2001

Kenneth W. Gibb v. Earl N. Dorius : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

STATE OF UTAH

KENNETH W. GIBB,
Plaintiff-Respondent,

vs.

EARL N. DORIUS, Director, Driver License Division, State of Utah,
Defendant-Appellant.

Case No. 13626

BRIEF OF RESPONDENT

APPEAL FOR A REVERSAL OF THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE D. FRANK WILKINS, JUDGE, PRESIDING.

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

KENNETH W. GIBB,
Plaintiff-Respondent,

vs.

EARL N. DORIUS, Director, Driver License Division, State of Utah,
Defendant-Appellant.

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This appeal concerns legality of the driver's license revocation by the appellant under Utah's Implied Consent Law, Section 41-6-44.10 U. C. A., as amended.

DISPOSITION BELOW

On October 8, 1973, the appellant revoked respondent's driver's license to drive for the latter's alleged failure to submit to a sobriety test under Section 41-6-44.10, U. C. A., as amended. Pursant to the provisions of said act, respondent timely sought a trial de novo in the

District Court of Salt Lake County, for a determination of whether respondent's license was subject to revocation. The case was heard before the Honorable D. Frank Wilkins on the 18th day of December, 1973. Judge Wilkins found that the state failed to prove that the order entered on the 8th day of October, 1973, was lawful and not in excess of appellant's authority and jurisdiction; further, that the respondent had a right to rely upon representations made by the arresting officer that he had a right to counsel, and that the arresting officer was in error, after informing respondent of this right, but refusing to allow him to obtain such counsel prior to requesting that he either submit or refuse a chemical test for sobriety. Further, that the question of respondent's refusal to submit to a chemical test was moot in light of the fact that the state failed to provide a duly authorized laboratory technician as required in Section 41-6-44.10(f) U. C. A. (1953), as amended.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's judgment findings of fact and conclusions of law granting a return of the respondent's driver's license and seeks an order in harmony with the appellant's order of revocation.

STATEMENT OF FACTS

Respondent is obligated to set forth a concise statement of the material facts of this case because appellant

has failed to set forth in his brief any facts relevant to respondent's position or any facts upon which the lower court based its decision. Respondent agrees that on May 17, 1973 at approximately 4:01 A.M. he was arrested by Trooper Wayne Smith and was asked to submit to a chemical test to determine the amount of alcohol in his blood. Respondent agrees that he had no preference as to the type of chemical test but contends that it was the officer's preference and desire that he submit to a blood test (R. 18). Respondent agrees that Trooper Smith then called the dispatcher to notify a technician for the purpose of drawing blood upon their arrival at the County jail. The respondent agrees that he was stopped at 4:01 A.M. on May 17, 1973. That he was placed under arrest at 4:04 A.M., that he was advised of his rights at 4:09 A.M.

Respondent agrees thereafter, Trooper Smith and another highway patrolman proceeded to the Salt Lake City and County jail. Respondent agrees that a discussion was had in regard to the implied consent law. Respondent agrees that he asked to speak to an attorney and he was provided a telephone and permitted to make several telephone calls until he contacted the undersigned counsel. Respondent agrees that Trooper Smith talked to his attorney and that the Trooper asked that the respondent submit to a chemical test but only requested that he submit to a blood test (R. 18). Respondent agrees that respondent's counsel informed Trooper Smith that he would not refuse the test but that he could not

fully advise Mr. Gibb over the telephone. Respondent agrees that Trooper Smith requested that he get an answer as to whether Mr. Gibb would take the chemical test, a blood test. Respondent does not agree that these activities took place between 4:45 A.M. and 5:30 A.M., but contends that they took place from 4:50 A.M. to 5:20 A.M., and that Trooper Smith turned the respondent over for booking by the jailer at 5:25 A.M. (R. 29). Respondent contends that he had a short conversation and not a long conversation with his attorney and that Trooper Smith really could not recall the exact time and was quite foggy on the sequency of facts (R. 29, 30). Respondent agrees that Trooper Smith was informed that respondent's counsel could not advise Mr. Gibb over the phone due to the lack of privacy; that he was coming to the jail to speak to Mr. Gibb in private. Respondent's counsel informed Trooper Smith that in the opinion of respondent's counsel, a telephone call with the trooper, the technician and other jail employees standing next to the defendant, did not permit adequate privacy; therefore it necessitated a trip to the jail so that he could speak in private with his client. Respondent further contends that Trooper Smith was informed by the respondent's counsel that he would be there in a few minutes and that his counsel arrived at 5:25 A.M. (R. 30). Respondent agrees that in cross-examination, Mr. Lynn Davis stated his qualifications as a chemist and stated that he was employed by the City-County Health Department, however, respondent contends that Mr. Davis failed to give any testimony to show that he was a duly

authorized laboratory technician as is required under Section 41-6-44.10(f) (R. 13), or that he was even a laboratory technician (R. 5, 6, 11, 12, 13). Respondent contends that Mr. Davis' testimony primarily established the foundation that would be necessary to give testimony regarding the actual analysis of a sample but gave no testimony showing his qualifications or authorization to draw said sample (R. 5, 6, 11, 12, 13). Respondent contends that Mr. Davis testimony stated the only authorization which he had was an implied authorization due to the fact that the State Division of Health, a department unrelated to the department charged with the administration of Section 41-6-44.10 monitored his procedure in analyzing blood alcohol and "running blood alcohol tests" (R. 12). Respondent contends that Mr. Davis failed to give any testimony to indicate that he was authorized to withdraw blood alcohol samples, pursuant to 44-6-44.10(f) (R. 12). That the lower court's decision should be affirmed for the following reasons:

ARGUMENT

POINT I.

THE LOWER COURT'S DETERMINATION THAT MR. LYNN DAVIS WAS NOT A "DULY AUTHORIZED LABORATORY TECHNICHIAN" THEREFORE RENDERING THE QUESTION OF RESPONDENT'S REFUSAL TO GRANT A BLOOD ALCOHOL SAMPLE MOOT, FINDS SUBSTANTIAL

SUPPORT IN THE EVIDENCE AND THE LAW.

Under Section 41-6-44.10(a), U. C. A., as amended, the District Court in a trial de novo was vested with jurisdiction "to take testimony and examine into the facts of the case and to determine whether . . . [respondent] license is subject to revocation . . .".

The appellant had to demonstrate by a preponderance of the evidence that respondent had refused to take the sobriety test requested because this was the basis upon which appellant revoked the respondent's license. This determination admittedly is a question of fact within the providence of the trier of fact. Apparent in the opinion of the lower court, the appellant failed to meet the burden of proof required and the evidence indicated that respondent did consent to the taking of his blood test.

This court has long held it is the prerogative of the trial court to judge the credibility of the witnesses in in applying the facts; that the court reviews evidence in the light most favorable to the trial judge and that the trial judge's finding will not be disturbed if there is reasonable basis in the evidence to sustain them. E.g., *Bramel* v. *Utah State Road Commission*, 24 Utah 2d 50, 465 P. 2d 534, 535 (1970). *Seegmiller* v. *Western Men, Inc.*, 20 Utah 2d 352, 354, 427 P. 2d 892, 894 (1968). *Marks* v. *Continental Casualty Co.*, 19 Utah 2d 119, 123-24, 427 P. 2d 387, 390 (1967).

In the instant case there is reasonable basis in the evidence to sustain the trial court's findings.

It cannot be denied that respondent consented to submit to a blood test at the first request of Trooper Smith (R. 18), and never refused (R. 30). Subsequent to the respondent's consent to giving a blood sample for the purpose of determining the blood alcohol level, it was Trooper Smith's obligation to administer the test according to law. Trooper Smith requested that the respondent take a blood test and radioed the dispatcher at the Salt Lake City and County jail to have a technician meet them (R. 18).

Section 41-6-44.10(f) provides:

> "Only a physician, registered nurse, practical nurse, or *duly authorized laboratory technician* acting at the request of a police officer can withdraw blood for the purpose of determining the alcoholic or drug content therein." (Emphasis added.)

The lower court found as a question of fact and law that Mr. Davis was not a duly authorized laboratory technician.

The appellant argues that the correct interpretation or reading of Section 41-6-44.10(f) would be "to read the section as a whole", and ignore the words "duly authorized" (A. 12).

To do this would be to determine that the words "duly authorized" have no substantive meaning and are

present in the statute strictly as a matter of form. This is contrary to the holding of this court, the doctrine of ejusdem generis and expressio unius est exclusio alterius. The appellant concedes that "duly" has substantive meaning and in fact cites two cases in his brief holding to that effect (A. 19).

In *General Talking Pictures Corp.* v. *Hyatt*, Justice Wolfe said:

> "The word 'duly' has acquired a fixed legal meaning, and when used before any word implying action, it means that the act was done properly. It does not relate to form merely, but includes form and substance, implying the existence that every fact essential to perfect regularity of procedure in the observance of statutory requirements; and has been defined generally as meaning according to law, or some rule of law, or practice, * * * by proper procedure * * * properly, regularly, sufficiently." 114 Utah 362, 366, 199 P. 2d 147, 148 (1948).

Further, it must be assumed that each term of the statute was used advisably and should be interpreted and applied in light of its accepted or established meaning. *Grant* v. *Utah State Landboard*, 26 Utah 2d 100, 485 P. 2d 1035, 1036 (1971).

It is an axiomatic rule that every law should be construed in a light that will give effect to all of its provisions. *State* v. *Gates*, 118 Utah 182, 187, 221 P. 2d 878, 880 (1950). In a specific statute the words "duly" and "authorized" must be given meaning, and it should be

construed in a manner that will render the words operative rather than to make them idle and nugatory *Stevenson* v. *Salt Lake City Corp.*, 7 Utah 2d 28, 30, 317 P. 2d 597 (1957). This court has long held that in interpreting statutes, an attempt should be made to give every word effect. *Maw* v. *Lee*, 108 Utah 99, 107, 157 P. 2d 585, 588 (1945).

It is obvious that the legislature did not intend to include all laboratory technicians. *Rio Grande Motorway, Inc* v. *Public Service Commission*, 21 Utah 2d 377, 380, 445 P. 2d 990 (1968). This is the only interpretation that would be consistent in light of the specific individuals mentioned earlier in this sentence (physicians, registered nurses, practical nurses) and would be the only interpretation consistent with the doctrine of ejusdem generis which this court has prescribed in numerous cases. E.g. *Lark* v. *Whitehead*, 28 Utah 2d 343, 345, 504 P. 2d 557, 559 (1972), *Townsend* v. *Board of Review of Industrial Commission*, 27 Utah 2d 94, 96, 493 P. 2d 614, 616 (1972), *Heathman* v. *Giles*, 13 Utah 2d 368, 370, 374 P. 2d 839, 840 (1962), *Stone* v. *Salt Lake City*, 11 Utah 2d 196, 204, 356 P. 2d 631, 636 (1960).

Mr. Davis was called to the Salt Lake City and County jail at the request of Trooper Wayne Smith and testified that he was an employee of the Salt Lake City and County Health Department and that his position was a chemist (R. 5). He stated that he had a certificate as a medical technologist from the United States Navy during World War II and he had a bachelor of arts de-

gree with a composite major in Bacteriology and Chemistry and approximately twenty-five years experience in clinical laboratory work (R. 6). On cross-examination, he admitted that he had never received specific authorization to function as a duly authorized laboratory technician in drawing blood samples pursuant to Section 41-6-44.10(f) (R. 13). The trial court then determined that Mr. Davis was not a duly authorized laboratory technician as is required by the statute and that the question of Mr. Gibb's refusing to permit Mr. Davis to take a blood sample was moot in light of this fact. This is the prerogative of the trier of fact. *Thomson* v. *Condas*, 27 Utah 2d 129, 130, 493 P. 2d 639, 640 (1972).

Upon a reading of the statute, it is apparent that the legislature placed a requirement that any laboratory technician who wished to perform the act of withdrawing blood samples from a suspect, be duly authorized. There is good reason for this and a strong public policy in support of it. Appellant concedes (A. 12) that laboratory technicians are not licensed by the State of Utah. Therefore it is difficult to ascertain the minimum level of competency for a laboratory technician without some regulatory standard which sets a minimum level of competency such as is applied to physicians, nurses, and practical nurses. Consequently, the legislature within its power to provide for the general welfare and to secure its citizens against the consequences of ignorance and incompetency, placed a requirement in the statute that the laboratory technician be duly authorized to perform

the tests. The power to promulgate procedures to bring about this authorization is provided in Section 41-1-3, U. C. A. (1953). Section 41-6-44.10, U. C. A., as amended, is a law the commission is charged with enforcement of. Further Section 41-6-1 provides:

> "The following words and phrases when used in this act shall, for the purpose of this act, have the meanings respectively ascribed to them"

The appellant has extensively briefed the subject of agency by implication and agency by estoppel. I feel this is irrelevant for two reasons: (1) All of the cases deal with an individual innocent third party who is applying the doctrine of agency to prevent an injustice after there had been a clear and apparent holding forth in previous dealings; (2) The doctrine of agency by implication is not an acceptable doctrine to be applied against the State of Utah in light of its sovereign immunity. See *Section* 63-30-1 *U. C. A.*, (1953), *as amended, et seq. of the Governmental Immunity Act.* Further, it is pure speculation on the part of the appellant to contend that Trooper Smith could have, had we raised the objetcion early in the proceedings as to Mr. Davis' qualifications, administered a breathalizer test to Mr. Gibb. Trooper Smith and Mr. Davis admitted that they left the Salt Lake City and County jail complex prior to the arrival of respondent's counsel. Further, the question of which test Trooper Smith could have administered was decided by him when he requested Mr. Gibb to submit to a blood test (R. 18). The decision was

Trooper Smith's decision by statute and not Mr. Gibb's but where he requested Mr. Gibb to submit to one test he cannot now be permitted to say that another test could have been given to avoid this problem.

The lower court committed no error in light of the facts and testimonies, and the lower court's decision should be affirmed and this appeal dismissed.

POINT II.

AS A MATTER OF LAW RESPONDENT WAS NOT AFFORDED HIS RIGHT TO COUNSEL.

Appellant has misconstrued the holding of the court. Nowhere in the findings of fact and conclusions of law did the court hold respondent had a right to have his counsel physically present in the county jail prior to the taking of the blood test. The court did hold, that based upon the facts, the respondent was not afforded the right to fully consult counsel and be properly advised of his rights. The appellant concedes that the respondent had the right to counsel. In fact, Trooper Smith informed him of this fact and permitted him to contact an attorney. The issue in the lower court was whether or not a telephone call under the facts and circumstances in this particular case sufficiently constituted respondent's right to counsel. It appears in the record, that respondent could not converse freely with his counsel due to the presence of Trooper Smith and Mr. Davis (R. 10, 33). Respon-

dent concedes that this matter is not a criminal matter and the right to counsel should not be treated as a technicality, the denial of which would totally vitiate the proceedings. However, respondent contends that based on the facts present in this case it would not have been unreasonable or burdensome to permit the respondent the right to privately speak to his attorney prior to making his decision to submit to a chemical test. Respondent submits this issue should be decided by weighing the strong public policy established by this court, that the accused should be afforded the right to counsel at the earliest possible moment; if the exercise of this right is not unreasonable, burdensome or delaying. *State* v. *Hamilton,* 18 Utah 2d 234, 238, 419 P. 2d 770, 774 (1966).

The trial court, based upon facts presented, determined that it would not have been unreasonable or burdensome for Trooper Smith to have afforded the respondent this right. It is our contention, that the period of time that Trooper Smith would have waited for respondent's counsel to reach the jail and converse with respondent privately, was only a matter of minutes. Therefore, Trooper Smith was totally unreasonable in filling out the refusal and leaving the jail after being specifically informed by respondent's counsel, twice, that he would be there shortly.

The record indicates that respondent's counsel arrived at the Salt Lake City and County jail at 5:25 A.M. Trooper Smith insisted that he was still at the jail at that time. Further, the record indicates that the respon-

dent's counsel requested to see the respondent and was not permitted to do so.

The accused has a right to counsel at the earliest time practical, since it is his means of knowing what his other rights are. *State* v. *Hamilton*, 18 Utah 2d 234, 238, 419 P. 2d 770, 774 (1966). Although the accused driver has given his consent to a chemical test, by being granted the privilege to drive, he has the right to be advised by counsel as to the implication of his compliance or refusal with said consent. *Hunter* v. *Dorius*, 23 Utah 2d 122, 123, 458 P. 2d 877, 879. Further, in light of the stiff penalty attached to a refusal, the respondent should be afforded, if it would not cause an unreasonable delay, every opportunity to consider and be informed by counsel.

The respondent was stopped at 4:01 A.M. and not delivered to the Salt Lake City and County jail until 4:55 A.M., some 55 minutes later. Trooper Smith stated that Mr. Davis was not at the jail at the time they arrived, and that Mr. Davis arrived later (R. 20). The record would show where Mr. Gibb was stopped is only five minutes from the jail. It would not have been an unreasonable or unjustified delay for the officer to have waited until 5:25 A.M. to submit the respondent to a chemical test, or even 5:30 A.M. He had initially waited 51 minutes to bring the respondent to the City and County jail and he gave no reason for this delay. The chemical test would still have been probative and the small additional delay would not have been unjustified. Trooper Smith gave the reason he had to leave and could

not wait, was due to the fact that there were only two cars on duty that night and that he had brought the other officer with him to the jail (R. 24). However, he stated that Mr. Gibb at no time during the period of custody was hostile or dangerous (R. 34), and that Officer Tenny could have taken his car and returned to patrol (R. 34).

Consequently, there is sufficient evidence in the record to warrant a finding that the respondent's conduct was not a refusal within the meaning of Section 41-6-44.10(c), U. C. A., (1953), as amended, but was an exercise of this right to counsel without causing unreasonable delay or burden. Therefore, because there is reasonable basis in the evidence to support the lower court's decision, the decision of that court should be affirmed.

POINT III.

WHAT CONSTITUTES "REFUSAL TO CONSENT TO A CHEMICAL TEST" PURSUANT TO 41-6-44.10(c), UTAH CODE ANNOTATED, AS AMENDED, IS A FACT QUESTION TO BE DETERMINED BY THE TRIAL COURT.

The consideration of credibility of witnesses and the weight accorded to their respective testimony is a question of fact within the prerogative of the trial court.

> Section 41-6-44.10(c), Utah Code Annotated (1953), as amended, provides . . . if at said hearing the department determines that the person

> was granted the right to submit to a chemical test and without *reasonable* cause refused to submit . . . (emphasis added).

Respondent contends that he was not granted the right to submit to a chemical test as is provided in 41-6-44.10(f) and that he had a reasonable cause to request time to consult with counsel in light of the fact that it would only have required waiting five to ten minutes longer (R. 29). Reasonable cause can be termed synonymous with reasonable excuse. *Ballentine's Law Dictionary*, Third Edition, 1060, 1061.

During the trial de novo, in the lower court, the Judge heard testimony from Mr. Davis, Trooper Smith and Mr. Reagan, respondent's counsel.

Appellant contends Mr. Gibb's statement that he would not submit to a chemical test until his attorney arrived, constituted a refusal. The lower court, after hearing the facts and analyizing the circumstances, found that Mr. Gibb's actions as a question of fact did not constitute a refusal. This court has long held, "[It should be] assumed that [the fact finder] believed those aspects of evidence, and drew such inference as fairly could be drawn therefrom, favorable to his findings and judgment." *People Finance and Thrift Co.* v. *Landis*, 28 Utah 2d 392, 395, 503 P. 2d 444, 445 (1972).

Further the trial court's findings and conclusions are presumed valid and it is the appellant's obligation to show error. *Latimer* v. *Katz*, 29 Utah 2d 280, 283, 508 P. 2d 542, 545 (1973).

CONCLUSION

Respondent respectfully requests that for the reasons above stated that the lower court's decision should be affirmed.

Respectfully submitted,

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