

2004

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

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.

APPELLANT'S REPLY BRIEF

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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UTAH APPELLATE
JAN 24 2005

ORAL ARGUMENT REQUESTED

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APPELLANT'S REPLY BRIEF

The Appellant, John Gonzales, hereby submits this Reply to the Appellee's Brief
filed on December 20, 2004.

ARGUMENTS

In Appellant's Brief, the Appellant argued 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 its Response, the Appellee argues that the officer took the necessary steps to clarify Mr. Gonzales's understanding of his rights and obligations under the Implied Consent Law. The Appellee further argues that the officer cannot be required to determine the state of mind of the particular driver with which he is dealing. The Appellant agrees with this statement as well as the Appellee's argument that "Under Utah law an objective standard applies to determine the legal sufficiency of an officer's warnings. Beck v. Cox, 597 P.2d 1335, 1339 (Utah 1979)." Appellees Brief pg. 8.

As such, the fact that the Appellant failed to testify at the Trial de Novo is irrelevant to this Court's determination. The Appellant requests that the court review the sufficiency of the arresting officer's warnings through the eyes of an objective person in the position of the Appellant. It is the position of the Appellant that an objective person in the situation described here would have reasonably been confused by the officer's act of showing the driver a breath test printout card with a numeric reading of .195 followed by the officer's statements that he had refused to submit to the chemical test and the officer's failure to clarify that the .195 result on an insufficient sample would not be an admissible test result.

A. Deputy Mulder Failed to Discharge His Duty to Properly Warn Mr. Gonzales of the Consequences of Refusing the Chemical Test When HE failed to Clarify Mr. Gonzales's Obvious Misunderstanding Regarding the Validity of the Breath Test

In the present case, Mr. Gonzales's confusion is evidenced by his statement that "I have already taken one test, I'm not going to take another." The Appellee argues that Officer Mulder clarified Mr. Gonzales's rights by explaining "to Mr. Gonzales that the

Intoxilyzer test result did not qualify because there was an insufficient sample, and Gonzales's failure to follow the instructions for blowing into the Intoxilyzer, was considered a refusal." In support of this statement the Appellee cites to pg. 24 of the Trial De Novo transcript. However, pg. 24 of the transcript contains the following exchange between Deputy Mulder and defense counsel:

Q And at that point, did you take any steps to clear up his misunderstanding about the fact that he hadn't actually completed the full test?

A Yes, sir. I did.

Q All rights. And what specifically did you tell him?

A I told him that he was failing to follow instructions because of the invalid sample, and that this was his option. In case there is a lung problem of anything of that nature, this is his option, it's his way out, basically, to avoid that revocation.

Q *Did you ever specifically tell him that an intoxilyzer insufficient reading was inadmissible?*

A *I don't think I told him that. You're referring to the .195?*

Q *Right.*

A *I don't think I mentioned that.*

Transcript pg. 24 (emphasis added).

This exchange clearly demonstrates that Deputy Mulder acknowledges that there may be legitimate reasons why a subject may not be able to provide a sufficient breath sample for testing such as health related problems. At the Trial de Novo Deputy Mulder testified that:

Q I mean, in this particular situation, did he just ever flat out refuse to blow?

A No.

Q He was trying?

A Correct.

Transcript pg. 20.

Furthermore, the earlier exchange demonstrates that Deputy Mulder clearly did not take any reasonable and necessary steps to clarify Mr. Gonzales's reasonable belief that he had given a valid test resulting in a BAC of .195. Mr. Gonzales's statement "I have already taken one test, I'm not going to take another," as testified to by Deputy Mulder, evidences Mr. Gonzales's subjective misunderstanding of his rights.

Furthermore, even from an objective standard, an average driver of reasonable intelligence could have reached the same misguided conclusion about the validity of the breath test based on Deputy Mulder's action of showing them the printout card with the numeric reading of .195 in conjunction with Deputy Mulder's failure to further clarify that although the printout card contained a numeric reading it was inadmissible in court because a sufficient sample had not been given.

B. Deputy Mulder's Failure to Read the Entire Set of Refusal Warnings at the Time he Requested the Breath Test or at the time he Requested the Blood Test Renders Mr. Gonzales's Refusal Invalid

The Appellee argues that the Court should reject this argument because the Appellant cites no statutory or legal authority to support this position. The Appellant concedes that there is no case law on this point and that it appears to be a matter of first impression for the court. However, the Appellant is free to argue that the principles of Holman v. Cox 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.*" extends to this sort of situation as well.

It is not the Appellant's contention that an officer must read the chemical test admonitions verbatim as the Appellee seems to argue but that the refusal admonitions be read together so that a driver can reasonably take these admonitions and consider them in relation to one another so that he can fully understand the rights and consequences of his refusal to submit to a chemical test. These separate admonitions are normally read as part of a continuous colloquy with the driver. The driver is initially read the "Unlawful Amount Admonition". If he refuses, he is immediately read the "Refusal Admonition." If he requests to speak to counsel or invokes his right to remain silent he is immediately advised of the "Right to Counsel Admonition". The purpose for reading these admonitions in close proximity to one another is so that the driver can take consider these subsequent admonitions in conjunction with the "Unlawful Amount Admonition" in determining whether or not he wishes to change his mind and submit to the test.

In the present case it appears as if the admonitions were read however, they were never read all together at one time. Deputy Mulder did not read Mr. Gonzales the “Refusal Admonition” until approximately one hour after he was initially read the “Unlawful Amount Admonition.” In the meantime. Mr. Gonzales had been taken to the Salt Lake County Adult Detention Center where he was placed in a holding cell where he remained in the holding cell where he waited for approximately one hour until a blood technician arrived at the jail to draw his blood.

Once again the Appellant is not arguing that the warnings failed because the arresting officer failed to read the warnings verbatim from the DUI report form but rather that the warnings failed because there were two separate requests for a chemical test. Certainly there was a significant amount of time between the request to submit to a breath test and the subsequent request to submit to a blood test as well as some significant intervening events. Therefore it is the position of the Appellant that 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 for a chemical test each and in order to comply with the requirements of Utah Code Annotated § 41-6-44.10(2)(a), a full and complete set of “admonitions” should have been given at the time of each request.

CONCLUSION

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.

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.

REQUEST FOR ORAL ARGUMENT

Since this case appears to raise an issue of first impression with regard to the arguments set forth by the Appellant in his brief, the Appellant respectfully requests that this case be scheduled for oral argument to allow the Court an opportunity to hear argument from both counsel regarding the issues raised in the Appellant's brief before rendering a decision.

DATED this day, January 24, 2005.



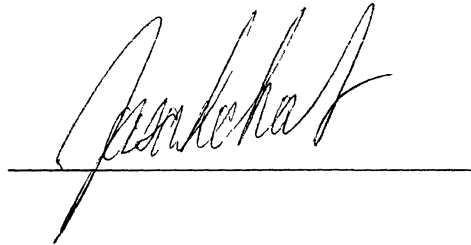
Jason Schatz
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on this January 24, 2005, I personally mailed and/or hand delivered two true and correct copies of the foregoing Reply Brief of Appellant to the following:

Utah Court of Appeals

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A handwritten signature in cursive script, appearing to read "Rebecca Waldron", is written over a horizontal line.