

2008

State of Utah v. Joseph David Bosquez : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Utah v. Bosquez*, No. 20080158 (Utah Court of Appeals, 2008).

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The State of Utah
Plaintiff/Appellee

vs.

Joseph David Bosquez
Defendant/Appellant

In the Utah Court of Appeals
Case No.: 20080158-CA

Appellant's Corrected Opening Brief

Appeal from the Eighth District Court, Duchene County, Judge John R. Anderson

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FILED

UTAH APPELLATE COURTS

PARTIES

The parties in this case are as follows: Appellant is Joe David Bosquez, represented by Brett M. Kraus, Attorney at Law. Appellee is the State of Utah, which is represented by Ryan Tenney, Assistant Attorney General.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2
JURISDICTIONAL STATEMENT.....3
STATEMENT OF ISSUES AND STANDARD OF REVIEW.....3
CONSTITUTIONAL PROVISIONS.....5
STATEMENT OF THE CASE.....5
STATEMENT OF FACTS.....6
ARGUMENT.....7
 a. Ineffective Assistance of Counsel.....8
 b. Actual Physical Control.....10
CONCLUSION.....13
CERTIFICATE OF MAILING.....15

TABLE OF AUTHORITIES

Article I, Section 7 of the Utah Constitution
Article I, Section 12 of the Utah Constitution
4th Amendment to the U.S. Constitution

5th Amendment to the U.S. Constitution

6th Amendment to the U.S. Constitution

Utah Code Annotated §41-61-502

Utah Code Annotated §78A-4-103(2)(e)

Bodell Constr. Co. v. Robbins, 2009 UT 52, ¶16, 215 P.3d 933

Jensen v. Young, 2010 Utah 67

Ostler v. Buhler, 1999 UT 99, ¶ 5, 989 P.2d 1073 (1999)

Richfield City v. Walker, 790 P.2d 87, at 93 (Ut. App. 1990)

State v. Alfatlawi, 2006 UT App 511, ¶ 17, 153 P.3d 804

State v. Clark, 2004 UT 25, ¶ 6, 89 P.3d 162

State v. Cox, 2007 UT App 317, ¶ 10, 169 P.3d 806

State v. Litherland, 2000 UT 76, ¶ 19, 12 P.3d 92

State v. Tennyson, 850 P.2d 461, 468 (Utah Ct.App.1993)

Strickland v. Washington, 466 U.S. 668, 687 (1984)

JURISDICTIONAL STATEMENT

This court has jurisdiction over this case as this appeal pertains to an appeal of a final order of a criminal case, held in district court, a court of record, pursuant to Utah Code Annotated §78A-4-103(2)(e).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF

State v. Bosquez, Appellant's Corrected Opening brief 3 of 15

COUNSEL WHEN FAILING TO OBJECT TO HEARSAY EVIDENCE WHICH PROVIDED THE ONLY BASIS FOR THE STATE'S CONCLUSION THAT THE APPELLANT DROVE THE VEHICLE.

An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law,' which we review for correctness." *State v. Cox*, 2007 UT App 317, ¶ 10, 169 P.3d 806 (quoting *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162). To support an ineffective assistance of counsel claim, a defendant must demonstrate, first, "that counsel's performance was deficient" and, second, "that counsel's deficient performance was prejudicial." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In evaluating counsel's performance, " an ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions," *State v. Tennyson*, 850 P.2d 461, 468 (Utah Ct.App.1993), and "[w]here the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively," *Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92. To show prejudice, a defendant must establish that "there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Id.* at 694, 104 S.Ct. 2052.

2. THE APPELLANT DID NOT HAVE PHYSICAL CONTROL OF THE VEHICLE WHEN HE WAS INTOXICATED AND SLEEPING IN A VEHICLE, IN WHICH HE LIVED, WHETHER THE KEYS WERE IN THE IGNITION OR NOT.

For issues of fact, the court affords the jury's decision great deference, and "view[s] the facts and all reasonable inferences in the light most favorable to the nonmoving party." *Jensen v. Young*, 2010 Utah 67 (quoting *Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶16, 215 P.3d 933.) However, this issue deals with significant legal issues, for which the review is for correctness. *Ostler v. Buhler*, 1999 UT 99, ¶ 5, 989 P.2d 1073 (1999).

CONSTITUTIONAL PROVISIONS

Article I, Section 12 of the Utah Constitution provides the right of the accused to have the assistance of Counsel, which by its guarantee implies that the assistance would be effective. Article I, Section 7 of the Utah Constitution. Another provision is the 4th Amendment to the U.S. Constitution and its guarantee to be secure in one's house. Additionally counsel relies on Articles 5 and 6 of the U.S. Constitution.

STATEMENT OF THE CASE

Joe David Bosquez was convicted of Driving Under the Influence in

State v. Bosquez, Appellant's Corrected Opening brief 5 of 15

violation of Utah Code Annotated §41-61-502 before a jury of his peers on the 27th day of November, 2007. During the trial where this happened, Mr. Bosquez was represented by counsel, a Ms. Stephanie K. Miya, who represented Mr. Bosquez in this matter. Mr. Bosquez was sentenced in the case on January 31, 2008. In a timely manner following his conviction and sentencing, the Defendant, Mr. Bosquez, submitted his notice of appeal to the state requesting review of these facts and this court accepted the case. Defendant/Appellant through counsel now presents this argument for appeal requesting that this court either overturn his conviction or remand the charges for a new trial on the merits of the case.

STATEMENT OF FACTS

1. On November 3, 2006, appellant, Joe David Bosquez arrived in the parking lot of the Video & Sound of Roosevelt, Utah. Transcript, pg. 150, lines 15-23.
2. Mr. Bosquez was a resident of Cedar City, Utah, but was working in the Uintah Basin, near Roosevelt, Utah. Transcript, pg. 179, line 20; Transcript pg. 180, lines 6-22.
3. Mr. Bosquez was living in his car. Transcript pg. 182, line 12.
4. Mr. Bosquez received a ride from a coworker to the video store to rent a video for his birthday. Transcript, pg. 181, line 19 – pg 182, line 2.
5. After arriving at the store, the coworker driving the car left. Transcript pg. 182, lines 5-12.

6. After the coworker left, Mr. Bosquez went to the nearby Maverick, used the facilities and went to his car to sleep. Transcript pg. 182, line 22 – pg. 183, line 7.
7. After sleeping for a couple of hours, the defendant was awoken by an officer. Transcript pg. 183, lines 8-10; pg. 151, line 21 to pg. 152, line 15.
8. The car was not on when the officer arrived and the officer did not check to see if the car hood was warm or not. Transcript pg. 173, lines 10-12.
9. Everyone agrees that Mr. Bosquez was intoxicated on the night he was arrested. His blood alcohol level at the time of arrest was 0.269. Transcript pg 160, lines 6-12.
10. The officer testified at trial that the store clerk reported to dispatch that a person had driven to the parking lot and then leaned over the steering wheel and was asleep. Pg. 150, lines 15-19. The officer did not interview anyone from the store. Pg. 167, lines 10-22.

ARGUMENT

1. Did trial counsel provide ineffective assistance of counsel when failing to object to hearsay evidence which provided the only basis for the state's conclusion that the appellant drove the vehicle?
2. Did the appellant have physical control of the vehicle when he was intoxicated and sleeping in a vehicle, in which he lived, whether the keys were in the ignition or not?

I. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN FAILING TO OBJECT TO INADMISSIBLE HEARSAY EVIDENCE THAT WAS OVERLY PREJUDICIAL.

An attorney provides ineffective assistance of counsel when (1) trial counsel's performance was deficient by falling below an objective standard of reasonableness, and (2) trial counsel's deficient performance prejudiced [the d]efendant by depriving him of a fair trial." *State v. Alfatlawi*, 2006 UT App 511, ¶ 17, 153 P.3d 804 (internal quotation marks omitted); accord *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The right to effective counsel is a guarantee provided in both the Utah and U.S. Constitutions. *Utah Constitution* Article I, Section 12 and *U.S. Constitution* 4th Amendment. The right to counsel implies that the counsel will not only be licensed, but that they will be competent and diligent in working to assist their client through the often precarious legal world. When an attorney fails to meet the standard at which they should perform, they fail their client and the client should not be blamed for their fault.

In this case, the failing of the attorney was a failure to protect the client from highly damaging inadmissible testimony. The only testimony in this case that the state was able to produce that the defendant drove the vehicle came from hearsay testimony repeated by the officer that indicated that a store clerk watched a person drive into the parking lot and then lean over and fall asleep on the wheel. *Transcript of Jury Trial* pg. 150, lines 15-19. There is no indication that the

witness was able to positively confirm that the person sleeping in the car was the person driving the vehicle. There is no indication how well the clerk could see the car, nor if they saw any passengers, or other indication that someone other than the defendant was in the vehicle. There is no indication that the officer ever questioned the clerk who made the statement, creating even more doubt in the translation given by the officer in his testimony on the stand. The only statement was ambiguous as to the identity of the driver.

This testimony was unreliable at best, and was extremely prejudicial as it placed seeds in the jury's mind that would have formed an impression that the appellant had actually been driving the vehicle, in spite of an overwhelming lack of evidence to support that claim. Further this evidence could have been excluded under Utah Rules of Evidence 801, because it is hearsay not covered by any of the hearsay exceptions.

Compounding this error is the fact that Trial Counsel failed to object to the instruction stating that the defendant could be found guilty if it was found that they had driven the vehicle. The state failed to produce any legitimate evidence that the defendant had driven the vehicle. It is clear that with this instruction the jury was allowed to consider this possibility in their deliberation and could have relied on the hearsay statement provided by the officer that the Defendant had been seen driving the vehicle.

Failure to object to the introduction of this evidence, and allowing an instruction that a defendant would be found guilty if it was determined that he had driven the car prejudiced the defendant, allowing the jury to convict on actual driving and not merely being in actual physical control, thus calling into question the validity of the jury's decision in this case.

Because trial counsel failed to object to the damning hearsay, we cannot conclude that the jury actually convicted on reasonable and reliable evidence and the case should be remanded for a new trial so that an impartial jury can rehear the case without the unfounded prejudicial hearsay testimony.

II. A PERSON IS NOT IN ACTUAL PHYSICAL CONTROL OF A VEHICLE FOR PURPOSES OF DRIVING UNDER THE INFLUENCE WHEN THAT PERSON LIVES IN THEIR VEHICLE AND IS SLEEPING IN THAT VEHICLE.

As a matter of policy, when a person is drunk at night, the best place for them to be is in a place where they are not likely to hurt others or themselves. When a person who is drunk returns home to sleep and rest, they are going to a place of seclusion and rest. It is important to note that the officer needed to spend a significant effort to wake the appellant up. He had gone into the car to sleep, just as someone with a non-portable dwelling would go to their bed.

The defendant went to the best place possible to seclude himself until he could sleep off his impairment. The fact that he slept in his car establishes a basis that his car, at the time it was set to the side of the road, was no longer acting as a

vehicle for the purposes of the law, but was rather acting as a dwelling.

There are interesting cases on this issue, namely *State v. Barnhart* and *Richfield city v. Walker*, where the court determined that a person sleeping in the driving seat of a vehicle was in actual physical control of the vehicle, when the keys were in the ignition, because the person could wake up and decide to move the vehicle at any time.

The position officers found Mr. Bosquez in is distinguished from those cases because in both of those cases, the defendants had attempted or intended to go somewhere else. In *Barnhart*, the defendant indicated that he was planning on having his girlfriend take him home. His final destination was not the store, staying at the store appeared to be just a temporary stop. In *Walker*, the defendant had attempted to secure lodging at a hotel, which was full, and could well have hunted for a new hotel.

In the present case, Mr. Bosquez's residence during the week was his car. He testified that he would sleep in his car, in different spots at night. His final destination that night was his car; he was not a big risk of wanting to go somewhere else. The normal idea is that a person who is drunk should not be in physical control of a vehicle, but not that a person who is legally intoxicated should not sleep in their residence, even if that residence is a vehicle. Surely the legislature could not have intended to make homeless a person who lives in their

car simply because they are intoxicated. In fact, the case law reads:

“[W]e look to the totality of the circumstances to determine whether defendant was in actual physical control of his vehicle. Relevant factors for making this determination include, but are not limited to the following: (1) whether defendant was asleep or awake when discovered; (2) the position of the automobile; (3) whether the automobile's motor was running; (4) whether defendant was positioned in the driver's seat of the vehicle; (5) whether defendant was the vehicle's sole occupant; (6) whether defendant had possession of the ignition key; (7) defendant's apparent ability to start and move the vehicle; (8) how the car got to where it was found; and (9) whether defendant drove it there.” *Richfield City v. Walker*, 790 P.2d 87, at 93 (Ut. App. 1990).

The law is supposed to consider the whole picture and not just the handful of evidence, which allows this court to take into consideration the special circumstances of this case and find that for the purposes of Utah Code Annotated 41-61-502, Mr. Bosquez was not in actual physical control of the vehicle.

When considering the factors set forth in *Richfield*, we apply the factors to this case, the officer approaching Mr. Bosquez indicated that it took him some time to wake up Mr. Bosquez, who had clearly settled in for the night. The car was found parked in a parking spot at a local movie rental store. The motor was off. The defendant was sitting in the driver's seat, the defendant was then the sole occupant of the vehicle, the defendant had possession of the ignition key, and had the apparent ability to start and move the vehicle.

Factors 8 and 9 appear to have conflicting evidence, but there was no evidence presented that should have been admitted, that would indicate that Mr.

Bosquez drove the vehicle to that spot. In fact the only admissible testimony as to how the vehicle arrived at that spot was from Mr. Bosquez himself, who indicated that a coworker had driven him to that spot and then left him in the parking lot. The prosecution only challenged this determination, but presented no legitimate evidence that Mr. Bosquez had driven.

Now that we see the clear breakdown of the elements, we consider their importance. The only circumstances that fall against the defendant are the factors that indicated that he was alone in the vehicle, with possession of the keys, and that he could have started the car when he awoke. Given only these factors, it seems that the appellant could have had actual physical control of the vehicle, but that would ignore an important element of this case, that the appellant was living in his car at the time he was sleeping in his vehicle. With this factor, the location of the keys is less important in this circumstance than what Mr. Bosquez's behavior was. Mr. Bosquez was asleep, to such a degree that the officer had to knock on the door "several times"¹ and tap him on the leg before Mr. Bosquez could be awakened.² The car was parked late at night in the parking lot of a store, in a position where the driver is likely to have gotten a quiet night's sleep.

CONCLUSION

The case should be dismissed, because no evidence that should have been

¹ Trial Transcript pg. 152, line 6.

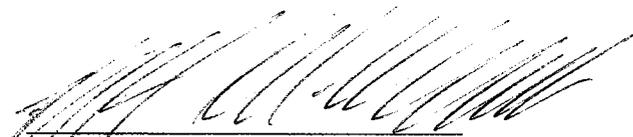
² Trial Transcript pg. 152, lines 7-9.

admissible provided any proof that the appellant drove the vehicle. Additionally, given the totality of the circumstances, it is evident that the defendant was going to sleep for the night at the parking lot of the Video & Sound, video rental store, making it such that it would be inappropriate for the court to determine that the defendant had actual physical control of the vehicle.

In the alternative, because trial counsel was ineffective in preventing prejudicial evidence from being introduced to the jury, they prevented the jury from making a fair decision and a new trial should be ordered.

Dated this 15th day of December, 2010.

BRETT M. KRAUS



Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Appellant's Corrected Opening Brief* was mailed to the following this 25th day of December, 2010:

Ryan Tenney
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FILED
UTAH APPELLATE COURTS
JAN - 3 2011

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee,

vs.

JOE DAVID BOSQUEZ,

Defendant/Appellant.

ADDENDUM

Case No.: 20080158-CA

Appellant, Joe David Bosquez, by and through his attorney, hereby submits the addendum containing an unsigned copy of the final order and judgment in this case for the following reasons:

1. Appellant does not have an original copy of the order, but is attempting to secure an original copy.
2. Counsel believes that the unsigned edition is identical to the signed copy.
3. Therefore, Appellant requests that this court accept the unsigned order as the addendum until Appellant is capable of obtaining a signed copy.

Dated this 27th day of December, 2010.

BRETT M. KRAUS

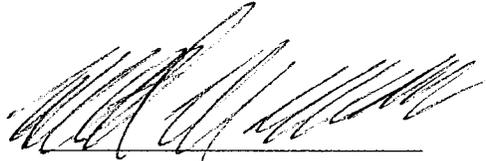


Brett M. Kraus
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Addendum* was mailed to the following this 28th day of December, 2010:

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH
DUCHESNE COUNTY, ROOSEVELT DEPARTMENT

---000O000---

STATE OF UTAH, : JUDGMENT AND ORDER
Plaintiff, :
vs. : Criminal No. 061000417
 :
JOE DAVID BOSQUEZ, :
Defendant. : Judge John R. Anderson

---000O000---

DRIVING UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS - A THIRD DEGREE FELONY

ALCOHOL RESTRICTED DRIVER - A CLASS B MISDEMEANOR

The above-entitled case came before the Court for Sentencing on Thursday, January 31, 2008, the Honorable Judge John R. Anderson presiding. The defendant was present with his attorney, Stephanie Miya. The State of Utah was represented by Grant H. Charles, Deputy Duchesne County Attorney. The Court and the parties had received and reviewed the Pre-Sentence Investigation Report prepared by Adult Probation and Parole. Statements were made by counsel for the parties and the defendant.

NOW THEREFORE, based upon the file and record herein, it is hereby ORDERED,

ADJUDGED AND DECREED as follows:

That the defendant has been convicted by a Jury of the offense of **Driving Under the Influence of Alcohol and/or Drugs, a Third Degree Felony**, in violation of Section 41-6a-502 UCA (1953) as amended. That the defendant has been convicted by his own plea of guilty of the offense of **Alcohol Restricted Driver, a Class B Misdemeanor**, in violation of Section 41-6a-530 UCA (1953) as amended.

That for the offense of **Driving Under the Influence of Alcohol and/or Drugs, a Third Degree Felony**, it is hereby ordered that the defendant is sentenced to serve an indeterminate term of not to exceed five (5) years in the Utah State Prison. That for the offense of **Alcohol Restricted Driver, a Class B Misdemeanor**, it is hereby ordered that the defendant is sentenced to serve a term of six (6) months in the Duchesne County Jail. Said prison and jail sentences shall run concurrently with each other.

The foregoing prison and jail sentences are suspended and the defendant is placed on supervised probation with Adult Probation and Parole for a period of three (3) years upon the following terms and conditions:

1. The defendant shall serve 365 days in the Duchesne County Jail. The defendant shall report to the jail no later than 12:00 noon, Friday, February 8, 2008. The jail sentence shall be reviewed on May 8, 2008.
2. The defendant shall pay fines in the sum of \$2,000 on terms set forth by Adult Probation and Parole.
3. The defendant shall enter into and successfully complete substance abuse treatment and any aftercare recommended by the treatment facility. At the jail review on May 8, 2008, the Court will decide if the treatment shall be in-patient or out-patient.

4. The defendant shall install an ignition interlock device on any vehicle registered to him, and he shall not drive any vehicle without a ignition interlock device installed.
5. The defendant shall not possess or consume alcohol or illegal controlled substances or be where alcohol or illegal controlled substances are being possessed or consumed.
6. The defendant shall abide by any curfew imposed by Adult Probation and Parole.
7. The defendant shall sign a consent to release form to allow Adult Probation and Parole or the Court to monitor his treatment.
8. The defendant shall reimburse Duchesne County for his indigent counsel expenses in the sum of \$500.

DATED this _____ day of February, 2008.

BY ORDER OF THE COURT

JOHN R. ANDERSON
DISTRICT COURT JUDGE

Approved as to form:

Stephanie Miya
Attorney for Defendant

State of Utah vs. **Joe David Bosquez**
Criminal No. 061000417

CERTIFICATE OF DELIVERY

I hereby certify that on the 1st day of February, 2008, I delivered a true and correct copy of the foregoing Judgment and Order to:

Stephanie Miya
Attorney at Law
PO Box 711819
Salt Lake City UT 84171

by depositing in her box at the Duchesne County Justice Center, Duchesne, Utah.



Legal Assistant