

2001

# Melinda Gilley v. G. Barton Blackstock, And The Department of Public Safety, Office of Drivers License Service : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MELINDA GILLEY,	:	APPELLEE'S RESPONSIVE BRIEF
Plaintiff/Appellant,	:	
vs.	:	
	:	Case No. 20010828- CA
	:	(Lower Docket 010300534)
G. BARTON BLACKSTOCK, AND	:	
THE DEPARTMENT OF PUBLIC	:	Priority No. 14
SAFETY, OFFICE OF DRIVERS	:	
LICENSE SERVICE,	:	
Defendant/Appellee.	:	

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR TOOELE COUNTY, STATE OF UTAH  
HONORABLE DAVID S. YOUNG

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NO ORAL ARGUMENT OR  
OR PUBLISHED OPINION REQUESTED

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SAFETY, OFFICE OF DRIVERS	:	
LICENSE SERVICE,	:	
Defendant/Appellee.	:	

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Respondent/Appellee G. Barton Blackstock, and the Department of Public Safety, Office of Drivers License Division (“the Division”) responds to Petitioner/Appellant Melinda Gilley, appeal of the lower court’s final order dismissing Gilley’s appeal from the Driver License Division’s administrative order revoking her driving privilege.

STATEMENT OF JURISDICTION

Gilley appeals from the District Court’s final order of dismissal entered October 10, 2001, following a hearing on the Division’s motion to dismiss. The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. 78-2a-3(b)(i) (1997).

## RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following statutes and constitutional provision will be determinative of the issue on appeal:

### Rule 5(b), Utah Rules of Civil Procedure

(b) Service: How made and by whom.

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.

(B) Service by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day.

Utah Code Ann. § 41-6-44.1 (j) (Supp. 2001)

(i) Any person whose license has been revoked by the Driver License Division under this section may seek judicial review.

(ii) Judicial review of an informal adjudicative proceeding is a



trial. Venue is in the district court in the county in which the offense occurred.

Utah Code Ann. § 53-3-224 (Supp. 2001)

(1) A person denied a license or whose license has been cancelled, suspended or revoked by the division may seek judicial review of the division's order.

(2)(a) Venue for judicial review of informal adjudicative proceedings is in the district court in the county where the offense occurred, which resulted in the cancellation, suspension or revocation.

(b) Persons not residing in the state shall file in Salt Lake County or the county where the offense occurred which resulted in the cancellation, suspension or revocation.

Utah Code Ann. § 63-46b-1(3) (Supp. 2001)

(3) This chapter does not affect any legal remedies otherwise available to:

(a) compel an agency to take action; or

(b) challenge an agency's rule.

Utah Code Ann. § 63-46b-5(1)(k) (1997)

(k) A copy of the presiding officer's order shall be promptly mailed to each of the parties.

Utah Code Ann..§ 63-46b-14(3)(a) (1997)

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

Utah Code Ann. § 63-46b-18 (1997)

- (1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.
- (2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.
- (3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.
- (4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that:
  - (a) the agency violated its own rules in denying the stay; or
  - (b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;  
(ii) the party seeking judicial review will suffer irreparable injury without immediate relief;  
(iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; and  
(iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances.

Utah Code Ann. § 78-3-4 (Supp 2001)

- (1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.
- (2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.
- (3) The district court has jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court.
- (4) The district court has jurisdiction over all matters properly filed in the circuit court prior to July 1, 1996.

- (5) The district court has appellate jurisdiction to adjudicate trials de novo of the judgments of the justice court and of the small claims department of the district court.
- (6) Appeals from the final orders, judgments, and decrees of the district court are under Sections 78-2-2 and 78-2a-3.
- (7) The district court has jurisdiction to review:
  - (a) agency adjudicative proceedings as set forth in Title 63, Chapter 46b, Administrative Procedures Act, and shall comply with the requirements of that chapter, in its review of agency adjudicative proceedings; and
  - (b) municipal administrative proceedings in accordance with Section 10-3-703.7.
- (8) Notwithstanding Subsection (1), the district court has subject matter jurisdiction in class B misdemeanors, class C misdemeanors, infractions, and violations of ordinances only if:
  - (a) there is no justice court with territorial jurisdiction;
  - (b) the matter was properly filed in the circuit court prior to July 1, 1996;
  - (c) the offense occurred within the boundaries of the municipality in which the district courthouse is located and that municipality has not formed a justice court; or
  - (d) they are included in an indictment or information covering a single criminal episode alleging the commission of a felony or a class A misdemeanor.

### STATEMENT OF THE CASE

Gilley was arrested on February 1, 2001, for violation of section 41-6-44, Utah Code Ann.. Addendum B (Exhibit 1). The Division issued an order on February 25, 2001, pursuant to section 41-6-44.10, that revoked Gilley's driving privilege for a period of eighteen months. Addendum B (Exhibit 1). On February 26, 2001, the Division mailed that order to Gilley at 5655 North Inverness Court, Stansbury Park, Ut 84074, her place of residence. Addendum B (Exhibit 1) and Addendum C at 8 & 9. Gilley appealed the

Division's revocation order to the District Court on May 21, 2001, by filing a "Complaint and Petition for Order Temporarily Restraining Defendant from Suspending Petitioner's Driving Privilege, and Ordering Reinstatement of Said Privilege Pending Trial, or for an Order Staying the Order of Suspension under U.C.A. 63-46b-18; for Preliminary and Permanent Injunction and Order Reversing the Suspension Order." Addendum A.

In response to Gilley's Complaint, the Division filed a motion to dismiss for lack of jurisdiction on the grounds that Gilley had failed to file her complaint for judicial review within 30 days of the issuance of the Division's order as required by section 63-46b-14 (3)(a), Utah Code Ann.. (R 7). The Division attached to its memorandum in support of the motion to dismiss a copy of the order of revocation the Division sent to Gilley's place of residence which shows a certificate of mailing stamp dated February 26, 2001 and signed by an employee of the Division. Addendum B (Exhibit 1). Gilley opposed that motion arguing that since she was not served with notice of the Division's intent to suspend or revoke her license, the Division lacked jurisdiction to revoke her license in the first place. (R 27).

There was a temporary restraining order hearing on June 25, 2001, before the Honorable David S. Young. At that hearing, Counsel for the Division agreed to a stay of the revocation order pending the outcome of the appeal and a hearing on the motion to dismiss was set for July 9, 2001. (R 11, 13)

At the hearing on the motion to dismiss, Gilley wanted to present evidence that

the Division did not personally serve her with notice of their intent to suspend or revoke her license and that she never received a copy of the Division's order of revocation. The Division agreed for the purpose of the hearing only that if Gilley took the stand she would testify that she was not personally served with notice of the Division's intent to suspend or revoke, and that she never received the February 26, 2001, order of revocation.

Addendum C at 12.

The District Court found that the order of revocation was mailed February 26, 2002, and that by depositing the order in the mail it was presumptively received. Addendum C at 10. The District Court dismissed Gilley's complaint for lack of jurisdiction because the Complaint was untimely filed. Addendum C at 14.

### STATEMENT OF FACTS

There are no facts relevant to this appeal other than those set forth in the state of the case because this case was dismissed absent a trial or evidentiary hearing.

### SUMMARY OF ARGUMENT

The District Court did not err in dismissing Gilley's complaint for lack of jurisdiction regardless of whether the initial notice of the Division's intent to suspend or revoke was personally served on Gilley by the arresting officer. The District court did not underestimate its broad, general jurisdiction. Gilley's complaint can only be determined to be a traditional petition for review. Gilley filed her petition for review of agency action outside the time restraints of the Utah Administrative Procedures Act. Therefore,

the district court lack jurisdiction to hear the appeal regardless of the grounds for the appeal.

## ARGUMENT

### I. THE DISTRICT COURT DID NOT ERR IN DISMISSING GILLEY’S COMPLAINT FOR LACK OF JURISDICTION

#### **A. The timeliness of filing a petition for review is jurisdictional.**

The district court did not err in dismissing Gilley’s complaint for lack of jurisdiction. Historically, an individual can challenge jurisdiction (service), but that challenge must be timely. See Thomas v. District Court of Third Judicial District, 171 P.2d 667, 670 (Utah 1946) (noting that, as early as 1880, this court held that under the statute defects of service must be timely raised by motion or it would be deemed waived.) This court has consistently refused to hear appeals that are not timely filed. See Sandy City v. Woolsey, 2001 WL 312395 (Utah App.) (“When a timely notice of appeal is not filed, this court lacks jurisdiction to consider an appeal.”)

The time limits within which a person can challenge a final agency action are very clear and controlled by statute. Utah Code Ann. § 53-3-224 (Supp. 2001) provides that a person whose license has been suspended may seek “judicial review” of the Driver License Division’s order. The seeking of judicial review in drivers license cases is controlled by the provisions of the Utah Administrative Procedure Act (hereinafter UAPA), Utah Code Ann. §§ 63-46b-1 to 22. Brinkerhoff v. Schwendiman, 790 P.2d 587

(Utah App. 1990). UAPA provides:

a party shall file a petition for judicial review of final agency action within thirty days after the date that the order constituting the final agency action is issued or is considered to have issued under subsection 63-46b-13(3)(b).

Utah Code Ann. § 63-46b-14(3)(a) (1997).

Both the Utah Supreme Court and the Court of Appeals have ruled that the date the agency's final order bears on its face is considered the date of issue. Dusty's Inc. v. Utah State Tax Commission, 842 P.2d 868, 870 (Utah 1992) (per curiam); Bonded Bicycle Couriers v. Department of Employment Security, 844 P.2d 358, 360, (Utah App. 1992) cert. denied, 853 P.2d 897 (Utah 1993). Utah Code Ann. § 63-46b-5(1)(k) (1997), requires that "copy of the presiding officer's order be promptly mailed to each of the persons."

If a petition for review is not filed within the required thirty days of the date of issue of the final agency action, as provided by section 63-46b-14(3)(a), it is untimely and the district court lacks jurisdiction. Bonded Bicycle Couriers, 844 P.2d at 359-60; See Silva v. Department of Emp. Sec., 786 P.2d 246, 247 (Utah App. 1990). (Holding, the timeliness of filing a petition for review is jurisdictional.)

Here, the Division's final order which revoked Gilley's driving privilege is dated February 25, 2001, and mailed February 26, 2001, as evidenced by the certificate of service. Addendum B (Exhibit 1). Gilley did not file her appeal of that order until on or about May 21, 2001, more than 80 days after the date of issue of the Division's final

order. Addendum A . As such, Gilley's appeal is clearly untimely.

Additionally, Gilley argued at the hearing on the motion to dismiss that she never received the Division's final order,<sup>1</sup> even though she agreed that it was mailed to her place of residence. This argument also lacks merit. Under Rule 5 (1), Utah Rules Civil. Procedure service by mail is completed upon mailing. For administrative orders, a mailing certificate which shows the date the order was sent is sufficient to establish the required service. See Wiggins v. Board of Review, 824 P.2d 1199 (Utah App 1992).<sup>2</sup> Section 63-46b-5(k) requires that the Division promptly mails the presiding officer's final

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<sup>1</sup>In Gilley's complaint for review she did not allege that she never received a copy of the final revocation order. She alleged merely that "Plaintiff was the subject of an order suspending her driving privilege issued by the Defendant on or about March 5, 2001, and while Plaintiff is aware of, or suspects such Order was made, Defendant [sic] does not have a copy of said Order." Addendum A at 2.

<sup>2</sup> This court in Wiggins in defining what is meant by the word "issued" in section 63-46b-14(3)(a), held that "issue as used in section 63-46b-14(3)(a) means the date the agency action is properly mailed, as accurately evidenced by the certificate of mailing. . ." Wiggins 824 P.2d at 1199. In Wiggins this court concluded that the time for filing a petition for review commenced the date the agency decision was mailed, and not when the petitioner received the agency's decision. The Utah Supreme Court, in Dusty's Inc. v. Utah State Tax Comm'n, 842 P.2d 868, 870 (Utah 1992) (per curiam), concluded without specifically overruling Wiggins that the term "issued" as used in section 63-46b-14(3)(a), means that date the order bears on its face. Based on the Supreme Court decision in Dusty's Inc, this court then expressly overruled its decision in Wiggins and held "the date the order constituting the final agency action issues is the date the order bears on its face, and not the date it is mailed." Bonded Bicycle Couriers, 844 P.2d at 360, (citing Dusty's Inc., 342 P.2d at 870.) Even though Wiggins was overruled, with respect to what is meant by the word "issued," neither this Court nor the Supreme Court addressed what is necessary to establish the required service nor did they determine that the 30-day time period to file an appeal began upon Petitioner's receipt of the agency's final order.



order to each of the parties. Here, the certificate of mailing shows that the Division's order was promptly mailed to Gilley on February 26, 2001, one day after the date of issue, to Gilley's place of residence.

**B. An allegation of lack of initial notice of intent to suspend or revoke does not stop the running of the time to appeal a final order of revocation.**

Gilley argues in her opening brief that the District Court erred as a matter of law in dismissing Gilley's complaint on the ground that it was not timely filed because the Division never obtained proper jurisdiction and the time to file an appeal thus never began to run. In support of her argument, Gilley relies on this Court's recent decision in Mabus v. Blackstock, 994 P.2d 1272 (Utah 1999). However, Gilley's reliance on Mabus is misplaced.

This Court in Mabus neither recognized, as argued by Gilley, nor ruled that the time limits for fighting the revocation process do not run in cases in which the Department never obtained jurisdiction in the first place. This Court did rule that "the police officer's service of the immediate notice of intention to revoke with a form giving basic information on how to obtain a hearing (service of immediate notice and basic information) is the initiatory event" of the Driver License Division's administrative process, and is therefore jurisdictional. Id. at 1274. As such, the Division has the burden of producing at the trial de novo competent evidence that the revocation proceeding was initiated by service of immediate notice and basic information. Id. at 1275. In Mabus,

the Division failed to present evidence of service of the notice of the intent to revoke at the trial de novo. As a result this Court set aside the Division's action. This is not the case in the instant action. Pursuant to the ruling in Mabus, Gilley had the right to challenge the police officer's service of the immediate notice of the Division's intent to revoke and basic information. Id. If Gilley's challenge was timely, the Division would have needed to prove at the trial de novo that she was personally served with immediate notice and basic information. Id. However, Gilley's challenge was not timely made. As a result, the District Court lacked jurisdiction to hear Gilley's appeal. See Bonded Bicycle Couriers, 844 P.2d at 359-60; Silva, 786 P.2d at 247.

Gilley is trying to circumvent the statutory time requirements for filing an appeal to the district court by alleging lack of initial notice and by claiming she never received the Division's final order of revocation. She should not be allowed to do this. The law is clear a person can challenge jurisdiction, but the challenge must be timely. Gilley's challenge was not timely. The District Court did not have jurisdiction to hear her appeal regardless of the grounds for the appeal.

## II. THE DISTRICT COURT DID NOT ERR WHEN IT TREATED GILLEY'S COMPLAINT AS A PETITION FOR REVIEW

In her opening brief, Gilley argues for the first time on appeal, that the district court underestimated its broad, general jurisdiction in that it failed to recognize that Gilley's action was not a traditional appeal from the revocation process. Gilley goes on

to argue that the district court should have recognize that, under Utah Code Ann. §§ 78-3-4 (1) &(2) and 63-46b-1(3)(a)(Supp. 2001), the district court had jurisdiction to issue a writ to compel the agency to take action, and under section 78-3-4(7)(a), the district court still had the authority to issue the order by virtue of its general appellate jurisdiction over agency's adjudicative proceedings. These arguments are without merit and have been waived because Gilley raised these arguments for the first time on appeal.

In any event, the district court did not underestimate its broad and general jurisdiction as provided by section 78-3-4, and it correctly dismissed Gilley's appeal for lack of jurisdiction because it was untimely filed. First, as argued by Gilley, section 78-3-4 (7)(a) does provide the district court with jurisdiction to review "agency adjudicative proceedings as set forth in Title 63, chapter 46b, Administrative Procedures Act." However, section 78-3-4(7)(a) also requires that the district court comply with the requirements of UAPA in its review of adjudicative proceedings. Section 63-46b-14(3)(a) of the UAPA requires a party to file a petition for judicial review of final agency action within 30 days after the final order is issued. Here, Gilley failed to file her petition for review within the time period required by section 63-46b-14(3)(a). As a result, the district court did not have jurisdiction to hear the appeal under section 78-3-4(7)(a) and it had no choice, but to dismiss Gilley's appeal as untimely.

Second, the subsections 78-3-4(1) and(2) did not apply in this case to confer jurisdiction on the district court. Gilley has failed to show that her complaint is anything

but a traditional petition for review of agency action pursuant to UAPA. In paragraph 2 of her complaint she alleges “venue pursuant to sections 53-3-224 and 41-6-44.1

(h)(i)(ii)<sup>3</sup>(1953 as amended).” Utah Code Ann. § 41-6-44.1 (j) (Supp. 2001) states:

- (i) Any person whose license has been revoked by the Driver License Division under this section may seek judicial review.
- (ii) Judicial review of an informal adjudicative proceeding is a trial. Venue is in the district court in the county in which the offense occurred.

Section 53-3-224 states:

- (1) A person denied a license or whose license has been cancelled, suspended or revoked by the division may seek judicial review of the division’s order.
- (2)(a) Venue for judicial review of informal adjudicative proceedings is in the district court in the county where the offense occurred, which resulted in the cancellation, suspension or revocation.
- (b) Persons not residing in the state shall file in Salt Lake County or the county where the offense occurred which resulted in the cancellation, suspension or revocation.

In addition, in her complaint, Gilley specifically states that her request for a temporary stay is pursuant to Utah Code Ann. § 63-46b-18 (1997), Gilley does not allege jurisdiction pursuant to any other statute or code.

Gilley neither alleged in her complaint nor argued in her opposition to the Division’s motion to dismiss or at the hearing on the motion to dismiss that she was petitioning the district court for an extraordinary writ. Furthermore, Gilley does not seek

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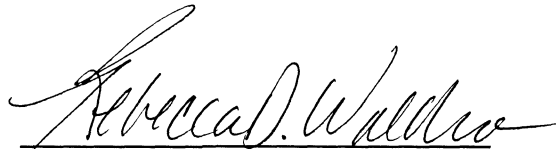
<sup>3</sup>Gilley was incorrect in citing to Utah Code Ann. § 41-6-44.10 (h) which does address venue. Section 41-6-44.10 (j)(i)(ii) addresses venue and judicial review.

an order compelling the Division to take action. She seeks an order from the district court reversing an action taken by Division. As such, there is no way Gilley's complaint can be interpreted as being anything other than a petition for review of the Division's order pursuant to sections 53-3-224 and 41-6-44.1(j). The district court does not have jurisdiction to hear her petition for review because it was filed outside the time restraints mandated by section 63-46b-14(3)(a)

#### CONCLUSION

Fore the foregoing reasons, the Division respectfully requests that this court uphold the lower court's ruling that it did not have jurisdiction to hear Gilley's appeal because her petition for review for agency action was untimely filed.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of April, 2002.

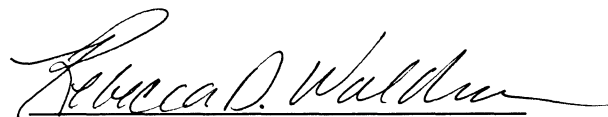
A handwritten signature in cursive script, reading "Rebecca D. Waldron", written in black ink.

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

# CERTIFICATE OF SERVICE

I, Rebecca D. Waldron, counsel for the Division, hereby certify that on the 26<sup>th</sup> day of April, 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 to J. Franklin J. Allred, Attorney for Appellate, 321 South 600 East, Salt Lake City, Ut 84102

DATED this 25<sup>th</sup> day of April, 2002.

A handwritten signature in cursive script, reading "Rebecca D. Waldron", written over a horizontal line.

Rebecca D. Waldron  
Assistant Attorney General

## ADDENDUM A

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321 South 600 East  
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Telephone: (801) 531-1114  
Facsimile: (801) 531-1113

FILED  
3RD JUDICIAL DISTRICT COURT TOOELE  
01 MAY 21 PM 3:48

FILED BY \_\_\_\_\_ *AD*

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**IN THE THIRD JUDICIAL DISTRICT COURT, TOOELE COUNTY  
TOOELE DEPARTMENT, STATE OF UTAH**

---

MELINDA GILLEY,	)	
	)	COMPLAINT AND PETITION FOR
	)	ORDER TEMPORARILY
	)	RESTRAINING DEFENDANT FROM
	)	SUSPENDING PETITIONER'S
Plaintiff,	)	DRIVING PRIVILEGE, AND
vs.	)	ORDERING REINSTATEMENT OF SAID
	)	PRIVILEGE PENDING TRIAL,
G. BARTON BLACKSTOCK, AND THE	)	OR FOR AN ORDER STAYING THE
DEPARTMENT OF PUBLIC SAFETY,	)	ORDER OF SUSPENSION UNDER
OFFICE OF DRIVER LICENSE	)	U.C.A. 63-46b-18; FOR
SERVICE,	)	PRELIMINARY AND PERMANENT
	)	INJUNCTION AND ORDER
Defendants.	)	REVERSING THE SUSPENSION ORDER
	)	
	)	Judge: David S. Young
	)	
	)	Case No: 010300534 AA

---

The Plaintiff-Petitioner above-named, complains of the Defendant and for cause of action alleges:

**FIRST CAUSE OF ACTION**

1. Plaintiff is a resident of Tooele County, State of Utah and venue is in the above-entitled Court pursuant to U.C.A. 53-3-224 and U.C.A. 41-6-44.1(h)(i)(ii)(1953, as amended).
2. Plaintiff was the subject of an order suspending her driving privilege issued by the

00005



Defendant on or about March 5th, 2001, and while Plaintiff is aware of, or suspects such Order was made, Defendant does not have a copy of said Order.

3. The Defendant had no authority to proceed against the Petitioner's driving privilege for the following reasons:

a.. The Defendant's lack jurisdiction over Plaintiff because the document through which jurisdiction was attempted to be exercised was not personally served on Plaintiff as required by

b. The Defendant had no jurisdiction to take action against the Defendant, because any notice claimed to have been served failed to give Defendant notice of the nature of the type of penalty the Defendants proposed to impose.

c. Defendants lack jurisdiction over Plaintiff because they purport to take action against Plaintiff under to mutually exclusive statutory procedures.

d. The Plaintiff did not refuse to take a test to determine her blood alcohol level because the officer requesting the test failed to advise Plaintiff that he did not have the right to have her attorney present nor the right to counsel before he determined what action to take with respect to the officer's request she take a test.

e. Plaintiff was confused about her obligation to take multiple tests, given the multiplicity of requests to take breath tests, and after having taken several, was never told she must continue to take tests until the requesting person decided to stop requiring them.

f. Plaintiff took a breath test and the arresting officer obtained a sample of Plaintiffs breath, and the officer had a duty to, but failed, to explain the difference between the test Plaintiff took and the impact of §41-6-44 (1)(b), which under the circumstances he was

obligated to do.           4.                           The Defendants acted contrary to law in revoking  
Petitioner's driving privileges for the reason that Defendant's arrest was a violation of Plaintiff's  
rights under the Fourth and Fourteenth Amendments of the United States Constitution and  
Article I Section Fourteen of the Utah Constitution.

5           The Defendants acted contrary to law in revoking Plaintiff-Petitioner's driving  
privilege for the reason that at the time of his arrest her arrest she was not driving a vehicle was  
not incapable of safely driving a vehicle nor did he have a blood alcohol content in excess of  
.08%.

6.       Less than thirty days have passed since notification of the acts of the Defendant  
complained of herein.

7.       Plaintiff has had no actual notice of the acts of the Defendants complained of  
herein.

8.       That Plaintiff-Petitioner is entirely dependent on a driving privilege for a  
livelihood and will suffer immediate and irreparable harm in being unable to conduct every-day  
commerce, to move about the community in the pursuit of business, for purposes of health care,  
and obtaining the necessities of life which consequences are also extraordinary circumstances  
requiring immediate judicial intervention both of which justify an order either restraining and  
enjoining or staying the Defendant from continuing the status of Plaintiff as suspended or  
revoked.

9.       There is a substantial likelihood that Plaintiff will prevail in this action.

10.      Granting relief to Plaintiff/Petitioner will not harm other parties to the suit nor is  
there any threat to public health, safety or welfare sufficiently serious to justify the agency's

action under the circumstances.

11. Unless a Temporary Restraining Order and Preliminary Injunction are ordered, or unless a stay is granted, Plaintiff risks the cause of action becoming moot under the ruling in *Phillips v. Schwendiman* 802 P.2d 108 (Utah App. 1990).

12. The Plaintiff-Petitioner is entitled to a judicial review of the findings of the Department which judicial review contemplates an evidentiary hearing, at which hearing Defendants have the burden of sustaining their jurisdiction and their action against the Petitioner by a standard of beyond a reasonable doubt, except as to jurisdiction which must be proved by a preponderance of the evidence.


**WHEREFORE**, Plaintiff-Petitioner prays for the following relief:

1. The Court grant a hearing for temporary relief and at said hearing enter a Preliminary Temporary Restraining Order and Preliminary Injunction temporarily restraining and enjoining the Defendant from suspending Plaintiff-Petitioner's driving privilege until a full trial in the matter, or, enter an order staying the order of suspension, or, in the alternative, for an immediate trial on this Petition.

2. For a judgment in Plaintiff-Petitioner's favor finding the Defendants have no jurisdiction nor, in the alternative, any legal basis on which to adversely affect Plaintiff-Petitioner's driving privileges.

3. For an Order permanently reinstating Plaintiff-Petitioner's driving privilege and requiring the Defendant to remove any indication of adverse action from Plaintiff's permanent driving history.

DATED this 18<sup>th</sup> day of May, 2001

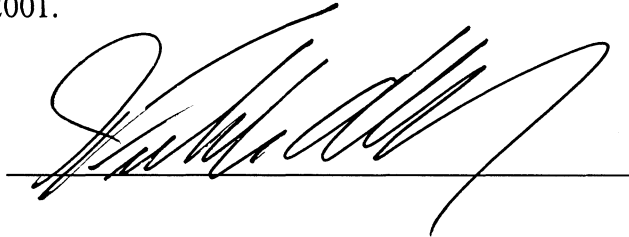
  
J. FRANKLIN ALLRED  
Attorney for the Plaintiff

MAILING CERTIFICATE

I here by certify that on the 21<sup>st</sup> day of May, 2001, a true and correct copy of the  
forgoing COMPLAINT AND PETITION was hand deposited in the U. S. Mail, postage prepaid  
and addressed to:

REBECCA WALDRON  
ATTORNEY GENERAL'S OFFICE  
160 EAST 200 SOUTH, 6<sup>TH</sup> FLOOR  
P.O. BOX 140856  
SALT LAKE CITY, UTAH 84114

DATED this 21<sup>st</sup> day of January, 2001.



## ADDENDUM A

J. FRANKLIN ALLRED A0058  
J. FRANKLIN ALLRED P.C.  
Attorney for Plaintiff  
321 South 600 East  
Salt Lake City, Utah 84102  
Telephone: (801) 531-1114  
Facsimile: (801) 531-1113

---

**IN THE THIRD JUDICIAL DISTRICT COURT, TOOELE COUNTY  
TOOELE DEPARTMENT, STATE OF UTAH**

---

MELINDA GILLEY,	)	
	)	COMPLAINT AND PETITION FOR
	)	ORDER TEMPORARILY
	)	RESTRAINING DEFENDANT FROM
	)	SUSPENDING PETITIONER'S
Plaintiff,	)	DRIVING PRIVILEGE, AND
vs.	)	ORDERING REINSTATEMENT OF SAID
	)	PRIVILEGE PENDING TRIAL,
G. BARTON BLACKSTOCK, AND THE	)	OR FOR AN ORDER STAYING THE
DEPARTMENT OF PUBLIC SAFETY,	)	ORDER OF SUSPENSION UNDER
OFFICE OF DRIVER LICENSE	)	U.C.A. 63-46b-18; FOR
SERVICE,	)	PRELIMINARY AND PERMANENT
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Defendants.	)	REVERSING THE SUSPENSION ORDER
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	)	Judge: David S. Young
	)	
	)	Case No: 010300534/AA

---

The Plaintiff-Petitioner above-named, complains of the Defendant and for cause of action alleges:

**FIRST CAUSE OF ACTION**

1. Plaintiff is a resident of Tooele County, State of Utah and venue is in the above-entitled Court pursuant to U.C.A. 53-3-224 and U.C.A. 41-6-44.1(h)(i)(ii)(1953, as amended).
2. Plaintiff was the subject of an order suspending her driving privilege issued by the

Defendant on or about March 5th, 2001, and while Plaintiff is aware of, or suspects such Order was made, Defendant does not have a copy of said Order.

3. The Defendant had no authority to proceed against the Petitioner's driving privilege for the following reasons:

a.. The Defendant's lack jurisdiction over Plaintiff because the document through which jurisdiction was attempted to be exercised was not personally served on Plaintiff as required by

b. The Defendant had no jurisdiction to take action against the Defendant, because any notice claimed to have been served failed to give Defendant notice of the nature of the type of penalty the Defendants proposed to impose.

c. Defendants lack jurisdiction over Plaintiff because they purport to take action against Plaintiff under to mutually exclusive statutory procedures.

d. The Plaintiff did not refuse to take a test to determine her blood alcohol level because the officer requesting the test failed to advise Plaintiff that he did not have the right to have her attorney present nor the right to counsel before he determined what action to take with respect to the officer's request she take a test.

e. Plaintiff was confused about her obligation to take multiple tests, given the multiplicity of requests to take breath tests, and after having taken several, was never told she must continue to take tests until the requesting person decided to stop requiring them.

f. Plaintiff took a breath test and the arresting officer obtained a sample of Plaintiffs breath, and the officer had a duty to, but failed, to explain the difference between the test Plaintiff took and the impact of §41-6-44 (1)(b), which under the circumstances he was

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Petitioner's driving privileges for the reason that Defendant's arrest was a violation of Plaintiff's  
rights under the Fourth and Fourteenth Amendments of the United States Constitution and  
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7.       Plaintiff has had no actual notice of the acts of the Defendants complained of  
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livelihood and will suffer immediate and irreparable harm in being unable to conduct every-day  
commerce, to move about the community in the pursuit of business, for purposes of health care,  
and obtaining the necessities of life which consequences are also extraordinary circumstances  
requiring immediate judicial intervention both of which justify an order either restraining and  
enjoining or staying the Defendant from continuing the status of Plaintiff as suspended or  
revoked.

9.       There is a substantial likelihood that Plaintiff will prevail in this action.

10.      Granting relief to Plaintiff/Petitioner will not harm other parties to the suit nor is  
there any threat to public health, safety or welfare sufficiently serious to justify the agency's



action under the circumstances.

11. Unless a Temporary Restraining Order and Preliminary Injunction are ordered, or unless a stay is granted, Plaintiff risks the cause of action becoming moot under the ruling in *Phillips v. Schwendiman* 802 P.2d 108 (Utah App. 1990).

12. The Plaintiff-Petitioner is entitled to a judicial review of the findings of the Department which judicial review contemplates an evidentiary hearing, at which hearing Defendants have the burden of sustaining their jurisdiction and their action against the Petitioner by a standard of beyond a reasonable doubt, except as to jurisdiction which must be proved by a preponderance of the evidence.

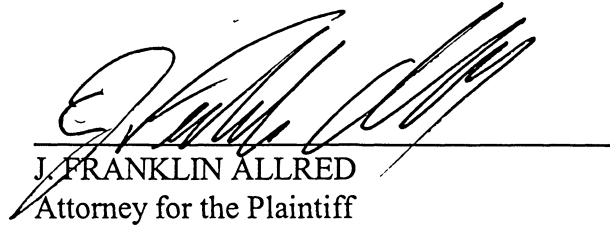
**WHEREFORE**, Plaintiff-Petitioner prays for the following relief:

1. The Court grant a hearing for temporary relief and at said hearing enter a Preliminary Temporary Restraining Order and Preliminary Injunction temporarily restraining and enjoining the Defendant from suspending Plaintiff-Petitioner's driving privilege until a full trial in the matter, or, enter an order staying the order of suspension, or, in the alternative, for an immediate trial on this Petition.

2. For a judgment in Plaintiff-Petitioner's favor finding the Defendants have no jurisdiction nor, in the alternative, any legal basis on which to adversely affect Plaintiff-Petitioner's driving privileges.

3. For an Order permanently reinstating Plaintiff-Petitioner's driving privilege and requiring the Defendant to remove any indication of adverse action from Plaintiff's permanent driving history.

DATED this 18<sup>th</sup> day of May, 2001

  
J. FRANKLIN ALLRED  
Attorney for the Plaintiff

MAILING CERTIFICATE

I here by certify that on the 24<sup>th</sup> day of May, 2001, a true and correct copy of the  
forgoing COMPLAINT AND PETITION was hand deposited in the U. S. Mail, postage prepaid  
and addressed to:

REBECCA WALDRON  
ATTORNEY GENERAL'S OFFICE  
160 EAST 200 SOUTH, 6<sup>TH</sup> FLOOR  
P.O. BOX 140856  
SALT LAKE CITY, UTAH 84114

DATED this 24<sup>th</sup> day of January, 2001.

  
\_\_\_\_\_

## ADDENDUM B

REBECCA D. WALDRON (6148)  
Assistant Attorney General  
MARK L. SHURTLEFF (4666)  
Attorney General  
Attorneys for Respondent  
P.O. Box 140857  
160 East 300 South  
Salt Lake City, Utah 84114-0857  
Telephone: (801) 366-0353

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
TOOELE COUNTY, STATE OF UTAH

---

MELINDA GILLEY,	:	
	:	<b>MEMORANDUM IN SUPPORT OF</b>
Petitioner,	:	<b>MOTION TO DISMISS FOR</b>
	:	<b>FAILURE TO TIMELY FILE</b>
vs.	:	
G. BARTON BLACKSTOCK, AND THE	:	
DEPARTMENT OF PUBLIC SAFETY,	:	Case # 010300534 AA
OFFICE OF DRIVERS LICENSE	:	
SERVICE,	:	Judge David S. Young
	:	
Respondent.	:	

---

Respondent, by and through its counsel of record, submits this Memorandum in support of its Motion to Dismiss for Failure to Timely File.

**MEMORANDUM**

Utah Code Ann. § 53-3-220 provides that a person whose license has been suspended may seek “judicial review” of the Driver License Division’s order. The seeking of judicial

review in drivers license cases is controlled by the provisions of the Utah Administrative Procedure Act (UAPA), Utah Code Ann. §§ 63-46b-1 to 22. Brinkerhoff v. Schwendiman, 790 P.2d 587 (Utah App. 1990). UAPA provides:

a party shall file a petition for judicial review of final agency action within thirty days after the date that the order constituting the final agency action is issued or is considered to have issued under subsection 63-46b-13 (3)(b).

Utah Code Ann. § 63-46b-14(3)(a).

As noted and alleged in Petitioner's Appeal, the Petitioner's drivers license was revoked by an administrative order dated February 25, 2001. (Exhibit 1, Driver License Division Order). Petitioner should have filed her Appeal on or before March 27, 2001. She did not do so until May 18, 2001, and therefore this Court lacks jurisdiction to review this matter.

In Bonded Bicycle Couriers v. Department of Employment Security, 844 P.2d 358 (Utah App. 1992), the Utah Court of Appeals dealt with the issue of timeliness of an appeal seeking judicial review of an administrative order. The Court held that the date of the order is the date the order was issued and the date it had on its face. The Court held in that case that the "timely filing of a petition for review from final agency action is jurisdictional," 844 P.2d at 358. The Utah Supreme Court reached a similar opinion in Dusty's, Inc. v. Utah State Tax Comm'n, 842 P.2d 868 (Utah 1992). The Supreme Court held, in the Dusty's, Inc. case, that "for the guidance of all those who petition for judicial review from agency action, we hold that the date the order

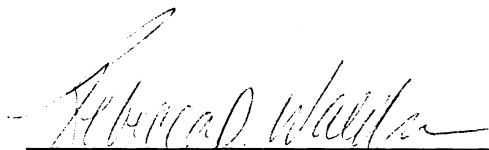
constituting final agency action issues is the date the order bears on its face,” and not the date it is mailed. Dusty’s, Inc., 842 P.2d 868, 870 (Utah 1992).

Petitioner failed to file this Appeal within thirty (30) days of the issuance of the Driver License Division order. The Driver License Division order was issued on February 2, 2001. Petitioner’s Appeal was not filed with the Court until May 18, 2001. Thus, the Court lacks jurisdiction to conduct a judicial review of the Driver License Division order in this case.

#### **CONCLUSION**

Based on the foregoing analysis, Respondent respectfully requests that the Court issue an order dismissing this Appeal with prejudice for lack of jurisdiction.

Dated this 7<sup>th</sup> day of June, 2001.

  
\_\_\_\_\_  
Rebecca D. Waldron  
Assistant Attorney General  
Attorney for Respondent





Michael O. Leavitt  
Governor  
Robert L. Flowers  
Commissioner  
Earl R. Morris  
Deputy Commissioner

# State of Utah

## DEPARTMENT OF PUBLIC SAFETY DRIVER LICENSE DIVISION

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

CERTIFICATE OF MAILING  
that on the date below as an employee of the Drivers License Division  
State Department of Public Safety I deposited the United States Mail Salt  
Lake City Utah the original order of which this is an exact copy in an envelope  
with postage stamp and address to the person named in the order, at his or her last  
address as shown by the records of the Department  
Date 2-26-01  
Employee of Department [Signature]

DATE OF ARREST: 01 FEB 2001  
DATE OF BIRTH: 02 JAN 1972  
LICENSE/FILE NUMBER: 149555043  
DATE: 25 FEB 2001  
**THIS ORDER IS EFFECTIVE**  
12:01 AM ON 03 MAR 2001

MELINDA MCKEAN GILLEY  
5655 NORTH INVERNESS COURT  
STANSBURY PARK UT 84074

AS A RESULT OF REFUSAL TO SUBMIT TO A CHEMICAL TEST, YOUR DRIVING PRIVILEGE IS REVOKED FOR A PERIOD OF EIGHTEEN (18) MONTHS EFFECTIVE 03 MAR 2001. THE BASIS FOR THIS ACTION IS THE HEARING OFFICER'S FINDINGS OF FACT AND CONCLUSION THAT YOU REFUSED TO SUBMIT TO A CHEMICAL TEST AFTER BEING REQUESTED AND WARNED BY A PEACE OFFICER, OR YOU FAILED TO REQUEST A HEARING, OR YOU FAILED TO APPEAR FOR THE HEARING, CONTRARY TO UCA 41-6-44.10 OR THE IMPLIED CONSENT LAW OF ANOTHER STATE.

THIS ACTION IS IN ACCORDANCE WITH 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 REVOKED 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: UTAH DEPARTMENT OF PUBLIC SAFETY.  
PLEASE INDICATE YOUR LICENSE OR FILE NUMBER ON THE CHECK OR MONEY ORDER AND MAIL TO THE ABOVE ADDRESS.

APPLY FOR A NEW DRIVER LICENSE BY TAKING THE REQUIRED TESTS AND PAYING THE FEE.

UPON REINSTATEMENT YOU WILL HAVE A "NO-ALCOHOL" CONDITIONAL LICENSE.

RESPECTULLY,

G. BARTON BLACKSTOCK, BUREAU CHIEF  
DRIVER LICENSE DIVISION

CC:

GBB: JREED  
A12R  
(REFUSAL)



**CERTIFICATE OF MAILING**

I certify that I mailed a true and correct copy of the foregoing **MEMORANDUM IN  
SUPPORT OF MOTION TO DISMISS FOR FAILURE TO TIMELY FILE**, postage  
prepaid, on this 7<sup>th</sup> day of June, 2001, to the following:

J. FRANKLIN ALLRED  
Attorney for Plaintiff  
321 SOUTH 600 EAST  
SALT LAKE CITY UT 84102

  
\_\_\_\_\_

## ADDENDUM C

ORIGINAL TRANSCRIPT

FILED  
3RD DISTRICT COURT TOOELE

01 NOV -5 PM 5:12  
IN THE THIRD JUDICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

MELINDA GILLEY, :

Plaintiff, :

vs. :

G. BARTON BLACKSTOCK, : Case No. 010300534

AND THE DEPARTMENT OF :

PUBLIC SAFETY, OFFICE OF :

DRIVER LICENSE SERVICES, :

Defendants. :

BE IT REMEMBERED that on the 9th day of July,  
2001, the above-entitled matter came on for Hearing  
before the HONORABLE DAVID S. YOUNG, sitting as Judge  
in the above-named Court for the purpose of this cause,  
and that the following audiotape proceedings were had.

FILED

NOV 21 2001

COURT OF APPEALS

20010828CA



CitiCourt, LLC  
THE REPORTING GROUP

50 South Main, Suite 920  
Salt Lake City, Utah 84144

A P P E A R A N C E S

For the Plaintiff: J. FRANKLIN ALLRED, ESQ.  
J. FRANKLIN ALLRED P.C.  
321 South 600 East  
Salt Lake City, Utah 84102

For the Defendant: REBECCA WALDRON, ESQ.  
ATTORNEY GENERAL'S OFFICE  
160 East 200 South, 6th Floor  
P.O. Box 140856  
Salt Lake City, Utah 84114

1 THE COURT: Now let's return to the matter of  
2 *Melinda Gilly vs. G. Barton Blackstock*, 010300534.  
3 Your argument, briefly?

4 MR. ALLRED: J. Franklin Allred on behalf of the  
5 Plaintiff, Your Honor.

6 MS. WALDRON: Rebecca Waldron on behalf of the  
7 Respondent.

8 THE COURT: All right. You may proceed. If you  
9 wish to submit it on the papers, I'd be happy, or you  
10 may proceed with argument, as you wish.

11 MR. ALLRED: Your Honor, I understood we were  
12 going to have some opportunity to advance some evidence  
13 here, and that the first step would be they'd need to  
14 prove that the document, which the Drivers License  
15 Division intended to use, over which to obtain  
16 jurisdiction of the Gilleys, is the very first matter  
17 that needs to be established, and it's a factual  
18 matter.

19 MS. WALDRON: Your Honor--

20 MR. ALLRED: I think we were talking about doing  
21 that when we were here last week.

22 MS. WALDRON: Your Honor, the Respondent's  
23 position is that whether or not notice was served at  
24 the very beginning of--well, when the individual was  
25 arrested, is not at issue here. My argument is,

1 assuming that notice was not served, which I'm not  
2 saying it is, but assuming, for this motion to dismiss,  
3 it was not.

4 THE COURT: Right.

5 MS. WALDRON: The appeal in this case was filed  
6 late, and based on the cases I've cited in my moving  
7 papers and my reply memorandum, it is an untimely  
8 challenge--an untimely challenge. So, it doesn't  
9 really matter if notice was served or if notice was  
10 not, it's untimely. This Court does not have  
11 jurisdiction to hear the appeal, because the appeal was  
12 filed late.

13 THE COURT: Okay. Now, if I understand their  
14 position, it is that they have to have some fundamental  
15 notice. They get a citation. They then have notice of  
16 remedies associated with hearings that they can  
17 request, and so on, which may be in the citation, and  
18 they then having a hearing. The hearing is conducted.  
19 Then there is a ruling out of the hearing and then they  
20 have--that starts the time for them to appeal to the  
21 District Court. Now, if I'm understanding their  
22 position, it is they didn't get the predicate  
23 information; thus, that original date did not pass.  
24 So they have taken the position that they haven't been  
25 given the timely beginning for that notice of appeal.

1 MS. WALDRON: Well, what they're saying is that  
2 the--they're claiming, because of this lack of notice,  
3 that the Drivers License Division did not have a proper  
4 jurisdiction. However, on--when an individual does not  
5 request a hearing, no matter what the reason is--

6 THE COURT: Okay.

7 MS. WALDRON: --they are sent--the file's reviewed  
8 and they are sent an order, either suspending their  
9 license or not suspending their license--

10 THE COURT: Okay.

11 MS. WALDRON: --which I've attached to our moving  
12 papers--

13 THE COURT: Right.

14 MS. WALDRON: --a copy of that order.

15 THE COURT: Right, and I have a copy.

16 MS. WALDRON: And on the--in the--

17 THE COURT: And that's February 1, 2001, right?

18 MS. WALDRON: Exactly.

19 THE COURT: Okay.

20 MS. WALDRON: Now, on that order it says, "You may  
21 appeal this action in the District Court in the county  
22 in which the offense occurred within 30 days of the  
23 effective date of this notice."

24 THE COURT: Okay.

25 MS. WALDRON: They have a right to appeal the

1 Drivers License Administrative action 30 days from the  
2 effective date of that order, which is March 3, 2001,  
3 which, in appealing that, then they can challenge the  
4 notice. They did not file a notice of appeal within  
5 30 days of that date. It is my argument, based on the  
6 cases that are cited, it is untimely. Otherwise, an  
7 individual could totally disregard the 30-day rule,  
8 bring it a year and a half later, saying, oh, no--  
9 allege no notice was given--

10 THE COURT: Uh-huh.

11 MS. WALDRON: --which would throw out the notice  
12 of appeals rules. Also, the case I've cited in there  
13 addresses when, like, proper service is challenged in a  
14 regular civil case. They say, yes, you can challenge  
15 that service, but it has to be timely.

16 THE COURT: Okay. All right.

17 MS. WALDRON: Also, if a case is filed in the  
18 Court of Appeals challenging jurisdiction in the lower  
19 Court, or service, that has to be timely. You can't  
20 file an untimely appeal and just say, hey, that doesn't  
21 matter, because we're challenging the initial service.

22 THE COURT: Okay. So, your position is that  
23 even--they got an initial citation, whatever transpired  
24 thereafter, they thereafter received--and the initial  
25 citation says the date of--or this document says the



1 date of arrest was February 2001, and they thereafter  
2 got the notice of the--well--

3 MS. WALDRON: Agency action.

4 THE COURT: --the agency action, all right, and  
5 that certainly gave them notice of a date for a  
6 beginning to their appeals period.

7 MS. WALDRON: Exactly.

8 THE COURT: All right. And they filed this May 1,  
9 if I recall, or May something.

10 MS. WALDRON: They filed it, I think--

11 THE COURT: May 21.

12 MS. WALDRON: Exactly, which was like 80--

13 THE COURT: No, is that--

14 MS. WALDRON: They filed it on May 18.

15 THE COURT: May 21. Okay.

16 MS. WALDRON: The effective date of the agency  
17 action was--well, the date was February 25, but I think  
18 the effective date was March 3.

19 THE COURT: Actually, it was filed May 21, it was  
20 signed on May 18, and so the effective date--March 30  
21 was the period or the time that they were given  
22 notice--somewhere in that time period.

23 MS. WALDRON: I can tell you--show--the effective  
24 date of the agency action was March 3.

25 THE COURT: Okay.

1 MS. WALDRON: So, technically, they had 30 days  
2 from March 3 within which to file the appeal.

3 THE COURT: All right. Thank you. All right, Mr.  
4 Allred, briefly.

5 MR. ALLRED: Which gives rise to a second critical  
6 fact, which must be proved. I believe the claim is  
7 that the notice was mailed regular mail, not certified  
8 receipt return requested. Not served.

9 THE COURT: Uh-huh.

10 MR. ALLRED: And so they are trying to assume that  
11 that was received, that notice. It still doesn't  
12 change the underlying defect in jurisdiction. So the  
13 facts we're here to prove today is, one, there was  
14 never any receipt of the statutory notice authorizing  
15 the Defendant's (inaudible) Department to obtain  
16 jurisdiction.

17 THE COURT: Are you saying that they're obligated  
18 to mail all of these by certified mail, return receipt  
19 requested?

20 MR. ALLRED: I am saying they have some obligation  
21 to prove that it was received.

22 THE COURT: All they have to do--this--driving is  
23 a privilege, and all they'd have to do, in my judgment,  
24 unless I'm wrong on this, is show that they mailed it  
25 at least to the driver's license address. Does your

1 client acknowledge the address 5655 North Inverness  
2 Court?

3 MR. ALLRED: That's the correct address.

4 THE COURT: Okay. All right.

5 MR. ALLRED: But the client denies that it was  
6 ever received.

7 THE COURT: Okay.

8 MR. ALLRED: And the whole factual claim must--or  
9 the whole argument that counsel makes for the motion  
10 must rest on some factual proceeding. Maybe there's a  
11 *prima facie* showing by attaching the document and then  
12 coming in and saying it was received. But it is not  
13 satisfactory to start the appeal time running if it was  
14 not, in actuality, received. These people aren't  
15 sitting by here trying connive a way into this Court.

16 THE COURT: Uh-huh. Well, I understand that.

17 MR. ALLRED: If they'd had that notice, they  
18 would've done so. So the factual things that we're  
19 asking the Court to hear today, which I thought we were  
20 going to do, was the initial--whether or not there was  
21 jurisdiction.

22 THE COURT: Okay. Well, I will let you make a  
23 proffer briefly of the facts. But this is what I  
24 understand. Your client was arrested on February 1,  
25 2001, and issued a citation. That citation gave rise

1 to the potential of denial of your client's license,  
2 based on refusal to submit to a chemical test. And the  
3 Department mailed, on or about February 26, with a  
4 Department employee's signature, the information of the  
5 letter--notice of intent to revoke, I guess. It  
6 doesn't have a title to it, but it is this letter,  
7 which you've seen attached to their pleadings.

8       So, your client knew at least they were initiating  
9 proceedings in February because of the citation, where  
10 she was present. And the Court would have to find, by  
11 depositing this in the mail, it would presumptively  
12 have been received. Now, she can file an affidavit in  
13 opposition to that, but she doesn't file her cause of  
14 action until May 18, at the earliest, and May 21 is  
15 actually the date it's filed in the courthouse. So  
16 that's a long time from February. So my concern is,  
17 you can supplement the record. I don't think I need  
18 further testimony. I'm ready to rule on the motion.

19       MR. ALLRED: Well, and if the Court relates that  
20 back and says she was advised of the proceedings.

21       THE COURT: Well, the citation gave certain advice  
22 of the proceedings.

23       MR. ALLRED: But the citation was not served.

24       THE COURT: Wasn't it hand-delivered?

25       MR. ALLRED: It was not served, period. We deny

1 that it was served. And that's the fact that we're  
2 here to prove, initially, is that the citation was  
3 served. And I've got two witnesses here prepared to  
4 testify that that's (inaudible).

5 THE COURT: Okay. Well, this isn't the time for  
6 testimony.

7 MR. ALLRED: Yeah. That's what I'm saying.

8 THE COURT: Yeah.

9 MR. ALLRED: That's what I--I thought we were  
10 going to do that.

11 THE COURT: Uh-huh.

12 MR. ALLRED: So, the initial thing the Court must  
13 decide is whether or not there was service of the  
14 document to obtain jurisdiction. The *Mavis* case  
15 indicates that--and that's attached to our response--

16 THE COURT: Right.

17 MR. ALLRED: --indicates that if there is no  
18 jurisdiction, the Court cannot take any action, but the  
19 Court certainly can look to determine whether it has  
20 jurisdiction. So the initial question is, was a  
21 document, which would give jurisdiction over this  
22 Plaintiff, served? And that answer to that factually  
23 is absolutely not--no way, shape or form.

24 THE COURT: Okay.

25 MR. ALLRED: So, if we can have a hearing on that

1 point, then maybe the Court might still find that there  
2 was an obligation, and that it might have been somehow  
3 imposed by a letter claimed to have been sent, but I've  
4 got two witnesses who will--

5 THE COURT: I'll tell you what I'll do. I'll just  
6 simply invite you and Ms. Waldron to see if you can  
7 agree on a statement of facts, based on what their  
8 testimony would be. I'm prepared to rule on the  
9 motion, based on the letter and the--just simply the  
10 dates, the filing times. Ms. Waldron?

11 MS. WALDRON: Your Honor, I would be willing, for  
12 the purpose of this motion only, to say, assume notice  
13 was not given--

14 THE COURT: Well, right.

15 MS. WALDRON: --which I'm not agreeing to, but  
16 assume, for the purpose of this motion only, that no  
17 notice was given.

18 THE COURT: Okay.

19 MS. WALDRON: The initial summons and citation was  
20 not personally served. It is my position here today,  
21 because the appeal is untimely filed, he has waived his  
22 right to challenge that.

23 THE COURT: Okay. I understand that. So, what  
24 they're assuming then is that your facts are given.

25 MR. ALLRED: Yeah. There was no service--

1 THE COURT: Right.

2 MR. ALLRED: --of the initiatory document--

3 THE COURT: Okay.

4 MR. ALLRED: --under *Mavis*. The second--

5 THE COURT: All right. That may be a part of the  
6 record.

7 MR. ALLRED: The second fact, I guess, which they  
8 would have to admit is that the letter, claimed to have  
9 been mailed--

10 THE COURT: Uh-huh.

11 MR. ALLRED: --was not mailed and not received.

12 THE COURT: Now, I'm not so sure that they did  
13 not--

14 MR. ALLRED: (Inaudible) not mailed. They might--  
15 they might believe they mailed it. There might be  
16 something in the document that says it was mailed.

17 THE COURT: Well, the file will speak for itself  
18 in respect to that. That document has been placed in  
19 the record of this case. So--

20 MR. ALLRED: If they'll stipulate that the  
21 record--that it was not received, or that our testimony  
22 is that that document was not received. They've got to  
23 have some actual notice (inaudible).

24 THE COURT: Okay. Well, do you have any objection  
25 to agreeing that their testimony would be that it was

1 not received?

2 MS. WALDRON: I will agree that--to his proffer  
3 that if the--they--the Petitioner would take the stand,  
4 she would say, "I did not receive the letter of agency  
5 action."

6 THE COURT: Okay.

7 MR. ALLRED: They should go a little further than  
8 that, because the Petitioner was in a daily--in a  
9 facility, at Day Spring, and her husband was actually  
10 running the household through the majority of that time  
11 and monitoring the mail, and he's here as well, David  
12 Gilley, to testify that there was no letter from the  
13 Driver License Division that came. Those are the  
14 facts, Your Honor, that we would hope to establish.

15 THE COURT: Okay. Well, you've made that  
16 statement. I'm not sure the State can agree to it, but  
17 they certainly agree to the facts consistent with no  
18 service. So, the Court finds that the Defendant's  
19 motion to dismiss this appeal as untimely should be and  
20 the same is granted. Ms. Waldron, I'll ask you to  
21 prepare an order consistent with that--

22 MS. WALDRON: Thank you, Your Honor.

23 THE COURT: --so we'll have something in the  
24 record.

25 MS. WALDRON: Thank you, Your Honor.



1 THE COURT: Thank you, Mr. Allred.

2 MR. ALLRED: Thank you.

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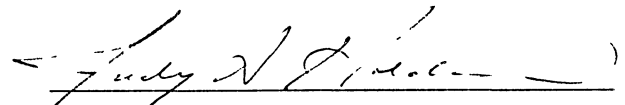
STATE OF UTAH            )  
                                  ) ss.  
Salt Lake County        )

I, Debra H. Peterson, do hereby certify that the foregoing pages, numbered 1 through 15, contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability from the tapes furnished to me.

DATED: October 25, 2001.

  
Debra H. Peterson

I, Judy A. Holdeman, Certified Shorthand Reporter, and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Debra H. Peterson was transcribed under my supervision and direction.

  
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My Commission Expires:

