

1992

Judy A. Cordova v. G. Barton Blackstock, Bureau Chief, Records Bureau, Drivers License Division : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920370

IN THE UTAH COURT OF APPEALS

JUDY A. CORDOVA,

Plaintiff-
Appellee,

v.

G. BARTON BLACKSTOCK, Bureau
Chief, Records Bureau, Drivers
License Division,

Defendant-
Appellant.

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BRIEF OF THE APPELLANT

Case No. 920370-CA

Argument Priority No. -16-

APPEAL FROM THE FINAL JUDGMENT OF THE THIRD
DISTRICT, SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE J. DENNIS FREDERICK, PRESIDING.

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IN THE UTAH COURT OF APPEALS

JUDY A. CORDOVA,	*	
	*	
Plaintiff-	*	
Appellee,	*	Case No. 920370-CA
	*	
v.	*	
	*	
G. BARTON BLACKSTOCK, Bureau	*	
Chief, Records Bureau, Drivers	*	
License Division,	*	Argument Priority No. -16-
	*	
Defendant-	*	
Appellant.	*	

BRIEF OF THE APPELLANT

JURISDICTION

Jurisdiction is in the Court of Appeals based upon Utah Code Ann. § 78-2A-3(2)(a) (1992).

ISSUES PRESENTED AND STANDARDS OF REVIEW

A. Does the district court's review of the record created in an informal administrative adjudication satisfy the requirement of "trial de novo" in Utah Code Ann. § 63-46b-15 (Supp. 1992)? This is a question of law and, consequently, this Court should accord no deference to the district court's judgment but should review it under a "correctness" standard. State v.

Johnson, 821 P.2d 1150, 1161 (Utah 1991); Rollins v. Petersen, 813 P.2d 1156, 1159 (Utah 1991); Landes v. Capital City Bank, 795 P.2d 1127, 1129 (Utah 1990); State v. Humphreys, 794 P.2d 496, 497 (Utah App. 1990); Monticello v. Christensen, 788 P.2d 513, 516 (Utah) cert. denied __ U.S. ___, 111 S. Ct. 120 (1990).

B. If the District Court on a trial de novo may review and base its ruling on the administrative record, does failure to appear and present the issue of the legal inadequacy of the evidence at the administrative hearing preclude a Petitioner from arguing in the district court that the evidence is legally insufficient under the residuum rule? This also is a question of law, and the same standard of review applies to this issue as to the one above.

C. If the district court on a trial de novo may base its ruling on the administrative record and the evidence presented there by applying the residuum rule, was the documentary evidence admitted at the administrative hearing with no objection from the Petitioner competent evidence satisfying the residuum rule, even though it was unobjected-to-admissible hearsay? This too is a question of law; no deference should be given to the district court's judgment, and review should be under a "correctness" standard.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

A copy of the determinative statute, Utah Code Ann. § 63-46b-15 (Supp. 1992), is attached as Addendum "F."

STATEMENT OF THE CASE

This appeal is from the final judgment and decree of the Third Judicial District, Salt Lake County, The Honorable J. Dennis Frederick presiding.

Appellee Judy A. Cordova's driving license was suspended for a period of ninety days following an informal adjudicative proceeding before the Department of Public Safety, Drivers License Division (the "Department"). Cordova petitioned for judicial review of the Department's decision by way of a trial de novo in district court pursuant to Utah Code Ann. § 63-46b-15 (Supp. 1992).

Before trial de novo, Cordova moved to vacate and set aside the administrative order based upon a claimed lack of a "residuum of competent evidence" because the officer did not appear at the administrative hearing and testify. The motion was granted, final judgment was entered on May 15, 1992, and the Notice of Appeal was filed June 5, 1992.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

On January 24, 1992, Cordova was arrested for driving under the influence of an intoxicating beverage. (DUI Report Form at 1 (Attached as Addendum "A"); Record ("R") at 17.) She was requested to submit to a chemical breath test and agreed to do so. The test results indicated that her breath alcohol content was .169 percent. (R. at 19.) On behalf of the Department, the arresting officer served the Petitioner with notice of intention to suspend her driving privileges in accordance with Utah Code Ann. § 41-2-130 (Supp. 1992). (R. at 2.) Petitioner requested an administrative hearing before the Department, and one was scheduled for February 19, 1992 at 9:00 a.m. (Findings of Fact and Conclusions of Law ("Findings") at 2; R. at 45, Attached as Addendum "G") Cordova was notified of the hearing by first class mail on February 6, 1992.

At the time set for the hearing, neither Cordova, her attorney, nor the officer appeared. (Findings at 2; R. at 45.) The hearing officer reviewed the Department's file and the reports submitted by the police officer, including: the DUI report form, the notice of citation and intent to suspend, the completed intoxilyzer operational check list, the intoxilyzer result card, and the Department's record of intoxilyzer test and

affidavit for the day of January 22, 1992. (Findings at 2; R. at

45) The hearing officer then made the following findings:

There was a reason to make the initial stop of the Petitioner, i.e., excessive speed. There was reasonable suspicion that the Petitioner was DUI, i.e., her admission that she had been drinking, odor of alcohol, slurred and slowed speech, impaired balance and Nystagmus in both eyes. She was properly warned and took the breath test. There is a check list for the breath machine in evidence, showing that all procedures were followed and a test result card with breath sample showing .169 BrAC and no indication that there were problems with the test or machine. The preponderance of evidence would support a suspension in this case.

Department of Public Safety, Driver License Division, Findings of Proceedings on Hearings for Administrative Suspension at 4; R. at 42 (Plaintiff's Exhibit 1, "Transcript," Attached as Addendum "E".)

Based upon those findings and determinations, the Department suspended the driving privilege of the Petitioner. (Findings at 2; R. at 45.)

Cordova brought an action for judicial review by trial de novo in district court pursuant to Utah Code Ann. § 63-46b-15 (Supp. 1992). (R. at 2.) Instead of trial de novo, the district court held a hearing wherein it granted Cordova's motion to vacate and set aside the administrative order based upon a claimed lack of a "residuum of competent evidence." The district court concluded that it "is not compelled to hold a

trial de novo in all cases." (Findings at 3; R. at 46.) From this order to vacate and set aside, Defendant appealed. (R. at 53.)

SUMMARY OF ARGUMENT

POINT I

Prior to 1988, "per se" driver's license suspension hearings were on the record and the residuum rule was applied on judicial review. Since 1988, and the adoption of the Utah Administrative Procedures Act (UAPA), the Department's adjudicative hearings are informal proceedings, and judicial review is by trial de novo in the district court. Trial de novo contemplates a complete retrial upon new evidence in which the record below becomes irrelevant. Therefore, the district court erred when it failed to conduct a trial de novo and instead based its judgment on review of the informal adjudicative record and application of the "residuum rule."

POINT II

Even if the "residuum rule" is applicable in the district court's de novo review of the Department's informal adjudications, Cordova is precluded from raising an issue for the first time on appeal when she failed to appear at the administrative hearing and raise it at that level. Cordova failed to argue the "residuum rule" at the administrative hearing

and thus waived her opportunity to rely upon it in the subsequent judicial review by trial de novo.

POINT III

To the extent the "residuum rule" does apply, it only prevents administrative action based exclusively on incompetent evidence. Evidence that is admissible as an exception to the hearsay rule is competent evidence, for purposes of the residuum rule, when the party against whom it is admitted fails to appear and object on the basis that the necessary foundation for invocation of the hearsay exception has not been laid. In the instant case, Cordova did not object to the admission of the evidence at the hearing. The evidence was consequently competent, and the requirements of the "residuum rule" were satisfied.

ARGUMENT

I. STATUTORY CHANGES REGARDING JUDICIAL REVIEW OF THE DEPARTMENT'S INFORMAL ADJUDICATIONS REQUIRE THAT THE DISTRICT COURT CONDUCT A TRIAL DE NOVO IN WHICH THE RESIDUUM RULE CANNOT APPLY.

A. UAPA CHANGED JUDICIAL REVIEW OF THE DEPARTMENT'S DRIVER'S LICENSE SUSPENSION HEARINGS FROM "REVIEW OF THE RECORD" TO "TRIAL DE NOVO."

Prior to the Utah Administrative Procedures Act (UAPA), Utah Code Ann. § 63-46b-1 to -22 (1989), effective January 1, 1988,

judicial review of "per se" driver's license suspensions was a review of the administrative record:¹

Any person denied a license or whose license has been cancelled, suspended or revoked by the department ... shall have the right to file a petition within thirty days for a hearing in the matter in a court of record in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon ten days written notice to the department. The court's jurisdiction is limited to a review of the record to determine whether or not the department's decision was arbitrary or capricious.

Utah Code Ann. § 41-2-20 (1953)(Supp. 1985)(emphasis added)(current version at Utah Code Ann. § 41-2-131)(1988). Judicial review by "review of the record" clearly provides a forum for application of the "residuum rule." Under this statutory framework, Utah courts held that the rule applied to judicial review of the decision of the Department's administrative Hearing Officers. McMillin v. Matheson, 741 P.2d 960, 961 (Utah 1987); Williams v. Schwendiman, 740 P.2d 1354, 1356 (Utah App. 1987); Kehl v. Schwendiman, 735 P.2d 413, 414 (Utah App. 1987).

¹ "Per se" hearings arise out of an intoxilyzer result indicating a breath alcohol concentration above .08 percent; no other condition is required for suspension. "Refusal hearings" arise out of the motorist's refusal to submit to a chemical test. Judicial review of a "refusal hearing" has always been by trial de novo. See Utah Code Ann. § 41-6-44.10(b)(1953)(providing for review of refusal hearings by trial de novo)(amended 1987 Utah Laws ch. 138, now superseded by Utah Code Ann. § 63-46b-15 (Supp. 1992)).

UAPA made two changes of importance to this case. First, UAPA removed the language in Utah Code Ann. § 41-2-20 that provided for judicial review of per se driver's license suspension hearings by "review of the record." See 1987 Utah Laws ch. 909. Second, UAPA provided for judicial review by "trial de novo" of all informal adjudicative proceedings. Utah Code Ann. § 63-46b-15 (Supp. 1992). All of the Department's adjudicative proceedings are informal. Utah Admin. R. 708-17-6 (1992). The first issue before this Court is whether UAPA's requirement of "trial de novo" for judicial review of the Department's driver's license suspension hearings is satisfied by the district court's review of the informal adjudicative record.

"Trial de novo" may have two meanings when applied to judicial review of administrative action: the first is "[a] complete retrial upon new evidence," and the second is "a trial upon the record made before the lower tribunal." Denver & Rio Grande W. R.R. v. Public Serv. Comm'n, 98 Utah 431, 100 P.2d 552, 554 (1940); see also University of Utah v. Industrial Comm'n, 736 P.2d 630, 632 (Utah 1987); Pledger v. Cox, 626 P.2d 415, 416 (Utah 1981).

Pledger created a two part analysis to determine which type of "trial de novo" is called for: (1) the wording and context of the statute in which the "trial de novo" requirement appears;

and, (2) the nature of the administrative body, the decision and procedure being reviewed. Pledger, 626 P.2d at 416-17. Both parts of the analysis require that "trial de novo," in the context of judicial review of driver's license suspension hearings, mean a complete retrial upon new evidence.

1. Statutory Context.

UAPA provides for two types of judicial review depending on the form of the administrative adjudicative proceeding. In formal adjudicative proceedings, a formal record with sworn testimony and cross-examination is required. See Utah Code Ann. § 63-46b-8 (1989). Judicial review of formal adjudications is on the record in either the Supreme Court or the Court of Appeals. Utah Code Ann. § 63-46b-16 (1989). In contrast, in informal adjudicative proceedings no record need be created. See Utah Code Ann. § 63-46b-5 (1989). Judicial review is by trial de novo in the district court. Utah Code Ann. § 63-46b-15 (Supp. 1992). "Trial de novo," in the context of judicial review of administrative action where no record need be created, must be a complete retrial upon new evidence rather than a trial on the basis of the record, since the latter may be an impossibility.

Further support for this definition of trial de novo is found in UAPA's correlation between the court of review and the form of review. An appellate court's expertise is in an "on the

record" review of the developed record. A trial court, on the other hand, is best suited to hear evidence and testimony, and make an independent determination of the facts. As stated by this Court in Davis County v. Clearfield City, 756 P.2d 704, 710 n.8 (Utah App. 1988), "[UAPA's] approach leaves each level of court doing what it does best -- trial courts receiving and evaluating testimony and appellate courts reviewing records and resolving legal issues."

Thus, in the context of UAPA, "trial de novo" in Utah Code Ann. § 63-46b-15 means a complete retrial, upon new evidence, and not a review of the administrative record. Section 63-46b-15(3)(b) (Supp. 1992) further provides that, in reviewing informal agency adjudicative proceedings, the district court "shall determine all questions of fact and law." In this case, the district court erred when it concluded as a matter of law that the Department's action should be reversed, instead of conducting a trial de novo.

2. The Administrative Body and Proceedings. The Utah Supreme Court has held that, in the context of driver's's license suspension hearings that are appealed to the district court, "de novo" review means "a complete retrial upon new evidence." Pledger, 626 P.2d at 417. The Court reasoned that the more elaborate trial de novo "affords a party who is about to suffer

from administrative action a closer judicial scrutiny than a mere review of the record of agency action." Id.

The definition of trial de novo as a complete retrial upon new evidence accords with this Court's pronouncement in Brinkerhoff v. Schwendiman, 790 P.2d 587 (Utah App. 1990). Regarding judicial review of a driver's's license suspension, this Court noted:

It seems clear that no prejudice would ordinarily occur when an informal hearing is held under the UAPA because the litigant has an absolute right to a trial de novo before the district court. In the trial de novo, Brinkerhoff was able to present his entire case before a new tribunal for an independent decision.

Brinkerhoff, 790 P.2d at 590.

The district court cannot preserve the motorist's right to "present his entire case before a new tribunal for an independent decision" if it merely reviews the administrative record and bases its judgment thereon. Thus, the second prong of the Pledger test, i.e., "the nature of the administrative body, the decision and procedure being reviewed," also requires that "trial de novo" in the context of judicial review of the Department's driver's license suspension hearings mean a complete retrial upon new evidence. The district court erred when it failed to conduct a trial de novo and instead entered judgment on the basis of the residuum rule.

B. THE RESIDUUM RULE IS INCOMPATIBLE WITH THE REQUIREMENT OF TRIAL DE NOVO.

Because "trial de novo" in the district court means a complete retrial upon new evidence, the record below is irrelevant. In contrast, a reviewing court applying the residuum rule must conduct a review of the administrative record. The "residuum rule" provides that an administrative agency's findings "cannot be based exclusively on hearsay evidence." Yact Club v. Utah Liquor Control Comm'n, 681 P.2d 1224, 1226 (Utah 1984). A district court applying the "residuum rule" reviews the record searching for a "residuum of evidence, legal and competent in a court of law, to support an award ..." Hackford v. Industrial Comm'n, 11 Utah 2d 312, 315, 358 P.2d 899, 901 (1961). In the event such competent evidence cannot be found in the record, the administrative action is reversed. Clearly, for the reviewing court to base its judgment on the residuum rule, it must base its judgment on review of the administrative record.

McMillin, Kehl and Williams were decided under the earlier statutory framework that provided for review "on the record," not by "trial de novo." They are no longer controlling or applicable because UAPA statutorily changed the nature of review for the Department's suspension hearings. Although post-UAPA decisions by this Court have upheld application of the "residuum rule" to other administrative proceedings, none have done so in the

context of judicial review of informal adjudicative hearings brought to the district court under UAPA's remedy of trial de novo. See, e.g., Wagstaff v. Dep't of Employment Sec., 826 P.2d 1069, 1072 n.2 (Utah App. 1992) (appellate review of formal administrative proceeding); Adams v. Board of Review of the Indus. Comm'n, 821 P.2d 1 (Utah App. 1991) (appellate review of formal administrative proceeding); Tolman v. Salt Lake County Attorney, 818 P.2d 23 (Utah App. 1991) (petition for extraordinary writ under Utah R. Civ. Pro. 65(b)); Mayes v. Dep't of Employment Sec., 754 P.2d 989, 992 n.1 (Utah App. 1988) (appellate review under Utah Code Ann. § 35-4-10(i) (1987)). Because of the recognized trend in other jurisdictions to abandon application of the residuum rule, see Wagstaff v. Dep't of Employment Sec., 826 P.2d 1069, 1072 n.2 (Utah App. 1992) (citing 3 Kenneth C. Davis, Administrative Law Treatise, § 16.6 (2d ed. 1980)); Mayes v. Dep't of Employment Sec., 754 P.2d 989, 992 (Utah App. 1992), this Court should limit application of the "residuum rule" to judicial review that is based on the administrative record. The "residuum rule" cannot apply to trial de novo where the administrative record is irrelevant, and for this reason, the district court erred in this case when it based its judgment upon it.

II. CORDOVA CANNOT RAISE FOR THE FIRST TIME ON APPEAL AN ISSUE SHE FAILED TO BRING TO THE ATTENTION OF THE HEARING OFFICER.

Generally, appellate courts only consider questions which were raised and preserved in the lower tribunal. See Crookston v. Fire Ins. Exchange, 817 P.2d 789, 800-01 (Utah 1991); Loveland v. Orem City Corp., 746 P.2d 763, 767 (Utah 1987). The corollary is that an appellant cannot assert an argument for the first time on appeal. See Bangerter v. Poulton, 663 P.2d 100 (Utah 1983); James v. Preston, 746 P.2d 799 (Utah App. 1987).

This rule is equally applicable in the review of administrative proceedings. Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah App. 1990). In State v. Utah Merit System Council, 614 P.2d 1259 (Utah 1980), the Utah Supreme Court held that a party who did not object to the failure to administer an oath in an administrative hearing could not raise that issue in the subsequent judicial review: "Because no timely objection was made in the administrative hearing, the matter was not appropriately raised before the district court." Utah Merit System, 614 P.2d at 1261. Further, "[a] party must raise an objection in an earlier proceeding or waive its right to litigate the issue in subsequent proceedings." Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah App. 1990)(involving a driver's license suspension).

The test for whether an issue has been preserved for appeal was set forth by this Court in LeBaron & Associates v. Rebel Enterprises, 823 P.2d 479, 482-83 (Utah App. 1991), as follows: "To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits." Because Cordova failed to object to the evidence or to argue a failure of proof at the administrative hearing, she failed to bring the "residuum rule" issue to the attention of the hearing officer and denied him the opportunity to rule on the issue's merits. On appeal to the district court, Cordova should be precluded from claiming that failure to apply the "residuum rule" was error because of her failure to preserve the issue. See Brinkerhoff, 790 P.2d at 589; LeBaron & Associates, 823 P.2d at 482-83.

This Court cannot condone the practice Cordova has relied upon in pursuing this appeal. Allowing parties to by-pass the administrative hearing and then argue on appeal to the district court that the evidence presented against them at the hearing was objectionable would vitiate the purpose of the administrative hearing. In S & G Inc. v. Morgan, 797 P.2d 1085 (Utah 1990), an interested party failed to appear and present evidence at a hearing before the state engineer. The Utah Supreme Court

refused to allow the party to present the evidence upon review de novo in the district court. The court's reasoning is instructive in this case.

The requirement of participation as a prerequisite to standing to appeal is a corollary of the doctrine of exhaustion of administrative remedies. It is well settled under this doctrine that persons aggrieved by decisions of administrative agencies "may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon the courts to determine ... the matters properly determinable originally by such agencies."

S & G, Inc., 797 P.2d at 1087, quoting People v. Keith Ry. Equip. Co., 70 Cal. App. 2d 339, 346 161 P.2d 244, 249 (Cal. Dist. Ct. App. 1945).

The rule of waiver precludes Cordova from raising the residuum rule issue on appeal to the district court when she failed to bring the issue to the attention of the administrative hearing officer. If trial de novo is a review of the record, the district court should have reviewed the record to insure that Cordova had preserved the residuum rule issue below. Failing to do so, the district court erred when it reversed the administrative ruling on the basis of this new argument.

III. CORDOVA'S FAILURE TO OBJECT TO THE EVIDENCE AT THE ADMINISTRATIVE PROCEEDING RENDERED THE EVIDENCE LEGALLY COMPETENT AND SUFFICIENT TO SATISFY THE REQUIREMENTS OF THE RESIDUUM RULE.

In order to complain of the admission of evidence, a party must make a clear and definite objection to the admission of the

evidence. Utah R. Evid. 103(a)(1); State v. Eldredge, 773 P.2d 29, 34-35 (Utah), cert. denied, 493 U.S. 814 (1989); State v. Malmrose, 649 P.2d 56, 58 (Utah 1982); Stagmeyer v. Leatham Brothers, 20 Utah 2d 421, 439 P.2d 279, 282 (1968).

"All relevant evidence is admissible, except as otherwise provided by the [rules of evidence]." Utah R. Evid. 402. There are various objections to evidence which, unless made, are waived, making the evidence admissible. See, e.g., State v. Eldredge, 773 P.2d 29, 34-35 (Utah 1989); Cook Asocs. Inc. v. Warnick, 664 P.2d 1161, 1164 (Utah 1983); State v. Belgard, 811 P.2d 211, 213-215 (Utah App. 1991). Even admissible "hearsay" evidence, if there is no objection based on lack of foundation for admission of the evidence as an exception to the hearsay rule, is competent evidence that satisfies the requirements of the "residuum rule." See Industrial Power Contractors v. Industrial Commission of Utah, 187 Utah Adv. Rep. 29, 31 (Utah App. 1992).

Cordova's failure to appear and object to admission of the admissible hearsay evidence at the administrative hearing precludes a reviewing court from concluding that such evidence was incompetent and, precludes a district court's conclusion that the residuum rule was not satisfied. In Industrial Power Contractors, Wanona Johnson brought a claim against Industrial

Power Contractors (IPC) for dependents' benefits before the Industrial Commission. The issue was whether Johnson's husband had died as a result of an industrial accident. Johnson introduced her deceased husband's medical records into evidence to prove the causal connection between the alleged industrial accident and his death. Based on these records, which were the only evidence of Johnson's involvement in the accident, the Commission awarded Johnson benefits.

On appeal, IPC argued that the medical records were hearsay and insufficient to support the Commission's findings under the "residuum rule." This Court rejected IPC's argument thus:

Foundational defects, unless timely objected to, are deemed waived and the evidence is deemed competent. In this instance, IPC failed to challenge the foundation of the medical records before the Commission below; therefore, IPC cannot question their competence for the first time on appeal.

The medical records from Utah reveal that Johnson was being treated for a cough and congestion as well as heart problems. Johnson's account therein of climbing stairs and inhaling fumes during an attempted rescue of a co-worker provides a factual explanation as to the cause or external source for the symptoms, pain, or sensations being treated. Absent a foundational challenge, the records would have been admissible in a court of law under Rule 803(4) as an express exception to the hearsay rule.

The residuum rule requires that findings be supported by a residuum of legally competent evidence, not that they be supported by "non-hearsay" evidence. Certain hearsay evidence is admissible in a court of law and is therefore legally competent. Since the Commission's findings in this case were based on admissible hearsay, they were based upon legally competent evidence. IPC's failure to raise its

foundational challenges below prevents IPC from raising them for the first time on appeal. We therefore hold that the requirements of the residuum rule were satisfied.

Industrial Power Contractors, 187 Utah Adv. Rep. at 31 (citations omitted).

The reasoning in Industrial Power Contractors, is equally applicable in the instant case: the DUI report (Attached as Addendum "A"), the operational check list, (Attached as Addendum "B"), the intoxilyzer test result, (Attached as Addendum "C"), and the Department's Intoxilyzer test affidavit, (Attached as Addendum "D"), admitted without objection, are all competent evidence to support the Hearing Officer's findings. The DUI report showed that Cordova had been driving at excessive speed and the arresting officer had reason to make the initial stop. The DUI report recorded Cordova's admission that she had been drinking and the officer's report of an odor of alcohol, Cordova's slurred and slowed speech, impaired balance and Nystagmus in both eyes, which show probable cause for the arrest. The DUI report also indicated that Cordova had been properly warned and took the breath test. Absent a foundational objection, the DUI report is a public record and competent evidence. See Kehl v. Schwendiman, 735 P.2d 413, 417 (Utah App. 1987); Triplett v. Schwendiman, 754 P.2d 87, 89 (Utah App. 1988). The intoxilyzer checklist, the test result of 1.69%, and the

affidavit showing the machine had been tested and was working properly are similarly competent, absent foundational objection, as business records, Triplett, 754 P.2d at 89, or under Utah Code Ann. § 41-6-44.5 (1988).

Thus, even if this Court determines that the "residuum rule" should apply to judicial review of driver's license suspension hearings, the rule was satisfied when Cordova failed to object and her DUI records were admitted as competent evidence.

"Absent a foundational challenge, the records would have been admissible in a court of law under Rule 803(4) [in this case Rule 803(8)] as an express exception to the hearsay rule." Industrial Power Contractors, 187 Utah Adv. Rep. at 31. The trial court thus erred as a matter of law in concluding that the residuum rule was not satisfied in this case.

If trial de novo means a complete retrial upon new evidence, see Part I herein, the rule of waiver, like the "residuum rule" is irrelevant. The Department's arguments in Points II and III are necessary only if this Court concludes that trial de novo means an on the record review that makes the "residuum rule" applicable.

CONCLUSION

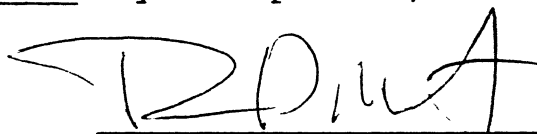
Judicial review of an informal adjudicative proceeding such as a driver's license suspension hearing lies with the district court by trial de novo. A trial de novo in the context of driver's license suspension hearings is a complete retrial upon new evidence. The district court erred when it failed to conduct such a review. Trial de novo is incompatible with application of the residuum rule and, consequently, this Court should reverse the district court's judgment granting relief to Cordova based upon its review of a portion of the administrative record and its application of the "residuum rule." This case should then be remanded to the district court for a proper "trial de novo."

If this court determines that the "residuum rule" applies, Cordova's failure to properly raise or preserve the "residuum rule" issue in the administrative proceeding precludes the district court from basing its decision on that issue. Consequently, this Court must reverse the district court's action.

Similarly, even if this Court determines that the "residuum rule" applies, the evidence presented at the administrative hearing was legal, competent, and sufficient to support the Department's findings. Thus, the judgment below should be

reversed in light of the competent evidence supporting the Department's findings.

RESPECTFULLY SUBMITTED this 3rd day of September, 1992.

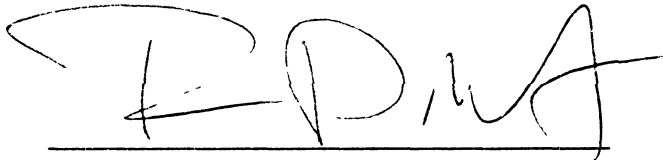
A handwritten signature in black ink, appearing to read "T.D. Roberts", written over a horizontal line.

THOM D. ROBERTS
Assistant Attorney General
Attorney for Defendant-
Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF OF THE APPELLANT, was mailed, postage-prepaid this 30th day of September, 1992, to the following:

Herschel Bullen, Esq.
Attorney for Plaintiff-Appellee
2749 Parleys Way, Suite 210
Salt Lake City, Utah 84109

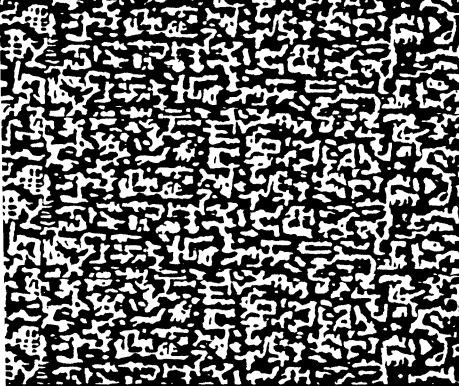
A handwritten signature in black ink, appearing to read "R. D. W. A.", is written over a horizontal line.

ADDENDUM

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ADDENDUM "A"
DUI REPORT FORM

SUMMONS AND CITATION		AGENCY <u>SOUTH JORDAN</u> 920101 D108514	
STATE OF UTAH		NAME (Last) <u>CORDOVA</u> (First) <u>JOEY</u> (Middle) <u>A</u> DOB <u>4-7-59</u>	
COUNTY OF <u>SALT LAKE</u>		ADDRESS (City) <u>3200 S. 1000 E. S. 1000 E. S. 1000 E.</u> (State) <u>UT</u> Zip <u>84105</u>	
CITY OF <u>SOUTH JORDAN</u>		Driver License No. <u>3455-1</u> Class <u>D</u> Expires <u>4-92</u> State <u>UT</u> Restriction <u>None</u> Social Security No. <u>521-2-90</u> Motorcycle <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN:		Height <u>5-7</u> Weight <u>160</u> Eyes <u>Brown</u> Sex <u>M</u> Vehicle License No. <u>RD LADY</u> State <u>UT</u> Expires <u>1-92</u>	
PART OF <u>SOUTH JORDAN</u>		Vehicle Make <u>Lincoln</u> Vehicle Type <u>SA</u> Year <u>75</u> Color <u>Red</u> Accident <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Comm. Vehicle <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Haz. Material <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Direction of Travel <u>N S E W</u>	
DATED AT <u>1175 S 1700 W</u>		THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:	
<u>Jordan UT 84105</u>		<input type="checkbox"/> UTAH CODE <input type="checkbox"/> COUNTY CODE <input checked="" type="checkbox"/> CITY CODE NO.: <u>7-13-010</u>	
		ON THE <u>24</u> DAY OF <u>JAN</u> 19 <u>92</u> MILITARY TIME <u>3:1</u>	
		LOCATION <u>3400 W 1-400 E</u> MILE POST NO. <u></u>	
less than (5) nor more than (14) days after issuance is citation.		VIOLATION(S): <u>DUI</u>	
		WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN	
		SIGNATURE <u>X</u>	
		I CERTIFY THAT A COPY OF THIS SUMMONS AND CITATION WAS DULY SERVED UPON THE DEFENDANT ACCORDING TO LAW ON THE ABOVE DATE AND I KNOW OR BELIEVE AND SO ALLEGE THAT THE ABOVE NAMED DEFENDANT DID COMMIT THE OFFENSE HEREIN SET FORTH CONTRARY TO LAW I FURTHER CERTIFY THAT THE COURT TO WHICH THE DEFENDANT HAS BEEN DIRECTED TO APPEAR IS THE PROPER COURT PURSUANT TO SECTION 77-7-19, U.C.A.	
		OFFICER <u>E. Gutierrez</u> BADGE NO. <u>1273</u>	
		COMPLAINANT <u>H. L. / R. L.</u> DATE OF CITATION <u>1-24-92</u>	
PERSE		MAIL TO: DRIVER'S LICENSE DIVISION P. O. BOX 30560 SALT LAKE CITY, UTAH 84130-0560	
		DATE SENT TO DLD <u></u> DOCKET NO. <u>120 days</u>	

JAN 28 1992

READ CAREFULLY

SURR. LIC.

This citation is not an information and will not be used as an information without your consent. If an information is filed you will be provided a copy by the court. You MUST appear in court on or before the time set in this citation. IF YOU FAIL TO APPEAR AN INFORMATION WILL BE FILED AND THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST.

NOTICE OF INTENT TO SUSPEND OR REVOKE: You are hereby notified that thirty-one (31) days from the date of this notice your privilege to operate motor vehicles in the State of Utah will be suspended pursuant to Section 41-2-130 UCA for a period of ninety (90) days thereafter, or for a period of one hundred twenty (120) days if this is the second or subsequent occurrence of this offense OR if a peace officer has indicated you have refused to submit to a chemical test to determine the alcohol and drug content of your breath, blood or urine, you are hereby notified that thirty-one (31) days from the date of this notice your privilege to operate motor vehicles in the State of Utah will be revoked pursuant to 41-6-44.10 UCA for a period of one (1) year. YOU HAVE THE RIGHT TO REQUEST A HEARING ON THIS SUSPENSION OR REVOCATION. The hearing is not for purpose of granting you a limited license but only to determine whether your license should be suspended or revoked.


The department will NOT contact you further regarding a hearing unless you request a hearing in writing. Your WRITTEN REQUEST must be sent WITHIN TEN (10) DAYS of the date of arrest to the DRIVER LICENSE DIVISION at 4501 South 2700 West, P. O. Box 30560, Salt Lake City, Utah 84130-0560. Upon your timely written request for a hearing you will be notified of a time and place to appear. If you fail to appear or request a hearing, your driver license suspension or revocation will become effective as indicated above. The administrative hearing is civil in nature and does not satisfy the requirement for you to appear in court when required.

*COMMERCIAL DRIVER LICENSE HOLDERS SEE REVERSE SIDE

TEMPORARY DRIVER LICENSE:

- ☐ This is VALID as a temporary driver license for a period of thirty (30) days from the date of this notice.
- ☐ This is NOT VALID as a temporary driver license.
- ☐ This IS valid as a temporary Commercial Driver License for a period of thirty (30) days from the date of this Notice.
- ☐ This is NOT valid as a temporary Commercial Driver License.

Reason for not issuing temporary license: _____

SUMMONS AND CITATION STATE OF UTAH COUNTY OF _____ CITY OF _____ THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN: _____ OF _____ D AT _____ _____ _____ than (5) nor more than (14) days after issuance of citation.		AGENCY						
		NAME (Last) (First) (Middle) DOB ADDRESS (City) (State) Zip						
		Driver License No	Class	Expires	State	Restriction	Social Security No.	Motorcycle <input type="checkbox"/> Yes <input type="checkbox"/> No
		Height	Weight	Eyes	Sex	Vehicle License No.	State	Expires
		Vehicle Make	Vehicle Type	Year	Color	Accident <input type="checkbox"/> Yes <input type="checkbox"/> No	Comm. Vehicle <input type="checkbox"/> Yes <input type="checkbox"/> No	Haz. Material <input type="checkbox"/> Yes <input type="checkbox"/> No
						Direction of Travel N S E W		
		THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING: <input type="checkbox"/> UTAH CODE <input type="checkbox"/> COUNTY CODE <input checked="" type="checkbox"/> CITY CODE NO.: 7-1 ON THE _____ DAY OF _____ 19____ MILITARY TIME _____ LOCATION _____ MILE POST NO. 16-1 VIOLATION(S): 120 days						
		WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN SIGNATURE _____ I CERTIFY THAT A COPY OF THIS SUMMONS AND CITATION WAS DULY SERVED UPON THE DEFENDANT ACCORDING TO LAW ON THE ABOVE DATE AND I KNOW OR BELIEVE AND SO ALLEGE THAT THE ABOVE NAMED DEFENDANT DID COMMIT THE OFFENSE HEREIN SET FORTH CONTRARY TO LAW I FURTHER CERTIFY THAT THE COURT TO WHICH THE DEFENDANT HAS BEEN DIRECTED TO APPEAR IS THE PROPER COURT PURSUANT TO SECTION 77-7-19, U.C.A. OFFICER _____ BADGE NO _____ COMPLAINANT _____ DATE OF CITATION _____						
		ISSUING AGENCY COPY		DATE SENT TO DLD		DOCKET NO		
						120 days		

READ CAREFULLY

This citation is not an information and will not be used as an information without your consent. If an information is filed you will be provided a copy by the court. You MUST appear in court on or before the time set in this citation. **IF YOU FAIL TO APPEAR AN INFORMATION WILL BE FILED AND THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST.**

NOTICE OF INTENT TO SUSPEND OR REVOKE: You are hereby notified that thirty-one (31) days from the date of this notice your privilege to operate motor vehicles in the State of Utah will be suspended pursuant to Section 41-2-130 UCA for a period of ninety (90) days thereafter, or for a period of one hundred twenty (120) days if this is the second or subsequent occurrence of this offense **OR** if a peace officer has indicated you have refused to submit to a chemical test to determine the alcohol and drug content of your breath, blood or urine, you are hereby notified that thirty-one (31) days from the date of this notice your privilege to operate motor vehicles in the State of Utah will be revoked pursuant to 41-6-44.10 UCA for a period of one (1) year. **YOU HAVE THE RIGHT TO REQUEST A HEARING ON THIS SUSPENSION OR REVOCATION.** The hearing is not for purpose of granting you a limited license but only to determine whether your license should be suspended or revoked.

The department will NOT contact you further regarding a hearing unless you request a hearing in writing. Your **WRITTEN REQUEST** must be sent **WITHIN TEN (10) DAYS** of the date of arrest to the **DRIVER LICENSE DIVISION** at 4501 South 2700 West, P.O. Box 30560, Salt Lake City, Utah 84130-0560. Upon your timely written request for a hearing you will be notified of a time and place to appear. If you fail to appear or request a hearing, your driver license suspension or revocation will become effective as indicated above. The administrative hearing is civil in nature and does not satisfy the requirement for you to appear in court when required.

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TEMPORARY DRIVER LICENSE:

- ☒ This is VALID as a temporary driver license for a period of thirty (30) days from the date of this notice.
- ☐ This is NOT VALID as a temporary driver license.
- ☐ This IS valid as a temporary Commercial Driver License for a period of thirty (30) days from the date of this Notice.
- ☐ This is NOT valid as a temporary Commercial Driver License.

Reason for not issuing temporary license: _____

see dress
w length coat
sh heels.

DIU0014

DUI REPORT FORM

I. CASE IDENTIFICATION:

Date 1-24-92 Day FRIDAY Accident NO Case # 920101 Time Prepared 2330
Subject's Name JUDY A CORONA Address 3205 STARLINE CIR
Place of Employment D.C. TANNER S Address 1930 S STATE
Home Telephone Number 561-0263 Work Telephone Number 406-2430
D.O.B. 4-7-59 Driver License # 3458121 Time of Arrest 2320
Place of Arrest 10400 S 1700 W Charges DUI - SPEED
Arresting Officer G. SMITH Assisting Officers M. FENLEY - M. MASON
Arresting Agency SOUTH JORDAN

II. VEHICLE

Year 75 Color RED Make Lincoln Model CONTINENTAL
License # and state RAL40Y UT Disposition STATE TAX IMPOUND
Registered Owner GRANT FAHRNI Address 3205 STARLINE CIR

III. WITNESSES: (If passengers, indicate specifically)

Name	Address	Tele. #	Age/DOB
------	---------	---------	---------

1.
2.
3.
4.

5. MATHEW MASON P067 254-4700 OFFICER S JORDAN P.D.

IV. ACTUAL PHYSICAL CONTROL:

The facts establishing the subject's actual physical control of a motor vehicle are: R/O observed JUDY in the driver seat. NO other passengers in vehicle. vehicle was running with KEYS in the ignition.

V. DRIVING PATTERN:

Subject's location when first observed 2200 W - locked RADIATOR AT 2100 W
The facts observed regarding driving pattern: R/O observed via VIO's speed camera first - EST 50 mph. VIO 49 49 49 48 (48) NO vehicles in PATH. R/O activated lights AT the light of 10400 S 1700 W. VIO did not respond. SHE hesitated. VIO was turning right but did NOT proceed when the light was green for her. SHE did respond TO the lights on my patrol vehicle and pulled over on 1700 W @ 10400 S.

VI. PRE-ARREST STATEMENTS OF SUBJECT:

I'm coming from BETTERS UP. I had a glass of wine with some friends. I was just on my way out to see my boyfriend in RIVINGTON. I had a couple glasses of wine.

I. PHYSICAL CHARACTERISTICS:

Odor of alcoholic beverage an apparent smell of an alcoholic beverage was emitting from within vehicle
Speech slow - slurred
Balance slightly BACK & FORTH
Signs or complaints of injury or illness NONE
Other physical characteristics —

Turn was not done like 'explaining' - used arms to keep balance
left 2. One leg stood first told R/O that she was unable to do test, but promised to do it. Vio - used arms to
keep balance. Dropped foot at 13. She said she could not continue. She then continued the
Foot 3. test, keeping her hands out to her side to keep her balance

4. Horizontal Gaze Nystagmus: Right eye onset prior to 45°. Left eye onset prior to 45°. Distinct Nystagmus at maximum deviation in both eyes.
5. Neither eye followed smoothly.

Were tests demonstrated by officer? Yes Subject's ability to follow instructions will did not do parts of each test like instructed.

X. SEARCHES

A. Vehicle:

Was subject's vehicle searched? Yes Where? 10400 S 1700 W
When? incident to arrest Evidence Handcuffs

Person who performed the search G. Smith

B. Subject:

Was subject's person searched? Yes Where? 10400 S 1700 W
When? incident to arrest Evidence Found 3 small bottles in police
Person who performed the search G. Smith

X. CHEMICAL TESTS:

Mr. or Mrs. CORDOVA, do you understand that you are under arrest for driving under the influence of alcohol (drugs)? Response, (if any) I do

I hereby request that you submit to a chemical test to determine the alcohol (drug) content of your blood/ breath. I request that you take a BREATH test.
(blood-breath-urine)

2340
The following admonition was given by me to the subject before the chemical test was administered:

Results indicating .08 grams or more by weight of alcohol in your blood/breath shall, and the existence of a blood alcohol content or presence of drugs sufficient to render you incapable of safely driving a vehicle may, result in suspension or revocation of your license or privilege to operate a motor vehicle.

What is your response to my request that you submit to a chemical test? Response: I do.

Did subject submit to a chemical test? Yes Type of test Breat
Test Administered by G. Smith Where? 11175 S 1700 W
Time: 2358 Results .169 Was subject notified of results?

Serial No. of test machine:

94-601022 (if the subject refuses the test, read the following)

☐ The following admonition was given by me to the subject:

If you refuse the test, it will not be given, however I must warn you that if you refuse, your license or permit to drive a motor vehicle may be revoked for one year with no provision for a limited driver's license. After you have taken this test, you will be permitted to have a physician of your own choice administer a test at your own expense, in addition to the one I have requested you to submit to, so long as it does not delay the test or tests requested by me. Upon your request, I will make available to you the results of the test if you take it.

☐ The following admonition was given by me to the subject:

Your right to remain silent and your right to counsel do not apply to the implied consent law which is civil in nature and separate from the criminal charges. Your right to remain silent does not give you the right to refuse to take the test. You do not have the right to have counsel during the test procedure. Unless you submit to the test I am requesting, I will consider that you have refused to take the test. I warn you that if you refuse to take the test, your driver's license can be revoked for one year with no provision for a limited license.

XI. CONSTITUTIONAL RIGHTS:

Was subject advised of the following rights? Yes When 0012
By Whom? G. Smith Where? 11175 S 1700 W

- X 1. You have the right to remain silent.
X 2. Anything you say can and will be used against you in a court of law.
X 3. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
✓ 4. If you decide to answer questions now without having counsel present, you may stop answering questions at any time. Also, you may request counsel at any time during questioning.

Were the following waiver questions asked? _____

X 1. Do you understand each of these rights I have explained to you?
Response I do

X 2. Having these rights in mind, do you wish to talk to us now?
Response I don't feel like I couldn't drive. No

INTERVIEW:

Were you operating a vehicle? _____
Where were you going? _____
What street or highway were you on? _____
Direction of travel? _____
Where did you start from? _____
When? _____ What time is it now? _____
What is today's date? _____ Day of week? _____
(Actual time _____ Date _____ Day _____)
What city or county are you in now? _____
What were you doing during the last three hours? _____

Have you been drinking? _____
What? _____ How much? _____
Where? _____
When did you have your first drink? _____ Last drink? _____
Are you under the influence of an alcoholic beverage (drugs) now? _____

Are you taking tranquilizers, pills, medicines or drugs of any kind? _____
(What kind? Get sample) _____
When did you have the last dose? _____
Are you ill? _____

(If subject was in an accident, ask these questions:)

Were you involved in an accident today? _____
Have you had any alcoholic beverage or drugs since the accident? _____
If so, what? _____ When? _____
How much? _____

II. OTHER OCCURRENCES OR FACTS:

VED was cited for speed 48/35 citation # 874743

III. ATTACHED DOCUMENTS:

I have attached the following documents to this report:

1. ☒ Copy of citation/temporary license
2. ☒ Subject's Utah driver's license or driver's permit
3. ☐ Traffic accident report
4. ☒ Other documents (specify) STATE TAX, impaired vehicle inventory, RESULTS of TEST, PROPERTY SHEET, intoxilyzer checklist, citation # 874743 Release Form (w/)

hereby certify that I am a sworn Utah Peace Officer and that the information contained above in this report form and attached documents is true and correct to my knowledge and belief and that this report form was prepared in the regular course of my duties. It is my belief the subject was in violation of section 41-6-44 U.C.A. at the date, time, and place specified in this report.

Glenn Smith
Signature of Peace Officer
Law Enforcement Agency: South Jordan
Date: 1-25-92 Time: 0050

The original of this form and the Driver License copy of the Citation must be sent within five (5) days of the arrest of the subject to:

Driver License Division
4501 South 2700 West
P.O. Box 30560
Salt Lake City, Utah 84130-0560

26 02 1992

ADDENDUM "B"
OPERATIONAL CHECK LIST

920101 40705

CMI INTOXILYZER OPERATIONAL CHECK LIST
South Jordan Police Department
Serial #94001022 Model #4011AS - A

Subject JUDY CORDOVA Date 1-24-92
a.m.

(4) Time 2351 p.m. Operator G. Smith

1. (4) Power switch on, ready light on, connect
2352 pump tube to breath tube Insert record
2353 card, press advance and wait for light 2.
2. (4) Press advance, auto zero, wait for light 3.
3. (4) Disconnect pump tube from breath tube,
2355 extend breath tube, Insert mouthpiece.
4. (4) Secure breath sample from subject, observe
2356 breath lamp while subject is blowing.
5. (4) Remove mouthpiece, House breath tube,
connect pump tube to breath tube, press
2357 advance and wait for light 5.
6. (4) Press advance, Insert quartz calibrator,
2357 wait for light 6, remove quartz calibrator.
7. (4) House breath tube, press advance, wait
2358 for light 7.
8. (4) Remove test card, end of test, turn power
switch off.

ADDENDUM "C"
INTOXILYZER TEST RESULT

**TEST RECORD CARD FOR THE
INTOXILYZER® INSTRUMENT - 4011 MODELS**

GRAMS ALCOHOL PER 210 LITRES BREATH			INSTRUMENT PRINT CODE
•			A — AIR BLANK
•			B — BREATH
•			C — CALIBRATOR (Simulator)
•			OBSERVED SUBJECT FOR REQUIRED OBSERVATION PERIOD AND FOLLOWED CHECK LIST
A	0	0	<u>GS</u> OPERATOR'S INITIAL
C	2	0	<u>11175 S 1700 W</u> INSTRUMENT LOCATION
A	0	0	<u>94-001022</u> INSTRUMENT SERIAL NUMBER
E	1	0	<u>1-24-92</u> DATE
A	0	0	

JUDY CORDOVA
SUBJECT'S NAME

2327
TIME FIRST OBSERVED

2351
TIME TEST STARTED

G. Smith
OPERATOR

ADDITIONAL INFORMATION AND/OR REMARKS

.109 BAC.

40705 920621

ADDENDUM "D"
INTOXILYZER TEST AFFIDAVIT

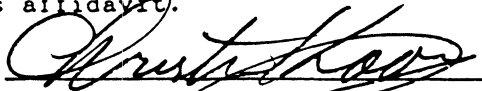


STATE OF UTAH
DEPARTMENT OF PUBLIC SAFETY

CUSTODIAN CERTIFICATE

I, the undersigned, being first duly sworn, state that:

1. I am the 'Breathtesting Supervisor of the Utah Highway Patrol and the official keeper of and responsible for the maintenance check records of the breathtesting instruments maintained in the State of Utah.
2. Attached are true and correct copies of the records of maintenance and certification for the Intoxilyzer serial number 94001022 located at South Jordan P.O., of which are kept on file by me, in the course of official business, for the State of Utah, Department of Public Safety and in accordance with the current regulations of the Commissioner of Public Safety.
3. The attached tests were done before and after the date of 24 January 1992.
4. The breathtest technicians(s) whose signature(s) appear on the attached affidavit(s) are certified by the State of Utah and has/have met all of the following requirements as required by the Department of Public Safety:
Satisfactory completion of the operator's initial certification course and/or renewal course;
Satisfactory completion of the Breath Alcohol Testing Supervisor's course offered by Indiana University, or an equivalent course of instruction, as approved by the Breath Alcohol Testing Program;
Satisfactory completion of a Breath Alcohol Testing Instrument Manufacturer's Maintenance/Repair Technician course for the instruments in use in the State of Utah or is qualified by nature of his/her employment or training to maintain/repair those instruments;
Maintain Technician's status through a minimum of eight (8) hours related training each calendar year.
5. I am competent to testify and have personal knowledge of the matters alleged in this affidavit.


Sgt. Christiaan Kooring
Breathtesting Supervisor
Utah Highway Patrol

STATE OF UTAH)
COUNTY OF DeBevoise)
ON THE 17 DAY OF March 19 92, PERSONALLY APPEARED BEFORE ME, CHRISTIAAN KOORING, WHO BEING DULY SWORN BEFORE ME EXECUTED THE ABOVE REFERENCED CERTIFICATE AND I CERTIFY THAT SAID PERSON IS AN OFFICER AND EMPLOYEE OF THE DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF UTAH AND IS THE LEGAL CUSTODIAN OF THE INTOXILYZER AFFIDAVITS OF SAID DEPARTMENT AND THAT HIS SIGNATURE AFFIXED HERETO IS GENUINE.

NOTARY PUBLIC:

MY COMMISSION EXPIRES 8/9/93 RESIDING AT:

UTAH DEPT. OF PUBLIC SAFETY RECORD OF INTOXILYZER TEST AND AFFIDAVIT (A)

/We the undersigned, being first duly sworn, state that:

1. Breath testing instrument, INTOXILYZER, serial number 94-001022 located at Saxon Jordan P.D. was properly checked by me/us in the course of official duties, on 22 January 1992 at 11:30 A.M.
2. This was done by a currently certified technician and according to the standards established by the Commissioner of the Utah Department of Public Safety.
3. This is the official record and notes of this procedure which were made at the time these tests were done.
4. I am/we are competent to testify and have personal knowledge of the matters alleged in this affidavit.

THE FOLLOWING TESTS WERE MADE:

YES

NO

- ☒ Electrical power check:
- (Power switch on power indicator light is on)..... (☒) ()
- ☒ Temperature check (Ready light is on)..... (☒) ()
- ☒ Internal purge check:
- (Air pump works, runs for approximately 35 seconds.. (☒) ()
- ☒ Zero set, Error indicator, and Printer Check:
- (Zero set at .000, .001, .002, .003.)..... (☒) ()
- (With proper zero set, printer works properly)... (☒) ()
- (Printer deactivated when error light is on)..... (☒) ()
- ☒ Fixed absorption calibrator test (if equipped)
- (Reads within +/- .01 of calibration setting).... (☒) ()
- ☒ Checked with known sample: (Simulator, 3 tests within +/- .005 or 5% whichever is the greatest).... (☒) ()
- ☒ Gives readings in grams of alcohol per 210 liters of breath..... (☒) ()
- REPAIRS REQUIRED(Explain) NONE REQUIRED () (☒)
- ☒ The simulator solution was of the correct kind and properly compounded..... (☒) ()
- ☒ The results of this test show that the instrument is working properly..... (☒) ()



Notary Public - STATE OF UTAH
2700 West 7839 South
West Jordan, Utah 84088
COMM. EXP. 4-4-94

STATE OF UTAH)
COUNTY OF Salt Lake

RE-INSTALLATION THIS DATE _____ 19____
CERTIFIED BREATH TEST TECHNICIAN(S) _____

I/We, on oath, state that the foregoing is true.

Subscribed and sworn before me this 22 day of January 1992

Notary Public

My commission expires April 4 1994

City of Residence West Jordan

County of Residence Salt Lake

UTAH DEPT. OF PUBLIC SAFETY RECORD OF INTOXILYZER TEST AND AFFIDAVIT (A)
e the undersigned, being first duly sworn, state that:

1. Breath testing instrument, INTOXILYZER, serial number 94-001022
located at SOUTH JORDAN P.D. was properly checked by me/us in
the course of official duties, on 21 FEBRUARY 1992 at 1:40 P.M.
2. This was done by a currently certified technician and according to
the standards established by the Commissioner of the Utah
Department of Public Safety.
3. This is the official record and notes of this procedure which were
made at the time these tests were done.
4. I am/we are competent to testify and have personal knowledge of the
matters alleged in this affidavit.

: FOLLOWING TESTS WERE MADE:

YES

NO

✓ Electrical power check:

(Power switch on power indicator light is on).....

(✓)

()

✓ Temperature check (Ready light is on).....

(✓)

()

✓ Internal purge check:

(Air pump works, runs for approximately 35 seconds..

(✓)

()

✓ Zero set, Error indicator, and Printer Check:

(Zero set at .000, .001, .002, .003.).....

(✓)

()

(With proper zero set, printer works properly)...

(✓)

()

(Printer deactivated when error light is on).....

(✓)

()

✓ Fixed absorption calibrator test (if equipped)

(Reads within +/- .01 of calibration setting)....

(✓)

()

✓ Checked with known sample: (Simulator, 3 tests

within +/- .005 or 5% whichever is the greatest)....

(✓)

()

✓ Gives readings in grams of alcohol per 210 liters

of breath.....

(✓)

()

PAIRS REQUIRED(Explain) NONE Required

()

(✓)

✓ The simulator solution was of the correct kind and

properly compounded.....

(✓)

()

✓ The results of this test show that the instrument

is working properly.....

(✓)

()

st prior check of this instrument was done on 22 JANUARY 1992

CERTIFIED BREATH TEST TECHNICIAN(S)

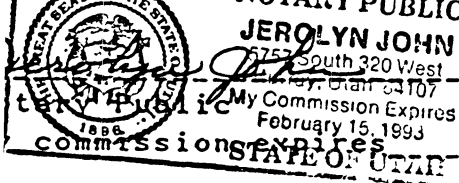
[Signature]
[Signature]
[Signature]

STATE OF UTAH)

COUNTY OF Salt Lake

I/We, on oath, state that the foregoing is true.

observed and sworn before me this 21 day of February 1992



City of Residence Salt Lake

County of Residence Salt Lake

Feb 15 1993

ADDENDUM "E"

**Department of Public Safety, Driver License Division,
Findings of Proceedings on Hearings for
Administrative Suspension**

**DEPARTMENT OF PUBLIC SAFETY
DRIVER LICENSE DIVISION**

**Findings of Proceedings on Hearing for Administrative Suspension
(Utah Code Ann. 41-2-130)**

Date of Hearing <u>2-19-92</u>	Time Set For Hearing <u>9:00 am</u>	Name and Address of Driver <u>Judy A. Cordova</u> <u>3205 Starlite Cir.</u> <u>West Jordan, Ut 84088</u>	Hearing Officer <u>Amuse</u>
Name and Address of Attorney <u>Herschel Bullen</u> <u>455 E 5th St. #200</u> <u>SLC, Utah 84111</u>		Date of Birth <u>4-7-59</u>	Arresting Officer <u>G Smith</u>
		DL Number <u>3458121</u>	Agency <u>So. Jordan P.D.</u>
Witness	Date of Arrest <u>1-24-92</u>	Witness	
Witness	Location of Hearing <u>UVC</u>	Witness	

OPENING STATEMENT

This hearing is being conducted at the driver's request in accordance with the Utah Administrative Procedures Act and Utah Code Ann. 41-2-130, following his/her arrest for driving while under the influence of alcohol or drugs or a combination of alcohol and drugs. The issue to be determined are: if the peace officer had grounds to believe the driver had been in actual physical control of a vehicle while under the influence of alcohol and/or drugs, was requested to take a chemical test, was warned of the potential consequences of taking the test, and was informed of the test results if any.

All formalities required in court proceedings need not be used in this hearing. However, the Division shall substantially comply with the fundamental rules of due process. Sworn testimony will be taken and the parties may have witnesses testify. The driver may testify and may cross examine others who testify.

If the license is suspended the driver has the right within 30 days, to petition the proper court for an appeal hearing.

Those testifying will be sworn and the hearing shall proceed.

The following documents and information are part of the records for this hearing:

- | | | |
|-------------------------------------|--------------------------|---|
| Yes | No | |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | The officer's report submitted in compliance with Utah Code Ann. 41-2-130. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Notice and citation served by the officer of the Department's intent to suspend, and information on how to receive a hearing by the Department. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Hearing request made within ten days. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Test machine record of test results, if any. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Operational checklist of test instrument. |

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Department of Public Safety affidavit that indicates the breath testing instrument was check according to Department Standards (41-6-44.3 UCA) |
| <input type="checkbox"/> | <input type="checkbox"/> | Other (ie. Documents and/or information received in behalf of the friver and/or other evidence received which is made official record for the purpose of this hearing).
Explain: |

TESTIMONY AND EVIDENCE PRESENTED

- [illegible]

Substance of statement and/or questions by driver's legal counsel

RESIDING OFFICERS FINDINGS OF FACT AND CONCLUSION OF LAW:

- A The peace officer had reason to believe that the driver had ☐ had not ☐ violated Utah Code Ann 41-6-44 and was arrested for the same
- B The driver was ☐ was not ☐ placed under arrest for D U I
- C The driver was ☐ was not ☐ advised of the possible revocation/suspension of his/her driving privilege
- D The chemical test was ☐ was not ☐ administered by an officer certified to do so
- E Proper procedures and standards were ☐ were not ☐ followed by the peace officer to insure the operation of the test machine to be reliable, with the results of _____ %
- F Department of Public Safety affidavit indicated the breath testing instrument used was ☐ was not ☐ reliable and in proper working order according to Department Standards (UCA 41-6-44 3)

G. All procedures and requirements were ☒ were not ☐ followed by the reporting officer pursuant to Utah Code Ann. 41-2-130. (Explain what procedures were not followed, if any):

H. Officer did ☐ did not ☒ appear.

Reasons for non-appearance: Unknown

I. Additional findings of fact not covered above:

CONCLUSIONS:

BASED UPON THE FOREGOING FINDINGS OF FACT, IT IS CONCLUDED THAT ALL OF THE STATUTORY PROVISIONS REQUIRED TO SUSPEND THE DRIVING PRIVILEGE PURSUANT TO UTAH CODE ANN. 41-2-130 WERE ☒ WERE NOT ☐ PROVIDED IN THIS CASE, AND THE FOLLOWING DECISION IS RENDERED:

☒ To suspend the driving privilege by authority of Utah Code Ann. 41-2-130.

☐ Take No Action:
Explain: _____

Comments by Presiding Officer:

No one appeared for the hearing. According to the police report, there was reason to make the stop, i.e., excessive speed. There was reasonable suspicion that driver was DUI, i.e., her admission that she had been drinking, odor of alcohol, slurred and slow speech, impaired balance and nystagmus in both eyes. She was arrested for DUI, was properly warned and took and breath test. There is a checklist for the breath machine in evidence showing that all procedures were followed and a test result card with breath sample showing .16 BrAC and no indication that there were problems with the test or machine. The preponderance of evidence would support a suspension in this case.

ORDER: Suspension of driving privilege.

Presiding Officer: *S. F. Frouse*
mw

FOR CENTRAL OFFICE USE ONLY

Reviewed by: *Brian Dough*
074k

Title: *Manager 20 Feb. 92*

ADDENDUM "F"

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 63-46b-15 (Supp. 1992)

63-46b-15. Judicial review — Informal adjudicative proceedings.

- (1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile court shall have jurisdiction over all state agency actions relating to removal or placement decisions regarding children in state custody.
(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.
- (2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:
 - (i) the name and mailing address of the party seeking judicial review;
 - (ii) the name and mailing address of the respondent agency;
 - (iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;
 - (iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;
 - (v) a copy of the written agency order from the informal proceeding;
 - (vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;
 - (vii) a request for relief, specifying the type and extent of relief requested;
 - (viii) a statement of the reasons why the petitioner is entitled to relief.
(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.
- (3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.
(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

History: C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25; 1990, ch. 132, § 1.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, added the exception at the end of Subsection (1)(a).

NOTES TO DECISIONS

ANALYSIS

Claim to licensure by reciprocity.
Function of district court.

Claim to licensure by reciprocity.

District court erred in declining a de novo review of a dentist's claim to licensure by reciprocity, where there had been no proceeding on his application that was sufficiently judicial in nature, and he had not yet had the licensing

agency's action reviewed in a "trial-type hearing." *Kirk v. Division of Occupational & Professional Licensing*, 815 P.2d 242 (Utah Ct. App. 1991).

Function of district court.

The only appellate jurisdiction statutorily delegated to the district court is to review informal agency adjudicative proceedings. *State v. Humphrey*, 794 P.2d 496 (Utah Ct. App. 1990).

ADDENDUM "G"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Herschel Bullen (0482)
McDONALD & BULLEN
Attorney for Petitioner
The Hermes Building
455 East Fifth South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 359-0999

RECEIVED
MAY 15 1992
OFFICE OF ATTORNEY GENERAL
LITIGATION DIV.

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---oooOooo---

JUDY A. CORDOVA,

:

Petitioner,

:

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

vs.

:

G. BARTON BLACKSTOCK, Bureau
Chief, Records Bureau, Drivers
License Division,

:

Civil No. 920901040
Judge J. Dennis Frederick

:

Respondent.

:

---oooOooo---

The above captioned matter came on before the Honorable J. Dennis Frederick on the 30th day of April, 1992, at the hour of 9:00 a.m., Herschel Bullen appearing for the Petitioner and Thom Roberts, Assistant Attorney General, appearing for the Respondent. The Petitioner having made a Motion to Vacate and Set Aside the administrative Order suspending the driving privilege of the Petitioner, based upon the exhibits received, the pleadings and record of the case and having heard argument of counsel, the Court now makes and enters the following:

FINDINGS OF FACT

1. An administrative hearing regarding the Department of Public Safety Driver's License Division's intention to suspend the Petitioner's driving privileges as a result of Petitioner's arrest

for driving under the influence of alcohol or any drug on January 24, 1992, was scheduled pursuant to Petitioner's request on or about February 19, 1992, at the hour of 9:00 a.m., at 2780 West 4700 South, West Valley City, Utah.

2. The record of the administrative suspension hearing reflects that "no one appeared for the hearing", and no witnesses testified whatsoever, not the arresting officer, the operator of the breathalyzer, the Petitioner, nor anyone else. The evidence apparently considered at the hearing was the arresting officer's D.U.I. Report form, a copy of the operational check list, a breathalyzer test result, and the Utah Department of Public Safety's "record of intoxilyzer test and affidavit" for the day January 22, 1992.

3. The Department of Public Safety issued its Order suspending the Petitioner's driving privilege.

4. The Order of the Department of Public Safety, effective 12:01, a.m., on February 23, 1992, states that,

"the basis for such action is findings of fact and conclusion by the hearing officer for the Department that a peace officer had reasonable grounds that you were operating, or were in physical control of a motor vehicle while under the influence in violation of, or failed to request a hearing, contrary to U.C.A. 41-6-44 and U.C.A. 41-2-130."

Based upon the foregoing Findings of Fact the Court now makes and enters the following

CONCLUSIONS OF LAW

1. With respect to Respondent's argument that Petitioner's failure to appear at the administrative hearing constitutes a waiver of her right to object to the basis of the Respondent's Order of Suspension, the Court concludes that that argument is not compelling. Though it may have been had the arresting officer or other witnesses for the State appeared and testified.

2. The "residuum rule" set forth in Kehl v. Schwendiman, 735 P.2d 413 (Ct. of App. 1987) is applicable to this fact situation and requires that some degree or modicum of competent legal evidence support the Respondent agency's findings.

3. In as much as there was not a residuum of competent legal evidence to support the agency's finding, this Court concludes that the determination of the Department of Public Safety Driver's License Division to suspend the driving privilege of the Plaintiff was arbitrary and capricious.

4. The requirement of a hearing and findings supported by a modicum of competent legal evidence is an appropriate and necessary safeguard to protect Petitioner and persons similarly situated from having their driving privilege taken from them without due process of law.

5. This court is not compelled to hold a trial de novo in all cases, otherwise the administrative process would be valueless and not subject to judicial review.

6. The objection raised by the Petitioner is not merely technical, non-prejudicial and procedural, and trial de novo would not be the proper remedy to cure such prejudicial error.

Dated this ____ day of May, 1992.

J. DENNIS FREDERICK
THIRD DISTRICT COURT JUDGE

APPROVED AS TO FORM:

THOM D. ROBERTS