1971

Lynda M. Jennings v. Jack C. Mahoney, Director, Financial Responsibility Division, Department Of Public Safety, State of Utah : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

LYNDA M. JENNINGS,
Plaintiff-Appellant,

vs.

JACK C. MAHONEY, Director, Financial Responsibility Division, Department of Public Safety, State of Utah,
Defendant-Respondent.

Case No.

BRIEF OF RESPONDENT

An Appeal from the Third Judicial Dist
and for Salt Lake County, State of Utah, the H
Frank Wilkins, Judge, presiding.

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LYNDA M. JENNINGS,
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Case No. 12171

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The Respondent, on April 29, 1970, after reviewing all pertinent information as required by statute, determined there was a possibility of appellant's culpability and ordered the driver's license of appellant Lynda Jennings revoked, pursuant to Utah Code Ann. § 41-12-5 (1970). The appellant challenged the order and the case was heard before the Honorable D. Frank Wilkins, Judge of the Third Judicial District in and for Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

The Honorable D. Frank Wilkins, District Judge of the Third Judicial District Court, in and for Salt Lake County, State of Utah, on the 8th of June, 1970, affirmed the order issued by the respondent requiring the appellant

to forego her driver's license or post security in the amount of $241.00.

RELIEF SOUGHT ON APPEAL

Respondent submits that the order requiring suspension of appellant's driver's license or a posting of a bond for $241.00 be affirmed.

STATEMENT OF FACTS

On March 16, 1970, Lynda M. Jennings and Roy W. Young collided while driving their respective automobiles. The accident occurred at 253 Center Street, and Officer William C. Duncan cited the appellant, Lynda M. Jennings, for "starting in traffic," a violation of 201 of the Traffic Code. Officer Duncan, Mr. Young and appellant all filed separate reports of the accident as required by Utah Code Ann. § 41-6-35 (1970) (Exhibit 3-D). The reports indicated that Mr. Young's car was damaged in excess of $100.00 and that Miss Jennings, the appellant, had no automobile liability insurance (Exhibit 3-D). Pursuant to the Safety Responsibility Act, Utah Code Ann., Title 41, Chapter 12 (1970), the respondent, Jack C. Mahoney, Director of the Financial Responsibility Division, wrote the appellant on April 29, 1970, stating that unless the appellant posted bond for $241.00 (estimated cost of repair to Mr. Young's car) in one of the ways specified in the letter, her driver's license would be revoked May 14, 1970 (Exhibit 3-D).

On May 12, 1970, attorney for appellant filed a complaint and motion for an order of stay on the revocation of the driver's license which was granted by Judge Hall. On

May 22, 1970, Judge D. Frank Wilkins of the Third Judicial District Court, in and for Salt Lake County, State of Utah, had a hearing on the matter.

At the hearing, counsel for appellant offered appellant's testimony and requested a continuance to get the testimony of Officer Duncan (T. 29). (Apparently counsel had failed to give the subpoena for Officer Duncan to the Police Department until the night before the hearing, and as a result, the police officer was not present.) Respondent's counsel offered the reports of Officer Duncan, Mr. Young, and appellant into evidence and elicited the testimony of the respondent. On this evidence, Judge Wilkins ruled that Mr. Mahoney, the respondent, had not abused his discretion. Appellant was then permitted a proffer of proof for the record. It is from this hearing that appellant is appealing.

ARGUMENT

POINT I.

THE SUSPENSION OF LYNDA M. JENNINGS' DRIVER'S LICENSE DID NOT VIOLATE DUE PROCESS OF LAW.

The procedure outlined in Utah Code Ann. § 41-12-2 and 41-12-5 (1970) and followed by respondent, does not violate due process. Utah Code Ann. §§ 41-12-5(a) and (b) (1970) provide that the Commission must base their decision on all reports or other evidence submitted to the Commission.

Pursuant to the above mentioned statute, the respondent, before making any decision, received and looked over appellant's accident report, Mr. Young's accident report, and the investigating officer's report. These reports, under *Simmons* v. *State Dept. of Public Safety,* Case No. 11771 (1970), are considered competent and valid evidence. On the basis of these reports, the respondent, under *Hague* v. *State Dept. of Public Safety,* 23 Utah 2d 209, 462 P. 2d 418 (1968) determined whether or not there was the possibility of appellant's culpability. Mr. Mahoney concluded that the appellant could have been at fault and therefore issued an order suspending her driver's license. Once the order was issued, the appellant had and took advantage of the opportunity to petition a district court. Utah Code Ann. § 41-12-2(b) (1970) states:

> "(b) Any person aggrieved by an order or an act of the commission, may, within ten days after notice thereof, file a petition in the district court for a review thereof; but the filing of such petition shall not suspend the order or act unless a stay thereof shall be allowed by a judge of said court pending final determination of the review. The court shall summarily hear the petition and may make any appropriate order or decree."

The appellant was also granted stay on the execution of the order pending the outcome in the district court (R. 6).

There is no reason why this procedure outlined by statute and Utah Supreme Court decisions violates due process. Due process does not require that judicial inquiry be made before the discretion of an administrative official can be

exercised and there is no judicially or expressly defined form of procedure that need be followed. As stated in *Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho* v. *Mills*, 325 U. S. 697 (1945):

> "The requirements imposed by constitutional guaranty of due process are not technical, nor is any particular form of procedure necessary, and the guaranty does not require a hearing at the initial stage or any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Id.* at 710.

The only thing required by due process in an administrative decision is that the person being accused or deprived have an opportunity to be heard:

> "Where a preliminary decision by an agency is a step in an administrative proceeding, no hearing at preliminary stage is required by due process, as long as requisite hearing is held before final administrative order becomes effective." *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 595 at 598 (1950).

The appellant was given and used the opportunity to be heard in the district court. State law and Utah Supreme Court decisions require a person in appellant's situation to have an opportunity to be heard in court. See Utah Code Ann. § 41-12-2(b) (1970) and *Hague* v. *State Dept. of Public Safety, supra.* Lynda Jennings appeared in court and was heard by Judge D. Frank Wilkins. Judge Wilkins, under the guidelines of *Hague* v. *State Dept. of Public Safety, supra,* which states "the court should determine

whether the administrative body exceeded this jurisdiction or acted capriciously," *Id.* at 302, determined that the respondent did not act capriciously or exceed its jurisdiction. The procedure outlined in the Financial Responsibility Act, as followed by respondent and Judge Wilkins, does not violate due process.

Appellant attacks the failure to satisfy due process in specific areas. She alleges first, that she was denied an administrative hearing. As pointed out earlier in the brief, it does not matter if appellant was heard at the administrative hearing — it only matters if the appellant receives the opportunity to be heard before the administrative decision becomes final. Appellant received that opportunity. As stated in *Adams* v. *City of Pocatello,* 91 Idaho 99, 416 P. 2d 46 (1966) :

> "Suspension without prior hearing of driver's license by commissioner of law enforcement for failure to deposit sum required as security for satisfaction of any judgment which might be recovered against uninsured driver for damage resulting from accident did not deny him due process, where the law authorizing suspension provided for judicial review of action of commissioner." *Id.* at 49.

Besides the administrative decision was made by the respondent under the auspices of the constitution. The respondent considered all the facts, he received a report submitted by the appellant, a report by the other party involved in the accident, and a report by a neutral party, the investigating police officer. The report that the appellant filed had just as much weight for consideration as the other

reports which were filed and in that sense, due process was served.

Appellant next attacks the judicial hearing itself, claiming that the hearing was a denial of due process because it was placed on the law and motion calendar. The type of motions scheduled on a particular day have no bearing on whether or not due process was followed. There is no basis in arguing that because the hearing was held on law and motion day, due process was not followed. The important factor is whether the appellant had a chance to be heard in court. It does not follow that a person who had a hearing on law and motion day was deprived of due process. This court in *Toleman* v. *Salt Lake County*, 20 Utah 2d 310, 437 P. 2d 442 (1968) stated the requisites for due process:

> "Our feeling pretty much is expressed in Mullane v. Central Hanover Bank, [299 U S. 306 (1950)], where it was said:
>
> > 'The fundamental requisite of due process of law is the opportunity to be heard'" *Id.* at 448.

The Utah Rules of Civil Procedure seem to support this doctrine. The rules state that a trial must be held in open court but that a hearing can be conducted anywhere by a district court judge as long as it is within the county where the matter is pending. Rule 77(b), Utah Code Ann. (1953):

> "(b) All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings

> may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place within the state, either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the county wherein the matter is pending without the consent of all the parties to the action affected thereby."

Miss Jennings had a hearing which was conducted in open court and according to the rules of civil procedure.

Appellant's third contention is that her counsel was unable to interrogate Officer Duncan. Counsel for appellant has no one to blame but his own neglect for not being able to interrogate Officer Duncan in court. Counsel for appellant alleges that attorneys for respondent told him, before the hearing, that he would not be allowed to call witnesses. Yet, if that statement is correct, why did counsel for appellant subpoena Officer Duncan the day before the trial, and then admit at trial that he was delinquent in not issuing the subpoena earlier? (T. 29). The complaint was filed by appellant on May 12, 1970 (T. 12) and the hearing was held on May 22, 1970. That gave counsel for appellant ten days to subpoena Officer Duncan and assure his appearance in court. Besides, both Mr. Hansen and Mr. Young stated in court that they did not object to Officer Duncan being called to testify:

> MR. HANSEN: There has been a mistake in his understanding. That's not the position of the state. * * * We have no objection at all if the plaintiff in this matter wishes to call witnesses. . . .

> MR. DOLOWITZ: Your Honor, maybe I'm blaming Mr. Hansen for Mr. Young's point of view, Mr. Young being counsel with him.
>
> MR. YOUNG: Our position was that it was discretionary issue as to whether the department had properly exercised its authority to revoke on the basis of the information before it. It doesn't go to stipulating that no one can be called as witnesses, or anything like that (T. 15, 16).

The fact of the matter is that counsel for appellant failed to either follow up on his subpoena or issue it earlier, and that is the only reason why Officer Duncan was not available to testify. Error on the part of appellant does not mean he was denied due process. Appellant cannot fail to call a witness and then turn around and allege his constitutional rights were denied because that witness was not present.

Appellant's last contention is that there was not sufficient time given for her attorney to subpoena necessary witnesses. As indicated earlier, appellant had ten days in which to subpoena all necessary witnesses. (Complaint filed May 12, 1970, hearing held May 22, 1970.) There was ample opportunity for appellant's counsel to subpoena witnesses and abide by *McAnerney* v. *State,* 9 Utah 2d 191, 34 P. 2d 212 (1959), which requires the opportunity by the defendant to subpoena witnesses. The respondent submits no one but the appellant and her counsel are to blame for not subpoenaing all necessary witnesses.

CONCLUSION

The appellant, Lynda M. Jennings, was given a full hearing in compliance with due process of law, and found guilty of violating Utah Code Ann. § 41-12-5(b) (1970). On this basis, respondent submits that the district court decision suspending appellant's driver's license be affirmed.

Respectfully submitted,

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