

1987

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

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David L. Wilkinson; Utah Attorney General; Bruce M. Hale, Jr.; Assistant Attorney General;  
Attorney for Respondent.

Randall Gaither; Attorney for Appellant.

---

## Recommended Citation

Brief of Respondent, *Moore v. Schwendiman*, No. 870248 (Utah Court of Appeals, 1987).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/478](https://digitalcommons.law.byu.edu/byu_ca1/478)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
KFU  
50

IN THE UTAH COURT OF APPEALS

.A10

DOCKET NO. ~~VIRGIL MOORE,~~

870248

Plaintiff-Appellant,

-v-

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

Defendant-Respondent.

:

:

:

:

:

Case No. 870248-CA  
~~860367-CA~~

BRIEF OF RESPONDENT

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.

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

Attorneys for Respondent

RANDALL GAITHER  
321 South 600 East  
Salt Lake City, Utah 84102

Attorney for Appellant

RECEIVED  
OCT 13 1987

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

---

VIRGIL MOORE,	:	
Plaintiff-Appellant,	:	
-v-	:	Case No. 860367-CA
FRED C. SCHWENDIMAN, Chief,	:	
Drivers License Services, State	:	
of Utah,	:	
Defendant-Respondent.	:	

---

BRIEF OF RESPONDENT

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.

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

Attorneys for Respondent

RANDALL GAITHER  
321 South 600 East  
Salt Lake City, Utah 84102

Attorney for Appellant

## TABLE\_OF\_CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
JURISDICTION AND NATURE OF PROCEEDINGS.....	1
STATEMENT OF ISSUES.....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
SUMMARY OF ARGUMENT.....	6
ARGUMENT	
POINT I      UNDER UTAH CODE ANN. § 41-6-44.10(2) THE 5-DAY SUBMISSION REQUIREMENT OF A SWORN DUI REPORT IS DIRECTORY AND NOT JURISDICTIONALLY MANDATORY.....	7
POINT II     THE PETITIONER'S PRIOR ARREST EXPERIENCE SHOWED HIS STATE OF MIND AND WAS RELEVANT, ADMISSABLE AND NOT UNDULY PREJUDICIAL.....	12
POINT III    A POLICE OFFICER MAY TESTIFY TO A FELLOW OFFICER'S STATEMENTS MADE IN THE OFFICIAL COURSE OF BUSINESS.....	14
POINT IV     SUBSTANTIAL AND CREDIBLE EVIDENCE WAS PRESENTED AT TRIAL UPON WHICH THE TRIAL COURT COULD BASE THE DECISION UPHOLDING THE DEPARTMENT'S ACTIONS.....	16
CONCLUSION.....	18
ADDENDUM .....	19

TABLE OF AUTHORITIES  
CASES CITED

<u>Ballard v. State Motor Vehicle Division</u> , 595 P.2d 1302 (Utah 1979).....	17
<u>Blackburn v. Motor Vehicles Division, Dept. of Transportation</u> , 567 P.2d 1267 (Ct. App. Ore. 1978).....	11
<u>Colman v. Schwendiman</u> , 680 P.2d 29 (Utah 1984).....	11
<u>Garcia v. Schwendiman</u> , 645 P.2d 651 (Utah 1982).....	17
<u>Helsten v. Schwendiman</u> , 668 P.2d 509 (Utah 1983).....	11, 12
<u>Kehl v. Schwendiman</u> , 735 P.2d 413 (Ut. App. 1987).....	12
<u>Mackey v. Montrym</u> , 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979).....	9, 10
<u>Mathews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	10
<u>State v. Forsyth</u> , 641 P.2d 1172 (Utah 1982).....	13
<u>State v. Nielsen</u> , 727 P.2d 188 (Utah 1986).....	15

STATUTES AND RULES CITED

Utah Code Ann. § 41-2-19.5.....	9
Utah Code Ann. § 41-2-129.....	9
Utah Code Ann. § 41-6-44.10.....	3, 16
Utah Code Ann. § 41-6-44.10(2).....	1, 2, 6, 7
Utah Code Ann. § 41-6-44.10(2)(a)(iii) (as amended 1987)...	7, 8
Utah Code Ann. § 41-6-44.10(2)(b) (as amended 1987).....	10
Utah Code Ann. § 41-6-44.10(2)(c) (as amended 1987).....	10
Utah Code Ann. § 78-2a-3(2)(a).....	1
Rule 403, Utah Rules of Evidence.....	14
Rule 404, Utah Rules of Evidence.....	12
Rule 404(b), Utah Rules of Evidence.....	1, 6,
Rule 405(b), Utah Rules of Evidence.....	1, 6,
Rule 803(3), Utah Rules of Evidence.....	1, 12

---

IN THE UTAH COURT OF APPEALS

---

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

---

BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a driver license revocation after a de novo review in the Third District Court of Utah. This Court has jurisdiction to hear the appeal under the Implied Consent Statute and Utah Code Ann. § 78-2a-3(2)(a).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Is the statutory requirement to submit a sworn report to the Driver's License Division "within 5 days of arrest", directory in nature or jurisdictionally mandatory under Utah Code Ann. § 41-6-44.10(2)?
2. Was there prejudicial error by the trial court's allowance of respondent to question the petitioner concerning a particular incident to a previous DUI arrest?
3. Does the "Fellow Officer Rule" allow one officer to swear to another officer's statement concerning information gained in the official course of business?

4. Was there sufficient evidence which the district court could upon a preponderance base its decision?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Can the statutory provisions contained in Utah Code Ann. § 41-6-44.10(2) in relation to the issues and in light of the present § 41-2-129 be interpreted as directory in nature?

Can Rules 404(b), 405(b), and 803(3) of the Utah Rules of Evidence be found to be applicable to the disputed issues?

STATEMENT OF THE CASE

The petitioner was arrested for driving under the influence of alcohol in Salt Lake City, Utah on August 5, 1984 pursuant to U.C.A. § 41-6-44. This case arises from the civil proceeding over the revocation of petitioner's driving privileges. The petitioner was given a timely administrative hearing on the matter from which he appealed to the district court for a trial de novo pursuant to U.C.A. § 41-6-44.10. After some time, the district court revoked the petitioner's license after finding upon a preponderance of the evidence that:

1. The arresting officer had probable cause to and did arrest the petitioner for driving under the influence of alcohol.

2. The petitioner failed to comply with the officer's reasonable requests to properly blow into the intoxilyzer machine and therefore refused.

3. The petitioner was properly requested to take a chemical test pursuant to U.C.A. 41-6-44.10 (1953) as amended, and warned of the consequences of refusal and did refuse.

The trial court further concluded that all the essential elements of U.C.A. § 41-6-44.10 (1953) as amended, had been complied with and revoked petitioner's license for one year.

From this decision arises the appeal in question.

#### STATEMENT OF FACTS

On August 5, 1984 the petitioner, Virgil Moore, was arrested for driving while under the influence of alcohol. The petitioner was given an agency hearing from which he appealed to the district court for de novo review.

The following information was obtained at the district court trial through competent sworn testimony. The arresting officer, R.K. Sullivan, a policeman for the Salt Lake City Police Department first observed the petitioner in his automobile on 950 South State Street in Salt Lake City. Officer Sullivan testified that he personally observed erratic driving patterns exhibited by the petitioner's vehicle. Specifically, he saw the petitioner's car take a "drastic dive towards the curb for no apparent reason" (T.T. 4). As Officer Sullivan followed the vehicle he noted that "it made slight weaving from side to side inside its lane" (T.T. 4-5). Continuing to follow the vehicle, he saw it swerve to miss colliding with a flasher barricade that was in plain sight (T.T. 5). The car next made a right-hand turn onto an other street and while doing so, turned so widely that it crossed the center line into the opposing traffic's lane (T.T. 5). As Officer Sullivan continued to follow the petitioner he clocked him going 48 miles per hour in a 35 mph zone. And subsequently pulled him over (T.T. 5).



Officer Sullivan testified that as he approached the stopped vehicle he observed Mr. Moore to be the only occupant of that vehicle and identified him as such in court (T.T. 6). At this time in the incident, Officer Sullivan noted that the petitioner had poor balance, slurred speech, a prominent odor of alcoholic beverage around him and did not even know where he was at the time (T.T. 6, 7, 15). Subsequently, the petitioner was asked to perform some field sobriety tests including a modified standing test, one-leg count test, walk and turn test, hand slap test, and a gaze nystagmus test. Officer Sullivan testified that the petitioner had difficulty understanding instructions concerning the tests and was unable to perform any of them satisfactory. He swayed forward and back, put his foot down at the count of 3, walked heel to toe 6 to 10 inches apart and stumbled and staggered (T.T. 7-9).

With the foregoing information, Officer Sullivan placed the petitioner under arrest for drunk driving, requested that he submit to an intoxilyzer test, and read him the admonitions concerning it (T.T. 9). The petitioner responded that he would take the test.

At this point, Officer Cracroft, in a back-up unit, had arrived to assist Officer Sullivan with the arrest (T.T. 9). Since Officer Sullivan was on a motorcycle that evening he requested Officer Cracroft to transport the petitioner and administer the breath test to him (T.T. 5, 9-10).

Officer Sullivan next saw the petitioner at the police station where the breath test was to be administered. At that

point, he was told by Officer Cracroft that the petitioner refused to submit to a blood alcohol test (T.T. 18-19). Upon this, Officer Sullivan filled out his DUI report, properly swore to its truthfulness before a notary, and submitted it to the Driver's License Division (T.T. 10).

Officer David Cracroft, the officer who transported and attempted to administer the breathalyzer test to the petitioner, testified concerning the petitioner's refusal to submit to that test. Officer Cracroft testified that he was certified to administer the breath test and did in fact attempt to do so (T.T. 21-22). Officer Cracroft went through the standard operating procedure for the intoxilyzer machine, and used the operational checklist (T.T. 22, 31). He also testified that he observed no problems with the machine (T.T. 33). Officer Cracroft stated that when he asked the petitioner to blow into the machine as instructed, the petitioner would appear to blow but little if any air would pass into the machine (T.T. 22). This happened several times. Officer Cracroft then being of the opinion that the petitioner was purposely withholding his breath, gave him the implied consent warning (T.T. 23). Officer Cracroft gave the petitioner another chance and got the same type of response. Consequently, the petitioner's insubordinate actions deemed a refusal (T.T. 23-24). In Officer Cracroft's opinion, there were never any operational problems with the intoxilyzer machine other than it never received a sufficient air sample from the petitioner (T.T. 129).

After deeming the petitioner's response a refusal, Officer Cracroft personally told Officer Sullivan the circumstances surrounding the petitioner's refusal to take the test (T.T. 24). Officer Sullivan, additionally, testified that Officer Cracroft was his fellow officer that evening (T.T. 19).

The petitioner never offered any evidence that would have refuted any substantial element offered by the respondent other than declaring that he was, indeed, trying to blow into the intoxilyzer machine.

#### SUMMARY OF THE ARGUMENT

The court record supplied substantial credible evidence showing that Officer Sullivan actually submitted his sworn DUI Report to the Driver's License Division in the requisite amount of time. Furthermore, the statutory requirement of submitting said report to the Driver's License Division "within 5 days" of arrest stated in U.C.A. § 41-6-44.10(2) must be directory in nature and not mandatory. This conclusion is reached by viewing the submission requirement in light of the legislative intent behind the DUI statutes in general.

The trial court did not commit reversible error in allowing the respondent to ask questions of the petitioner concerning particular incidents surrounding a previous DUI arrest. The sought after information is admissible under Rule 803(3) of the Utah Rules of evidence since it showed the declarants then existing state of mind. The information is also admissible under Rules 404(b) and 405(b) of the Utah Rules of Evidence. Finally, admissibility is proper since the testimony's

prejudicial effect does not substantially outweigh its probative value.

An arresting officer's sworn DUI report is valid and complete despite the fact that some of the information contained in it was provided by an other officer's personal knowledge. The "Fellow Officer's Rule" allows the arresting officer to swear to the truthfulness of facts provided him by a fellow officer.

Substantial and credible evidence sustains the district court's finding that upon a preponderance of the evidence the petitioner was found to have been driving while intoxicated and to have refused an intoxilyzer test.

#### POINT I

UNDER UTAH CODE ANN. § 41-6-44.10(2)  
THE 5-DAY SUBMISSION REQUIREMENT OF  
A SWORN DUI REPORT IS DIRECTORY AND  
NOT JURISDICTIONALLY MANDATORY.

Substantial and creditable evidence was presented at the District Court De Novo trial that Officer Sullivan submitted a sworn DUI report to the Driver's License Division within 5 days of the petitioner's arrest. The DUI Report Form shows arrest on 8-5-84 and receipt 2 days later.

U.C.A. 41-6-44.10-2(a)(iii) (as amended 1987) says that on "behalf of the division" the arresting police officer in a DUI case is to submit a signed report to the Department on a "form approved by the division" which serves as a temporary 30-day license. The reason for a signed report is obviously to give the Department notice to record the temporary license and that a hearing may be required to be set if requested. It also notifies the Department of the grounds for the arrest and revocation and

information on which officers are to be subpoenaed for a requested hearing.

The statute indicates that the report which sets forth the information required in U.C.A. § 41-6-44.10(2)(iii) is mainly to "supply to the operator, basic information regarding how to obtain a hearing."

The relevant question of inquiry can be divided into two parts. One, was the DUI report submitted within 5 days of the questioned arrest; and two, did the report contain sufficient information to notify the Department and the driver as outlined in U.C.A. § 41-6-44.10(2)?

This record contains "substantial evidence" that Officer Sullivan submitted his DUI report to the Division on time. When asked if he had submitted the report to the Driver's License Division, Officer Sullivan testified in the affirmative (T.T. 10). No evidence was ever introduced at trial to rebut the officer's statements on this matter, therefore the trial court's finding that the DUI report was submitted to the Driver's License Division can only be sustained.

The evidence shows that the report satisfied the statute and common sense. In the first 10 pages of the trial transcript counsel for the respondent elicited from Officer Sullivan the information that established probable cause to arrest the petitioner for driving under the influence, actual physical control of a motor vehicle by the petitioner, and the facts surrounding petitioner's refusal to submit to a blood alcohol test. When the officer was asked whether he filled out a

report representing those facts, he responded, "Yes, I did do that" (T.T. 10). Officer Sullivan identified the DUI report (Addendum I) that he submitted to the Driver's License Division and affirmatively testified that he swore to it the night of the arrest before a notary (T.T. 10).

Reading the whole Implied Consent statute and its stated public safety purpose (U.C.A. § 41-2-129), it should be clear that the 5 day submission requirement of a DUI report form in U.C.A. § 41-6-44.10(2) is directory and procedural in nature to the Division and not jurisdictionally mandatory.

The purposes of the DUI statutes in this state are expressed in U.C.A. § 41-2-19.5. and U.C.A. § 41-2-129 (amended January 1987). The statute clearly states that the purpose of Section 41-6-44.10 is for:

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

When the State of Utah enacts legislation such as its DUI statutes it has two competing interests that must be balanced and weighed and given consideration. First, the state has a legitimate and compelling constitutional interest and duty in the protection of its innocent drivers as expressed in its purposeful statement. Against this interest must be weighed against the privileges of the drivers who break the law. See Mackey v. Montrym, 443 U.S. 1 99 S.Ct. 2612 (1979) for an example as well

as Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed2d 18 (1976). To determine the legislative intent concerning the mandatory or directory nature of the 5-day submission requirement for DUI reports, it might be analyzed as to whom the requirement was designed to protect, the state and its interests or the driver. If it is interpreted as directory, both interests are equally served. Five days directed and 30 days mandated to benefit the driver.

The states interest in quickly removing dangerous drivers from its roads and highways is compelling, but the Department of Public Safety must receive the notice or the license will not be suspended on the 30th day as required.

It could be argued that a mandatory purpose of the 30-day hearing time requirement also insures the quick resolution for the driver's benefit. During the 5 day or 30 day period the driver is in possession of a temporary driving license. His right to drive remains unaffected. This state's temporary driving license is valid until its is revoked by an agency hearing or for 30 days. Should the 30-day license expire prior to any requested administrative or judicial proceeding reviewing the merits of the revocation, the accused would surely have grounds for a temporary license extension or possibly a dismissal of the pending action. The 1988 Utah Administrative Procedures Act and § 41-6-44.10(2)(b) both provide for a reversal, and (c) for a court review. Mackey v. Montroy, Id. simply requires some form of procedural due process and opportunity to be heard subsequent to revoking a driver's license. There is in this

case, however, absolutely no evidence supporting or indicating that the petitioner's temporary license expired prior to the administrative hearing, therefore he received a prompt resolution prior to any final action even if the official report had been submitted late..

The above analysis makes sense. If a directory report is received after 5 days, then a requested hearing can still be held and reviewed. If the hearing shows that the driver is not dangerous, then both the state's and driver's interests are served. If mandated, then any harmless procedural error would leave a licensed dangerous driver on the highways. To hold that the 5 day requirement is jurisdictionally mandatory would ignore the fact that the driver is already protected by a temporary driver's license. It would also rob the district and appellant courts of jurisdiction.

Other civil proceedings that adjudicate individual privileges are not required to be docketed and disposed of in a short 25-day time period. Why would the legislature single out driver's license revocations to deserve special treatment in this manner?

The cited cases Helsten v. Schwendiman, 668 P.2d 509 (Utah 1983), Blackburn v. Motor Vehicles Division, Dept. of Transportation, 567 P.2d 1267 (Ct. App. Ore. 1978), and Colman v. Schwendiman, 680 P.2d 29 (Utah 1984) are not on point and the statute has since been amended. These cases solely address themselves to the necessity of a DUI report being sworn to, as was required, but specifically do not address the mandatory



jurisdictional arguments. Helsten v. Schwendiman, 668 P.2d 509, 512 (Utah 1983), not following Blackburn. See also Justice Oaks and Hall dissenting. Since the officer must appear and give a residuum of legally competent testimony, the report is solely necessary to the Department. Kehl v. Schwendiman, 735 P.2d 413 (Ut. App. 1987).

## POINT II

THE PETITIONER'S PRIOR ARREST EXPERIENCE  
SHOWED HIS STATE OF MIND AND WAS  
RELEVANT, ADMISSIBLE AND NOT UNDULY  
PREJUDICIAL.

The line of questioning that the petitioner opposes concerns information gained as a result of the respondent questioning him about a specific DUI arrest prior to the one in question (T.T. 48-51). The questions required simple "yes or "no" responses and were obviously designed to show that the petitioner had previous experience with an intoxilyzer machine. Specifically, questions of whether the officer in that previous case maintained that Mr. Moore had failed to blow properly into the intoxilyzer machine where relevant and not hearsay. Upon petitioner's objection to this question, the trial court felt that the question went to showing the state of mind of the declarant and admissible (T.T. 52). The respondent urges this Court to give great deference to the trial court's discretion and maintains that the question and response fall under hearsay exceptions Rule 803(3) of the Utah Rules of Evidence.

The question concerning the police officer's contention in this driver's previous case was material and relevant under Rule 404 of the Utah Rules of Evidence. Rule 404(b) of the same rule states:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Emphasis added).

This section is relevant to the question in that it allows evidence of past conduct to show that the petitioner's contended physical inability to blow was very possibly part of a preconceived plan and not a mistake or accident.

Furthermore, the narrow question was directed to a specific instance and therefore Rule 405(b) of the Utah Rules of Evidence may also be applicable.

In cases in which character or a trait of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. (Emphasis added).

The petitioner's unwillingness to correctly blow in the intoxilyzer machine in his previous arrest provides information showing a general unwillingness to follow intoxilyzer instructions and a desire to circumvent the purpose of the statute. In this particular case the Court could find that the petitioner intentionally failed to blow into the intoxilyzer machine after receiving proper instructions.

Ruling on the admissibility of evidence showing previous criminal behavior, the Utah Supreme Court in State v. Forsyth, 641 P.2d 1172, 1176 (Utah 1982) stated "The testimony is admissible if, and only if, it is relevant to prove some fact that is material to the crime charged." The petitioner in this case says he did not refuse the breath test under the implied

consent statute. Surely, the previous actions are relevant to the petitioner's state of mind in this civil case when he refused by failing to give an adequate air sample.

Rule 403 of the Utah Rules of Evidence excludes the admission of relevant evidence "when its probative value is substantially outweighed by the danger of unfair prejudice." The use of descriptive words such as "substantially" and "unfair" appear to indicate an extreme or out of the ordinary type of prejudice. The probative value of the evidence in question is high and it's "unfair prejudicial" affect is relatively low. The fact that there was already substantial evidence submitted by Officer Cracroft which showed the petitioner's conduct amounted to a refusal also minimizes any possible prejudicial effect of the corroborative information gained. Also, the strict application of the Rules of Evidence are primarily although not exclusively focused on protecting the accused from laymen juries who are not legally trained. This case was before a competent trial judge trained in evidence who's discretion should be upheld by this Court.

### POINT III

A POLICE OFFICER MAY TESTIFY TO A  
FELLOW OFFICER'S STATEMENTS MADE  
IN THE OFFICIAL COURSE OF BUSINESS.

At trial the petitioner contended that Officer Sullivan relied upon the hearsay statements of a fellow officer when he swore to the truthfulness of his DUI report. Officer Sullivan was not present when the petitioner allegedly refused to submit to the intoxilyzer test. Officer Sullivan relied upon his fellow

officer's word, Officer Cracroft, that there was a refusal and then entered that information into his sworn report (T.T. 10, 18, 19). The statute provides for help by fellow officers and no longer requires the same arresting officer to do everything in one case. Teamwork is necessary.

For example, the Utah State Supreme Court in State v. Nielsen, 727 P.2d 188 (Utah 1986) seemed to say hearsay is O.K. if it is reliable. Nielsen addresses the issue of whether the affidavit of a police officer supporting probable cause for a search warrant can contain hearsay of a fellow officer and still be valid. In the civil case at bar, the issue concerns the validity of a sworn DUI report in that it contains hearsay from a fellow officer as well. The two cases seem to be analogous except Nielsen was a criminal case that should have even stricter hearsay standards but did not.

Concerning the matter of fellow officer hearsay in a sworn statement, the Utah Court in Nielsen, supra. at p. 192 stated the following.

The use of hearsay evidence to establish probable cause does not necessarily undercut the validity of a warrant. If the hearsay is reliable, and there is a substantial basis for giving it credence, it will support the issuance of a warrant. United States v. Harris, 403 U.S. 573, 580-81, 91 S.Ct. 2075 2080, 29 L.Ed.2d 723 (1971); accord State v. Bankhead, 30 Utah 2d 135, 138, 514 P.2d 800, 802 (1973); State v. Treadway, 28 Utah 2d 160, 162-63, 499 P.2d 846, 847-48 (1972). In addition, there is a presumption that law enforcement officers will convey information to each other truthfully. See, e.g., United States v. Ventresca, 380 U.S. 102, 111, 85 S.Ct. 741, 747, 13 L.Ed.2d 684 (1965); McCormick v. United States, 309 F.2d 367, 372 (7th Cir. 1962), cert. denied, 372

U.S. 911, 83 S.Ct. 724, 9 L.Ed.2d 719 (1963);  
People v. Leahy, 173 Colo. 339, 484 P.2d  
778, 781 (1970); see generally 1 W. LaFave,  
Search and Seizure § 3.5(a) at 619-21 (1978).  
Therefore, double hearsay between police  
officers is not fatal on its face to the  
validity of a warrant.

The reliability of Officer Cracroft's statements  
concerning the petitioner's refusal to Officer Sullivan are in no  
way reasonably questionable, nor were they shown to be  
unreliable. The statements were made contemporaneously with the  
occurrence and they were personal observations made directly to  
Officer Sullivan. There is no indication in the record or  
elsewhere establishing a reason for why Officer Cracroft might  
lie. This compounded with the presumption that fellow officers  
will convey information to each other truthfully certainly  
provides the requisite reliability necessary to uphold the  
validity of the sworn DUI report. The trial court listened and  
observed as the fact finder and also believed the fellow  
officer's statements to be truthful and trustworthy under the  
circumstances. That Court's findings should therefore not be  
cast aside.

#### POINT IV

SUBSTANTIAL AND CREDIBLE EVIDENCE WAS  
PRESENTED AT TRIAL UPON WHICH THE TRIAL  
COURT COULD BASE THE DECISION UPHOLDING  
THE DEPARTMENT'S ACTIONS.

Substantial and credible evidence was presented at  
trial meeting all the requisite elements under Utah Code Ann. §  
41-6-44.10 statutorily necessary to revoke the petitioner's  
driving privileges for one year.

1. As the facts have more than adequately indicated, Officer Sullivan had grounds to believe that the petitioner was under the influence of alcohol. The petitioner's erratic driving pattern and inability to successfully perform the field sobriety tests provided an ample basis for grounds for arrest.

2. The evidence also showed uncontrovertibly, that the petitioner was in actual physical control of a motor vehicle while under the influence.

3. The petitioner was given the implied consent admonitions and warnings regarding the consequences of refusing a blood alcohol test on two different occasions, and the evidence showed that he understood them.

4. Finally, Officer Cracroft provided credible testimony regarding the petitioner's refusal to properly blow into the intoxilyzer machine. There was never any evidence indicating that the petitioner did not objectively understand Officer Cracroft's instructions or was physically unable to properly blow into the machine.

Driver's license revocation proceedings such as this are civil and the standard of proof is upon a preponderance of the evidence. Ballard v. State Motor Vehicle Division, 595 P.2d 1302 (Utah 1979). In the case of Garcia v. Schwendiman, 645 P.2d 651, 653 (Utah 1982) the Utah Supreme Court outlined the standard of appellate review in driver's license revocation cases. "The standard for appellate review of factual findings affords great deference to the trial court's view of the evidence unless the trial court has misapplied the law or its findings are clearly against the weight of evidence." (Emphasis added).

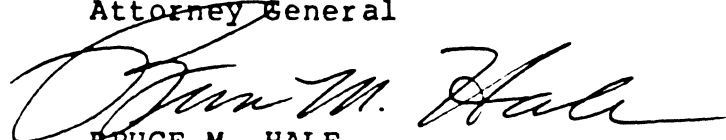
Since the record contains the evidence of substance to sustain the trial court's findings, those findings should not be disturbed.

CONCLUSION

Based upon the substantial uncontradicted evidence produced at trial and the absence of any prejudicial error, the trial court's and Division's decisions must be affirmed.

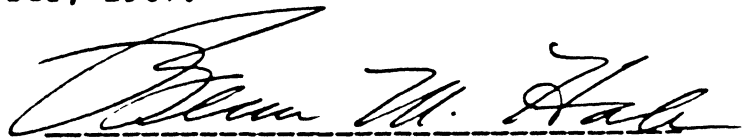
DATED this 13<sup>th</sup> day of October, 1987.

DAVID L. WILKINSON  
Attorney General

  
BRUCE M. HALE  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Randall Gaither, 321 South 600 East, Salt Lake City, Utah 84102, this 13<sup>th</sup> day of October, 1987.



## **ADDENDUM**



## ADDENDUM I



## DUI REPORT FORM

### I. CASE IDENTIFICATION:

Date 8-5-84 Day Sun Accident No Case # 84-66929 Time Prepared 0348  
Subject's Name MOORE, VIRGIL LAR Address 2345 So. 350 W. Bountiful  
Place of Employment \_\_\_\_\_ Address \_\_\_\_\_  
Home Telephone Number \_\_\_\_\_ Work Telephone Number \_\_\_\_\_  
D.O.B. 12-21-36 Driver License # 7754105 Time of Arrest 0328  
Place of Arrest 9100 So. main Charges 105, 117, 195  
Arresting Officer Sullivan D78 Assisting Officers F59 & G57  
Arresting Agency SLCPD

### II. VEHICLE:

Year 1979 Color Black Make Pontiac Model FB  
License# and state PLM 213 Utah Disposition City Impound  
Registered Owner MOORE, VIRGIL L. Address \_\_\_\_\_

### III. WITNESSES: (If passengers, indicate specifically)

Name	Address	Tele. #	Age/DOB
------	---------	---------	---------

- 1.
- 2.
- 3.
- 4.
- 5.

### IV. ACTUAL PHYSICAL CONTROL:

The facts establishing the subject's actual physical control of a motor vehicle are: R/O observe  
and followed car. A/P only pers in car at  
time R/O stop car.

### V. DRIVING PATTERN:

Subject's location when first observed 950 So. State St. Time: 0300

The facts observed regarding driving pattern: A/P CAR TOOK SHARP DIVE  
TOWARD CURB. R/O follow noted several side-side  
weaves in left lane in 1/2 block of 1000 So. State very sharp  
L. turn to miss 3/4 block of flash barricades at  
cont. 1700 So. wide R. turn into E → N. Left turn lane.  
1700 & main wide L. Straddle as 1/2 block. Speed 48 mph  
35 zone. Cal 19-20 38-40 57-60 8-31-84

### VI. PRE-ARREST STATEMENTS OF SUBJECT:

Frm Bountiful Head to 4350 W. 4400 So. girl friends  
I don't know where I'm at  
Time guess → 0345

### VII. PHYSICAL CHARACTERISTICS:

Odor of alcoholic beverage \_\_\_\_\_  
Speech VERY SLURRED, R/O REQUEST Repeat SELF on first statement  
Balance POOR. Fell over against car when walk over to side walk  
Signs or complaints of injury or illness Muscle in arm, later said other  
Other physical characteristics Arm, still later said both arms. Said so  
Day since see Dr. for - ARMA.

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

1. Modified Attention - Swayed Back - Front & Side - Side 5-6 inches
2. Stand one leg 30 sec count - made to 3 and Touch Down
3. 9 Step Walk & Turn - feet 6-10 inches apart all way and cross over twice starting - Stumble, Stagger Turn
4. Hand Slap - kept ques how did it - would reverse position of hands
5. Nystagmus - Good at 30°

Were tests demonstrated by officer? YES Subject's ability to follow instructions NO NEED  
Remind wait to start, not do tests as demo.

IX. SEARCHES

A. Vehicle:

Was subject's vehicle searched? YES Where? 210 So. Main  
When? 0345 Evidence NONE

Person who performed the search SULLIVAN

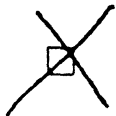
B. Subject:

Was subject's person searched? YES Where? 2100 South Main  
When? 0330 Evidence Found NONE  
Person who performed the search G57

X. CHEMICAL TESTS:

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

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



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

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

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

Did subject submit to a chemical test? NO Type of test \_\_\_\_\_  
Test Administered by \_\_\_\_\_ Where? \_\_\_\_\_  
When? \_\_\_\_\_ Results \_\_\_\_\_ Was subject notified of results? \_\_\_\_\_

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

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

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

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

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

**XI. CONSTITUTIONAL RIGHTS:**

Was subject advised of the following rights? YES When? 0330  
By Whom? Sullivan Where? Sto. So. Man

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

Were the following waiver questions asked? \_\_\_\_\_

- ☒ 1. Do you understand each of these rights I have explained to you?

Response YES

- ☒ 2. Having these rights in mind, do you wish to talk to us now?

Response I will

**INTERVIEW:**

Were you operating a vehicle? BEFORE

Where were you going? ARRREST

What street or highway were you on? 30th or 31st St.

Direction of travel? South

Where did you start from? BANKRUPT

When? \_\_\_\_\_ What time is it now? \_\_\_\_\_

What is today's date? \_\_\_\_\_ Date of week? \_\_\_\_\_

(Actual time \_\_\_\_\_ Date \_\_\_\_\_ Day \_\_\_\_\_)

What city or county are you in now? \_\_\_\_\_

What were you doing during the last three hours? \_\_\_\_\_

Have you been drinking? \_\_\_\_\_

What? \_\_\_\_\_ How much? \_\_\_\_\_

Where? \_\_\_\_\_

When did you have your first drink? \_\_\_\_\_ Last drink? \_\_\_\_\_

Are you under the influence of an alcoholic beverage (drugs) now? \_\_\_\_\_

Are you taking tranquilizers, pills, medicines or drugs of any kind? YES

(What kind? get sample) Tylanol 3

When did you have the last dose? 2 HRS AGO

Are you ill? NO

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

Were you involved in an accident today? \_\_\_\_\_

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

If so, what? \_\_\_\_\_ When? \_\_\_\_\_

How much? \_\_\_\_\_

RECEIVED BY  
DRIVER LICENSE

AUG 07 1984

OTHER OCCURRENCES OR FACTS:

OFFICER CHROSOFT G57 INDICATED CONSEQUENTS OF  
FAILURE TAKE TEST BUT A/P STILL FAILED TAKE TEST"

ATTACHED DOCUMENTS

I have attached the following documents to this report:

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

Date 8-5-84 Time 0345 Report was completed.

HORIZED ENDORSING SIGNATURE:

I do hereby certify and swear that I am a sworn Utah peace officer and that I have prepared the above report form and that  
information on the report form and the attached documents are true and correct to my knowledge and belief  
I that the report form was prepared in the regular course of my duties. It is my belief the subject was in violation  
section 41-6-44 U.C.A. at the date, time and place specified in this report.

Signature of Peace Officer

Law Enforcement Agency: SLCPD

Date: 8-5-84

Time: 0348

STATE OF UTAH

COUNTY OF Salt Lake } SS.

Subscribed and sworn to before me this 5th day of August, 19 84.

NOTARY PUBLIC

Residing at: 450 South 300 East

My Commission Expires:

August 26, 1986

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

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

## ADDENDUM I I

(b) Upon the conclusion of the examination the division may suspend or revoke the person's license, permit him to retain the license, or issue a license subject to restriction by § 41-2-113.

(c) Refusal or neglect of the licensee to submit to an examination is grounds for suspension or revocation of his license.

(11) A report authorized by § 41-2-119 may not contain any evidence of a conviction for speeding on an interstate system in this state if the conviction was for a speed of less than 71 miles per hour and did not result in an accident, unless authorized in writing by the individual whose report is being requested

(12) (a) By following the emergency procedures set forth in Chapter 46b, Title 63, the division may immediately suspend the license of a person if it has reason to believe that the person is the owner of a motor vehicle for which a security is required under Chapter 12a, Title 41, Financial Responsibility of Motor Vehicle Owners and Operators Act, and has operated the vehicle or permitted it to be operated within this state without the security being in effect.

(b) Sections 41-12a-411 and 41-12a-412 regarding the surrender of license plates and registration of motor vehicles and the requirement of proof of financial responsibility apply to persons whose driving privileges are suspended under this subsection.

(c) If the division exercises the right of immediate suspension granted under this subsection, the notice and hearing provisions of Subsection (5) apply.

(d) A person whose license suspension has been sustained or whose license has been revoked by the division under this subsection may file a request for agency action requesting a hearing.

History: C. 1953, 41-2-19, enacted by L. 1978 (2nd S.S.), ch. 9, § 2; L. 1983, ch. 99, § 3; 1983, ch. 183, § 22, 1983, ch. 187, § 3; 1983, ch. 192, § 1; 1984, ch. 39, § 1; 1985, ch. 153, § 2; 1985, ch. 242, § 47; 1986, ch. 204, § 280; renumbered by L. 1987, ch. 136, § 5; 1987, ch. 137, § 28, 1987, ch. 161, § 137.

Amended effective January 1, 1988. — Laws 1987, Ch. 161, § 137 amends this section effective January 1, 1988. See catchline "Compiler's Notes" below.

Compiler's Notes. — The 1987 amendment, by Chapter 136, so rewrote this section as to make a detailed analysis impracticable

The 1987 amendment, by Chapter 137, renumbered this section which formerly appeared as § 41-2-19, substituted "division" for "department" throughout the section, and re-

wrote and reorganized the section, as last amended by Laws 1986, ch. 204, § 280, to the extent that a detailed analysis is impracticable

The 1987 amendment, by Chapter 161, effective January 1, 1988, rewrote the section to the extent that a detailed analysis is impracticable

This section is set out as reconciled by the Office of Legislative Research and General Counsel

A.L.R. — Automobiles validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A L R 4th 367

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301

## 41-2-129. Purpose of revocation or suspension for driving under the influence.

The Legislature finds that a primary purpose of the provisions in this title that relate to suspension or revocation of a person's license or privilege to operate a motor vehicle for driving with a blood alcohol content above a certain level or while under the influence of alcohol or any drug, or a combina-

tion of alcohol and any drug, or for refusing to take a chemical test as provided in § 41-6-44.10, is protecting persons on highways by quickly removing from the highways those persons who have shown they are safety hazards by driving with a blood or breath alcohol content above a certain level or while under the influence of alcohol or any drug or combination of alcohol and any drug or by refusing to take a chemical test that complies with the requirements of § 41-6-44.10.

**History:** C. 1953, 41-2-19.5, enacted by L. 1983, ch. 99, § 5; renumbered by L. 1987, ch. 137, § 29.

**Compiler's Notes.** — The 1987 amendment renumbered this section which formerly appeared as § 41-2-19.5, substituted "title" for "code", added "or breath" before the second in-

stance of "alcohol content above a certain level", and made minor changes in phraseology and style.

Cited in *Lopez v. Schwendiman*, 720 P.2d 778 (Utah 1986).

**41-2-130. Chemical test — Grounds and procedure for officer's request — Taking license — Issuing temporary licenses — Information to obtain hearing — Report to department — Department procedure — Suspension — Additional fee.**

(1) (a) When a peace officer has reasonable grounds to believe that a person may be violating or has violated § 41-6-44 the peace officer may, in connection with his arrest of the person, request the person to submit to chemical tests to be administered in compliance with the standards under § 41-6-44.10.

(b) In this section, § 41-6-44 includes a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1).

(2) The peace officer shall advise a person prior to the person's submission to a chemical test that results indicating a violation of § 41-6-44 shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a vehicle may, result in suspension or revocation of the person's license or privilege to operate a motor vehicle.

(3) If the person submits to that chemical test and the results indicate a blood or breath alcohol content in violation of § 41-6-44, or if the officer makes a determination, based on reasonable grounds, that the person is otherwise in violation of § 41-6-44, the officer directing administration of the test or making the determination shall serve on the person, on behalf of the division, immediate notice of the division's intention to suspend the person's privilege or license to operate a vehicle. If the officer serves that immediate notice on behalf of the division he shall: (a) take the Utah license certificate or permit, if any, of the operator; (b) issue a temporary license effective for only 30 days; and (c) supply to the operator, on a form to be approved by the division, basic information regarding how to obtain a prompt hearing before the division. A citation issued by the officer may, if approved as to form by the division, serve also as the temporary license.

(4) The peace officer serving the notice shall send to the division within five days after the date of arrest and service of the notice the person's license along with a copy of the citation issued regarding the offense, and a signed report indicating the chemical test results, if any, and any other basis for the officer's



### ADDENDUM I I I

(3) Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided for in subsection (1), and the test or tests may be administered whether the person has been arrested or not.

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

(5) (a) Only a physician, registered nurse, practical nurse or person authorized under Subsection 26-1-30 (19), acting at the request of a peace officer, may withdraw blood to determine the alcoholic or drug content. This limitation does not apply to the taking of a urine or breath specimen.

(b) 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 the sample is drawn, is immune from any civil or criminal liability arising from drawing the sample, if the test is administered according to standard medical practice.

(6) The person to be tested may, at his own expense, have a physician of his own choice 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 the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer. The additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(7) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested does not have the right to consult an attorney or have an attorney, physician, or other person present as a condition for the taking of any test.

(8) If a person under arrest refuses to submit to a chemical test or tests or any additional test under this section, evidence of any refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating 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.

**Implied consent to chemical tests for alcohol or drug  
— Number of tests — Refusal — Warning, report  
— Hearing, revocation of license — Appeal —  
Person incapable of refusal — Results of test  
available — Who may give test — Evidence [Ef-  
fective January 1, 1988].**

(1) (a) A person operating a motor vehicle in this state is considered 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 operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under § 41-6-44, if the test is or tests are administered at the direction of a

peace officer having grounds to believe that person to have been operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under § 41-6-44.

(b) The peace officer determines which of the tests are administered and how many of them, shall be administered. If an officer requests more than one test, refusal by a person to take one or more requested tests, even though he does submit to any other requested test or tests, is a refusal under this section.

(c) A person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine, may not select the test or tests to be administered. The failure or inability of a peace officer to arrange for any specific test is not a defense to taking a test requested by a peace officer, and it is not a defense in any criminal, civil, or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(2) (a) If the person has been placed under arrest, and has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1), and refuses to submit to the chemical test or any one or all of the tests requested, the person shall be warned by a peace officer requesting the test or tests that a refusal to submit to the test or tests may result in revocation of his license to operate a motor vehicle. Following this warning, unless the person immediately requests that the chemical test or tests as offered by a peace officer be administered, no test may be given. A peace officer shall serve on the person, on behalf of the division, immediate notice of the division's intention to revoke the person's privilege or license to operate a motor vehicle. If the officer serves the immediate notice on behalf of the division he shall:

(i) take the Utah license certificate or permit, if any, of the operator;

(ii) issue a temporary license effective for only 30 days; and

(iii) supply to the operator, on a form approved by the division, basic information regarding how to obtain a hearing before the division. A citation issued by a peace officer may, if approved as to form by the division, serve also as the temporary license. The peace officer shall submit a signed report, within five days after the date of the arrest, that he had grounds to believe the arrested person had been operating or was in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited or while under the influence of alcohol or any drug or combination of alcohol and any drug under § 41-6-44 and that the person had refused to submit to a chemical test or tests under Subsection (1).

(b) Within 20 days after receiving a written request, the division shall notify the person of his opportunity to be heard as early as practicable, and that his request shall be made within ten days after the date of arrest. If the person does not make a timely written request for a hearing before the division, his privilege to operate a motor vehicle in Utah shall be revoked for a period of one year beginning on the 31st day after the date of arrest. If a hearing is requested by the person and conducted by the division, and the division determines that the person was granted the

right to submit to a chemical test or tests and refused to submit to the test or tests, or if the person fails to appear before the division as required in the notice, the division shall revoke his license or permit to operate a motor vehicle in Utah for one year, beginning on the date the hearing is held. The division shall also assess against the person, in addition to any fee imposed under Subsection 41-2-112 (6), a fee under § 41-2-103, which shall be paid before the person's driving privilege is reinstated, to cover administrative costs. The fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this subsection that the revocation was improper.

(c) Any person whose license has been revoked by the division under this section may seek judicial review in the circuit court in the county in which the person resides.

(3) Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided for in Subsection (1), and the test or tests may be administered whether the person has been arrested or not.

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

(5) (a) Only a physician, registered nurse, practical nurse, or person authorized under Subsection 26-1-30 (19), acting at the request of a peace officer, may withdraw blood to determine the alcoholic or drug content. This limitation does not apply to the taking of a urine or breath specimen.

(b) 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 the sample is drawn, is immune from any civil or criminal liability arising from drawing the sample, if the test is administered according to standard medical practice.

(6) (a) The person to be tested may, at his own expense, have a physician of his own choice administer a chemical test in addition to the test or tests administered at the direction of a peace officer.

(b) The failure or inability to obtain the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer.

(c) The additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(7) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested does not have the right to consult an attorney or have an attorney, physician, or other person present as a condition for the taking of any test.

(8) If a person under arrest refuses to submit to a chemical test or tests or any additional test under this section, evidence of any refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating 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.