

1978

John A. Beck v. S. Tony Cox : Brief of Appellant

Utah Supreme Court

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Robert B. Hansen; Attorney for Defendant and Respondent;

David E. Littlefield; Attorney for Plaintiff and Appellant;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

JOHN A. BECK,

Plaintiff
and Appellant,

v.

TONY COX, Director
Drivers License
Division of the
State of Utah,

Defendant
and Respondent.

* * * * *

APPELLANT'S BRIEF

Appeal From the
Of The Third Judicial District
For Salt Lake County
The Honorable Peter F. [illegible]

* * * * *

DAVID
LIT
Attorney
Appellant
Salt Lake City
(801) 571-1111

ROBERT B. HANSEN
Attorney General
BRUCE M. HALE
Assistant Attorney General
236 State Capitol Building
Utah State
Salt Lake City, Utah 84114

Attorney for Defendant
and Respondent.

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JUN 1981

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

| | | |
|--------------------|---|-------------------|
| JOHN A. BECK, |) | |
| |) | |
| Plaintiff |) | |
| and Appellant, |) | APPELLANT'S BRIEF |
| |) | ON APPEAL |
| v. |) | |
| |) | |
| TONY COX, Director |) | |
| Drivers License |) | |
| Division of the |) | Case No. 15795 |
| State of Utah, |) | |
| |) | |
| Defendant |) | |
| and Respondent. |) | |

* * * * *

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Order of the Third Judicial District Court In And For Salt Lake County, State of Utah, the HONORABLE PETER F. LEARY, Judge presiding. As a result of a trial held on March 7, 1978, the Court found that the Appellant refused to submit to a chemical test pursuant to Section 41-6-44.10, Utah Code Annotated, (1953, as amended). (Record, 23-24). The case was heard by the Court without a jury.

The issue on appeal involves the interpretation of Section 41-6-44.10, as amended by the 1977 Utah State Legislature.

DISPOSITION OF THE LOWER COURT

The Third Judicial District Court after non-jury trial entered an Order upholding the decision of the Drivers License Division that Appellant refused to submit to a chemical test, resulting in a revocation of his driver's license. The trial was held pursuant to Section 41-6-44.10, Utah Code Annotated, (1953, as amended), authorizing a de novo review of the findings of the Department of Motor Vehicles.

NATURE OF RELIEF SOUGHT ON APPEAL

The Appellant seeks a reversal of the Third Judicial District Court decision, and a permanent reinstatement of his driving privileges.

STATEMENT OF FACTS

On December 8, 1977, John Beck and his wife were at Little America Restaurant for the purpose of having dinner. (Record, 31). They discovered that they had left their checkbook at the motel where they were staying on North West Temple. Appellant left his wife at the restaurant and went to get the checkbook. (Record, 32).

At approximately the intersection of Second South and Third West, Salt Lake City, Utah, he was pulled over by police officers. (Record, 32, 46-67). Officer Mark, the arresting officer, observed the automobile making a right hand turn and not returning to the right hand lane of traffic. (Record, 46-47). He also observed him holding onto the door of his car, apparently for support, and smelled an odor of alcohol. (Record, 53). Officer Mark also believed that Mr. Beck's speech was slurred, but later admitted that Mr. Beck speaks like that all of the time. (Record, 54).

Field sobriety tests were administered. The record contains no evidence that the results of that test indicated

a state of intoxication. (Record, 18-19, 47-48). Nevertheless, he was placed under arrest for driving under the influence of alcohol. (Record, 12, 48-49).

Upon being placed under arrest, Mr. Beck was very upset and hostile. (Record, 34, 50-51). Officer Mark asked him if he would submit to a test. His rights were read to him. Mr. Beck replied "I'm a criminal; yeah, yeah, yeah, I'm a criminal." When asked if he wanted to take the test, Mr. Beck replied, "I don't know." (Record 36, 49-50).

Officer Mark testified that he asked Mr. Beck to submit to a breathalyzer test on these occasions before arriving at the jail, and one time at the jail. (Record, 50). He testified that he read the statutory warning once and explained, "the implied consent statute" to Mr. Beck in his own words twice. (Record, 50). On at least two (2) occasions, Mr. Beck replied, "I don't know", and the other times said nothing. (Record, 34, 50).

At no time was Mr. Beck taken to the breathalyzer machine for the purpose of administering the test. (Record, 36, 50).

Mr. Beck testified that he was upset at the officers for arresting him, but at no time intended not to take the test. He believed the test would be administered after being booked into jail. (Record, 36, 38). He told the woman at the

booking desk that he had not yet had a breath test and advised Larry Bench of Pre-trial Services of the same fact. (Record, 36-37, 57-58).

Mr. Beck has just moved to Utah, having lived in the State of California for Twenty-three (23) years. He believed, based upon publicity and talking to friends in the State of California, that the tests were to be administered by a chemist at booking. He believed that a refusal to take such a test would be signified by signing a statement of refusal. (Record, 37,38). He became uncooperative with the officers after feeling he had passed the field sobriety tests, but nevertheless being arrested. (Record, 40). He believed that he would be given the test and that he could make the determination to take it after he arrived at the jail. (Record, 44).

Larry Bench interviewed Mr. Beck shortly after his arrival at the jail. (Record, 36-37, 59-60). Mr. Beck mentioned the breathalyzer to Mr. Bench on several occasions, expressing disbelief that he could be charged with drunk driving without having taken a breathalyzer test. (Record, 57). Mr. Bench had no reason to believe that Mr. Beck was refusing to take a breathalyzer test. Mr. Beck initiated

each conversation regarding the breath test. (Record, 37, 58).

ARGUMENT

POINT I

APPELLANT CONSENTED TO A CHEMICAL TEST BY OPERATION OF LAW

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

"(a) Any person operating a motor vehicle in this state shall *be deemed to have given his consent* to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was driving or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, or combination of alcohol and any drug, and provided that such test is or tests are administered at the direction of a peace officer having grounds to believe such person to have been driving or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, or combination of alcohol and any drug...." (Italics added).

Clearly under Utah law, a valid consent to a chemical

test exists solely by virtue of the operation of a motor vehicle by the individual within this State. No further consent need legally be given, and a test may be administered based upon the "Implied Consent Law" unless that implied consent is specifically revoked. Hyde v. Dorius, 549 P.2d 451 (1976).

POINT II

APPELLANT DID NOT EXPRESSLY REFUSE TO SUBMIT TO A CHEMICAL TEST, THUS REVOKING THE LEGALLY OPERATIVE CONSENT AND MAKING APPLICABLE THE FURTHER PROVISIONS OF SECTION 41-6-44.10 (b)

Section 41-6-44.10(b) provides:

"If such person has been placed under arrest and has thereafter been requested by a peace officer to submit to any one or more of the chemical tests provided for in sub-section (a) of this section and *refuses to submit to such chemical test or tests*, such person shall be warned by a peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of his license to operate a motor vehicle. Following this warning, unless such person immediately requests the chemical test or tests *as offered by a peace officer* be administered, no test shall be given...." (italics supplied).

A condition precedent to the operation of the warning provisions of the statute and that the person request a test is a refusal to such

chemical test, the rest of the section is not applicable.

This Court has clearly set forth the requirements of a refusal in Hyde v. Dorius, *supra*. Hyde was arrested for driving under the influence and, when asked to submit to a chemical test, replied that she wouldn't listen and that the police did not know what they were talking about. A period of approximately five (5) minutes elapsed between her arrest and her alleged refusal. This Court, recognizing the efficacy of the implied consent statute, stated:

"Under the circumstances here, four or five minutes is not a reasonable time within which to expect a *assentient consent or refusal*; particularly when the Court found that, at the scene, Plaintiff was upset, irritated and scared as a result of the accident and accompanying events." (*italics added*). 549 P.2d at 452.

In this case, the record shows that Appellant was irritated, upset and hostile as a result of having to interrupt his dinner with his wife, leave her at the restaurant, and return to the motel to get their checkbook, and having been arrested en route to the motel when he felt that it was unjustified. Appellant's words and conduct clearly indicate an uncertainty and can by no means be construed to be an express refusal. The record shows no indication that Officer Mark advised the Appellant that he considered his

silence or uncertainty to be a refusal. The Appellant believed that he had the right to make a final determination at the jail to the chemist and, that a refusal, if given, would have to be expressed by him in writing.

The determinative statement by this Court on the issue of refusal is still that which was set forth in Hyde v. Dorius, *supra*. There, the Court adopted the language of the Idaho Supreme Court in State v. Bock, 328 P.2d 1065 (Idaho, 1958):

"By operating a motor vehicle in this state the defendant is 'deemed to have given his consent to a chemical test.' The only way that he can withdraw that consent is to expressly refuse the test. So under our law if he neither refuses nor consents, expressly, the test may be made." 328 P.2d at 1072-73

This Court also cited Idaho law in Hyde v. Dorius, *supra*, for the purpose of determining what constitutes express refusal. Mills v. Swanson, 460 P.2d 704 (Idaho, 1969) involved a situation where Swanson had remained silent when requested to take the test. The Trial Court found that silence was insufficient to constitute a refusal, and the Idaho Supreme Court affirmed. The Court concluded,

"In the case at bar, the respondent did not at any time expressly refuse to take the test. Expressly means indirect or unmistakable terms. Expressly means declared and not merely left to implication. Thus where an individual has neither refused or consented, but for some reason within the discretion of the officer, the test is not administered, it cannot be said that there was an express refusal to take the test. 460 P.2d at 705 (citations omitted).

It was clearly by implication only that Officer Mark concluded that Mr. Beck refused to take the test. At no time was the test physically offered to the Appellant. In addition, Mr. Beck had a misunderstanding of Utah law, relating to the administration of the chemical test and the manner of an actual refusal. All of this occurred within a short period of time. Hunter v. Dorius, 23 Utah 2d 122, 458 P.2d 877 (1969) recognized that an individual has a "reasonable length of time in which to make up his mind" and to consult counsel.

The 1977 Amendment to the Statute provides that there shall be no right to consult an attorney "for the purpose of determining whether to submit to a chemical test or tests." 41-6-44.10(g), Utah Code Annotated, (1953, as amended). The Statute on its face, thus contemplates a deter-

mination whether to submit. It does not require the determination to be immediate or without contemplation. Sub-section (b) of the Statute does require an immediate request by the accused to take the test but *only in the event of a preceeding refusal*. No such refusal is present in this case.

The holdings of Gassman v. Dorius, 543 P.2d 197 (1975) and Elliott v. Dorius, 557 P.2d 759 (1976) show that a subjective understanding of the situation by the accused person is necessary to justify a finding of refusal. Gassman held that warning given approximately an hour and fifteen minutes prior to the officer's request for the test did not comply with the Statute. Elliott held that a contemporaneous warning did comply. The only logical assumption from these two cases is that the Court recognized the importance of a subjective understanding of the situation by the accused as a basis for finding a refusal.

The Court below specifically found that Appellant had a misconception regarding the law. (Record, 23-24). In Calver v. State, 519 P.2d 341 (Colo. 1974), the Colorado Supreme Court, interpreting Statute similar to Utah's, held that a refusal to take a chemical test based upon a mis-

understanding is not a refusal within the statutory meeting, and, therefore, no basis for revocation. See also West v. DMV, 80 Cal. Reprtr. 385 (1969). Thus, even an express refusal may be invalidated because of a misunderstanding. Where, as in the instant case, the presence of a refusal is open to conjecture, the presence of a misunderstanding becomes even more important.

Clearly, because of the implied consent law, the Appellant's consent existed at least until the time of his arrest. After booking, his conduct and words indicated that the consent was not revoked, since he inquired about the breathalyzer test. The period between the arrest and booking shows no verbal refusal, and at the most, shows uncertainty over whether or not to submit.

The 1977 Amendment did nothing to alter the law with regard to what constitutes a refusal. Therefore, the holding of Hyde v. Dorius, *supra*, is controlling.

CONCLUSION

The Court below erred in finding that Appellant refused to submit to a chemical test and in affirming the revocation of his driver's license. The implied consent

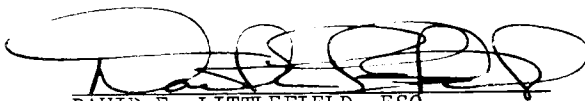
was never revoked and the test should have been administered. Even if an actual refusal had been made, based upon a material misconception, it is invalid.

The decision of the Third Judicial District Court should be reversed.

Dated this 28 day of June, 1978.

Respectfully submitted,

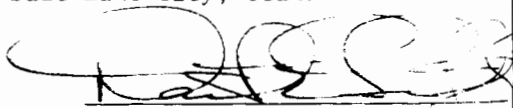
LITTLEFIELD, RITCHEY & COOK

A large, stylized handwritten signature in black ink, appearing to read 'David E. Littlefield', is written over a horizontal line.

DAVID E. LITTLEFIELD, ESQ.
Attorney for Plaintiff and
Appellant.

CERTIFICATE OF DELIVERY

I hereby certify that I delivered two (2), true and correct copies of the foregoing Brief, this the 28th day of June, 1978, to Robert B. Hansen, Attorney General and Bruce M. Hale, Assistant Attorney General, 236 Utah State Capitol Building, Salt Lake City, Utah.

A handwritten signature in dark ink, appearing to be "K. S. [unclear]", is written over a horizontal line.