

2001

# Kenneth W. Gibb v. Earl N. Dorius : Brief of Appellant

Utah Supreme Court

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IN THE  
SUPREME COURT DEC 5 1975  
OF THE  
STATE OF UTAH  
BYAM YOUNG UNIVERSITY  
Reuben Clark Law School

KENNETH W. GIBB,  
*Plaintiff-Respondent,*

vs.

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

Case No.  
13626

BRIEF OF APPELLANT

APPEAL FOR A REVERSAL OF THE JUDG-  
MENT 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

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KENNETH W. GIBB, <i>Plaintiff-Respondent,</i>	}	Case No. 13626
vs.		
EARL N. DORIUS, Director, Driver License Division, State of Utah, <i>Defendant-Appellant.</i>		

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BRIEF OF APPELLANT

---

STATEMENT OF THE NATURE OF THE CASE

Is the revocation of respondent's driver's license, pursuant to Utah Code Ann. § 41-6-44.10 (1953), as amended, for failure to take the chemical test, a refusal, when respondent, relying on advice of counsel, refuses to submit to the test until his attorney is present, after having had two phone calls with said attorney; is the right to contact counsel a right under the *Hunter v. Dorius* case to have the attorney present prior to the taking of the chemical test or deciding to take the chemical test, or either submitting or refusing said test; further, are the above two issues moot in view of the court's ruling that Section 41-

6-44.10(f) was not complied with in the court's opinion because Lynn Davis, City-County Health Lab Technician, was not "an authorized lab technician" pursuant to the statute?

### DISPOSITION IN LOWER COURT

On October 8, 1973, the appellant revoked respondent's driver's license to drive for one year, effective September 13, 1973. This was due to respondent's failure to submit to a sobriety test under Section 41-6-44.10, Utah Code Annotated (1953), as amended. Pursuant to the act, respondent filed a petition for trial de novo in the Third District Court, in and for 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 after a hearing that respondent's motion to set aside the revocation order be granted and that the action be dismissed upon the merits and that the respondent have and recover his driving privilege. Said order was signed and entered on the 29th day of January, 1974. According to the conclusions of law entered by the court of date, Judge Wilkins held that the order entered on the 8th of October, 1973, was unlawful and in excess of appellant's authority and jurisdiction; further, that the petitioner had a right to rely upon the representations made by the arresting officer that he had a right to counsel, and that the arresting officer was in error, after informing petitioner of his right and 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 petitioner's refusal to submit to a chemical test was moot in light of the fact that the State failed to prove a duly authorized lab technician as required in Utah Code Ann. § 41-6-44.10(f) (1953), as amended, was provided.

### 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

Trooper Wayne Albert Smith testified that respondent was observed in a Chevrolet Pickup Truck going northbound on Interstate I-15 Freeway and turning into the emergency lane and then going off onto the shoulder portion of the road in a zigzag pattern (R. 33). The trooper followed him from just north of 17th South until stopping the subject's car at approximately 12th South. He noticed the odor of alcohol (R. 33, 34) and he asked Mr. Gibb, the respondent, to step back to the highway patrol vehicle and as he did so he observed the respondent walking, which he indicated was in a staggering and unsteady manner. No field agility tests were given (R. 34). Trooper Smith placed him under arrest and read him the *Miranda* rights (R. 35) and respondent indicated that he would talk to the Trooper (R. 35). Trooper Smith

asked the respondent if he would submit to a chemical test and asked him if he had a preference as to which test he would take, to which the respondent indicated he had no preference, but that if it was okay, he would take the blood test. The Trooper then called the dispatcher to notify the technician for the purpose of drawing the blood to meet at the county jail (R. 35). The respondent was stopped at 4:01 a.m. on May 17, 1973. He was placed under arrest at 4:04 a.m. He was advised of his rights at 4:09 a.m. (R. 35).

Thereafter, the respondent and Trooper Smith and another highway patrolman, Trooper Tenney, proceeded to the Salt Lake County Jail. Trooper Smith in the car explained the implication of the Implied Consent Law and the chemical test to the respondent, but did not read the entire rights to him at the scene prior to leaving for the jail. He did tell him that he was required to take a test and that his license would be revoked if he refused and did not have a valid reason for the refusal. The respondent and Trooper Smith and Trooper Tenney arrived at the jail and there met Mr. Lynn Davis, the City-County Lab Technician who was there for the purpose of drawing the blood (R. 37). The respondent asked to speak to an attorney and so Trooper Smith provided him with a phone, the respondent made several phone calls and then did contact an attorney represented to be Mr. Reagan (R. 37). Mr. Gibb, after his conversation, requested that Trooper Smith talk to the attorney, which conversation took place (R. 37) at which time Trooper

Smith asked that his client subject himself to a chemical test, either breath or blood (R. 37). Trooper Smith testified that Mr. Reagan said that he would not refuse the test (that is his client) supplied but that he would not agree to Mr. Gibb taking a test without him (Mr. Reagan) being present at the jail (R. 38). Mr. Reagan, the attorney, was informed by Trooper Smith that he had no intention of interrogating Mr. Gibb at the jail further concerning the arrest for drunk driving or taking any of his rights away but that he did request that he get an answer as to whether Mr. Gibb could take the chemical test or not and that Trooper Smith was the only other car on the road that night and it was important for him to get back to the highway (R. 38). These activities took place between 4:45 a.m., the approximate time they arrived at the jail and 5:30 a.m., the time that Trooper Smith turned the respondent, Mr. Gibb, over to the jailer for booking.

Trooper Smith testified that the respondent had a lengthy conversation with his attorney, approximately five or ten minutes, and could have been as much as fifteen (R. 38-39). Mr. Gibb's attorney advised Trooper Smith that he would not advise Mr. Gibb over the phone and that he was going to come to the jail to speak to Mr. Gibb in private, and Mr. Gibb's attorney informed Mr. Gibb that he was coming to the jail to advise him whether or not to submit to the chemical test. Trooper Smith advised both the attorney for Mr. Gibb and Mr. Gibb that there was no need for the attorney to come to

the county jail as far as the implied consent was concerned (R. 41) whereupon respondent, Mr. Gibb, said that subsequent to him being informed of his rights under Section 41-6-44.10 that he would not submit to a test unless his attorney was present. However, the record reveals that he admitted to Mr. Davis, the technician, affirmatively that he would refuse until his attorney was present (R. 26). Attorney Reagan, attorney for respondent, stated by way of a stipulation that he arrived at the jail at 5:25 a.m. and that on the phone prior to coming to the jail, he notified Trooper Smith that in his opinion what constituted right to counsel was not a phone call but was the opportunity to personally interview and talk to his client, to which Trooper Smith reiterated to attorney Reagan that his presence was not necessary as far as the law and the refusal was concerned (R. 48).

The respondent, in talking to the lab technician said that at the time when he was asked if he would submit to the test that he would refuse until his attorney was present because if "we took his blood, he would lose his license, *but if he refused and we didn't wait for his attorney, he could get by the refusal hearing*" (R. 26). (Emphasis supplied.)

On cross-examination after having testified as to his qualifications, Mr. Lynn Davis, a chemist with the City-County Health Department for the previous nine and one-half years, a medical technologist with the United States Navy during World War II, and holding a bachelor of arts degree in Bacteriology and Chemistry, with ap-

proximately twenty-five years' experience in clinical laboratory work, that he did not have on his person a card or writing of any kind that indicated that he was authorized to draw blood by the State of Utah (R. 30). However, he did indicate he was authorized by the State Division of Health and was on the approved list with the State Department of Health and that the State Department of Health monitored him as to his procedure in running blood alcohol tests (R. 20). He indicated that the authorization was in the form of a letter as to his proficiency rating on the program of the State Division of Health (R. 29). However, Mr. Davis answered Mr. Gibb's attorney that he did not have a card from the State of Utah, that he did have a card from the Director of the City-County Health Department reflecting his employment and authorization status.

The lower court's decision should be reversed for the following reasons:

## ARGUMENT

### POINT I.

THE COURT ERRED IN HOLDING THAT THE QUESTION OF PETITIONER'S REFUSAL TO SUBMIT TO A CHEMICAL TEST WAS MOOT BASED ON THE RULING THAT THE CITY AND COUNTY LAB TECHNICIAN WAS NOT A "DULY AUTHORIZED LABORATORY TECHNICIAN" AS

REQUIRED UNDER UTAH CODE ANN. §  
41-6-44.10(f).

There is no specific case law on this subject as to what constitutes a duly authorized laboratory technician under the law in the State of Utah. However, the question as to what is a "duly authorized" agent or person has been ruled on in other jurisdictions. A case in point being an Indiana case of March, 1942, *Wise v. Curdes, et al.*, 40 N. E. 2d 122, held on a question of what constitutes duly authorized as used in the bankruptcy act that where an attorney had been directed to act for a client and is acting within the scope of the agency it is binding notwithstanding the absence of writing to that effect or a formal power of attorney. A New York case, *People v. Johanerson*, 49 N. Y. S. 2d 190, 199 (1944), on question of a chiropractor and the practice of medicine held that duly authorized by law meant authority under the laws of the State and would require a medical decree since the statute required one to practice. A more recent case in Texas concerning a physician on a dispute as to whether a physician licensed in one county could certify pursuant to the election code for another county, the court held in *Olivarez v. Aquilar*, Tex. Civ. App., 431 S. W. 2d 932 (1968), that a physician whose medical certificate was registered in Zapata County and who resided in the county was a "duly licenced physician" within the meaning of the election code and authorized to execute medical certificates in support of application of voters in Star County for absentee ballot for primary election

involving nomination for office and a constable in Star County.

Two insurance cases likewise sustain the proposition that a duly authorized agent refers not only to the form but includes form and substance. *Rosenthal v. Monarch Life Insurance Company*, a 1935 case from the Supreme Judicial Court of Massachusetts, 195 N. E. 339, involved a suit brought to secure a decree to the effect that a policy of accident and health indemnity insurance issued to the plaintiff was reinstated after a lapse as in full force and effect. The problem was that the insured's check for the overdue payment of premium was received by the agent, deposited to the credit of the insurer, in its bank, and was duly collected and the proceeds held by the insurer for almost two weeks. The court held that the agent accepted the check in payment of the overdue premium and that the duly authorized agent as used in the statute providing for reinstatement referred to the representative of the insurer with power to collect regular premiums and in this case the last previous one paid by the insured and upheld the reinstatement and the effect of the insurance as being in force. A second Massachusetts case in the Supreme Judicial Court of Massachusetts, March 1, 1917, is *Lamontagne v. Standard Life and Accident Insurance Company*, 115 N. E. 244. There the question was whether there was evidence which would warrant a finding that the defendant insurance company was not liable unless plaintiff had complied with their "immediate written notice" requirement that a notice of the claim be given to the company at its home office or "its duly

authorized agent.” There was no notice to the home office. However, the question was whether notice to an agent empowered to issue a policy, received premiums to be forwarded to the home office less the agent’s commission, and who in fact had received from the insurance company a general agent’s commission on general liability insurance business, was such a person as would constitute a duly authorized agent for receiving notice on an accident. The jury found that the sales agent was clothed with sufficient powers that the plaintiff who gave the agent notice was justified in assuming that it would be a sufficient compliance with that condition within the policy. The Court sustained the lower court on appeal that this sales agent was “duly authorized” to accept notice of claim within the meaning of the policy.

A recent California case, *Kuenstler v. Occidental Life Insurance Company*, 292 F. Supp. 532 (1968), in the United States District Court for the Central District of California, again involving an insurance company adds additional illumination to the question of who may be a duly authorized agent.

In this case the dispute was over \$72.00 in medical expenses from a private insurance company who was by contract administering benefit provisions for the federal government. On a dispute of the claim with the insurance carrier and litigation that followed, an issue arose as to whether or not this private insurance company was “duly authorized as an agent of the United States,” it being important as effecting the question of whether or not the

district court could take jurisdiction to decide the merits of a claim against the company. The court, though there was no written authorization other than the general business relationship of contracting insurance benefits, held that the secretary of health, education and welfare was authorized to enter into contracts with private insurance carriers, and in this case did enter in with such a contract with the defendant insurance company, and finally that the defendant insurance company while acting in this capacity, was a duly authorized agent of the United States of America.

From the foregoing, it is apparent that the courts uniformly in disputes involving insurance company claims, benefits and questions of whether the companies are rightly approving claims have interpreted the provision liberally recognizing, (1) the authority of a private insurance carrier as it functions under the Social Security Act, (2) recognizing the rights of a claimant where notice was given to an agent, though not to the home office on a claim, (3) recognizing the authority and the binding nature thereof when a policy holder paid premiums on a health policy after a lapse where the money was in fact received by the agent, deposited and two weeks passed. Based on the foregoing, in the case at hand, it would appear that the court should sustain a liberal interpretation of what constitutes duly authorized and certainly recognize the authority of one acting within the scope of his employment in a municipality, or in a properly licensed hospital, or other recognized testing or treatment facility

which had a "laboratory technician" whom they regarded as not only authorized but qualified.

The question here is whether the statutes as set forth by the legislature of the State of Utah and the grouping of a physician, registered nurse, practical nurse, or duly authorized laboratory technician contemplates any kind of state authorization for the laboratory technician. There is no legislative requirement that laboratory technicians be licensed within the State of Utah, as is the requirement for practical nurses, registered nurses, or physicians. In fact, it is the recognized established practice that laboratory technicians function without State licenses and so recognized by the legislature in hospitals, in clinics, and in this case in the City-County Health Department, having received their training and recognition satisfactory to those in the related professions and with whom they work. The better reading of the statute, under the rules of statutory construction, is to read the section as a whole, which section provides that the police officer can request the laboratory technician, a practical nurse, a registered nurse, or a physician, to draw the blood.

The statute was amended in 1967 to change police officer to peace officer and to include a practice nurse category. Since peace officer is a broad category and includes officers of various municipal, city, county and state police agencies, one must conclude that those who may act as peace officers are those from the various state, city and city-county and municipal categories. Likewise, it is reasonable to conclude that a laboratory technician

capable and properly authorized by the county government and the city government of Salt Lake City, respectively in absence of any state licensing requirement, was one "duly authorized" pursuant to the statute and capable of administering the test. It is analogous to conclude that as peace officers, representing various city and municipal governments act in their own capacity and authority on behalf of the peace-keeping mission and on behalf of their work in the broad police power of the state, so also Mr. Davis in his city-county employee status could act in concert with Trooper Smith pursuant to the statute in this case. It must be the conclusion that Mr. Davis, an experienced laboratory technician for Salt Lake City and Salt Lake County is a "duly authorized laboratory" technician to so act under the statute, though he did not have on his person or present in court a writing, a certificate, or a diploma indicating any specific authorization from the State of Utah, since none is required by the legislature of the State of Utah, as is the case in the other three of the four categories mentioned, vis. practical nurses, registered nurses, and physicians.

It was error on the part of the court to rule that this matter should be granted as to the petition of the respondent solely on the technical question of the presence of a "duly authorized laboratory technician" in the absence of state requirements therefore and not to consider the matter on its merits. The choice of tests was properly with the trooper and had the question been raised by either Mr. Reagan or respondent at the time, concerning their dispute as to the authority of Mr. Davis, it could

have simply been a matter of giving to Mr. Gibb a breathalyzer test at that moment. Trooper Smith was authorized and capable of giving the test. That alternative did not in fact exist because Mr. Reagan advised and Mr. Gibb advised that Mr. Gibb would take no tests until his attorney was present. A close case on point is a California case, *Westmorland v. Chapman*, 74 Cal. Rptr. 363, 268 C. A. 2d 1 (1969), which upheld a refusal, under California law, which is similar to Utah's law, except the descriptive terms vary, reads "duly licensed clinical laboratory technologist or clinical laboratory bioanalyst." A party was challenging the refusal revocation based on the failure of the arresting officer to advise him that a licensed technician is *authorized* (emphasis ours) to take the blood specimen, the court held that the implied consent law does not impose the duty on the arresting officer to advise a driver that the licensed technician is authorized to take the blood specimen.

The lower court committed error further in light of the testimony, which was unrebutted, that it was intended by Mr. Gibb that if the officer did not wait until the attorney was present that somehow they could get by the hearing or the law requiring him to take such a test.

## POINT II.

THE COURT ERRED IN HOLDING THAT  
RIGHT TO COUNSEL MEANT THAT RE-  
SPONDENT HAD THE RIGHT TO HAVE  
HIS ATTORNEY PHYSICALLY PRESENT

IN THE COUNTY JAIL PRIOR TO HIS TAKING THE BLOOD TEST AFTER HE HAD HAD TWO OPPORTUNITIES TO CONVERSE WITH HIS COUNSEL ON THE TELEPHONE ABOUT MATTERS SURROUNDING THE IMPLIED CONSENT LAW AND HIS SUBMITTING OR REFUSING SAID CHEMICAL TEST.

There is serious doubt in many jurisdictions that such a right to counsel exists in the civil aspects of the Implied Consent Law where an arrested party must decide whether or not to submit to a type of sobriety test.

*Mills v. Bridges*, 471 P. 2d 66, 93 Idaho 679; I. S. § 49-352; *Garcia v. Department of Motor Vehicles*, 456 P. 2d 85; *Rust v. Division of Motor Vehicles, et al.*, 1971, 267 C. A. 2d 545, 73 Cal. Rptr. 366; *Stratikos v. Department of Motor Vehicles*, (1968) 477 P. 2d 237; *People v. Brown*, 485 P. 2d 500; *Johnson v. Department of Motor Vehicles*, 485 P. 2d 1258, (Oregon 1971); *Campbell v. Superior Court in and for Maricopa County*, 479 P. 2d 685, 106 Ariz. 542; *Goodman v. Orr*, 1971, 97 Ctl. Rptr. 226, 19 C. A. 3rd 845. Utah has not ruled squarely on this issue.

A recent Colorado case has held that Implied Consent statute is not unconstitutional on grounds that it violates right to travel upon state highway, *or that it constitutes violation of due process by compelling citizen to choose either his right to refuse to surrender evidence that would help to convict him or his right to retain li-*

*cense to drive, or creates a crime of refusing to consent to blood test punishable by forfeiture of right to drive while denying fundamental rights of person charged with criminal offense or that it enforces warrantless and unreasonable searches and seizures, or that it sanctions invasion of privacy or privilege against self-incrimination.* (Emphasis supplied.) Const. Art. 2 §§ 3, 7; U. S. C. A. Const. Amends. 4, 9; 1967 Perm. Supp., C. R. S., Section 13-5-30(3) et seq. *People v. Brown*, 485 P. 2d 500. Brown's appeal to the U. S. Supreme Court was dismissed for want of a substantial Federal question. 92 S. Ct. 671.

The Implied Consent Law of California (prior to amendment), Idaho and Oregon all have provisions similar to the language of Utah Section 41-6-44.10, U. C. A. 1953, as amended, section (a). In several cases before the courts of last impression the decisions are unanimous that the right to counsel before a decision to submit does not exist on the civil aspect.

Even greater clarification of the "right to counsel" and "presence of attorney" is provided by an Oregon case on rehearing on the question of presence of his attorney, it was there held that the driver's refusal to take a breath-analyzer test without having his attorney present was a refusal to take the test under the Implied Consent Law, and justified suspension of his driver's license. (See *Stratikos v. Department of Motor Vehicles*, (1968) 477 P. 2d 237, adhered to and Supplemental 478 P. 2d 654; also *Johnson v. Department of Motor Vehicles, et al.*, 485 P. 2d 1258. See also *Mills v. Bridges*, 471 P. 2d 66, 93

Idaho 679; *Ent v. Department of Motor Vehicles*, 265 A. C. A. 1073, 71 Cal. Rptr. 726; *Finley v. Orr*, 262 A. C. A. 711, 69 Cal. Rptr. 137

In the *Ent* and *Finley* cases the refusals were likewise upheld. The language in another recent California case is supportive (see *Funk v. Department of Motor Vehicles*, 1 Cal. App. 3rd 499, 18 Cal. Rptr.).

A case on point is the *Johnson* case, *supra*, decided June 17, 1971, where the attorney advised taking a breathalyzer *when he got there*. (Emphasis ours.): The attorney did not come. The Court said that *any erroneous impression* (emphasis supplied) upon which petitioner relied in failing to take the test (he thought he could remain silent), was created by his counsel, not the police, and the Court reversed the trial court, holding it was a refusal. *Johnson v. Department of Motor Vehicles of the State of Oregon, Appellant*, 485 P. 2d 1285.

In the case at hand, the respondent not only after requesting to do so, contacted his attorney but did so on two occasions and the attorney had an opportunity to discuss the matter with the respondent. The "right to counsel" as relates to the Implied Consent Law does not mean the right to the physical presence of the respondent's attorney for monitoring or being present during the Implied Consent chemical test.

Nor does the *Hunter* case, *Hunter v. Dorius*, 23 Utah 2d 122, 458 P. 2d 877, stand for the proposition that the respondent or any one in like circumstances is granted

the right to the personal presence of his attorney. The *Hunter* case indicates that the respondent, when given an opportunity to contact an attorney, by the peace officer, such as Trooper Smith,, has a reasonable time in which to contact the attorney and thereafter has a reasonable time in which to make a decision as to whether he will or will not submit to a chemical test. Clearly, the *Stratikos v. Department of Motor Vehicles* case and the *Johnson v. Motor Vehicles* case, *supra*, both stand for the proposition that the driver's refusal to take a test without having his attorney present was in fact a refusal and further that if there was a misunderstanding in the mind of the driver, the respondent herein, this was created by the attorney and not by the police officer. Certainly this is the case in the matter at bar. Though Mr. Gibb refused to take the test, the officer made it very clear to Mr. Gibb that he did not have a right to have his attorney present, nor was it needful for him to be present, that he could make his decision after conversing with him on the phone, and that if he chose to wait, this was not reasonable in the mind of Trooper Smith, and if he thought he could continue to postpone the decision until the attorney came, and if the officer were not present, thereby use that as a basis for getting around the law, that was incorrect.

If correct, such procedure, of course, would be available to anyone who is attempting to circumvent the requirements of the right they have to drive on the highways of the State of Utah.

## POINT III.

RESPONDENT'S ACTION CONSTITUTED A REFUSAL UNDER UTAH CODE ANN. § 41-6-44.10 AND OFFICER SMITH WAS JUSTIFIED IN CONCLUDING THAT THE REFUSAL TO SUBMIT TO THE CHEMICAL TESTS WAS COMPLETED.

The Utah cases relating directly to revocation of a driver's license for failure to submit to a test under the statute are only these: *Bean v. State*, 12 Ut. 2d 76, 362 P. 2d 750 (1961); *Ringwood v. State*, 8 Ut. 2d 287, 333 P. 2d 943 (1959); *Hunter v. Dorius*, 23 Ut. 2d 122, 458 P. 2d 877. The first two of these cases invalidate the revocation because the officer failed to give the accused his choice of which test of those offered under the statute he would take. The 1967 Amendment added a second sentence to paragraph a, leaving that decision within reasonable grounds with the peace officer. See 41-6-44.10 (a).

"Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath or blood for the purpose of determining the alcoholic content of his blood, provided that such test is administered at the direction of a peace officer having reasonable grounds to believe such person to have been driving in an intoxicated condition. *The arresting officer shall determine within reason which of the aforesaid tests shall be administered.*" (Emphasis supplied.)

The *Hunter* case is distinguishable because although Dr.

Hunter was clearly given his choice, he was given a chance to contact an attorney which opportunity he took, and the court said he should have a reasonable time to do so. Here Mr. Gibb asked for an attorney, he had time to call one, did talk to his counsel twice, and in the opinion of the Trooper had adequate time to decide to take the test.

Courts have considered that an implied refusal is sufficient. *Calciano v. Hults*, 13 App. Div. 2d 534, 213 N. Y. S. 2d 500 (1961); *Clancy v. Kelly*, 7 App. Div. 2d 820, 180 N. Y. S. 2d 923 (1958). The instant case is not rested on solely the implication.

#### POINT IV.

A FAILURE OF ASSENT TO THE REQUEST  
OF THE ARRESTING OFFICER TO TAKE  
A CHEMICAL TEST IS A REFUSAL UN-  
DER UTAH CODE ANN. § 41-6-44.10 (1953),  
AS AMENDED.

A Nebraska case, *Johnson v. Dennis*, 187 Neb. 95, 187 N. W. 2d 605, was a case of an action to contest the revocation of a license under the Nebraska Implied Consent law which is similar to Utah's, except the refusal is a criminal offense there, rather than a civil offense as is the case under Utah law. The Supreme Court held that a failure to reply to a direct inquiry as to which test should be administered, as provided in the Implied Consent Act, was equivalent to a refusal to take any of the tests. In that case, the driver contended that silence was

not a refusal and that the driver had not withdrawn his implied consent to a blood test. The Nebraska Supreme Court held otherwise and also cited as additional authorities: *Blattner v. Tofany*, 312 N. Y. S. 2d 173, 34 A. D. 2d 1066; *State v. Pandoli*, 109 N. J. Super. 1, 262 A. 2d 41; *Campbell v. Superior Court*, 106 Ariz. 542, 479 P. 2d 685; *DiSalvo v. Williamson*, (R. I.), 259 A. 2d 671; *Clancy v. Kelly*, 180 N. Y. S. 2d 923, 7 A. D. 2d 820.

Prerequisites under Utah law are essential to the validity of the revocation of a license. They are:

a. The requirement of an appropriate invitation to take the test including (a) the prerequisite arrest, (b) sufficient probable cause to consider the invitee to be intoxicated, and (c) an appropriate opportunity to advise which of the tests is to be applied.

b. The refusal, either expressed or implied, must be communicated to, or reasonably presumed by the inviting officer.

The Court's attention is again drawn to the case of *Hunter v. Dorius*, 23 Utah 2d 122, 458 P. 2d 877, from which case appellant feels this case is distinguishable.

In the case before us, the arresting officer had reasonable cause to believe the petitioner was intoxicated; he gave him the appropriate warning, both *Miranda* and the Implied Consent. Conditionally assenting to take the test after being advised of his rights constitutes a refusal as the test cannot be administered by force. The statute

specifically states that on refusing "the test shall not be given."

In the *Hunter* case, *supra*, it was a matter of the attorney for Dr. Hunter asking on the telephone that he be given a blood test after a previous refusal by Dr. Hunter, and the officer refusing to administer it because it was too late in his opinion; but both the officer and Dr. Hunter were still present at the police station when the request for the blood test was made by counsel.

In the case at bar, the Trooper had left by the time the attorney came. The respondent had talked to his attorney (R. 37), the attorney had talked to the officer (R. 37, 38), the officer had informed both respondent (R. 27, 38, 42) and respondent's attorney that he was the only car on duty at that time and that respondent should make a decision to take the test then, and there was no need for the attorney to come to the county jail (R. 41). Respondent's answer after being fully advised of his rights was that he would not submit to a test unless his attorney was present, according to Trooper Smith (R. 39). However, at one point, to Mr. Davis, he admitted affirmatively that he would refuse until his attorney was present (R. 36). This testimony was never rebutted or changed. Respondent's attorney told Trooper Smith the same thing (R. 42).

The respondent was stopped at 4:01 a.m. Smith advised him of his rights at 4:09 a.m. Trooper Smith noted the refusal at 5:20 a.m. at the jail. Both Trooper Smith and Trooper Tenney left the jail at 5:30 a.m.,

after presenting the respondent for booking, having previously filled out the refusal form in part (R. 43) it being the Trooper's opinion that a reasonable time had elapsed from arrest and consultation with counsel for Mr. Gibb to decide whether to submit to the chemical test (R. 43, 44).

Attorney Reagan stated for the record he was at the jail at 5:25 a.m. He also raised the question as to what constituted "right to counsel" and a phone call in his opinion, was not such right as pointed out to the Trooper. The Trooper reiterated that Mr. Reagan's presence was not necessary as far as the refusal was concerned (R. 48).

In a recent California case, a more extreme case on silence, *Lampman v. Department of Motor Vehicles*, 28 Cal. App. 3d 927, 105 Cal. Rep. 101 (January 17, 1973), the Court held at page 104 that, in face of the driver's assertion that the officer should have attempted to administer one of the tests, to find out whether silence meant a refusal in fact it was held the implied consent law is designed to be an alternative in the routine cases of suspected drunken driving to the use of compulsion to obtain a chemical test, i.e., volition is substituted for force, and therefore in essence, the officer is not required to attempt to administer one of the tests.

The above case also sets forth as the principal issue on appeal as to whether Miss Lampman's silence in the face of repeated requests to submit to a chemical test constituted a failure to submit to a test under their code. The court held her silence infers (a refusal), the same

meaning as the driver in the *Cahall* case. The court refers to this California case, *Cahall v. Department of Motor Vehicles*, 16 Cal. App. 3d, in explaining their holding: "There the driver, in response to a request for a choice of test said 'I'm not even going to give you an answer.'" The court held in *Cahall* that the statement amounted to a failure to submit to a chemical test.

This same *Lampman* case holds as a collateral matter on the question that she was confused by the officer's advice, that the true test in determining whether the driver's failure to submit as a result of confusion "is not the driver's state of mind, but the fair meaning to be given her response to the request that she submit to a chemical test." *Supra*, 105 Cal. Rep. 103.

In the case at hand, the mere fact that Mr. Gibb said he was not refusing, would not negate the fact that his choice to do nothing until his attorney came was a refusal. The very purpose of the Implied Consent Law is to provide a volitional solution, not one of compulsion on the taking of the chemical test, to which Mr. Gibb and every other driver has given his consent. The statute permits the suspected party to withdraw his consent. In this case, Mr. Gibb's failure to assent to the test does just that, and constitutes a refusal; further, the presence of Mr. Lynn Davis to administer the test as one authorized by the health officials of Salt Lake County, was a person "duly authorized" as contemplated by Utah Code Ann. § 41-6-44.10 (1953), as amended, and is not a reasonable excuse to relieve Mr. Gibb from compliance with

the request for a chemical test and the results flowing therefrom.

#### POINT V.

THE TRIAL JUDGE ERRED IN NOT RE-  
QUIRING THE REVOCATION OF THE RE-  
SPONDENT'S DRIVER'S LICENSE TO RE-  
MAIN IN FORCE UNDER THE PRESENT  
FACTS.

The record reveals that, though the respondent alleges he did not refuse the test or tests, Trooper Smith's testimony and Mr. Davis' testimony (R. 26, 38, 39, 41) was to the effect that by not taking the test until his attorney came he may get around the law.

The statute, Section 41-6-44.10, Utah Code Ann. (1953) does not require the officer to invite the respondent to take the test more than once. In this case the officer invited him to take the test on two occasions and in each case the respondent refused, until his attorney was present. The Trooper felt that adequate opportunity for counsel and adequate time for a decision had elapsed.

At that point, under the statute, it was the officer's obligation that "the test shall not be given and the arresting officer shall advise the person of his rights under this section." Utah Code Ann. § 41-6-44.10 (1953), as amended. This the officer did.

We submit that the Judge in the trial court erred

in not requiring the revocation to remain valid under the circumstances.

## CONCLUSION

Fundamental to the issues of this case are the two questions basic to the ruling of Judge Wilkins. One, that there was no right to adequate consultation with counsel. Two, that the question of a "duly authorized laboratory technician" was ambiguous and not well defined and that a city and county authorized laboratory technician was not one authorized by the state to act pursuant to Section 41-6-44.10(f). Taking the second point first, the appellant respectfully submits that inasmuch as the Utah State Legislature has not spoken to the point that a state authorization, licensing, or certification for laboratory technicians within the state is required, that no state requirement exists and therefore, at the time the statute was changed in 1967, to include registered nurses, practical nurses and "duly authorized laboratory technicians" that custom and usage at the time of the enactment of that legislation would require that any proper laboratory technician qualified by the hospital, laboratory, city or county government in which they were employed or served, was a "duly authorized laboratory technician" and that the one at court, Mr. Davis, was such an individual, meeting the statutory requirement.

If the Court holds with the appellant on that point, then the first point comes into play, inasmuch as the trial court said that they had decided the matter on the

merits. On this point, appellant respectfully submits that the facts demonstrate that respondent had adequate time to contact his attorney, did in fact so contact him did converse with him on two occasions from the jail, and thereafter had an adequate time in which to decide whether he would or would not take the chemical test pursuant to the request of the peace officer. The respondent's failure to assent to a test in what was concluded to be a reasonable time by the peace officer, without the physical presence of his attorney, was properly concluded to be and reported by the Trooper as a refusal.

Respectfully submitted,

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