

2001

# Melinda Gilley v. Department of Public Safety : Brief of Appellant

Utah Court of Appeals

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J. Franklin Allred; Attorney for Appellant.

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**IN THE UTAH COURT OF APPEALS**

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MELINDA GILLEY,

Plaintiff/Appellant,

v.

DEPARTMENT OF PUBLIC SAFETY,

Defendant/Appellee.

:

:

:

:

CASE NO. 20010828CA

:

PRIORITY NO. 14

---

**OPENING BRIEF OF APPELLANT**

This is an opening brief in an appeal from a dismissal of Ms. Gilley's complaint for relief from the Department of Public Safety's revocation of Ms. Gilley's driver's license. The dismissal was entered in the Third District Court in and for Tooele County, State of Utah, the Honorable David S. Young, Judge, presiding.

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**FILED**  
Utah Court of Appeals

FEB 21 2002

Paulette Stagg  
Clerk of the Court

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JAN - 3 2002

Paulette Stagg  
Clerk of the Court

THE UTAH COURT OF APPEALS

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Melinda Gilley,

Petitioner and Appellant,

v.

G. Barton Blackstock, and the  
Department of Public Safety,  
Office of Driver License  
Services,

Respondents and Appellees.

ORDER

Case No. 20010828-CA

This matter is before the court on a sua sponte motion for summary disposition pursuant to Rule 10 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the motion for summary disposition is withdrawn, and a ruling on the issues raised therein is deferred pending plenary presentation and consideration of the appeal.

Dated this 2 day of January, 2002.

FOR THE COURT:

~~James Z. Davis, Judge~~

CERTIFICATE OF MAILING

I hereby certify that on January 3, 2002, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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321 S 600 E  
SALT LAKE CITY UT 84102-4082

Dated this January 3, 2002.

By   
Deputy Clerk

Case No. 20010828-CA

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**IN THE UTAH COURT OF APPEALS**

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MELINDA GILLEY,

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v.

DEPARTMENT OF PUBLIC SAFETY,

Defendant/Appellee.

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: CASE NO. 20010828CA

: PRIORITY NO. 14

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**JURISDICTION**

Utah Code Ann. § 78-2a-3(2)(a) and/or (b) provide this Court's jurisdiction over this appeal from the district court's review of the adjudicative action of the Department of Public Safety.

**STATEMENT OF ISSUES, STANDARDS OF REVIEW, AND PRESERVATION**

1. Did the trial court err in ruling that it had no jurisdiction to review the defendant's revocation of Ms. Gilley's driver's license?

This jurisdictional ruling involves a question of law, to be reviewed without deference for correctness. See Beaver County v. Qwest, Inc., 2001 UT 81 at ¶ 8, 31 P.3d 1147, 1149.

This issue was preserved by memoranda and argument in the trial court (e.g. R. 1-5, 14-27, R. 60 at 1-14).

**CONSTITUTIONAL PROVISIONS, STATUTE AND RULES**



The following constitutional provisions, statutes and rules are determinative of this appeal and are set forth in the addendum to this brief: Constitution of Utah, Article I §§ 7, 11; United States Constitution, Amendment XIV, § 1; Utah Code Ann. § 41-6-44.10(2)(b); Utah Code Ann. § 63-46b-1(3)(a); Utah Code Ann. § 63-46b-14(3)(a); Utah Code Ann. § 78-3-4.

### STATEMENT OF THE CASE

#### NATURE OF THE CASE, COURSE OF PROCEEDINGS, DISPOSITION

Ms. Gilley was arrested for DUI on about February 1, 2001, and the Department of Public Safety, Driver's License Division, subsequently revoked her license (e.g. R. 27).

On May 21, 2001 Gilley filed 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 (R. 1-5). In this document, Gilley alleged that as a result of the failure of the Department to effect service of process on her pursuant to the applicable statute, that they had no jurisdiction to proceed against her in revoking her license (R. 1-5). Gilley sought a hearing for temporary relief from the revocation or an immediate trial, a judgment that the Defendants had no lawful basis for revoking Gilley's license, and an order reinstating her license (R. 2).

The Department did not file an answer to the complaint but filed a Motion To Dismiss For Failure To Timely File in which they alleged the court had no jurisdiction to

consider an appeal because more than thirty days had elapsed since the revocation had occurred (R. 6-7, 11-13). To this motion the Department attached as an exhibit a copy of a letter claimed by them to have been sent to Gilley notifying her of their action, which letter was dated February 25<sup>th</sup>, 2001 (R. 9).

In her response to the motion Gilley denied having received the letter and asserted that the Department had no jurisdiction because they had never effected service on her (R. 14-27).

At a hearing on July 9<sup>th</sup>, 2001, the Department stipulated that, for the purpose of the hearing on their motion to dismiss the complaint, the court should consider that the notice required under § 41-6-44.10(2)(b) was not given (R. 60 at 12-14).

The court refused to allow Gilley to put on evidence of the non-receipt of the letter dated February 25, 2001, but allowed Gilley's counsel to effectively proffer that the evidence would conclusively show that the subject letter was not received by Gilley, nor was the citation, the document designed to give the Department jurisdiction, ever served on or received by her (R. 60 at 11-14). Counsel for the Department then agreed that if Gilley were to testify that she would say she had not received the letter (R. 60 at 12-14). Counsel for Gilley further proffered that both Gilley and her husband would testify regarding the attention being given to the mail and the extreme unlikelihood that the letter had been received and escaped the notice of Gilley and her husband (R. 60 at 11-14).

Despite the uncontradicted indication that the Department of Public Safety had never properly obtained jurisdiction to revoke Gilley's license, Judge Young dismissed

Gilley's complaint because she had failed to timely appeal (R. 60 at 15, R. 45-46).

### STATEMENT OF FACTS

Because this case was dismissed absent a trial or evidentiary hearing, there are no facts relevant to the appeal other than those set forth in the statement of the case.

### SUMMARY OF ARGUMENTS

When the Department fails to give notice of its intent to revoke a person's driver's license, the Department fails to obtain jurisdiction, and any actions taken by the Department in the absence of jurisdiction are a legal nullity.

In the instant matter, the district court erred as a matter of law in dismissing Ms. Gilley's complaint on the ground that the appeal was not timely filed, when the Department never obtained proper jurisdiction, and the time to file an appeal thus never began to run.

Moreover, Gilley did not file a traditional appeal, but filed 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 (R. 1-5). In this document, Gilley alleged that as a result of the failure of the Department to effect service of process on her pursuant to the applicable statute, that they had no jurisdiction to proceed against her in revoking her license (R. 1-5). Gilley sought a hearing for temporary relief from the revocation or an immediate trial, a judgment that the Defendants had no lawful basis for revoking Gilley's license, and an order reinstating her license (R. 2).

The Utah Administrative Procedures Act recognizes that the Act does not foreclose petitions such as Gilley's, seeking to compel the Department to act. The district court's broad general jurisdiction surely extends far enough to grant Ms. Gilley the relief sought in her petition.

## ARGUMENTS

### I.

#### BECAUSE THE DEPARTMENT NEVER OBTAINED JURISDICTION OVER GILLEY, THE REVOCATION IS A NULLITY, AND THE TRIAL COURT ERRED IN DISMISSING GILLEY'S COMPLAINT.

Utah Code Ann. § 41-6-44.10(2)(b) requires the officer who receives a driver's refusal to take a chemical test to provide the driver with notice of intent to revoke the driver's license, and notice of how to request a hearing on the revocation. It provides,

(b) Following the warning under Subsection (2)(a), if the person does not immediately request that the chemical test or tests as offered by a peace officer be administered a peace officer shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle. When the officer serves the immediate notice on behalf of the Driver License Division, he shall:  
(i) take the Utah license certificate or permit, if any, of the operator;  
(ii) issue a temporary license effective for only 29 days; and  
(iii) supply to the operator, on a form approved by the Driver License Division, basic information regarding how to obtain a hearing before the Driver License Division.

(Emphasis added).

In Mabus v. Blackstock, 994 P.2d 1272 (Utah App. 1999), the Court held that service of this notice of intent to revoke and of basic information on how to obtain a hearing is the initiator of the revocation process, and is the first element of due process in revoking a driver's license. See id. at 1273-74. As the Court there explained,

"The right to drive is a valuable right or privilege and it cannot be taken away without procedural due process." Ballard v. State, Motor Vehicle Div., Licensing Dep't, 595 P.2d 1302, 1304 (Utah 1979). And, "at a minimum, 'timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness.'" In re Worthen, 926 P.2d 853, 876 (Utah 1996) (quoting Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1983)); see also In re N.H.B., 777 P.2d 487, 489 (Utah Ct. App. 1989)("Procedural due process entails 'procedural requirements, notably notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property.'" (quoting Wells v. Children's Aid Soc'y, 681 P.2d 199, 204 (Utah 1984))). The statute recognizes as much by mandating that the officer serve immediate notice and basic information upon the arrestee-driver. See Utah Code Ann. § 41-6-44.10(2) (Supp. 1999). Drivers cannot "initiate" the revocation process by requesting a hearing within ten days of their arrests if they have not been notified that hearings are available and how and when they may request hearings. Thus, the true precipitating event in the revocation process is the officer's service of immediate notice and basic information.

Id. at 1274 n.2.

In the instant matter, it is undisputed that the arresting officer did not give Ms. Gilley the requested notice, and that she did not receive information on how to contest the revocation through a hearing (R. 60 at 11-14).

While more than thirty days passed from the revocation until Gilley learned of the revocation and filed a complaint in district court, Mabus recognizes that time limits for fighting the revocation process do not run in cases in which the Department never properly obtained jurisdiction in the first place. See id. at 1275.

In Mabus, the driver failed to request a hearing within ten days of arrest, but in the district court, the Driver's License Division failed to meet its burden of proving that Mabus received the requisite notice of intent to revoke and information on how to request a hearing. See id. at 1275. The court found that in these circumstances, the entire revocation process was a nullity, stating,

It is undisputed that the Division failed to present evidence that the officer here served Mabus with the statutorily required immediate notice of the Division's intent to revoke, along with basic information on how to obtain a hearing on the matter. This failure "rendered the administrative revocation of

appellant's license and the derivative district court review void and the revocation a legal nullity."

Id. (citation omitted).

Likewise, in the instant matter, in the absence of the requisite notice, the revocation process was wholly lacking in due process and was a nullity. See id. See also Moore v. Schwendiman, 750 P.2d 204 (Utah App. 1988)(decided under different version of DUI statute, holding that absence of proof of filing of a sworn report rendered revocation proceedings nullity).

## II. THE DISTRICT COURT UNDERESTIMATED HIS BROAD, GENERAL JURISDICTION.

In the instant matter, Judge Young dismissed Ms. Gilley's complaint on the theory that it was an appeal which was not timely filed under Utah Code Ann. § 63-46b-14(3)(a), which provides,

....

(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).

He dismissed the complaint, despite the facts that Gilley never had proper notice of the revocation, and that the revocation process was a nullity because of the lack of notice.

This ruling not only diverged from Moore and Mabus, *supra*, but also violated the open courts and due process guarantees of the Utah Constitution. See Constitution of Utah, Article I § 11 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil

cause to which he is a party.”); Brady v. Magonagle, 195 P. 188, 191 (Utah 1921)(“The district courts of this state are courts of general jurisdiction. Such courts have original jurisdiction in all matters, civil and criminal, not excepted by the Constitution, and not prohibited by it. Const. Utah art. 1, §§ 11; Comp. Laws Utah 1917, §§ 1667. Such courts are open to all litigants for the redress of grievances or the enforcement of rights. Such is elementary in the jurisprudence of this country.”). See also Constitution of Utah, Article I § 7 (“No person shall be deprived of life, liberty or property, without due process of law.”); Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945)(in discussing the due process provision of the Utah Constitution, the court stated, “[N]o party can be affected by such action, until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and at which he had an opportunity to be heard and to give evidence as to his rights or defenses.”).

Moreover, the dismissal failed to recognize that Gilley’s action was not a traditional appeal from the revocation process, but was filed as 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 (R. 1-5). In this document, Gilley alleged that as a result of the failure of the Department to effect service of process on her pursuant to the applicable statute, that they had no jurisdiction to proceed against her in revoking her license (R. 1-5). Gilley sought a hearing for temporary relief from the revocation or an immediate trial, a judgment that the Defendants had no lawful basis for revoking Gilley’s

license, and an order reinstating her license (R. 2).

Utah Code Ann. § 63-46b-1 expressly indicates that UAPA does not supplant or foreclose traditional remedies to require agencies to take certain actions, stating,

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

(a) compel an agency to take action[.]

This Court interpreted this provision in V-1 Oil Company v. Department of Environmental Quality, 893 P.2d 1093 (Utah App. 1995), rev'd on other grounds, 939 P.2d 1192 (Utah 1997), a case in which the V-I Oil Company successfully petitioned this Court to order the recusal of a presiding officer over formal agency adjudicative proceedings. Id. at 1094.<sup>1</sup> Before proceeding to the merits of the recusal issue, this Court addressed the issue of the Court's subject matter jurisdiction which was raised by the Department's motion to dismiss for lack of jurisdiction, which contended that the sole remedy for V-1 was to file a petition for judicial review after the adjudicative proceedings were complete. Id. at 1094-95. The Court stated,

Utah Code Ann. §§ 63-46b-1 (1993) contains exclusions from the coverage of the Utah Administrative Procedures Act (UAPA). Subsection (3)(a) of that section provides that "this chapter does not affect any legal remedies otherwise available to compel an agency to take action." Id. §§ 63-46(b)-1(3)(a). We conclude that this section of UAPA preserves the availability of extraordinary writ proceedings to compel agency action. Cf. Nielsen v. P.O.S.T., 211 Utah Adv. Rep. 30, 851 P.2d 1201, 1205 n.5 (Utah App. 1993) (finding extraordinary writ proceedings under rule 65B were available as avenue of possible redress to review P.O.S.T.'s decision not to initiate agency complaint).

We further conclude that this court has jurisdiction over the instant petition for extraordinary writ. Utah Code Ann. §§ 78-2a-3(1)(b) (Supp. 1994) grants the court "jurisdiction to issue all extraordinary writs and to

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<sup>1</sup> On certiorari, the Utah Supreme Court ruled that recusal was not required, but did not address or disturb this Court's jurisdictional analysis. See 939 P.2d 1192 (Utah 1997).



issue all writs and process necessary: (a) to carry into effect its judgments, orders, and decrees; or (b) in aid of its jurisdiction." *Id.* In Barnard v. Murphy, 882 P.2d 679 (Utah App. 1994), this court held that the phrase "in aid of its jurisdiction" includes subject matter jurisdiction to issue necessary writs in cases that are within the court's appellate jurisdiction even if no appeal is pending. *Id.* at 681-82. On the same basis, we have jurisdiction over the petition in this case. Pursuant to section 78-2a-3(2)(a), this court has appellate jurisdiction over "the final orders and decrees resulting from formal adjudicative proceedings of state agencies . . . except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, Mining and the State Engineer." Because this court has appellate jurisdiction over the subject matter of the underlying agency action, and because UAPA does not divest the court's jurisdiction over extraordinary writ petitions, we hold that this court has jurisdiction over the instant petition.

V-1 Oil at 1094-95.

The same jurisdictional rationale applies here, where Gilley petitioned the district court for an order compelling the Department to reinstate her license. As in V-1, the district court should have recognized that UAPA did not foreclose Gilley's petition, which fell within the district court's broad general jurisdiction, provided in Utah Code Ann. § 78-3-4:

(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.

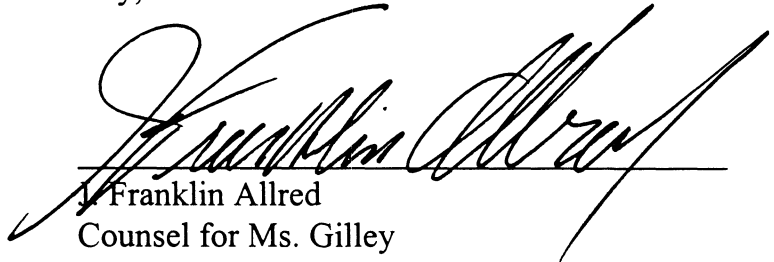
Applying the rationale of V-1 Oil, the district court should have recognized that under subsections (1) and (2) of its own jurisdictional statute, 78-3-4, the court had jurisdiction to issue a writ to compel the agency to reinstate Gilley's license. See V-1 Oil, *supra*. While there was no appeal pending prior to the filing of Gilley's petition, the district court still had the authority to issue the order by virtue of its general appellate jurisdiction over the agency's adjudicative proceedings under 7(a). Cf. V-1 Oil, *supra*.

### CONCLUSION

This Court should reverse the district court's dismissal order, and remand this matter to the district court with instructions that the district court should grant Ms. Gilley the relief sought because the Department never properly obtained jurisdiction to revoke her

license.

Dated this 20<sup>th</sup> day of February, 2002.

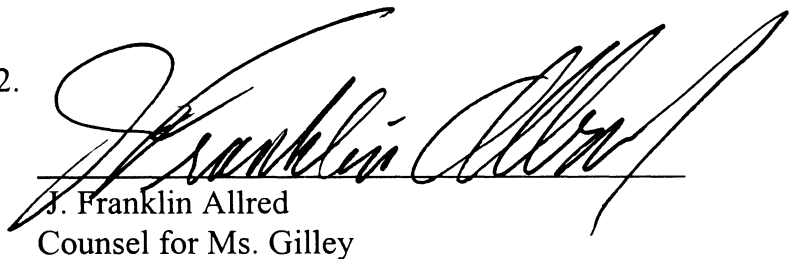
  
J. Franklin Allred  
Counsel for Ms. Gilley

Certificate of Mailing

I, J. Franklin Allred, counsel for Ms. Gilley, hereby certify that on the 21<sup>st</sup> day of February, 2002, I have caused to be mailed, first-class postage pre-paid, two true and correct copies of the foregoing document to:

Assistant Attorney General Rebecca Waldron  
160 East 300 South, 6<sup>th</sup> Floor  
PO BOX 140854, Salt Lake City, Utah  
84114-0854

Dated this 20<sup>th</sup> day of February, 2002.

  
J. Franklin Allred  
Counsel for Ms. Gilley

## ADDENDUM

## Constitutional Provisions Statutes and Rules

Constitution of Utah, Article I § 7

No person shall be deprived of life, liberty or property, without due process of law.

Constitution of Utah, Article I § 11

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

United States Constitution, Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code Ann. § 41-6-44.10(b)(2)

(b) Following the warning under Subsection (2)(a), if the person does not immediately request that the chemical test or tests as offered by a peace officer be administered a peace officer shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle. When the officer serves the immediate notice on behalf of the Driver License Division, he shall:

- (i) take the Utah license certificate or permit, if any, of the operator;
- (ii) issue a temporary license effective for only 29 days; and
- (iii) supply to the operator, on a form approved by the Driver License Division, basic information regarding how to obtain a hearing before the Driver License Division.

Utah Code Ann. § 63-46b-1(3)(a)

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

- (a) compel an agency to take action[.]

Utah Code Ann. § 63-46b-14(3)(a)

....

(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. § 78-3-4

(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.