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George G. McAnerney v. Department of Public Safety, Drivers' Licensen Division, and George C. Miller : Brief of Respondent

Utah Supreme Court

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CLERK, SUPREME COURT, UTAH

In the
Supreme Court of the State of Utah

FILED

SEP 24 1959

GEORGE G. McANERNEY,
Plaintiff and Appellant,

vs.

DEPARTMENT OF PUBLIC SAFE-
TY, DRIVERS' LICENSE DIVI-
SION, and GEORGE C. MILLER,
Director,
Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No.
8969

Respondent
BRIEF OF APPELLANT

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SION, and GEORGE C. MILLER,
Director,
Defendant and Respondent.

Case No.
8969

BRIEF OF APPELLANT

STATEMENT OF FACTS

The facts as outlined in appellant's brief are substan-
tially correct and are not in dispute.

STATEMENT OF POINTS

POINT I.

INTRODUCTION

POINT II.

APPELLANT IS A HABITUAL NEGLIGENT DRIVER.

- (a) DEFINITION.
- (b) THE PROOF ADDUCED BY THE STATE WAS PROPER AND CONSTITUTIONAL.
- (c) THE EVIDENCE IS SUFFICIENT TO PROVE HABITUAL NEGLIGENT DRIVING.

POINT III.

NO ERROR WAS COMMITTED BY PERMITTING TWO PREVIOUS CONVICTIONS TO BE CONSIDERED IN ARRIVING AT THE CONCLUSION THAT THREE VIOLATIONS OCCURRED WITHIN AN EIGHTEEN MONTH PERIOD.

POINT IV.

LICENSE TO DRIVE IS A PRIVILEGE AND THE DISCRETIONARY ACTION OF THE DIRECTOR IS CONSTITUTIONAL.

ARGUMENT

POINT I.

INTRODUCTION

The Legislature has plenary power over the highways, which may impose conditions under which the limited right

of use may be exercised, and may regulate the manner and circumstances under which automobiles may be operated thereon. *Commonwealth v. Funk*, 323 Pa. 390, 186 A. 65 (1936).

Pronouncements to the same effect may be found in practically every state.

The power of the state to regulate traffic and prescribe conditions under which motor vehicles may be operated extends even to the power to prohibit their operation on highways when conditions or circumstances render it reasonably necessary to bar such use for safety and protection of the public.

This power (police power) is inherent in every sovereignty and permits the enactment of laws within constitutional limits to promote the general welfare of the citizens. Therefore, in the interest of the public, the state may make and enforce regulations reasonably calculated to promote care on the part of all those who use its highways. *Hadden v. Aitken, et al.*, 156 Neb. 215, 55 N. W. 2d 620 (1952).

While it is the function of the State Legislature to make and ordain the laws, such measures necessarily must be put into effect by and through proper administrative agencies of government, operating by virtue of power and authority delegated to them by the Legislature. In the field of driver licensing, these administrative functions have been conferred upon agencies such as the Department of Licensing in the State of Utah and the Public Safety Department.

In all cases the Legislature selects the subject, and indicates the public policy with respect thereto. The subject is thereby brought within governmental control.

POINT II.

APPELLANT IS A HABITUAL NEGLIGENT DRIVER.

- (a) DEFINITION.
- (b) THE PROOF ADDUCED BY THE STATE WAS PROPER AND CONSTITUTIONAL.
- (c) THE EVIDENCE IS SUFFICIENT TO PROVE HABITUAL NEGLIGENT DRIVING.

POINT III.

NO ERROR WAS COMMITTED BY PERMITTING TWO PREVIOUS CONVICTIONS TO BE CONSIDERED IN ARRIVING AT THE CONCLUSION THAT THREE VIOLATIONS OCCURRED WITHIN AN EIGHTEEN MONTH PERIOD.

POINT IV.

LICENSE TO DRIVE IS A PRIVILEGE AND THE DISCRETIONARY ACTION OF THE DIRECTOR IS CONSTITUTIONAL.

It seems completely logical to combine respondent's arguments on Points II, III and IV of appellant's brief. We shall attempt to do so in order.

In answer to subparagraph (a) of Point II, respondent declares that the record discloses to any reasonable mind that the appellant "repeated by force of habit" the violations charged against him. By his own admissions, Ex-

hibit P-1 and R. 13-24, appellant concedes he knew of posted limitations, but nevertheless contends if traffic was light and conditions good, a minor excess in his driving offended no one, hence he is not a habitual negligent driver. We submit that under the definition of "habitual" as set forth in appellant's brief, Mr. McAnerney comes squarely within that definition.

Appellant has stated the law which is designated as Section 42-2-19, U. C. A. 1953, on page 11 of his brief. The procedure as outlined by the Utah statutes is such that the department *may* subpoena witnesses and examine the licensee with respect to his violations. The licensee has under the law the right to demand the appearance of witnesses against him and if such demand is made, the witnesses could and should be subpoenaed so that he may have the right of cross examination. This he did not do. The nature of the cause is civil and not criminal. At both the hearing before Miller and the Court, McAnerney testified regarding the citations. From his testimony alone the hearings substantially support the findings.

In the cases submitted by appellant the question of whether the license is a right or a privilege is considered. We submit that the license to operate a motor vehicle on a public highway is a privilege granted by the state and not guaranteed, nor is it an inalienable right.

The weight of authority is to the effect that the driving of an automobile upon public highways is a privilege and not a property right and is subject to reasonable regulation under the police power in the interest of public

safety and welfare. In a leading case involving the financial responsibility law of New Hampshire, *Rosenblum v. Griffin*, 89 N. H. 314, 197 A. 701, the court stated:

“The operation of an automobile upon the public highway is not a right but only a privilege which the state may grant or withhold at pleasure. What the state may withhold it may grant upon condition.
* * * The statute confers a privilege which the citizen is at liberty to accept by becoming a licensee, or not, as he pleases. Having accepted the privilege he cannot object to any conditions which have been attached thereto by a grantor with power to entirely withhold the privilege.”

See *Thornhill v. Kirkman*, 62 So. 2d 740 (1953); *Rawson v. Department of Licenses*, 15 Wash. 2d 364, 130 P. 2d 876 (1942); *Doyle v. Kahl*, 242 Iowa 153, 46 N. W. 2d 55 (1951).

As to whether the proof adduced was improper, we call the Court's attention to the case of *Carnegie v. Department of Public Safety*, 60 So. 2d 728 (Fla.) (Special Division B 1952), where the court held:

“Because it appears that the lower court may have misconceived its duties and responsibilities under Section 322.31, Florida Statutes, and for the future guidance of the courts in hearing ‘appeals’ under the provisions of this statute we feel it incumbent to point out that Section 322.31 requires the court on such appeal to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of his license under the provisions of this chapter.”

In construing a similar provision of the Pennsylvania Vehicle Code, 75 PS, para. 193, the courts of that state have

uniformly held that the cases are heard de novo by the court and not merely as a review of the action of the department charged with the enforcement of the Vehicle Code of that state; that it is the duty of the court "to hear evidence and determine in the exercise of its sound discretion and in the furtherance of justice whether the license should be suspended."

This would certainly seem to be the better rule, where as in this state the department is authorized to suspend without a hearing and the operator may appeal, directly to a court of record from such suspension, so that the hearing before the court is the first opportunity he has had to present his side of the story and to confront and cross examine the witnesses against him. While the policies developed by the department in the course of its enforcement of the Drivers' License Act should be given due consideration by such court, we hold with the Pennsylvania courts that such court has the jurisdiction and responsibility to make its own findings of fact independently of the ex parte administrative findings of the department.

In this case a "hearing" was had before George Miller, the Director of the Drivers' License Division, and in his opinion there was sufficient evidence to suspend the license of the appellant. Upon the proper proceeding the matter was brought before the District Court of the Third Judicial District of Salt Lake County, Utah, and upon that hearing (de novo) the court determined that the license as suspended should be affirmed.

Throughout appellant's brief there is a contention that the operative clauses of the law are unconstitutional due

to the fact that they are in violation of the due process clause of both the United States Constitution and the Constitution of Utah. In that respect, may we make this further observation. The fact that the suspension of a driver's license by a Motor Vehicle Administrator before affording the licensee an opportunity to be heard on the matter violates the due process clause of the 14th Amendment to the Federal Constitution, and likewise to that amendment of the Utah State Constitution which provides that no state shall deprive any person of life, liberty or property without due process of law, it has been determined by the courts construing statutes similar to ours in the following manner.

The Supreme Court of Florida, in expressing the majority view of the American courts on this point—that failure to provide such an opportunity for a prior hearing does not constitute a denial of due process of law—said in *Thornhill v. Kirkman*, 62 So. 2d 740 (1953) :

“Increase on highway casualties is one of the most impelling social questions now confronting the public. Civic bodies and law enforcement officers at every level are bending their efforts to reduce them. To hold that the Legislature must provide notice and a hearing to one charged with flagrantly abusing his use of the highways before he can be stopped from using them, would not only be unjust to the public, it would place an intolerable burden on enforcement officers. We think the provision for hearing after suspension of one's license meets every requirement of the process.”

Following through with the substance of the previous enunciation by the court, we are firmly of the opinion that the essence of a claim of denial of due process seems to be

that the appellant's license was suspended by the Director without a proper hearing. The statute does not require the Director to give such a hearing prior to suspension of a license, whenever he has reason to believe that the holder thereof is an improper or incompetent person to operate motor vehicles or is operating so as to endanger the public. The information upon which the Director acts may turn out to be erroneous (and for that reason the right of review before a board of appeal is given). We have no doubt that these provisions of law are reasonable regulations in the interest of safeguarding lives and property from highway accidents. The incident hardship upon an individual motorist, in having his license suspended pending investigation and review must be borne in deference to the greater public interest served by the statutory restriction. It seems to us that it is well settled that the concept of due process of law does not necessarily require the granting of a hearing prior to the taking of official action in the exercise of the police power. When justified by compelling public interest, the Legislature may authorize some action subject to later judicial review of its validity.

There seems to be some question in the brief of appellant that the suspension or revocation is a penalty and that the appellant has been twice in jeopardy and that as a result thereof certain violations previous to the one in 1958 should not be considered as a basis for his final suspension. Our law specifically provides that a suspension by the Director may be imposed if the licensee has three moving violations within a period of 18 consecutive months. In this case, the driver, Mr. McAnerney, while having been suspended by virtue of certain violations in 1957, still had three

consecutive violations within an 18 month period from that time until 1958 when his license was finally suspended again by the Director of the License Division.

The argument with respect to the withdrawal of the driving privilege as being a penalty in addition to the fine or penalty imposed by the court where the law requires mandatory suspension or revocation, or discretionary suspension or revocation, is given consideration in the case of *Commonwealth v. Ellett*, 174 Va. 407, 4 S. E. 2d 762 (1939), wherein the court answered the argument as follows:

“Within the limits prescribed by law, the trial court fixed a measure of punishment for each offense. The penalty of being deprived of the right to operate a motor vehicle is not a part of, nor within the limits of the punishment to be fixed by the court or jury.”

And again in the case of *Pritchard v. Battle*, 178 Va. 455, 17 S. E. 2d 393 (1941), the court commented:

“The question as to whether the revocation of a license because of an act for which the licensee has been convicted or because of the conviction itself is an added punishment has frequently been before the courts. The universal holding is that such a revocation is not an added punishment, but is a finding that by reason of the commission of the act or the conviction of the licensee, the latter is no longer a person fit to hold and enjoy the privilege which the state had heretofore granted to him under its police power. The authorities agree that the purpose of the revocation is to protect the public and not to punish the licensee.”

It is quite possible that the proceedings before the Director were not in full accordance with judicial practices, but, nevertheless, he, acting in a quasi judicial capacity, had the right to either subpoena or not to subpoena witnesses unless demand was made upon him by the appellant (which demand was not made) and to examine the licensee and from such examination to determine whether or not the appellant McAnerney, was in his judgment a habitual negligent driver and a menace on the highways of the State of Utah. The District Court, having full jurisdiction, considered the facts and the evidence, and determined that the appellant was a habitual negligent driver and was, therefore not entitled to have his license reinstated.

CONCLUSION

We submit that the respondent, Mr. Miller, acted within his administrative powers and that the District Court, in sustaining him in such action, did not err. We therefore further submit that the decision of the lower court should be affirmed and that the appellant go hence with his costs herein incurred.

Respectfully submitted,

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