1978

Terry D. Mertin v. Georgia R. Shaw : Brief of Defendant-Respondent

Utah Supreme Court

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

IN THE SUPREME COURT

OF THE

STATE OF UTAH

TERRY D. MERTIN,

Plaintiff-Appellant,

v.

Supreme Court No. 15300

GEROGIA R. SHAW, Acting Director, Drivers License Division, State of Utah,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDANT

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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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

STATEMENT OF THE CASE

This is a brief in opposition to 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 the order.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the lower court's determination affirmed.

STATEMENT OF THE FACTS

On January 26, 1977, Appellant was arrested and charged with driving under the influence of alcohol. On being brought to the police station, Appellant was asked to submit to a breathalyzer test after being informed of the implied consent law. Appellant refused to take the breathalyzer test.

Respondent, Georgia R. Shaw, reviewed these facts, took testimony, and revoked Appellant's license effective March 19, 1977. The District Court Judge then found that the petitioner unreasonably refused to submit to a chemical test to determine the alcoholic content of his blood pursuant to the laws of the State of Utah (R, 10).

ARGUEMENT

POINT I

THE DISTRICT COURTS FINDING THAT PETITIONER'S REFUSAL TO SUBMIT TO A CHEMICAL TEST WAS UNREASONABLE SHOULD BE SUSTAINED BY THIS COURT.

This court in Gassman v. Dorius, 543 P.2d 197 (1975) stated a well-known principle of appellate law, "We do not re-

verse the trial judge unless he clearly does violence to the f as they relate to his findings." The facts of this case and applicable law clearly support the Distirct Court's determinat that Appellant's refusal was unreasonable.

Respondent disagrees with the statement in Appellant' brief that "The alternate test (blood) was readily available." (No transcipt was designated by the Appellant). The facts were that the breathalyzer test was readily available while the bloo alcohol test was not. The officer made that clear to the Appellant, explained it, read him the statute and then designated the test to be taken. The trial court obviously believed these facts.

The Appellant, would put the shoe on the wrong foot and have the officer tried for unreasonableness. The officer's actions are not on re-trial. The only reason given and argued the Appellant for refusing the breathalyzer test is that he believed it to be unreliable. Under these facts, if the officer were on trial, he would have acted reasonably in requesting the breathalyzer test anyway. So found the trial court and we ask this court to uphold that finding.

POINT II

APPELLANT DID IN FACT UNREASONABLY REFUSE TO SUBMIT TO A CHEMICAL TEST PURSUANT TO UTAH CODE ANNOTATED 41-6-44.10.

Appellant's brief attempts to use Elliot v. Dorius, 557 P.2d 759 (1976), to argue the position that if the order

revoking Appellant's license is not overturned, this Court would be granting police officers absolute power to determine which test is to be used. Elliot seems to support this necessary result and in no way supports the Appellant's case. In fact, the holding of Elliot could dictate the necessary outcome of the case at bar, ie., that since the alternate test was not readily available, Appellant's refusal to take the available breathalyzer test was unreasonable, whether available or not. By statute, the test requested is presumed to be a reliable and reasonable one.

Appellant contends his refusal was not unreasonable due to his fear of the unreliability of the breathalyzer test and that he should be given the choice. This court in Elliot stated:

> In construing the meaning of reasonable cause, in this subsection, ((c) of Utah Code Annotated 44-6-44.10), it is significant the person is granted the right to submit to a 'chemical test,' the choice of which is by statute, determined by the arresting officer. A stated preference for another chemical test is not a reasonable cause for refusal of a requested test. ...A person may not unilaterally determine one of the tests designated in subsection (a) of 41-6-44.10 to be unreliable; then on that alone, claim his refusal to submit to such test was with reasonable cause. ...Plaintiff claims the subsection by the police officer, denied him a reliable test. Such is without merit. A chemical test specified by statute may not be deemed unreliable as a matter of law. The statute specifically designates the arresting officer as the one to determine the test to be administered. (Emphasis added).

The foregoing quotes demonstrate this court's interpretation of the Utah Implied Consent Statute. All tests indicated in the statute, including the breathalyzer test, are deemed by law to be realiable and reasonable. The officer decides which test is to be taken. When one is asked to submit to a particular test, he must, on his refusal to submit is then reviewed to determine if the refusal was reasonable. This court, as quoted above, said that a stated preference for another chemical test and a fear that a particular test is unreliable are not solely reasonable causes for a refusal to take a particular test. This Appellant's only contention is, therefore, without merit. The sole fact that the blood test requested, but was not readily available and would have caused undue delay and risk of losing the evidence, is an unreasonable ground for refusal. If he had some other valid reasons for refusal, the appellant might have been reasonable, but such is not the trial court's finding on the facts of this case.

The above construction of Utah Code Annotated 41-6-44. was incorporated into the code via amendment by the 1977 Utah Legislature. The 1977 amendments to this section provide in no uncertain terms that the officer has discretion as to which test used and the tests are presumed to be reliable. (Breathalyzer tests have been used for years). Subsection A of the latest statute grants the right to a contemporaneous test if desired.

POINT III

POLICY CONSIDERATIONS DICTATE THAT STATE MOTOR VEHICLE SAFETY LAWS BE DEALT SWIFTLY

AND EFFICIENTLY WITH UNSAFE DRIVERS.

The U.S. Supreme Court in Dixon v. Love, on May 16, 1977, upheld an Illinois law authorizing revocation or suspension of a drivers license without preliminary hearings. The court ruled that holding prehearings in every case would impede administrative efficiency and prove a danger to the public on the highways. This is just one example of how state courts are tightening their drunk driving laws. The 1977 amendments to its Implied Consent Law show a definite concern for public safety. The policy behind these amendments is obviously due to undue delay tactics. Keeping the highways safe for the innocent driver seems certainly present in this court's construction of the implied consent statutes even before the statutory amendments went into effect. Utah's judicial decisions and legislative enactments have also reflected concern with the drunk driving problem. The District Court's finding certainly is in accord with policy and holdings by this court.

CONCLUSION

This court's statutory interpretation of the applicable law gives the peace officer discretion as to which available chemical test is to be used. The facts and applicable law clearly show that Appellant's refusal to take the breathalyzer test was unreasonable. A refusal to take the test offered due to fear of its unreliability and/or a stated preference for another test is clearly an unreasonable refusal.

Respondent requests this court to uphold the Trial Court's findings.

DATED this _____ day of _____, 1978.

Respectfully submitted,

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MAILING CERTIFICATE

Mailed a copy of the foregoing Brief of Defendant-Respondent this _____ day of January, 1978, to Robert M. McRae, and Robert J. Haws, Attorneys for Plaintiff-Appellant, 370 East 500 South, Salt Lake City, Utah 84111.

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