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John A. Beck v. S. Tony Cox : Brief of Respondent on Appeal

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

JOHN A BECK,)
)
Plaintiff)
and Appellant,)
)
-v-)
)
S. TONY COX, Director,)
Drivers License Division,)
Dept. of Public Safety,)
State of Utah,)
)
Defendant)
and Respondent.)

Case Number:
15795

* * * * *

RESPONDENT'S BRIEF ON APPEAL

Appeal From An Order
Of The Third Judicial District Court
For Salt Lake County, State of Utah
The Honorable Peter F. Leary, President

* * * * *

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

JOHN A BECK,)	
)	
Plaintiff)	
and Appellant,)	
)	RESPONDENT'S BRIEF
-v-)	ON APPEAL
)	
S. TONY COX, Director,)	
Drivers License Division,)	
Dept. of Public Safety,)	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 de novo held on March 7, 1978, the Trial Court found that the Appellant unreasonably 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 seems to involve the legal 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 a 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 de novo was held pursuant to Section 41-6-44.10, Utah Code Annotated, (1953), as amended.

NATURE OF RELIEF SOUGHT ON APPEAL

The Respondent seeks an affirmation of the Third Judicial District Court's decision.

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, swerve in a jerky fashion and did not return to the right hand lane of traffic but straddle a

white lane-dividing line. (Record, 46-47). He also testified that he had to hold the door of his car, apparently for support, and also that he smelled an odor of alcohol from the Appellant's person. (Record, 53).

Field sobriety tests were administered. The testimony was that the heel to toe test was not performed as requested. (Record, 48). After observing Mr. Beck and his performance of all of the field sobriety tests, Officer Mark formed his opinion that Mr. Beck had been driving under the influence of alcohol. (Record, 54). Officer Mark then arrested Mr. Beck for driving under the influence of intoxicants. (Record, 54).

Officer Mark read verbatim from his card one time explaining the Utah Implied Consent Law and on two other occasions explained it to Mr. Beck. (Record, 54). Each of the three times testified to Mr. Beck was warned of the consequences of a refusal. (Record, 55). Mr. Beck was requested to submit to a chemical test on three different occasions before he and Officer Mark arrived at the jail and once while at the jail. (Record, 50). Mr. Beck responded, "I don't know" when asked the first two times and refused to answer the third and fourth requests. (Record, 50). Mr. Beck at no time requested the test. (Record, 55).

At the jail, the officer asked the Appellant to take a chemical test for the fourth time, and filled out the refusal form. (Record, 50-52).

ARGUMENT

POINT I

APPELLANT'S RESPONSES AND REFUSALS TO ANSWER WHEN REQUESTED TO SUBMIT TO A CHEMICAL TEST CONSTITUTED A REFUSAL UNDER THE IMPLIED CONSENT LAW

"Actions" or "inaction" and/or "spoken words" or "muteness" under the circumstances can constitute a refusal to submit to a chemical test. To hold otherwise would mean that all unsafe motorists could escape the consequences of the civil implied consent law by merely refusing to speak and/or act.

Lampman v. Department of Motor Vehicles, 28 Cal. App. 3d 922, 105 Cal. Rptr. 101, is almost directly on point with this case. In Lampman, the officer explained the implied consent law to the motorist and requested her on four different occasions to submit to a chemical test. Each time she remained mute and failed to respond in any way to the requests. The test was never "physically" offered. The Court, after quoting a case where the motorist replied "I'm not even going to give you an answer" held that the motorists silence after the four requests

indicated the same and constituted a refusal. In answering the motorist's contention that the officer should have attempted to administer the test in order to find out if her silence meant refusal in fact, the Court declared, "we discern no substance to this phantom suggestion" and went on to explain why.

In McKenzie v. Bureau of Motor Vehicles, 37 Ohio Misc. 24, 306 N.E. 2d 197, the Court held that the motorist's muteness when requested to submit to a chemical test constituted a refusal. The Court also held that lack of intelligence or language skill was no defense. See also State, Department of Motor Vehicles v. Riba, 10 Wash. App. 857, 520 P. 2d 942, where the Court held that the motorist's silence, under the circumstances, constituted a refusal.

Appellant cites Hyde v. Dorius, 549 P. 2d 451 (Utah 1976), (under the old statute), asserting that a refusal must be express. In Hyde, the arrest took place at 9:45 a.m. and the alleged refusal at 9:50 a.m. After noting that plaintiff was extremely upset and that "probable cause" for the arrest was awfully suspect, the Court stated that "under the circumstances here, four or five minutes is not a reasonable time within which to expect a sentient consent or refusal." This case is clearly distinguishable on its facts. In the case at

bar, the officer and Appellant were together thirty to

forty minutes, certainly a reasonable length of time within which to make a decision to submit or not. (Record, 55).

This Court, along with every other Court who has considered the question of what constitutes a refusal, has acknowledged the obvious and practical reality that a refusal need not be in words. The officer, and the Trial Court reasonably interpreted the silence (subsequent to words showing he was listening) to be an express refusal just as if Appellant had said "no".

Appellant cites Mills v. Swanson, 93 Idaho 279, 460 P. 2d 704, for the proposition that silence is insufficient to constitute a refusal. That Court held silence to be insufficient on the facts since the motorist was bleeding, had lost some teeth, sustained head injuries and a fractured periosteum, and the arresting officer admitted that the motorist could have been dazed. These facts are clearly distinguishable from those in the case at

POINT II

APPELLANT'S ALLEGED MISCONCEPTIONS WERE NOT INDUCED BY THE OFFICER NOR WERE THEY MADE KNOWN TO HIM; THEREFORE, THOSE ALLEGED MISCONCEPTIONS CANNOT BE A DEFENSE

Elliot v. Dorius, 557 P. 2d 759 (Utah 1976), and Gassman v. Dorius, 543 P. 2d 197 (Utah 1975), cited by

Appellant, do not stand for the proposition that the

"secret" intentions or misconceptions of the motorist are to be considered on the issue of "refusal". Elliot held that plaintiff's demand for a blood test, after being informed that it was not available locally, constituted a refusal and further held that a contemporaneous advising of rights, designation of test, and refusal sufficiently complied with statutory requirements. In Gassman, this Court affirmed the Trial Court's finding that the arresting officer and the motorist had agreed to the taking of a blood test and that the officer refused thereafter to participate pursuant to their agreement. While these two cases look objectively to the facts and circumstances to see if the refusal was reasonable or not, they do not stand for the proposition that the subjective and secret thoughts of the appellant are to be considered.

The main requirements of the officer under the Utah Implied Consent Law, Utah Code Annotated, 41-6-44.10, (1953), as amended, are that he request the motorist to submit to a chemical test and that he explain the consequences of a refusal. No other explanations are required by the law.

Case law seems unanimous in holding that misunderstandings or misconceptions on the motorist's part are no defense to a refusal unless the officer has created

manifested to the officer and he should, and could then, attempt to dispel it. Absent this "objective confusion" the officer has no affirmative duty to explain further, for obvious reasons.

In Jones v. Department of Motor Vehicles, 71 Cal. App. 3d 615, 139 Cal. Rptr. 734, an out-of-state motorist claimed that California's implied consent law is confusing per se to an out-of-state driver and that his misconception about an out-of-state exemption was honest and reasonable and could be a defense. The Court held that the California law was not confusing per se to an out-of-stater. The Court further held that since the officer had not induced the misconception nor was the misconception objectively manifested to the officer, the second defense was also meritless.

The Court in Hatten v. Department of Motor Vehicles, 15 Wash. App. 656, 551 P. 2d 145, quoted itself while speaking to defense of "confusion on the motorist's part".

When a driver clearly exhibits that he is confused or does not understand the information directed by RCW 46.20.308 to be given him by the officer, then the officer is required to further clarify the driver's alternative and the consequences of electing one or the other. Under these circumstances, when clarification is not provided, the license of the driver may not be revoked on the ground that he refused the breathalyzer test. The burden of showing that he made his confusion apparent to the officer and was denied

further clarification is upon the driver who proposes such a defense. When such a defense is presented, a finding as to whether or not the defendant explicitly exhibited his lack of understanding and was denied clarification must be entered. (Emphasis added).

For other cases holding that "silent" misunderstandings or misconceptions are not a valid defense to a refusal see Lampman, supra; Massaro v. Dolan, 535 P. 2d 1135 (Colo Ct. App. 1975); McKenzie, supra; Shoemaker v. State, Department of Motor Vehicles, 11 Wash. App. 860, 526 P. 2d 908; Department of Motor Vehicles v. Riba, supra.

In this case, there is no evidence whatsoever indicating either that the officer mislead Appellant or that the alleged "misconceptions" on Appellant's part were objectively manifested to the officer. The fact that Appellant's alleged misconceptions may have been manifested to one other than the officer, after the officer considered the silence to be a refusal, is irrelevant and inconsequential insofar as the refusal is concerned.

The case law above holds that the burden is on Appellant to establish that he manifested his misconceptions to the officer. The officer was not required to explain the "niceties" of the law or the procedures to be followed unless questioned. A motorist has no

right to "silently" speculate as to when and where the test is to be administered, when the last point in time to submit is, how one refuses, etc. The law and policy cannot tolerate such conduct.

As indicated earlier, the law is not confusing per se and an out-of-state motorist cannot rely on the law of his home state but must be deemed to know the law of the jurisdiction he chooses to enter. The cases seem to hold that a motorist who has a misconception or who is "not sure" about law or procedure has the burden of inquiring and cannot just sit back and refuse to respond or inquire.

Appellant cites both Calvert v. State Department of Revenue, Motor Vehicle Division, 519 P. 2d 341 (Colo. 1974) and West v. Department of Motor Vehicles, App. 80 Cal. Rptr. 385, to support his argument that a misunderstanding can invalidate a refusal. Both cases are easily distinguishable since Calvert involved officer-induced confusion and West involved an objectively manifested confusion that the officer failed to dispel.

POINT III

THE ISSUES INVOLVING "REFUSAL" AND "MISCONCEPTION" ARE QUESTIONS FOR THE TRIER OF FACT. THE TRIAL COURT'S FINDINGS SHOULD NOT BE REVERSED SINCE THEY ARE SUPPORTED BY THE EVIDENCE.

The evidence adduced at trial is clearly sufficient to support the Trial Court's finding that Appellant refused to submit to a chemical test.

Appellant had sufficient time to make a sentient decision to submit or not. (Record, 55). Officer Mark read verbatim his card explaining the implied consent law to Appellant and on two other occasions explained it to him. (Record, 54). Each time (three) Appellant was warned of the consequences of a refusal. (Record, 55). Appellant was requested to submit to a chemical test on three different occasions before he and the officer arrived at the jail and was then requested to submit once while at the jail. (Record, 50). Appellant responded, "I don't know" when asked the first two times and refused to answer when asked the third and fourth times. (Record, 50).

Appellant at no time requested the officer to give him a chemical test. (Record, 55). Officer Mark stayed at the jail long enough to request Appellant to submit to a test for the fourth time and to fill out the refusal form. (Record, 50-52).

Both the officer and the Trial Court considered Appellant's refusal to respond to the officer's requests to be a refusal. Appellant was warned of the consequences three different times and failed to "immediately thereafter request the test" as required by the new statute. The

Trial Judge could properly find that the officer certainly wasn't aware of Appellant's thoughts and intentions and could not be expected to do or say anything more than what he did.

The issues of "refusal" and confusion" are to be looked at objectively from a reasonable person's point of view. They are questions of fact to be decided by the trier of fact.

The Trial Judge is in a position to observe the testimony first hand, the demeanor of the witnesses, etc. He can get the most "accurate" and "just" feeling for the evidence. This Court in Gassman, supra, stated that, "Each case is based on its own facts, and we do not reverse the Trial Judge unless he clearly does violence to the facts as they relate to his findings."

The Arizona Supreme Court in Campbell v. Superior Court, 106 Ariz. 542, 479 P. 2d 685, indicated how a non-verbal refusal is to be ascertained.

It is the opinion of this Court that a refusal to submit to the test occurs where the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and manifested an unwillingness to submit to the test.

That Court recognized that the issue of "refusal" is

for the trier of fact. State Department of Public

Safety v. Stravaas, 227 N.W. 2d 819 (Minn. 1975), stated that the issues surrounding an alleged "misconception" are for the trier of fact. For other cases holding that the "refusal" and "confusion" issues are for the trier of fact and should not easily be disturbed on appeal see Hatten, supra; Kauffman v. Motor Vehicle Division, 500 P. 2d 473 (Or. App. 1972).

The evidence establishing a refusal is substantial and certainly sufficient to support the Trial Court's decision. The record is devoid of any evidence supporting Appellant's defense of misunderstanding. The discussions Appellant had with "others" after the officer left are irrelevant.

The finding of "refusal" should only be reversed if this Court decides as a matter of law that a refusal to speak or otherwise respond to a request to submit to a chemical test, under any circumstances, cannot constitute a refusal. Such a legal conclusion would ignore reality and practicality in reasonably applying Utah's Implied Consent Law and would expose the public to greater danger on the highways.

CONCLUSION

Case law recognizes that a refusal to speak when requested to submit to a chemical test can constitute

a refusal just as if the motorist said "no".

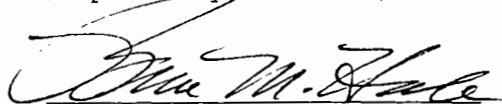
By his semi-muteness, when requested to submit to a chemical test, Appellant did expressly refuse.

Under the facts of this case, the law does not recognize Appellant's alleged misconceptions, whether true in fact or not, as a defense to his refusal.

The Trial Court's finding that Appellant refused to submit to a chemical test involves issues of fact, for the trier of fact, and should not be reversed as there is substantial evidence in the record supporting that finding.

DATED this 27th day of July, 1978.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Bruce M. Hale", written over a horizontal line.

BRUCE M. HALE
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief to David E. Littlefield, Attorney for Plaintiff and Appellant, Suite 707 Boston Building, Salt Lake City, Utah 84111, on this ____ day of July, 1978.
