1988

Bountiful City v. Jesse G. Palomino : Brief of Appellant

Utah Court of Appeals

Russell L. Mahan; Attorney for Respondent.
Walter F. Bugden; Attorney for Appellant.

DOCKET NO. 880179-CA IN THE UTAH COURT OF APPEALS

BOUNTIFUL CITY, :

Plaintiff/Respondent, :

v. :

JESSE G. PALOMINO, : Case No. 880179-CA

Defendant/Appellant :

BRIEF OF APPELLANT

Appeal from a Judgment entered in the
Fourth Circuit Court for Davis County,
State of Utah, the Honorable Mark S. Johnson

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ARGUMENT PRIORITY CLASSIFICATION: 2

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JURISDICTIONAL STATEMENT

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78-2a-3 (1953) and Rule 4(a) of the Rules of the Utah Court of Appeals.

NATURE OF PROCEEDINGS

This is an appeal from a conviction for Driving Under the Influence of an Alcoholic Beverage after a jury trial which was held on January 26, 1988, and the Judgment of Conviction, which was rendered against the Appellant on February 22, 1988, by the Honorable Mark S. Johnson, Fourth Circuit Court for Davis County.

STATEMENT OF ISSUE ON APPEAL

1. Whether or not the failure of the Trial Court to instruct the jury on the definition of the term "actual physical control", an element of the offense charged, Driving Under the Influence of an Alcoholic Beverage, constitutes reversible error.

STATEMENT OF THE CASE

The Appellant was charged by Information with driving or being in actual physical control of a motor vehicle on November 10, 1987.[1] At the trial, no evidence was presented that any

[1] No transcript has been ordered or prepared for the Appeal. The parties have stipulated to an Agreed Statement As The Record On Appeal. All references herein are to the paragraphs in the Agreed Statement (hereinafter "A.S.")

police officer or other witness had seen the Appellant driving a motor vehicle on November 10, 1987. The City did introduce testimony from Officer Jim Garner that he had observed the Appellant behind the wheel of an automobile at approximately 810 East 500 South in Bountiful, Utah. Officer Garner testified that the vehicle was not moving, and that he never saw the Appellant actually driving said vehicle (A.S. 1, 2). Field sobriety tests were administered and the Appellant was arrested for Driving Under the Influence of an Alcoholic Beverage (A.S. 6). The Appellant refused to submit to a chemical test (A.S. 7).

The Appellant testified on his own behalf. He testified that he drove to Wendover, Nevada, and on the return from Wendover, the Appellant admitted consuming two (2) beers. The Appellant also admitted that he had been the driver of the vehicle (A.S. 8). He further testified that he opened a beer after his vehicle ran out of gas. He stated that he drank about half of that beer prior to the time that Officer Garner arrived at the scene and observed the Appellant's motor vehicle stopped along the roadway (A.S. 9).

After the Trial Court read all of the instructions to the jury, the City's attorney requested permission to approach the bench. At that time, the City's attorney requested that the Court include in the elements instruction to the jury that the

Appellant could be found guilty of the offense of Driving Under the Influence if the City proved beyond a reasonable doubt that the Appellant was either driving an automobile on November 10, 1987, or that the Appellant was in actual physical control of a motor vehicle on the same date (A.S. 10). Appellant's counsel urged that it would be necessary to define the legal term of art, "actual physical control", in order for the jury to understand the elements of the offense (A.S. 11). The Trial Court instructed Appellant's counsel to prepare such an instruction. Appellant's counsel did prepare such an instruction and tendered it to the Court. The Court refused to give the instruction, and Appellant's counsel excepted to the Court's failure to give said instruction (A.S. 11).

SUMMARY OF THE ARGUMENT

The term "actual physical control" is a term of art, and is not self-explanatory. The Appellant was entitled to a basic "elements" instruction to the jury. The Trial Court's refusal to submit the proffered instruction to the jury, believing that the jury would understand the term "actual physical control", constituted reversible error. The jury was not instructed concerning the elements of the alleged crime, and therefore it cannot be determined whether or not the jury properly found each element of the crime beyond a reasonable doubt.

ARGUMENT

I. AN ACCURATE INSTRUCTION UPON THE BASIC ELEMENTS OF DRIVING UNDER THE INFLUENCE IS ESSENTIAL, AND THE FAILURE TO INSTRUCT THE JURY ON THE DEFINITION OF THE TERM "ACTUAL PHYSICAL CONTROL" CONSTITUTES REVERSIBLE ERROR.

The Utah Supreme Court has consistently ruled that an accurate instruction upon the basic elements of the offense charged is essential, and the failure to so instruct constitutes reversible error. In State v. Laine, 618 P.2d 33 (Utah 1980), the Supreme Court ruled that the failure of the Trial Judge to include the intent element in the basic "elements" instruction in a prosecution for theft by deception was reversible error. The Court reached this conclusion even though one of the instructions included the "Information" instruction which did refer to the intent required for the commission of the crime, but did "not inform the members of the jury that before returning the verdict, they must find beyond a reasonable doubt that defendant had the conscious objective to withhold the property (automobile) permanently." Id. at 35.

The Laine holding was reaffirmed by the Utah Supreme Court in State v. Harmon, 712 P.2d 219 (Utah 1986). The Harmon case presents a virtually identical factual scenario as that presented in the instant matter. There the defendant was charged by an Information with robbery, but at trial, the Court granted the

State's motion to instruct the jury on the lesser included offense of Attempted Robbery. In its instructions to the jury, however, the Court merely inserted the word "attempted" before the word "robbery" in the previously prepared instruction on the elements of robbery and then read that to the jury as the elements instruction for attempted robbery. The Court failed to instruct the jury on the specific definition of an attempt.

In Harmon, the defendant, just as in the case at bar, objected to the Court's instruction and requested an instruction defining the word "attempt". The trial court refused the defendant's proffered instruction, instead believing the jury would understand the word "attempt". Because the jury was not instructed concerning the elements of the crime for which the defendant was convicted, the Court citing State v. Laine, granted the defendant a new trial.

In the instant matter, the failure of the Trial Court to define "actual physical control" constitutes reversible error because in the absence of such an instruction, it cannot be determined whether or not the jury properly found each element of the crime of Driving Under the Influence beyond a reasonable doubt. This is so because the jury could have logically concluded that the City had not proven beyond a reasonable doubt that the Appellant was actually driving a motor vehicle while

under the influence of an alcoholic beverage. Although the Appellant did admit to drinking two beers during his drive from Wendover to Bountiful, a jury could have logically concluded that two beers consumed over several hours prior to the driving at issue was not a sufficient quantity of alcohol to appreciably impair the Appellant's ability to safely operate a motor vehicle.

Thus, if the jury concluded that it was appropriate to acquit the Appellant on the driving alternative of Driving Under the Influence, then the jury's verdict could only be supported if they concluded beyond a reasonable doubt that the Appellant was in "actual physical control" of an operable motor vehicle. The Appellant did admit that he had consumed about one-half of a beer after his vehicle had run out of gas, and prior to the time that the arresting officer arrived at the scene. The jury could have concluded that even though the Appellant was not guilty under the driving alternative, that he was guilty under the actual physical control alternative since, by his own testimony, he had consumed two and a half beers by that point in time. Laine and Harmon mandate the granting of a new trial in the case at bar. Just as in Harmon, "actual physical control" is a term of art and is not self-explanatory. The Appellant is entitled to a basic "elements" instruction. Because the jury was left to guess at the meaning of "actual physical control", the Trial Court's

failure to instruct the jury on the basic elements was reversible error.

CONCLUSION AND RELIEF SOUGHT

The Appellant's conviction should be reversed and a new trial should be ordered.

RESPECTFULLY SUBMITTED this _____ day of April, 1988.

WALTER F. BUGDEN, JR.,
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, four (4) true and correct copies of the foregoing Brief of Appellant, first class postage prepaid, this _____ day of April, 1988, to:

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