

1978

John L. McDonald v. Georgia R. Shaw : Brief of Plaintiff-Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Bruce M. Hale; Attorney for Defendant-respondent;

Robert M. McRae; Robert J. Haws; Attorneys for Plaintiff-Appellant;

Recommended Citation

Brief of Appellant, *McDonald v. Shaw*, No. 15299 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/714

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE
STATE OF UTAH

JOHN L. McDONALD, :
Plaintiff-Appellant, :
vs. : Supreme Court No. 15299
GEORGIA R. SHAW, :
Defendant-Respondent. :

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE DETERMINATION OF THE
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT,
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE STEWART M. HANSON, JR., PRESIDING

ROBERT M. McRAE
ROBERT J. HAWS
Attorneys for
Plaintiff-Appellant
370 East Fifth South
Salt Lake City, Utah 84111

BRUCE M. HALE, JR.
Asst. Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

FILED

NOV - 1 1997

IN THE SUPREME COURT
OF THE
STATE OF UTAH

JOHN L. McDONALD, :
Plaintiff-Appellant, :
vs. : Supreme Court No. 15299
GEORGIA R. SHAW, :
Defendant-Respondent. :

BRIEF OF PLAINTIFF-APPELLANT

TABLE OF CONTENTS

	PAGE
STATEMENT OF CASE	1
DISPOSITION IN LOWER CASE	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	

HAS APPELLANT UNREASONABLY REFUSED TO SUBMIT TO A CHEMICAL TEST WHEN REQUESTED BY THE ARRESTING OFFICER TO TAKE A BREATHALYZER TEST AND APPELLANT REQUESTS A BLOOD ALCOHOL TEST INSTEAD, WHICH IS READILY AVAILABLE, IF THE PERTINENT STATUTE GIVES THE ARRESTING OFFICER THE RIGHT TO DETERMINE WHICH OF THE CHEMICAL TESTS TO ADMINISTER, THE STATUTE FURTHER REQUIRING THE ARRESTING OFFICER TO MAKE SUCH A DETERMINATION " <u>WITHIN REASON.</u> "	2
---	---

CONCLUSION	4
----------------------	---

CASES CITED

<u>Elliot v. Dorius</u> , 557 P.2d 759 (1976)	2
---	---

STATUTES CITED

Utah Code Annotated, 1953, as amended Sec. 41-6-44.10	2
--	---

STATEMENT OF THE CASE

This is an appeal from an order revoking Appellant's driver's license.

DISPOSITION IN LOWER COURT

On May 3, 1977, the Honorable Stewart M. Hanson, Jr. reviewed the Order of the Department of Public Safety revoking Appellant's driver's license and upheld said order.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Lower Courts Determination vacated and Appellant's driver's license reinstated.

STATEMENT OF THE FACTS

On January 13, 1977, Appellant was arrested and charged with driving under the influence of alcohol. (R,2) On being brought to the police station, Appellant was requested to submit to a breathalyzer test after being informed of the implied consent law in the State of Utah. Appellant responded by

by requesting a blood alcohol test which was denied him. Appellant did not take the breathalyzer test but did not refuse to take a chemical test. The above facts were stipulated to both counsel. (R,8)

Respondent, Georgia R. Shaw, reviewed these facts and revoked Appellant's license effective Feb. 16, 1977, for one year. On review, the district court affirmed the revocation.

ARGUMENT

HAS APPELLANT UNREASONABLY REFUSED TO SUBMIT TO A CHEMICAL TEST WHEN REQUESTED BY THE ARRESTING OFFICER TO TAKE A BREATHALYZER TEST AND APPELLANT REQUESTS A BLOOD ALCOHOL TEST INSTEAD WHICH IS READILY AVAILABLE, IF THE PERTINENT STATUTE GIVES THE ARRESTING OFFICER THE RIGHT TO DETERMINE WHICH OF THE CHEMICAL TESTS TO ADMINISTER THE STATUTE FURTHER REQUIRING THE ARRESTING OFFICER TO MAKE SUCH A DETERMINATION "WITHIN REASON."

This statute, Sec. 41-6-44.10, Utah Code Annotated, 1953, as amended was recently reviewed (in this court) in the case of Elliot v. Dorius, 557 P.2d 759 (1976). In Elliot the officer requested the defendant to submit to a breathalyzer exam. Defendant was informed that this exam was the only one available but defendant insisted that the only exam he would take was a blood alcohol test, arguing before the court that he would not submit to the breathalyzer because defendant felt the test was unreliable.

The court rejected defendant's argument because it was unreasonable to require the officer to give a test that was unavailable, the request being impossible to comply with. Similarly, when reviewing the officer's actions as to their reasonableness, the court found the officer's request reasonable under the circumstances. There was no other test available and consequently the officer's request was "within reason."

By contrast, the case at bar presents entirely different circumstances. In the present case the alternate test was readily available and competent personnel to administer the test were also ready to do so. All the arresting officer needed to do was make the proper calls. The issue then becomes: Does the arresting officer have absolute power to choose any test irrespective of circumstances? If the result in the case at bar is to find for respondent then Appellant submits that the answer to the question is yes. When would the officer's actions not be within reason? When would the limiting phrase "within reason" be applicable to limit the officer's actions? It would not have any meaning at all.

Reasonably, either test is acceptable under case law. Both tests are available. Defendant offers to submit to one because he fears the inaccuracy of the other. Choosing one over the other will not unduly delay production of useful evidence for the defense or the state. In effect, a ruling for the respondent

grants the officer an arbitrary right to choose any test he wants, even though limiting language exists in the statute.

Appellant's actions were not unreasonable under the circumstances. Certainly a lack of faith in the breathalyzer cannot help a defendant if no other test is available because a unilateral determination of validity prevents the application of the consent statute and defendant has other means available to challenge the accuracy of the breathalyzer.

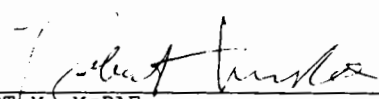
On the other hand, in the case at bar, the belief of Appellant does not prevent the state from gathering evidence nor does it frustrate the statute. The state simply refused to make the necessary calls nor make defendant available for the test. Such a power in the arresting officer is arbitrary and capricious. Under the circumstances, therefore, Appellant's actions were not capricious nor unreasonable.

CONCLUSION

The applicable Utah statute requires an arresting officer to act "within reason" when requesting that a defendant take a particular chemical test. When the Appellant requested a blood test when one was available, Appellant submits that he did not act unreasonably when the request would not delay the

production of evidence nor prejudice the position of the state. Appellant further submits that the arresting officer's actions were capricious and arbitrary and not "within reason." Appellant therefore requests the court to reinstate his license.

Respectfully submitted.

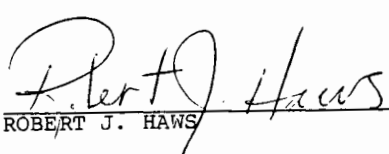


ROBERT M. MCRAE
Attorney for Plaintiff-Appellant



ROBERT J. HAWS
Attorney for Plaintiff-Appellant

Mailed two copies of the foregoing Brief to
Mr. Bruce M. Hale, Jr., Asst. Attorney General of Utah, 236 State
Capitol, Salt Lake City, Utah 84114, postage prepaid, this
1 day of November, 1977.



ROBERT J. HAWS