1-8-1985

Brewer v. Motor Vehicle Div., Dep't of Revenue

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

Case No. 84 SA 252

HUGH BREWER, Plaintiff-Appellant,	)	
	)	APPEAL FROM THE DISTRICT COURT
vs.	)	IN AND FOR THE COUNTY OF JEFFERSON
	)	THE HONORABLE ANTHONY F. VOLLACK,
MOTOR VEHICLE DIVISION, DEPARTMENT OF REVENUE, STATE OF COLORADO, Defendant-Appellee	)	PRESIDING

OPENING BRIEF OF PLAINTIFF-APPELLANT

RANDALL J. DAVIS

Randall J. Davis No. 8249
7907 Zenobia Street
Westminster, Colorado 80030
426-1770

DAVID R. JUAREZ

David R. Juarez No. 13304
7907 Zenobia Street
Westminster, Colorado 80030
426-1770

ATTORNEYS FOR PLAINTIFF-APPELLANT

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 1

Statement of Facts 1

Issues Presented 4

Arguments:

A. THE TRIAL COURT ERRED IN AFFIRMING THE FINDING THAT THE PLAINTIFF WAS DRIVING UNDER THE FACTS OF THIS CASE. 5

B. THE PROVISIONS OF C.R.S. §42-2-122.1 ARE UNCONSTITUTIONAL .8

C. THE TRIAL COURT ERRED IN NOT HOLDING THAT THE PLAINTIFF WAS DENIED HIS ABILITY TO CROSS-EXAMINE WITNESSES, AND THAT THERE WAS A LACK OF SHOWING OF TRUSTWORTHINESS OF THE DOCUMENTS ADMITTED INTO EVIDENCE. 14

D. THE TRIAL COURT ERRED IN RULING THAT THE PLAINTIFF NEED NOT BE ADVISED BEFORE BEING REQUIRED TO SUBMIT TO A CHEMICAL ANALYSIS OF HIS BLOOD OR BREATH. 18

Conclusion 20

TABLE OF AUTHORITIES

Page

Statutes:

C.R.S. §24-4-105 11

C.R.S. §42-1-204 11

C.R.S. §42-2-122.1 ..... 1, 2, 4, 6, 8, 11, 14, 20

C.R.S. §42-2-122.1(1)(a).....6, 9

C.R.S. § 42-2-122.1(1)(c)..... 8

C.R.S. §42-2-122.1(1)(a)..... 9

C.R.S. §42-2-122.1(8).....2, 9

C.R.S. §42-2-122.1(10)..... 11

C.R.S. §42-2-122(3)..... 11

C.R.S. §42-4-1202(3)(1973)..... 18

C.R.S. §42-4-1202(3)(a)(I)..... 15

C.R.S. §42-4-1202(3)(a)(II)..... 19

Cases:

Aultman v. Motor Vehicle Division, Department of Revenue, State of Colorado, Adams County District Court, Case No. 83 CV 2557 (1984), Colorado Court of Appeals Case No. 84 C 80611..... 17

Cantrell v. Weed, 35 Colo. App. 180, 530 P2d 986 (1974) 18

Edwards v. State, 42 Colo. App. 52, 592 P2d 1345 (1979) 12

Elizondo v. State, 194 Colo. 113, 570 P2d 518 (1977) 11, 12

Friedman v. State, 194 Colo. 228, 571 P2d 1086 (1977) 12

Garcia v. District Court, 197 Colo. 38, 589 P2d 924 (1979)..... 13, 14

Loesch v. State, 194 Colo. 169, 570 P2d 530 (1977) 12

Marin v. Colorado Department of Revenue, 41 Colo. App. 557, 591 P2d 1336 (1978) 6, 7

Treatises:

2 Jones on Evidence §14.37 (6th Edition 1972) 17

Richardson, Modern Scientific Evidence §13.10 and §13.13(a) (2d Edition 1974) 17

Other:

Article IV, Title 24, State Administrative Procedure Act..... 11

TABLE OF AUTHORITIES (continued)

Moon v. State, 478 A.2d 695, (MD. App. 1984) 16

People v. Beruman, __Colo.__, 638 P2d 789 (1982) 9, 10

People v. Caponey, __Colo.__, 647 P2d 668 (1982) 10

People v. Culp, 189 Colo. 76, 537 P2d 746 (1975) 19

People v. Dee, __Colo.__, 638 P2d 749 (1981) 15

People v. Enea, __Colo.__, 665 P2d 1026 (1983) 10

People v. Fernandez, Adams County District, Court Case No. 84 CR 0370 (1984)..... 17

People v. Gillett, __Colo.__, 629 P2d 613 (1981) 18, 20

People v.Holloway, __Colo.__, 649 P2d 318 (1982) 14

People v. Lorio, 190 Colo. 373, 546 P2d 1254 (1976) 10

People v. Morgan, 199 Colo. 237, 606 P2d 1296 (1980) 13

People v. New Horizons Inc., 200 Colo. 377, 616 P2d 106 (1980)..... 11

People v. Ro'mar, 192 Colo. 428, 559 P2d 710 (1977) 9

People v. Velasquez, ___Colo.___, 666 P.2d 567(1983)..... 10

People v. Williams, 477 N.Y.S.2d 315 (N.Y. App. 1984) 16

Rust v. Dolan, 38 Colo. App. 529, 563 P2d 28 (1977) 5, 6

Schmerber v. California, 384 U.S. 754 (1966) 18

State v. Schmitz, 450 SO.2d 1254 (FLA. DIST. APP. 1984) 16

South Dakota v. Neville, __U.S.__, 103 S.CT. 916 (1983) 19

United States v. Martinez, 667 F2d 886 (10th Cir. 1981), cert. denied, 456 U.S. 1008 (1981)..... 14

Regulations:

1 Code of Colorado Regulations 204-8 12

5 Code of Colorado Regulations 1005-2 17

SUPREME COURT, STATE OF COLORADO

Case No. 84 SA 252

PLAINTIFF-APPELLANT'S OPENING BRIEF

HUGH BREWER, Plaintiff-Appellant,

vs.

MOTOR VEHICLE DIVISION, DEPARTMENT OF REVENUE, STATE OF COLORADO, Defendant-Appellee.

COMES NOW the Plaintiff-Appellant, by and through his attorneys Randall J. Davis and David R. Juarez and submits this Opening Brief in support of his Petition filed herein.

STATEMENT OF THE CASE

This is an Appeal from the revocation of Plaintiff-Appellant's (hereinafter refered to as Plaintiff) drivers license by the Department of Motor Vehicles pursuant to C.R.S. §42-2-122.1, which occurred on September 9, 1983. Plaintiff thereafter appealed the Order of Revocation by filing a Petition for Review with the District Court in and for Jefferson County. Judge Anthony F. Vollack affirmed the Department of Motor Vehicle Order of Revocation, revoking Plaintiff's driving privilege for a period of one year on April 27, 1984. Plaintiff now appeals this decision.

STATEMENT OF THE FACTS

On or about July 24, 1983, the Plaintiff was arrested at or near 860 Lilac Street, Broomfield, Colorado for driving under the influence of an intoxicating liquor. Subsequent to his arrest he was directed to submit to a chemical analysis of his breath by the Officer of the Broomfield Police Department pursuant to the Express Content Law contained in C.R.S.

§42-4-1202(3)(a)(I). The results of the tests demonstrated an alcohol content in his breath in excess of .15 or more grams of alcohol/210 liters of breath. Upon receiving the result, the arresting Officer revoked the license of the Plaintiff and provided him with a notice that he must request a hearing with Defendant-Appellee(hereinafter referred to as Defendant) within seven days. This hearing was requested within the specified period of time and was held on September 9, 1983.

On September 9, 1983 at the offices of Defendant a hearing was held before Hearing Commissioner Barbara R. Stafford pursuant to C.R.S. §42-2-122.1(8). During the course of the hearing evidence was introduced that the arresting officer had received a call from a citizen's witness advising that there was an automobile parked in the cul-de-sac near his house with the engine running and lights on. The officer testified that he did not know how long the vehicle had been parked, nor had he received any indication from the citizen-witness who had called the Police Department (R. at pg. 32 and 37). The arresting officer testified that the automobile was in park and that at no time did he ever observe the Plaintiff driving the motor vehicle. (R. at pg. 33). The officer testified that on contacting the Plaintiff he detected a real strong odor of alcohol on his breath and that he did not feel it would be in the best interest of the Plaintiff to allow him to perform the roadside manuevers, so that he placed him under arrest and transported him to the Police Department to perform the intoxilizer test. The officer further testified that the results of the test were .178 grams of alcohol/210 liters of breath.(R. at pg. 32 and 33)

Counsel for Plaintiff objected to any consideration of the testimony as it related to the operation of vehicles as there had not been any evidence, whatsoever, that at any time Plaintiff had been driving his motor vehicle. Secondly, Counsel for Plaintiff objected that an inadequate foundation had been established for allowing the admission into evidence of the chemical test results. Specifically that insufficient evidence had been submitted to demonstrate that the intoxilizer unit itself or the operator had been properly certified and that a valid breath test was performed in conformance with the rules and regulations promulgated by the Department of Health (R. at pg. 37). Finally, Counsel for Plaintiff argued that the results of the test were insufficient to establish a basis for revocation, as there was no evidence to indicate that the test was performed within one hour of the offense of driving under the influence as there had been no evidence introduced to establish the Plaintiff was driving the automobile. (R. at pg. 37 and 38). Plaintiff's Counsel argued strenuously that there was no reliable basis on which to judge whether or not the test was performed within one hour of the alleged offense of driving while intoxicated, as the automobile was in park, in a cul-de-sac area, and there was no testimony as to how long he had been parked there. Further, Plaintiff argued that the action taken by Plaintiff should be encouraged in that he had moved to a side street so that he would not present a hazard to traffic that he had voluntarily stopped driving and that a person should not be penalized for taking proper action under the circumstances. (R. at pg. 38).

At the conclusion of the evidence the Hearing Officer issued the following findings and order:

> Under the old Implied Consent Law the question was brought to the courts, what exactly constitutes driving under the influence or driving while impaired. And the courts ruled and I'll cite, Rust out of the Supreme Court, 563 P.2d 28, "being in operation and control of a motor vehicle did constitute, can constitute the offense of driving under the influence when an officer had reasonable grounds to request a test." In that case, there was a car parked on the shoulder of the road. In your case, you were parked in the middle of the cul-de-sac. So, we have to say that you were in operation and control of that motor vehicle in the cul-de-sac and being in operation and control of a motor vehicle while under the influence, or impaired, is in fact an offense. The test was given within an hour's time of that alleged offense. (R. at page 39).

At the close of the hearing, the Hearing Officer revoked Plaintiff's drivers license for a period of one year. Thereafter Plaintiff appealed to the District Court in and for Jefferson County. Judge Anthony F. Vollack affirmed the Order of Revocation entered by Defendant and this Petition has followed.

ISSUES

A. DID THE TRIAL COURT ERR IN AFFIRMING THE FINDING OF DEFENDANT THAT THE PLAINTIFF WAS DRIVING UNDER THE FACTS OF THIS CASE?

B. ARE THE PROVISIONS OF C.R.S. §42-2-122.1 UNCONSTITUTIONAL?

C. DID THE TRIAL COURT ERR IN NOT HOLDING THAT PLAINTIFF WAS DENIED HIS ABILITY TO CROSS EXAMINE WITNESSES,AND THAT THERE WAS A LACK OF SHOWING OF TRUSTWORTHINESS OF THE DOCUMENTS ADMITTED INTO EVIDENCE?

D. DID THE TRIAL COURT ERR IN RULING THAT THE PLAINTIFF NEED NOT BE ADVISED BEFORE BEING REQUIRED TO SUBMIT TO A CHEMICAL ANALYSIS OF HIS BLOOD OR BREATH?

ARGUMENT

A. THE TRIAL COURT ERRED IN AFFIRMING THE FINDING THAT THE PLAINTIFF WAS DRIVING UNDER THE FACTS OF THIS CASE.

During the course of the hearing, evidence was admitted to establish that the Plaintiff was parked in a cul-de-sac with his engine running, lights on and the automobile in park. (R. at pg. 32 and 33). The arresting officer further testifed that he had no knowledge as to how long the automobile had been parked in the cul-de-sac in that manner. (R. at pg. 36). The Hearing Officer found that the Courts had ruled that what constituted driving under the influence or driving while impaired included being in operation and in control of a motor vehicle. Being parked in a cul-de-sac with the engine running constituted being in operation and control of a motor vehicle and that since that was the offense charged against the Plaintiff, the test was given within one hour of that alleged offense. The Hearing Officer stated that he was relying upon Rust v. Dolan, 38 Colo. App.529, 563 P.2d 28(1977).(R. at pg. 39)

The Trial Court concluded that the Hearing Officer had sufficient grounds to believe the Plaintiff had been driving a motor vehicle under the influence of alcohol. The Court went on to state that although it is circumstantial evidence, when a person is found behind the wheel of a motor vehicle in an unconscious state with the motor running and the lights on, that it may properly be inferred that the person had been operating the motor vehicle. Though this may be insufficient evidence to meet the burdens which apply in a criminal proceeding, the Trial Court found that this was sufficient evidence to meet the burden relative to this civil proceeding. (R. at page 66).

At the hearing, the Hearing Officer was relying on the case of Rust v. Dolan, 38 Colo. App. 529, 563 P.2d 28(1977) to provide a definition as to what would constitute driving as it would apply to C.R.S. §42-2-122.1. The Trial Court erred in ruling that the Hearing Officer was applying a burden to establish driving for the administrative hearing which the Court characterized as a civil proceeding. The specific language which applys to the Defendant's authority to revoke a driving privilege is contained in C.R.S. §42-2-122.1(1)(a) which states in pertinent part as follows:

> (1)(a) The Department shall revoke the license of any person upon its determination that the person: (I) drove a vehicle in this state when the amount of alcohol in such person's blood was 0.15 or more grams of alcohol/100 milliliters of blood or 0.15 or more grams of alcohol/210 liters of breath at the time of the commission of the alleged offense or within one hour thereafter, as shown by chemical analysis of such person's blood or breath; or (emphasis added)

The statute itself does not contain a definition of the term driving nor does it expressly state what would constitute "drove a vehicle" so as to invoke the authority contained in the above-cited statute.

This Court clearly articulated the standard to be applied by Defendant when invoking its authority to revoke a driving privilege relative to alcohol related driving offenses, in Marin v. Colorado Department of Revenue, 41 Colo. App. 557, 591 P.2d 1336(1978). In this case, as in the Marin case, the statutes are consistent in specifying that their provisions apply to persons who drive any motor vehicle within the State of Colorado and that driving means driving. In Marin evidence was introduced at the administrative hearing that he had not driven the automobile at any time and that at the time of his arrest he had simply been parked in an alley with

the car on and the engine running. The Supreme Court held that constituted substantial evidence to indicate that Marin had not been driving the vehicle, thereby making the Implied Consent Statute inapplicable to his case. In this case the Trial Court stated that the difference between the case before it in this action and the Marin case was that Marin had presented substantial evidence that he was not driving. The Trial Court ruled that the Hearing Officer was proper in inferring that the police officer had reasonable grounds to believe that the Plaintiff was operating a vehicle.

In this case no inferences need be drawn, the arresting officer testified that he was contacted by a citizen-witness, that upon his investigation he encountered the Plaintiff parked in a cul-de-sac with the automobile in park, the engine on, the lights on, and the Plaintiff unconscious in the front seat.(R. at pg. 32 and 33) The arresting officer testified that he never witnessed the Plaintiff driving.(R. at pg. 33) Plaintiff submits that this constitutes substantial evidence to indicate that Plaintiff was not driving.

Judge Ruland in his dissent in the Marin case states that the General Assembly concluded that the test should be required in any case where there are reasonable grounds to believe that a licensee has been operating a vehicle while under the influence of alcohol. Judge Ruland stated that a licensee might be inconvenienced by having to take a test in order to retain his license, and that the defense of not operating a motor vehicle should be preserved for presentation during the trial of any charge arising out of the incident. Marin at pg.1338. In the present case the

underlying criminal charge does not in any way effect the revocation pursuant to C.R.S. §42-2-122.1 and so the defense of not driving was properly raised during the administrative hearing.(See C.R.S. §42-2-122.1(1)(c))

Based on the evidence presented at the administrative hearing the Defendant was in error, through its hearing officer, in revoking the license of the Plaintiff. The District Court erred as well in affirming the determination made by the hearing officer. In the case before this Court the actions taken by the Plaintiff should be promoted rather than penalized in that an inference can be drawn from the evidence presented that when the effects of alcohol overcame Plaintiff he pulled off the main road into a cul-de-sac, put the car into park, to wait out the alcohol's effects. The hearing officer by his order of revocation, and the Trial Court's affirmance of the order, promote the practice that a driver under similar circumstances bears an equal risk of suffering a revocation of their driver's license by pulling over as they would by continuing in their attempts to drive in that condition.

For the reasons and arguments expressed herein Plaintiff believes that the Trial Court was in error and their ruling should be reversed.

ARGUMENT

B. THE PROVISIONS OF C.R.S. §42-2-122.1 ARE UNCONSTITUTIONAL.

Plaintiff submits to this Court that the revocation statute applied to his case is internally inconsistent and thus unconstitutionally vague. Specifically, the portion of the statute in question refers in the first part that a driver's license shall be revoked if the chemical test

results meet the criteria required in the statute if taken within one hour after the commission of the alleged offense. In the second part the statute states that the burden is upon the state to establish that the chemical analysis result is in excess of the statutory standard at the time of the commission of the alleged offense.

The language of C.R.S. §42-2-122.1(1)(a) and (8) states in pertinent part as follows:

> (1)(a) The Department shall revoke the license of any person upon its determination that the person: (I) drove a vehicle in this state when the amount of alcohol in such person's blood was 0.15 or more grams of alcohol/ 100 milliliters of blood or 0.15 or more grams of alcohol/210 liters of breath at the time of the commission of the alleged offense or within one hour thereafter, as shown by chemical analysis of such person's blood or breath; or . . .
>
> (8)(c) The sole issue at the hearing shall be whether by preponderance of the evidence, the person drove a vehicle in this state when the amount of alcohol in such person's blood was 0.15 or more grams of alcohol/ 100 milliliters or 0.15 or more grams of alcohol/210 liter of breath at the time of the commission of the alleged offense, as shown by chemical analysis of such person's blood or breath, or refused to submit to a chemical analysis of his blood, breath, saliva, or urine as required by §42-4-1202(3). If the presiding hearing officer finds the affirmative of the issue, the revocation order shall be sustained. If the presiding hearing officer finds a negative of the issue, the revocation order shall be rescinded.

This Court has set out the standard to be applied for review of a challenge of a statute for being unconstitutionally vague, as being vague so that persons of common intelligence must guess at its meaning. See People v. Beruman,__ Colo.__ 638 P.2d 789(1982). See People v. Ro'mar, 192 Colo. 428,559 P.2d 710(1977). The burden is on the party challenging the constitutionality of a statute to prove its invalidity beyond a reasonable

doubt. People v. Lorio, 190 Colo. 373, 546 P.2d 1254(1976), "a statute in the first instance is presumed to be constitutional and the burden falls upon the person attacking the statute to establish its unconstitutionality." People v. Velasquez,__ Colo.__ 666 P.2d 567(1983). This Court has gone on to state, "However, a statute is presumed to be constitutional and the one who challenges its constitutionality must prove beyond a reasonable doubt that it is unconstitutional." People v. Enea,__ Colo.__ 665 P.2d 1026(1983), see also People v. Caponey,__ Colo.__ 647 P.2d 668(1982).

In People v. Beruman, this Court stated that "penal statutes and regulations must be clearly understandable and reasonably specific so that the Defendant may be sufficiently apprised of the crime with which he stands charged (citations omitted) this affords the Defendant due process notice and enables him to plead the resolution of the charge as it bars double jeopardy. Fundamental fairness requires that no lesser standard be applied (Citations omitted)." People v. Beruman at page 792. In the case before this Court the Plaintiff must guess when reviewing these statutes as to whether or not the authority to revoke his license wil be invoked if the chemical analysis demonstrates that the alcohol content of his blood or breath was in excess of the statutory standard at the time the test was taken (which must be within one hour after the commission of the alleged offense) or whether that result must somehow be related back to reflect what the alcohol content was of his blood or breath at the time of the commission of the alleged offense. The language of the specific subsections is clearly internally inconsistent. "While we recognize a duty, whenever possible, to authoritatively construe a Colorado statute to conform to constitutional

standards, we are bound by the clear language of the statute and must declare it unconstitutional." People v. New Horizons Inc., 200 Colo. 377, 616 P.2d 106(1980). In order to construe this statute to bring it in conformity with the constitution would require this Court to infer that the General Assembly inadvertantly omitted the one-hour testing period from subsection (8)(c) as set forth above. This Court might also infer that the General Assembly intended that the test be taken within one hour of the commission of the alleged offense in order that the test results be related back to demonstrate the condition of the driver at the time of the commission of the alleged offense. Under either scenario these interpretations place this Court in the position of the Hearing Officer to determine whether the acts engaged in by the Plaintiff constitute driving, and whether his acts constitute the commission of an alleged offense sufficient to invoke the authority contained in the subsections of the statute as set forth above.

C.R.S. §42-2-122.1 was unconstitutionally applied to the Plaintiff-Appellant in this case. Revocation of a drivers license by the Defendant is subject to Article IV of Title 24 of the State Administrative Procedure Act. C.R.S. §42-2-122.1(10). Revocations hearings are subject to the procedural standards as set forth in C.R.S. §24-4-105. See section 42-2-122(3). The director of Defendant has the authority to promulgate rules and regulations for revocation hearings pursuant to C.R.S. §42-1-204.

This Court ruled in Elizondo v. State, 194 Colo. 113, 570 P2d 518(1977) that Defendant was required to promulgate rules and regulations

for probationary license hearings. This Court stated that without procedural rules and regulations the probationary licenses hearings failed to satisfy due process requirements. In Elizondo the licensee's license was suspended and she sought a probationary license for the suspension. Ms. Elizondo appealed the hearing officer's denial of her probationary license. The District Court ruled, in that case, the entire probationary license statute was invalid, but upon review by the Supreme Court, the only constitutional infirmity was found to exist in the Division's failure to promulgate rules and regulations related to the conduct of probationary license hearings. The Court stated:

> As a result neither the public nor the Courts have any means of knowing in advance what evidence might be considered material to any particular decision. Nor is there any assurance that each hearing officer will not, consciously or subconsciously, follow standards quite different from those applied by his or her colleagues.

Elizondo v. State, at pg. 521. See also Loesch v. State, 194 Colo. 169, 570 P2d 530 (1977) and Friedman v. State,194 Colo. 228, 571 P2d 1086 (1977).

Pursuant to the Supreme Court's direction the Division of Motor Vehicles promulgated Department of Revenue regulation 2-123.11, 1Code of Colorado Regulations 204-8, December 12, 1977. Subsections B.1 (a)-(d) of the regulations set forth the factors which will be considered relevant in probationary license hearings. The Colorado Court of Appeals has ruled that the regulation comports with due process. See Edwards v. State, 42 Colo. App. 52, 592 P2d 1345 (1979).

In this case no rules or regulations have been promulgated by Defendant that would have provided Plaintiff with reasonable notice as to what factors would be considered relevant and what standards would be

applied by the Defendant at the administrative hearing. For this reason counsel for Plaintiff asked of the hearing officer whether or not she would consider certain evidence which could have rebutted the evidence introduced by the arresting officer regarding the chemical analysis results of the Plaintiff's breath. The hearing officer ruled that she would not consider such evidence and in fact admitted evidence of the chemical results, as introduced by the arresting officer, without the establishment of any foundation or a finding that the evidence was in any way trustworthy.(R. at pg. 30 and 39)

The Colorado Supreme Court in Garcia v District Court 197 Colo. 38, 589 P2d 924 (1979) indicated that any Defendant in a misdemeanor alcohol case had an absolute right to have a second sample of blood or breath available for independant testing. The stated intent of that case was to provide any defendant an opportunity to have evidence available to him that would demonstrate that some error had occurred with the original test. See People v. Morgan, 199 Colo. 237, 606 P2d 1296 (1980).

In this case the District Court concluded that in light of the Plaintiff's failure to actually offer evidence of a second sample or any lay testimony which tended to refute the validity of the chemical test result, that there was no basis for a denial of due process claim, and that Plaintiff's contentions were without merit.(R. at pg.65) Based on the hearing officer's statements the introduction of such evidence would have been futile.

The District Court had the authority and the jurisdiction to rule on this issue and to prohibit Defendant's hearing officers from excluding

such evidence from the administrative hearing. The District Court could use their reviewing authority to prevent Defendant from benefiting from misconduct in order to protect the integrity of the judicial system despite the lack of statutory or consititutional rule protecting the Plaintiff from such conduct. See United States v. Martinez,667 F2d. 886 10th Cir. (1981) cert. denied 456 U.S. 1008 (1981). The misconduct engaged in by Defendant was, articulating a standard which precluded Plaintiff from introducing evidence which could have refuted the validity of the chemical test, in violation of his due process rights, and contrary to this Court's ruling in Garcia. See also People v. Holloway, __Colo.__, 649 P2d 318 (1982).

For the reasons set forth herein, C.R.S. §42-2-122.1 should be declared to be unconstitutional as it is unconstitutionally vague. In the alternative, this statute should be held to have been unconstitutionally applied to the Plaintiff as he was in effect denied due process by its application.

ARGUMENT

C. THE TRIAL COURT ERRED IN NOT HOLDING THAT PLAINTIFF WAS DENIED HIS ABILITY TO CROSS-EXAMINE WITNESSES, AND THAT THERE WAS A LACK OF SHOWING OF TRUSTWORTHINESS OF THE DOCUMENTS ADMITTED INTO EVIDENCE

At the hearing, Defendant admitted into evidence the results of a chemical analysis of Plaintiff's breath without requiring the arresting officer to establish any foundation whatsoever as to their relevance or trustworthiness. (R. at p. 32 and 33). The hearing officer further failed to require that any evidence be presented that the chemical analysis was performed in compliance with the rules and regulations promulgated by the Department of Health governing alcohol related chemical analysis.

Plaintiff's counsel specifically objected to the testimony relating to the chemical analysis results by questioning the arresting officer's certification to administer the intoxilyzer test and whether the intoxilyzer instrument itself had been properly certified as required by the Colorado Department of Health. (R. at p. 37).

The statute providing for the administration of chemical tests is contained in C.R.S. §42-4-1202(3)(a)(I) which states in pertinent part as follows:

> The test shall be administered at the direction of the arresting officer having reasonable grounds to believe that the person had been driving a motor vehicle in violation of (I) or (I.5) of this section and in accordance with the rules and regulations prescribed by the State Board of Health, with utmost respect for the constitutional rights and dignity of person, and health of the person being tested.... No civil liability shall attach to any person authorized to obtain blood, breath, saliva, or urine specimen or to any hospital in which such specimens are obtained as provided in this subsection (3). As a result of the act of obtaining such specimens from any person submitting thereto and such specimens were obtained according to the rules and regulations prescribed by the State Board of Health; except that such provision shall not relieve any such person from liability in negligence in the obtaining of any specimen sample.(emphasis added)

The General Assembly prescribed the means of obtaining chemical test results from drivers within the State of Colorado subject to the general confines of the constitutional law as set forth by People v. Dee. ___ Colo. ___, 638 P.2d 749 (1981).

In the case before this court, the arresting officer utilized an intoxilyzer instrument. The arresting officer admitted that he was not responsible for the preparation of the standard solutions utilized in the

machine nor for maintenance on the intoxilyzer. (R. at pg. 35). There is no testimony on the record of this case showing that the intoxilyzer was operated correctly, that it had been properly calibrated, that it had been properly maintained, and that the instrument was operating on that given date in a proper fashion. The arresting officer was not responsible for maintaining and preparing the standard solutions which were relied upon by the hearing officer to establish that the test result of Plaintiff's breath was in excess of the statutory standard. Defendant the Trial Court both assume that the intoxilyzer machine was functioning properly though the person responsible for its maintenance did not testify.

The right of confrontation of one's accusers is not necessarily limited to a criminal proceeding. The fact that in an administrative hearing the rules of evidence are somewhat relaxed, and hearsay evidence may be utilized, is insufficient as a basis to deny Plaintiff the right to confront and cross-examine the party responsible for the maintenance of the intoxilyzer machine which issued the results utilized against him. The right to confront the technician who has taken the test is an important right. Moon v. State, 478 A.2d 695(MD.App.1984). In this case the situation is aggravated as the arresting officer was confronted on cross-examination and could not specifically state for the hearing officer when he was certified.(R. at pg. 34) Certification means the ability to produce a valid certificate showing that there has been proper training. State v. Schmitz, 450 SO.2d 1254 (FLA.Dist.App.)(1984), see alsoPeople v. Williams, 477 N.Y.S.2d 315 (NY.App.)(1984). The Colorado Board of Health Regulations mandate that both the operator and the intoxilyzer machine be properly

certified at the time that a test is taken. 5 Code of Colorado Regulations 1005-2 et seq.

The case before this court involves the invocation of a per se statute, which places great weight on a result of a chemical analysis of a person's breath or blood. Some foundational requirements for the admissibility of those test results should be required to comply with a person's entitlement to due process protections. Such foundational requirements should include: 1) That the particular machine used was working properly, 2) The test used was properly conducted, and 3) The person conducting the test was qualified to do so. See 2 Jones on Evidence (6th Edition 1972), §14.37; Richardson, Modern Scientific Evidence (2d Edition 1974) §13.10, and §13.13(a). See People v. Armando Fernandez, Adams County District Court, Case No. 84 CR 0370 (1984) attached hereto as Appendix "A"). See also Robert Dale Aultman v. Motor Vehicle Division, Department of Revenue, State of Colorado, Adams County District Court, Case No. 83 CV 2557 (1984) attached hereto as Appendix "B" (Colorado Court of Appeals Case No. 84 C 80611).

For the reasons set forth herein, this court should rule that the hearing officer denied Plaintiff due process by improperly admitting into evidence the chemical analysis results without a proper foundation. Further, this could should rule that the District Court improperly concluded that competent evidence existed as to these matters in affirming the hearing officer's findings in this regard.

ARGUMENT

D. THE TRIAL COURT ERRED IN RULING THAT THE PLAINTIFF NEED NOT BE ADVISED BEFORE BEING REQUIRED TO SUBMIT TO A CHEMICAL ANALYSIS OF HIS BLOOD OR BREATH

Absent in the record in this case is any advisement by the officer or anyone else as to the implications involved with taking or refusing to take a chemical test. Under these circumstances, absent a showing of a valid waiver of the right to refuse there can be no administrative revocation.

The predecessor to the existing Express Consent Law was the Implied Consent Law which set forth in detail the necessity to advise a driver of what penalties would occur if he failed to take a chemical test. That advisement had to be given in writing to the driver before an election was made as to whether a test was to be taken and then as to which type of test would be taken. C.R.S. §42-4-1202(3)(1973): See Cantrell v. Weed, 35 Colo.App. 180, 530 P.2d 986 (1974). The Express Consent Law fails to state any requirement for any advisal relating to the penalties for failing to submit to a chemical analysis. Plaintiff was not advised that he had a right to refuse the test or that by that refusal or even by taking the test it might lead to an administrative revocation of his driver's license. Plaintiff must have been given the option not to take the chemical test and further be advised as to what results would follow by that failure.

The General Assembly, by enacting the Express Consent Law, abrogated the general federal constitutional standards which required a driver to submit to a chemical testing of his blood after a valid arrest. See Schmerber v. California, 384 U.S. 754 (1966), see also People v. Gillett, ____ Colo. ____, 629 P.2d 613 (1981). The Express Consent Law invokes the arresting officer with the power to apply the provisions of the

law at his discretion. C.R.S. §42-4-1202(3)(a)(II). See also People v. Culp, 189 Colo. 76, 537 P.2d 746 (1975). (In Culp the arresting officer was allowed to use his discretion in invoking the provisions of the old Implied Consent Law.) The Express Law is in derogation of federal constitutional law and the General Assembly has chosen to give each driver, by its enactment, the opportunity to refuse to take a chemical test as well as selecting, should they choose to take the test, the type of test whether it be breath or blood, it then follows that each driver must be advised of these options at the time that he or she is arrested.

In upholding South Dakota's Implied Consent Law, the United States Supreme Court in South Dakota v. Neville, ____ U.S. ____, 103 S.Ct. 916 (1983) discussed at great length the options given to drivers within that State. A driver was advised in detail before being requested to take a test as to what choices as to the type of test he would submit to he had, and the resulting penalties for failure to submit to a chemical test. In this case there was no advisement whatsoever and certainly no indication given to Plaintiff that by submitting to a chemical test the results could be used to revoke his license, thus denying him due process of law protections.

The statute which sets forth the procedure for requesting a driver submit to a chemical test specifically makes the election of a blood test the initial requirement of the law. C.R.S. §42-4-1202(3)(a)(II) states in pertinent part as follows:

> If such person requests that said chemical test be a blood test, then the test shall be of his blood; but, if such a person requests that a specimen of his blood not be drawn, then a specimen of his breath shall be obtained and tested.

It is clear from the language of the statute that some determination must be made that there has been a request not to have a blood test taken. The general assembly's intent appears to be that the blood test be the first test to be considered as the blood test is the most conclusive of all chemical tests currently in use. See People v. Gillett, supra. The record in this case is barren of any advisement or any testimony that Plaintiff refused to take a blood test. Apparently, it is Defendant's and the District Court's position that no advisement whatsoever is required by the Express Consent Law. This position offends the clear language of the statute as it is written requiring that a specific refusal to have a blood test taken be determined before there can be the taking of a breath test. For this reason, the decision of the trial court and the decision of the Defendant should be reversed.

CONCLUSION

For the reasons set forth herein, this court should reverse the decision of the District Court and of the Defendant and direct that it reinstate Plaintiff's right to drive. The argument may be raised that this appeal may be moot as Plaintiff has now suffered the one-year revocation of his driving privilege and is eligible for reinstatement of his driver's license. Plaintiff nonetheless suffers the stigma of having had his driving privilege revoked due to an alcohol-related offense. Such stigma continues to be carried on his driving record and affects his ability to secure statutorily required insurance coverage. Further, this court should declare C.R.S. §42-2-122.1 unconstitutional in order to protect the general citizenry of the State of Colorado from a streamlined administrative process

which fails to provide fundamental constitutional protections by causing them to suffer unfair revocations of their driving privilege.

Respectfully submitted,

RANDALL J. DAVIS

Randall J. Davis, No. 8249
Attorney for Plaintiff
7907 Zenobia Street
Westminster, Colorado 80030
426-1770

DAVID R. JUAREZ

David R. Juarez, No. 13304
Attorney for Plaintiff
7907 Zenobia Street
Westminster, Colorado 80030
426-1770

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing PLAINTIFF-APPELLANT'S OPENING BRIEF by placing same in the United States Mail, proper postage prepaid, this 24th day of January, 1985, addressed to:

Steven M. Bush, Assistant Attorney General
General Legal Services Section
1525 Sherman Street
Third Floor
Denver, Colorado 80203

APPENDIX A

DISTRICT COURT
ADAMS COUNTY
STATE OF COLORADO

Case no. 84CR0370

CERTIFICATE OF MAILING

THE PEOPLE OF THE STATE OF COLORADO
VS

Armando Fernandez

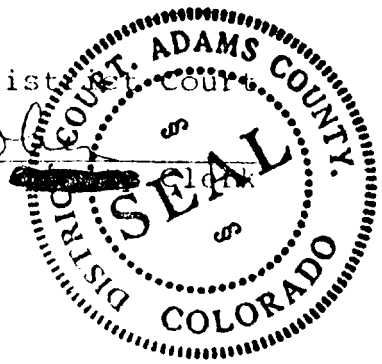
I hereby certify that I have this day served a copy of the ORDER in the above entitled proceedings to each person hereinafter named to wit:

Judge Patrick Williams	Hall of Justice
Judge Howard J. Otis	Hall of Justice
Judge Jennifer K. Brown	Hall of Justice
Judge Ovid R. Beldock	Hall of Justice
Judge Thomas R. Ensor	Hall of Justice
Judge Dorothy E. Binder	Hall of Justice
Judge Michael A. Obermeyer	Hall of Justice
dge Oyer G. Leary	Hall of Justice
udge Richard M. Borchers	Hall of Justice
Judge Philip F. Roan	Hall of Justice
Judge Harlan R. Bockman	Hall of Justice
Clerk of the County Court	Hall of Justice
Law Library	Hall of Justice
District Attorney's Office	450 South 4th Ave., Brighton, Co 806(
Samuel Escamilla, Attorney for Defendant	7390 Lowell Blvd., Westminster, CO 30(

Dated: July 20, 1984

Clerk of the Dist[illegible] Court

by Eloise Co[illegible] Clerk



DISTRICT COURT, ADAMS COUNTY, COLORADO

CRIMINAL ACTION NO. 84CR0370

RULING REVERSED AND CASE REMANDED

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

v.

ARMANDO FERNANDEZ,

Defendant-Appellee.

Interlocutory Appeal from Division V of the Adams County Court,
The Honorable Patrick D. Williams, Judge.

Opinion by The Honorable Harlan R. Bockman,
District Court Judge,
Seventeenth Judicial District.

James Smith, District Attorney
Steven Bernard, Deputy District Attorney
Attorneys for Plaintiff-Appellant.

Samuel Escamilla, Attorney at Law
Attorney for Defendant-Appellee.

Defendant was charged with DUI and Driving While the Amount of Alcohol in His Blood Exceeded 0.15 grams per 210 liters of Breath. Before trial, the Trial Court granted Defendant's Motion to Suppress evidence of a chemical test of Defendant's breath. The People then filed this Interlocutory Appeal. This Court REVERSES and REMANDS.

On November 12, 1983, while Defendant was driving in Brighton, Brighton police officers stopped him, conducted roadside sobriety tests, arrested him and transported him to the Brighton Police Department. On arrival, an officer conducted an intoxilyzer test of Defendant's breath, pursuant to 42-4-1202(3)(a)(II), C.R.S. (1983

Cum. Supp.), the blood alcohol test provision of Colorado's Drunk Driving statute. After the test, Defendant was charged with DUI, 42-4-1202(1)(a), C.R.S., and Driving While the Amount of Alcohol in His Blood Exceeded 0.15 grams per 210 liters of Breath, 42-4-1202(1.5)(a), C.R.S. (1983 Cum. Supp.)

Before trial, Defendant moved to suppress the breath test results on the ground that the test violated the administrative regulation governing such tests because the officer who conducted Defendant's test had not been recertified in accordance with the regulation. At the motion hearing, the officer testified that he had originally been certified on April 12, 1983; that he had conducted over 100 breath tests before conducting Defendant's; and that he followed the standard intoxilyzer checklist when he conducted Defendant's test. The People stipulated, however, that although the regulation required the officer to become recertified on October 15, 1983, he had not done so and was not recertified when he conducted Defendant's test. The Trial Court found that the officer's noncompliance with the regulation rendered the test result evidence irrelevant, and therefore suppressed that evidence. The People then filed this Interlocutory Appeal.

Under 42-4-1202(3)(a)(II), anyone who drives a motor vehicle on a public highway in Colorado may be required to undergo a chemical test of the alcohol content of his breath or blood, if arrested for drunk driving. Under 42-4-1202(3)(b), the test "shall be administered...in accordance with rules and regulations prescribed by the State Board of Health." Pursuant to subsec. (3)(b), the Colorado Department of Health adopted 5 CCR 1005 - 2 (5 CR 12), which requires that breath samples shall be tested by persons who are certified by the Colorado Department of Health, and that certified persons shall demonstrate their proficiency to an instructor every six months. Secs. (III)(B)(1)(a)(3) and (IV)(a)(3). As noted above, the People have stipulated that the officer violated the regulation by failing to be recertified at the time of Defendant's test.

The issue is whether the Trial Court correctly concluded that the officer's noncompliance with the regulation rendered the test results inadmissible.

Under Colo. R.E. 402, relevant evidence is admissible unless excluded by an authority enumerated in that Rule; and irrelevant evidence is inadmissible. Assuming for the moment that the test result evidence here was relevant, the question is whether some authority required its exclusion. The only authority arguably

requiring exclusion here is the blood alcohol test provision, 42-4-1202(3)(b), of Colorado's Drunk Driving statute, which provides as noted above that breath tests shall be conducted according to Colorado Department of Health regulations.

All states have enacted statutes regarding blood alcohol tests. Some states have statutes making test evidence admissible provided that administrative regulations governing such tests are followed.[1] Another state has a statute providing that substantial compliance with such regulations is sufficient for admissibility and that noncompliance affects only the weight of the evidence.[2]

California and several other states have statutes like Colorado's, providing that tests shall be conducted according to the regulations but not expressly conditioning admissibility of the test results thereon.[3] Although courts in two of these states, Iowa and Ohio, have held that the mandatory language of such statutes dictates exclusion of evidence obtained in violation of the regulations, the California courts have held that noncompliance with the regulations enacted under their statute affects the weight of the evidence but does not automatically render it irrelevant and inadmissible. The rationale for this holding, at least in part, is that California's evidence code explicitly favors admissibility in the absence of a contrary statutory expression. People v. Bush, 171 Cal. Rptr. 274 (Cal. App. 1981); People v. Adams, 131 Cal. Rptr. 190 (Cal. App. 1976); West's Anno. Calif. Evid. Code, sec. 351 (1979).

The Colorado Supreme Court has declined as yet to rule on the question of the evidentiary effect of a violation of 42-4-1202 (3)(b). In People v. Dee, 638 P.2d 749 (Colo. 1981), a drunk driving case involving an alleged violation of sec. (3)(b)'s requirement that blood alcohol tests be conducted "with utmost respect for the constitutional rights, dignity of person, and health of the person being tested," (but no violation of any regulation), the Colorado Supreme Court noted that:

---

[1]See, e.g., Connecticut Gen. Stats. Anno., sec. 14-227a(b), (1984 Cum. Supp.); Burns Indiana Stats. Anno., sec. 9-11-4-5 (1984 Cum. Supp.); Pa. Stats. Anno., Title 75, sec. 1547(c) (1984-1985 Cum. Supp.).

[2]Code of Virginia 1950, sec. 18.2-268(s) (1984 Cum. Supp.).

[3]See, e.g., West's Anno. Calif. Health and Safety Code, sec. 436.52(1979); Idaho Code, sec. 18-8004 (1984 Cum. Supp.); Iowa Code Anno., sec. 321B.15 (1983-84 Supp.); Page's Ohio Rev. Code Anno., sec. 4511.19 (1983 Supp.).

> The statute [42-4-1202(3)(b)] prescribes no remedy for its violation. Whether suppression of the test results is an appropriate judicially created remedy, as the superior court ruled, is a question we need not reach because we have concluded there was no statutory violation [in this case].

638 P.2d at 752 n. 5.

In the absence of caselaw from the Colorado Supreme Court or the Colorado Court of Appeals on the issue of the evidentiary effect of a violation of blood alcohol test regulations enacted under Colorado's Drunk Driving statute, and in light of the fact that the Colorado Rules of Evidence, like the California Evidence Code, explicitly favor admissibility in the absence of a contrary statutory expression[4] this Court's position has been that the better view on this issue is that of the California courts, that noncompliance with blood alcohol test regulations affects the weight but not the admissibility of the test results. See, e.g., People v. Houtchens, Adams County Dist. Ct. 83CR0569 (Feb. 3, 1984) (test evidence admissible where blood test was conducted with blood collection tubes containing less sodium fluoride than regulation required); People v. Plant, Adams County Dist. Ct. 82CR0453 (June 25, 1983), cert. den. Colo. Supreme Ct. 83SC315 (Jan. 16, 1984) (test evidence admissible where blood test was conducted 14 days after blood was drawn though regulation required test within 10 days); People v. Haynes, Adams County Dist. Ct. 83CR0428 (Jan. 13, 1984) (test evidence admissible where breath test was conducted in which one breath sample was analyzed though regulation required analysis of two). This view is consistent with the rule in Colorado that the sanction of the exclusionary rule is designed to remedy constitutional violations but not statutory violations. People v. Hamilton, 666 P.2d 152 (Colo. 1983).

Having concluded that if the test evidence here is relevant, then 42-4-1202(3)(b) does not require its exclusion, the issue becomes whether the test evidence is, or may be, in fact relevant. Essentially the issue is whether the People have laid an adequate foundation for the admission of the test results. This Court concludes that they have.

Where relevance is conditioned on the existence of foundational facts, Colo. R.E. 104(b) applies. That rule, which is identical

[4] See Colo. R.E. 402, and West's Anno. California Evid. Code sec. 351 (1979).

to Fed. R.E. 104(b), provides that when the relevance of proffered evidence depends on the existence of a preliminary fact (i.e., a foundational fact), the Trial Court must make a preliminary determination whether the evidence is sufficient to support a finding that the preliminary fact exists. If the Trial Court finds that the evidence is sufficient, the Trial Court must admit the proffered evidence and submit the issue of whether the preliminary fact exists to the jury. If the jury then finds that the preliminary fact does not exist, it must disregard the proffered evidence. If, however, the Trial Court finds that the evidence is not sufficient to support a finding that the preliminary fact exists, the Trial Court must exclude the proffered evidence. See Advisory Committee Note to Fed. R.E. 104(b).

The foundational requirements for admissibility of blood alcohol test results are that (1) the particular machine used was properly working, (2) the test used was properly conducted, and (3) the person conducting the test was qualified. See 2 Jones on Evidence (6th ed. 1972), sec. 14.37; Richardson, Modern Scientific Evidence (2d ed. 1974), secs. 13.10, 13.13 a. These foundational facts are the preliminary facts on which the relevance of the proffered evidence (the test results) depends.

Therefore, under Rule 104(b), when blood alcohol test results are proffered, the Trial Court must make a preliminary determination whether the evidence is sufficient to support a finding that the 3 foundational facts set forth above exist. If so, the Trial Court must admit the test result evidence, and instruct the jury to disregard that evidence if the jury finds that any one or more of the 3 foundational facts do not exist. If the Trial Court finds that the evidence is insufficient to support a finding that any one or more of the 3 foundational facts exist, it must then and only then exclude the test result evidence.

Here, as to the issue of the officer's qualification, the officer testified that he had been certified seven months before Defendant's test and had conducted such tests over 100 times before Defendant's test. The only apparent deficiency was that he had not become recertified in accordance with the regulation. In this Court's view, the officer's prior certification and experience constituted evidence sufficient to support a finding that he was qualified to conduct Defendant's test.

Under Rule 104(b) then, assuming that the Trial Court found evidence sufficient to support a finding that the intoxilyzer worked properly and that the test was properly conducted, the issue as to

whether the 3 foundational facts exis[illegible] should have been submitted to the jury, along with the test [illegible]sult evidence, with instructions that if the jury found tha[illegible]ny of the 3 foundational facts did not exist, they must disreg[illegible]l the test result evidence. See People v. Bush, supra; People v. [illegible]ams, supra.

The Trial Court's ruling is REVERSED and the case is REMANDED with directions to proceed consistently with this opinion.

DATED and SIGNED this 13th day of July, 1984.

BY THE COURT:

H. R. Bockman

Harlan R. Bockman
District Court Judge

APPENDIX B

DISTRICT COURT, ADAMS COUNTY, COLORADO

Case No. 83CV2557 Division A

ORDER OF REVERSAL AND REMAND

ROBERT DALE AULTMAN,

Plaintiff,

v.

MOTOR VEHICLE DIVISION, DEPARTMENT OF REVENUE, STATE OF COLORADO,

Defendant.

This case comes before the Court on appeal from Defendant's revocation of Plaintiff's driving privileges pursuant to Section 42-2-122.1, C.R.S., Colorado's Express Consent Law. Oral arguments having been dispensed with, and the Court having reviewed the transcript of the proceedings dated November 21, 1983, and having read the briefs submitted by both counsel, now finds and concludes as follows:

Plaintiff sets forth several grounds for reversal: (1) that the above-cited statute denies the Plaintiff due process of law by denying Plaintiff the right to a jury trial and the right to confront and cross-examine witnesses; and (2) that Plaintiff was denied due process because he was improperly advised as to the options available to him and the consequences prior to a request that he submit to a chemical test of blood or breath; and (3) that there was no showing of the trustworthiness of the documents

admitted into evidence; and (4) that the requirements of due process were violated because Defendant was not required to present a foundation to establish the reliability of the chemical test results.

Plaintiff was given a chemical test of his breath following his arrest on a charge of driving under the influence of alcohol. Test results, according to the report of the arresting officer, showed .162 grams of alcohol per 210 liters of breath. The hearing officer found that the evidence presented at the hearing on November 21, 1983 established that the arresting officer had reasonable grounds to request that Plaintiff submit to a chemical test. The hearing officer further found that the test results of .162 mandated revocation of Plaintiff's driver's license and, accordingly, revoked said license for a period of one year, pursuant to the statute.

Plaintiff contends that the Express Consent Law is unconstitutional because it denies him the right to a jury trial and to confront and cross-examine witnesses at the administrative hearing for driver's license revocation. He states: "The Legislature apparently thought it could be 'cute' and deny...a right to a

jury trial..." (page 3 of opening brief). The law is well-settled in this state that a driver's license revocation hearing is civil in nature and not criminal (Bedell v. Colorado Department of Revenue, ___Colo. App.___, 655 P.2d 849(1982)). The Colorado Supreme Court, in Campbell v. State of Colorado, Department of Revenue, 176 Colo. 202, 491 P.2d 1385(1971), after noting its previous ruling that "there is no constitutionally guaranteed illimitable right to drive upon highways" (citing source), held that a driver's license revocation hearing is not criminal in nature and "not governed by the strict rules of evidence and procedure which obtain in a criminal action". The Court then addressed the issue of constitutional rights, ruling at 491 P.2d 1389:

> "Campbell's contention that he was denied the right to trial by jury and the right to confront witnesses against him is adequately answered by our recent decision in People v. Brown, supra, where we held that the right to jury trial and the right to confront witnesses are inapplicable in an implied consent hearing. We feel they are also inapplicable in an administrative hearing to determine whether a driver's license should be revoked for accumulated traffic violations."

This Court finds that the same reasoning should apply to the Express Consent Law, which is substantially similar to the Implied Consent Law.

Plaintiff's asserted second grounds for reversal---that he was denied due process because he was improperly advised as to the options available to him and the consequences of refusal prior to being requested to submit to a chemical test---was answered by the Colorado Supreme Court in Vigil v. Motor Vehicle Division of the Department of Revenue, 184 Colo. 142, 519 P.2d 332(1974). The Court held, at 519 P.2d 334:

> "The requirements of due process in relation to the warnings are satisfied by the notice which is given licensees through publication of the statutes. A licensee to operate a motor vehicle on public highways is presumed to know the law regarding his use of the public highways."

The Court went on to say that the Implied Consent Law, in requiring police officers to inform drivers orally and in writing of the probable consequences of refusing to submit to the chemical test, granted rights greater than those required by due process. In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908(1966), the United States Supreme Court held that there is no constitutional right to refuse to submit to a blood test; and in People v. Sanchez, 173 Colo. 188, 476 P.2d 980(1970), the Colorado Supreme Court held that the right to refuse a blood test under Colorado's Implied Consent Law was a statutory right

only and thus subject to sanctions imposed by statute.

Plaintiff's third and fourth arguments are based on the same grounds, namely, the lack of evidence to support the hearing officer's findings. The only objection made to the "trustworthiness" of documents admitted at the hearing concerns the reliability of the breath test results. Cross-examination of the arresting officer (Officer Foster) by Plaintiff's attorney did not touch upon the functioning of the intoxilyzer machine. It is apparent that counsel was following a check-list with reference to the operation of the machine in his questioning, however. He made no inquiry relating to certification of the machine, although he had mentioned this in his objection to documents. There is no basis for the assertion in Plaintiff's opening brief (page 2) that "...on cross-examination, it became obvious that Officer Foster could not provide much information as to the test itself". The officer answered every question that was asked. Plaintiff makes much of the fact that Officer Foster could not remember the date of his last certification prior to administering the breath test to Plaintiff. The officer stated that he was certified and further, that he had been certified

within a six-months period. There is no requirement that the date of certification be given. Plaintiff offered no evidence to controvert the officer's statement, and the hearing officer properly found that the evidence presented was sufficient.

In his final argument at the hearing, Plaintiff's counsel mentioned only two matters: (1) that Plaintiff wasn't properly advised of his options; and (2) "the state health regulations require some showing of when the certification was for the operator of the intoxilyzer" (T. p. 13). The hearing officer addressed both of those arguments in his ruling and found that grounds for revocation had been shown (T. p. 14).

Plaintiff argues in his brief that "State Department of Health regulations require that...the instrument itself must be certified every year by the Department" (page 3, opening brief). No evidence was presented at the hearing regarding regulations of the state board of health, and no request for administrative notice was made. Indeed, Plaintiff presented no evidence at the hearing, whatsoever.

This Court must confine its ruling to the record made before the hearing officer. If there is competent evidence to support the findings made at the hearing, the Court must affirm the order

entered therein. The only difficulty that the Court is having in this case is determining whether the evidence relied upon by the hearing officer was competent evidence. Even though the rules of evidence are relaxed in an administrative hearing, there are limits beyond which a hearing becomes a mere pro forma step in the imposition of a statutory penalty.

The hearing officer found that Officer Foster had reasonable grounds to request Plaintiff to submit to a chemical test, and Plaintiff did not, and does not, argue to the contrary. On the issue of Officer Foster's certification to operate the intoxilyzer, the hearing officer found that, given Officer Foster's testimony and the absence of evidence to the contrary, "...there is no difficulty here today with the certification of Officer Foster as an operator" (T. p. 14). The Court concludes that this finding was proper, as already noted.

The hearing officer made no other findings relative to the administration of the breath test. At the beginning of the hearing, in answer to a question by Plaintiff's counsel, the hearing officer stated:

> "I would take the position that if there is evidence that the test were not run within the conformity of the rules and regulations of the State Board of Public Health, then the reading

> would not be a proper reading, and, therefore, I would take the position that I would not have the evidence that this test would be sufficient, and I very possibly would dismiss on that basis..." (T. p. 6).

It appears from this and subsequent statements by the hearing officer that he had attached a presumption of validity to the written test results reported to Defendant by the arresting officer. He required no further foundation, and the burden was then cast upon Plaintiff to overcome this presumption.

It is well-established that Defendant has the burden of showing grounds for revocation of a driver's license by a preponderance of the evidence. By statute, revocation is mandatory where a chemical test of a driver's breath yields results of 0.15 or more grams of alcohol per 210 liters of breath. Here, testimony by Officer Foster and the documentation which he submitted to Defendant show test results of .162. If accurate, revocation was proper. Assuming the accuracy of test results, however, amounts to prejudgment of the case.

In a trial of a case involving alcohol-related traffic offenses, a Court is required to take judicial notice of the operation of machines for testing breath to determine alcohol content. Judicial notice is, of course, only a method of

presenting evidence. On an appeal such as this, the Court may not consider additional evidence. A question arises, therefore, as to whether, absent a request therefor, the hearing officer was required to take administrative notice of the rules and regulations prescribed by the state board of health relating to breath-testing devices. The Court concludes that he was required to do so. Indeed, in his initial remarks concerning that issue, and again, in discussing Officer Foster's certification, the hearing officer acknowledged the applicability of those rules and regulations. This was tantamount to taking administrative notice. However, no foundation concerning the accuracy of the intoxilyzer, itself, was required. Where a machine is relied upon to produce results which can be the basis for revoking a driver's license for a period of one year, due process requires, at the very minimum, that the machine be established to be operating and operated properly. Administration of a test by a certified operator is not sufficient foundation. The best-qualified operator will obtain an erroneous result if his machine is not functioning correctly. Proof of compliance with applicable rules and regulations would provide a foundation for admissibility of test results. Such properly admitted test

results would establish a prima facie case justifying revocation. The statute dealing with judicial notice of testing methods provides that it "shall not prevent the necessity of establishing during a trial that the testing devices used were in proper working order and that such testing devices were properly operated" (Section 42-2-1202(6), C.R.S. No less should be required at an administrative hearing. Controverting evidence could be presented at bothatrial and an administrative hearing, of course.

The Court is not unmindful of statutory provisions relating to the evidentiary value of Defendant's records. However, the Court does not interpret such statutes as creating a presumption of validity of breath test results by the mere filing of a verified report by the arresting officer pursuant to subsection 42-2-112.1(2), C.R.S. Granted that such a report may warrant revocation if no hearing is requested, a greater burden falls on Defendant where there is an objection to admission of the report into evidence at a hearing. These reports are not included in the enumeration of records required to be kept by Defendant and which are to be admitted as prima facie evidence of their contents under section 42-2-118, C.R.S.

The Court concludes that it was error to admit the breath test results over Plaintiff's objection since there was insufficient foundation for admission of such evidence.

IT IS THEREFORE ORDERED that Defendant's order of revocation entered on November 21, 1983 is reversed.

FURTHER ORDERED that, unless prohibited by other applicable orders, Defendant shall reinstate Plaintiff's driver's license, and the matter is remanded for that purpose.

Done this 3rd day of May, 1984.

By the Court:

Dorothy E. Sanders
Judge

cc: Randall J. Davis, Esq.
Steven L. Bernard, Esq.

Motor Vehicle Division
c/o George Theobald
140 W. 6th
Denver, Colorado