

1992

Layne W. Stephens v. State of Utah, Department of Public Safety, Drivers License Division : Brief of Appellant

Utah Court of Appeals

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Thom D. Roberts; Assistant Attorney General; Attorney for Defendant/Respondent.

D. Bruce Oliver; Attorney for Plaintiff/Appellant.

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BRIEF

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DOCKET NO. 920205CA IN THE UTAH COURT OF APPEALS

LAYNE W. STEPHENS,

Plaintiff/Appellant

vs.

STATE OF UTAH, Department
of Public Safety, Drivers
License Division,

Defendant/Respondent.

:

APPELLANT'S BRIEF

:

:

Appeal No. 920205-CA

: Priority No. 14

APPELLANT'S BRIEF

Appeal from the Judgment of the
Second District Court,
Davis County, State of Utah,
The Honorable Douglas L. Cornaby

D. BRUCE OLIVER #5120
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1218
Telephone: (801) 328-8888
Attorney for Plaintiff/Appellant

THOM D. ROBERTS
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Telephone: (801) 538-1016
Attorney for Defendant/Respondent

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236 State Capitol Building
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Telephone: (801) 538-1016
Attorney for Defendant/Respondent

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Utah Code Annotated 26-1-30 (19)

D. Bruce Oliver #5120
Attorney for Plaintiff/Appellant
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1218
Telephone: (801) 328-8888

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STATE OF UTAH, Department
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APPELLANT'S BRIEF

Appeal No. 920205-CA
Priority No. 2

STATEMENT OF JURISDICTION

The specific statutory authority that confers jurisdiction upon the Utah Court of Appeals is Utah Code Annotated Section 78-2a-3 (2) (a).

NATURE OF PROCEEDINGS

This is an appeal from a decision by the district court on a trial de novo resulting from an administrative hearing on the revocation of the Plaintiff/Appellant's driver's license for refusing to submit to a chemical test after having been arrested for Driving Under the Influence.

STATEMENT OF THE ISSUES

POINT I

Does Utah Code Annotated 41-6-44.10 allow the individual being arrested to request medical personnel to administer the test when

they are available to do so and it would not delay the administration of the test as requested by the police officer?

POINT II

Does Utah Code Annotated 41-6-44.10 (5) allow any one other than those specified therein and in Utah Code Annotated 26-1-30 (19) to draw blood for a DUI and since there is no such Section as Utah Code Annotated 26-1-30 (19) are the only persons who can administer the blood test those specifically enumerated in Utah Code Annotated 41-6-44.10 (5)?

DETERMINATIVE CONSTITUTIONAL PROVISIONS OR STATUTES

Utah Code Annotated Section 41-6-44.10 (5) (a) (1953 as amended).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from a bench trial in the Second Judicial District Court of Davis County, which was a trial de novo from an administrative hearing held by the Driver's License Division.

II. COURSE OF PROCEEDINGS

The Plaintiff/Appellant was arrested for DUI on November 28, 1991. A hearing to determine whether or not to revoke his drivers license was held and a suspension became effective on December 26, 1991. An appeal for a trial de novo was filed and the trial de novo was held on February 26, 1992. This appeal followed.

III. DISPOSITION AT TRIAL COURT

At the trial Court the Court sustained the action of the Driver's License Department and continued the revocation of the Plaintiff/Appellant's license.

IV. STATEMENT OF THE FACTS

On November 28, 1991 the Plaintiff/Appellant was involved in an automobile accident in Layton City. After the officer arrived, it was suspected that the Plaintiff/Appellant was operating a vehicle while under the influence of alcohol. He was arrested for Driving Under the Influence of Alcohol and subsequently transported to the hospital by ambulance. At the hospital the police officer requested that the Plaintiff/Appellant submit to a blood test to determine the alcoholic content of his blood. The Plaintiff/Appellant request that a physician or nurse perform the test. The officer refused to allow either of them to perform the test and subsequently called a paramedic from the Davis County Sheriff's Office to respond to perform the blood draw. When the Plaintiff/Appellant continued to request a physician or nurse the officer submitted a refusal to take the test to the Drivers License Department.

SUMMARY OF THE ARGUMENT

When the police arrested the Plaintiff/Appellant in this matter the only people who were authorized by law to draw blood for purposes of determining the alcohol and or drug content of a persons blood was a physician, registered nurse, and a practical nurse. When the police officer requested another person, other than one of these three, he was not with in his authority under the statute. The Plaintiff/Appellant's request that a physician or nurse perform the test complied with the statute and as such his license should not have been revoked.

ARGUMENT

POINT I

Does Utah Code Annotated 41-6-44.10 allow the individual being arrested to request medical personnel to administer the test when they are available to do so and it would not delay the administration of the test as requested by the police officer?

Utah Code Annotated Section 41-6-44.10 (1) (a) (b) and (c) states:

(a) A person operating a motor vehicle in this state is considered to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, if the tests are administered at the direction of a peace officer having the grounds to believe that person to have been operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44.

(b) The peace officer determines which of the tests are administered and how many of them are administered, except that the officer shall request that either a blood or urine test be administered under Section 76-5-207. If an officer requests more than one test, refusal by a person to take one or more requested tests, even though he does submit to any other requested test or tests, is a refusal under this section.

(c) A person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine may not select the test or tests to be administered...

This provision of the Statutes provides that the officer may select the type of test to be administered, not the person to administer the test. When the request is made at the emergency room and there

are qualified medical personnel available it is not unreasonable for an individual to request that a physician or a registered nurse perform the blood test. The statute does not prohibit the arrested individual from selecting the person to administer the test. The statute does not give the officer the latitude to exclude authorized persons from performing the blood test.

POINT II

Does Utah Code Annotated 41-6-44.10 (5) allow any one other than those specified therein and in Utah Code Annotated 26-1-30 (19) to draw blood for a DUI and since there is no such Section as Utah Code Annotated 26-1-30 (19) are the only persons who can administer the blood test those specifically enumerated in Utah Code Annotated 41-6-44.10 (5)?

This is a case where there was an automobile accident and one of the drivers was subsequently arrested and charged with Driving Under the Influence of Alcohol (hereinafter DUI). The basic question before this Court is to determine if the Plaintiff/Appellant refused to submit to a chemical test as requested by the arresting officer. An important question, the answer to which will aid this Court in arriving at a decision herein is, "Whether an officer may request a person to submit to a chemical test for which he has no authority to request and the refusal thereto is a refusal to submit to a chemical test as anticipated by the Statute?" Utah Code Annotated Section 41-6-44.10 (5) (a) (1953 as amended) provides:

Only a physician, registered nurse, practical nurse, or person authorized under Subsection 26-1-30(19), acting at the request of a peace officer, may draw blood to determine the alcoholic or drug content. This limitation does not apply to the taking of a

urine or breath specimen.

The legislature has specifically limited the persons who may draw blood for the purposes of determining the alcoholic and or the drug content of a persons blood when that person has been charged with DUI in the State of Utah. This provision provides that "Only a physician, registered nurse, practical nurse or person authorized under Subsection 26-1-30 (19)" and then places the requirement that said person must be acting at the request of a police officer may draw blood for DUI.

Subsection 26-1-30 (19) did not exist at the time of the arrest of the Plaintiff/Appellant and the exchange which took place in this case. Therefore the only persons who were authorized by the legislature to draw blood for DUI was a physician, registered nurse and a practical nurse. The plaintiff/Appellant requested that either a physician or a nurse perform a blood draw. This was refused by the police officer. The police officer chose a paramedic to perform the blood draw. This was not an option available to the officer at the time of this incident. The officer was not familiar with the law and consequently the Plaintiff/Appellant was prejudiced by the conduct of the officer. The Plaintiff/Appellant did not refuse to take a test but rather made a specific request that the test be performed in accordance with the statutory provisions. This was not a refusal and the action against his license should not be allowed to stand and indeed should be set aside.

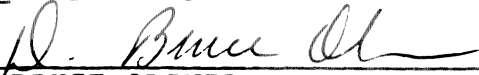
The statutory provisions are very specific and unambiguous.

They were placed there by the legislature to be followed and as such the officer was without authority to make the request for the blood draw that he made. His request was extra-authority and as such should not be ratified by this Court.

CONCLUSION

The officer was without authority to demand that a paramedic perform the blood draw. The only persons who could perform the blood draws were a physician, registered nurse, and a practical nurse. The Plaintiff/Appellant did not refuse to submit to a chemical test, but rather, requested the proper test be administered.

RESPECTFULLY SUBMITTED this 19 day of April, 1993.



D. BRUCE OLIVER
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing
APPELLANT'S BRIEF to THOM D. ROBERTS, Assistant Attorney General
236 State Capitol Building, Salt Lake City, Utah 84114 this 19
day of April, 1993.

P. Bruce

A D D E N D U M

Utah Code Annotated Section 41-6-44.10 (1) (a)(b)(c)

(a) A person operating a motor vehicle in this state is considered to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, if the tests are administered at the direction of a peace officer having the grounds to believe that person to have been operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44.

(b) The peace officer determines which of the tests are administered and how many of them are administered, except that the officer shall request that either a blood or urine test be administered under Section 76-5-207. If an officer requests more than one test, refusal by a person to take one or more requested tests, even though he does submit to any other requested test or tests, is a refusal under this section.

(c) A person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine may not select the test or tests to be administered...

Utah Code Annotated Section 41-6-44.10 (5) (a) (1953 as amended)

Only a physician, registered nurse, practical nurse, or person authorized under Subsection 26-1-30(19), acting at the request of a peace officer, may draw blood to determine the alcoholic or drug content. This limitation does not apply to the taking of a urine or breath specimen.