1977

State of Utah v. William R. Chipman : Brief of Defendant / Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

THE STATE OF UTAH	:	
Plaintiff-Respondent	:	
vs.	:	Case No. 15023
WILLIAM ROBERTS CHIPMAN	:	
Defendant-Appellant	:	

BRIEF OF DEFENDANT/APPELLANT

THIS IS AN APPEAL FROM A CONVICTION FOR VIOLATION OF SECTION 41-6-44 U.S.A. (1953), DRIVING OR CONTROLLING A VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR

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TABLE OF CONTENTS

CASES CITED

CASES CITED

STATUTES CITED

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OF THE STATE OF UTAH

THE STATE OF UTAH	:	
Plaintiff - Respondent	:	
		Case No. 15023
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DEFENDANT - APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an appeal from a conviction for violation of Section 41-6-44 U.C.A. (1953), driving or controlling a vehicle under the influence of intoxicating liquor.

DISPOSITION IN 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 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

Appellant prays that the judgment of the lower court be reversed and the case be remanded with instructions to dismiss complaint.

STATEMENT OF FACTS

On the night of October 30, 1975, appellant was asleep in his friends truck parked off of the Brooklane Circle in Salt Lake County. The truck was completely off the road with the motor turned off. Officer Schipaanboard, of the Salt Lake County Sheriff's Department was dispatched to the scene because a neighbor thought someone was ill and slumped over the seat of the truck. Officer Schipaanboard did not observe any violation of law, but decided to wake up appellant anyway. After taking some ten minutes to awaken appellant, Officer Schipaanboard detected the smell of alcohol and appellant was subsequently placed under arrest for violation of Section 41-6-44 U.C.A. (1953), driving or being in actual physical control of a vehicle while under the influence of alcohol. Appellant was taken to the Salt Lake County Sheriff's Office where alcohol influence tests and a report were refused by appellant.

ARGUMENT

POINT I

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE IT RELIES EXCLUSIVELY ON ACTS OCCURRING PRIOR TO THE TIME THE ARRESTING OFFICER DISCOVERED APPALLANT'S VEHICLE BECAUSE:

(A) THE ARRESTING OFFICER COULD NOT VALIDLY ARREST APPELLANT FOR A MISDEMEANOR THE OFFICER DID NOT WITNESS: AND,

(B) THE EVIDENCE OF DRIVING OR CONTROLLING A VEHICLE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION.

Section 41-6-44 (a) provided, "It is unlawful . . . for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle . . ."

The arresting officer did not have the right to arrest appellant for any acts prior to the officer's arrival because the officer witnessed no driving or controlling prior to his arrival and a legal arrest for a misdemeanor cannot be made without a warrant unless the offense was committed in the presence of the arresting officer. Utah Liquor Control Commission vs. Vatsis, 112 Utah 282, 186 P .2d 975.

The offense charged included the element of driving or controlling a vehicle, plus the element of being in an intoxicated condition which affects a persons driving ability. In order to sustain a conviction for driving "under the influence" of intoxicating liquor, there must be evidence beyond a reasonable doubt that intoxication affected the ability of the accused to drive. Luellen vs. State, 64 Okl.Cr. 382, 81 P .2d 323. Section 41-6-44 (b) raises a presumption that a person with a breathalyzer test result greater than 0.10 percent is acting "under the influence," but that presumption does not relieve the state of its burden to prove beyond a reasonable doubt every element of a crime charged. In the case at hand, the appellant did not take a chemical or breathalyzer and there was not conclusive evidence of

driving under the influence.

The conclusion that appellant was driving under the influence of alcohol can be supported only by circumstantial evidence that appellant was intoxicated at the time he was found asleep in his car, and there are several possible explanations which support the constitutional presumption of innocence which are consistent with that evidence. Appellant could have become intoxicated after he parked the car or someone else could have driven the car to its parking place. The evidence is therefore insufficient as a matter of law to base appellant's conviction on acts prior to the arrival of the arresting officer. State vs. Burch, 100 Utah 414, 115 P .2d 911.

POINT II

THE CONVICTION IN THE LOWER COURT MUST ALSO BE REVERSED IF THE JURY BASED ITS FINDING ON CONDUCT OF THE APPELLANT INTRODUCED AS EVIDENCE OF HIS CONDITION AFTER THE POLICE OFFICERS ARRIVED BECAUSE:

(A) APPELLANT DID NOT DRIVE OR CONTROL THE VEHICLE SUBSEQUENT TO THE ARRIVAL OF THE OFFICER;

(B) THE STATUTE UNDER WHICH APPELLANT IS CHARGED IS VOID FOR VAGUENESS IF IT APPLIES TO A PARTY WHO IS ADMITTEDLY ASLEEP AT ALL RELEVANT TIMES NECESSARY TO CHARGE HIM WITH ACTUAL PHYSICAL CONTROL:

(C) THE STATUTE IF APPLIED TO A SLEEPING PERSON, EITHER INTOXICATED OR NOT, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Officer Schipaanboard testified that when he arrived on the scene, appellant's truck was not running, and appellant was asleep on the seat of his vehicle. He futher testified, as did other

witnesses, that it took from 5 to 20 minutes to awaken the appellant. (emphasis supplied).

It is obvious from the testimony of the arresting officer that the appellant was neither in actual or physical control of the vehicle in the presence of the arresting officer, and his state of sleeping could not be presumed to have the intent to be in actual or physical control. Based upon these facts alone, the statute as applied to the appellant, violates due process of law, since all reasonable men would have to guess that its meaning included a person sleeping. Musser v. State, 333 U.S. 95; State v. Musser, 118 Utah 537, 223 P.2d 193.

There are further reasons why the actual physical control clause is unconstitutional as applied to appellant. Section 76-1-29 U.C.A. (1953), requires that, "In every crime or public offense there must exist a union or joint operation of act and intent." The state failed to produce any evidence that appellant intended to drive or be in actual physical control of his vehicle. As for the act element which Section 76-1-20 requires, if Section 41-6-44 (a) is applied to appellant, then it would appear that the legislature has made sleeping a crime.

The particular reason why the conviction of the appellant must be reversed is that the facts and circumstances of the instant case fall nearly four-quarter with the facts and circumstances in State v. Bugger, 25 U. 2d 404, 483 P.2d 442, where this court clearly held that an appellant who was fast asleep in an automobile completely off the traveled portion of a street or highway was not in actual physical control within the meaning of the statute 41-6-44 U.C.A. (1953).

CONCLUSION

Section 41-6-44 U.C.A., (1953), cannot constitutionally be applied to the facts and circumstances of this case for the following reasons:

(a) Appellant was not in actual physical control of the vehicle at a time when any competent witness could know of his intoxication.

(b) The State has failed to sustain its burden of proof in establishing that appellant, if intoxicated, was under the influence while driving.

(c) The appellant's condition of being asleep at the time the arresting officers arrived totally negates any intent necessary to establish the elements of a crime as provided in 76-1-20 U.C.A., (1953).

(d) Said statute would be unconstitutional for vagueness if appellant's condition can be construed to fall within the meaning of the statute.

Judgment of the lower court should be reversed and remanded by this honorable court with directions to dismiss the charges.

Respectfully submitted this 30th day of August, 1977.

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Mailed two copies of Brief of Appellant to Ginger Fletcher, Attorney for Plaintiff-Respondent, this 30th day of August, 1977, at 3060 Lester, Suite D., Granger, Utah 84119

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