

2001

John Rolfe Gassman v. Earl N. Dorius : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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OCT 24 1975

SUPREME COURT
OF THE
STATE OF UTAH

JOHN ROLFE GASSMAN,
Plaintiff-Respondent,

vs.

EARL N. DORIUS, Director, Driver
License Division, Department of Pub-
lic Safety,
Defendant-Appellant.

Case No. 13849

RESPONDENT'S BRIEF

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JOHN ROLFE GASSMAN,
Plaintiff-Respondent,

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EARL N. DORIUS, Director, Driver
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Defendant-Appellant.

} Case No. 13849

RESPONDENT'S BRIEF

STATEMENT OF FACTS

On the evening of November 22, 1973, Plaintiff-Respondent, Dr. John Rolfe Gassman, was stopped by Trooper Arlo Wilkinson for an alleged traffic violation involving Dr. Gassman's execution of a right-hand turn. After Dr. Gassman pulled to the side of the road in response to the trooper, he was suspected of driving under the influence of alcohol and was asked to perform certain field sobriety tests. Thereafter, Plaintiff-Respondent was placed under arrest for driving under the influence.

Thereafter, Trooper Wilkinson took out the appropriate forms and read to Dr. Gassman the provisions of Utah's implied consent law as contained in U.C.A. 41-6-44.10 (1953). After completion of his reading of the form, according to Dr. Gassman, Trooper Wilkinson asked Dr. Gassman if he would submit to a blood test. Dr. Gassman indicated that he would. Trooper Wilkinson next asked Plaintiff-Respondent if he desired the presence of a physician to take a blood test. To this question Dr. Gassman responded affirmatively. No mention was made of a breathalyzer test or of any other chemical test other than a blood test.

Attempts were thereafter made to locate Plaintiff-Respondent's personal physician, Dr. LaVere Poulsen. He was unavailable. Dr. Jerry Poulsen was apparently on call at Granger Medical Clinic. Dr. Gassman declined to ask Dr. Jerry Poulsen to be present for personal reasons. After taking Dr. Gassman to the Salt Lake County Jail, another unsuccessful attempt was made to locate Dr. LaVere Poulsen.

After no further discussion of a blood test, Trooper Wilkinson asked Dr. Gassman to submit to a Breathalyzer test, to which request Dr. Gassman refused. At this point, without further discussion or explanation, Trooper Wilkinson left the jail.

Sometime thereafter, Trooper Wilkinson filed a refusal affidavit with Defendant-Appellant, and on the 25th day of January, 1974, Defendant-Appellant, issued an order of revocation as to Dr. Gassman's driving privileges. A temporary restraining order precluding

the enforcement of said revocation order was signed by Judge Stewart M. Hanson of the Salt Lake County District Court on February 25, 1974, and was served upon Defendant-Appellant on February 26, 1974.

Dr. Gassman's petition to review Defendant-Appellant's order of revocation was heard on June 19, 1974, before the Honorable Jay E. Banks. Judge Banks held that the evidence indicated that Plaintiff-Respondent did not refuse to take a chemical test within the meaning of U.C.A. 41-6-44.10 (1953) and that his driving privileges should be fully reinstated. From this ruling, Defendant-Appellant has appealed.

ARGUMENT

POINT I.

AMPLE EVIDENCE WAS BEFORE THE LOWER COURT TO SUPPORT ITS CONCLUSION THAT PLAINTIFF-RESPONDENT DID NOT REFUSE TO TAKE A CHEMICAL TEST WITHIN THE MEANING OF U.C.A. 41-6-44.10 (1953).

Despite a conflict of testimony as to which party first introduced the subject of a blood test, there is no dispute that a blood test was mutually agreed upon by the arresting officer and Dr. Gassman. There is also a slight conflict of the testimony as to whether the presence of a physician was first mentioned by Trooper Wilkinson or by Dr. Gassman; however, there is no dispute that Trooper Wilkinson undertook efforts to locate Gassman's physician, nor is there any evidence that Dr. Gassman refused to take a blood test without the presence of a physician.

There is no evidence to indicate that Dr. Gassman was attempting to stall for time, a factor which was

emphasized in the dissenting opinion of *Hunter v. Dorius*, 23 Utah 2d 122, 458 P. 2d 877 (1969). In fact, Dr. Gassmand did not even take the opportunity to attempt to locate his physician after Trooper Wilkinson's efforts had failed. On the contrary, the evidence seems to indicate that it was the arresting officer who was concerned with time, as his regular shift had ended a couple of hours earlier.

Once he had abandoned his efforts to locate Dr. LaVere Poulsen, the arresting officer apparently decided that a blood test would take too long, requested that Dr. Gassman submit to a breathalyzer test, and merely left without further adieu once Plaintiff-Respondent indicated an unwillingness to take a breathalyzer test. Trooper Wilkkinson did not attempt to ascertain whether Dr. Gassman was refusing all chemical tests, nor did he make any effort to inform Plaintiff-Respondent of the consequences of a refusal.

The evidence shows that Plaintiff-Respondent was led to believe by the arresting officer that he had the right to have a blood test and that he had the right to have a physician present while said test was performed. The last line of the form covering the implied consent law states that an arrested person is permitted to have his own physician administer an additional chemical test. Immediately after reading this line, the efforts to locate Dr. Poulsen were undertaken by Trooper Wilkinson. The cases as cited in Appellant's brief indicate that it is not the arrested person's state of mind that is important. However, that line of reasoning does not follow when the state of mind is induced by the arresting officer as in

the present case. Once Trooper Wilkinson led Dr. Gassman to believe as he did, it was his further duty to clear the matter up prior to accepting the refusal of the breathalyzer.

POINT II

THE ARRESTING OFFICER FAILED TO FULFILL HIS STATUTORY REQUIREMENTS AS SET FORTH IN U.C.A. 41-6-44.10 (1953).

U.C.A. 41.6.10 (c) (1953), reads in part as follows:

If such person has been placed under arrest and has thereafter been requested to submit to any one of the chemical tests provided for in subsections (a) or (b) of this section and refuses to submit to such chemical test, the test shall not be given and the arresting officer *shall advise the person of his rights under this section . . .* (Emphasis added).

Under different circumstances it could be argued that an arresting officer's reading of the implied consent material prior to the arrested person's agreement to or refusal of a chemical test would satisfy his obligation as set forth in the preceding quoted portion of the statute. However, under the circumstances of the present case where assent to a blood test had already been made by Dr. Gassman and agreed to by the arresting officer, said officer had a statutory duty to further explain the statute and its consequences to Dr. Gassman once a refusal of a completely different test was made. The arresting officer failed to follow the clear dictates of the above-quoted statute. His initial reading of the printed form should not be allowed to apply to any and all refusals subsequent thereto regardless of the circumstances.

The evidence clearly indicates that Dr. Gassman had agreed to submit to a blood test. There is no evidence that Dr. Gassman refused to take a blood test without his physician's presence, and there is no evidence that the arresting officer requested that Dr. Gassman submit to a blood test in the absence of a physician.

With this set of facts, a person could very easily become confused as to the consequences of his refusal to submit to the breath test. The arresting officer had a duty to be aware of said confusion and to clarify the matter. Since he failed to so inform Dr. Gassman, the statutory requirement has not been satisfied.

POINT III

THE CIRCUMSTANCES OF THIS CASE MAKE IT A MATTER OF FIRST IMPRESSION IN THIS JURISDICTION.

None of the cases cited by Defendant-Appellant in its brief is applicable to the present situation and should not be relied upon by this Court in reaching its decision. Four of appellant's cited cases deal with the completely different situation in which an arrested person refused to submit to the test at all unless performed by a physician of the arrested person's choice.

Cushman v. Tofany, 36 A.D. 2d 1000, 321 N.Y.S. 2d 831 (1971), was such a case, and there the appellate court held that an arrested person could not impose such a condition upon his consent. In effect, his consent was no consent at all.

Similar decisions were made in *Breslin v. Hults*, 20 A.D. 2d 790, 248 N.Y.S. 2d 70 (1964); *Wegner v. Department of Motor Vehicles*, 76 Cal. Rptr. 920 (1969);

and *Beales v. Department of Motor Vehicles*, 76 Cal. Rptr. 662 (1969).

Sowa v. Hults, 22 A.D. 2d 730, 252 N.Y.S. 2d 294 (1964), was a case in which the arresting officer and the arrested person agreed that a blood test would be given, as in the present situation. However, in that case the defendant refused to take the test without the presence of his physician and further refused to tell the name of his physician. The facts of that case boil down to nothing more than an outright refusal, which is not the case in the present situation at all.

Shields v. Hults, 26 A.D. 2d 971, 274 N.Y.S. 2d 760 (1966), is closer to the present case, but it, too, is not controlling. In that case the arrested person demanded the presence of a physician, but said demand was refused by the arresting officer. The arresting officer attempted to explain the provisions of the statute, which is apparently similar to Utah's, as allowing the arrested person to have a physician of his choice administer another test, but that it did not give the person an unqualified right to have the physician present while the custodial test was administered. In the present case, the arresting officer could have done as the officer in the *Shields* case; however, he did not, and once the decision was made to allow Dr. Gassman's physician to be present he had a statutory duty to follow through with this approach or to inform Dr. Gassman of the consequences of his refusal to take the breath test. His willingness to accommodate Plaintiff-Respondent only served to confuse him. This confusion should have been clarified prior to Trooper Wilkinson's leaving.

Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (1969), and *Fallis v. Department of Motor Vehicles*, 70 Cal. Rptr. 595 (1968), are cases in which the arrested party attempted to place conditions upon his consent, which, as previously statated, is the same as no consent at all.

Maxsted v. Department of Motor Vehicles, 92 Cal. Rptr. 579 (1971), and *Lampman v. Department of Motor Vehicles*, 105 Cal. Rptr. 101 (1972), were both cases in which the arrested person alleged to have refused to take a chemical test due to confusion resulting from the reading of the so-called "Miranda Warning" prior to the reading of the implied consent law. These cases are not on point because here the arrested person agreed to submit to a chemical test and did not request the presence of an attorney or request a conference with his attorney prior to deciding.

In *Sidler v. Strelecki*, 98 N.J. Super. 330, 237 A. 2d 903 (1968), in which the arrested person flatly refused to submit to a chemical test claiming a lack of understanding of the consequences of a refusal, the court held that the circumstances did not support his lack of understanding. The circumstances of the present case are very different. Here, the arrested person gave his consent to a particular test, and was led to believe that he had the right to the presence of a physician. When that presence was proved to not be possible and when the arresting officer decided upon another type of test, the officer should have ascertained the arrested person's understanding of the results of a refusal to this subsequent test. The *Sidler* case is easily distinguishable.

Janson v. Fulton, 162 N.W. 2d 438 (Iowa 1968), and *Commonwealth Dept. of Public Safety v. Cheek*, 451 S.W. 2d 394 (Ky. 1970), are not applicable. In the *Cheek* case, the arrested person said "no" when requested to submit to a test but claimed to have meant "yes." In *Janson, supra*, the court held that the fact that the arrested person had been acquitted of the criminal charge should have no bearing upon the refusal aspects of the incident. Neither case has any resemblance to the case at hand.

Likewise, the case of *Westmoreland v. Chapman*, 74 Cal. Rptr. 363 (1968), which is cited in Appellant's brief, has no application to the present case. In that case, the arrested person refused to permit a blood test to be taken because the administering technician was not an M.D. There is no evidence that Dr. Gassman refused the blood test, even though it was to be administered by a technician rather than a medical person.

Even the Utah cases dealing with refusal cases are not very close to the present situation. *McCall v. Dorius*, 527 P.2d 647 (Utah, 1974), was a case in which the arrested person did everything possible to stall and to show his lack of understanding of both the Miranda Warning and of the implied consent law. This court held that the evidence did not uphold the arrested persons' contentions as to certain actions by the custodial authorities and that his driving privileges were properly revoked for one year. It should be noted that the arresting officer in that case did everything possible to make the arrested person understand the nature of the action and the consequences of a refusal. In the present case, no such efforts

were made by Trooper Wilkinson. He merely left after Dr. Gassman said "no" to the breathalyzer. In *McCall, supra*, the arresting officer read the implied consent law, and the arrested person refused any tests. At that point, the officer read it again and explained the consequences of a refusal. In that case, the officer fulfilled his statutory obligations as set forth in U.C.A. 41-6-44.10 (1953). In the present case, the arresting officer did not.

Defendant-Appellant's efforts to convert the reasoning of *Hunter v. Dorius*, 23 Utah 2d 122, 458 P.2d 877 (1969), to the case at hand seems strained at best. In that case, this court held that the arrested person did not refuse to submit to a sobriety test when he said that he would take a test after consulting with his attorney. This was true even though the officer had already completed his refusal affidavit. It should be noted that even the arresting officer in that case made sure that the arrested person understood the consequences of a refusal prior to accepting the same. After arriving at the station at approximately 9:15 P.M., the arrested person was asked to submit to a test in accordance with the provisions of the statute. But prior to accepting his refusal, the officer took the time to once again explain the consequences of a refusal at approximately 9:48 P.M. The officer in the *Hunter, supra*, case was attempting to fulfill his statutory requirements.

Thus, it can be seen that none of the cases cited by Appellant are controlling of the present case. If anything, they point out the need for an arresting officer to attempt to obtain an informed refusal and to attempt to clear up any confusion upon the part of the arrested

person. This is even more applicable under the terms of the applicable statute in the State of Utah, which states that the arresting officer must advise a person of his rights *after* the person refuses. In the present case, the confusion was brought about and fostered by the actions of the arresting officer; therefore, he had an added duty to clear up the confusion that he had created.

CONCLUSION

This is a case of first impression in the State of Utah. Prior Utah decisions and decisions from other jurisdictions give some guidelines for the decision at hand, but none is right on point. The controlling statute, U.C.A. 41-6-44.10 (1953), created a duty for arresting authorities to follow for cases such as the one at hand. In the present situation, the arresting officer failed to fulfill the clear dictates of this statute. His actions, after the reading of the printed form, led Dr. Gassman to believe that he had a right to a blood test, and that he had the right to have his physician present while said blood test was given. Without explanation, the arresting officer altered the agreed-to plan of a blood test, and requested that Dr. Gassman submit to a breath test, which the arresting officer was to perform. When Dr. Gassman decided not to submit to a breath test, the arresting officer had a statutory duty to once again go over the relevant portions of the implied consent statute and to advise Dr. Gassman of his rights. His failure to do so was a substantive failure to follow the statute, and the State should not now be allowed to enforce the remaining provisions of the statute against Plaintiff-Respondent.

Plaintiff-Respondent respectfully concludes that the decision of the lower court was well reasoned and should be upheld.

Respectfully submitted,

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