

1980

## Ray Pledger v. S. Tony Cox : Brief of Defendant-Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

RAY PLEDGER,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs	)	Case No. 16987
	)	
S. TONY COX,	)	
	)	
Defendant/Respondent.	)	

\* \* \* \* \*

BRIEF OF DEFENDANT RESPONDENT

\* \* \* \* \*

REVIEW OF A DECISION  
OF THE THIRD JUDICIAL  
DISTRICT COURT OF  
SALT LAKE COUNTY

The Honorable Maurice D. Jones  
Presiding

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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RAY PLEDGER,	)	
	)	
Plaintiff/Appellant,	)	RESPONDENT'S BRIEF
	)	ON APPEAL
vs	)	
	)	
S. TONY COX,	)	Case No. 16987
	)	
Defendant/Respondent.	)	

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STATEMENT OF THE NATURE OF THE CASE

This proceeding involves a claim by appellant that the trial court, in a de novo hearing on a driver's license revocation under the implied consent law, erred in a ruling against appellant based on appellant's failure to support its position by evidence.

DISPOSITION IN THE LOWER COURT

The Honorable Maurice D. Jones found that appellant had refused to submit to a breathalyzer test as required by law and that appellant-plaintiff had not met its burden of proof as party seeking relief in a civil action.

## RELIEF SOUGHT ON APPEAL

Appellant seeks remand and a new trial.

## STATEMENT OF FACTS

Appellant was arrested for driving under the influence of alcohol on September 2, 1979. When requested to take the breathalyzer test by the arresting officer, appellant refused. Pursuant to statutory law requiring the revocation of the license of a driver who refuses to submit to a chemical test, appellant's driver's license was revoked after a hearing on the matter on the 31st day of October, 1979.

Appellant filed a petition for a de novo review of the matter in District Court for the Third Judicial District for Salt Lake County. Hearing was held on February 26, 1980. After hearing testimony and evidence presented, the trial court judge determined that appellant's burden of proof as plaintiff and moving party in the civil action was not met and that appellant-plaintiff had not sustained its position. (T. at 15, 16.) The trial judge then ruled that, as determined in the departmental hearing, appellant's driver's license should be revoked for one year.

## ARGUMENT

### POINT I

APPELLANT PRODUCED NO EVIDENCE AT THE TRIAL DE NOVO TO SHOW A LACK OF ANY OF THE ESSENTIAL ELEMENTS FOR A REVOCATION UNDER SECTION 41-6-4410, U.C.A. 1953, AS AMENDED

A cursory reading of the transcript of the trial below will show obviously and clearly that the appellant had an opportunity to present his case and evidence of the merits and simply failed to prove his allegations.

A. BOTH IN THE DEPARTMENTAL HEARING AND DE NOVO REVIEW A PRIMA FACIE CASE WAS ESTABLISHED BY THE DEFENDANT DEPARTMENT OF PUBLIC SAFETY.

Under authority of Utah Code Ann. § 41-6-44.10, 1953, as amended, the Department of Public Safety, Drivers' License Division is obligated to revoke the license of any person who:

- 1) "has been placed under arrest" where the arresting officer "had grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol," and 2) "has thereafter been requested by a police officer to submit to any one or more of the chemical tests provided for," 3) has "refused to submit to such test or tests," 4) "was warned by a police officer...that a refusal to submit to the test or tests can result in revocation of his license," and who 5) did not "immediately request the chemical test."

Utah Code Ann. § 41-6-44.10(b), 1953, as amended.

The transcript of the trial evidence shows: 1) That appellant was placed under arrest (T. at 30) and that the arresting officer, on the basis of appellant's statement that he had "hit" a car (T. at 31), and on the basis of appellant's unsteadiness (T. at 33), odor of alcohol (T. at 33), and performance on the field sobriety tests (T. at 33), had grounds to believe appellant



had been driving while under the influence of alcohol; 2) that appellant was requested to take a breathalyzer test (T. at 30); 3) that he refused (T. at 30, 33); 4) that he was warned of the consequences of his refusal (T. at 34); and 5) that appellant failed to request the test after this warning (T. at 34).

B. THERE WAS NO EVIDENCE PRODUCED BY PLAINTIFF-APPELLANT WHICH SHOWED OR TENDED TO SHOW A LACK OF ANY OF THE FOREGOING ELEMENTS.

The function of the trial judge is to weigh evidence. His determination should not be overturned unless it does violence to the facts. In the present case, in light of the lack of evidence to controvert the appellee-defendant's prima facie case, the judge could not have ruled other than he did, and therefore should not be overturned.

While the plaintiff in a de novo refusal hearing is not required to overcome the entire weight of the original administrative decision, it still must produce evidence which conflicts with any prima facie evidence of the essential elements.

## POINT II

IN A CIVIL ACTION THE BURDEN OF PROOF IS ON THE PETITIONER TO PRODUCE EVIDENCE AND PERSUADE THE TRIER OF FACT OF THE ALLEGATIONS THE PETITIONER MAKES.

Appellant set out in its complaint and petition to the district court an allegation challenging the arresting officer's "probable cause" to make the arrest for driving under the influence of alcohol.

It is clearly Utah law that implied consent trials de

novo are civil proceedings. See the case of Ballard v. State Motor Vehicle Division, 595 P.2d 1302 (Utah 1974) and all of the subsequent cases on point. Therefore, the basic civil rules of procedure and evidence were probably used by the trial court. The trial court was fully aware of the court's opinions and decisions in these obvious kinds of cases and therefore did not apply the more rigorous requirements of a criminal case as was urged by the petitioner, yet he gave the petitioner a full opportunity to present evidence.

Under elementary Utah law, Koesling v. Basamaklis, 539 P.2d 1043 (Utah 1975), the proponent of a proposition must bear both the burden of producing evidence in support of that proposition, and the burden of persuading the trier of fact by a preponderance of the evidence as to that proposition. The appellant in this case cannot expect to make a general allegation and provide no support in evidence especially when his own evidence establishes the opposite claim of the defendant.

In a de novo hearing subsequent to an administrative "Implied Consent" Revocation Hearing, the burden of proceeding with the evidence and persuading by a preponderance of the evidence should be on the motorist-licensee. In Heer v. Department of Motor Vehicles, 450 P.2d 533 (Oregon 1969), the Oregon Supreme Court ruled on the issue of burden of proof in a de novo hearing. The case involved an appeal from a de novo proceeding on the

Motor Vehicle Department's suspension of the petitioner's license for refusing to submit to a chemical test under the implied consent laws. The petitioner alleged that it was a gross abuse of discretion "to require the petitioner to proceed first in the trial de novo when the reverse was their position in the administrative hearing." The court noted:

The same complaint was made by the petitioner in *Lira v. Billings* and the Kansas Supreme Court held the statute there, procedurally identical with the Oregon statute, requires the petitioner, as the one seeking affirmative relief, to carry the burden of proof. We agree with this analysis, and it follows that if petitioner has the burden he must initiate the evidence. *Buda v. Fulton*, 157 N.W.2d 336 (Iowa 1968).

The questions which have been raised by the petitioners, as shown by the foregoing discussion, all have been raised and disposed of in uniform holdings of the supreme courts of other states having statutes almost identical with the Implied Consent Law in Oregon. We agree with the results in those cases.

Id at 537. This same issue was again before the Oregon Supreme Court in *Burbage v. Department of Motor Vehicles*, 450 P.2d 775 (Oregon 1969) and the court referred to its earlier discussion in *Heer v. Dept. of Motor Vehicles*, *supra*, and then went on to discuss the issue at more length:

The trial court instructed the jury that the Department of Motor Vehicles had the burden of proof by a preponderance of the evidence and that the verdict must be by at least 10 to 2 majority. Petitioner claims that he was entitled to an instruction that the burden of the Department was to prove its case beyond a reasonable doubt and that the verdict

The Department claims that the court erred in putting any burden of proof upon the Department because the burden was upon the petitioner; that the quantum of proof was by a preponderance of the evidence; and that the verdict should be the same as in civil cases--that is, not less than a 9 to 3 majority.

[3] In *Heer; Grayson, supra*, the first case to come before this court involving the Oregon Implied Consent Law, the circuit judge required the petitioners to go forward with the evidence. We affirmed that as the correct procedure and held that the burden of proof is upon the petitioner, citing *Lira v. Billings*, 196 Kan. 726, 414 P.2d 13 (1966), and *Buda v. Fulton*, 157 N.W.2d 336 (Iowa 1968). The latter case held that the trial judge in an implied consent law appeal de novo to the court was in error in holding that the burden of proof was upon the department. The Iowa court discussed the meaning of "de novo" in this context, said that the petitioner was the one taking the appeal, that as the appellant he necessarily made the affirmative allegations, and that the burden of proof follows the pleading. In this connection the Iowa Supreme Court cited our opinions in *Burkholder v. S.I.A.C.*, 242 Or. 276, 281, 282, 409 P.2d 342 (1965), and *Dimitroff v. State Ind. Acc. Com.*, 209 Or. 316, 321, 322, 306 P.2d 398 (1957). A review of these Oregon cases indicates that the compensation act governing the procedure there specifically placed the burden of proof on the party appealing from the administrative ruling. Unfortunately, the statute does not explicitly allocate the burden in this case. Nevertheless, the more logical and workable rule, as we held in *Heer; Grayson, supra*, is that the petitioner who makes the affirmative allegations has the burden of proving them and must initiate the evidence. ORS 172.250(5).

[4] *Buda v. Fulton, supra*, as already noted, holds that the quantum of evidence necessary to carry the burden of proof in a case of this nature is a preponderance of evidence. (Emphasis added.)

It should be noted that the Oregon Supreme Court has construed its provision for review of implied consent refusal hearings in the same manner as Utah has construed its provision. In fact, the Oregon court notes this, citing McAnerney v. State Dept. of Public Safety, 9 Utah 2d 191, 194, 341 P.2d 212, 214 (1959) in its opinion in Stehle v. State Dept. of Motor Vehicles, 368 P.2d 386, 390 (Oregon 1962). It construes its statute as requiring an independent determination, in a trial de novo, in the same sense as the Utah Supreme Court has in McAnerney. This adds a great deal of persuasiveness to the argument that Utah should resolve the burden of proof question along the lines of the Oregon rationale in Heer and Burbage.

The two cases cited by the Oregon court, Lira v. Billings, 196 Kan. 726, 414 P.2d 13 (1966) and Buda v. Fulton, 157 N.W. 2d 336 (Iowa 1968), directly addressed the burden of proof issue. The Kansas Supreme Court in Lira stated:

We further hold that K.S.A. 8-259(a) requires a trial de novo of the particular question at issue, governed by the rules applicable to civil proceedings in the district court, with the burden of proof on petitioner as the one seeking affirmative relief. (Emphasis added.)

Id at 18. The Iowa Supreme Court held that since a licensee's statutory appeal from an administrative hearing is heard de novo, with the right to present evidence as in an ordinary action commenced originally in the district court, the burden of proof is on the plaintiff licensee. Buda v. Fulton, supra, at 338-339.

Faced with this same issue, the Nebraska Supreme Court cited rulings of several different jurisdictions that:



The rationale of the Iowa court set forth in Buda v. Fulton, supra, is persuasive and we refer the reader to that opinion. We hold that an appeal to the District Court... from an order of the Director of the Department of Motor Vehicles...revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish by a preponderance of the evidence the ground for reversal.

MacKey v. Director of Dept. of Motor Vehicles, 194 Neb. 707, 235 N.W. 2d 394, at 397 (1975).

A later Oregon case applied the law cited above in a fact situation similar to the present case in that appellant alleged a lack of reasonable grounds for his arrest. The court held that "on appeal to the circuit court, petitioner had the burden of proving, by a preponderance of the evidence, that his license was wrongfully suspended, i.e., that one of the elements ...was not present." Nordquist v. Department of Motor Vehicles, 552 P.2d 873, 874 (Oregon App. 1976). (Emphasis added.)

Other courts have ruled that the burden of proof on appeal or in a de novo hearing from a drivers license revocation is on the licensee. Lutjemeyer v. Dennis, 186 Neb. 46, 180 N.W. 2d 679 (1970); Hoban v. Rice, 22 Ohio App. 2d 130, 259 N.E.2d 136 (1970). In addition, courts in several states have addressed the burden of proof issue making it depend on the specific allegations made by licensees: no refusal because of confusion over Miranda warning; State v. Severino, 537 P.2d 1187 (Hawaii 1975); Strand v. State Dept. of Motor Vehicles, 8 Wash. App. 877, 509 P.2d 999 (1973); Barton v. Director of Dept. of Motor Vehicles,

test by implied consent laws; Meyer v. Dept. of Public Safety License Control, Etc., 312 So. 2d 289 (La. 1975). All of these courts have held the burden of proof as to these allegations to be on the petitioner.

### POINT III

APPELLANT WAS NOT PREJUDICED BY  
ANY OF THE PROCEDURES IN THE  
TRIAL COURT.

Assuming, arguendo, that the district court committed error of some type, appellant must show that such error was prejudicial and not harmless.

Appellant has asked for remand and a new de novo refusal hearing. Having failed to move for a new trial under Rule 59, Utah Rules of Civil Procedure, the appellant should not be rewarded for such failure by being allowed a new trial under requirements not set out in Rules 59(a) and 61, and by this Court's decisions applying those rules.

### CONCLUSION

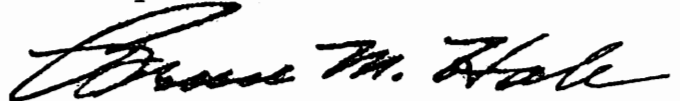
According to Utah law, the burden of proof is on the party pleading or alleging a proposition. The Utah Supreme Court may not have directly ruled on the specific procedure and rule of evidence in a de novo review of a driver's license refusal hearing under implied consent law, as provided for by statute, however, courts of several other states have ruled on this issue

and as a whole found the burden of proof consistently on the petitioner, as is the usual rule in all civil proceedings. Courts in these states, many of which have implied consent statutes very similar to Utah's (e.g. Oregon and Kansas), apply the basic rule that the moving party has the burden of production and persuasion, Koesling v. Basamaklis, 539 P.2d 1043 (Utah 1975), to de novo proceedings.

The discretion of the trial court should not be overturned unless it is prejudicial. Appellant supplied no evidence to upset the prima facie evidence of the appellee nor has it alleged any prejudice on appeal. Appellee urges this court to affirm the judgment of the district court and deny the appeal as being spurious.

DATED this 21st day of July, 1980.

ROBERT B. HANSEN  
Attorney General

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

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