

1992

Layton City v. Karl John Weihert : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 920394 IN THE UTAH COURT OF APPEALS

LAYTON CITY,	:	
Plaintiff/Appellee,	:	BRIEF OF APPELLEE
vs.	:	
Karl John Weihert	:	Appeal No. 920394-CA
Defendant/Appellant	:	

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT OF THE SECOND CIRCUIT COURT
DAVIS COUNTY, STATE OF UTAH, THE HONORABLE ROGER S.
DUTSON PRESIDING.

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ARGUMENT PRIORITY CLASSIFICATION: 2

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to Court

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IN THE UTAH COURT OF APPEALS

LAYTON CITY,	:	
	:	BRIEF OF APPELLEE
Plaintiff/Appellee,	:	
vs.	:	
Karl John Weihert	:	Appeal No. 920394-CA
Defendant/Appellant	:	

STATEMENT OF JURISDICTION

This appeal arises from a jury verdict and conviction in the Second Circuit Court, Layton Department. Pursuant to Utah Code Ann. § 78-2a-3 (2)(d), this Court of Appeals has appellate jurisdiction over criminal appeals from the circuit courts.

NATURE OF PROCEEDINGS

This is an appeal from a jury verdict and final judgement convicting the Defendant of driving under the influence of alcohol ("DUI").

STATEMENT OF THE ISSUES

This Court must determine whether the actions of the prosecuting attorney in signing the information, presenting it to and filing it with the office of the clerk properly commenced prosecution of this case.

The Court must further determine whether the affidavits of the certified breath test technician and the breath testing

supervisor satisfy the legal requirements of Utah Code Ann. § 41-6-44.3 and the Utah rules of evidence and procedure governing the admissibility of affidavits.

In making these determinations, the Court will examine the trial court's interpretation of pertinent statutory authority and the trial court's determination of the legal sufficiency of the affidavits. "Questions of . . . statutory interpretation are matters of law, not of fact; the trial court's ruling is therefore a question of law that [the Court] review[s] for correctness." State v. Mitchell, 824 P.2d 469, 471-72 (Utah App. 1991); No particular deference is given to the trial court's interpretation. Roosevelt City Corp. v. Nebeker, 815 P.2d 738, 739 (Utah App. 1991) (citing Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1038 (Utah 1989)); See also State v. Swapp, 155 Utah Adv. Rep 25 (Utah App. 1991); Asay v. Watkins, 751 P.2d 1135, 1136 (Utah 1988).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES
AND RULES OF EVIDENCE**

Utah Const. art. I. § 13.

Utah Code Ann. § 41-6-44.3.

Utah Code Ann. § 77-2-1.1.

Utah Code Ann. § 77-7-21.

Utah R. Crim. P. 4(a).

Utah R. Crim. P. 5(a).

Utah R. Evid. 902.

Utah R. Evid. 1005.

STATEMENT OF THE CASE

Defendant/Appellant has entered this appeal from a jury verdict and conviction for driving under the influence of alcohol ("DUI"). The matter came on for trial May 20, 1992. At trial, Defendant/Appellant made a motion to dismiss on the basis that the Information had been improperly filed. The Court allowed the trial to go forward over Defendant/Appellant's objection after finding that the Information had been filed in compliance with a newly enacted statute and after taking precautionary, curative steps.

During the course of the trial Plaintiff/Appellee offered into evidence affidavits of a certified breath technician and the custodian of the records. Defendant/Appellant objected to the admission of the affidavits on the basis that the affidavits contained hearsay and conclusions and therefore did not meet the necessary requirements under the Utah Rules of Evidence. The trial court overruled defense counsel's objections finding that the affidavits met the standards for admissibility set forth in Utah Code Ann. § 41-6-44.3.

Defendant/Appellant appeals from the trial court's rulings on these two issues.

STATEMENT OF FACTS

The Defendant/Appellant was arrested December 22, 1991 on the charge of DUI pursuant to Utah Code Ann. § 41-6-44. Defendant/Appellant was booked in Davis County Jail and issued DUI Summons and Citation Number D108720. (Trial Court Record, p. 6)

(hereinafter "Tr. rec."). The Defendant was released from jail by pre-trial services December 23, 1992 (Tr. rec. p. 9). A copy of the summons and citation was filed with the Second Circuit Court, Layton Department, December 24, 1992. (Tr. rec. p. 1).

Defendant/Appellant's first personal court appearance was at the pretrial conference held April 1, 1992. The matter was scheduled for jury trial May 20, 1992. (Tr. rec. p. 1).

A formal Information was filed May 15, 1992 charging Defendant/Appellant with DUI, a class "B" misdemeanor.¹ (Tr. rec. p. 1)(Trial Transcript Record, p. 18)(hereinafter "R."). In filing the Information the prosecuting attorney signed, presented and filed the information in the office of the clerk. The Information was subscribed by court clerk B. Love. (Tr. rec. p. 18). The Information was not sworn before or presented to a magistrate at the time of filing. (Tr. rec. p. 18, R. p. 30).

The matter came to trial May 20, 1992 at which time both parties indicated their readiness to proceed. Following jury voir dire and impanelment, the Defendant/Appellant made a motion to dismiss on the basis that the Information had not been sworn to before and subscribed by a magistrate. (R. 29). Plaintiff/Appellee explained how the Information had been filed and referred to the new statute governing the filing of informations. (The statute was later to be identified as Utah Code Ann. 77-2-

¹The case was filed as a class "B" misdemeanor pursuant to the penalties for DUI set forth in Utah Code Ann. § 41-6-44(3)(a). The Information formalized the information on the citation. There were no additions to or changes in the allegations set forth in the citation.

1.1.) The Court acknowledged the existence of the new statute and took notice that the citation itself had been timely filed. (R. 30). The Court further agreed to subscribe the new rule in the event "there is a problem with prior offenses." (R. 30) The Court found that the statute affecting the procedure for filing informations made procedural changes only. (R. 30-31) The Court then had the prosecuting attorney, counsel for the Plaintiff/Appellee, sign the information under oath and subscribed it thereto. (R. 32).

The trial proceeded with the testimony of the arresting officer. During the officer's testimony regarding the intoxilizer instrument Plaintiff/Appellee offered Plaintiff's Exhibit 3, affidavits of the certified breath test technician and the custodian certificate. Counsel for Defendant/Appellant objected to the admission of the affidavits on the basis that the affidavits did not meet the appropriate criteria for admissibility. (R. 108-119, 124-127). Plaintiff/Appellee objected to the Court's allowing the Defendant/Appellant to argue his objection as the issue was not timely raised under Rule 12 of the Utah Rules of Criminal Procedure. (R. 108). The Court did not rule on the timeliness of Defendant/Appellant's objection but did overruled his objections, making the specific findings required for admission of the affidavits as set forth in Utah Code Ann. § 41-6-44.3. (R. 127-131). The affidavits were admitted into evidence. (R. 132-33).

At the conclusion of the trial and after deliberation the jury returned a verdict of guilty.

SUMMARY OF THE ARGUMENT

The Information was filed in accordance with statutory requirements. The statutory requirements are consistent with the pertinent rules of procedure. The state constitutional section cited by the Defendant/Appellant is inapplicable in that it pertains only to grand jury proceedings.

The affidavits introduced as evidence to show the reliability of the breath test machine qualify under the statutory hearsay exception established in Utah Code Ann. § 41-6-44.3 and are legally and factually sufficient to meet statutory and evidentiary requirements for admissibility.

ARGUMENT

POINT I

THE INFORMATION WAS PROPERTY FILED IN ACCORDANCE WITH STATUTORY REQUIREMENTS

Utah Code Ann. § 77-7-21 provides in pertinent part as follows:

(1) Whenever a citation is issued pursuant to the provisions of Section 77-7-18, the copy of the citation filed with the magistrate may be used in lieu of an information

(2) If the person cited fails to appear. . . , or pleads not guilty to the offense, or does not deposit bail on or before the date set for his appearance, an information shall be filed and proceedings held in accordance with the Rules of Criminal Procedure and all other applicable provisions of this code, which information shall be deemed an original pleading; . . . the person cited may by written agreement waive the filing of the information. . . .

Utah Code Ann. § 77-7-21 (1990). Under Utah Code Ann. § 76-1-302, "a prosecution for . . . a misdemeanor other than negligent homicide shall be commenced within two years after it is committed"

Rule 4(a) of the Utah Rules of Criminal Procedure states as follows:

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

Utah R. Crim. P. 4(a). In addition, Rule 5 of the Utah Rules of Criminal Procedure states the following:

(a) Unless otherwise provided, all criminal prosecutions whether for felony, misdemeanor or infraction shall be commenced by the filing of an information or the return of an indictment. Prosecution by information shall be commenced before a magistrate having jurisdiction of the offense alleged to have been committed unless otherwise provided by law.

U.R.Crim.P. 5(a).

Article I, Section 13 of the Utah Constitution cited by Defendant/Appellant is inapplicable. That section pertains only to grand jury proceedings. Section 13 provides that "[o]ffenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate Utah Const. art. I, § 13. An indictment is "an accusation in writing presented by a grand jury to the district court charging a person with a public offense." Utah Code Ann. § 77-1-3(2) (1990).

Therefore, in summary, absent written waiver from a Defendant, an information is required to commence prosecution and

prosecution for a misdemeanor offense must be commenced within two years from the date of the offense. The information must be sworn to and subscribed by a magistrate "unless otherwise provided by law." U.R.Crim.P. 4(a), U.R.Crim.P. 5(a).

The 1992 Legislature enacted an additional section to the Utah Code of Criminal Procedure which provides another method for filing informations. The newly-enacted section reads as follows:

The prosecuting attorney shall sign all informations. The prosecuting attorney may:

- (1) sign the information in the presence of a magistrate; or
- (2) present and file the information in the office of the clerk where the prosecution is commenced upon the signature of the prosecuting attorney.

Utah Code Ann. § 77-2-1.1. (Supp. 1992). Section 77-2-1.1 became effective April 27, 1992. See 1992 Utah Laws 33.²

²Although Utah Code Ann. § 77-2-1.1 became effective four months after Defendant/Appellant's arrest, it still applies to the proceedings against him as it is remedial in nature. A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right. Camer v. Seattle School Dist. No. 1, 52 Wash. App. 531, 762 P.2d 356 (1988). Legislation which is remedial in nature is to be liberally construed to effectuate the purpose for which it was enacted. Gonzales v. Callison, 9 Kan. App.2d 567, 683 P.2d 454 (1984).

In passing section 77-2-1.1 the legislature clearly intended to create a less cumbersome filing procedure for misdemeanor prosecutions. It is well established that

[d]espite the existence of some contrary authority, remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. . . .

In the absence of any saving clause a new law changing a rule of practice is generally regarded as applicable to all cases then pending. . . .

The prosecution of the Defendant/Appellant was commenced by the filing of the information on May 15, 1992--nineteen days after the effective date of Utah Code Ann. § 77-2-1.1 and less than two years from the date of commitment of the alleged offense--and was therefore commenced in the manner prescribed by law.³

POINT II

THE AFFIDAVITS OF THE CUSTODIAN OF THE RECORDS AND THE CERTIFIED BREATH TEST TECHNICIAN WERE PROPERLY ADMITTED UNDER UTAH CODE ANN. § 41-6-44.3 AND UTAH RULES OF EVIDENCE.

Affidavits of the Breath Test Technician

Defendant/Appellant does not challenge the constitutionality of Utah Code Ann. § 41-6-44.3, but challenges the legal

Sometimes the rule is stated in the form that when a statute deals with procedure only it applies to all actions - those which have accrued or are pending and future actions. . . .

73 Am Jur 2d. 354 n.42.

³The information was filed five months after Defendant/Appellant's arrest and only five days before trial. Counsel for Defendant/Appellant did not receive a copy of the Information until the morning of trial. (R. 29) Although the issues of speedy trial and prejudice are implicated, Defendant did not raise these issues at trial and therefore has not preserved them on appeal. Therefore this Court "will not consider them." Roosevelt City v. Nebeker, 815 P.2d 738, 739 n.2 (Ut.App. 1991) citing State v. Webb, 790 P.2d 65, 71, n.2 (Utah 1990). Furthermore, Under Utah Rules of Criminal Procedure, "[a]ny error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." Utah R. Crim. P. 30(a). State v. Johnson, 771 P.2d 1071 (Utah 1989) (court will not reverse a conviction unless the error is substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a more favorable result for the defendant.) Defendant has made no showing of prejudice as a result of the way the Information was filed.

sufficiency of the breath test technician's and supervisor's affidavits and the trial court's findings that the affidavits meet the requirements for admissibility under Utah Code Ann. §41-6-44.3. Defendant/Appellant argues that the affidavits contain hearsay and conclusions and are therefore inadmissible under Rule 81 of the Utah Rules of Civil Procedure.

In Murray City v. Hall, 663 P.2d 1314 (Utah 1983), the Utah Supreme Court recognized Section 41-6-44.3 as a statutory exception to the hearsay rule. Hall, Id. The Utah Supreme Court's decision in Hall has since been consistently followed and reaffirmed by this Court. Layton City v. Bennett, 741 P.2d 965 (Utah App. 1987); Bountiful City v. Maestes, 788 P.2d 1062 (Utah App. 1990); Roosevelt City v. Nebeker, 815 P.2d 738 (Utah App. 1991).

The Court. in Hall, found that Utah Code Ann. § 41-6-44.3 was

a codification of the findings necessary to establish a proper foundation for the introduction of breathalyzer evidence. It is a legislative recognition of the universal acceptance of the reliability of such evidence.

Hall, Id. at 1320. However, the Court made it clear that

prior to the acceptance of those affidavits . . . [the statute] requires an affirmative finding by the trial court that (1) the calibration and testing for accuracy of the breathalyzer and the ampoules were performed in accordance with the standards established by the Commissioner of Public Safety, (2) the affidavits were prepared in the regular course of the public officer's duties, (3) that they were prepared contemporaneously with the act, condition or event, and (4) the "source of information from which made the method and circumstances of their preparation were such as to indicate their trustworthiness."

Id. (citing Utah Code Ann. § 41-6-44.3).

In Maestas, this Court ruled that the trial court must make specific findings set forth in Hall on the record in order for the affidavits to qualify for the statutory hearsay exception set forth in Utah Code Ann. § 41-6-44.3. Maestas, 788 P.2d at 1065 (citing Hall, 663 P.2d at 1320 n.4.)

The trial court made the requisite Hall findings in the case before the Court. The trial court found as follows:

In looking at these document, I--they appear that the calibration and testing of the machine was done pursuant to the standards established by the Commissioner of Public Safety, if I admit Koorings affidavit [the custodian's certificate] in, and then the other affidavit of Ron Ellsworth [breath test technician's affidavit], and that, I believe, is the intent of the statute. And that these affidavits were prepared in the regular course of these public officers' duties and that they were prepared contemporaneously with the act, condition or event that they purport to be certifying to. And in reasonable proximity to those times finding that specifically the one affidavit was not signed until a day later by Ronald Ellsworth, he asserts that he did the test on January 20th at 9:40 a.m. but did not swear to that until January the 21st

I further find that the source of this information from which made, and the method and circumstances of the preparation are such as to indicate trustworthiness.

(R. 130-31).

The trial court's findings of fact were correct and should not be set aside. A review of the standards set forth by the Commissioner of the Utah Department of Public Safety shows that the testing procedures as set forth on the face of the breath test technician's affidavits do, in fact, conform to those

standards.⁴ The affidavit states on its face that the information contained therein was prepared contemporaneously with the instrument check and in the course of the technician's regular duties. There is nothing on the face of the documents suggesting a lack of trustworthiness.⁵

Defendant/Appellant makes reference to the following two statements on the technician's affidavit which he considers conclusions:

2. This was done according to the standards established by the Commissioner of the Utah Department of Public Safety.

* * *

⁴Utah Admin. R. 735-500-5(4)(1991) states as follows:

The specificity of the procedure shall be adequate and appropriate for the reasonable analysis of breath specimen for the determination of alcohol concentration in law enforcement. The instrument function to be checked shall include, but not necessarily be limited to the following:

1. Intoxilyzer 4011 series.
 - (a) electrical power.
 - (b) operating temperature.
 - (c) internal purge.
 - (d) zero set.
 - (e) printer deactivation.
 - (f) fixed absorption calibration (if so equipped),
 - (g) known reference samples.
 - (h) reads in grams of alcohol per 210 liters of breath.

⁵Defendant/Appellant makes reference to the fact that the test record for January 20, 1992 was sworn before a notary public on January 21, 1992, one day after the test was made. The trial court made the specific finding that in itself did not show a lack of trustworthiness. (R. 130). Furthermore, a closer review of the affidavit shows that the breath test technician signed the test record and affidavit twice--presumably once on January 20, 1992, when he executed the affidavit and again when he attested, under oath to the truthfulness of the contents of the affidavit.

THE FOLLOWING TESTS WERE MADE:

* * *

Gives readings in grams of alcohol per 210 liters of breath.

Neither of these referenced statements are conclusions. These statements are facts of which the affiant, the certified breath test technician, had personal knowledge. Therefore, the affidavit meets the requirements of Rule 81 Utah Rules of Civil Procedure cited by Defendant.

The affidavits of the certified breath test technician offered by the prosecution and admitted into evidence met the requirements set forth in Murray City v. Hall, and were therefore properly admitted by the trial court.

Custodian Certificate

The Supreme Court's ruling in Hall addressed the affidavits of the breath test technician and did not directly rule on the admissibility of the custodian's affidavit. However, in Maestes, this Court found that

Hall stated that affidavits proving the accuracy of breathalyzer equipment must "show on their face that the affiants . . . attest from their own personal knowledge." Id. We find that both affidavits [of the custodian and the breath test technician] comply with the personal knowledge requirements.

The breath testing supervisor signed his name to the custodian affidavit, listed the intoxilyzer serial number, and filled in the date upon which the test was completed. The custodian affidavit used the term "I" indicating that the breath testing supervisor personally attested to the information contained in the affidavit. . . .

Maestas, 788 P.2d at 1065 (citing Hall, Id.). The ruling of the Court impliedly recognizes that the affidavit of the breath testing supervisor is a necessary part of the foundation required for admission of the affidavits of the breath test technician and the breath test results. As a necessary part of the foundation, the affidavit of the breath testing supervisor is entitled to the statutory hearsay exception set forth in Utah Code Ann. § 41-6-44.3.

Although the custodian affidavit is entitled to the hearsay exception under Utah Code Ann. § 41-6-44.3, the affidavit must still comply with the Utah Rules of Evidence. Rule 1005 of the Utah Rules of Evidence states as follows:

The contents of an official records . . . if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902

Utah R. Evid. 1005. Rule 902(4) regarding certified copies of public records requires the following:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(4) **Certified copies of public records.** A copy of an official records or report . . . certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

U. R. Evid. 902(4). Subsection (2) of Rule 902 reads as follows:

(2) **Domestic public documents not under seal** A document purporting to bear the signature in his official capacity of an officer or employee of any [state], [is admissible] if a public officer having a seal and having official duties in the district or political

subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

The custodian certificate was sworn before a Notary Public who certified "under seal" that Sgt. Kooring, the breath testing supervisor, was "an officer and employee of the Department of Public Safety of the State of Utah and is the legal custodian of the intoxilyzer affidavits of said department. The notary public further certified that "his signature affixed hereto is genuine." Therefore the requirements of Rules 902 and 1005 were met and the custodian certificate was properly admitted as foundation for the admission of the affidavits of the certified breath test technician.

Defendant/Appellant argues that the following statements contained in the affidavit of the breath testing supervisor are either hearsay or conclusory in nature:

1. I am the Breathtesting Supervisor of the Utah Highway Patrol and the official keeper of and responsible for the maintenance check records of the breathtesting instruments maintained in the State of Utah.

* * *

3. The attached tests were done before and after the date of December 22, 1991.

However, the affiant, Sgt. Christian Kooring, also states as follows:

5. I am competent to testify and have personal knowledge of the matters alleged in this affidavit.

The statements referred to by Defendant/Appellant are neither conclusions nor hearsay, but are facts of which the affiant has personal knowledge.

The custodian certificate is a necessary document for a proper foundation for the admission of the affidavits of the certified breath test technician. The custodian certificate meets all the legal requirements of the Utah Rules of Evidence and is entitled to the same hearsay exception set forth in Utah Code Ann. § 41-6-44.3. Therefore, the custodian certificate was properly admitted into evidence by the trial court.


CONCLUSION

The prosecution of the Defendant/Appellant was commenced in accordance with Utah Code Ann. § 77-2-1.1 and other statutory and procedural requirements and was therefore commenced in the manner prescribed by law.

The affidavits of the certified breath test technician evidence met the requirements set forth in Murray City v. Hall, and were therefore properly admitted by the trial court. The custodian certificate is a necessary document for a proper foundation for the admission of the affidavits of the certified breath test technician and is therefore entitled to the same hearsay exception set forth in Utah Code Ann. § 41-6-44.3. Furthermore, the custodian certificate meets all the legal requirements of the Utah Rules of Evidence and was properly admitted into evidence by the trial court.


Base one the foregoing, Plaintiff/Appellee respectfully requests that the ruling's of the trial court be affirmed.

RESPECTFULLY SUBMITTED this 28th day of December, 1992


Janene H. Eller
Layton City Prosecutor
Attorney for Layton City
Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee was mailed to counsel for Defendant/Appellant, D. Bruce Oliver, 180 South 300 West, Suite 210, Salt Lake City, Utah 84101, on this 28th day of December, 1992.


Janene H. Eller
Layton City Prosecutor
Attorney for Layton City
Plaintiff/Appellee

A D D E N D U M

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES
AND RULES OF EVIDENCE**

Utah Const. art. I, § 13. [Prosecution by information or indictment - Grand jury.]

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

Utah Code Ann. § 41-6-44.3

(1) The commissioner of the Department of Public Safety shall establish standards for the administration and interpretation of chemical analysis of a person's breath, including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

(a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and

(b) the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.

(3) If the judge finds that the standards established under Subsection (1) and the conditions of Subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

Utah Code Ann. § 76-1-302 Time limitations for prosecution of offenses -- Commencement of prosecution.

(1) Except as otherwise provided, a prosecution for:

* * *

(b) a misdemeanor other than negligent homicide shall be commenced within two years after it is committed. . . .

Utah Code Ann. § 77-1-3. Definitions.

For the purpose of this act:

(2) "Indictment" means an accusation in writing presented by a grand jury to the district court charging a person with a public offense.

(3) "Information" means an accusation, in writing, charging a person with a public offense which is presented, signed, and filed in the office of the clerk where the prosecution is commenced pursuant to Section 77-2-1.1.

Utah Code Ann. § 77-2-1.1 Signing and filing of information.

The prosecuting attorney shall sign all informations. The prosecuting attorney may:

(1) sign the information in the presence of a magistrate; or

(2) present and file the information in the office of the clerk where the prosecution is commenced upon the signature of the prosecuting attorney.

Utah Code Ann. § 77-7-21. Proceeding on citation - Voluntary forfeiture of bail - Information, when required.

(1) Whenever a citation is issued pursuant to the provisions of Section 77-7-18, the copy of the citation filed with the magistrate may be used in lieu of an information to which the person cited may plead guilty or no contest and be sentenced or on which bail may be forfeited. With the magistrate's approval a person may voluntarily forfeit bail without appearance being required in any case of a class B misdemeanor or less. Such voluntary forfeiture of bail shall be entered as a

conviction and treated the same as if the accused pleaded guilty.

(2) If the person cited willfully fails to appear before a magistrate pursuant to a citation issued under Section 77-7-18, or pleads not guilty to the offense charged, or does not deposit bail on or before the date set for his appearance, an information shall be filed and proceedings held in accordance with the Rules of Criminal Procedure and all other applicable provisions of this code, which information shall be deemed an original pleading; provided, however, that the person cited may by written agreement waive the filing of the information and thereafter the prosecution may proceed on the citation notwithstanding any provisions to the contrary.

Utah Admin. R. 735-500-5(4) Instrument Certification.

The specificity of the procedure shall be adequate and appropriate for the reasonable analysis of breath specimen for the determination of alcohol concentration in law enforcement. The instrument function to be checked shall include, but not necessarily be limited to the following:

1. Intoxilyzer 4011 series.
 - (a) electrical power.
 - (b) operating temperature.
 - (c) internal purge.
 - (d) zero set.
 - (e) printer deactivation.
 - (f) fixed absorption calibration (if so equipped),
 - (g) known reference samples.
 - (h) reads in grams of alcohol per 210 liters of breath.

Utah R. Crim. P. 4(a)

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

Utah R. Crim. P. 5(a)

(a) Unless otherwise provided, all criminal prosecutions whether for felony, misdemeanor or infraction shall be commenced by the filing of an information or the return of an indictment. Prosecution by information shall be commenced before a magistrate having

jurisdiction of the offense alleged to have been committed unless otherwise provided by law.

Utah R. Evid. 902 (in pertinent part)

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(2) Domestic public documents not under seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in Paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certified under seal that the signer has the official capacity and that the signature is genuine.

* * *

(4) Certified copies of public records. A copy of an official records or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

Utah R. Evid. 1005

The contents of an official records, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complied with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

CIRCUIT COURT, STATE OF UTAH, DAVIS COUNTY

LAYTON DEPARTMENT

LAYTON CIRCUIT COURT
May 15 3 55 PM '92

LAYTON CITY,
a Municipal Corporation,

Plaintiff,

INFORMATION

Case No. 912007007TC

vs.

KARL J. WEIHERT
PSC 1 Box 221
Hill Air Force Base, UT 84056
DOB: 11/22/63
Defendant.

The undersigned, Janene H. Eller under oath, states on information and belief that the defendant committed, in the above-named county, the crime of DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL, a Class B Misdemeanor, at the vicinity of 2100 North Main, Layton, Utah 84041 on or about December 22, 1991, at about 6:29 p.m., in violation of Section 41-6-44, Layton Municipal Code.

The act or acts of defendant constituting the crime were as follows: That at the time and place aforesaid, the defendant unlawfully

operated and/or had actual physical control of a vehicle within this state while under the influence of alcohol to a degree which rendered the defendant incapable of safely driving said vehicle and/or driving with a blood or breath alcohol content of .08% weight or greater.

This information is based on evidence obtained from the following witness: Donald J. Keith.

Janene H. Eller
Janene H. Eller
Layton City Prosecutor

Filed
Subscribed and sworn to before me this 15 day of May, 1992.

[Signature]
Circuit Judge

Issued to be heard on this 20th day of May, 1992 -



STATE OF UTAH
DEPARTMENT OF PUBLIC SAFETY

CUSTODIAN CERTIFICATE

I, the undersigned, being first duly sworn, state that:

1. I am the Breathtesting Supervisor of the Utah Highway Patrol and the official keeper of and responsible for the maintenance check records of the breathtesting instruments maintained in the State of Utah.
2. Attached are true and correct copies of the records of maintenance and certification for the Intoxilyzer serial number 94-001082 located at LAYTON P.D., of which are kept on file by me, in the course of official business, for the State of Utah, Department of Public Safety and in accordance with the current regulations of the Commissioner of Public Safety.

3. The attached tests were done before and after the date of 22 December 1991.

4. The breathtest technicians(s) whose signature(s) appear on the attached affidavit(s) are certified by the State of Utah and has/have met all of the following requirements as required by the Department of Public Safety:

Satisfactory completion of the operator's initial certification course and/or renewal course;

Satisfactory completion of the Breath Alcohol Testing Supervisor's course offered by Indiana University, or an equivalent course of instruction, as approved by the Breath Alcohol Testing Program;

Satisfactory completion of a Breath Alcohol Testing Instrument Manufacturer's Maintenance/Repair Technician course for the instruments in use in the State of Utah or is qualified by nature of his/her employment or training to maintain/repair those instruments; Maintain Technician's status through a minimum of eight (8) hours related training each calendar year.

5. I am competent to testify and have personal knowledge of the matters alleged in this affidavit.

Christiaan Kooring

Sgt. Christiaan Kooring
Breathtesting Supervisor
Utah Highway Patrol

STATE OF UTAH
COUNTY OF Salt Lake

ON THE 24 DAY OF Jan. 1992, PERSONALLY APPEARED BEFORE ME, CHRISTIAAN KOORING, WHO BEING DULY SWORN BEFORE ME EXECUTED

THE ABOVE REFERENCED CERTIFICATE AND I CERTIFY THAT SAID **NOTARY PUBLIC** IS AN OFFICER AND EMPLOYEE OF THE DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF UTAH AND IS THE LEGAL CUSTODIAN OF THE INTOXILYZER AFFIDAVITS OF SAID DEPARTMENT AND HIS SIGNATURE AFFIXED HERETO IS GENUINE.

NOTARY PUBLIC: Jerolyn John **STATE OF UTAH**

MY COMMISSION EXPIRES 2/15/93 RESIDING AT: Salt Lake



JEROLYN JOHN
5757 South 320 West
Murray, Utah 84107
My Commission Expires
February 15, 1993

UTAH DEPT. OF PUBLIC SAFETY RECORD OF INTOXILYZER TEST AND AFFIDAVIT (A)

I/We the undersigned, being first duly sworn, state that:

1. Breath testing instrument, INTOXILYZER, serial number 94-001082 located at LAYTON POLICE DEPT was properly checked by me/us in the course of official duties, on DECEMBER 19, 1991 at 11:35 A.M.
2. This was done by a currently certified technician and according to the standards established by the Commissioner of the Utah Department of Public Safety.
3. This is the official record and notes of this procedure which were made at the time these tests were done.
4. I am/we are competent to testify and have personal knowledge of the matters alleged in this affidavit.

THE FOLLOWING TESTS WERE MADE:

YES NO

- (☒) Electrical power check:
 (Power switch on power indicator light is on)..... (☒) ()
- (☒) Temperature check (Ready light is on)..... (☒) ()
- (☒) Internal purge check:
 (Air pump works, runs for approximately 35 seconds.. (☒) ()
- (☒) Zero set, Error indicator, and Printer Check:
 (Zero set at .000, .001, .002, .003.)..... (☒) ()
 (With proper zero set, printer works properly)... (☒) ()
 (Printer deactivated when error light is on)..... (☒) ()
- (☒) Fixed absorption calibrator test (if equipped)
 (Reads within +/- .01 of calibration setting).... (☒) ()
- (☒) Checked with known sample: (Simulator, 3 tests
 within +/- .005 or 5% whichever is the greatest).... (☒) ()
- (☒) Gives readings in grams of alcohol per 210 liters
 of breath..... (☒) ()
- REPAIRS REQUIRED(Explain) None () (☒)

- (☒) The simulator solution was of the correct kind and properly compounded..... (☒) ()
- (☒) The results of this test show that the instrument is working properly..... (☒) ()

Last prior check of this instrument was done on November 15, 1991.
 CERTIFIED BREATH TEST TECHNICIAN(S)

Donald Ollsworth

STATE OF UTAH)
 COUNTY OF DAVIS)

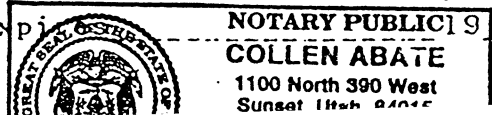
I/We, on oath, state that the foregoing is true.

Donald Ollsworth

Subscribed and sworn before me this 19 day of Dec 1991

Colleen Abate City of Residence Sunset
 Notary Public County of Residence DAVIS

My commission expires



UTAH DEPT. OF PUBLIC SAFETY RECORD OF INTOXILYZER TEST AND AFFIDAVIT (A)
I/We the undersigned, being first duly sworn, state that:

1. Breath testing instrument, INTOXILYZER, serial number 94-001082 located at LAYTON POLICE DEPT. was properly checked by me/us in the course of official duties, on JANUARY 20, 1992 at 9:40 A.M.
2. This was done by a currently certified technician and according to the standards established by the Commissioner of the Utah Department of Public Safety.
3. This is the official record and notes of this procedure which were made at the time these tests were done.
4. I am/we are competent to testify and have personal knowledge of the matters alleged in this affidavit.

THE FOLLOWING TESTS WERE MADE:

	YES	NO
(✓) Electrical power check:		
(Power switch on power indicator light is on).....	(✓)	()
(✓) Temperature check (Ready light is on).....	(✓)	()
(✓) Internal purge check:		
(Air pump works, runs for approximately 35 seconds..	(✓)	()
(✓) Zero set, Error indicator, and Printer Check:		
(Zero set at .000, .001, .002, .003.).....	(✓)	()
(With proper zero set, printer works properly)...	(✓)	()
(Printer deactivated when error light is on).....	(✓)	()
(✓) Fixed absorption calibrator test (if equipped)		
(Reads within +/- .01 of calibration setting)....	(✓)	()
(✓) Checked with known sample: (Simulator, 3 tests		
within +/- .005 or 5% whichever is the greatest)....	(✓)	()
(✓) Gives readings in grams of alcohol per 210 liters		
of breath.....	(✓)	()
REPAIRS REQUIRED(Explain) <u>None</u>	()	(✓)

-
- (✓) The simulator solution was of the correct kind and properly compounded..... (✓) ()
- (✓) The results of this test show that the instrument is working properly..... (✓) ()

Last prior check of this instrument was done on December 19, 1991.

CERTIFIED BREATH TEST TECHNICIAN(S)

Ronald Ollsworth

STATE OF UTAH)
COUNTY OF Daguerre)

I/We, on oath, state that the foregoing is true.

Ronald Ollsworth

Subscribed and sworn before me this 21st day of January 1992.

Clay M. Kei
Notary Public

City of Residence Merida
County of Residence Daguerre

~~My commission expires~~ 3 2 1993

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 0-3
CASE NO. 912076

Defendant

Citation: D108720

LPD Case: 912007007 TC

WEIHERT, KARL JOHN

Traffic Court Case

Judge: S. MARK JOHNSON

PSC 1

HILL AFB

UT

OTN #: 565475

ChargesBail

Violation Date: 12/22/91

1. DRIVING UNDER THE INFLUENCE OF ALC/DRUGS 41-6-44

910.00

Sev: MB Attr: L

Proceedings

12/24/91 Case filed on 12/24/91. CBF
RELEASED PRETRIAL SERVICE. CBF
ARR scheduled for 12/26/91 at 1:30 P in room 2 with SMJ CBF
12/26/91 ATTY BRUCE OLIVER CALLED FOR DEF. DEF REQ 1 WK CONTINUANCE TO BL
SEEK COUNCIL. ATTY OLIVER ANTICIPATES DEF RETAINING HIM AS ATTY. BL
ATTY WILL CONTACT LAYTON CRT IF HE ENTERS HIS APPEARANCE AS BL
COUNCIL. DEF WILL APPEAR 1/2/92 IF NOT ATTY OBTAINED. BL
ARR on 12/26/91 was cancelled BL
ARR scheduled for 1/ 2/92 at 1:30 P in room 2 with RSD BL
12/30/91 FILED: A/C BY ATD OLIVER & TRJ DEMAND- RFW
ARR on 1/ 2/92 was cancelled RFW
01/06/92 FILED: INMATE RELEASE SHEET, BOOKING INFO, INTERVIEW SHEET- RFW
01/13/92 FILED UTAH ARREST & COURT FILING/DISPO RPT DTD 12-22-91- SDM
01/14/92 PTC SET W/ATD OLIVER. DOCKET & CITATION TO CPR. DOCKET TO ATD- RFW
PTC scheduled for 3/18/92 at 1:30 P in room 2 with RSD RFW
02/05/92 REC'D MO TO CONTINUE - TO JUDGE DUTSON - SDM
02/06/92 MO TO CONTINUED SIGNED BY JUDGE DUTSON- SDM
CPR WILL BE OUT OF TOWN AT A TRAINING CONFERENCE ON 3-18-92; SDM
THEREFORE, PTC HAS BEEN RESCHEDULED AS FOLLOWS: SDM
PTC rescheduled to 4/ 1/92 at 11:00 A in room 2 with RSD SDM
CY OF DOCKET TO ATD, CPR, & DEF- SDM
04/01/92 Hearing: JUDGE: DUTSON, ROGER S. BL
TAPE: 439 COUNT: 828 BL
Deft Present BL
ATD: OLIVER, D BRUCE PRO: ELLER, JANENE BL
TRJ scheduled for 05/20/92 at 0900 A in room 2 with RSD BL
JURY TRIAL SET FOR 5/20/92 AT 9:00 AM. NOTED: THERE ARE 3 JURY BL
TRIALS SET ON THIS DATE. BL
05/15/92 FILED: INFORMATION FROM CPR OFFICE BL
05/20/92 Trial: JUDGE: DUTSON, ROGER S. BL
TAPE: 456 COUNT: 45 BL
Deft Present BL
ATD: OLIVER, D BRUCE PRO: ELLER, JANENE BL
#223 DEF ATY OLIVER REQ TO ENVOKE EXCLUSIONARY CLAUSE, REQ BL
GRANTED, #233 DEF OBJECT TO OFFICER REMAINING IN CRT ROOM, CRT BL
GRANTS EXCLUSION RULE WITH EXCEPTION OF OFFICER, #355 INFORMAT BL

Defendant Citation. D108720
WEIHERT, KARL JOHN

LFD Case. 912007007 TC
Traffic Court Case

05/20/92 GIVEN TO DEF ATY, #370 JURY BROUGHT IN CRT RM, #450 JUDGE ADDRES BI
JURORS, #495 JURORS SWORN, CPR AND DEF ATY INTRODUCES THEMSELVES BI
#566 JURORS INTRODUCED, #980 JURORS INSTRUCTED AS TO LAW AND BI
FEELINGS REGARDING DUI, #1198 CPR QUESTIONS PROSP JURORS, #1244 BI
ATY OLIVER QUEST PROSP JURORS, #1511 CPR AND DEF ATY CHALLENGES BI
JURORS #1795 JURORS SELECTED: DIANE MCKINNIS ALMA SCHMIDT BI
DONNA HIGGINS MARCIA GUNDERSON BI
#1880 JURORS SWORN #1895 JURORS INSTRUCTED NOT TO SOCIALIZE OR BI
TALK ABOUT CASE #1960 CRT IN RECESS, #1982 DEF ATTY REQ MO. TO BI
DISMISS DUE TO LACK OF IMPROP FILING #2084 CPR REBUTTALS ABOUT BI
IMPROP FILING WITH MAGISTRATE NOT REVIEWING FILING. JUDGE KRB BI
OKAYED INFORMATION TO BE FILED, #2131 RSD STATES CITATION WAS BI
FILED AND CPR WILL SIGN INFORMATION IN COURT, #2157 ATTY OLIVER BI
STATES CITATION NOT SUFFICIENT AND WAIVER NOT AUTHORIZED, IMPROP BI
COMMENCED AND DISMISSAL #2205 INFORMATION SIGNED BY CPR IN OPEN BI
CRT #2250 OBJECTIONS TO JURY INSTRUCTIONS BY DEF ATTY BI
#2490 CRT REVIEWS STATUTE REGARDING PRESUMPTION, #2556 NOT OBJEC BI
OF JURY INSTRUCT BE CHANGED, #2588 OBJECT TO PAGE BEING STRICKEN BI
#2705 ISSUE OF DUI DESCRIPTION TAKEN UNDER ADVISEMENT EL
#2751 OBJECT TO JUROR ALMA SCHMIDT'S HEALTH PROBL #2826 CRT EL
DENIED MO TO STRIKE SCHMIDTS & WHITECAR #2859 FORMAL INFORMATION BI
FILED BUT FILED AFTER JURY PICKED #2895 JURY INSTRUCTIONS BI
GIVEN TO JURY ***NEW TAPE** #457 #10 OPENING STMT BY PLA #121 BI
RESERVE OPENING REMARKS #135 PLA CALLS PW#1 #140 PW#1 OFFICER BI
JIM KEITH SWORN AND TESTIFIES #170 OBJECT DATY TO JOB RELATED BI
TRAINING, OBJECT SUST #185 OBJECT DATY TO JOB RELATED TRAINING BI
ANSWER TO REMAIN #238 OBJECT DATY TO HEARSAY, ANSWER STRIKEN AND BI
ANSWER TO DISPATCH CALL ONLY #462 OBJECT DATY TO INFO AFTER STOP BI
SUSTAINED #526 OBJECT TO CONCLUS FROM OBSERVATION, #539 OVERRULE BI
DEF TO TELL WHAT OBSERVED AND NOT DRAW CONCLUSION #632 OBJ DATY BI
REQ PW#1 TO REF TO NIGHT IN QUESTION NOT GENERAL, #655 OVERRULED BI
#748 DATY REQ PW#1 TO TESTIFY FROM OWN RECOLLECTION NOT FROM BI
NOTES. DEF SO DIRECTED BY CRT #1142 OBJ DATY RELAVANT TO BI
LINE OF QUEST #1183 BOTH COUNSEL APPROACH BENCH #1277 JURORS BI
EXCUSED FOR LUNCH #1323 CPR CONTINUES TO QUEST PW#1 BI
#1596 DEF ATY QUEST PW#1 BI
REGARDING QUALIFICATION TO TESTING #1963 NOTHING FURTHER BI
#1870 CRT ALLOWS PW#1 TESTIMONY ADMITTED ONLY LIMITED TO PROFER BI
BEING MADE ON PERSONAL OBSERVATION, TESTING TO BEFORE & AFTER BI
ALC CONSUMPTION. #2024 CPR REBUTTALS ON CORALATION BETWEEN BI
ALC IN SYSTEM AND HORIZ GAZE #2066 OBJ OVERRULED BI
#2125 PW#1 RESUMES TESTIMONY #2251 OBJECT TO ANSWER. CRT ALLOWS BI
ANSWER BUT NO FURTHER #2344 PW#1 IDENTIFIES DEF #2540 OBJ-STRIKE BI
TESTIMONY REG RIGHTS #3640 QUESTION RESTATED #2653 JURY TO BI
DISREGARD TESTIMONY #2762 OBJECT TO FOUNDATION OF QUEST #2873 BI
OBJECT TO TESTM FROM P EXHIBIT-DOCUMENT NOT ENTERED YET AS EXHIB BI
#2920 PW#1 TO NOT DISCLOSUE CONTENTS OF EXHIBIT UNTIL PROPER BI
TIME #3217 OBJECT DATY #3235 ATY OLIVER REDIRECTS PW#1. OFFICER BI
NOT QUALIF TO TEST TO INTERPRETATION OF TEST RESULTS #2264 OBJ BI
OVERRULED #3445 CPR OFFERS P-3 AS EXHIBIT. DATY OBJECTS TO EXHIB BI
NEW TAPE 458 DATY STATES OBJECT 1) ONE PAGE SIGNED 1/24/92 BI
DOES NOT COMPLY WITH EVENT TIMING (CHRIS CORING AFIDAVT) 2)AVIDA BI

Defendant Citation: D108720
WEIHERT, KARL JOHN

LPD Case: 912007007 TC
Traffic Court Case

05/20/92 OF BREATH TECH CONTAINS HEARSAY/CONCLUSIONS #425 OBJ TO AFIDAV BL
ONLY 3) AFIDAVIT EXECUTED IN DAGETTE COUNTY #490 SUBMIT AFIDAV BL
WERE NOT EXECUTED IN TIMELY MANNER. AFIDAV IS NOT RELIABLE #534 BL
RESPONSE BY CPR #626 CPR RESTATES OBJ TO DATY UNTIMELY OBJ BL
#674 DATY ARGUES CONTENT OF AFIDAVIT #964 CRT FINDS AFIDAVIT BL
WAS EXECUTED IN COMPLIANCE AND REGULAR COURSE OF OFFICERS DUTIES BL
#1285 CRT FINDS AFIDAVIT IS TRUSTWORTHY AND OBJECT IS OVERRULED BL
#1319 RECESS #1330 DATY CONCERNED WITH ATTENTIVENESS OF JUROR BL
SCHMIDT, WILL CONTINUE #1377 JURY BROUGHT BACK IN #1440 EXHIBIT BL
P-3 ENTERED INTO EVIDENCE , CPR REQ TO ENTER EXHIBIT 1 & 2, BL
RESERVE OBJ ON P EXHIBIT 1 & 2 FOR LATER TIME, #1520 OBJ TO BL
INSTRUCTED TO ANSWER QUEST #1567 XEX BY DATY PW#1 #2987 DATY BL
OBJ TO HEARSAY ON CAR SEARCH, JURY TO DIS-REGARD ANSWER #3085 BL
COUNSEL APPRO BENCH #3129 JURY EXCUSED #3140 RECESS BL
#376 OBJ TO ADMISSION OF EXHIB 2 #390 PL EXHIBIT 2 SHOWN TO PW#1 BL
#445 D-4 EXHIBIT MARKED FOR DEF #459 DATY OFFERS D-4 EXHIB #469 BL
EXHIB ENTERED, EXHIBIT P-2 AND D-4 DIFFER IN INFORMATION #524 BL
CPR QUEST PW#1 ***NEW TAPE 459*** 531 OBJ TO QUEST, DEF TO ANSWE BL
#572 DATY OBJ TO P-1 EXHIBIT BEING ENTERED #616 OBJ OVERRULED BL
#671 OBJ TO LACK OF QUALIFICATION TO ADMINISTER TEST ON EXHIBIT BL
P-2 AND NOT INSTRUCTED IN TESTIMONY INSTRUCTION #720 CPR RESPOND BL
#752 EXHIBITS 1 & 2 ENTERED #770 OBJ DATY TO ALC CONSUMP AND BL
ACETONE PRESENCE #840 CPR RESPONDS TO BREATH TEST #874 OBJ BL
DUE TO WEIGHT AND NOT ADMISSIBLE. #946 EXHIB D-4 ENTERED UNDER BL
STIPULATION #960 DATY RESUMES XEX #1204 DEMOSTRATION ON P-2 EXHI BL
IF CARBON PAPER #1289 NO FURTHER #1292 REDIRECT BY CPR BL
#1358 OBJ TO QUEST OF BREATH TEST ON ACETONE READING #1384 QUEST BL
WITHDRAWN AND JURY DISREGARD LAST QUEST #1406 NO FURTHER BY CPR BL
#1413 PW#1 STEPS DOWN #1432 CPR CALLS PW#2 #1445 PW#2 OFFICER BL
JOHN LYBERT SWORN AND TESTIFIES #1583 PW#2 IDENTIFIES DEF #1595 BL
OBJ ACCUMULATIVE TESTIMONY #1614 OBJ OVERRULED #1773 NO FURTHER BL
BY CPR #1779 XEX BY DATY #2014 NO FURTHER BY EITHER SIDE #2023 BL
CITY RESTS #2068 DEF ATY REST #2078 COUNSEL APPROACH BENCH BL
#2115 EXHIBITS GIVEN TO JURY #2132 CRT ADDRESS JURY REGARDING BL
JURY INSTRUCTIONS #2295 ARGUMENT BY CPR #2846 DE ATTY OLIVER ARG BL
NEW TAPE #403 CPR CLOSING ARGUMENT #525 CRT ADDRESSES JURY BL
DELIB. #611 JURY RETIRES TO DELIBERATE BL
#622 JURY RETURNS #635 JURY HAS REACHED VERDICT #640 JURY FINDS BL
DEF GUILTY AS CHARGED, #655 JURY POLLED AND VERDICT IS UNANIMOUS BL
#749 WAIVE TIME FOR SNT #776 DATY ADDRESS CRT REGARDING SNT BL
CRT ENTERS JUDGMENT GUILTY AS CHRGED BL
SNT: BL
TAPE: 460 COUNT: 1145 BL
Judge: DUTSON, ROGER S. BL
Chrg: DUI Plea: Not Guilty Find: Guilty - Ju BL
Fine Amount: 650.00 Suspended: .00 BL
Jail: 30 DAYS Suspended: 30 DAYS BL
Community Service: 2 DAYS in lieu of jail. BL
Fines and assessments entered: FN 520.00 BL
SB 130.00 BL
Total fines and assessments... 650.00 BL
DEF LEAVES AREA ORDERED TO REPORT NEW ADDRESS TO THE COURT AND BL

Defendant

Citation: D108720

LPD Case: 912007007 TC

WEIHERT, KARL JOHN

Traffic Court Case

05/20/92 PAY FINE. DEF TO COMPLETE COUNSELING THRU ALC PROGRAM THRU BL
HAFB IF APPROVED PROGRAM THRU STATE. DEF TO PAY \$100 PER MONTH BL
1ST PMT END OF JUNE AND END OF EACH MONTH THEREAFTER. DEF TO BL
DO 24 HRS COM SERVICE. IF APPEAL IS IN FUTURE, PROBABLE CAUSE BL
HEARING COULD BE HELD. BL
Probation Agency Information: BL
LAYTON CIRCUIT COURT BL
425 N WASATCH DRIVE BL
LAYTON, UT 84041 BL
Phone: (801) 546-2484 BL
Conditions of Probation: BL
NO VIOLATIONS, EXCEPT MINOR TRAFF, SPEC NO LIKE CHARGES BL
PAY FINES AND ASSESSMENTS BL
ATTEND AND COMPLETE ALCOHOL PROGRAM BL
12 MONTHS-----PROBATION TO THE COURT BL
DO NOT DRIVE UNLESS LEGAL AND INSURED BL
REV scheduled for 12/23/92 at 0300 P in room 2 with RSD BL
06/22/92 FILED: NOTICE OF APPEAL SWF
CERTIFIED COPY OF NOTICE IS MAILED TO COURT OF APPEALS. SWF
Began tracking Appeal Review on 07/22/92 SWF
06/29/92 FILED: FROM THE COURT OF APPEALS--NEW CASE # 920394-CA KAD
07/15/92 Hearing (REVIEW HEARING): JUDGE: DUTSON, ROGER S. BL
TAPE: 491 COUNT: 2180 BL
Deft not present BL
ATD: OLIVER, D BRUCE PRO: ELLER, JANENE BL
ATY OLIVER REQ CERTIFICATE OF PROBABLE CAUSE BE ISSUED AND STAY BL
OF EXECUTION UNTIL APPEAL. CRT TO SET HRG ON PROBABLE CAUSE. BL
STAY GRANTED TILL AFTER HRG. BL
07/21/92 HRG scheduled for 9/23/92 at 2:00 P in room 2 with RSD BL
07/22/92 REC'D: ORDER (THAT SNT BE STAYED TIL REV BY CT OF APPEALS,MO FOR DKM
CERT OF PROB CAUSE, MO & ORDER FOR PREP OF TRANSCRIPT. TO RSD- DKM
07/30/92 ORDER SIGNED BY JUDGE DUTSON- RFW
PER REQ OF ATD, TAPES SENT TO PENNY C ABBOTT, TRANSCRIBER- RFW
08/17/92 DOCKET TO ATD PER REQUEST- DKM
08/19/92 FILED: ORIGINAL TRANSCRIPT FROM PENNY C ABBOTT, CSR- RFW
TAPES RETURNED FROM TRANSCRIBER- RFW
08/20/92 COPY OF TRANSCRIBER'S COVER LETTER SENT TO COURT OF APPEALS- RFW
Appeal Review date changed to 11/01/92 RFW
08/28/92 RFW T/CD CT OF APPEALS. NOTHING NEEDED FROM CT OR CPR THIS DATE- RFW
09/08/92 FILED: COPY OF DOCKETING STATEMENT SENT BY ATD TO CT OF APPEALS- RFW
09/16/92 CLERK CONTACTED ATY OLIVERS OFFICE REG HRG ON 9/23/92. HRG TO BL
BE CANCELLED. BL
HRG on 9/23/92 was cancelled BL
10/07/92 SHERRY, CT OF APPEALS, T/CD. REQ'S TRANSCRIPTS & FILE- RFW

endant Citation: D108720 LPD Case: 912007007 TC
WEIHERT, KARL JOHN Traffic Court Case

Counting Summary

	Total Due	Paid	Credit	Balance	Time Pay#
ne Due	650.00			650.00	

tional Case Data

Sentence Summary

1. DUI Plea: Not Guilty Find: Guilty - Jury
Fine amount: 650.00 Suspended: .00
Jail: 30 DA Suspended: 30 DA
Community Service: 2 DA

Parties

Atty for Defendant

OLIVER, D BRUCE
180 SOUTH 300 WEST,
SUITE #260
SALT LAKE CITY, UT 84101

Home Phone: () -
Work Phone: () -

Personal Description

Sex: M DOB: 11/22/63
Dr. Lic. No.: 0

State: UT Expires:

Scheduled Hearing Summary

PRE-TRIAL CONFERENCE	on 04/01/92	1100 A in room 2 with RSD
JURY TRIAL	on 05/20/92	0900 A in room 2 with RSD
REVIEW HEARING	on 06/17/92	0300 P in room 2 with RSD
REVIEW HEARING	on 12/23/92	0300 P in room 2 with RSD

Tracking Status

Appeal

Review Date
11/01/92

nd of the docket report for this case.

DUI MONS AND CITATION STATE OF UTAH Y OF _____ F <u>Layton</u> DEFENDANT IS HEREBY NOTICE TO APPEAR IN: <u>K. Roger Bean</u> <u>429 wasatch</u> 5) nor more than (14) days after issuance FOR COURT USE ONLY INVICTON _____ _____ <u>SUSPENDED</u> _____ _____ <u>SUSPENDED</u> _____ ↓ / <input type="checkbox"/> No Contest / <input type="checkbox"/> Not Guilty Agency _____	ISSUING ENFORCEMENT AGENCY <u>Layton P.D.</u> NAME (Last) (First) (Middle) <u>Weichert</u> <u>Karl</u> <u>John</u> ADDRESS (City) (State) <u>PSC. 1 Bx 221</u> <u>HAFB ut</u> Driver License No. Class Expires State Restriction Social Security No. Motorcycle <u>5706342201</u> <u>Reg</u> <u>11-22-92</u> <u>Wiscon</u> <u>N</u> <u>72-76-7614</u> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Height Weight Eyes Sex Vehicle License No. State Expires <u>6'1"</u> <u>200</u> <u>BRN</u> <u>M</u> <u>N 45832</u> <u>ut</u> <u>Temp. Tag</u> Vehicle Make Vehicle Type Year Color Accident Comm. Vehicle Haz. Material Direction of Travel <u>Ford</u> <u>Truck</u> <u>92</u> <u>BRN</u> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <u>NSE W</u>	<div style="text-align: right; font-size: small;">116278 APO 28 9/2007 TC</div> CASE NO. <u>910</u> <u>6843</u> CITATION NO. <u>D108720</u> DOB <u>11-22-63</u> Zip <u>84040</u> Social Security No. <u>72-76-7614</u> Vehicle License No. <u>N 45832</u> State <u>ut</u> Expires <u>Temp. Tag</u>
THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING: <input type="checkbox"/> UTAH CODE <input type="checkbox"/> COUNTY CODE <input checked="" type="checkbox"/> CITY CODE NO.: <u>41-6-44</u> ON THE <u>22</u> DAY OF <u>Dec.</u> 19 <u>91</u> MILITARY TIME <u>1829</u> LOCATION <u>2100 N main</u> MILE POST NO _____ VIOLATION(S): <u>DUI</u>		
WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN SIGNATURE <u>Booked DCSO</u> I CERTIFY THAT A COPY OF THIS SUMMONS AND CITATION WAS DULY SERVED UPON THE DEFENDANT ACCORDING TO LAW ON THE ABOVE DATE AND I KNOW OR BELIEVE AND SO ALLEGE THAT THE ABOVE NAMED DEFENDANT DID COMMIT THE OFFENSE HEREIN SET FORTH CONTRARY TO LAW. I FURTHER CER- TIFY THAT THE COURT TO WHICH THE DEFENDANT HAS BEEN DIRECTED TO APPEAR IS THE PROPER COURT PURSUANT TO SECTION 77-7-19, U.C.A. OFFICER <u>D. J. Xeriff</u> BADGE NO. <u>P025</u> COMPLAINANT _____ DATE OF CITATION <u>12-22-91</u>		
COURT COPY ONE		DATE SENT TO DLD DOCKET NO.

PORT TO. IN THE COURT
JRT RM. #2 LAYTON
W. STATE ST.
RINGTON, UT. COUNTY OF DAVIS, STATE OF UTAH

LAYTON
VS
WEIHERT, KARL JOHN
endant No. 916439
ORDER RELEASING DEFENDANT,
PROMISE TO APPEAR,
AND WAIVER OF EXTRADITION

THE SHERIFF OF DAVIS COUNTY, STATE OF UTAH: WHEREAS the above named
fendant has been duly charged with DUI

D WHEREAS just cause has been shown to the above entitled Court, you
e hereby ordered to release the above named defendant from the Davis
untly Jail without bail subject to the following conditions, orders,
c., if any: APPEAR IN COURT THURSDAY, DECEMBER 26, 1991 at 1:00 P.M.

DGE BEAN BY MARY S. ROBB
Pretrial Service Officer

PROMISE TO APPEAR AND WAIVER OF EXTRADITION

the above named defendant, hereby promise to appear in the above
itled Court on the 26 day of DECEMBER, 19 91,
1:00 P.M. M. I further promise to appear before the appropriate
rt, as instructed, until the charges against me have been dismissed
I have been sentenced. I understand that should I fail to appear as
tructed and promised, or if I fail to comply with the above
ditions, orders, etc., if any, my release will be revoked and I will
returned to custody and confinement. I further understand and agree
t should I fail to appear and I am apprehended outside the state of
h I waive extradition proceedings in order that I might be returned
this Jurisdiction, and I agree to pay reasonable costs incurred in
sing my return to custody.

CERTIFICATION

the above named defendant, hereby certify that I have read the above
mise to Appear and Waiver of Extradition; that it has been explained
me, and that I fully understand said Promise to Appear, Waiver of
radition, and agreement to pay costs in the event that I fail to
ear.

Dated this 23 day of DECEMBER, 19 91.

Karl Weiher
Defendant

Witness

1 received a copy of the Information this morning, your Honor.

2 THE COURT: Mr. Bailiff, we're going to have the
3 jury step out for just a minute more. I'm sorry. We have a
4 preliminary matter.

5 MR. OLIVER: Just received a copy of the
6 Information this morning. It was apparently filed with the
7 Court on May 15th at 3:55 p.m., which was on Friday of this
8 week past. And the bottom of the Information says this
9 Information is based upon evidence obtained from the
10 following witness: Donald J. Keith, and that's signed by
11 Janene H. Eller, Layton City Prosecutor.

12 Then the next line, I--is scratched out, and put
13 "filed this 15th day of May, 1992," Circuit Judge is crossed
14 out, and I don't know who signed this. I don't read--I
15 can't read the signature, but that's neither here nor there.

16 The Constitution of the State of Utah, Article 1,
17 Section 13 requires that offenses heretofore required to be
18 prosecuted by indictment shall be prosecuted by Information
19 after examination and commitment by a magistrate. This was
20 not sworn to before a Judge nor authorized by a Judge.

21 I think that even technically speaking and I'll
22 raise the argument now commensurate therewith, but the
23 important thing is that they be commenced by the commitment
24 of the--examination and commitment by the magistrate rather
25 than being filed in the middle of a case. I think the

1 filing is inadequate, but I think that's really the crux of
2 my motion to dismiss is that this has not been presented to a
3 magistrate and authorized for filing. And that's improper
4 and totally improper and we would move to dismiss the case.

5 THE COURT: City?

6 MS. ELLER: Yes. He's correct, it was not sworn
7 to before the Judge. I--I was informed by the clerk that an
8 Information had not been filed in this case. I came over and
9 met with Judge Bean, who indicated that due to--because of
10 amendment, I'm not sure if it's to a rule or statutory
11 requirements, that they no--these Informations no longer
12 need to be sworn before the Judge. And so based on that
13 information from Judge Bean, I signed the Information and
14 filed it at that time.

15 If the Court wants to give me a minute, I'm sure
16 that I can find a reference to the amendment.

17 THE COURT: Well, there is a new rule on that;
18 however, in order to have the proper record here, I'd
19 indicate that the citation itself appears to have been
20 filed by the Court--or with the Court quite some time ago,
21 it's in the file itself. And I would allow the State or
22 the City at this time to sign the Information under oath,
23 or to verify it under oath, and I would even subscribe, the
24 new rule in the event there is any problem with prior
25 offenses, I think it's more of a technical, procedural

1 matter than anything else; so would you raise your right
2 hand, please?

3 MR. OLIVER: Judge, before you do that--

4 THE COURT: Yes.

5 MR. OLIVER: --if I may just address briefly--

6 THE COURT: Yes.

7 MR. OLIVER: --what the Court has just raised.

8 77-7-21, Utah Code Annotated indicates that the
9 citation is not sufficient.

10 THE COURT: I understand.

11 MR. OLIVER: As a matter of fact, to proceed on
12 the citation requires--

13 THE COURT: I understand.

14 MR. OLIVER: Well, I appreciate that, but I still
15 would like to make it for the record.

16 The 77-7-15 requires that a waiver be had prior
17 to proceeding on the citation, that waiver has not been had,
18 definitely Mr. Weihert nor myself, neither one, has waived
19 that in writing, and do not waive that. And the very fact
20 that the prosecution must be commenced is not technical,
21 it's a Constitutional requirement.

22 THE COURT: I--

23 MR. OLIVER: And as such, the appropriate remedy
24 at this point in time is to dismiss because it's been
25 improperly commenced and we're here improperly before the

1 Court, and the appropriate remedy is to dismiss the case.

2 THE COURT: I understand your position.

3 Now, would you raise your right hand, please, and
4 be sworn?

5 Do you solemnly swear that the facts set forth
6 in this Information are true and correct to the best of
7 your knowledge, so help you, God?

8 MS. ELLER: I do.

9 THE COURT: Would you sign again where you have
10 already signed?

11 MR. OLIVER: Your Honor, not knowing how far the
12 Court is going to go with regards to the jury instructions
13 at this point in time, I do have some objections and if the
14 Court anticipates--excuse me--anticipates reading those to
15 the--the entirety to the jury at this time, I would like to
16 address that.

17 THE COURT: Okay. This might be a good time to--
18 to make the objections, also to have the--your position
19 concerning the jurors that--

20 MR. OLIVER: Oh. The--

21 THE COURT: --that you had asked be excused for
22 cause, put that on the record so we have the record.

23 MR. OLIVER: Okay. Thank you, your Honor. The
24 instructions are not numbered, so I'm referring to the
25 instruction that has at the top of the page a G. It says,

1 A The actual breath sample was administered at 1912,
2 which would be 7:12 p.m.

3 Q And do there appear to have been any alterations
4 made to those documents that you filled out at the time you
5 gave the test to Mr. Weihert?

6 A No.

7 MS. ELLER: Your Honor, I'd like to offer
8 Plaintiff's Exhibit 3 which is custodian certificate and
9 intoxilyzer test and affidavit regarding the intoxilyzer
10 machine.

11 THE COURT: Has defense counsel seen that?

12 MS. ELLER: He has.

13 MR. OLIVER: I've seen them just briefly, your
14 Honor. Do have some objections to them.

15 THE COURT: All right. We will have a very brief
16 removal of the jurors while we discuss a legal issue here
17 and you're again advised not to discuss the case until you
18 go into the jury room to finally discuss it.

19 MS. ELLER: Your Honor, if Mr. Oliver's objection
20 goes to the admission of those--that affidavit and ultimately
21 to the other documents that are before Officer Keith, then I
22 would have an objection to him raising that objection at
23 this time. I would like to go forward with that.

24 THE COURT: Well, let's go ahead and hear what the
25 objection is at this point. What is your objection?

1 MR. OLIVER: May I approach the bench, your Honor?

2 THE COURT: Yes.

3 (Whereupon, an off-the-record discussion was held
4 at side bar.)

5 MR. OLIVER: With regards to Exhibit P-3, I think
6 there are a couple of significant (inaudible). Point 3,
7 which is the stan--the standards for chemical breath analysis,
8 the evidence. Under this, and I have perused this today
9 specifically in conjunction with this case--

10 THE COURT: 41-6-44.3?

11 MR. OLIVER: That's correct, your Honor.

12 THE COURT: Okay. Go ahead.

13 MR. OLIVER: It says, the Department of Public--
14 the Commissioner of the Department of Public Safety shall
15 establish standards for the administration and interpreta-
16 tion of chemical analysis of a person's breath, including
17 standard of training.

18 Now, first thing, those standards are not available
19 here and we don't know what the standards are; but going on
20 to Paragraph 2, says, in any action or proceeding in which
21 it is material to prove that a person was operating or in
22 actual physical control of a vehicle while under the
23 influence of alcohol or any drug, or operating with a blood
24 or breath alcohol content statutorily prohibited, documents
25 offered as memorandum or record of acts, conditions or

1 events to prove that the analysis was made and the instrument
2 used was accurate according to standards established in
3 Subsection 1 are admissible if, and then it goes on and says,
4 No. 1, the Judge finds that they were made in the regular
5 course of the investigation at or about the time of the act,
6 condition or event.

7 Dealing specifically with Subsection A, there are
8 several objections. First off, one of the pages, and there
9 are apparently three pages to Exhibit 3, one of the pages to
10 Exhibit 3, signed by Sergeant Christian Kooring was signed
11 on the 24th of January, 1992. Taking on its face that this
12 incident occurred on December 22nd, 1991, that's clearly,
13 what is it, 32, 33 days after the incident. And therefore,
14 based upon the fact that this is executed at least 32 days
15 after, it can't comply with--that it has to be made in the
16 regular course of the investigation at or about the time of
17 the act, condition or event. Can't comply with that. So
18 consequently, that's a specific thing--

19 THE COURT: Well, let me--let me interrupt you
20 briefly so I understand your position. Your position is
21 that a certification made by the sergeant by 30 days or so
22 after the incident in question, certifying certain records
23 from on or about this occasion does not comply with Subsection
24 1?

25 MR. OLIVER: Well, your Honor, certainly that's

1 my position, but I would state further that one of the
2 things, and I want to address it a little bit further than
3 that; but I hadn't indicated exactly which one that was, as
4 far as which document was represented by this one signed by
5 Sergeant Chris Koorring.

6 THE COURT: Until I see it, of course, I can't
7 really understand the argument, so--

8 MR. OLIVER: I understand.

9 THE COURT: --if we've got copies or something so
10 that I can follow you, then that--

11 MR. OLIVER: This is all I've got, your Honor.

12 THE COURT: Okay.

13 MR. OLIVER: I don't know if there's a copy--

14 MS. ELLER: I apologize. I don't believe I have a
15 copy, your Honor.

16 THE COURT: All right. Go ahead then. Go ahead.

17 MR. OLIVER: The--at any rate, so consequently, the
18 interesting thing is that it has to be in the regular course
19 of the investigation. Now, obviously, what Chris Koorring--
20 what Sergeant Chris Koorring is doing here is not in the
21 regular course of the investigation. The investigation is
22 well completed at that time; the reports are submitted,
23 everything's done, and Chris Koorring is not a part of the
24 investigation. So the reports must be conducted in the
25 regular course of the investigation; this is not done in the

1 regular course of the investigation.

2 Now, I would anticipate that then Counsel's going
3 to suggest that it comes in under 803-6 as a routine thing
4 for business exceptions, but that's only if he's here to
5 testify, and then the records that he's testifying about,
6 not an affidavit in his place, can come in. And so
7 consequently, when we look at 803-6 as a business record
8 exception, which Sergeant Chris Koorring's not here to testify
9 to the fact that these are indeed kept, he's submitted his
10 affidavit in lieu thereof.

11 And I've reviewed Murray City vs. Hall in anticipa-
12 tion of this, and Murray City vs. Hall only deals with the
13 technicians' affidavits, not with anything else. And I
14 would submit to the Court that that is what was anticipated
15 when this provision was written into the law in 41-6-44.3,
16 that it was anticipated to be the technicians' affidavits,
17 and I still think that the technicians' affidavits are
18 defective on their face and I will address that in a moment;
19 but nonetheless, I think that that's what's anticipated,
20 not a whole series of things that may follow thereafter that
21 obviate certain burdens of proof that the State has simply
22 by submitting an affidavit. That is not the intent of the
23 statute, that is not the intent of the Commissioner of
24 the Department of Public Safety's rules and regulations,
25 they deal specifically with the breath-testing device, not

1 with the keeping of records.

2 And so consequently, the affidavit of Chris
3 Kooring under the circumstances is inadmissible, simply
4 because it doesn't fit anything.

5 And with regards to the business record exceptions
6 under 803-6, it says records of regularly conducted activity.
7 It says a memorandum, report, record or data compilation in
8 any form of acts, events, conditions, opinions or diagnoses
9 made at or near the time by or from information transmitted
10 by a person with knowledge--we're talking about documents
11 that are made at that time of the incident, the time of the
12 breath test--if kept in the course of regularly-conducted
13 business activity and if it was the regular practice of that
14 business activity to make the memorandum, report, record,
15 data compilation, all as shown by the testimony of the
16 custodian or other qualified witness, unless the source of
17 information or the method of circumstances of preparation
18 indicate lack of trustworthiness. Okay?

19 So, unless there's a--it's admissible under this
20 exception unless there's an indication of lack of trust-
21 worthiness. I think there is an indication in this
22 particular case, which I'm going to argue in just a moment,
23 but the important thing is, it has to be the testimony of
24 the custodian or other qualified person.

25 And in this case, all we have is an affidavit, and

1 so consequently, it doesn't fit under the exception as
2 provided in 41-6-44.3, doesn't fit under the exception as
3 provided in 40--in 803-6, Utah Rules of Evidence, nor does
4 it fit under 803-8, because under 803-8, it specifically--
5 8(b) says, matters observed pursuant to a duty imposed by
6 law as to which matters there was a duty to report, excluding
7 however, in criminal cases, matters observed by police
8 officers or other law enforcement personnel.

9 So this is a matter, Sergeant Christian Koorring,
10 Breath Testing Supervisor, Utah Highway Patrol, it's a
11 matter observed by a police officer, and therefore, in a
12 criminal matter, is not admissible.

13 Now, I make the same argument with regards to the
14 affidavits of the technician, but specifically the argument
15 that I'm making now goes to only this affidavit of Chris
16 Koorring. And so with regards to this affidavit of Chris
17 Koorring, it's not the exception as provided for in statute,
18 it's not guaran--it's not provided for by the Commissioner
19 of the Department of Public Safety in his rules and regula-
20 tions, standards and policies, it's not covered under 803-6
21 because he's not here to testify and it's not covered under
22 803-8 because this is a criminal proceeding and this is a
23 police report which is kept and observed by a police
24 officer; therefore, it would be specifically excludable.

25 So therefore specifically to the affidavit of

1 Chris Koorring, we would object to that.

2 Then with regards to--may I just for a moment--
3 well, then with regards to the affidavit of the breath
4 technician, I would indicate that I think that 803-8(b)
5 specifically excludes this, recognizing that there's been an
6 exception under 41-6-44.3; but I think that the affidavit
7 of the technician in this case, who is Ronald Ellsworth, a
8 certified breath technician, is--contains hearsay. Not
9 only does it contain hearsay, it contains conclusions of law
10 which would be prohibited in a standard affidavit under
11 Rule 56 of the Utah Rules of Civil Procedure.

12 It would be the position, as a matter of fact,
13 Utah Criminal Code--and I don't have 76--well, I do, I've
14 got part of 76; the Utah Criminal Code in, I think it's
15 76--76-1-501, says a defendant in a criminal proceeding is
16 presumed to be innocent until each element of the offense
17 charged against him is proved beyond a reasonable doubt.
18 Now, that's the standard in a criminal proceeding. The
19 standard in a civil proceeding is a--by a preponderance,
20 simply the 50 percent or 51 percent rule. Affidavits which
21 would not be acceptable in the 50 or 51 percent rule, the
22 preponderance, certainly would not be acceptable when we
23 have to prove the elements beyond a reasonable doubt.

24 Now, affidavits may be acceptable under 41-6-44
25 if done properly; but when done, containing aspects of an

1 affidavit which would not be admissible in a civil case
2 should absolutely not be admissible in a criminal case,
3 since the burden is far greater in a criminal matter. The
4 standard should be far greater, that the adherence of that
5 affidavit should conform to what--what the rules of evidence
6 would require and what 76-1-501, or was it 2-501 would
7 require, the burden of proof. 1-501.

8 And so thereunder, the--and the specific
9 provisions of the affidavit with regards to Ron Ellsworth
10 that I'm objecting to are that he makes a conclusion that
11 says this is the official record and notes of this procedure
12 which were made at the time these tests were done, that's
13 for this Court to determine and that is--that--if we rely
14 solely on the face of the affidavit, that obviates the
15 Court's responsibility under A.

16 THE COURT: But I could disagree with it, couldn't
17 I, if I examine--

18 MR. OLIVER: There's noth--there's no way that I
19 can produce anything that's going to allow you to disagree,
20 except in this particular case, and I'll show the Court
21 something that will allow it to disagree; but routinely,
22 that statement makes the affidavit inadmissible. Okay.

23 The fact that he says he's competent to testify is
24 a conclusion of law. That it was done, let's see, that it's
25 done in accordance with the standards established by the

1 Commissioner of Utah, Department of Public Safety, that's a
2 conclusion, these are all conclusions that we don't have the
3 opportunity to look behind, 'cause we don't have the facts
4 to look behind it. A properly constituted affidavit and a
5 properly constructed affidavit would give us the facts and
6 allow us to draw the conclusions from the facts. That's not
7 what's happening here. They're telling us what we have to
8 believe, not giving us the facts and allowing us to draw our
9 own conclusions as is the purview of this Court, to make
10 findings as to whether or not indeed these facts exist. We
11 don't have the facts upon which to base it.

12 And so all we have to rely on is the conclusions,
13 strike the conclusions and the affidavit goes out the window
14 because it doesn't comport with the requirements of 41-6-44.3.
15 Leave them in and it totally takes away from the Court the
16 opportunity to examine the facts and find--make the finding
17 of facts and the conclusions which are required for the
18 admission of the affidavit.

19 So, based upon the Constitution of these affidavits
20 specifically, we're objecting to these affidavits, and I
21 want that clear, I'm not objecting to 41-6-44.3, nor an
22 affidavit that would comply with the requirements therein;
23 only with a defective affidavit to begin with. My argument
24 does not go to the right of confrontation, I want that
25 specifically understood. I'm going to content only and

1 admissibility of affidavit, not to the right of confrontation.

2 Now, specifically one of the findings that this
3 Court must make in order to have these admissible is that
4 in 2-(a) of 41.6-44.3 says, the Judge finds that they were
5 made in the regular course of the investigation at or about
6 the time of the act, condition or event and, then it goes
7 on and says...

8 I would like to point out to the Court if I may,
9 point to Counsel first, okay.

10 MS. ELLER: Well, what is it that you're pointing
11 out? I'm sorry.

12 MR. OLIVER: The affidavit was executed in Daggett
13 County, your Honor; Daggett County is at minimum three hours
14 away from Layton, Utah, and as such, this affidavit could
15 not have been executed in accordance with what the Court
16 has to find; that is, the Judge finds that they were made
17 at--in the regular course of business, or in the regular
18 course of investigation at or about the time of the act,
19 condition or event.

20 And furthermore, I would say that's if Trooper
21 Ellsworth got in his vehicle and drove straight from here up
22 to Daggett County. We have no idea what transpired between
23 the time the test was conducted here or whatever he's--
24 he's affining to; we have no idea what happened between here
25 and there, and what the time element is on that. And so

1 consequently, I would submit that the irregularity of the
2 affidavit itself indicates that it was not done at or about
3 the time of the event for which the affidavits are prepared.
4 Wasn't even--except for the fact that Trooper Ellsworth says
5 so, in a conclusionary type way, we don't even--from the--
6 from the notary public side of that, we don't really know a
7 whole heck of a lot because it creates--creates a lot of
8 confusion in my mind as to why it's notarized in Daggett
9 County, when the test is administered in Davis County,
10 theoretically in Layton, unless the machine was in Lay--
11 unless the machine was in Daggett County. I don't know. We
12 have no answers to these things.

13 And the affidavit on its face raises substantial
14 questions and substantial problems. The admission of the
15 affidavit is inadmissible--or the--the--is not acceptable, it
16 is inadmissible, based upon 41-6-44.3, 806--or 803-6,
17 803-8(b) and on its face, it's just unreliable. And that's
18 one of the things that the Court has to find is that it's
19 reliable. And I see nothing to help us to get from Davis
20 County to Daggett County, and that, on its face, destroys the
21 reliability of the document.

22 THE COURT: Response?

23 MS. ELLER: I've also reviewed Murray City vs. Hall,
24 and the Supreme Court of Utah specifically stated in that,
25 recognized Section 41-6-44.3 as a codification of the findings

1 matter, so go ahead and--

2 MR. OLIVER: Just briefly, your Honor, I'd indicate
3 to the Court that Ms. Eller did not address the reliability
4 aspect of this that was raised by the location of signing
5 of the affidavit. She didn't even address that, and Murray
6 City vs. Hall only goes to the technicians' affidavits, and
7 it addresses it very specifically.

8 And as the Court reads through the four points,
9 the first three points were correct that Ms. Eller cited; but
10 the fourth point is the reliability which I think that the
11 Daggett County notary brings into question the reliability
12 of this particular affidavit. I think there's a substantial
13 question on its face as to its reliability. But Murray City
14 vs. Hall does not address the custodial affi--or the
15 custodian's affidavit.

16 And I read specifically 803-6 which requires
17 testimony from the custodian, not an affidavit from the
18 custodian. And while the purpose of the statute as is
19 espoused by Murray City vs. Hall may be one of economy, I
20 guess if we really wanted to, we could say, gee wilikers,
21 anybody who is arrested is guilty because we don't want to
22 waste the Court's time, money or the officer's time or money
23 or the prosecutor's--that's not what they're doing. What
24 they're doing is that the--they're deeming that the machine
25 is basically reliable provided that the technician does as

1 he's supposed to, then the results are admissible. That's
2 what they're attempting to determine. They're not trying to
3 obviate a defendant's rights in a trial. What they're
4 trying to do is they're trying to say, you can challenge
5 this and you can spend five days challenging this, and
6 every time we challenge it, we can have expert testimony,
7 and we can do this and we can do this, and the burden can
8 become overwhelming on the system, and this and that, and as
9 long as the officer does what he's supposed, as long as the
10 machine's deemed reliable, then the affidavits are
11 admissible, when they comply with certain things.

12 And in this case, I'm not arguing about the right
13 of confrontation. That's what Murray City vs. Hall is about
14 is the right of confrontation, and I'm not arguing the right
15 of confrontation. I'm arguing content of affidavit. And
16 there's a world of difference between right of confrontation
17 and content of affidavit.

18 I have, in civil matters, in domestic matters, go
19 in to the Court with the individual sitting in the courtroom
20 that executed the affidavit and if the affidavit is
21 improperly prepared, the affidavit is inadmissible. Now
22 that person can still testify, that person can still verify
23 the content of that affidavit, but do so in the appropriate
24 fashion because the content of the affidavit must be
25 admissible as evidence in Court. Conclusions wouldn't be

1 admissible.

2 If I objected and if he says, I did them in
3 conformance with the standards of the Commissioner of the
4 Department of Public Safety, I would object, and I would
5 say, let's see what those are and let's find out exactly
6 what you did, that's a conclusion and I want to know what
7 you did to comply with that, and this Court would sustain
8 my objection and would then make Trooper Ellsworth testify
9 to the steps that he followed and why it was in conformity
10 with the standards.

11 This affidavit so--totally bypasses that and doesn't
12 give us anything to rely on. It just says, I did it, believe
13 me, I did it. That would not be admissible in any Court as
14 testimony, as would none of the other three provisions that
15 I've indicated; competent to testify. He may well be
16 competent to testify, but that's a determination to be made
17 in this courtroom, not by anybody else, anywhere else.
18 That's a self-serving statement that goes to his own ends.

19 And so whether it's under 41-6-44.3, whether
20 it's on the face of the affidavit, whether it's under 806--
21 or 803-6 or 803-8(b), it's not admissible on its content,
22 not on the right to confrontation. Murray City vs. Hall
23 disposed of the right to confront--right of confrontation.
24 And now we're talking about, not the right of confrontation,
25 we're talking about content. And this Court must rule that

1 the content must be admissible as evidence, and if it's not,
2 then the affidavit is not admissible.

3 And lastly, and I'm just going to--it's almost a
4 restatement again and I apologize, but I just want to re-
5 emphasize the fact, I still don't know where Daggett County
6 comes from in this matter. I have absolutely no idea
7 whatsoever; but to me, on its face, that creates a question
8 of reliability.

9 THE COURT: I don't think anyone can read Section
10 41-6-44.3 and Murray vs. Hall together without recognizing
11 that the legislature and the Supreme Court have approved a
12 method of allowing certain evidence into a trial in a manner
13 that is somewhat unusual, and there's--there's an intent
14 here, obviously, to allow the legislature to shortcut, as it
15 were, some of the procedural aspects, but gives to the trier
16 of fact a very important responsibility of determining
17 whether based upon the affidavits, and I have to acknowledge,
18 they're somewhat of a bootstrapping process that is provided
19 for in Murray vs. Hall and the statute; but the ultimate
20 responsibility of the trier of fact is to determine that the--
21 one of the findings is that the method and circumstances of
22 the preparation of the documents were such to--as to indicate
23 their trustworthiness.

24 That leaves, of course, an interesting issue
25 raised by defense counsel of an affidavit by Christian

1 Koorring, Sergeant, custodian, signed in--on January the
2 24th as a certification that these records are correct. And
3 I read that affidavit as only being a certification of the
4 intoxilyzer tests being part of the official records, and
5 specifically rule that that is not prohibited under the
6 intent of 41-6-44.3, even though I do find that the affidavit
7 of Christian Koorring, the breath testing supervisor at the
8 Utah Highway Patrol was not made in the regular course of
9 the investigation, but that it was made at or about the
10 time that it says it was made. And you--you can reserve that
11 issue for--for appeal, if you feel it's an appropriate issue
12 to appeal; but I do find that on the face of that affidavit,
13 that it is what it purports to be, that is, that it was made
14 out on the 24th day of January, 1992, and he certified as to
15 the statements contained therein and some of them are legal
16 conclusions, or at least conclusions that there were
17 regulations in effect and that these records are done in
18 accordance with those regulations. And I'll allow you to
19 make that argument at a higher court if you feel strongly
20 enough about it, because I believe the intent of 41-6-44.3
21 is to allow these documents in, if I find that they
22 otherwise are reliable.

23 Now, as to the argument that they do not occur
24 necessarily at the time of the investigation, I read that
25 section more broadly than that where the language says at or

1 about the time of the act, condition or event, and I'm
2 reading that as meaning the event that these people are
3 swearing occurred, and that it does not have to be at the
4 time of this particular investigating officer's investiga-
5 tion.

6 MR. OLIVER: No, I wouldn't suggest--just if I may
7 just interrupt the Court; I'm not suggesting that it has to
8 be done contemporaneously with the officer's investigation.
9 I don't think that's the intent of 41-6-44.3, and if I made
10 the Court believe that that's--

11 THE COURT: Well--

12 MR. OLIVER: --my argument, I back off. I would
13 specifically state that the affidavit of Ron Ellsworth has
14 to be prepared contemporaneously, as according to Murray
15 City vs. Hall, with his conduct.

16 THE COURT: Yes. Yes. And that raises then
17 another issue. He states on one of the affidavits that on
18 December 19th at 11:35, he performed tests on the machine to
19 determine if it was accurate, certify that it was done and
20 that it was--and the machine was accurate at that time and
21 on the 19th of December, 1991, in Davis County, in front
22 of Colleen Abate, or Abate, the clerk--I know that's the
23 clerk out of Clearfield Court that--this is a matter of
24 knowledge, that she certified that it was done in--in--or
25 he certified it was done in front of her on that same day.

1 It looks to me as though, the way I construe what
2 happened on the second page of the affidavit is that on
3 January the 20th, 1992, he, at 9:40 a.m., he certifies that
4 he tested the machine again. He did not swear to that,
5 however, until the next day. And I believe that although he
6 swore to it in Daggett County and it was the next day, that
7 that is in substantial compliance with the requirements of
8 41-6-44.3.

9 In looking at these documents, I--they appear
10 that the calibration and testing of the machine was done
11 pursuant to the standards established by the Commissioner
12 of Public Safety, if I admit Koorring's affidavit in, and
13 then the other affidavit of Ron Ellsworth, and that, I
14 believe, is the intent of the statute. And that these
15 affidavits were prepared in the regular course of these
16 public officers' duties and that they were prepared contem-
17 poraneously with the act, condition or event that they
18 purport to be certifying to. And in reasonable proximity to
19 those times; finding that specifically the one affidavit
20 was not signed until a day later by Ronald Ellsworth, he
21 asserts that he did the test on January 20th at 9:40 a.m.,
22 but did not swear to that until January the 21st. He
23 certifies that the intoxilyzer was at the Layton Police
24 Department when he tested it and then he certified to that
25 apparently when he was in front of a notary that resides in

1 Manila, Daggett County, and he swore to that on the '21st
2 day of January, and I would find that he probably swore to
3 it in Manila, Daggett County as a--that's how I would have
4 to construe this particular record. And I find that that
5 is reasonably contemporaneous with the act, condition or
6 event that he is certifying.

7 I further find that the source of this information
8 from which made, and the method and circumstances of the
9 preparation are such as to indicate trustworthiness. That
10 being the intent of the statute and Murray vs. Hall,
11 therefore, I would overrule your objection on that basis.

12 Do you have further objection to Plaintiff's
13 Exhibit 3?

14 MR. OLIVER: None, your Honor.

15 THE COURT: All right. Let's have a very brief
16 recess, we'll call the jury back in, and take about a three-
17 minute recess.

18 (Whereupon, the recess was taken.)

19 MR. OLIVER: Your Honor, there was one concern that
20 I wanted to bring before the Court. And--

21 THE COURT: You may be seated.

22 MR. OLIVER: Mr.--Mr. Schmidt, I don't know if
23 the Court's noticed or been aware of it, and I really don't
24 know what or whatnot; but he seems not to be paying a whole
25 heckuva lot of attention. I've looked at him several times

1 and he's staring straight ahead, looking at neither of the
2 speakers, staring straight ahead and just almost in a daze,
3 so to speak. And--are we on the record? And I'm just a
4 little concerned about his attentiveness and whether or not
5 he actually is being attentive to the trial. I--I don't
6 know how to determine that, except that I would like the
7 Court to pay attention to that and notice it and indeed,
8 see if the Court feels the same way I do.

9 THE COURT: I have been watching Mr. Schmidt, and
10 I saw him in the hall out here, just before I came in and I
11 asked him how he was feeling, just as I was coming through,
12 and he said he was feeling okay. So, I will continue to
13 observe him. I have been keeping my eye on him.

14 All right. Call the jury in.

15 (Whereupon, the jury returned to the courtroom.)

16 THE COURT: Would the Counsel come forward and
17 I'll give you copies of these instructions that we've--

18 THE BAILIFF: All rise.

19 THE COURT: All rise.

20 You may be seated.

21 We'll discuss those later.

22 MS. ELLER: Where were we?

23 THE COURT: Plaintiff had offered Exhibit 3 into
24 evidence, and we had a hearing on the admissibility of
25 Plaintiff's Exhibit 3 and it has been reviewed by the Court

1 and the Court reached certain findings during the hearing
2 out of the presence of the jury. Those are made a part of
3 the record, and Plaintiff's Exhibit 3 is admitted.

4 MS. ELLER: Okay. And based on that, we would
5 also offer Plaintiff's Exhibit 1 and 2.

6 MR. OLIVER: We'd reserve objection on that,
7 your Honor, until we have the opportunity to cross-examine.

8 THE COURT: All right. We'll reserve ruling on
9 the admissibility of Exhibits 1 and 2 at this time.

10 Q (By Ms. Eller) After you gave Mr. Weihert the
11 breath test, did you appraise him of his Constitutional
12 rights per Miranda at that time?

13 A Yes. I did. I read them right off of this sheet
14 as I checked them off to him.

15 Q All right. And did he make any statements to you
16 after he'd been Mirandized at that time?

17 A He did agree to answer some questions and I did
18 ask him the questions on this form pursuant to the
19 investigation.

20 Q What questions did you ask him at that time?

21 A I asked him specifically, Were you operating a
22 vehicle? He responded, Yes. I then asked him, Where were
23 you doing? He said, Going home. What street or highway were
24 you on? I do not know. What direction of travel were you
25 going? He said westbound.