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State of Utah v. Bert James Durrant : Brief of Respondent

Utah Supreme Court

Vernon B. Romney; Earl F. Dorius; Attorneys for Respondent.
Kathryn Collard; Attorney for Appellant.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

BERT JAMES DURRANT,

Defendant-Appellant.

Case No.
14478

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE ALLEN B. SORENSEN, JUDGE, PRESIDING

VERNON B. ROMNEY
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

KATHRYN COLLARD

Twelve Exchange Place
Salt Lake City, Utah 84111

Attorney for Appellant

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- BERT JAMES DURRANT, Defendant-Appellant.	:	Case No. 14478

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of the crime of automobile homicide in violation of Utah Code Ann. § 76-5-207 (1953), as amended, in the Fourth District Court, Utah County, State of Utah.

DISPOSITION IN LOWER COURT

Appellant was found guilty by a jury of the crime of automobile homicide in violation of Utah Code Ann. § 76-5-207 (1953), as amended, before the Honorable Allen B. Sorensen, Judge, presiding. Appellant was thereafter sentenced to a term of five years probation and to serve

thirty days in the Utah County Jail.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the lower court's decision finding appellant guilty of automobile homicide.

STATEMENT OF FACTS

At 2:00 a.m. on the morning of April 17, 1975, the appellant with three other persons riding in his vehicle collided with a parked construction earthmoving vehicle in the area of 695 East 700 North, American Fork, Utah (R.47-54, Exhibits). As a result, Mrs. Cindy Edwards was killed in the collision (R.40-41). Appellant was then taken to American Fork Hospital where he was admitted and given emergency treatment (R.51-52). At this time, appellant was receiving medical treatment from a registered nurse, Dr. Murdock, a licensed physician, and Mr. Linebaugh, a technologist specializing in blood analysis at the American Fork Hospital (T.4,27). At the request of Dr. Murdock and under his direction and supervision, Mr. Linebaugh, an experienced technician of seventeen years, withdrew blood from the appellant in accordance with standard medical practice (T.4,27). Mr. Linebaugh testified that although he was authorized to withdraw blood from appellant, no one

actually stood over his shoulder and watched his every move (R.74-75).

The lower court found that the State had provided appellant with a "duly authorized technician" in compliance with Utah Code Ann. § 41-6-44.10(f) (1953), as amended. The appellant was taken to American Fork Hospital and thereby placed in a very sanitary environment. In the presence of a registered nurse and a licensed physician, Mr. Linebaugh was requested and directed to withdraw blood from appellant (T.4,27). The trial court found that under the facts of this case, the State provided a "duly authorized technician." On appellate review, the Supreme Court of the State of Utah must view the findings of the trial court in a favorable light consistent with those findings.

Secondly, appellant claims that it was error for the lower court not to instruct the jury to "criminal negligence." The law in Utah has always been that "simple negligence" is sufficient for the offense of automobile homicide; therefore, the lower court was correct in refusing to instruct upon an element which is totally inapplicable to the charged offense.

Respondent respectfully submits that in the instant case, the State provided a "duly authorized technician" and that the trial court was correct in denying appellant's requested instruction.

ARGUMENT

POINT I

AS REQUIRED BY UTAH CODE ANN. § 41-6-44.10(f) (1953), AS AMENDED, THE STATE PROVIDED A "DULY AUTHORIZED" LABORATORY TECHNICIAN TO WITHDRAW BLOOD FROM APPELLANT UNDER THE DIRECTION AND SUPERVISION OF A LICENSED PHYSICIAN IN ACCORDANCE WITH STANDARD MEDICAL PRACTICE.

Utah Code Ann. § 41-6-44.10(f) (1953), as amended, sets forth the standard to be followed to withdraw blood for chemical testing from those suspected of driving under the influence of alcohol. The statute provides:

> "(f) Only a physician, registered nurse, practical nurse or duly authorized laboratory technician, acting at the request of a police officer can withdraw blood for the purpose of determining the alcoholic or drug content therein. This limitation shall not apply to the taking of a urine or breath specimen. Any physician, registered

> nurse, practical nurse or duly authorized laboratory technician who, at the direction of a peace officer, draws a sample of blood from any person whom the peace officer has reason to believe is driving in violation of this chapter, or hospital or medical facility at which such sample is drawn, shall be immune from any civil or criminal liability arising therefrom, provided such test is administered according to standard medical practice."

In the instant case, the State provided a "duly authorized medical laboratory technician" within the language of the statute to withdraw blood from the appellant in accordance with standard medical practice.

Blood was withdrawn from the appellant by Mr. Linebaugh (T.4). Mr. Linebaugh is a medical technologist at the American Fork Hospital and has specialized at the hospital in blood analysis and drawing blood for ten years (T.4,27). Mr. Linebaugh has a total of seventeen years experience in drawing and analyzing blood and has a bachelor's degree in Chemistry, a minor in Bacteriology, and is registered with the American Society of Clinical Pathology (T.27). Mr. Linebaugh is responsible for the blood analysis of half of all the patients at the American Fork

Hospital and through his career has withdrawn blood from thousands of patients (T.27,28).

In the instant case, appellant was taken to American Fork Hospital and was thereby placed in a totally sanitary environment. Present at this time were Mr. Linebaugh, the medical technologist, a superivising registered nurse, and a licensed physician, Dr. Dale Murdock (T.4). At the request of Dr. Murdock, as well as the request from the police officer, Mr. Linebaugh withdrew blood from the appellant in accordance with standard medical practice at the American Fork Hospital (T.4). It is clear from the facts of this case that Mr. Linebaugh was acting under the direction and supervision of Dr. Murdock, a licensed physician, and a registered nurse, when he withdrew blood from appellant, thereby establishing sufficient compliance with the provisions of Utah Code Ann. § 41-6-4410(f) (1953), as amended.

In a recent Utah Supreme Court case, Gibbs v. Dorius, 533 P.2d 299 (1975), this Court defined the meaning of "duly authorized laboratory technician." This Court held:

> "Within the context of Section 41-6-44.10(f) the term 'duly authorized laboratory technician' means an individual acting under the direction and supervision of a licensed physician. Such a person must 'administer the test . . . according to standard medical practice.' There is no evidence in the record showing Mr. Davis to be such a person."

In the Gibbs case, appellant was to have his blood withdrawn by a technician, not under the supervision of a licensed physician and not in accordance with standard medical practice because appellant was in the unsanitary environment of the Salt Lake City and County Jail (unsanitary for medical purposes). There was no evidence in the Gibbs case showing the technician to be a "duly authorized laboratory technician."

However, in the instant case, Mr. Linebaugh, the medical technologist, was in the presence of several registered nurses, and Dr. Dale Murdock,a licensed physician, who requested the blood tests (T.4). Mr. Linebaugh clearly withdrew blood from the appellant in the sanitary environment of American Fork Hospital under the direction and supervision of Dr. Murdock and several superivising registered nurses (T.4).

Contrary to appellant's position, it is respondent's position that the phrase "acting under the direction and supervision of a licensed physician" as expounded in the Gibbs case, does not mean the physician must stand by the side of the technician and hold his hand as he withdraws blood from appellants.

In State v. Mari, Sup. Ct. Colo., 528 P.2d 917 (1974), defendant was convicted of driving while under the influence of intoxicating liquor. The defendant contended that under the Colorado statute, the medical technologist was not qualified to withdraw blood for the purpose of determining the alcoholic content therein. The Colorado statute states:

> "The test shall be administered at the direction of the arresting officer if he has reasonable grounds to believe such person was driving a motor vehicle while under the influence of intoxicating liquor, and in accordance with rules and regulations prescribed by the state board of public health, and with utmost respect for the constitutional rights, dignity of person, and health of the person being tested. The arresting officer may not take a blood sample, and no person except a physician, registered nurse, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse shall be entitled to withdraw blood for the purpose of determining the alcoholic content therein." 1967 Perm. Supp., CRS, 13-5-30(3)(b).

In the Mari case, the technician was under the direction and supervision of a doctor, but the doctor was not present at the time the blood was withdrawn and defendant claimed this as error. The Court stated:

> "The defendant, on the other hand, asserts that because Mrs. Lambert was not, at the moment she withdrew defendant's blood, acting under the supervision of a doctor or registered nurse, she did not come within the class of persons qualified by the statute to withdraw blood. We do not read the statute to require on-the-spot supervision; on the contrary, if her normal duties as a medical technologist include withdrawing blood samples while she is under the supervision of a physician or registered nurse, she qualifies notwithstanding the fact that supervision was not present at this time. We read the 'under supervision' clause as referring to any 'normal duties' and not as a requirement that the supervision be present at the time the technician withdraws the blood."

In State v. Stover, Or. App., 513 P.2d 537 (1973), a case which was later reversed on other grounds, defendant was convicted of negligent homicide. Defendant claimed that the blood sample used in the test in question was not obtained in compliance with ORE 483.640, which provides:

> "In conducting a chemical test of the blood, only a duly licensed physician or a person acting under his direction or control may withdraw blood or pierce human tissues."

The Court held that:

> "When blood samples are taken, ORS 483.640 minimizes the impact of that procedure on the driver in question, and maximizes the chances that procedures will be used that do not contaminate the blood sample in a way as to affect a subsequent test of it for alcohol content. Given these probable legislative purposes, we conclude the requirement that blood be withdrawn by 'a person acting under * * * [the] direction or control' of a licensed physician means only that blood be withdrawn in a medically accepted manner by someone who is ordinarily supervised by physicians; the statute does not literally mean that a physician must be physically present when the blood is withdrawn."

The purpose of Section 41-6-44.10(f), Utah Code Ann. (1953), as amended, is obvious; to protect citizens from the dangers inherent in incursions into a person by one not duly authorized in accordance with standard medical practice.

As this court stated in Gibbs v. Dorius, supra, at 301:

> "There are situations, in this area of law enforcement, when blood tests would not only be appropriate but may be necessary, as the only means of securing analysis. Such situations, almost invariably occur when a lawfully supervised, sanitary condition exists."

Respondent respectfully submits that in the instant case a lawfully supervised, sanitary condition did exist. The appellant in the instant case was taken to a hospital and had his blood withdrawn by an experienced medical technologist who was under the direction and supervision of a licensed physician in accordance with standard medical practice, thereby constituting a "duly authorized technician" in compliance with Utah Code Ann. § 41-6-4410(f), (1953), as amended.

Respondent respectfully submits that the trial court had sufficient evidence to find Mr. Linebaugh to be a "duly authorized laboratory technician" and that evidence must be viewed with an eye favorable to those

findings including all fair inferences which can be drawn from the evidence and the circumstances. Howarth v. Ostergaard, 30 Utah 2d, 183, 185, 515 P.2d 442 (1973).

POINT II

AUTOMOBILE HOMICIDE UNDER UTAH CODE ANN. § 76-5-207 REQUIRES ONLY SIMPLE NEGLIGENCE IN A PERSON'S DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL, IF AS A RESULT HE CAUSES THE DEATH OF ANOTHER PERSON.

Utah Code Ann. § 76-5-207 (1953), as amended, provides the following:

> "(1) Criminal homicide constitutes automobile homicide if the actor, while under the influence of intoxicating liquor, a controlled substance, or any drug, to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner.
>
> (2) The presumption established by section 41-6-44(b) of the Utah Motor Vehicle Act, relating to blood alcohol percentages, shall be applicable to this section and any chemical test administered on a defendant with his consent or after his arrest under this section, whether with or against his consent, shall be admissible in accordance with the rules of evidence.
>
> (3) For purposes of the automobile homicide section, a motor vehicle constitutes any self-

> propelled vehicle and includes, but is not limited to, any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.
>
> (4) Automobile homicide is a felony of the third degree."

The automobile homicide statute clearly speaks in terms of simple negligent operation of a motor vehicle which results in the death of another, not "criminal negligence," therefore, the trial court was correct in refusing to instruct the jury upon an element which is totally inapplicable to the crime charged. Respondent submits that the legislation must be read in the light of its clear language and import. Therefore, the trial court was correct in instructing the jury concerning the degree of negligence necessary for the offense of automobile homicide.

It has always been the rule in Utah that automobile homicide is an offense requiring simple negligence when the driver is under the influence of alcohol which results in the death of another. In State v. Johnson, 12 Utah 2d 220, 364 P.2d 1019 (1961), defendant was convicted of automobile homicide. This Court held that: the crime of automobile homicide required only simple negligence and went on to state that:

> "It seems evident that our legislature has concluded that the time has now come when we must recognize that any kind of vehicular negligence, mingled with gas and booze, produces a lethal mixture that, if it cause death should penalize to a greater degree than before, the mobile, tipsy vehicle-operating brew-master, in order to bring to a screeching halt the mounting holocaust daily dedicated to traffic fatalities."

In State v. Risk, ___ Utah 2d ___, 520 P.2d 215 (1974), defendant was convicted of automobile homicide and this court again held that the offense of automobile homicide may be made out by simple negligence in a person's driving while under the influence of intoxicating liquor if as a result thereof he causes the death of another person.

Appellant maintains that the trial court should have instructed the jury in terms of "criminal negligence". However, it is obvious from the clear language of the automobile homicide statute, and from well established principles of law in the State of Utah that criminal negligence is not an element of the offense of automobile homicide. Therefore, appellant was not prejudiced or prevented from having a fair trial because the trial court refused to give

an instruction to a totally erroneous element of the offense of automobile homicide. Respondent respectfully submits that the lower court was correct in refusing to instruct the jury on "criminal negligence" as an element in the crime of automobile homicide under the facts of this case.

CONCLUSION

Respondent respectfully submits that under the facts of this case the State of Utah provided appellant with a "duly authorized" technician, as found by the lower court and that "simple negligence" not "criminal negligence" is sufficient for the offense of automobile homicide. Respondent respectfully submits that the lower court decision be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent