

2001

Michael C. W. Hess v. G. Barton Blackstock : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL C. W. HESS,	:	APPELLEE'S RESPONSIVE BRIEF
Petitioner/Appellant,	:	
vs.	:	
	:	Case No. 20010621- CA
	:	(Lower Docket 010700131)
G. BARTON BLACKSTOCK, Bureau	:	
Chief, STATE OF UTAH, DRIVER	:	
LICENSE DIVISION,	:	
	:	
Respondent/Appellee.	:	

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH
HONORABLE RODNEY S. PAGE

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NO ORAL ARGUMENT
OR PUBLISHED OPINION REQUESTED

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IN THE UTAH COURT OF APPEALS

MICHAEL C. W. HESS	:	APPELLEE’S RESPONSIVE BRIEF
Petitioner/Appellant,	:	
vs.	:	
	:	Case No. 20010621- CA
	:	(Lower Docket 010700131 AA)
G. BARTON BLACKSTOCK, Bureau Chief, STATE OF UTAH, DRIVER LICENSE DIVISION,	:	
	:	
Respondent/Appellee.	:	

Respondent/Appellee G. Barton Blackstock, Bureau Chief, State of Utah, Driver License Division (“the Division”) responds to Michael C. W. Hess’ (“Hess”) appeal of the lower court’s denial of his petition for appeal of the administrative order suspending his driving privilege, following a trial de novo.

STATEMENT OF JURISDICTION

Hess appeals from the District Court’s final order entered August 22, 2001, following a trial de novo. The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(b)(i) (1997).

STANDARD OF REVIEW

ISSUE: Whether the lower court erred in its ruling that the procedures set forth in Utah Code Ann. § 53-3-223 (Supp. 2001), do not violate the Administrative Procedures

Act and do not infringe on Petitioner's rights of due process.

STANDARD OF REVIEW: In matters of pure statutory interpretation, an appellate court reviews a trial court's ruling for correctness and gives no deference to its legal conclusions. Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997), State v. Vigil, 842 P.2d 843, 844 (Utah 1992); Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah App. 1990).

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 53-3-223. Addendum A

Utah Code Ann. § 63-46b-3. Addendum A

Utah Code Ann. § 53-3-222 (Supp. 2001)

The Legislature finds that the purpose of this title relating to suspension or revocation of a person's license or privilege to drive a motor vehicle for driving with a blood alcohol content above a certain level or while under the influence of alcohol, any drug, or a combination of alcohol and any drug, or for refusing to take a chemical test as provided in Section 41-6-44.10, is protecting persons on highways by quickly removing from the highways those persons who have shown they are safety hazards.

Utah Admin. Code R708-14-6.

(1) In accordance with Subsection 63-46b-3(1), alcohol/drug adjudicative proceedings may be commenced by:

(a) a notice of division action, if the proceedings are commenced by the division; or

(b) a request for division action, if the proceedings are commenced by a person other than the division.

(2) A notice of division action and request for division action shall include the information set forth in Subsections 63-46b-3(2)(a) and (3)(a) respectively. In addition, a request for division action shall include the petitioner's full name, date of birth, and the date of arrest or occurrence which prompted the request for division action. A request for division action that is not made timely, in accordance with Subsections 53-3-223(6)(a), 53-3-231(7)(a)(ii), and 53-3-418(9)(b), will not be granted except for good cause as determined by the division.

STATEMENT OF THE CASE

Hess was arrested on January 27, 2001 for driving under the influence of alcohol. Appellant's Appendix¹, p. 33. The arresting officer served Hess with a copy of the DUI Summons and Citation which included the Division's notice of its intent to suspend or revoke Hess' driving privilege, his right to a hearing, and basic information on how to request a hearing. Appellant's Appendix p. 31 & 33. No hearing was requested or held. Addendum B, p. 3. Hess' license was suspended for one year effective February 26, 2001, based on a second or subsequent driving under the influence arrest. Appellant's Appendix, p. 33.

Hess appealed that suspension to the Third District Court. Addendum B. In his Petition for review Hess alleged that the Division lacked jurisdiction to suspend his driving privilege because the Division did not comport with section 63-46b-3, Utah Code Ann. Addendum B, p. 3. At the trial de novo, the Parties stipulated that the only issue

¹ Appellant referred to the addendum to his opening brief as Appendices. Accordingly, Appellee cites to Appellant's addendum as an "Appendix."

before the Court was whether the procedure authorized by section 53-3-223, Utah Code Ann. violated the Administrative Procedures Act and denied Hess due process.

Appellant's Appendix, p. 33. The court took the issue under advisement. On June 20, 2001, Judge Page issued a Ruling on Appeal where he concluded that the procedures set up by section 53-3-223 are in the nature of emergency actions and are therefore exempt from the requirements of section 63-46b-3. Addendum C, p. 2. Therefore, he ruled that the procedures set forth in section 53-3-223 do not violate the Administrative Procedures Act and do not infringe on Plaintiff's rights of due process. Addendum C, p. 3. The District Court's Findings of Fact, Conclusions of Law and final order was entered and by the court on September 5, 2001. Appellant's Appendix, p. 32 & 35. An Amended Notice of Appeal was filed by Hess on October 2, 2001.

STATEMENT OF FACTS

1. On January 27, 2001, Hess was arrested for driving while under the influence of alcohol and/or drugs. Appellant's Appendix, p. 33.

2. The arresting officer served Hess with a copy of the DUI Summons and Citation which included the Division's notice of intent to suspend or revoke Hess' driving privilege and his right to a hearing before the revocation became effective. Appellant's Appendix, p. 33.

3. Hess did not request a hearing. Appellant's Brief, p.3; Addendum B.

4. Petitioner's license was suspended for one year effective February 26, 2001

based on a second or subsequent driving under the influence arrest. Appellant's Appendix, p. 33.

SUMMARY OF ARGUMENT

The District Court's ruling that the procedures set forth in section 53-3-223, Utah Code Ann. do not violate the Administrative Procedures Act is correct. In looking at the plain language of the statutes, the requirements mandated by section 63-46b-3, Utah Code Ann. do not apply to notices of intent to suspend served pursuant to section 53-3-223.

By failing to raise his due process claim in the trial court, Hess waived his claim that the U.S. Constitution mandates the use of the requirements set forth in section 63-46b-3(2). Additionally, Hess has failed to adequately brief his due process claim on appeal.

ARGUMENT

I. DISTRICT COURT DID NOT ERR IN RULING THAT THE PROCEDURES SET FORTH IN SECTION 53-3-223 DO NOT VIOLATE THE ADMINISTRATIVE PROCEDURES ACT.

Hess, at the trial de novo and in his opening brief, argues that the Division's notice of intent to suspend or revoke and the basic information regarding how to obtain a hearing which the arresting officer served on him pursuant to Utah Code Ann. § 53-3-223 (Supp. 2001) violated his rights to due process because the notice of intent did not comply with the requirements set forth in Utah Code Ann. § 63-46b-3 (Supp. 2001). Hess further argues that sections 53-3-223 and 63-46b-3 are in conflict, but that section 63-

46b-3 controls. As such, Hess argues, the Division's action suspending his driver license was not properly commenced and the suspension should be set aside. However, this argument is erroneous and lacks any legal basis.

The primary goal when interpreting a statute ‘ “is to give effect to the legislature’s intent in light of the purpose that the statute was meant to achieve.”’ Biddle v. Washington Terrace City, 1999 UT 1107, 993 P.2d 875, 879 (Utah 1999)(*quoting* Evans v. Utah, 963 P.2d 177, 184 (Utah 1998)). The courts look “first to the plain language of a statute when deciding questions of statutory interpretation and assumes that each term was used advisedly by the Legislature.” Id. (citation omitted). “Statutory construction presumes that the expression of one should be interpreted as the exclusion of another.” Id. (citation omitted). ‘Omissions in statutory language should “be taken note of and given effect.”’ Id. (*quoting* Kennecott Copper Corp v. Anderson, 514 P.2d 217, 219 (1973).) In circumstances “where the operation of two statutory provisions are in conflict, the more specific provision will govern over that which is more general.” Id. (citations omitted).

In looking at the plain language of sections 53-3-223 and 63-46b-3, these statutes are not in conflict. Section 53-3-223 gives the Division authority to suspend an individual’s license for driving a vehicle while under the influence of alcohol and/or drugs and sets forth the requirements that must be met before the Division can suspend a license. In order for the Division to obtain jurisdiction to suspend, section 53-3-223

requires that the arresting officer serve on the arrested individual notice of the Division's intent to suspend or revoke and basic information on how to obtain a hearing. Mabus v. Blackstock, 1999 UT App 389, 994 P.2d 1272, 1275. Specifically, section 53-3-223(3) requires that the arresting officer serve on the person, on behalf of the division, immediate notice of the division's intention to suspend the person's license to drive a motor vehicle. Section 53-3-223(4) requires that when the officer serves immediate notice on behalf of the division he shall also take the Utah license certificate or permit, if any, of the driver, issue a temporary license certificate effective for only 29 days, supply to the driver, on a form to be approved by the division, basic information regarding how to obtain a prompt hearing before the division. This Court in Mabus further ruled that if the Division fails to present evidence that the officer served the statutory required immediate notice of the Division's intent to revoke along with basic information on how to obtain a hearing on the matter, the administrative action of suspension or revocation is null and void. Mabus, 994 P.2d at 1275. This court in Mabus neither referred to nor addressed any of the requirements set forth in section 63-46b-3(2). Id.

Section 63-46b-3(2), on the other hand, sets forth the requirements for notices of agency action, if the action is commenced by the agency and requests for agency action, if the action is requested by the individual. Section 63-46b-3(2) requires that,

- (a) The notice of agency action shall be in writing, signed by a presiding officer, and shall include:
 - (i) the names and mailing addresses of all persons to whom notice is being given by the presiding officer, and the

name, title, and mailing address of any attorney or employee who has been designated to appear for the agency;

(ii) the agency's file number or other reference number;

(iii) the name of the adjudicative proceeding;

(iv) the date that the notice of agency action was mailed;

(v) a statement of whether the adjudicative proceeding is to be conducted informally according to the provisions of rules adopted under Sections 63-46b-4 and 63-46b-5, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11;

(vi) if the adjudicative proceeding is to be formal, a statement that each respondent must file a written response within 30 days of the mailing date of the notice of agency action;

(vii) if the adjudicative proceeding is to be formal, or if a hearing is required by statute or rule, a statement of the time and place of any scheduled hearing, a statement of the purpose for which the hearing is to be held, and a statement that a party who fails to attend or participate in the hearing may be held in default;

(viii) if the adjudicative proceeding is to be informal and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, a statement that the parties may request a hearing within the time provided by the agency's rules;

(ix) a statement of the legal authority and jurisdiction under which the adjudicative proceeding is to be maintained;

(x) the name, title, mailing address, and telephone number of the presiding officer; and

(xi) a statement of the purpose of the adjudicative proceeding and, to the extent known by the presiding officer, the questions to be decided.

(b) When adjudicative proceedings are commenced by the agency, the agency shall:

(i) mail the notice of agency action to each party;

(ii) publish the notice of agency action, if required by statute; and

(iii) mail the notice of agency action to any other person who has a right to notice under statute or rule.

Utah Code Ann. § 63-46b-3(2) (Supp. 2001). Hess' argument incorrectly assumes that a

“notice of intent to suspend” as addressed in section 53-3-223 is the same as a “notice of agency action” as addressed in section 63-46b-3. As stated above, courts look “first to the plain language of a statute when deciding questions of statutory interpretation and assumes that each term was used advisedly by the Legislature.” Biddle, 993 P.2d at 879. Had the legislature intended sections 53-3-223 and 63-46b-3 to address the same type of notices they would have used the same term to define both notices, but it did not. Additionally, if the legislature intended the notices of intent to suspend or revoke to also comply with the requirements of 63-46b-3(2) it would have plainly stated as such, which it also did not. Notices of intent to suspend or revoke are served on the arrested individual prior to the Division taking any agency action and prior to the request of agency action by the arrested individual. In fact, Utah Administrative Code, R708-14-6(2) states that “a request for division action that is not made timely, in accordance with Subsections 53-3-223(6)(a), . . . will not be granted except for good cause as determined by the division.” The notice of intent to suspend or revoke contains the requirements of subsection 53-3-223(6)(a). See Appellant’s Appendix p. 31.

Clearly the legislature did not intend to require the initial notices of intent to include all of the requirements set forth in section 63-46b-3(2). To require such would defeat the purpose of the driving under the influence statute. Utah Code Ann. § 53-3-222 (Supp. 2001) states the purpose of the statutes relating to suspension or revocation of a person’s license for driving while under the influence of alcohol “is protecting persons on

highways by quickly removing from the highways those persons who have shown they are safety hazards.” As this court has previously noted,

“The purpose of the entire drunken driving statutory scheme is to expeditiously remove drunken drivers from Utah’s roads. Thus, time is of the essence in the statutory scheme when considered as a whole and substantial rights could depend on compliance with the . . . requirement [of service of immediate notice and basic information].”

Mabus, 994 P.2d at 1275 (*quoting Moore v. Schwendiman*, 750 P.2d 204, 205 (Utah App. 1988)). It is impracticable, if not impossible, for the notices of intent to contain all of the section 63-46b-3(2) requirements. It would be impossible for the Division to expeditiously remove drunken drivers from the road if its notice of intent to suspend must contain all of the information required by section 63-46b-3(2). This court has stated that “we interpret a statute to avoid absurd consequences and to arrive at a reasonable and sensible construction.” Brixen & Christopher Architects v. State of Utah, 2001 UT App 210, 29 P.3d. 650, 656 (Utah App. 2001). If the notices of intent pursuant to section 53-3-223 are required to contain all of the requirements of 63-46b-3(2) there would definitely be absurd consequences. The main consequence would be that the Division would be unable to serve the notice of intent on the individual at the time of arrest, because the Division would not know all of the information section 63-46b-3(2) requires.

Even though Utah courts have not directly addressed this issue, in their decisions they have yet to treat a notice of intent to suspend as a notice of a hearing/agency action

or request for a hearing. As previously stated, this court in Mabus ruled that service of the Division's intent to suspend or revoke and basic information on how to obtain a hearing, pursuant to section 53-3-223, is the initiatory event that confers jurisdiction on the Division. Mabus, 994 P.2d at 1275. Prior to this court's ruling in Mabus, and the statutory change in section 53-3-223, the initiatory event that conferred jurisdiction on the Division was arresting officer's mailing of the sworn DUI report form to the Division within five days of the arrest. Mabus, 994 P.2d at 1274; Moore, 750 P.2d at 205-207. Hess has cited no case authority which mandates that the event which confers jurisdiction on the Division must meet the requirements of section 63-46b-3. In Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah 1990), this court looked at whether the Division's notice of hearing complied with section 63-46b-3, where the notice of hearing failed to include whether the hearing was formal or informal. A notice of hearing is not the same as the notice of intent to suspend or revoke. Once the notice of intent to suspend or revoke is served upon an individual arrested for driving under the influence, it is up to him to request a hearing within ten days of his arrest. Utah Code Annotated § 53-3-223(6)(a) (Supp. 2001). If the individual requests a hearing/agency action, then the Division sends out the notice of hearing. If no hearing is requested the Division may, on its own, take action to suspend or revoke the individual's license. Utah Code Ann. § 53-3-223 (Supp. 2001).

In looking at the drunken driving statutory scheme as a whole the most practicable.

reasonable interpretation of sections 53-3-223 and 63-46b-3 is that the Division's notice of intent to suspend or revoke does not need to include all of the requirements set forth in 63-46b-3(2).

II. BY FAILING TO RAISE IT IN THE TRIAL COURT
HESS WAIVED ANY CLAIM THAT THE U.S.
CONSTITUTION MANDATES THE REQUIREMENTS
SET FORTH IN SECTION 63-46B-3(2).

Hess in his opening brief, argues that the U.S. Constitution mandates the requirements set forth in section 63-46b-3. However, the general rule is that claims not raised before the trial court may not be raised on appeal. State v Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346, 350. The preservation rule applies to every claim, including constitutional questions. Id. At the trial de novo, Hess failed to raise a constitutional due process claim. As such, he can not raise a due process claim on appeal. Appellant's Appendix, pp. 13-29.

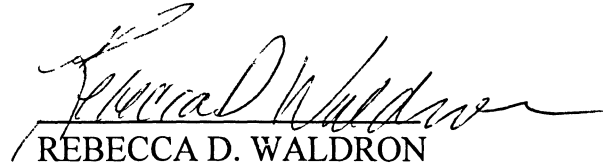
Additionally, briefs must contain reasoned analysis based upon relevant legal authority. Smith v. Smith, 1999 UT App 370, 995 P.2d 14, 16. 'An issue is inadequately briefed when the "overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court."' Id. (*quoting State v. Thomas*, 961 P2d 299, 305 (Utah 1998)). Hess' has inadequately briefed his due process claim on appeal.

CONCLUSION

Based on the foregoing reasons, the Division respectfully requests that this court uphold the lower court's ruling that the procedures set forth in section 53-3-223, do not

violate the Administrative Procedures act and do not infringe on Petitioner's rights of due process.

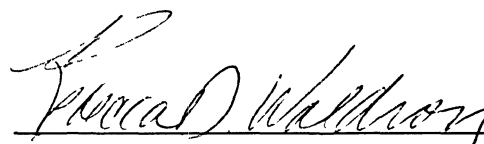
RESPECTFULLY SUBMITTED this 15th day of June, 2002.

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

REBECCA D. WALDRON
Assistant Attorney General
Attorney for Driver License Division

CERTIFICATE OF SERVICE

I Rebecca D. Waldron, hereby certify that on June 26th 2002, I caused to be hand delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, Fifth floor, PO Box 140230, Salt Lake City, Utah 84114-0230 and two copies by First Class Mail to D. Bruce Oliver, 180 South 200 West, Suite 210, Salt Lake City, Utah 84101-1490.

A handwritten signature in cursive script, appearing to read "Rebecca D. Waldron", is written over a horizontal line.

Rebecca D. Waldron

ADDENDUM

ADDENDUM A

Utah Code Ann. § 53-3-223.

(1) (a) If a peace officer has reasonable grounds to believe that a person may be violating or has violated Section 41-6-44, prohibiting the operation of a vehicle with a certain blood or breath alcohol concentration and driving under the influence of any drug, alcohol, or combination of a drug and alcohol or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6, the peace officer may, in connection with arresting the person, request that the person submit to a chemical test or tests to be administered in compliance with the standards under Section 41-6-44.10.

(b) In this section, a reference to Section 41-6-44 includes any similar local ordinance adopted in compliance with Subsection 41-6-43(1).

(2) The peace officer shall advise a person prior to the person's submission to a chemical test that a test result indicating a violation of Section 41-6-44 or 41-6-44.6 shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a motor vehicle may, result in suspension or revocation of the person's license to drive a motor vehicle.

(3) If the person submits to a chemical test and the test results indicate a blood or breath alcohol content in violation of Section 41-6-44 or 41-6-44.6, or if the officer makes a determination, based on reasonable grounds, that the person is otherwise in violation of Section 41-6-44, the officer directing administration of the test or making the determination shall serve on the person, on behalf of the division, immediate notice of the division's intention to suspend the person's license to drive a motor vehicle.

(4) (a) When the officer serves immediate notice on behalf of the division he shall:

- (i) take the Utah license certificate or permit, if any, of the driver;
- (ii) issue a temporary license certificate effective for only 29 days; and
- (iii) supply to the driver, on a form to be approved by the division, basic

information regarding how to obtain a prompt hearing before the division.

(b) A citation issued by the officer may, if approved as to form by the division, serve also as the temporary license certificate.

(5) As a matter of procedure, the peace officer serving the notice shall send to the division within ten calendar days after the date of arrest and service of the notice:

- (a) the person's license certificate;
- (b) a copy of the citation issued for the offense;
- (c) a signed report on a form approved by the division indicating the chemical test results, if any; and
- (d) any other basis for the officer's determination that the person has violated Section 41-6-44 or 41-6-44.6.

(6) (a) Upon request in a manner specified by the division, the division shall grant to the person an opportunity to be heard within 29 days after the date of arrest. The request to be heard shall be made within ten calendar days of the date of the arrest.

(b) A hearing, if held, shall be before the division in the county in which the arrest occurred, unless the division and the person agree that the hearing may be held in some other county.

(c) The hearing shall be documented and shall cover the issues of:

(i) whether a peace officer had reasonable grounds to believe the person was driving a motor vehicle in violation of Section 41-6-44 or 41-6-44.6

(ii) whether the person refused to submit to the test; and

(iii) the test results, if any.

(d) (i) In connection with a hearing the division or its authorized agent:

(A) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers; or

(B) may issue subpoenas for the attendance of necessary peace officers.

(ii) The division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section

(e) The division may designate one or more employees to conduct the hearing.

(f) Any decision made after a hearing before any designated employee is as valid as if made by the division.

(g) After the hearing, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

(h) If the person for whom the hearing is held fails to appear before the division as required in the notice, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

(7) (a) A first suspension, whether ordered or not challenged under this Subsection (7), is for a period of 90 days, beginning on the 30th day after the date of the arrest.

(b) A second or subsequent suspension under this Subsection (7) is for a period of one year, beginning on the 30th day after the date of arrest.

(8) (a) The division shall assess against a person, in addition to any fee imposed under Subsection 53-3-205 (13) for driving under the influence, a fee under Section 53-3-105 to cover administrative costs, which shall be paid before the person's driving privilege is reinstated. This fee shall be cancelled if the person obtains an unappealed division hearing or court decision that the suspension was not proper.

(b) A person whose license has been suspended by the division under this section may file a petition within 30 days after the suspension for a hearing on the matter which, if held, is governed by Section 53-3-224.

Utah Code Ann. § 63-46b-3

(1) Except as otherwise permitted by Section 63-46b-20, all adjudicative proceedings shall be commenced by either:

- (a) a notice of agency action, if proceedings are commenced by the agency; or
- (b) a request for agency action, if proceedings are commenced by persons other than the agency.

(2) A notice of agency action shall be filed and served according to the following requirements:

(a) The notice of agency action shall be in writing, signed by a presiding officer, and shall include:

(i) the names and mailing addresses of all persons to whom notice is being given by the presiding officer, and the name, title, and mailing address of any attorney or employee who has been designated to appear for the agency;

(ii) the agency's file number or other reference number;

(iii) the name of the adjudicative proceeding;

(iv) the date that the notice of agency action was mailed;

(v) a statement of whether the adjudicative proceeding is to be conducted informally according to the provisions of rules adopted under Sections 63-46b-4 and 63-46b-5, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11;

(vi) if the adjudicative proceeding is to be formal, a statement that each respondent must file a written response within 30 days of the mailing date of the notice of agency action;

(vii) if the adjudicative proceeding is to be formal, or if a hearing is required by statute or rule, a statement of the time and place of any scheduled hearing, a statement of the purpose for which the hearing is to be held, and a statement that a party who fails to attend or participate in the hearing may be held in default;

(viii) if the adjudicative proceeding is to be informal and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, a statement that the parties may request a hearing within the time provided by the agency's rules;

(ix) a statement of the legal authority and jurisdiction under which the adjudicative proceeding is to be maintained;

(x) the name, title, mailing address, and telephone number of the presiding officer; and

(xi) a statement of the purpose of the adjudicative proceeding and, to the extent known by the presiding officer, the questions to be decided.

(b) When adjudicative proceedings are commenced by the agency, the agency shall:

(i) mail the notice of agency action to each party;

(ii) publish the notice of agency action, if required by statute; and

(iii) mail the notice of agency action to any other person who has a right to notice under statute or rule.

(3) (a) Where the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings, that person's request for agency action

shall be in writing and signed by the person invoking the jurisdiction of the agency, or by that person's representative, and shall include:

- (i) the names and addresses of all persons to whom a copy of the request for agency action is being sent;
- (ii) the agency's file number or other reference number, if known;
- (iii) the date that the request for agency action was mailed;
- (iv) a statement of the legal authority and jurisdiction under which agency action is requested;
- (v) a statement of the relief or action sought from the agency; and
- (vi) a statement of the facts and reasons forming the basis for relief or agency action.

(b) The person requesting agency action shall file the request with the agency and shall mail a copy to each person known to have a direct interest in the requested agency action.

(c) An agency may, by rule, prescribe one or more forms eliciting the information required by Subsection (3)(a) to serve as the request for agency action when completed and filed by the person requesting agency action.

(d) The presiding officer shall promptly review a request for agency action and shall:

(i) notify the requesting party in writing that the request is granted and that the adjudicative proceeding is completed;

(ii) notify the requesting party in writing that the request is denied and, if the proceeding is a formal adjudicative proceeding, that the party may request a hearing before the agency to challenge the denial; or

(iii) notify the requesting party that further proceedings are required to determine the agency's response to the request.

(e) (i) Any notice required by Subsection (3)(d)(ii) shall contain the information required by Subsection 63-46b-5(1)(i) in addition to disclosure required by Subsection (3)(d)(ii).

(ii) The agency shall mail any notice required by Subsection (3)(d) to all parties, except that any notice required by Subsection (3)(d)(iii) may be published when publication is required by statute.

(iii) The notice required by Subsection (3)(d)(iii) shall:

(A) give the agency's file number or other reference number;

(B) give the name of the proceeding;

(C) designate whether the proceeding is one of a category to be conducted informally according to the provisions of rules enacted under Sections 63-46b-4 and 63-46b-5, with citation to the applicable rule authorizing that designation, or formally according to Sections 63-46b-6 to 63-46b-11;

(D) in the case of a formal adjudicative proceeding, and where respondent parties are known, state that a written response must be filed within 30 days of the date of the agency's notice if mailed, or within 30 days of the last publication date of the agency's notice, if published;

(E) if the adjudicative proceeding is to be formal, or if a hearing is to be held in an informal adjudicative proceeding, state the time and place of any scheduled hearing, the purpose for which the hearing is to be held, and that a party who fails to attend or participate in a scheduled and noticed hearing may be held

in default;

(F) if the adjudicative proceeding is to be informal, and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, state the parties' right to request a hearing and the time within which a hearing may be requested under the agency's rules; and

(G) give the name, title, mailing address, and telephone number of the presiding officer.

(4) When initial agency determinations or actions are not governed by this chapter, but agency and judicial review of those initial determinations or actions are subject to the provisions of this chapter, the request for agency action seeking review must be filed with the agency within the time prescribed by the agency's rules.

(5) For designated classes of adjudicative proceedings, an agency may, by rule, provide for a longer response time than allowed by this section, and may provide for a shorter response time if required or permitted by applicable federal law.

(6) Unless the agency provides otherwise by rule or order, applications for licenses filed under authority of Title 32A, Chapters 3, Packaging Agencies, 4, Public Liquor License, and 5, Private Club Liquor License are not considered to be a request for agency action under this chapter.

(7) If the purpose of the adjudicative proceeding is to award a license or other privilege as to which there are multiple competing applicants, the agency may, by rule or order, conduct a single adjudicative proceeding to determine the award of that license or privilege.

ADDENDUM B

D. Bruce Oliver #5120
Attorney for Petitioner
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1490
Telephone: (801) 328-8888
Fax: (801) 595-0300

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

----- 00000000 -----

MICHAEL C.W. HESS,)	
	(
)	PETITION FOR JUDICIAL REVIEW
Petitioner,	(
)	
vs.	(
)	
G. BARTON BLACKSTOCK, Bureau Chief,	(
DAVID A. BEACH, Director,)	Case No.
DRIVER LICENSE DIVISION,	(
)	
Respondents.	(
)	

Comes now the petitioner, Michael C.W. Hess, by and through counsel, D. Bruce Oliver, and having a cause of action against the respondents alleges, as follows:

1. The acts complained of took place in Davis County, State of Utah.
2. The petitioner is an actual and bona fide resident of Davis County, State of Utah.
3. The respondents have taken action against the petitioner and have suspended the petitioner's license.
4. The respondents are a governmental entity and its employees doing business in and throughout the State of Utah.

15. Pursuant to Utah Code Ann. § 53-3-223 (1953, as amended), the respondents may order whether the person's license to drive a motor vehicle is suspended or not, only after a hearing.

16. There was no hearing conducted whether requested by Petitioner or not.

17. Despite no hearing, the Department issued an order cancelling, suspending, revoking or otherwise denying the Petitioner's license. (See attached Addendum A, incorporated herein and annexed hereto by this reference).

18. By Utah Law, agency action can only commence by a notice of agency action or by a request for agency action, pursuant to *Utah Code Ann.* § 63-46b-3 (1953, as amended).

19. No agency action was commenced pursuant to Section 63-46b-3.

20. This Division must comport with section 63-46b-3 or cannot lawfully take action.

21. The current cancellation, suspension, or revocation causes petitioner immediate and irreparable harm in that she requires a driver's license.

22. The Division's decision to cancel, suspend, or revoke the petitioner's license violates the due process clauses of both the State and U.S. Constitutions as well as Article I, Section 11 of the Utah Constitution requiring open access to tribunals.

23. Based upon information and belief, the Division is denying hearings for others under like situations violating them due process of law and causing them immediate and irreparable harm.

24. The Division's action without a hearing violates these individuals' rights guaranteed under Article I, Sections 7, 11, and 24 of the Utah State Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution. Specifically, "no person shall be barred

5. This Court has jurisdiction in this matter pursuant to *Utah Code Ann.* §§ 63-46b-15 (1953, as amended).

6. This Court is the Court of proper jurisdiction and venue is proper in Davis County pursuant to *Utah Code Ann.* § 53-3-224 (1953, as amended).

FIRST CAUSE OF ACTION-ADMINISTRATIVE APPEAL

7. Paragraphs 1 through 6 are incorporated herein by this reference.

8. On or about January 27, 2001, the Petitioner was arrested for driving under the influence of alcohol.

9. Based upon information and belief, the arresting officer failed to observe a violation of law.

10. Based upon information and belief, the arresting officer lacked reasonable belief to detain the petitioner.

11. Based upon information and belief, the arresting officer lacked the probable cause to arrest the petitioner.

12. The arresting officer's authority to serve the DUI Summons and Citation on behalf of the Division violates *Utah Code Ann.* § 63-46b-3 (1953, as amended), therefore this Court should declare the service unconstitutional.

13. The Division's decision to cancel, suspend, or revoke the petitioner's license violated the petitioner's substantive and procedural right to due process of law as a result of improper service.

14. The Division lacked the evidence necessary to cancel, suspend, or revoke Petitioner's license.

from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party." Utah Const. art. § 11.

25. It would be just and proper for this court to order the Division's action against the petitioner and these individuals' licenses as being unconstitutional.

26. It would be just and proper for this court to grant summary judgment in favor of the petitioner for the Division's conduct.

27. It would be just and proper for this court to stay the Division's orders canceling, suspending, or revoking, a license to operate a motor vehicle against the petitioner and these other individuals who have not been provided the opportunity of a hearing.

28. It would be just and proper for this court to restrain and enjoin the Division from canceling, suspending, or revoking, the petitioner's driving privilege and others like situated and reinstate same until further order of the Court.

SECOND CAUSE OF ACTION-RECORDS EXPUNGEMENT

29. Paragraphs 1 through 27 are incorporated herein by this reference.

30. It would be just and proper to clear the petitioner's DMV records, as well as others' records; the Division's records should be expunged relating to this action, in the event the petitioner prevails on the merits of this action, or if this matter becomes moot.

THIRD CAUSE OF ACTION-LACK OF JURISDICTION

31. Paragraphs 1 through 30 are incorporated herein by this reference.

32. As a result of the Division's violation of Section 63-46b-3, the Division lacked jurisdiction to consider whether a cancellation, suspension, revocation or denial would be appropriate. A commencement of an action is either by the Division or upon request of the

Petitioner.

33. In the alternative, as a result of the Division's violation of Section 53-3-223, the Division lacked jurisdiction to consider whether a cancellation, suspension, revocation or denial would be appropriate. A hearing needed to be conducted prior to taking action against the Petitioner.

34. The petitioner should be reimbursed for his reasonable fees and costs for any of the three above identified causes of action..

WHEREFORE PETITIONER PRAYS that this Court grant relief as follows:

1. For an expedited hearing to review this matter.
2. For an order declaring the service and the agency action unconstitutional.
3. For an order declaring the Division's action against individuals' licenses to be unconstitutional.
4. For an order setting aside the Division's orders canceling, suspending, or revoking Petitioner and other individuals' driver licenses.
5. For an immediate order staying the cancellation, suspension, or revocation of Petitioner and other individuals' driver licenses during the pendency of these proceedings.
6. For an order reinstating the individuals licenses.
7. For an order of expungement, in the event the petitioner prevails on the merits of this action, or if this matter becomes moot.
8. For attorney fees and costs in bringing this action.

9. For such other relief as the Court deems reasonable and just in the premises.

RESPECTFULLY SUBMITTED this 27th day of

March, 2001.



D. BRUCE OLIVER
Attorney for Petitioner

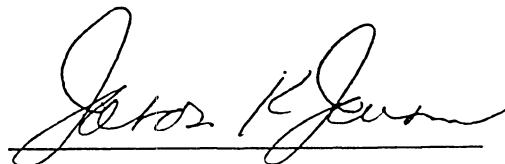
PETITIONER'S ADDRESS:

1260 West Mayor Circle
Woods Cross, Utah 84087

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing PETITION FOR JUDICIAL REVIEW, postage prepaid, to: Rebecca D. Waldron, OFFICE OF THE ATTORNEY GENERAL, 160 East 300 South, P.O. Box 140856, Salt Lake City, Utah 84114-0856.

Dated this 27th day of March, 2001.





Michael O. Leavitt
Governor
Craig L. Dearden
Commissioner
Ferns E. Groll
Deputy Commissioner
Richard A. Greenwood
Deputy Commissioner

State of Utah

DEPARTMENT OF PUBLIC SAFETY DRIVER LICENSE DIVISION

G. Barton Blackstock, Bureau Chief
Driver Services Bureau

P.O. Box 30560
Salt Lake City, Utah 84130-0560
(801) 965-4437

DATE OF ARREST: 27 JAN 2001
DATE OF BIRTH: 29 MAR 1971
LICENSE/FILE NUMBER: 150800752
DATE: 20 FEB 2001
THIS ORDER IS EFFECTIVE
12:01 AM ON 26 FEB 2001

MICHAEL CW HESS
1260 WEST MAYOR CIRCLE
WOODS CROSS UT 84087

AS A RESULT OF A SECOND OR SUBSEQUENT ARREST FOR DRIVING UNDER THE INFLUENCE, OR DRIVING WITH A MEASURABLE AMOUNT OF A CONTROLLED SUBSTANCE OR METABOLITE IN YOUR BODY OR A COMBINATION OF THE TWO, YOUR DRIVING PRIVILEGE IS SUSPENDED FOR ONE (1) YEAR EFFECTIVE 26 FEB 2001.

THIS ACTION IS BASED ON ONE OR MORE OF THE FOLLOWING: A FINDING OF FACT AND CONCLUSION BY THE HEARING OFFICER FOR THE DEPARTMENT THAT A PEACE OFFICER HAD REASONABLE GROUNDS TO BELIEVE THAT YOU WERE IN VIOLATION OF OPERATING OR IN PHYSICAL CONTROL OF A MOTOR VEHICLE WITH A MEASURABLE AMOUNT OF A CONTROLLED SUBSTANCE OR METABOLITE IN YOUR BODY; YOU FAILED TO REQUEST A HEARING; YOU HAVE SET OR RESET THE HEARING AFTER THE 30TH DAY FROM THE ARREST; YOU HAVE FAILED TO APPEAR FOR THE HEARING CONTRARY TO UCA 41-6-44.6, 53-3-223, 63-46b-3 AND 63-46b-11 OR NOTIFICATION OF AN ARREST AND SANCTION FROM ANOTHER STATE.

CREDIT WILL BE GIVEN FOR ANY TIME YOUR DRIVING PRIVILEGE HAS ALREADY BEEN WITHDRAWN AS A RESULT OF A CONVICTION FOR THE SAME OFFENSE OF DRIVING UNDER THE INFLUENCE OR CONTROLLED SUBSTANCE/METABOLITE.

THIS ACTION IS AUTHORIZED BY TITLES 41 AND 53 UTAH CODE ANNOTATED, 1953. THIS NOTICE DOES NOT REPLACE ANY PRIOR NOTICE ALREADY IN EFFECT.

*****IMPORTANT INFORMATION - PLEASE READ*****

WHEN YOUR DRIVING PRIVILEGE HAS BEEN SUSPENDED FOR A DRUG OR ALCOHOL VIOLATION YOU MUST DISCONTINUE DRIVING ALL MOTOR VEHICLES. IT IS A MISDEMEANOR TO OPERATE ANY MOTOR VEHICLE UPON THE HIGHWAYS OF THIS STATE UNTIL THE SANCTION PERIOD IS OVER, YOU HAVE REINSTATED AND OBTAINED A VALID DRIVING PRIVILEGE.

YOU MAY APPEAL THIS ACTION IN THE DISTRICT COURT IN THE COUNTY IN WHICH THE OFFENSE OCCURRED WITHIN THIRTY (30) DAYS OF THE EFFECTIVE DATE OF THIS NOTICE.

TO REINSTATE YOU MUST COMPLY WITH THE FOLLOWING:

PAY A \$50.00 REINSTATEMENT FEE. PAY AN ADMINISTRATIVE FEE OF \$150.00.

OTHER FEES MAY APPLY.

MAKE CHECK OR MONEY ORDER PAYABLE TO THE UTAH DEPARTMENT OF PUBLIC SAFETY.

PLEASE INDICATE YOUR LICENSE OR FILE NUMBER ON THE CHECK AND MAIL TO THE ABOVE ADDRESS.

RESPECTFULLY,

G. BARTON BLACKSTOCK, BUREAU CHIEF
DRIVER LICENSE DIVISION

CC:

GBB:
A982

(PER SE - DRUG SUSPENSION)

ADDENDUM C

SECOND DISTRICT COURT, STATE OF UTAH
COUNTY OF DAVIS, FARMINGTON DEPARTMENT

MICHAEL C. W. HESS Plaintiff, v. G. BARTON BLACKSTOCK, Bureau Chief, DAVID A. BEACH, Director, DRIVER LICENSE DIVISION, Defendant	RULING ON APPEAL Case No. 010700131 Judge: Rodney S. Page
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The above entitled matter came before the Court for hearing. Plaintiff was present and represented by Mr. D. Bruce Oliver. Defendant was represented by Ms. Rebecca D. Waldron. The parties stipulated that the Plaintiff was served with a copy of the citation at the time of arrest, along with a notice of Division's intent to revoke his driver's license and information on his right to hearing before the revocation becomes effective. Parties further stipulated that the only issue before the Court was whether procedure authorized by Section 53-3-223 UCA, (1953, as amended), violated Administrative Procedures Act and denied Plaintiff due process. The Court having heard arguments of counsel and reviewed the statutes now rules as follows:

Section 53-3-223 of the Driver's License Act allows an officer to confiscate the driver's license of one suspected for driving under the influence of alcohol or drugs. The section allows the officer to issue the suspect a temporary license good for 30 days and to give the suspect notice that his driver's license will be suspended beginning 30 days from the date of the citation, providing information on his right to a hearing before the revocation period starts.

The Administrative Procedures Act sets up regulations governing procedures that must be followed prior to an agency taking certain action, (i.e., notice, right to hearing, etc.), Section 63-46(b)-0.5 et seq UCA (1953, as amended)

The Plaintiff claims that the procedures established by Section 53-3-223 do not comply with the requirements of the Administrative Procedures Act and are therefore invalid and deny the Plaintiff due process

Section 63-46(b)-3 sets forth how agency adjudicative procedures must be commenced and what procedures must be followed. The Section exempts those kinds of administrative procedures that are permitted pursuant to Section 63-46(b)-20 of the act.

Section 63-46(b)-20 provides for emergency adjudicative proceedings and states that an agency may issue an order without complying with the requirements of the chapter if the facts known by the agency or presented to the agency show that an immediate and significant danger to the public health, safety or welfare exists and that the threat requires immediate action by the agency. It also provides for certain limitations on any order issued by the agency in those circumstances

The procedures set up by Section 53-3-223 are designed to limit the driving privileges of those suspected of driving under the influence of alcohol or drugs and to remove them from the highway as quickly as possible without waiting for the regular judicial process. No one can question the immediate danger or magnitude of the problem posed to the public and society by those who drive while impaired by drugs or alcohol.

The Court concludes that the procedures set up by Section 53-3-223 are in the nature of emergency actions and are therefore exempt from the requirements of 63-46(b)-3.

The Court further concludes that the procedures comply with the requirements of 63-46(b)-20(2) in that notice and citation provide facts and statements sufficient to provide the basis for using the emergency procedure and it is signed by the police officer. It provides notice to the defendant and an opportunity for hearing before the effective date of the revocation.


For the foregoing reasons, the Court concludes that the procedures set forth in Section 53-3-223 UCA (1953, as amended) do not violate the Administrative Procedures Act and do not infringe on Plaintiff's rights of due process.

Based on the stipulation of counsel and the Court's above ruling, the appeal of the plaintiff is dismissed, and the revocation order affirmed.

Defendant's counsel is to prepare findings, conclusions and judgment in accordance with the Court's ruling and submit the same to plaintiff's counsel at least five days prior to the time they are submitted to the Court for signature.

Dated this 20 day of June, AD 2001

By Rodney S. Page
Rodney S. Page
District Court Judge



CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ruling to:

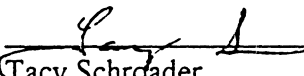
D. Bruce Oliver
180 South 300 West, Suite 210
Salt Lake City, UT 84101-1490,

and

Rebecca D. Waldron
Assistant Attorney General
P.O. Box 140857
Salt Lake City, UT 84114-0857,

postage prepaid this 20th day of June, AD 2001.

By


Tacy Schröder,
Deputy Court Clerk