

1983

## American Fork City v. Louis L. Cosgrove : Respondent's Brief

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Sheldon R. Carter; Attorney for Appellants

---

### Recommended Citation

Brief of Respondent, *American Fork v. Cosgrove*, No. 19174 (1983).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/4100](https://digitalcommons.law.byu.edu/uofu_sc2/4100)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

--ooo0ooo--

AMERICAN FORK CITY, :  
Plaintiff/Respondent, :  
vs. : Case No. 19174  
LOUIS L. COSGROVE, :  
Defendant/Appellant. :

--ooo0ooo--

RESPONDENT'S BRIEF

--ooo0ooo--

Appeal from the Fourth Judicial District Court  
in and for Utah County, State of Utah  
Honorable David Sam, Judge

--ooo0ooo--

ROLLIN THORLEY  
HARDING & HARDING  
306 West Main Street  
American Fork, Utah 84003  
Telephone: 756-7658

Attorney for Respondent

SHELDEN R. CARTER  
YOUNG, HARRIS & CARTER  
350 East Center Street  
Provo, Utah 84601  
Telephone: 375-9801

Attorney for Appellant

**FILED**

AUG 30 1983

Clerk, Supreme Court, Utah



## TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE . . . . .	1
DISPOSITION IN THE LOWER COURTS . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS. . . . .	1
ARGUMENT:	
I. DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN HE WAS ASKED TO PERFORM THE FIELD SOBRIETY TESTS . . . . .	2
II. BECAUSE DEFENDANT VOLUNTARILY TOOK THE BREATHALYZER TEST, HE WAS NOT COMPELLED TO GIVE EVIDENCE AGAINST HIMSELF . . . . .	3
III. PERFORMING FIELD SOBRIETY TESTS AND TAKING THE BREATH TEST DO NOT CONSTITUTE "GIVING EVIDENCE AGAINST ONESELF" AS PROSCRIBED BY THE UTAH CONSTITUTION . . . . .	4
SUMMARY . . . . .	5

## CASES CITED

<u>Cavaness v. Cox</u> , 598 P.2d 349 (Utah 1979) . . . . .	3
<u>Hansen v. Owens</u> , 619 P.2d 315 (Utah 1980) . . . . .	3,4,5
<u>Salt Lake City v. Carner</u> , 664 P.2d 1168 (Utah 1983) . . . . .	2,4
<u>State v. VanDam</u> , 554 P.2d 1324 (Utah 1976) . . . . .	5

## STATUTES CITED

Utah Code Annotated, Section 41-6-44.10 . . . . .	3
Utah State Constitution, Article I, Section 12 . . . . .	2

IN THE SUPREME COURT OF THE STATE OF UTAH

--ooo0ooo--

AMERICAN FORK CITY, :  
Plaintiff/Respondent :  
vs. : Case No. 19174  
LOUIS L. COSGROVE, :  
Defendant/Appellant. :

--ooo0ooo--

STATEMENT OF THE NATURE OF THE CASE

Defendant was convicted for driving under the influence of alcohol, and alleges on appeal that results of a breathalyzer test should have been suppressed and that his conviction should be reversed.

DISPOSITION IN THE LOWER COURT

The Fourth Judicial District Court for Utah County sustained the conviction from the Circuit Court for Utah County, State of Utah, American Fork Department.

RELIEF SOUGHT ON APPEAL

Respondent asks that the decision of the lower courts be affirmed.

STATEMENT OF FACTS

Respondent agrees with the statement of facts set forth in Appellant's Brief.

## ARGUMENT

### I. DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN HE WAS ASKED TO PERFORM THE FIELD SOBRIETY TESTS.

Section 12 of Article I of the Utah Constitution provides that ". . . the accused shall not be compelled to give evidence against himself . . ." In the instant case, the Defendant was requested to perform field sobriety tests after being stopped while driving within the City of American Fork. The tests are offered to give the officers an opportunity to further examine the driver of a vehicle to determine if the driver is impaired through the consumption of alcohol. The tests are not required. If a driver refuses to take the test, the officers are left with the driving pattern and other evidence to determine whether the driver should be placed under arrest. The evidence produced at trial showed only that the Defendant was requested to perform the test and that he did so. There was no evidence presented at the trial that any force was exerted upon the Defendant other than the officer's request.

The facts in this case are similar to those in Salt Lake City v. Carner, 664 P.2d 1168 (Utah 1983).

Defendant was requested and he agreed, both verbally and by attempts at compliance, to perform the field sobriety tests. No facts indicate that he was forced, coerced, or intimidated into performing them. Rather, it appears that he performed them voluntarily. We therefore hold the Defendant was not "compelled to give evidence against himself" in violation of our state constitution. Salt Lake City v. Carner, supra, at 1172.

II. BECAUSE DEFENDANT VOLUNTARILY TOOK THE  
BREATHALYZER TEST, HE WAS NOT COMPELLED  
TO GIVE EVIDENCE AGAINST HIMSELF.

Any person operating a motor vehicle in the State of Utah is deemed to have consented to a chemical test of his blood or breath for the purpose of determining the alcoholic content of his blood. Utah Code Annotated, Section 41-6-44.10, as amended. This "implied consent" is a condition for receiving the privilege to drive within the State of Utah.

If a driver refuses a breath test, he is advised that such refusal constitutes a violation of the implied consent law and his driving privilege in this state will be revoked. No further force is exerted. The driver is left with the choice of complying with the conditions of his driving privilege and taking the test or refusing the test and having his driving privileges terminated. The revocation of a driver's license for a refusal to submit to a breath test is a civil action and not a criminal penalty. See Cavaness v. Cox, 598 P.2d 349 (Utah 1979).

In the present case, the police officer, after having reasonable grounds to believe the Defendant had been driving in an intoxicated condition, requested the Defendant to take a breath test. The Defendant initially refused the test, but after being advised of the implied consent law, agreed to submit to the test.

This case can be distinguished from Hansen v. Owens, 619 P.2d 315 (Utah 1980), in which this Court held that a court order directing the Defendant to submit a handwriting sample for use in connection with forgery charges against him violated his

constitutional right "to not be compelled to give evidence against himself." In Hansen, supra, the Defendant was compelled to give evidence against himself by order of the court. In the present case, Defendant volunteered to take the breath test after being advised of the implied consent law.

At no time was Defendant physically forced to take the breath test. If he still refused to take the test after being informed of the implied consent statute, the only sanctions imposed would be civil in nature, resulting from the Defendant's refusal to abide by the terms under which he has been granted the privilege to drive. Being advised that his driver's license would be revoked if he did not take the breath test did not "compel" the Defendant to take the test in violation of his constitutional rights.

"[T]here is no violation of constitutional rights if one voluntarily gives evidence against oneself." Sale Lake City v. Carner, supra, at 1170. Because Defendant voluntarily submitted to the breathalyzer test, he was not "compelled to give evidence against himself" as prohibited by the Utah Constitution.

III. PERFORMING FIELD SOBRIETY TESTS AND TAKING  
THE BREATH TEST DO NOT CONSTITUTE "GIVING EVIDENCE  
AGAINST ONESELF" AS PROSCFIBED BY THE UTAH CONSTITUTION.

Appellant relies on Hansen v. Owens, supra, to support his theory that his performance of the field sobriety tests and the breathalyzer test required him to give evidence against himself. As mentioned above, Hansen involved a court order to give handwriting samples in connection with a forgery charge against the Defendant. In Hansen, the Utah Supreme Court stated:



. . . we note that this case goes beyond making observations or comparisons of an accused's appearance, or of his body, or his parts, or substances obtained therefrom. We do not mean this decision to be understood as going beyond its particular facts. Hansen v. Owens, supra, at 317, (emphasis added).

This Court has previously held that it is not a violation of the Defendant's constitutional rights to be required to provide real or physical evidence, such as hair samples, against himself. State v. VanDam, 554 P.2d 1324 (Utah 1976). Because the field sobriety tests and breath test only involved observations of and substances obtained from Defendant's body and because the holding in Hansen v. Owens, supra, is limited to its particular facts, Defendant was not "compelled to give evidence against himself" in violation of the Utah Constitution.

#### SUMMARY

Because Defendant's performance of the field sobriety tests and breathalyzer test were done voluntarily, Defendant was not "compelled to give evidence against himself." Even if Defendant was compelled to take the tests, they did not result in the type of evidence protected by Article I, Section 12 of the Utah Constitution.

DATED this \_\_\_\_\_ day of August, 1983.

HARDING & HARDING  
ATTORNEYS AT LAW

  
ROLLIN THORLEY  
Attorney for Plaintiff/Respondent

MAILING CERTIFICATE

I hereby certify that I mailed a true and accurate copy of  
the foregoing RESPONDENT'S BRIEF, in a postage prepaid envelope, on  
this 21<sup>st</sup> day of August, 1983, to:

SHELDEN R. CARTER  
Attorney for Defendant/Appellant  
350 East Center Street  
Provo, Utah 84601

Sheldon R. Carter  
SECRETARY