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Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

JERALD WIXOM GREAVES,
Plaintiff-Respondent,

vs.

STATE OF UTAH,
Defendant-Appellant.

Case No.
13631

BRIEF OF APPELLANT

APPEAL FROM THE MEMORANDUM DECISION IN THE FIRST JUDICIAL DISTRICT COURT, IN AND FOR CACHE COUNTY, STATE OF UTAH, THE HONORABLE VENOY CHRISTOFFERSON, JUDGE, PRESIDING.

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IN THE

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JERALD WIXOM GREAVES,
Plaintiff-Respondent,

vs.

STATE OF UTAH,
Defendant-Appellant.

Case No. 13631

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This case was a declaratory judgment action filed under Utah Code Ann. §§ 78-33-1, 2 (1953), against the State of Utah complaining that Utah Code Ann. § 41-6-44.2 (Supp. 1973) and 41-2-18 (Supp. 1973), are unconstitutional.

DISPOSITION IN THE LOWER COURT

In the District Court of the First Judicial District, in and for Cache County, State of Utah, on February 26, 1974, Judge Venoy Christofferson found Utah Code Ann. § 41-6-44.2 (Supp. 1973), unconstitutional. He made no ruling on the constitutionality of Utah Code Ann. § 41-2-18 (Supp. 1973).

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RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the decision and order of Judge Christofferson declaring Section 41-6-44.2, *supra*, unconstitutional, or in the alternative a remand of the case to the lower court so that a full and complete hearing on the merits of the case may be obtained.

STATEMENT OF FACTS

The proceedings in this case were initiated by the filing of a complaint by respondent on November 23, 1973, in the First District Court complaining that two statutes under which he had been charged were unconstitutional. However, the defendant had not been charged in the District Court, but rather, in the Logan City Court. For this reason, the complaint filed on November 23, also asked for a stay of the proceedings in the city court pending a determination by the district court of the constitutionality of the statutes in question.

The respondent in this case, Jerald Greaves, was arrested on August 1, 1973, by a Logan City police officer and was charged with driving while under the influence of alcohol under Section 42-6-1, Logan City Ordinance. Respondent pleaded not guilty to the charge and trial was set for September 24, 1973, in Logan City Court. Just prior to the trial date, Logan City dismissed the complaint and then charged respondent with the same offense under Utah Code Ann. § 41-6-44.2 (Supp. 1973). Apparently, the police officers had taken a blood alcohol test of respondent's blood, and it was alleged in the com-

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plaint filed by respondent in the district court that the state would attempt to introduce the results of said test in evidence at the trial, and that the results of the test allegedly showed a .12 percent blood alcohol content. (See Complaint, p. 1.)

It was on the basis of this new charge that respondent filed the complaint in District Court asking for the stay of the lower court proceedings and alleging that the statute, Utah Code Ann. § 41-6-44.2, *supra*, was unconstitutional as applied to him. The State of Utah, represented by the Attorney General, made a motion for a more definite statement which was granted by Judge Venoy Christofferson of the First District Court. An amended complaint was filed by respondent, and the Attorney General responded to this amended complaint with a motion to dismiss predicated largely upon procedural allegations and this motion was answered by a memorandum from the respondent.

After the filing of appellant's motion to dismiss and respondent's memorandum, both parties were awaiting a decision on the motion and anticipating the setting of a trial date in the event the motion to dismiss was denied. No hearing or oral argument was held on the motion pursuant to Rule 13 of the First District Court (see Appendix No. 1). Instead of ruling on the motion, Judge Christofferson rendered a memorandum decision on the merits of the case without holding a hearing on the matter. Thus, appellant never had the opportunity to argue the merits of the case in open court, and for that matter, never

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received a specific ruling on his motion to dismiss. Appellant immediately filed a notice of appeal to this Court.

Subsequently, the respondent prepared an order which should have been in conformance with the Court's Memorandum Decision. This order did not conform to the Court's decision, but was based upon other grounds. For this reason, appellant prepared a motion to strike the order and also submitted a new order which Judge Christofferson determined to be in accordance with his decision and which he subsequently signed.

The respondent filed a memorandum opposing appellant's motion to strike and appellant's order, but the judge refused to reconsider the matter. Thus, the order submitted by appellant has been signed and approved by the judge of the lower court as an accurate statement of his holding. The appellant in this case now appeals Judge Christofferson's ruling that Utah Code Ann. § 41-6-44.2, *supra*, is unconstitutional. More specifically, appellant appeals from Judge Christofferson's holding expressed in the following Memorandum Decision (quoted in its entirety):

> "The plaintiff herein has asked the court for a declaratory judgment asking the court to declare unconstitutional Section 41-6-44.2 of the Utah State Code, wherein such provides as follows:
>
> "It is unlawful and punishable as provided in subsection (b) of this section for any person with a blood alcohol content of .10 per cent or

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greater by weight to drive or be in actual physical control of any vehicle within this state."

Section 41-6-44, which has not been repealed, states:

"It is unlawful and punishable as provided in subsection (d) for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state."

and then sets up certain presumptive standards. Section 41-6-44.2 states only that if it is proved that your blood alcohol content is .10 per cent or greater by weight it is unlawful to drive a vehicle, with no relation to how the blood alcohol content of .10 per cent or greater by weight is achieved--that is, by drinking intoxicating liquor.

It is the opinion that there must be stated in the statute some relation of the blood alcohol content being .10 per cent or greater to some act of the person so charged, such as drinking intoxicating liquor. There are ways, of course, in which a person could have .10 per cent by weight of alcohol in his blood with no criminal intent involved or even knowledge of the .10 per cent, yet this statute makes it an offense simply by that fact alone. For example, a person's physican may advise him to take Nyquil for a cold or whatever is experienced to give relief for a cold, which is twenty-five per cent alcohol or fifty proof, and I am sure other medical remedies are available with greater or lesser amounts of alcohol that could cause

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a person to be in violation of this statute, or even possibly some prescriptions, injections or otherwise by a doctor could cause the same result.

The court, therefore, declares the statute is unconstitutional for vagueness. Counsel for the plaintiff is requested to prepare an order in conformance with this Memorandum Decision. DATED February 26, 1974."

ARGUMENT

POINT I.

IT IS NOT A REQUIREMENT, EITHER OF THE STATE OR FEDERAL CONSTITUTION, THAT A STATUTE EXPRESS OR REQUIRE *MENS REA* AS A NECESSARY ELEMENT OF A CRIME SUCH AS THE ONE IN QUESTION.

The memorandum decision rendered by Judge Christofferson may be interpreted in one sense as declaring the statute, Utah Code Ann. § 41-6-44.2 (Supp. 1973), unconstitutional because it does not require an act of a person to constitute a crime. Point III, *infra*, will show that an act of the person is in fact required by the statute before a crime is committed. However, the other, more likely interpretation of the decision is that the statute is unconstitutional because it does not express or require criminal intent as a necessary element of the crime. This interpretation is buttressed by the court's

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statement, "There are ways, of course, in which a person could have .10 percent by weight of alcohol in his blood with no *criminal intent* involved or even *knowledge* of the .10 percent, yet this statute makes it an offense simply by that fact alone." (Emphasis added.) P. 1, Memorandum Decision.

The United States Supreme Court, as well as this Court, has long recognized a particular class of crimes which, because of the potential damage to the public welfare which can result from doing or neglecting to do a certain act, have not required criminal intent as an element of the crime. A very good discussion of history surrounding this development is found in *Morissette* v. *United States*, 342 U. S. 246, 96 L. Ed. 288, 72 S. Ct. 240 (1952), beginning at 72 S. Ct. 243. The point is made, that while traditionally all crimes required some kind of *mens rea*, scienter, or criminal intent to signify evil purpose or mental culpability, there has been a tendency in the last hundred years or so to formulate new duties and crimes which disregard any ingredient of intent.

The reason for this development and the situations to which it applies are stated here in the words of the Court:

> "The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. *Traffic of velocities, volumes and varieties un-*

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heard of came to subject the wayfarer to intolerable casualty risks if owner and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undereamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trade, properties or activities that affect public health, safety or welfare.

While many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called "public welfare offenses." These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it im-

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> poses a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. *In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.* The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." (Emphasis added.) *Id.* at 245-246.

The court then goes on to hold that a state which prohibits the embezzlement or stealing of public property and does not specifically eliminate intent as an element will be construed as requiring intent. But, the important point for our purposes is that there is a class of crimes for which intent is not a necessary element. The Court in *Morissette, supra,* specifically sustains the rulings in three earlier Supreme Court cases which had not required

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intent in respect to particular crimes. Those cases were: *United States* v. *Balint*, 258 U. S. 250, 66 L. Ed. 604, 42 S. Ct. 301 (1922); *United States* v. *Behrman*, 258 U. S. 280, 66 L. Ed. 619, 42 S. Ct. 303 (1922); and, *United States* v. *Dotterweich*, 320 U. S. 277, 88 L. Ed. 48, 64 S. Ct. 134 (1943). All of these cases dealt with Federal statutes and dealt with drug and foods, therefore meeting the requirement that they be "public welfare" offenses. A more recent case dealing with Federal regulations is *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 29 L. Ed. 2d 178, 9 1S. Ct. 1697 (1971). The Court there acknowledged the line of cases mentioned above by saying: There is leeway for the exercise of congressional discretion in applying the reach of "*mens rea.*" 91 S. Ct. at 1701.

There is no federal constitutional requirement, at least so far as Congress is concerned, that all crimes contain a "*criminal intent*" element. There is a recognized class of crimes for which it is not necessary. The court has not laid down a precise line of demarcation between the two classes, but there are two classes:

> "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static. The conclusion reached in the *Balint* and *Behrman* cases has our approval and adherence for the

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circumstances to which it was there applied." *Morissette v. United States,* 72 S.Ct. at 248.

The next question is to determine what restraints, if any, are placed on the states by the federal constitution as to whether they can pass statutes not requiring *mens rea* as an element of a crime. A fairly recent United States Supreme Court case, *Smith* v. *People of the State of California,* 361 U. S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1960), rehearing denied, 361 U. S. 950, 4 L. Ed. 2d 383, 80 S. Ct. 399, held:

> " . . . it is doubtless competent for the states to create strict criminal liabilities by defining criminal offenses without any element of scienter though . . . there is precedent in this Court that the power is not without limitation." *Id.* at 217.

A more recent case, *Powell* v. *Texas,* 392 U. S. 514, 20 L. Ed. 2d 1254, 88 S. Ct. 2145 (1968), points out:

> " . . . *this Court has never articulated a general constitutional doctrine of mens rea.*
>
> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the

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> evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. *This process of adjustment has always been thought to be the province of the States.*" (Emphasis added.) *Id.* at 2156.

While there may be some limitations on the state power to enact strict criminal liability statutes, it is generally within the province of the states to make these determinations. The *Powell* decision appears to be the most recent relevant pronouncement of the Supreme Court on the question of what requirements the Constitution imposes on the states in respect to *mens rea.* The problem has not yet been totally clarified on the federal level, see *United States* v. *International Minerals, supra,* and *United States* v. *Freed,* 401 U. S. 601, 28 L. Ed. 2d 356, 91 S. Ct. 1112 (1971), but at least the states are free to fashion crimes which do not require scienter. Some recent state decisions recognizing this fact are: *State* v. *Vietor,* 208 N. W. 2d 894 (Iowa 1973); *State* v. *Medlin,* 273 So. 2d 394 (Fla. 1973); *Gregory* v. *State,* 291 N. E. 2d 67 (Ind. 1973); *State* v. *Husser,* 290 A. 2d 425 (R. I. 1972); *Wright* v. *State,* 236 So. 2d 408 (Miss. 1970); *Coats* v. *Commonwealth,* 469 S. W. 2d 346 (Kent. 1971).

While it is recognized that certain states have reservations about so-called strict liability crimes, this Court has recognized such crimes. *State* v. *Twitchell,* 8 Utah 2d 314, 333 P. 2d 1075 (1959), dealt with a similar question. The defendant in this case claimed "that the legis-

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lature had substituted the status of being under the influence of drugs or liquor for criminal intent formerly required before one could be convicted of a felony." *Id.* at 1077.

The Court answered this argument by saying:

> "So far as the question of the present statute being unlawfully discriminatory is concerned, this court has held that all that is required is that the statute apply equally to all members in the class and that as long as there is a valid reason for a classification by the legislature, their determination of the class will not be disturbed. Neither, so far as we are aware, is there any constitutional prohibition against legislative substitution of an admittedly unlawful status for the required criminal intent in a felony prosecution. *For example, criminal intent is not necessary to support a conviction of unlawful cohabitation.*" (Emphasis added.) *Id.* at 1077.

The precedent for this statement is found in *State* v. *Barlow*, 107 Utah 292, 153 P. 2d 647 (1944), a bigamy case in which the defendant claimed that since he felt that having more than one wife was not evil, but rather God-inspired, he could not have the necessary criminal intent to violate the statute. It is quite clear in this state that the legislature may enact statutes which may be violated without the element of criminal intent.

While the particular statute presently in issue has

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not been before the court, other similar statutes have been. In 1930, the Court, in *State* v. *Johnson*, 76 Utah 84, 287 P. 909 (1930), said:

> "Operating an automobile on a public street or highway by one under the influence of intoxicating liquor is itself an unlawful act and an offense. . . ."

Furthermore, this Court said in *State* v. *Brennan*, 13 Utah 2d 195, 371 P. 2d 27 (1962), "It is within the prerogative of the legislature to make it unlawful for one to drive a vehicle while under the influence of liquor . . ." *Id.* at 29. It will be recalled that the United States Supreme Court, in talking about the class of crimes which did not require intent, referred to them as "public welfare offenses." See *Morissette* v. *United States*, 72 S. Ct. at 246. This Court has clearly categorized statutes prohibiting persons from driving under the influence of alcohol as being in this realm. The court in *Salt Lake City* v. *Kusse*, 97 Utah 113, 93 P. 2d 671 (1939), characterized driving under the influence of intoxicating liquor as "definitely and closely related to the safety of the inhabitants and the preservation of property." *Id.* at 672. Thus, a crime which consists of driving while intoxicated can certainly be classified as a "public welfare offense." See also *United States* v. *Greenbaum*, 138 F. 2d 437 (3d Cir. 1943):

> "Where the offense prohibited and made punishable are capable of inflicting widespread

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> injury, and where the requirement of proof of the offender's guilty knowledge and wrongful intent would render enforcement of the prohibition difficult if not impossible (i.e., in effect tend to nullify the statute), the legislative intent to dispense with mens rea as an element of the offense has justifiable basis."

As will be shown later, there is good cause for the legislature to prohibit a person from driving while his blood alcohol content is .10 percent or higher. The danger to property and life is readily apparent when it is shown that substantial impairment of a person's ability to drive results from that much alcohol being present in his system.

The conclusion must be that it is clearly within the prerogative of the legislature to enact statutes not requiring proof of *mens rea* or criminal intent. This is especially true in situations which may have a significant impact on the public, the so-called "public welfare offenses." The dangers to the public are readily apparent from the medical and statistical evidence which has been accumulated in respect to alcohol-related offenses and the impairment of a driver's faculties when there is .10 percent of alcohol in his blood. (See Point V.)

Finally, the lower court's statement that a person's blood alcohol level could reach the statutory level as a result of that person taking prescribed medication without the person having criminal intent is irrelevant. The fact remains that such persons still present a danger to

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the welfare and safety of the citizens of the state when such persons choose to operate a motor vehicle while in that condition, and the legislature has just as legitimate an interest in enacting a statute making such persons criminally liable without a showing of criminal intent since such would still be a "public welfare offense" statute. See *People of the State of New York* v. *Calcasola*, 349 N. Y. S. 2d 958 (1973), wherein the court found an operator of a motor vehicle whose ability to operate the vehicle impaired by use of prescribed methadone in violation of the New York statute.

Thus, appellant submits that Section 41-6-44.2, *supra*, is clearly not unconstitutional merely because a criminal intent element is not specified therein.

POINT II.

ALTHOUGH UTAH CODE ANN. § 41-6-44.2 (SUPP. 1973), NEED NOT INCLUDE A REQUIREMENT OF CRIMINAL INTENT TO REMAIN CONSTITUTIONAL (SEE POINT I), THE UTAH LEGISLATURE HAS ENACTED A GENERAL CRIMINAL INTENT STATUTE WHICH APPLIES TO STATUTES SUCH AS SECTION 41-6-44.2, *SUPRA*, WHICH DO NOT SPECIFICALLY CONTAIN A CRIMINAL INTENT ELEMENT THEREBY PROVIDING SUCH STATUTES WITH AN INTENT ELEMENT.

The opinion of the First District Court assumes that

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if criminal intent is not specifically mentioned in a criminal offense statute, the statute is unconstitutional. It was demonstrated in Point I that there is no constitutional requirement or doctrine of *mens rea.* The conclusion in Point I is further reinforced by the fact that the Utah Legislature, in enacting the new Criminal Code in 1973, specifically provided for "strict liability" offenses. See Utah Code Ann. § 76-2-101 (Supp. 1973). However, in enacting this Code Section, the Utah Legislature also stated (for purposes of construction only) that in Utah all offenses which are not specifically designated as strict liability offenses should require a "culpable mental state" or *mens rea.* Section 76-2-101, *supra,* provides as follows:

> "*Requirements of criminal conduct and criminal responsibility.* -- No person is guilty of an offense unless his conduct is prohibited by law and:
>
> (1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each element of the offense as the definition of the offense requires; or
>
> (2) His acts constitute an offense involving strict liability."

Utah Code Ann. § 76-2-102 (Supp. 1973), further provides:

> "Every offense not involving strict liability shall require a culpable mental state, *and when the definition of the offense does not specify a culpable mental state, intent, know-*

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> *ledge, or recklessness shall suffice to establish criminal responsibility.* An offense shall involve strict liability only when a statute defining the offense clearly indicates a legislative purpose to impose strict liability for the conduct by use of the phrase 'strict liability' or other terms of similar import." (Emphasis added.)

Thus, although the Legislature required that each offense not specifically designated a strict liability offense have a culpable mental state element, the legislature did *not* go so far as to require that each statute defining a non-strict liability criminal offense specifically contain a *mens rea* element. Instead, Section 76-2-102, *supra*, was enacted as a general *mens rea* provision to be used in conjunction with, applied to, and read together with those non-strict liability statutes lacking an intent provision. Section 76-2-102, *supra*, thus, applies much like Utah's attempt statute, Utah Code Ann. § 76-4-101 (Supp. 1973), which is read together with other criminal statutes to provide all of the elements of a particular attempt crime. For example, the crime of attempted burglary is found by reading Utah Code Ann. § 76-4-101, *supra*, together with Utah Code Ann. § 76-6-202 (Supp. 1973).

The remaining question is whether Sections 76-2-101 and 102, *supra*, apply to Title 41 of the Code, or whether they only govern the construction of the Criminal Code, Title 76.

The answer to this question is found in Utah Code Ann. § 76-1-103 (Supp. 1973):

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"*Application of code--Offense prior to effective date.*--(1) The provisions of this code shall govern the construction of, the punishment for, and defenses against any offense defined in this code or, *except where otherwise specifically provided or the context otherwise requires, any offense defined outside this code;* provided such offense was committed after the effective date of this code.

(2) Any offense committed prior to the effective date of this code shall be governed by the law, statutory and non-statutory, existing at the time of commission thereof, except that a defense or limitation on punishment available under this code shall be available to any defendant tried or retried after the effective date. An offense under the laws of this state shall be deemed to have been committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto." (Emphasis added.)

In other words, unless otherwise specifically provided or the context otherwise requires, any offense, committed after the effective date of the Criminal Code and defined elsewhere in the Utah Code, shall be governed by the provisions of the Criminal Code in respect to the construction of, the punishment for, and defenses against such offenses.

Therefore, Section 76-2-102, *supra*, may be read together with Section 41-6-44.2, *supra*, since the latter section does not specify a culpable mental state nor does

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it specifically designate a strict liability offense, and it must be proved that the defendant acted intentionally, knowingly or recklessly in order to obtain a conviction. In other words, one of the enumerated forms of mental culpability, listed in Section 76-2-102, *supra*, must be proved in connection with the conduct prohibited in Section 41-6-44.2, *supra*.

Therefore, Judge Christofferson wrongly interpreted Section 41-6-44.2, *supra*, as having eliminated any criminal intent or knowledge as a necessary element of the crime since Section 76-2-102, *supra*, provides Section 41-6-44.2, *supra*, with an intent element. Thus, the lower court judge's declaration that the statute is unconstitutional for lack of an intent element is untenable.

POINT III.

SECTION 41-6-44.2, *SUPRA*, DOES EXPRESS SOME RELATION BETWEEN BLOOD ALCOHOL CONTENT AND AN ACT OF THE PERSON CHARGED.

Part of Judge Christofferson's Memorandum Decision provides that "there must be stated in the statute some relation of the blood alcohol content being .10 percent or greater to some act of the person so charged, such as the drinking of intoxicating liquor." As was expressed in Point I, it is unclear whether this holding declares Section 41-6-44.2, *supra*, unconstitutional because it allegedly does not require an act of a person to constitute

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a crime, or whether the statute is unconstitutional for lack of a *mens rea* element. Points I and II discuss and resolve the latter interpretation. It is the purpose of this Point to resolve the former construction of the court's holding.

Utah Code Ann. § 41-6-44.2(a), *supra*, reads: "It is unlawful and punishable as provided in subsection (b) of this section for any person with a blood alcohol content of .10 percent or greater, by weight, *to drive or be in actual physical control of any vehicle* within this state." (Emphasis added.)

It is clear from reading this statute that the act which must be performed by a person to constitute a violation of this statute is to be in "actual physical control of" or "to drive" a vehicle while the person has a blood alcohol content of .10 percent or greater. Two elements of the crime which must be proved are the blood alcohol content of the person, and whether he was in actual physical control of the vehicle. This reading of the statute shows that there must be an act done while in a certain condition to constitute a violation. Therefore, the lower court's determination that the statute is unconstitutional because it lacks some relation of the blood alcohol content to some act of the person charged is erroneous and unfounded.

POINT IV.

CONTRARY TO THE LOWER COURT'S DE-

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CISION, SECTION 41-6-44.2, *SUPRA*, IS NOT VOID FOR VAGUENESS.

While it is not clear from the Memorandum Decision of Judge Christofferson what basis there is for saying that Section 41-6-44.2, *supra*, is vague, the Court declared "the statute is unconstitutional for vagueness." The statute, on its face, is manifestly clear. It reads:

> "It is unlawful . . . for any person with a blood alcohol content of .10% or greater, by weight, to drive or be in actual physical control of any vehicle in the state."

This Court laid down the standard for judging the uncertainty or vagueness of a statute in *State* v. *Packard*, 122 Utah 369, 250 P. 2d 561 (1952):

> "It must be sufficiently definite (a) to inform persons of ordinary intelligence, who would be law abiding, what their conduct must be to conform to its requirements; (b) to advise a defendant accused of violating it just what constitutes the offense with which he is charged, and (c) to be susceptible of uniform interpretation and application by those charged with responsibility of applying and enforcing it." *Id.* at 376.

In applying these standards to the statute in question, it is clear that a person of ordinary intelligence would know that if his blood alcohol content is .10 percent and he drives his car while in this condition, he may be pun-

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ished. It may be contended that a person cannot tell when his blood alcohol content is .10 percent, but this is a specious argument for several reasons. First of all, he knows if he has been drinking at all that he should exercise caution. Secondly, it is possible to correlate a certain number of drinks of various types of alcoholic beverages with a certain blood alcohol level and this information is available and is advertised frequently (see Point V). Thirdly, if a person really is concerned he can obtain his own balloon test mechanism and test himself.

In respect to standard (b) above, the offense is driving or being in actual physical control of a vehicle in the state with the requisite blood alcohol level. It is clear this language adequately advises of the offense.

Standard (c) is met since the blood alcohol content level to constitute the offense is the same for everyone and the person must be in control of a vehicle. In fact, this statute is susceptible of more uniform interpretation and application than most criminal statutes since it is so precise. It is clear from an examination of this statute that it meets or exceeds all of the requirements set forth by this Court to sustain its validity.

POINT V.

SECTION 41-6-44.2, *SUPRA*, IS CONSTITUTIONAL SINCE THE LEGISLATURE HAD A RATIONAL BASIS FOR MAKING UNLAWFUL AND CRIMINALLY PUNISHABLE THE CONDUCT OF DRIVING OR

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BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE HAVING A BLOOD ALCOHOL CONTENT OF .10 PERCENT OR GREATER.

The basic question to be answered here is whether the legislature has the power to enact such a statute. The general principle regarding the legislature's power to define criminal offenses is as follows:

> "The legislative power of a state or the federal government covers every subject of legitimate legislation except so far as it is limited by constitutional provisions. Therefore, the legislature has the power to define what acts shall constitute criminal offenses . . . and generally to enact all laws deemed expedient for the protection of public and private rights and the prevention and punishment of public wrongs, the expediency of making any such enactment being a matter of which the legislature is the proper judge." 1 *Wharton's Criminal Law and Procedure* (Anderson Ed.) § 16, p. 25.

The Supreme Court of Utah expressed their acceptance of the aforementioned principal in *Brim* v. *Jones*, 11 Utah 200, 39 P. 825, *aff'd*, 165 U. S. 180 (1895):

> "It is in the discretion of the legislature to regulate the use of the highways. . . ." *Id.* at 826.

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See also *Bamberger Transp. Co.* v. *Public Service Comm.*, 115 Utah 274, 204 P. 2d 163, 165 (1949).

The Court articulated the parameters of the legislative power to enact driving while intoxicated statutes in *State* v. *Twitchell*, 8 Utah 2d 314, 333 P. 2d 1075 (1959), as follows:

> "If the legislature sees fit to single out the unlawful act of driving while intoxicated as being in a special classification, we think it is within their legislative prerogative to do so." *Id.* at 1078.

Furthermore, this Court stated in *State* v. *Brennan*, 13 Utah 2d 195, 371 P. 2d 27, 29 (1962), that "it is within the prerogative of the legislature to make it unlawful for one to drive a vehicle while under the influence of liquor . . ."

It is therefore apparent that the Utah State Legislature can enact driving under the influence of alcohol legislation. The United States Supreme Court defines the presumptions to be afforded to statutes of proper legislative subjects in *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734, 58 S. Ct. 510, *reh. den.*, 303 U. S 667, 82 L Ed. 1124, 58 S. Ct. 510 (1938):

> "When the action of the legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and priority are not for the determination of courts,

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> but for the legislative body, on which rests the duty and responsibility of decision. . . Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility." *Id.* at 517.

In *Railway Express Agency* v. *People of State of New York*, 336 U. S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949), the appellant challenged a traffic regulation which was enacted to protect the safety of the public in the use of the streets. The court held as follows:

> "We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. . . We would be trespassing on one of the most intensly local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation." *Id.* at 465.

Finally, the foundational precepts regarding the constitutionality of a legislative act were articulated in *Great Salt Lake Authority* v. *Island Ranching Co.*, 18 Utah 2d 45, 414 P. 2d 963 (1966), as follows:

> " . . . that all presumptions favor validity; that courts will strike down such an act with reluctance and only where that is clearly necessary; and that in case of uncertainty the act

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should be construed so that it will be constitutional whenever that reasonably can be done." *Id.* at 47.

The object sought to be attained by Utah Code Ann. § 41-6-44.2, *supra,* is a reduction in alcohol related highway accidents. This object and its relation to blood alcohol content was recognized in *Breithaupt* v. *Abram,* 352 U. S. 432 (1957), by the following observation:

> "The test (to determine alcohol content) upheld here is not attacked on the ground of any basic deficiency or of injudicious application, but admittedly is a scientifically accurate method of detecting alchol content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication. Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoided, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous." *Id.* at 439.

One means selected by the Utah State Legislature to attain the object of reducing alcohol related highway accidents was to define being "under the influence" in terms of blood alcohol level in a concentration of 0.10 percent by weight. That the established level is reasonable cannot seriously be questioned.

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The *Public Information Programs on Alcohol and Highway Safety* (1972), point out that "people don't seem to realize (that) it takes an enormous amount of liquor to get to 0.10" and that "drinking behavior very rarely reaches the level of those arrested for drunk driving."

In *Public Information Programs on Alcohol and Highway Safety* (1972), which is a collection of proceedings of a national conference of governmental, commercial and involuntary organizations, the following was emphasized:

> "The Department of Transportation . . . is soliciting public support of efforts to obtain uniform legislation in the various states, fixing a blood alcohol level of 0.10 as presumptive of intoxication." *Id.* at 37.

In 5 *Journal of Safety Research* (1973), a National Safety Council Publication, it was pointed out that Europeans feel that the United States permissible standard for blood alcohol content is "ludicrously liberal." In Sweden, when a driver is apprehended with a mere 0.05 percent blood alcohol content there is a mandatory two year license revocation, three months imprisonment, and insurance cancellation. The higher Brtish standard of 0.08 percent blood alcohol content carries with it a fine of 100 pounds and a one year suspension of the motorist's driver's license or up to four months in jail, or both.

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A recently published American Medical Association manual, which tabulates the results of 36 studies conducted from 1934 through 1965 to determine the relationship between blood alcohol levels and driving ability concludes:

> "It is apparent that impairment in some drivers commence at a low level and 0.04 percent w/v (40 mg./100 ml) seems to be the threshold. Of equal importance is the rapid increase in involvement in accidents and deterioration of driving skill at levels of 0.08 percent w/v (8 mg/100 ml) and above. Based on all these data there is no question but that there is epidemiological evidence of an association between blood alcohol levels and the likelihood of being involved in a vehicular accident." *Alcohol and the Impaired Driver,* American Medical Association publication, 01-86 G; 170-2M; OP-288 (1970), at page 58.

Leading researchers on alcohol and traffic safety, including R. N. Harger, Henry Newman, Herman Heise, T. A. Loomis, Leonard Goldberg, D. W. Penner and H. W. Smith, concluded as follows:

> "It is the opinion of this committee that a blood alcohol concentration of .05% will definitely impair the driving ability of some individuals, and as blood alcohol concentration increases, a progressively hightr proportion of such individuals are so affected, until at a blood alcohol concentration of .10% all individuals

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are definitely impaired." *Alcohol and the Impaired Driver: A manual on the Medicolegal Aspects of Chemical Tests for Intoxication;* Committee on Medicolegal Problems, American Medical Association. 1968. p. 146.

The debates of the 1973 Utah State Legislature regarding the merit of H. B. 56 which was later codified as Utah Code Ann. § 41-6-44.2 (Supp. 1973), indicate that the Legislature realized and acted upon the rational scientific and medical connection between a driver's blood alcohol content and his likelihood of being involved in a traffic accident. The bill received bi-partisan support and was overwhelmingly approved in both houses. See *House Journal* 217, 560 (1973), and *Senate Journal* 531 (1973).

The chief sponsor of H. B. 56, Rep. Lynn M. Hilton, spoke in favor of the bill before the House of Representatives on January 24, 1973, and before the Senate on February 15, 1973. Rep. Hilton stated that state and national surveys indicated that one-half of all traffic accidents are alcohol related and that H. B. 56 was designed to increase highway safety and in turn reduce the number of traffic fatalities and injuries. The prohibited 0.10 percent blood alcohol content level was medically and scientifically shown to be rational and proper by the following analysis presented by Rep. Hilton and with the aid of the State Department of Public Safety.

The Representative stated that a blood alcohol content of .02 percent was likely to cause poor driving habits.

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A blood alcohol content of .05 percent will affect the judgment and decision time of most drivers. A blood alcohol content of .08 percent will limit the vision and coordination of drivers and further distort judgment and decision time. Finally, when the blood alcohol content reaches the .10 percent level, all physical and mental functions of *all* drivers are adversely affected.

On January 24, 1973, Rep. Richard P. Lindsay indicated that there was a demonstrated cause and effect relationship between the level of blood alcohol and the increased possibility of being involved in a traffic accident. The representative presented several charts which were prepared in connection with the State Department of Public Safety which demonstrated that the probability of a traffic mishap greatly increased when a driver had .10 percent or above blood alcohol content.

In conclusion, it has long been judicially recognized that it is a legislative prerogative to regulate the highways. Thus, the legislature may constitutionally use the police power to make it unlawful for one to drive a vehicle while under the influence of alcohol, and in turn promote the safety and welfare of the citizens of the State. After the passage of such legislation, it is not the judicial function to determine whether the measure is sound or appropriate, but merely to determine whether the legislature felt that the regulation had some rational relation to the traffic probem. It is evident that the scientific, medical, legal and judicial authorities agree that a blood alcohol concentration of .10 percent will definitely

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impair the driving abilities of all drivers. It is therefore safe to conclude that there is a rational connection between Utah Code Ann. § 41-6-44.2, *supra*, and the Utah State Legislature's decision to term such conduct criminal.

POINT VI.

THE LOWER COURT JUDGE VIOLATED THE UTAH RULES OF CIVIL PROCEDURE AND ALSO ABUSED HIS DISCRETION WHEN HE GRANTED THE RELIEF PRAYED FOR BY THE PLAINTIFF WITHOUT A HEARING AND WITHOUT A MOTION FOR SUMMARY JUDGMENT.

As the statement of facts describes, the plaintiff-respondent in this case filed a complaint which was answered by the defendant-appellant with a motion to dismiss for failure to state a claim upon which relief may be granted. Plaintiff filed a memorandum in response to the motion to dismiss and the parties awaited a decision on the motion. The court then, instead of ruling on defendant's motion, granted the relief prayed for by the plaintiff by ruling on the merits of the case in a memorandum decision, which amounted to summary judgment in plaintiff's behalf. At no time did plaintiff file a motion for summary judgment under Rule 56, Utah Rules of Civil Procedure, or a motion for judgment on the pleadings under Rule 12(c), Utah Rules of Civil Procedure. In fact, the response to defendant's motion to

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dismiss by plaintiff prayed that the motion to dismiss be denied. It did not ask for a judgment on the pleadings or on the merits of the case.

It is clear that a Rule 12(b)(6), Utah Rules of Civil Procedure, motion to dismiss for failure to stay a claim may be construed, in certain circumstances, as a motion for summary judgment under Rule 56,*supra*. However, that motion was made by defendant and that motion was apparently denied (although it was never formally ruled on). Rule 56, *supra*, further entitles parties to move for summary judgment and the court may grant such a motion, but only if "the moving party is entitled to a judgment as a matter of law." Rule 56(c), Utah Rules of Civil Procedure. So, even if defendant's Section 12(b)(6) motion could be treated as a Rule 56 motion for summary judgment, only the moving party (defendant) could be granted summary judgment absent the filing of a similar motion by plaintiff, which would thereby make him a moving party also.

The harm which has arisen in this particular case from the court's disregarding these procedures is that defendant-appellant was not afforded the opportunity to completely argue the merits of his case and all of the issues were not fully presented to the court before Judge Christofferson rendered his Memorandum Decision. If, in fact, the plaintiff-respondent had filed a motion for summary judgment, the defendant would have been entitled to respond to that motion. Then all of the grounds upon which summary judgment could be based could

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have been argued. Rule 12(b), *supra*, seems to contemplate a full airing of the issues if a motion to dismiss is treated as a motion for summary judgment. The last sentence of that rule concludes, ". . . all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Rule 8, Utah Rules of Civil Procedure, further provides that "all pleadings shall be so construed as to do substantial justice." Appellant submits that the court's construction of his motion to dismiss as one for summary judgment (if that is in fact what was done) did not do substantial justice, but precluded appellant from fully presenting his case.

A further complication arises because the parties in this case were deprived of any hearing on the matter. Rule 13(D) of the First District Court (see Appendix No. 1), reads:

> "*Decisions* shall be rendered without oral argument unless oral argument is *requested by the court,* in which event the Clerk shall set a day and time for hearing such argument." (Emphasis added.)

It appears from this rule that only the court rather than the parties can request a hearing on a motion. The harshness of such a rule needs little explanation. In the present case, the ruling of the court, pursuant to the Court's Rule 13, which did not allow a hearing, constituted a final judgment on the merits of the case.

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Finally, it may be argued that appellant was given due notice that the court could render a "decision" on the merits of the case without a hearing based upon the language of the First District Court's Rule 13(D), which was mailed to appellant at the outset of the proceedings. However, the heading of Rule 13 is entitled "ORDER PERTAINING TO LAW AND MOTION" and a reading of the entire Rule leads the reader to conclude that the rule deals only with the court's procedure on treating and disposing of motions and that the term "decisions" in subparagraph (D) refers only to "decisions" on all *motions* being made by the court without oral argument unless oral argument is requested by the court. Thus, appellant awaited the court's ruling on his motion to dismiss never anticipating that the court would render a "decision" adverse to him on the entire merits of the case.

Based on above analysis as well as the concept that parties are entitled to a full hearing in order to satisfy the requirements of justice and due process, appellant contends that the court violated the Utah Rules of Civil Procedure and abused its discretion by handling this case as it did.

CONCLUSION

Appellant respectfully submits that Utah Code Ann. § 41-6-44.2 (Supp. 1973), is constitutional for the following reasons:

1. There is no constitutional requirement that a

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criminal statute require criminal intent as an element.

2. Utah Code Ann. § 76-2-102 (Supp. 1973), "lends" an intent element to Section 41-6-44.2, *supra*, thereby eliminating the argument that the latter statute lacks such an element.

3. Section 41-6-44.2, *supra*, does express some relation between blood alcohol content and an act of the accused.

4. Section 41-6-44.2, *supra*, is not void for vagueness.

5. The Utah Legislature had a rational basis for making the conduct described in Section 41-6-44.2, *supra*, criminal in nature.

For the above reasons, the lower court's decision declaring the Code Section in question unconstitutional is improper and should be reversed.

In the alternative, appellant submits that since he was never afforded a full and complete hearing on the merits of the case by the lower court, at the very least he is entitled to have the case remanded to the lower court so that such a hearing may be obtained.

Respectfully submitted,

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APPENDIX NO. I

NO. 13

IN THE DISTRICT COURT OF CACHE, BOX ELDER, & RICH COUNTIES

ORDER PERTAINING TO LAW AND MOTION

(A) All motions shall be accompanied by points and authorities and any affidavits relied upon.

(B) Responding party shall file and serve upon all parties within ten days after service of a motion answering points and authorities and counter affidavits.

(C) Moving party may serve and file reply points and authorities within five days after service of responding party's points and authorities. Upon the expiration of such five day period to file reply points and authorities, the Clerk shall submit the matter to the Court for decision.

(D) Decisions shall be rendered without oral argument unless oral argument is requested by the court, in which event the Clerk shall set a date and time for hearing such argument.

(E) In all cases where the granting of a motion would dispose of the action on the merits with prejudice, the party resisting the motion may request oral argument to the court. If no such request is made, oral arguments will be deemed to have been waived.
Dated August 4, 1970.

Venoy Christofferson
District Judge

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