

1988

Utah v. Toni L. Vigil : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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THE COURT OF APPEALS OF THE STATE OF UTAH

A10

DOCKET NO.

880095-CA

STATE OF UTAH,

:

Plaintiff-Respondent,

:

v.

:

TONI L. VIGIL,

:

Case No. 880095-CA
Priority #2

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Driving Under the Influence, a Class B Misdemeanor, following a jury trial held in the Fifth Circuit Court, in and for Salt Lake County, West Valley Department, State of Utah, the Honorable Tyrone E. Medley presiding.

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THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	
TONI L. VIGIL,	:	Case No. 880095-CA
Defendant-Appellant.	:	Priority #2

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this court pursuant to Utah Code Ann., Section 78-2a-3(2) (c), (1953), and Utah Code Ann. Section 77-35-26(b) (1), (1953) whereby a defendant in a criminal case may take an appeal to the Court of Appeals from a final judgment of conviction. In this case, the Appellant was found guilty after a jury trial held in the Fifth Circuit Court, Salt Lake County, West Valley Department, the Honorable Tyrone E. Medley presiding.

STATEMENT OF ISSUES

1. Did the State of Utah fail to establish adequate foundation to demonstrate the accuracy and reliability of the Intoxilyzer machine for admissibility of the breath test given to the Appellant?
2. If the results of the Intoxilyzer test given to the Appellant were improperly admitted into evidence by the Trial Court, was this error prejudicial to the Appellant?

TEXT OF STATUTES

UTAH CODE ANN. §44-6-44(1)(a)(1953)

DRIVING UNDER THE INFLUENCE OF
ALCOHOL OR DRUG OR WITH HIGH
BLOOD ALCOHOL CONTENT

It is unlawful and punishable as provided in this section for any person with a blood alcohol content of .08% or greater by weight, or who is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely driving a vehicle to drive or be in actual physical control of a vehicle within this state.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	
TONI L. VIGIL,	:	Case No. 880095-CA
Defendant-Appellant.	:	Priority #2

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Appellant, Toni L. Vigil, appeals from a judgment and conviction of Driving Under the Influence (DUI), a Class B misdemeanor in violation of Utah Code Ann. 46-6-44(1)(a) (1953). Appellant was convicted in a jury trial held on January 15, 1988, in the Fifth Circuit Court, West Valley Department, the Honorable Tyrone E. Medley presiding.

STATEMENT OF FACTS

On October 3, 1987, the Appellant Toni L. Vigil was arrested for the offense of Driving Under the Influence by Trooper David Poplemeyer of the Utah Highway Patrol. (R. p.1, 2). The Appellant entered a plea of not guilty, and a jury trial was held on the date of January 15, 1988. At the jury trial, the following evidence was presented:

Testimony of Trooper Poplemeyer

Driving Pattern

Trooper Poplemeyer testified that he observed a yellow Fiat in the area of 3500 South 3200 West on the date of October 3, 1987, at 2:00 a.m. (Tr. p. 61, L. 14-22). At this time, he observed that the vehicle crossed over the white lane markers by 1 1/2 ft. to 2 ft. as it was proceeding West on 3500 South. (Tr. p. 61, L. 22-24). The Trooper stated that he followed the Fiat from 3200 West to 5600 West. He pulled over the vehicle immediately after it turned right to go North on 5600 West. (Tr. p. 64, L. 4-13). Trooper Poplemeyer testified that during the period he was following the vehicle, he observed that it crossed over the lane marker on three (3) occasions. (Tr. 99, L. 24-25; p. 100, L. 1-11). At approximately 4000 West he observed the vehicle make an abrupt turn towards the right curb, straighten out, and then make an abrupt turn to get back into the westbound lane of traffic. (Tr. p. 100, L. 12-20). The Trooper further testified that from 4800 West to 5600 West on 3500 South, the westbound traffic was restricted to one lane of traffic, and the lane was lined on both sides by cones. (Tr. p. 101, L. 24-25; p. 102, L. 1-5). Trooper Poplemeyer admitted that the Fiat did not hit a single cone as it drove through this area. (Tr. p. 101, L. 21-23). When the Trooper put on his overhead lights at the intersection of 3500 South and 5600 West, the Fiat pulled over immediately. (Tr. 103, L. 11-13). Appellant does not contest the fact that she was the driver of the vehicle.

Physical Characteristics of the Appellant

Trooper Poplemeyer testified that the speech of the Appellant was okay. (Tr. p. 104, l. 14-15). While he did testify that she had a problem with her balance (Tr. 75, l. 10-12), he also noted that she was wearing shoes with very high heels. (Tr. p. 75, l. 9-10).

Field Sobriety Tests

Trooper Poplemeyer then administered a series of field sobriety tests to the Appellant. (Tr. 76, l. 18-19). Concerning the one-leg stand test (described at Tr. p. 82, l. 16-24), the Trooper admitted that the Appellant performed decently on this test. (Tr. p. 84, l. 11).

The Appellant also performed a finger count test (described at Tr. p. 84, l. 13-20). Trooper Poplemeyer also admitted that Ms. Vigil did okay on this test as well. (Tr. p. 84, l. 24-25).

Another field sobriety test performed by the Appellant was reciting the alphabet. (Tr. p. 86, l. 13-14). According to the Trooper, the Appellant recited the entire alphabet correctly with the exception of saying "P" instead of "Z". (Tr. p. 86, l. 16-19).

After her arrest, the Appellant agreed to take a breath test to determine the alcohol content in her blood. (Tr. p. 89, l. 10-15). The breath test was subsequently administered at the South Salt Lake Police station at 3:05 a.m. (Tr. 90, l. 23-25; p. 95, l. 2-3).

Testimony of Trooper Kerry J. Zdunich

Trooper Zdunich was called to testify on behalf of the State of Utah. Trooper Zdunich testified that he is currently assigned to the breath testing section of the Utah Highway Patrol. (Tr. p. 110, l. 5-8) His responsibilities include testing and maintaining Intoxilyzer machines, and filing affidavits regarding the maintenance and operation of breath testing machines. (Tr. p. 111, l. 14-23). Based upon his training and experience, Trooper Zdunich was qualified as an expert regarding the operation and repair of the Intoxilyzer machines. (Tr. p. 117, l. 5-8).

Trooper Zdunich testified that he performed routine maintenance and testing on the Intoxilyzer machine used to test Ms. Vigil on the date of September 30, 1987. (Tr. p. 112, l. 8-25; p. 113, l. 1-7). The Trooper further testified the machine was operating properly on the date of September 30, 1987. (Tr. p. 113 l. 10-18).

Trooper Zdunich then testified that the next time he checked the same machine was on the date of October 13, 1987. (Tr. p. 113, l. 19-22). The reason the machine was checked on that date was because the Trooper had received a complaint that the machine was not working. (Tr. p. 113, l. 24-25). Upon checking the machine, he located the problem as being a corroded four-pronged connector on the main power input for the machine. (Tr. 114, L. 12-18; Tr. p. 115, l. 23-25; p. 116, l. 1-3). The Trooper then repaired the machine and placed it back into service on October 16,

1987. (Tr. 114, l. 4-5). He checked the machine again on October 16, 1987, and the machine worked properly. (Tr. p. 116, l. 4-11). Appellant does not dispute that Trooper Zdunich's testimony relates to the Intoxilyzer machine that was used to administer the breath test to Ms. Vigil.

Based upon the testimony of Trooper Zdunich, defense counsel objected to the introduction of the test results for the Intoxilyzer breath test given to Ms. Vigil on October 3, 1987. (Tr. p. 120, l. 22-25; p. 121, l. 8-25; p. 122, l. 1-25; p. 123, l. 1-10). The objection was based upon the grounds that the State of Utah failed to lay adequate foundation for admissibility of the test results. The objection was overruled by the Trial Court, and the results of the Intoxilyzer test given to Ms. Vigil were admitted into evidence. (Tr. p. 123, l. 11-25; p. 124, l. 1-11). The results of the test indicated a blood alcohol concentration of .10%. (Tr. p. 125, l. 6-14).

On cross-examination, Trooper Zdunich was asked to perform a hypothetical determination of the Appellant's blood alcohol level at or about the time of her arrest by using Widmark's formula. (Widmark's formula is explained at Tr. p. 147, l. 23-25; p. 148, l. 1-13). The variables used by the Trooper in performing the Widmark are set forth at (Tr. p. 149, l. 19-25; p. 150, l. 1-4). The information was based upon Ms. Vigil's body weight, and her subsequent testimony regarding the amount of beer which she had to drink and the time period during which she drank the beer. Applying the information supplied to him, Trooper Zdunich testified that

Widmark's formula would yield a blood alcohol content of .04% for Ms. Vigil at 3:00 a.m. on October 3, 1987 (Tr. p. 150, l. 22-25), and blood alcohol content of .055% or .05% at 2:00 a.m. on October 3, 1987. (Tr. p. 151, l. 1-4).

Testimony of Chris Crosley

After the State of Utah rested, the defense called Chris Crosley to testify on behalf of the Appellant. Ms. Crosley testified that she was with the Appellant for most of the evening prior to Ms. Vigil's arrest for DUI. (Tr. p. 169, l. 2-8). She testified that herself, Toni Vigil, and another friend named Tammy drove to the Main Event located in Murray at approximately 8:30 p.m., and left the Main Event at 12:00 a.m. (Tr. p. 169, l. 15-18). Ms. Crosley expressed her opinion that Toni Vigil was capable of operating the vehicle safely after leaving the Main Event (Tr. p. 172, l. 7-18). After leaving the Main Event, they stopped for breakfast at a Dee's Family Restaurant located on 3500 South. (Tr. p. 171, l. 18-20). She further testified that Ms. Vigil was capable of driving safely when they left the restaurant. (Tr. p. 174, l. 5-8).

Ms. Crosley stated that Ms. Vigil's speech was fine, and she was not slurring her words. (Tr. 172, l. 19-21). In addition, she stated that the road they were driving on after leaving the restaurant (3500 South) was in bad shape. (Tr. p. 174, l. 9-20). Ms. Crosley also testified that during the time they were driving, they were engaged in lively conversation. (Tr. p. 175, l. 8-12; p. 180, l. 17-20).

Testimony of Toni L. Vigil

Finally, the Appellant Toni L. Vigil took the stand and testified. She stated that she consumed six (6) glasses of beer, and the glasses contained eight (8) oz. or less, while at the Main Event. (Tr. p. 184, l. 19-23; p. 185, l. 18-23). She testified that she arrived at the Main Event between 8:00 p.m. and 8:30 p.m., and that she had nothing to drink prior to arriving at the Main Event. (Tr. p. 185, l. 9-14). She stated that they left the Main Event at approximately quarter to 12:00 or 12:00 a.m. (Tr. p. 187, l. 11-12). Ms. Vigil felt that she could drive safely after she left the Main Event, and didn't feel intoxicated. (Tr. p. 187, l. 21-25; p. 188, l. 1-4; p. 191, l. 23-25). She also testified that she and her friends were engaged in lively conversation while they were driving. (Tr. p. 188, l. 13-15).

Regarding the driving pattern, Ms. Vigil testified that she started to turn right on 4000 West, but realized it was the wrong street and turned back to go straight on 3500 South. (Tr. p. 188, l. 25; p. 189, l. 1-15). She stated she was unfamiliar with the area. (Tr. p. 189, l. 18-20). She also remembered swerving on several occasions on 3500 South in order to miss potholes and a bottle. (Tr. p. 195, l. 11-25; p. 196, l. 1).

SUMMARY OF ARGUMENT

1. Appellant asserts that the Trial Court erroneously admitted the results of the Intoxilyzer test administered to her on the date

of October 3, 1987. Specifically, the State of Utah failed to lay adequate foundation regarding the accuracy and reliability of the Intoxilyzer machine used to test Ms. Vigil because the State could not establish that the machine was working properly for the entire period between September 30, 1987, and October 13, 1987.

2. Further, the Appellant urges the Court of Appeals to overturn the conviction against Ms. Vigil because the improper admission of the breath test results was prejudicial to the Appellant, and absent the error, there was a reasonable likelihood that the outcome of the trial could have been more favorable to the Appellant.

ARGUMENT

POINT I.

THE RESULTS OF THE INTOXILYZER TEST
ADMINISTERED TO THE APPELLANT WERE IMPROPERLY
ADMITTED INTO EVIDENCE BY THE TRIAL COURT
BECAUSE THE STATE OF UTAH FAILED TO LAY
ADEQUATE FOUNDATION DEMONSTRATING THE ACCURACY
AND RELIABILITY OF THE INTOXILYZER MACHINE.

Although the use of breath tests administered to a defendant in a "driving under the influence" case is universally accepted, the results of such a test cannot be admitted into evidence unless the proper foundation has been laid demonstrating the accuracy and reliability of the test. Murray City v. Hall, 663 P.2d 1314, 1320 (Utah 1983). In the case of State of Washington v. Baker, 35 P.2d 806 (Wash. 1960), the Washington Supreme Court set

forth the foundational requirements for the admissibility of a breath test used to determine the blood alcohol content of a motorist charged with driving under the influence of alcohol:

(1) That the machine was properly checked and in proper working order at the time of conducting the test; (2) that the chemicals employed were of the correct kind and compounded in proper proportions; (3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test; (4) that the test be given by a qualified operator and in the proper manner.

Baker, Id. 355 P.2d at 809, 810.

The foundational requirements set forth above have become known as the "Baker Rule", and have been accepted and followed by many jurisdictions. In the case of State of Utah, In The Interest of Oaks, 571 P.2d 1364, (Utah 1977), the Baker Rule was discussed extensively in the dissenting opinion of Justice Maughan.

In the case at hand, the breath test given to the Appellant was administered on an Intoxilyzer machine, rather than a Breathalyzer machine. However, the foundational requirements set forth in the Baker Rule are also applicable to the Intoxilyzer machine. In the case of Williams v. Schwendiman, 740 P.2d 1354, 1357 (Utah App. 1987), this Court held that the results of the Intoxilyzer test in that case were inadmissible because there was no evidence in the record indicating that the Intoxilyzer machine was properly tested and maintained in accordance with the standards set

by the Commissioner of Public Safety, as required by Utah Code Ann. §44-6-44.3 (1953). See also State of Hawaii v. Souza, 732 P.2d 253, 257 (Hawaii App. 1987), where the Court stated that in order to have the test result of an Intoxilyzer admitted into evidence, a proper foundation must be laid "showing that (1) the Intoxilyzer was in proper working order; (2) its operator was qualified and (3) the test was properly administered."

By regularly maintaining an Intoxilyzer machine according to the standards set forth by the Commissioner of the Department of Public Safety, the State can show that a particular machine is operating properly. As was stated in State of Utah, In the Interest of Oaks, Supra, 571 P.2d at 1365, " . . .the fact that the machine was accurate on March 4 and on May 25 leads to a fair conclusion that it was accurate on March 24." In other words, the fact that a machine is found to be operating properly on two separate dates raises a reasonable inference that the machine was also operating properly during the period of time in between those dates.

The Appellant is not questioning whether the Intoxilyzer machine used in this case was regularly maintained. Rather, it is asserted that the prosecution has failed to demonstrate that the Intoxilyzer machine was operating properly when it was checked before and after the date of the breath test given to the Appellant. Because of this, there can be no reasonable inference that the machine was functioning properly on the date in question.

According to the testimony of Trooper Zdunich, he checked the machine on the date of September 30, 1987, and certified that it was operating properly on that date. However, on the next date when he checked it, October 13, 1987, the machine was not functioning. Although Trooper Zdunich testified that he checked the machine on the 13th after receiving a call that it was not operating properly, there is no evidence in the record indicating when the machine stopped functioning.

Moreover, the Trooper testified that the problem with the machine was that the main power source had become nonfunctional because of a corroded four-prong connector. Under these circumstances, it cannot be guaranteed that an Intoxilyzer machine which relies upon specific amounts of electrical energy was operating properly. Apparently, the corrosion eventually became bad enough to cause the machine to stop operating entirely. But it is reasonable to assume that the corroded connector may have affected the operation of the machine prior to its total malfunction, thereby undermining its reliability. Because of this problem, any subsequent tests of the Intoxilyzer machine after it was fixed still cannot guarantee that the machine was operating properly on the date of October 3, 1987. As was stated in the case of State v. Hartwig, 732, P.2d 339, 344 (Idaho App. 1987), "If there is evidence that any particular machine has malfunctioned or was designed or operated so as to produce unreliable results, such evidence would be relevant to both the admissibility and weight of the test results."

Thus, the prosecution has failed to establish that the Intoxilyzer machine was operating properly on the date of October 3, 1987. Consequently, the accuracy and reliability of the Intoxilyzer machine were not established, and the test result should have been suppressed by the Trial Court because of inadequate foundation.

POINT II

THE IMPROPER ADMISSION OF THE INTOXILYZER TEST CONSTITUTES PREJUDICIAL ERROR.

In the case of State of Utah v. Eaton, 569 P. 2d 1114 (Utah 1977), the Utah Supreme Court set forth the standard for determining whether a new trial should be granted because of an error committed by the trial court:

. . . [T]he rule which we have numerous times stated is that if the error is such as to justify a belief that it had a substantial adverse affect upon the defendant's right to a fair trial, in that there is a reasonable likelihood that in its absence there may have been a different result, then the error should not be regarded as harmless; and conversly, if the error is such that it is clear beyond a reasonable doubt that it was harmless in that the result would have been the same, then the error should not be deemed prejudicial and warrant granting a new trial.

Eaton, Id. 569 P.2d at 116.

See also, State v. Fontana, 680 P.2d 1042 (Utah 1984); State v. Knight, 734 P.2d 913, 920 (Utah 1987), where the Utah Supreme Court adopted an "erosion-of-confidence" criterion to give substance to "reasonable likelihood" standard; Rule 30 of the Utah Rules of Criminal Procedure; Rule 103(a) of the Utah Rules of Evidence.

Applying the "reasonable likelihood" standard to the present case leads to the conclusion that the improper admission of the Appellant's breath test was prejudicial, and therefore a new trial should be granted. The offense of driving under the influence can be established simply by showing that a person was driving or in actual physical control of a motor vehicle with a blood alcohol content of .08% or greater. Since the test result in this case was .10%, its admission into evidence by itself could have led to the conviction of the Appellant.

Without the breath test, the prosecution would have been required to prove that the Appellant was impaired by the consumption of alcohol to the point that she could not safely operate her vehicle. Because of the substantial evidence in the record indicating that the Appellant was capable of driving safely, there is a strong likelihood that the Appellant would not have been convicted but for the admission of the breath test.

A review of the evidence shows that Ms. Vigil did fine on several of her field sobriety tests, including the one-leg stand, the finger count, and the alphabet test. She also drove a distance

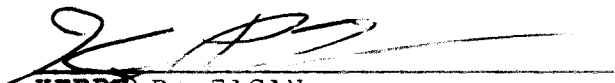
of eight (8) blocks of single lane traffic lined with highway cones, without knocking over a single cone. Even though Trooper Poplemeyer followed the Appellant for a distance of twenty-four (24) blocks, all he observed was several instances of crossing over the lane marker, abrupt turns in the area of 4000 West, and a wide turn onto 5600 West. In response, the Appellant testified that she swerved on several occasions to miss pot holes and a bottle, and that at 4000 West she almost turned right by mistake. Trooper Poplemeyer also admitted that Ms. Vigil's speech was good. The Widmark performed by Trooper Zdunich indicated a result that was one-half of the legal limit of .08%. Finally, both Ms. Vigil and her friend Chris Crosley testified that in their opinions, the Appellant was capable of operating the vehicle safely.

Given this evidence, there is a substantial likelihood, let alone a reasonable likelihood, that the admission of the breath test swayed the jury in favor of finding the Appellant guilty. Given the conflicting testimony regarding the Appellant's state of intoxication, it is very possible that the admission of a breath test with a result of .10% was the critical factor relied upon by the jury in returning a guilty verdict. Therefore, the admission of the breath test was prejudicial to the Appellant, and caused an adverse effect on the outcome of the trial.


CONCLUSION

Based upon the foregoing arguments, the Appellant urges the Court to find that the Trial Court erred in admitting into evidence the results of the breath test taken by the Appellant. Because the improper admission of the breath test was prejudicial and effected the outcome of the trial, the Appellant further requests that this case be remanded to the Trial Court for a new trial.

Respectfully submitted this 27th day of June, 1988.


KERRY P. EAGAN
Attorney for Appellant

MAILED/DELIVERED a copy of the foregoing to the South Valley County Attorney's Office, 2001 South State Street, S3700, Salt Lake City, Utah 84190-1200 this 27th day of June, 1988.



ADDENDUM

WE ARE AWARE OF THE ADDENDUM REQUIREMENT, NO ADDENDUM IS
REQUIRED ON THIS BRIEF.