

1979

# Carl H. Powell v. S. Tony Cox, Director, Drivers License Division, Department of Public Safety For the State of Utah : Appellant's Brief on Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH  
STATE OF UTAH

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CARL H. POWELL, :  
Appellant, :  
vs. : Case No. 16660  
S. TONY COX, Director, :  
Drivers License Division, :  
Department of Public Safety :  
for the State of Utah, :  
Respondent. :

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APPELLANT'S BRIEF ON APPEAL

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An appeal from the final order  
of the Fourth Judicial District  
Court of Uintah County, State  
of Utah, the Honorable J. Robert  
Bullock, Judge

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Clk, Supreme Court, Utah

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APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF THE NATURE OF THE CASE

This case involves a claim by appellant that the revocation of his driving privileges for refusing to submit to a chemical test is erroneous.

DISPOSITION IN THE LOWER COURT

On a trial de novo the Honorable J. Robert Bullock sustained the actions of respondent's hearing officer in determining that appellant had not submitted to a breathalyzer test as requested by the arresting officer.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the trial court decision reversed and for an order reinstating his driving privileges

STATEMENT OF THE FACTS

Appellant was arrested by a Vernal City police officer on March 13, 1979 for the offense of driving under the influence of alcohol R 15 . Subsequent to the arrest he was taken to the Tintan County jail at which time he was requested to submit to a breath test as contemplated by 41-6-44 UTAH CODE ANNOTATED, as amended, and in fact agreed to submit to that test R 14 . Officer Paul Parker testified to his observations of Officer Mel Curtis administering the test R 16 . It was alleged that appellant apparently was holding his tongue over the mouth piece.

Q Finally I did hear a small amount of air go in the and the green light did come on.

THE COURT: This green light did come on?

THE WITNESS: Yes, it did.

Q. By Mr. Hale. Okay. After that light went on Officer Curtis administering the test ask for another breath with more air?

A. Yes, he did.

Q. What did he say to Mr. Powell?

A. Said, "You haven't given us a deep lung sample. made the light go on, but we need more than that. Keep blowing harder." Some words to that effect.

Q. What did Mr. Powell say to that?

A. He stalled around there for several minutes. Telling him that would be a refusal if he did not give us a deep lung sample.

Q. Did he subsequently blow into it again as he was requested?

A. No, he did not. He kept saying, "The green light was on. That's all I have to do." (R 26 & 27)

In cross examination Officer Park testified:

Q. You are familiar that as soon as the cylinder has acquired 55 c.c.'s of breath that a green light will go on?

A. Yes, sir.

Q. You are familiar with the fact that when the requisite 55 c.c.'s, which is the maximum this cylinder holds, that a magnetic, electro-magnetic action takes place within the machine to activate the green light? Right?

A. Some sort of reaction, yes.

Q. So apparently what happened is that Mr. Powell gave you 55 c.c.'s of breath, right?

A. Yes, sir.

Q. And Mel Curtis never -- I trust he was using the standard operational checklist?

A. Yes, he was.

Q. An eight-step checklist?

A. I believe it's eight, yes.

Q. And the eight-step is: "turn to analyze"?

A. Yes.

Q. And Officer Curtis never turned to analyze the 55 c.c.'s that was provided?

A. No, he did not." (R 28 & 29)

Further he testified on cross examination:

Q. Okay. Why did Officer Parker not turn the machine to "analyze" -- Officer -- which one was it?

A. Curtis.

Q. -- Curtis. Why did he not turn it to "analyze"?

A. I do not know.

Q. And the breath sample was supplied within an hour after the arrest?

A. Yes, sir. (R 30)

#### ARGUMENT

APPELLANT SUPPLIED THE ARRESTING OFFICER WITH A SAMPLE OF HIS BREATH AS REQUIRED BY 41-6-44 and 41-6-44.10 UTAH CODE ANNOTATED, AS AMENDED.

The pertinent part of 41-6-44(b) UTAH CODE ANNOTATED as amended states:

" . . . the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's blood, breath, or other bodily substance shall give rise to the following presumptions:

In 41-6-44.10(a) UTAH CODE ANNOTATED as amended is found:

"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 under the influence of alcohol, . . ."

Nowhere in the motor vehicle code or any other section of the statutes of this state is there any statement as to what constitutes a breath test differently than filling the cup of the machine.



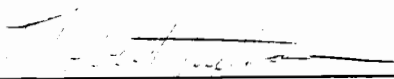
In a publication written by the inventor of the machine Dr. R.F. Borkenstein Medicine, Science and The Law October 1961 pp. 15 is found the following:

"The sample volume is 51.5 ml. of expired air when measured at 31°C. which is considered to be the temperature at which the breath leaves the mouth. This volume has been found to be large enough for accurate analysis and small enough for uniform sampling. The actual volume collected is larger than this (approximately 58 ml.) since the sample chamber is heated to 45-5°C. to avoid condensation of the moisture in the sample. In addition, this volume allows for the amount of dead space between the sample chamber and ampoule."

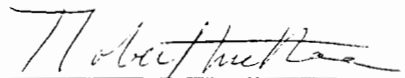
#### CONCLUSION

Appellant having given the arresting and testing officer the required amount of breath to analyze, under our statutes has no standing to object and refuse to analyze the sample resulting in the instant refusal allegation. No where is the officer's subjective standard of blowing into the breathalyzer contained in our laws. Further, it would be impossible because of various physiological make-up of people and health defects to set a standard other than supplying a cylinder to capacity full of breath. Appellant asks for a reversal of the trial court's decision and for reinstatement of his license.

Respectfully submitted this 9th day of November, 1979.

  
\_\_\_\_\_  
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MAILED a copy of the foregoing to Bruce M. Hale, Jr.  
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