

1977

State of Utah v. William R. Chipman : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Kenneth L. Rothery; Attorney for Defendant;

Ginger Fletcher; Attorney for Plaintiff;

Recommended Citation

Brief of Respondent, *State v. Chipman*, No. 15023 (Utah Supreme Court, 1977).

https://digitalcommons.law.byu.edu/uofu_sc2/584

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH.

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

WILLIAM R. CHIPMAN,

Defendant-Appellant.

BRIEF

APPEAL FROM THE
JUDICIAL DISTRICT OF
SALT LAKE COUNTY,
HONORABLE JUDGE

KENNETH L. ROTHE,

2275 South West Temple
Salt Lake City, Utah

Attorney for Appellant

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	1
STATEMENT OF FACTS-----	2
ARGUMENT	
POINT I: APPELLANT'S CONVICTION SHOULD BE AFFIRMED BECAUSE IT RELIES ON ACTS OCCURRING CONCURRENT AND SUBSEQUENT TO THE ARRESTING OFFICER'S ARRIVAL AT APPELLANT'S VEHICLE-----	8
A. THE ARRESTING OFFICER MADE A VALID ARREST FOR THREE MISDEMEANORS COM- MITTED BY APPELLANT IN HIS PRESENCE, TO WIT: (1) BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR IN VIOLATION OF UTAH CODE ANN. §41-6-44 (1953); (2) BEING UNDER THE INFLUENCE OF INTOXICATING LIQUOR, TO A DEGREE THAT THE PERSON MAY ENDANGER HIMSELF OR ANOTHER IN A PUBLIC PLACE IN VIOLATION OF UTAH CODE ANN. §76-9-701 (1973) AS AMENDED; (3) BEING IN AN INTOXICATED CONDITION IN A PUBLIC PLACE IN VIOLATION OF UTAH CODE ANN. §32-7-13 (1953) AS AMENDED.-----	8
B. THE EVIDENCE OF BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR IN VIOLATION OF UTAH CODE ANN. §41-6-44 (1953) IS SUFFICIENT TO SUSTAIN A CONVICTION-----	15
POINT II: THE CONVICTION IN THE LOWER COURT MUST BE AFFIRMED, NOTWITHSTANDING THE FACT THAT THE JURY MAY HAVE BASED ITS FINDING ON THE CONDUCT OF THE APPELLANT INTRODUCED AS EVIDENCE OF HIS CONDITION AFTER THE POLICE OFFICERS ARRIVED-----	26
A. APPELLANT HAD ACTUAL PHYSICAL CONTROL OF THE VEHICLE WHEN THE OFFICERS ARRIVED-----	26

TABLE OF CONTENTS
(Continued)

	Page
B. THE STATUTE UNDER WHICH APPELLANT WAS CONVICTED IS NOT VOID FOR VAGUENESS AS APPLIED TO APPELLANT, NOR IS IT CRUEL AND UNUSUAL PUNISHMENT-----	27
C. APPELLANT'S SLEEPING CONDITION IS A FACTOR TO BE CONSIDERED BY THE JURY, I.E., WAS THE APPELLANT TRULY SLEEPING IN THE USUAL CONNOTATION OF THE WORD, OR WAS HE "PASSED OUT" DUE TO INTOXICATION-----	31
CONCLUSION-----	31

CASES CITED

Appeal of Tucker, Okla.App. 538 P.2d 626 (1975)---	25
Application of Baggett, 531 P.2d 1011 (Okla. 1974)-----	25
City of Oregon v. Szakovits, 32 Ohio St.2d 271, 291 N.E.2d 742 (1972)-----	11
Commonwealth v. Klock, Pa. Super., 327 A.2d 375 (1974)-----	12
Grooms v. State, 142 P.2d 862 (Okla. 1943)-----	25
Hughes v. State, Okl. Cr., 535 P.2d 1023 (1975)---	23,29
Jacobsen v. State, 551 P.2d 935 (Alaska 1976)----	22
Jenkins v. State, Okl.Cr., 501 P.2d 905 (1972)---	22
Lee v. Howes, 548 P.2d 619 (Utah 1976)-----	9,32
Lombard v. Cory, 95 Idaho 868, 522 P.2d 581 (1974)-----	24
Luellen v. State, 64 Okl.Cr. 382, 81 P.2d 323 (1938)-----	24,30
Parker v. State, Okl.Cr., 424 P.2d 997 (1967)----	23,28
People v. Culp, 537 P.2d 746 (Colo. 1975)-----	20
Simpson v. General Motors Corporation, 24 Utah 2d 301, 470 P.2d 399 (1970)-----	31
State v. Brown, Or.App., 485 P.2d 444 (1971)----	16
State v. Bryan, 16 Utah 2d 47, 395 P.2d 539 (1964)-----	10
State v. Bugger, 25 Utah 2d 404, 483 P.2d 442 (1971)-----	21,22,23,28

TABLE OF CONTENTS (Continued)

	Page
State v. Buick, 100 Utah 414, 115 P.2d 911 (1941)-----	16
State v. Carabesek, 412 S.W.2d 97 (Mo. 1967)-----	11
State v. Dickens, 130 N.J. Super. 73, 325 A.2d 353 (1974)-----	12
State v. Dutchover, 85 N.M. 72, 509 P.2d 264 (1973)-----	9
State v. Englehart, 158 Conn. 117, 256 A.2d 231 (1969)-----	16,21
State v. Hopkins, 11 Utah 2d 363, 359 P.2d 486 (1961)-----	16,17
State v. McFarland, 401 P.2d 824 (Idaho 1965)-----	24
State v. Montieth, 417 P.2d 1012 (Oregon 1966)----	29
State v. Myers, 88 N.M. 16, 536 P.2d 280 (1975)----	25
State v. Robinson, 385 P.2d 754 (Oregon 1963)-----	25
State v. Romero, 554 P.2d 216 (Utah 1976)-----	21
State v. Ruona, 133 Mont. 243, 321 P.2d 615 (1958)-----	23,27,29
State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970)-----	9,16,17
State v. Shondel, 22 Utah 2d 343, 453 P.2d 146 (1969)-----	27
State v. Warner, 97 Idaho 204, 541 P.2d 977 (1975)-----	24
State v. Webb, 78 Ariz. 8, 275 P.2d 338 (1954)----	22
Thompson v. People, 510 P.2d 311 (Colo. 1973)-----	24,27

STATUTES CITED

Utah Code Ann. § 32-7-13 (1953)-----	8,11,14
Utah Code Ann. § 41-6-44 (1953)-----	2,8-31
Utah Code Ann. § 76-1-21 (1953)-----	30
Utah Code Ann. § 76-1-22 (1953)-----	30
Utah Code Ann. § 76-1-29 (1953)-----	30
Utah Code Ann. § 76-9-701 (1973)-----	8,14
Utah Code Ann. § 77-13-3 (1953)-----	10,13

OTHER AUTHORITIES CITED

142 A.L.R. 550, 555-----	25
47 A.L.R.2d 571-----	22
74 A.L.R.3d 1138-----	12

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

WILLIAM ROBERTS CHIPMAN,

Defendant-Appellant.

:

:

:

:

:

:

Case No. 15023

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an appeal from a conviction for violation of Utah Code Ann. § 41-6-44 (1953), driving or controlling a vehicle under the influence of intoxicating liquor.

DISPOSITION IN THE LOWER COURT

Appellant was tried in the District Court of the Third Judicial District, in and for the County of Salt Lake, the Honorable Ernest F. Baldwin, Judge, presiding, with a jury, and found guilty by the jury of driving or being in actual physical control of a vehicle while intoxicated.

RELIEF SOUGHT ON APPEAL

Respondent prays that the judgment of the lower court be affirmed.

STATEMENT OF FACTS

Appellant was arrested for a violation of Utah Code Ann. § 41-6-44 (1953), during the early morning hours of October 30, 1975. The facts, as stated in the record, were presented as follows:

During the early morning hours of October 30, 1975, Pat Wellbourn was preparing for bed (12:00 or 12:30 a.m.), when she "heard a motor pull up" outside her residence on Brooklane Drive in Salt Lake County (T.3,4). She looked outside her window and saw a pickup truck (camper style) driving back and forth, coming close to striking the fire hydrant several times (T.5). This was occurring at an approximate distance of a little further than thirty to thirty-five feet from Ms. Wellbourn's window through which she was viewing the truck (T.4,5).

The truck eventually came to a stop, and Ms. Wellbourn attempted to sleep, but was prevented from so doing because the noise of the engine running was "bugging" her (T.6). She once again looked through the window, seeing the globe or dome light on inside the cab of the truck (T.6). She testified that she saw a person inside the cab (a man) (T.6). This person then turned the dome light off and then slumped over the steering wheel (T.7).

Ms. Wellbourn concluded her testimony by saying that she became quite concerned that the person in the truck might have been hurt or sick, so she told Pat Quinlen when he arrived at her home (2:00 or 2:30 a.m.), at which time the police were called (T.7,8). Larry Worley was with Pat Quinlen at that time. Both of them left the house to go outside immediately after calling the police (T.9).

On cross-examination, Ms. Wellbourn testified that the engine in the truck was running from the time she just noticed the truck (12:00 or 12:30 a.m.), until Pat Quinlen and Larry Worley arrived (2:00 or 2:30 a.m.) (T.10,11).

Pat Quinlen testified that he arrived at Pat Wellbourn's place about 1:00 a.m., at which time he was informed of the presence of the truck with a man slumped over the steering wheel (T.13,14). He immediately looked through the window and observed the same truck with a man slumped over the steering wheel, as had been described by Pat Wellbourn (T.14). The man slumped over the steering wheel was identified by Quinlen as the appellant (T.14).

Further testimony by Quinlen revealed that the police were notified of this situation, arriving on the scene approximately ten minutes thereafter (T.14,15). Quinlen testified that his observations revealed that the police had a difficult time trying to awaken the appellant, and he was still slumped over the steering wheel when the police arrived (T.16). The appellant also had to be helped out of the truck by the police (T.16,17), was "a little bit staggy," and presented communication problems to the police (T.17).

Upon cross-examination, Quinlen testified to the fact that the dome light was on in the truck, the engine was running, and the appellant was slumped over the wheel when he (Quinlen) first observed the vehicle (T.19). His testimony also revealed that the truck lights were on (T.20).

Larry Worley arrived with Pat Quinlen at Ms. Wellbourn's house somewhere between 2:00 and 3:00 a.m., at which time he noticed the truck parked with the back wheel on the sidewalk and the front wheels on the street (T.22). The truck was one of camper style and was parked in front of Ms. Wellbourn's house (T.22). A man, identified by Worley as the appellant, was in the truck sitting in the driver's seat, slumped over onto his right side (T.23).

Worley testified that the police had a hard time waking the appellant up, and had to "bounce him up and down in the seat." (T.24). This process took three to five minutes. The appellant was not standing too well (once the officers got him out of the truck), was not in a very good mood, and was using some "pretty abusive" language, very slurred and not very comprehensible (T.24,25). Worley testified that the appellant had an odor of alcohol on his breath (T.25), and that it was his (Worley's) opinion that the appellant had been drinking (T.25). Worley concluded his testimony on direct examination by saying that the appellant had to be assisted by the officers to the police car following his arrest because he (appellant) "wasn't walking very straight." (T.29).

On redirect examination, Worley said that in his opinion, the appellant was "pretty well sloshed" (referring to the state of intoxication) (T.41). Upon recross examination, Worley said he observed a cup on the dashboard of the truck with alcoholic beverages in it (T.42), and was able to smell the odor of alcohol on appellant's breath (T.43).

Officer Shipanboard of the Salt Lake County Sheriff's Department arrived at Brooklane Drive sometime

after 1:00 a.m. on October 30, 1975. Upon his arrival he observed a truck backed up against a fire hydrant with the lights on and the engine running (T.46). There was a man slumped over the wheel and a cup in the front window of the truck (T.46). Officer Shipanboard shook the appellant, trying to awaken him, but got no response (T.47). He was finally able to arouse the appellant after Officer Neff arrived. The appellant was a little fiesty (T.49) and smelled like alcohol (T.50). He did not walk very stable (T.50), and once at the patrol car, he swung at the officers, saying a few unkind remarks (T.51).

Officer Shipanboard testified that in his opinion the appellant had been drinking and was at the time under the influence of alcohol (T.52).

On cross-examination, Officer Shipanboard testified that alcohol was in the cup found on the dashboard (T.53), and that appellant had been drinking it (T.53). He reiterated that upon his arrival, he found the truck backed up against the hydrant, lights on and engine running (T.55). He also found the appellant slumped over the wheel (T.56). Shipanboard stated that he turned the engine off upon his arrival, but did not shut off the lights.

The final witness for the prosecution was Officer Neff of the Salt Lake County Sheriff's Department. He arrived on the scene after Officer Shipanboard observed a man lying down on the front seat of the truck in the driver's position with his head towards the passenger side (T.63). He noticed an odor of alcohol about the appellant (T.64). The lights of the truck (headlights) were still on, but the engine had been turned off (T.65). The appellant needed assistance from both officers because he was unstable on his feet (T.65). Officer Neff testified that the appellant was not cooperating in their attempt to search him, throwing his arms wildly around at the officers (T.65).

Subsequent to his being advised of his Miranda rights, appellant told Officer Neff that he had been drinking earlier that night (T.67,68).

Officer Neff further testified that he observed the cup on the dashboard containing a liquid which had the odor of whiskey to it (T.68), and that it was his opinion that the appellant was under the influence of alcohol (T.68,69).

Upon cross-examination, Officer Neff testified that it took him approximately three to five minutes to awaken the appellant (T.70).

On redirect, Neff said that appellant was very unstable and unsure of himself on his feet (T.75), and his coordination was "off." (T.76).

Finally, it was Officer Neff's opinion that the appellant was "fumbling around" so much due to his state of intoxication (T.78).

The only witness called for the defense was Terry Nish, not an eyewitness to the incident, who testified as to the difficulty he had had on several occasions in awakening the appellant (T.88).

ARGUMENT

POINT I

APPELLANT'S CONVICTION SHOULD BE AFFIRMED BECAUSE IT RELIES ON ACTS OCCURRING CONCURRENT AND SUBSEQUENT TO THE ARRESTING OFFICER'S ARRIVAL AT APPELLANT'S VEHICLE.

- A. THE ARRESTING OFFICER MADE A VALID ARREST FOR THREE MISDEMEANORS COMMITTED BY APPELLANT IN HIS PRESENCE, TO-WIT: (1) BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR IN VIOLATION OF UTAH CODE ANN. § 41-6-44 (1953); (2) BEING UNDER THE INFLUENCE OF INTOXICATING LIQUOR, TO A DEGREE THAT THE PERSON MAY ENDANGER HIMSELF OR ANOTHER, IN A PUBLIC PLACE, IN VIOLATION OF UTAH CODE ANN. § 76-9-701 (1973), AS AMENDED; (3) BEING IN AN INTOXICATED CONDITION IN A PUBLIC PLACE IN VIOLATION OF UTAH CODE ANN. § 32-7-13 (1953), AS AMENDED.

- B. THE EVIDENCE OF BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR IN VIOLATION OF UTAH CODE ANN. § 41-6-44 (1953), IS SUFFICIENT TO SUSTAIN A CONVICTION.

A. Before attempting any response to the points of argument set forth by appellant, it should be noted that appellant's factual summary and legal arguments have been presented based upon a seemingly strong assumption by appellant that the facts are as he alleged them to be. The jury apparently viewed the evidence in a different light, finding the appellant guilty. Respondent will address itself to the facts and legal issues based upon the evidence which tends to support the verdict.

The Supreme Court of Utah has very clearly stated that the evidence and any reasonable inferences that fairly may be drawn therefrom must be surveyed in the light favorable to the jury's verdict. State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970). This Court must assume, therefore, that the jury believed that evidence which supports its verdict and must review the record in that light. Lee v. Howes, 548 P.2d 619 (Utah 1976). See also State v. Dutchover, 85 N.M. 72, 509 P.2d 264 (1973), where on appeal from conviction, evidence is reviewed in light most favorable to state.

With this in mind, respondent will address the issue raised as to whether or not the arrest was valid. A look into the Utah Code Annotated and applicable case law reveals that a valid arrest was effected.

Utah Code Ann. § 77-13-3 (1953), as amended, reads in part as follows:

"A peace officer may make an arrest . . . without a warrant. . .
(1) For a public offense committed or attempted in his presence. . . ."

It should be noted that the above section does not specify that the officer must personally witness the offense for which he is making the arrest without a warrant. As the section reads, an officer could conceivably watch a suspect as he committed or attempted to commit a public offense, then arrest him without a warrant and charge him with a separate offense which he (the officer) had reasonable cause to believe the suspect had committed. Such was the case in State v. Bryan, 16 Utah 2d 47, 395 P.2d 539 (1964). In that case the defendant ran into the rear end of a flat-bed truck, killing some passengers in the car. The sheriff arrived on the scene within a minute or two after the accident. Upon his arrival, the sheriff found the defendant sitting on the curb with a strong odor of alcohol on his breath and apparently in an intoxicated condition. The defendant also stated he was drunk. The

defendant was taken to a hospital, treated for wounds, and placed under warrantless arrest for operating a motor vehicle while intoxicated in violation of Utah Code Ann. § 41-6-44 (1953). He was also later charged with automobile homicide.

The defendant alleged that his arrest for driving while intoxicated, a misdemeanor, was unlawful because it was not committed in the presence of the arresting officer. The court rejected this argument, using the rationale that "the defendant was intoxicated in a public place in violation of Sec. 32-7-13, U.C.A. 1953." The court concluded its attention to this issue by succinctly declaring:

"Nor can he [defendant] justifiably complain because he was arrested for and finally charged with a different crime than that which the officer had actually seen him commit." 395 P.2d at 540.

Other jurisdictions have similarly rejected arguments such as those propounded by the defendant in State v. Bryan, supra, holding that warrantless arrests can be made in "driving or operating under the influence" cases, where the officer does not actually see the offense committed, but has reasonable cause to believe that the law has been violated. City of Oregon v. Szakovits, 32 Ohio St. 2d 271, 291 N.E.2d 742 (1972); State v. Darabcsek, 412 S.W.2d 97 (Mo. 1967);

State v. Dickens, 130 N.J. Super. 73, 325 A.2d 353 (1974);
Commonwealth v. Klock, Pa.Super., 327 A.2d 375 (1974). See
also 74 A.L.R.3d 1138. In both Dickens and Klock, the
defendant was found by officers in an automobile either on
the highway or the adjoining shoulder with the engine
running, the headlights on, and a strong odor of alcohol
present. In Klock, the defendant admitted that he had been
drinking in a bar earlier and had driven the vehicle.

The court in Klock, at 327 A.2d 384, seemingly added
a new "dimension" to reasonable cause by declaring that
police officers could not only use facts obtained through
personal knowledge to make warrantless arrests, but could
draw "inferences":

" . . . In assessing whether appellant
was operating the car while under the
influence of intoxicating liquor, i.e.,
was committing a crime in their presence,
the troopers could rely not only on the
'personal knowledge acquired . . .
through [their] senses' but also on
'inferences properly drawn from the
testimony of their senses."

Although the case law in Utah is seemingly not as
broad as that enunciated in some other jurisdictions,
statutory amendments have broadened the scope of warrantless
arrests by peace officers by enabling them to arrest on
reasonable cause for believing a person to have committed
a public offense, although not in the arresting officer's

presence. Certain statutory conditions are also attached to this section of the Utah Code Annotated, 1953, as amended, Section 77-13-3(3) (a) (b) (c).

Turning now to the case at bar, it can be seen that the arrest was valid based on several theories.

First, the theory that the officer (Shipanboard) observed appellant in actual physical control of a vehicle while under the influence of intoxicating liquor is sound. The evidence reveals that Officer Shipanboard approached the truck in which the appellant was slumped over the steering wheel, noticed the engine running and headlights on, saw a cup on the dashboard containing what appeared to be alcohol, and smelled a strong odor of alcohol. This, coupled with the fact that the appellant was extremely hard to awaken, being in the early hours of the morning, certainly justified Officer Shipanboard in arresting appellant for being in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of Utah Code Ann. § 41-6-44 (1953), as amended. This is of course looking at the evidence in the light most favorable to the verdict. The jury was also justified in arriving at such a conclusion, as will be discussed later.

The second theory on which the arrest can be justified as valid is that enunciated in State v. Bryan, supra. Officer Shipanboard witnessed the appellant in violation of two sections of the Utah Code Annotated, other than Section 41-6-44. Utah Code Ann. § 32-7-13 (1953), reads:

"No person shall drink liquor in a public building, park or stadium or be in an intoxicated condition in a public place."
(Emphasis added.)

Utah Code Ann. § 76-9-701 (1953), as amended, reads in part as follows:

"(1) A person is guilty of intoxication if he is under the influence of intoxicating liquor . . . to a degree that the person may endanger himself or another, in a public place or in a private place where he unreasonably disturbs other persons."

Based on the law set forth by this Honorable Court in State v. Bryan, supra, Officer Shipanboard could have arrested appellant for a violation of either or both of the above sections, without a warrant, and subsequently charged him with violation of Utah Code Ann. § 41-6-44 (1953).

Which theory is and was used is not the issue. They are both legally sound in this jurisdiction, and are both supported by the evidence in the case. The appellant

indulged himself in actions which could certainly lead Officer Shipanboard to believe that the appellant was in a highly intoxicated state, e.g., odor of alcohol on breath, slumped over steering wheel in a "passed out" condition, slurred speech once awake, unable to stand on own feet without assistance, etc. As will be subsequently discussed, a jury could also reach this same conclusion beyond a reasonable doubt. Based upon either theory, the arrest must be upheld as valid.

B. THE EVIDENCE OF BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR IN VIOLATION OF UTAH CODE ANN. § 41-6-44 (1953), IS SUFFICIENT TO SUSTAIN A CONVICTION.

Appellant alleges that the evidence did not support the conviction for seemingly three reasons: (1) there was no evidence beyond a reasonable doubt that the intoxication affected the ability of the accused to drive; (2) no breathalyzer test was taken by the accused and there was not conclusive evidence of driving under the influence; (3) the verdict was supported only by circumstantial evidence, and there are several possible explanations which support the constitutional presumption of innocence which are consistent with that evidence.

It should just be noted in response that questions such as degree of intoxication, impaired ability to drive, actual physical control of the vehicle, etc., are questions to be determined by the jury, unless as a matter of law evidence exists on which reasonable men would not differ. State v. Burch, 100 Utah 414, 115 P.2d 911 (1941); State v. Hopkins, 11 Utah 2d 363, 359 P.2d 486 (1961); State v. Schad, *supra*; State v. Englehart, 158 Conn. 117, 256 A.2d 231 (1969); State v. Brown, Or. App., 485 P.2d 444 (1971).

As is so often the case in appeals, appellant bases his argument on evidence which is viewed "through the glasses of the appellant." Sometimes these glasses are tinted so as to expose and reveal only that version of the evidence which tends to support the appellant's allegations. As such, the

appellant assumes that the jury is obliged to believe his version of the evidence. This Court commented on this erroneous assumption in State v. Hopkins, 359 P.2d at 487:

"The difficulty with defendant's position is that the rule he relies on is not applicable where, as here, there is dispute in the evidence and one version theory does not support his thesis. He errs in assuming that the jury was obliged to believe his story as to what happened...it was their exclusive prerogative to judge the credit to be given the evidence and to determine the facts."

Appellant seems to be guilty in the case at bar of that very situation as described above in Hopkins. He assumes that the jury believed his interpretation of the evidence, therefore giving credence to his explanation as to why the appellant was found in the condition he was. This of course, is erroneous, and was again commented on by the Utah Supreme Court in State v. Schad, 470 P.2d at 247:

"As to point (1): Whether the evidence justifies the verdict, we survey the evidence and any reasonable inferences that fairly may be drawn therefrom in the light favorable to the jury's verdict. However, there are some further observations as to the manner in which the basic rule is applicable in this case. It is true, as the defendant contends, that where a conviction is based on circumstantial evidence, the evidence should be looked upon with caution, and that it must exclude every reasonable hypothesis except the guilt of defendant. This is entirely logical, because if the jury believes that there is a reasonable hypothesis in the evidence consistent with the defendant's innocence, there would naturally be a reasonable doubt as to

his guilt. Nevertheless, that preposition does not apply to each circumstance separately, but is a matter within the prerogative of the jury to determine from all of the facts and circumstances shown; and if therefrom they are convinced beyond a reasonable doubt of the defendant's guilt, it necessarily follows that they regarded the evidence as excluding every other reasonable hypothesis. Unless upon our review of the evidence, and the reasonable inferences fairly to be deduced therefrom, it appears that there is no reasonable basis for such a conclusion, we should not overturn the verdict."

Appellant has not really offered his version of the evidence, but has merely alleged that there are possible explanations which tend towards the innocence of appellant. A review of the evidence shows that the jury could very well have found that the evidence presented, and inferences fairly drawn therefrom, excluded every reasonable hypothesis except the guilt of the appellant.

The evidence shows three witnesses observing a man slumped over the steering wheel of a truck in the early hours of the morning. The headlights of the truck are on and the engine is running. One of the witnesses observes the truck moving forward and backward in continuous motion, striking a nearby fire hydrant. The police are called and subsequently arrive. Officer Shipanboard finds the appellant slumped over the steering wheel, a strong odor of alcohol on his breath, and a cup of whisky sitting on the dashboard. He too finds the engine running and headlights on. The officer finds it

extremely hard to awaken the appellant. Officer Neff then arrives, and observes the same situation, with the exception of the engine being shut off. The appellant is unable to stand on his feet without assistance, and becomes very fisty and uncooperative with the officer. His speech is quite slurred and he fumbles about incoherently, at times taking a swing at the officers. He admits having been drinking earlier in the evening.

Certainly the above set of facts have to be stretched to the point of exaggeration to support a theory that the appellant was "sleeping," and that someone else had driven the truck there for him. Eyewitness testimony by Pat Wellbourn disputes this theory, as the jury could reasonably believe that she saw the appellant drive the truck to the position in which it was found by the officers. Certainly a theory that the appellant was "passed out" or was "sleeping it off" is plausible and could have been so believed by the jury, as well as appellant's contention that the appellant "happened to sleeping" at that time of the morning. They jury could have found that the action of appellant in leaning over the steering wheel with the motor running and the headlights on constituted "actual physical control" as specified in Utah Code Ann. §41-6-44, (1953) as amended.

Nevertheless, an inescapable conclusion is apparent:

that the evidence presented, and the inferences to be fairly drawn therefrom, was sufficient to support the verdict.

Appellant questions the validity of the circumstantial evidence, and seems to allege that no conviction can stand because there was no chemical or breathalyzer tests administered. Officer Neff testified that no field sobriety tests were administered because of the fact that it was the opinion of the officers that the appellant was in no condition to perform any of these tests (T.75).

Even so, Utah Code Ann. §41-6-44 (1953) does not require that any tests be administered, but may be used to establish certain presumptions. Utah Code Ann. §41-6-44(b) (4) (1953) states:

"The foregoing provisions of this subdivision shall not be construed as }
limiting the introduction of any other
competent evidence bearing upon the
question whether or not the person was
under the influence of alcohol."

The officers were not required by law to administer any of the tests enumerated in §41-6-44. Thus, the verdict should not be affected by this fact alone. See People v. Culp, 537 P.2d 746 (Colo. 1975), where the court said that chemical tests are neither necessary nor required to prove intoxication.

As to the question of circumstantial evidence, it is a well settled principle of law that no distinction between circumstantial evidence and direct evidence is recognized as

far as probative force is concerned. State v. Englehart,
supra. At 256 A.2d 232, the Court in Englehart said:

"...if evidence, whether direct or
circumstantial, should convince a jury
beyond a reasonable doubt that an accused
is guilty, that is all that is required
for conviction."

This same principle holds true in Utah, as recently expressed
in State v. Romero, 554 P.2d 216 (Utah 1976).

Turning now to the question of the sufficiency of
the evidence to sustain a finding by the jury that the appellant
was in actual physical control of the vehicle and also under
the influence of intoxicating liquors, it must again be noted
that these are questions for the jury to determine. There are
however, many cases, some with nearly identical factual
situations such as the one at hand, which have dealt with these
issues.

Perhaps the best place to begin is with our own
jurisdiction. The most notable case, also cited by appellant,
is that of State v. Bugger, 25 Utah 2d 404, 483 P.2d 442 (1971).
There, the defendant was convicted of being in actual physical
control of his vehicle while under the influence of intoxicating
liquor. He was found asleep in his car with the smell of alcohol
about him. His car was completely off the traveled portion of
the highway and the motor was not running. His conviction was
reversed on appeal. The Court seemed to strongly imply that
the difference between the Bugger case and similiar cases of

other jurisdictions was the fact that the car was not on the traveled portion of the highway, the engine was not running, etc. The issue of whether or not one is found behind the steering wheel or in the car with the motor running seems to be of significance in determining whether or not there is actual physical control, not only in Utah but in other jurisdictions. Jenkins v. State, Okl. Cr., 501 P.2d 905 (1972), where defendant was found in an automobile, which was in a ditch with the lights on and motor running, and was convicted; State v. Webb, 78 Ariz. 8, 274 P.2d 338 (1954), where defendant was held to be in actual physical control when he was found "passed out" sitting behind the steering wheel with the motor running; Jacobsen v. State, 551 P.2d 935 (Alaska 1976), where defendant was found sleeping in the front seat, just under the steering wheel, and motor running. See also 47 A.L.R. 2d 571 for other cases.

The term "actual physical control" has been defined by this Court in State v. Bugger, 483 P.2d at 443:

"The word 'actual' has been defined as meaning 'existing in act or reality; ...in action or existence at the time being; present;...' The word 'physical' is defined as 'to exercise restraining or directing influence over; to dominate; regulate; hence, to hold from actions; to curb.' The term in 'actual physical control' in its ordinary sense means 'existing' or 'present bodily restraint, directing influence, domination or regulation.'"

Many of these terms and expressions were used in State v. Ruona, 133 Mont. 243, 321 P.2d 615 (1952); Parker v. State, Okl. Cr., 424 P.2d 997 (1967) and Hughes v. State, Okl. Cr. 535 P.2d 1023 (1975), in defining "actual physical control." It should be noted that the Court in Parker adopted the definition set forth in Ruona, and the Utah Supreme Court in Bugger quoted from Ruona in defining "actual physical control." In Ruona, the defendant was found in his parked automobile while under the influence of intoxicating liquor, with the motor still running.

Was there evidence to adequately find that the appellant in the case at bar was in actual physical control of his vehicle? Based upon the overwhelming majority of case law, the answer is yes. The appellant, while behind the steering wheel, with the motor running, was in a position in which he could exercise total management and authority over the movement of the vehicle. He could make the automobile move by merely shifting the gear. As was pointed out in Ruona, control means more than the ability to stop an automobile, it means the ability to keep it from moving or starting, and to exercise directing influence over. The jury could reasonably find that the appellant did in fact exercise "actual physical control" over the truck in the case at bar.

Finally, appellant challenges the sufficiency of the evidence to sustain the jury finding that the appellant was

under the influence of intoxicating liquor. Here again, this is a question of jury determination. Lombard v. Cory, 95 Idaho 868, 522 P.2d 531 (1974). There are however, cases which have established certain definitions and guidelines.

Different jurisdictions seem to have different wordings or phrases defining the term "under the influence of intoxicating liquor", yet they all basically say the same thing, i.e., keep the person who is under the influence of alcohol off the public highways in the capacity as a driver. Most jurisdictions have held that no specific degree of intoxication is required, only that the driver at the time he was charged had consumed intoxicating liquor to such an extent as to influence or affect his driving of a motor vehicle. State v. McFarland, 401 P.2d 824 (Idaho 1965); State v. Warner, 97 Idaho 204, 541 P.2d 977 (1975). Colorado has adopted as its test for the level of intoxication one of "substantial (intoxication) so as to render the defendant incapable of safely operating a vehicle" Thompson v. People, 510 P.2d 311 (Colo. 1973). Oklahoma has consistently held that a person is "operating a motor vehicle while under the influence of intoxicating liquor" if his nervous system, brain or muscles are impaired to any appreciable degree so that he cannot operate his automobile as would an ordinary, prudent and cautious man, in full possession of his faculties, using reasonable care, under tight conditions. Leullen v.

State, 64 Okl. Cr. 382, 81 P.2d 323 (1938); Application of Baggett, 531 P.2d 1011 (Okl. 1974); Appeal of Tucker, Okla. App. 538 P.2d 626 (1975). The New Mexico Supreme Court, in State v. Myers, 88 N.M. 16, 536 P.2d 280 (1975) held that "under the influence" meant a person who is to the slightest degree less able, either mentally or physically, or both, to exercise clear judgement and steady hand necessary to handle an automobile with safety to himself and the public. Finally, the Supreme Court of Oregon in State v. Robinson, 385 P.2d 754 (Oregon 1963), had adopted the test of whether one has imbibed to the extent that his mental and physical condition is deleteriously affected. See also 142 A.L.R., 550, 555.

Perhaps the best summation of all the definitions was expressed in Grooms v. State, 142 P.2d 862 (Okl. 1943), where the court, at 864 said:

"...It is not a question of how much intoxicating liquor a person accused of operating his car while under the influence of intoxicating liquor has drunk, but rather a question of whether or not he has imbibed enough alcoholic drink to affect his faculties to such an extent that the jury, under all the facts in the case, could reasonably conclude that he was under the influence of intoxicating liquor."

It matters not which definition is applied, the fact remains that the appellant's condition could very comfortably fit into any of the tests adopted. The jury could easily find

that appellant was under the influence of intoxicating liquor at the time he was discovered by Officer Shipanboard, not only because of the condition he (appellant) was in at that time, but also because of his actions upon and after being awakened. The jury could also draw reasonable inferences from the presence of the cup containing the alcohol on the dashboard.

The evidence as presented, and the inference to be fairly drawn therefrom, is sufficient to sustain the jury's verdict.

POINT II

THE CONVICTION IN THE LOWER COURT MUST BE AFFIRMED, NOTWITHSTANDING THE FACT THAT THE JURY MAY HAVE BASED ITS FINDING ON THE CONDUCT OF THE APPELLANT INTRODUCED AS EVIDENCE ON HIS CONDITION AFTER THE POLICE OFFICERS ARRIVED.

- A. APPELLANT HAD ACTUAL PHYSICAL CONTROL OF THE VEHICLE WHEN THE OFFICERS ARRIVED.
- B. THE STATUTE UNDER WHICH APPELLANT WAS CONVICTED IS NOT VOID FOR VAGUENESS AS APPLIED TO APPELLANT, NOR IS IT CRUEL AND UNUSUAL PUNISHMENT.
- C. APPELLANT'S "SLEEPING" CONDITION IS A FACTOR TO BE CONSIDERED BY THE JURY, I.E., WAS THE APPELLANT TRULY SLEEPING IN THE USUAL CONNOTATION OF THE WORD, OR WAS HE "PASSED OUT" DUE TO INTOXICATION.

- A. APPELLANT HAD ACTUAL PHYSICAL CONTROL OF THE VEHICLE WHEN THE OFFICERS ARRIVED.

Appellant contends that he did not drive or have actual physical control of the vehicle subsequent to the

the arrival of the officers. This issue was thoroughly reviewed in section B under Point I of this brief. However, as a summation of that discussion, it can be said that whether or not the appellant had actual physical control of the vehicle at the time of the arrival of the officer or subsequent thereto is a matter wholly within the prerogative of the jury, to be decided based upon the evidence presented and any inferences derived therefrom. This issue was apparently decided by the jury contra to appellant's point of view.

B. THE STATUTE UNDER WHICH APPELLANT WAS CONVICTED IS NOT VOID FOR VAGUENESS AS APPLIED TO APPELLANT, NOR IS IT CRUEL AND UNUSUAL PUNISHMENT.

Appellant now alleges that Utah Code Ann. §41-6-44 (1953) is vague as applied to him, since all reasonable men would have to guess that its meaning included a sleeping person.

It should first of all be noted that statutes very similiar to Utah Code Ann. §41-6-44 (1953) as amended have been upheld in most jurisdictions as not being vague or uncertain, therefore, constitutional. State v. Ruona, supra; Thompson v. People, supra.

The standard as to statutory certainty in Utah is expressed in State v. Shondel, 22 Utah 2d 343, 453 P.2d 146 (1969):

"...The well-established rule is that a statute creating a crime should be sufficiently certain that persons of ordinary intelligence who

desire to obey the law may know how to conduct themselves in conformity with it. A fair and logical concomitant of that rule is that such a penal statute should be similarly clear, specific and understandable as to the penalty imposed for its violation." 453 P.2d at 148.

With this in mind, one must look now to the intent of the legislative in enacting §41-6-44, and then to the specific language used.

In enacting Utah Code Ann. §41-6-44 (1953), it seems very clear that the legislative intended to define and enact two separate offenses; one being: "it is unlawful...for any person who is under the influence of intoxicating liquor to drive...any vehicle within the state;" and the other being: "it is unlawful...for any person who is under the influence of intoxicating liquor...to be in actual physical control of any vehicle within the state." ("under the influence of intoxicating liquor" was later changed to "under the influence of alcohol".)

The Court of Criminal Appeals of Oklahoma, in Parker v. State, supra., at p.1000, held that the legislature, in enacting their drunk driving statute, which is almost verbatim to Utah Code Ann. §41-6-44 (1953), intended to define two offenses. Respondent contends that the Utah legislature had the same thought process in mind when enacting Utah Code Ann. §41-6-44 (1953).

The purpose in wording Utah Code Ann. §41-6-44 (1953) to include both those who drive under the influence and those who are in actual physical control of a vehicle while under the influence is two fold: (1) in the case of one driving under the influence, to get off the highways those people whose judgment, vision, reflexes and ability to see and react have been impaired by drink, State v. Montiethe, 417 P.2d 1012, 1015 (Oregon 1966); (2) in the case of one who is in actual physical control of a vehicle while under the influence, to enable the police to apprehend the drunken driver before he strikes, Hughes v. State, supra.

In summary then, the Utah legislature intended to make it a crime for one to be under the influence of alcohol while in actual physical control of a vehicle. In ascertaining whether one is in "actual physical control" or not, the general rule that "words of a statute are to be interpreted in their ordinary, everyday sense, unless a contrary interpretation is indicated in the statute" should be applied. State v. Ruona, 321 P.2d at 618. Using State v. Bugger, supra, as a guideline, one must use powers beyond human comprehension to find vagueness or ambiguity in the phrase "actual physical control" as set forth in Utah Code Ann. §41-6-44 (1953). See

Utah Code Ann. §76-1-106 (1973) as amended and Luethen v. State, supra., for rules of construction of drunk driving statute (to be given literal construction so as to bring safety to those who drive the public highways).

Appellant argues that no union or joint operation of act and intent exist as required by Utah Code Ann. §76-1-20 (1953). Utah Code Ann. §76-1-21 (1953) specifies that intent is manifested by the circumstances connected with the offense and sound mind and discretion of the accused. Utah Code Ann. §76-1-22 (1953) states to the effect that intoxication is relating to act and intent. A jury could find that appellant had the necessary intent to have actual physical control of the vehicle by being in the vehicle in an intoxicated condition, behind the steering wheel, with the engine running. If the jury believed the testimony of Pat Wellbourn, they could find that the appellant had the intent to operate or drive the vehicle by looking at the very act of driving by the appellant.

As for the act itself, sufficient evidence existed whereby the jury could find that the appellant did drive or actually control physically the vehicle in which he was found.

In conclusion, no evidence or argument has been presented to show that Utah Code Ann. §41-6-44 (1953) was or is void for vagueness as applied to appellant. Sufficient evidence does exist by which the jury could find the necessary elements of the offense charged on which to convict.

C. APPELLANT'S "SLEEPING" CONDITION IS A FACTOR TO BE CONSIDERED BY THE JURY, I.E., WAS THE APPELLANT TRULY SLEEPING IN THE USUAL CONNOTATION OF THE WORD, OR WAS HE "PASSED OUT" DUE TO INTOXICATION.

Appellant alleges that it appears that the legislature has made sleeping a crime, and that under Utah Code Ann. §41-6-44 (1953), all reasonable men would have to guess that its meaning included a person sleeping. Appellant seems, however, to ignore the key question to the word "sleeping," that being, "Why was the appellant sleeping?" Was he, as the old saying goes, "Takine a snooze" or was he so drunk from imbibing in alcohol that he eventually "passed out" and had to "sleep it off."

As mentioned before, these are questions for the jury to determine from the facts and circumstances surrounding the issue, and as pointed out in earlier discussion, the evidence and reasonable inference was presented by which the jury could adequately decide this issue.

CONCLUSION

Appellant has alleged several points of error, which respondent feels have no legal merit. No showing of prejudicial error has been made. All presumptions form the validity of the jury verdict below. Simpson v. General Motors Corp., 24 Utah 2d 301, 470 P.2d 399 (1970). The parties have had a fair opportunity to present their evidence and have the

issues determined by a jury, and as this Court said in Lee v. Howes, 548 P.2d at 621:

"...when that has been accomplished we will not disturb the determination made by the jury and the trial court unless it is shown that there was substantial and prejudicial error which prevented a fair trial, or that there is no substantial basis in the evidence which reasonable minds could conclude as the jury did..."

CONCLUSION

For the reasons heretofore stated, the conviction should be upheld.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

Attorneys for Respondent