

1977

State of Utah v. James W. Bradley : Brief of Plaintiff-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.

Robert S. Hansen; Assistant Attorney General;

Sumner J. Hatch; Attorney for Defendant-Appellant;

Donald R. Wilson; Attorney for Defendant-Appellant;

Recommended Citation

Brief of Respondent, *State v. Bradley*, No. 15307 (Utah Supreme Court, 1977).

https://digitalcommons.law.byu.edu/uofu_sc2/724

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

THE STATE OF UTAH,

Plaintiff-Respondent,

v.

Case No. 15307

JAMES W. BRADLEY,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

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

ROBERT B. HANSEN
Attorney General
BRUCE M. HALE
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

SUMNER J. HATCH
Attorney for Defendant-
Appellant
370 East 500 South
Salt Lake City, Utah 84111

DONALD R. WILSON
Attorney for Defendant-
Appellant
5630 Highland Drive
Salt Lake City, Utah 84121

TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
Point I	
THERE WAS SUFFICIENT EVIDENCE FOR A CONVICTION OF DRIVING UNDER THE IN- FLUENCE OF ALCOHOL.	5
Point II	
THE ADMISSION OF THE BREATHALYZER RE- SULTS AND THE ACCOMPANYING EXPERT TESTI- MONY INTO EVIDENCE WAS NOT PREJUDICIAL ERROR.	8
Point III	
THE COURT DID NOT ERROR IN INSTRUCTING THE JURY AS TO THE STATUTORY PRESUMPTIONS BASED ON BLOOD ALCOHOL LEVEL.	14
CONCLUSION	17
CASES CITED	
<u>State v. Peterson</u> , 21 Utah 2d 36, 210 P.2d 229 (1949) . .	5
<u>State of Ohio v. Fields</u> , 176 N.E. 2d 845 (1960)	5
<u>State v. Canfield</u> , 18 Utah 292, 422 P.2d 196, 197 (1967)	7
<u>State v. Sullivan</u> , 6 Utah 2d 110, 307 P.2d 212, 215 (1957)	7
<u>State Road Commission v. Silliman</u> , 22 Utah 2d 233, 448 P.2d 347 (1968).	8
<u>Lamb v. Bangart</u> , 525 P.2d 602 (1974).	9
<u>State of Utah v. Cannon</u> , 17 Utah 2d 105, 404 P.2d 971 (1965)	10, 12

<u>State of Idaho v. Sutliff</u> , 547 P.2d 1128 (1976)	11, 14
<u>People of Michigan v. Kozar</u> , 221 N.W. 2d 170 (1974) . .	11
<u>State of Arizona v. City Court of Tucson</u> , 487 P.2d 766 (1971)	11
<u>State of New Hampshire v. Gallant</u> , 227 A.2d 597 (1967)	11
<u>Toms v. State of Oklahoma</u> , 239 P.2d 812 (1952)	11
<u>State of New Mexico v. Trujillo</u> , 510 P.2d 1079 (1973)	14

STATUTES CITED

Utah Code Annotated, Title 76, Section 5	1
Utah Code Annotated 41-6-44	14
Utah Code Annotated 41-6-44.5	10, 12, 15

OTHER AUTHORITIES

42 A.L.R., at 1507	=
49 A. L. R., at 1397	

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

v.

JAMES W. BRADLEY,

Defendant-Appellant.

Case No. 15307

RESPONDENT'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 by a jury in Davis County before District Judge Thornley K. Swan 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 southerly. 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 (T. 224), 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., traveling several blocks to his brother-in-law's home where he consumed some beer (T. 224). He then started home, driving south on State Road 106. The pickup truck he was driving hit a vehicle eastbound on Center Street in the controlled intersection. 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 his arrival at the scene he assisted in the removal of the injured parties. He testified that he noticed an odor of alcohol about the Appellant; he, therefore, demonstrated and gave the the Appellant a "field sobriety test," (T. 65, 66) which consisted of many 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 left and then his right hand and he testified (T. 70) that the Appellant touched his finger to his upper lip instead of his nose. 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, and at that time he lost his balance and he had to step backwards to catch himself." Officer Durrant also asked the Appellant (T. 71) to walk around a flashlight 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 flashlight only twice and would have fallen had not the officer caught him. 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 Durrant 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).

Both Officer Mills (a North Salt Lake Police Officer who was at the scene at the time of the accident), and Officer Durrant testified that in his opinion Appellant was under the influence of alcohol.

At trial, other indications that Appellant had been driving under the influence of alcohol were brought out, such as empty beer cans (T. 19).

As foundation, with respect to his testimony concerning the breathalyzer results and alcohol burnoff rates, Lt. Newell G. Knight gave testimony concerning his qualifications as an expert. He testified as to his position of Technical Supervisor of Chemical Testing for the State of Utah and to his extensive training and experience with respect to breathalyzer machines and related matters (T. 105-108). He also testified that he was personally involved with numerous controlled experiments to ascertain the absorption and burnoff rates and that the breathalyzer machines were used in conjunction with these experiments (T. 239-241).

With respect to his expert testimony, Dr. Terry Rich testified that he was the Deputy Medical Examiner for the State of Utah and that he was a medical doctor and had had special pathological training (T. 153). Dr. Rich also testified that

he had training and experience as to toxicology and alcohol burnoff rates.

off rates.

The trial court was satisfied with these qualifications and admitted the expert testimony as to the probable content of intoxicants in the blood of the Appellant at the time of the accident.

ARGUMENT

Point I

THERE WAS SUFFICIENT EVIDENCE FOR A
CONVICTION OF DRIVING UNDER THE IN-
FLUENCE OF ALCOHOL.

In State v. Peterson, 21 Utah 2d 36, 210 P.2d 229 (1949), the evidence concerning intoxication was disputed. The trial court, in response to a request by defendant for a directed verdict summarily stated "We see no merit to Appellant's second point. The evidence of intoxication is in conflict. That is for the jury to determine."

The law is clear that circumstantial evidence, if probative and believable, is sufficient for a conviction of driving while intoxicated. It is equally clear that an appellate court won't substitute its judgment for that of the jury's. State of Ohio v. Fields, 176 N.E. 2d 845 (1960). With respect to the charge of driving while intoxicated, 42 A.L.R. at 1507 states the general policy that "Where there is evidence in the record from which the jury may infer that the accused drove...while under the influence of intoxicating liquor, a conviction will not be disturbed on appeal, though there is also evidence in the record to the contrary." 49 A.L.R. at 1397 states "Where the

evidence reasonably supports the verdict, its weight and credibility is for the jury, and, in the absence of unusual circumstances, the court will not set aside a judgment for insufficiency of the evidence."

If there is some believable evidence, then it is the jury's sole province to hear all the evidence, to determine the credibility of the witnesses, to observe the demeanor of the witnesses and the defendant, to give the evidence what weight it determines, and to make a final determination as to the facts of the case.

In this case, there is an abundance of evidence indicating that Appellant was driving under the influence of alcohol at the time of the accident. Appellant stated to Trooper Durrant that he had been drinking that day (T. 66, 224). Five empty cans of Coors beer, three empty cartons or containers and eight unopened cans of beer were found in Appellant's truck after the accident. Officer Mills also testified that when he first arrived at the accident, he saw Appellant standing by the door of his truck taking something from the seat and putting it behind the seat where the beer was found (T. 12, 19). Both Officer Mills and Officer Durrant gave their opinions, based on their training and actual observations of the Appellant at the scene that the Appellant was in fact under the influence of alcohol (T. 23, 81). Officer Mills stated that Appellant was belligerent and wouldn't cooperate at one point (T.21). Officer

Durrant smelled the odor of alcohol about the Appellant and

was told by the Appellant that he had been drinking (T. 66). Appellant performed inadequately on actual field tests demonstrated by Officer Durrant (T. 67-72), which could have benefited him. Breathalyzer results from a test administered approximately three hours and fifty minutes after the accident showed a blood alcohol level of .06 (T. 175), but was obviously not the sole consideration of the jury in a two-day trial.

The evidence presented by the officers and lay witnesses show that the jury made a reasonable decision clearly within their prerogative, and that verdict should be sustained.

In State v. Canfield, 18 Utah 2d 292, 422 P.2d 196, 197 (1967) this court stated:

It is our duty to respect the prerogative of the jury as the exclusive judges of credibility of the witnesses and as the determiners of the facts. Consequently we assure that they believed the state's evidence, and we survey it, together with all fair inferences that the jury could reasonably draw therefrom, in the light most favorable to their verdict.

In this particular case the jury, pursuant to all of the instructions given to them by the court, made a fair determination.

In State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212, 215 (1957), in which Sullivan had been convicted of second degree burglary and on appeal argued that the evidence was not sufficient to sustain the verdict, the Supreme Court affirmed the conviction stating the general principles of law:

Before a verdict may properly be set aside, it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly upon it must have entertained reasonable

doubt that defendants committed the crime. Unless the evidence compels such conclusion as a matter of law, the verdict must stand. The very essence of trial by jury is that the jury are the exclusive judges of the weight of the evidence, the credibility of the witnesses and the facts to be found therefrom. (Emphasis added).

Point II

THE ADMISSION OF THE BREATHALYZER RESULTS AND THE ACCOMPANYING EXPERT TESTIMONY INTO EVIDENCE WAS NOT PREJUDICIAL ERROR.

The trial judge was satisfied that the foundation laid for the admission of the breathalyzer results was adequate and that the experts for the State who testified were sufficiently qualified to testify.

Breathalyzer results are overwhelmingly accepted across the country as competent evidence when proper procedures are followed. It was clearly established in this case that the breathalyzer machine was in proper working order and that the test was administered properly.

As to the admissibility of expert testimony, Utah law is quite clear. In State Road Commission v. Silliman, 22 Utah 2d 233, 448 P.2d 347 (1968) it is stated:

The qualification of an expert witness is to be determined by the trial judge, and if he determines that a witness by reason of training and experience can assist the jury by giving an opinion on a matter properly before the court, we on appeal should not hold that testimony should be stricken unless such palpable ignorance of the subject matter is manifested by the witness as to indicate an abuse of discretion on the part of the trial judge.

In Lamb. v. Bangart, 525 P.2d 602, this court said:

The trial court is allowed considerable latitude of discretion in the admissibility of expert testimony, and in the absence of a clear showing of abuse, this court will not reverse. A challenge to the reliability of such expert testimony will be considered as not involving its competency but its weight and credibility, which is a matter for the jury to determine.

With respect to his testimony concerning the breathalyzer machine and results and alcohol burnoff rates, Lt. Newell G. Knight gave extensive testimony concerning his qualifications as an expert. He testified as to his position of Technical Supervisor of Chemical Testing for the State of Utah and to his extensive training and experience with breathalyzer machines and related matters (T. 105-108). He also testified that he was personally involved with numerous controlled experiments to ascertain alcohol absorption and burnoff rates and that breathalyzer machines were used in conjunction with these experiments (T. 239-241).

Dr. Terry Rich testified that he was the Deputy Medical Examiner for the State of Utah and that he was a medical doctor and had had special pathological training (T. 153). Dr. Rich also testified that he had training and experience as to toxicology and alcohol burnoff rates.

The trial court was satisfied with these qualifications and admitted the expert testimony and the jury was properly admonished and instructed that the real decision was theirs.

Certainly the trial judge did not abuse his discretion in determining that the experts' testimony would be of assistance to the jury.

Appellant contends that since the breathalyzer test was approximately three hours and fifty minutes after the accident, the results shouldn't be admissible into evidence.

For practical reasons, the chemical tests are always administered some time after a person is arrested. Due to the particular circumstances, the delay time always varies. When there has been a long delay, it has been the practice in this state to use expert testimony to relate the test results back to the time of the accident. This practice is codified in the 1965 enactment of Utah Code Annotated 41-6-44.5 which states:

In any action or proceeding in which it is material to prove that a person was driving under the influence of alcohol, the results of a chemical test or tests as authorized in 41-6-44.10 shall be admitted as evidence if the chemical test was taken within one hour of the alleged incident. The level of the alcohol determined to be in the blood by the chemical test shall be presumed to be not less than the blood alcohol level of the person at the time of the incident. If the chemical test was not taken within one hour after the alleged incident, the evidence of the amount of alcohol in the person's blood as shown by the chemical test is admissible if expert testimony establishes its probative value and the results of said test may be given prima facie effect if established by expert testimony. (Emphasis added).

This has always been the case law in Utah. In State of Utah v. Cannon, 17 Utah 2d 105, 404 P.2d 971 (1965), this court overruled a claim of remoteness and upheld the trial court's allowance of expert testimony.

There is a great deal of case law in other jurisdictions on this point which is helpful here. In the absence of clear statutory language requiring a relation-back, the apparent overwhelming view throughout the country is that breathalyzer results, if properly administered, are admissible even without any testimony relating back the results. Any question of time or delay between the accident and the administration of the test simply goes to the weight of the evidence and is a matter for the jury's consideration. These jurisdictions state that relating back the results is not necessary and that the evidence by itself without relation-back is competent and probative. See State of Idaho v. Sutliff, 547 P.2d 1128 (1976); People of Michigan v. Kozar, 221 N.W. 2d 170 (1974); State of Arizona v. City Court of Tucson, 487 P.2d 766 (1971); State of New Hampshire v. Gallant, 227 A.2d 597 (1967); and Toms v. State of Oklahoma, 239 P.2d 812 (1952).

These cases cite many other cases which have held similarly with reported delays being over four hours. State of Idaho v. Sutliff, State of New Hampshire v. Gallant, and Toms v. State of Oklahoma (*supra*), take note of the fact that admissibility of test results taken some time after the incident generally favor the defendant. State v. Kozar, *supra*, states the obvious relation-back by experts is permissible even though it is not required.

Appellant states in his brief that there must necessarily be a realtion-back citing the Utah Implied Consent Stat. as authority. The Implied Consent Statute says nothing at all concerning realtion-back or delay. Utah Code Annotated 41-6-4 (1977) simply allows a realtion-back by expert testimony if the test is given more than one hour after the incident. Again in State of Utah v. Cannon, supra, this court stated that delay is "a matter for expert medical testimony and the jury." In that case, expert testimony was used to relate back the test results simply to advise the jury.

The State offered testimony of two expert witnesses; without question were able to establish the probative value of the test results as evidence, i.e., they gave testimony which helped the jury relate back the results of the test to the time of the accident if they wanted to. Deputy Medical Examiner, Terry Rich, gave expert testimony as to alcohol burnoff rates. Doctor Rich testified that in approximately three hours and fifty minutes an individual who would burn off alcohol at the lowest end of the "burnoff range" would burn off .036 percentage units while an individual at the top of the range would burn off .072 percentage units (T. 171-174). Thus, the blood alcohol level approximately three hours and fifty minutes earlier could be .096 to .132 barring other factors. Another expert, Newell Knight, also testified concerning burnoff rates and gave his expert opinion that Appellant could not have achieved a breath

five beers that day, the first being consumed at 11:30 a.m., and the last at 5:45 p.m. Any testimony as to "burnoff" could help the defendant.

The facts upon which the expert opinions were based had been established, ie., that Appellant had nothing to eat all day and had allegedly only consumed four or five beers before leaving work. Upon leaving work at 5:45 p.m., he allegedly had no more alcohol that day. Appellant went to his brother-in-law's home where he consumed "some pieces of chicken." Within minutes after leaving there, he was involved in the accident. Newell Knight testified concerning alcohol absorption rates (T. 244-250). The absorption rate appears to have little impact with respect to the facts of this case since the alcohol was all allegedly consumed before Appellant ate the chicken, as was argued by the defendant. This was only one factor considered by the jury. The evidence of the breathalyzer results and the expert testimony was clearly helpful to the jury. The experts' testimony was based on personal experience and knowledge and facts made known at trial.

With respect to the authority cited and the facts of this case, it is clear that the admission of the breathalyzer results and the expert testimony into evidence was not error. The expert testimony relating back the results was competent and "helpful" evidence for the jury to consider and was properly admitted as being within the judge's discretion and not prejudicial when taken in the light of a two-day trial and substantial jury instructions.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.

Machine-generated OCR, may contain errors.

POINT III

THE COURT DID NOT ERROR IN INSTRUCTING THE JURY AS TO THE STATUTORY PRESUMPTIONS BASED ON BLOOD ALCOHOL LEVEL.

As indicated in Point II, if the test is given more than one hour after the alleged incident and expert testimony establishes some probative value of the results, those results are given prima facie effect and nonconclusive presumptions are applicable. If the test is given within one hour of the incident, then expert testimony is not required for the presumptions to be applicable. Again, it is helpful to review the law in other jurisdictions. State of New Mexico v. Trujillo, 510 P.2d 1079 (1973), states that the presumption instruction is proper if the implied consent statute has been complied with. In the case at bar, Utah's Implied Consent Statute was complied with in every respect. State of Idaho v. Sutliff, supra, states:

We hold that this statute does not require extrapolation back but establishes that the percentage of blood alcohol as shown by chemical analysis relates back to the time of the alleged offense for purposes of applying the statutory presumption. This holding is in accord with those of other jurisdictions who have considered the question.

The statute referred to is Idaho's "presumption" statute whose language "at the time of the alleged offense" is exactly similar to the language in Utah Code Annotated 41-6-44 which states "at the time alleged." The court goes on to give other citations and the reasons for its decision.

Appellant in his brief states "The legislature has since this occasion enlarged the presumption to hold over for an hour after the time of driving. At the time of the crime herein charged, there was no such holdover period." Appellant purportedly wants us to believe that before the 1977 amendment of Utah Code Annotated 41-6-44.5, expert testimony was required even within the one-hour period. The logical conclusion from case law is that the presumptions have always applied even without relation-back testimony and that the requirements of Utah Code Annotated 41-6-44.5 with respect to expert testimony if the time period is greater than one hour, is simply a codification of the common-law principles of evidence which are simply an attempt to get all truthful and helpful evidence before a jury.

In any event, the State of Utah in this case offered expert testimony relating back the results.

It is urged by Respondent that under pre-1977 Utah law, a presumption instruction is proper even without relating back test results. Furthermore, even if the court decides relation-back testimony was required, Respondent has duly complied and, therefore, a presumption instruction was not prejudicial error in light of the entire case.

It should be noted here that the presumption instruction was simply stated as being part of the applicable law, and left the decision to the jury. It started, "If there was at the time ..." (T. 257), without question, "if" leaves discretion to the jury.

The judge was careful to explain the nature of the presumption, ie., that it was not conclusive but to be considered along with the rest of the evidence (T. 258). The judge also explained the reasonable doubt notion many times (T. 258).

It cannot be said that the Instructions unlawfully prejudiced Appellant in any way. In instruction No. 1 the jury was admonished to exercise sincere judgment. In No. 3 they were admonished not to take the instructions as a statement of the facts. Instruction No. 5, which is the instruction complained of by the Appellant, also has a paragraph in it stating "If you believe" with a subsequent instruction to the jury to weigh the evidence. Of course, they were instructed that they must find "beyond a reasonable doubt" the elements of the offense. Instruction No. 13 was to the effect that any possible presumptions raised were to be applied only to the time that the defendant was driving a motor vehicle and that the presumptions must be so proved "to your satisfaction beyond a reasonable doubt by competent and believable evidence." They were also advised to determine the issues they must consider all of the facts immediately proceeding and surrounding the occurrence and not to be moved to a conclusion solely by the fact of an unfortunate result. They were instructed that the Appellant was presumed to be innocent until proven guilty beyond a reasonable doubt. In Instruction No. 18, the jury was instructed that they were the sole judges of the weight of the evidence and the credibility of the witnesses and the

facts. They were also told that they may consider any interest or bias that any witness may or may not have. Also, they were told "You are not bound to believe all that the witnesses may have testified to nor are you bound to believe any witness; you may believe one witness as against many or many as against one. In the light of the above observations, it is your privilege to judge the weight to be given to the testimony of the witnesses and to determine what the facts are." (Emphasis added).

Instruction No. 20 on expert opinions stated, "You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if, in your judgement, the reasons for it are unsound."

Therefore, we submit that the trial court did not error in its instructions to the jury with respect to the expert testimony offered and even if there was error, the error was certainly not prejudicial to the defendant. In fact, we submit that the expert testimony taken, because of the time elements involved, could have just as easily helped the Appellant's case as it could have possibly prejudiced it.

CONCLUSION

We, therefore, submit to this Honorable Court that there was sufficient evidence for the jury to convict the Appellant of the offense that he was sentenced for by the Trial Court. We also truly conclude that the expert testimony as to the breathalyzer results taken in light of the time period in-

volved, was properly weighed by the jury. The jury was able to consider the demeanor of the parties and the witnesses and they were properly instructed by the Trial Court to weigh all of that evidence in order to render their verdict. The court properly left the prerogative and the decision with the jury and, therefore, since the Appellant got a fair trial, this court should not overturn that jury verdict.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

BRUCE M. HALE
Assistant Attorney General

MAILING CERTIFICATE

Mailed 2 copies of the foregoing Brief of Plaintiff-
Respondent this ____ day of February, 1978, to Sumner J.
Hatch, 370 East 500 South, Salt Lake City, Utah 84111; and
Donald R. Wilson, 5630 Highland Drive, Salt Lake City, Utah
84121.
