2001

Jerald Wixom Greaves v. State of Utah : Reply Brief

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

JERALD WIXOM GREAVES,
Plaintiff-Respondent,

vs.

STATE OF UTAH,
Defendant-Appellant.

Case No. 13631

REPLY BRIEF

APPEAL FROM THE MEMORANDUM DECISION IN THE FIRST JUDICIAL DISTRICT COURT, IN AND FOR CACHE COUNTY, STATE OF UTAH, THE HONORABLE VENOY CHRISTOFFERSON, JUDGE, PRESIDING.

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RESTATEMENT OF FACTS

Appellant adopts his prior statement of the facts with the following additions.

Pursuant to Utah R. Civ. P. 75, both parties timely filed their respective briefs with the Utah Supreme Court. However, Points III and IV of respondent's brief contained new material which was not considered by the trial court and/or was stricken from the trial court record. In point III, respondent alleged that he may suffer a possible denial of the right to travel, equal protection, and due process of law. In Point IV, respondent contended that he may lose his driving privileges if Utah Code Ann. § 41-2-18(a)(3) (Supp. 1973), were invoked against him.

The lower court's memorandum decision of February 26, 1974, held that Utah Code Ann. § 41-6-44.2 (Supp. 1973), was unconstitutional for vagueness (R. 21-22). The final order approved by the trial court on March 19, 1974, also indicated that the statute in question was unconstitutional for vagueness (R. 30). A prior order drafted by respondent for the Judge's signature contended that Utah Code Ann. § 41-6-44.2, supra, was unconstitutional because it could deprive the respondent of due process and his right to travel (R. 26). This order was subsequently stricken from the trial court record by the Judge (R. 29). The lower court determined that the constitutional arguments expressed in the order prepared by respondent were inconsistent with those expressed by the Court in its memorandum decision (R. 28). Thereafter, respondent attempted to strike the court's final order and reinstate his prior order (R. 32-33).

The Honorable Venoy Christofferson reaffirmed the court's position by denying the respondent's motion to strike order simultaneously rejecting respondent's arguments concerning right to travel, equal protection and due process of law.

Respondent and appellant agree, as evidenced by statements which appear in their respective briefs, that "[n]o ruling was issued regarding the constitutionality of Utah Code Ann. § 41-2-18, *supra*." The aforementioned statute is concerned with driver's license revocation which is not under consideration in this case. The only statute reviewed for constitutionality in this case is Utah Code

Ann. § 41-6-44.2, *supra*, which does not address the subject of driver's license revocation.

Points III and IV of respondent's brief contained new material which was stricken from the trial court record, but argued by the respondent in his brief. It is therefore necessary for the appellant to file a reply brief and answer the new matter set forth in respondent's brief.

ARGUMENT

POINT I.

THE SUPREME COURT CANNOT LOOK BEYOND THE TRIAL COURT'S MEMORANDUM DECISION AND FINAL ORDER ON APPEAL AND CONSIDER ARGUMENTS STATED IN RESPONDENT'S BRIEF, BUT STRICKEN FROM THE TRIAL COURT'S FINAL ORDER.

In Points III and IV of respondent's brief, he has argued issues which were specifically stricken from the trial court record for their nonconformance with the trial court's memorandum decision (R. 29). It is appellant's contention that the Supreme Court of the State of Utah should not consider such issues argued in respondent's brief which are absent from the official record. See *Cooper* v. *Foresters Underwriters*, 123 Utah 215, 257 P. 2d 540 (1953).

The procedural facts of the instant case indicate that the Honorable Venoy Christofferson handed down a

memorandum decision concerning the merits of this declaratory judgment action in response to appellant's motion to dismiss (R. 21, 22) on February 26, 1974. Respondent prepared an order (R. 26) for Judge Christofferson's signature which was supposed to be in conformance with the judge's memorandum decision. On March 19, 1974, Judge Christofferson realized that the order drafted by respondent's counsel was not in conformance with his memorandum decision of February 26, 1974, and ordered it stricken (R. 29). The court then approved and signed a substitute final order (R. 30) which accurately expressed the basis of the court's decision. Thereafter, respondent filed a motion to strike (R. 35) the substitute final order issued by the court on March 21, 1974. Respondent's motion was denied on March 28, 1974 (R. 35) by Judge Christofferson and the substitute final order (R. 30) was simultaneously reaffirmed.

The Utah case law of *Wasatch Oil Refining Co.* v. *Wade*, 92 Utah 50, 63 P. 2d 1070 (1936), and *Miller* v. *Marks*, 46 Utah 257, 148 P. 412 (1951), holds that the Utah State Supreme Court will look to the court's final order rather some qualified, limited, or stricken preliminary opinion of the court in the Supreme Court's effort to ascertain what the court based its decision upon. The Supreme Court of the State of Utah in *Bradley* v. *Lewis*, 78 Utah 307, 3 P. 2d 253 (1939), held as follows:

> "It is well established law that the appellate court is bound by the record as certified and may

> consider only the record as certified and transmitted to it." *Id.* at 339.

See also *Murphy Wholesale Grocery Co.* v. *Skaggs* 67 Utah 487, 248 Pac. 127 (1926); and *Reliable Furniture Company* v. *Fidelity and Guaranty Ins. Under., Inc.*, 14 Utah 2d 169, 380 P. 2d 135 (1963). In the more recent *Corbet* v. *Corbet*, 24 Utah 2d 378, 472 P. 2d 430 (1970), this Court similarly held as follows:

> "On appeal to this court we review the judgments and orders appealed from on the basis of the record upon which the trial court acted." *Id.* at 433.

The issues that respondent raises in Points III and IV of his brief were clearly stricken (R. 29) from the record by the lower court and are therefore not appropriate subjects for review by the Utah State Supreme Court as indicated by the prior case law.

Chief Justice Joseph E. Frick expressed the court's policy not to review issues that have been stricken or omitted from the trial court in the case of *VanCott* v. *Wall*, 53 Utah 282, 178 P. 42 (1919), as follows:

> "The duty that we owe to ourselves, as well as to other litigants, however, requires us to state that almost the entire argument contained in appellant's brief refers to matters wholly outside of the record on this appeal, and hence may not be considered by us for any purpose. The layman is very apt to assume that as long as he deals with facts as he sees them it is immaterial in

> what manner they are brought to the court's attention. As he views it, courts are created to administer justice according to the facts, and if the facts are laid before them they should consider them, regardless of how or when presented. We need not, nor shall be pause to, offer either argument or explanation why such a view cannot be entertained, much less enforced, by courts. Then again appellant overlooks the fact that this court, in cases like the one at bar, exercises appellate jurisdiction only, and its power of review is strictly limited to the record presented on appeal. Although we had the inclination yet we were powerless to enter upon a consideration of any matter or fact which was not contained in the record as originally presented on this appeal." *Id.* at 48.

The case law clearly indicates that the Utah State Supreme Court should act solely on the basis of the trial court record. Therefore, the issues previously stricken from the trial court record do not appear to be appropriate subjects for respondent's brief and should not be considered by this Court on this appeal.

POINT II.

RESPONDENT HAS FAILED TO DEMONSTRATE A POSSIBLE DENIAL OF THE RIGHT TO TRAVEL, EQUAL PROTECTION, OR DUE PROCESS OF LAW.

In the event that this Court deems that Points III and IV of respondent's brief are appropriate issues to be

considered on this appeal, it is the appellant's contention that respondent has failed to demonstrate a possible denial of the right to travel, equal protection, or due process of law.

Respondent asserts that Utah Code Ann. § 41-6-44.2 (Supp. 1973), is vague when it is enforced through Utah Code Ann. § 41-21-18(a)(3) (Supp. 1973), because "it works to deny the person charged the right to operate a motor vehicle without regard as to his ability to operate the vehicle." Respondent additionally asserts that the statute is vague in not specifying the basis upon which the denial of one's driver's license is made.

Respondent's argument is without merit. By respondent's own admission, he states that no ruling was issued by the lower court regarding the constitutionality of Utah Code Ann. § 41-2-18(a)(3) (Supp. 1973). See page two of respondent's brief and page one of appellant's brief. The aforementioned statute was not relied upon by the trial court when it made its determination of vagueness. The respondent erroneously concludes that the lower court pivoted its decision on something other than what was stated by the court. The only statute considered by the lower court and presently under consideration by this court, is that of Utah Code Ann. § 41-6-44.2, *supra*. The aforementioned statute contains no provisions which would deny a person the privilege of operating a motor vehicle. Utah Code Ann. § 41-6-44.2, *supra*, embodies provisions which would allow the judiciary to imprison and/or fine the offender after he had been convicted in a

court of law. However, there is no language within the above statute that would allow a court to revoke an individual's driver's license for violation of its provisions.

It is clear that Utah Code Ann. § 41-6-44.2, *supra*, is not void for vagueness. Appellant has adequately reviwed this issue in Point IV of his brief. Further support of appellant's position is found in *Synnott* v. *State*, 515 P. 2d 1154 (Okl. Cr. 1973). The defendant Synott contended that the statutory elements, including the prohibited blood alcohol concentration, which were articulated in the state driving under the influence statute, were not sufficiently related to the conduct of the defendant and were so vague and uncertain that he was unable to prepare a defense against them. The court, without extensive discussion, held that defendant's argument was frivolous:

> "This assertion is likewise without merit. We find no unconstitutional vagueness or ambiguity in that statute." *Id.* at 1157.

The Utah State Legislature did not need to specify the actual basis for enacting the measure or punishing the offender. *Brim* v. *Jones*, 11 Utah 200, 39 Pac. 825, *aff'd*, 165 U. S. 180 (1895), holds that "it is in the discretion of the legislature to regulate the use of the highways." The United States Supreme Court later defined the presumptions to be afforded to proper legislative subjects in *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734, *reh.*

den., 303 U. S. 667, 58 S. Ct. 510, 82 L. Ed. 1124 (1938), as follows:

> "When the action of the legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and priority are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision . . . Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved precluded that possibility." *Id.* at 517.

The Legislature was not required to articulate its basis for enacting the measure or punishing an offender. However, the appellant went to great length on pages thirty through thirty-two of his brief to specify the Utah State Legislature's basis for this statutory measure. It is readily apparent that the statute in question was designed to promote public safety by protecting members of the traveling public from those who, while under the influence of intoxicating liquor, attempt to operate an automobile on the highways of this State. This interest is sufficiently strong to justify regulation of the conduct under the police power of the State. See *Synnot* v. *State*, 515 P. 2d 1154 (Okl. Cr. 1973).

The respondent then raises the *Bell* case which should be properly named and cited as *Bell* v. *Burson*, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). Although *Bell*, *supra*, unlike the case at hand, is a driver's license

revocation case, appellant fully concurs with the holding and reasoning of the court:

> "(Drivers) Licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment . . . The hearing required by the Due Process Clause must be 'meaningful,' and 'appropriate to the nature of the case.'" 91 S. Ct. at 1589 and 1591.

Utah Code Ann. § 41-6-44.2, *supra*, indicates that no state action will be directed against an individual who violates the statute until the offender is *convicted* of a violation of the above section. Therefore, before respondent is subject to imprisonment and/or a fine under this section he must be *convicted* by a court of law wherein meaningful and appropriate due process of law will be administered by a court of law. Appellant is unable to follow respondent's reasoning and conclusion when he alleges that a *conviction* in a court of law as required by Utah Code Ann. § 41-6-44.2, *supra*, will not provide respondent with full and complete due process of law.

Respondent then cites *Vlandis* v. *Kline*, 412 U. S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63, No. 72-493 (1973), which deals with the constitutionality of a Connecticut statute under which nonresidents of the state are permanently and irrebuttably classified as nonresidents for the purpose of determining their tuition and fees at state institutions of higher education. Respondent concludes that permanent and irrebuttable conclusions are not favored under the due process clause.

The appellant recognizes *Vlandis, supra,* as articulating a general rule. However, it should be noted that residency cases for determining tuition are easily distinguishable from driving under the influence of alcohol cases. The later is criminal in nature and is a strict liability offense (unless this court concludes that Utah Code Ann. § 76-2-101 (Supp. 1973), is applicable). The public interest to reduce the carnage and slaughter from alcohol related accidents on our public highways and in turn, increase highway safety is much greater than is the public interest as it relates to nonresident tuition problems. Finally, Utah Code Ann. § 41-6-44.2, *supa,* is not a presumption situation like *Vlandis, supra.* The legislators did not utilize the term "presumption" or any similar phrase when drafting the enactment in question. The above statute simply makes blood alcohol concentration an element of the offense. See *State* v. *Rucker,* 297 A. 2d 400 (Del. Super. 1972), and *State* v. *Abbott,* 514 P. 2d 355 (Or. App. 1973).

There is available case law concerning similar statutes which uphold the validity of a strict liability offense in a driving under the influence of alcohol situation. In *Coxe* v. *State,* 281 A. 2d 606 (Del. Supr. 1971), the Delaware Supreme Court affirmed the appropriateness of the .10% blood alcohol standard as well as the strict liability designation. The court held that under the Delaware statute, which is very similar to the Utah enactment of Utah Code Ann. § 41-6-44.2, *supra*:

> ". . . that only two elements need be found

> for guilt: (1) operation of the vehicles, with (2) the prohibited blood alcohol concentration . . . Its (the statute's) effect is to forbid any person to operate a motor vehicle if his blood contains .1 of one percent alcohol. It represents a legislative determination that such quantity of alcohol has sufficient adverse effect upon any person to make his driving a definite hazard to himself and others. We cannot say that this determination is unfounded or contrary to the facts; a number of studies and many statistics have recently been published by experts in this field which support this conclusion." *Id.* at 607.

In *State* v. *Rucker*, 297 A. 2d 400 (Del. Super, 1972), the Delaware Superior Court reversed a lower court dismissal of a driving under the influence charge and held that a 0.104% reading of blood alcohol by weight was sufficient for a conviction. The court reaffirmed the constitutionality and validity of the statute and held as follows:

> "The statute does not set up a presumption. It simply makes a blood alcohol concentration of 0.100%, or more, as shown by specified types of tests, an element of the offense. If one has that concentration while driving, as determined by the test specified in the statute and if that test was administered within 4 hours after the alleged offense, (the statute) directs that such person 'shall be guilty.'" *Id.* at 402.

Finally, in *State* v. *Abbott*, 514 P. 2d 355 (Or. App. 1973), the Court of Appeals of Oregon reversed a lower court dismissal of a prosecution for driving with .15% or

more of blood alcohol. Oregon, like Utah, has a strict liability driving under the influence statute. However, the Oregon law requires a .15 percent blood alcohol content to satisfy the elements of the crime.

> "While common sense indicates that it is unlikely that a person with a .15 percent or more blood alcohol is unintoxicated, yet, it is entirely possible that he may physically conduct himself in such a manner that he may appear to be free of all or most of the usual indicia of intoxication. Thus, there would be reason under such evidence to find him not guilty of a DUIL charge. Under the state's police power, it is not unreasonable that the legislature should nevertheless make it illegal for all people to drive who have such a concentration of alcohol in their blood. We see no conclusive presumption of intoxication in such a prohibition because the question is not whether they are intoxicated, but whether they have .15 per cent or more of alcohol in their blood." *Id.* at 357.

It should further be noted that the passage of a strict liability driving under the influence offense which is based on blood alcohol content levels, represents a trend among state legislatures. *The Constitutionality of California's Under-the-Influence-of-Alcohol Presumption*, 45 So. Calif. L. Rev. 955 (1972), was published a mere two years ago. At the time the above article went to press, the author knew of only one state that had a strict liability driving under the influence of alcohol statute.

> "Nebraska alone makes a 0.10 blood alcohol

> percentage itself an element of the crime instead of raising an under-the-influence presumption on proof of that percentage." *Id.* at 959.

In a period of less than two years the number of strict liability driving under the influence states has increased from one to eight. They are as follows:

(1) Del. Cod. Ann. tit. 21 § 2176(a) (Cum. Supp. 1970).

(2) Minn. Stat. Ann. § 169.121 (Cum. Supp. 1973).

(3) Neb. Rev. Stat. §§ 39-727, 39-727.03 (Cum. Supp. 1971).

(4) McKinney's Consol. Laws of N. Y. Veh. & Traf. § 1192 (McKinney 1973).

(5) Ore. Rev. Stat. § 483.999 (Supp. 1973).

(6) S. D. Code § 32-23-1 (Supp. 1973).

(7) Utah Code Ann. § 41-6-44.2 (Supp. 1973).

(8) Vt. Stats. Ann. tit. 23 § 1201 (Cum. Supp. 1973).

Respondent further contends that his right to due process is violated because a driver is unable to determine his blood alcohol content prior to the instant when he is apprehended by a law enforcement official and a scientific test is administered. The argument appears to be novel with the respondent. He cites no case or statutory law to bolster the veracity of his argument.

This assertion is likewise without merit. There is

no unconstitutional vagueness or ambiguity in the statute in question. Points IV and V of appellant's brief specifically address and refute respondent's argument. In addition, the Utah Alcohol Safety Action Program, distributed through state liquor stores, 50,000 Blood Alcohol Calculators and 120,000 Blood Alcohol Wallet Cards during 1973 and 1974. See Appendix No. 1. The Calculators and Cards indicate an individual's blood alcohol content in light of a person's weight, the number of drinks, the type of beverage, and the time period in which the alcohol was consumed. It is clearly evident that there are satisfactory means available to put drinkers on notice as to when their alcoholic consumption exceeds the statutory limits for safe and lawful driving.

Respondent further argues "that alcohol effects (sic) different people in different ways under different circumstances." Appellant partially agrees with respondent's initial premise. Point V (pages 29 and 30) of appellant's brief indicates the preeminent medicolegal authorities agree that in the range of .04% and .05% blood alcohol concentration levels, the driving ability of *some* but not *all* individuals will be definitely impaired The above authorities also agree "as blood alcohol concentration increases, a progressively higher proportion of such individuals are so affected, until at a blood alcohol concentration of .10% *all* individuals are definitely impaired." Point V (pages 29 and 30) appellant's brief. The evidence compiled by the State Department of Public Safety and considered by the Utah State Legislature also indi-

cates a blood alcohol content of .05% will affect the judgment and decision time of *most but not all* drivers. However, "when the blood alcohol content reaches the .10 percent level, *all* physical and mental functions of *all* drivers are adversely affected." Point V (page 31) appellant's brief.

In *People* v. *Lachman,* 23 Cal. App. 3d 1094, 100 Cal. Rptr. 710 (1972), the defendant was convicted of the felony of drunk driving on the basis of the accused's blood alcohol concentration level which exceeeded the 0.1% standard. The court held that the statutory blood alcohol concentration level was:

> ". . . not based on speculation but is founded on the long-recognized and scientifically established relationship between blood alcohol level and degree of concentration. At bench the chemist, an experienced researcher in the significance of alcohol readings, testified that 'an individual with a blood alcohol percentage falling with (in) this range (from .10 to .15 per cent blood alcohol) will be probably under the influence of alcohol, for it is within this range, if not in the previous .05 to .10 range, that all persons will come under the influence of alcohol . . .'
>
> "There exists sufficient rational connection in experience between the preliminary fact proved and the ultimate fact presumed to satisfy the requirement of due process of law." *Id.* at 712.

Respondent admits (R. 1) that "the results of a blood alcohol test showing plaintiff's (respondent's) blood

alcohol taken shortly after his driving was .012 (percent) thus in violation of the recently enacted code." The very high blood alcohol concentration level possessed by the respondent at the time of his arrest makes the aforementioned argument untenable. It is evident that the respondent exceeded the strict liability level of Utah Code Ann. § 41-6-44.2, *supra*, by .02 percent blood alcohol content. The argument espoused by the respondent may have been somewhat more applicable had his blood alcohol level been much lower and within the aforementioned disputed levels.

Respondent without citing any statutory or case law authority asserts that he will be denied equal protection of the laws because Utah Code Ann. § 41-6-44.2, *supra*, establishes an arbitrary class which denies the respondent a basic right of travel.

It is a well established rule that appellate courts will not consider assertions contained in a party's brief which are not supported by argument or citations of authority. An appellate court is not required to search the books for authority to support points raised by the respondent. See *Williams* v. *State*, 88 Nev. 164, 494 P. 2d 960 (1972); *Kennedy* v. *State*, 470 P. 2d 372 (Wyo. Supr.), *reh. den.*, 474 P. 2d 127 (Wyo. Supr.), *cert. den.*, 401 U. S. 939, 91 S. Ct. 933, 28 L. Ed. 218 (1970); *State* v. *Anstine*, 91 Idaho 169, 418 P. 2d 210 (1966); *State* v. *Lopez*, 46 N. M. 463, 131 P. 2d 273 (1942). The Supreme Court of the State of Utah has recognized an exception to this rule in *State* v. *Davenport*, 30 Utah 2d 298, 517 P. 2d 544 (1973).

However, the exception is limited to jurisdictional questions. Respondent's argument is not jurisdictional in nature and must therefore satisfy the general rule.

Appellant is further unable to comprehend how Utah Code Ann. § 41-6-44.2, *supra*, will deny respondent of his right to travel or equal protection of the laws. As one reviews Utah Code Ann. § 41-6-44.2, *supra*, it is obvious that it is void of provisions which would allow the state to revoke respondent's driver's license. The statute in question merely provides for a prison sentence and/or fine for one convicted in a court of law for its violation.

The concept of equal progtection of the laws was reviewed in *Railway Express Agency* v. *People of State of New York*, 336 U. S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949). The court held that the question of equal protection was to be answered by practical consideration based on experience, such as whether the classification has a sufficient relation to the purpose for which it was enacted. A further case law requirement of equal protection was articulated in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947). The court held that so long as the law applies to all alike, the requirements of equal protection are met. See also *Schilb* v. *Kuebel*, 404 U. S. 357, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971).

A comparison of the case at hand with the previously mentioned legal standard indicates that Utah Code Ann. § 41-6-44.2, *supra*, does not violate the equal protection

clause. Point V of appellant's brief demonstrates that the statutory blood alcohol concentration classification has a close relation to the purpose for which it was enacted. It is readily apparent that the statute in question was designed to promote public safety by protecting members of the traveling public from those who while under the influence of intoxicating liquor attempt to operate an automobile on the highways of this State. The prohibited standard for blood alcohol concentration was statutorily set at 0.10 percent. The above standard was based on the experience of leading scientific, medical, and legal authorities in the area of alcohol and traffic safety. See *People* v. *Jackman*, 23 Cal. App. 3d 1094, 100 Cal. Rptr. 710 (1972). The Utah State Legislature adopted the 0.10 percent standard as a police power measure which was enacted to apply to all parties who utilize the State highways.

Courts that have considered contentions that statutes similar to Utah Code Ann. § 41-6-44.2, *supra*, are violations of the equal protection clause, have found them wanting. In *People* v. *Berner*, 28 Cal. App. 392, 82 P. 2d 617 (1938), the defendant contended that a statute which prohibited an individual from driving while under the influence of an intoxicating drug was unconstitutional for the reason that it deprived the defendant of equal protection of the law. The court held that defendant's contention was simply without merit. See also *People* v. *Kimbley*, 189 Cal. App. 2d 300, 11 Cal. Rptr. 519 (1961).

State v. *Sanchez*, 110 Ariz. 214, 516 P. 2d 1226 (1973),

similarly held that punishing an indivdual for a driving under the influence of alcohol conviction is not a violation of equal protection:

> "It is obvious from this statute that a class of persons is created which is subject to severe prosecution, a felony, if they should drive while intoxicated. We do not, however, believe that the class is arbitrarily or unreasonably defined, and we believe the State has a valid and continuing interest in attempting to bar from the public highways those people in a rationally defined class whose driving habits have merited the attention from the State that the defendant and others similarly classified require . . . by applying (the Equal Protection) clause, this court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Id.* at 1229 and 1230.

Respondent contends that his constitutional right to travel will be abridged by Utah Code Ann. § 41-6-44.2, *supra.* The issue therefore appears to be whether the above statutory prohibition allows the state to punish an offender who violates the driving under the influence statute and whether such prohibition is within the police power of the state.

In *Crandall* v. *Nevada*, 73 U. S. (6 Wall.) 35 (1867), the right of a citizen to travel was characterized variously as protected by the commerce clause, the privileges and immunities clause of the fourteenth amendment, and the implied constitutional guarantee to go to the seat of government. However, the right to travel, like other rights, is not absolute. In *California* v. *Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 (1941), the United States Supreme Court held that states are not wholly precluded from exercising their police power in matters of local concern even though they may affect interstate commerce. The above holding was further defined to specifically include highway and safety regulation in *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1948):

> "It (prior case law) recognized, as we do, broad power in the state to protect, inhabitants against perils to health, *safety*, fraudulent traders, and *highway hazards*, even by use of measures which bear adversely upon interstate commerce." (Emphasis added.) 69 S. Ct. at 662.

It should also be noted that the argument may not be a bona fide "right to travel" issue as respondent is free to travel anywhere within the United States. Unless respondent's license is revoked under other sections of the Utah Code, he is free to travel and operate a motor vehicle. In any event, respondent may travel extensively and as often as he wishes by airplane, train, boat, bus, etc., without government interference.

POINT III.

ALTHOUGH THE QUESTION OF THE REVOCATION OF RESPONDENT'S DRIVER'S LICENSE IS NOT BEFORE THIS COURT AT THIS TIME, IT IS EVIDENT THAT THE UTAH STATUTORY REVOCATION PROVISIONS SATISFY CONSTITUTIONAL STANDARDS.

The lower court limited its ruling of "void for vagueness" to the single statute of Utah Code Ann. § 41-6-44.2, *supra*, which it declared to be unconstitutional. The lower court specifically rejected respondent's motions and orders to include Utah Code Ann. § 41-2-18, *supra*, in this declaratory judgment proceeding. However, in the event that the Utah State Supreme Court considers the issues surrounding Utah Code Ann. § 41-2-18(a)(3) (Supp. 1973), and finds them to be appropriate for review, it is the contention of appellant that the aforementioned statute is constitutional on its face and as applied to the respondent. The text of Utah Code Ann. § 41-2-18(a)(3), *supra*, is as follows:

> "Except as hereinafter provided, the department shall forthwith revoke the license of any person upon receiving a record of the conviction of such person of any of the following crimes: . . . (3) Driving or being in actual physical control of a vehicle with a blood alcohol content of .10% or higher."

Appellant contends that the revocation of his driver's

license will deny him of his constitutional right to travel. The case law indicates that there is no merit to respondent's contention. In *Agee* v. *Kansas Highway Com'n Motor Vehicle Dept.*, 198 Kan. 1973, 422 P. 2d 949 (1967), the court held as follows:

> "It is established law that the right to operate a motor vehicle upon public streets and highways is not a natural right, but a privilege, subject to reasonable regulation in the public interest. Being a privilege, the right of operation is subject to suspension when the public interest and welfare reasonably requires." *Id.* at 955.

A similar conclusion was reached by the Supreme Court of North Dakota in *State* v. *Harm*, 200 N. W. 2d 387 (N. D. 1972), as follows:

> "Permission to operate a motor vehicle upon the public highways is not a civil right nor is the license to do so a contract or property right in a constitutional sense, but, rather, it is a mere license or privilege. Although the privilege might be a valuable one, nevertheless the license to drive may be revoked pursuant to the procedure and for violations of the conditions prescribed by the statute under which it is issued." *Id.* at 391.

The United States Supreme Court similarly accepted the aforementioned principle in *Bell* v. *Burson, supra.* See also *Aiken* v. *Malloy*, ... Vt. ....., 315 A. 2d 488 (1974).

Respondent also cites hardship as a reason to support the alleged unconstitutionality of Utah Code Ann. § 41-

2-18, *supra.* The case law is emphatic in rejecting this argument as indicated by the holding of *Lewis* v. *Oklahoma Department of Pub. Safety,* 506 P. 2d 1387 (Okl. Supr. 1972).

> ". . . whether or not the Commissioner's revocation of appellee's driver's license worked a hardship on him was immaterial because hardship constitutes no ground for challenging such an order." *Id.* at 1389.

See also *Agee* v. *Kansas Highway Com'n Motor Vehicle Dept.,* 198 Kan. 1973, 422 P. 2d 949 (1967). The principle was more recently reiterated in *Commonwealth* v. *Futch,* 223 Pa. Super. 752, 300 A. 2d 92 (1973), as follows:

> "Although there may be severe consequences inherent therein economic hardship or considerable inconvenience befalling a motor vehicle operator whose license has been suspended, is irrelevant in an examination of the propriety of the suspension." *Id.* at 94.

If at the conclusion of the numerous statutory and judicial procedures it is necessary to revoke respondent's driver's license, it should be understood that such revocation is not a punishment. While respondent may realize that his ability to drive a motor vehicle within the State of Utah and neighboring states has been curtailed, the case law indicates that the police power is the important end to be satisfied. In *State* v. *Scheffel,* 82 Wash. 2d 872, 514 P. 2d 1052 (1973), the court held as follows:

> "While recognizing in one context that it might be so interpreted, it has been almost universally held that the suspension or revocation of a driver's license is not penal in nature and is not intended as punishment, but is designed solely for the protection of the public in the use of the highways." *Id.* at 1057.

The neighboring jurisdiction of Idaho accepted the aforementioned rule of law in *State* v. *Parker*, 81 Idaho 51, 336 P. 2d 318 (1959):

> "The deprivation of the driving . . . privilege is for the protection of the public and is not done for the punishment of the individual convicted. Moreover, the revocation is not by the court in which the conviction occurs, but is by the commissioner of law enforcement, in pursuance of regulations and conditions imposed upon the exercise of the driving . . . privilege, under the police power of the state." *Id.* at 320.

It is well established law that a motor vehicle operator's license is an important and valued privilege which may not be arbitrarily suspended or revoked. See *Bell* v. *Burson*, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). The Supreme Court of Utah recognized the above principle in *McAnerney* v. *State*, 9 Utah 2d 191, 341 P. 2d 212 (1959). The Colorado Court of Appeals in *Cove* v. *Colorado Department of Revenue*, 30 Colo. App. 185, 501 P. 2d 479, 482 (1972), indicated that "an operator's license, once issued, is not to be revoked arbitrarily but only in the manner provided by law."

Utah statutory law as codified in Utah Code Ann. § 41-2-18, *supra*, provides for a departmental driver's license revocation "of any person upon receiving a record of the conviction of such person . . . [d]riving or being in actual physical control of a vehicle with a blood alcohol content of .10% or higher." The interpretation of the above language is defined in *Emmertson* v. *State Tax Commission*, 93 Utah 219, 72 P. 2d 467 (1937), wherein the court sanctioned the revocation of a driver's license after one has been convicted and provided complete due process in a court of law.

Several states have statutes similar to that of Utah Code Ann. § 41-2-18, *supra*. One such state is Texas. The Tevxas judiciary upheld the constitutionality of the mandatory revocation statute in *Hurley* v. *Texas Department of Public Safety*, ... Tex. ....., 505 S. W. 2d 700 (1974):

> "The rule appears to be well established that a final in-state conviction for driving while intoxicated results in an automatic driver's license suspension under (the statute) . . ." *Id.* at 701.

The court in *Slater* v. *State*, 296 P. 2d 193 (Okl. Cr. 1956), arrived at the same conclusion:

> "(The statute) provides that a court of record must, after final conviction, require motorists to surrender operator's or chauffer's license and forward them to Commissioner of Public Safety . . .
>
> "From the above it appears that . . . the mandatory duty of the Commissioner of Public Safety

> to revoke the driver's license of a person convicted of driving while drunk, or more properly 'driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.' " *Id.* at 198-199.

Even states with more permissive statutory revocation requirements are deemed to be constitutional. In *Keller* v. *Paris*, 207 N. W. 2d 239 (N. D. 1973), the court held as follows:

> "Applying that rule we conclude that (the statute) permits the commissioner to suspend a person's driver's license *prior* to conviction of an offense for which mandatory revocation of a license is required upon conviction, when the records of the Commissioner or other evidence disclose to his satisfaction that the person accused of such an offense has committed it." *Id.* at 244.

Although Utah Code Ann. § 41-2-18, *supra*, does not require a hearing before revocation, it appears that the suspension of the privilege of operating a motor vehicle requires a hearing to meet constitutional standards. See *Bell* v. *Burson*, *supra*. The Driver's License Division of the Department of Public Safety has fully complied with these hearing requirements. Before the Division revokes a driver's license, it must receive a record of conviction from a court of law. See Utah Code Ann. § 41-2-18(a), *supra*. In the lower court judicial proceedings, a driver who is charged with driving under the influence will be accorded complete due process which will be sufficient

to satisfy all constitutional standards. It is only after the accused has been convicted and provided with his constitutional rights that he is subject to the mandatory revocation requirement of Utah Code Ann. § 41-2-18, *supra*. There is no question but that the judicial proceedings in a trial are sufficient to satisfy all constitutional requirements, including due process of law. After notice of conviction is sent to the Driver's License Division of the Department of Public Safety, the Division is justified in exercising their mandatory statutory duty of revoking one's driver's license with the assurance that the accused has been provided with complete due process of law.

POINT IV.

RESPONDENT MISREPRESENTED THE FACTS AND ISSUES OF THIS CASE BY INDICATING THAT APPELLANT FAILED TO READ RULE THIRTEEN OF THE FIRST JUDICIAL DISTRICT OF UTAH.

Appellant continues to maintain, as previously articulated in Point VI of appellant's brief, that "the lower court judge violated the Utah Rules of Civil Procedure and also abused his discretion when he granted the relief prayed for by the plaintiff without a hearing and without a motion for summary judgment." Appellant further maintains that he read the First District Court's Rule 13 entitled "Order Pertaining to Law and Motion." Respondent, without offering facts in support of his allega-

tion, raises the assumption that appellant failed to read the lower court's rules. Contrary to respondent's statements, appellant was fully apprised of the language and content of the lower court's rules.

Appellant stands by his original statement and argument with regard to the issues in question. The appellant after reading the disputed rules asserts that there is no question but that appellant has standing to argue the harshness and unfairness of the First District Court's Rules. Appellant submits that the aforementioned false statements contained in respondent's brief amount to a breach of professional courtesy. The court in *Hays* v. *Walker*, 90 Ind. 105 (1883), made some appropriate remarks for attorneys who engage in appellate litigation:

> "Counsel who abuse their adversaries instead of arguing their causes do their clients no good and themselves no honor. In the present instance, the language of counsel is such as merits severe censure and keen rebuke." *Id.* at 107.

CONCLUSION

Appellant adopts his prior conclusion with the following additions.

Points III and IV of respondent's brief were stricken from the trial court record and are therefore clearly ininappropriate issues for consideration by the Supreme Court. However, if the Supreme Court considers any or all of the aforementioned issues, it is well established that Utah Code Ann. §§ 41-6-44.2 and 41-2-18, *supra*,

satisfy constitutional standards and do not deny respondent his constitutional rights.

Respectfully submitted,

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Attorney General

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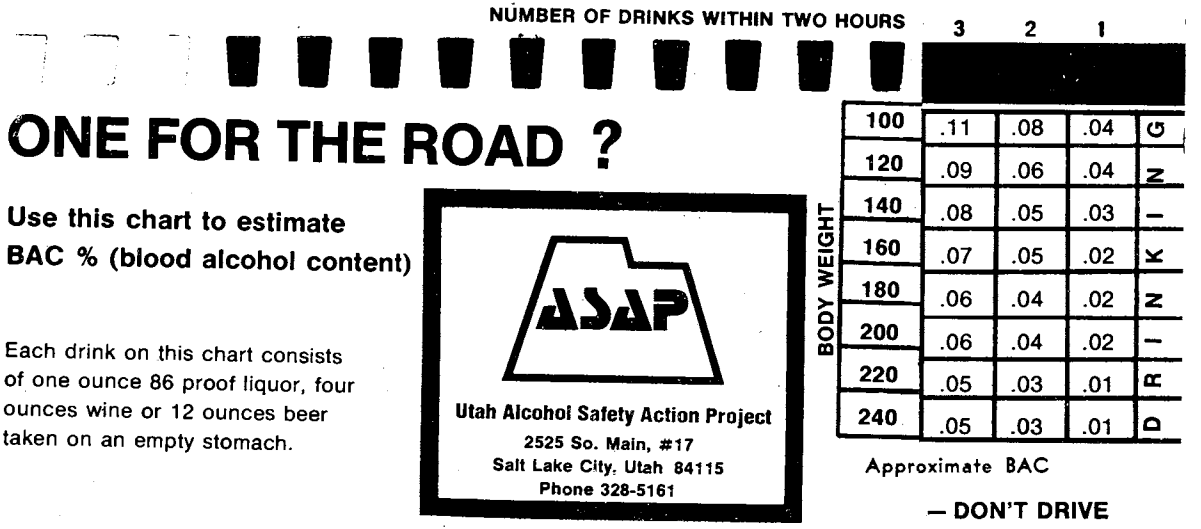
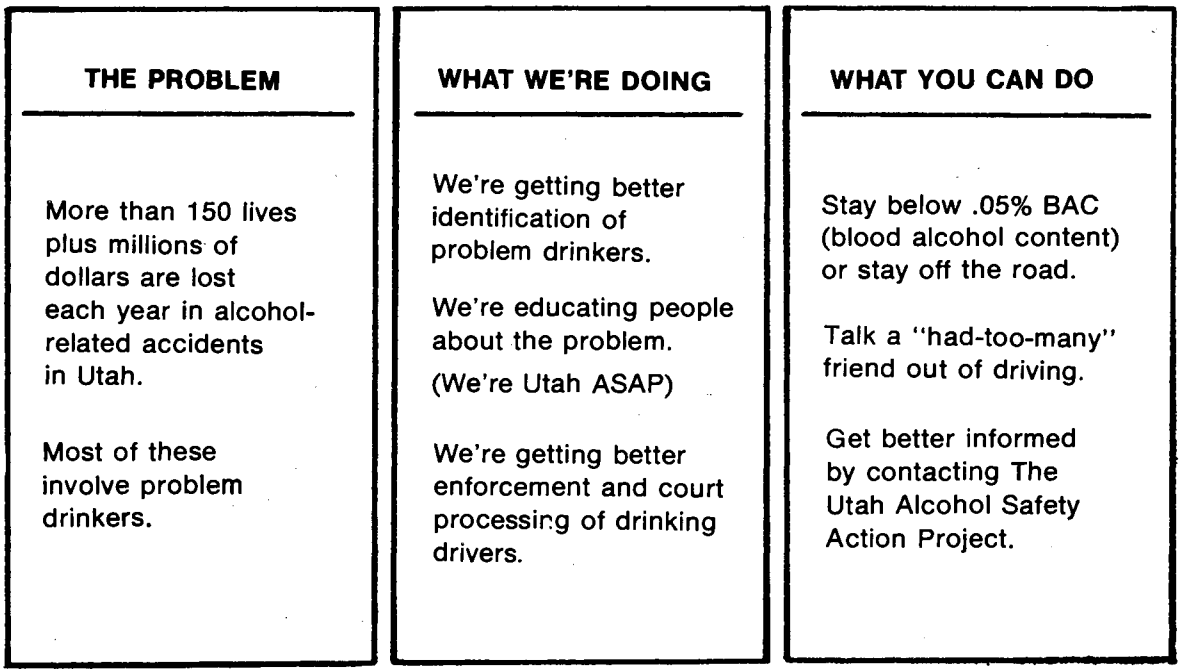
Assistant Attorney General

Attorneys for Appellant

APPENDIX NO. 1



APPENDIX NO. 1—Continued



KNOW YOUR LIMIT

NUMBER OF DRINKS IN ONE HOUR

APPROXIMATE BLOOD ALCOHOL CONTENT (BAC)

DRINKS	BODY WEIGHT IN POUNDS								
	100	120	140	160	180	200	220	240	
1	.04	.03	.03	.02	.02	.02	.02	.02	
2	.08	.06	.05	.05	.04	.04	.03	.03	
3	.11	.09	.08	.07	.06	.06	.05	.05	RISKY
4	.15	.12	.11	.09	.08	.08	.07	.06	
5	.19	.16	.13	.12	.11	.09	.09	.08	
6	.23	.19	.16	.14	.13	.11	.10	.09	
7	.26	.22	.19	.16	.15	.13	.12	.11	
8	.30	.25	.21	.19	.17	.15	.14	.13	ILLEGAL
9	.34	.28	.24	.21	.19	.17	.15	.14	
10	.38	.31	.27	.23	.21	.19	.17	.16	

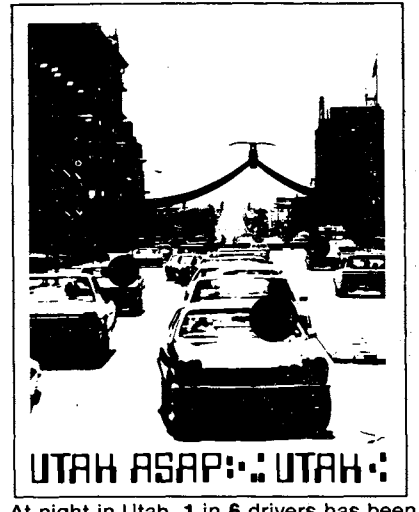
One drink = 1 oz. of 100 proof liquor or one 12 oz. beer.

Subtract .01% for each hour of drinking • In Utah the legal BAC limit is 0.08%

• At **0.08%** your risk of crash is **6** times normal

• At **0.15%** it is **25** times normal.

UTAH ALCOHOL SAFETY ACTION PROJECT
2525 South Main, #17
Salt Lake City, Utah 84115 • Phone 328-5161



- At night in Utah, **1** in **6** drivers has been drinking.
- ½ of all auto deaths are alcohol related.