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State of Utah v. James W. Bradley : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,
v.
JAMES W. BRADLEY,
Defendant-Appellant.

Case No. 1999

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE VERDICT AND CONVICTION IN
DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH
THE HONORABLE THORNLEY K. SWAN PRESIDING

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FILE

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STATUTES CITED

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 15307
vs.	:	
JAMES W. BRADLEY,	:	
Defendant-Appellant.	:	

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This was an action brought by the State of Utah against the appellant for the offense of criminal homicide in violation of Title 76, Section 5, Paragraph 207, Utah Code Annotated, 1953 as amended, wherein the appellant was accused of causing the death of another person while operating a motor vehicle in a negligent manner while under the influence of intoxicating liquor.

DISPOSITION IN LOWER COURT

This case was tried to a jury in Davis County on May 26 and 27, 1977. The appellant was found not guilty of criminal homicide as charged in the information, but was found guilty of running a red light, and guilty of driving while under the influence of intoxicating liquor. The court sentenced the appellant to a

term of six months in the Davis County Jail and to pay a fine of \$299.00, from which the appellant appeals.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the judgments rendered against him or, in the alternative, a remand to the lower court for a new trial consistent with due process.

STATEMENT OF FACTS

This action arose out of an automobile accident which occurred on September 11, 1976 at approximately 6:15 P.M. at the intersection of State Road No. 106 and Center Streets, in North Salt Lake, Davis County, Utah. State Road No. 106 runs in a north-south direction and Center Street runs northeasterly and southwesterly. The intersection is controlled by a traffic light. At approximately 11:30 A.M. (T.224) on the morning of the accident the appellant arrived at the maintenance shop of the construction company for whom he was employed. He testified that between 11:30 A.M. and 5:45 P.M. that date, he had consumed four or five beers while working on his truck. He left the shop shortly before 5:45 P.M., travelling several blocks to his brother-in-law's home where he consumed several pieces of chicken (T.224). He then started home, driving south on State Road 106. The light pickup truck he was driving collided with a vehicle eastbound on Center Street in the intersection of State Road 106 and Center Street. The driver of the other vehicle died as a result of

injuries sustained in that accident. Utah Highway Patrol Trooper Daryl W. Durrant, testified (T.64) that he arrived at the accident scene at approximately 6:22 P.M. after having been informed of the accident on his radio. Upon arrival at the scene he assisted in the removal of the injured parties, and more than one hour after the accident he first observed the appellant (T. 82 & 91). He testified (T.65) that he noticed an odor of alcohol about the appellant and gave the appellant what he referred to as a "field sobriety test" (T.66) consisting of several maneuvers in which the appellant was asked to stand with his feet and knees together with his arms outstretched, close his eyes, and tilt his head back. He testified (T.69) the appellant swayed unsteadily. He then asked the appellant to perform a finger to nose test with his feet and knees together and he testified (T.70) that the appellant touched his finger to his upper lip. Officer Durrant then asked the appellant to walk an imaginary line, and on command, turn on his heel and return to the starting point. He testified (T.71) the appellant was walking the line "a fairly good job until he turned around" at which time he tended to lose his balance, but did not fall. Officer Durrant also asked the appellant (T.71) to walk around a flash light which had been placed on the ground in an upright position while bent over. He testified (T.72) the appellant was able to go around the flash light only twice. Trooper Durrant completed his investigation at the accident scene and then took the appellant (T.74) to his employer's shop on

Cudahy Lane, and then to the Davis County Jail. Trooper Durran asked the appellant at 8:40 P.M. (T.97) to take a "breathalyzer test which was administered to him at 9:50 P.M. on the evening of the accident. Test results taken on the Stevenson Corporation Breathalyzer, Model 900, reported a reading of .06 and were admitted into evidence as Exhibit "I" (T.175). One prosecution witness testified (T.48) she had observed the traffic light was green to the traffic on Center Street as she was approaching the intersection of Center Street and Highway 106 but that she did not observe the light at the time of the accident (T.49). Several witnesses for the defense testified (T. 183, 193, 202, 211) that they had observed the appellant just prior to the accident and subsequent to the accident, that they did not notice any peculiarity in the appellant's coordination or speech, and that in their opinion, he was not "drunk," although he was shaken up.

Lt. Newell G. Knight of the Utah Highway Patrol testified (T.105) that he was the technical supervisor of chemical testing for the State of Utah. He testified (T.140) that he had never drawn blood, nor had an occasion to be trained in checking blood. He also testified (T.141) that there was nothing in the operation of the breathalyzer that would convert breath alcohol by volume to blood alcohol by weight. Exhibits "H", a checklist for breathalyzer and "I", breathalyzer results, were offered into evidence and were objected to by defense counsel (T.151). Trooper Knight testified (T.244) that he had never actually, by his own experience,

as to what blood alcohol tests ran. He also testified (T.245) that the body rids itself of alcohol in a rather predictable fashion and that the body loses about one drink an hour, which equates to a 12 oz. can of beer (T.246). Trooper Knight was asked a hypothetical question (T.237) and allowed to testify (T.247) as to how much alcohol would be in a person's system after consuming 4 or 5 beers between 11:30 A.M. and 9:50 P.M.

Dr. Terry H. Rich, Deputy Medical Examiner for the State of Utah, testified (T.159) that he had studied toxicology and the metabolism of alcohol in the body. Dr. Rich testified (T.166) that the average body can burn off approximately 9 mililiters to 15 mililiters of alcohol per hour and (T.170) that there was a differentiation of 100% between the high and the low metabolism rate for alcohol. He further testified (T.171) there was no way of determining whether an individual, such as the appellant, could be at the top range or at the bottom range of metabolism and that to do so would be pure speculation.

Upon conclusion of the testimony the jury was given instructions (T.254) as set forth in 41-6-44 Utah Code Annotated 1953, as amended and (T.262) that their verdict must be:

- (1) Guilty of criminal homicide, or
- (2) Guilty of driving while under the influence of intoxicating liquor, a lesser included offense, or
- (3) Guilty of running a red light, a lesser included offense, or

(4) Not guilty.

The jury returned verdicts (R.66, 67, 68, 69) that the appellant was guilty of running a red light, guilty of driving while under the influence of intoxicating liquor, and not guilty of criminal homicide. The court entered an order (R.74) that the appellant serve a term of six months in the Davis County Jail and pay a fine of \$299.00. The appellant appeals that judgment.

POINT I

THERE WAS INSUFFICIENT EVIDENCE FOR A CONVICTION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL.

The jury, after deliberating for several hours, found the defendant not guilty of automobile homicide, 76-5-207, Utah Code Annotated, which required finding beyond a reasonable doubt the following elements.

- A. The defendant was driving an automobile (which is conceded).
- B. In Davis County, Utah (which is conceded).
- C. That there was simple negligence (the jury found the defendant guilty of running a red light.
- D. That the defendant was driving under the influence of alcohol (see Instruction No. 6), 41-6-44, Utah Code Annotated.

A review of the evidence shows that several of the State's witnesses and all of the defendant's witnesses observed the defendant, either immediately before or immediately after the accident or both, and none of that testimony suggests that he was impaired in any way at the time. (See State witness Mills testimony at T.21, witness Welton, T.39-40, Witness Wentz, T.50 and defense witness Lannie Lee Lloyd, T.185 and 190, Marcia Lloyd, T.195-197, Glenn Orvis France, T.204 and George A. Sanders, T.215)

Officer Durrant, Utah Highway Patrol, gave a series of coordination tests more than one hour after the accident that

were not satisfactory to the officer, but from reading the description of the tests by both Officer Durrant and Officer Mills, the tests could not be considered as conclusive in any way, especially with the realization that the defendant had been waiting for one and one-half hours after a violent accident.

Some three hours and fifty minutes after the accident, a breathalyzer test was taken at Farmington, Davis County, with a .06 percent blood alcohol by weight result. The State attempted to relate this test back to the time of driving, but their expert witness, Dr. Terry H. Rich, testified that from his experience different persons could vary in metabolism of alcohol by as much as one hundred percent (T.170) and that an extrapolation back as to any one individual could be purely speculative (T.171).

Other than the above described items of evidence there is no scintilla of evidence that the defendant was driving in an impaired condition arising from the use of alcohol.

POINTS II AND III

THE COURT ERRED IN ADMITTING EXHIBITS H AND I AS THERE IS NO EVIDENCE IN THE RECORD OF WHAT THE DEFENDANT'S BLOOD ALCOHOL BY WEIGHT WAS AT THE TIME HE WAS OPERATING THE AUTOMOBILE.

THE COURT ERRED IN INSTRUCTING THE JURY REGARDING STATUTORY PRESUMPTIONS ARISING FROM BLOOD ALCOHOL BY WEIGHT LEVELS AT THE TIME OF DRIVING.

Points II and III are so interrelated that they are discussed together.

The court, over objection of the defendant (T.151), admitted Exhibit H, the breathalyzer check list, and Exhibit I,

the breathalyzer machine result indicator card (T.171) and instructed the jury with regard to presumptions arising from blood alcohol by weight (see Instruction No. 12), which instruction was duly excepted to by defense counsel (T.284). The Court further instructed by Instruction 13 (T.258) that the only time the presumptions in Instruction 12 were applicable was at the time the defendant was driving or in actual control of the motor vehicle.

The test having been taken between three and one-half and four hours after the time of driving, there must necessarily be a relation back to the time of driving by expert testimony. (41-6-44.10, Utah Code Annotated)

The Legislature has since this occasion enlarged the presumption to hold over for one hour after the time of driving. At the time of the crime herein charged there was no such hold-over period. Furthermore, in the instant case the test was taken more than three and one-half hours after any driving by the defendant.

The State attempted to make this proof by Dr. Terry H. Rich, a pathologist, who frankly admitted that under the State's hypothetical question, any conclusion he could come to as to the status of the blood alcohol by weight at the time of driving would be "purely speculative".

The State then tried to qualify Lt. Newell G. Knight, Utah Highway Patrol, who frankly admitted that he had not tested blood and further claimed that there was no mechanical basis in the

breathalyzer that converted breath alcohol by volume to blood alcohol by weight, but claimed that the transition was made by "something that does that is the phenomena of a color change, of density, and that's what happens." (T.141, lines 24-26)

Despite this, the court allowed Lt. Knight to testify to the effect that a person who had five beers between 11:30 a.m. and 9:30 p.m. could not have a .06 percent blood alcohol by weight reading at 9:30 p.m. The question and answer were properly objected to (T.244-5).

The only evidence in the record with regard to the presumption is Lt. Knight's assumption, erroneously referred to as an opinion, that at 9:30 p.m. under the hypothetical question that the defendant's blood alcohol could not have been .06 percent.

There is no evidence of what it was at the time of driving, to wit, 5:45 p.m. to 6:00 p.m. Under the circumstances, giving the presumption instruction to the jury is reversible error.

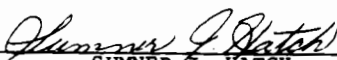
CONCLUSION

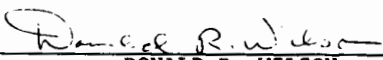
The defendant urges the court to make a thorough review of the record and in view of the entire absence of evidence as to the defendant's condition at the time of the accident, and due to the lack of adequate testimony or any relation back to the time of driving on the breath test, further on the basis that the court instructed the jury as to presumptions when there was no basis to

under Instruction No. 13 for relation back.

Defendant prays the court to reverse the verdict and judgment as to the charge of driving under the influence of intoxicants and remand the case back to the lower court under the misdemeanor charge only.

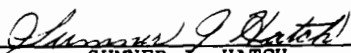
Respectfully submitted,


SUMNER J. HATCH


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I certify that two copies of the foregoing Brief of Defendant-Appellant were delivered to Robert B. Hansen, Attorney General of Utah, 236 State Capitol, Salt Lake City, Utah 84114, this 13th day of January, 1978.


SUMNER J. HATCH