

1985

Glen H. Whitehouse v. Fred C. Schwendiman, Chief, Driver License Services, Department of Public Safety, State of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

1985 20669

GLEN H. WHITEHOUSE,

:

Petitioner/Appellant,

:

vs.

:

Case No. 20669

FRED C. SCHWENDIMAN, CHIEF,
DRIVER LICENSE SERVICES,
DEPARTMENT OF PUBLIC SAFETY,
STATE OF UTAH,

:

:

:

Defendant/Respondent.

:

BRIEF OF APPELLANT

AN APPEAL FROM A FINDING THAT APPELLANT REFUSED TO SUBMIT
TO A CHEMICAL TEST CONTRARY TO THE PROVISIONS OF
§41-6-44.10 UTAH CODE ANNOTATED
IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
The Honorable Raymond S. Uno, Presiding.

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FILED

JUL 9 1985

IN THE SUPREME COURT OF THE STATE OF UTAH

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Petitioner/Appellant,	:	
vs.	:	Case No. 20669
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DRIVER LICENSE SERVICES,	:	
DEPARTMENT OF PUBLIC SAFETY,	:	
STATE OF UTAH,	:	
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TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED ON APPEAL	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION	9

TABLE OF CASES

<u>Gaunt v. Motor Vehicle Division,</u> 666 P.2d 524 (Ariz.App. 1983)	7
<u>Lund v. Hjelle,</u> 224 N.W.2d 552 (N.D. 1974)	5, 7
<u>Mackey v. Montrym,</u> 443 U.S. 1, 61 L.Ed.2d 321, 99 S.Ct. 2612	9
<u>Perkins v. Spencer,</u> 121 Ut. 468, 243 P.2d 446 (1952)	9
<u>Sedlacek v. Pearson,</u> 284 N.W.2d 556 (Neb. 1979)	8
<u>South Dakota v. Neville,</u> 459 U.S. 553, 74 L.Ed.2d 748, 103 S.Ct. 916	8
<u>State v. Moore,</u> 614 P.2d 931 (Hawaii 1980)	7
<u>Zahtila v. Motor Vehicle Division,</u> 560 P.2d 847 (Colo. App. 1977)	6, 7

TABLE OF STATUTES

Utah Code Annotated, §41-6-44, as amended	1
Utah Code Annotated, §41-6-44.5(2)	6
Utah Code Annotated, §41-6-44.10(8), as amended	8

OTHER

<u>Chemical Tests and the Law,</u> R. Donigan, 2d ed. 1966	6
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BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issue on appeal is whether or not a driver having been arrested for driving under the influence of alcohol after having once refused to take the chemical test can recant his refusal within a reasonable time.

STATEMENT OF FACTS

For purposes of this expedited appeal, appellant, will not contest that the South Salt Lake police officer had probable cause to place him under arrest for violation of §41-6-44 U.C.A. as amended (DUI). He was arrested in South Salt Lake August 22, 1984 (T. 2) at 10:10 p.m. (T. 16). After certain field tests he was transported to the South Salt Lake Police Station where a breath test was requested.

For purposes of this appeal appellant does not contest the adequacy of the warning by the arresting officer of the possible consequences for refusing to submit to a chemical test of the officer's choosing.

By way of factual background the following evidence is directed to the Court's attention.

(T. 12, lines 2-7)

A: Then I believe Sgt. Gillette asked him again, "You're not going to take the test?"

And he said, "No, I am not."

And Sgt. Gillette made some comment about, "Thanks for wasting my time," and shut the machine down and left the office.

(T. 12, lines 8-22)

Q: Now, Officer, did Mr. Whitehouse ever make any further request that the test be readministered to him?

A: Yes, sir, he did.

Q: Could you tell us the time element there and who was present and what was said?

A: The only two present were myself and Mr. Whitehouse. It was approximately three to five minutes after Sgt. Gillette left that Mr. Whitehouse expressed his desire to take the test. I refused to allow him and I believe I explained that that would involve Sgt. Gillette coming back and turning on the machine and going through the same processes again. And that he had refused once, and I believe statutorily that was mentioned.

(T. 16, lines 3-21)

Q: Okay. You started preparing the report at 10:25 at, where, the police station?

A: Yes, sir.

Q: So that puts Gillette at arrived about 10:30?

A: Approximately, yes, sir.

Q: And Gillette is there about how long before he leaves?

A: Probably ten minutes.

Q: And within four minutes after Gillette leaves the driver says, "I will take the test"?

A: Yes, sir.

Q: Gillette is still on duty?

A: Yes, sir.

Q: Any other officers on duty?

A: Yes, sir.

Q: That are certified to operate the machine?

A: I believe Officer Davis, who assisted me in the arrest, but I am not sure of that.

(T. 17, lines 2-25)

Q: I believe you testified in another proceeding on the way to the jail he again wanted to take the test?

A: Yes, sir, I believe he did at that point.

Q: And by the time you arrived at the Salt Lake County Jail, did you offer him the test, which -- at the machine located there?

A: No, sir.

Q: And so twice, once with Gillette on duty within three or four minutes, on the way to the Salt Lake County Jail, he again

wanted to take the test, and you did not offer him a test again; is that correct?

A: That's correct.

Q: Now, going to the last page of your report, it's signed by Gary Gillette, your sergeant; is that correct?

A: Yes, sir.

Q: That signing is at 2330, which is 11:30?

A: Yes, sir.

Q: That would be approximately an hour and ten minutes after he was stopped?

A: Yes, sir.

(T. 18, lines 12-16)

Q: And this is 2320 after you returned to Salt Lake an hour and 20 minutes after you completed the stop, completed your report sworn to it before Gillette, who is a notary public?

A: Yes, sir.

For purposes of this brief appellant not having raised the issue at the lower court does not either directly or by inference question the validity of the notarization of the arresting officer's affidavit by a sergeant of the same police agency.

SUMMARY OF ARGUMENT

Appellant submits that his subsequent agreeing to take the breath test within a reasonable time after his arrest and without evidence of undue delay effecting the validity of the test results or hardships on the police, a prior refusal can be withdrawn.

ARGUMENT

The brief transcript reveals no facts in dispute. The question of withdrawing a refusal has been dealt with by many courts. The most cited case for this proposition is Lund v. Hjeile, 224 N.W.2d 552 (N.D. 1974). In that case Lund was arrested at 8:30 p.m. following an accident. He was duly advised of the repercussions of refusing to submit to a chemical test after his refusal to submit to the requested test. At 9:30 p.m. Lund requested the opportunity to submit to a chemical test which was denied by the arresting officer. In sustaining the district court's reversal of the actions of the State Highway Commissioner, the Supreme Court of North Dakota stated as follows:

[6-9] The purpose of Chapter 39-20, N.D.C.C., the Implied Consent Law, is to eliminate the drunken driver from the highways by requiring drivers suspected of operating motor vehicles while under the influence of intoxicating liquor to submit to a chemical test to determine the alcoholic content of their blood. Since the accuracy of a chemical test under Chapter 39-20 does not depend upon its being administered immediately after an arrest, accident or other event, and thus a delay for a reasonable period of time while an arrested person considers or reconsiders a decision whether or not to submit to a chemical test will not frustrate the object of the Legislature in enacting Chapter 39-20, we hold that where, as here, one who is arrested for driving under the influence of intoxicating liquor first refuses to submit to a chemical test to determine the alcoholic content of his blood and later changes his mind and requests a chemical blood test, the subsequent consent to take the test cures the prior first refusal when the request to take the test is made

within a reasonable time after the prior first refusal; when such a test administered upon the subsequent consent would still be accurate; when testing equipment or facilities are still readily available; when honoring a request for a test, following a prior first refusal, will result in no substantial inconvenience or expense to the police; and when the individual requesting the test has been in police custody and under observation for the whole time since his arrest. At 557.

Support for this proposition was noted in R. Donigan, Chemical Tests and the Law (2d ed. 1966):

Thus, from the known length of elapsed time between the taking of the specimen for analysis and the event in issue, the known rate of average elimination of blood alcohol in the average person, and the result of the chemical test in the particular case, experts in this field can arrive by the process of extrapolation at a fairly reasonable estimate of the percentage of blood alcohol in the average person at the time of a certain event if he had the quantity of alcohol in his blood as shown by the chemical test in the case on trial.

The same reasoning was codified in §41-6-44.5(2)¹.

Other cases in accord are Zahtila v. Motor Vehicle Division, 560 P.2d 847 (Colo. App. 1977). In that case Zahtila refused

¹ (2) If the chemical test was taken within two hours of the alleged driving or actual physical control, the blood alcohol level of the person at the time of the alleged driving or actual physical control shall be presumed to be not less than the level of the alcohol determined to be in the blood by the chemical test.

a blood test and twenty-five (25) minutes afterwards reconsidered his decision and requested a test. The Colorado Supreme Court stated as follows:

While a motorist has no right under the statute to confer with counsel prior to deciding whether he will consent to a test, Calvert v. Motor Vehicle Division, supra, where, as here, he is permitted to do so, thereafter consents to the test, and the officer is available to see that the test is administered, the primary purpose of the statute is fulfilled unless the delay will materially affect the result of the test. At 849.

The Hawaii Supreme Court in State v. Moore, 614 P.2d 931 (Hawaii 1980) adopting this rule also citing Zahtila and Hjelle, supra, stated:

We adopt the criteria of the North Dakota Supreme Court. We hold that unless a delay would materially affect the test results or prove substantially inconvenient to administer, a subsequent consent may cure a prior refusal to be tested. At 935.

In Gaunt v. Motor Vehicle Division, 666 P.2d 524 (Ariz.App. 1983) adopting the Zahtila, Moore and Hjelle and recognizing that there is a majority and minority position stated as follows:

We find the so-called minority rule to be "more logical and fair." (citation omitted) Although an absolute rule preventing a subsequent consent after an initial refusal has the advantage of granting unmistakable clarity to the defendant's obligation under the implied consent law, it could lead to unnecessarily harsh and self-defeating results. It is not hard to imagine circumstances where the defendant, soon after declining to take the breath test, has second thoughts. If the test results would remain valid, and if no material

inconvenience is caused to the police, we fail to see the harm in permitting the defendant to subsequently consent to take the test.

The breath test results could be an essential part of the state's case against the arrested motorist (or part of motorist's defense). By approving a flexible rule we believe that this important evidence will be more frequently available and therefore the prophylactic purpose of the implied consent law will be achieved. At 527.

See also Sedlacek v. Pearson, 284 N.W.2d 556 (Nebraska 1979).

In view of South Dakota v. Neville, 459 US 553, 74 L.Ed.2d 748, 103 S.Ct. 916, and §41-6-44.10(8) U.C.A. as amended², appellant's refusal to submit to a chemical test is admissible in any civil or criminal trial.

We are dealing with a civil standard for forfeiture of driver's privileges. Therefore in applying for a license, a driver impliedly agrees to submit to a chemical test if arrested for driving under the influence. He thereby consents

² (8) 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.

to a validly obtained test result be used against him in a criminal proceeding, or he permits evidence of refusal to be introduced for what evidentiary inferences may exist. This constitutes a forfeiture of one of two rights. In view of the forfeiture of a right, a reasonable analogy to that forfeiture can be found in standard Uniform Real Estate Contract liquidated damage clauses. This Court has repeatedly held since Perkins v. Spencer, 121 Ut. 468, 243 P.2d 446 (1952) that it disfavors forfeitures. It is undisputed law that a drivers license is a "protectable property interest". Mackey v. Montrym, 443 U.S. 1, 61 L.Ed.2d 321, 99 S.Ct. 2612 at 329. Therefore if forfeitures of money are treated in disfavor it would be only reasonable to apply a more fair standard in determining if a person has in fact refused to submit to a chemical test.

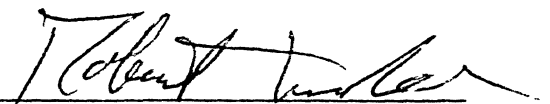
CONCLUSION

Since appellant within minutes of his refusal to submit to a chemical test requested the test be given while a test was still available, and again requested the test be given while in route to the Salt Lake County Jail where a machine was available, the refusal to provide him with an opportunity to submit to (at least) a breathalyzer test was unreasonable. Appellant submits that the action of the respondent in revoking his driving privileges when the entire period from first viewing appellant (10:10 p.m.), transporting

him to the South Salt Lake Police Station, thereafter to the Salt Lake County Jail for booking, and the arresting officer returning to his station completing his DUI report form (Exhibit 1) and having the same approved and notarized at 11:30 p.m. by the same officer who came to the station to administer the test constitutes arbitrary and capricious acts. The District Court should be reversed and appellant's license reinstated.

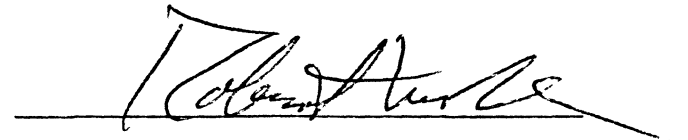
Respectfully submitted this 28 day of June, 1985.

McRAE & DeLAND


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CERTIFICATE OF DELIVERY

I do hereby certify that I caused to be hand-delivered four true and correct copies of the foregoing Brief of Appellant to Bruce M. Hale, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 on this 28 day of June, 1985.



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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

GLEN H. WHITEHOUSE,)	
)	
Petitioner,)	
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
)	AND ORDER
FRED C. SCHWENDIMAN, Chief,)	
Driver License Services,)	Case No. C84-6217
Department of Public Safety,)	
State of Utah,)	
)	
Respondent.)	

The above-entitled matter having come before the Court, being regularly scheduled for trial de novo on February 27, 1985, the parties being represented by counsel and the arresting officer being present, and the parties having made proffers of proof and stipulations and being accepted by the Court and the Court being apprised in the premises, the Court makes the following:

FINDINGS OF FACT

1) The testimony preponderates that the officer had cause to and did arrest the petitioner.

2) The petitioner was properly requested to take a chemical test, pursuant to Utah Code Ann. § 41-6-44.10 (1953) as amended, and warned of the consequences if there was a refusal and the machine was shut down.

3) That petitioner understood he would lose his driving privilege for one year, and did not immediately after refusing request the test.

The Court, having made the foregoing Findings of Fact, now makes its:

CONCLUSIONS OF LAW

1) Pursuant to Utah Code Ann. § 41-6-44.10 (1953) as amended, and all elements thereof being complied with, the petitioner having refused to submit to a chemical test, the petition should be denied.

2) The circumstance and uncontradicted testimony show that petitioner did not make an "immediate" request for the officer's test.

O R D E R

The Court having made the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that

1) The petition is denied.

2) The petitioner's driving privileges be revoked pursuant to Utah Code Ann. § 41-6-44.10 (1953) as amended.

DATED this 25th day of March, 1985.

HONORABLE RAYMOND S. UNO
District Court Judge

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order was mailed, first class, postage prepaid, to the following on this 25th day of March, 1985:

Robert M. McRae
Attorney at Law
209 East 100 North
Vernal, Utah 84078

Christie S. Johnson

41-6-44.5. Admissibility of chemical test results in actions for driving under the influence or with a prohibited blood alcohol content — Weight. (1) 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 with a blood alcohol content of ~~10% or greater~~ statutorily prohibited, the results of a chemical test or tests as authorized in section 41-6-44.10 shall be admissible as evidence.

(2) If the chemical test was taken within two hours of the alleged driving or actual physical control, the blood alcohol level of the person at the time of the alleged driving or actual physical control shall be presumed to be not less than the level of the alcohol determined to be in the blood by the chemical test.

(3) If the chemical test was taken more than two hours after the alleged driving or actual physical control, the test result shall be admissible as evidence of the person's blood alcohol level at the time of the alleged driving or actual physical control, but the trier of fact shall determine what weight shall be given to the result of the test.

(4) The foregoing provisions of this section shall not be construed as limiting the consideration or application by the trier of fact of the presumptions set forth in section 41-6-44, nor shall they prevent a court from receiving otherwise admissible evidence as to a defendant's blood alcohol level at the time of the alleged driving or actual physical control.

History: C. 1953, 41-6-44.5, enacted by L. 1979, ch. 243, § 3; L. 1983, ch. 99, § 15.

41-6-44.8. Municipal attorneys authorized to prosecute for driving while license suspended or revoked. Alleged violations of section 41-2-28, which consist of the person driving while his operator's or chauffeur's license is suspended or revoked for a violation of section 41-6-44, a local ordinance which complies with the requirements of section 41-6-43, section 41-6-44.10, section 76-5-207, or a criminal prohibition that the person was charged with violating as a result of a plea bargain after having been originally charged with violating one of more of those sections or ordinances, may be prosecuted by attorneys of cities and towns as well as by prosecutors who are empowered elsewhere in this code to prosecute those alleged violations.

History: C. 1953, 41-6-44.8, enacted by L. 1983, ch. 102, § 1.

attorneys of cities and towns to prosecute those alleged violations.

Title of Act.

This act enacts section 41-6-44.8. Utah Code Annotated 1953. — Laws 1983, ch. 102.

An act relating to prosecution of alleged violations of section 41-2-28, empowering city

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)~~ (1) 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 having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug as detailed in section 41-6-44, ~~provided that such so long as the test is or tests are administered at the direction of a peace officer having grounds to believe such~~ that person to have been driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and

any drug as detailed in section 41-6-44. A peace officer shall determine which of the aforesaid tests shall be administered.

No person; who has been requested pursuant to under 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 is not be a defense with regard to taking a test requested by a peace officer nor and it shall not 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) (2) If ~~such~~ the 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) (1) of this section and ~~refuses~~ refuses to submit to ~~such~~ the chemical test or tests, ~~such the 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~~ the 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~~, within five days after the date of the arrest, that he had grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited or while under the influence of alcohol or any drug or combination of alcohol and any drug as detailed in section 41-6-44 and that the person had refused to submit to a chemical test or tests as set forth in subsection (a) (1) of this section. Within ~~20~~ days after receiving a sworn report from a peace officer to the effect that ~~such the~~ the person has refused a chemical test or tests the department shall notify ~~such the~~ the person of a hearing before the department. If at ~~said~~ that 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 the~~ the test or tests, or if ~~such the~~ the 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. The department shall also assess against the person, in addition to any fee imposed under subsection 41-2-8 (7), a fee of \$25, which must be paid before the person's driving privilege is reinstated, to cover administrative costs, and which fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this subsection that the revocation was not proper. 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 the~~ the person shall ~~reside~~ resides. ~~Such The~~ The 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~~ chapter.

(c) (3) 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) (1) of this section, and the test or tests may be administered whether such person has been arrested or not.

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

(e) (5) 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) (6) 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) (7) 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) (8) 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.

History: C. 1953, 41-6-44.10, enacted by L. 1981, ch. 126, § 43; L. 1983, ch. 99, § 16.

Actual physical control.

To establish actual physical control of a vehicle for purposes of this section, it is unnecessary to show actual intent to control the vehicle; intent to control a vehicle may be inferred from the performance of those acts which constitute actual physical control. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

There was an adequate showing that motorist was in actual physical control of a motor vehicle where motorist occupied the driver's position behind the steering wheel of a motor vehicle with possession of the ignition key and with apparent ability to start and move the vehicle; fact that vehicle was blocked by a fence and another vehicle and could be moved only a few feet did not preclude a finding of actual physical control. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

The "actual physical control" language of this section should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive

occupants. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

Proceeding to revoke license for failure to submit to test.

Driver's license revocation proceeding for failure to submit to a requested chemical test requires proof only by a preponderance of the evidence. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

At a proceeding to revoke a driver's license for failure to submit to a requested chemical test, department of public safety has the burden to show arrested person was driving or in actual physical control of a motor vehicle in addition to showing that the arresting officer had grounds to believe that the arrested person was under the influence; the same evidentiary burden must be met in a trial de novo in the district court. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

Law Reviews.

Hansen v. Owens — Expansion of the Privilege against Self-Incrimination to Unknown Limits, 1981 Utah L. Rev. 447.

41-6-44.30. Seizure and impoundment of vehicles by category I peace officers. The legislature finds that it is contrary to the safety of the public to leave vehicles unattended on public roads.

(1) If a category I peace officer arrests or cites the driver of a vehicle for violating sections 41-6-43, 41-6-44, 41-6-44.2, or 41-6-44.10, the officer shall seize and impound the vehicle.

(2) Any such officer who impounds a vehicle under this section shall remove, or cause the vehicle to be removed, to the nearest accessible state impound yard that meets the standards set by rule by the state department of motor vehicles,