

1979

State of Utah v. Vincent L. Belgard : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH, | : | |
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| Plaintiff-Respondent, | : | |
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| -v- | : | |
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| VINCENT L. BELGARD, | : | Case No. 15743 |
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| Defendant-Appellant. | : | |

BRIEF OF APPELLANT

An appeal from the conviction of Automobile Homicide in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge presiding.

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| Defendant-Appellant. | : | |

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of Automobile Homicide, a Third Degree Felony, in violation of Utah Code Ann. §76-5-207 (1953 as amended) in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge presiding.

DISPOSITION IN THE LOWER COURT

The appellant, VINCENT L. BELGARD, was charged by Information with the offense of Automobile Homicide, a Third Degree Felony, in violation of Utah Code Ann. §76-5-207 (1953 as amended) (T.6, Vol.II). On November 17, 1977, the appellant was convicted by a jury of the offense charged in the Information. On March 17, 1978, the appellant was sentenced by the above entitled Court, the Honorable Jay E. Banks, Judge presiding,

to zero to five years at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The appellant, VINCENT L. BELGARD, seeks reversal of the judgment of guilt entered against him and a reversal of the instant case to the trial court with instructions to dismiss the complaint.

STATEMENT OF THE FACTS

The facts adduced at trial are as follows. At approximately 1:00 p.m. on the 28th day of July, 1977, appellant was involved in an automobile-bicycle accident at the intersection of 7th East and 33rd South, in Salt Lake County. Appellant did not stop at the accident scene, but continued south on 7th East pursued by three private citizens: Mr. Alan Harenberg (T.89, Vol.II), Mr. Jerry R. Miller (T. 6, Vol.III), and Mr. Uffe Traeden (T. 25, Vol.III). These individuals pursued appellant to a cul-de-sac on 3835 South 600 East, where appellant's vehicle came to a rest (T. 96, Vol.II), whereupon Mr. Harenburg placed appellant under a citizen's arrest (T. 98, Vol.II).

Trooper Lynn Thompson of the Utah Highway Patrol took appellant into custody (T.49, Vol.III). Although there was evidence that appellant had been drinking, he was not given a field sobriety test (T.65, Vol.III). Instead, Trooper Thompson took appellant to St. Mark's Hospital, explaining the Utah

Implied Consent Law to him and stating that if appellant refused a blood alcohol test, he would lose his driver's license (T.50, Vol.I). Appellant, an American Indian, indicated that he did not want to take such a test, as it was against "God's Law" (T.50, Vol.I). Trooper Thompson reiterated that the test would be taken, by force if necessary (T.54, Vol.I). Appellant renewed his objection; however, at the hospital, he permitted himself to be placed on a gurney. At 2:35 p.m. on the same day, Kay Fowler, a registered nurse employed by the City-County Health Department, withdrew blood from appellant for the blood alcohol test (T.69-70, Vol.III). That blood sample was tested by two individuals. Lynn Davis, a chemist for the City-County Health Department, tested the blood sample at 10:20 a.m. on August 1, 1977, and found that it contained 0.28% alcohol by weight (T.90, Vol.III). Dr. Darrell Murdock analyzed the same blood sample and came to the conclusion that it contained 0.20% alcohol by weight (T.148, Vol.III).

The victim of the accident, a sixteen year old male named Michael Winn, was transported to St. Mark's Hospital. He died at 8:30 p.m., the evening of the accident, due to massive cerebral edema, swelling of the brain (T.54, Vol.II).

On August 1, 1977, appellant was brought before Justice of the Peace Charles A. Jones, where he was arraigned on charges of driving under the influence of intoxicating liquor, improper and fraudulent registration, no driver's license, and no inspec-

tion (M.6-8). No formal complaint accompanied the appellant (M.8); instead, he was arraigned from a booking and property record (M.21). Judge Jones contacted the County Attorney's Office, and after being assured that two formal complaints would be forthcoming, he proceeded with the arraignment (M.8-9, 30). That complaint was never received (M.9).

Judge Jones advised appellant of his rights, particularly the right to counsel (M.10), and his right to trial by jury (M.10-11). Appellant waived those rights, pleaded guilty to the charges, and was sentenced by Judge Jones (M.11-13). Judge Jones sent a commitment order to the Salt Lake County Jail pursuant to the results of the hearing (M.13).

On August 3, 1977, Joseph Tesch and Spencer Austin of the Salt Lake County Attorney's Office, went to Judge Jones and petitioned for an order vacating and setting aside the results of the arraignment. Judge Jones signed the order, which was then presented to the County Jail (M.15,65). That same day, the County Attorney's Office filed a complaint of Automobile Homicide against appellant. Trial commenced on November 15, 1977.

In the preliminary hearing, and at trial, appellant's counsel offered a motion to dismiss the charge of automobile homicide, based on the single episode provision of Utah Code Ann. §76-1-402(2) (1953 as amended) (M.3, T.4, Vol.I). The trial court ruled that the Justice of the Peace had no juris-

diction over the proceeding before his involving the appellant; hence it was a nullity and the single episode provision inapplicable (T.73, Vol.I). Appellant's counsel next offered a motion to suppress the results of the blood test on the ground that the taking violated appellant's constitutional rights (T.4, Vol.I). The trial court denied that motion on the grounds that exigent circumstances required the taking of the blood test (T.3, Vol.II). Finally, appellant's counsel objected to testimony offered by Officer Clark Bowles, extrapolating the blood alcohol level back from the time of the test to the time of the accident, on grounds that such testimony was inadmissible because the State could not show when appellant had consumed his last drink (T.144, Vol.III). Counsel's objection was overruled.

Appellant was convicted by a jury of the crime of Automobile Homicide, a Third Degree Felony, as charged in the Information, and judgment was entered thereon. Appellant now takes this appeal from the trial court.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED ERROR IN REFUSING TO GRANT APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF THE BLOOD ALCOHOL ANALYSIS BECAUSE TAKING THE BLOOD SAMPLE AGAINST HIS WILL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

In the 1966 case of Mapp v. Ohio, 367 U.S. 643 (1966), the United States Supreme Court held for the first time that the federal "exclusionary rule", under which evidence obtained from an unlawful search or seizure is inadmissible in a criminal trial, applies to the states via the Fourteenth Amendment. Since that time, the well recognized rule has been that if it is found that evidence was obtained in violation of a person's rights under the Fourth Amendment to the United States Constitution, it may not be used against the person in a criminal proceeding. In Mapp, the defendant was convicted of having pornographic material in her possession. Such material was the basis of her conviction, although it was discovered by an unlawful search of defendant's home. The Court reasoned that the assurance against unreasonable searches and seizures guaranteed by the Fourth Amendment would be meaningless if evidence obtained illegally could be freely used in court. The Court held:

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. 367 U.S. 643, 655.

POINT A

THE BLOOD SAMPLE WAS OBTAINED IN VIOLATION OF APPELLANT'S RELIGIOUS SCRUPLES.

In Schmerber v. California, 384 U.S. 757 (1966), the United States Supreme Court was faced with a case factually similar to the case at bar. There, the defendant was convicted of driving an automobile while under the influence of intoxicating liquor. The defendant was arrested at a hospital where he received treatment for injuries suffered in an accident involving the automobile he had been driving. The officer who made the arrest smelled liquor on defendant's breath at the scene of the accident and at the hospital. On the basis of his observations, the officer ordered a physician to take a blood sample from defendant. Defendant refused to consent to the blood test, on the advice of counsel, but the sample was drawn against his consent. At trial, the defendant objected to the admission of the blood analysis in evidence, contending it violated his Fourth, Fifth, and Sixth Amendment rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

Although the Schmerber Court affirmed the defendant's conviction, it recognized his privacy interest in his own blood. The Court stated that a compulsory administration of a blood test:

. . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. That Amendment expressly provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . . It could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons", and depend antecedently upon seizures of "persons", within the meaning of that Amendment. [Emphasis in original] 384 U.S. 757, 767.

Having thus found that the Fourth Amendment applies to compulsory extraction of blood, the Court went on to find that under the facts presented by Schmerber, the search was not "unreasonable", based upon the fact that the officer had probable cause to believe the defendant was intoxicated and that evidence of intoxication would soon be destroyed by the body's process of eliminating alcohol. However, the Court recognized that its holding may have been different in another situation:

Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused. . . We need not decide whether such wishes would have to be respected. 384 U.S. 757, 771.

The Court further limited Schmerber to its facts in its concluding statement:

It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of society. That we today hold that the Constitution does not forbid the states minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.
384 U.S. 757, 772.

Appellant contends that since the blood sample in this case was obtained against his wishes and in violation of his religious scruples, this case falls within the exception implicitly recognized by the United States Supreme Court in Schmerber, supra, to the rule established in that case. Appellant was placed under arrest soon after the incident by Officer Lynn Thompson of the Utah Highway Patrol (T.40, Vol.I). Although appellant had suffered extensive injuries, he emphatically refused any medical attention offered by the officer (T.40, Vol.I). Appellant was then transported by the officer to St. Mark's Hospital to obtain treatment and a blood sample to test blood alcohol content (T.43, Vol.I). The officer informed appellant that under the Implied Consent Law, if he refused to submit to a blood alcohol test he would lose his license to drive for one year (T.50, Vol.I). At the hospital, appellant again indicated he did not want medical attention (T.44, Vol.I).

Appellant's religious convictions must be appraised in light of the fact that he is a Native American, raised on the Turtle Mountain Reservation in South Dakota. When Officer Thompson informed appellant that he would have to submit to a blood test, and that due to the seriousness of the injuries of the victim, under Utah Code Ann. §76-5-207 (1953 as amended) he would be forced to take such a test, appellant repeatedly refused to consent on the basis that it was "against God's Law" (T.47,50,52,53, Vol.I). Nevertheless, the blood sample was taken (T.48,54, Vol.I). Appellant's counsel moved to suppress the results of the analysis of appellant's blood (T.62, Vol.I), which motion was denied by Judge Jay E. Banks (T.3, Vol.II).

Appellant argues that the failure to suppress such evidence was reversible error. At the time the blood sample was obtained appellant made clear that such a procedure violated his religious beliefs. Yet no attempt was made to substitute for the blood test either a breath or urine test, both of which are approved in Utah Code Ann. §41-6-44.10(a) (1953 as amended). Under the reasoning of Schmerber, supra, where a person refuses to consent to a blood test on religious grounds, a result opposite to that reached in Schmerber is appropriate. Given the circumstances of this case, appellant contends that taking a blood sample against his will was an unreasonable intrusion into his body (which he as a Native American believes should remain inviolate and thus violated his rights under the Fourth Amendment to the

United States Constitution. As such, the evidence obtained from the blood test should have been excluded under the authority of Mapp v. Ohio, supra.

POINT B

APPELLANT WAS COMPELLED THROUGH THE THREATENED USE OF FORCE TO PERMIT THE BLOOD SAMPLE TO BE TAKEN.

The Supreme Court has long recognized that invasions into the person warrant the most stringent protection of the Fourth Amendment's right to privacy. In Rochin v. California, 342 U.S. 165 (1952), the defendant was convicted of possession of morphine. When officers entered defendant's home, he quickly put two pills in his mouth. The officers jumped on the defendant, attempting to extract the pills by violent means. The defendant was then taken to a hospital, where an emetic was forced into his stomach against his will, forcing him to vomit. The pills were recovered and used in evidence at trial.

In reversing defendant's conviction, the Supreme Court wrote:

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of the stomach's contents--this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.
342 U.S. 165, 172.

In this case, although such force was never applied to the appellant's person, Trooper Lynn Thompson, the arresting officer, made it clear that he would use force, if necessary, in order to obtain the blood sample. He testified as follows, in response to questions from appellant's counsel:

Q. You indicated to him at that point that if he refused to take the test you would take it by force, is that correct?

A. Yes, I indicated he would be restrained.

* * * * *

Q. How many times did you tell him if you don't take the test we are going to have to take it from you by force?

A. I don't recall.

Q. More than once?

A. I am sure more than once.
(T. 54, Vol.I)

Even as the conduct in Rochin was shocking, so too in this case the indiscriminate threats of violence applied by officers of the law against the appellant's person is "close to the rack and screw". The fine line between psychological and physical intimidation blurs when compared to the stringent protection guaranteed to an individual's person by the Fourth Amendment and Rochin. Permitting such conduct will undercut these constitutional protections and will subject appellant and others to random threats of violence by law enforcement officers to secure by proscribed means that which they cannot obtain freely and legally.

POINT C

UTAH CODE ANN. §76-5-207(2) IS UNCONSTITUTIONALLY OVERBROAD, PERMITTING CHEMICAL TEST RESULTS AS EVIDENCE WITHOUT REGARD TO A DEFENDANT'S CONSENT.

Appellant further submits that insofar as Utah Code Ann. §76-5-207(2) (1953 as amended) allows that the results of any chemical test administered on a defendant with or without his consent will be admissible in evidence subject only to the rules of evidence, is unconstitutionally overbroad. This is because under this provision, any chemical test, no matter how administered, and regardless of whom it is administered to, will be admissible. This provision sweeps too broadly in violation of the constitutional principles laid down in Mapp, Rochin and Schmerber, supra.

POINT D

THE BLOOD SAMPLE VIOLATED APPELLANT'S RIGHT TO REFRAIN FROM GIVING EVIDENCE AGAINST HIMSELF.

The blood sample taken also violated appellant's rights under Article I, Section 12 of the Constitution of the State of Utah. The relevant portion of Article I, Section 12 provides: "The accused shall not be compelled to give evidence against himself. . ." From the outset, it must be remembered that this provision is broader than the comparable federal self-incrimination privilege of the Fifth Amendment. That privilege has

been held to apply only to evidence which is of a testimonial or communicative nature. In Schmerber v. California, supra, the Fifth Amendment was expressly held not to apply to blood samples involuntarily taken from an arrestee.

The Utah Supreme Court, however, has held that Article I, Section 12 of the Constitution of the State of Utah does apply to evidence of a non-testimonial or non-communicative nature. In State v. Sirmey, 40 Utah 525, 122 P.748 (1912), testimony was received which compared the shoes of the defendant with footprints found at a murder scene. The Court found:

It is generally held, and as stated in 12 Cye. 402, that although evidence, including documents and other articles, may have been obtained in a criminal case by unfair or illegal methods, it is nevertheless, as a general rule, admissible if relevant, provided the accused is not thereby compelled to do any act which incriminates him, and the confession or incriminating admission is not extorted from him; and by the weight of authority it is held to be error to compel the accused to submit to a comparison of footprints and to permit a witness who was present when the accused was forcibly compelled to place his foot in footprints, or to surrender his shoes for the purpose of making a comparison, to testify as to the result; by where the accused voluntarily places his foot in the tracks, or surrenders his shoes to the sheriff, he cannot object to evidence that they seemed to fit.
122 P. at 748.

In that case, the Court went on to find that there was no compulsion involved, because the defendant gave the police officer his shoes upon the officer's request to make the comparison.

The only other case in Utah dealing with the question of a defendant giving evidence against himself is State v. Van Daele.

554 P.2d 1324 (1976). In that case the defendant was requested to give hair samples to the police to compare with samples found at the scene of a rape. He was also requested to give blood samples and fingerprints to the police, all of which were admitted in evidence. The Court emphasized the compulsion factor stating:

As to state and federal constitutional provisions mentioned, defendant was not compelled to give (a) evidence, (b) or be a witness against himself. The officers relieved him of the hair (without any resistance). Under such circumstances the cases say no constitutional rights are violated. [Emphasis by the Court, footnote omitted]
524 P.2d at 1325.

In both of these cases, before the Court could logically reach the compulsion issue it had to find that the items requested were within the protections of Article I, Section 12. The blood sample taken from the appellant in the case at hand is obviously within those same protections. The case at hand is distinguished from State v. Van Dam, supra, and State v. Sirmay, supra, in that in those cases the evidence was relinquished upon request by policy officers. In the case at hand, appellant was compelled to give a blood sample. The arresting officer told appellant he would take a blood sample with or without appellant's consent and if appellant did not submit to the test the sample would be taken by force (T.54, Vol.I).

Consequently, the appellant was compelled to give evidence against himself in violation of his privilege against self-incrimination as described in Article I, Section 12 of the

Constitution of the State of Utah.

The blood sample taken from appellant violated appellant's rights to be free from unreasonable searches as guaranteed by the Fourth Amendment to the United States Constitution and violated his right not to be compelled to give evidence against himself as guaranteed by Article I, Section 12 of the Constitution of the State of Utah. Because the Court erred in not granting appellant's motion to suppress the results of the blood alcohol analysis, this Court should reverse the conviction and set it aside.

POINT II

THE COURT ERRED IN ADMITTING INTO EVIDENCE THE RESULTS OF THE BLOOD ALCOHOL TEST BECAUSE THE STATE DID NOT ESTABLISH THE PROBATIVE VALUE OF SUCH TEST.

Utah Code Ann. §41-6-44.5 (1953 as amended) provides:

41-6-44.5. Driving while intoxicated--Chemical tests as evidence--Presumption of blood alcohol level.--In any action or proceeding in which it is material to prove that a person was driving under the influence of alcohol, the results of a chemical test or tests as authorized in 41-6-44.10 shall be admitted as evidence if the chemical was taken within one hour of the alleged incident. The level of the alcohol determined to be in the blood by the chemical test shall be presumed to be not less than the blood alcohol level of the person at the time of the incident. 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 and the results of said test may be given prima facie effect if established by expert testimony.

The accident appellant was involved in occurred at approximately 1:00 p.m. on July 28, 1977 (T.85, Vol.II). The blood sample for a blood alcohol test was withdrawn from appellant at 2:35 p.m. approximately one and a half hours after the accident (T.76, Vol.III). Appellant contends that the probative value of the test was not established by the expert testimony and therefore the results of the blood alcohol test should not have been admitted into evidence.

Lynn Davis, a chemist for the City-County Health Department of Salt Lake County, testified, over the objection of counsel, that the blood sample taken from appellant at 2:35 p.m. contained 0.28% alcohol by weight (T.90, Vol.III). In an effort to relate back the figure to the time of the accident, the State called Clark Bowles, a sergeant with the Highway Patrol in charge of the Breathalyzer Project for the State of Utah. Officer Bowles testified to alcohol absorption rates and burn off rates in the body (T.110-111, Vol.III). Officers Bowles testified that in order to extrapolate the blood alcohol test back to a certain time, it was necessary to know when the individual last had something to drink (T.117-118, Vol.III). There was no evidence presented as to when appellant had had his last drink. Mr. Bowles testified that without knowing when the last drink was taken, he could not say with certainty what the blood alcohol level was at a given time (T.144, Vol. III).

Under Utah Code Ann. §41-6-44.5 (1953 as amended), the State's burden was to establish the probative value of the blood test in proving what the level of appellant's intoxication was at the time of the accident. Since the testimony of the expert witnesses introduced by the State failed to show what appellant's blood alcohol level may have been when the accident occurred, the State failed to meet its burden. Thus, the admission of the results of the blood alcohol test was error.

Under Utah Rules of Evidence, Rule 4, a verdict may be set aside on the grounds of erroneous admission of evidence only where there is a timely and specific objection interposed and the reviewing court finds that the evidence should have been excluded and probably had a substantial effect on the verdict. In this case, appellant's counsel objected to the admission of the results of the blood test on the ground that the probative value of such evidence had not been established under Utah Code Ann. §41-6-44.5 by the testimony of Lynn Davis as an expert witness (T.89, Vol.III). The objection was overruled (T.89, Vol.III).

Appellant submits that the evidence should have been excluded on the ground stated in his objection. Utah Code Ann. §41-6-44.5 provides that the results of a blood alcohol test which was conducted more than one hour after the incident in question are admissible in evidence only if the "probative value" of such evidence is established by expert testimony.

The term "probative value" has been defined by this Court as evidence tending to prove an issue. State v. Scott, 111 Utah 9, 175 P.2d 1016 (1947). In the case of Liquor Control Commission v. Bartolas, 225 N.E. 2d 859 (1963), the Ohio Court wrote:

Probative evidence is testimony of substance and relevant consequences not vague or uncertain, but having the quality of proof or fitness to induce conviction of truth, and has reference to the substance of the testimony generally and not the credibility of the witness . . . 225 N.E.2d 859, 862. See also Hunnicut v. Boughner, 231 N.E.2d 159 (Ind. 1967).

Appellant contends that the testimony of Lynn Davis and Officer Bowles failed to establish that the results of the blood alcohol test proved what appellant's blood alcohol level was at the time of the accident. The only way that such evidence could have been shown to have "probative value" as tending to prove appellant's blood alcohol level at the relevant time was to establish that the expert could scientifically relate the results of the actual blood test back to the time of the accident. Officer Bowles testified that he could not establish with any degree of certainty what appellant's blood alcohol level was at the time of the accident without knowing when appellant took his last drink (T.144, Vol.III). No evidence was presented as to when the last drink was taken. The evidence of the results of the blood test did not have the "quality of proof" envisioned in Bartolas, supra.

Since the testimony of Officer Bowles as an expert witness failed to establish the probative value of the results of the blood test, testimony as to those results was not admissible under the standard established by Utah Code Ann. §41-6-44.5. The admission of such evidence by the trial court was error.

Finally, the admission of the results of the blood alcohol test had a substantial influence upon the finding of the jury that appellant was under the influence of alcohol at the time of the accident. Given that the statutory presumption of intoxication arises at 0.08%, when the jury heard Lynn Davis testify that the test revealed a blood alcohol level of 0.28%, they were bound to infer that appellant had been intoxicated an hour and a half earlier when the accident occurred. It was at least possible that appellant consumed more alcohol after the accident occurred (T.31, Vol.I), since he went into his residence after being arrested by Mr. Harenburg. Because of this, the inference that the results of the test established appellant's intoxication at the time of the accident was unwarranted and prejudicial to appellant's case.

Thus, the admission of evidence as to the results of the blood alcohol test should not have been admitted and the admission of such evidence was reversible error under Rule 4 of the Utah Rules of Evidence.

POINT III

THE CHARGES AGAINST APPELLANT AROSE FROM A SINGLE CRIMINAL EPISODE WITHIN THE MEANING OF UTAH CODE ANN. §76-1-401 (1953 AS AMENDED); CONSEQUENTLY APPELLANT'S GUILTY PLEA TO SOME OF THE CHARGES BARRED A SUBSEQUENT PROSECUTION OF THE AUTOMOBILE HOMICIDE CHARGE.

Appellant was taken before Justice of the Peace Charles Jones on August 1, 1977, and pleaded guilty to the charges of Driving Under the Influence, Improper Registration, Driving Without a Driver's License and No Safety Inspection. Judge Jones did not have a complaint but was advised by the Salt Lake County Attorney's Office they would send him a complaint (M.30). Before taking his plea, Judge Jones informed appellant of his right to a trial and his right to counsel (M.10). Judge Jones then imposed sentence on the appellant for the charges and sent a commitment to the Salt Lake County Jail concerning the sentence (M.12-13).

After deciding that he would file Automobile Homicide charges, the Salt Lake County Attorney petitioned Judge Jones to set aside appellant's guilty plea, which he did (M.14-15).

Appellant contends his plea to Driving Under the Influence bars a subsequent prosecution for Automobile Homicide. Utah Code Ann. §76-1-402 (1953 as amended) provides:

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; . . .

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

- (a) The offenses are within the jurisdiction of a single court, and
- (b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

Appellant has met the statutory requirement of the single episode rule. All of the offenses charged were within the jurisdiction of a single court--the District Court. Furthermore, it is arguable that all offenses were known to the prosecutor's office at the time appellant was arraigned before Judge Jones on August 1, 1977. Judge Jones that day spoke with a clerk in the County Attorney's Office after appellant was brought before him without a formal complaint. Later on, he spoke with Michael Christensen of the County Attorney's Office who assured him that a complaint would be forthcoming (M.8-9,30). On that basis, Judge Jones accepted appellant's pleas (M.11-12). Yet the deceased passed away at 8:30 p.m. on July 28, 1977, one and one half days before appellant was arraigned before the Justice of the Peace (T.54, Vol.II). It was not until August 3, 1977, two days after appellant's arraignment and pleas of guilty, that the County Attorney filed Automobile Homicide charges against appellant, and petitioned Judge Jones to vacate and set aside appellant's pleas of guilty (M.15,65).

Appellant is aware that a similar argument has been made

and rejected by this Court in State v. Cooley, 575 P.2d 693 (1978). Appellant contends that the opinion in that case was erroneous, that the dissenting opinion of Justice Maughan should be adopted by this Court, and that Cooley should be overruled based upon the meaning set forth by Justice Maughan:

Section 76-1-402(2) confers a valuable right on one charged with multiple offenses under a single criminal episode--he is not compelled to face the emotional trauma and expense of several trials, if his circumstances fall within the qualifying terms. Even under the reasoning of the majority opinion in State v. Johnson, the jurisdiction of the district court could be invoked, for the justice of the peace would not have jurisdiction (would not be qualified) to try all the offenses charged. Furthermore, Sec. 76-1-402(2), is a later enactment, conferring a substantive right, and it should be held, if it be necessary, to modify an earlier, procedural enactment. 575 P.2d at 696.

Appellant's guilty plea to the charges should have been a bar to any subsequent prosecution.

CONCLUSION

Appellant respectfully submits that the trial court's admission of blood test results obtained in violation of his constitutional rights and without requiring the State to establish the probative value of such tests, and its failure to apply the single episode rule to bar the prosecution of Automobile Homicide contribute reversible error. Appellant requests that this Court reverse the verdict of the jury and

the judgment entered thereon, and remand the instant case to the Third Judicial District Court with instructions to dismiss the Information.

DATED this ____ day of November, 1979.

RONALD J. YENGICH
Attorney for Appellant