1984

Barlen R. Collier v. Fred C. Schwendiman, Chief Driver License Services, Department of Public Safety For The State of Utah : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

HARLEN R. COLLIER, Petitioner, vs. FRED C. SCHWENDIMAN, CHIEF Driver License Services, Department of Public Safety for the State of Utah, Respondent.	)	Case No. 19379

BRIEF OF RESPONDENT

ANSWER TO AN APPEAL FROM A JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY STATE OF UTAH, HONORABLE RICHARD C. DAVIDSON, JUDGE

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STATEMENT OF THE NATURE OF THE CASE

Appellant's Utah driving privileges were revoked under Utah Code Ann. § 41-6-44.10 (1953) as amended in 1981, because he refused to submit to a chemical test of his breath when requested to do so by a police officer.

DISPOSITION IN LOWER COURT

A hearing before the Department of Public Safety, Driver License Division, was held on May 9, 1983. Appellant petitioned the District Court of the Seventh Judicial District in and for Uintah County, State of Utah, for review pursuant to Utah Code Ann. § 41-6-44.10(b). After a trial de novo on June 16, 1983, the Seventh Judicial District Court denied Appellant's petition.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the decision of Judge Richard C. Davidson of the Seventh Judicial District Court, Uintah County, State of Utah.

FACTS

The uncontroverted and undocumented facts are that On April 12, 1983, appellant was arrested by Officer Lynn L. Hooper of the Vernal City Police Department for violation of Utah Code Ann. § 41-6-44, driving under the influence of alcohol ("DUI"). Sergeant Laursen, also of the Vernal City Police Department, assisted in the arrest. Appellant was admittedly intoxicated and was unable to perform simple field sobriety tests. Upon arrest, appellant was transported to the Vernal City Police Department where Officer Hooper requested that appellant submit to a breath test on an intoxilizer. Appellant refused. (Transcript and Appellant's Brief.)

Officer Hooper in his police report reported that appellant was totally uncooperative and abusive during the entire episode. He used abusive language and threatened to cause Orficer Hooper to lose his job by talking to various higher authorities including Governor Matheson. Appellant told Officer Hooper that if Officer Hooper wrote any of this in his report, appellant would deny it.

After appellant refused to submit to the breath test, the implied consent statute, Utah Code Ann. § 41-6-44.10, was

explained to him. He was again asked to submit to the test. Again, he refused. This process was repeated a number of times. Appellant informed Officer Hooper "that he could go to hell."

ISSUE

Because there is no question that appellant was intoxicated and that he refused to submit to the test offered, the only possible issue before this Court on appeal is whether the test offered (but refused) satisfied the requirements of Utah Code Ann. § 41-6-44.10. Respondent argues that in a refusal fact situation, the type of test is not an issue but also, obviously, that the intoxilizer test meets the intent of the statute.

POINT I

APPELLANT'S REFUSAL TO TAKE A BREATH TEST IS A VIOLATION OF UTAH CODE ANN. § 41-6-44.10

The issue before Department of Safety Hearing Officer C. Niels Nielson was simply whether appellant had refused a chemical test offered to him pursuant to Utah Code Ann. § 41-6-44.10. The same issue was before the Seventh Judicial District Court. Neither the Department nor the court erred in finding that appellant had refused.

Appellant argues that no "chemical test" was offered, because an intoxilizer test for chemicals in the blood is not a chemical test. This argument must fail regardless of whether

or not an intoxilizer is technically a "chemical test."

Utah Code Ann. § 41-6-44.10 (1953), as applicable at the time or the arrest, provided in part:

> (a) Any person operating a motor vehicle in this state shall be deemed 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 driving or in actual physical control of a motor vehicle while under the influence of alcohol, . . . A peace officer shall determine which of the aforesaid tests shall be administered.
>
> No person, who has been requested pursuant to this section to submit to a chemical test or tests of his breath, blood, or urine, shall have the right to select the test or tests to be administered. The failure or inability of a peace officer to arrange for any specific test shall not be a defense to taking a test requested by a peace officer nor be a defense in any criminal, civil or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.
>
> (b) If such person has been placed under arrest and has thereafter been requested by a peace officer to submit to any one or more of the chemical tests provided for in subsection (a) of this section and refuses to submit to such chemical test or tests, such person shall be warned by a peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of his license to operate a motor vehicle. . . .

From the record it is clear that appellant was offered a breath test and refused. It is not clear, however, what test was offered. Appellant admits that a breathalyzer, as opposed to an intoxilizer, is a valid chemical test. Officer Hooper's report states at one point that an intoxilizer test was offered. At another point, his report identified the

test offered as a breathalyzer. Although the record is not explicit on this point, it is safe to assume from the testimony of this proceeding and the arguments of counsel that had appellant submitted to a test, an intoxilizer test would have been given to him. This fact, however, is irrelevant to the determination of whether a chemical test was offered to, and refused by, appellant.

The inconsistency in Officer Hooper's report is most likely due to lack of language, rather than volition. It is unlikely that Officer Hooper perceived a difference between the terms intoxilizer and breathalyzer. The terms are used synonymously by most people. Indeed, this court has not made a distinction between the two. For example, in Holman v. Cox, 598 P.2d 1331 (Utah 1979), in dealing with a test refusal issue, this court identified the test offered simply as a "breath test." In Powell v. Cox, 608 P.2d 239 (Utah 1980), this court identified the test offered as a "breathalyzer" test. Id. at 239. The language used does not matter since appellant's witness testified that intoxilizers had been in use at least as early as 1975. (R. 20)

There is no difference between a "chemical test" and a test or the "chemicals in the blood" -- the purpose and intent of the statute. An intoxilizer is a "chemical test" intended by the statute anyway. It is unlikely that appellant knew the difference.

There is absolutely nothing in the record to support the view that appellant refused because he reasonably believed that no "chemical test" had been offered. Appellant only transcribed one witness's testimony. (R. 20) Further, appellant was simply offered "a breath test," and the court found that appellant refused to submit to any test of any kind. The statute clearly states that "[t]he failure or inability of a peace officer to arrange for any specific test shall not be a defense. . . ." (Emphasis added.) The Utah implied consent statute clearly directs that a test "or tests" is to be given at "the direction of a peace officer" who has grounds to believe and clearly directs that the peace officer shall be the one to "determine which of the aforesaid tests shall be administered." The legislature even went further and added a paragraph stating that "no person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine, shall have the right to select the test or tests to be administered." As well, the legislature added that "the failure or inability of a peace officer to arrange for any specific test is not a defense with regard to taking a test requested by a peace officer . . ." clearly showing a legislative intent that an individual could not equivocate, stall or argue by attempting to specify what type or test may or may not be given. (Utah Code Ann. § 41-6-44.10(1)) The legislature clearly showed this kind of intent

and as this Court has stated, the statute should be construed in a fashion to make its application practicable, and to enable an officer to deal realistically with arrested drivers who may be uncooperative, and even hostile." Justice Stewart in Beck v. Cox, 597 P.2d 1335, 1337 (1979).

This legislative intent is still further exemplified in subparagraph (2), where the legislature again states that after a warning, unless the person immediately requests the chemical test or tests "as offered by a peace officer be administered, no test shall be given . . ." Utah Code Ann. § 41-6-44.10(2) In addition, this Court clearly held in Cavaness v. Cox, 598 P.2d 349 (Utah 1979), that the defense of "reasonable refusal" is not available and a simple "yes" or "no" answer is required. Id. at 352. Therefore, Judge Richard C. Davidson was correct in ruling that the issue before the court was whether or not appellant refused, and that appellant had, in fact, refused. Based on the Record this Court can only affirm that holding.

POINT II

AN INTOXILIZER IS A CHEMICAL TEST WITHIN THE LOGICAL MEANING OF UTAH CODE ANN. § 41-6-44.10

Appellant alleges that because no chemical reaction is involved in the intoxilizer analysis, (which by definition may not be true), the intoxilizer test is not a "chemical test" within the meaning of the statute. This kind of narrow reading of the statute is illogical and contrary to the intent and

purpose of the statute. Other courts that have considered this question have uniformly rejected the argument that no chemical test is involved simply because no chemical reaction takes place.

The earliest decision on the subject came from the Superior Court of Delaware in 1973. In State v. Moore, 307 A.2d 548 (Del.Super. 1973), the court was faced with the question of whether an intoxilizer test gave a "chemical analysis" within the terms of a statute similar to the Utah statute in question in this case. (The Utah statutes do not use the language "chemical analysis".) The court stated: "The defendant seems to contend that the phrase 'chemical analysis' means an analysis made with chemicals. However, I gather that the phrase does not have so narrow a meaning." Id. at 549. The court found that the phrase related to an examination of the component parts of a chemical substance by any means and logically concluded, "the test in question is a 'chemical analysis' regardless of the fact that the procedure is purely mechanical." Id.

In City of Dayton v. Schenck, 63 Ohio Misc. 14, 409 N.E.2d 284 (1980), the Municipal Court of Dayton, Ohio, was faced with this same issue. In finding the defendant's definition of chemical test "far too narrow," the court noted that the scientific world accepts physical tests as reliable

for the purpose of chemical analysis. Therefore, the court held that "the phrase 'chemical analysis' is used quite commonly to include tests for identifying chemical compounds by their physical properties, as the intoxilizer does." Id. at 16, 286.

A similar result was reached by the Oregon Court of Appeals in the case of State v. Dorsey, 58 Or.App. 521, 648 P.2d 1304 (1982).

Each of these cases were decided on statutes basically similar to the Utah statutes. The "chemical analysis" language is found in Utah Code Ann. § 41-6-44. The "chemical test" language is found in Utah Code Ann. § 41-6-44.10. The statutes in the states involved in the above cases are similarly worded. Compare, for example, the Oregon statutes involved in Dorsey and in State v. Wardrip, 55 Or.App. 117, 637 P.2d 219 (1981), with the Utah statutes. While most of the cases have relied on the "chemical analysis" language, there is absolutely no indication that the broader language, "chemical test", would require a different result. Indeed, all of the courts seem to use the terms interchangeably.

In another recent case of People v. Jones, 118 Misc.2d 687, 461 N.Y.S.2d 962 (Albany County Ct. 1983), the Albany County Court rested its decision directly on "chemical test" language. The case involved the question of whether the

Intoximeter 3000, a highly sophisticated intoxilizer device, was included in the statutory language, "chemical test," even though no chemical reaction was involved. In a scholarly discussion, the court noted the scientific principles upon which the Intoximeter operates and also weighed the professional acceptance and use of the machine. In rejecting the claim that the Intoximeter did not meet the terms of the statute because no chemical "reaction" was involved, the court stated:

> The position advanced by defendant seeks to restrict the meaning of "chemical test" to a process more appropriately called a chemical reaction. There is no authority in the law to require defendant's interpretation. Furthermore, to adopt the defendant's position would be to bind inflexibly the administration of justice to the level of technology extant at the time of the enactment of the statute while technological advances thereafter would be unavailable to law enforcement officials if they did not fall within the terminology of a dated statute. If such a result is not required, it ought not to be adopted.

Id. at 962. The court, therefore, logically concluded that the term "chemical test" was "intended to mean an analysis of the chemistry of the substance therein referred to -- breath, blood, urine or saliva -- to determine the subject's blood-alcohol content, and was not intended to refer to the method of testing." Id. (Emphasis added.)

This Court, if it reaches this issue, certainly should adopt the sound reasoning of the Albany County Court. The intoxilizer in present use by trained law enforcement officials subjects the chemicals of an air sample to a physical test that determines the chemical composition of the air sample and the blood. This information can be used to accurately calculate blood-alcohol levels. Therefore, although there may be testimony that no chemical reaction is involved, the intoxilizer is a chemical test within the purpose and intent of Utah Code Ann. § 41-6-44.10.

The testimony of Dr. Kevin McCloskey really does not require a different result. Dr. McCloskey did not testify that the intoxilizer is not a "chemical test." Instead, a careful reading of the testimony shows that he gave only an opinion that no "chemical reaction" is involved in an intoxilizer analysis. In attempting to explain how an intoxilizer operates, Dr. McCloskey answered as follows:

> The basic scientific principle of the functioning of the intoxilizer rests on a phenomenon called "infrared spectrometry" which, essentially, is taking advantage of a property of chemical compound, of their ability to absorb particular and specific wavelengths of light. Essentially what the machine does is once a substance is in the chamber, it shines a specific frequency of light through it that is then sensed. Or any decrement, any reduction, in the intensity of that frequency of light, then, is registered on a sensing device and shows up electronically as both a presence of a compound, and through some other electronic apparatus the amount of that

> compound present. But it's dependent upon the absorption qualities of the chemical molecules and no chemical reaction takes place. (Tr. 10-11) (emphasis added).

This opinion clearly indicates that the test is based upon an analysis or the properties of a chemical compound. Further, Dr. McCloskey testified during cross-examination that the intoxilizer is accurate and is generally accepted by the scientific community, (Tr. 15), which is a factor weighed by all of the courts. Therefore, appellant's own expert's opinion cannot refute respondent's position that an intoxilizer is a chemical test within the meaning of Utah Code Ann. § 41-6-44.10.

POINT III

THE LEGISLATURE INTENDED TO INCLUDE INTOXILIZERS WITHIN THE MEANING OF THE TERM "CHEMICAL TEST OR TESTS" IN UTAH CODE ANN. § 41-6-44.10.

Appellant alleges that the legislature must have intended to exclude intoxilizers and other "physical tests" from the implied consent statute, Utah Code Ann. § 41-6-44.10, because intoxilizers were used in 1975, and repealed and re-enacted the statute was enacted in 1981 and no mention of physical tests appears in the statute. This argument must fail for a number of reasons.

The argument is based on the assumption that the legislature was aware of the distinction appellant now asserts between the breathalyzer and the intoxilizer. As has already

noted, this assumption is highly unlikely. The legislative record contains no mention of either the breathalyzer or intoxilizer. Since both the breathalyzer and the intoxilizer were in use prior to the 1981 enactment of the statute, it is at least as likely to assume that the legislature expected both would be treated similarly, as to assume that the legislature intended to include one, but exclude the other.

More importantly, appellant's assumption that the legislature intended not to include intoxilizers because the statute was enacted in 1981 and intoxilizers were in use in 1975 (and for a number of years prior to that date) is unsupportable because it is based on insufficient data and not based on any testimony.

Utah Code Ann. § 41-6-44.10 was first enacted in 1957, many years prior to the invention of the intoxilizer. The statute, as enacted in 1957, read in part as follows:

> (a) Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine or saliva for the purpose of determining the alcoholic content of his blood, ...

1957 Utah laws 188. It was amended in 1959, 1967, 1969, 1977, 1981 and 1983. Most of the amendments dealt with minor grammatical or organizational corrections. Also, the words saliva and urine were deleted, and urine was subsequently

restored. The consequences were changed. However, the "chemical test" language has remained unchanged since 1957. In addition, the 1977 and 1981 versions of the statute are identical in every respect. In 1981, the statute was repealed and reenacted in exactly the same form as a part of S.B. 74 of 1981, a comprehensive revision of the entire health code. Therefore, any assumptions about what the legislature intended by the "chemical test" language must be based on facts known or available to the legislature in 1957. There is no evidence that the legislature ever considered the interpretation of that language at any subsequent date.

Further, because all of the cases that have considered the question have decided an intoxilizer is a chemical test, it is reasonable to assume the legislature intended to include intoxilizers on each date the statute was amended, because the legislature did not exclude intoxilizers from the operation of the words chosen.

A basic rule of statutory construction is that the legislature was aware of the judicial interpretations of the words used, and intended the judicially established meaning. Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975); In re Marriage of Bouquet, 546 P.2d 1371 (Cal. 1976); C. Forsman Real Estate Co. v. Hatch, 547 P.2d 1116 (Idaho 1976). It is therefore safe to assume the legislature did not intend to

exclude intoxilizers from the statutory term "chemical test," especially where no affirmative evidence of such an intent can be found.

In City of Dayton v. Schenck, 63 Ohio Misc. 14, 409 N.E 2d 284 (Dayton Mun. Ct. 1980), a "chemical test" case, the court noted that dictionary meanings should not be controling. Instead, "the touchstone of statutory interpretation is the legislature's purpose, not any supposed 'plain meaning' of the words it used." Id. at 16, 286. In rejecting a claim that an intoxilizer is not a chemical test, the court stated: "[I]t is hardly conceivable that the legislature intended . . . to allow into evidence the results of chemical analyses which employ chemical reactions but to exclude non-reaction physical tests regarded as equally reliable by persons who do chemical analyses professionally every day." Id. at 16, 286, (statutory citation omitted). In the instant case, appellant's claim that the legislature intended to exclude intoxilizers from the meaning or the term "chemical test" is equally as inconceivable.

POINT IV

THE SEVENTH JUDICIAL DISTRICT COURT COMMITTED NO ERROR IN DETERMINING THAT THE INTOXILIZER IS A "CHEMICAL TEST."

Appellant argues the lower court committed error by taking judicial notice that the intoxilizer is a chemical test. While it was argued at trial that it would be proper for the

court to take judicial notice that the intoxilizer is a chemical test within the meaning of the statute, there is no evidence in the record that the district court took judicial notice of this fact. In fact, the court below did not even decide the issue of whether an intoxilizer is a chemical test, but chose to rest its decision on the broad language of the statute which says "the failure or inability of a peace officer to arrange for any specific test shall not be a defense to taking a test requested by a peace officer nor be a defense in any criminal, civil or administrative proceeding resulting from a person's refusal to submit to the requested test or tests." Utah Code Ann. § 41-6-44.10(a). (See, Findings of Fact and Conclusions of Law and Order, Findings of Fact #3.) Appellant's argument that a court cannot judicially determine a question of statutory construction is fallacious. That is emphatically the province of the court. Appellant has confused the doctrine of judicial notice.

While a court may only take judicial notice of certain types of facts, the court must judicially decide questions of law and of statutory construction. The court would have been well within its bounds if it had decided an intoxilizer is a chemical test within the meaning of Utah Code Ann. § 41-6-44.10, but apparently did not.

Assuming the court below had taken judicial notice that an intoxilizer is a chemical test under the old Rule 9 of

the Utah Rules of Evidence, as appellant asserts, the court would have done so properly. Rule 9 (now Rule 201) allows a court to take judicial notice of facts of generalized (not general) knowledge "which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." As has already been noted, the scientific world generally accepts the principles of infrared molecular absorption and spectrophotometry as accurate and reliable means of identifying the chemical composition of unknown compounds. Such information can be obtained from any textbook on the subject.

The words used by the statute are "chemical test," not "chemical reaction." Therefore, the court would have been within its bounds if it had decided to take judicial notice of the intoxilizer as a "chemical test," or a chemical test of the chemicals and compounds in the blood within the purpose and intent of the statute.

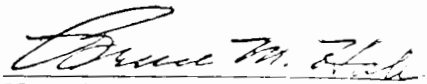
CONCLUSION

An intoxilizer test is a "chemical test" within the meaning of Utah Code Ann. § 41-6-44.10. Appellant was offered a breath test and refused. Under Utah Code Ann. § 41-6-44.10, it was the duty of the Department of Public Safety, Driver License Division, to revoke appellant's license for one year.

The Seventh Judicial District Court, Uintah County, State of Utah, correctly held that the only issue before it was

whether or not appellant had refused an offered test. That court correctly held that appellant had refused and that his license should be revoked. Respondent respectfully requests that this court affirm the holding of the district court.

Respectfully submitted this 17th day of January, 1984.



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MAILING CERTIFICATE

I certify I mailed a true and exact copy of the foregoing Brief, first-class, postage prepaid to Robert M. McRae, 1680 West Highway 40, #1190, Vernal, UT 84078.

DATED this 17th day of January, 1984.

Vicki L. Walker