

1986

State of Utah v. Robert Glen Houtz : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, 20608 :
Plaintiff-Respondent, :
-v- : Case No. 20608
ROBERT GLEN HOUTZ, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM CONVICTIONS OF TWO COUNTS OF
AUTOMOBILE HOMICIDE, TWO COUNTS OF DRIVING
WHILE UNDER THE INFLUENCE OF ALCOHOL AND
CAUSING BODILY INJURY, LEAVING THE SCENE OF
AN ACCIDENT INVOLVING DAMAGE TO A VEHICLE,
AND FAILURE TO REPORT AN ACCIDENT, IN THE
FIFTH JUDICIAL DISTRICT COURT IN AND FOR
BEAVER COUNTY, STATE OF UTAH, THE HONORABLE
J. HARLAN BURNS, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 20608
ROBERT GLEN HOUTZ, :
Defendant-Appellant. :

STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue presented in this appeal that requires consideration by the Court is whether the trial court erred in ordering that trial proceed without defendant present.

STATEMENT OF THE CASE

Defendant, Robert Glen Houtz, was charged with two counts of automobile homicide, a third degree felony, under UTAH CODE ANN. § 76-5-207 (1978) (amended 1985); two counts of driving while under the influence of alcohol and causing bodily injury, a class A misdemeanor, under UTAH CODE ANN. § 41-6-44(1) and (3) (Supp. 1985); leaving the scene of an accident involving personal injury or death, a class A misdemeanor, under UTAH CODE ANN. § 41-6-29 (Supp. 1985); leaving the scene of an accident involving damage to a vehicle, a class B misdemeanor, under UTAH CODE ANN. § 41-6-30 (1981); and failure to report an accident, a class B misdemeanor, under UTAH CODE ANN. § 41-6-34 (1981) (R. 2-4). After a trial, at which defendant was not present, the jury returned verdicts of guilty on all charges (R. 91-7). The trial court then sentenced defendant to the Utah State Prison for the

following terms: two consecutive terms of zero to five years for the automobile homicide convictions, two concurrent terms of 364 days for driving while under the influence of alcohol and causing bodily injury to be served consecutively to the automobile homicide sentences, and a term of 364 days for leaving the scene of an accident that resulted in death or injury to run concurrently with the sentence imposed for driving while under the influence of alcohol and causing bodily injury. No additional sentences were imposed for leaving the scene of an accident and failure to report an accident. The trial court further ordered that defendant pay a fine of \$5,000 for the automobile homicide convictions and restitution to the victims in the amount of \$7,673.70 (R. 114-8).

STATEMENT OF FACTS

This case came before the trial court on February 25, 1985, but was set for trial on the following day because defendant was not present. On the morning of the 26th, defendant again failed to appear, and the trial court, unwilling to proceed with a non-jury trial--which defense counsel indicated defendant desired--without an in-court waiver of the jury by defendant himself, set the trial over another day (Transcript of Feb. 26, 1985 at 2, 8-10). On the 27th, defendant, for the third time, failed to appear for trial. Defense counsel indicated to the court that he had spoken with defendant on February 23 and informed him of his February 26th trial date. He then told the court that, at approximately 10:00 p.m. on the 26th, the prosecutor received word that defendant had been incarcerated on

February 25 in San Diego, California on a drunk driving charge. Neither of the parties could say whether defendant had posted the \$750 bail set for that charge or been released on other terms. It was also noted that defendant had agreed to remain in Salt Lake County as a condition to a pretrial bail reduction in the Beaver County case. Based upon these representations, which were not in dispute, defendant's counsel moved for a continuance of trial until defendant could return from San Diego and appear at trial. After summarizing the facts before it, the trial court denied this motion and ordered that trial proceed without defendant. The court specifically ruled that defendant's absence from trial was voluntary and without good cause (Transcript of Feb. 27, 1985 at 16-24; Addendum).

Subsequently, the jury returned verdicts of guilty on all the charges against defendant. On March 1, 1985, defendant waived extradition from San Diego County to Utah (R. 43). He was voluntarily present for sentencing in the trial court seventeen days later (R. 115).

SUMMARY OF ARGUMENT

Under federal and Utah law, a criminal defendant has the right to be present at trial. Although that right may be waived by the defendant's voluntary absence, the trial court in the instant case had before it insufficient information upon which to rule that defendant was voluntarily absent on the date of his trial. Because it had information that defendant was probably incarcerated in San Diego, California on the day of trial, the trial court improperly ordered that trial proceed

without him. With that information, the court simply could not have safely assumed that defendant's absence was voluntary. Accordingly, defendant's convictions should be reversed and his case remanded for a new trial.

ARGUMENT

POINT I

BECAUSE IT APPEARS THAT THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO BE PRESENT AT TRIAL, HIS CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

Article I § 12 of the Utah Constitution states that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person and by counsel" This right is codified in UTAH CODE ANN. § 77-1-6 (1982). A similar right is afforded under the Sixth and Fourteenth Amendments to the United States Constitution. Illinois v. Allen, 397 U.S. 337 (1970); State v. Glenny, 656 P.2d 990, 992 (Utah 1982). However, the right to be present at trial is a personal right which may be waived by a defendant. Glenny, 656 P.2d at 992. This is codified in UTAH CODE ANN. § 77-35-17 (1982), which provides in pertinent part:

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present[.] [Emphasis added.]

*Myers
254, 508 P.2d 91 (73)
appears at trial
or appeal may be
red.*

A voluntary waiver may be established by the conduct or words of the defendant, but it is the State's burden to establish that the waiver is voluntary. See State v. Ross, 655 P.2d 641, 642 (Utah PC 1982). *Heart attack in hospital. Then leaves State / Bond in Nebraska*

The question presented in the instant case is whether the trial court correctly ruled that defendant's absence from trial was voluntary and that trial could therefore proceed without him. The court ruled this way even though it had before it undisputed information that defendant had been incarcerated in San Diego two days before trial and nothing to indicate that defendant was not still incarcerated on the days trial proceeded in his absence. Under these circumstances, it appears the court had insufficient information upon which to base its conclusion that defendant's absence was voluntary and without good cause. The court simply could not have safely assumed that defendant was no longer incarcerated at the time of trial, or that he had voluntarily waived his right to be present. Defendant's waiver of extradition from San Diego County on March 1, 1985 and his court appearance in Utah on March 18 for sentencing weighs against the validity of such an assumption. Furthermore, defendant's presence in San Diego on February 25 would not in itself, setting aside the question of incarceration, have made it impossible for him to have attended trial in Utah on either that day or the 26th, and thus render his absence voluntary. It being clear that, when a defendant is in custody, the trial court has a duty to see that he is personally present at every stage of trial, State v. Aikers, 87 Utah 507, 515, 51 P.2d 1052, 1056

(1935), the court here, which in all fairness had to assume that defendant was still incarcerated in San Diego on the date of trial, erred when it ordered that trial proceed without him present. Given the information available, the court could not reasonably determine that defendant's absence was voluntary.¹ See Diaz v. United States, 223 U.S. 442, 455 (1912) (noting, in dictum, that a defendant in custody does not have the power to waive his right to be present); State v. Coles, 688 P.2d 473 (Utah 1984); United States v. Crutcher, 405 F.2d 239, 243 (2d Cir. 1968), cert denied, 394 U.S. 908 (1969) (holding that an incarcerated defendant who gave a false name upon arrest had not knowingly or voluntarily waived his right to be present at trial on another matter). Cf. State v. Ross, 655 P.2d 641 (Utah 1982); State v. Myers, 29 Utah 2d 254, 508 P.2d 41 (1973). Accordingly, it appears that defendant is entitled to reversals of his convictions and a remand of his case for a new trial.

CONCLUSION

Based upon the foregoing argument, the Court should reverse defendant's convictions and remand the case for a new trial.

Did not appeal,
on advice of counsel.

¹ That defendant may have violated a condition for his pretrial reduction of bail by traveling to San Diego does not alter this conclusion.

RESPECTFULLY submitted this 13th day of January,
1986.

DAVID L. WILKINSON
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Brief were mailed, postage prepaid, to Leo G. Kanell, Attorney for Appellant, 157 South Main Street, P.O. Box 735, Milford, Utah 84751, this 13th day of January, 1986.

David B. Thompson

ADDENDUM

1 the trial can go forward if the penalty is not death, which
2 it is not in this case.

3 The second requirement is that the defendant must
4 have received notice of the trial setting. And that is
5 clear that he did in this case. Those are the two
6 requirements.

7 I might mention, if it is an analogy, I'm not sure
8 it is, in the bail forfeiture statute -- chapter, it says
9 that a bail forfeiture may be set aside if the defendant
10 cannot appear. However, it may not be set aside if the
11 reason for his non-appearance was that he was in detention
12 in military or civil authorities. And that seems to be
13 the case here. If that's an analogy, then it would apply.

14 I do resist the motion.

15 THE COURT: Rebuttal?

16 MR. VAN SCIVER: Well, I don't know whether
17 it's appropriate or inappropriate analogy, but it seems
18 to me that I ought not to be put in the peculiar position
19 of asking for the issuance of a warrant. And he hasn't
20 asked and you haven't taken the initiative to do that.
21 But I don't suppose at this juncture it would be inappro-
22 priate to ask that it be done. And I think somebody from
23 law enforcement ought to confirm whether he's in San Diego.
24 And then I think we ought to find out if he would waive
25 extradition, and if so, he could be brought back here.

1 There's nothing wrong with admonishing this jury and
2 at least trying the case when he's present.

3 Now, admittedly, the rules have slacked up substantially.
4 But I don't think anybody in this room questions what we
5 are doing. It's just about as unique as any procedure that
6 I've been involved with, and I think that it's the first
7 time it's been done in the state. And I think more effort
8 ought to be made by the Court to see if that man can be
9 here. That's all I'm suggesting.

10 I don't like running back and forth from Salt Lake
11 and Beaver either but --

12 THE COURT: I love it.

13 MR. VAN SCIVER: I don't want to end up trying
14 the case a second or third time, at least a second. I
15 don't know why we can't confirm that he's there and
16 available.

17 THE COURT: Anything else?

18 MR. VAN SCIVER: I'll submit it.

19 THE COURT: All right, the matter having been
20 submitted to the Court, and I take it, Mr. Van Sciver,
21 what you are really doing is renewing your motion for
22 a continuance?

23 MR. VAN SCIVER: I am.

24 THE COURT: And the Court held that yesterday
25 after you made it, until you had an opportunity to further

1 supplement it with whatever you wanted in the record.

2 And I take it the record is now full on that issue.

3 MR. VAN SCIVER: It is.

4 THE COURT: All right, the first ground, as
5 I understand it, is because counsel for the defendant has
6 only had the opportunity of personally interviewing his
7 client, Robert Glen Houtz, one half-hour period with
8 respect to the facts and circumstances and the defense
9 in this case. Do I correctly state that?

10 MR. VAN SCIVER: You do, your Honor.

11 THE COURT: And in addition to that, counsel has
12 pointed out to the Court that he, as counsel for the
13 defendant, is under a serious disability by reason of the
14 absence of the defendant. Do I state that correctly?

15 MR. VAN SCIVER: You do.

16 THE COURT: And as a further reason, counsel
17 for the defendant submits to the Court that as of ten
18 o'clock last evening, the whereabouts of the defendant
19 has been, at least in some manner, determined by the
20 Beaver County Sheriff's Department as being incarcerated
21 in San Diego City, State of California, under a charge
22 of driving under the influence, bail set, the best hearsay,
23 at \$750. Do I state that correctly?

24 MR. CHRISTIANSEN: That's correct, your Honor.

25 MR. VAN SCIVER: That is.

1 THE COURT: All right. Now, then, the Court
2 having listened to the argument of respective counsel and
3 having reviewed the file and the file revealing (1) that
4 the Information was filed in this Court on or about September
5 14, 1984, and that counsel -- let's see, he was arraigned
6 on September 17, 1984, wherein a plea of not guilty on
7 all counts was entered. The bail had been set, as I
8 review it, in the amount of \$100,000, and not posted; and
9 that an application was made, to this Court, by a motion,
10 with a mailing certificate 28th day of September, 1984,
11 over the signature of instant counsel, Mr. Robert Van Sciver,
12 and I should say that the record shows that Mr. Leo Kanell,
13 an attorney licensed and practicing in the State of Utah
14 and charged with Beaver County's counsel for those who
15 are determined indigent, on some basis appeared at
16 arraignment. Did he represent him at the preliminary hearing,
17 Mr. Christiansen?

18 MR. CHRISTIANSEN: Yes, he did, your Honor.

19 THE COURT: All right, Mr. Kanell having repre-
20 sented the accused at preliminary hearing; and the Court
21 having reviewed the motion to reduce bail, over the signa-
22 ture of Robert Van Sciver, attorney for the defendant,
23 and that motion to reduce bail having been supported by an
24 affidavit of Mr. Robert Van Sciver, setting forth (1) "I
25 am the attorney for the defendant in the above-entitled

1 matter and as such have personal knowledge of the defendant.

2 (2) "The defendant is presently being held in the
3 Beaver County Jail on a \$100,000 bond and charged with
4 two counts of automobile homicide, third-degree felonies.

5 (3) "In spite of the transitory appearance of the
6 defendant, he has lived in the Salt Lake valley for 20
7 years, has been employed as a businessman in the Salt Lake
8 valley for the same period of time, and is the father of
9 six children.

10 (4) "A high probability exists that the defendant
11 will not be convicted as charged.

12 (5) "As a condition of bail, the defendant would
13 consent to remain in Salt Lake County, living with his
14 son, Greg Houtz, who has adequate physical facilities to
15 provide him housing. He will also be afforded opportunities
16 for employment.

17 (6) "Because of congested trial calendars and
18 because of the complex nature of what appear to be a
19 circumstantial case, the defendant should be made available
20 to assist counsel with his case through bail, and adequate
21 time to prepare cannot be afforded within the time permitted
22 by law when one is in custody.

23 Dated this 28th day of September, 1984," over the
24 signature of Robert Van Sciver, attorney for the defendant.

25 On that basis, this Court reduced the bail to \$15,000 cash

1 or appropriate and approved corporate surety. And that
2 was signed by myself, as District Judge, on the 25th day
3 of October, 1984.

4 The record should show that Mr. Robert Van Sciver
5 is an attorney, this Court will take judicial knowledge
6 of this, who has considerable reputation in trial work
7 not only in the State of Utah but in sister and neighboring
8 states. And this Court, on the basis of the affidavit,
9 by an officer of the Court, who I have due respect for,
10 and on those representations I reduced the bail to afford
11 an opportunity to prepare for trial.

12 Now, the minute entry will further show, or the
13 record will further show, that trial was originally set,
14 over the signature of Sheila G. Rose, Trial Court
15 Executive, on the 27th of December, 1984, and a mailing
16 certificate on the same day to Mr. Robert Van Sciver.
17 That notice shows that the trial was reset for the
18 25th day of February, 1985 beginning at ten o'clock
19 a.m. in this courtroom, Beaver County Courthouse, Beaver,
20 Utah.

21 The Court, by reason of a telephone conversation
22 with Mr. Van Sciver, who advised the Court that the
23 defendant and accused intended to waive a jury, and the
24 Court, on the 25th of February, 1985, having a jury already
25 summoned to come in to try two jury cases; and again upon

1 the representation of counsel, an officer of the Court,
2 this Court changed the sequence of trials and tried another
3 jury matter on Monday, setting this matter on Tuesday, the
4 26th of February, to follow the jury trial, so that the
5 summoning of the jury and the expense would come to some
6 beneficial effect.

7 The Court agreed to allow counsel for the defendant
8 and the defendant to appear on the 26th for trial and at
9 that time to waive the jury, after being advised by this
10 Court of what he was doing and the circumstances surrounding
11 his waiving a constitutional act. And I told counsel that
12 I would require it to be in writing, signed in Court at
13 that time, after inquiry.

14 Yesterday morning, at the time of trial, Mr. Van
15 Sciver appeared but the defendant did not. At that time
16 Mr. Van Sciver advised the Court that he had only had
17 one half hour-conference with the defendant from the entry
18 of his counsel of record in September of 1984 until the
19 instant date, to-wit, February 25, 1985.

20 Now, then, while counsel for the defendant was
21 present, the defendant was not. Without the defendant's
22 presence, the Court would not and could, under the law,
23 proceed with trial without a jury, because the Constitution
24 of the United States and the Constitution of this state
25 provide with emphasis that an accused has the right to be

1 present, with certain limited exceptions; he has the right
2 to a trial by jury, unless he knowingly and after advice
3 waives that in open court. And I required it to be in
4 writing, so that the record is clear.

5 Therefore, the Court could not proceed with trial,
6 and finding the grounds that counsel made for a continuance
7 not effectively, not sufficient, held the motion until
8 today to allow Mr. Van Sciver to further supplement the
9 motion with facts or law; and the Court having been advised
10 by Mr. Van Sciver that he talked to the defendant on
11 Saturday, the 23rd of February -- and, now, I take it that
12 that was by telephone?

13 MR. VAN SCIVER: It was, your Honor. And I
14 inquired where he was and he said Salt Lake County.

15 THE COURT: All right. And the Court further
16 having released him on a reduced bail with the under-
17 standing that he would reside in the Salt Lake County
18 area and be available for preparation; and the Court
19 finding that he has violated that condition and that the
20 Court would find the fact that Mr. Van Sciver has not
21 had an opportunity to talk to him more than one-half
22 hour is by cause and fault of the defendant and not Mr.
23 Van Sciver; and that he has absented himself from this
24 area on the day of trial set and that he had knowledge of
25 that; and this Court finds that it is voluntary and without

1 good cause, and the motion for continuance is denied.

2 Mr. Christiansen, do you have anything further in
3 the record?

4 MR. CHRISTIANSEN: Nothing further on that
5 matter, your Honor.

6 THE COURT: Mr. Van Sciver, do you have anything
7 further to go in the record on that matter?

8 MR. VAN SCIVER: We're going to make the
9 defense lawyer ask for the warrant after all, is that
10 what it comes down to?

11 THE COURT: Well, we're not -- I'll discuss
12 that with you in chambers. I have no problem at all in
13 ordering a warrant for the arrest and if necessary the
14 extradition of the defendant. We're going to go forward
15 with this trial. That's the order.

16 Now, anything further, Mr. Christiansen?

17 MR. CHRISTIANSEN: Not on that matter, your
18 Honor. I do --

19 THE COURT: Mr. Van Sciver?

20 MR. VAN SCIVER: Nothing.

21 THE COURT: All right, now, Mr. Van Sciver,
22 do you have any other motions?

23 MR. VAN SCIVER: I have none.

24 THE COURT: Mr. Christiansen?

25 MR. CHRISTIANSEN: Yes, I have a motion, your