

1992

# J. R. Scarth v. g. Barton Blackstock, Bureau Chief, Drivers License Division for the State of Utah : Brief of Appellant

Utah Court of Appeals

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J. R. Scarth; Pro Se Appellee.

Jan Graham; Utah Attorney general; Thom D. Roberts; Assistant Attorney General; Attorneys for Appellant.

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UTAH COURT OF APPEALS  
BRIEF

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920580-CA

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THE UTAH COURT OF APPEALS

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J. R. SCARTH,

Petitioner and  
Appellee,

v.

G. BARTON BLACKSTOCK, Bureau  
Chief, Drivers License  
Division for the State of  
Utah,

Respondent and  
Appellant.

\*  
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\*

BRIEF OF APPELLANT

Civil No. 920580-CA

---

APPEAL FROM THE FINAL JUDGMENT OF THE SIXTH  
JUDICIAL DISTRICT COURT, KANE COUNTY, THE  
HONORABLE DON B. TIBBS, PRESIDING.

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JAN 4 1993

Mary T. ...  
Clerk of the Court  
Utah

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THE UTAH COURT OF APPEALS

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J. R. SCARTH, \*  
\*  
Petitioner and \* **BRIEF OF APPELLANT**  
Appellee, \*  
\*  
v. \* Civil No. 920580-CA  
\*  
G. BARTON BLACKSTOCK, Bureau \*  
Chief, Drivers License \*  
Division for the State of \*  
Utah, \*  
Respondent and  
Appellant.

---

JURISDICTION

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

ISSUE PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Did the trial court improperly credit the time Petitioner's driving privileges were temporarily reinstated pending trial toward his 120-day suspension?

This is a question of law and the Court should accord no deference to the district court judgment and should review the matter on a "correctness" standard. State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991); Rollins v. Peterson, 813 P.2d 1156, 1159 (Utah 1991).

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 41-2-130(7) (1988):

(b) A second or subsequent suspension under this subsection is for a period of 120 days, beginning on the 31st day after arrest.

The statute has been recently amended, effective April 27, 1992, to require a one-year suspension for second and subsequent suspension. Utah Code Ann. § 41-2-130(7)(b) (Cum. Supp. 1992).

STATEMENT OF THE CASE AND RELEVANT FACTS

This appeal is from a portion of the final judgment and decree of the Sixth Judicial District Court, Kane County, the Honorable Don B. Tibbs presiding, involving the judicial review of an informal adjudicative proceeding of the Drivers License Division.

Petitioner sought judicial review of the administrative action of the respondent suspending Petitioner's driving privileges for a period of 120 days, commencing March 11, 1992, for driving or being in actual physical control of a motor vehicle while having a breath alcohol content above .08%. Verified Petition for Reinstatement of Drivers License, R. at 40. On April 20, 1992 Petitioner obtained an ex parte order reinstating his driving privileges pending judicial review. Temporary Order Reinstating Driving Privileges and drivers

license, R. at 38. After the June 25, 1992 hearing on judicial review, the trial court affirmed the 120-day suspension and immediately vacated its temporary order. However, the trial court included as part of the suspension period the time from April 20, 1992 through June 25, 1992, the time when the trial court had reinstated the Petitioner's driving privileges pending trial. See Order Affirming Suspension of Petitioner's Driving Privileges for a Period of 120 Days, Addendum Item B,R. at 5. Respondent has appealed that portion of the Order, claiming that the Petitioner is required by law to serve 120 days of actual suspension.

#### SUMMARY OF ARGUMENT

Petitioner is required to serve a period of 120 days of suspension of his driving privileges for driving or being in the actual physical control of the motor vehicle while having a breath alcohol content above .08%, since this was his second suspension within five years. Utah Code Ann. § 41-2-130(7) (1988). Pending trial in the district court, the Petitioner obtained temporary relief that reinstated his driving privileges, but that should not allow him substantive relief from the 120-day statutory suspension period. The court should not allow the days when the Petitioner's driving privileges were reinstated to count toward the 120 days of suspension.

### ARGUMENT

THE TRIAL COURT SHOULD NOT HAVE CREDITED TOWARD PETITIONER'S 120-DAY SUSPENSION THE DAYS WHEN HIS DRIVING PRIVILEGES WERE REINSTATED PENDING TRIAL.

The Petitioner's driving privileges were suspended by the Respondent pursuant to Utah Code Ann. § 41-2-130 (1988), for the reason that Petitioner had driven or been in actual physical control of a motor vehicle while having a breath alcohol content above .08 percent. Since this was his second suspension, the suspension period was 120 days. Utah Code Ann. § 41-2-130(7) (1988). Petitioner sought judicial review of the Suspension Order by way of a trial de novo in District Court. Utah Code Ann. § 41-2-131(1) (Supp. 1991).

As an action seeking to review the administrative order of the Respondent, this action was governed by the Utah Administrative Procedures Act, Utah Code Annotated § 63-46b-0.5 et seq. (Supp. 1992). Brinkerhoff v. Schwendiman, 790 P.2d 587 (Utah App. 1990). After filing the Petition, the Petitioner obtained an ex parte order entitled "Temporary Order Reinstating Driving Privileges and Driver's License," directing the Respondent to restore and return Petitioner's driving privileges to him "pending final determination in this cause." R. at 38 Respondent objected immediately to the ex parte proceedings and the order. R. at 20.

After the hearing on the merits of judicial review, the trial court indicated that it was ruling in favor of the Respondent Driver's License Division, affirming Petitioner's suspension, and immediately vacated the temporary order reinstating the driving privileges. Most important to this appeal, the trial court then directed that the suspension period would be 120 days commencing the 31st day after the arrest, and the suspension period would include the period when the trial court had reinstated and "stayed" the suspension order by the Respondent. R. 5, Order Affirming Suspension (Addendum Item B). Respondent here contends that the trial court erred in counting the period of time that Petitioner retained his license under the temporary order towards the 120-day period of suspension.

The Uniform Operator License Act, Utah Code Ann. § 41-2-130(7) (1988), provides that:

(7) A second or subsequent suspension under this section is for a period of one hundred twenty (120) days, beginning on the 31st day after the date of arrest.

The plain meaning of the statute is that the Petitioner should be required to serve a 120-day period of "suspension." "Suspension" is defined as:

the temporary withdrawal by action of the division of a licensee's privilege to operate a motor vehicle.

Utah Code Ann. § 41-2-102(28) (Supp. 1992). Thus, the period when his driving privileges were reinstated by the temporary court order should not count toward that period of suspension nor should he be entitled to credit for those days he was allowed to drive, as during that time he was not under "suspension."

Under the Utah Administrative Procedures Act, the court is authorized, in certain instances, to "grant a stay or other temporary remedy," pending judicial review. Utah Code Ann. § 63-46b-18 (Supp. 1992). Although not denominated as such, the temporary order granting the Petitioner driving privileges pending judicial review must be considered a "stay or other temporary remedy" pursuant to that section. A properly obtained stay should not grant, nor be allowed to grant, substantive relief from the administrative order, but should merely suspend enforcement of that order pending judicial review. See Reed v. Rhodes, 472 F. Supp. 603, 605 (D.C. Ohio 1979). When a court subsequently vacates the stay, the original order should be enforceable.

In this case, the trial court allowed the time when the Petitioner's driving privileges were temporarily returned to him pending trial to be counted toward his period of suspension. This was improper, as it allows the temporary order to grant substantive relief to the Petitioner, thereby shortening the

period of suspension by 66 days. The trial court should have entered its order affirming the suspension of the driving privileges of the Petitioner for a period of 120 days from the date of its order, allowing as a credit toward the period of suspension only the time spent on actual suspension, here 54 days. The Petitioner should be required to spend the statutory period of 120 days with his driving privileges suspended and not be allowed to drive for any of those 120 days.

CONCLUSION

It is respectfully submitted that this Court should reverse that portion of the Order of the district court giving credit toward the period of suspension when Petitioner's driving privileges were reinstated and direct the district court to order that the Petitioner's driving privileges be suspended for a period of 120 days commencing upon entry of the district court's new order, giving credit only for the number of days the Petitioner had previously spent on actual suspension.

Respectfully submitted this 4<sup>th</sup> day of January,  
1993.



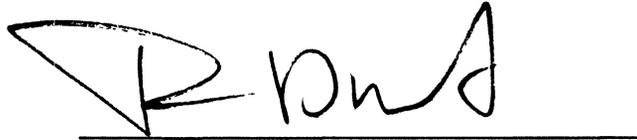
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THOM D. ROBERTS  
Assistant Attorney General  
Attorney for Respondent

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed two true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following this 4<sup>th</sup> day of January, 1993:

J. R. SCARTH, Pro Se Petitioner  
76 North Main  
Kanab, Utah 84741



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

ADDENDUM A

R. PAUL VAN DAM (3312)  
Attorney General  
THOM D. ROBERTS (2773)  
Assistant Attorney General  
Attorneys for Defendants  
236 State Capitol Building  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1016

---

IN THE SIXTH JUDICIAL DISTRICT COURT FOR KANE  
STATE OF UTAH

---

J. R. SCARTH,	*	
	*	
Petitioner,	*	
	*	<b>FINDINGS OF FACT AND</b>
vs.	*	<b>CONCLUSIONS OF LAW</b>
	*	
G. BARTON BLACKSTOCK, Bureau	*	
Chief, Drivers License	*	Civil No. 920600020
Division for the State of	*	
Utah,	*	Judge Don V. Tibbs
Respondent.	*	

---

The above entitled matter having come on regularly for hearing on Thursday, June 25, 1992, the Honorable Don V. Tibbs, District Court Judge, presiding, Petitioner appearing in person and representing himself, and the Respondent appearing through counsel, Thom D. Roberts, Assistant Attorney General, and the proceedings being held in the District Court in and for Sevier County, by prior agreement and stipulation of the parties, and the Court having heard the evidence offered by the parties, arguments on their behalf, and being fully advised in the premises, hereby makes and enters its:

## FINDINGS OF FACT

1. That shortly after midnight on February 10, 1992, the Petitioner was in actual physical control of a motor vehicle in Kanab City, Kane County, State of Utah.

2. That at that time, the vehicle was apparently "hung up" and stuck in a ditch at the side of the road, that the car lights were on, the engine running, the transmission engaged, and the rear wheels spinning. The Petitioner was in the driver's seat and was in control of the vehicle.

3. That Officer Doug Crosby of the Kanab City Police approached the vehicle because the car and/or driver appeared to be in difficulty and to ascertain the nature of the problem.

4. Upon approaching the vehicle and making contact with the Petitioner, the officer noticed an odor of alcohol and other indications of intoxication and asked the Petitioner if he would perform some field sobriety tests. The Petitioner agreed and performed and/or attempted to perform the field sobriety tests, generally in an unsatisfactory manner.

5. Based upon the officer's observations of the Petitioner, he reasonably concluded and had probable cause to believe and believed that the Petitioner had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol to a degree which rendered him incapable of

safely operating a motor vehicle, and therefore placed the Petitioner under arrest for driving under the influence.

6. That after placing Petitioner under arrest, the officer reasonably requested that the Petitioner submit to a breath test, which the Petitioner agreed to perform.

7. That for a period in excess of 15 minutes prior to the breath test, the officer had the Petitioner under constant observation, and for that period of time Petitioner consumed no food or drink or otherwise put or had anything in his mouth.

8. That the officer properly operated the machine, following the approved operational checklist and complied with all matters pursuant to his training to insure a proper test result.

9. That the calibration and testing for the accuracy of the intoxilyzer were performed in accordance with the standards established by the Commissioner of Public Safety, and that the affidavits regarding the machine were prepared in the regular course of the public officer's duty, that they were prepared contemporaneous with the act, condition or event described therein, and that the source of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness.

10. That the results of the intoxilyzer on the Petitioner accurately reflected his breath alcohol content.

11. That the intoxilyzer results and the breath alcohol concentration of the Petitioner were .17 percent.

12. That the officer, after filling out the paperwork, personally served upon the Petitioner a DUI summons and citation and the notice, on behalf of the Driver License Division, of the Division's intent to suspend the driving privileges of the Petitioner.

13. At the time of officer's initial observance of the Petitioner in the vehicle, the Petitioner was under the influence of alcohol to a degree which rendered him incapable of safely operating a motor vehicle.

The Court, having heretofore made and entered its Findings of Fact, now hereby makes and enters its:

#### CONCLUSIONS OF LAW

1. That the Petitioner was lawfully arrested for driving under the influence of alcohol.

2. That the driving privileges of the Petitioner were subject to suspension based upon his driving or being in actual physical control of a motor vehicle while under the influence of alcohol to a degree which rendered him incapable of safely operating a motor vehicle, and based upon his driving or being in actual physical control of a motor vehicle with a breath alcohol content in excess of .08 percent.

3. That this Court should enter an order affirming the suspension of the driving privileges of the Petitioner for a period of 120 days, and make its own order to such an effect.

DATED this 3 day of AUGUST, 1992.

BY THE COURT:

  
\_\_\_\_\_  
DON V. TIBBS  
District Court Judge

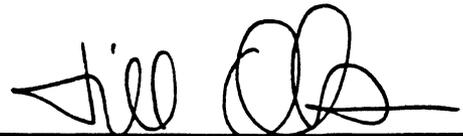
Approved as to Form:

  
\_\_\_\_\_  
J. R. SCARTH  
Petitioner Pro Se

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to the following this 8<sup>th</sup> day of July, 1992:

J. R. SCARTH, Pro Se Petitioner  
76 North Main  
Kanab, Utah 84741

  
\_\_\_\_\_

ADDENDUM B

R. PAUL VAN DAM (3312)  
Attorney General  
THOM D. ROBERTS (2773)  
Assistant Attorney General  
Attorneys for Defendants  
236 State Capitol Building  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1016

---

IN THE SIXTH JUDICIAL DISTRICT COURT FOR KANE  
STATE OF UTAH

---

J. R. SCARTH,	*	
	*	
Petitioner,	*	
	*	ORDER AFFIRMING SUSPENSION OF
vs.	*	PETITIONER'S DRIVING
	*	PRIVILEGES FOR A PERIOD OF
G. BARTON BLACKSTOCK, Bureau	*	120 DAYS
Chief, Drivers License	*	
Division for the State of	*	
Utah,	*	Civil No. 920600020
Respondent.	*	
		Judge Don V. Tibbs

---

The above entitled matter having come on regularly for hearing on Thursday, June 25, 1992, the Honorable Don V. Tibbs, District Court Judge, presiding, Petitioner appearing in person and representing himself, and the Respondent appearing through counsel, Thom D. Roberts, Assistant Attorney General, and the proceedings being held in the District Court in and for Sevier County, by prior agreement and stipulation of the parties, and the Court having heard the evidence offered by the parties, arguments on their behalf, and being fully advised in the premises, and the Court having previously entered the Findings of

Fact and Conclusions of Law and being fully advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED that the decision of the Respondent suspending the driving privileges of the Petitioner for a period of 120 days, commencing March 11, 1992, shall be and is hereby affirmed; it is further

ORDERED, ADJUDGED AND DECREED that the previously entered Temporary Order Reinstating Driving Privileges and Drivers License was vacated at the conclusion of the hearing in this case on June 25, 1992, and is of no further force and effect; and it is further

ORDERED, ADJUDGED AND DECREED that the period during which the order of suspension by the Respondent was stayed and of no force and effect pursuant to the above-mentioned Temporary Order Reinstating Driving Privileges and Drivers License, consisting of the period from April 20, 1992 up to and including June 25, 1992, does not alter or effect the period of suspension, and that therefore the period of suspension shall expire 120 days after March 11, 1992, which is July 9, 1992; and that therefore on and after July 10, 1992, Petitioner shall be entitled to apply for reinstatement and obtain reinstatement of his driving

privileges, should he otherwise so qualify.

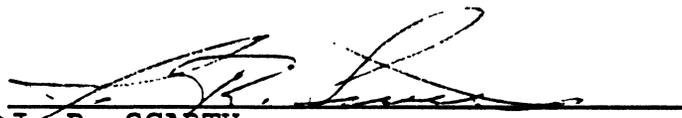
DATED this 3<sup>rd</sup> day of August, 1992.

BY THE COURT:

S/

\_\_\_\_\_  
DON V. TIBBS  
District Court Judge

Approved as to Form:



\_\_\_\_\_  
J. R. SCARTH  
Petitioner Pro Se

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true and correct copy of the foregoing ORDER AFFIRMING SUSPENSION OF PETITIONER'S DRIVING PRIVILEGES FOR A PERIOD OF 120 DAYS to the following this 8<sup>th</sup> day of July, 1992:

J. R. SCARTH, Pro Se Petitioner  
76 North Main  
Kanab, Utah 84741

