

2004

John Gonzales v. G. Barton Blackstock, Bureau Chief Driver Control Bureau, Driver License Division, Department of Public Safety, State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

John Gonzales, : Appellate Case No. 20040274-CA

Appellant/Petitioner, :

v. : Priority No. : 15

G. BARTON BLACKSTOCK, Bureau :
Chief Driver Control Bureau, Driver License
Division, Department of Public Safety, :
State of Utah, :

Appellee/Respondent.

BRIEF OF APPELLANT/PETITIONER

Appeal from the final judgment of the Honorable Glenn K. Iwasaki, of the Third District Court, State of Utah, in and for Salt Lake County, Salt Lake Department, denying the Appellant/Petitioner's Petition for Judicial Review and upholding the suspension order issued by the Driver License Division suspending the Appellant/Petitioner's driving privileges for 18 months.

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STATEMENT OF JURISDICTION

This court has jurisdiction over this case pursuant to Utah Code Annotated § 78-2a-3(2)(a) which provides that the Utah Court of Appeals has appellate jurisdiction over an appeal from the district court review of an informal adjudicative proceedings of a state agency.

STATEMENT OF ISSUE AND STANDARD OF REVIEW

ISSUE: Whether the arresting officer's actions in this case constituted a failure to adequately explain to the driver his rights and duties under Utah's Implied Consent Law thus violating the driver's right to fairness and due process rendering the driver's subsequent refusal to submit to a chemical test invalid and the suspension of the driver's

license for refusal improper.

Particularly, 1) did the arresting officer's actions of showing the driver the breath test printout card showing a highest value obtained reading of .195 (despite the fact that the result was invalid due to an "insufficient sample" to be tested) improperly mislead the driver to believe that he had in fact provided a valid breath test, 2) did the officer's failure to immediately read the driver the "Refusal Admonition" following his alleged refusal to submit to the breath test constitute a failure to properly advise the driver of the requirements of the Implied Consent Law, and 3) did the officer's failure to re-read the "Arrest Admonition and Request for Chemical Test" and the "Unlawful Amount Admonition" before requesting a blood test, approximately one hour after the driver allegedly refused the breath test, constitute a failure to properly advise the driver of the requirements of the Implied Consent Law.

STANDARD OF REVIEW: Correction of Error Standard. See Miller v. Blackstock, 36 P.3d 525 (Utah App. 2001)

PRESERVATION OF ISSUE FOR APPEAL: Counsel for the Defendant raised the above stated issues during counsel's closing arguments at the Trial de Novo before Judge Iwasaki on February 25, 2004. (See Transcript of Trial de Novo, pages 27-30)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution, Article I, Section 7. [Due Process of Law]

No person shall be deprived of life, liberty, or property, without due process of law.

Utah Code Annotated § 41-6-44.10 states that:

(2)(a) If the person has been placed under arrest, has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1), and refuses to submit to any chemical test requested, the person shall be warned by the peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of the person's license to operate a motor vehicle.

A complete copy of Utah Code Annotated § 41-6-44.10 is attached as Addendum A.

"Arrest Admonition & Request for Chemical Test":

Mr. Gonzales, do you understand that you are under arrest for:

Driving Under the Influence of alcohol and/or drugs or with a measurable amount of a controlled substance or metabolite in your body? (41-6-44, 41-6-44.6 UCA)

I hereby request that you submit to a chemical test to determine the alcohol (drug) content of your blood/breath. I request that you take a test.

*See Attached DUI Report Form-Addendum B.**The test of this warning is referred to in Appellant's Brief as the Arrest Admonition & Request for Chemical Test."

"Unlawful Amount Admonition":

Test results indicating an unlawful amount of alcohol, drug or a controlled

substance or its metabolite in your breath/blood/urine in violation of Utah Law, or the presence of alcohol and/or drugs sufficient to render you incapable of safely operating a motor vehicle may, result in denial, suspension, revocation or disqualification of your driving privilege or refusal to issue you a license.

*See Attached DUI Report Form-Addendum B.**The test of this warning is referred to in Appellant's Brief as the "Unlawful Amount Admonition."

"Refusal Admonition":

If you refuse the test(s) or fail to follow my instructions the test(s) will not be given. However, I must warn you that your driving privileges may be revoked for 18 months for a first refusal or 24 months for a subsequent refusal with no provisions for limited driving. After you have taken the test(s), you will be permitted to have a physician of your own choice administer a test(s) at your own expense, in addition to the one(s) I have requested, so long as it does not delay the test or tests requested by me. I will make the test results available to you, if you take the test(s).

*See Attached DUI Report Form-Addendum B.**The test of this warning is referred to in Appellant's Brief as the "Refusal Admonition."

STATEMENT OF THE CASE

Nature of the Case:

In this appeal, the Appellant seeks a reversal of the suspension order issued by the Drivers License Division suspending the Appellant's driving privileges for a period of 18 months based on his refusal to submit to a chemical test. It is the position of the Appellant that his refusal was not a knowing refusal and is invalid due to the arresting officer's actions which improperly mislead the Appellant into believing that he had already completed a valid breath test and the arresting officer's failure to properly advise him as to his rights and duties under Utah's Implied Consent Law.

Course of Proceedings Below:

The Appellant was arrested and cited for Driving Under the Influence on September 17, 2003. The Appellant failed to request an administrative hearing pursuant to Utah Code Annotated § 41-6-44.10 and a suspension order was issued by the Drivers License Division suspending the Appellant's driving privileges for a period of 18 months effective as of 12:01 a.m. on October 17, 2003. The Appellant filed a Petition for Judicial Review and a Trial de Novo was held before the Honorable Glenn K. Iwasaki on February 25, 2004.

Disposition Below:

At the conclusion of the Trial de Novo, Judge Iwasaki entered an order denying the Appellant's Petition for Judicial Review and upholding the suspension order issued by the Drivers License Division suspending the Appellant's driving privileges for 18 months based on the court's finding that he refused to submit to a chemical test. It is from this final judgment of the Third District Court that the Appellant now appeals.

SUMMARY OF RELEVANT FACTS

In the early morning hours of September 17, 2003, Deputy Mulder of the Salt Lake County Sheriff's Department responded to a call of a hit and run accident involving the Appellant, John Gonzales. With the assistance of witnesses, Deputy Mulder located Mr. Gonzales at his home a short time later. (Transcript at 5-6) Deputy Mulder made contact with Mr. Gonzales at his home and eventually placed him under arrest for DUI. (Transcript at 7-8)

After placing Mr. Gonzales under arrest, Deputy Mulder took Mr. Gonzales to the Salt Lake County Special Operations Unit for a breath test. (Transcript at 9) When they arrived at the Special Operations Unit, Deputy Mulder read the “Arrest Admonition and Request for Chemical Test” advising Mr. Gonzales that he was under arrest for DUI and requested that Mr. Gonzales submit to a breath test. Deputy Mulder also read Mr. Gonzales the “Unlawful Amount Admonition” at approximately 1:51 a.m. advising him that if an unlawful amount of alcohol or drugs was found in his body it could result in a loss of his drivers license. (Transcript at 9) At the deputy’s request Mr. Gonzales agreed to submit to the breath test. (Transcript at 10) However, when the breath test was attempted, Mr. Gonzales was not able to blow long and hard enough in the machine to get a complete test. (Transcript at 10-11) As a result, an “insufficient sample” reading was given on the test print out card along with a highest value obtained of .195. (Transcript at 11) Deputy Mulder showed the breath test printout card with the .195 reading to Mr. Gonzales. (Transcript at 21)

Rather than attempting a second test, Deputy Mulder made his own determination that Mr. Gonzales was not going to comply with the breath test and called for a blood technician. (Transcript at 12) At no time did Mr. Gonzales simply fail to blow at all, he did not state that he was refusing to take the test nor did he state that he did not wish to comply with Deputy Mulder’s instructions. (Transcript at 20) At this time Deputy Mulder did not read Mr. Gonzales the “Refusal Admonition” prior to summoning the

blood technician and transported Mr. Gonzales to the Salt Lake County Adult Detention Center. (Transcript at 12, 20-22)

When the blood technician arrived at the jail approximately one hour later, Deputy Mulder did not re-read the “Arrest Admonition” nor did he re-read the “Unlawful Amount Admonition” to Mr. Gonzales. (Transcript at 23) Deputy Mulder then “explained to Mr. Gonzales that he had failed to follow my instructions for the intoxilyzer, which was considered a refusal. *I showed him the result card* and read the admonition regarding refusals and failing to follow instructions. *I told him that this was his only chance to comply, by blood draw.* He refused by stating: *I have already taken 1 test, I’m not going to take another.* I asked again and he repeated himself.” (See DUI Report Form and Transcript at 13-14)

SUMMARY OF THE ARGUMENTS

It is the position of the Appellant that an arresting officer has a duty to properly advise a driver as to his rights under Utah’s Implied Consent Law as it pertains to the officer’s request that the driver submit to a chemical test. Further, that the officer must avoid actions which may confuse the driver as to his rights and duties with regard to his submission to a chemical test after being placed under arrest and must take adequate steps to properly advise the driver as to his rights and duties so that the driver can make an appropriate choice whether or not to submit to the chemical test.

In Holman v. Cox, the Utah Supreme Court stated that “*Fairness and due process require* that a person threatened with the loss of his driver’s license should be afforded an opportunity to make a choice *based on a fair explanation of his rights and duties.*” Id. at 1334 (emphasis added) In the present case the Appellant asks this court to overturn the trial court’s conclusion that the Appellant was properly advised and refused to submit to a chemical test since the Appellant was not afforded an opportunity to make his decision whether or not to submit to a chemical test based on a fair explanation of his rights and duties. Instead the Appellant was first confused by the arresting officer’s action of showing him the breath test printout card which contained a highest value obtained reading of .195 despite the fact that the test was not valid due to an insufficient sample. Secondly, the officer failed to properly advise the Appellant of his rights under the Implied Consent Law when he failed to read the Appellant the “Refusal Admonition” after he allegedly refused to comply with the instructions on the breath test. Thirdly, the officer failed to properly advise the Appellant of his rights under the Implied Consent Law when he failed to re-read the “Arrest Admonition” and “Unlawful Amount” admonition when requesting that the Appellant submit to a blood draw nearly one hour after the Appellant’s alleged refusal to comply with the instructions on the breath test.

The above factors not only combined to improperly confuse the Appellant regarding his completion of a valid breath test but also fall short of the proper warnings which must be given to a driver who has been placed under arrest for DUI and requested to submit to a chemical test pursuant to Utah Code Annotated § 41-6-44.10. Therefore

the Appellant requests that this court find his refusal invalid and the suspension of his drivers license based on his alleged refusal improper.

ARGUMENT

MR. GONZALES'S ALLEGED REFUSAL SHOULD NOT BE USED AS A BASIS FOR SUEPNDING HIS DRIVING PRIVILEGES DUE TO THE FACT THAT THE ARRESTING OFFICER FAILED TO TAKE ADEQUATE MEASURES TO ADVISE THE DEFENDANT AS TO HIS RIGHTS AND DUTIES WITH REGARD TO THE REQUEST THAT HE SUBMIT TO A CHEMICAL TEST

It is the position of the Petitioner that an arresting officer has the duty to properly advise a driver as to his rights and duties with regard to the officer's request that he submit to a chemical test. Furthermore, the officer must avoid actions which may confuse the driver as to his rights and duties with regard to his submission to a chemical test after being placed under arrest and must take adequate steps to properly advise the driver as to his rights and duties so that the driver can make an appropriate choice whether or not to submit to the chemical test.

In Holman v. Cox, the Utah Supreme Court was asked to rule on the issue of a driver's refusal to submit to a chemical test. The Court in Cox ruled that giving a driver suspected of driving under the influence the Miranda warnings and advising the Defendant that he does not have the right to remain silent or to consult with an attorney prior to taking a chemical test "are no inconsistent with each other, but it is important that each proposition be stated fully, clearly, and understandably so that the driver

understands that his affirmative duty to take a blood test is not obviated by the Miranda warning.” Holman v. Cox, 598 P.2d 1331, 1333. The concern was that giving the Miranda warnings prior to requesting a chemical test may cause confusion and may ultimately affect the driver’s choice to submit to a chemical test. The Court stated that “*Fairness and due process require* that a person threatened with the loss of his driver’s license should be afforded an opportunity to make a choice based on a fair explanation of his rights and duties.” Id. at 1334 (emphasis added)

I. DEPUTY MULDER’S ACTION OF SHOWING MR. GONZALES THE BREATH TEST PRINTOUT CARD SHOWING A HIGHEST READING OBTAINED OF .195 IMPROPERLY LEAD MR. GONZALES TO BELIEVE THAT HE HAD IN FACT PROVIDED A VALID BREATH TEST

In the present case, the action of Deputy Mulder showing Mr. Gonzales the breath test printout card with a .195 highest reading obtained caused substantial confusion for Mr. Gonzales as to whether or not he had completed the breath test. According to Deputy Mulder, Mr. Gonzales was blowing into the machine however he did not blow hard enough or long enough to get a complete test. (Transcript at 11) Deputy Mulder found Mr. Gonzales’s failure to blow a failure to follow his instructions and advised Mr. Gonzales that he was not following instructions. After receiving a reading of “insufficient sample” on the intoxilyzer test, rather than reading Mr. Gonzales the “Refusal Admonition” and attempting a second breath test, Deputy Mulder made his own determination that Mr. Gonzales was not going to comply with the breath test and

requested that a blood tech respond to do a blood draw from Mr. Gonzales. However, prior to requesting the actual blood draw Deputy Mulder showed the Mr. Gonzales the intoxilyzer test card which showed a reading of .195.

To Mr. Gonzales, as it would to any reasonable person under the circumstances, the reading of .195 on the breath test printout card shown to him by Deputy Mulder meant to him that the test had been completed and a valid reading had been obtained. Mr. Gonzales was unaware that the .195 “insufficient sample” reading was not admissible in court. At no time did Deputy Mulder ever advise Mr. Gonzales that the “insufficient sample” reading meant that the test had not been completed and therefore would not be admissible in court. (Transcript at 22) Mr. Gonzales’s belief that he had completed the breath test is evidence by his repeated statements to Deputy Mulder that he “had already taken 1 test.” At the point Mr. Gonzales indicated that he did not want to take “another” test, Deputy Mulder did not take any steps to clarify Mr. Gonzales’s misunderstanding that he had already completed one test and did not advise him that he was required to submit to multiple tests if requested. (Transcript at 22-23) Likewise, the “admonitions” read to Mr. Gonzales by Deputy Mudler also failed to clearly indicate that he was required to submit to multiple tests if they were requested by the officer.

Based on the testimony of Deputy Mulder and the statements of Mr. Gonzales that he had already taken one test, it is obvious that Deputy Mulder’s act of showing Mr. Gonzales the breath test printout card with the .195 highest reading obtained improperly led Mr. Gonzales to believe that he had in fact completed the breath test. It should have

been obvious to Deputy Mulder that Mr. Gonzales believed that he had completed the breath test based on his statements that he “had already taken 1 test” yet Deputy Mulder did nothing to clarify Mr. Gonzales’s apparent misbelief that he had completed the breath test. Although it is not specifically included in the admonitions contained on the DUI report form used by Deputy Mulder, Deputy Mulder had a duty to clarify Mr. Gonzales’s obvious misbelief but Deputy Mulder failed to do so. Deputy Mulder failed to take any substantial steps to clarify Mr. Gonzales’s rights and duties under the implied consent law and specifically failed to advise Mr. Gonzales that the .195 reading would not be admissible in court and did not constitute a completed test. Likewise, Deputy Mulder did not clearly advise Mr. Gonzales that he was required to take multiple chemical tests if requested by the officer.

It is the position of the Appellant that Deputy Mulder failed to properly advise him of his rights and duties under the Implied Consent Law despite Mr. Gonzales’s obvious confusion and misbelief about his completion of the breath test. As such, Mr. Gonzales was not “afforded an opportunity to make a choice *based on a fair explanation of his rights and duties*” as set forth in Holman v. Cox when later deciding on whether to submit to the blood test requested by Deputy Mulder. Therefore Mr. Gonzales’s refusal to submit to the blood draw was not a knowing refusal and is not a valid basis upon which to suspend his drivers license. Likewise, Mr. Gonzales’s failure to provide a sufficient breath sample should not be considered a refusal since he did attempt to blow into the machine and Deputy Mulder’s stated basis for considering this case a refusal was

not the inability to provide a valid breath sample but rather Mr. Gonzales's refusal to submit to the subsequent blood test.¹

II. DEPUTY MULDER FAILED TO READ ALL OF THE APPLICABLE ADMONITIONS WHEN REQUESTING THE BREATH TEST OR WHEN REQUESTING THE BLOOD TEST AND THEREFORE FAILED TO PROPERLY ADVISE THE DRIVER AS REQUIRED UNDER UTAH'S IMPLIED CONSENT LAW

Pursuant to Utah Code Annotated § 41-6-44.10 (Utah's Implied Consent Law) a person who has been arrested and refuses to take a chemical test when requested should be warned about the consequences of his refusal. Utah Code Annotated § 41-6-44.10(2)(a) states that:

If the person has been placed under arrest, has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1), and refuses to submit to any chemical test requested, the person shall be warned by the peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of the person's license to operate a motor vehicle.

Utah Code Ann. § 41-6-44.10 (1953 as Amended)(emphasis added)

In order to comply with this "warning" requirement, Utah has developed several different "admonitions" which are read to drivers who are suspected of driving under the influence. These "admonitions" are contained in the DUI Report Form prepared by peace officers in Utah when making a DUI arrest. There are

¹ Deputy Mulder testified at the Trial de Novo that had he done the blood draw, he would not have marked Mr. Gonzales as a refusal. (See Transcript at 23)

four such “admonitions” contained in the DUI Report Form. In the present case we are concerned only with the first three “admonitions.” These three “admonitions” are often referred to as the “Arrest Admonition and Request for Chemical Test”, the “Unlawful Amount Admonition”, and “Refusal Admonition.” (Please see the attached DUI Report Form or the table of Constitutional Provisions, Statutes and Rules for the complete text of these admonitions) Each one of the “admonitions” serves to warn or advise the driver of an important right or duty and are read to the driver (often times verbatim from the DUI report form) during the course of the arrest and subsequent request for a chemical test.

It is the position of the Appellant that in the current case the request to submit to the breath test and the later request to submit to a blood draw should be treated as two distinct and separate requests. Likewise, it is the position of the Appellant that the two requests for chemical test were separated by time and events to a degree that each separate request to submit to a chemical test required the reading of all the appropriate warnings regarding the consequences of the chemical test and/or the Appellant’s refusal to submit to the chemical test as requested.

As testified to by Deputy Mulder, Mr. Gonzales was originally taken to the Salt Lake County Special Operations Unit to take the breath test. When Mr. Gonzales failed to provide a sufficient sample, he was then taken to the Salt Lake County Adult Detention Center where he was placed in a holding cell. Mr.

Gonzales remained in the holding cell where he waited for approximately one hour until a blood technician arrived at the jail to draw his blood. Certainly there is a significant amount of time between the requests to submit to a breath test and the request to submit to a blood test as well as some significant intervening events.

The circumstances and situations changed significantly between the two requests. At the time of the first request Mr. Gonzales had been placed under arrest but had not been taken to jail and was in a separate area where the breath test was to be conducted. By the time the blood tech arrived, Mr. Gonzales had been taken to a different area, placed in a holding cell, and had been held in the holding cell for nearly a hour. It is the position of the Appellant that these facts in essence render these two requests for chemical test two distinct and separate requests and therefore in order to comply with the requirements of Utah Code Annotated § 41-6-44.10(2)(a), a full set of “admonitions” should have been given at the time of each request.

A. Deputy Mulder’s failure to immediately read the Mr. Gonzales the “Refusal Admonition” following his alleged refusal to submit to the breath test constitutes a failure to properly advise the driver of the requirements of the Implied Consent Law.

According to Deputy Mulder’s testimony, prior to requesting the breath test he read Mr. Gonzales the “Arrest Admonition and Request for Chemical Test” as well as the “Unlawful Amount Admonition.” (Transcript at 9-10) However, after he determined

that Mr. Gonzales was not going to comply with the breath test, he did not immediately read Mr. Gonzales the refusal admonition and he did not attempt a second breath test. (Transcript 19-20) As a matter of procedure, a suspect who states a willingness to submit to the chemical test is not normally read the “Refusal Admonition” as he has not yet refused. The common procedure in a situation where a suspect refuses the test, is not cooperating or is not following instructions is to read the person the “Refusal Admonition” advising them of the consequences of their refusal and allowing them another chance to choose to submit to the chemical test. One of the obvious purposes of the refusal admonition is to advise a suspect who is not cooperating with the chemical test that their refusal to follow instructions can result in a significant loss of license so that they can choose whether they wish to follow those instructions and complete the test or suffer the consequences of a refusal.

In the present case, Deputy Mulder failed to read Mr. Gonzales the “Refusal Admonition” after he allegedly failed to follow Deputy Mulder’s instructions on how to blow into the breath testing machine. Up to that point Mr. Gonzales had not been advised as to the consequences of his failure to follow instructions or that his license could be suspended for 18 months if he refused to take the test or failed to follow instructions. Instead, Deputy Mulder showed Mr. Gonzales the breath test printout card which indicated that a reading of .195 had been obtained. What Deputy Mulder should have done is read Mr. Gonzales the “Refusal Admonition” and then given him another opportunity to take the breath test which had been requested after he had been fully

advised as to the consequences of his refusal to follow instructions.

Thus, during the first request for the breath test, Deputy Mulder failed to give Mr. Gonzales the full set of “admonitions” as required in that he failed to read Mr. Gonzales the “Refusal Admonition” advising him of the consequences of his failure to follow instructions. Therefore Mr. Gonzales’s alleged failure to submit to the breath test cannot serve as a basis for suspending his drivers license for a refusal.²

B. Deputy Mulder’s failure to re-read the “Arrest Admonition and Request for Chemical Test” and the “Unlawful Amount Admonition” to Mr. Gonzales before requesting a blood test, approximately one hour after the he allegedly refused the breath test, constitutes a failure to properly advise the driver of the requirements of the Implied Consent Law.

It is important to note that at the time Deputy Mulder had initially read Mr. Gonzales the “Arrest Admonition and Request for Chemical Test”, the only test he had requested was a breath test. Deputy Mulder did not request the blood test until nearly an hour later during which time Mr. Gonzales had been transported to a new area and was placed in a holding cell. According to Deputy Mulder’s testimony, when the blood technician arrived at the jail at approximately 2:54 a.m. to draw Mr. Gonzales’s blood, he did not read Mr. Gonzales the “Arrest Admonition and Request for Chemical Test” nor did he read Mr. Gonzales the “Unlawful Amount” admonition. He simply read him the “Refusal Admonition.” (Transcript at 23) Thus, before requesting the blood draw he never advised the defendant that an unlawful amount of alcohol or drugs in his blood would result in a suspension of his license.

² As stated in footnote 1, Deputy Mulder testified that he did not mark Mr. Gonzales for a refusal as a result of his failure to provide a valid breath test.

Once again Deputy Mulder failed to give Mr. Gonzales the full set of “admonitions” included in the DUI Report Form and therefore he again failed to properly advise Mr. Gonzales as to his rights and duties as they pertained to Deputy Mulder’s request that he submit to a blood test. Therefore Mr. Gonzales’s alleged failure to submit to the blood test cannot serve as a basis for suspending his drivers license for a refusal.

CONCLUSION

The Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Utah Constitution guarantee that “No person shall be deprived of life, liberty, or property, without due process of law.” Although it is not considered a “right” similar to that of the right to vote or the right to privacy, the privileges to drive extended by the State of Utah to its citizens is an important privilege that cannot simply be taken away without granting the driver certain protections and due process.

“The loss of driving privileges is a severe deprivation that may have serious consequences for an individual, not the least of which is the possible loss of employment. Accordingly, it is important that a law enforcement officer make a determination that a motorist has refused to take a test on the basis of conduct *which clearly indicates a volitional refusal with an understanding of the consequences that follow upon a refusal.*

Beck v. Cox, 597 P.2d 1335, 1339 (Utah 1979)(emphasis added)

In Homan v. Cox, the Utah Supreme Court in essence extended to right to due process of law during the process of requesting a chemical test subsequent to an arrest for Driving Under the Influence when the court opined that “*Fairness and due process*

require that a person threatened with the loss of his driver's license should be afforded an opportunity to make a choice based on a fair explanation of his rights and duties."

Holman v. Cox, 598 P.2d 1331, 1334. Thus the court found the decision of a driver whether or not to submit to a chemical test is so important that due process applied and imposed upon an officer a duty to properly advise a driver as to his rights and duties as they pertain to the officer's request that he submit to a chemical test as well as the potential consequences of his refusal

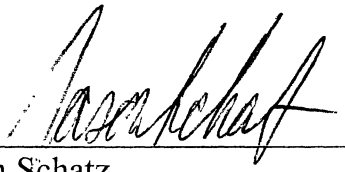
Based on the circumstances of this case, particularly the fact that the arresting officer showed the driver the breath test printout card with the .195 reading which served only to confuse Mr. Gonzales's regarding his submission to the intoxilyzer test, and the failure of the arresting officer in clarifying Mr. Gonzales's rights and duties as they applied to the requests that he submit to a breath test and the later request for a blood test, Mr. Gonzales's alleged refusal to follow instructions on the breath test and his choice not to submit to the blood draw were **not** based on a fair explanation of his rights and duties as is required and therefore his alleged refusal to submit to the breath test and/or the blood draw should not be considered as a basis for suspending his driving privileges.

Additionally, Deputy Mulder's statements to Mr. Gonzales that "I told him that this was his only chance to comply, by blood draw" indicates he did not consider Mr. Gonzales's inability to provide a sufficient sample on the breath test a refusal. Likewise, his testimony at the Trial de Novo clearly indicated that had Mr. Gonzales done the blood draw he would not have marked Mr. Gonzales as a refusal. As such, this serves as an

additional basis upon which this court should find that Mr. Gonazales's inability to provide a "sufficient sample" on the breath test should not be considered as a refusal and should not be considered as a basis for suspending his driving privileges.

THEREFORE the Appellant respectfully requests that Order of the Third District Court denying his Petition for Judicial Review and upholding the suspension order issued by the Drivers License Division be overturned and that his drivers license be reinstated immediately and the suspension removed from his MVR.

DATED this day, October 18, 2004.

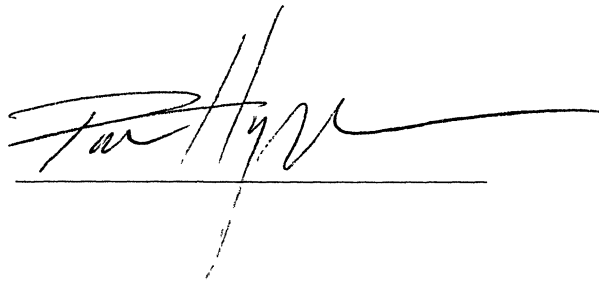


Jason Schatz
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on this October 18, 2004, I personally mailed and/or hand delivered two true and correct copies of the foregoing Brief of Appellant to the following:

Rebecca Waldron
Assistant Attorney General
Utah Attorney General's Office
236 State Capitol Building
Salt Lake City, Utah 84114

A handwritten signature in black ink, appearing to read "Rebecca Waldron", is written over a horizontal line. The signature is stylized with a large, sweeping "R" and a long horizontal stroke at the end.

ADDENDA

ADDENDUM A

41-6-44.10. Implied consent to chemical tests for alcohol or drug -- Number of tests -- Refusal -- Warning, report -- Hearing, revocation of license -- Appeal -- Person incapable of refusal -- Results of test available -- Who may give test -- Evidence.

(1) (a) A person operating a motor vehicle in this state is considered to have given the person's consent to a chemical test or tests of the person's breath, blood, urine, or oral fluids for the purpose of determining whether the person was operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section **41-6-44**, **53-3-231**, or **53-3-232**, while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section **41-6-44**, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section **41-6-44.6**, if the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section **41-6-44**, **53-3-231**, or **53-3-232**, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section **41-6-44**, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section **41-6-44.6**.

(b) (i) The peace officer determines which of the tests are administered and how many of them are administered.

(ii) If a peace officer requests more than one test, refusal by a person to take one or more requested tests, even though the person does submit to any other requested test or tests, is a refusal under this section.

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

(ii) The failure or inability of a peace officer to arrange for any specific chemical test is not a defense to making a test requested by a peace officer, and it is not a defense in any criminal, civil, or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(2) (a) If the person has been placed under arrest, has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1), and refuses to submit to any chemical test requested, the person shall be warned by the peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of the person's license to operate a motor vehicle.

(b) Following the warning under Subsection (2)(a), if the person does not immediately request that the chemical test or tests as offered by a peace officer be administered, a peace officer shall, on behalf of the Driver License Division and within 24 hours of the arrest, give notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle. When a peace officer gives the notice on behalf of the Driver License Division, the peace officer shall:

- (i) take the Utah license certificate or permit, if any, of the operator;
- (ii) issue a temporary license certificate effective for only 29 days from the date of arrest; and
- (iii) supply to the operator, in a manner specified by the Driver License Division, basic information regarding how to obtain a hearing before the Driver License Division.

(c) A citation issued by a peace officer may, if provided in a manner specified by the Driver License Division, also serve as the temporary license certificate.

(d) As a matter of procedure, the peace officer shall submit a signed report, within ten calendar days after the day on which notice is provided under Subsection (2)(b), that the peace officer had grounds to believe the arrested person had been operating or was in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section **41-6-44**, **53-3-231**, or **53-3-232**, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section **41-6-44**, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section **41-6-44.6**, and that the person had refused to submit to a chemical test or tests under Subsection (1).

(e) (i) A person who has been notified of the Driver License Division's intention to revoke the person's license under this section is entitled to a hearing.

(ii) A request for the hearing shall be made in writing within ten calendar days after the day on which notice is provided.

(iii) Upon request in a manner specified by the Driver License Division, the Driver License Division shall grant to the person an opportunity to be heard within 29 days after the date of arrest.

(iv) If the person does not make a request for a hearing before the Driver License Division under this Subsection (2)(e), the person's privilege to operate a motor vehicle in the state is revoked beginning on the 30th day after the date of arrest for a period of:

(A) 18 months unless Subsection (2)(e)(iv)(B) applies; or

(B) 24 months if the person has had a previous:

(I) license sanction for an offense that occurred within the previous ten years from the date of arrest under this section, Section **41-6-44.6**, **53-3-223**, **53-3-231**, or **53-3-232**; or

(II) conviction for an offense that occurred within the previous ten years from the date of arrest under Section **41-6-44**.

(f) (i) Except as provided in Subsection (2)(f)(ii), if a hearing is requested by the person, the hearing shall be conducted by the Driver License Division in the county in which the offense occurred.

(ii) The Driver License Division may hold a hearing in some other county if the Driver License Division and the person both agree.

(g) The hearing shall be documented and shall cover the issues of:

(i) whether a peace officer had reasonable grounds to believe that a person was operating a motor vehicle in violation of Section **41-6-44**, **41-6-44.6**, or **53-3-231**; and

(ii) whether the person refused to submit to the test.

(h) (i) In connection with the hearing, the division or its authorized agent:

(A) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers; and

(B) shall issue subpoenas for the attendance of necessary peace officers.

(ii) The Driver License Division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section **78-46-28**.

(i) If after a hearing, the Driver License Division determines that the person was requested to submit to a chemical test or tests and refused to submit to the test or tests, or if the person fails to appear before the Driver License Division as required in the notice, the Driver

License Division shall revoke the person's license or permit to operate a motor vehicle in Utah beginning on the date the hearing is held for a period of:

(i) (A) 18 months unless Subsection (2)(i)(i)(B) applies; or

(B) 24 months if the person has had a previous:

(I) license sanction for an offense that occurred within the previous ten years from the date of arrest under this section, Section **41-6-44.6**, **53-3-223**, **53-3-231**, or **53-3-232**; or

(II) conviction for an offense that occurred within the previous ten years from the date of arrest under Section **41-6-44**.

(ii) The Driver License Division shall also assess against the person, in addition to any fee imposed under Subsection **53-3-205(13)**, a fee under Section **53-3-105**, which shall be paid before the person's driving privilege is reinstated, to cover administrative costs.

(iii) The fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this Subsection (2) that the revocation was improper.

(j) (i) Any person whose license has been revoked by the Driver License Division under this section may seek judicial review.

(ii) Judicial review of an informal adjudicative proceeding is a trial. Venue is in the district court in the county in which the offense occurred.

(3) Any person who is dead, unconscious, or in any other condition rendering the person incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided for in Subsection (1), and the test or tests may be administered whether the person has been arrested or not.

(4) Upon the request of the person who was tested, the results of the test or tests shall be made available to the person.

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

(b) Any physician, registered nurse, practical nurse, or person authorized under Section **26-1-30** who, at the direction of a peace officer, draws a sample of blood from any person who

believe is driving in violation of this chapter, or hospital or medical facility at which the sample is drawn, is immune from any civil or criminal liability arising from drawing the sample, if the test is administered according to standard medical practice.

(6) (a) The person to be tested may, at the person's own expense, have a physician of the person's own choice administer a chemical test in addition to the test or tests administered at the direction of a peace officer.

(b) The failure or inability to obtain the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer.

(c) The additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(7) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested does not have the right to consult an attorney or have an attorney, physician, or other person present as a condition for the taking of any test.

(8) If a person under arrest refuses to submit to a chemical test or tests or any additional test under this section, evidence of any refusal is admissible in any civil or criminal action or

proceeding arising out of acts alleged to have been committed while the person was operating or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, combination of alcohol and any drug, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body.

Amended by Chapter 161, 2004 General Session

Amended by Chapter 205, 2004 General Session

Download Code Section [Zipped](#) WP 6/7/8 41_04052.ZIP 7,517 Bytes

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Last revised: Thursday, April 29, 2004

ADDENDUM B

**SALT LAKE COUNTY SHERIFF'S OFFICE
DUI REPORT**

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CASE IDENTIFICATION 03-108995

Citation: D440896	Date: Sept 17, 2003	Day: Wednesday	Accident: Y	Time Prepared: 0055
Subject's Name: John R Gonzales		Address: 4522 W Penny Cir		
Place of Employment: UDOT		Address:		
Home Telephone Number: 282-4001		Work Telephone Number:		
DOB: 02/19/43	Driver License Number: UT 4141418		Time of Arrest: 0027	
Place of Arrest: 4522 W Penny Cir		Charges: DUI, Fail to Stop (H&R) - property damage \$500,		
Arresting Officer: Mulder		Arresting Agency: Utah Highway Patrol		
Assisting Officers: Dehera				

VEHICLE

Year: 1993	Color: white	Make: Chev	Model: Blazer
License # and State: Ut 560WNZ		Disposition: state tax	
Registered Owner: same		Address:	

WITNESSES: (If passengers, indicate specifically)

Name	Address	Telephone #	Age/DOB
Robert Thompson	4309 Yorkshire Cir South Jordan 84095	694-8760	06/22/79
Matt Thompson	4309 Yorkshire Cir South Jordan 84095	280-2213	

ACTUAL PHYSICAL CONTROL:

The facts establishing the subject's actual physical control of a motor vehicle are: I observed the subject struggling (staggering) upon getting out of his vehicle. The keys were in his right hand.

DRIVING PATTERN OR REASON FOR FIRST CONTACT:

Subject's location when first observed: (by witnesses) 5400 S Bangerter Hwy (by deputy) 4522 W Penny Cir
The facts observed regarding driving pattern, or reason for contact: The driver was involved in a collision where he rear ended another vehicle, then continued on leaving the scene. He was followed by witnesses who advised 911 of updated movements until I arrived to find the subject. See witness statements

PRE-ARREST STATEMENT(S) OF SUBJECT:

Admission to drinking

PHYSICAL CHARACTERISTICS:

Odor of alcoholic beverage or drug indicator: very strong sickening odor
Speech: slurred
Balance: poor,
Signs or complaints of injury or illness: bad knees

VIII. FIELD SOBRIETY TESTS: (Describe subject's actions)

1. HGN - The subject failed to follow my instructions. He was told to follow my finger with his eyes only. He would not do this.
2. Other balance tests were not conducted because he said that he had bad knees and he was already in custody.
3.
4.
5.

Were tests demonstrated by officer?	Subjects ability to follow instructions:
-------------------------------------	--

IX. SEARCHES: (Vehicle)

Vehicle: 1993 white Chev Blazer	
Was subject's vehicle searched? Yes	Where? 4522 W Penny Cir
When? 0027	Evidence: none
Person who performed search: Mulder	

X. CHEMICAL TESTS: 0150 hours

Mr. or Ms. John R Gonzales, do you understand that you are under arrest for:

- x Driving under the influence of alcohol and/or drugs or with a measurable amount of a controlled substance or metabolite in your body? (41-6-44, 44-6-44.6 UCA)
- An alcohol offense under 21 years of age in violation of (32A-12-209 UCA)
- Violation of conditional license (53-3-232 UCA) (use this form for refusal to submit to the chemical test under the conditional license citation)
- Commercial driver license offense (53-3-418) (.04) (no arrest)

Response if any: Okay

I hereby request that you submit to a chemical test to determine the alcohol (drug) content of your blood/breath. I request that you take a test.

(Time) 0151 -

The following admonition was given by me to the subject before the chemical test was administered:

Test results indicating an unlawful amount of alcohol, drug or a controlled substance or its metabolite in your breath/blood/urine in violation of Utah Law, or the presence of alcohol and/or drugs sufficient to render you incapable of safely driving a motor vehicle may, result in denial, suspension, revocation or disqualification of your driving privilege or refusal to issue you a license.

What is your response to my request that you submit to a chemical test? Response: Subject verbally stated, "I'll do that.", but then did not comply with instructions for the intoxilyzer. He made numerous blows into the machine, but would not maintain the blow for the length of time required. I advised him numerous times that he had to blow longer, which he did not. The intoxilyzer reported an "Insufficient Sample", but also noted that the highest reading taken was .195. It was apparent that he was not going to comply, so I called for a blood draw technician. When the blood tech arrived at approximately 0254 hours, I explained to Mr Gonzales that he had failed to follow my instructions for the intoxilyzer, which was considered a refusal. I showed him the result card and read the admonition regarding refusals and failing to follow instructions. I told him that this was his only chance to comply, by blood draw. He refused by stating: I have already taken 1 test, I'm not going to take another. I asked again, and he repeated himself.
--

Did subject submit to a chemical test? No		Type of test	
Test Administered by.		Where?	
Time:	Results	Was subject notified of results?	
Serial Number of test instrument			

(IF THE SUBJECT REFUSES THE TEST, READ THE FOLLOWING)

Time) 0254 hours

— The following admonition was given by me to the subject:

If you refuse the test(s) or fail to follow my instructions the test(s) will not be given. However, I must warn you that your driving privilege may be revoked for 18 months for a first refusal or 24 months for a subsequent refusal with no provision for limited driving. After you have taken the test(s), you will be permitted to have a physician of your own choice administer a test(s) at your own expense, in addition to the one(s) I have requested, so long as it does not delay the test or tests requested by me. I will make the test results available to you, if you take the test(s).

Unless you immediately request a test(s), the test(s) cannot be given. Response if any: I have already taken 1 test, I'm not going to take another. ✓

(IF THE SUBJECT CLAIMS THE RIGHT TO REMAIN SILENT
OR THE RIGHT TO COUNSEL, READ THE FOLLOWING)

ime)

The following admonition was given by me to the subject:

Your right to remain silent and your right to counsel do not apply to the implied consent law which is civil in nature and separate from the criminal charges. Your right to remain silent does not give you the right to refuse to take the test(s). You do not have the right to have counsel during the test procedure. Unless you submit to the test(s) I am requesting, I will consider that you have refused to take the test(s). I warn you that if you refuse to take the test(s), your driver's license can be revoked for 18 months with no provision for a limited license.

Response, if any:

I. INTERVIEW No Interview

Was subject advised of the following rights?

When?

By whom?

Where?

- ___ 1. You have the right to remain silent.
- ___ 2. Anything you say can and will be used against you in a court of law.
- ___ 3. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
- ___ 4. If you decide to answer questions now without having counsel present, you may stop answering questions at any time. Also, you may request counsel at any time during questioning.

Were the following waiver questions asked?

- ___ 1. Do you understand each of these rights I have explained to you? Response:
- ___ 2. Having these rights in mind, do you wish to talk to us now? Response:

Were you operating vehicle?		Where were you going?	
What street or highway were you on?		Direction of travel?	
Where did you start from?		When?	
What time is it now?	What is today's date?		Day of Week?
(Actual time, date and day of week):			
What city or county are you in now?			
What were you doing during the last three hours?			
Have you been drinking?	What?	How much?	Where?
When did you have your first drink?		Last drink?	
Are you under the influence of an alcoholic beverage (drugs) now?			
Are you taking tranquilizers, pills, medicines or drugs of any kind?			
What kind? (get sample)			
When did you have the last dose?			
Are you ill?			
(If subject was in a crash, ask these questions):			
Were you involved in a crash today?		When?	

II. OTHER OCCURRENCES OR ACTS

The subject was involved in a collision where he rear-ended another vehicle at 5400 S Bangerter Hwy. He then backed his vehicle, drove around the other vehicle, and continued on. Witnesses called 911 and kept them updated with his location until I caught up. I found him just after he had pulled into his driveway. The headlights were still on in the vehicle, and he was just starting to get out. He had the keys in his right hand.

III. ATTACHED DOCUMENTS:

I have attached the following documents to this report:

- ☒ 1. Copy of citation/temporary license
- ☒ 2. Subject's Utah driver's license or driver's permit
- ☒ 3. Traffic accident report
- ☒ 4. Intoxilyzer checklist and results
- ☒ 5. Other documents (specify)

I hereby certify that I am a sworn Utah Peace Officer, Special Function Officer, or Port-of-Entry Agent and that the information contained above in this report form and attached documents is true and correct to my knowledge and belief and that this report form was prepared in the regular course of my duties. It is my belief the subject was in violation of Section 41-6-44, 41-6-44.6, 41-6-44.10, 32A-12-209, 53-3-231, 53-3-232, or 53-3-418 UCA at the time, and place specified in this report. My signature includes acknowledgment that I personally served upon the driver, notice if the Departments intent to deny, suspend, revoke, or disqualify his/her driving privilege.

☒ I served notice on the subject and verbally informed subject of their right to a hearing before the Driver License Division

Time Served: 0257 Hours



Signature of Officer or Agent

Agency: Salt Lake County Sheriff's Office

Date: Time:

The original of this form and the Driver License copy of the Citation must be sent within Ten (10) calendar days of the arrest of the subject to:

DRIVER LICENSE DIVISION
PO BOX 30560
SALT LAKE CITY UT 84130-0560