

IN THE UTAH COURT OF APPEALS

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Jeffrey Val Palmer,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Petitioner,)		
)	Case No. 20050865-CA	
v.)	F I L E D	
)	(November 3, 2005)	
The Honorable Ann Boyden,)		
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Respondent.)		

Original Proceeding in this Court

Attorneys: Benjamin A. Hamilton, Salt Lake City, for Petitioner
 Brent M. Johnson, Salt Lake City, for Respondent

Before Judges Billings, Bench, and Greenwood.

PER CURIAM:

Petitioner Jeffrey Palmer filed this petition for extraordinary relief challenging the decision of the district court denying a motion in limine to exclude the results of an intoxilyzer test and the resulting conviction.

The underlying case originated in the Murray City Justice Court. After pleading guilty in the justice court to driving under the influence of alcohol, Palmer appealed to obtain a trial de novo in district court. The district court denied a motion in limine seeking to exclude the results of the intoxilyzer test, and Palmer was again convicted of the DUI offense after a trial de novo.

Palmer correctly states that no direct appeal to this court is available because the district court did not rule on the constitutionality of a statute or ordinance. See Utah Code Ann. § 78-5-120(7)(2002) ("The decision of the district court is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance."). Accordingly, Palmer asserts that he has no plain, speedy, or adequate remedy to obtain review of the decision on the motion in limine during de novo proceedings. Under the circumstances, "pursuit of an extraordinary writ is procedurally correct." Dean v. Henriod, 1999 UT App 500, ¶8, 975 P.2d 946.

Because the petition challenges a judicial decision, "our review shall not extend further than to determine whether [the court] has regularly pursued [its] authority." State v. Stirba, 972 P.2d 918, 920 (Utah Ct. App. 1998). "We may grant the extraordinary relief of a writ in the nature of mandamus, compelling a lower court's compliance, when the lower court has '(A) . . . exceeded its jurisdiction or abused its discretion [or] (B) . . . failed to perform an act required by law as a duty of office, trust or station.'" Id. at 921 (quoting Utah R. Civ. P. 65B(d)(2)). While an extraordinary writ under rule 65B(d)(2)(B) is available to direct the exercise of discretionary action, it is not available to "direct the exercise of judgment or discretion in a particular way." Id. (quotations and citations omitted). On the other hand, while rule 65B(d)(2)(A) does allow this court "to direct the particular exercise of a lower court's judgment to correct the lower court's abuse of discretion," the requisite abuse of discretion to support relief under rule 65B(d)(2)(A) writes "must be much more blatant than the garden variety 'abuse of direction' featured in routine appellate review," requiring a showing of "gross and flagrant" abuse of discretion. Id. at 922.

Palmer claims both that the district court abused its discretion in denying his motion to suppress the breath test results and that the court failed to perform a legal duty to grant the motion. He argues that the foundation requirements for admission were not satisfied because the arresting officer was not certified to administer the test, Palmer was left unattended in the patrol car, and he was "not personally observed" for a period of one to two minutes during the required observation period. Palmer argues that the Baker rule, as reiterated in State v. Vialpando, 2004 UT App 95, ¶14, 89 P.3d 209, requires a fifteen minute uninterrupted and unimpeded observation period that cannot be cured by an extended but interrupted period.

The foundation requirements for admission of breath test results are: (1) the machine is in proper working condition at the time of the test; (2) the test was administered correctly by a qualified operator; and (3) "a police officer observed the defendant during the fifteen minutes immediately preceding the test to ensure that the defendant introduced nothing into his or her mouth during that time." Id. In Vialpando, we concluded:

The purpose of the observation period is to ensure that a defendant does not introduce anything into his mouth that might taint the test results. While this requirement serves to ensure that the defendant places no food, drink, or smoke into his mouth during the observation period, its most important

function is to ensure that any alcohol in a suspect's mouth is absorbed into the system before the test is administered. We do not believe that this requires the undivided attention of the observing officer. Instead, "the level of surveillance must be such as could reasonably be expected to" ensure that no alcohol has been introduced into the suspect's mouth, "from the outside or by belching or regurgitation," during the entire observation period. The purpose of the observation period is satisfied if (1) the suspect was in the officer's presence for the entire period; (2) it is clear that the suspect had no opportunity to ingest or regurgitate anything during the minimum observation period; and (3) nothing impeded the officer's powers of observation[] during the observation period.

Id. at ¶18 (citation omitted).

The district court in this case found that Sergeant Latham had Palmer in his presence throughout Palmer's transport to the testing station and up until the time of the test, satisfying the fifteen minute observation period. Even assuming that Palmer was inside the patrol vehicle alone for one or two minutes before Latham entered the vehicle, Palmer was handcuffed at that time, he answered in the negative when asked if he had vomited prior to administration of the test, and he was within the observation of one or both officers during the entire fifteen minute period prior to the test. Palmer testified that he had burped, but he did not recall whether liquid came into his mouth. The district court found Palmer's testimony to be self-serving and not credible. In contrast, Latham testified that he kept Palmer under his observation from the time that his mouth was checked until the time the test was administered. Both officers testified that they understood the observation requirement and testified that they complied with it. Palmer's contention that the officer who observed Palmer must also have been certified to operate the intoxilyzer machine is without support, particularly since the purpose of the observation period is simply to ensure that all alcohol is absorbed prior to the test's administration, which has no bearing on the actual operation of the intoxilyzer.

The district court did not abuse its discretion in denying the motion to suppress, and particularly, the court's actions did not demonstrate a gross or flagrant abuse of discretion to justify extraordinary relief. In addition, there is no support

for the assertion that the district court failed to perform a duty in denying the motion to suppress.

We deny the petition seeking extraordinary relief.

Judith M. Billings,
Presiding Judge

Russell W. Bench,
Associate Presiding Judge

Pamela T. Greenwood, Judge