

1980

Ray Pledger v. S. Tony Cox : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RAY PLEDGER,	:	
Plaintiff-Appellant,	:	
v.	:	Case No. 16937
S. TONY COX, Director,	:	
Drivers License Division,	:	
Defendant-Respondent.	:	

BRIEF OF APPELLANT

Appellant, RAY PLEDGER, appeals from a judgment and order of the Court below that he unlawfully refused a breathalyzer test and therefore, would have his driver's license revoked.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the judgment of the Honorable Maurice D. Jones, sitting pro-tem as a judge of the Third Judicial District Court, that appellant had refused to submit to a chemical test following an arrest for driving under the influence of alcohol, and that his driver's license would therefore be revoked for a period of one year.

DISPOSITION IN THE LOWER COURT

Appellant's drivers license was ordered revoked for a period of one year, the Third Judicial District Court having found that he refused without just cause to submit to a breathalyzer test.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of the court reversing the judgment and remanding the case back to the District Court for a de novo refusal hearing.

STATEMENT OF THE FACTS

On February 26, 1980, appellant's de novo refusal hearing was held in the courtroom of the Honorable Maurice D. Jones, who was sitting pro-tem as a judge of the Third Judicial District Court. The court required appellant to go forward with his evidence, stating that appellant had the burden of proving by a preponderance of the evidence that he had not refused a lawfully requested breathalyzer test. (T. 2) A startled defense attorney objected to that format, suggesting that the State, and not the appellant had the burden of going forward and the burden of proof. (T.2)

The court was resolute and appellant eventually called the arresting officer as a witness. (T.2)

At the conclusion of the brief hearing, Judge Jones found that appellant had not met his burden by a preponderance of the evidence and ordered his driver's license revoked for a one year period. (T. 15)

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN PLACING THE BURDEN OF PROOF ON THE APPELLANT AT THE DE NOVO REFUSAL HEARING.

A de novo hearing is a hearing held anew. The burden of proof does not shift because the defendant in the original hearing must procedurally become the appellant in the new one.

Utah Code Annotated, §41-6-44.10 (1953, as amended), briefly described the initial refusal hearing conducted by an officer of the state's Driver License Division of the Department of Public Safety:

"Within twenty days after receiving a sworn report from a peace officer to the effect that such person has refused a chemical test or tests the department shall notify such person of a hearing before the department. If at said hearing, the department determines that the person was granted the right to submit to a chemical test or tests, or if such 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."

Under the statute it is the state that initiates the revocation proceeding and the state therefore, that has the burden of proof.

The operation of the statute is manifest in the Report of Proceedings of Hearing for Refusal to Submit to Chemical Tests, attached to brief and incorporated herein by reference. That document, completed during a refusal hearing by a depart-

ment hearing officer, makes it abundantly clear that it is the state, through the hearing officer, that goes forward with evidence and has the burden of proof. After initially administering an oath, the hearing officer calls as a witness the peace officer who determined that an individual was driving or in actual physical control of a motor vehicle while under the influence of alcohol. Testimony is given concerning the breathalyzer refusal. If necessary, other peace officers are called by the hearing officer to testify. Finally, if he chooses, the driver may testify. Then the hearing officer completes the filling out of the report by making a determination of whether the driver was requested to submit to a chemical test and whether he unreasonably refused, after having been warned of the consequences of refusal. Based upon this report, the department will either revoke or not revoke the driver's license.

§41-6-44.10, Utah Code Annotated (1953, as amended), also grants the driver the right to petition for a trial de novo in the District Court, where the judge is to take testimony and determine anew "whether the petitioner's license is subject to revocation under the provisions of this act." Absolutely no mention is made of and no language infers any shifting of the burden of proof to the driver who petitions for a trial de novo.


Utah case law supports appellant's position. Miles v. Cox, 597 P.2d 1344 (Utah, 1979), and especially Ballard v.

State Motor Vehicle Division, 595 P.2d 1302 (Utah, 1979), describe the revocation proceedings as administrative in nature, a function of the police power of the state to protect the public. Ballard notes that the driver is under no legal duty to even appear at the hearing. These statements and the public policy behind them are an acknowledgment that the state is and remains the moving party in any revocation hearing and that in a de novo revocation hearing the burden of proof does not shift to the driver.

CONCLUSION

Because the court impermissibly shifted both the burden of proof and the burden of going forward with evidence to the driver/petitioner in the de novo revocation hearing, appellant urges this court to reverse the judgment of the court below and to remand the case to the District Court for another de novo revocation hearing.

Respectfully submitted,


JO CAROL NESSET-SALE
Attorney for Appellant

Report of Proceedings of Hearing for Refusal to Submit to Chemical Tests

(Sec. 41-6-44.10 UCA 1953, as amended)

Date of Hearing	Time Set For Hearing	Name and Address of Driver	Hearing Officer
Name & address of lawyer			Peace Officer
		Date of Birth of Driver	Name of Department
Witness		Driver License Number	Witness
			Witness

OPENING STATEMENT

Having notified the driver of a hearing before this Department within 20 days after receipt a report of arrest and refusal of chemical tests, this hearing is conducted to determine whether a driver was granted the right to submit to such test or tests and without reasonable cause refuse

It is not intended that all formalities required in court proceedings need be met in this hearing. However, the Department shall substantially comply with the fundamental rules of due process. Sworn testimony will be taken and the driver shall have the privilege of having witnesses testify. The driver may testify and may cross examine others who testify.

If, based on the testimony, the Department acts to revoke the driver's privilege to drive, the driver has the right within 30 days to petition the district court in the county of residence for a trial de novo.

Those testifying will be sworn and the hearing shall proceed.

* * * * *

1. The sworn testimony of Peace Officer -

- (a) Facts leading the peace officer to believe the driver to have been driving or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, or combination of alcohol and any drug, consisted of,

- (b) ~~Arrested person~~ arrest ☐ no ☐ yes (charge)_____
- (c) The arrested person was requested to submit to a test or tests (breath, blood, urine).
Name test or tests offered:_____
- (d) The arrested person refused to submit to the requested test or tests: (Explain reason
for refusal)
- (e) The arrested person was warned that a refusal to submit to the test or tests can re-
sult in the revocation of his/her license or permit to operate a motor vehicle
☐ yes ☐ no.
- (f) That after having been so warned, said driver ☐ did ☐ did not immediately request
the chemical test or tests, requested by the officer, be administered.
2. Testimony of witness for arresting officer:
3. Substance of testimony or cross examination by driver, or driver's counsel:

On the basis of the evidence received in this hearing, it is determined that the driver in
this case ☐ was ☐ was not requested to submit to a chemical test or tests, was warn-
ed of the consequence of refusal and ☐ with ☐ without reasonable cause, the driver
refused to submit to such test or tests.

Hearing Officer's determination: REVOKE ☐ NO ACTION ☐ REVIEW ☐
COMMENTS:_____

Hearing Officer_____

If additional space is needed to complete this report, attach additional sheets to this form.

FOR CENTRAL OFFICE USE ONLY

Revoke	<input type="checkbox"/>	Take No Action	<input type="checkbox"/>	Comments: _____
R.T. & FTA	<input type="checkbox"/>	Officer Did Not Appear	<input type="checkbox"/>	_____
F.T.	<input type="checkbox"/>	Affidavit Withdrawn	<input type="checkbox"/>	_____
ODR	<input type="checkbox"/>	Other _____	<input type="checkbox"/>	_____