

1977

## Terry D. Mertin v. Georgia R. Shaw : Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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TERRY D. MERTIN, :  
Plaintiff-Appellant, :  
vs. : Supreme Court No. 15300  
GEORGIA R. SHAW, :  
Defendant-Respondent. :  
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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

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BRIEF OF PLAINTIFF-APPELLANT  
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## STATEMENT OF THE CASE

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

## DISPOSITION IN LOWER COURT

On May 17, 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 26, 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 by both counsel. (R,8)

Respondent, Georgia R. Shaw, reviewed these facts and revoked Appellant's license effective March 18, 1977, for refusal. 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 REQUIRES THE ARRESTING OFFICER TO MAKE SUCH A DETERMINATION "WITHIN REASONABLE

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 defendant 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 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 that Appellant does not prevent the state from gathering evidence 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

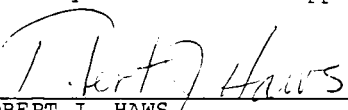
The applicable Utah statute requires an arresting officer to act "within reason" when requesting that a defendant take a particular chemical test. When the Appellant requested a blood test when one was available, Appellant submits that he did not act unreasonably when the request would not delay the



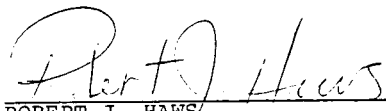
production of evidence nor prejudice the position of the state. Appellant further submits that the arresting officer's actions were capricious and arbitrary and not "within reason." Appellant therefore requests the court to reinstate his license.

Respectfully submitted.

  
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Mailed two copies of the foregoing Brief to  
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1 day of November, 1977.

  
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