

1979

# Ogden City Corporation v. Bill Joe Parker : Appellant's Brief On Appeal

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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OGDEN CITY CORPORATION,	)	
Plaintiff and Respondent,	)	Case No. 15460
vs.	)	
BILL JOE PARKER,	)	
Defendant and Appellant.	)	

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APPELLANT'S BRIEF ON APPEAL

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Appeal from the Judgment of the Second Judicial  
District Court in and for Weber County, State  
of Utah, the Honorable Calvin Gould presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

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OGDEN CITY CORPORATION, )

Plaintiff and Respondent, )

Case No. 15460

vs. )

BILL JOE PARKER, )

Defendant and Appellant. )

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STATEMENT OF POINTS

The evidence does not show that the Defendant-Appellant was in actual physical control of the motor vehicle.

STATEMENT OF KIND OF CASE

The Defendant-Appellant was convicted of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor contrary to the provisions of Section 14-15-1 of the Revised Ordinances of Ogden City, 1965 Revision.

DISPOSITION IN LOWER COURT

The case was tried to the Court from a verdict and judgment for Ogden City, Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks a reversal of the verdict and judgment and the judgment in his favor as a matter of law.

### STATEMENT OF FACTS

This appeal is based on the record and the transcript in this matter. All references to the record are designated as (R) and all references to the transcript are designated as (T).

On April 2, 1977, within the corporate limits of Ogden City, the Defendant-Appellant was found behind the steering wheel of his car. The car was on a lawn in front of a house. Its rear wheels were buried to the axle in mud. the front of the car was resting on the base of a "dead end" or "yield" sign that had been broken off by the impact of the car (T23, Exhibit 1). The arresting officer testified that there were three (3) men in the car, Parker behind the steering wheel, Hicks in the right front seat, and a third person named Stanger in the rear seat (T 11, 27, 28). The officer does not assert that Defendant-Appellant Parker drove the vehicle to the place where it was found on the lawn and the officer had also charged Hicks with driving the Parker vehicle while under the influence of intoxicating liquor (T28, 30,31).

The officer testified that the motor of the vehicle was running, the rear wheels were spinning but were buried to the axle in the mud (T 25), the front end of the car was stuck on the base of the dead end sign that had been broken off (T 23). The officer stated that in his opinion there was no

way the car could have been moved by the efforts of Parker, that it was impossible to drive the car away (T 23, 28, 29). Parker testified the car was driven to that position by Stanger, Parker was in the middle of the front seat and Hicks was in the right front seat; that at the time the officer arrived Stanger had gotten out of the left front and Parker had slid over and was attempting to exit the left front door (T 32, 33). The officer testified that Parker was trying to extricate the car by accelerating and shifting the gears (T 27). Parker denied this (T 33). A chemical sobriety test was refused by Parker; no field tests were administered; the officer was of the opinion that Parker was under the influence of intoxicants (T 26).

#### POINT I

THE EVIDENCE DID NOT SHOW THAT THE DEFENDANT-APPELLANT WAS IN ACTUAL PHYSICAL CONTROL OF THE VEHICLE.

Defendant-Appellant was charged with "driving or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor, contrary to the provisions of Section 14-15-1 of the Revised Ordinances of Ogden City (R-9). The ordinance under which Defendant-Appellant was charged was enacted pursuant to the authority given to the city by 41-6-43, Utah Code Annotated, 1953, and is in substance identical to 41-6-44 (a), Utah Code Annotated, 1953, in that it provides that "It shall be unlawful for any person who is under the influence of intoxicating liquor to drive or

be in actual physical control of any vehicle within Ogden City".

It is the contention of the Defendant-Appellant that where the vehicle was on the lawn, not in the roadway, the front end being raised a foot off the ground on the stub of the signpost, the rear wheel being embedded to the axle in mud and it was impossible for the automobile to be driven away as the officer testified that the Defendant-Appellant was not in the actual physical control of the motor vehicle as contemplated by the statute.

Our Court has previously discussed and defined the phrase "actual and physical control" in the case of State vs. Bugger, 483 P2d 442.

"That part of the statute which states: "be in actual physical control of any vehicle" has been before the courts of other jurisdictions which have statutes with similar wordings. The word "actual" has been defined as meaning "existing in act or reality; \* \* \* in action or existence at the time being; present; \* \* \*." The word "physical" is defined as "bodily," and "control" is defined as "to exercise restraining or directing influence over; to dominate; regulate; hence, to hold from actions; to curb.: The term in "actual physical control" in its ordinary sense means "existing" or "present bodily restraint, directing influence, domination or regulation."

As was rightly observed by Justice Ellett in his assenting opinion, the statute 41-6-44, Utah Code Annotated, 1953 was amended to prevent an intoxicated person in charge of an automobile from getting on the highway and wreaking havoc by



getting into traffic and injuring himself and others.

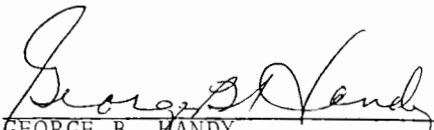
(State vs. Bugger, 483 P2d at Page 443)

It is the position of the Defendant-Appellant that the present case is a stronger case for finding the Defendant-Appellant was not in "actual physical control" than the Bugger case. In the Bugger case, the defendant could have roused himself from sleep or stupor, turned on the ignition key, driven onto the highway and thus, posed a dangerous threat to himself and others. In the present case, the Parker vehicle could never have been driven onto the roadway, the front end was raised a foot in the air by the post, the rear wheels were immersed in the mud to the axle. The officer's observation was correct that it would have been impossible to move the car by driving it. If it was impossible to move the car by driving it, Parker certainly was not in actual physical control in that in the words of the Bugger case there was no "actual" control in that there was no control "existing in act or reality". There was no "physical control" in that Parker was not able to "exercise restraining or directing influence over; to dominate; regulate; to hold from action; to curb". Parker could not move the vehicle forward, backward or sideways. He did not present a threat to anyone. There was no way he could have injured himself or others in the operation of the vehicle.

### CONCLUSION

The evidence shows that because of the impossibility of a driver, whether intoxicated or not, to move the vehicle from its position off the roadway by driving it the Defendant. Appellant was not in actual physical control of the vehicle and the judgment of the Court should be reversed.

Respectfully submitted this 3rd day of November, 1977.

  
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I certify that I mailed two copies of the foregoing to Ralph Johnson, Esq., Attorney for Plaintiff-Respondent, City and County Building, Ogden, Utah 84401, this \_\_\_\_ day of November, 1977.

  
Secretary