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State of Utah v. Tallie Lee Cavaness : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent, :

vs. :

Case No. 15801

TALLIE LEE CAVANESS, :

Defendant and Appellant.

APPELLANT'S BRIEF

Appeal from the judgment of
the Third Judicial District for Salt Lake County
Honorable Jay Banks

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STATEMENT OF KIND OF CASE

This is an appeal from a trial de novo hearing in Third District Court from a finding of the Utah Department of Public Safety, Driver's License Division Hearing that the Appellant unreasonably refused to submit to a chemical test under Utah's implied consent statute.

DISPOSITION IN LOWER COURT

Judge Jay Banks of the Third District Court found that the requirements of Utah's implied consent law had been met, and that the Appellant had wrongfully refused a chemical test pursuant thereto and revoked Appellant's Driver's License for one year.

RELIEF SOUGHT ON APPEAL

Appellant challenges the constitutionality of the implied consent law which purports to deny a right to counsel to the accused and challenges the factual finding of the judgment in lower court and seeks the reinstatement of his driver's license.

FACTS

On October 8, 1977, at approximately 3:34 a.m., a Salt Lake City Police Officer, Henry B. Huish, stopped the Appellant in an alley outside of his apartment for a minor traffic violation (T-39,40,47). At trial, the officer (T-39) testified that over the next few minutes he detected the odor of alcohol (T-43); that Appellant had mumbled and slurred speech (T-42,43); had hand coordination problems (T-43); and admitted

to having had two beers earlier (T-42). After concluding that the Appellant was under the influence of alcohol, the officer placed the Appellant under arrest for exhibition driving and driving under the influence of alcohol. He then asked the Appellant to take some field sobriety tests which were refused. (T-43,66,67,71).

During the period of time after the officer pulled the Appellant over, and prior to arresting him, the officer made the Appellant sit in his car for fifteen minutes (T-47) to a half an hour (T-65). Such treatment aroused the anger of the Appellant, and he told the officer that he felt he was being treated unfairly, which angered the officer. (T-48,67,69,71,72,73).

Shortly after the arrest, Officer Huish requested the Appellant to take a breathalyzer test (T-45). The Appellant requested an opportunity to consult counsel in order to determine whether or not it was in his best interests to take a breath test or to refuse (T-51,T-67, T-68). The officer refused to let him call an attorney. Between the time of arrest and the time the officer marked the Appellant as a refusal, about 45 to 50 minutes had elapsed (T-47). The Appellant was aware of his attorney's whereabouts, his telephone number, and could have completed a call within ten minutes. He had left his attorney's home just prior to the arrest. (T-57,68,69).

After the arrest, the officer read to the Appellant the Miranda rights which included the right to consult counsel. At the jail, the officer allowed the Appellant an opportunity to read a card containing the implied consent law. That card did not inform the Appellant that he could not consult counsel. (T-68)

Herschel Bullen and Sandra McIntosh, character witnesses, stated that the Appellant's reputation in the community for truthfulness and veracity are excellent. (T-59,61).

I

SECTION 41-6-44.10 (g), UTAH CODE ANNOTATED (1953 as amended 1977) DEPRIVES THE PLAINTIFF OF HIS CONSTITUTIONALLY PROTECTED RIGHT AGAINST SELF INCRIMINATION AND HIS RIGHT TO COUNSEL UNDER THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF UTAH, BECAUSE 41-6-44.10 (h) RAISES THE PRE-TRIAL CONFRONTATION TO A "CRITICAL STAGE" OF THE PROCEEDINGS.

§41-6-44 Utah Code Annotated, provides that it is illegal to drive while under the influence of intoxicating beverages and provides certain presumptions which will be entertained by the Court regarding blood levels at the time of driving. In order to facilitate those presumptions, the Legislature then provides for a method of obtaining evidence as to blood alcohol levels. Those provisions are encompassed in §41-6-44.10 which provides the requirement to submit to chemical testing of breath, blood or urine to determine alcohol content. A refusal to submit when rightfully requested results in a suspension of driving privileges. Subsection (g) thereof states as follows:

For the purpose of determining whether to submit to a chemical test or tests, the person to be tested shall not have the right to consult an attorney nor shall such a person be permitted to have an attorney, physician or other person present as a condition for the taking of any test.

By that section, there is an attempt to subvert the right to counsel as guaranteed by the United States Constitution and the Constitution of the State of Utah.

In the case Of Gideon v. Wainwright, 372 U.S. 335 (1963), the United States Supreme Court held that the Sixth Amendment guarantee of

assistance of counsel was applicable to the states via the Fourteenth Amendment to the United State Constitution. Subsequently, the Supreme Court has extended that right. In United States v. Wade, 388 U.S. 218 (1967), the Court held that an accused does not have to stand alone against state prosecution at any stage of criminal prosecution, formal or informal, in court or out of court, if the absence of counsel might infringe upon his right to a fair trial. The Constitution of the State of Utah, Article I, Section 12, reads as follows:

In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel. . . the accused shall not be compelled to give evidence against himself; . . .

Furthermore, in civil proceedings, the Utah State Constitution provides in Article I, Section 11 as follows:

. . . No person shall be barred from prosecuting or defending before any tribunal in the state, by himself or counsel, any civil cause to which he is a party.

The language of Kirby v. Illinois, 406 U.S. 682 (1972), applying the principles that were being developed at that time, apply equally to civil cases such as ours. That case extended the right to those pre-trial confrontations wherein the presence of counsel,

. . . is necessary to preserve the defendant's right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." 388 U.S. at 277.

In other words, the ability to have a meaningful trial, civil or criminal, may be circumvented by pre-trial confrontation, wherein the accused is required to provide evidence to be used against him at trial. By the use of evidence that has been obtained in the absence of counsel, which with competent advice of counsel, would not have been

obtained, the police have been too often able to get convictions where none were deserved. In the case of Escobedo v. Illinois, 378 U.S. 478 (1974), the court illustrated the difficulty with the following language:

The rule sought by the state herein, however would make the trial no more than an appeal from the interrogations; and the right to use counsel at trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pre-trial examination. . . .

The Escobedo rationale is particularly apt under the current state of §41-6-44.10. Subsection (g) of that section exceeds the limits the State and Federal Constitutions permit the state to use because of the section that follows therein. §41-6-44.10 (h) reads as follows:

If a person under arrest refuses to submit to a chemical test or tests under the provisions of the section, evidence of a refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in the actual physical control of a motor vehicle while under the influence of alcohol or any drug or combination of alcohol and any drug.

As a result of subsection (h), a person charged with a crime is in fact compelled to give evidence against himself in a criminal proceeding no matter which choice he makes. The refusal hearing then becomes only a step in providing criminal evidence. (There is no legal compulsion to dismiss the criminal charges if the defendant is found to not have refused the chemical test).

Utah has recognized that pursuant to the section of the law at issue herein, an accused has a "right" to refuse the chemical test. If he does, and does so unreasonably, then he must suffer the consequences. Peterson v. Dorius, 547 P. 2d 693, Hunter v. Dorius, 23 U. 2d 122, 458 P. 2d 877, Moran v. Shaw, 580 P. 2d 241 (Ut. 1978). But under subsection (h) the choice becomes meaningless without the reasoned judgment of counsel to determine which alternative protects the suspect most effectively.

In denying a right to counsel in refusal hearing circumstances, some states have specifically indicated that the result of such hearings, expressly were not admissible in the pending criminal proceedings, they based their decisions, at least partly, on that dichotomy. Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (Va., 1969), State v. Dellvener, 128 Vt. 85, 258 A. 2d 834 (Vt., 1969), Stratikos v. Oregon Department of Motor Vehicles, 4 Ore. App. 313, 477 P. 2d 237 (Ore., 1970).

Other courts have used the fact that their laws, like Utah's, provide that said refusals are admissible in criminal procedures. State v. Welch, 376 A. 2d 351 (Vt., 1977); Siegwald v. Curry, 319 N.E. 2d 381 (Ohio, 1974) they extended the right to counsel in these cases.

In Utah, prior to the 1977 amendments which added subsections (g) and (h), the court has recognized the acceptability of access to an attorney in reaching the decision to submit to or refuse a chemical test. The court has not couched discussions of access to counsel in terms of constitutional rights, but rather in terms of reasonableness of a request to consult counsel. Peterson v. Dorius, *supra.*; Hunter v. Dorius, *supra.*; Moran v. Shaw, *supra.* In each case cited, an opportunity was given to the accused to call an attorney and subsequently a delay resulted in a refusal report. The Appellant has not found a case in Utah where the Court discussed the right to counsel in these circumstances and under the 1977 amendments which added subsections (g) and (h). Rather, the right to refuse was the basis for the privilege.

Various courts have extended access to counsel to involve situations where an administrative refusal hearing was the result of the police activity. In Ohio, the court has said that there is a constitutional right to consult counsel, but that right may be controlled by time

and circumstance. That is, there is a modified right. There, the court has extended a statute providing a right to counsel in criminal cases to include refusal situations. Siegwald v. Curry, supra.. The court there stated at p. 384:

Although the proceedings relative to the suspension of driving rights, for a failure to take a chemical test, and a prosecution for driving while under the influence are separate and distinct proceedings, the former being civil and the latter criminal, it is difficult to distinguish between the two proceedings up until there is a refusal to take a chemical test.

Consequently, the court there saw fit to extend the statutory right to counsel to include refusal situations. The court expressly emphasized the fact that there, as in Utah, the refusal could be used to support a criminal conviction. Id. at p. 385. See also: Troy v. Curry, 303 N.E. 2d 925 (Ohio, 1975).

In the case of People v. Gursey, 22 N.W. 2d 224, 292 N.Y.S. 416, 239 N.Y. 2d 351 (N.Y. Ct. of App., 1968), a criminal case, the court extended a modified right to consult counsel. There, as in our case, the accused knew the lawyer he wanted to call and was refused until after he took a chemical test. The court stated as follows:

"By these provision, defendant had the option to refuse to take the drunkenness test, electing instead to submit to the revocation of his license. . . . Of course, defendant was informed that he would lose his license if he refused to take the police administered test. Nevertheless, he wished legal counseling concerning his option and refused to submit to the test until his several requests to telephone his lawyer were denied. Granting defendant's request would not have substantially interfered with the investigative procedure, since the telephone call would have been concluded in a matter of minutes. At least, the record here does not indicate otherwise. Consequently, the denial of defendant's requests for an opportunity to telephone his lawyer must be deemed to have violated his privilege of his access to counsel. 239 N.E. 2d at p. 353.

The holding there was the same as that in an automobile homicide case which involved an implied consent statute in the State of Vermont.

State v. Welch, supra.. That court stated:

In view of the statutory provision of 23 VSA §1205 (a) protecting an operator's right to refuse to take any test, it seems clear that when a serious criminal case is involved, the request to submit to a chemical test can rise to the level of a "critical stage" in the proceedings. The choice whether to take the test will invariably affect the evidence that will be made available at trial, and the presumptions to be drawn from that evidence. The Implied Consent Law, therefore, by creating the statutory choice, has put the suspect operator in a situation where counsel could be of aid. It seems to us, then, that concern for the individual's rights requires that we recognize a limited right to counsel so that drivers may adequately evaluate their decision pursuant to the Implied Consent Law. Id. at p. 355.

The court made the request to take a chemical test and the choices therefrom a "critical stage" of the proceedings. Thereby they bring it to a level requiring right to counsel. U.S. v. Wade, 388 U.S. 281, 18 L. Ed. 2d 1149, 875 Ct. 1926 (1967). Also, because of the "right to refuse" the "critical stage" attaches as distinguished from the facts of Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S.Ct. 1826 (1966) where there was no "right to refuse" and no suggestion that a refusal would be used against the defendant.

In each instance cited in the Siegwald, Gursey and Welch cases they granted a limited right to consult counsel. In each instance they were sensitive to the needs of the police for a rapid completion of their procedures.

In People v. Gursey, supra. at p. 352, the court stated its limitations:

"The privilege of consulting with counsel concerning the exercise of legal rights to counsel however, extend so far as to palpably impair or nullify the statutory procedure requiring drivers to choose between taking the test or losing their license."

And in State v. Welch, supra. at p. 355, the court limited its ruling:

Therefore, the Court holds that police officials may not, without reason, deny access between an accused and his lawyer, when such access is requested and is readily available and will not interfere with investigation of the matter at hand.

While the Welch case and the Gursey case both involved the criminal case underlying the implied consent law, there is little to be accomplished by applying a different standard to refusal hearings where the results may be used in criminal prosecutions. Furthermore, in Siegwald v. Curry, supra., the Ohio court expressly avoided such a dichotomy. Comparing the Gursey case in New York with a case decided earlier, they avoided an unnecessary conflict.

The apparent New York result from these cases is that where a person, required to submit to a chemical test pursuant to the implied consent law, refuses to do so until he telephones his attorney, such person's driving rights are revoked even though the right to telephone the attorney is denied by the police. However, if, instead of refusing to submit to the test when denied the right to telephone his attorney, he submits to the test, the results of the test are not admissible into evidence against him. We cannot agree that such is, or should be the law of Ohio. Such a rule would encourage persons arrested for driving while intoxicated to immediately request the right to call an attorney, and, when denied the right to do so by the police, as the cases indicate appears to be the custom, to submit to the test, and have the results thereof suppressed upon trial, thereby substantially lessening the chances of conviction. 319 N.E. 2d at p. 387.

In Utah, Article, Section 11 of The Constitution of the State of Utah guarantees the right to counsel in civil cases. Denying access to counsel under the provision of §41-6-44.10 (g) effectually bars a person from effective counsel and the rationale of Kirby v. Illinois, supra., and Escobedo v. Illinois, supra., is particularly appropriate.

It is a clear denial of an essential right, the right to counsel, to require a person under the circumstances of our case, where whatever

choice he makes will result in evidence in a criminal hearing, to be denied

at least telephonic access to a lawyer before making that choice. Inasmuch as he does in fact have a right to make such a choice, it would be a meaningless right if he had no understanding as to what the potential harm from a particular choice would be. For instance, if he wished not to provide evidence of intoxication to the court in a drunk driving circumstance and would rather face the civil interruption of his privilege to drive on the highways of the State of Utah, he may mistakenly think he is keeping evidence from a criminal prosecution by refusing. When in fact, he may very well be giving worse evidence against himself and causing greater restrictions on his potential freedom than he would if he consulted counsel to determine the full impact of his decision. Furthermore, there are few attorneys aware of the provisions of §41-6-44.10 U.C.A. who would recommend that a suspect refuse to take a chemical test unless it was distinctly a strategic move to protect the suspect's rights in a criminal proceedings, or, if based upon what the suspect says, there is no reason for which the police should ask the suspect to take such a test in the first place.

Therefore, there would be no damage done to the intent of the legislature nor the efficiency of the police in keeping intoxicated drivers off the streets in Utah. The right to consult counsel can be limited to a situation where, by allowing a telephone call, no undue or unreasonable delay will happen. Because of the rapid dissipation of the level of alcohol in the blood, and the statutory one hour requirements, §41-6-44.5 U.C.A., there would seldom be time for the attorney to come to the jail. Also, if the attorney cannot be reached readily by telephone, the burden is on the accused. By such a system, the right of the accused are protected as far as efficacy allows and the needs of society are not prejudiced.

to call an attorney whose telephone number he knew by memory and that he knew was home. Had he so called, this case would never have gotten to this court and the adversary process could have taken a normal course.

The vitality of a person being able to defend against charges of driving under the influence demand that he be granted a right to telephone his attorney. In most instances, with a five minute telephone conversation, the accused can determine whether his criminal risk is such that he should take a chemical test, thus avoiding a civil determination of refusal, and the use of such determination against him or to provide evidence of a refusal to the criminal arsenal of the state. Inasmuch as there is no possibility of a restricted license in refusal situations, most of the time the recommendation will be to take the test. Where there are circumstances in which it would be protective of the defendant to refuse, he should make that decision with the benefit of counsel. That choice can mean the difference between jail and freedom, and should not be restricted beyond necessity. Where both choices result in criminal evidence, an attorney's experience and judgment are necessary to fully protect an accused. Anything short of this limited right to consult counsel effectively denies to an accused an attorney at the most critical stage of the proceedings, U.S. v. Wade, supra..

II

THE REFUSAL MUST BE UNEQUIVOCAL IN ORDER TO BE REASONABLE AND, UNDER THE FACTS OF THIS CASE, THE REQUEST TO CONTACT COUNSEL SHOWED A SINCERE DESIRE TO MEET THE TERMS OF THE LAW AND NOT TO UNEQUIVOCALLY REFUSE TO SUBMIT TO A CHEMICAL TEST.

At all times, the Appellant herein was willing to follow the advice of counsel. He had been informed of a right to counsel under the Miranda warning and, as he testified, he was not subsequently informed he had no such right. He was given a card to read on the implied consent

statute that did not negate his right to counsel (T-68). Under those circumstances he was entitled to believe he had a right to counsel. Furthermore, he felt he had been unduly delayed in getting to the jail and wanted to telephone counsel that he knew was home and whose telephone number he knew.

The entire problem involved in this case would have been avoided had the officer granted him a phone call and limited it to three minutes or five minutes. The State of the accused would have had the evidence desired and the matter would have proceeded as the law is designed to provide for.

The general application of this type of law has been that the refusal should be unequivocal. Gassman v. Dorius, 543 P. 2d. 197 (Utah); Hunter v. Dorius, supra.; Peterson v. Dorius, supra.; Gooch v. Spradling, 523 S.W. 2d 861 (Mo., 1975). It is clear from the facts of this case, that there was no unequivocal refusal. The Appellant simply wanted an opportunity to contact counsel, at which time he would have found he had no right to have counsel present or would have lost his defense that could derive from a chemical test. That was a reasonable expectation.

Furthermore, some states have found that where Miranda rights are given, the fact that there is no right to counsel under the implied consent law (a state of the law Appellant does not concede), must be clearly explained. Calvert v. State Department of Revenue, Motor Vehicle Division, 519 P. 2d 341 (Colo., 1974); Plumb v. Department of Motor Vehicles 1 Cal. App. 3rd 256, 81 Cal. Rptr. 639 (1969); State v. Severino, 537 P. 2d 1187 (Hawaii, 1975); Swan v. Department of Public Safety, 311 Southern 2d 493 (La. App. 1975), State Department of Highways vs. Lee, 292 Minn. 473, 194 N.W. 2d 766 (1972).

Since the Appellant was sincerely attempting to fulfill a right he thought he had (T-67, T-68) and was not informed that he did not, he was justified in insisting in a right to consult counsel. A simple telephone call could have dispelled any wrongful impression and most likely avoided the subsequent complications.

This Court has stated that this section of the Utah Code Annotated implicitly is "subject to a fair and sensible application under reasonable conditions". Moran v. Shaw, 580 P. 2d at p. 243. The request of the Appellant here could have been fulfilled in full spirit of the law without affecting the practicality of the requested chemical test nor causing unreasonable delay. While his words indicated a desire to have counsel present, a telephone call would have necessarily preceded that request. Had the lawyer not been contacted or, if contacted, given faulty advice, the Appellant would have had to live with those circumstances. But, if the attorney had been reached, in all likelihood the Appellant would have taken the chemical test immediately. In any event, he would have received all he could ask for and the State would have excluded the defense Appellant has been forced to use here.

CONCLUSION

The provisions of §41-6-44.10 (g) Utah Code Annotated (as amended) denying a right to consult counsel in determining whether or not to exercise one's right to refuse to submit to a chemical test of intoxication, when read in the light of §41-6-44.10 (h), is unconstitutional under both the Federal and State Constitutions. There is a critical decision to make between two choices, either of which will result in evidence for a criminal prosecution. It is critical that an accused have at least telephonic access to an attorney, if such access does not unreasonably

interfere with the timeliness of the proposed investigation. To allow otherwise will destroy any concept of fairness in the law and most likely will result in more refusals than if counsel were consulted.

In the facts of this case, a fair and reasonable interpretation calls for the conclusion that the Appellant's request for counsel was not, under the circumstances, unreasonable, nor did he intend to circumvent the requirements of the law. He simply sought to exercise his rights under the Miranda ruling, of which he had been advised, to see that his choices were exercised within legal boundaries.

HAND DELIVERY CERTIFICATE

I do hereby certify that a copy of the foregoing Brief was hand delivered to Robert B. Hansen and Bruce Hale at the Attorney General's Office, State Capitol Building, Salt Lake City, Utah 84114, on this _____ day of October, 1978.
