

2001

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Don Blackham; Attorney for Plaintiff-Respondent.

Vernon B Romney; Attorney General; Bernard M Tanner; Assistant Attorney General; Attorneys for Appellant .

Recommended Citation

Brief of Appellant, *Gassman v. Dorius*, No. 13849.00 (Utah Supreme Court, 2001).
https://digitalcommons.law.byu.edu/byu_sc2/1020

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT

UTAH SUPREME COURT

RECEIVED
LAW LIBRARY

BRIEF

KEY NO.

13849A

DEC 17 1975

UTAH
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

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

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT, IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE JAY E. BANKS, JUDGE, PRESIDING.

VERNON B. ROMNEY
Attorney General
BERNARD M. TANNER
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Appellant

DON BLACKHAM
3545 South 3200 West
Salt Lake City, Utah 84119
Attorney for Respondent

FILED

MAY 2 - 1975

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION BELOW	1
RELIEF SOUGHT IN THIS PROCEEDING	2
STATEMENT OF FACTS	3
ARGUMENT	6
POINT I. THE FINDINGS MADE BY THE TRIAL COURT AND ORDER ARE NOT JUSTIFIED BY THE EVIDENCE	6
POINT II. AS A MATTER OF LAW THE SOBRI- ETY TEST UNDER UTAH CODE ANN. § 41-6-44.10 (1953), AS AMENDED, WAS MADE AVAILABLE TO RESPONDENT FOR A REASONABLE LENGTH OF TIME AND THE OFFICER CAN RESPOND WITH A REFUSAL AFFIDAVIT WHERE WITHIN THAT LENGTH OF TIME HE REASON- ABLY CONCLUDES THAT THE RESPON- DENT HAS CHANGED HIS MIND FROM A WILLINGNESS TO SUBMIT TO A TEST TO AN UNWILLINGNESS TO DO SO	12
CONCLUSION	18

CASES CITED

Beales v. Dept. of Motor Vehicles, 76 Cal. Rptr. 662 (Cal. App. 1969)	9
Breslin v. Hults, 248 N. Y. S. 2d 70 (A. D. 1964)	9
Commonwealth v. Cheek, 451 S. W. 2d 394 (Ky. 1970)	7
Cushman v. Tofany, 321 N. Y. S. 2d 831 (A. D. 1971)	9

TABLE OF CONTENTS—Continued

	Page
Deaner v. Commonwealth, 210 Va. 285, 170 S. E. 2d 199 (1969)	8
Fallis v. Dept. of Motor Vehicles, 70 Cal. Rptr. 595 (Cal. App. 1968)	9
Hunter v. Dorius, 23 Utah 2d 122, 458 P. 2d 877 (1969)	13
Janson v. Fulton, 162 N. W. 2d 438 (Iowa 1968)	9
Lampman v. Department of Motor Vehicles, 28 Cal. App. 3d 922, 105 Cal. Rptr. 101 (1973)	18
Maxsted v. Department of Motor Vehicles, 14 Cal. App. 3d 982, 92 Cal. Rptr. 579 (1971)	7, 17
McCall v. Dorius, Utah 2d, 527 P. 2d 647 (1974)	18
Shields v. Hults, 26 A. D. 2d 971, 274 N. Y. S. 2d 760 (1966)	9
Sidler v. Strelecki, 98 N. J. Super. 530, 237 A. 2d 903 (1968)	8
Sowa v. Hults, 22 A. D. 2d 730, 253 N. Y. S. 2d 294 (1964)	9
Wegner v. Dept. of Motor Vehicles, 76 Cal. Rptr. 920 (Cal. App. 1969)	9
Westmoreland v. Chapman, 74 Cal. Rptr. 363 (Cal. App. 1968)	9

STATUTES CITED

Utah Code Ann. § 41-6-44.10 (1953), as amended
10, 11, 12, 13, 15, 16

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JOHN ROLFE GASSMAN,
Plaintiff-Respondent,

vs.

EARL N. DORIUS, Director, Driver
License Division, Department of Public
Safety,

Defendant-Appellant.

Case No.
13849

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This appeal concerns the legality of a driver's license revocation by the appellant under Utah's Implied Consent Law, Utah Code Ann. § 41-6-44.10 (1953), as amended.

DISPOSITION BELOW

On January 25, 1974, the appellant revoked the respondent's license to drive for the latter's alleged failure to submit to a sobriety test under Utah Code Ann. § 41-

6-44.10 (1953), as amended, said revocation to be for one year commencing January 3, 1974. Pursuant to the provisions of said act, respondent through his attorney, sought a trial de novo in the District Court in and for Salt Lake County, filed on the 25th day of February, 1974, and obtained from Third District Judge Stewart M. Hanson, a stay on the revocation pending the hearing de novo, on the question of whether respondent's license was subject to revocation. The case was heard before the Honorable Jay E. Banks on June 19, 1974. Judge Banks found that respondent did not unreasonably refuse to submit to a sobriety test but did in fact request a blood alcohol test. Consequently, Judge Banks ruled that the petition of the respondent to set aside the revocation under administrative hearing be granted, and that the respondent be ordered reinstated to his driving privileges as if the same had never been revoked, and that any and all references to said revocation from respondent's driving record be deleted by appellant. This order of Third District Judge Jay E. Banks was entered and filed of record on September 5, 1974.

RELIEF SOUGHT IN THIS PROCEEDING

Appellant seeks a reversal of the lower court's order of September 5, 1974, ordering the restoration of respondent's license and seeks an order in harmony with appellant's prior order of revocation. Respondent would have this court affirm the lower court's decision.

STATEMENT OF FACTS

On November 22, 1973, at approximately 10200 South State Street at approximately 12:45 o'clock a.m., Utah Highway Patrol Trooper Arlo Wilkinson, stopped and arrested respondent, John Rolfe Gassman (R. 23, 24). Prior to the arrest, the Trooper had respondent perform some field agility tests, one of which he did fairly well and the others which the Trooper did not feel were satisfactory (R. 24, 25). Subsequent to the arrest, the Trooper advised respondent of his constitutional rights (all of V from Exhibit S-1), and also of his rights under the Implied Consent law by reading to him all of VI from Exhibit S-1 which contained the information from Utah Code Ann. § 41-6-44.10 (1953), as amended (R. 25, 26). The Trooper testified that he thereafter asked, "Mr. Gassman, what is your response to my request that you submit to a chemical test?" and his response was in these words: "Yes, I will take a blood test. Also I want my physician to be there." Thereafter, the trooper called the dispatcher while yet in the patrol vehicle and finding the name of respondent's physician to be LaVere Poulsen at the Granger Clinic discovered that he was not on call but that Dr. Poulsen's brother, Jerry Poulsen, was (R. 27). On discovering this fact, Mr. Gassman refused the use of Dr. Jerry Poulsen, saying "No way do I want him to take my blood" (R. 27, 37). Prior to this time the Trooper had made it clear to the respondent that his physician could take a test *in addition* (emphasis ours) to the one that the trooper requested him

to take (R. 36, lines 9 and 10). Respondent and the trooper proceeded to jail. At the jail the trooper advised the respondent that he would try to call Dr. Poulsen's answering service to see what response could be obtained, and discovered from a Mrs. Beverly Simpson that "he (meaning Dr. LaVere Poulsen) is not available. I don't even know where he is at. I cannot locate him." The trooper hung up from calling the Granger Clinic and advised Mr. Gassman that they could not locate his doctor (R. 29). Upon being advised again that Dr. Poulsen's brother Jerry was available, Mr. Gassman, the respondent, said "No way do I want Jerry." The respondent did not further attempt to get hold of Dr. LaVere Poulsen saying that if the officer could not reach him certainly the respondent could not (R. 30).

Thereafter, the trooper said to respondent, "Let's forget a blood test for a moment. Here is the breathalyzer in the other room. Will you come in and take the breath test?" To this the respondent said, "No I will not. No, no." Subsequent to that, the trooper said, "Okay," and thereafter shortly left the jail (R. 30, 37, 38). The respondent verified that he had been asked to take a breathalyzer (R. 45), and further that he understood that Trooper Wilkinson would be administering it (R. 45). Respondent further verified that the trooper was at the jail sometime, probably a half hour (R. 45, lines 12 and 13). The respondent expressed on direct testimony from his attorney, Mr. Blackham, that he thought Trooper Wilinkson was not an impartial witness

to administer the breath test (R. 45, 46). The respondent acknowledged, however, under cross-examination that he knew a number of doctors in the community (R. 46). The respondent further acknowledged that there was not any particular reason when Dr. LaVere Poulsen was unavailable that he did not designate some other doctor, and did admit that he did not suggest any other physician when he refused to let Dr. Jerry Poulsen, the brother, be contacted (R. 46, 47).

The respondent further acknowledged that he was read the entire Implied Consent Law and that he had never previously taken a breathalyzer test. Trooper Wilkinson took approximately 15 minutes or more attempting to contact Dr. LaVere Poulsen and estimated that he left the jail at approximately 2:15 o'clock a.m. as he arrived at home at 3:00 o'clock a.m. (R. 30). The testimony was un rebutted that Trooper Wilkinson told the respondent at the jail that he could lose his license for a year if he did not take either the breath or the blood test (R. 31, 32, 38). The normal time for Trooper Wilkinson to be off shift that particular day was 1:00 o'clock a.m. (R. 32).

At no time did the respondent request to call an attorney. A phone was made available and was available during the entire time they were in the jail (R. 31). At no time subsequent to leaving the jail did Trooper Wilkinson receive a call to return (R. 32).

The court found that the last advice given by the trooper from his form (S-2) before asking him whether he would submit was as follows: "You will be permitted to have a physician of your own choice administer a chemical test in addition to the one I have requested you to submit to." To that the court said, "I can see how somebody could see that that's a right and you have the right to wait for that, unless it's further explained, and as such if he is not given that right, I can see how he could rationalize" (R. 48).

Thereafter, the court found that it was not a refusal on the part of the respondent.

ARGUMENT

POINT I.

THE FINDINGS MADE BY THE TRIAL COURT AND ORDER ARE NOT JUSTIFIED BY THE EVIDENCE.

According to the record, Trooper Wilkinson arrested the respondent on probable cause for driving under the influence of alcohol. The record further contains invitations from Trooper Wilkinson to take and submit to a chemical test on three occasions. The first, at the scene to which the respondent indicated he would take a blood test. The second and third requests were at the jail when the trooper asked him to take again the blood test and he indicated he wanted his doctor present.

The third request was to take a breathalyzer test after both the trooper and the respondent were aware that his personal physician was not on call and unavailable to come, and that his personal physician's brother, a person in the same clinic was unacceptable to respondent as qualifying as his physician, for reasons personal to the respondent only. The respondent did not further denote any other physician which he would call or which he requested the trooper to call. The respondent did not evidence any confusion as to his rights. The only thing that occurred at trial was the expression of respondent that he did not feel that the trooper was an impartial witness and therefore gave that as his reason why he would not take the breathalyzer test, which was the third offer made by the Trooper. There is no dispute in the facts or evidence that he did refuse to take a breathalyzer test at the jail at approximately 2:15 o'clock a.m. at a time just prior to Trooper Wilkinson leaving the jail.

The Court found that there was not a refusal. The evidence does not support this finding.

The question has been long settled that when the officer requests a chemical test and the driver responds with "no" that that is a refusal. *Commonwealth v. Cheek*, 451 S. W. 2d 394 (Ky. 1970). *Maxted v. Department of Motor Vehicles*, 14 Cal. App. 3d 982, 92 Cal. Rptr. 579 (1971). Should a person in respondent's position say

"I am not taking a test," that has likewise been ruled as a refusal. *Sidler v. Strelecki*, 98 N. J. Super. 530, 237 A. 2d 903 (1968).

The question is here raised, by implication from the findings and order of the court below, that this driver can somehow impose additional conditions or qualifications to his taking the chemical test. In the case before us, however, the evidence is unequivocal that the respondent did agree to take a blood test, provided his own physician was there, but unequivocally refused to take a breath test when it was determined that his own physician was not available and a substitute physician standing it was personally unacceptable to respondent. Therefore, the above evidence does not support the finding of the trial court.

It has been generally held that the person arrested cannot impose conditions on his submission to a chemical test. The Supreme Court of Virginia has said, "In Virginia, the consent to take a blood test is given when the person operates a motor vehicle. It is not a qualified consent and it is not a conditional consent, and therefore there can be no qualified refusal or conditional refusal to take a test." *Deaner v. Commonwealth*, 210 Va. 285, 170 S. E. 2d 199 at 204 (1969).

In many cases a driver in respondent's position here have tried to impose the requirement that the doctor perform the test for the peace officer, or have his own doctor present when the test was performed. These con-

ditions placed by the driver have generally been held to be a refusal. *Westmoreland v. Chapman*, 74 Cal. Rptr. 363 (Cal. App. 1968); *Fallis v. Dept. of Motor Vehicles*, 70 Cal. Rptr. 595 (Cal. App. 1968); *Beales v. Dept. of Motor Vehicles*, 76 Cal. Rptr. 662 (Cal. App. 1969); *Wegner v. Dept. of Motor Vehicles*, 76 Cal. Rptr. 920 (Cal. App. 1969); *Cushman v. Tofany*, 321 N. Y. S. 2d 831 (A. D. 1971); *Breslin v. Hults*, 248 N. Y. S. 2d 70 (A. D. 1964); *Janson v. Fulton*, 162 N. W. 2d 438 (Iowa 1968); *Shields v. Hults*, 26 A. D. 2d 971, 274 N. Y. S. 2d 760 (1966); *Sowa v. Hults*, 22 A. D. 2d 730, 253 N. Y. S. 2d 294 (1964). The law in Utah is the same. When licensed to drive, a driver has given his unqualified consent to a chemical test. Drivers thereafter arrested under circumstances as here set forth have the choice to submit or refuse, drawing the penalty of revocation.

It cannot be denied that the respondent did initially consent to the taking of a sobriety test (R. 26); it is clear that in specifying he would take a blood test if his physician was there was a conditional agreement to submit to a test. There is no dispute further in the evidence that that agreement carried forward in time to the jail and reasonable efforts were made by Trooper Wilkinson in response to said request to obtain his personal physician. Respondent was waiting to see if they could get Dr. LaVere Poulsen and apparently the testimony is uncontroverted that Trooper Wilkinson was willing to wait for Dr. LaVere Poulsen to come in order to have him give a blood test to the respondent in addition to the one that would be given pursuant to the request of the officer.

When the trooper asked if the respondent would care to try to get ahold of him, he responded, "If you can't get him, obviously I can't get ahold of him" (R. 30). After that, Trooper Wilkinson said something to the effect that they would forget about the blood test for the moment and it was thereafter that the request was made for the breathalyzer.

The testimony is un rebutted that the respondent refused the breathalyzer test. The officer's testimony was that the respondent said, "No I will not. No, no." The trooper further testified (R. 31, line 10-13) that the respondent gave no qualification or reason to the officer at that point in time as to why he would not take the breath test, all he said was "no, no."

Therefore, other than respondent's testimony on direct to his counsel that he did not feel that the officer was an impartial witness, there was no evidence that would indicate that he was either confused or that there was any qualification to the refusal to the breath test, which was the third request by the trooper made of the respondent. Therefore, this evidence does not support the findings or the order of the lower court.

The last question as to whether the evidence supports the finding of the trial court is as relates to the advice given to Mr. Gassman in relation to the Exhibit S-2.

Section 41-6-44.10, Utah Code Annotated (1953), as

amended, sets forth at paragraph (g) the following language:

“(g) The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the peace officer.”

This subsection (g) does not give any parameters as to whether said respondent has the right to have the physician present at the time of the initial test or whether it can be done at a time or place different.

It is submitted by appellant that a fair reading of paragraph (g) would indicate that a physician of respondent's choice could administer a test in addition to either the breathalyzer or the blood test inasmuch as the statute states “the one administered at the direction of the peace officer.”

Further, paragraph (e) stipulates that on the request of the one tested, the respondent in the case here, the results of the test shall be made available to the respondent.

Paragraph (a) of Utah Code Ann. § 41-6-44.10 (1953), as amended, in the last sentence, states:

“The arresting officer shall determine within reason which of the aforesaid tests shall be administered.”

In the situation before the trial court, the evidence, again, is un rebutted that the trooper had abandoned the blood

test and requested a breath test. This power to designate within reason, is the prerogative by statute of the peace officer, in this case, Trooper Wilkinson. Both parties to this matter, Trooper Wilkinson and respondent, Mr. Gassman, were aware that his personal physician was unavailable and therefore it was reasonable for the trooper to ask him to take the alternate test, the breathalyzer. Mr. Gassman was clear that he assumed the trooper was going to administer the test (R. 45). The evidence is further un rebutted that an unequivocal "no" was given by the respondent to the taking of such test (R. 30, 37, 38).

The evidence is further un rebutted that respondent was on notice that the availability of his own physician to take an additional test was *in addition* (emphasis ours) *not in lieu of* (emphasis ours) the test as required under the statute (R. 36).

Appellant respectfully submits under the above facts that the evidence adduced at trial do not support the findings and order as set forth by the trial court.

POINT II.

AS A MATTER OF LAW, THE SOBRIETY TEST UNDER UTAH CODE ANN. § 41-6-44.10 (1953), AS AMENDED, WAS MADE AVAILABLE TO RESPONDENT FOR A REASONABLE LENGTH OF TIME AND THE OFFICER CAN RESPOND WITH A REFUSAL AFFIDAVIT WHERE WITHIN

THAT LENGTH OF TIME HE REASONABLY CONCLUDES THAT THE RESPONDENT HAS CHANGED HIS MIND FROM A WILLINGNESS TO SUBMIT TO A TEST TO AN UNWILLINGNESS TO DO SO.

The case at bar is somewhat the opposite of the *Hunter v. Dorius* case, 23 Utah 2d 122, 458 P. 2d 877 (1969). In that case Dr. Hunter during a portion of his time refused to take the test and then subsequently changed his mind under circumstances where this Honorable Court, concluded that it was within a reasonable period of time and that the time period was such that Dr. Hunter could change his mind.

In the case before the Court, it is a circumstance where the respondent agreed to take the test and subsequently thereafter changed his mind and refused to submit to an alternate test, to-wit, the breathalyzer.

Appellant submits that at that point in time the officer was not, within the prerogative of his responsibilities, obligated to force a chemical test upon the respondent. Utah Code Ann. § 41-6-44.10 (1953) as amended, subsection (c) provides in part:

“(c) 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 subsection (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*

shall advise the person of his rights under this section." (Emphasis ours.)

The statute does not indicate that an officer in Trooper Wilkinson's position is required only to offer a single test, nor does the statute state that once a consent to one test is given and the same cannot, for whatever reason occurs, be administered, that a refusal to an alternate test would not thereafter be binding. The statute merely states that if a person refuses, to any *one* of the chemical tests (emphasis ours) the test shall not be given. As in the *Hunter* case, if a person can change his mind after he learns of the consequences of his action, there being nothing in the statute precluding a person from changing his mind and submitting to a test once he has previously refused, the alternative is likewise true that having said he would consent to a test, there is nothing that precludes the respondent from changing his mind and refusing a test as appellant alleges occurred here.

The state and the individual have a valid interest in objectively determining the level of alcohol in a driver's bloodstream. This true for the purposes of better law enforcement and also in order to protect fully the rights of arrested drivers. The state should make these chemical tests available so that they might provide whatever probative value they reveal, equally beneficial to the respondent in a case for exoneration, as also perhaps could be utilized for implication.

The fact that respondent, after agreeing to a test

and the conditions subsequent to that agreement being unfulfilled, (that is, not being able to obtain his personal physician), and thereafter unequivocally refusing the breathalyzer test, it was the officer's duty to not so administer the test and to respect respondent's answer. There is nothing in the statute that requires the officer at that point without some affirmative action by respondent to obtain other physician or meet any conditions not reasonable under the circumstances. The duty, if any, was certainly upon the respondent to fulfill his conditions, imposed by himself, and agreed to by Trooper Wilkinson, to find alternative persons just as the duty would be affirmatively upon the respondent in analogous circumstances to find an alternate attorney if the one he had asked to consult was unavailable, and he and the officer had taken reasonable time and efforts to obtain his personal attorney to consult with, prior to taking the test.

Appellant asserts that this court is aware that most states hold that there is no right to consult an attorney before submitting to a chemical test or having one present for the taking of a chemical test. That position is modified within this jurisdiction by *Hunter v. Dorius*. However, the Court did not state specifically under the *Hunter* case that one in respondent's position, had an absolute right to counsel, but expressed that it was the law of this jurisdiction, under those circumstances, that were a person in respondent's position to request an attorney and that request was asceded to by one in

Trooper Wilkinson's position, that a reasonable effort should be made and that when the officer did agree to permit the contact of an attorney prior to the taking of a test that was a right then existing by the arrested driver. The *Hunter* case further states that thereafter there should be a reasonable time in which to obtain such an attorney and, a reasonable time after such contact within which the arrested driver could make up his mind to take or to not submit to a chemical test.

By analogy, in the *Hunter* case, as it applies to the statute and interprets the same, the same spirit of interpretation would apply in the case at bar.

By analogy, the *Hunter* case, *Hunter v. Dorius*, 23 Utah 2d 122, should not be expanded unreasonably to cover cases where the arrested party either cannot find his physician or the arrest party voluntarily gives up trying to contact a physician; or as in this case, contacts his physician's answering service, finds him *unavailable*, also, his substitute an *unacceptable* (emphasis ours), but suspends a decision *he* (emphasis ours) must necessarily make, within a reasonable time, until he can see his physician, which time may well be so far removed from time of arrest as to invalidate any results then obtainable by chemical test.

Specifically, appellant argues that when as provided by the statute, and the advice given to the respondent herein that he could have a physician of his own choice administer a chemical test in addition to the one the

officer was requesting, and as here, the respondent wanted a blood test, it follows that the peace officer should grant the right for respondent to contact his personal physician and should grant a reasonable time for said personal physician to locate himself at the place where the test the officer has specified would be administered. In the case before us, the respondent had specifically requested a blood test, had asked that his physician administer it, the respondent was advised clearly and the testimony was un rebutted at trial that he could have his personal physician administer the test but that it would be in addition to, not instead of, a test requested by the officer, and one could only assume that he was agreeable to a blood test for Mr. Gassman.

It would further follow then that when it was apparent that his personal physician was not available, his substitute on duty was not agreeable to the respondent, Trooper Wilkinson could only conclude that the taking of a blood test, absent any further request by Mr. Gassman for some other physician, was not within reason at that point in time. Therefore, the request of the Trooper to take the breathalyzer was a reasonable request under the circumstances.

Respondent's unequivocal refusal to take a breathalyzer test without any renewal of his request for a physician or without a renewal of any other qualification or stipulations could only be concluded by reasonable men to be a refusal, by appellant herein denoted as a direct refusal. *See Maxsted, supra.*

Also in that regard, the *Lampman* case, *Lampman v. Department of Motor Vehicles*, 28 Cal. App. 3d 922, 105 Cal. Rptr. 101 (1973), sets forth even stricter interpretations in a California recent decision in addition to the case of a flat no in the *Maxsted* case, and a case of silence in the *Lampman* case. Both held refusals.

Further, the recent decision in *McCall v. Dorius*, Utah 2d, 527 P. 2d 647 (1974), makes it clear that in the case at bar, as it was in the *McCall* case, where there was no confusion, and the respondent, Mr. Gassman, refused to take the test, and he understood the consequences of loss of driver's license as a result thereof, and there was no stated confusion on his part at all except for the comment that he thought the Trooper was not an impartial witness, a loss of license would occur.

CONCLUSION

It is appellant's position that the findings and order of the trial court were not justified by the evidence at trial. It is further appellant's position that the officer acted reasonably in all respects and that the respondent was not confused and that he had the affirmative duty, in not being able to obtain his own physician, to either obtain an alternate physician or in the alternative to agree to take the breathalyzer test or suffer the consequence of loss of license for the failure to take either of the two tests at that point in time, and that the respondent's failure to take the test after an arrest upon

probable cause, and proper advice of rights, without any explanation or further conditions, left the affirmative duty with Trooper Wilkinson, upon a direct refusal, of not administering the test and advising him of his rights. All of the above which was accomplished, therefore the trial court erred in reversing the administrative revocation, and the case should be reversed and remanded for the trial court to be instructed to revoke plaintiff's driver's license as required by law for the period of one year.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

BERNARD M. TANNER
Assistant Attorney General

Attorneys for Appellant