

1977

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,

vs.

GEORGIA R. SHAW, Acting Director,
Utah State Department of Public
Safety, Driver's License Division,

Defendant and Respondent.

Case No. ~~240004~~

No. 15217

BRIEF OF APPELLANT

Appeal from the Judgment of the Third
District Court of Salt Lake County
Hon. Stewart M. Hanson Jr., Judge

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FILED

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Point I. The Appellant cannot be held to have refused to submit to a chemical test under the Utah Implied Consent Statute where the circumstances and the atmosphere were agitated and confusing and where all of the rights contained in said Statute were not fully explained to the Appellant so he could understand those rights and be given the opportunity to submit or to refuse the chemical test based upon a reasonable understanding of those rights.

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CASES AND AUTHORITIES

CASES:

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AUTHORITIES:

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the lower Court's determination that Appellant's driving privilege in the State of Utah be revoked pursuant to a Driver's License Revocation Hearing with regard to Appellant's alleged refusal to submit to a chemical test.

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

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the lower Court's decision reversed and to have the Supreme Court of the State of Utah restore Appellant's driving privilege, or in the alternative, that the case be remanded to the trial Court for a new hearing.

STATEMENT OF FACTS

Appellant was operating a motor vehicle on a public highway on Interstate 80 approximately 13 miles east of Wendover, Utah, on the 24th day of December, 1976, at the approximate hour of 11:00 p.m. At that approximate time and location, a Utah Highway Patrolman, Gary Ogilvie, who was operating radar, observed Appellant's automobile which was allegedly traveling over the

posted speed limit of 55 miles per hour and said Patrolman thereupon proceeded to stop the Appellant's vehicle.

The Appellant was thereafter arrested for driving under the influence of alcohol and was placed in the patrol vehicle and transported to the jail located at Wendover, Utah. That at the jail the Officer commenced to read an Implied Consent Form regarding the chemical test, but never completed reading the same.

Appellant requested of Officer Ogilvie the right to contact his attorney but was unable to do so. The Officer stated that if he could not afford an attorney that one would be appointed for the Appellant. Appellant thereupon requested that an attorney be appointed for him but the Officers stated that they would not and could not appoint an attorney for Appellant.

In the meantime, Officer Nelson, another Peace Officer, arrived at the scene and the Appellant and Officer Nelson became argumentative and a physical schuffle took place between Appellant and said Officer. Officer Nelson afterwards left the room and the Appellant was placed in a dark cell. A short time later Officer Ogilvie went to the cell and allegedly read the Appellant his rights under the Utah Implied Consent Statute through several small holes in the steel door of the cell, but received no reply.

The following day the Appellant was released from the jail.

ARGUMENT

POINT I

THE APPELLANT CANNOT BE HELD TO HAVE REFUSED TO SUBMIT TO A CHEMICAL TEST UNDER THE UTAH IMPLIED CONSENT STATUTE WHERE THE CIRCUMSTANCES AND THE ATMOSPHERE WERE AGITATED AND CONFUSING AND WHERE ALL OF THE RIGHTS CONTAINED IN SAID STATUTE WERE NOT FULLY EXPLAINED TO THE APPELLANT SO HE COULD UNDERSTAND THOSE RIGHTS AND BE GIVEN THE OPPORTUNITY TO SUBMIT OR TO REFUSE THE CHEMICAL TEST BASED UPON A REASONABLE UNDERSTANDING OF THOSE RIGHTS.

The Courts have long recognized that an individual is denied his constitutional rights, such as those set forth in the Miranda Warning, when those rights are not clearly stated to the accused and in such a manner as to reasonably inform an accused of those rights and when the atmosphere at that particular time and place is agitated and confused. In the 1969 Utah Supreme Court case of Hunter vs. Dorius, 23 Ut.2d 122, 451 P.2d 877, Justice Ellett in the dissent stated that "...the statute puts the duty upon the arresting officer to advise the arrested of his rights..."

In the instant case, Appellant was never fully informed of his rights under the Utah Implied Consent Statute nor given the opportunity to either submit or refuse the chemical test. The only basis for refusal in this case is when the Appellant stated he would not take a chemical test until he consulted with his attorney. The Implied Consent Statute was not either fully read to the Appellant before this statement or after.

The entire circumstances and atmosphere from shortly after the Appellant was arrested until he was placed in a jail cell was one of confusion, agitation, and physical contact.

Officer Ogilvie stated that he commenced to read the Implied Consent Statute to the Appellant but never completed the reading thereof as the Appellant repeatedly requested the appointment or opportunity to contact counsel. Furthermore, at the same time, Officer Nelson became combative with the Appellant and Officer Ogilvie stated he did not read the Implied Consent Statute at that time because of those circumstances.

In the Hunter case, supra, the Court held that an individual must be advised of his rights under the Utah Implied Statute after the individual refuses to submit to a chemical test. When the Appellant herein said he would not take a chemical test until he consulted an attorney, the same was not a refusal to submit under the Statute and cases in effect at the time of this incident. At no time thereafter, excepting as hereinafter stated was the Appellant informed of his rights and the full implication of the Implied Consent Statute.

In the case of Hyde vs. Dorius, 549 P.2d 451, (Utah, 1976), the Court held that a consent being implied, may be withdrawn only by the express refusal and that one who neither refuses nor submits to a chemical test has not refused to take the test (emphasis mine). As the Appellant herein was never informed of his rights nor given the opportunity to submit or refuse to take the test, there was no refusal.

Officer Ogilvie stated that he placed the Appellant in a dark cell behind a steel door which had only several small holes drilled in the door for air. He thereupon made notes regarding the arrest, and circumstances involved therein, and sometime thereafter stated he read the Implied Consent Statute through the steel door to the Appellant who he could not see and from whom he heard nothing but subsequent snoring.

The trial Court erred when it held that the Appellant was fully informed of his rights under the Implied Consent Statute in these circumstances and that the Appellant was given the right to either submit or refuse to take the chemical test, and in revoking Appellant's driving privilege in the State of Utah.

POINT II

APPELLANT WAS DENIED HIS RIGHT TO COUNSEL.

Officer Ogilvie stated that he read the Miranda Warning to the Appellant after the arrest but did not ask the Appellant whether or not he understood those rights.

At the jail, the Appellant stated that he would not take a chemical test until a lawyer was present and requested the Officer to appoint an attorney as they had previously stated they would do under the Miranda Warning. The Officers stated they would not appoint an attorney for him.

Furthermore, at the jail, Officer Ogilvie stated to the Appellant that he could make a telephone call and the Appellant made the call in an attempt to secure help for himself. The Appellant reasonably believed he was allowed only one telephone call and again requested of the Officers to appoint counsel for him which was refused.

The Appellant stated that he gave a business card of an attorney in Salt Lake City to the Officers and requested they contact said attorney, but again the Officers refused to call. In the case of Peterson vs. Dorius, 547 P.2d 693, (Utah, 1976), the Court held that a demand that the accused's attorney be present before the administration of a test was not an unreasonable delay. In the present case, the Appellant did not attempt to delay by requesting a Salt Lake attorney to appear in Wendover as the Appellant requested the Officers to appoint counsel for him as they stated they would do or to find an attorney in Wendover for him, but his request for counsel was denied.

In the case of Hyde vs. Dorius, supra, the Court found that the circumstances wherein the plaintiff was involved in an accident and while still agitated and upset was informed of the provisions of the Implied Consent Law without expressly refusing to take a chemical test, the subsequent suspension of her driver's license on that ground was error. In the present case the Appellant was involved on an argumentative basis with the Officers and in physical contact with Officer Nelson, and the circumstances surrounding the alleged informing of the Appellant of his rights under

the Utah Implied Consent Statute and the Appellant's right to counsel were done in an agitated and confused atmosphere making it impossible for any form of communication between the parties.

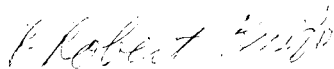
Suspension of the Appellant's driver's license herein by the trial Court is also an error.

CONCLUSION

The Judgment of the trial Court should be reversed and the Appellant's driving privilege should be reinstated as the Appellant was not informed of his rights under the Utah Implied Consent Statute and was actually and constructively denied his right to counsel herein and further, the evidence does not support the trial Court's determination that Appellant's driving privilege should be revoked.

DATED this 12th day of November, 1977.

Respectfully submitted,



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MAILING CERTIFICATE

I hereby certify that I ~~mailed~~-delivered a true and correct copy of the foregoing Brief of Appellant to Bruce M. Hale, Attorney for Respondent, 236 State Capitol Building, Salt Lake City, Utah, 84114, postage prepaid, this 14th day of November, 1977.

P. Robert Knight

P. ROBERT KNIGHT