

1986

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

Utah Supreme Court

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UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

1986  
LUANN LEE, 21010

Plaintiff-Respondent,

-v-

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

Defendant-Appellant.

Case No. 21010

BRIEF OF RESPONDENT

THIS IS AN APPEAL FROM A DISMISSAL OF A  
PETITION REQUESTING THE REINSTATEMENT OF  
APPELLANT'S DRIVER LICENSE PURSUANT TO A  
REFUSAL.

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FILED

FEB 13 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Respondent, :  
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-v- : Case No. 21010  
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FRED C. SCHWENDIMAN, Chief, :  
Driver License Services, :  
Department of Public Safety, :  
State of Utah, :  
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The appeal issues presented are whether the trial court properly found that the appellant was properly warned of the consequences of a refusal and refused.

II. Whether the trial court properly found that the appellant's response to the officer's request was a refusal.

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Driver License Services,	:	
Department of Public Safety,	:	
State of Utah,	:	
Defendant-Appellant.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from an order of driver license revocation issued by the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dean Conder presiding.

The Third District Court held a trial de novo on October 23, 1985 to determine whether appellant's driver's license should be revoked under Utah's Implied Consent Statute. In accordance with Utah Code Ann. § 41-6-44.10 (1953 as amended), the trial court found that:

1) The officer had cause to and did arrest the petitioner for driving while under the influence.

2) The petitioner was properly requested to take a chemical test, pursuant to Utah Code Ann. § 41-6-44.10 (1953 as amended), and warned of the consequences to the driving permit if there was a refusal.

3) The petitioner, having refused to submit to a chemical test, should be denied her petition and license should be revoked for one year which would expire on August 29, 1986.

#### STATEMENT OF FACTS

On July 27, 1985, about 2:15 a.m. (R. 20), Officer Scott Gardner observed appellant Luann Lee turn west on to 600 South, an east-bound one way street. Lee apparently did not realize that she was going the wrong way on a one way street, despite having to go around another vehicle coming towards her in the same lane. (R. 21) Officer Gardner switched on his overhead lights and followed appellant as she continued to drive for a few more blocks and then turn into the Radisson Hotel parking lot. She nearly hit several other parked vehicles while attempting to stop.

Officer Gardner approached the appellant and asked her if she had been drinking. She said she had "had a couple." (R. 23) Lee had a strong odor of alcohol about her, her eyes were bloodshot, and her speech was slurred. (R. 23) She was also unsteady on her feet.

The officer asked Lee to take the field sobriety tests. A female passenger in the car kept interjecting and trying to give appellant advice not to take the field tests. (R.28)

Officer Gardner then placed appellant under arrest for driving under the influence of alcohol and going the wrong way on a one way street. At this time, the appellant began crying. The appellant continued to cry during the short trip to the police station. In the police station parking lot, Officer Gardner

requested Lee to take a chemical breathalyzer test. After the .08 admonition she said, "You're going to ruin my job." (R. 26) The officer gave her the second admonition with no response. The officer then gave her the third warning specifically stating that if she did not submit to the test, he would deem her behavior a refusal. (R. 20) Lee then said, "Please help me" and continued to cry. (R. 27) Officer Gardner waited in silence for a substantial period of time, at least ten minutes, for the appellant to request the test. He then asked her in his own words, to take the test and he explained the consequences and the possibility of losing her license. (R. 27) Still, Lee did not request the test. At no point did she indicate that she was confused concerning the warnings or a Miranda warning or unable to hear or understand the request and warnings.

#### SUMMARY OF ARGUMENT

Appellant was given a clear explanation of her rights and duties under the Implied Consent Statute. Appellant's response to the officer's request to take a chemical test objectively indicated a refusal.

#### ARGUMENT

##### POINT I

THE FACTS SHOW THE OFFICER CLEARLY INFORMED THE APPELLANT OF THE CONSEQUENCES OF REFUSING A BREATHALYZER TEST.

The Implied Consent Statute § 41-6-44.10(2) (1953 as amended) states that if a person arrested for driving under the influence refuses to take a chemical test as requested by the peace officer, that peace officer must warn the person that a



refusal can result in revocation for one year of his or her license to operate a motor vehicle. The statute provides that after the warning, the person must immediately request the chemical test or else no test will be given and the person will be considered to have refused to take the test. This court has stated that "the important and mandatory aspects of this section 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." Elliot v. Dorius, 557 P.2d 759, 761, 762 (Utah 1976). This court has further held that if a person manifests confusion caused by the officer's reading of Miranda, then the officer must give a clear explanation of the driver's rights under Miranda and his duties under the implied consent law. Holman v. Cox, 598 P.2d 1331, 1334 (Utah 1979).

The appellant did not manifest confusion concerning her affirmative duty to take the test nor did the officer cause any confusion with a Miranda warning. To the contrary, appellant made two statements to the officer which show her awareness of the situation. She said, "You're going to ruin my job" (R. 8) and, "Please help me." Obviously, these objective statements show that appellant realized that she had been caught driving while intoxicated. She also apparently realized that there would be consequences as explained by Officer Gardner and that her refusal could have direct repercussions on her license and her work.

If an arresting officer gives the arrestee "fair warning, notices, and an opportunity to be heard as to the consequence of his refusal," then the arrested person's due process rights are preserved and the officer has satisfactorily warned the arrestee. Larsen v. Schwendiman, No. 20185 (Utah filed Dec. 12, 1985) (emphasis added). In this case, Officer Gardner requested appellant to take a breath test while they were both in the front seat of the police car parked next to the police station. The officer gave her all three admonitions and each time he repeated his request. Because appellant continued to cry, the officer even went beyond the required explanations. He waited in silence for at least ten minutes to afford appellant a chance to compose herself and request the test. She did neither. The officer then explained again, in his own words, the possible consequences of her refusal and asked her to take the test.

As this court asked in Beck v. Cox, 497 P.2d 1335, 1337, "how many times should an officer ask a driver, who refused to give an unequivocal answer, to take the test? The answer is in Cavenass v. Cox, 598 P.2d 349 (Utah 1979) which provides as the statute does for an immediate and "simple 'yes' or 'no' to the officer's request, the obvious legislative purpose being to eliminate delays." Drivers should not be allowed to equivocate. A driver must agree to take a test immediately following a warning of the consequences of a refusal. If a driver does not do so, a refusal is conclusively presumed. Conrad v. Schwendiman, 680 P.2d 736, 738 (Utah 1984). Officer Gardner

warned appellant three times, waited a substantial amount of time, and then warned her again. The appellant was upset and perhaps inattentive, yet the officer did all he was required to do and beyond in an effort to give her clear notice and an opportunity to hear the consequences of her actions. Short of yelling at appellant or bullying her into responding, Officer Gardner could do nothing more.

Appellant does not have the right to reasonably refuse to submit to a chemical test. Caveness at 352. Under the implied consent statute, appellant is deemed to have already given her consent to a chemical test whenever she operates a motor vehicle. U.C.A. 41-6-44.10 and Moran v. Cox, 580 P.2d 241, 243 (Utah, 1978). A person threatened with the loss of her driver's license has only the right to make a choice and must make a choice based on a fair explanation of her rights and duties. Holman, at 1334. The fact that appellant did not heed the officer's warnings and thus made an unwise choice does not excuse her from her duty to take the test nor does it relieve her of the explained consequences.

Officer Gardner did everything reasonable under the circumstances to afford appellant the information needed to make a proper decision without delay. Appellant's tears do not render the officer's explanation less clear or less reasonable. Appellant's uncooperativeness should not be rewarded since the officer gave appellant a clear explanation of the consequences of a refusal. See Beck at 1337.

## POINT II

### APPELLANT'S BEHAVIOR CONSTITUTED A REFUSAL TO SUBMIT TO A CHEMICAL TEST.

Officers must often deal with uncooperative and hostile drivers. If the implied consent statute were interpreted to require an express, volitional and perfectly understood verbal refusal, the dangerous driver could avoid the statutory consequences by equivocating or remaining silent and then "later claiming an unexpressed intent to take the test." Beck v. Cox, 597 P.2d 1335 (Utah 1979). An arresting officer cannot know the subjective state of mind of an arrestee. Therefore, the refusal is not required to be in unequivocal terms; a driver's behavior indicating his intention to refuse is sufficient. Conrad v. Schwendiman, 680 P.2d 736 (Utah 1984). The standard for determining whether a driver intends his response to equal a refusal must be objective.

This court has previously addressed types of responses which constitute refusals. In Mathie v. Schwendiman, 656 P.2d 463 (Utah 1982), a driver's refusal to remove chewing gum from his mouth in order to produce a valid breath test was considered a refusal to take the test. In Beck v. Cox, 597 P.2d 1335 (Utah 1979), the plaintiff would not say "yes" or "no" but only "I don't know." The totality of his conduct was a refusal to do what was necessary. In Conrad v. Schwendiman, 680 P.2d 736 (Utah 1984), the driver first responded to a request for a breath test by agreeing only to take a blood test. His response to subsequent requests was to express concern for his car. He never expressly refused or agreed to take the test. The Court said the

diver must "immediately" agree following a warning of the consequences of a refusal, "otherwise, refusal is conclusively presumed." Id. p. 738. In each case, this court has held that "the volitional failure to do what is necessary in order that the test can be performed is a refusal." Beck, at 1338. Mathie, at 464. See Conrad at 738.

Appellant in this case responded to the officer's request by crying. The subjective intent behind this continuous sobbing cannot be determined: it may have been a result of fear, the liquor consumed, or an effort to manipulate the officer. However, her behavior effectively rendered it impossible to perform the test, whatever her unexpressed intent may have been.

The record of the trial de novo shows that at no time, either during the arrest or the trial, did appellant claim to be confused or to have intended to take the test. Counsel for the appellant argues only that her response did not clearly indicate an intention to refuse.

Again, in Caveness, this court held that the Implied Consent Statute precluded the defense of "reasonable refusal." A driver is required to give only a simple "yes" or "no" to an officer's request. Caveness v. Cox, 598 P.2d 349 (Utah 1979). The legislative purpose is "to eliminate delays" in the taking of tests because alcohol quickly dissipates with time. Id. at 352 (emphasis added). Here, appellant refused to provide a "yes" or "no" and the continuous crying acted as a delay.

As discussed previously, Officer Gardner did everything he could to elicit some response from appellant. He

continued to ask appellant to take the test, although he is not required to do so when a driver refuses to answer simply to a clearly stated request. Conrad, at 738. Appellant's behavior was difficult and uncooperative. Judged objectively, even by a disinterested bystander, appellant's behavior constituted a refusal.

#### CONCLUSION

The officer clearly explained the consequences of a refusal to the appellant. Appellant's behavioral response was uncooperative and would have delayed the test contrary to the statute. Whatever her unexpressed and subjective intent concerning the chemical test may have been, the officer and the trial court only considered appellant's actions from an objective standard. Appellant's continuous behavior and verbal conditional response rendered any chemical test impossible to immediately administer. Therefore, appellant's actions and words constituted a refusal.

The Respondent respectfully requests the court to uphold the discretion and the findings of the trial court and to let its order stand.

DATED this 13<sup>th</sup> day of February, 1986.

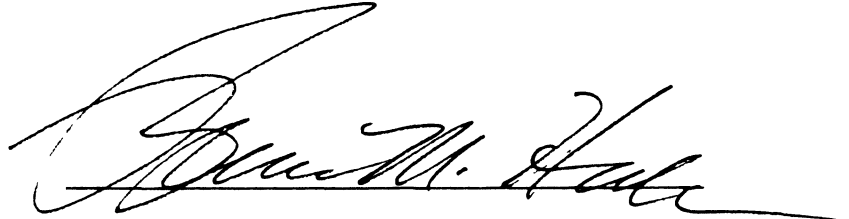
DAVID L. WILKINSON  
Attorney General

A handwritten signature in black ink, appearing to read "Bruce M. Hale", written in a cursive style.

BRUCE M. HALE  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing Brief, postage prepaid, to G. Fred Metos, attorney for Appellant, 72 East 400 South, Suite 355, Salt Lake City, Utah 84111 this 19<sup>th</sup> day of February, 1986.

A handwritten signature in black ink, appearing to read "Bruce M. Hull", with a long horizontal flourish extending to the right.