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State of Utah v. Tallie Lee Cavaness : Brief of Respondent on Appeal

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

TALLIE LEE CAVANESS,

Plaintiff and Appellant,

-vs-

S. TONY COX, Director,
Drivers License Division,
Department of Public Safety,
State of Utah,

Case Number:
15801

Defendant and Respondent.

RESPONDENT'S BRIEF ON APPEAL

Appeal From an Order
Of The Third Judicial District Court
For Salt Lake County, State of Utah
The Honorable Jay E. Banks, Presiding

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

TALLIE LEE CAVANESS,)
)
Plaintiff and Appellant,)
)
-vs-)
)
S. TONY COX, Director,)
Drivers License Division,)
Department of Public Safety,)
State of Utah,)
)
Defendant and Respondent.)

RESPONDENT'S BRIEF
ON APPEAL

Case No. 15801

* * * * *

STATEMENT OF THE NATURE OF THE 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 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

Respondent requests this court to affirm the Trial Court's decision and to declare Subsection (g) of Utah Code Annotated, 41-6-44.10 (1953) as amended, to be constitutional, if, and to what extent, this court considers that issue.

STATEMENT OF FACTS

Respondent would make this court aware of essential dispositive facts that were not emphasized by the Appellant.

The chronology of the events in the transcript is that rather than being stopped for a "minor driving offense," he was stopped for exhibition driving and there was apparently some argument as to that. Besides the odor of alcohol, slurred speech, hand coordination problems and the admission of drinking, the appellant refused the field sobriety tests. (R-94) Subsequently, the officer found a half open mini bottle in Respondent's coat pocket. (R-94). The arresting officer was also threatened with a false imprisonment suite, (R-99), before the breathalyzer test was requested and in the presence of a back-up officer (R-94), who had arrived approximately 10 minutes later or at least after the officer waited 10 minutes for a wants and warrants check. During this time, Mr. Cavanaugh got out of the car three times while he was under arrest, (R-94) which testimony was substantiated by the officer, the back-up

officer (R-87), and also by the Respondent. (R-120). The Respondent on subsequent testimony denied that he ever got out of the car. (R-124). Although the Petitioner testified to the contrary, the arresting officer testified that he requested an attorney only 45 minutes later at the jail. (R-101).

The back-up officer substantiated the arresting officer's testimony that the first refusal was "in the negative," (R-84), and that the implied consent statute was read and a similar request made (R-85). The arresting officer's testimony was that "he said no he wouldn't take the breathalyzer," (R-95), but that he did request to have an attorney present at the jail which was admitted and substantiated by the testimony of the Plaintiff when he admitted under oath that he had refused and wouldn't take the test "unless his attorney was present." (R-117). This was subsequent, and at the jail and the officer explained that "he could call his attorney after he had taken the breathalyzer test." (R-101). The consequences of his refusal were explained to him, (R-96, 97), and he was allowed to read the implied consent card himself, (R-84, 85), which testimony was corroborated by the Plaintiff himself when he admitted that he was allowed to read the implied consent card and law, (R-118), which had previously been read to him. (R-97).

The Respondent testified that he was in his last semester of law school at the time, (R-116, 96), and had taken

criminal law, (R-117), had "an exact knowledge of the law," (R-124), and had gone into the implied consent law in those classes. (R-119).

He also admitted under oath that the real reason he refused was that he was angry at the officers, (R-123), and he felt that his rights had been violated. (R-125).

POINT I

THE UTAH IMPLIED CONSENT STATUTE IS CIVIL AND ADMINISTRATIVE

The Utah implied consent law, Utah Code Annotated 41-6-44.10, (1953) as amended, is obviously a civil statute as declared by other courts with respect to similar statutes as the only remedy provided for there is a public safety remedy or the revocation of a "license or permit to drive." There are no other remedies provided under that act. The Utah Operator and Chauffeurs License Act, Utah Code Annotated 41-2-1 (o), defines the word license as a privilege to operate a motor vehicle over the highways of this state. A license certificate is also defined as evidence of "the privilege" . . . The purpose of that act is obviously for the safety of the traveling public and to identify individuals who have "a discretion for the safety of other persons on the highways." See Utah Code Annotated 41-2-19 (6).

The United State Supreme Court in the case of Dixon v.

Love, 41 U.S. 105, 1977, on May 16, 1977, in holding that the

Illinois statute allowing the suspension of a driving privilege without a preliminary hearing was adequate under the due process clause of the Fourteenth Amendment to the United States Constitution, also stated that the nature of the private interest was not so great as to require a departure from "the ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to adverse administrative action," and cited the case of Mathews v. Eldridge, 424 U.S. 319. This case involved a commercially licensed truck driver, and the court stated that the risks of a deprivation of an individual's rights as opposed to the paramount public interest, did not deny the Appellant due process. Essentially that is the argument of this Appellant, i.e. that his right to due process was denied as he was denied the right to counsel.

This has been the holding of all of the courts that have ruled on this question. For example, the court in Fritts v. The Department of Motor Vehicles, 6 Wash. App. 233, 492 P.2d 558, 1971, stated that, "regardless of whether driving is a right or a privilege, the license revocation proceeding is not a criminal proceeding" . . . "the fact that in the criminal proceeding that the driver was not proven beyond a reasonable doubt to have been driving while intoxicated has no bearing on civil proceedings under 'cite omitted' to revoke his drivers license for refusal to submit to a chemical test of his breath. We find other jurisdictions in accord." The cases all explain that implied consent

proceedings are not criminal because there are no criminal penalties or dangers and because the public safety dangers out weigh the dangers to the loss of an individual's rights. They unanimously hold that criminal safeguards are not applicable to driving privilege revocation proceedings under implied consent laws because they have a subsequent right to hearing and a trial de novo along with the right to cross examine the individuals taking the test and the basis for the test scientifically and also, as in the case of the Utah implied consent statute, a right to have their own scientific test taken contemporaneously with the test requested by the officer. See Utah Code Annotated 41-6-44.10 (f) as amended. Many of these cases are cited subsequently and we have found such holdings in the states of Arizona, Washington, California, Colorado, Iowa, Minnesota, Nebraska, North Carolina, Ohio, Oregon, South Dakota, Hawaii, North Dakota along with it being implied by this Court in the State of Utah. Wherein all of these cases simply say, what the statute does , that is that the only remedy provided is a revocation civil driving privilege.

POINT II

A DRIVER UNDER THE UTAH IMPLIED CONSENT LAW HAS
NO CONSTITUTIONAL RIGHT TO CONSULT WITH AN ATTORNEY
OR TO HAVE AN ATTORNEY PRESENT BEFORE DECIDING TO
SUBMIT OR NOT

Many courts have considered the question of whether or not a driver asked to take a chemical test under implied consent laws has a constitutional right to consult with counsel or to have counsel present before saying yes or no to the test. The consensus with respect to implied consent proceedings, among state supreme courts, is that such a constitutional right does not exist under either the United States Constitution or state constitutions. Agnew v. Hjelle, 216 N.W. 2d 291 (N.D. 1974); Blow v. Commissioner, 83 S.D. 628, 164 N.W. 2d 351 (1969); Campbell v. Superior Court, 106 Ariz. 542, 479 P. 2d 685 (1971); Coleman v. Commonwealth, 212 Va. 684, 187 N.E. 2d 172 (1972); Commonwealth, Department of Transportation v. Cannon, 4 Pa. Cmwlth. 119, 286 A. 2d 24 (1972); Calvert v. State, 519 P. 2d 341 (Colo. 1974); Harrison v. State, Department of Public Safety, 298 So. 2d 312 (La. App. 1974); Mills v. Bridges, 93 Id. 679, 471 P. 2d 66 (1970); Robertson v. State, 501 P. 2d 1099 (Okla. 1972); Siegwald v. Curry, 319 N.E. 2d 381 (Ohio 1974); Spradling v. Deimeke, 528 S.W. 2d 759 (Mo. 1975); State v. Dellveneri, 258 A. 2d 834 (Vt. 1969); State v. Kenderski, 99 N.J. Super. 224, 239 A. 2d 249 (1969); State v. Petkus, 269 A. 2d 123 (N.H. 1970); State v. Severino, 537 P. 2d 1187 (Haw. 1975); State v. Stevens, 252 A. 2d 58 (Me. 1969); State v. Trotter, 4 Conn. Cir. 185, 230 A. 2d 618 (1967); Stratikos v. Department of Motor Vehicles, 4. Or. App. 313, 477 P. 2d 237 (1970); Swenumson v. Iowa Department of Public Safety, 210 N.W. 2d 660 (Iowa 1973); Wiseman v. Sullivan,

190 Neb. 724, 211 N.W. 2d 906 (1973); Westmoreland v. Chapman, Ct. App., 74 Cal. Rptr. 363 (1968).

The foregoing cases represent 21 different jurisdictions and are mostly state supreme court decisions. Two United States Supreme Court cases, Schmerber v. California, 384 U.S. 757 (1966) and U.S. v. Wade, 388 U.S. 218 (1967), to be discussed later, are in agreement.

The most often cited reason why no constitutional right to counsel exists is that implied consent proceedings are civil and administrative in nature and not criminal in nature having no criminal penalties and involve safety of the public. As this Court knows, the Sixth Amendment to the United States Constitution providing that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense," is applied by the courts only to criminal prosecutions. They also have denied its applicability to civil implied consent proceedings.

The judges in Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (1969), held, along with others that, Virginia's implied consent proceedings to be civil and administrative in nature. They said:

An accused who refuses a blood test is not required to post bond for his appearance, and he does not have to give bail or enter into a recognizance. He is under no legal duty to appear at the hearing if he does not desire to introduce evidence of the

basis and reasonableness of his refusal to take a test, or for his failure to appear at a hearing. In fact, there is nothing about the entire proceeding that parallels the procedure in criminal prosecution. (Emphasis added.)

For other cases on point holding implied consent proceedings to be civil in nature and not criminal, see Agnew, Calvert, Campbell, Mills, State of Hawaii, Stratikos, Swenumson, all supra, and Ziemba v. Johns, 163 N.W. 2d 780 (Neb. 1969). These cases specifically hold that the right to counsel, does not attach to implied consent proceedings.

Subsection (h) of Utah Code Annotated, 41-6-44.10 (1953), as amended, provides " . . . evidence of refusal shall be admissible in any civil or criminal action . . ." Appellant argues that since "refusal evidence" is admissible in a criminal prosecution, that the right to counsel should attach when the driver is asked to take a chemical test. Other jurisdictions (and two U.S. Supreme Court cases) have given some decisive reasons why this verbage of the statute is not decisive.

It should be noted at this point that the constitutional question of right to counsel in a criminal case, where evidence of refusal or the results of a chemical test are at issue, is not before this Court. The only fact tried below was a refusal involving a driving privilege. Appellant should, therefore, have no standing to raise this question since this case is a civil trial de novo and administrative only.

However, if the Court does wish to consider this question, there is substantial authority on the constitutional right to counsel before taking a chemical test under the implied consent law even where the proceeding before the Court is a criminal prosecution.

In Schmerber, supra, the United States Supreme Court upheld a California drivers criminal conviction for driving while intoxicated. A blood alcohol test was taken over the motorist's "counsel-based" objection. The court held that the convicted motorist was not entitled to assert the Sixth Amendment right to counsel for the reasons that he had no right to refuse the test and "no issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The court said that the test involved no testimonial or communicative evidence so the driver was not entitled to assert the Fifth Amendment privilege against self-incrimination.

The court also held that due process was complied with and that the taking of the test did not constitute an unconstitutional search and seizure.

In People v. Sudduth, 55 Cal. Rptr. 393, 421 P. 2d 401 (1966), they affirmed a driving under the influence criminal conviction. The California Supreme Court, in banc, held that:

Suspects have no constitutional right to refuse a test designed to produce physical evidence in the form of a breath sample (cites omitted) whether or not counsel is present (cite omitted.)

We note that the physical and psychological disturbance of the individual involved in obtaining

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a breath sample is apt to be significantly less than that involved in extracting a blood sample, an evidence gathering technique recently approved in Schmerber v. State of California (1966) 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 208, and that the blood alcohol test and the breath test for alcoholic absorption are alternate means for determining the percentage of alcohol in the blood. The value of such objective scientific data of intoxication to supplement the fallible symptomatic of intoxication cannot be disputed. (People v. Duroncelay (1957) 48 Cal. 2d 766, 772, 312 P. 2d 690.) In a day when excessive loss of life and property is caused by inebriated drivers, an imperative need exists for a fair, efficient, and accurate system of detection, enforcement and, hence prevention. (Cite omitted, Emphasis added.)

California and U. S. law is well settled that a driver confronted with a chemical test has no constitutional right to consult with counsel or to have counsel present whether the proceeding in question is civil under California's implied consent law, or even a criminal prosecution. The reasons are that the motorist has no legal right to refuse the test or to assert other privileges such as the Fifth Amendment. Schmerber, Sudduth, Westmoreland, all supra and Ent v. State, Ct. App., 71 Cal. Rptr. 726 (1968).

The Arizona Supreme Court in Campbell, supra, denied any constitutional right to counsel under its implied consent law after holding that a chemical test confrontation under the implied consent law was not a "critical stage" requiring assistance of counsel. The court considered the principles expounded in Schmerber and Wade, (both supra), to be controlling saying:

The United States Supreme Court in *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) held that an accused has a right to the assistance of counsel at any critical state of the prosecution. In *Wade* the Court found that a post-indictment lineup was such a critical stage. The following passage from *Wade*, however makes it evident that under the rationale of that decision respondent was not entitled to counsel prior to deciding whether or not to submit to the breathalyzer test:

"The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence not different--for Sixth Amendment purposes--from various other preparatory steps, such as systemtized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary process of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such states might derogate from his right to a fair trial." 388 U. S. at pages 227 228, 87 S. Ct. at pages 1932-1933.

As previously noted, under Arizona's Implied Consent Law a person does not have a right to refuse to submit to a chemical test only the physical power; therefore, as in *Schmerber*, there is no issue of counsel's ability to assist respondent in respect of any rights he did possess. It is the opinion of this court that respondent was not entitled to the assistance of counsel in deciding whether or not to submit to the breathalyzer test.

(Cites omitted. Emphasis added.)

See also State v. Kenderski and State v. Trotter, both supra, where criminal convictions were affirmed after the courts held there was no constitutional right to counsel with respect to chemical tests requested.

The New Hampshire Supreme Court in State v. Petkus, supra, in affirming a driving under the influence conviction, held that the taking of a blood test under its implied consent law was not a critical stage of the prosecution. The driver was not allowed upon request to talk with his attorney prior to his taking the test. They moved to have the test results suppressed. The court stated:

We hold that the decisions to be made by an accused under our implied consent law are not essentially "a lawyer's decision, (cite omitted), but, on the contrary, can be made by a defendant in the absence of the assistance of counsel without any substantial prejudice to his rights under the Sixth Amendment. (Cites omitted.)

In other words we hold that the taking of defendant's blood under the implied consent law (cite omitted), was not a "critical" stage of the criminal proceeding requiring the assistance of counsel "to preserve the defendant's basic right to a fair trial." Coleman v. Alabama, supra. The Trail Court properly ruled that the results of the test of defendant's blood were admissible in evidence at the trial.

The courts stress that under the implied consent law a motorist has no right to refuse a test but only the physical power. See, for example, Campbell, Kenderski, Schmerber and Sudduth, all supra, and State v. Miller, 185 S.E. 2d 239 (S.C. 1971). The Utah implied consent law by its clear

All vehicle operators are deemed as a matter of law to have previously consented to a chemical test. (Hence the name of the statute). Utah Code Annotated, 41-6-44.10 (a) provides in part, "Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test or test of his breath, blood, or urine . . ." Utah drivers also sign a contract agreeing to the test when applying for their permit to drive. (See the attached exhibit "A".) Therefore, Utah drivers as in other states, have no "right" to refuse but certainly the physical power. The cases explain that the reason a motorist's physical "refusal" or recision of prior consent is allowed. It avoids violence and physical coercion (Very good public policy considering the circumstances surrounding these types of cases generally.)

Utah Code Annotated, 41-6-44.10 (b), (1953) as amended 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 subsection (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.

Language similar to this has been construed by many courts not to give motorists the "right" to refuse. Campbell, *supra*, at 692 states:

In Arizona, (cite omitted), provides that "[I]f a person under arrest refuses to submit to a chemical test designated by the law enforcement

agency as provided in subsection A, none shall be given." This language does not give a person a "right" to refuse to submit to the test only the physical power. We agree with the court in (cite omitted) that the "obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is 'deemed to have given his consent' is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates." (Cite omitted.)

It is the opinion of this court that since a person does not have a right to refuse to submit to the test and because the refusal itself is not "testimonial communication" that comment upon such refusal is not improper. (Emphasis added.)

The court in Campbell, in footnote 6 at 692, went even further in advancing public safety and explained that a wrongful refusal to submit was the same type of evidence as the test results (non-testimonial) and just as the test results are not subject to the Fifth Amendment, neither is evidence of refusal.

The California Supreme Court in Sudduth, supra, held that comment on refusal in a criminal case was constitutionally permissible and that the Fifth Amendment did not apply. Then the Court explained any different results in other jurisdictions with respect to the admissibility of refusal evidence in a criminal case can be ascribed to:

. . . an underlying constitutional or statutory right to refuse to produce the physical evidence sought. States that recognize a right to refuse to take such tests exclude evidence of a refusal. States that recognize no right to refuse allow testimony and comment on the refusal. (Emphasis added.)

Utah now obviously falls in the latter category. Our

Implied Consent Statute does not give motorists the "right" to

refuse and expressly allows refusal evidence in criminal proceedings. Utah Code Annotated, 41-6-44.10 (h) (1953) as amended.

Appellant cites three prior Utah cases to support his argument that he had a "right" to refuse. Hunter v. Dorius, 23 U. 2d 122, 458 P. 2d 877 (1969), Moran v. Shaw, 580 P. 2d 241 (Ut. 1978) and Peterson v. Dorius, 547 P. 2d 693 (Ut. 1977). These cases simply addressed the questions of whether or not the refusal was reasonable and whether or not there was a refusal at all. This Court has never recognized a "right" to refuse. In State v. Miokovich, 185 S.E. 2d 360 (S.C. 1971) the South Carolina Supreme Court held that comment on refusal in a criminal trial was constitutionally permissible and further construed that the State's implied consent law (similar to Utah's) to clearly not give a motorist the "right" to refuse.

An example of a jurisdiction in the former category, where the statutory right to refuse exists and, therefore, the refusal is not admissible into evidence is, State v. Stevens, 252 A. 2d 58 (Me. 1969). The court noted that Maine's law expressly gives the motorist the right to refuse. It provides that a test can only be given upon the consent of the motorist. Consent is not implied by that statute. The officer simply asks the motorist if he would like a chemical test and explains the legal ramifications. Our Legislature as

in other jurisdictions, as indicated above, clearly intended

just the opposite policy. The authorities cited in Appellant's brief are distinguishable.

Appellant cites Siegwald, supra, and State v. Welch, 376 A. 2d 834 (Vt. 1977) claiming that the right to counsel was extended in those cases for the reason that refusal evidence was admissible in criminal proceedings. The Siegwald, statute extended a statutory right to counsel while Welch extended a limited right to counsel only after concluding that the motorist had a "right" to refuse. Welch also involved a serious criminal automobile homicide case. People v. Gursey, N.Y. Ct. of App., 239 N.E. 2d 351 (1968) extended a limited right to counsel but was also a criminal case recognizing the motorist's right to refuse.

Appellant cites Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (1969), State v. Dellveneri, supra and Stratikos, supra, claiming that the denial of counsel in those cases is based partly on the fact that refusal evidence is not admissible in criminal proceedings. The holdings are not that broad. Those courts did not discuss "refusal evidence" or the ramifications on the right to counsel issue, if such evidence was allowed. The courts simply declared the proceedings to be civil and held that no constitutional right to counsel attached for that reason. The court in Stratikos stated it did not even see the need for a "critical stage" inquiry since the proceeding was not criminal in nature.

Appellant states in his brief at P. 4 that U. S. v. Mc
388 U.S. 218 (1967), a robbery case, stands for the proposition
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.

Appellant cannot ignore the court's discussion and reasoning of
scientific evidence and physical gathering techniques cited
above.

The Government characterizes the lineup as a
mere preparatory step in the gathering of the
prosecution's evidence, not different--for Sixth
Amendment purposes--from various other preparatory
steps, such as systematized or scientific analyzing
of the accused fingerprints, blood sample, clothing,
hair, and the like. We think there are differences
which preclude such stages being characterized as
critical stages at which the accused has the right
to the presence of his counsel. Knowledge of the
techniques of science and technology is sufficiently
available, and the variables in techniques few
enough, that the accused has the opportunity for a
meaningful confrontation of the Government's case
at trial through the ordinary processes of cross-
examination of the Government's expert witnesses
and the presentation of the evidence of his own
experts. The denial of a right to have his counsel
present at such analyses does not therefore violate
the Sixth Amendment; they are not critical stages
since there is minimal risk that his counsel's
absence at such stages might derogate from his
right to a fair trial.

Escobedo v. Illinois, 378 U.S. 478 (1964) simply held
that the right to counsel was guaranteed at the point where the
accused, prior to arraignment, was subjected to secret interro-
gation despite repeated requests to see his lawyer. (Not out

facts here). Escobedo also dealt with crucial criminal evidence subject to the Fifth Amendment. Kirby v. Illinois, 406 U.S. 682 (1972) is likewise inapplicable to the facts of this civil case.

Article I, Sections 11 and 12 of the Utah Constitution relied on by the Appellant provide free access to the courts. Section 12 providing that "the accused shall not be compelled to give evidence against himself" is duplicative of the United States Consitution's Fifth Amendment privilege against self-incrimination and should be interpreted no broader than its federal counterpart. Our statute grants free access, trial de novo and appeal.

Respondent has cited cases from 21 jurisdictions holding that a drunk driver has no constitutional right to consult with counsel or to have counsel present before deciding whether or not to take a chemical test under similar implied consent laws. These cases all say that miranda rights and criminal safeguards do not attach, and our statute imposes no criminal penalties. With respect to implied consent proceedings, Respondent could find no authority granting a constitutional right to counsel although a minority has extended a limited statutory right. Our Legislature has expressly stated that such a right does not exist and there are no legal or logical reasons to overturn that policy. Specifically, Utah Code Annotated, 41-6-44.10 (g) (1953) as amended.

In conclusion, if this Honorable Court does decide to

consider the question of constitutional rather than statutory right to counsel before a chemical test in the criminal context, Respondent has cited substantial authority. It stems from two United States Supreme Court cases, Schmerber and Wade, both *supra*, and seems to be persuasive.

POINT III

THERE EXPRESSLY IS NO STATUTORY RIGHT TO CONSULT WITH COUNSEL OR TO HAVE COUNSEL PRESENT FOR A REQUESTED CHEMICAL TEST UNDER THE UTAH IMPLIED CONSENT STATUTE

The Utah Legislature has expressly declared that "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 . . . present as a condition for the taking of any test." Utah Code Annotated, 41-6-44.10 (g) (1953) as amended.

As discussed under Point I, subsection (g) does not violate the Utah or the United States Constitutions. The policy reasons why the legislature chose not to grant a statutory right to counsel under the implied consent drivers licensing statute are obvious and compelling! Even one mainline or death on the highways caused by drinking drivers is sorrowful for family and friends and a drain on society--let alone what statistics show statewide.

It is common scientific knowledge that alcohol in the blood spreads evenly and quickly but dissipates with time.

Therefore, the public interest demands that a driver suspected of driving under the influence of intoxicants be given his chance for a chemical test swiftly. Any and all maneuvering and stalling on the part of the drinking driver must be avoided. The innocent public's rights are obvious, prevailing and should tip the scales of justice and decency. The court in State v. Pandoli, N.J. Super., 262 A. 2d 41 (1970) very aptly said it:

In any event, the request for consultation with counsel necessarily involved a delay in administration of the test. Having in mind the remedial purpose of the statute, and the rapidity with which the passage of time and the physiological processes tend to eliminate evidence of ingested alcohol in the system, it is sensible to construe the statute to mean that anything substantially short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take the test constitutes a refusal to do so. (Cite omitted.) The occasion is not one for debate, maneuver or negotiation, but rather for a simple "yes" or "no" to the officer's request. (Emphasis added.)

Before enactment of the 1977 amendments to the Utah implied consent law, many implied consent cases involved extensive factual inquiries into innumerable issues surrounding the drivers request to consult with counsel. For example; Was the request reasonable, made solely for delay, would late phone calls unduly hamper the test, how much time should be given, and under what circumstances, etc. Well, our Legislature (and the Courts cited above) clearly answered all of these issues in one decisive swoop. These difficult fact questions, the continual attempts to delay the test and the grave public interest

express denial of a statutory right to counsel in the matter of the drivers license.

Some jurisdictions have extended motorists a limited right to counsel based upon statute, rule or police procedure; and some of these jurisdictions solely extend this right when criminal prosecution is at issue. If there were a conflict between Utah statute, regulation or rule extending to an arrested driver a blanket right to consult with counsel about a test or drivers license, subsection (g), supra, expresses the most recent intent of the Utah Legislature and should be supreme.

POINT IV

THE TRIAL COURT'S FINDING THAT APPELLANT REFUSED AND TRIED TO DELAY THE BREATHALYZER TEST IS SUPPORTED BY FACT AND SHOULD NOT BE REVERSED

The statute under which this case was tried specifically provides that no right to counsel exists and that the driver has no right to condition the test upon the presence of an attorney or anyone else. Utah Code Annotated, 41-6-44.10 (g) (1953) as amended.

This Court has never stated that a refusal must be unconditional under any circumstances, nor have the Courts in other jurisdictions. It is clear that the unreasonable conditioning a chemical test upon the right to counsel or any other delay tactic, when no such right exists, constitutes a refusal. The court in Spradling, supra, defines refusal as follows:

There is no mysterious meaning to the word "refusal". In the context of the implied consent law, it simply means that an arrestee, after having been requested to take the breathalyzer test, declines to do so of his own volition. Whether the declination is accomplished by verbally saying, "I refuse", or by remaining silent and just not breathing or blowing into the machine, or by vocalizing some sort of qualified or conditional consent or refusal, does not make any difference. The volitional failure to do what is necessary in order that the test can be performed is a refusal. (Emphasis added.)

Mills, supra, also states:

It has been quite uniformly held by the courts which have considered the issue that a qualified or conditional refusal to take a test to determine the level of blood alcohol is a refusal within the meaning of statutes similar to ours. A defendant cannot condition his consent of the test upon the presence of counsel. (Cites omitted, Emphasis added.)

See also Coleman, Commonwealth v. Cannon, State v. Pandoli, Swenumson, Westmoreland and Wiseman, all supra. Based upon Utah law, the trial court properly found that Appellant's refusal to take the breathalyzer test until he contacted his attorney definitely was a refusal upon the law and the facts, and shouldn't be overturned.

Appellant cites some case law to support his contention that he was sincerely confused concerning his right to counsel and, therefore, his (admitted) refusal was reasonable.

Appellant did not tell the officer that he was confused about his rights or ask for a further explanation. He simply refused to take a test without his attorney being present and

was told he could call his attorney after the test. (R-101, 117)

The cases seem to say that it is incumbent upon the officer to clear up any confusion concerning "rights" only when confusion is objectively manifested, which was not found by this Trial Judge.

Although Appellant (a law student) claims he was confused about his right, the Trial Judge who heard and saw witnesses specifically found that Appellant "had a chip on his shoulder clear up to his eyebrows. He wasn't about to take a test. He had a little smattering of law and thought he knew everything. There's no question about that in my mind." (R-41, 130). The Trial Judge also found that Appellant's request for counsel was delayed and interposed for delay of the test. (R-40, 131).

The evidence brought out at trial is sufficient to sustain the trial judge's findings of fact. It is a well established principle that the trial court's findings of fact should not be reversed on appeal "unless he clearly does violence to the facts as they relate to his findings." Gassman, supra.

The above principle is especially important in this case since much of the testimony at trial was contradictory. See for example the Trial Record at 123. See also the Trial Record at 99 and 127 where the officer testified Appellant got out of his car three times while waiting for the officer. At R-126, Appellant testified that he absolutely did not, during this same time, ever get out of his car.

POINT V

THERE IS NO STATUTORY LIMITED RIGHT TO COUNSEL
IN ORDER TO DECIDE WHETHER OR NOT TAKE A CHEMICAL
TEST TO DETERMINE THE ALCOHOLIC CONTENT OF ONES
BLOOD IN THE STATE OF UTAH

The Appellant argues that it is a critical stage of the criminal proceedings. As pointed out previously, the implied consent statute only involves a driving privilege, is a solely civil and administrative proceeding, and therefore; the burden of proof in the criminal trial and its accompanying penalties and rights are not applicable. Even if they were, the United States Supreme Court in the Wade, supra, specifically pointed out that the taking of blood was not a critical stage in the proceedings nor was it testimonial evidence requiring all of the criminal protections of the Fifth Amendment and due process. This decision was upheld in May, 1977 in the Dixon v. Love, supra. The Appellant cites the language of Kirby v. Illinois, supra, which reiterates the supreme court's decision stating that there is no substantial prejudice to the individual's rights because he has a right to cross-examine, confront the test and witnesses in a subsequent trial de novo. Of course, that right is granted by the Utah implied consent statute.

Appellant cites Peterson and Hunter, both supra, Gassman v. Dorius, 543 P. 2d 197 (Utah 1975) and Gooch v. Spradling, 523 S.W. 2d 861 (Mo. 1975) arguing that any refusal or withdrawal of prior consent must be unequivocal. These cases all

involved a limited right to counsel within reason and dealt with the motorist's attempts to contact counsel agreed to by the officers. Each case applied reason under the facts and particular circumstances.

The legislature realized the driver's opportunity for delay tactics under the former law and shifted the focus away from those fact inquiries into the "reasonableness" of a refusal to the simpler question of: Was there a refusal? This intent was expressed by the 1977 amendment's deletion of "without reasonable cause" from the former law.

If at said hearing the department determines that the person was granted the right to submit to a chemical test and (without reasonable cause) refused to submit to such test, or if such person fails to appear before the department as required in the notice, the department shall revoke for one year his license or permit to drive. (Deleted language underlined.) Utah Code Annotated 41-6-44.10, (1953), as amended.

The 1977 Legislature also deleted the words "without reason" from the last sentence of sub-paragraph (a) of the above quoted statute, substituting the words "a peace officer" for arresting officer. Therefore, it was the apparent intent of the legislature as shown by specifically deleting the words "within reason" and "without reasonable cause" to not only allow the officer choice of tests, but require the individual to take that test without any limited right to counsel.

Such expressions of intent by the legislature have often been upheld by this Court, it has long been a maxim of

statutory construction that where a express provision of a statute is deleted (especially a whole paragraph) there is a presumption that there was a specific change in the law intended. That is what this Court said in the case of Allen v. Board of Education of Weber County, 120 Utah 556, 236 P. 2d 756, 763 (1951), and in other cases:

. . . It is clear that when express powers are conferred upon such a governing body and by subsequent amendment a section of the enactment which conferred a specific power is repealed, there is manifest a legislative intent to withdraw the specific power . . . (Emphasis added.)

Such is the law of other states such as California as accentuated in the case of Subsequent Injuries Fund v. Industrial Acc. Commission, 31 Ca. Rptr. 477, 382 P. 2d 597 (1963).

The Appellant argues that he should have had a limited right to counsel because his refusal was not unequivocal. Such is not supported by the facts as found by the trial judge. The facts show that it was unequivocal the first time and the second time conditioned on an attorney being present. Since consent to the test is implied by the statute and also specifically contracted for and agreed to by the individual when he applies for his license (See exhibit "A"), we urge this Court to hold that there is even less of a burden upon the drivers license division to show any kind of refusal at all. If there is any right to counsel implied, it would have to be based on the reasonableness of the situation and the facts of the case.

This in essence puts the arresting officer on trial, which is

surely not the intent of the statute. If unreasonableness or reasonableness becomes an element, it should surely be in the nature of an affirmative defense that should be plead and proved by the driver who has previously consented to the taking of the chemical test.

CONCLUSION

The only conclusion that this Court can draw is that the Trial Court was right in its decision that the amended statute gives no statutory right to counsel, and that there was a specific, unconditional refusal. Also that, there was no constitutional right to counsel, and even if there were, the request was made solely for purposes of delay, as found by the Trial Judge.

DATED this 9th day of November, 1978.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General



BRUCE M. HALE
Assistant Attorney General
Attorney for Defendant and
Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Respondent's Brief on Appeal, postage pre-paid to D. Sanford Jorgensen, Attorney for Plaintiff and Appellant, 352 South 300 East, Suite 3, Salt Lake City, Utah 84111, on this 9th day of November, 1978.

Janifer McKay

Exhibit A

STATE OF UTAH APPLICATION FOR ORIGINAL DRIVER LICENSE

(EXAMINEE CHECKS APPROPRIATE TYPE OF LICENSE)

OPERATOR CHAUFFEUR MOTORCYCLE
A B C D YES NO

PRINT PLAINLY IN INK
DO NOT FILL IN SHADED AREAS

NAME IN FULL																									
LAST NAME						FIRST NAME						MIDDLE OR MAIDEN NAME													
ADDRESS																									
NUMBER AND STREET BOX OR RFD						CITY						STATE						ZIP CODE							
BIRTH DATE				SEX		OLD USE ONLY SOCIAL SECURITY NUMBER				HEIGHT		WEIGHT		EYES		PLACE OF BIRTH									
MO.		DAY		YEAR		M/F		REST		STAT		FT. IN.		LBS.		COLOR		CITY		STATE OR COUNTRY					
FOR DRIVER LICENSE DIVISION USE ONLY																									
LIC.		HEIGHT		WEIGHT		YR. OF LIC.		FILE		CITY		COUNTY		ZIP CODE		EYES		ORIG.		LICENSE					
E-DATE		IN.		LBS.		ORIG.		TYP		STAT						COLOR		ISSUE		NUMBER					

VISION																			
ACUITY				Right				Left				Both				REMARKS OR RESTRICTIONS			
With Glasses				20/20				20/20				20/20							
Without				20/20				20/20				20/20							

NOTE: ANY PERSON OPERATING A MOTOR VEHICLE IN THIS STATE SHALL BE DEEMED TO HAVE GIVEN HIS CONSENT TO A CHEMICAL TEST TO DETERMINE THE ALCOHOLIC CONTENT OF HIS BLOOD OR WHETHER HE IS UNDER THE INFLUENCE OF DRUGS. YOU WILL BE SUBJECT TO A FINE AND/OR IMPRISONMENT AND YOUR DRIVER LICENSE MAY BE SUSPENDED IF YOU GIVE ANY FALSE INFORMATION IN THIS APPLICATION.

ANSWER ALL QUESTIONS BELOW

		YES	NO			YES	NO
1. DO YOU WEAR CONTACTS OR GLASSES?		<input type="checkbox"/>	<input type="checkbox"/>	4. DURING THE LAST 4 YEARS HAVE YOU BEEN HOSPITALIZED FOR AN EMOTIONAL OR MENTAL CONDITION?		<input type="checkbox"/>	<input type="checkbox"/>
2. ARE YOU NOW OR HAVE YOU BEEN LICENSED TO DRIVE IN ANY STATE?		<input type="checkbox"/>	<input type="checkbox"/>	5. DO YOU HAVE A HISTORY OF EPILEPSY, SEIZURES, MENTAL CLOUDING, CONVULSIONS, "BLACKOUTS", DIZZY SPELLS, ETC.?		<input type="checkbox"/>	<input type="checkbox"/>
IF YES, LIST BELOW EACH SUCH STATE, THE LICENSE NUMBER AND EXPIRATION DATE:				6. HAVE YOU HAD HEART TROUBLE, DIABETES, PARALYSIS, OR ANY OTHER PHYSICAL HANDICAP OR DISABILITY (OTHER THAN VISION DEFECTS)?		<input type="checkbox"/>	<input type="checkbox"/>
STATE	DRIVER LICENSE NO.	EXP. DATE		IF YES, INDICATE			
				7. HAVE YOU BEEN CONVICTED OF DRIVING WHILE INTOXICATED OR UNDER THE INFLUENCE OF DRUGS?		<input type="checkbox"/>	<input type="checkbox"/>
3. HAS YOUR DRIVING PRIVILEGE EVER BEEN REVOKED, SUSPENDED, CANCELED OR DENIED?		<input type="checkbox"/>	<input type="checkbox"/>	8. OCCUPATION			
IF YES, INDICATE (Date) (State)							

AFFIDAVIT

STATE OF UTAH
COUNTY OF _____ ss.

I, THE UNDERSIGNED, BEING DULY SWORN, STATE THAT I AM THE APPLICANT DESCRIBED ABOVE; THAT I AM AT LEAST 16 YEARS OF AGE; THAT I HAVE CAREFULLY READ SAID APPLICATION AND THE INFORMATION THEREIN FURNISHED BY ME IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

X (SIGNATURE OF APPLICANT - IN INK)

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____ DAY OF _____ 19____.

(NOTARY PUBLIC)

ASSUMPTION OF LIABILITY FOR MINORS
UNDER EIGHTEEN YEARS OF AGE

STATE OF UTAH) ss.
COUNTY OF _____)

I, THE UNDERSIGNED, BEING DULY SWORN, STATE THAT I AM THE _____ OF THE APPLICANT NAMED HEREIN; THAT I HAVE READ THE STATEMENTS HE HAS MADE IN THIS APPLICATION AND THAT THEY ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

I HEREBY CONSENT TO ASSUME THE OBLIGATION IMPOSED UNDER SEC. 41-2-10, UTAH CODE ANNOTATED 1953 AS AMENDED, OF BEING JOINTLY AND SEVERALLY LIABLE WITH THE APPLICANT FOR ANY DAMAGES CAUSED BY HIS NEGLIGENCE OR WILLFUL MISCONDUCT WHILE HE IS UNDER THE AGE OF EIGHTEEN YEARS WHEN DRIVING A MOTOR VEHICLE UPON A HIGHWAY.

X (SIGNATURE OF PARENT OR OTHER RESPONSIBLE PERSON - IN INK)

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____ DAY OF _____ 19____.

(NOTARY PUBLIC)