic Influence Report Form.**
- 2 hours...Testimony of the Arresting Officer.**
- 3 hours...Legal Aspects of Chemical Testing.**
- 1 hour...Detecting the Drinking Driver.**
- 8 hours...Laboratory Participation. (Running Simulator tests on the instruments and tests on actual drinking subjects).**
- 1 hour...Examination and Critiques of Course.**

B. Training for recertification is to be conducted by a Breath Testing Technician and should include the following:

- 2 hours...Effects of alcohol in the Human Body.**
- 2 hours...Operational principles of Breath Testing.**
- 1 hour...Alcohol Influence Report Form and Testimony of arresting officer.**
- 2 hours...Legal Aspects of Chemical Testing and Detecting and the Drinking Driver.**
- 1 hour...Exam.**

C. Anyone having previously successfully completed a twenty-four (24) hour operators school, may be recertified at anytime by successfully completing an eight (8) hour recertification course, and also may be certified to operate another type of breath testing instrument after eight (8) hours instruction pertaining to the instrument in question.