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Bruce P. Jones v. Fred C. Schwendiman, Cheif, : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE P. JONES,

Plaintiff and Appellant,

-v-

FRED C. SCHWENDIMAN, Chief,

Defendant and Respondent.

Case No. 20635

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE RAYMOND L. UNO, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES CITED

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE P. JONES, Plaintiff and Appellant. -v- FRED C. SCHWENDIMAN, Chief, Driver License Services, Defendant and Respondent.	:	Case No. 20635

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an appeal from an order of driver license revocation issued by the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond L. Uno, presiding.

The Third District Court held a trial de novo on February 19, 1985 to determine whether Mr. Jones' driver's license should be revoked under Utah's implied consent statute. In accordance with Utah Code Ann. § 41-6-44.10 (1953) as amended, the trial court found that:

1. The arresting officer had reasonable cause to and did arrest the petitioner.

2. The petitioner was properly requested to take a chemical test, pursuant to Utah Code Ann. § 41-6-44.10 (1953) as amended, and warned of the consequences if he refused, and the

petitioner did refuse and did not immediately thereafter unconditionally request the officer's test.

3. Since the petitioner refused to submit to a chemical test and thus violated the implied consent statute, his petition should be denied and his license should be revoked for one year which would expire on May 6, 1986.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. The appeal issues presented are whether the trial court properly found that the arresting officer had reasonable grounds to believe that the appellant was driving or in actual physical control of the vehicle.

2. Whether the trial court properly found that the arresting officer had reasonable grounds to believe that the appellant was under the influence of alcohol.

3. Whether the arresting officer properly requested the appellant to submit to a chemical test pursuant to Utah Code Ann. § 41-6-44.10 (amended 1983).

4. Whether the Court prejudicially erred or not in admitting as evidence for a limited purpose the sworn DUI report prepared by the arresting officer.

STATEMENT OF FACTS

On April 9, 1984, Trooper Lynn Richardson received a radio call notifying him of a burglary and describing the suspects and their vehicle (R. 63). Trooper Richardson then observed a vehicle which matched the exact description and followed it, watching the driving pattern for about 10 miles. He then stopped the vehicle and held the three occupants until city

officers Bruce Beal and then Chris Neal arrived to transport them to the Juab Jail (R. 64). Trooper Richardson and witnesses pointed out Mr. Jones as the driver in a conversation with Officer Nielson which took place in front of Mr. Jones (R. 64, 65, 72). The appellee did not there or at any time thereafter deny that he was the driver (R. 82). He and the vhicle registered to him matched the dispatch descriptions (R. 64, 65).

At the scene and later, Officer Nielson detected the strong odor of alcohol on the plaintiff and noticed his bloodshot eyes, slurred speech, and flushed face (R. 72, 86). The vehicle which was registered to the plaintiff was searched at the scene (R. 71). The officers found several beer cans in the back of the pickup and one partially full can of beer in the front of the vehicle on the console (R. 71). The driver "appeared very agitated, very hyperactive, and his face was flushed, eyes were bloodshot, speech was very slurred" (R. 73). The driver was arrested, detained and transported to the county jail.

After transporting all three suspects to the Juab Jail, Officer Nielson reminded Bruce Jones that he "was under arrest for driving under the influence of alcohol." He replied, "That's what I've heard." He was also asked to take a breath test (R. 73). Mr. Jones refused saying, "No reason for it" (R. 73). Officer Nielson then read the plaintiff the consequences of a refusal warning him that if he refused "he can have his license revoked" (R. 74). Mr. Jones again refused, then saying that he wanted to make a phone call first (R. 75). Officer Nielson then told Mr. Jones that his duty to take the test was not conditional

on being able to make a phone call (R. 75). He warned him that the test was civil in nature and that "unless he submitted to the test, he would be considered to have refused." He read the plaintiff his Miranda rights and the implied consent admonition again and again requested that Mr. Jones take the test. Mr. Jones again insisted that he be allowed to make a phone call first and was told a phone call was not a condition of taking the test (R. 26). The driver and counsel did not "argue" or contest that there was a proper refusal (R. 77, L.22).

After the refusal, Officer Nielson asked Mr. Jones if he would respond to questions and Jones replied that it would "depend on the questions" (R. 78). The officer then continued with the interview portion of the form. During the interview, besides other responses, the appellant stated that he had been driving the vehicle (R. 81). The officer's report was admitted into evidence as part of a continuing pattern (R. 87) to show that the refusal responses were voluntary, that he must have understood the warnings that were given, that the interview answers given were responsive to the question (R. 77), and that he never did deny that he had been driving the vehicle (R. 79).

The trial court ruled that the officer had cause to arrest the petitioner. The one year statutory revocation would be over on May 6, 1986.

SUMMARY OF ARGUMENT

Respondent argues that the court properly found that the peace officer had reasonable grounds to make the DUI arrest based on uncontradicted circumstantial evidence such as another

trained officer's statements, registration of vehicle, and witness statements.

ARGUMENT

POINT I

THE ARRESTING OFFICER HAD REASONABLE GROUNDS TO BELIEVE THAT THE APPELLANT WAS DRIVING AND HAD BEEN IN ACTUAL PHYSICAL CONTROL OF THE VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL AND THUS THE DRIVER WAS PROPERLY REQUESTED TO TAKE A CHEMICAL INTOXILYZER TEST.

Utah's implied consent statute, Utah Code Ann. § 41-6-44.10 states that any person operating a motor vehicle in the state is deemed to have given his consent to a chemical test (breath, blood or urine) to determine if the driver was driving under the influence of drugs or alcohol. The peace officer merely needs to have "grounds to believe that person to have been driving or in actual physical control of a motor vehicle... while under the influence of alcohol..." The Department must show by a preponderance of the evidence that the arresting officer had "grounds to believe" and those grounds must be "reasonable." Ballard v. State Motor Vehicle Division, 595 P.2d 1302, 1306 (Utah 1979). The uncontradicted evidence before the trial court preponderated that 1) the person was or had been in actual physical control and 2) the person was then under the influence. Garcia v. Schwendiman, 645 P.2d 651, 652 (Utah 1982).

Those grounds can be the total circumstances, from observation, witnesses, statements, and "inferences" that can fairly be drawn. In State v. Whittenback, 621 P.2d 103 (Utah 1980) the Utah Supreme Court set down the elements constituting reasonable grounds for an arrest without a warrant. "The

determination should be made on an objective standard: whether from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense." Id. at 106 (emphasis added).

According to the uncontradicted testimony before the trial court, Officer Nielson was justified in believing that the appellant was the driver of the vehicle. The officer making the stop, Trooper Richardson, who must have had certain and personal knowledge, pointed out Jones as the driver to Officer Nielson. Jones did not deny that assertion, although it was stated in front of him. Jones was the registered owner of the vehicle matching the description of the recently fleeing vehicle.

Appellant argues that Officer Nielson could not have had reasonable grounds upon which to base his belief that Jones was the driver because Nielson did not actually "see" him drive. However, the case law points out that "certain knowledge of guilt" is not required. State v. Hatcher, 495 P.2d 159, 1260 (Utah 1972). Reasonableness under the total circumstances is still the test. In Ballard, the arresting officer arrived after the automobile was stationary in a burrow pit. The officer arrested the plaintiff after questioning him and talking with witnesses. The court rejected the plaintiff's contention that the state could not independently, without his admissions, establish that he was in actual physical control. The criminal rules of evidence were not applied to the civil case. The court ruled that the evidence was sufficient. Id. at 1305. In State

v. Lawson, 688 P.2d 479 (Utah 1983), the jury believed appellant to be the driver of the vehicle that caused the collision, although neither the witnesses nor the arresting officer who arrived some time after the accident had actually seen the appellant driving. The Court held that there was "sufficient circumstantial evidence" from the witnesses, who testified to having seen appellant crawl out of the vehicle, to justify the jury's belief and the officer's belief that appellant was the driver of the vehicle. In both Ballard and Lawson, the arresting officer did not see the appellant drive, however the court held their grounds for belief to be reasonable even though it was based upon citizens' statements and circumstantial evidence. Certainly, the trial court in this case could find that Officer Nielson could reasonably believe that Jones was the driver, where that belief was based in part upon the uncontradicted statements of a fellow officer, one he knew and with whom he had previously worked. Surely Trooper Richardson was a source of "reasonably trustworthy information." Ballard, at 1306. The vehicle was also registered to the arrestee and matched the description of the fleeing vehicle. None of these circumstances or testimony were denied or refuted by the appellant at the trial. Therefore the trial court's discretion and findings should be upheld.

The appellant asserts that the arrest for driving under the influence of alcohol was improper because Jones was first arrested by Trooper Richardson on a suspicion of burglary charge. However, the record shows that Richardson was only detaining the appellant and his passengers until Officers Nielson and Beal

appellant and his passengers until Officers Nielson and Beal arrived (R. 36). Richardson had initially detained appellant because his vehicle and his personal appearance matched the description given over his radio. It was Officer Beal who arrested Mr. Jones for burglary, before Officer Nielson arrested him for drunk driving. The fact that Jones was initially arrested for one offense and subsequently charged with another offense that the officer did not actually see does not render the arrest invalid. See State v. Bryan, 395 P.2d 539 (Utah 1964), allowing a subsequent DUI arrest and auto homicide prosecution and conviction was allowed even though "not committed in the presence of the arresting officer."

Officer Nielson also had reasonable grounds to believe that Mr. Jones was under the influence. He could smell a strong odor of alcohol on the appellant as well as detect his bloodshot eyes, slurred speech, and flushed face. There was also an open can of beer in his own vehicle within easy reach of the appellant. It is not unreasonable to base one's belief that a person is intoxicated upon that person's demeanor and appearance. See Ballard, supra. See also Lawson, supra and Garcia.

The appellant was properly requested to take a chemical test pursuant to the implied consent statute, Utah Code Ann. § 41-6-44.10(2). The facts show that appellant was arrested, received his Miranda warning, and only then was asked to take the test. Following Jones response, "No reason for it," Officer Nielson explained the consequences of a refusal and warned him that he could lose his license for a year. Jones answered by

explained that Jones duty to take the test was not conditioned by a phone call. When Jones persisted in his behavior, the officer warned him that his conduct would be considered a refusal. Beck v. Cox, 597 P.2d 1335 (Utah 1979) (refusal may be established on the basis of the conduct of the motorist without an express refusal if he has clearly been asked to take the test). Despite that warning, Jones did not immediately request the test." Utah Code Ann. § 41-6-44.10(2)(1).

POINT II

THE ARRESTING OFFICER'S DUI REPORT WAS PROPERLY ADMITTED INTO EVIDENCE AS A BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The trial court properly admitted the DUI Report of Officer Nielsen into evidence. This is a civil case and it was offered and admitted for limited purposes. It was solely to show that there was "no indication that he did not understand what the consequences would be" (R. 77, L. 24). His responses were objective manifestations of his state of mind or understanding. The appellant's counsel did not object to the admission of the DUI report into evidence (R. 87). The Utah Rules of Evidence 803(6) allow business entries and the like to come into evidence as an exception to the Hearsay Rule as long as proper foundation has been laid. In order to qualify as an exception, the records must be 1) made in the regular course of business 2) at about the time of the act, condition or event recorded 3) the source of information from which made and the method and circumstances of preparation were such as to indicate trustworthiness. Government records can come in under this rule, for even though the

government is not a business, it is an organization which must keep records. Barney v. Cox, 588 P.2d 696 (1978). The essential test in deciding whether the exception applies is the "reliability of the document"; "a business record may be admitted irrespective of the type of organization from which it emanates." State v. Bertul, 664 P.2d 1181, 1183, (Utah 1983). This report may be excluded in a criminal case, depending on the use and purpose of its introduction, but its use in this case is "primarily for the trial court to determine." State v. Bryan, id. p. 541.

During the trial, the court determined there was the proper foundation for the admittance of the DUI report into evidence. Officer Nielson testified that the report was made in the course of his duties at or about the time of the arrest (R. 80). He signed the report and swore to its truthfulness in front of a notary (R. 80-81). The method and the preparation indicate trustworthiness; and certainly Officer Nielson is a trustworthy source. At the time of the admittance of the record into evidence, defense counsel made no objection (R. 87). Where the trial court found the foundation to be sufficient, appellate courts will usually not reverse without a "clear showing of abuse of his discretionary power." Barney, at 698.

The appellant argues that the admission of the DUI report was prejudicial because Mr. Jones admits, in the interview section following his refusal to take the chemical test, that he was the driver of the vehicle. The appellant maintains that the trial court must have solely relied on this section of the report

for his determination that Officer Nielson had reasonable grounds to believe Mr. Jones was the driver. He cannot so read the Court's mind, especially since the evidence shows that at the time of the arrest, Officer Nielson had ample grounds under the circumstances upon which to base his belief that Jones was the driver: 1) the information given by Trooper Richardson 2) the fact that the vehicle was registered to Bruce Jones 3) its description and location and 4) the fact that Jones never denied he was the driver -- not when Richardson pointed him out as such in front of him and not when Nielson arrested him for driving under the influence.

Although Jones' later admittance to actually being the driver supports the reasonableness of Officer Nielson's prior belief and action and the Court's Findings, the appellant and this Court cannot assume it to be the Court's sole basis for probable cause merely because it confirms the reasonableness of the arrest and the Court's Findings. Even if Jones had refused to answer any questions, the trial court still would have concluded, based on the preponderance of the only evidence before him, that Officer Nielson had reasonable grounds and cause to properly arrest Mr. Jones for driving while intoxicated.

Since there was other independent evidence and circumstances, the DUI Report and admission to driving was not prejudicial--it merely contained a comporting confirmation of a predetermined reasonable fact and admission to driving.

CONCLUSION

The arresting officer had reasonable articulable grounds upon which to believe that the appellant was driving a vehicle while intoxicated. Because probable cause for the arrest existed, the appellant was properly requested to take a chemical breathalyzer test, which he refused to do. In addition, the trial court did not err prejudicially when it admitted the arresting officer's DUI Report into evidence. Therefore, the respondent respectfully requests this court to uphold the discretion findings of the trial court that are based on the testimony and let the order of revocation of appellant's driver's license stand.

DATED this 24th day of January, 1986.

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Attorney General

BRUCE M. HALE
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief, postage prepaid, to Stephen R. McCaughey, 72 East 400 South, Suite 330, Salt Lake City, Utah 84111 this 27 day of January, 1986.