

1988

Utah v. Toni L. Vigil : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 880095-CA

IN THE UTAH COURT OF APPEALS

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

BRIEF OF RESPONDENT

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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Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this court pursuant to Utah Code Ann., Section 78-2a-3(2)(c) (1986), and Utah Code Ann. Section 77-35-26(2)(a) (1987) 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.

DETERMINATIVE STATUTORY PROVISIONS

UTAH CODE ANN. SECTION 41-6-44(1)(a) (1987)

It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within this state if the person has a blood or breath alcohol content of .08% or greater by weight as shown by a chemical test given within two hours after the alleged operation or physical control, or if the person is under the influence of alcohol and any other drug to a degree which renders the person incapable of safely operating a vehicle.

UTAH CODE ANN. SECTION 41-6-44.3 (1987)

(1) The commissioner of the Department of Public Safety shall establish standards for the administration and interpretation of chemical analysis of a person's breath, including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate according to standards established in Subsection (1), are admissible if:

(a) the judge finds that they were made in the regular course of the investigation at or about the time the act, condition, or event; and

(b) the source of information from which made and method and circumstances of their preparation indicate their trustworthiness.

(3) If the judge finds that the standards established under Subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction to the evidence is unnecessary.

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The facts have in the most part been adequately presented by the Appellant. The State will present additional facts that they feel were inadequately presented by the Appellant.

Trooper Poplemeyer upon initially seeing the Appellant's car crossing a lane marker by 1 1/2 ft. pulled next to the car at which time the Appellant's car again crossed the lane marker coming within 2 ft. of the Trooper's vehicle. (Tr. p. 61-61). The Trooper then observed the Appellant's car make an abrupt turn toward a curve then straighten out and proceed forward through the intersection in a clearly marked turning lane. (Tr. p. 62-63). When the Appellant made a right hand turn onto 5600 West, she went into the left hand turning lane of the oncoming traffic and then went back into the proper lane. (Tr. p. 63). Trooper Poplemeyer testified that he did not observe any chuckholes or other obstructions that would cause the appellant to swerve. (Tr. p. 69, 73).

After the Trooper pulled the vehicle over and contacted the Appellant he noticed a very strong odor of an alcoholic beverage emanating from the vehicle. He also noticed that the alcoholic odor was coming from the Appellant. (Tr. p. 74, 76). After exiting her vehicle the Appellant had some difficulty with her balance and admitted having a few drinks earlier. (Tr. p. 75-76). Although the Appellant was wearing high heel shoes upon exiting her car, she removed them and was unable to properly perform the heel to toe sobriety test. (Tr. p. 85, 87).

Trooper Poplemeyer was qualified to administer the intoxilyzer test. (Tr. p. 93). Poplemeyer operated the intoxilyzer in accordance with his training and certification and properly completed the operational checklist when he administered the test to the Appellant. (Tr. p. 94-95). Poplemeyer before administering the breath test checked the Appellant's mouth and observed her for fifteen minutes making sure that nothing was put into her mouth. (Tr. p. 91). The breath test was administered within two hours of the driving. (Tr. p. 95, 98). Poplemeyer observed the Appellant give an adequate breath sample and the machine printed out a result which matched the digital read out on the machine. (Tr. p. 95-97). He kept the checklist and results in a safe place and observed that they were the same as on the test night. (Tr. p. 96-98).

Trooper Zdunich a qualified expert who regularly

maintains the intoxilyzer testified that on October 3, 1987, the intoxilyzer was working properly based on the fact that the defective power connector would have rendered the machine completely inoperable and there could have been no test result if the power connector had been broken on that date. (Tr. p. 117-118). Zdunich further testified that the results of the breath test would be accurate if the operational checklist was properly followed by the operator. (Tr. p. 119).

SUMMARY OF ARGUMENT

1. The State argues that foundation was properly laid since a presumption that an intoxilyzer is functioning properly is raised when the intoxilyzer is regularly maintained pursuant to Department of Public Safety standards as was done in the present case. Further, the State went beyond the statutory requirement to raise a presumption, and presented additional expert testimony that the intoxilyzer functioned properly on the date in question. Thus foundation was properly laid pursuant to both statutory or any other evidentiary standards.

2. Regardless of the evidence concerning the intoxilyzer results, ample evidence was presented that establishes a reasonable likelihood that the jury would have reached the same verdict.

ARGUMENT

POINT I. THE STATE LAID ADEQUATE FOUNDATION TO DEMONSTRATE THAT THE RESULTS OF THE INTOXILYZER TEST ADMINISTERED TO THE APPELLANT WERE RELIABLE AND ACCURATE, MAKING THEIR ADMISSION INTO EVIDENCE PROPER.

In Murray City v. Hall, 663 P.2d 1314 (Utah 1983), the Utah Supreme Court stated that Utah Code Ann. Section 41-6-44.3 (1983):

is merely a codification of the findings necessary to establish a proper foundation for the introduction of breathalyzer evidence. It is a legislative recognition of the universal acceptance of the reliability of such evidence.

Murray City, at 1320.

Thus, if pursuant to Section 41-6-44.3 the State submits evidence regarding the proper maintenance, functioning and accuracy of a breathalyzer and the trial judge finds that:

(1) the calibration and testing for accuracy of the breathalyzer were performed in accordance with the standards established by the Commissioner of Public Safety, (2) the affidavits were prepared in the regular course of the public officer's duties, (3) that they were prepared contemporaneously with the act, condition or event, and (4) the "source of information from which made and the method and circumstances of the preparation were such as to indicate their trustworthiness" ... those affidavits establish a rebuttable presumption that the breathalyzer machine was functioning properly.

Murray City, at 1320, 1321.

As Murray City holds, proper foundation is laid and a rebuttable presumption is created that a breathalyzer functioned properly when the State shows that it was tested and maintained pursuant to standards established by the Commissioner of Public Safety. This Court has also applied the Murray City holding to intoxilyzer machines as was used in the present case. Triplett v. Schwendiman, 754 P.2d 87 (Utah App. 1988). Further, Triplett reveals that the Department of Public

Safety's standard for the proper testing of intoxilyzers to determine that they are functioning properly need only occur every forty days. Thus, if an intoxilyzer is tested and found functioning properly, a presumption is established that the intoxilyzer is functioning properly until it must be tested again forty days later. Contrary to what the defendant asserts, there is no requirement pursuant to Utah Court decisions or statutory and administrative standards that the State must go beyond the requirements of Section 41-6-44.3 and its supplemental Department of Public Safety standards to lay proper foundation on an intoxilyzer's admissibility into evidence. Consequently, once an intoxilyzer has been shown to be properly tested the defendant has the burden of showing the machine was not functioning properly when it was administered to him. Triplett, at 88, 89.

The Appellant admits in his brief that the intoxilyzer machine in the present case was regularly maintained. (Brief of Appellant at 10). The Appellant only argues that since the intoxilyzer was found to be nonfunctional due to a corroded power source connector ten days after the appellant was administered a breath test, the State could not lay proper foundation for admission of the breath test unless they tested the machine after the appellant was administered a breath test and before the malfunction was discovered. In State v. Palomino, 587 P.2d 107 (Or.App. 1978), which was cited by this Court in Triplett, an Oregon appellate court on facts similar to the present case stated:

Defendant's argument, carried to its logical conclusion, would mean that if at the end of a ... certification period the machine was found to be malfunctioning, all blood alcohol tests conducted since that last certification would be inadmissible. It is unlikely the legislature intended that result to follow from the machine certification procedure.

The state laid proper foundation Any malfunction detected subsequent to this certification does not preclude admission of the test results. The discovered failure only reflects upon the weight to be accorded the test results. We cannot assume as a matter of law that the machine was inaccurate on the day the defendant was tested.

Palomino, at 109.

A Missouri appellate court decision also held that a malfunction found fourteen days after the defendant was given the breath test, does not effect the admissibility of the test. State v. Powers, 690 S.W.2d 859 (Mo.App. 1985). The appellant in contrast argues that the Baker rule as applied in Utah requires that intoxilyzers for foundational purposes must be checked and shown to be functioning properly both before and after a defendant is tested. However, the Utah Supreme Court has stated that the Baker rule does not require repeated testing to confirm the accuracy of each breath test given. Layton City v. Watson, 733 P.2d 499, 501 (Utah 1987); State In Interest of K. K. H., 610 P.2d 849, 853 (Utah 1980). The law in Utah is best stated by this Court in Triplett, where this Court held "if the standards set by the commissioner of public safety are satisfied, as they have been in the present case, the results of a breath test are presumed to be valid."

Triplett, at 89. Since, the standards set by the commissioner were satisfied in this case, and the appellant himself does not question whether the intoxilyzer machine was regularly maintained, the results are presumed to be valid. The fact the intoxilyzer which was tested and found to function perfectly four days before the appellant was administered a breath test, and then ten days later developed a power source connector problem cannot make the breath test inadmissible, particularly since the intoxilyzer would shut down and not give any reading during such a malfunction.

Since Section 41-6-44.3 concerns the foundational requirements of affidavits and documents, rather than in person testimony concerning the proper functioning of the intoxilyzer as was done in the present case, it might be argued that Section 41-6-44.3 does not specifically apply. Whether Section 41-6-44.3 applies or another foundational requirement as asserted by the Appellant applies, the State has nevertheless laid proper foundation. The Appellant contends that the State must show for foundational purposes that the machine was checked and shown to be functioning properly both before and after a defendant is tested in order to comply with the Baker rule. What Baker actually requires before a test result is admissible is "(1) that the machine was properly checked and in proper working order at the time of conducting the test (emphasis added) (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 15 minutes prior to taking the test; (4) that the test be given by a qualified operator and in the proper manner." State v. Baker, 355 P.2d 806, 809 (Wash. 1960) ((2) was inapplicable to intoxilyzers since they do not involve the use of ampoules.)

The State contends that it has properly established each of these foundational requirements for admissibility of the intoxilyzer results. The State showed the following through the testimony of the arresting officer, Trooper Popelmeyer:

(1) That he checked the defendant's mouth and found nothing in it 15 minutes prior to giving the defendant the intoxilyzer test.

(2) That he observed that the defendant did not eat, drink, or place anything into her mouth during the 15 minute period prior to the test,

(3) That he was a certified intoxilyzer operator on the date of the test,

(4) That he operated the intoxilyzer in accordance with his training and certification on the test date,

(5) That he properly completed the operational checklist for the intoxilyzer test given to defendant as he was trained ,

(6) That he observed defendant give an adequate breath sample and the response of the machine,

(7) That he observed the machine to print out a

result which matched the digital readout on the machine,

(8) That he kept the checklist and results in a safe place and observed that they were the same as on the test night.

The State further showed through the testimony of Trooper Zdunich the following:

(1) That he was qualified by the court to be an expert in the repairs and operation of the intoxilyzer after having given extensive testimony as to his training, his certification and recertification classes, his attendance at an operator class, an instrument maintenance class, a testing expert supervisor class, and a standardized field sobriety testing course,

(2) That he has the responsibility as a technician to test and maintain the intoxilyzer machine on a regular basis,

(3) That he is in charge of taking care of the affidavits for all of Utah in regards to maintenance and operation of intoxilyzers, court testimony and instruction on the machine to police officers and others,

(4) That he understood and explained to the Jury the functioning of the intoxilyzer,

(5) That he personally tested the intoxilyzer in question,

(6) That this intoxilyzer was functioning properly on September 30, 1987, three days prior to the test date and further gave specifics as to the procedures he used to properly establish this,

(7) That he received a complaint on October 13, 1987, ten days after the test date, that the machine would not work,

(8) That as he began to test the machine he determined that it would not turn on because the power connector was defective,

(9) That he replaced the power connector, then fully tested the machine, determining that it then worked and that the only problem with the machine had been the power connector,

10) That on October 3, 1987, this intoxilyzer was working properly based on the fact that the defective power connector would have rendered the machine completely inoperable and there could have been no test result if the power connector had been broken on that date,

11) That the results of the test would be accurate if the operational check list was properly followed by the operator.

From the testimony as presented above, it is clear that the State has shown that the intoxilyzer "was properly checked and was in proper working order at the time of conducting the test." Baker, supra. Furthermore, the State has established the other Baker requirements. Consequently, the State has properly established a foundation for the admissibility of the intoxilyzer results. It then would become a question of the weight the Jury wished to afford it. Since a result was obtained in the present case while following correct procedures, expert testimony established that the intoxilyzer

necessarily was functioning properly on the day the appellant was tested. The test results coming from a regularly maintained intoxilyzer were an issue of the weight of the evidence of which the appellant had an opportunity before a jury to attack.

POINT II. A REASONABLE LIKELIHOOD EXISTS THAT THE JURY WOULD HAVE REACHED THE SAME RESULT WITHOUT EVIDENCE OF THE BREATH TEST.

Although the intoxilyzer was regularly maintained and properly admitted pursuant to the foundational requirements of Utah Code Ann. Section 41-6-44.3 (1987), a reasonable likelihood exists that the jury would have reached the same result without evidence of the breath test. Trooper Poplemeyer observed the appellant cross over lane markers three times at one time almost hitting the side of his vehicle on a well maintained road. Poplemeyer observed the appellant abruptly swerve toward a curve and then proceed through an intersection while in a well marked turning lane. The appellant had alcohol on her breath, trouble at times with her balance and could not complete properly the heel to toe sobriety test. Finally, the appellant herself admitted drinking six beers at a bar that evening.

CONCLUSION

The evidence of the intoxilyzer was admitted into evidence upon proper foundation. Further, the jury decision would have been the same irrespective of the intoxilyzer's admission. Thus, the State asks this Court to affirm the conviction.

Respectfully submitted this 26th day of August, 1988.


VIRGINIA L. CHRISTENSEN
Deputy County Attorney

MAILED/DELIVERED a copy of the foregoing to Salt Lake Legal Defender Association, 430 East 500 South, Salt Lake City, Utah 84111, this 26th day of August, 1988.

