

1988

## State of Utah v. Colin K. Hamilton : Reply Brief

Utah Court of Appeals

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 880422-CA

STATE OF UTAH,	:	
	:	
Plaintiff/Respondent,	:	
vs.	:	Case No. 880422-CA
	:	Category 2
COLIN K. HAMILTON,	:	
	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

AN APPEAL FROM AN ORDER OF THE EIGHTH CIRCUIT COURT  
OF DUCHESNE COUNTY, DUCHESNE DEPARTMENT, STATE OF UTAH  
The Honorable A. Lynn Payne, Presiding

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DEC 30 1993

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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Plaintiff/Respondent, :  
vs. : Case No. 880422-CA  
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REPLY BRIEF OF APPELLANT

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to U.C.A. §78-2a-3(2)(c).

SUMMARY OF ARGUMENT

A motion and ruling to exclude evidence of the breath test in a prosecution for driving under the influence of alcohol under Utah's per se statute is semantically the same motion as a motion for a directed verdict.

This Court's holding in State v. Gregorious has been superseded by U.C.A. §77-35-17(o) and State v. Smith.

## ARGUMENT

### POINT I

A MOTION AND RULING TO EXCLUDE EVIDENCE OF THE BREATH TEST IN A PROSECUTION FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL UNDER UTAH'S PER SE STATUTE IS SEMANTICALLY THE SAME MOTION AS A MOTION FOR A DIRECTED VERDICT.

The State argues that defendant never made a motion for directed verdict and therefore the court properly allowed the State to reopen. While technically true, this argument fails because exclusion of the breath test is tantamount to dismissal of a charge for violating the per se provision of §41-6-44 which the defendant was convicted of violating.

Without the breath test results, the case could only proceed if it had established a prima facie case that defendant exhibited evidence of intoxication. The Court ruled that the State did not establish a prima facie violation of the "intoxication" section of the statute. Thus a ruling excluding the breath test is the equivalent of a ruling granting a directed verdict and defendant should therefore be entitled to the protections of Rule 17(o).

### POINT II

THIS COURT'S HOLDING IN STATE V. GREGORIOUS HAS BEEN SUPERSEDED BY U.C.A. §77-35-17(o) AND STATE V. SMITH.

The State argues that State v. Gregorious, 81 Utah 33, 16 P.2d 893 (1933), grants the trial court discretion to allow

the State to reopen its case in chief after defendant makes a well founded motion for a directed verdict. State v. Gregorious is in direct conflict with this Court's holding in State v. Smith, 675 P.2d 521 (1983) wherein the Court stated:

If the State's evidence at the close of its case in chief does not establish a prima facie case against defendant, the Court must, as required by Rule 17(o), dismiss the charge.

Id. at 524.


This Court stated that the trial court has no discretion to reopen the case after the State fails to make out a prima facie case. State v. Gregorious has therefore been superseded by Rule 17(o) of the Utah Rules of Criminal Procedure and State v. Smith.

#### CONCLUSION

For the above reasons, defendant/appellant respectfully requests that this Court reverse the decision of the trial court and enter a judgment of acquittal.

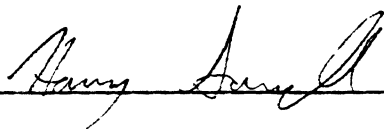
DATED this 27<sup>th</sup> day of December, 1988.

McRAE & DeLAND

  
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Attorney for Appellant

CERTIFICATE OF MAILING

I do hereby certify that I mailed, postage prepaid, four (4) true and correct copies of the Reply Brief of Appellant, to Herbert Wm. Gillespie, Roland Uresk, Mabelle Fitzgerald, Attorneys for Respondent, 156 North 200 East, Roosevelt, Utah 84066 on this 27<sup>th</sup> day of December, 1988.

  
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