

1987

Layton City v. James Bennett : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Scott R. Wangsgard; Conder and Wangsgard; Attorneys for Petitioner .

Steven Garside; Layton City Prosecutor; Attorneys for Respondent.

Recommended Citation

Petition for Certiorari, *Layton City v. Bennett*, No. 870305.00 (Utah Supreme Court, 1987).

https://digitalcommons.law.byu.edu/byu_sc1/1702

This Petition for Certiorari is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

48.0
80

870305 IN THE SUPREME COURT OF THE STATE OF UTAH

LAYTON CITY,

Plaintiff/Respondent,

vs.

JAMES BENNETT,

Defendant/Appellant/Petitioner.

Case No. 870305

Category 13

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari and review of a decision of the
Utah Court of Appeals.

Judges: Russell W. Bench
Judith M. Billings
Richard C. Davidson

SCOTT R. WANGSGARD
CONDER & WANGSGARD
4059 South 4000 West
West Valley City, Utah 84120
Attorneys for Petitioner

STEVEN GARSIDE
Layton City Prosecutor
437 North Wasatch Drive
Layton, Utah 84041
Attorney for Respondent

FILED

AUG 28 1987

Clerk, Supreme Court, Utah

STEVEN GARSIDE

SCOTT R. WANGSGARD

IN THE SUPREME COURT OF THE STATE OF UTAH

LAYTON CITY,

Plaintiff/Respondent,

vs.

JAMES BENNETT,

Defendant/Appellant/Petitioner.

Case No.

Category 13

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari and review of a decision of the
Utah Court of Appeals.

Judges: Russell W. Bench
Judith M. Billings
Richard C. Davidson

SCOTT R. WANGSGARD
CONDER & WANGSGARD
4059 South 4000 West
West Valley City, Utah 84120
Attorneys for Petitioner

STEVEN GARSIDE
Layton City Prosecutor
437 North Wasatch Drive
Layton, Utah 84041
Attorney for Respondent

STEVEN GARSIDE

SCOTT R. WANGSGARD

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues Presented for Review	iv
Statutes and Rules for Review	iv
Reference to Opinion	vii
Jurisdiction of the Court	1
Statement of the Case	2
Argument I	3
Argument II	12
Conclusion	19
Appendix	20

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

Fourth Amendment to the United States Constitution, Article Four	iv,6,7,8,9,11
Utah Constitution, Article I, Section 14	iv,8,11
Utah Constitution, Article VIII, Section 4	iv,v,vi,vii,13,16

STATUTES:

Utah Code Section 41-6-44.3	14,16,17
Utah Code Section 41-6-44.3(b)	iv,15,16
Utah Code Section 77-7-15	v,8,11
Utah Code Section 78-2-2(3)(a)	1

CASES:

<u>Brown v. Texas</u> , 443 U.S. 47, (1979)	7,8,10
<u>Camara v. Municipal Court</u> , 387 U.S. 523, 534-535, 536-537, (1967)	6
<u>Layton v. Bennett</u> , 63 Utah Adv. Rpts. 16	vii, Appendix A&B
<u>Murray v. Hall</u> , 663 P.2d 1314 (1983)	17,18
<u>Robinson v. Durand</u> , 36 Utah 93, 104 Pac 1314 (1908)	v
<u>State v. Carpena</u> , 714 P.2d (1986)	10
<u>State v. Constantino</u> , 732 P.2d 125 (1987)	10
<u>State v. Hanson</u> , 588 P.2d 164 (1978)	vi
<u>State v. Swanigan</u> , 699 P.2d 718 (1985)	9,10
<u>Terry v. Ohio</u> , 392 U.. 1 (1967)	5,6,7

RULES OF EVIDENCE:

Preliminary Note to Utah Rules of Evidence	v,13
The Advisory Committee Notes to Rule 101	vi,13
Rule 801(c)	vi,14
Rule 802	vi,14
Rule 803(6)	vi,vii,14,15,16
Rule 803(8)	vii,14,15,16

APPENDIX:

Minute Entry of Fourth Circuit Court	A
Memorandum Decision	B
Agency Rules and Regulations	C
Custodian Certificate and Maintenance Affidavits ...	D

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should all of the evidence obtained by the Layton police from the Petitioner have been suppressed?

2. Should the evidence concerning the results of the "intoxilyzer" test have been admitted by the Court at trial and subsequently submitted to the jury?

STATUTES AND RULES FOR REVIEW

* United States Constitution, Fourth Amendment, states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* Utah Constitution, Article I, Section 14, states:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

* Utah Constitution, Article VIII, Section 4, states:

The supreme court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The legislature may amend the rules of procedure and evidence adopted by the supreme court upon a vote of two-thirds of all members of both houses of the legislature...

* Utah Code, Section 41-6-44.3, passed into law in 1979 and amended in 1983, states:

(1) The commissioner of public safety shall establish standards for the administration and interpretation of

chemical analysis of a person's breath including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or driving with a blood alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions or events to prove that the analysis was made and the instrument used was accurate, according to standards established in subsection (1) shall be admissible if:

- (a) The judge finds that they were made in the regular course of the investigation at or about the time of the act, condition or event; and
- (b) The source of information from which made and the method and the circumstances of their preparation were such as to indicate their trustworthiness.

(3) If the judge finds that the standards established under subsection (1) and the conditions of subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

*Utah Code, Section 77-7-15, passed in 1980, reads as follows:

A peace officer may stop any person in a public place when he has reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Utah Rules of Evidence:

*The Preliminary Note to the Utah Rules of Evidence, paragraph two, reads as follows:

The Committee met...and recommended adoption of the Federal Rules of Evidence by the Supreme Court pursuant to the general judicial powers contained in the Constitution of Utah, Article VIII, Section 1, to supervise inferior courts, and pursuant to the statutory rulemaking power of the Supreme Court contained in Utah Code Annotated, Section 78-2-4 (1953). It was the view of the Committee that, while the legislature may not enlarge judicial powers beyond those prescribed by the Constitution of Utah, Robinson v. Durand, 36 Utah 93, 104 Pac. 760, (1908), the power to promulgate rules is within the

general judicial powers conferred by Article VIII, Section 1. Any existing statutes inconsistent with these rules, if and when these rules are adopted by the Supreme Court, will be impliedly repealed.

*The Advisory Committee Note to Rule 101 of the Utah Rules of Evidence, paragraph three, reads as follows:

The position of the court in State v. Hansen, 588 P.2d 164 (Utah 1978) that statutory provisions of evidence law inconsistent with the rules will take precedence is rejected.

*Rule 801(a) & (c) of the Utah Rules of Evidence read as follows:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

*Rule 802 of the Utah Rules of Evidence reads as follows:

Hearsay is not admissible except as provided by law or by these rules.

*Rule 803(6) & (8) of the Utah Rules of Evidence read as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified

witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

ADMINISTRATIVE LAW

18 Utah Advance Reports 3, (1985).

Pursuant to the provisions of Article VIII, Section 4, Constitution of Utah, as amended, the Court adopts all existing statutory rules of procedure and evidence not inconsistent with or superseded by rules of procedure and evidence heretofore adopted by this Court. Effective as of July 1, 1985.

Breath Testing Regulations, Department of Public Safety

(Text in appendix)

REFERENCE TO OPINION

This Honorable Court is hereby referred to the memorandum opinion of the Utah Court of Appeals styled Layton City v. James Bennett, Case No. 870038-CA, 63 Utah Advance Reports 16, filed July 31, 1987.

A P P E N D I X

FOURTH CIRCUIT COURT, STATE OF UTAH

Davis County, Layton Department

MINUTE ENTRY

LAYTON CITY
Plaintiff

vs.

JAMES BENNETT
Defendant

No. 86 TF 559

Date 11-13-86

Judge Bean

MATTER: DECISION ON MOTION

After hearing the testimony of Officer Patterson and the arguments of counsel, the Court took Defendant's motion under advisement and has since read the pertinent decisions and further analyzed the facts involved, and now finds and concludes as follows:

1. Although this is not a "reasonable suspicion for a stop" case, since Officer Patterson didn't stop Defendant's car, the "reasonable suspicion" cases provide guidance for deciding the motion.

2. The controlling questions are, did the officer have the right to be on the property and did he have the right to question Defendant.? Both questions must be answered in the affirmative.

3. When Officer Patterson saw the pickup and camper hesitate in the left turn lane for an unusual length of time without any apparent reason at 1:00 a.m. and then turn onto a construction site, it was natural for him to pay further attention to the vehicle.

4. Because of thefts and vandalism from construction sites around the city, the police had been given written and verbal instructions to investigate any nighttime activity at or near a construction site. Officer Patterson proceeded onto the site to question Defendant in furtherance of those instructions. In response to the officer's questions, Defendant stated he was the night watchman and was properly on the premises.

5. Defendant argues that he had a right to be there, that there was only one piece of equipment on the site at the time and therefore no need for the officer to be questioning anybody.

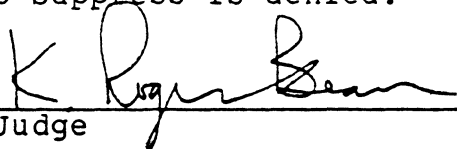
2.

But the policeman didn't know those things going in, and from his position he had good reason to question the driver of the truck/camper. The obvious question is, if there was no danger of theft or vandalism at the site, why was Defendant there as a night watchman? About the time a police officer fails to question someone under such circumstances and learns later of a burglary or vandalism at that time and location, he finds he has some explaining to do. Accepting Defendant's position, the officer is condemned if he does and condemned if he doesn't.

6. When the officer stopped his car behind Defendant's truck Defendant voluntarily exited, approached the officer and voluntarily spoke to him. If Defendant had chosen to do so, he could have declined to speak to the officer or do field sobriety tests. The officer may then have been limited to giving friendly advice and leaving; he very likely would not have had probable cause for an arrest. It was Defendant, not the officer, who knew how much Defendant had had to drink and who knew that if he got close to an officer the drinking might become apparent.

7. A Terry stop must be brief and minimally intrusive unless and until probable cause for an arrest appears. The stop in this case met those requirements. After the field sobriety tests, Officer Patterson had probable cause for an arrest of Defendant.

8. Defendant's Motion to Suppress is denied.



Judge

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Layton City,)	
)	MEMORANDUM DECISION
Plaintiff and Respondent,)	
v.)	(For Publication)
)	
James Bennett,)	Case No. 870038-CA
)	
Defendant and Appellant.)	

Before Judges Bench, Billings and Davidson.

FILED
JUL 31 1987

Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

PER CURIAM:

Defendant James A. Bennett appeals his conviction in circuit court for driving while under the influence of alcohol. On appeal, defendant argues that (1) the arresting officer violated defendant's fourth amendment rights by "interrogating" him without any "reasonable suspicion;" (2) the trial court should have dismissed two potential jurors for cause; and (3) the trial court improperly admitted "intoxilyzer maintenance affidavits." We reject these claims and affirm defendant's conviction.

A complete statement of facts is unnecessary. Briefly stated, a police officer observed defendant driving his truck into a construction site at 1:00 a.m. and followed in behind him. Defendant parked his truck at the site and exited his vehicle without any request to do so by the officer. Defendant walked up to the police car as the officer was getting out and freely initiated a conversation. This initial encounter was a consensual and voluntary discussion between the defendant and the officer. It was not a seizure subject to fourth amendment protection. Defendant's constitutional right to be free from unreasonable searches and seizures was therefore not violated at this stage. Florida v. Rodriguez, 469 U.S. 1 (1986); Florida v. Royer, 460 U.S. 491 (1983); State v. Dietman, 58 Utah Adv. Rep. 24 (1987). See also, State v. Trujillo 60 Utah Adv. Rep. 52 (Ct. App. 1987). There was also no violation of Utah Code Ann. § 77-7-15 (1982).

It was not until after the defendant's voluntary approach that the officer observed him and detected a strong odor of alcohol. Defendant was then detained on suspicion of driving while intoxicated and was requested to submit to field sobriety tests. The officer had the necessary "reasonable suspicion" to detain defendant at this point.

Second, defendant argues that two potential jurors should have been excused from the panel venire for cause. He erroneously focuses attention only upon selective statements in the jury voir dire, ignoring substantial assurances to the trial court that, as jurors, the individuals would be fair, impartial and objective to both sides and follow the court's instructions. Defendant criticizes the first proposed juror's association with MADD (Mothers Against Drunk Drivers) and the other's position as a reserve police officer in an adjoining city. In specific, detailed questioning by the court, each assured the trial judge that their respective associations would be no impediment to proper fulfillment of a juror's duty. After our review of the entire record, we find no abuse of the trial court's discretion in refusing to excuse either juror for cause. State v. Hewitt, 689 P.2d 22 (Utah 1984); State v. Lacey, 665 P.2d 1311 (Utah 1983); State v. Van Dam, 554 P.2d 1324 (Utah 1976). Defendant did not demonstrate on the trial record, or on appeal, that either could not act in a fair and impartial manner, State v. Brooks, 631 P.2d 878, 884 (Utah 1981), or that "strong and deep impressions" against the defendant's case had formed. State v. Hewitt, at 26.

Defendant maintains that the intoxilyzer testing affidavits (Exhibits A, B, and C) were inadmissible hearsay. He claims that Utah Code Ann. § 41-6-44.3 (1986) is inconsistent with and was impliedly repealed by the Utah Rules of Evidence. He then argues that the affidavits would not be admissible under any exception to the hearsay rule, Utah R. Evid. 802.

We reject the argument that the adoption of the evidence rules on admissible hearsay automatically repealed other statutory hearsay exceptions. Utah R. Evid. 802, provides that: "hearsay is not admissible except as provided by law or by these rules" (emphasis added). Utah Code Ann. § 41-6-44.3 was enacted as a statutory exception to the hearsay rule and its validity was affirmed in Murray v. Hall, 663 P.2d 1314 (Utah 1983). Rule 802 clearly contemplates that other statutory provisions may similarly apply as valid exceptions to otherwise inadmissible hearsay. See e.g., State v. Nelson, 725 P.2d 1353 (Utah 1986) and State v. Fulton, 58 Utah Adv. Rep. 16, 21 (1987).

Moreover, pursuant to its constitutional power in article VIII, § 4, of the Utah Constitution, in September 1985, the Supreme Court formally adopted all statutory rules of evidence not inconsistent with the Court's rules. The creation of an additional exception to the hearsay rule by § 41-6-44.3 is supplemental to and not inconsistent with Rule 802. cf. State v. Barneycastle, 699 P.2d 745, 746 (Utah 1985).

Finally, defendant challenges the sufficiency of the intoxilyzer testing affidavits, asserting they are not sufficiently detailed to satisfy the requirements of Murray City v. Hall, 663 P.2d at 1321-2. In Hall, the Utah Supreme Court held that only affidavits contemporaneously prepared in the normal course of duty, with indications of trustworthiness, are admissible under Utah Code Ann. § 41-6-44.3 (1986). In this case the facts stated are based upon the affiant's personal knowledge and observation as the person who conducted the machine testing procedures, and not upon someone else's hearsay information as in Hall. Id. at 1320, n.5. The affidavits contain sufficient foundation to be admissible.

The remainder of the alleged flaws in the affidavits relate only to the weight given them by the trier of fact-- not to their admissibility. The affidavits create only a rebuttable presumption that the testing was properly performed. As stated in Hall, if the defendant desired to impeach the accuracy or the completeness of the testing procedures or the affidavits, he could have subpoenaed the officer responsible for the testing or secured other demonstrative evidence. Id. at 1321-2. But, as in Hall, defendant did not do so.

Defendant's conviction is affirmed.

ALL CONCUR:

Russell W. Bench, Judge

Judith M. Billings, Judge

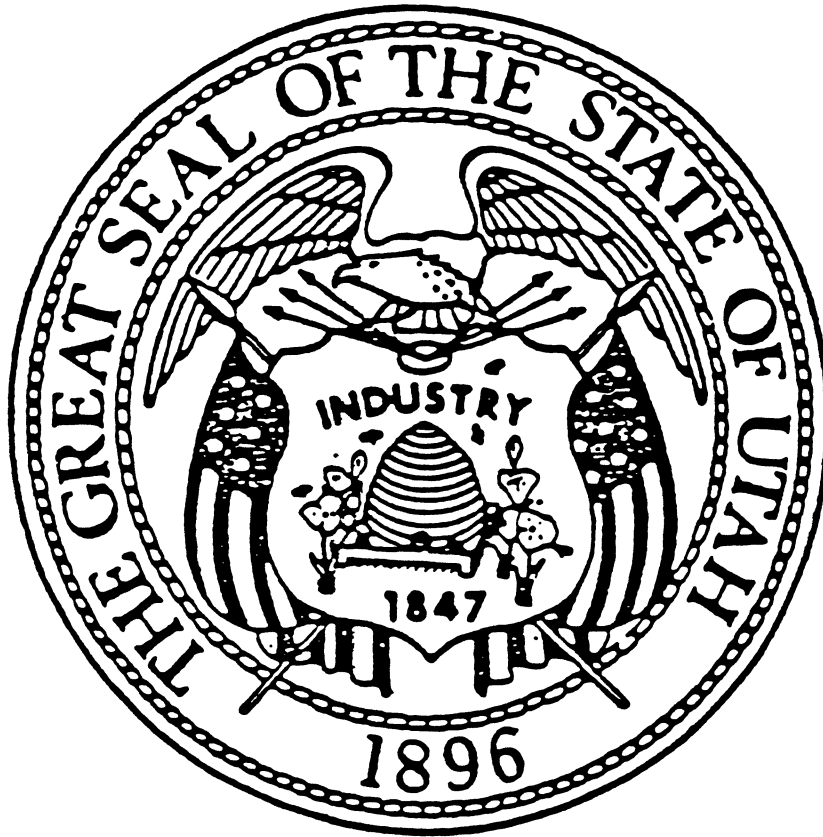
Richard C. Davidson, Judge

effective. June 22, 1979
Archives file #3531

Revised: April 1, 1981
Archives file# 4714

BREATH TESTING REGULATIONS

Revised: November 4, 1983
Archives file# 6734



DEPARTMENT OF PUBLIC SAFETY

Jerry E. Luchen
Jerry E. Luchen
Commissioner

I. TECHNIQUES OR METHODS

- A. Tests to determine the concentration of alcohol in a persons blood, may be applied to blood, breath or other bodily substances. Results shall be expressed as equivalent to grams of alcohol per one hundred (100) cubic centimeters of blood. The results of such tests shall be entered in a permanent record book.**
- B. Written check lists, outlining the method of properly performing the tests in use under division A of this regulation, shall be available at each location where tests are given. The check list and the test record shall be retained by the operator administering the test or the arresting officer.**

Definition :

A check list sets forth the steps, in sequence, that a breath test operator must follow. A square is provided by each of the steps for the operator to check each one as it is performed to insure proper operation of the test instrument.

II. BREATH TESTS

- A. Breath samples of alveolar air shall be analyzed with instruments specifically designed for the analysis of breath. The calculation of the blood alcohol concentration shall be on the basis of aveolar air to blood ratio of 2100:1. Breath samples shall be analyzed according to the methods described by the manufacturer of the instrument or instructions issued by the office of the Commissioner of Public Safety.**

III. TESTS FOR CHECKING CALIBRATION

- A. Breath testing instruments must be certified on a routine basis not to exceed forty (40) days.**
- B. Calibration tests must be performed by a technician using appropriate solutions of ethyl alcohol, and using methods and techniques for checking calibration recommended by the manufacturer of the instrument or the office of the Commissioner of Public Safety.**
- C. Results of test for calibration shall be kept in a permanent record book. A report of each calibration test shall be recorded on the appropriate form and sent to the supervisor of the Breath Testing Program. The supervisor of the Breath Testing Program is hereby designated as the official keeper of said records.**

IV. PROCEDURE FOR CERTIFICATION OF INSTRUMENTS

A. Breathalyzer

- 1. Instrument heating properly:**
 - a. between 47 and 53 degrees centigrade**
- 2. Collection chamber output:**
 - a. COLD between 55 and 58 cc's**
 - b. WARM between 50 and 54 cc"s**
- 3. NULL meter functioning properly:**
 - a. Must be able to achieve a balance and swing freely in both directions.**

4. Read light in mechanical center :

Place two ampoules of the same control number in the holders, turn on the read light, balance galvanometer and check for mechanical center. Switch the ampoules, turn on the read light. The null meter should not swing more than $\frac{1}{4}$ inch in either direction.

5. Blood alcohol pointer slippage check :

Balance the instrument with ampoules in the holders. Set the blood alcohol pointer on .20%, or center of the Blood Alcohol scale. Using the light carriage adjustment, and with the read light on, run the B. A. needle to .00% and back to .20%, observing to see that the null meter balances at the same time the B. A. needle reaches .20%. Then run the B.A. needle to .40% and back to .20% observing to see that the null meter balances at the .20% line on the blood alcohol scale.

6. Simulator Check :

At least three (3) simulator checks of a known value shall be run on the instrument. The results must be within .01% plus or minus of the actual value of the known solution.

7. Ampoule Check :

A series of simulator tests with the accumulated total of .60% shall be run on an ampoule from each control number on hand with the instrument. The results of each simulator test must be within .01% plus or minus of the actual value. The ampoule should then be observed to see if there is a slight yellow color, indicating the presence of potassium dichromate. If it meets the above standards, the chemicals are correct or within allowed tolerances.

B. Intoxilyzer

- 1. Place the mode selector switch in the zero set mode.**
- 2. ELECTRICAL POWER CHECK:** With the power switch on, observe to see that the power indicator light comes on, indicating there is electrical power to the instrument.
- 3. TEMPERATURE CHECK:** If the instrument is already warmed up, check to see that the ready light is on. If it is not warmed up, wait approximately 10 minutes to see that the ready light comes on. (This light indicates that the sample chamber is heated to the proper temperature).
- 4. INTERNAL PURGE CHECK:** Put the mode selector in the air blank mode. Place thumb on the end of the pump tube to see that it is pumping air. Time the pumping sequence to see that it pumps for approximately 35 seconds.
- 5. ZERO SET AND ERROR INDICATOR CHECK: (AS Model)**
Set the mode selector in the zero set mode. Depress the zero adjust knob and adjust the digital display to a plus .000, .001, .002 or .003 to see that you can achieve a proper zero set. Re-set the digital display above the acceptable plus .000 to .003. Place the mode selector to the test mode and observe to see that the error light comes on. Repeat, placing the digital display at minus .000 and observe to see that the error light comes on when the mode selector is placed in the test mode.

(ASA Model)

Advance the test cycle to the zero set mode and see that the unit registers a reading of plus .000, .001, .002, or .003. If this reading is not observed, advance to the next cycle and see that the error light comes on.

6. **FIXED ABSORPTION CALIBRATOR CHECK:** With the test card in the printer, run a test on the fixed absorption calibrator to see that the instrument gives the correct reading on the digital display and the printed test card. THIS CHECK NOT REQUIRED ON INSTRUMENTS NOT EQUIPPED WITH THE FIXED ABSORPTION CALIBRATOR.
7. **SIMULATOR CHECK:** Run three tests on a simulator solution of a known value and an air blank before each one. Observe to see that the correct readings, within plus or minus .01% of the actual value is indicated on the digital display and printed on the test card for each simulator test and a .00% reading for each air blank.
8. **PRINTER DEACTIVATOR CHECK:** (AS Model) Run a simulator test with the zero set NOT in the proper zero set range, to see that the printer is deactivated and will not print.

(ASA Model)

This check must be performed before the unit is up to operating temperature . (before the ready lamp is on) Advance the unit to the first purge cycle (air blank). Observe the error light to see that it is lit. At the end of the test cycle (approximately 35 seconds), see that the pump stops and that the printer is deactivated and will not print.

✓. QUALIFICATIONS OF PERSONNEL

A. Breath test shall be performed by a qualified operator who shall have completed the operators course prescribed by the Commissioner of Public Safety. Operators shall use only those instruments which they are certified to operate.

B. Breath test operator certification requirements:

- 1. Must have successfully completed training for each type of instrument and pass the required test, as approved by the Commissioner of Public Safety.**
- 2. Operators must complete an approved recertification training course and pass a test every two (2) years to maintain their certification.**

C. Breath test technician requirements:

- 1. Must comply with one of the following:**
 - a. Must successfully complete the Breath Testing Supervisors course offered by Indiana State University.**
 - b. A manufacturers repair technician course for the breath testing instruments in use in the State of Utah.**
 - c. Be qualified by the nature of his employment or training to maintain and repair the breath testing instrument in question and to instruct in the proper operation of the instrument.**

VI. REVOCATION OF CERTIFICATION

A. The Commissioner of Public Safety may on the recommendation of a technician, revoke the certification of any operator:

1. Who obtains a certification card falsely or deceitfully.
2. Who fails to comply with the foregoing provisions governing the operation of breath test instruments.
3. Who fails to demonstrate satisfactory performance in operating breath testing instruments.

VII. PREVIOUSLY QUALIFIED PERSONNEL

The foregoing regulations shall not be construed as invalidating the qualification of personnel previously qualified as either breath test operators or breath test technicians under programs existing prior to the promulgation of these regulations. Such personnel shall be deemed certified until such time as retraining would have been required were these regulations not in effect.

This provision shall take effect as if enacted contemporaneously with the other Breath Testing Regulations of the Department of Public Safety on June 11, 1979.

In the opinion of the Department of Public Safety, it is necessary to the peace, health and welfare of the inhabitants of the State of Utah that this regulation become effective immediately.

- A. Training for original certification is to be conducted by a Breath Test Technician and should include the following:**

1 hour...Welcome, registration, preview of Alcohol and Traffic Safety.
3 hours...Effects of Alcohol in the Human Body.
3 hours...Operational Principles of Breath Testing.
2 hours...Alcoholic Influence Report Form.
2 hours...Testimony of the Arresting Officer.
3 hours...Legal Aspects of Chemical Testing.
1 hour...Detecting the Drinking Driver.
8 hours...Laboratory Participation. (Running Simulator tests on the instruments and tests on actual drinking subjects).
1 hour...Examination and Critiques of Course.

- B. Training for recertification is to be conducted by a Breath Testing Technician and should include the following:**

2 hours...Effects of alcohol in the Human Body.
2 hours...Operational principles of Breath Testing.
1 hour...Alcohol Influence Report Form and Testimony of arresting officer.
2 hours...Legal Aspects of Chemical Testing and Detecting and the Drinking Driver.
1 hour...Exam.

- C. Anyone having previously successfully completed a twenty-four (24) hour operators school, may be recertified at anytime by successfully completing an eight (8) hour recertification course, and also may be certified to operate another type of breath testing instrument after eight (8) hours instruction pertaining to the instrument in question.**



NORMAN W. BANGERTER
Governor

JOHN T. NIELSEN
Commissioner

DEPARTMENT OF PUBLIC SAFETY
UTAH HIGHWAY PATROL
4501 South 2700 West
Salt Lake City, Utah, 84119

Telephone (401) 965-4518



DENNIS J. NORDFELT
SUPERINTENDENT

CUSTODIAN CERTIFICATE

I, the undersigned, being first duly sworn, state that:

1. I am the Breathtesting Supervisor of the Utah Highway Patrol and the official keeper of and responsible for the maintenance check records of the breathtesting instruments maintained in the State of Utah.
2. Attached are true and correct copies of the records of maintenance and certification for the Intoxilyzer serial number 94-001082 located at Layton P.D., of which the originals are kept on file by me, in the course of official business, for the State of Utah, Department of Public Safety and in accordance with the current regulations of the Commissioner of Public Safety.
3. The attached tests were done before and after the date of 6 August 1986.
4. The breathtest technicians(s) whose signature(s) appear on the attached affidavits are certified by the State of Utah and have met one or more of the following requirements as required by the Department of Public Safety:
 - a. have successfully completed the Breathtesting Supervisors Course at Indiana University, or:
 - b. a manufacturer's repair technician course for breathtesting instruments in use in the State of Utah, or
 - c. is qualified by nature of his employment or training to maintain and repair the breathtesting instrument in question and to instruct in the proper operation of the instrument.

Donald W. Marcek
Sgt. Don Marcek
Breathtesting Supervisor
Utah Highway Patrol

STATE OF UTAH)
COUNTY OF SLC)

ON THE 20 DAY OF Oct 1986, PERSONALLY APPEARED BEFORE ME, CLARON BRENCHEY, WHO BEING DULY SWORN BEFORE ME EXECUTED THE ABOVE REFERENCED CERTIFICATE AND I CERTIFY THAT SAID PERSON IS AN OFFICER AND EMPLOYEE OF THE DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF UTAH AND IS THE CUSTODIAN OF THE INTOXILYZER AFFIDAVITS OF SAID DEPARTMENT AND THAT HIS SIGNATURE AFFIXED HERETO IS GENUINE.

NOTARY PUBLIC

MY COMMISSION EXPIRES 7-5-87 RESIDING AT _____

RECEIVED

OCT 21 1986

I/we the undersigned, being first duly sworn, state that:

1. Breath testing instrument, INTOXILYZER, serial number 94001082 located at Layton Police Dept. was properly checked by me/us in the course of official duties, on July 23 1986 at 9:30 A.M.
2. This was done according to the standards established by the Commissioner of the Utah Department of Public Safety.
3. This is the official record and notes of this procedure which were made at the time these tests were done.

THE FOLLOWING TESTS WERE MADE:

YES NO

- [X] Electrical power check: (Power switch on, power indicator light is on) [X] []
- [X] Temperature check (Ready light is on) [X] []
- [X] Internal purge check: (Air pump works, runs for approximately 35 seconds) [X] []
- [X] Zero set, Error indicator, and Printer check:
- (Zero set at .000, .001, .002, .003) [X] []
- (With proper zero set, printer works properly) [X] []
- (Printer deactivated when error light is on) [X] []
- [X] Fixed absorption calibrator test (if equipped)
- (Reads within $\pm .01\%$ of calibration setting) [X] []
- [X] Checked with known sample: (Simulator, 3 tests within $\pm .01\%$) [X] []
- [X] Gives readings in percent blood alcohol by weight, based upon grams of alcohol per 100 cubic centimeters of blood. [X] []

REPAIRS REQUIRED

[] [X]

(If yes, explain)

The simulator solution was of the correct kind and properly compounded. [X] []

[X] The results of this test show that the instrument is working properly. [X] []

Last prior check of this instrument was done on June 24 1986.

BREATH TEST TECHNICIAN(S)

STATE OF UTAH)

COUNTY OF Weber)

Melvin L. Schiffman

I/we, on oath, state that the foregoing is true.

Melvin L. Schiffman

Subscribed and sworn before me this 23 day of July 1986

Diane M. Montoya
Notary Public

City of Residence Ogden

County of Residence Weber

My Commission Expires May 5 1988

I/we the undersigned, being first duly sworn, state that:

1. Breath testing instrument, INTOXILYZER, serial number 94 1101082 located at Lavton Police Dept. was properly checked by me/us in the course of official duties, on August 19 1986 at 8:15 A.M.
2. This was done according to the standards established by the Commissioner of the Utah Department of Public Safety.
3. This is the official record and notes of this procedure which were made at the time these tests were done.

THE FOLLOWING TESTS WERE MADE:

YES NO

- ☒ Electrical power check: (Power switch on, power indicator light is on) ☒ ☐
- ☒ Temperature check (Ready light is on) ☒ ☐
- ☒ Internal purge check: (Air pump works, runs for approximately 35 seconds) ☒ ☐
- ☒ Zero set, Error indicator, and Printer check:
- (Zero set at .000, .001, .002, .003) ☒ ☐
- (With proper zero set, printer works properly) ☒ ☐
- (Printer deactivated when error light is on) ☒ ☐
- ☒ Fixed absorbtion calibrator test (if equipped)
- (Reads within $\pm .01\%$ of calibration setting) ☒ ☐
- ☒ Checked with known sample: (Simulator, 3 tests within $\pm .01\%$) ☒ ☐
- ☒ Gives readings in percent blood alcohol by weight, based upon grams of alcohol per 100 cubic centimeters of blood. ☒ ☐

REPAIRS REQUIRED

☐ ☒

(If yes, explain)

The simulator solution was of the correct kind and properly compounded. ☒ ☐

☒ The results of this test show that the instrument is working properly. ☒ ☐

Last prior check of this instrument was done on July 23 1986.
BREATH TEST TECHNICIAN(S)

STATE OF UTAH)

COUNTY OF Weber)

Melvin L. Schiffman

I/we, on oath, state that the foregoing is true.

Melvin L. Schiffman

Subscribed and sworn before me this 19 day of August 1986.

Notary Public

City of Residence Ogden
County of Residence Weber

My Commission Expires May 5 1988.