

1987

# Virgil Moore v. Fred C. Schwendiman, Cheif, Drivers License Services, State of Utah : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. \_\_\_\_\_

870248

IN THE UTAH COURT OF APPEALS

VIRGIL MOORE,

Plaintiff-Appellant,

vs.

FRED C. SCHWENDIMAN, Chief,  
Drivers License Services,  
State of Utah,

Defendant-Respondent.

Case No. 870248-CA

#146

BRIEF OF APPELLANT

Appeal from an order revoking the plaintiff-appellant's driving privileges in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, presiding.

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FILED

SEP

Clerk  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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VIRGIL MOORE,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	Case No. 870248-CA
	)	
FRED C. SCHWENDIMAN, Chief,	)	
Drivers License Services,	)	
State of Utah,	)	
	)	
Defendant-Respondent.	)	

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IN THE UTAH COURT OF APPEALS

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VIRGIL MOORE,	)	
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Plaintiff-Appellant,	)	
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vs.	)	Case No. 870248-CA
	)	
FRED C. SCHWENIDMAN, Chief,	)	
Drivers License Services,	)	
State of Utah,	)	
	)	
Defendant-Respondent.	)	

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BRIEF OF APPELLANT

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court err in refusing to grant the petition and to reinstate the driving privileges of the plaintiff-appellant based upon the fact that the trial court did not receive into evidence any document which was a sworn report filed within five days after the date of arrest with the Division of Driver License Services?

2. Did the trial court err in allowing the respondent to question the plaintiff concerning prior DUI arrests?

3. Did the evidence sustain the Court's finding that the defendant-respondent had met the burden of proof?

STATEMENT SHOWING JURISDICTION

Under §78-2(a)-3, Utah Code Annotated (effective December 31, 1987), the Court of Appeals has jurisdiction on the grounds that this case involves an appeal from a final order of a District Court review of a state agency, the Drivers License

Services Division of the Department of Public Safety for the State of Utah.

STATEMENT SHOWING NATURE OF PROCEEDINGS

This is an appeal from the Findings of Fact, Conclusions of Law and Order entered by the Honorable Raymond S. Uno after the hearing held on March 11, 1987. In that order the District Court sustained the decision of the Drivers License Services Division of the Department of Public Safety and continued the suspension of the plaintiff-appellant's driving privileges which was first entered on October 4, 1984.

DETERMINATIVE STATUTORY PROVISIONS

The plaintiff-appellant submits that this case can be determined under the statutory provision set forth in §41-6-44.10, U.C.A. (1953, as amended) (Addendum A).

STATEMENT OF THE CASE

At the hearing on March 11, 1987, the defendant-respondent proceeded to present the evidence and called as his first witness a Salt Lake City police officer, R.K. Sullivan (T. 3).

Officer Sullivan testified that on Sunday, August 5, 1984, at approximately 3:28 a.m., he arrested the plaintiff-appellant Virgil Moore. He indicated that he first observed a vehicle at about 950 South State Street traveling southbound in the outside lane when it suddenly took a drastic dive towards the curb for no apparent reason. He indicated that he followed the vehicle down the roadway noting a slight weaving from side

to side. After the vehicle made another sudden movement to avoid making contact with barricades located at 1200 South State, he again followed the vehicle out on State Street to 1700 South where the vehicle made a right-hand turn. He stated that the vehicle made a wide turn, crossed over the center line into the eastbound lanes of travel and was traveling 48 m.p.h. in a 35 m.p.h. zone.

He then pulled over the vehicle and identified Virgil Moore as being the person in court who was operating the vehicle on the day in question. After testifying concerning his detection of slurred speech and the odor of alcoholic beverage, he administered the field sobriety tests. After the field sobriety tests, he placed Mr. Moore under arrest for driving under the influence of an alcoholic beverage, and he testified that he requested him to take a chemical test by reading verbatim the admonition from the DUI Report Form (T. 9). The officer indicated that Mr. Moore said he would take the test, and the officer instructed another police officer to transport him to the Salt Lake County Jail and administer a test (T. 10).

He later indicated that he was informed by the officer that the arrested person "had not completed the breath test," and so he filled out a report and submitted it to the Drivers License Division. The DUI Report Form was not received in evidence, and the officer indicated that he did sign a DUI Report Form dated August 5, 1984, in his own handwriting which he swore to by raising his right hand in front of a notary (T. 10)



On cross-examination, the report was marked by the attorney for the plaintiff-appellant as Exhibit 1 but was not received into evidence. Officer Sullivan indicated that he had no personal knowledge of whether or not Mr. Moore did take the test.

Q Do you recall requesting the other officer to go administer the test?

A Yes.

Q Okay. And do you recall filling out the report?

A Yes . . . .

Q Does that indicate that the arrested person refused to take the test?

MR. GAITHER: I will object to his conclusions about the document.

THE COURT: Unless there's more foundation, I think that the objection is sustainable.

MR. HALE: The foundation is he put it down, Your Honor. Isn't that correct; officer?

THE WITNESS: Yes, that's right. I listed that on the report.

On further re-cross examination by counsel for the plaintiff-appellant, the officer indicated that he had not heard any statements by Mr. Moore or observed Mr. Moore do any acts which would cause him to personally reach the conclusion that Mr. Moore had refused to take the test prior to the time that he filled out the report (T. 18). He did indicate that when Mr. Moore was in his presence, he stated that he would take the tests.

At the conclusion of Officer Sullivan's testimony, the attorney for the plaintiff-appellant made a motion to strike the entire last line of testimony concerning the information that Officer Sullivan received from Officer Cracroft about the alleged refusal to submit to the test as being hearsay. Counsel for the plaintiff-appellant indicated that he understood that the information was only being offered to show how the information got into the report, but it was hearsay as far as witness Sullivan was concerned. The Court indicated that the report would not be received until after the testimony of Officer Cracroft.

The next witness called by the State was David Cracroft, a police officer for Salt Lake City Police Department (T. 20). Officer Cracroft indicated that he was requested by Officer Sullivan to take Mr. Moore to the Salt Lake City Police Station located in Salt Lake City, Utah, to administer breath test. He indicated that he transported him to the place where the intoxilyzer was located at the entrance to the jail. He indicated that he was certified to operate the test, and he went through the standard procedure of running the intoxilyzer machine (T. 22). He stated that he put the hose to Mr. Moore's mouth, and he blew for just a short period, a second, and then quit blowing (T. 22). The officer testified that Mr. Moore puffed his cheeks, blew into the machine for a second and then no more air went into the machine, the sample light went out, so no air sample was going in the machine. The officer indicated that

he told Mr. Moore to blow until he told him to stop, and he did not do that. After which he told him, "Stop faking and blow into the machine or you could lose your license," (T. 23). He stated that Mr. Moore indicated to him that he was blowing, but the officer's conclusion was that he did not get any more air. At that point he stopped the test. Officer Cracroft indicated that he reported back to Officer Sullivan what had occurred concerning Mr. Moore's alleged conduct (T. 24).

On cross-examination the officer testified that there was a test record made from the intoxilyzer machine which he destroyed immediately after the incident. He indicated that he never recalibrated the intoxilyzer machine and had no records in court to show whether or not the machine was functioning properly at the time the test procedures were being given (T. 28). He stated that during the testing procedure as well as the green light that came on concerning the breath sample that the error light kept coming on. When asked whether or not the error light meant more than merely insufficient breath sample, the officer testified that "in this case it meant there was an improper sample, in my opinion. However, if there is a malfunction with the machine in any of the steps, the error light will come on," (T. 29). He stated that the error light is a red light that comes on during the testing procedure as opposed to the green light concerning the air sample. He stated that normally when the light comes on, you have to shut off the

machine and turn it back on and start over and recalibrate the machine, which he did not do in this case (T. 30).

On re-direct he indicated that he followed a checklist that is prepared in connection with the intoxilyzer machine but that he tore it up at the same time that the test card was torn up. On recross-examination the officer indicated that the error light came on about five seconds after the test and that there was enough time for him to put the tube up, take a short sample, remind him to blow again and then tell him that if he did not blow that he could lose his license. The officer testified that all of these procedures took place within the span of time of about five seconds before the error light came on and that it took place within a matter of "several seconds," (T. 34).

When the witness concluded testifying, the defendant-respondent rested. Counsel for the plaintiff-appellant made a motion at that time to dismiss citing §41-6-44.10, U.C.A. (1953, as amended), on the grounds that there was no evidence of a sworn report admitted into evidence; that the officer did not have any personal knowledge at the time the alleged report was completed; and that the Court did not have jurisdiction because there was no showing that the Driver License Division had jurisdiction initially to take the action to suspend the petitioner's driving privileges (T. 36). The plaintiff-appellant also made a motion to dismiss based upon the fact that no records concerning the intoxilyzer machine were introduced to show a foundation as to whether or not the machine was working correctly

or incorrectly in light of the testimony that an error light came on during the procedure. The Court denied the motion to dismiss (T. 41).

The plaintiff-appellant, Virgil Moore, then took the stand and testified that he was arrested on the day in question for driving under the influence. Mr. Moore indicated that he was told that he was not blowing into the machine but that he did blow into the machine at the time in question.

On cross-examination, the Court, over objection of counsel for the plaintiff-appellant, allowed the State to ask a question as to whether or not Mr. Moore had ever had a prior DUI arrest. The Court overruled the objection and counsel for the defendant-respondent was able to ask whether or not on April 16, 1983, he had been previously requested to take a similar test (T. 49). Over another objection by counsel for the plaintiff-appellant, the attorney for the defendant-respondent was allowed to ask whether or not the officer in the previous arrest had contended that he was not blowing properly into the machine. Mr. Moore indicated that the officer had previously made that contention (T. 51).

Thereafter, the plaintiff-appellant rested and the Court entered an order denying the petition and finding that there had been a refusal by the plaintiff-appellant (T. 53).

#### SUMMARY OF ARGUMENT

1. Did the trial court err in refusing to grant the petition and to reinstate the driving privileges of the

plaintiff-appellant based upon the fact that the trial court did not receive into evidence any document which was a sworn report filed within five days after the date of arrest with the Division of Driver License Services?

2. Did the trial court err in allowing the respondent to question the plaintiff concerning prior DUI arrests?

3. Did the evidence sustain the Court's finding that the defendant-respondent had met the burden of proof?

#### ARGUMENT

##### I

THE TRIAL COURT ERRED IN REFUSING TO GRANT THE PETITION AND TO REINSTATE THE DRIVING PRIVILEGES OF THE PLAINTIFF-APPELLANT BASED UPON THE FACT THAT THE TRIAL COURT DID NOT RECEIVE INTO EVIDENCE ANY DOCUMENT WHICH WAS A SWORN REPORT FILED WITHIN FIVE DAYS AFTER THE DATE OF ARREST WITH THE DIVISION OF DRIVER LICENSE SERVICES.

The trial court did not have any evidence in this matter that the document which was referred to during the evidence as a report was ever submitted to the Driver License Division within five days after the arrest. The statute clearly requires that the report shall be submitted within five days from the date of the arrest. The defendant-respondent argued that the report was not jurisdictional and that the court did not need to receive the report because the matter was a trial de novo and sufficient oral testimony was introduced without the necessity for any documentation.

In the case of Helsten v. Schwendiman, 668 P.2d 509 (Utah, 1983), the Utah Supreme Court held that in Utah an officer's report that initiates the administrative revocation proceedings is a mandatory requirement of the statutes. In that case the Court found that the officer's report was not signed in the presence of a notary and was not a sworn report. Therefore, the Court ruled that the document failed to satisfy the statutory requirement of §41-6-44.10, U.C.A., and the Driver License Division revocation proceedings based thereon were invalid and the revocation of the person's driving privileges was a legal nullity.

In the Utah decision of Helsten, the Court cited the Oregon case of Blackburn v. Motor Vehicles Division, Department of Transportation, 576 P.2d 1267 (Ct.App.Ore., 1978). In the Blackburn decision, the Oregon court stated that the entire process toward suspension for refusal to take a breathalyzer test is initiated by the "sworn report." The Oregon court said that without this report the Oregon Motor Vehicle Division had no authority to commence the suspension process. The Court said the sworn report is in essence the basis of the Division's authority to consider suspension. The Court held that the sworn report is a jurisdictional requirement.

In Blackburn the Court went on to state that it would be unnecessary for the Court in the appeal to define the outer limits of the scope of the de novo review in the lower court of the Division's suspension order because of the irregularity

of the jurisdictional document. In the case of Colman v. Schwendiman, 680 P.2d 29 (Utah, 1984), the Utah Supreme Court followed the decision in Helsten and held that the sworn report is required to show the validity of the revocation proceedings and that if the report is not sworn, the subsequent proceedings would be void. In Colman they found that the revocation proceedings were a legal nullity because the officer did not follow the essential requirements to constitute the taking of an oath as required by the statute.

In matters where the District Court jurisdiction is based upon review of the action of an agency, even if the matter is on trial for a de novo review, the jurisdiction of the District Court is based upon whether or not the agency had subject matter jurisdiction. Berry v. Arizona State Land Department, 651 P.2d 853 (Ariz., 1982) The District Court in an appeal de novo has only the subject matter jurisdiction which could be asserted in the administrative hearing from which the appeal was taken. It is clear under the statute that if the report was not a sworn report or was not submitted within five days, the Driver License Division would not have jurisdiction to take away the plaintiff-appellant's driving privileges; therefore, the District Court would not have the jurisdiction to proceed over the subject matter at issue.

In addition at the hearing before Judge Uno and in this appeal, the evidence did not support the conclusion reached by the trial court that a sworn report was submitted to the



Drivers License Division. The plaintiff-appellant submits that the testimony indicated that the officer filled out a document entitled "DUI Report Form." On direct the officer merely indicated that he signed the DUI Report Form and submitted the DUI Report Form to the Driver License Division (T. 10). The evidence is completely absent that the document which the officer claims was submitted to the Driver License Division was more than a DUI Report Form and consisted of a "sworn report" as required by the statute. Later during the trial, on redirect examination, the attorney for the defendant-respondent attempted to elicit from the witness the conclusions contained in the documents (T. 17). The Court sustained an objection to the officer testifying about the conclusions contained in the document. Further questioning revealed that the last sentence of the report indicated that the officer may have signed a document which stated that the subject violated §41-6-44, U.C.A., which is the substantive provision for driving under the influence and is not related to the implied consent law (T. 17).

Therefore, the District Court did not have any sufficient competent evidence to make a ruling that a sworn report was ever submitted to the Driver License Division.

This Court should interpret the provision requiring that a sworn report be submitted within five days as jurisdictional as is clearly contemplated by the statute. There are many policy reasons for the Legislature enacting such a requirement, one of which being that these matters should be

done in a prompt and expeditious fashion. If that requirement is not construed as being mandatory, then there could be instances where an officer or the Driver License Division does not act on a sworn report for months or years after the reported incident takes place.

On the basis of the foregoing, the plaintiff-appellant requests that the Court find that the State of Utah did not meet their burden of proof in presenting all of the jurisdictional facts necessary before the District Court in opposition to the petition to have his driver's license reinstated. As a result of not meeting the burden of proof, the Court should have granted the petition reinstating the plaintiff's driving privileges.

## II

THE COURT ERRED IN ALLOWING THE RESPONDENT  
TO QUESTION THE PLAINTIFF CONCERNING PRIOR  
DUI ARRESTS.

As referenced in the Statement of Facts, the Court allowed the respondent's attorney to ask Mr. Moore if he had ever been arrested for a DUI. After overruling the objection for relevancy, the Court allowed the attorney for the respondent to ask Mr. Moore as to whether or not the officer in the prior case contended that he was not blowing properly (T. 51). Over objection by plaintiff's counsel, Mr. Moore was required to answer the question that the officer had previously contended that he had not blown properly into the machine. Counsel for the plaintiff then made a motion to strike the entire line of questioning based upon the fact that it was inadmissible hearsay

without foundation, arguing that if the Court allowed the evidence to be received, the Court would have to base its decision on inadmissible hearsay evidence. The Court denied the motion to strike the evidence.

In this case the Court may have possibly been correct in ruling that Mr. Moore's prior knowledge of the intoxilyzer machine may have been relevant to the civil proceedings. However, to do this the Court would have to find that the relevance outweighed the undue prejudice of evidence concerning his prior acts of misconduct. Notwithstanding the limited relevance of this line of questioning, it was clearly error to require Mr. Moore to either admit or deny the out-of-court declarations made by the arresting officer in his prior case. Those declarations were not introduced by means of any written or evidentiary documents but merely in the form of hearsay evidence to which Mr. Moore was required by the Court to either agree or disagree with as far as the conclusions of another party.

The questions of Mr. Moore were clearly inappropriate under the Rules 403, 404 and 802, Utah Rules of Evidence.

### III

THE EVIDENCE DID NOT SUSTAIN THE COURT'S  
FINDING THAT THE DEFENDANT-RESPONDENT HAD  
MET THE BURDEN OF PROOF.

In the case of Lopez v. Schwendiman, 720 P.2d 778 (Utah, 1986), the Supreme Court indicated that a district court must determine by a preponderance of the evidence whether the

petitioner's license is subject to revocation under the provisions of this chapter. In that case the Supreme Court indicated that it would give deference to the trial court's view of the evidence unless the trial court has misapplied principles of law or its findings are clearly against the weight of the evidence.

Plaintiff-appellant submits that the findings of the court here are clearly against the evidence and that the evidence did not support the conclusions reached by the court. The officer that filled out the DUI Report Form, which the Court concluded constituted a sworn report of refusal, only had personal knowledge that Mr. Moore consented to take the test. When Officer Sullivan asked Mr. Moore to take the test, he indicated that he would take the test.

The other officer testified as to two areas which the plaintiff-appellant submits are inconsistent. First, he testified that in his opinion, Mr. Moore was not blowing into the machine. However, he later testified that the red error light was coming on and that from the time he first asked Mr. Moore to blow into the machine until the error light came on, a period of time of only five seconds had elapsed. The officer testified that the machine had two lights upon which he was basing his conclusions--the green light for the air sample and the red error light. The officer was not an expert familiar with the machine and there was not evidence introduced to show whether or not the machine was malfunctioning.

In light of these inconsistent facts, the plaintiff-appellant submits that the Court should find that the trial court should have required sufficient documentation before giving weight to the testimony of the officer to the extent that the Court sustained the Driver License Division's ruling. There was no evidence of any check record or the checklist which the officer said that he prepared and tore up after he believed that Mr. Moore had refused to take the test. Nor was there any evidence from any of the experts who regularly maintained the machine as to whether or not the machine was malfunctioning on the time and date in question.

In addition, the plaintiff-appellant requests the Court to review carefully page 34 of the transcript. In that portion of the transcript, the officer testified that in the space of several seconds, there was enough time for him to put the tube up again to the plaintiff's mouth, require him to take a short sample, remind him to blow again into the air tube and then tell him that if he did not blow, he could lose his license. After that, the red error light came on and the officer deemed that Mr. Moore had refused to take the test.

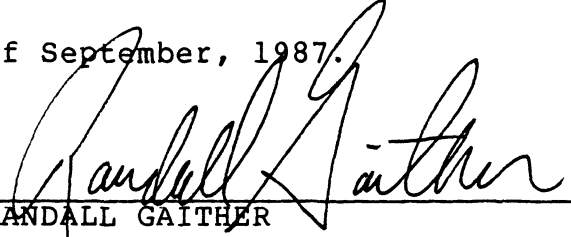
Therefore, a review of the facts in the brief transcript of the hearing will indicate that the trial court made findings which are clearly against the weight of the evidence and that much of the evidence which the trial court gave great weight should not even have been admitted because

of the lack of foundation concerning the scientific equipment used for breath testing.

CONCLUSION

On the basis of the foregoing brief, the plaintiff-appellant requests that the Court enter an order finding that the trial court erred in denying the plaintiff-appellant's motion made at the close of the case on direct by the defendant-respondent to grant the relief requested in the petition and enter an order remanding this matter back to the District Court for reinstatement of the plaintiff-appellant's driving privileges in relation to the incident at issue in this case.

Dated this 8<sup>th</sup> day of September, 1987.

  
\_\_\_\_\_  
RANDALL GAITHER  
Attorney for Plaintiff-Appellant

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to Bruce M. Hale, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this \_\_\_\_\_ day of September, 1987.

\_\_\_\_\_

## ADDENDUM A

**41-6-44.10. Implied consent to chemical tests for alcohol or drug — Refusal to allow — Warning, report, revocation of license — Court action on revocation — Person incapable of refusal — Results of test available — Who may give test — Evidence.** (a) Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was driving or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, or combination of alcohol and any drug, provided that such test is or tests are administered at the direction of a peace officer having grounds to believe such person to have been driving or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, or combination of alcohol and any drug. A peace officer shall determine which of the aforesaid tests shall be administered.

No person, who has been requested pursuant to this section to submit to a chemical test or tests of his breath, blood, or urine, shall have the right to select the test or tests to be administered. The failure or inability of a peace officer to arrange for any specific test shall not be a defense to taking a test requested by a peace officer nor be a defense in any criminal, civil or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(b) If such person has been placed under arrest and has thereafter been requested by a peace officer to submit to any one or more of the chemical tests provided for in subsection (a) of this section and refuses to submit to such chemical test or tests, such person shall be warned by a peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of his license to operate a motor vehicle. Following this warning, unless such person immediately requests the chemical test or tests as offered by a peace officer be administered, no test shall be given and a peace officer shall submit a sworn report that he had grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or any drug or combination of alcohol and any drug and that the person had refused to submit to a chemical test or tests as set forth in subsection (a) of this section. Within 20 days after receiving a sworn report from a peace officer to the effect that such person has refused a chemical test or tests the department shall notify such person of a hearing before the department. If at said hearing the department determines that the person was granted the right to submit to a chemical test or tests and refused to submit to such test or tests, or if such person fails to appear before the department as required in the notice, the department shall revoke for one year his license or permit to drive. Any person whose license has been revoked by the department under the provisions of this section shall have the right to file a petition within 30 days thereafter for a hearing in the matter in the district court in the county in which such person shall reside. Such court is hereby vested with jurisdiction, and it shall be its duty to set the matter for trial de novo upon 10-days' written notice to the department and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner's license is subject to revocation under the provisions of this act.

(c) Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any such chemical test or tests shall be deemed not to have withdrawn the consent provided for in subsection (a) of this section, and the test or tests may be administered whether such person has been arrested or not.

(d) Upon the request of the person who was tested, the results of such test or tests shall be made available to him.

(e) Only a physician, registered nurse, practical nurse or person authorized under subsection 26-1-30 (19), acting at the request of a peace officer can withdraw blood for the purpose of determining the alcoholic or drug content therein. This limitation shall not apply to the taking of a urine or breath specimen. Any physician, registered nurse, practical nurse or person authorized under subsection 26-1-30 (19) who, at the direction of a peace officer, draws a sample of blood from any person whom a peace officer has reason to believe is driving in violation of this chapter, or hospital or medical facility at which such sample is drawn, shall be immune from any civil or criminal liability arising therefrom, provided such test is administered according to standard medical practice.

(f) The person to be tested may, at his own expense, have a physician of his own choosing administer a chemical test in addition to the test or tests administered at the direction of a peace officer. The failure or inability to obtain such additional test shall not affect admissibility of the results of the test or tests taken at the direction of a peace officer, nor preclude nor delay the test or tests to be taken at the direction of a peace officer. Such additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(g) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested shall not have the right to consult an attorney nor shall such a person be permitted to have an attorney, physician or other person present as a condition for the taking of any test.

(h) If a person under arrest refuses to submit to a chemical test or tests under the provisions of this section, evidence of refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of alcohol or any drug or combination of alcohol and any drug.