

1986

Willis C. Gabbard v. David A. Beach : Brief of Appellant

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIS C. GABBARD,

Plaintiff/Appellant,

v.

DAVID A. BEACH, Bureau Chief,
Driver License Services,

Defendant/Respondent.

:
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:
:
:
:

860308-CA
Case No. 20750

BRIEF OF APPELLANT

Appeal from the Findings of Fact and Conclusions
of Law and Order entered by the Honorable Leonard
H. Russon on July 1, 1985 in the Third Judicial
District Court

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AUG 23 1985

IN THE SUPREME COURT OF THE STATE OF UTAH

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	:	
Plaintiff/Appellant,	:	
	:	
v.	:	Case No. 20750
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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff/Appellant,

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v.

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Case No. 20750

DAVID A. BEACH, Bureau Chief,
Driver License Services,

:

:

Defendant/Respondent.

:

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an Order issued by the Honorable Leonard H. Russon sustaining an order of driver's license suspension issued by respondent.

DISPOSITION IN THE LOWER COURT

By Order dated July 1, 1985, following review of the file and hearing arguments of counsel, the court below ruled that the Order of Suspension issued by respondent under date of March 18, 1985 was supported by substantial and competent evidence and therefor sustained the said order.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Order of the District Court with instructions on remand to order respondent to reinstate

appellant's driving privileges.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Is an order of suspension of driver's license which pre-dates the driver's license suspension hearing a denial of due process on its face?

2. Where a statute mandates that the standards of the Commissioner of Public Safety be followed in the administration of chemical testing for breath/blood alcohol, is it a foundational requirement to provide evidence that said standards were followed in order to properly admit the results of said test?

3. Is the order of suspension arbitrary and capricious where chemical test results are admitted absent a showing of compliance with the commissioner's standards?

STATEMENT OF FACTS

On February 21, 1985, appellant was arrested for driving under the influence of alcohol (DUI) in violation of Section 41-6-44, Utah Code Ann. The arresting officer served appellant with a notice of intention to suspend his driver's license pursuant to 41-2-19.6. That notice informed the appellant he had ten days to request a hearing before the "department." (Respondent). (Exhibit A).

Appellant timely requested a hearing which was scheduled for March 22, 1985. At the hearing testimony was

taken from Deputies Beam and Dial of the Salt Lake County Sheriff's Office and certain documents were admitted as evidence. (A transcript of the hearing is attached as Exhibit B).

Sometime in early April, 1985, appellant received an Order of Suspension dated March 18, 1985, signed by respondent, notifying him that his driver's license was suspended for 90 days (Exhibit C).

On April 8, 1985 appellant filed a Petition for Hearing in the Third District Court pursuant to 41-2-20, Utah Code Ann., requesting the court to review the decision of respondent and vacate the said order of suspension.

The matter came on for hearing before the Honorable Leonard H. Russon on May 21, 1985. After hearing argument of counsel and reviewing the file, the court issued a Memorandum Decision, same date (Exhibit D). Having failed to rule on appellant's first issue (order pre-dating the hearing), the court issued a supplemental opinion denying appellant's claim.

On July 1, 1985 the Court signed its Findings of Fact and Conclusions of Law and Order from which this appeal lies (Exhibit E).

SUMMARY OF ARGUMENT

Point I of this brief will argue that respondent failed to comply with the statutory requirements of 41-2-19.6 and with

common law and constitutional requirements of due process in issuing its suspension order prior to the hearing on the same matter.

Point II will argue that the respondent's hearing officer admitted chemical breath test results without sufficient foundation and in violation of 41-6-44.3.

ARGUMENT

POINT I: THE COURT ERRED IN SUSTAINING
RESPONDENT'S ORDER OF SUSPENSION WHERE
APPELLANT'S RIGHT TO DUE PROCESS WAS
PRIMA FACIE VIOLATED

Article I, Section 12 of the Constitution of Utah, The Fifth Admendment to the United States Constitution and multitudes of cases interpreting the same leave no doubt that persons involved in the administrative process are entitled to the due process of law prior to any deprivation of life, liberty or property. "Property" and "liberty" have been extended to include "privileges." (Cf 42 U.S.C. 1983 and the abundant case law defining the scope of due process under that act).

Furthermore, where certain rights, obligations or expectations are set forth in statutes, ordinances, rules, policies and the like, persons who's conduct is regulated thereby can achieve a property right status or an expectation akin to contract in reliance thereon. The U.S. Supreme Court

has gone so far as to hold that where a state grants written procedural rights to convicts which aren't even constitutionally required, that state is bound by it's own written rules and must afford those rights it has created. (Wolff v. McDonnell, 418 U.S. 539 (1974)).

In 41-2-19.6 the State of Utah legislated that when police officers make DUI arrests they seize the arrestees driver's license, serve him notice of the State's intent to suspend his license after 31 days unless he requests a hearing to oppose the said suspension and if said hearing is requested, he is afforded a right to said hearing. All these things were done in the instant case.

The salient issue deals with 41-2-19.6(5). "After the hearing, the department shall order (suspension or no suspension)." (Emphasis added). This section presumes that a fair and impartial hearing will determine the efficacy of the arresting officer's "interim" suspension based upon competent and substantial evidence. The burden of proof which the state is required to meet in driver's license hearings concerning DUI suspensions and revocations is a "preponderance of evidence." Murray v. Hall, 663 P.2d 1314 (Utah 1983).

In this case the hearing to determine whether or not to suspend was held four days after the Order of Suspension was dated.

The respondent will argue the need to have the order ready "just in case" is a computerized bureaucratic necessity to efficiently manage the driver's license system. Appellant presumes that this court would take a dim view of criminal trial judges preparing, signing and issuing judgments and verdicts of guilt before the trial of the accused actually occurs.

The action of the respondent shows a predisposition to place the burden of proof on the appellant. The order in this case was issued prior to the statutorily mandated 31-day period expired and must therefor be considered void ab initio by this court.

POINT II: THE COURT ERRED IN SUSTAINING
RESPONDENT'S ORDER OF SUSPENSION WHERE
SAID ORDER WAS BASED ON INADMISSABLE
EVIDENCE

It is the policy of the driver's license hearing officers, except in rare circumstances, to avoid suspensions of license absent a valid, admissible breath test. Respondent will not argue with that assertion. Therefore, the breath test results in this case are critical.

It is statutorily mandated at 41-6-44.3(1), Utah Code Ann., that the Commissioner of Public Safety establish standards for breath testing by police officers. Those standards are public record in the State Archives.

It is also statutorily required that before documents purporting to prove breath test results may be admitted in evidence, the proponent must provide the foundation that the "analysis was made and the instrument used was accurate, according to standards established in (41-6-44.3(1))..." The judge may find the results trustworthy only if subsection (2) is satisfied (emphasis added).

Ergo, the proponent must introduce the written standards and provide evidence that those standards were complied with in the analysis stage and in the interpretation stage.

In this case the appellant not only objected to the admission of the breath testing documents because respondent failed to offer the commissioner's standards and could not therefore provide sufficient foundation, (Exhibit B, pages 11 and 12); appellant asked the police officer on cross-examination if he was familiar with those standards and he replied that he had never seen them (Exhibit B, page 9).

Since the hearing officer did not have the standards before him as an exhibit and his witness could not provide the foundational testimony, the admission of the testing documents was totally without foundation and the decision based thereon was arbitrary and capricious and should not have been sustained by the court.

The respondent will claim that the hearing officer found that all "procedures and requirements" were met. Who's requirements? Respondent cannot point to a single part of the record that shows compliance with the "commissioner's standards". It is not the officer's standards, the department's standards or the policeman's standards that are material or statutorily sufficient.

This must be reversed and remanded and the order of suspension must be vacated.

CONCLUSION

For the reasons set forth in appellant's arguments, both on statutory as well as constitutional grounds, the court should reverse the decision of the court below and remand this matter with instruction to vacate the Order of Suspension issued by respondent herein.

RESPECTUFLY SUBMITTED this 23 day of August, 1985.




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MAILED, postage prepaid, four copies of the foregoing
Appellant's Brief to Bruce Hale, Assistant Attorney General,
236 State Capitol, Salt Lake City, Utah 84114 this 23 day
of August, 1985.


LONI F. DeLAND

A D D E N D U M

SUMMONS AND CITATION		ENFORCEMENT AGENCY EXHIBIT A		NO 13782		37472	
STATE OF UTAH COUNTY OF <u>Salt Lake</u>		NAME (Last) <u>Grisman</u> (First) <u>Willis</u> (Middle) <u>C.</u>				DOB <u>7-9-39</u>	
CITY OF _____		ADDRESS <u>4707 S 300W</u> (City) <u>S.L.C.</u> (State) <u>UT</u>				Zip <u>84107</u>	
THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN COURT OF <u>DUI</u>		Driver License No <u>3842817</u>		License Class <u>E</u>		Expires <u>1988</u>	
LOCATED AT <u>3839 S W. Temple St</u> <u>In March 6, 1985 0830</u>		Height <u>5'11</u>		Weight <u>175</u>		Eyes <u>Blue</u>	
		Sex <u>M</u>		Vehicle License No <u>WPP424</u>		State <u>UT</u>	
		Vehicle Make <u>Chev</u>		Vehicle Type <u>Corvette</u>		Vehicle Year <u>1985</u>	
		Color <u>Blk</u>		Accident Yes <u>No</u>		Direction of Travel <u>N S E W</u>	
of less than (5) nor more than (14) fourteen days after issuance of this citation		THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING <input checked="" type="checkbox"/> UTAH CODE <input type="checkbox"/> COUNTY CODE <input type="checkbox"/> CITY CODE NO ON THE <u>21</u> DAY OF <u>Feb</u> 19 <u>85</u> MILITARY TIME <u>2325</u> LOCATION <u>4707 S. State St.</u> MILE POST NO _____ VIOLATION(S) <u>DUI</u>					
		WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN					
		SIGNATURE <u>Booked.</u>					
		I CERTIFY THAT COPY OF THIS SUMMONS AND CITATION WAS DULY SERVED UPON THE DEFENDANT ACCORDING TO LAW ON THE ABOVE DATE AND I KNOW OR BELIEVE AND SO ALLEGE THAT THE ABOVE NAMED DEFENDANT DID COMMIT THE OFFENSE HEREIN SET FORTH CONTRARY TO LAW. I FURTHER CERTIFY THAT THE COURT TO WHICH THE DEFENDANT HAS BEEN DIRECTED TO APPEAR IS PROPER COURT PURSUANT TO SECTION 77-7-19.					
DLS SE		PERSE		OFFICER <u>TJ Basm</u>		BADGE NO <u>5864F</u>	
				COMPLAINANT _____		DATE OF CITATION <u>2-21-85</u>	
				DATE SENT TO ODLS _____		DOCKET NO _____	

FEB 25 1985

Valid

READ CAREFULLY

SURR. LIC.

This citation is not an information and will not be used as an information without your consent. If an information is filed you will be provided a copy by the court. You MUST appear in court on or before the time set in this citation. IF YOU FAIL TO APPEAR AN INFORMATION WILL BE FILED AND THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST.

NOTICE OF INTENT TO SUSPEND: You are hereby notified that thirty-one (31) days from the date of this notice your privilege to operate motor vehicles in the State of Utah will be suspended pursuant to Section 41-2-19.6 U.C.A. for a period of ninety (90) days thereafter, or for a period of one hundred twenty (120) days if this is the second occurrence of this offense. You are required by law to surrender to a peace officer all Utah licenses or permits in your possession. **YOU HAVE THE RIGHT TO REQUEST A HEARING ON THIS SUSPENSION.** The department will NOT contact you further regarding a hearing unless you request a hearing in writing. Your WRITTEN REQUEST must be sent WITHIN TEN (10) DAYS of the date of arrest to the Office of Driver License Services at 4501 South 2700 West, Salt Lake City, Utah 84119. Upon your written request for a hearing you will be notified of a time and place to appear. If you fail to appear or request a hearing your driver license suspension will be automatic. The administrative hearing is civil in nature and does not satisfy the requirement for you to appear in court as indicated above.

TEMPORARY DRIVER LICENSE: This entire information ☒ is VALID as a temporary driver license for a period of thirty (30) days from the date of this notice ☐ is NOT VALID as a temporary driver license.

Reason for not issuing temporary license: _____

RECEIVED BY
DRIVER LICENSE

FEB 25 1985

EXHIBIT B

Transcription of Official Tape
of the Hearing
March 22, 1985

H.O.: Dennis Hicks
Att.: Lonnie F. Deland

Driver: Willis C. Gabbard
DL #3842817
DOB: 7-9-39

H.O.: This administrative suspension hearing is being conducted at the request of Willis C. Gabbard, 10955 South 1300 West, South Jordan, Utah. Mr. Gabbard's date of birth is 7-9-39. Driver License Number is 3842817 and today's date is Friday, March 22, 1985. Present for the hearing are Dennis H. Hicks, the hearing officer; arresting officer is Deputy Beam of the Salt Lake County Sheriff's Office; and, ah, we also have a witness, Wayne Dial of the Salt Lake County Sheriff's Office; Attorney of record is Lonnie F. Deland. Mr. Gabbard is not present for the hearing. Lonnie, is he going to come in?

Att.: No.

H.O.: Mr. Gabbard will not be present for the hearing but he is represented by Counsel. Again, the hearing is being conducted at the driver's request. Formal rules of evidence and procedure shall not strictly apply. However, as the hearing officer I will take sworn testimony and I'll consider all relevant evidence. If Mr. Gabbard's privilege to drive is suspended, he does have the right to petition a court of record in the county in which he resides within 30 days after the effective date of such suspension for judicial review by that court. So those testifying will be sworn and we will begin with the hearing. So,

ah, Deputy Beam, would you please raise your right hand? Do you swear any testimony you may give during the course of the hearing to be the truth, the whole truth and nothing but the truth, so help you, God?

Officer: I do.

H.O.: Thank you. Deputy Dial, would you please raise your right hand? Do you swear any testimony you may give during the course of the hearing to be the truth, the whole truth, and nothing but the truth, so help you, God?

Witness: I do.

H.O.: Thanks. I have in receipt from the Salt Lake County Sheriff's Office several documents I'd like to identify for the record. Documents will be taken into consideration. First of all, we have a copy of a DUI summons and citation indicates to me that Willis C. Gabbard, 7-9 of 39 was arrested February 21, 1985. Military time indicated is 2325. Charged with driving under the influence by Deputy Beam of the Salt Lake County Sheriff's Office. Attached to that we have what appears to me to be the original DUI report form filled out in conjunction with the same arrest. Report form has been signed, the signature has been notarized and there is an authorized endorsing signature. We have also copies, photostat copies, intoxilyzer operational check list, and test record. Indicates the machine location is 4474 South Main, which I believe to be the traffic division in Salt Lake County Sheriff's Office. Ah, it indicates on both the test record and the check list that the subject is Willis C. Gabbard and the date is 2-21-85. The operator is Deputy Dial.

Att.: What does your record show? My copy doesn't -- 24 at calibration

(inaudible conversation between two individuals)

H.O.: Okay, you're looking on the test record.

Att.: Uh-huh.

H.O.: Okay. Correct, two four. From our records I would like to also add copies of the intoxilyzer test record. Have you still got them?

Officer: I got copies.

??? (Further inaudible conversation)

? You showed it to me.

? (Further inaudible conversation)

? You can search me before I leave. (Laughter)

? What is it you're looking for? An original copy?

H.O.: The intoxilyzer service affidavit. Ah, for the record I have one right here.

? Ah ha, search him (Laughter)

H.O.: I have one from February 13th and I have one from March 2nd, a before and an after, done by the technician of the Sheriff's Office, Stan Jensen. Ah, same location, same serial number, 984001121 and those will also be taken into consideration.

Att.: (inaudible) inspect them now or later?

H.O.: Ah, which ever.

Att.: I'll save everything until the end.

H.O.: All right. (Laughter) Deputy Beam, can you identify the DUI report form as the original you filled out in conjunction with the arrest of Mr. Gabbard?

Officer: Yeah, that's my writing, my signature.

H.O.: Okay. On the back, ah, you've indicated that that is your signature, correct?

Officer: Yes, it is.

H.O.: Did you sign in front of a notary?

Officer: Yes, I did.

H.O.: Indicated here?

Officer: Uh-huh.

H.O.: Did you swear before that notary that the contents of this report were all true and correct to the best of your knowledge?

Officer: Yes, I did.

H.O.: Is there any part of this report that you did not fill out yourself other than the authorized endorsing signature and the notary public?

Officer: It's all filled out by me.

H.O.: Can you describe to me what you did when you had that document notarized?

Officer: Ah, I contacted the field commander who is the notary, raised my right hand. I don't remember --- he asked me if the contents of this report were true to the best of my knowledge. I don't remember exactly what he said and I said "I do" and he signed it and notarized it.

H.O.: Thank you. According to the report form you observed Mr. Gabbard in actual physical control of a vehicle and after coming in contact with Mr. Gabbard, ah, for --- you were under the suspicion that Mr. Gabbard could be under the influence of alcohol.

Officer: That's correct.

H.O.: First of all, what brought your attention to the Gabbard vehicle, or the vehicle driven by Mr. Gabbard, I should say.

Officer: I was in my car sitting at the, in the left turn lane, ah,

southbound to go east on 45th. Ah, I observed another car northbound weaving in and out of traffic approaching 4500 South and I couldn't guess at his speed but he was passing most everything that was on the street. When he got to the red light at 4500 South and State Street he, ah, slammed on his brakes and he, he, ah, slid into the intersection, maybe as far as the first lane and then just continued through the red light. As he got through the intersection I made a "U" turn and got behind him. He then went from the far right hand lane, which was the lane that he was in when he went through the intersection, to the inside or the left lane and now traveling about 20 to 25 miles an hour. I followed him a block. He went into the left turn lane at about, I believe the intersection's 4295, and made a "U" turn and now he's going south on State Street and at which time I stopped him.

H.O.: What led you to believe that he may be under ...

Officer: Well...

H.O.: ...driving under the influence of alcohol.

Officer: As I walked up to the vehicle he rolled the window down and, ah, there was a very distinct odor of alcohol coming from the car. I asked him to step out. When he stepped out of the car he had to use the car to --- he was leaning against the car with his left hand and there was an odor of alcohol about him and on his breath. His eyes were watery and, ah, basically it appeared to me at that time that he had been drinking alcohol.

H.O.: Okay. How did you identify the driver?

Officer: With his driver's license, Utah driver's license.

H.O.: All right, what were the sequence of events from that point?

Officer: I asked him if he had been drinking. He stated that he had had some to drink. I then asked him if he would take some field sobriety tests to see if he was able to operate a motor vehicle.

H.O.: And did you give some, or administer field sobriety tests?

Officer: Yes, I did.

H.O.: And, ah, what conclusion did you draw? (Coughing)

Officer: If I might look at my ---. Okay, on a couple of the tests he did fair, ah, on a couple. The two balance tests I asked him to just stand heel to toe while I explained what I wanted him to do and he had to step to the side several times. I asked him to stand on one foot and count to 30 out loud for me and he had to step off several times to maintain his balance, and it was my opinion at that time that he was under the influence of alcohol to the point where he couldn't operate a motor vehicle.

H.O.: Okay. How many tests did you give altogether?

Officer: Four.

H.O.: So you're saying that two were okay and two weren't.

Officer: Basically his, ah, when I just asked him to stand with his feet together and his head back he swayed slightly and I would say he did fair compared to some I've seen. When I asked him to walk heel to toe he, ah, the steps weren't all heel to toe. He did take the correct number of steps. When he turned to take the steps back he stumbled and, ah, when he did the, ah, --- like I explained before the heel to toe just standing there he was unable to just stand heel to toe without stepping to the side to maintain his balance.

H.O.: You mean you're conclusions were then...

Officer: That he was under the influence of alcohol which impaired his

ability to drive a car.

H.O.: And what did you do about that?

Officer: At that time I placed him under arrest for driving under the influence of alcohol.

H.O.: Okay. Go over the sequence of events from that point.

Officer: Ah, Deputy Dial had arrived on the scene and I asked him if he would conduct the intoxilyzer test. I'm not currently certified and he was driven over to Traffic Division where Deputy Dial administered the test.

H.O.: Did you transport?

Officer: Yes, I did.

H.O.: Were you present during the testing procedure?

Officer: Yes, I was.

H.O.: What did you observe?

Officer: Well, we --- I had read him the, ah, request to take the breath test and the, ah, the, ah, statements about .08% would, ah, was above the legal limit and he could lose his driver's license, suspended or revocation of his driver's license and Deputy Dial conducted the intoxilyzer test.

H.O.: Okay. Did Mr. Gabbard agree to the test?

Officer: Yes, he did.

H.O.: (Coughing) Do you have any questions, Lonnie?

Att.: Well, I'm just going to ask --- you indicated you watched Deputy Dial perform that intoxilyzer test. That is, what did you observe him do?

Officer: Ah, well, not knowing that much about it, he went through the check list, ah, like I said I don't know that much about the intoxilyzer machine to tell you, you know, if it was done

correctly or not, but, ah, he went through the check list. He read the, the, ah, whatever you want to call it, you know, what would occur, you know, with the chemical test as far as the driver's license suspension went. And, ah, did the test.

Att.: You watched, you watched Mr. Gabbard blow into the machine.

Officer: Yes, I did.

Att.: You saw the results come out?

Officer: Yeah.

Att.: All right. Had you at any time prior to today, ah, seen Deputy Dial's certification?

Officer: No.

Att.: You presumed that he was certified at that time...

Officer: To my best knowledge that he was certified.

Att.: That's all.

H.O.: Let me just get some clarification. Ah, you indicated that you weren't currently certified. Have you ever been certified?

Officer: Yes, I have.

H.O.: Okay, on an intoxilyzer?

Officer: On the intoxilyzer and the breathalyzer.

H.O.: Did it lapse or..?

Officer: I was in vice for two and a half years and we never got to re-certify on it. So my certification lapsed.

H.O.: Okay.

Att.: Let me just ask a follow-up question on that. In that case the, ah, machine that you used out at the sub station is the CMI 4011 ASA. Well, you wouldn't know that.

Officer: (Laugh) It's a big box that says intoxilyzer on (Laughter).

Att.: According to your report, referring to the operational check

list, I think that exhibit speaks for itself. That's an ASA check list. It's that right there that you got. When you were certified the only machines out at that time would have been, if it was two and a half years ago, would have been the 4011 and the 4011A, is that true?

Officer: I think -- it was --- I was certified on that just as they were starting to put the intoxilyzer to use.

Att.: All right. Have you seen the Commissioner of Public Safety's regulation that was published on this or the operating procedures published by CMI on the ASA?

Officer: I've never seen them.

Att.: That's all.

H.O.: Okay. (Cough) Deputy Dial, you've heard the testimony here of Deputy Beam, and he's already testified to the fact that, ah, ah, you were called or you appeared at the scene, ah, so let's start at that point. Ah, of the arrest, I should say. The scene of the arrest when I said the scene. Ah, let's begin at that point and can you tell me what you witnessed once you arrived.

Witness: I arrived at the Currant's address, ah, and the, ah, Mr. Gabbard was being placed under arrest at the time. Ah, after he was being, after he had been placed under arrest, I checked his mouth following the Baker Ruling to insure that time would lapse from the time his mouth was checked and the time he blew into the machine. Ah, there was another individual in the vehicle which he had been stopped and a passenger --- normally we impound a vehicle. Well, in this case we were going to determine whether this individual could drive the vehicle away from the scene. So I conducted a couple of field sobriety tests on his passenger and

it was determined by me that he was not impaired and that he could take the vehicle at that time. I responded to our traffic division, turned on the breathalyzer, and started my paper work. Deputy Beam arrived a few moments later. I am sure that the Baker Rule was followed to determine that the time had elapsed that is required. I am currently certified and was certified at that time. This is my certification card.

H.O.: Good until November.

Officer: Correct. After conducting the, ah, intoxilyzer I took the check list, the test record, and the license of the arrestee and made three copies. One for Deputy Beam and two for the County Attorney and this used as well. Ah, I made those copies.

H.O.: Okay, ah, as you operated that particular machine, did you follow the nine steps?

Officer: I did.

H.O.: And as you, ah, completed each of those steps --- what do you do just check it off for...?

Officer: Correct. As each step is completed I check it off and move on to the next step. At the time the machine was turned on was 2335. The time he blew into the machine was 2350. The time I checked his mouth would probably ten minutes prior to 2335, approximately 10 minutes. I would estimate.

H.O.: Did you have any problems with the machine?

Officer: No.

H.O.: What result?

Officer: The results of the breath test were .14.

H.O.: Okay. Ah, I can't see any place on here other than the actual stamp, ah, what's the actual calibration of that machine, do you

know?

Officer: No.

H.O.: Question? I'm ready.

Att.: I'll give you my good objection first. (Laughter) shopping list.
(Laughter) All right?

H.O.: All right.

Att.: No foundation for the breath results. You don't have a third digit. You don't know the calibration. Law requires you to be within .01. Ah, here's the shopping list now.

H.O.: Okay.

Att.: Object to the admission of the affidavit (inaudible) request prior to this hearing nor are they certified or --- certified copies pursuant to the rules of evidence or originals. Nor is there a supervisory affidavit per Murray vs Hall. Ah, even though Deputy Dial's here I will still object to the --- since it's based upon the report. Since that is an item signed and subscribed to by Deputy Dial on the report not on the two exhibits, check list and the result. I'll object to their admission on those grounds as well. Ah, and further --- based upon tendings and unfamiliarity with the machine (inaudible) sufficient level to (inaudible). Ah, 41-6-44.3 which mandates the Commissioner's regulations or the manufacturer's regulations to follow. Copy here, if you take notice of the ASA regulations (inaudible) a deputy with a check list does not use the same steps that the latest publication by CMI. (Inaudible) If you check with the Highway Patrol they'll tell you that they made those check lists differently. Couple of steps.

H.O.: What you're saying then is that the Sheriff's office made this up

and UHP made up a different plan.

Att.: UHP is the same, I think. If everybody used the same one --- for some reason they made a policy decision not to precisely follow those outlined by CMI and I -- and their experts will testify it doesn't make any difference. You get the same results.

H.O.: Okay, now...(inaudible)

Att.: (inaudible) It's a technical argument.

H.O.: Okay, now I understand what you are saying.

Att.: I'm saying the statute has to be followed.

H.O.: Okay.

Att.: Strictly.

H.O.: Okay. All right. I understand what you're saying now. Ah, anything else?

Att.: That's it.

H.O.: All right. Of course I'll take everything into consideration before I make a decision, and, ah, it will probably be best to also notify your office because we don't for sure exactly what Mr. Gabbard's address is.

Att.: Oh, I looked on my --- I'm sure that one address is his home and the other one is his..

H.O.: Business?

Att.: Business.

H.O.: I think he used his business address when the old lady threw him out.

Att.: Yeah, that's what he said. He says I'm living here now.
(Laughter)

H.O.: Well, with her friends now maybe he's back to 109 (inaudible)

Att.: Yeah, he called me yesterday to see what the results of this

hearing were and I said, "I wouldn't be able to tell you that for another 24 hours." And he said, "Oh" and he was holding this in his hand and he said I just misread it. So I know he got it. But I think you can feel safe in sending it to the South Jordan address and if he doesn't get it I'll bear the responsibility of sending a copy anyway.

H.O.: Sounds good.


TRANSCRIPTION CERTIFICATION

STATE OF UTAH
DEPARTMENT OF PUBLIC SAFETY

THIS IS TO CERTIFY that the Departmental Hearing of the matter of State of Utah versus Willis C. Gabbard, File Number 3842817 was electronically recorded by the Office of Driver License Services.

That such recording was transcribed by me into typewriting; and that a true and correct transcription of said recording, to the best of my knowledge, is set forth in the foregoing pages.

WITNESS MY HAND this 8th day of May 1985.

by 
OFFICE OF DRIVER LICENSE SERVICES



SCOTT M. MATHESON
Governor

LARRY E. LUNNEN
Commissioner

UTAH DEPARTMENT OF PUBLIC SAFETY
HIGHWAY SAFETY DIVISION
OFFICE OF DRIVER LICENSE SERVICES

DRIVER IMPROVEMENT SECTION
4501 South 2700 West
Salt Lake City, Utah 84119
965-4437



ROBERT F. PARENTI
Director

FRED C. SCHWENDIMAN, Mg.
Driver License Services

18 MARCH 1985

WILLIS C GABBARD
10955 SO 1300 WEST
SO. JORDAN, UT. 84065

ORDER OF SUSPENSION

LICENSE NUMBER 003842817

BY AUTHORITY OF TITLE 41, UTAH CODE ANNOTATED 1953, IT IS HEREBY ORDERED THAT YOUR PRIVILEGE TO OPERATE A MOTOR VEHICLE ON THE HIGHWAYS OF THIS STATE IS SUSPENDED FOR A PERIOD OF 3 MONTHS EFFECTIVE 24 MARCH 1985.

IT IS FURTHER ORDERED THAT YOU IMMEDIATELY SURRENDER TO THIS DEPARTMENT YOUR UTAH DRIVER LICENSE NUMBER 003842817 AND ALL OTHER DRIVER LICENSES ISSUED TO YOU.

THE AUTHORITY FOR SUCH ACTION IS U.C.A. 41-2-19.6 AND THAT A PEACE OFFICER HAD REASONABLE GROUNDS TO BELIEVE YOU HAD BEEN OPERATING A MOTOR VEHICLE IN VIOLATION OF U.C.A. 41-6-44 (DRIVING UNDER THE INFLUENCE LAW).

UTAH LAW REQUIRES ANY PERSON WHOSE UTAH DRIVING PRIVILEGE HAS BEEN SUSPENDED OR REVOKED TO PAY A \$25.00 FEE FOLLOWING THE REVOCATION OR SUSPENSION PERIOD TO HAVE THIS PRIVILEGE REINSTATED. IN ADDITION TO THE REINSTATEMENT FEE, A \$25.00 ADMINISTRATIVE SERVICE FEE WILL BE ASSESSED WHEN THE PRIVILEGE TO DRIVE HAS BEEN ADMINISTRATIVELY SUSPENDED FOR BEING ARRESTED FOR DRIVING UNDER THE INFLUENCE.

IF YOU HAVE NOT VOLUNTARILY SURRENDERED UPON DEMAND ALL LICENSES AND PERMITS AND A PICKUP ORDER HAS BEEN ISSUED FOR THESE ITEMS, AN ADDITIONAL \$25.00 FEE WILL BE ASSESSED AT THE TIME OF REINSTATEMENT.

IT IS A MISDEMEANOR TO OPERATE ANY MOTOR VEHICLE UPON THE HIGHWAYS OF THIS STATE WHILE YOUR DRIVER LICENSE IS SUSPENDED OR REVOKED.

YOU MAY APPEAL THIS ACTION IN A COURT OF RECORD IN THE COUNTY OF YOUR RESIDENCE WITHIN THIRTY (30) DAYS.

DATED AT SALT LAKE CITY, UTAH, THIS 18TH DAY OF MARCH 1985.

85 cc: Loni F. DeLand
Attorney at Law
132 S. 600 E.
S.L.C. UT 84102

VERY TRULY YOURS,

DAVID A. BEACH, BUREAU CHIEF
DRIVER LICENSE SERVICES

EXHIBIT D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WILLIS C. GABBARD,

Petitioner,

vs.

DAVID A. BEACH, Bureau
Chief, Driver License
Services,

Respondent.

: MEMORANDUM DECISION
:
: CIVIL NO. C-85-2219
:
:
:
:
:

Petitioner, Willis C. Gabbard, appeals from the respondent's decision suspending his driving privileges for 90 days. This matter came on for hearing this date. The Court received the transcript of the hearing, along with pertinent documents, including the report of the hearing of the administrative officer, two affidavits of breath test technicians, the DUI Summons and Citation, DUI Report Form of the arresting officer, Intoxilyzer Test Record and Checklist, and miscellaneous correspondence, including the Order of Suspension, dated March 18, 1985, effective March 24, 1985, and mailed to the petitioner on April 4, 1985.

Petitioner claims that the actions of respondent were arbitrary and capricious in that there was insufficient evidence to support the findings of the examiner, and that the Order of Suspension was prepared and dated March 18, 1985 (four days prior to the hearing date.)

Section 41-2-19.6 of Utah Code Ann. provides that a peace officer who has reasonable grounds to believe a driver is in violation of Section 41-6-44 has a right to request a chemical test be performed for blood/alcohol. If the blood/alcohol is found to be .08% or more, or if the officer makes a determination, based upon reasonable grounds, that the person is otherwise in violation of Section 41-6-44, the officer may take the driver's license and issue a temporary license good for 30 days.

Section 41-6-44.5 provides that chemical tests taken within two hours of the alleged driving shall be presumed to be "not less" than the level of alcohol determined to be in the blood by the chemical test itself.

Section 41-6-44.3 provides that the commissioner of public safety shall establish standards for the administration and interpretation of chemical analysis and standards for training. Documents proving that the analysis was made and the instrument was accurate in accordance with the commissioner's standards are admissible into evidence if the judge finds that such documents indicating the same were made in the regular course of investigation, at or about the time of the act, condition or event, and the source of the information from which the document was made indicate trustworthiness.

In the case at bar affidavits of Stan Jensen indicate that the equipment in question was tested in accordance with standards

established by the commissioner of public safety and passed such test indicating the instrument was working properly. One such test occurred prior to the arrest in question, and the other test subsequent thereto.

The Intoxilyzer Test Record indicates that nine items were checked on the Operational Checklist. This would indicate that the intoxilyzer machine was operated in accordance with the nine requirements set forth on the Operational Checklist. However, there was no evidence as to whether or not this checklist complies with standards set forth by the commissioner of public safety. Also, there is no testimony as to the meaning of the calibrating reading of .24%. There is testimony, however, by the operator of the machine to the effect that it was working properly without problem at the time of testing.

The investigating officer, T. J. Beam testified at the hearing of his observations of petitioner. He testified that he observed the petitioner "weaving in and out of traffic" approaching 4500 South, and "passing most everything that was on the street." He testified the petitioner slammed on his brakes and slid into the intersection through a red light, and then continued through the red light, and continued for a block wherein he made a U-turn. It was at this point the officer stopped him.

He detected a "very distinct odor of alcohol coming from the car" and from the petitioner as he stepped out of his car. The petitioner's eyes were watery. It appeared to the officer that petitioner "had been drinking alcohol." Based upon his observations, including the results of field sobriety tests, he concluded that petitioner was under the influence of alcohol which impaired his ability to drive a car.

Deputy Dial testified that in performing the intoxilyzer test, he followed the prescribed nine steps and had no problems with the machine. The test results indicated .14% blood/alcohol.

The arresting officer's DUI Report Form included information that the petitioner was driving "at a high rate of speed approaching the red light" when he put on his brakes and skidded through the intersection. The driver stated he had consumed three rum and cokes, and three beers, the first drink being consumed at 8:30 or 9:00 o'clock, and the last drink five minutes before being stopped by the police. This Report was signed February 22, 1985 at 02:30 a.m., and was notarized. It was also endorsed by the signature of the chief of police or the equivalent, Dee A. Kartchner.

The question on appeal is whether or not there was a residuum of evidence before the hearing examiner upon which he could reasonably base his decision. In this regard, there was sufficient testimony that the arresting officer had reasonable grounds

to believe that the petitioner was in violation of Section 41-6-44, even without the blood/alcohol test. However, the Court believes there was enough evidence to indicate the machine was working in accordance with standards of the commissioner, and enough evidence to imply that the test was administered in accordance with standards of the commissioner.

The actions of the hearing examiner in suspending the petitioner's driver's license are affirmed.

Counsel for defendant will prepare the Order in accordance with this Memorandum Decision.

Dated this 21 day of May, 1985.

/s/ Leonard H. Russon
LEONARD H. RUSSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following this _____ day of May, 1985:

Loni F. DeLand
Attorney for Petitioner
132 South 600 East
Salt Lake City, Utah 84102

Bruce M. Hale
Assistant Attorney General
Attorney for Respondent
236 State Capitol
Salt Lake City, Utah 84114

EXHIBIT E

DAVID L. WILKINSON (#3472)
Attorney General
BRUCE M. HALE (#1298)
Assistant Attorney General
Room 236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7606

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILLIS C. GABBARD,)	
)	
Petitioner,)	
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
)	AND ORDER
FRED C. SCHWENDIMAN, Chief,)	
Driver License Services,)	Case No. C-85-2219
Department of Public Safety,)	Judge Leonard H. Russon
State of Utah,)	
)	
Respondent.)	

This matter having come before the Court on May 21, 1985, and the parties being represented by their respective counsel and the Court having received and reviewed the record of the Department of Public Safety, State of Utah and administrative hearing in the above-entitled matter, and plaintiff's complaint alleging that the Office of Driver License Services was arbitrary and capricious under the Utah Operator's License Act, Utah Code Ann. §§ 41-2-19.6 and 41-2-20, the Court being fully apprised in the premises now makes its:

FINDINGS OF FACT

1. The Court finds that the evidence and the agency record preponderates that there is substantial and competent evidence to support the findings of the hearing officer of the Department of Public Safety. There was sufficient testimony that the arresting officer had cause to stop and probable cause to arrest, did arrest and had reasonable grounds to believe that petitioner was in violation of Section 41-6-44, even without the blood alcohol test to establish a residuum of evidence, upon which the hearing officer could reasonably base his decision. The Court finds that the preponderance of the evidence is that the intoxlizer machine was working in accordance with the standards of the Commissioner of Public Safety, and the chemical breath test was administered in accordance with the standards of the Commissioner.

2. The Court further finds that all of the elements of Utah Code Ann. § 41-2-19.6 were proven before the Agency. The Court specifically finds that the evidence before the Agency is competent and preponderates that the arresting officer had reasonable grounds to believe that plaintiff may have been in violation of Utah Code Ann. § 41-6-44, when he observed him 1) weaving in and out of traffic, 2) driving at a high rate of speed as he approached a stop light, then applying his brakes and skidding through the intersection, 3) and detected a distinct odor of alcohol emanating from the car as well as the

petitioner's person. The petitioner was then arrested, and was requested to take an intoxilyzer test, and advised that a result indicating a blood alcohol content, by weight, of .08% or more shall and can result in the suspension or revocation of the person's license or privilege to operate a motor vehicle, that a chemical test was voluntarily agreed to by plaintiff, and that it was properly given by a certified operator showing reliably a result of .08% or above of alcohol by weight in plaintiff's blood.

3. The Court further finds that the DUI report was properly signed, notarized, countersigned and forwarded to the Office of Driver License Services within five days of the arrest, that plaintiff requested a timely hearing which was held by an unbiased Hearing Officer with the plaintiff, as well as the officer, offering sworn testimony.

4. The hearing was granted prior to 30 days from the date of the arrest, and the statute grants the plaintiff due process and the opportunity to appeal to this Court for a hearing on the record and a determination of whether or not the Department was arbitrary or capricious.

5. The arresting officer gave sworn testimony before the Department to the contents of the DUI Report Form. The Court finds that the officer who administered the breath test with the intoxilyzer was certified, that he used a checklist and had no problems with the machine. The intoxilyzer was therefore

properly presumed to be reliable and in working order and the results were admissible before the Administrative Department without further foundation as official records of the Department of Public Safety.

6. Pursuant to § 41-2-19.6 the plaintiff's license was suspended. The plaintiff appealed that adverse decision to this Court for a review pursuant to Utah Code Ann. §§ 41-2-19.6 and 41-2-20.

7. The Court adopts the memorandum decision issued by the Court on the 21st day of May, and its supplement of May 29, 1985, in the above-entitled matter.

Having made the foregoing findings of fact, the Court now makes its:

CONCLUSIONS OF LAW

1. The Court concludes that there was substantial competent evidence to support the Department's determination to sustain the Notice of Intention to Suspend plaintiff's privilege to operate a vehicle in the State of Utah served upon plaintiff when he was arrested and due process was granted.

2. There was competent evidence to support the Administrative findings, and the Court concludes that the arresting officer had reasonable grounds to believe that the plaintiff may have been in violation of Utah Code Ann. § 41-6-44, and that there were reliable test results which indicated a blood alcohol content of .08% or greater in the plaintiff, or

that the plaintiff had been operating a motor vehicle under the influence of alcohol rendering him incapable of safely driving the same.

3. The Court concludes that the intoxilyzer machine was reliable and the results admissible before the Department, pursuant to the presumption set forth in Utah Code Ann. §§ 41-6-44.5 and 44.3, and Murray City v. Hall, 663 P.2d 1314 (Utah 1983).

4. The Court further concludes that, under the definitions of arbitrary and capricious given in Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601, the Department of Public Safety's decision was not arbitrary or capricious.

The Court having made the foregoing findings of fact and conclusions of law, now makes the following:

ORDER

1. The decision of the Department of Public Safety, Office of Driver License Services, is sustained and plaintiff's driving privileges are to be suspended or revoked as required by law.


DATED this 1st day of July, 1985.

B/Leonard' Russon
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and exact copy of the foregoing Findings of Fact, Conclusions of Law and Order, first class postage prepaid, to the following on this 25 day of June, 1985:

Loni F. DeLand
Attorney at Law
132 South 600 East
Salt Lake City, Utah 84102



sections 41-2-29 and 41-2-30, Utah Code Annotated 1953, as last amended by chapter 83, Laws of Utah 1967, section 41-6-43.10, Utah Code Annotated 1953, as last amended by chapter 78, Laws of Utah 1957, section 41-6-44, Utah Code Annotated 1953, as last amended by chapter 46, Laws of Utah 1982, sections 41-6-44.3 and 41-6-44.5, Utah Code Annotated 1953, as enacted by chapter 243, Laws of Utah 1979, section 41-6-44.10, Utah Code Annotated 1953, as enacted by chapter 126, Laws of Utah 1981, section 41-22-14, Utah Code Annotated 1953, as enacted by chapter 107, Laws of Utah 1971, section 63-43-10, Utah Code Annotated 1953, as last

amended by chapter 2, Laws of Utah 1980, section 73-18-12, Utah Code Annotated 1953, as last amended by chapter 183, Laws of Utah 1977, and section 76-5-207, Utah Code Annotated 1953, as last amended by chapter 63, Laws of Utah 1981, enacts sections 41-2-19.5 and 41-2-19.6, Utah Code Annotated 1953; repeals and reenacts section 41-6-43, Utah Code Annotated 1953, as enacted by chapter 242, Laws of Utah 1979; and repeals section 41-6-44.2, Utah Code Annotated 1953, as last amended by chapter 4, Laws of Utah 1982, Second Special Session — Laws 1983, ch. 99.

41-2-19.6. Chemical test — Grounds and procedure for officer's request — Taking license — Report to department — Procedure by department — Suspension. (1) When a peace officer has reasonable grounds to believe that a person may be violating or has violated section 41-6-44 the peace officer may, in connection with his arrest of the person, request the person to submit to a chemical test to be administered in compliance with the standards set forth in section 41-6-44.10.

(2) The peace officer shall advise a person prior to the person's submission to a chemical test that results indicating .08% or more by weight of alcohol in the blood shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a vehicle can, result in suspension or revocation of the person's license or privilege to operate a motor vehicle.

(3) If the person submits to that chemical test and the results indicate a blood alcohol content of .08% or more, or if the officer makes a determination, based on reasonable grounds to believe that the determination is correct, that the person is otherwise in violation of section 41-6-44, the officer directing administration of the test or making the determination shall serve on the person, on behalf of the department, immediate notice of the department's intention to suspend the person's privilege or license to drive. If the officer serves that immediate notice on behalf of the department he shall take the Utah driver license or certificate or permit, if any, of the driver, issue a temporary license effective for only 30 days, and supply to the driver, on a form to be approved by the department, basic information regarding how to obtain a prompt hearing before the department. A citation issued by the officer may, if approved as to form by the department, serve also as the temporary license.

(4) The peace officer serving the notice shall send to the department within five days after the date of arrest and service of the notice the person's license along with a copy of the citation issued regarding the offense, and a sworn report indicating the chemical test results, if any, and any other basis for the officer's determination that the person has violated section 41-6-44, and the officer's belief regarding the person's violation of section 41-6-44. Each such report shall be on a form approved by the department and shall be endorsed by the police chief or his equivalent or by a person authorized by him, other than the officer serving the notice.

(5) Upon written request of a person who has been issued a 30-day license, the department shall grant to the person an opportunity to be heard within 30 days after the date of arrest and issuance of the 30-day license, but the request must be made within 10 days of the date of the arrest and issuance of the 30-day license. A hearing, if held, shall be before the department in the county in which the arrest occurred, unless the department and the person agree that the hearing may be held in some other county. The hearing shall be documented and its scope shall cover the issues of whether a peace officer had reasonable grounds to believe the person

to have been operating a motor vehicle in violation of section 41-6-44, whether the person refused to submit to the test, and the test results, if any. In connection with a hearing the department or its duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers. One or more members of the department may conduct the hearing, and any decision made after a hearing before any number of the members of the department shall be as valid as if made after a hearing before the full membership of the department. After the hearing, the department shall order, either that the person's license or privilege to drive be suspended or that it not be suspended. A first suspension, whether ordered or not challenged under this subsection, shall be for a period of 90 days, beginning on the 31st day after the date of the arrest. A second or subsequent suspension under this subsection shall be for a period of 120 days, beginning on the 31st day after the date of arrest. The department shall assess against a person, in addition to any fee imposed under subsection 41-2-8(7), a fee of \$25, which must be paid before the person's driving privilege is reinstated, to cover administrative costs, and which fee shall be cancelled if the person obtains an unappealed department-hearing or court decision that the suspension was not proper. A person whose license has been suspended by the department under this subsection may file a petition within 30 days after the suspension for a hearing in the matter which, if held, shall be governed by the provisions of section 41-2-20.

History: C. 1953, 41-2-19.6, enacted by L. 1983, ch. 99, § 6.

41-2-20. Judicial review of license cancellation, revocation or suspension — Scope of review. Any person denied a license or whose license has been canceled, suspended or revoked by the department except where such cancellation or revocation is mandatory under the provisions of this act unless the suspension occurred pursuant to section 41-2-19.6 shall have the right to file a petition within thirty days thereafter for a hearing in the matter in a court of record in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon ten days' written notice to the department; and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to cancellation, suspension or revocation of license under the provisions of this act. The court's jurisdiction is limited to a review of the record to determine whether or not the department's decision was arbitrary or capricious.

History: L. 1933, ch. 45, § 20; 1935, ch. 47, § 2; C. 1943, 57-4-23; L. 1983, ch. 99, § 7.

41-2-21. New license after revocation. (1) Any person whose license has been revoked under this act shall not be entitled to apply for or receive any new license until the expiration of one year from the date such former license was revoked or longer as provided in sections 41-2-18 and 41-2-19. Licenses which have been revoked may not be renewed, but application for a new license must be filed as provided in section 41-2-8, and a license so issued shall be subject to all of the provisions of an original license. The department shall not grant the license until an investigation of the character, abilities and habits of the driver has been made to indicate whether it will be safe to again grant him the privilege of using the highways.

(2) Any resident or nonresident whose operator's or ~~chauffeur's~~ license to operate a motor vehicle in this state has been suspended or revoked as provided in this

act shall not operate a motor vehicle in this state under a license, permit, or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and as permitted under this act.

History: L. 1933, ch. 45, § 21; 1935, ch. 47, § 2; 1941, ch. 51, § 2; C. 1943, 57-4-24; L. 1967, ch. 82, § 12; 1983, ch. 183, § 23.

41-2-22. Owner liable for negligence of minor.

Actions by automobile owner against third party.

The negligence of the minor is not imputed to the automobile owner and this section does not provide a third party a statutory

shield against actions brought by the automobile owner against third parties for damage to the owner's automobile; comparative negligence statutes do not change such rule. *Otto v. Leany* (1981) 635 P 2d 410.

41-2-23. Violation of license provisions. It shall be unlawful for any person to commit any of the following acts:

First: (1) To display or cause or permit to be displayed or to have in possession any operator's ~~or chauffeur's~~ license knowing the same to be fictitious or to have been canceled, revoked, suspended or altered;

Second: (2) To lend to, or knowingly permit the use of, by one not entitled thereto, any operator's ~~or chauffeur's~~ license issued to the person so lending or permitting the use thereof;

Third: (3) To display or to represent as one's own any operator's ~~or chauffeur's~~ license not issued to the person so displaying the same;

Fourth: (4) To fail or refuse to surrender to the department upon demand, any operator's ~~or chauffeur's~~ license which has been suspended, canceled or revoked as provided by law;

Fifth: (5) To use a false or fictitious name or give a false or fictitious address in any application for an operator's ~~or chauffeur's~~ license, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application.

History: L. 1933, ch. 45, § 24; C. 1943, 57-4-27; L. 1983, ch. 183, § 24.

41-2-23.5. Confiscation of licenses, plates, and registration cards — Contracts with law enforcement agencies for pick-up orders — Additional fee to cover costs. (1) The department is hereby authorized to enter into contractual agreements with constables or other law enforcement agencies for the purpose of facilitating confiscation of operator's and chauffeur's licenses, license or registration plates, and registration cards when a person fails or refuses to surrender any of those documents to the department upon demand.

(2) The department shall assess against a person making an application referred to in subsection 41-2-8(7), in addition to any fee imposed under subsection 41-2-8(7), a fee of \$25, which must be paid before the person's driving privilege is reinstated, to cover the costs required to serve orders related to the purposes of subsection (1).

History: C. 1953, 41-2-23.5, enacted by L. 1983, ch. 191, § 1.

Title of Act.

An act relating to motor vehicles; authorizing the department of public safety to enter

into contractual agreements with law enforcement agencies for the purpose of facilitating confiscation of license-privilege indicia; and providing an effective date.

~~(h)~~ (8) A peace officer may, without a warrant, arrest a person for a violation of this section when ~~such~~ the violation is coupled with an accident or collision in which ~~such~~ the person is involved and when ~~such~~ the violation has, in fact, been committed, although not in his presence, if the officer has reasonable cause to believe that the violation was committed by ~~such~~ the person.

~~(i)~~ (9) The department of public safety shall ~~revoke~~ suspend for a period of 90 days the operator's ~~or chauffeur's~~ license of any person convicted for the first time under subsection (1) of this section, and shall revoke for one year the license of any person otherwise convicted under this section, except that the department may subtract from any suspension period the number of days for which a license was previously suspended under section 41-2-19.6 if the previous suspension was based on the same occurrence which the record of conviction is based upon.

History: L. 1941, ch. 52, § 34, C 1943, 57-7-111, L. 1949, ch. 65, § 1, 1957, ch. 75, § 1, 1967, ch. 88, § 2; 1969, ch. 107, § 2; 1977, ch. 268, § 3; 1979, ch. 243, § 1, 1981, ch. 63, § 2, 1982, ch. 46, § 1, 1983, ch. 99, § 13; 1983, ch. 103, § 1; 1983, ch. 183, § 33.

Compiler's Notes.

Laws 1983, ch. 183, discontinuing separate classification for chauffeur's license, is effective January 1, 1984

The 1982 amendment increased the minimum term in subsec (d) from 30 to 60 days, deleted "not less than \$100 nor more than" before "\$299" in subsec (d), inserted subsec (e), redesignated former subsec (e) as (f), increased the period of work from not less than two nor more than 10 days to not less

than 10 nor more than 30 days in the first sentence of subsec. (f), added "or to obtain treatment at an alcohol rehabilitation facility" to the first sentence of subsec (f), increased the periods in the second sentence of subsec. (f) from not less than 10 nor more than 30 days to not less than 30 nor more than 90 days, added "plus obtain treatment at an alcohol rehabilitation facility" to the second sentence of subsec (f), inserted subsec. (g), redesignated former subsecs (f) and (g) as (h) and (i)

Effective Date.

Section 2 of Laws 1982, ch. 46 provided that the act should take effect upon approval Approved February 19, 1982

41-6-44.2. Repealed.

Repeal.

Section 41-6-44.2 (L. 1973, ch. 80, § 2; 1982 (2nd S.S.), ch. 4, § 2), relating to driving with

blood alcohol content of 10% or higher, was repealed by Laws 1983, ch. 99, § 21.

41-6-44.3. Standards for chemical breath analysis — Evidence. (1) The commissioner of public safety shall establish standards for the administration and interpretation of chemical analysis of a person's breath including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or driving with a blood alcohol content of 10% or greater statutorily prohibited, documents offered as memoranda or records of acts, conditions or events to prove that the analysis was made and accuracy of the instrument were made pursuant to used was accurate, according to standards established in subsection (1) shall be admissible if:

(a) The judge finds that they were made in the regular course of the investigation at or about the time of the act, condition or event; and

(b) The source of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness.

(3) If the judge finds that the standards established under subsection (1) and the provisions conditions of subsection (2) have been met, there ~~shall be~~ is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

History: C. 1953, 41-6-44.3, enacted by L. 1979, ch. 243, § 2; L. 1983, ch. 99, § 14.