

1986

Layton City v. Billy E. Noon : Brief of Respondent

Utah Supreme Court

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BRIEF

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DOCKET NO. 860493

IN THE SUPREME COURT OF THE STATE OF UTAH

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

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

HONORABLE DOUGLAS CORNABY, JUDGE

Steven L Garside, #4323
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FILED

DEC 15 1986

Clerk

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
NATURE OF THE CASE	1
SUMMARY OF ARGUMENTS	4
ARGUMENT	
PROPOSITION I - THE TRIAL AND DISTRICT COURTS CORRECTLY RULED THAT THE POLICE OFFICERS HAD PROBABLE CAUSE TO ARREST DEFENDANT.	6
PROPOSITION II - DEFENDANT'S TRIAL COUNSEL'S CONDUCT WAS COMMENDABLE AND REFLECTED COMPETENCE.	9
PROPOSITION III - THE JURY VERDICT BELOW IS WELL SUPPORTED BY THE EVIDENCE.	12
PROPOSITION IV - STANDARD OF REVIEW.	13
CONCLUSION	14
ADDENDUM	15
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<u>Codianna v. Morris</u> , Utah, 600 P.2d 1101 (1980)	12
<u>State v. Brooks</u> , Utah, 600 P.2d 539 (1980)	14
<u>State v. Bryan</u> , Utah, 600 P.2d 539 (1980)	6,7
<u>State v. Cazier</u> , Utah, 521 P.2d 1114 (1974)	1
<u>State v. Daniels</u> , Utah, 584 P.2d 880 (1978)	1
<u>State v. Haro</u> , 703 P.2d 101 (Utah 1985)	14
<u>State v. Hatcher</u> , Utah, 496 P.2d 1114 (1972)	8,9
<u>State v. Howell</u> , Utah, 649 P.2d 91 (1982)	11
<u>State v. Kazda</u> , Utah, 600 P.2d 1101 (1980)	1
<u>State v. Kerekes</u> , Utah, 622 P.2d 1161 (1980)	1
<u>State v. Lairby</u> , Utah, 699 P.2d 1187 (1984)	1
<u>State v. Maestas</u> , Utah, 655 P.2d 1132 (1982)	13
<u>State v. McNicol</u> , Utah, 554 P.2d 203 (1976)	1
<u>State v. Schoenfeld</u> , Utah, 540 P.2d 1113 (1976)	11
<u>State v. Smathers</u> , Utah, 600 P.2d 1101 (1980)	13
 <u>Statutes</u>	
§41-6-44 Utah Code Annotated (1953 as amended)	6,9,14
§41-6-41.10 (3), Utah Code Annotated (1953 as amended)	11
§41-6-44, Layton Municipal Code	6,9,14
 <u>Rules</u>	
Utah Rules of Evidence	
Rule 612	11
Rule 701	11
Rule 702	11

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vs.)	Docket No. 860493
)	
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)	Category No. 2
Defendant, Appellant.)	

STATEMENT OF ISSUES

Whether at the close of the City's evidence, the Trial Court properly denied defendant's motion to dismiss for lack of probable cause to effect an arrest, and whether the District Court properly upheld said ruling.

Whether defendant's counsel effectively and adequately represented the defendant, thus affording defendant a fair trial, and whether the District Court's ruling stating so, was proper.

STATEMENT OF THE CASE

This is a criminal case involving a single charge, that being the traffic offense of driving while under the influence of alcohol, a class B misdemeanor.

The violation and the arrest occurred on November 30, 1985 within Layton City. The matter was set for a jury trial in the Fourth Circuit Court, Layton Department of the Davis County District Court, before the Honorable Judge K. Roger Bean. The jury trial was held March 4, 1986 and at the conclusion thereof

the jury returned a verdict of guilty and the judge entered a conviction pursuant thereto.

On April 23, 1986 defendant's motion for arrest of judgment and order of acquittal or, in the alternative, a new trial was heard before Judge Bean. After hearing argument and reviewing the file said motion was denied.

Thereafter, defendant appealed to the Second District Court. Briefs were filed and oral arguments presented to the Honorable Judge Douglas L. Cornaby. The District Court upheld the verdict of the Circuit Court and announced that ruling July 25, 1986.

Defendant now makes this appeal.

STATEMENT OF FACTS

In the late evening hours of November 30, 1985, the defendant drove into the parking lot of the Circle K store just west of the corner of Antelope Drive and Main Street, Layton City, Utah. (Tr. 22). The defendant drove the vehicle into the parking lot in such a manner that the Circle K employee's attention was immediately drawn to the vehicle as its lights flashed vertically as the vehicle crossed the driveway approach. (Tr. 34). Defendant then entered in the parking lot and continued at such a rate of speed that the same employee thought the vehicle would come right into the store. The employee, Matt Wilhelm, did not know how, but somehow defendant was able to get the vehicle stopped. (Tr. 22). There were no customers in the store and no other vehicles in the parking lot and Mr. Wilhelm's eyes were "fixed" on the defendant's car. (Tr. 24). Defendant

was the sole occupant of the vehicle. (Tr. 23, 148).

As the defendant entered the store, Mr. Wilhelm immediately began to make observations concerning the manner in which the defendant conducted himself. (Tr. 25). The defendant was walking awkwardly, his speech was slurred, he could not control his cup of coffee and there was an odor of alcohol. (Tr. 25, 26). The defendant could hardly walk, and he was stumbling. (Tr. 27, 38, 46).

Mr. Wilhelm, having no doubt in his mind who was driving the vehicle (Tr. 44), and having observed defendant's condition, became concerned about the potential results of that combination and notified the police. (Tr. 26).

While waiting for the police to arrive, Mr. Wilhelm continued to attempt conversing with defendant in order to delay him so he would not "drive off." (Tr. 28). Shortly thereafter, the officers arrived and directly went up to Mr. Wilhelm to obtain his information concerning the events leading up to his notifying the police. Before approaching defendant, they made sure that Mr. Wilhelm had seen defendant driving, that the witness could have seen what he claims he saw and that it was the same individual that was still in the store. (Tr. 28, 55-57, 74-77, 90, 92). After being satisfied that Mr. Wilhelm was quite positive (Tr. 57), the officers approached and began making their own observations. (Tr. 44, 58-60, 63-66, 78-80, 93-96, 105-108, 118-127, 156).

Based on those observations, their training and experience, the defendant's characteristics, the presence of one car and one

customer and the corroborating information of Mr. Wilhelm, the defendant was placed under arrest for driving a motor vehicle while under the influence of alcohol. (Tr. 63, 67, 140).

Defendant was then transported to the Layton Police Department and was requested to submit to a chemical test of a breath sample. (Tr. 68). Defendant refused to submit to the test. (Tr. 69, 70, 84, 85, 98, 99).

The case was tried to a jury before the Honorable Judge K. Roger Bean on March 4, 1986, and at the conclusion thereof, the defendant was adjudged guilty of driving a motor vehicle while under the influence of alcohol, and a conviction was entered accordingly.

SUMMARY OF ARGUMENTS

As set forth in both state statute and case law pursuant to said statute, the officers had probable cause to arrest the defendant for driving under the influence of alcohol. Although the officers did not see the defendant drive, they had contact with the defendant a very short time after the driving had occurred and noticed his extremely intoxicated state. Further, prior to their contact with defendant they spoke with a witness who positively placed defendant as the driver of the vehicle. Defendant's arrest was based on probable cause.

Defendant's trial counsel more than satisfied the minimal performance requirements. It is obvious from the record that he was familiar with these type of trials. Defendant has failed to

establish that trial counsel's performance was ineffective or that the results would have been different.

ARGUMENT

PROPOSITION I

THE TRIAL AND DISTRICT COURTS CORRECTLY RULED THAT
THE POLICE OFFICERS HAD PROBABLY CAUSE TO ARREST
DEFENDANT.

Defendant's initial assignment of error is that both lower courts erred in ruling that there was probably cause to arrest the defendant for driving under the influence of alcohol. The lower court's rulings are correct as they are founded on state law and this Court's interpretations of said laws.

State statute specifically provides the standard an officer may use in effectuating an arrest for a violation of the "driving under the influence" statute. This standard, set forth in §41-6-44(8), Utah Code Annotated (1953, as amended), and provides that:

A peace officer may, without a warrant, arrest a person for violation of this section when the 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.

Admittedly, the officers did not observe the defendant driving a motor vehicle. That is not fatal to this case, in fact, such a situation was contemplated by the drafters of this statute as is indicated by the phrase "although not in his presence" The Utah State Supreme Court has construed this statute and applied it to facts not unlike those in the case at bar. In State v. Bryan, Utah, 395 P.2d 539 (1964), the Defendant was involved in an automobile accident. The officers arrived at the scene shortly thereafter to find Defendant sitting

on the curb. The officers did not see Bryan driving the vehicle and the only offense committed in the officers' presence was public intoxication. Bryan, supra at 540. That is precisely the situation in the case at bar. However, in Bryan, after the Defendant was transported to the hospital the officers placed him under arrest for driving while intoxicated. The Court ruled that the arrest was lawful regardless of the facts that the arrest was delayed and that the offense did not take place in the officers' presence. Bryan, supra, at 540. In the case at bar, the facts available and known by the police officer provide even a stronger foundation for arrest than that in Bryan, as herein the officers had direct evidence that the defendant was driving. (Tr. 22,23,44).

Defendant has at least conceded that the officer had probable cause to arrest defendant for public intoxication. (Defendant's Statement of Points and Authorities in support of appeal to District Court, p.6). Thus, the scenario in Bryan was nearly followed herein, but instead of delaying the arrest, the officers herein had the necessary probable cause at the initial scene.

Defendant claims that the City failed to account for defendant's activities from the time he arrived at the store until the officers arrived. This, according to defendant, is fatal to the case since a possible alternate explanation for defendant's intoxicated state exists and that this renders the conviction void as defendant "could have" consumed the alcohol at the store. First of all, a substantial amount of defendant's

activities in this short period of time were indeed accounted for. Defendant entered the store and "attempted to buy a cup of coffee." (Tr. 25). As defendant testified, it was in a paper cup (Tr. 148), presumably the same cup Officer Cline observed him holding. (Tr. 91). Also, during this period of time, the defendant returned to his vehicle, turned off the lights and tried to close the trunk (Tr. 25, 26), tried to explain to Mr. Wilhelm the problem with the trunk (Tr. 26, 27), and was being observed by Mr. Wilhelm and continued conversation was attempted. (Tr. 27, 28).

In applying the "probable cause" standard to the case at bar, it is clear that the standard was satisfied by the officers at the time of arrest. That standard, as articulated by the Supreme Court in State v. Hatcher, Utah, 495 P.2d 1259 (1972), is to be objective, as follows:

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.

Hatcher, supra.

In applying that standard to this case, the facts known to the officer were that the defendant was extremely intoxicated, in a public place, was the only customer on the premises and there was only one car in the parking lot. The information received from the eyewitness, Mr. Wilhelm, included that defendant was the driver of that vehicle, was the sole occupant of that vehicle, drove into the parking lot at an alarming speed and an admission that it was defendant's vehicle. This latter type of information

is analogous to that given the officers in Hatcher, wherein solely the information from a witness was used to locate and arrest the Defendant therein without the officers having observed anything first hand.

In the case at bar, the information given the officers by Mr. Wilhelm was corroborated by existing physical evidence, i.e., one car, one customer and an individual so intoxicated that the field sobriety tests were terminated for his own safety. (Tr. 63, 95, 108, 1190). Most assuredly, in using the standard announced in Hatcher, supra, the facts known to the officers, coupled with reasonably deducted inferences, a reasonable and prudent person would be justified in believing that the defendant committed the offense. The officers did have probable cause to arrest defendant for driving under the influence of alcohol pursuant to §41-6-44(8), U.C.A. (1953, as amended). This Court should respond to defendant's contention just as it did to the same argument in State v. Cazier, Utah, 521 P.2d 554, at 556 (1974).

PROPOSITION II

DEFENDANT'S TRIAL COUNSEL'S CONDUCT WAS COMMENDABLE AND REFLECTED COMPETENCE.

Defendant's next assignment of error is that, due to alleged ineffective assistance of counsel, defendant was denied a fair trial. In support therefor, defendant has cited five (5) instances wherein, in the opinion of defendant, objections should have been interposed. Based on those five (5) instances and, in defendant's contention, a weak evidentiary foundation for his

conviction, the results of the trial would have been different.

The first alleged error defendant claims counsel made was failure to object to the prosecutor's leading questions of Mr. Wilhelm. It is obvious from the record that the majority of said questions were preliminary in nature. Further, the questions, for the most part, did not suggest an answer that would not or could not have been elicited otherwise.

Secondly, defendant claims that counsel's refraining from objecting to Mr. Wilhelm's narrative was extremely prejudicial. Mr. Wilhelm was testifying as to his state of mind and motivation for notifying the police. (Tr. 26). The objection would have had to have been made during the witness' response as opposed to the conclusion of a question. It may have been that counsel did not object and request for the answer to be stricken as a strategy to avoid actually reinforcing the statement in the jurors' minds. It should be noted that when the prosecutor attempted to elicit an additional like response, defense counsel did object and it was kept from the jury. However, it should be noted that the Court's ruling was not that the information was not admissible but rather, it was repetitive. Thus even if an initial objection had been made it may have been overruled and then that testimony would have been heard immediately after that ruling and would have been more emphasized to the jury.

The third alleged error was counsel's refraining from objecting to Officer Robnett's recitation of Mr. Wilhelm's information to the officer. Defendant asserts that this was objectionable hearsay. Such evidence could have been offered for

other reasons, such as to show what information the officers received from Mr. Wilhelm as well as for corroboration of the witnesses' testimonies. The information contained in the statements had already been established directly from Mr. Wilhelm, rendering any alleged prejudice or harm negligible.

The fourth alleged error by defense counsel was the allowing of Officer Robnett to read from a report without establishing need for refreshing his memory. Defense counsel most assuredly knew that if such an objection was made, it would be merely a procedural formality to establish a foundation and upon doing that, the possibility of the entire report being admissible could be an undesirable result for the defense. (Rule 612, U.R.E.).

Fifth alleged error by defense counsel was allowing Officer Robnett to testify concerning defendant's refusing to submit to the intoxilyzer test. Evidence concerning a refusal to submit to such a chemical test is specifically allowed by statute. §41-6-44.10(8) U.C.A. (1953 as amended). Further, the officer testified how he arrived at the opinion that defendant refused. Such opinion testimony is admissible under both Rules 701 and 702 of the Utah Rules of Evidence.

It is clear from the record that these alleged errors, either singularly or cumulatively, had little, if any impact on the outcome of the trial. That defendant has only been able to find five (5) alleged errors from a transcript of 190 pages is indicative of defense counsel's performance. As has been established, appellate courts "do not second guess an attorney's legitimate exercise of judgment, as to trial tactics or strategy."

Codianna v. Morris, 660 P.2d 1101 (Utah 1983), citing State v. McNicol, Utah, 554 P.2d 203 (1976).

Further, when these alleged errors are viewed in relation to the substantial evidence supporting the verdict, the insignificance thereof is apparent.

This contention is without merit.

PROPOSITION III

THE JURY VERDICT BELOW IS WELL SUPPORTED BY THE EVIDENCE.

The elements that the City was required to satisfy were that 1) on or about the 30th day of November, 1985, defendant drove a vehicle; 2) that at that time, defendant was under the influence of alcohol to a degree that rendered him incapable of safely driving a vehicle; and 3) that these acts took place within Layton, Utah.

Direct evidence established that defendant was indeed driving a vehicle. (Tr. 22, 23, 44). This was subsequently admitted to by defendant. (Tr. 148). There was no dispute that this all occurred within Layton City. (Tr. 50). As for the element of defendant's degree of impairment, Mr. Wilhelm and the three officers independently concluded that defendant was extremely intoxicated and the officers opined, based on their training, experience and observations of defendant that he was not capable of safely driving a vehicle. (Tr. 65, 96, 120).

The only remaining element was to establish that defendant was so intoxicated and impaired while driving the vehicle. Based on the above referenced direct evidence and the manner in which

Mr. Wilhelm saw the vehicle approach the store and with the proximity in time of defendant's driving and the observation of his intoxicated state, clearly a reasonable inference that may be drawn therefrom is that defendant was intoxicated while driving. Making such reasonable inferences based on the direct evidence is a proper function of the trier of fact, State v. Kazda, Utah, 392 P.2d 686 (1964); State v. Maestas, Utah, 652 P.2d 903 (1982).

The jurors so found.

PROPOSITION IV STANDARD OF REVIEW

Initially, it is the defendant's burden to establish that "the evidence was so inconclusive or insubstantial that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime charged." State v. Kerekes, Utah 622 P.2d 1161 (1980), (citing State v. Daniels, Utah, 584 P.2d 880 (1978)). This standard and language has been repeated and reiterated on numerous occasions and is found again in State v. Lairby, 699 P.2d 1187 (Utah 1984). Defendant has failed to satisfy this burden.

This Court's role in reviewing appeals from criminal convictions has been well established. In reviewing the conviction, it is incumbent upon the appellate court to assume that the jury believed those aspects of the evidence which support the verdict. State v. Smathers, Utah, 602 P.2d 708 (1979). Further, on appeal the evidence, including the reasonable inferences which may be fairly drawn therefrom, will

be reviewed in a manner that will support the jury verdict. State v. Schoenfeld, Utah, 545 P.2d 193 (1976). Finally, on these appeals from criminal convictions, the evidence is to be viewed "in a light most favorable to the jury's verdict and will reverse only when the evidence is so unsubstantial that a reasonable person could not have reached the verdict beyond a reasonable doubt." State v. Haro, 703 P.2d 301 (Utah 1985), (citing State v. Brooks, Utah, 638 P.2d 537 (1981), and State v. Howell, Utah 649 P.2d 91 (1982)).

It is obvious from the record that the evidence supporting the City's contention was substantial and gave the jury a solid foundation on which to base the verdict.

CONCLUSION

Pursuant to the case law set forth herein, it is clear that the results in case at bar are in line with the previous rulings announced by the State Supreme Court. The defendant's arrest was proper and in accordance with §41-6-44(8) U.C.A. (1953); and the elements of the offense were well proven by substantial and generally uncontested evidence. It is clear that the verdict herein must be affirmed.

WHEREFORE, Layton City respectfully prays this Court uphold the findings of the jury, the trial court, and the district court and affirm the finding of guilt.

RESPECTFULLY SUBMITTED this 15th day of December, 1986.

STEVEN L GARSIDE
Attorney for Respondent

ADDENDUM

	<u>Page</u>
1. §41-6-44, Utah Code Annotated (1953, as amended)	16
2. §41-6-44.10 (8), Utah Code Annotated (1953, as amended)	18
3. §41-6-44, Layton Municipal Code	16
4. Utah Rules of Evidence	19
Rule 401	19
Rule 402	19
Rule 403	19
Rule 612	19
Rule 701	20
Rule 702	20

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.

Note: §41-6-44, Layton Municipal Code, is identical to the Utah Code version

(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.

§42-6-44.10 (8), Utah Code Annotated 1953, as amended

If a person under arrest refuses to submit to a chemical test or tests under the provisions of this section, evidence of refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of alcohol or any drug or combination of alcohol and any drug.

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. Opinion Testimony by Lay Witnesses.

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 612. Writing Used to Refresh Memory.

If a witness uses a writing to refresh his memory for the purpose of testifying, either

1. while testifying, or
2. before testifying, if the court in its discretion determines it is necessary in the interest of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, exercise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

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.

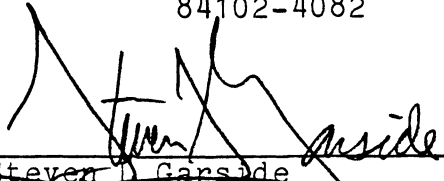
Rule 702. Testimony by Experts.

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.

CERTIFICATE OF SERVICE

I hereby certify tha four (4) true and correct copies of the foregoing Brief of Respondent were mailed, postage prepaid, to the following on this 15th day of December, 1986.

J. Franklin Allred
321 South Sixth East
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84102-4082



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