

1979

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
JOHNNIE MICHAEL CHAVEZ,	:	Case No. 16132
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty and the judgment based thereon by the Honorable Ernest F. Baldwin, Jr., Judge of the Third Judicial District Court.

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FILED

APR 10 1979

Clerk, Supreme Court, Utah

Utah Supreme Ct.
Brief. Case. 16132

Appellant
Symmister J
L.R.

REME COURT OF THE STATE OF UTAH

Respondent,

Case No. 16132

Appellant.

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Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by Information with the crimes of Manslaughter and Automobile Homicide arising out of an automobile accident 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

Appellant seeks the reversal of the conviction against

him. In the alternative, appellant seeks a new trial and that

appellant be properly sentenced.

STATEMENT OF THE FACTS

On July 21, 1977, at 10:45 p.m. at 3900 South State Street in Salt Lake County, appellant was involved in an automobile accident with another automobile driven by Gunnar Skollingsberg (R. 219, 220, 361, 362). In the Skollingsberg vehicle was 26 month old Eric who died as a result of head injuries suffered in the accident.

Mr. Skollingsberg testified 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 (R. 220-229). Mr. Skollingsberg said his left turn light was green when he last saw it (R. 229).

Other persons at the intersection said appellant's automobile was going north on State Street in the eastern most part of the road, at a high rate of speed when the two cars collided (R. 247, 265). The automobile driven by appellant was in what is used as a right turn lane, a cement gutter portion of the road, not designated as part of the road but used frequently by automobile traffic and buses (R. 249, 354). There were skid marks shortly before the point of impact (R. 326).

Appellant was arrested near the accident scene, walking briskly, and was administered first aid for his injuries, and taken to a hospital (R. 304, 309). The arresting officers said they

smelled the odor of alcohol on appellant, but made no other observations of him other than that appellant was "upset" (R. 305,313).

At the hospital appellant told the officer that the light was green for him (R. 313, 323). Samples of blood were taken from appellant at 12:14 a.m. and 12:48 a.m. on July 22, 1977 (R. 372, 373, Exhibits 11 and 12). Lynn Davis, a chemist, performed tests on appellant's blood samples and determined the blood alcohol level to be 0.19 for each of the two tests (R. 396, Exhibits 11 and 12). Bryan Finkle, a pharmacologist, said that given the facts he had, and assuming the last drink of alcohol was 10:30 p.m. on July 21, 1977, the blood alcohol level would have been between 0.05 and 0.08 at 10:45 p.m., the time of the accident (R. 459).

None of the arresting officers, or others who had contact with appellant at the accident scene or the hospital, were asked for, nor did they render, an opinion as to whether appellant was under the influence of alcohol. Eppie Duran, who was with appellant before and during the accident, said appellant was "not unusual" in his behavior, but he told appellant to slow down (R. 362).

ARGUMENT

POINT I

THE COURT BELOW ERRED BY INSTRUCTING THAT AN ELEMENT OF AUTOMOBILE HOMICIDE WAS NEGLIGENCE AND THE COURT PROPERLY SHOULD HAVE INSTRUCTED THE JURY THAT CRIMINAL NEGLIGENCE IS REQUIRED TO SUSTAIN A CHARGE OF AUTOMOBILE HOMICIDE.

Appellant was charged in one count of the Information with Automobile Homicide. Appellant contends that the Court erroneously instructed the jury in the elements of automobile homicide because the Court instructed the jury that simple negligence was all that the State needed to prove and appellant contends that criminal negligence is a necessary element of any homicide offense in the State of Utah.

The Court in Instruction No. 14 (R. 75) defined automobile homicide as defined in Utah Code Ann. §76-5-207 (1953 as amended) and said that it was sufficient if a person caused the death of another by operating a vehicle in a negligent manner. The Court in Instruction No. 15 (R. 76) also used in paragraph 4 the term simple negligence as the necessary element. Negligence was defined by the Court in Instruction Nos. 18 and 19 (R. 79, 80). Appellant excepted to the giving of those instructions (R. 472) on the basis that criminal negligence was necessary. Appellant offered instructions which defined automobile homicide and required criminal negligence and set out the elements of automobile homicide, one of those elements being criminal negligence rather than simple negligence (R. 107, 108).

Appellant's contention at the time of trial and now is that under our statutes no offense is a criminal offense unless a person acts intentionally, knowingly, recklessly or with criminal negligence or his act constitutes an offense involving strict liability. Utah Code Ann. §76-2-101 (1953 as amended). Further, appellant was charged with a form of criminal homicide and our statute, Utah Code Ann. §76-5-201 (1953 as amended) provides that a person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence unlawfully causes the death of another. Criminal Homicide is defined as murder in the first and second degree, manslaughter, or negligent homicide, or automobile homicide. Appellant is fully aware that this argument has been made and rejected by this Court in three previous cases, State v. Durant, 561 P.2d 1056 (Utah, 1977), State v. Wade, 572 P.2d 398 (Utah, 1977) and State v. Anderson, 561 P.2d 1061 (Utah, 1977). Appellant contends that the opinions in those cases are and were erroneous and the dissenting opinion of Justice Maughan in State v. Durant, supra, is the correct law in the State of Utah, and should be adopted by this Court and the above three cited cases should be overruled based upon reasoning set forth by Justice Maughan. Our statutes are clear in defining offenses and there is a substantial difference between simple negligence as defined by this Court in those cases and as defined by the trial court in this matter in its Instruction Nos. 18 and 19 and in criminal negligence as defined by

our code.

Under the facts of this case where appellant was found guilty of automobile homicide, it is apparent that the jury found appellant to be negligent in his driving pattern otherwise appellant could not have been found guilty. However, had the jury been properly instructed that he must have acted with criminal negligence using the definition of criminal negligence, the jury may not have found that the risk taken by appellant was of such a nature and degree that failure to perceive it (namely the red light) constituted a gross deviation from the standard of care than an ordinary person would exercise in all the circumstances as viewed from appellant's standpoint. That is, it is easy to say in retrospect that a jury would find going through a red light to be criminal negligence but that can only be said because the jury found appellant was negligent in apparently going through a red light. The clear difference between negligence and criminal negligence could easily have made a vast difference in the outcome of this case as the evidence of intoxication was slight or nil as will be discussed in Point II and Point III.

This Court should overrule the decisions in State v. Durant, supra, State v. Anderson, supra, and State v. Wade, supra, and follow our statutes as set forth above and adopt the reasoning of Justice Maughan in his dissenting opinion in State v. Durant, supra.

POINT II

THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON THE PRESUMPTIONS CREATED BY A BLOOD ALCOHOL LEVEL ABOVE 0.08 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH AN INSTRUCTION.

Appellant contends it was reversible error for the trial court to instruct the jury on the presumptions created by a certain blood alcohol level because there was absolutely no evidence to support such an instruction, and such an instruction only confused and deluded the jury in their deliberations and confused the question of intoxication.

To convict one of automobile homicide, the State must prove that a person is under the influence of intoxicating liquor to a degree which renders the person incapable of safely driving a vehicle. Clearly from that the State must prove that at the time of the driving which allegedly resulted in the death that the person was under the influence of alcohol. The Court so instructed the jury, but the Court also instructed the jury on the presumptions created by certain blood alcohol levels. In Instruction No. 17 (R. 78) the Court instructed the jury that if there was at the time of driving 0.05% or less by weight of alcohol in appellant's blood it was presumed he was not under the influence of intoxicating liquor. If the blood alcohol level was between 0.05 and 0.08 at the time of the driving there is no presumption and the Court instructed in paragraph number 3 of Instruction No. 17 that if there was at the time of driving 0.08% or more by weight of alcohol

in appellant's blood it shall be presumed that appellant was under the influence of intoxicating liquor. Appellant objected to that instruction (R. 472) on the basis that there was no evidence to support such an instruction (R. 473).

In an effort to show appellant's alleged intoxication the State introduced evidence that appellant's blood was taken at 12:14 a.m. and 12:48 a.m. on July 22, these times being some hour and a half and two hours after the incident is alleged to have occurred at 10:45 p.m. on July 21, 1977 (R. 390, 396, 370, 373). At those times in the early hours of July 22 there was testimony, objected to (see Point III A) that appellant's blood alcohol level at those times was 0.19. In an effort to "relate back" or "extrapolate" those figures back to the relevant time of the accident, 10:45 p.m. on July 21 (R. 32) the State called Bryan Finkle, employed by the University of Utah as a toxicologist and pharmacologist. He testified at length, taking 32 pages of transcript, about the effects of alcohol on the body and about how one can perform such computations in attempting to figure a blood alcohol level at an earlier time given the blood alcohol level at a later time. He engaged in certain assumptions given him and testified that it was very important that he know when the last drink occurred before driving because without that information he could not possibly know a person's blood alcohol level at a given time (R. 458). He assumed, apparently based upon the testimony of Eppie Duran that

Mr. Duran had been with appellant during the evening and appellant had nothing to drink after 10:30 p.m. and before that he had a glass with something in it (R. 356, 357, 358), that appellant's last drink would have been no later than 10:30 p.m. on July 21, 1977. Given that assumption and other factors which he assumed he related back to the time of driving, 10:45 p.m. and said that appellant's blood alcohol level would have been between 0.05 and 0.08 (R. 459). There was no other evidence given as to appellant's blood alcohol level. There was no evidence that it was higher than 0.08 at the time of driving, only that it was 0.19 some one and half and two hours later and Dr. Finkle described the phenomenon of blood alcohol level rising to reach a certain peak and then decreasing linearly over time. Simply stated there was no evidence that at the time of driving the blood alcohol level was above 0.08. Therefore, the instruction given by the Court was confusing and erroneous and was reversible error.

In State v. Chealey, 100 Utah 420, 116 P.2d 377 (1941) this Court reversed a conviction for involuntary manslaughter based upon reasons appellant is advancing in this case. In that case the Court instructed the jury that it was unlawful for a person to be driving on a public highway at a speed greater than was reasonable and prudent and the Court pointed out that there was no evidence in the State's case at all, that the defendant in that case was driving at an excessive speed. The Court pointed out that the instruction was a correct general statement of the law but served no purpose

in the case and should not have been given because there was no evidence of the speed that was greater than that which was reasonable and prudent. The Court also instructed the jury that it was unlawful for a person to drive while he was under the influence to such an extent that his ability to see objects was diminished in any substantial degree. Again the Court pointed out that if the State's evidence had shown that the defendant was under the influence of intoxicating liquor the instruction would have been correct. The instruction given by the Court did correctly state the traffic laws but this Court pointed out that the jury was committed "to go fishing into fields upon which no evidence was presented". This Court reversed the conviction.

In State v. Pacheco, 27 Utah 2d 45, 492 P.2d 1347 (1972) this Court reversed a conviction for grand larceny because an instruction was given defining aiding and abetting and there was no evidence supporting such an instruction. That was the only point on appeal and that was the sole basis for this Court's reversing the conviction.

Appellant contends that in this case there the testimony was lengthy dealing with this "relation back" testimony as to what a person's blood alcohol level is at any given time, that it was particularly troublesome to the jury to decide what to do with Instruction No. 17 of the Court when coupled with the testimony of the so-called experts. The bottom line of Dr. Finkle's testimony was that the blood alcohol level at the time of driving was less than

0.08. An instruction telling them what presumption arises if it is more than 0.08 was simply confusing because there was testimony that at other times the blood alcohol level was higher and such an instruction could do nothing but confuse the jury on this technical aspect of the case. Appellant contends that the giving of such an instruction, properly objected to, was reversible error.

Most significantly, this Court in State v. Bradley, 578 P.2d 1267 (Utah, 1978) held that where the State's evidence showed a 0.06 blood alcohol level at the time of the test, such a reading would not have given rise to the presumption at the time of the accident. If the State fails to show the presumption arises, the Court held, it is error to instruct the jury regarding the presumptions.

POINT III

THE COURT BELOW ERRED IN NOT GRANTING APPELLANT'S MOTION TO DISMISS AT THE END OF THE STATE'S CASE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SHOW APPELLANT WAS UNDER THE INFLUENCE OF ALCOHOL.

Appellant contends that the evidence was insufficient to convict him on the charge of automobile homicide and for that reason the court below erred in not granting appellant's motion to dismiss made at the end of the State's case (R. 469). Appellant contends there was simply no evidence of his intoxication at the time of driving and of course intoxication is a necessary element of automobile homicide as the jury was instructed (R. 76).

The two officers who initially stopped appellant both testified that they found him walking rapidly near the scene and in injured condition (R. 304). Deputy Frank Smith said that he smelled the odor of alcohol on appellant (R. 305) but significantly was asked for no other observations concerning appellant's condition nor gave an opinion as to his state of intoxication. Deputy Jerry Rigby also said he smelled the odor of alcohol about appellant (R. 310) but he was never asked nor gave any opinions nor described any other observations other than saying appellant appeared to be "upset" (R. 313). Two other officers, Kenneth Peay and Arlo Wilkins of the Utah Highway Patrol, described that they observed appellant at the hospital from 11:30 p.m. on July 21 until the tests were administered at 12:14 a.m. on July 22 and they said nothing of appellant's condition and gave no opinions as to his level of intoxication. Evelyn Mayberry, the nurse who took blood samples from appellant on July 22 at 12:14 a.m. and 12:48 a.m. talked with appellant on those occasions and gave no opinion and described no behavior indicating intoxication. The only person who was asked for any opinion was Eppie Duran, a friend of appellant's, who was in the car at the time of the accident. He described being with appellant for two and half hours before the accident and said that appellant was not unusual in his activities (R. 368). No other direct evidence, indeed no evidence, was proffered as to appellant's state of intoxication. As discussed in Point II the results of blood tests were admitted

into evidence over objection (see Point III A) and Dr. Finkle then described how at the time of driving the blood alcohol level would have been 0.05 and 0.08. As discussed in Point II appellant claims the giving of the that instruction was error because that presumption created by that instruction was virtually the only evidence that a jury could find that would lead to a conclusion he was under the influence of alcohol. Dr. Finkle described how immediately after taking a drink one's blood alcohol level would be almost immeasurable as the process of absorption from the stomach into the blood stream takes some time and usually does not reach a maximum peak for approximately 45 minutes to one hour. Therefore, even assuming that appellant had an alcoholic beverage to drink at 10:30, and Eppie Duran as described above did say that appellant was drinking something from a glass at 10:30 p.m., at 10:45 the blood alcohol level would have been low but could have been higher later at the time of the tests at 12:14 a.m. and 12:45 a.m., some one and a half hours and two hours after the driving and the accident. This Court has often stated that it can overturn a verdict on the ground of insufficiency of the evidence only when the evidence is so without foundation that reasonable minds must necessarily entertain a reasonable doubt as to the defendant's guilt. See, for example, State v. Wilson, 565 P.2d 66 (Utah, 1977). Clearly in this case there was much sympathy for the child victim and the jury could easily have found the appellant's driving pattern was way out of line with what should occur. However, appellant contends that no reasonable mind could

have found that the evidence was sufficient to believe appellant was under the influence of intoxicating liquor at the time of the driving to such a degree that he was rendered incapable of safely driving a vehicle. Even if he was not safely driving a vehicle it does not follow that the level of intoxication, if there was one, is what rendered him incapable of driving. People operate vehicles unsafely every day without being under the influence of alcohol and appellant merely contends that where there was no evidence of intoxication the Court should have granted appellant's motion to dismiss and should not have sent the matter to the jury on that offense. Because the Court erred in not granting appellant's motion to dismiss this Court should reverse the conviction and set it aside.

POINT III A

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE EXHIBITS 11 AND 12, THE RESULTS OF BLOOD TESTS, BECAUSE THE STATE DID NOT ESTABLISH THE PROBATIVE VALUE OF SUCH TESTS.

Appellant contends that recent legislation compels that this Court declare the court below erred in allowing into evidence the blood alcohol test results because the tests were taken more than one hour after the accident and the State did not prove the probative value of such tests.

Lynn Davis testified, as a chemist, that he analyzed the blood taken from appellant at 12:14 a.m. and 12:48 a.m. on July 22, 1977, these samples being taken one and a half hours and two hours after the relevant time of 10:45 p.m. on July 21. He was

was allowed to state the results of 0.19 over objection by appellant that Utah Code Ann. §41-6-44.5 (1953 as amended) must first be complied with (R. 396). The objection was overruled. Appellant moved shortly thereafter for a mistrial based on the admission of such evidence (R. 399). The motion was seemingly denied and the State was told the necessary evidence must be forthcoming. Following the testimony of Dr. Finkle, the actual exhibits, 11 and 12, were admitted over objection (R. 460). These exhibits contained in written form the 0.19 result.

Appellant submits that all of the above was prejudicial error by the court below. The results and exhibits should not have been received. As discussed infra in Point II, the State did not show by expert testimony the probative value of the tests at the time of driving. Utah Code Ann. §41-6-44.5 (1953 as amended), infra, became effective July 1, 1977. L. 1977, Ch. 270, §1.

Appellant contends that the results of chemical tests were not admissible in the above matter under the law and facts of this case. The Auto Homicide Statute (76-5-207) provides in subsection (2):

(2) The presumption established by section 41-6-44(b) of the Utah Motor Vehicle Act, relating to blood alcohol percentages, shall be applicable to this section and any chemical test administered on a defendant with his consent or after his arrest under this section, whether with or against his consent, shall be admissible in accordance with the rules of evidence. [Emphasis Supplied]

The Motor Vehicle Act provides as follows:

41-6-44.5. Driving while intoxicated--Chemical tests as evidence--Presumption of blood alcohol level.--In any action or proceeding in which it is material to prove that a person was driving under the influence of alcohol, the results of a chemical test or tests as authorized in 41-6-44.10 shall be admitted as evidence if the chemical test was taken within one hour of the alleged incident. The level of the alcohol determined to be in the blood by the chemical test shall be presumed to be not less than the blood alcohol level of the person at the time of the incident. If the chemical test was not taken within one hour after the alleged incident, the evidence of the amount of alcohol in the person's blood as shown by the chemical test is admissible if expert testimony establishes its probative value and the results of said test may be given prima facie effect if established by expert testimony.

From these statutes appellant contends it is clear that the presumptive levels of the Motor Vehicle Act shall apply to an auto homicide prosecution. The Motor Vehicle Act in turn says that in any proceeding in which it is relevant to show a person was under the influence of alcohol, certain conditions must be met. In an auto homicide prosecution it clearly is relevant to show the person was under the influence of alcohol at the time of driving - indeed that is the key element to the prosecution. In State v. Risk, 520 P.2d 2.5 (Utah, 1974) this Court reversed an auto homicide conviction because the lower court, before the adoption of 41-6-44.5, instructed the jury on the presumptions of Utah Code Ann. §41-6-44 (1953). This Court said if the legislature meant for the Motor Vehicle Act to

apply to the criminal code, they should have said so. Because the legislature had not "said so" at that time, the error was reversible. Now, the legislature has said in both the criminal code and the Motor Vehicle Act that the presumptions apply in auto homicide cases. In State v. Bradley, supra, this Court dealt with a case tried before the effective date of Utah Code Ann. §41-6-44.5. The defendant, in an auto homicide conviction, claimed the chemical test should not be admitted unless it was "related back" by expert testimony. The Utah Court said that was not the law before the statute, 41-6-44.5, as without "relation back" testimony the test was admissible but the weight of the test was for the jury. Significantly, the Court did not say the statute, 41-6-44.5, would not apply to an auto homicide case, it merely did not apply in that case because of its effective date. No expert testimony was given there. The Court held that where the blood alcohol level was 0.06, no instructions could be given on the presumptive level unless expert testimony showed the blood alcohol level was higher at the time of the incident, in cases arising before the effective date of Utah Code Ann. §41-6-44.5. It is apparent from Bradley, that this Court felt the new statute, 41-6-44.5, clearly would apply to auto homicide prosecutions and its mandates must be obeyed. If no "presumptive level" is shown at the time of the test, expert testimony is necessary. Here, the State's evidence would show a test result below the 0.08 presumptive level at the time of driving. Our legislature, in enacting Utah Code Ann.

§41-6-44.5 (1953) recognized the need for expert testimony in this area and set a time limit beyond which the test itself would not be reliable enough to be admissible without foundation testimony.

Appellant contends that as the test here was not given within the one hour time limit of Utah Code Ann. §41-6-44.5 (1953), no chemical test results can be admitted unless expert testimony first is adduced showing the probative value of such a test. As argued in Point II, there was no such testimony showing the presumption was to be given effect.

POINT IV

THE COURT BELOW ERRED IN NOT GRANTING APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF THE BLOOD ALCOHOL ANALYSIS OR ALTERNATIVELY DISMISSING 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 (R. 52). Evidence was taken and memorandum submitted and appellant's motion was denied (R. 52). Appellant claims such a ruling was reversible error.

Appellant was arrested in the late evening hours of July 21, 1977. Samples of his blood were taken on two occasions in the early hours of July 22, 1977, at approximately 12:14 a.m. and 12:48 a.m. Those samples of blood were removed by a Registered Nurse, Evelyn Mayberry. Those samples of blood were eventually turned over to Lynn R. Davis, a chemist with the Salt Lake County Health Department. An analysis of those specimens were performed by Mr.

Davis and the specimens were then retained by Mr. Davis in an unrefrigerated condition in room temperature (R.495), which conduct appellant contends is tantamount to the destruction of those physical specimens for purposes of further analysis and which conduct is thereby denial of due process of law.

Appellant contends that the act of leaving his blood specimens at room temperature is tantamount to destroying those samples. No allegations of bad faith or improper motives are made but the conduct was clearly not accidental. Appellant contends that where one of the main elements of the offense is that he was under the influence of alcohol and where Utah has statutes which set forth that a person with a blood alcohol content of above 0.08% is presumptively under the influence of alcohol (see Utah Code Ann. §41-6-44) that the blood alcohol level is certainly material to guilt or innocence and so the destroyed evidence is irretrievably lost to appellant and he is foreclosed from employing any experts he may choose to analyze that blood. The keeping of the specimen in a refrigerated condition could easily alleviate such problem. Appellant contends that this is of the law, destruction or loss of evidence, is closely akin to the suppression of evidence favorable to the accused by the State. It is, however, a relatively newer area and so remedies need to be fashioned based upon the overall circumstances. Appellant submits that in this case two remedies were possible. One was a dismissal of charge which has as an element intoxication, Count II, and the other is a suppression from evidence of the results

of the State's tests performed upon appellant's blood.

Several general rules have been developed in the area of suppression of favorable evidence.

This Court in State v. Stewart, 544 P.2d 477 (Utah, 1976) announced the rule governing nondisclosure of evidence favorable and material to criminal defendants:

. . . (S)uppression or destruction of evidence by those charged with prosecution, including police officers, constitutes a denial of due process if the evidence is material to guilt or innocence of the defendant in a criminal case . . .
Id., at 478

The rule in Stewart is even broader in scope than that of the leading United States Supreme Court case in the field of suppression of evidence, Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), in which the Court said:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.
Id., 373 U.S. at 87.

Stewart's extension of the duty to disclose to police officers has also been approved by the United States Supreme Court in its opinion in Giglio v. United States, 405 U.S. 150, 31 L.Ed. 2d 104, 92 S.Ct. 763 (1972):

Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government.

Id., 405 U.S. at 154.

If the police were not burdened with a duty to disclose, the prosecutor could successfully claim that police officers, who did the principle investigation of a case, had withheld exculpatory information from him, and, therefore, that he had no duty to disclose the material. This would leave the defendant with no assertable claim when his right to a fair trial had been clearly abridged. To impede due process disclosure in this fashion would effectively abrogate the fundamental fairness objectives sought by the many constitutional decisions requiring disclosure of favorable and material evidence to the defendant. For this reason:

The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of nondisclosure.

The duty to disclose is that of the State, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the State's failure is not on that account excused. We cannot condone an attempt to connect the defendant with the crime by questionable inferences which might be refuted by undisclosed and unproduced documents in the hands of the police.
Barbee v. Warden, 331 F. 2d 842. 846 (4th Cir. 1964)

Lynn Davis worked as an agent of law enforcement as the blood specimens were taken at the request of law enforcement and analyzed for their purposes.

The destruction of evidence case is akin to the above analysis. This Court has not dealt with this exact situation, but in State v. Stewart, 554 P.2d 477 (Utah, 1975) this Court did deal

with a problem similar in nature. In that case, the defendant was convicted of Unlawful Distribution of a Controlled Substance and during the trial there was evidence presented that the undercover agent who purchased the narcotics had a tape recorder on his person during the transaction. That tape was requested during the trial by defense counsel and the request was denied. In ruling on that contention this Court said that:

While it is true that 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 in a criminal case, there is no showing in this case that the material recorded on the tape in question was vital to the issue of whether or not the defendant was guilty of the charge.

This was so, the Court held, because the defendant specifically denied having made the sale and denied even having seen the undercover witness on the day the sale was supposedly to have occurred. This Court issued guidance in that case when it said:

We think it advisable that those charged with investigation and prosecution of crime retain intact all records and other evidence pertaining to the case until it is finally disposed of. By adopting such a practice, a claim of unfairness by one charged with a criminal offense would be groundless.

Thus, this Court has recognized that a destruction of evidence that is material to guilt or innocence is a denial of due process of law. In that case, however, there was no showing the destruction would have been beneficial. The defendant there denied completely

even having met the undercover agent on the date in question. In this case, there can be no question but that appellant's blood alcohol level was relevant to his guilt or innocence of the charge of automobile homicide. Given the simple nature of refrigeration and the small size of blood samples, appellant contends that the failure to follow the advise of this Court should warrant one of the remedies sought by the appellant.

In this case, of course, appellant did not show that the evidence would have been favorable to him. Such a burden and task under the circumstances was obviously completely impossible as the evidence had been destroyed. Appellant contends that he need not "prove" the material would be favorable to him as he would in a situation where there was evidence merely suppressed, but not destroyed. In State v. Brewer, 549 P.2d 188 (Ariz. App. 1976), the Court dealt with a conviction in a fraud case. The defendant alleged that certain evidence was destroyed prior to the trial which may have tended to establish his innocence. The Court examined that contention and noted that the destroyed documents had been transcribed and that transcript had been made available to the defendant. The Court in discussing the destruction of evidence said that to be in violation of due process:

The State must know, or have reason to know, that the evidence being destroyed was either material or favorable to the accused.

Thus, in that case, there was no required showing that the material be favorable if it was destroyed. It would be enough if the defendant

could show either that it was material or favorable and that the State knew or had reason to know of that materiality. Appellant submits that the very nature of the evidence in question must lead the Court to the conclusion that the State through its agent knew that the results of the blood test (where intoxication was a crucial element of the offense) would be material. This is the case, appellant contends, where, as the Court said in In Re Cameron, 439 P.2d 633 (Cal. 1968):

The police or prosecution may disable the State from ever giving a defendant a fair trial if they have lost or destroyed or otherwise made unavailable vital defense evidence.

In Cameron, the California Court noted that if such a situation arose a new trial should not be held, but the defendant should be discharged.

The State of Washington dealt with a similar case in State v. Wright, 557 P.2d 1 (Wash, 1976). In that case the defendant was convicted of first degree murder for the killing of his wife. Her badly decomposed body was found in a room and had apparently been dead for approximately 3 weeks. After removing all of the clothing from the body, due to its highly infected and unpleasant nature, the police burned all clothing before any analysis for blood or any other tests were performed. The police gave permission to a relative of the deceased to remove and burn the bedding and mattress and other items from the room. This was all accomplished before the defendant had been appointed an attorney but after he was arrested and before any scientific tests of any kind were performed. In

that case, the defendant prior to trial made a motion to dismiss the charge on the basis of a denial of due process of law. The Court began by discussing "what is material" and reached the inescapable conclusion that such evidence could have been material, but that it was impossible to tell whether or not the evidence would be favorable to the defendant because it had been destroyed. The Court quoted a leading case in the area, United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971). The Washington Court quoted as follows:

The purpose of the duty [to disclose] is not simply to correct an imbalance of advantage whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the government.

Further, quoting from Bryant, the Court said that:

Before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.

In Wright, the defendant pointed out several possibilities for the use of evidence and the Court held that by so doing, he demonstrated a reasonable possibility that the evidence destroyed by the police was material to guilt or innocence and favorable.

The Court then went on with the more difficult task of fashioning a remedy. They noted there have been situations where the prosecution has made "an earnest effort" to preserve the materials, but noted this was not the case. Even though the evidence was not destroyed for the specific purpose of hindering the defense,

the motive of the prosecution or the police is not determinative. The purpose of the duty of preservation "is not to punish the police but to insure a fair trial for the accused". The Court noted the destruction was intentional as there was no effort made to preserve the evidence and further noted that neither "administrative convenience nor inadequate facilities justifies a failure to preserve potential evidence". Therefore, the defendant was denied due process of law. The Court noted that usually in a suppression type case a new trial can be ordered and the defendant can be given the suppressed evidence. Of course, that is not possible in this case, so the Court saw no alternative other than to reverse the conviction and dismiss the charges, then went on to discuss some of the practical problems that would be created for police and gave suggestions as how to handle that.

Appellant contends that his case is very much similar in that the evidence was clearly intentionally not refrigerated even though there is no contention made that it was done as a purpose to hinder defense. Administrative ease is not a sufficient reason for denying evidence. There is no possible way appellant could have shown that the evidence would have been favorable, but it clearly was material and it might have been favorable. Appellant contends the Court should have followed the Wright rationale and held that the destruction of such evidence denies him due process of law and dismissed the charge against him. In not so doing, the Court erred. Alternatively, appellant's blood alcohol level should have been

suppressed from evidence prior to trial.

In State v. Trimble, 402 P.2d 162 (N.M. 1965) the Court dealt with a destruction of evidence case much weaker than appellant's. In that case the defendant, a minister, was convicted of first degree murder. It was defendant's theory at trial that he acted in self defense. He claimed to have in his possession a letter and some tapes which he was about to show the victim when the victim attacked the defendant and necessitated the shooting. After the shooting the police obtained a search warrant and obtained the letter and tapes and thereafter these were never seen again. The defendant claimed they were helpful to his defense of self defense in that they would have contained what he said they did and corroborated his trial testimony. The State argued that the existence of the letter and the tape were explained by defendant on the stand and his testimony was not contraverted and so there was no prejudice. The Court initially began by saying that the situation was similar to the suppression of favorable evidence by the State, although not exactly alike. The Court went on to hold over the argument of the State that even though the suppression was not willful, the same rule applies. The Court noted that the presence and existence of the letter and its assistance to defendant in corroborating his version were, "too apparent for argument". Therefore, under the facts of the case, the Court had no alternative, but to reverse and set aside the sentence.

The situation in this case is like the situation brought

to light in the California case of People v. Hitch, 527 P.2d 362 (Cal. 1974). In that case a person was convicted of driving while under the influence of alcohol and the results of a breathalyzer test were admitted at this trial. The defendant sought to analyze the test ampoules which had been used while the breath test had been given by police officers. Those had been destroyed after the test by the police officer. The California Court began its analysis and said that the results of such test clearly constitute material evidence and went on to say that evidence:

Substantially affecting the credibility of the results of the test would appear to be material and the suppression of such evidence would deny defendant a fair trial.

They noted, of course, that the critical evidence was not before them so it was not for the Court to determine whether the evidence was or was not favorable to the issue of the defendant's guilt or innocence. The Court likened the situation in that case to a situation where an undercover informant is known by the police on a drug sale, but the name is not revealed for the defendant to locate and interview the witness. The Court noted that in those situations where the defendant has shown a reasonable possibility that the informant could give favorable evidence his identity must be disclosed or the case dismissed. Similarly, the Court in Hitch said that given the availability of the test ampoule and its contents there is a reasonable possibility that it would constitute favorable evidence on the issue of guilt or innocence and if that is shown then such

evidence must be disclosed. If the evidence was available, it clearly must be disclosed. The Court in that case gave prospective effect only to their rule because of the immensity of cases dealing with a breathalyzer and test ampoules in California alone. The rule to be followed would be that the test results would be suppressed on the part of the State if the evidence were not preserved and discoverable by defense.

In fashioning a remedy appellant contends that the Court should have weighed the significance of the lost or destroyed evidence and the conduct which lead to that destruction. Further, the Court should have considered the ease or difficulty of retaining such evidence in determining what remedy ought to apply. Thus, in this case, we have a situation where a person certainly knowledgeable in the area of blood analysis, knew that by failing to refrigerate the specimen, the specimen would be forever lost to further analysis. The method of maintaining the evidence simply would have been to place the samples in refrigeration. The evidence and materiality has already been discussed and is, as the Court in Trimble, said, "too apparent for argument". Balancing these factors appellant contends that the Court should reverse the lower court.

The evidence that was destroyed should not have been admitted for other reasons (see Point III A) but appellant submits it was error to allow the State to use such evidence at all when he is not given a fair opportunity to utilize independent experts.

POINT V

THE COURT BELOW ERRED IN COMMITTING APPELLANT TO PRISON IN APPELLANT'S ABSENCE.

Appellant contends that he was entitled to be present when he was committed to the Utah State Prison and that the procedure used by the Court was in error and appellant is entitled to be re-sentenced.

After the jury verdict of guilty was returned on March 29, 1978 (R. 55,56), appellant was referred to the Adult Probation and Parole Department for a pre-sentence report and sentencing was set for April 14, 1978. On that date there are entries reflecting conflicting events. The written and signed Order of the Court (R. 149) reflects that the appellant was referred to the Division of Corrections for a period not exceeding 90 days, it appearing that imprisonment may be appropriate in this case. The Division of Corrections was requested to retain custody of the appellant principally at the Utah State Prison and be returned for sentencing on July 14, 1978. The minute entry date April 14, 1978 (R. 140), indicates that appellant was sentenced to be imprisoned in the Utah State Prison for zero to five years and a stay of execution was granted to July 14 for sentencing. The minute entry also shows appellant was to undergo a 90 day evaluation at the Utah State Prison. On July 14 both the minute entry (R. 155) and the written order of the Court (R. 156) indicates that there was to be a further 90 day evaluation at any appropriate place in the discretion of

the Division of Corrections and the appellant was to be returned to Court for sentencing on October 13, 1978. On August 16, 1978, a bench warrant was issued for appellant (R. 160) seemingly on the basis that appellant absconded from his second 90 day evaluation which was being performed at Odyssey House (R. 159). On October 27, 1978, the minute entry reflects that there was already an outstanding bench warrant and appellant was committed to the Utah State Prison "as heretofore sentenced". The minute entry reflects that appellant was personally not present (R. 165). That date commitment was issued to the Utah State Prison (R. 166).

Appellant contends that the order of October 27, 1978, committing appellant to Utah State Prison "as heretofore sentenced" was unlawful and erroneous. Utah Code Ann. §76-3-404(2) (1953 as amended):

Any commitment for a pre-sentence investigation under this section shall not constitute a commitment to prison.

Appellant contends that under that statute and under the written orders of the Court of both July 14, 1978 and April 14, 1978 appellant was not sentenced to the Utah State Prison as a referral to the Division of Corrections for a 90 day evaluation does not constitute a commitment to prison. The minute entry of April 14, 1978 lends some confusion and appellant contends that the written order of the Court should govern and if a commitment is to issue to the Utah State Prison appellant is entitled to be present at that critical stage of the proceeding.

Utah Code Ann. §77-35-3 (1953) says that for the purposes of judgment if the conviction is for a felony the defendant must be personally present. This Court in State v. Fedder, 1 Utah 2d 117, 262 P.2d 753 (1953) has held that even though the Court committed no error it must use whatever means are available in bringing defendant before the Court for pronouncement of judgment. That case has not been altered since 1953 and appellant contends that while it might be an extremely hollow victory he is entitled to be present when he is committed to the Utah State Prison. This Court should declare that the procedure employed by the trial court in this case, of saying the words "you are committed to prison" and then sending someone for a 90 day evaluation in the custody of the Division of Corrections is not judgment being imposed because our statute says specifically that a referral to the Division of Corrections is not a commitment to prison. Therefore, appellant contends that this Court should hold the procedure employed by the trial court erroneous and unlawful and remand the matter so that appellant may be properly sentenced if his other points on appeal are not well taken.

CONCLUSION

For the reasons above stated, that the evidence did not prove a necessary element of the offense, that the jury was improperly instructed, that evidence was admitted that should have been suppressed and that appellant was improperly sentenced, appellant respectfully

submits the conviction should be reversed, or in the alternative appellant should receive a new trial, or alternatively appellant should be properly sentenced.

Respectfully submitted,

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