1988

Sandy City v. David A. Bean : Reply Brief

Utah Court of Appeals

Clifford Lark, Esq.; Sandy City Prosecutor; Attorneys for Respondent.
Ronald E. Kunz; Cooke and Wilde, P.C.; Attorneys for Appellant.

880524 CA

IN THE COURT OF APPEALS

STATE OF UTAH

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SANDY CITY,	)	
	)	
Plaintiff and Respondent,	)	
	)	
vs.	)	
	)	Case No. 880524-CA
DAVID A. BEAN,	)	
	)	Priority No. 2
Defendant and Appellant.	)	

REPLY BRIEF OF APPELLANT

Appeal from the Third Circuit Court, Sandy Department
Honorable Robin W. Reese

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Attorneys for Appellant

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LIST OF PARTIES

There are no other parties to this action except as designated in the caption of this case.

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SUMMARY OF ARGUMENT

The evidence introduced at trial and assumed to be true by the trial court in its findings was clear that the motor behicle under Mr. Bean's control at the time of his arrest, was inoperable, and that Mr. Bean had not driven the vehicle to where it became inoperable. The Court should have taken these facts into consideration and found that Mr. Bean was not in actual physical control of an operable motor vehicle.

ARGUMENT

I. THE TRIAL COURT'S FINDINGS DO NOT SUPPORT MR. BEAN'S CONVICTION.

In Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982), the Utah Supreme Court noted:

> The standard for appellate review of factual findings affords great deference to the trial court's view of the evidence unless the trial court has misapplied the law or its findings are clearly against the weight of evidence. Id. at 653.

In this case, Mr. Bean doesn't question the accuracy of the trial court's findings. In fact, it is his position that the trial court's findings are correct.

In their entirety, the court's findings are as follows:

FINDING OF FACT

> The court finds the following to have been established:
>
> On November 2, 1985, the defendant, David A. Bean, was observed by a Sandy City police officer sitting behind the steering wheel of a motor vehicle, attempting to start the same. The defendant was never observed in the passenger side of the vehicle, the defendant said he was having car trouble and told the officer to "smell the carb'."
>
> The only direct evidence on the issue of who had driven the vehicle to the spot where the defendant was observed trying to start it was provided by the defendant and his brother, Michael Bean. At trial, each testified that Michael Bean had been driving the vehicle. (R at 63).

Further, in applying these findings, the trial court stated that it accepted as true Mr. Bean's claim that his brother drove the vehicle to the place where the officer arrested Mr. Bean. (R at 64).

Under the Garcia standard of review language, Mr. Bean's only contention in this appeal is that the trial court misapplied the law. Without making a finding as to whether the vehicle was operable, the trial court held that the fact that Mr. Bean was behind the wheel of the

vehicle, attempting to start the vehicle, was sufficient to establish that Mr. Bean was in actual physical control of the vehicle for purposes of the Sandy City DUI Ordinance.

However, the trial court also noted the Utah Supreme Court's holding in Garcia, that:

> [the] purpose of the actual physical control language of Utah's implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants... (R at 64), quoting Garcia at 654.

Sandy City, in its Brief, admits that, "If a vehicle is visibly inoperable...an occupant would generally not be in actual physical control." Brief of Respondent at page 13. These statements exhibit a fundamental inconsistency in the position taken by the trial court and Sandy City.

First, if a vehicle is inoperable, it is inoperable whether or not the problem with the vehicle is readily apparent. Second, if the vehicle is inoperable, then anyone who occupies the vehicle can be no more than a passive passenger. In the case at issue, the vehicle was inoperable. It would not start at the time of Mr. Bean's arrest, nor would it start after it was towed to the

impound garage. The vehicle would not start until Mr. Bean's brother put gas in it.

The purpose of this appeal is to determine from the findings of the trial court if Mr. Bean was in "actual physical control" of the vehicle. Although the trial court did not make a specific finding concerning the operability of the vehicle Mr. Bean was in, the facts show that it would not run. This is important because the trial court accepted the fact that Mr. Bean did not drive the vehicle to the place where the officer arrested him. Therefore, if Mr. Bean was in "actual physical control" of the vehicle, it must have been from the time when his brother left the vehicle to the time that the officer arrived at the scene.

The decisions of the Utah Supreme Court and other jurisdiction as set forth in Mr. Bean's Brief of Appellant indicate that operability of a vehicle is a factor to be considered in determining whether a person in the vehicle is in actual physical control. Therefore, findings of the trial court do not support Mr. Bean's conviction under Sandy City Ordinance §119(1)(a).

II. REASONABLE MINDS COULD DIFFER AS TO WHETHER MR. BEAN COULD EXERCISE ACTUAL PHYSICAL CONTROL OVER THE VEHICLE.

The circumstances surrounding Mr. Bean's arrest are important because they distinguish his case from the cases Sandy City cited to support Mr. Bean's conviction. Garcia, supra, Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986), and most of the others cited by Sandy City rely on facts which either establish that the person arrested drove the vehicle to the place where the police made the arrest, or that the person arrested could have operated the vehicle.

In citing Lopez in its Brief at page 11, Sandy City misrepresents the context in which the statement quoted was made. While the Utah Supreme Court held that the statute was not to be construed to exclude those whose vehicles were immobile due to mechanical failures, the language of the court leading up to this statement indicates that operability can be a factor in examining whether a person has actual physical control over a vehicle. The court noted, with approval, the decision by the Washington Court of Appeals in State v. Smelter, 674 P.2d 690, 693. In Smelter, the court recognized that no single fact establishes guilt or innocence in DUI cases.

It is the totality of the circumstances upon which a conviction is to be based. That is: How did the vehicle get to the point where the arrest was made; what type of authority did the arrested person exert over the vehicle and by implication, what was the operating condition of the vehicle? Lopez at 781.

The fact that the vehicle in which Mr. Bean was found was inoperable, by itself, does not establish his innocence. However, that fact, when viewed with the fact that Mr. Bean did not drive the vehicle to the place where the police arrested him, shows that Mr. Bean was never in "actual physical control" of an operable vehicle. While the facts in the case at issue may or may not have been sufficient to justify revocation of Mr. Bean's license in an administrative action as was the case in Lopez and Garcia, they do not satisfy the standard of proof beyond a reasonable doubt, necessary to uphold Mr. Bean's criminal conviction.

CONCLUSION

Based on the arguments contained herein and those contained in Mr. Bean's Brief of Appellant, Mr. Bean

requests this Court set aside his conviction for driving under the influence of alcohol.

DATED this 2 day of March, 1989.

RESPECTFULLY SUBMITTED

Ronald E. Kunz

RONALD E. KUNZ
COOK & WILDE, P.C.
Attorneys for Appellant

AFFIDAVIT OF SERVICE

STATE OF UTAH)
:ss
County of Salt Lake)

Ronald E. Kunz, being duly sworn, deposes and states that he is an attorney with the law firm of Cook & Wilde, P.C., attorneys for the Appellant herein; that he served the attached BRIEF OF APPELLANT upon the parties listed below by placing four (4) true and correct copies thereof in an envelope addressed to:

Clifford Lark, Esq.
Sandy City Prosecutor
440 East 8680 South
Sandy, Utah 84070

and causing the same to be mailed first class, postage prepaid, this 2 day of March, 1989.

Ronald E. Kunz

RONALD E. KUNZ

Subscribed and sworn to before me this 2nd day of March, 1989.

NOTARY PUBLIC

My Commission Expires:
9/22/91

Residing in:
Davis County, State of Utah