

1979

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

Utah Supreme Court

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IN THE SUPREME COURT OF
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

JOHNNIE M. CHAVEZ,

Defendant-Appellant.

APPEAL FROM
JUDICIAL DISTRICT
SALT LAKE COUNTY
ERNEST A. LUBBECK

BRUCE C. LUBBECK

Salt Lake Legal
Defender Association
333 South Second East
Salt Lake City, Utah 84143

Attorney for Appellant

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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.

In appellant's brief, the following claim is made:

Appellant contends that the act of leaving his blood specimens at room temperature is tantamount to destroying those samples. Appellant's brief, at p. 19.

This contention is not supported by any evidence or testimony in the record yet appellant uses the bold assumption to develop an argument of a prejudicial destruction and/or suppression of evidence in violation of the holding of Brady v. Maryland, 373 U.S. 83, 83.Ct. 1194, 10 L.Ed2d 215 (1963).

Respondent urges that such a conclusion is not only unwarranted by the absence of such evidence in the record, but a careful review of relevant statutes and case law also reveals that appellant's reliance on destruction and suppression of evidence and duty to disclose cases is misplaced.

Utah Code Ann., § 41-6-44.10 (d) (Supp. 1977) indicates that where a person suspected of driving under the influence of alcohol has had his blood tested for alcohol content,

Upon the request of the person who was tested, the results of such test or tests shall be made available to him.
(Emphasis added.)

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Thus, in the area of blood alcohol testing specific variations from traditional evidence disclosure principles are present. In the above quoted statute, the accused must make a specific request for the results of the tests made on his blood. If such a request is not made, or is made untimely (see *infra*), then the State is under no duty to make even the test "results" available to the accused, let alone the blood alcohol samples themselves.

Another statute further amplifies this duty on an accused. Utah Code Ann., § 41-6-44.10 (f) (Supp. 1977) states:

The person to be tested may, at his own expense, have a physician of his own choosing administer a chemical test in addition to the test or tests administered at the direction of a peace officer. The failure or inability to obtain such additional test shall not affect admissibility of the results of the test or tests taken at the direction of a peace officer, nor preclude nor delay the test or tests to be taken at the direction of a peace officer. Such additional test shall be subsequent to the test or tests administered at the direction of a peace officer.
(Emphasis added.)

Thus, appellant, by statute, is accorded the clear opportunity to have a separate, independent analysis done on his blood by a physician of his own choosing. Yet, his failure to do so will not bar the admissibility of the test results obtained by the arresting officers. Yet, appellant claims that if the blood samples taken at the request of the state are not

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reserved for him so that he may later conduct an independent analysis of the same samples, then the state's samples should be rendered inadmissible. This logic defies the clear intent and language of Utah Code Ann., § 41-6-44.10 (f) supra, and is directly contrary to Utah law and respondent urges the court to reject it.

Several states have dealt with the question of whether a defendant's preclusion (for whatever reason) from running a post-test on a breathalyzer ampoule or blood alcohol sample should require the exclusion of the State's test result. In State v. Superior Court, 107 Ariz. 332, 487 P.2d 399 (1971), the Supreme Court of Arizona was faced with this question. There, the state was unable to produce the test ampoule for inspection and re-testing by defendant since the state had discarded the ampoule "pursuant to standard procedure." 487 P.2d at 400. In establishing the requirement with which the defendant had to comply in order to suppress the admission of the State's test result, the Arizona Court ruled that the defendant

. . . must show how the production of the requested evidence would aid in the presentation of his defense. In the instant case [defendant] has failed to show how the post test chemical composition of the test ampoule, had it not been discarded, could have made a valid contribution to his defense.
487 P.2d at 401

Since the defendant in Superior Court could not meet the burden of showing how the post-test would have aided in his

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defense, the court rejected the motion to suppress and remanded the case for trial.

This requirement was restated later by the Arizona Court of Appeals in State v. Canter, 116 Ariz. 356, 569 P.2d 298 (1977):

Our Supreme Court rejected the contention that due process requires the State to produce the ampule for testing in State v. Superior Court, [supra] and therein ruled that a defendant must make a prior showing that the requested evidence would aid in his case before the trial court can order production. In that case as in this one there was no prior showing made by the defendant. 116 Ariz. at 358.

That defendants must make such a showing is also a holding of People v. Hedrick, 557 P.2d 378 (Colo., 1976). There, the Colorado Supreme Court applied the Brady v. Maryland, supra, test to the question of post-test analysis by defendants. The court noted that the Brady test:

. . . asks the questions: 1)
whether the evidence was suppressed by the prosecution after a request by the defense;
2) whether the evidence is favorable to the defense, i. e., exculpatory in nature; and
3) whether the evidence is material.

* * *

The defendant in the case at bar has failed to meet any of the three prongs of the test, all three of which must be met in order to support an argument that there has been a denial of due process.

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The first factor to be considered is whether there has been a suppression of evidence by the prosecution and, if so, whether such suppression took place after a request by the defense for the evidence.

There was no evidence here that the test as given could have been preserved. The request for a breath sample was first made through the defendant's "Motion to Produce," many months after the defendant was arrested and the breath test taken.

There is no claim that the alleged failure to have a sample available was deliberate.

* * *

Herein there simply was no evidence in this record that there was suppression or non-disclosure of evidence by the prosecution and we therefore do not reach to the other factors.

* * *

In summary, where there is a failure, as here, to prove that the evidence is preservable or that there was any prejudice to defendant by failure to have available to him a breath sample, we must hold that the wider interests of society favor the admissibility of the test results at trial.
557 P.2d at 380-382

Some jurisdictions have required that a defendant meet this burden of showing the exculpatory evidence present in a post-test by use of expert witnesses. In State v. Teare, 135 N.J. Super. 19, 342 A.2d 556 (1975) where no expert had testified, the court, on the State's appeal of the suppression order, remanded for a thorough development of the issues involved. On the second appeal, the court ruled as follows:

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Based on the testimony and evidence presented at this hearing the court finds as fact:

1. It is presently impossible to preserve the breathalyzer ampules so as to reliably eliminate all the factors which cause unpredictable changes in the ampule contents subsequent to the administering of the breathalyzer test.

2. The reactions begun inside the ampule by the original breathalyzer test continue in an unpredictable and uncontrollable manner. These unpredictable reactions cause subsequent analysis or retesting of the ampule to be totally unreliable evidence as a check on the accuracy or validity of the original breathalyzer test.

3. There is no predictable relationship to the changes that occur within the test ampule and the passage of time.

4. At the present time subsequent retesting or chemical analysis of the test ampules provides no acceptable scientific relationship to the accuracy or validity of the original test results.

5. The theory of Dr. Volpe and the experimentation of Dr. Jones have not been thoroughly tested or scientifically scrutinized as to be considered acceptable as scientific fact or accurate enough to produce results admissible as evidence.

CONCLUSION

Preservation of the test ampule is not feasible or practical since subsequent testing will not give any scientifically reliable results, this being due to the uncontrollable changes that occur in the breathalyzer test ampules after their use in the breathalyzer test. Furthermore, even if these changes or variations could be scientifically accounted for and accurately analyzed, you still could not properly analyze a test ampule subsequent to a breathalyzer test because there is simply no predictable relationship between the changes that occur and the lapse of time.

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Respondent makes no claim as to the similarities between breathalyzer tests and blood tests. It may well be that the above discussed "impossibility," "unpredictability" and "uncontrollable" problems that exist in breathalyzer tests are generally applicable to blood sample re-testing. But the important point is the requirement seen in Teare that expert testimony must be given in order for a defendant to establish the necessity of his post-test claims. Defendants, though, often find such expert testimony damaging to their position.

In People v. Stark, 73 Mich. App. 332, 251 N.E.2d 574 (1977), for example, an expert witness testified that in only 2% of the 200 ampoule retesting that he had conducted had he found any significant variation in the results of the first test and the later one. He also admitted that used ampoules are of little value after 30 days. (In Stark the defendant had waited 72 days before requesting the ampoule for retesting.)

So rigidly does Oregon hold to the requirement of expert witness testimony to support a defendant's claim, that in State v. Reaves, 550 P.2d 1403 (Ore., 1976) the court ruled that the defendant had not made the necessary showing of the value to him of retesting the ampoule, even though in State v. Michener, 550 P.2d 449 (Ore., 1976) (decided just 20 days before Reaves) the court ruled that the defendant had properly showed how the

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retesting would be to his benefit and the State's evidence was, therefore, suppressed.

Another important aspect that should be emphasized is that where the "destruction" of evidence is not done maliciously or in an effort to subvert defendant's case, courts have been unwilling to suppress the State's evidence or dismiss charges. In State v. Watson, 48 Ohio App. 2d 110, 355 N.E. 2d 883 (1975) the court held:

. . . where there is no evidence that the ampoule and solution, if preserved, could be scientifically examined so as to produce conclusive results, nor that it was maliciously destroyed, the results of the breathalyzer test may be admitted.

355 N.E.2d at 885 (Emphasis added.)

This view was also followed in State v. Myers, 88 N.W. 16, 536 P.2d 280 (1975).

It should be noted at this point that the sample was exhausted by the state in the conduct of its tests, so that no part of it remained for the defendant to test.

The court will not adopt a construction of a statute which will lead to unreasonable results. The record shows neither intent on the part of the state to destroy evidence nor any negligence by the state since all the blood was used in the tests conducted. The statute cannot insulate defendant "against the "slings and arrows of outrageous fortune", which may strike anyone at any time and are unfortunately incidental to life itself." United States v. Pate, 318 F.2d 559 (7th Cir. 1963); Nunn v. Cupp, 15 Or.App. 212, 515 P.2d 421 (1973).

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We conclude that the results of the state's tests were admissible regardless of the fact that defendant had no opportunity to test the sample.
526 P.2d at 284.

In accord, People v. Hedrick, supra; State v. Superior Court, supra; and State v. Canter, supra.

A related issue to the question of maliciously destroyed evidence, as noted in appellant's brief, is that of lost or accidentally destroyed evidence. In In Interest of Oaks, 571 P.2d 1364 (Utah, 1977), the Utah Supreme Court, in dicta, noted that the admission of blood alcohol data would have been proper in that case "even if the ampoule were lost or destroyed."
571 P.2d at 1365.

The fact that evidence of this nature is often-times destroyed according to normal operating procedures has also been acknowledged by several courts. Foy v. State, 533 P.2d 634 (Okla., 1974); State v. Myers, supra; State v. Superior Court, supra; and State v. Canter, supra.

Another consideration courts have found to be of relevance (as above noted) is the issue of timely request for the independent, post-test. In People v. Hedrick, supra, the defendant "made a motion to produce the breath sample" (557 P.2d at 379) nearly three months after the State had run its breathalyzer test. This factor, combined with defendant's failure

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to show that the test sample could have been preserved to enable him to conduct a later analysis, persuaded the court to allow the State to admit the evidence. In accord, State v. Canter, supra.

The same dilatory, tardy request is present in the instant matter and respondent submits that the result seen in Hedrick and Canter therefore is the result this court should also follow.

A tangentially-related issue to the admission of such evidence is that routinely - conducted tests, just as records kept in the regular course of business, are properly admitted. Here, respondent contends that the blood tests conducted by Lynn Davis were done in the ordinary course of his employment and therefore the reliability of the tests, in the first instance, must be deemed to be high. (See Sullivan v. Municipality of Anchorage, 577 P.2d 1070 (Alaska, 1978) and Utah Rules of Evidence 63 (13) and (15)).

Some courts have also ruled that where ample evidence was presented by the prosecution of defendant's intoxication, separate from any blood alcohol tests, the courts refused to overturn defendant;s conviction even were the tests to be excluded. (See Foy v. State, supra and People v. Hedrick, supra.)

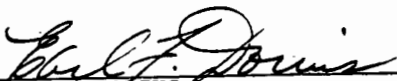
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One last consideration made in the Hedrick case is the public policy agreement that "the people [State] have no duty to give the defendant any chemical test." 557 P.2d at 379. The Hedrick court then quoted favorably from State v. Rejera, 92 Idaho 669, 448 P.2d 762 (1968):

To hold otherwise would be to transform the accused's right to due process into a power to compel the State to gather in the accused's behalf what might be exculpatory evidence. In this case, the State produced testimonial evidence of intoxication, but it had no obligation to obtain for appellant what he speculates might have been more scientific evidence of sobriety. The State may not suppress evidence, but it need not gather evidence for the accused.
448 P.2d at 767

In summary, therefore, appellant has not satisfied either statutory or case law duties of timely requesting a post-test; meeting his burden of showing the exculpatory nature of a retest; use of expert witnesses to show the "destruction" has actually occurred and that the "destruction" was malicious or, at least, greater than accidental and not routinely destroyed; and convincingly shown that the state should "gather evidence for the accused." Therefore, respondent submits that the blood test results were properly admitted and that the appellant's motion to suppress the test results was properly denied.

Dated this 13th day of September, 1979.


EARL F. DORIUS
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that I mailed a true copy of the attached
Respondent's Additional Authorities to Mr. Bruce C. Lubeck,
Attorney at Law, 333 South Second East, Salt Lake City, Utah
84111, this 13th day of September, 1979.

Stigis Rasmussen