1979

State of Utah v. Johnnie M. Chavez : Brief of Respondent

Utah Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - - - - - - - - -

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 16132

JOHNNIE MICHAEL CHAVEZ, :

Defendant-Appellant. :

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with the crimes of manslaughter in violation of Utah Code Ann., § 76-5-205(1)(a), (1973, as amended), and Automobile Homicide in violation of § 76-5-207 Utah Code Ann., (1973, as amended). Both charges were filed as a result of an automobile accident in which appellant was involved on July 21, 1977.

DISPOSITION IN THE LOWER COURT

The matter was tried before the Honorable Ernest F. Baldwin, Jr., sitting with a jury, on March 27, 28, and 29, 1978. The case was sent to the jury on the charge of

Automobile Homicide and appellant was found guilty of that offense. Thereafter, appellant was committed to the Utah State Prison for the term provided by law, zero to five years.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the judgment of the lower court as well as the sentence imposed.

STATEMENT OF THE FACTS

On July 21, 1977, at approximately 10:45 p.m. at 3900 South State Street in Salt Lake City, appellant was involved in an automobile accident with another automobile driven by Gennar Skollingsberg (T. 39, 42, 179, 180). In the Skollingsberg vehicle was 26-month old Eric who died as a result of head injuries suffered in the accident (T. 43).

At trial, Mr. Skollingsberg testified that he was southbound on State Street, stopped for a red light in the left turn lane, then turned left, or east, onto 3900 South when his car was hit by an automobile coming north on State Street (T. 38-42). The automobile that collided with Mr. Skollingsberg's was driven by the appellant, Johnnie Chavez (T. 179, 180). Mr. Skollingsberg also stated that he began to proceed turning left into the intersection once the green arrow in his lane of traffic came on (T. 48-49). He further testified that he noticed the through traffic

lights were red as the green arrow in his lane came on (T. 48-49). Cars headed north on State Street in through traffic lanes were stopped at the intersection, with the exception of those cars turning left into the intersection west on 3900 South (T. 53).

Thelma Skollingsberg, Gennar's sister, was a passenger in the Skollingsberg car, and corroborated his testimony (T. 56-59; 60-63). In addition, she stated that as her brother began to turn into the intersection onto 3900 South, she looked down State Street and saw a car (which turned out to be the one appellant was driving), "coming real quick" (T. 57).

Richard Williams, a professional over-the-road truck driver, testified that he was stopped in the traffic lanes (through lanes), headed north on State Street at 3900 South, waiting for the red light to change. He heard the sound of a car approaching from his right rear (the high revolutions of the motor turning (T. 67)), in a lane not used for through traffic (T. 66-67). This approaching car was driven by appellant and was estimated by Mr. Williams to be traveling at the rate of approximately 65 miles per hour (T. 71). He also stated that he observed the car driven by appellant strike the Skollingsberg vehicle and bounce off (T. 67, 71). The light controlling the

traffic headed north on State Street, the direction in which appellant's car was heading, was red when the accident occurred (T. 73). Immediately after the collision, the light controlling northbound through traffic on State Street turned green and traffic began to move (T. 76-79).

Wayne Spens corroborated the testimony of Richard Williams, stating that as he sat stopped in his jeep at the intersection of State Street and 3900 South (he was headed north on State), his attention was drawn to a high, loud, engine noise off to his right-hand side (T. 80-82). Spens was in the far right-hand lane (T. 81), and as he heard the noise of the engine from appellant's approaching car, he (Spens) turned his head just in time to see "a blur of a car" go by on his right (T. 82). He estimated the speed of appellant's car to be about 60 miles per hour as it entered the intersection and collided with the Skollingsberg vehicle (T. 83). Mr. Spens further stated that the color of the traffic light for through traffic heading north was red at the time appellant's vehicle entered the intersection (T. 83-84).

Other passengers in Wayne Spen's jeep corroborated the fact that the light for northbound traffic at 3900 South and State Street was red (T. 91, 82, 89), that they heard a

loud engine noise (T. 91), and that appellant was driving his car in a cement gutter portion of the road used only for right turns and as a bus stop (T. 66, 95), not for through traffic. Suzanna Pons also stated that she saw appellant exit the car from the driver's side following the crash, and noticed the appellant "wander around," acting like he was in a daze (T. 98,99).

Two witnesses to the accident, John Oldroyd and Don Askee, testified that they were sitting on a bench very close to the corner of 3900 South and State when appellant's vehicle ran the red light and hit the Skollingsberg vehicle (T. 109, 117). Both boys also stated that appellant's car went through the intersection in the far right-hand lane next to the gutter (T. 109, 116), before colliding with the other vehicle. They also stated that appellant's car was so close to the bench where they were sitting they had to pull their feet and legs up to keep from getting hit (T. 109, 117) [the car was less than two feet from them (T. 109, 117)].

The arresting officers stated that the appellant was arrested as he was walking briskly and fast away from the scene of the accident (T. 122, 130). Appellant seemed to be upset (T. 130), and both Officers Smith and Rigby detected the odor of alcoholic beverage about appellant's person (T. 123, 128).

Appellant was administered first aid for his injuries at the scene of the accident, then taken to a hospital (T. 127, 133). Following his arrival at the hospital, samples of blood were taken from appellant at 12:14 a.m. and 12:45 a.m. on July 22, 1977 (T. 190-191). While in the hospital, appellant asked his friend Eppie Duran, a passenger in appellant's car, what color the (traffic) light was (T. 140). The nurse who drew the blood samples from appellant, Evelyn Mayberry. testified that she detected the odor of alcohol on appellant's breath and that his pupils were dilated (T. 191).

Lynn Davis, a chemist with the City/County Health Department of Salt Lake County, testifed that he received the blood samples from Ms. Mayberry on July 22, 1977, and that on August 1, 1977, he analyzed them for the alcohol content level. using the "enzyme method" (T. 208, 212, 213). His results showed .19 percent ethyl alcohol by weight in both samples extracted from appellant (T. 214).

Dr. Bryan Finkle, a pharmacologist, pathologist and toxicologisttestified that in general, an individual will reach their maximum blood alcohol concentration level about one hour after their last drink (T. 251). He also stated that alcohol is cleared from the blood following maximum concentration, providing no further drinking occurs,

at about 0.02% per hour (T. 252). Using two given situations, (absorption and alcohol clearance), Dr. Finkle testified that in one situation (alcohol elimination), if there was no drinking for a long period of time prior to the .19 alcohol level reading (at 12:15 a.m. on July 22, 1977), and using the fact that alcohol clears the blood at the rate of 0.02% per hour, then working back to a point in time of 10:15 p.m., then an individual's (appellant's) blood alcohol would be about 0.23% at 10:15 p.m. (T. 263-264). In the other situation (absorption), Dr. Finkle testified that again, assuming that all drinking by appellant ceased at 10:25 p.m., the alcohol maximum concentration point would be reached at 11:15 p.m. (.21%), making the 12:15 a.m. alcohol level .19%. Then, at approximately 10:45 p.m., (the time of the accident), appellant's alcohol blood level would have been somewhere between .05 and .08 (T. 264-266). Dr. Finkle, however, further related that such a possibility of one's alcohol content going from zero (at 10:15 p.m.), to .21% in one hour is extremely unlikely (T. 266). He also testified that a person weighing the same as appellant (135 lb.), would have to have about 3.5 fluid ounces of pure alcohol (7 fluid ounces of 100 proof alcohol) circulating in their body to obtain a .19% alcohol blood reading (T. 268). Furthermore, since most whiskey is 80-proof, appellant would have had

to consume about 9 fluid ounces of whiskey to have reached a .19% alcohol reading (T. 268). Dr. Finkle said that even these figures constituted a minimum or conservative estimate, since 9 fluid ounces of whiskey consumed over a long period of time would be absorbed by the body and eliminated at such a rate that no or very little alcohol concentration could be built up (T. 169). Such an amount of alcohol (9 fluid ounces), would have to be consumed over an hour to an hour and a half, with the last drink coming an hour prior to a .19% reading, in order for there to be a blood alcohol concententration of 0.19%, according to Dr. Finkle (T. 269).[1]

The passenger in appellant's car, Eppie Duran, testified that appellant had a glass of something to drink about 10:25 p.m., immediately prior to their leaving a friend's house (T. 177). Appellant drank it "real fast" as they were leaving (T. 177). Duran said that he (himself), was drinking whiskey and coke (T. 176), but could not say what appellant was drinking (T. 176). Duran stated that he felt a little intoxicated when he left their friend's house and headed up State Street (north) (T. 179). Testimony by

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1 Testimony by Officer Smith, Rigby, Peay, and Wilkinson revealed that appellant did not have any alcoholic beverage to drink from the time of the accident (10:45 p.m.) until the time the blood samples were taken (T. 128, 134).

Duran also revealed that he told appellant to slow down as they were approaching the intersection at State Street and 3900 South (T. 180).

Testimony by Trooper Taylor of the Utah Highway Patrol revealed that skid marks were left by appellant's vehicle immediately prior to the collision (T. 149, 152). Gouge marks were also present (T. 154).

Finally, testimony by Trooper Steen of the Utah Highway Patrol revealed that the cycle of operation of the traffic lights at the intersection of 3900 South and State Street on the night of July 21, 1977, was such that the through traffic lanes (north and southbound) were red when the left turn green arrow was on. The traffic lights controlling North and southbound traffic would remain red until all left turning traffic would have cleared (T. 166-167). He also stated that the "gutter portion" of the road on which appellant was traveling was used about 80% of the time as a right turn lane (T. 167).

ARGUMENT

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT AN ELEMENT OF AUTOMOBILE HOMICIDE IS NEGLIGENCE AND THAT TO SUSTAIN A CHARGE OF AUTOMOBILE HOMICIDE, THE JURY MUST FIND, AMONG OTHER ELEMENTS, THAT APPELLANT DROVE OR OPERATED HIS MOTOR VEHICLE IN A NEGLIGENT MANNER.

Appellant contends that the trial court erroneously instructed the jury in the elements of automobile homicide

because the court instructed the jury that simple negligence was the type of negligence that the State must prove. He further contends that the proper standard of negligence on which the jury should have been instructed and to which the State must be held in their burden of proof is criminal negligence.

Appellant concedes that his contention and argument has been rejected by the Utah Supreme Court in previous cases, State v. Durant, 561 P.2d 1056, (Utah, 1977), State v. Wade, 572 P.2d 398 (Utah, 1977), State v. Anderson, 561 P.2d 1061 (Utah, 1977), and State v. Risk, 520 P.2d 215 (Utah, 1974). He nevertheless argues that these cases should be overruled and the dissenting opinion of Justice Maughan in State v. Durant, supra, be adopted as law in this state. Such an argu by appellant is apparently based upon two statutory provisions, § 76-2-101, Utah Code Ann., (1953, as amended), and § 76-5-201, Utah Code Ann., (1953, as amended), which appellant claims are in conflict with the automobile homicide statute, § 76-5-207, Utah Code Ann., (1953, as amended).

Respondent submits that the law in this state is well settled, i.e., in an automobile homicide prosecution, the State need prove only simple negligence and not criminal negligence. State v. Durant, supra, at 1058; State v. Wade,

supra, at 400; State v. Anderson, supra, at 1063; State v. Risk, supra at 213.

Appellant has advanced no reason why this Court should reverse itself and change the present state of the law. Respondent submits there is no need for change, since the statutes cited by appellant are not in conflict. Utah Code Ann., § 76-5-201 (1953, as amended), speaks of the elements and ways in which one may commit criminal homicide:

> (1) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence unlawfully causes the death of another.
> (2) Criminal homicide is murder in the first and second degree, manslaughter, or negligent homicide, or automobile homicide.

(Emphasis added).

Utah Code Ann., § 76-2-101 (1953, as amended), reads:

> No person is guilty of an offense unless his conduct is prohibited by law and:
> (1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each element of the offense as the definition of the offense requires; or
> (2) His acts constitute an offense involving strict liability.

(Emphasis added).

Utah Code Ann., § 76-5-207 (1953, as amended), defines automobile homicide:

> (1) Criminal homicide constitutes automobile homicide if the actor, while under the influence of intoxicating liquor,

> a controlled substance, or any drug, to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner. . . .

A careful reading of these statutes cited discloses no conflict. Sections 76-2-101 and 76-5-201 are both written in the disjunctive. A person, under the terms of § 76-5-201 may commit criminal homicide if he "intentionally, knowingly, recklessly, or with criminal negligence unlawfully causes the death of another." The statute does not require that the death be caused in all of the ways mentioned, only by one. The same principle holds true for § 76-2-101, where it specifies that one must act "intentionally, knowingly, recklessly, or with criminal negligence with respect to each element of the offense as the definition of the offense requires."

Applying §§ 76-5-201 and 76-2-101 to the automobile homicide section 76-5-207, it becomes evident that the elements of the offense of automobile homicide can be satisfied by one acting intentionally, or knowingly, or recklessly, or in a criminally negligent manner. As a specific example, one may be intentionally negligent, knowingly negligent, recklessly negligent, or negligent in a criminally negligent manner. Any manner is sufficient, as long as the evidence is sufficient to meet the burden of proof.

Furthermore, under the provisions of § 76-5-201, a person may commit criminal homicide (automobile homicide under 76-5-201(2)), in any one of four ways: intentionally, knowingly, recklessly, or in a criminally negligent manner. As was stated in State v. Wade, 572 P.2d at 399, an act, in order to be labeled as one of criminal homicide under § 76-5-201, be it automobile homicide or otherwise, need not necessarily be committed in a criminally negligent manner. Thus, appellant's allegation that criminal negligence is an element of automobile homicide does not stand. Had the legislature intended for criminal ngeligence to be the standard of negligence to which the prosecutor was bound in an automobile homicide prosecution most certainly they would have specified so in § 76-5-207. Instead, the legislature used the term, ". . . causes the death of another . . . in a negligent manner . . ."

The trial judge instructed the jury on the elements of automobile homicide specifically as they appear in the Utah Code Annotated § 76-5-207 (1953, as amended). (R. 75, 76). These instructions were in harmony with the law as set forth by this Court in the Durant, Wade, Anderson and Risk cases. Appellant has advanced no valid reason for this Court to reverse itself. The lower court's instructions regarding the elements of automobile homicide and the degree of negligence required must therefore be upheld.

POINT II.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE PRESUMPTIONS CREATED BY A BLOOD ALCOHOL LEVEL ABOVE 0.08 SINCE THERE WAS EVIDENCE TO SUPPORT THE GIVING OF SUCH AN INSTRUCTION.

Appellant alleges that it was reversible error for the trial court to instruct the jury on the presumptions created by a blood alcohol level above 0.08. He attempts to support such an allegation on the theory that no evidence existed to support such an instruction. Respondent submits that the record discloses evidence to support the giving of the instruction by the trial court regarding presumptions of being under the influence of intoxicating liquor (R. 78).[2]

Respondent agrees with appellant that in order to convict one of automobile homicide, the State must prove that a person was under the influence of intoxicating liquor to a degree which renders the person incapable of safely driving a vehicle.[3] From that, the State must also prove that at the time of the driving which resulted in the death of Eric Skollingsberg, the appellant, Johnnie Chavez, was under the influence of alcohol. The trial court so instructed (R. 76).

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2 The instruction given by the trial court was taken from Utah Code Ann., § 41-6-44(b) (1953, as amended).

3 Utah Code Ann., § 76-5-207 (1953, as amended).

A review of the evidence discloses that the State's expert witness, Dr. Bryan Finkle,[4] was called to "relate back" or "extrapolate" the blood alcohol level of appellant at the time the blood was taken to the time of the accident. In doing this, Dr. Finkle used several figures and gave two figures as to what appellant's blood alcohol level was at the time of the accident. He stated that in general, a person consuming alcohol will reach their maximum alcohol concentration level approximately one hour following their last drink (T. 251). In other words, after all drinking has ceased, alcohol is absorbed into a person's system during the next hour until a maximum alcohol concentration level in the blood is reached. Following this, the alcohol begins to "clear" from the blood at approximately 0.02% per hour (T. 252).

The evidence disclosed that appellant's blood samples were taken at 12:14 a.m. and 12:45 a.m. on July 22, 1977, these times being some hour and a half and two hours after the accident at 10:45 p.m. on July 21, 1977 (T. 190-101). These samples were analyzed and found to contain .19 percent alcohol by weight (T. 214). There was no specific time as to when appellant had his last drink. However, several pieces of evidence gave clues from which a

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4 Dr. Finkle, a toxicologist, pharamcologist, and pathologist at the University of Utah, qualified as an expert witness in Judge Baldwin's court at pages 247-258 of the trial transcript.

jury could infer time periods in which appellant would have had to have consumed his last drink. First appellant's friend Eppie Duran, had been with appellant during the evening of July 21, and testified that appellant had nothing to drink after 10:30 p.m. on July 21, fifteen minutes prior to the accident (T. 177). Duran stated that he saw appellant with a glass in his hand at 10:25 p.m., while they were at a friend's house (T. 177). Immediately prior to leaving their friend's house, appellant drank the liquid in the glass "real fast" (T. 177). Duran stated that he (himself) was drinking whiskey and coke, but he could not say for sure what appellant was drinking (T. 176). Respondent feels that at this point, based upon Duran's testimony, a jury could infer and/or deduce that if in fact whiskey or some type of alcohol was in appellant's glass just prior to leaving his friend's house, this drink would have been his last. Furthermore, Dr. Finkle's calculations, therefore, could be based upon 10:25 p.m. as a reference point for determining what the blood alcohol level was at 10:45 p.m., the time of the accident.

In determining the amount of alcohol appellant had consumed, Dr. Finkle testified that a person weighing the same as appellant (135 lbs.), would have to have about 3.5 fluid ounces of pure alcohol (7 fluid ounces of 100 proof alcohol) circulating in their body in order to obtain a

blood alcohol reading of .19% (T. 268). Since most whiskey is 80-proof, appellant would have had to consume about nine fluid ounces of whiskey to have reached a .19% reading (T. 26). A jury could, therefore, based upon Dr. Finkle's testimony, find that at 12:14 a.m. on July 22, 1977, appellant had at least 3.5 fluid ounces of pure alcohol (7 fluid ounces of 100 proof alcohol or 9 fluid ounces of 80 proof alcohol) circulating in his blood stream.

In relating back these figures to determine what the alcohol blood level would have been at 10:45 p.m., Dr. Finkle stated that such a figure would depend upon when the last drink was taken. Without knowing when the maximum alcohol concentration point occurred, and using the figure that alcohol clears the system at a rate of approximate .02% per hour, appellant's blood alcohol level at 10:45 p.m., would have been about .22%, which is well above the .08% of which appellant is complaining that there is no evidence (T. 262-264).

Dr. Finkle also stated that assuming alcohol was being absorbed, and the last drink was taken at 10:30 p.m., then maximum alcohol concentration level would be reached at approximately 11:30 p.m., and a chart which graphs alcohol absorption and alcohol blood content would intersect at 10:45 p.m. somewhere between .05 and .08% (T. 277). Dr. Finkle

however, noted that the possibility of someone who stopped drinking at approximately 10:30 p.m. and having a maximum blood alcohol concentration going from essentially zero (not having any drinking pattern), to 0.21% in one hour was extremely unlikely (T. 266). He then went on to elaborate on the amount of alcohol that appellant would have had to have consumed in order to show a reading of .19% at 12:14 a.m. (T. 266-269). He further stated that if such an amount of alcohol had been consumed over a long period of time, the body would have absorbed it and eliminated it at such a rate the person would never have built up any alcohol concentration at all (T. 269). A jury could therefore deduce or find that the amount of alcohol found to be present in appellant's blood at 12:14 a.m. (a fact), would have had to have been consumed over a rather short period of time. Since the alcohol level was at least at a .21% level at 11:14 p.m. on July 21, 1977, a jury could find that the alcohol blood level would have been at least .09% at 10:45 p.m., and probably much higher. As Dr. Finkle stated, the possibility of a person's alcohol blood level going from .08% at 10:45 p.m. (0% at 10:30 p.m., assuming appellant's one and only 9 ounce drink was consumed at 10:25 p.m.), to .21% at 11:14 p.m. is extremely remote. This would represent a jump of .13% alcohol blood level in 30 minutes. Based

upon this, a jury could find that appellant had consumed more than one 9 fluid ounce drink at 10:25, and had in fact been drinking throughout the evening. Furthermore, a jury could also find that appellant's blood level was well above .08% at the time of the accident, based upon Dr. Finkle's testimony, which in turn was based upon reasonable medical certainty.

Respondent thus submits that there was certainly ample evidence upon which to give point 3 of Instruction No. 17 (R. 78). Respondent also submits that case law supports respondent's position that the instruction was properly given.

State v. Bradley, 578 P.2d 1267 (Utah, 1978), which appellant cites, does not support his allegations, but instead supports respondent's argument and explains the law as it exists in Utah. In Bradley, defendant was convicted of driving under the influence, showed an alcohol blood level of .06% four hours after he ran a red light, and caused an accident. He alleged that the trial court should not have instructed the jury with regard to statutory presumptions based on blood alcohol levels present at the time of the incident because the state was allegedly unable to adequately extrapolate the chemical test results to that time. In agreeing with the defendant, the Court said:

> Thus, in cases arising before the enactment of 41-6-44.5, if the state is unable to produce chemical

> test results sufficient, to allow a presumption of intoxication when the test was administered, it must necessarily provide expert testimony to extrapolate the lower readings back to the time of the incident to show that a defendant's blood alcohol level was then sufficient to give rise to the presumption.

578 P.2d at 1269 (emphasis added).

It is certainly evident that the state in the case at bar has met all the requirements of Bradley. First, the state introduced chemical test results showing a .19% reading at the time the test was administered. This is well above the .08% requisite before a presumption of intoxication arises. Second, the state, through the use of expert testimony, extrapolated the results back to show a possible .22% reading at the time of the accident.[5] Even using the situation, arguendo, where one drink was taken at 10:30 p.m., a reading going from zero to .21% in 45 minutes is extremely unlikely. Thus, a reading above .08% at 10:45 p.m., is at worst a very definite "reasonable medical certainty."

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5 It is questionable whether or not according to the language in Bradley, the State is required to extrapolate the results back if the results at the time of testing show that the presumption cutoff (.08%) is met.

Finally, attention is called to three cases which support respondent's argument. In State v. Koklasch, Or. App., 502 P.2d 1158 (1972), defendant alleged that his case should not have been submitted to the jury because there was insufficient evidence to show what his blood alcohol context was at the time he was driving the automobile. The statute under which he was convicted prohibited driving a motor vehicle when the alcohol content was more than .15%. Defendant's test showed .23% 33 minutes after his arrest. The court held that the test results raised a rebuttable presumption that the blood alcohol content was not less than shown thereby when the defendant was driving.

In State v. Turner, 94 Idaho 548, 494 P.2d 146 (1972), the defendant objected to the giving of an instruction raising a presumption of intoxication. He was involved in an accident and took the breath test some two hours and 45 minutes later. The results showed .10%. The presumption of intoxication was "more than .10% by weight alcohol." In upholding the giving of the instruction, the Idaho Supreme Court said:

> The test revealed a blood alcohol content of 0.10%. Since the alcohol content decreases at the rate of 0.01% to 0.02% per hour after the first forty-five to sixty minutes, the state's

> chemical analyst testified that 0.10% was less than the "peak" alcohol content reached earlier that night. . . .

494 P.2d at 148.

Subsequent to Turner, the Idaho Supreme Court in State v. Sutliff, 97 Idaho 523, 547 P.2d 1128 (1976), held that:

> . . . this statute [creating presumptions in a prosecution for Driving under the Influence] does not require extrapolation back but establishes that the percentage of blood alcohol as shown by chemical analysis relates back to the time of the alleged offense for purposes of applying the statutory presumption. . . .

547 P.2d at 1130 (emphasis added).

Respondent thus submits that the evidence was sufficient to warrant the giving of point 3 of Instruction No. 17, instructing the jury on the presumptions of intoxication.

POINT III.

THE EVIDENCE WAS SUFFICIENT TO SHOW THAT APPELLANT, AT THE TIME OF THE ACCIDENT, WAS UNDER THE INFLUENCE OF ALCOHOL SUFFICIENTLY TO A DEGREE TO RENDER HIM INCAPABLE OF SAFELY DRIVING A VEHICLE.

Appellant contends that the evidence was insufficient to convict him of automobile homicide and for that reason, the court below erred in not granting his motion to dismiss at

the conclusion of the State's case (T. 287). Appellant, in his brief states that ". . . there was simply no evidence of his intoxication at the time of driving. . . ." Appellant's Brief, p. 11.

Respondent strongly challenges such a statement by appellant. The evidence speaks for itself regarding the issue of intoxication at the time of driving:

1. Appellant drove his car through a red traffic light (T. 48-49, 56-59, 60-63, 73, 83-84, 91-92, 98, 109, 117).

2. Appellant drove through the intersection in a lane not designated for through traffic. The "lane" was used only for right turns and for buses stopping for passengers (T. 66, 95, 167).

3. The car which appellant "struck" was lawfully making a left turn through the intersection (T. 38-49).

4. Appellant was driving the car at a fast rate of speed (T. 57, 71, 63) (60 miles per hour and 65 miles per hour, T. 71, 83).

5. Appellant came so close to hitting two young boys sitting at a bus stop bench that they had to pull up their feet to keep from getting hit (T. 109, 117).

6. When appellant exited his car following the accident, he "wandered around," acting as if he were in a daze (T. 98-99).

7. Officers who arrived at the scene shortly after the accident stated that they detected the odor of alcohol about appellant's person (T. 123, 128). The nurse who withdrew samples of appellant's blood, Evelyn Mayberry, stated that she detected the odor of alcohol on appellant's breath (T. 191). She also stated that his pupils were dilated (T. 191).

8. Appellant's blood alcohol level one and one-half hours after the accident was .19% (T. 214). Using a "burn-off" rate of .02% per hour, this would give appellant a blood alcohol level of .22% at the time of the accident (T. 263-264).

9. Evidence produced through Dr. Finkle established that appellant would have had to consumed a minimum of 9 fluid ounces during the previous hours to obtain a blood alcohol level of .19% (T. 269).

10. Assuming that appellant drank his 9 fluid ounces of alcohol at 10:30 p.m. or thereabouts, Dr. Finkle's testimony would seem to infer that for appellant to go from 0% alcohol blood level to .21% 45 minutes later is bordering on the incredible. A jury could infer that appellant had been drinking alcohol over the course of the evening. Testimony, uncontradicted, evidences that appellant had nothing alcoholic to drink after 10:30 p.m. Thus, most of the nine ounces of alcohol came during a period prior to

10:30 p.m. Thus, with appellant's blood alcohol level being .21% at 11:15 p.m., most certainly his blood alcohol level would have been above .08 only 30 minutes earlier.

These facts constitute sufficient evidence on which reasonable minds could have based a decision to find that appellant was under the influence of intoxicating liquor at the time of the accident to such a degree that he was rendered incapable of safely driving a vehicle. Appellant offered no evidence to show otherwise. Respondent further submits that notwithstanding the presumption of being under the influence, the evidence is sufficient to convict appellant of automobile homicide.

Appellant has not challenged any other elements of the crime other than being under the influence to the degree required. Respondent thus submits that the evidence is sufficient to sustain the conviction, and the ruling of the trial court overruling appellant's motion to dismiss because of insufficiency of evidence should be affirmed.

A.

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE EXHIBITS 11 AND 12, THE RESULTS OF APPELLANT'S BLOOD TESTS.

Appellant contends that § 41-6-44.5 Utah Code Ann., (1953, as amended), was not complied with, and as a result, the blood test results showing the alcohol blood

level content of appellant should not have been admitted. He argues that the blood tests were taken more than hour after the accident and that the State did not prove the probative value of such tests.

Respondent submits that appellant is wrong in his argument on two counts. First, the section which appellant is arguing is § 41-6-44.5. The Automobile Homicide Statute, § 76-5-207, refers to § 41-6-44(b), of the Utah Motor Vehicle Act:

> (2) The presumption established by section 4-6-44(b) of the Utah Motor Vehicle Act, relating to blood alcohol percentage shall be applicable to this section and any chemical test administered on a defendant . . . after his arrest. . . ., shall be admissible in accordance with the rules of evidence.

Respondent merely points out the fact that the legislature did specifically mention § 41-6-44(b) of the Motor Vehicle Act, to the exclusion of other statutes. Furthermore, § 76-5-207(2) specifies that ". . . any chemical test administered . . . shall be admissible in accordance with the rules of evidence." Respondent again points out the fact that the legislature specifically stated that the chemical tests be admissible according to the rules of evidence, not according to § 41-6-44.5.

Respondent notes that § 41-6-44.5, through the use of its language, may bring § 76-5-207(2) within the preview of its terms:

> In any action or proceeding in which it is material to prove that a person was driving under the influence of alcohol . . .

Notwithstanding the fact that § 76-5-207 may or may not come within the perview of § 41-6-44.5, respondent submits that the State has complied with the terms of § 41-6-44.5. Since the test was administered more than an hour following the accident, one requirement must be met in order for the blood test results to be admissible, that requirement being that the probative value of the tests be established through the use of expert testimony.

The probative value was established via the testimony of Dr. Bryan Finkle. He showed through the use of "extrapolation" what appellant's blood alcohol level would have been at the time of the accident using facts, figures, and data based upon reasonable medical certainty. His qualifications as an expert in the field of forensic toxicology were accepted by the trial court after examination and voir dire (T. 259). His testimony was allowed by the court, and pursuant to Utah Rules of Evidence, Rule 56(2)(3), his testimony as an expert witness was properly admitted. Certainly there can be no question as to the probative value of his testimony as to the blood level of appellant at the time of the accident. Appellant, in challenging the results of the test, is

admittedly dissatisfied with the apparent decision of the jury to believe the expert testimony of Dr. Finkle. No reason has been shown as to why his testimony is not probative or as why the results of the blood tests should not have been accepted into evidence. Most of appellant's argument in Point III A. is devoted to why § 41-6-44.5 is applicable to § 76-5-207, instead of telling this Court what, if any reason, exists as to why the results of the tests should not be admitted and in what way the State did not tie in the probative value of Dr. Finkle's testimony.

Finally, appellant cites the Bradley case (see Point I, infra), apparently in support of his contentions. Respondent notes that appellant alleges in his brief that "No expert testimony was given there" (referring to the Bradley case). Respondent calls the Court's attention to the Bradley case at 578 P.2d 1268 and 1269, where the Court several times refers to "the state's expert." The Bradley case has seemingly been misinterpreted by appellant. There the Court did not say that the test results were inadmissible because of a lack of probative value. The Court merely said that if the State is unable to produce chemical test results sufficient to allow a presumption of intoxication when the test was administered (.08 or less), then expert testimony must be provided to extropolate the lower readings back to the

time of the incident to show that a defendant's blood alcohol level was then sufficient to give rise to the presumption.

Respondent submits that the State: (1) provided expert testimony in the form of Dr. Finkle, which was accepted by the trial court; (2) such testimony was of probative value because the test results, which gave rise to a presumption at the time they were taken, were extropolated back to the time of the accident to give rise to a presumption at that critical time. The test results were therefore properly admitted into evidence, and § 41-6-44.5 was complied with.

POINT IV.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF THE BLOOD ALCOHOL ANALYSIS OR TO ALTERNATIVELY DISMISS THE ACTION.

Appellant moved, prior to trial, to suppress the blood alcohol results of the blood samples taken from him (R. 23). A hearing was held before the same judge that tried the case (T. 478-504). Evidence was taken, a memorandum submitted, and appellant's motion denied. Appellant claims such a ruling was reversible error.

The evidence at the hearing revealed that following appellant's accident during the late hours of July 21, 1977, two samples of blood were removed from his arm at approximately 12:14 a.m. and 12:48 a.m. on July 22, 1977. The samples were removed by Evelyn Mayberry, a Registered Nurse. The following day those samples were turned over to Lynn Davis, a chemist with the Salt Lake County Health Department. Testimony by Mr. Davis reveals that those samples were kept in a refrigerator in his laboratory until they were tested on August 1, 1977. He stated that he kept the samples in his refrigerator until testing in order to guard the chain of evidence and in order to prolong the life of a preservative which was in the tube, along with the blood and alcohol (R. 495). Mr. Davis also stated that upon his analysis completion of the samples, they were put in a box and sent to the State Health Department for analysis (R. 495). The samples were kept at room temperature in the interim period between analysis and being sent to the State Health Department (R. 495). The trial court asked Mr. Davis about any experiments he may have performed testing blood alcohol samples which had been kept in a refrigerator over an extended period of time as opposed to samples which had been left out at room temperature. Mr. Davis replied that he had performed only one such experiment. He further stated that there were several factors

which affect the decrease of blood alcohol content of a sample, temperature being one (R. 496). Mr. Davis said also that it was his usual procedure not to refrigerate samples after completion of testing (R. 499). When asked whether he would have any knowledge as to whether or not there would be any deterioration or increase of blood alcohol levels over a period of time if a sample were refrigerated for five months, he responded he did not know since he had not done any work in that area (R. 499).

Appellant's argument alleges that the act (by Lynn Davis) of leaving his blood specimens at room temperature is tantamount to destroying those samples.

Respondent submits that appellant's allegations are totally unfounded for several reasons. First, it is questionable as to whether or not Lynn Davis, a chemist with the County Health Department, is, in fact, an agent of the prosecution's office. The trial court found that he was not (R. 502). It is not necessary to the disposition of this issue to decide whether or not in this case he was in fact an agent of the prosecution. Respondent will assume, arguendo, that he was.

Second, it is very important to note that the record does not disclose that appellant ever requested the trial court or the prosecution to turn over to him one of the

samples so that a separate analysis could be run by another chemist at defense counsel's request. The record reflects that appellant was referred to the Legal Defender's Office on August 12, 1977. Counsel appeared with him in court on August 15, 1977. The record just reflects the appearance of appellant's present counsel on September 8, 1977 (R. 3). An information was filed on November 3, 1977 (R. 9). Finally, on January 5, 1978, appellant through his present counsel filed his motion to suppress (R. 23). A time period of almost four months elapsed between defense counsel's first record of appearance and his filing of the motion. The record does not reflect that a request was ever made to the court or the prosecution that a blood sample be turned over to the defense for separate analysis. Respondent will concede that if appellant had made a request for such a sample, and it thereby was denied, or if there was a long delay in turning over the sample after it was requested, perhaps appellant's claim would be stronger, particularly if he could show that such a delay caused the sample content to be altered in such a way as not to yield accurate results. Such, however, is not the case.

Appellant has not shown what he alleges. He has presented no evidence that the blood samples (alcohol content

would have produced any other results than those offered at trial. He has not shown in what way, if any, the blood samples were suppressed or destroyed. They have not been destroyed -- they were offered at trial as evidence. They have not been suppressed from the defense--no request has been made for them to be made available. All that has been done is that a blatant allegation by appellant has been made with no evidence whatsoever to substantiate it.

Finally, appellant has not shown that they (samples), (if this Court finds they have been destroyed), were material to appellant's guilt or innocence. State v. Stewart, 544 P.2d 477 (Utah, 1975). The rule of law in Utah, as set forth by this Court in the Stewart case is:

> . . . a deliberate suppression or destruction of evidence by those charged with the prosecution; including police officers, constitutes a denial of due process if the evidence is material to the guilt or innocence of the defendant. . . .

544 P.2d at 479 (emphasis added).

Appellant has not shown that his analysis of the blood samples would be material to his guilt or innocence. Two samples were withdrawn from appellant. Both samples revealed the same blood alcohol content (.1990). Even if appellant had run a test on a sample, it is difficult to imagine that such a test would do anything other than corroborate the prosecution's case.

Both samples were available or would have been made available to appellant if he had requested them (at least one sample would have been available).

The fundamental fairness guaranteed appellant under the Equal Protection and Due Process Clauses of the State and Federal Constitutions has not been violated or abridged. As such, the trial court's ruling should be sustained.

POINT V.

THE RECORD INDICATES THAT APPELLANT WAS PROPERLY SENTENCED TO THE UTAH STATE PRISON.

Appellant contends that he was sentenced in his absence, and that he must now be resentenced. The record discloses that on April 14, 1978, appellant was sentenced to be imprisoned in the Utah State Prison for a term of zero to five years. Appellant was present, and a stay of execution was granted to July 14, in order that appellant could undergo a 90-day evaluation (R. 140, 138-139). A further 90-day evaluation was ordered on July 14 (R. 155). Appellant absconded from Odyssey House on August 12, and a bench warrant was issued on August 15, 1978 (R. 158). The minute entry shows that on October 27, 1978, appellant's counsel appeared without appellant and the trial court did not extend the stay of execution of the sentence pronounced on April 14

(R. 165, 166). The bench warrant was still outstanding, and the minute entry reads as follows:

> The above named defendant having been granted a stay of execution of sentence to this date. Now on the courts own motion and good cause appearing thereof, it is ordered that a commitment issue forthwith as heretofore sentenced.

R. 165.

The Judgment and Commitment read exactly the same. (R. 166).

Respondent submits that appellant was properly sentenced the first time on April 14, 1978, when he was present. The proceedings on October 27, 1978, were for the purpose of discontinuing the stay of execution. Thus, appellant has shown no need to be re-sentenced.

CONCLUSION

Respondent has shown that the alleged errors complained of by appellant were not in fact errors at all. The trial court properly instructed the jury that simple negligence, not criminal negligence, is the proper degree of negligence to be proved in an automobile homicide prosecution. Second, there was ample evidence to support the giving of the instruction of the presumptions created by a blood alcohol level of 0.08%. Third, the evidence was sufficient on which reasonable minds could conclude that appellant, at the time of the accident, was under the influence of alcohol sufficiently to a degree to render him incapable of safely driving a vehicle. Fourth, the blood test results were

properly received into evidence and were tied in to the time of the accident via expert testimony. Fifth, appellant's claim that the blood alcohol samples were "destroyed" is totally without merit for the reasons cited by respondent. Finally, appellant was properly sentenced, and he must serve the sentence imposed upon him if appellant's appeal is dismissed.

For these reasons, respondent urges that the judgment of conviction of the lower court be affirmed.

Respectfully submitted,

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