

1986

# Luann Lee v. Fred C. Schwendiman, Chief, Driver License Services, Department of Public Safety, State of Utah : Brief of Appellant

Utah Supreme Court

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David Wilkinson; Attorney General; Attorney for Respondent.

G. Fred Metos; Yengich, Rich, Xaiz and Metos; Attorneys for Appellant.

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## IN THE SUPREME COURT OF THE STATE OF UTAH

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LUANN LEE,

Petitioner/Appellant,

BRIEF OF APPELLANT

v.

FRED C. SCHWENDIMAN, Chief,  
Driver License Services,  
Department of Public Safety,  
State of Utah,

Case No. 21010

Respondent.

THIS IS AN APPEAL FROM A DISMISSAL OF A COMPLAINT AND PETITION FOR AN EXTRAORDINARY WRIT REQUESTING THE REINSTATEMENT OF APPELLANT'S DRIVER LICENSE PURSUANT TO TITLE 41, CHAPTER 6, SECTION 44.10, UTAH CODE ANNOTATED, 1953 AS AMENDED, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DEAN CONDER, JUDGE PRESIDING.

G. FRED METOS  
YENGICH, RICH, XAIZ & METOS  
Attorneys for Petitioner/Appellant  
72 East 400 South, Suite 355  
Salt Lake City, Utah 84111  
Telephone: (801) 355-0320

DAVID WILKINSON  
ATTORNEY GENERAL  
Attorney for Respondent  
236 State Capitol Building  
Salt Lake City, Utah 84114

**FILED**

JAN 14 1986

IN THE SUPREME COURT OF THE STATE OF UTAH

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LUANN LEE, :  
 : BRIEF OF APPELLANT  
Petitioner/Appellant, :  
v. :  
FRED C. SCHWENDIMAN, Chief, : Case No. 21010  
Driver License Services,  
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State of Utah, :  
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G. FRED METOS  
YENGICH, RICH, XAIZ & METOS  
Attorneys for Petitioner/Appellant  
72 East 400 South, Suite 355  
Salt Lake City, Utah 84111  
Telephone: (801) 355-0320

DAVID WILKINSON  
ATTORNEY GENERAL  
Attorney for Respondent  
236 State Capitol Building  
Salt Lake City, Utah 84114

## TABLE OF CONTENTS

STATEMENT OF NATURE OF THE CASE.....	1
DISPOSITION IN THE LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	1
ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT OF THE FACTS.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT	

APPELLANT WAS NOT CLEARLY INFORMED OF THE CONSEQUENCES  
OF REFUSING TO SUBMIT TO A CHEMICAL TEST OF HER BLOOD  
ALCOHOL CONTENT, NOR DID HER ACTIONS CLEARLY INDICATE  
AN INTENTION TO REFUSE TO SUBMIT TO SUCH A TEST.... 3

## CASES CITED

<u>Beck v. Cox</u> , 597 P.2d 1335 (Ut. 1979).....	8, 9
<u>Elliot v. Dorius</u> , 557 P.2d 759, 762 (Ut. 1976).....	4
<u>Holman v. Cox</u> , 598 P.2d 1331, 1334 (Ut. 1979).....	5, 10
<u>Hyde v. Dorius</u> , 549 P.2d 451 (Ut. 1976).....	9
<u>Mathie v. Schwendiman</u> , 656 P.2d 463 (Ut. 1982).....	8

## OTHER AUTHORITIES

Utah Code Annotated, §44-6-44.10, (1953 as amended).....	1
Utah Code Annotated, §44-6-44.10(2), (1953 as amended).....	4

IN THE SUPREME COURT OF THE STATE OF UTAH

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v.	:	
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Driver License Services,	:	
Department of Public Safety,	:	
State of Utah,	:	
Respondent.	:	

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a trial de novo after an administrative revocation of appellant's driver license by the Department of Public Safety, Driver License Services, pursuant to Title 41, Chapter 6, Section 44.10, Utah Code Annotated, 1953 as amended.

DISPOSITION IN THE LOWER COURT

A trial de novo was held in the Third Judicial District Court before the Honorable Dean Conder, Judge presiding. The court denied appellant's motion to reinstate her driver license on October 23, 1985.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order from this court to have her driver license reinstated by respondent.

ISSUES PRESENTED FOR REVIEW

Was appellant clearly warned of the consequences of a

refusal to take a chemical test after she was arrested for Driving Under the Influence of Alcohol and did appellant's volitional actions clearly indicate an intention to refuse to submit to such a test?

#### STATEMENT OF THE FACTS

On July 27, 1985, at approximately 2:15 a.m., Salt Lake City Police Officer Scott Gardner observed appellant driving south bound on West Temple Street in Salt Lake City. (Tr. 3) At 600 South appellant made a right-hand turn, resulting in her driving the wrong way on a one-way street. (Tr. 4) She then turned left at the next intersection and pulled into a hotel parking lot. (Tr. 4) The officer had been following her with his overhead lights on as she drove on 600 South. He then approached her in the hotel parking lot. (Tr. 4-6)

At that time the officer detected an odor of alcohol, noticed that her eyes were somewhat bloodshot, and observed that she was unsteady on her feet. (Tr. 6) He requested that she perform several field sobriety tests, and also informed her that she need not take those tests if she did not want to. (Tr. 13) At that time, the passenger in her car began to talk to appellant, thus interfering with the officer, and distracting appellant. (Tr. 12) Appellant then refused to perform the field sobriety tests. (Tr. 7, 13)

Appellant was placed under arrest for driving under the influence of alcohol. (Tr. 14) The officer handcuffed appellant and she began to cry. (Tr. 14) He then drove her to

the Salt Lake County Jail. In the parking lot at the jail, the officer read the three admonitions off the "DUI Report Form"<sup>1</sup> as appellant continued to cry. He waited another ten minutes and tried to explain the implied consent law to appellant. (Tr. 8-10) Appellant at one time stated "you are going to ruin my job", then continued to cry without verbally responding to his requests. (Tr. 8-10)

After hearing these facts, the trial court ruled that crying, in and of itself, is not an indication that a person does not hear or understand what is said and that a witness heard that which was audibly announced. (Tr. 21) The request for reinstatement was denied. (Tr. 21)

#### SUMMARY OF ARGUMENT

Appellant's reactions to the officer's requests for a chemical test of her blood alcohol level did not indicate that she understood the consequences of a failure to submit to such a test. Likewise, her conduct did not clearly indicate a volitional refusal to submit to such a test.

#### ARGUMENT

APPELLANT WAS NOT CLEARLY INFORMED OF THE CONSEQUENCES OF REFUSING TO SUBMIT TO A CHEMICAL TEST OF HER BLOOD ALCOHOL CONTENT, NOR DID HER ACTIONS CLEARLY INDICATE AN INTENTION TO REFUSE TO SUBMIT TO SUCH A TEST.

Before one's driver license may be revoked for a

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1. The admonitions as described in the standard DUI Report Form are attached in the Addendum, and the officer's reading is reproduced on pages 6-7, *infra*.

refusal to submit to a chemical test, certain statutory prerequisites must be met by the arresting officer. Those are described in Utah Code Annotated, §41-6-44.10(2) (1953 as amended) which provides in part:

If the 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 (1) of this section and refuses to submit to the chemical test or tests, the 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 the person immediately requests the chemical test or tests as offered by a peace officer be administered, no test shall be given and a peace officer shall submit a sworn report.

This court has interpreted this statute to contain several mandatory aspects:

The important and mandatory aspects of this subsection are: after his arrest, the person should be informed which chemical test the officer has designated, and the consequences of his refusal to submit to the requested test. To comply with the mandate of the statute, the refusal and the advice, as to the resulting consequences, must be within the same time frame, but not necessarily within a precise sequence - they are integral to each other, and must be so administered. Elliot v. Dorius, 557 P.2d 759, 762 (Ut. 1976)

This court has also described the officer's duties with respect to the nature of the warnings:

The officer is responsible for making this clear to the arrested motorist, and this duty must be discharged in a fashion that will clearly alert the driver to the consequences of a refusal whether expressed



verbally or implied from his conduct and words. Holman v. Cox, 598 P.2d 1331, 1334 (Ut. 1979)

This court has also described the officer's duties with respect to the nature of the warnings:

The officer is responsible for making this clear to the arrested motorist, and this duty must be discharged in a fashion that will clearly alert the driver to the consequences of a refusal whether expressed verbally or implied from his conduct and words. Holman v. Cox, 598 P.2d 1331, 1334 (Ut. 1979)

In Holman, this court went on to hold that if the rights and obligations of the driver under the implied consent statute are not made clear to him, then it would be improper to revoke his driver license.

Holman also addressed the issue of what constitutes a refusal to take a test:

Obviously the arresting officer cannot know the subjective state of mind of the person arrested and whether he in fact intended his response to a request to take a blood test to be the equivalent of a refusal that would result in license revocation. The test must be objective; otherwise the whole statutory scheme could be subverted by one who equivocates or remains silent, and later protests that it was his unexpressed intent to take the test. However, the behavior of the driver must clearly indicate, judged objectively, that the driver intended to refuse to take the test.  
[Citations ommitted]

When an officer is confronted by a hostile driver, it is important that the personal animosities that may arise not be used as the basis for a conclusion by the officer that the driver refused. Rather, the actual behavior of the driver, as would be judged by a disinterested bystander, should

be the basis for such a conclusion. [Emphasis added] 598 P.2d at 1331.

The officer's testimony on direct examination regarding the requests for a chemical test and appellant's responses was as follows:

Q. [By Mr. Hale] After reading what is known as the .08 admonition did you request that she take a chemical test?

A. Yes, I did.

Q. And what test did you request?

A. Breath test.

Q. And what was her response to your request?

A. While I was reading these she was continually crying; and when I asked her what is your response on [sic] my request you submit to a chemical test, she continued to cry; but she says, "You're going to ruin my job."

Q. Ok. So she was crying and upset. Did she give any indications that she did not understand what your request was?

A. No.

Q. Say anything or do anything?

A. No. That's all she said at that time.

Q. The second admonition, would you read that as you read it to her that evening?

A. If you refuse, a test will not be given; however, I must warn you, that if you do refuse your license or permit to drive a motor vehicle can be revoked for one year with no provision for a limited driver's license.

After you've taken this test, you'll be permitted to have a physician of your own choice, administer a test at your own

expense, in addition to the one that I requested you to submit to, so long as it does not delay the test or tests requested by me. Upon your request, I'll make available to you, the results of the test if you take it.

Q. Did you again request her to take the test?

A. Yes, I did.

Q. And what was the response?

A. She continued crying.

Q. There is another admonition there; did you read that to her?

A. Yes, I did.

Q. Would you read it as you did then, please?

A. Your right to remain silent and your right to counsel do not apply to the implied consent law, which is civil in nature and separate from the criminal charges. Your right to remain silent does not give you the right to refuse to take the test. You do not have the right to have counsel during the test procedure. Unless you submit to the test I am requesting, I'll consider that you have refused to take the test. I warn you, that if you refuse to take the test, your driving license can be revoked for one year with no provision for a limited license.

Q. Did you again make the request for a breath test?

A. Yes, I did.

Q. And what was the response?

A. There was no response; she continued crying.

Q. Now, you've written in some language there below that admonition. Would you explain that?

A. Oh, yeah. She did state that. She said, "Please help me", and then she continued to cry. (Tr. 8-10)

The officer indicated that he waited another ten minutes, during that time the appellant continued to cry, he then tried to explain the implied consent law to her, but again she continued to cry. (Tr. 10) On cross examination the officer indicated that appellant gave no acknowledgment that she had heard what was read to her (Tr. 18-19) nor was the officer observing her reactions to these admonitions other than to hear her continuous crying. (Tr. 19)

This court has previously dealt with "constructive refusals" in a number of cases. In Mathie v. Schwendiman, 656 P.2d 463 (Ut. 1982), after being stopped for weaving and speeding, the defendant was arrested for driving under the influence of alcohol. He agreed to take a chemical test but refused to remove the chewing gum from his mouth. This court held that even though the driver agreed to take a test, the volitional failure to do what is necessary to perform a chemical test constituted a refusal.

In Beck v. Cox, 597 P.2d 1335 (Ut. 1979), the defendant was arrested for driving under the influence of alcohol. After being informed of the consequences of a refusal the driver responded "I'm a criminal, yeah, yeah, yeah, I'm a criminal". When asked if he would take a test, the driver responded "I don't know". A fourth, and final request was made and the driver refused to respond. This court held that there

need not be an express refusal to take the chemical test, but that a volitional failure to perform an act necessary to the proper completion of the test constitutes a refusal. In both of these cases it is important to note that both drivers acknowledged, through either words or conduct, that a chemical test had been requested.

By way of contrast, in Hyde v. Dorius, 549 P.2d 451 (Ut. 1976), the defendant was arrested for driving under the influence of alcohol and requested to take a chemical test. When informed of the consequences of a refusal to take the test she stated that the police did not know what they were talking about. She then began to cry and scream and became very belligerent. She subsequently took two field sobriety tests but was never again offered the opportunity to take a chemical test. The court ordered the defendant's license reinstated, in doing so, two of the justices held that an express refusal was necessary to invoke the statutory sanctions of license revocation. One justice held that the facts did not justify such a revocation. The requirement for an express refusal was rejected in Beck v. Cox, supra. However, appellant submits that Hyde v. Dorius, supra, may still be read to stand for the proposition that the facts there were insufficient to establish a volitional refusal.

In the instant case, the evidence indicates that appellant was extremely upset and crying as the required admonitions were read to her. The trial court ruled that, by being

present when something is said, a witness hears and understands it. (Tr. 21) The effect of the trial court's ruling is that an officer need merely read the admonitions no matter what the mental condition of the driver is. The case law from this court is contrary to this holding. As described above, the driver must be clearly alerted to the consequences of a refusal, and furthermore, the driver's actions must clearly indicate an intent to refuse to take the chemical test. Holman v. Cox, supra. In the instant case, neither of these requirements were met. There is nothing to indicate that appellant was in fact listening to the officer's admonitions, let alone understanding them. Furthermore, there were no actions taken by appellant evidencing any intent to refuse to submit to the requested test. Consequently, appellant's driver license should be ordered to be reinstated.

#### CONCLUSION

The evidence here is insufficient to support the finding that the arresting officer described the consequences of a refusal to take a chemical test in a fashion that would clearly alert the driver of those consequences. Further, appellant's actions did not constitute a clear indication of her intent to refuse to take a chemical test.

Dated this \_\_\_\_ day of January, 1986.

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G. FRED METOS

CERTIFICATE OF DELIVERY

I hereby certify that four true and correct copies were mailed/delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114, on this \_\_\_\_ day of January, 1986.

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## ADDENDUM

### Utah Code Annotated

#### §41-6-44.10 (1953 as amended)

(1) 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 having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug as detailed in section 41-6-44, so long as the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug as detailed in section 41-6-44. A peace officer shall determine which of the aforesaid tests shall be administered.

No person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine, shall have the right to select the test or tests to be administered. The failure or inability of a peace officer to arrange for any specific test is not a defense with regard to taking a test requested by a peace officer and it shall not be a defense in any criminal, civil or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(2) If the 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 (1) of this section and refuses to submit to the chemical test or tests, the 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 the person immediately requests the chemical test or tests as offered by a peace officer be administered, no test shall be given and a peace officer shall submit a sworn report, within five days after the date of the arrest, that he had grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited or while under the influence of alcohol or any drug or combination of alcohol and any drug as detailed in section 41-6-44 and that the person had refused to submit to a chemical test or tests as set forth in subsection (1) of this section. Within 20 days after receiving a sworn report from a peace



## ADDENDUM CONTINUED

U.C.A. §41-6-44.10 (1953 as amended) continued

officer to the effect that the person has refused a chemical test or tests the department shall notify the person of a hearing before the department. If at that hearing the department determines that the person was granted the right to submit to a chemical test or tests as set forth in subsection (1) of this section. Within 20 days after receiving a sworn report from a peace officer to the effect that the person has refused a chemical test or tests the department shall notify the person of a hearing before the department. If at that hearing the department determines that the person was granted the right to submit to a chemical test or tests and refused to submit to the test or tests, or if the 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. The department shall also assess against the person, in addition to any fee imposed under subsection 41-2-8(7), a fee of \$25, which must be paid before the person's driving privilege is reinstated, to cover administrative costs, and which fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this subsection that the revocation was not proper. Any person whose license has been revoked by the department under the provisions of this section shall have the right to file a petition within 30 days thereafter for a hearing in the matter in the district court in the county in which the person resides. The court is hereby vested with jurisdiction, and it shall set the matter for trial do novo upon 10-days' written notice to the department and thereupon take testimony and examine into the facts of the case and determine whether the petitioner's license is subject to revocation under the provisions of this chapter.

### Admonitions from the DUI Report Form

Results indicating .08% or more by weight of alcohol in your blood shall, and the existence of a blood alcohol content or presence of drugs sufficient to render you incapable of safely driving a vehicle can, result in suspension or revocation of your license or privilege to operate a motor vehicle.

If you refuse the test, it will not be given, however I must warn you that if you refuse, your license or permit to drive a motor vehicle can be revoked for one year with no provision for a limited driver's license. After you have taken this test, you will be permitted to have a physician of your own choice administer a test at your own expense in addition to the one I have requested you to submit to, so long as it does not delay

ADDENDUM CONTINUED

Admonitions from the DUI Report Form continued

the test or tests requested by me. Upon your request, I will make available to you the result of the test if you take it.

Your right to remain silent and your right to counsel does not apply to the implied consent law which is civil in nature and separate from the criminal charges. Your right to remain silent does not give you the right to refuse to take the test. You do not have the right to have counsel during the test procedure. Unless you submit to the test I am requesting, I will consider that you have refused to take the test. I warn you that if you refuse to take the test, your driver's license can be revoked for one year with no provision for a limited license.