1979

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

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

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CARL H. POWELL,

Plaintiff/Appellant,

vs

S. TONY COX, Director,
Driver License Division,
Utah Dept. of Public Safety,

Defendant/Respondent.

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RESPONDENT'S BRIEF

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An appeal from the
order of the
District Court of
State of Utah,
Robert Bullock,

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TABLE OF CONTENTS

AUTHORITIES AND CASES CITED

STATUTES CITED

SECONDARY SOURCES

IN THE SUPREME COURT

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CARL H. POWELL, Plaintiff/Appellant. vs S. TONY COX, Director, Driver License Division, Utah Dept. of Public Safety, Defendant/Respondent.	)	RESPONDENT'S BRIEF ON APPEAL Case No. 16660

STATEMENT OF THE NATURE OF THE CASE

This proceeding 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

The Honorable J. Robert Bullock found that appellant had not submitted to a breathalyzer test as requested by the arresting officer.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the decision of the trial court affirmed.

STATEMENT OF THE FACTS

The facts as presented by appellant paint a slanted and than clear picture of the total circumstances when appellant was arrested. Appellant attempts to show that he satisfied the statu by lighting the green light. A more careful viewing of the facts will actually show though that appellant did refuse to submit to test pursuant to the statute and this Court's standards.

Upon being arrested and being instructed that he must take the breathalyzer test or lose his license for a year, the appellant initially refused to take the test. (R. 22, 23.) It was only until after a telephone conversation that appellant had w his attorney that he finnaly submitted in part to the testing procedure. (R. 23, 24.)

Once the appellant placed the mouthpiece of the breathaly into his mouth, the record shows that he was pretending to be blowing, that he put his tongue over the hole of the mouthpiece and produced only short puffs, and that all the while the appellan kept faking blowing into the machine. He refused to follow the officer's instructions. The events as they transpired are explaine by the arresting officer on Direct. (R. 25-27.)

A. Officer Curtis instructed Mr. Powell that what he had to do, he brought the hose out, showed up the mouthpiece, said what he needed to do was give him a deep lung air sample.

Q. Are those his exact words?

A. To the best of my knowledge, yes. He said that frequently the word, "deep air sample, deep lung air sample."

Q. Did he demonstrate where that air was to come from?

A. I could not recall. During the test he placed his hands on his back in an effort to kind of indicate that he had to squeeze out some air. But I cannot recall any other gesture.

Q. Okay. Did you see Mr. Powell blow into the machine?

A. I saw him look like he was going to blow into the machine.

Q. What did he do? Describe his physical action.

A. He placed the mouthpiece in his mouth and kind-a made a move like he was blowing, like that. (Indicating) But het [yet] I heard no air going through the hose.

Q. Did he purse up his lips?

A. Yes, somewhat. I assume you mean by that kind of blow them out like there was air in there.

Q. Okay. The first time that he made that agreement did the green light go on?

A. No, it did not.

Q. Did Officer Curtis give any explanation about that light or what it meant or did not mean?

A. No, he did not. He just says basically he wanted him to blow the green light out, which is just a little inspiration. And then we wanted him just to blow in there as far as he can, and we indicated that to him.

Q. Did he explain to him how hard he needed to blow in order to give him the deep air sample that he requested?

A. More or less. He kept saying, "We've got to have a deep air sample. We've got to blow hard into it. Take your tongue off it. Just blow free into the machine. Blow down until it feels deep."

Q. Did he ever do that?

A. No, he did not.

Q. Okay. After the first time, you described him blowi the first time, did he attempt a second time?

A. Yes, he did. To my memory, it was several times. Officer Mel Curtis and the rest of us kept urging him to blow in the machine, telling him to take his tongue off it. And he kept making with this action. Finally I did hear a small amount of air go in there, and the green light did come in.

THE COURT: This green light did come on?

THE WITNESS: Yes, it did.

Q. (By Mr. Hale) Okay. After that light went on, did Officer Curtis administering the test ask for another breath sample 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. You made the light go on, but we need more than. Keep blowing harder." Some words to that effect.

Q. What did Mr. Powell say to that?

A. He stalled around there for several minutes. Kept telling him that 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."

Q. Okay. Who was holding the end of the hose?

A. He was.

Q. After the several minutes had ensued and these conversations that you talked about, then what happened?

A. I cannot recall exactly how he indicated that was enough. I recall him fling or doing something with the end of the hose and sitting down saying, "No, I will not take the test." I cannot recall his exact words, however. (Emphasis added.)

ARGUMENT

THE PEACE OFFICER DETERMINES HOW A BREATHALYZER IS TO BE ADMINISTERED AND IF A BREATH SAMPLE IS ADEQUATE

In regards to the "chemical testing" that is to be administered to suspected drunken drivers in the State of Utah, the pertinent parts of Utah Code Ann. § 41-6-44.10(a) state as follows:

"...A peace officer shall determine which of the aforesaid tests shall be administered.

No person, who has been requested pursuant to this section to submit to a chemical test or tests of his breath...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 shall not be a defense to taking a test requested by a peace officer... ."

Further, Utah Code Ann. § 41-6-44.10(b) provides the following:

"If such a 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 sub-section (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. Following this warning, unless such person immediately requests the chemical test or tests as offered by a peace officer be administered, no test shall be given... ."

The above statute explicitly provides peace officers with broad and discretionary powers to administer "chemical tests" for alcohol abuse. Certainly such statute lends support to allow officers certified and familiar with breathalyzer functions to make independent judgments when administering tests.

What may seem proper and adequate to an arrestee may be totally inadequate to a trained breathalyzer operator. An operator should be able to administer as many tests as he deems reasonable and necessary under the circumstances. Further, in a case where there is an uncertainty, an inadvertent mistake,

a misreading or even an error, an operator should be freely allowed to readminister such tests until a fair sample is obtained.

When it was determined in the case at hand that an adequate and reasonable sampling of "breath" had not been obtained, it was entirely proper for the peace officer to request that appellant continue to exhale into the breathalyzer. It was, and is, no defense for appellant to say that he supplied the "required amount of breath to analyze" when in all reasonableness he should have been required to supply more. All we are saying here is that which has already been said by this court in the case of Moran v. Shaw, 580 P.2d. 241, 243 (1978), "The statute plainly and simply requires that such an accused give his consent; and it does not give him the privilege of imposing any conditions as a prerequisite thereto", or as this court said in Beck v. Cox 597 P.2d. 1335, 1337 (1979), "The Implied Consent Statute should be construed in a fashion to make its application practicable and to enable an officer to deal realistically with arrested drivers who may be uncooperative, and even hostile." This court went on to say that the statute should not be construed to place a premium on uncooperativeness and obstruction, which seems to be the exact situation that was ruled upon by the trial court in this case. On Page 1338 of the Beck decision, this court states that the overwhelming weight of authority holds that a refusal may be established on the basis of the conduct of the motorists, without an express refusal. The court goes on to suggest that the trial

court should take an objective look at these circumstances, whic is what the trial court did in this case; and therefore his find of refusal should be upheld. The quotations from the record sho that the appellant was specifically instructed to give a deep a sample so that a fair test could be obtained. He refused to do that and also refused to follow the further instructions of the officer, probably full well knowing that valid scientific informa tion was therefore not obtained.

POINT II

THE APPELLANT'S REFUSAL TO FOLLOW THE OFFICER'S INSTRUCTION WAS A REFUSAL

Appellant would have us believe that the acts he perfor during the time when the breathalyzer was administered were adequate. The cold transcript shows that appellant, with little or no lung movement, merely puffed his cheeks out and blew out the air contained in his mouth. He pretended to be blowing, while all the while his tongue was over the hole of the mouthpie

If appellant had acted properly and as he was directed, he would have completely inhaled and exhaled, causing his lungs to contract and cause a gust of air to be exhaled from "down deep."

An expert in the field of breathalyzers explains below how a person is to blow into the machine and the problems that are encountered if one does not do so properly.

> A fresh mouth piece, or saliva trap, is then attached to the heated Sample Tube and the subject is instructed on how the sample is to be delivered. The subject should be told to blow as long as possible in order to be sure that the sample is from the deep lung area of the subject and thus an Alveolar air sample. Regardless of the amount of air blown into the machine, the vent system disposes of all but the last section of the predetermined sample chamber volume of 52.5 cc. If the subject does not, or cannot, produce a deep lung Alveolar air sample, and in reality only passes mouth air into the machine, then a false reading will be obtained. This reading may be falsely high or low depending upon the contents of residual hydrocarbon material present in the mouth of the subject at the time of the test. (Emphasis added.)

Richard E. Erwin, Defense of Drunk Driving Cases, Third Edition, Vol. 2 (1979), § 22.02, p. 22-15.

Not only does the driver not have the prerogative to impose conditions or qualifications, respondent submits that only giving part of the test is no test at all. This reasoning is not inconsistent with the Beck decision of this court and has been upheld in California. In the following case, after the driver was arrested and warned, he agreed to submit to a urine test. The officer's instructions were that a second sample would be required thirty minutes later. The driver was unable to give the second sample and his license revocation refusal was upheld by the California court.

> "Certainly, by agreeing to one type of test, and then voluntarily or involuntarily, failing to submit to it, a driver may not thereby deny

> to the state its right to any test....Drivers arrested for operating a vehicle while under the influence of intoxicating liquor could merely thwart the law by giving a partial balloon test, a partial blood sample, or, as here, an inadequate specimen of urine. The giving of a partial urine sample did not satisfy the requirements of the law. The statute contemplates that a partial test is not an entire test." (Emphasis added.)

Cahall v. Dept. of Motor Vehicles, 94 Cal. Rptr. 182, 185 (Cal. App.-1971).

What the appellant tries to do here is elevate form to substance which was not allowed by this court "to elevate form to substance" in the case of Elliott v. Dorius, 557 P.2d. 759 (1976) (page 761, paragraph 2), as expressed by Judge Maughn in that opinion.

POINT III

THE TRIAL COURT'S FINDING OF A REFUSAL IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD NOT BE REVERSED.

This court, in Gassman v. Dorius, 557 P.2d. 197 (1975), said that "Each case is based on its own facts and we do not reverse the trial judge unless he clearly does violence to the facts as they relate to his findings." Of course, this court has consistently upheld that simple rule of law and it has been reiterated. For example, in Beck, Id. at 1337, Judge Stewart said, "Since the findings of the trial court are supported by substantial competent evidence, they must be affirmed. Charleton v. Hackett,

11 Utah 2d, 389, 360 P.2d. 176 (1961); DeVas v. Noble, 13 Utah 2d, 133, 369 P.2d. 290 (1962)."

Applying the well-reasoned law to a complete reading of the transcript shows that there were substantial and uncontradicted facts showing that the trial judge's findings were correct and should be upheld.

CONCLUSION

The findings of the trial judge should be upheld as they are consisted with the evidence presented. The appellant did refuse by failing to comply with the totality of the officer's instructions and such a finding by the trial court was proper under the circumstances and should be upheld.

DATED this 13th day of December, 1979.

Respectfully submitted,

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MAILING CERTIFICATE

I certify I mailed two copies of the foregoing Brief to Robert M. McRae, Attorney for Appellant, of McRae & DeLand, at 319 West First South, Suite A, Vernal, Utah 84078, on this 13th day of December, 1979.

Doral Call, secretary