1978

# State of Utah v. Steven J. Laursen : Brief of Respondent

Utah Supreme Court


D. Sanford Jorgensen; Attorney for Appellant;
Robert B. Hansen; Michael L. Deamer; William W. Barrett; Attorneys for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

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| STATE OF UTAH, | : | |
| Plaintiff-Respondent, | : | |
| -vs- | : | Case No. 15573 |
| STEVEN J. LAURSEN, | : | |
| Defendant-Appellant. | : | |

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE J. ROBERT BULLOCK, JUDGE, PRESIDING

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| STATE OF UTAH,<br>Plaintiff-Respondent,<br>-vs-<br>STEVEN J. LAURSEN,<br>Defendant-Appellant. | Case No. 15573 |

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Defendant was charged with two counts of automobile homicide, a felony of the third degree, in violation of Utah Code Ann. § 76-5-207(1) (Supp. 1977).

DISPOSITION IN THE LOWER COURT

The jury returned a verdict of guilty on both counts, and the Honorable J. Robert Bullock sentenced the defendant to a term of not less than five years in the Utah State Prison on both counts; the terms are to run concurrently.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment rendered below.

## STATEMENT OF FACTS

On July 27, 1977, the defendant caused the death of Ronald Beck and Michael Hansen by driving a truck into their motorcycle (T.6,25). The defendant and Robert Greenwood, a passenger in defendant's truck, left the scene of the accident (T.10). The defendant was taken to his parent's home by David Jones (T.10). Later that evening, the defendant went to a hospital in American Fork to be treated for his injuries, and took a blood/alcohol test at that time at police request (T.35-37). The defendant's blood contained 0.15% alcohol (T.73).

The defendant admitted that he had been the driver of the vehicle that struck and killed the two victims (T.38). The single important factural issue at trial was whether defendant was intoxicated at the time of the accident.

The record on appeal contains only a partial transcript of the trial and omits the testimony of Officer Gary N. Johnson, Richard Blomquist (the driver of the vehicle that defendant was attempting to pass at the time the accident occurred) and Margaret Morrell (the nurse that drew defendant's blood for testing) (R.33-37). The jury apparently felt that Mr. Blomquist's testimony as to the defendant's driving pattern was important on the question of guilt (R.42).

The available transcript reveals the following evidence on the issue of intoxication: Robert Greenwood testified that the defendant had been drinking the day of the accident from a keg containing one to two gallons of bear (T.3-4). The defendant did not drink anything after the accident while being driven home (T.13,18). Officer Bob Greenhalgh testified that the defendant was given a blood alcohol test at 11:30 p.m. and that the accident had occurred at approximately 9:15 p.m. (T.35-38). The officer also took the defendant's statement that he had been drinking beer prior to the accident, that he had taken his last drink at about 7:00 p.m., that he had nothing to drink after the accident, and that he could remember nothing that happened after the accident (T.38). Officer Jay Schoonover stated that his opinion was that the defendant was intoxicated at the time of his arrest (T.58). Dr. Albert Swenson testified that the defendant's blood contained 0.15% alcohol (T.73). This percentage is equal to the amount of alcohol in eight twelve ounce cans of beer (T.76). The witness testified that if the defendant had taken his last drink at 7:00 p.m., his blood/alcohol level at the time of the accident would have been about 0.19% (T.78). The witness also testified, on cross-examination, that if the defendant had taken his last drink after the time of the accident, his blood/alcohol

level at 11:30 p.m. would be irrelevant to his blood/alcohol level at the time of the accident (T.79). The defendant made timely objection to the introduction of the blood/alcohol test results on the ground that an insufficient foundation had been laid, because there was no showing that defendant had not drunk alcohol after the accident (T.54-56). The court overruled the objection but did not instruct the jury that there was any presumption as to the time of the defendant's last drink (T.56-57). The record reveals no objection to any instruction given the jury, nor does the record reveal an objection to the court sentencing the defendant on both counts of the information.

## ARGUMENT

### POINT I

### THE COURT BELOW PROPERLY ADMITTED EVIDENCE OF THE DEFENDANT'S BLOOD/ALCOHOL LEVEL.

The results of a test to determine blood/alcohol content is admissible in an automobile homicide action when it is material to prove that a person was driving under the influence of of alcohol, Utah Code Ann. § 76-5-207(2) (Supp. 1977). Utah Code Ann. § 41-6-44.5 (Supp. 1977) provides:

> "If the chemical test was not taken within one hour after the alleged incident, the evidence of the amount of alcohol in the person's blood as shown by the chemical test is admissible if expert testimony establishes its probative value. . ."

In this case, expert testimony did establish the probative value of the blood test, because the expert testified that he could calculate the defendant's blood/alcohol level at the time of the accident from the test results if the defendant took his last drink before the accident. This evidence was relevant, probative and properly admitted because other evidence raised a jury question as to the defendant's intoxication at the time of the accident. In this case, the jury heard evidence of the defendant's driving pattern, defendant's drinking during the day of the accident, and defendant's somewhat contradictory statement that he had nothing to drink after the accident and that he remembered nothing that happened after the accident. There was also evidence that defendant left the scene of the accident and was belligerent at the time of his arrest. This evidence raises a jury question of intoxication at the time of the accident, and made evidence of the blood/alcohol test relevant and admissible.

The courts of several jurisdictions have dealt with this issue and have resolved it adversely to the defendant. In State v. Betts, 214 Kan. 271, 519 P.2d 655 (1974), the court held that evidence of a defendant's intoxication almost three hours after an accident was admissible where there was evidence

of an erratic driving pattern at the time of the accident, evidence that the defendant left the scene of the crime, and evidence that defendant was belligerent at the time of his arrest. The case of State v. Hansen, 206 N.W.2d 352 (Minn 1973) presents a striking parallel to the present case. In Hansen, there was a three hour interval between the accident and the test that showed defendant had a blood/alcohol level of 0.11%. The defendant challenged the admission of the test results into evidence because

> ". . .the prosecution failed to show the defendant had not consumed any alcoholic beverage in the three hour interval between the driving conduct resulting in death and the extraction of the blood sample." Hansen at 355.

The court concluded

> ". . .that the circumstances, including flight, justify the inference that defendant had not consumed alcohol during the three hour period." Id.

The court came to the conclusion even though the

> "eyewitness accounts as to defendant's condition as syptomatic of alcoholic intake at the time of the. . .collision are ambiguous and conflicting." Id. at 354-355

In the following cases, courts have rejected a defendant's contention that blood/alcohol test evidence is inadmissible unless the prosecution can demonstrate that the defendant

the last drink was taken after the accident. Defendant's counsel was free to argue, and the jury was free to find, that there was a reasonable doubt that the test reflected alcohol consumed prior to the accident. On the evidence outlined above, the jury did not make that finding. Respondent submits that the blood/alcohol evidence was properly admitted and defendant's conviction should be affirmed.

POINT II

THE COURT BELOW PROPERLY SENTENCED THE DEFENDANT ON BOTH COUNTS OF THE INFORMATION.

The record does not contain any indication that defendant objected to the trial court sentencing him on both counts. Respondent submits that this alleged error should not be heard for the first time on appeal. State v. Carter, 27 Utah 2d 416, 497 P.2d 26 (1972).

Utah Code Ann. § 76-1-402(1) (Supp 1977) does not bar sentencing on both counts because it applies only when the same act of the defendant is punishable in different ways under different provisions of the code. In this case, defendant's two different acts (ie. causing the death of Ronald Beck and causing the death of Michael Hansen) are punishable under the same provision of the criminal code.

The cases cited by the defendant for the proposition that it is improper to sentence on both counts are

distinguishable. Contrary to defendant's assertion, the facts of Dawson v. State, 266 So.2d 116 (Fla. 1972) do not indicate that the defendant was charged with causing the death of two passengers riding in the same car. As the court citation to Stewart v. State, 184 So.2d 489 (Fla. App. 1966) makes clear, an anomoly in Florida criminal procedure allows a defendant to be found guilty on two counts of manslaughter even if only one victim is involved. In Virgil v. State, 563 P.2d 1349 (1977) the trial court imposed only one sentence, and the Wyoming Supreme Court affirmed, but noted:

> "There are many cases holding that killing by culpable negligence several human beings in one automobile accident constitutes as many separate offenses as there are victims and consecutive sentences are proper." Virgil at 1352

In State v. Little, 19 Utah 2d 53, 426 P.2d 4 (1967) this court held that it was improper to impose two sentences under two separate provisions of the criminal code for one act. This rule does not apply to this case for the reasons discussed above. People v. Duran, 515 P.2d 1117 (Colo. 1973) dealt only with the imposition of consecutive punishments, not concurrent sentences as were imposed in this case. The California rule, demonstrated in People v. McFarland, 26 Cal. Rptr. 473, 376 P.2d 449 (1962), that two sentences can-

not be imposed for a burglary and a larceny is clearly in conflict with the Utah rule State v. Jones, 13 Utah 2d 35, 368 P.2d 262 (1962). In Ladner v. United States, 358 U.S. 169 (1958) the court did hold that a single shotgun blast wounding two federal officers constituted only a single offense. The persuasive value of Ladner is lessened by the fact that it dealt purely with an issue of congressional intent and not of constitutional law. "There is no constitutional issue presented." Ladner at 173. Further, Ladner involved the imposition of consecutive sentence, a problem not present in this case.

Respondent submits that causing two people to die is more culpable than causing one to die, and that defendant's two concurrent sentences are fair and appropriate punishments.

## CONCLUSIONS

Based on the foregoing, respondent submits that defendant's conviction should be affirmed.

Respectfully submitted,

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