

1986

# Layton City v. Billy E. Noon : Brief of Appellant

Utah Supreme Court

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Steven L. Garside; attorney for respondent.

J. Franklin Allred, Margo L. James; attorneys for appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LAYTON CITY,	)	BRIEF OF APPELLANT
	)	
Plaintiff-Respondent,	)	
	)	
-vs-	)	Docket No. 860493
	)	
BILLY E. NOON,	)	
	)	
Defendant-Appellant.	)	Category No. 2

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APPEAL FROM A JUDGMENT OF CONVICTION  
SECOND JUDICIAL DISTRICT COURT IN AND FOR  
DAVIS COUNTY

HONORABLE DOUGLAS CORNABY, JUDGE

Steven L. Garside  
Layton City Prosecutor  
437 North Wasatch Drive  
Layton, UT 84041

J. Franklin Allred, #A0058  
Margo L. James, #4463  
321 South 600 East  
Salt Lake City, UT 84102

Attorney for Respondent

Attorneys for Appellant

**FILED**

NOV 14 1986

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Clerk, Supreme Court, Utah

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LAYTON CITY,	)	BRIEF OF APPELLANT
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321 South 600 East  
Salt Lake City, UT 84102

Attorney for Respondent

Attorneys for Appellant

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Defendant-Appellant.	)	Category No. 2

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court err in denying defendant's motion to dismiss for lack of probable cause to make an arrest?
2. Was defendant denied a fair trial due to ineffective assistance of counsel?

STATEMENT OF FACTS

On November 30, 1985, defendant was arrested for violation of §41-6-44, Layton Municipal Code, driving under the influence of alcohol. (R. 2,8; Addendum 1). An information was filed charging him with this offense. (Addendum 2) A one day jury trial was held on March 4, 1986 in the Fourth Circuit Court of Davis County, Layton Department, before the Honorable K. Roger Bean. (R. 3-5, Tr. 1) The following facts were revealed at trial.

The defendant drove his car into the parking lot of the Circle K at the corner of Main and Antelope Drive, Layton, at approximately 9 p.m. (Tr.22,50,145) A clerk at the Circle K, Matt Wilhelm, saw defendant drive into the parking lot

"pretty fast." (Tr. 22) Defendant parked his car and went into the store. (Tr. 23) Mr. Wilhelm testified that defendant was stumbling (Tr. 24), his speech was slurred and he spilled coffee from a cup he had obtained in the store. (Tr. 25) Wilhelm also claimed he smelled alcohol on his breath. (Tr. 25) When defendant left the store to turn off his car lights, Wilhelm called the police. (Tr. 26) Defendant reentered the store and the police arrived approximately five minutes after Wilhelm had called. (Tr. 39) Defendant was still in the store when the police arrived. (Tr. 28) There was no testimony as to what defendant was doing during those five minutes.

Once Wilhelm pointed the defendant out to the police, Officer Robnett, Layton City Police, walked over to the defendant and asked him to blow into his hand. (Tr. 58) After defendant had complied, Robnett asked him to step outside of the store and perform some field sobriety tests. (Tr. 58) Defendant performed the tests as requested by Robnett and was subsequently placed under arrest "for his own safety." (Tr. 63)

Robnett asked defendant to repeat the field sobriety tests at the station. (Tr. 97-8,108) Robnett also testified that he requested the defendant perform a breathalyzer test at the police station. (Tr. 66) Defendant attempted to comply, but the results were never obtained. (Tr. 152) Officer Robnett was allowed to testify without objection concerning defendant's supposed "refusal" to take the test. (Tr. 67-70)

At the conclusion of the State's evidence, defendant moved to dismiss on two grounds: (1) no proof of corpus delicti and (2) lack of probable cause to arrest for driving under the influence of alcohol. (Tr. 131) The motions were denied. (TR. 131)

The jury found defendant guilty of driving while under the influence of alcohol, a class B misdemeanor, in violation of §41-6-44, Layton Municipal Code. (R. 25, Tr. 188) At trial, defendant was represented by attorney Christopher L. Shaw. (Tr. 3) After the jury verdict and prior to sentencing, defendant discharged Mr. Shaw and retained present counsel to represent him in this matter. (R. 27-29)

On March 26, 1986, defendant was sentenced to jail for 180 days with 120 days suspended, ordered to submit to assessment by and undergo a treatment program with the Utah Alcohol Foundation, and ordered to pay fines and restitution totaling \$408.00. (R. 30) On April 23, 1986, the trial judge denied defendant's motion for arrest of judgment and order of acquittal or in the alternative for a new trial. (R. 31-2, 41-2) Defendant appealed to the Second District Court, Honorable Douglas L. Cornaby presiding. Memoranda of points and authorities were filed by both parties. (R. 52-61, 63-74) After oral argument held on July 22, 1986, the District Court upheld the Circuit Court's verdict in a July 25, 1986 ruling. (R. 76-7) Defendant subsequently took an appeal to this Court. (R. 78-9)

Defendant's sentence has been stayed pending the outcome of this appeal.

#### SUMMARY OF ARGUMENT

1. The arresting officer did not have probable cause to arrest defendant for driving under the influence of alcohol since the officer never saw defendant drive, there was no verification of the informant's testimony placing defendant in a vehicle and the informant did not testify concerning an erratic driving pattern by defendant. There was also a delay in time between when the informant claimed he saw defendant drive and when he was approached by the police. In addition, the arresting officer was so unsure about defendant's condition that he asked defendant to perform additional field sobriety tests after he had been placed under arrest and taken to the police station.

2. Defendant was denied effective assistance of counsel at trial since his attorney on several occasions during the state's case failed to interpose objections to testimony that should have been inadmissible under the Utah Rules of Evidence. The testimony was prejudicial to defendant and denied him a fair trial.

## ARGUMENT

### I. PROBABLE CAUSE DID NOT EXIST TO ARREST DEFENDANT FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL.

A warrantless arrest is permitted for violation of §41-6-44, U.C.A. (1953, as amended), as follows:

§41-6-44 (8). A peace officer may, without a warrant, arrest a person for violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

#### Addendum 1.

Probable cause is thus the standard by which the constitutionality of the police officer's actions in questioning the defendant and subsequently arresting him is to be weighed. See Utah Constitution, Article I, Section 14; United States Constitution, Fourth Amendment. Addendum 3. The Utah Supreme Court has defined "reasonable" or "probable" cause as follows:

The determination should be made on an objective standard: whether from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense.

State v. Hatcher, 27 Utah 2d 318, 495 P.2d 1259, 1260 (1972), (fn. omitted). "This level of probability must exist at the actual moment of arrest,..., and must be based on known facts,...." People v. Severson, 561 P.2d 373, 375 (Colo. App. 1977) (citations omitted).

Based on the facts personally known to the officer, he did not have probable cause to arrest defendant for driving under the influence. "Probable cause may rest on reasonably trustworthy information from an informant. However, some of the details of the information given by the informant must be verified before an arrest." Pistro v. State, 590 P.2d 884, 886 (Alaska, 1979) (emphasis added) (fn. omitted). See also People v. Ramey, 16 Cal.3d 263, 127 Cal. Rptr. 629, 545 P.2d 1333, 1336 (1976). Here, there was no such verification as to whether defendant had actually been driving an automobile sometime prior to Officer Robnett's encounter with him in the Circle K. Defendant made no admission of either drinking or ownership of an automobile at any time, whether prior to or after his arrest. (Tr. 65-7)

The arresting police officer never saw the defendant driving so had no opportunity to observe whether his driving pattern was normal or not. The only data available to the officer at the time of the arrest which linked defendant to the car was the statement of Matt Wilhelm. (Tr. 56) There was no testimony which led conclusively to the inference that defendant was intoxicated while driving.

Defendant was in the Circle K for a period of time prior to the arrival of the police. There was no testimony as to what activities defendant was involved in while in the store. The Circle K and other convenience stores of its genre provide beer for sale to the public. The State's evidence failed to exclude the possibility that defendant consumed beer while on the premises sufficient to obtain the odor of

alcohol about his person and to render him intoxicated.

Indeed, the arresting officer was so unsure that defendant was actually intoxicated that he requested the defendant to again perform field sobriety tests at the station after defendant has been arrested. (Tr. 97-8, 108)

Based on the above discussion, defendant's arrest was without probable cause and defendant's motion to dismiss on this basis was improperly denied by the trial court.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL DENIED DEFENDANT A FAIR TRIAL.

As the result of the ineffective assistance of his counsel at trial, defendant was denied the right to counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Utah Constitution. (Addendum 4) The Utah Supreme Court has recently held that in order to challenge a conviction on the basis of ineffective assistance of counsel,

it is the defendant's burden to show: (1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error.

State v. Geary, 707 P.2d 645, 646 (Utah, 1985) (citations omitted).

An accused in a criminal case has "the right to have competent counsel who will take such actions and present whatever defenses and interpose whatever objections he can in honesty and good conscience justify in the interest of his

client." State v. Gray, 601 P.2d 918, 920 (Utah, 1979) (fn. omitted).

Defense counsel committed several errors in his representation of defendant. First, the prosecutor was allowed to lead witness Wilhelm on direct examination numerous times concerning facts central to the alleged offense. (Tr. 24-8 43-6) The testimony was damaging and the manner in which it was elicited served to compound its impact.

Second, counsel failed to object to witness Wilhelm's lengthy, extremely prejudicial and irrelevant explanation as to why he called the police to report the defendant. (Tr. 26) Such testimony should have been excluded under Rule 402, Utah Rules of Evidence, (irrelevant evidence inadmissible) and Rule 403 (exclusion of prejudicial evidence). (Addendum 5)

Third, Officer Robnett was permitted to testify without objection regarding his conversation with Mr. Wilhelm prior to Robnett's questioning of the defendant. (Tr. 55-56) The statements made to Officer Robnett by Mr. Wilhelm were offered to prove the truth of the matter asserted and were inadmissible hearsay and should not have been admitted into evidence. See Rule 802, Utah Rules of Evidence. (Addendum 5) The statements served to reinforce Mr. Wilhelm's testimony even though his credibility had not been challenged by defendant.

Fourth, Officer Robnett testified without objection regarding defendant's attempts to take the breathalyzer test

and was permitted to read from his report form without showing that this was necessary due to insufficient recollection of the transaction. (Tr. 67-70) Again, these statements were hearsay inadmissible under any of the exceptions to the hearsay rule and should have been excluded under Rule 802, Utah Rules of Evidence. (Addendum 5)

Fifth, without adequate foundation, Officer Robnett was permitted to testify to the legal conclusion that defendant refused to submit to the breathalyzer test. (Tr. 70) This conclusion was inadmissible under Rules 701 and 702, Utah Rules of Evidence. (Addendum 5)

The first part of the Geary test has been satisfied since defendant has demonstrated above that trial counsel rendered a deficient performance in some demonstrable manner. As regards the second half of the test, whether the outcome of the trial would probably have been different, it should be pointed out that the evidence against defendant was weak and the arrest was not supported by probable cause. None of the officers involved ever saw defendant's driving pattern, nor did they ever see him in the car. Mr. Wilhelm did not observe any erratic driving behavior either. Since no blood alcohol test was taken, for whatever reason, the jury had to decide if defendant had in fact driven the car and at the time of such driving was under the influence of alcohol based solely on the witnesses' testimony as to defendant's behavior. Given this reliance on subjective, personal observation rather than an objective test, the outcome of the trial could well have been different if counsel had not

committed the errors discussed above. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland v. Washington, 466 U.S. 668, 696, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

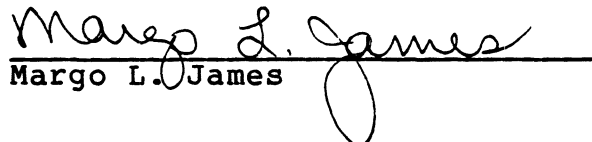
Thus, under the standards of Strickland, Geary and Gray, defendant has shown he was denied his right to counsel as guaranteed by the United States and Utah Constitutions.

#### CONCLUSION

Defendant respectfully asks the Court to find that the errors complained of above require reversal of his conviction and remand of this case for a new trial.

Respectfully submitted this 14th day of November, 1986.

  
J. Franklin Allred

  
Margo L. James

Attorneys for Defendant-Appellant

## ADDENDUM

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§41-6-44, Utah Code Annotated 1953, as amended

**41-6-44. Driving under the influence of alcohol or drug or with high blood alcohol content — Criminal punishment — Arrest without warrant — Suspension or revocation of license.**

(1) It is unlawful and punishable as provided in this section for any person with a blood alcohol content of .08% or greater by weight, or who is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely driving a vehicle, to drive or be in actual physical control of a vehicle within this state. The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug does not constitute a defense against any charge of violating this section.

(2) Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood.

(3) (a) Every person who is convicted the first time of a violation of Subsection (1) is guilty of a class B misdemeanor; imprisonment shall be for not fewer than 60 days. But if the person has inflicted a bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner, he is guilty of a class A misdemeanor; any imprisonment in the county jail shall be for not more than one year.

(b) For the purposes of this section, the standard of negligence is that of simple negligence, the failure to exercise that degree of care which an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(4) In addition to the penalties provided in subsection (3), the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 240 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 24 hours nor more than 50 hours and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility.

(5) (a) Upon a second conviction within five years after a first conviction under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43 (1), the court shall, in addition to the penalties provided for in Subsection (3), impose a mandatory jail sentence of not less than 240 consecutive hours nor more than 720 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 80 hours nor more than 240 hours and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility. The court may, in its discretion, order the person to obtain treatment at an alcohol rehabilitation facility.

(b) Upon a subsequent conviction within five years after a second conviction under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43 (1), the court shall, in addition to the penalties provided for in Subsection (3), impose a mandatory jail sentence of not less than 720 nor more than 2,160 hours with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work project for not less than 240 nor more than 720 hours and, in addition to the jail sentence or work in the community-service work program, order the person to obtain treatment at an alcohol rehabilitation facility.

(c) No portion of any sentence imposed under Subsection (3) may be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation of this section or a local ordinance similar to this section adopted in compliance with Subsection 41-6-43 (1) may not be terminated and the department may not reinstate any license suspended or revoked as a result of the conviction, if it is a second or subsequent conviction within five years, until the convicted person has furnished evidence satisfactory to the department that all fines and fees, including fees for restitution and rehabilitation costs, assessed against the person, have been paid.

(6) (a) The provisions in Subsections (4) and (5) that require a sentencing court to order a convicted person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility, obtain, in the discretion of the court, treatment at an alcohol rehabilitation facility, or obtain, mandatorily, treatment at an alcohol rehabilitation facility, or do any combination of those things, apply to a conviction for a violation of § 41-6-45 that qualifies as a prior offense under Subsection (7), so as to require the court to render the same order regarding education or treatment at an alcohol rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under § 41-6-45 that qualifies as a prior offense under Subsection (7), as he would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections 41-6-44 (4) and (5).

(b) For purposes of determining whether a conviction under § 41-6-45 which qualified as a prior conviction under Subsection (7), is a first, second, or subsequent conviction under this subsection, a previous conviction under either § 41-6-44 or 41-6-45 is deemed a prior conviction. Any alcohol rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Social Services.

(7) (a) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of § 41-6-45 or of an ordinance enacted pursuant to Subsection 41-6-43 (b) in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense. The statement shall be an offer of proof of the facts which shows whether or not there was consumption of alcohol or drugs, or a combination of both, by the defendant, in connection with the offense.

(b) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of § 41-6-45 as follows: If the court accepts the defendant's plea of guilty or no contest to a charge of violating § 41-6-45, and the prosecutor states for the record that there was consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense, the resulting conviction is a prior offense for the purposes of Subsection (5).

(c) The court shall notify the department of each conviction of § 41-6-45 which is a prior offense for the purposes of Subsection (5).

(8) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

(9) The Department of Public Safety shall suspend for 90 days the operator's license of any person convicted for the first time under Subsection (1), and shall revoke for one year the license of any person otherwise convicted under this section, except that the department may subtract from any suspension period the number of days for which a license was previously suspended under § 41-2-19.6 if the previous suspension was based on the same occurrence upon which the record of conviction is based.

~~STROTT COUNTY~~, STATE OF UTAH, DAVIS COUNTY

LAYTON DEPARTMENT

MAR 3 1986

LAYTON CITY,  
a Municipal Corporation,

Plaintiff,

vs.

Billy E. Noon  
810 23rd Street #23  
Ogden, Utah 84403  
DOB: 6/20/56  
Defendant.

INFORMATION

Clerk, Layton Circuit Court

Case No. 85TF881

The undersigned, William D. Robnett, under oath states on information and belief that the defendant committed, in the above-named county, the crime of DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS a Class B Misdemeanor, at the vicinity of Antelope Drive, Circle K Lot, Layton, Utah, on or about November 30, 1985 at about 9:15 p.m., in violation of Section 41-6-44, Layton Municipal Code.

The acts of defendant constituting the crime were: That at the time and place aforesaid the defendant did willfully and unlawfully

operate and/or have actual physical control of a vehicle within this state while under the influence of alcohol and/or drugs to a degree which rendered the defendant incapable of safely driving said vehicle, and/or driving with a blood alcohol content of .08% by weight or greater.

This information is based on evidence obtained from the following witness: William D. Robnett.

William D. Robnett  
Complainant

Subscribed and sworn to before me this 4<sup>th</sup> day of January, 1986.

K. Roger Bean  
Circuit Judge

Utah Constitution, Article I

**Sec. 14. [Unreasonable searches forbidden—Issuance of warrant.]**

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

United States Constitution

**AMENDMENT IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Utah Constitution, Article I

**Sec. 12. [Rights of accused persons.]**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

United States Constitution

**AMENDMENT VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

**AMENDMENT XIV**

**Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Rules of Evidence

Rule 401. Definition of "Relevant Evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the State of Utah, statute, or by these rules, or by other rules applicable in courts of this State. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.


Rule 802. Hearsay Rule.

Hearsay is not admissible except as provided by law or by these rules.

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to the following on this 14th day of November, 1986.

Steven L. Garside  
Layton City Prosecutor  
437 North Wasatch Drive  
Layton, Utah 84041

  
J. Franklin Allred  
Attorney for Defendant-Appellant