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Leland D. Moran v. Georgia R. Shaw : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LELAND D. MORAN, :
Plaintiff and Appellant, : Case No. 240884
v. :
GEORGIA R. SHAW, Acting Director, :
Utah State Department of Public :
Safety, Driver's License Division, :
Defendant and Respondent. :

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the District Court's affirmation of a Driver's License Revocation Hearing revoking Appellant's driver's license for refusal to submit to a chemical test pursuant to Utah Code Annotated 41-6-44.10.

DISPOSITION OF THE LOWER COURT

A non-jury trial de novo was held on April 19, 1977, in the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Stewart M. Hanson Jr., Judge presiding, the Court having taken the matter under advisement and on or about April 20, 1977, the lower Court entered a Judgment against Appellant denying Appellant's Petition for restoration of his driver's license, determining that the Appellant unreasonably refused to submit to a chemical test pursuant to Utah Code Anno-

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tated, Section 41-6-44.10, (1953), as amended.

RELIEF SOUGHT ON APPEAL

AFFIRMATION OF TRIAL COURT'S DECISION.

STATEMENT OF FACTS

Appellant was operating a motor vehicle on public highway I-80 approximately 13 miles east of Wendover, Utah, on December 24, 1976, at approximately 11:00 p.m. A Utah Highway Patrolman, Gary Ogilvie, caught Appellant's car on radar going 82 m.p.h. and weaving and proceeded to pull him over.

The Appellant was thereafter arrested for driving while under the influence of alcohol, read the Miranda warning, and was then transported to the jail in Wendover, Utah.

An officer Nelson arrived at the jail a short time later to administer the breathalyzer test. Appellant demanded that the officers find and appoint him an attorney. The testimony was that both the officers explained it was not their duty to do so, but that he could use the phone to contact an attorney himself. This opportunity was held open to him during the entire time he was at the jail. Appellant actually made calls, but his only calls were to try and find a particular casino girl, he didn't find her.

At various times the officers explained the implied consent law to the Appellant and the consequences of his refusal. Appellant staunchly refused to submit to the test whenever approached.

Appellant's physical condition and demeanor were testified to as being "hair mussed, eyes red, speech slightly slurred, unsteady on his feet, alcohol on his breath, belligerient, loud, and argumentative." The conversations between Appellant and the officers finally ended in a scuffle wherein Appellant was pushed into a cell. Thereafter, Appellant refused to respond to the officers. Some time after, the arresting officer had finished reading the implied consent statute, verbatim, to the Appellant, while in the cell snoring was heard. Previously both officers fully explained the consent statute to Appellant. Appellant was released the following day.

ARGUMENT

Point I

THE DISTRICT COURT'S DECISION IS SUPPORTED
BY AMPLE COMPETENT EVIDENCE AND SHOULD BE
UPHELD.

This Court in Gassman v. Dorius, 543 P.2d 197, (Utah, 1975), stated that it will not reverse the trial judge unless he clearly does violence to the facts. Respondent contends that the trial court's decision is supported by substantial competent evidence and should be upheld.

The trial judge, Stewart M. Hansen Jr., found Appellant was properly instructed with respect to the implied consent law, that Appellant unreasonably refused to submit to a chemical test. This conditional demand that an attorney be appointed for him

was unreasonable under the circumstances. Appellant was not denied his right to contact counsel. All of his findings are supported by substantial competent evidence and should not be disturbed under the prior holdings of this court.

Point II

APPELLANT WAS FULLY INFORMED AND UNDERSTOOD THE IMPLIED CONSENT LAW AND HIS RIGHTS.

The District Court's findings of fact that Appellant was properly instructed with respect to the implied consent statute is clearly substantiated by the evidence. Before Appellant was taken to the jail, Trooper Ogilvie explained the test and requested him to submit to a breathalyzer test when they arrived there. (Tr. p. 8-9). Officer Ogilvie read the Appellant part of the implied consent statute before Appellant was put in his cell and finished reading it verbatim a few minutes afterwards. (Tr. p. 11, 19, 20). It should be noted that the implied consent statute does not require a verbatim reading. This is just a practice of the department. (See Utah Code Annotated 41-6-44.10).

The arresting officers testified that at various times Appellant's rights under the implied consent statute and the consequences of his refusal to submit to a test were fully explained to him. (Tr. p. 9-11, 13, 19, 20, 25).

In Elliot v. Dorius, 557 P.2d 759 (1976), petitioner

argued that since the officers explained his rights before his refusal to take the test, rather than immediately after, the statute was not complied with. This Court held that "form should not be alleviated above substance," and that plaintiff had been sufficiently informed of his rights. In this case, Appellant was advised concerning his rights. Furthermore, any disjointment of the explanation was due to Appellant's belligerent behavior and argumentative attitude, and he should not be allowed now to benefit from his uncooperative and dangerous behavior.

Point III

APPELLANT UNREASONABLY REFUSED TO TAKE THE BREATHALYZER TEST OFFERED HIM.

The evidence also supports the District Court's findings of fact that the Appellant did refuse the test and that his refusal was unreasonable since it was strictly conditioned upon the officer's appointing him an attorney. This is clearly not the law.

On the way to jail, officer Ogilvie explained the test to the Appellant and asked him to submit to it. Appellant unqualifiedly refused. Appellant stated that he had been to an office party earlier in the day and "knew he would go over." He further retorted he would fight the officer all the way on it. (Tr. p. 9).

The foregoing evidence indicates Appellant's belligerence and undermines Appellant's contention that the only reason for his

refusal was his desire to consult with his attorney, that was also argued before the trial judge. Appellant was given further opportunities to submit to the test and replied that he wouldn't until he had an attorney present and demanded that the officers get him one. (Tr. p. 11, 12, 25, 26).

The Appellant's refusals under the circumstances were found by the trial court to be tantamount to express, unconditional refusals. The officers made it perfectly clear to Appellant that it was not their duty to appoint him an attorney. The officers told him "he could make all the calls he wanted." (Tr. p. 11). Appellant had his attorney's card with him, yet he made calls, not to his attorney, but to find a casino girl (Tr. p. 11). When he couldn't contact her, he made no further effort to contact an attorney, although the phone was always available to him. He continued to insist that the officers appoint him an attorney which, as the officers had explained, was not their duty. After Appellant was put in a cell, officer Ogilvie told him he would wait for a while until he made up his mind about calling an attorney. (Tr. p. 13). Appellant choose not to respond any further but ignored the officers.

Appellant refers to Hunter v. Dorius, 23 Utah 2d 122, 451 P.2d 877 (1969), in stating that refusal to take the test until an attorney was consulted was not a refusal. Hunter's facts are quite different than Appellant's. There, the petitioner had made a bona fide effort to contact her attorney for thirty

minutes. Fifteen minutes later, after the officer had written up an affidavit containing plaintiff's refusal, plaintiff's attorney finally made contact and advised plaintiff to submit to the test. The petitioner in Hunter, told the officer to give him the test and the officer refused. There was no undue delay in Hunter so the court held that plaintiff had not refused under the statute. Even in the context of these facts, Justice Ellett wrote a strong dissent concluding that delay was unreasonable and unjustified and that there was a refusal to submit to a chemical test.

In the case at bar, Appellant's only effort to get an attorney consisted of a call to find a casino girl. He had his attorney's card and full use of the telephone but made no effort to call him or to get a local attorney. Appellant did not eventually request the test as in Hunter, but refused to take, submit, and make possible for the officers to administer the test. It appears from this record that Appellant was not that concerned about having an attorney present and just wanted to delay.

Appellant also construes the reasoning in Hyde v. Dorius, 549 P.2d 451, Utah (1976), to support his contention that he neither refused nor submitted to the test, therefore, he has not refused. Again, the facts in Hyde are quite contrary to those presently before the court. In Hyde, the alleged refusal came within five minutes after the arrest while the plaintiff

never again offered an opportunity to take a test and this court rules that four or five minutes was not a reasonable time within which to make a sentient consent or refusal. There was no constructive refusal thereafter since there was no further request no further refusal. Again Justice Ellet wrote a powerful dissent stating that the evidence showing that the officers explained the consent statute at least on two occasions and that petitioner's only response that she wanted to go home was sufficient to justify the District Court's conclusion that there was a refusal.

In the case of bar, Appellant was given many opportunities to take the test and refused each time. The belligerence and unjustified conditional refusals under the circumstances amounted to express refusals. Appellant was given two hours in which to contact an attorney and submit to the test. (Tr. 21). The trial judge's view of the evidence that the Appellant did actually refuse to submit to a breathalyzer test and his refusal certainly was unreasonable under the circumstances, should be upheld.

POINT IV

APPELLANT UNDERSTOOD HIS RIGHTS AND MADE HIS
CONSCIOUS CHOICE TO REFUSE THE CHEMICAL TEST.

As discussed above, trooper Ogilvie explained the implied consent law and the consequences of Appellant's refusal on numerous occasions, so Appellant was aware of his choice and his rights thereunder.

Appellant's attitude as alleged to earlier, ie., "I'll fight you all the way," caused the agitation that existed. It did not prevent him from making his choice, but rather indicated his choice not to submit to the test. This agitation caused by the Appellant should not be allowed in any way to bear favorably on his case, but rather that Appellant understood and just wanted to delay or cause trouble so he wouldn't have to take the test.

Point V

APPELLANT WAS AFFORDED HIS RIGHT TO COUNSEL.

After arresting the Appellant, officer Ogilvie read to him the Miranda warning. Later at the jail it was clearly explained to Appellant that he had a right to contact counsel for himself and that it was not the duty of the officers to find and appoint him an attorney. It was also made clear that the "appointment" right referred to an arraignment and not to the chemical test proceeding. (Tr. 12, 25).

A phone was made available to Appellant for quite some time (Tr. 12). Appellant contends he reasonably believed he could only make one phone call. The evidence does not support the contention (Tr. 11-12).

Appellant contends that his demand for an attorney constituted a reasonable delay. His authority, Peterson v. Dorius, 547 P.2d 693, Utah (1976), does not support this

case on the merits. In Peterson, the petitioner stated she would take the test when her attorney got there. The attorney was contacted and took 45 minutes to arrive at the jail which the court found to be a reasonable length of time. The officer, knowing the attorney was on his way, left five or ten minutes before he arrived. The majority concluded that there was no refusal because the delay was reasonable and it appeared that the concern of the petitioner and the effort of the attorney were bonafide. Even though the plaintiff did not expressly refuse, a strong dissent concluded that a 45 minute delay, even with the attorney actually on his way, was an unreasonable delay and that the petitioner did unreasonably refuse to submit to a test.

The Appellant in the case at bar did not even make an honest effort to contact an attorney, let alone be waiting for one to arrive. Therefore, the Peterson case was found not applicable by the trial court in this case.

Point VI

PUBLIC SAFETY DICTATES AN EFFICIENT AND
EFFECTIVE PROCEDURE FOR DEALING WITH DRUNK
DRIVERS.

Driving an automobile is a statutory privilege so the strict rigidities of the criminal system are not mandatory in a license revocation proceeding. It is a well-known fact that drunk drivers are the greatest cause of highway fatalities. Because alcohol in the blood dissipates

there is no place for delay tactics on the part of any party who mixes alcohol with driving. The test will also clear an innocent driver.

In this case, Appellant was driving 82 m.p.h. in an allegedly intoxicated condition.

CONCLUSION

The whole tenor of Appellant's behavior was one of delay and beligerance. Appellant stated he would go over if the test was given and apparently from the evidence presented was really not that concerned about having an attorney present. After he was put in his cell, he refused to respond further. In light of the public concern for safety on the highways such antics should not be tolerated by the law of this state or this Court. Therefore, the conclusions of the trial Judge who actually heard the evidence should be sustained by This Honorable Court.

DATED this _____ day of December, 1977.

Respectfully submitted,

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MAILING CERTIFICATE

Mailed a copy of the foregoing Brief of Respondent
this _____ day of December, 1977, to P. Robert Knight,
1606 South Main, Salt Lake City, Utah 84115.
