

1979

# Logan City v. Robert Kelly Bassett : Brief of Appellant

Utah Supreme Court

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Brian R. Florence; Attorney for Defendant;

J. Blaine Zollinger; Robert B. Hansen; Attorneys for Plaintiff-Respondents;

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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LOGAN CITY, )  
Plaintiff-Respondent, )  
vs. )  
ROBERT KELLY BASSETT, )  
Defendant-Appellant. )

Case No.  
16328

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BRIEF OF APPELLANT

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APPEAL FROM A JUDGMENT OF THE HONORABLE VERNON W. JONES,  
FIRST JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF KANE

BRIAN R. FLORENCE  
Attorney for Defendant  
818-26th Street  
Ogden, UT 84401

J. BLAINE ZOLLINGER  
Attorney for Plaintiff-Respondent  
256 North 100 West  
Logan, UT 84321

ROBERT B. HANSEN  
Utah State Attorney General  
236 State Capitol Building  
Salt Lake City, UT 84114

FILED

MAR 30 1979

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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LOGAN CITY,	)	
Plaintiff-Respondent,	)	
vs.	)	Case No.
		16320
ROBERT KELLY BASSETT,	)	
Defendant-Appellant.	)	

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BRIEF OF APPELLANT

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STATEMENT OF THE KIND OF CASE

This is an appeal from a judgment in a criminal case by the Honorable VeNoy Christoffersen.

DISPOSITION IN LOWER COURT

The lower court denied appellant's motion to dismiss an appeal filed by the respondent, Logan City, concerning a charge of driving with a blood-alcohol content of .10% or higher.

RELIEF SOUGHT ON APPEAL

The appellant requests this Court to reverse the decision of the lower court and dismiss the criminal charge against the appellant.

## STATEMENT OF FACTS

By a single Complaint signed January 30, 1978, the appellant was charged with having committed criminal offenses on January 25, 1978 of driving with a blood-alcohol content of .10% or higher, driving a motor vehicle through a red stop light, and being a person under the age of twenty-one years in possession of alcoholic beverages. (R01)

The matters were set for trial on April 12, 1978. At the start of the trial Count 2 and 3, the red light violation and illegal possession of alcohol violation respectively, were dismissed on motion of Logan City. Then the prospective jurors were sworn and voir dired. A jury was selected and sworn to try the case. (R9)

Appellant's counsel then moved the Court to dismiss Count 1, the charge of driving with a blood alcohol content of .10% or higher, pursuant to 76-1-402 and 403, Utah Code Annotated. This motion was granted by the Logan City Judge, the Honorable Zachary T. Champlin. (R10)

On April 17, 1978, Logan City appealed Judge Champlin's decision to the District Court of the First Judicial District in and for the County of Cache, contending that the City Court erroneously interpreted and applied the Single Criminal Episode Statutes,

76-1-402 and 403, Utah Code Annotated. (R6)

The appellant filed a Motion to dismiss respondent's appeal, contending that the Notice of Appeal had not personally been served upon the appellant or his counsel. This Motion was denied by Memorandum Decision of Judge VeNoy Christoffersen on June 16, 1978. (R12, 20)

Appellant then filed a Motion to dismiss the Complaint pursuant to the Single Criminal Episode Statutes. (R25-27)

By Memorandum Decision dated August 21, 1978, Judge VeNoy Christoffersen denied appellant's Motion to dismiss the appeal. (R33)

Immediately after this Memorandum Decision, appellant filed a Motion to dismiss the Complaint, contending that 77-51-6, Utah Code Annotated, constituted a bar to any further prosecution of the appellant. (R35)

By Memorandum Decision dated September 19, 1978, Judge Christoffersen declined to rule on that issue and remanded the matter back to Logan City Court which had by this time become the Logan Department of the Circuit Court. (R37)

Appellant then filed his Motion to dismiss the Complaint in the Logan Department of the Circuit Court. It was denied by the Honorable Zachary T. Champlin by

Memorandum Decision dated November 20, 1978. (R46)

Appellant filed an appeal to the Cache County District Court, still contending that 77-51-6, Utah Code Annotated, prohibited further prosecution of the offense of driving with a blood-alcohol content of .10% or higher. By Memorandum Decision dated February 8, 1979, the Honorable VeNoy Christoffersen denied appellant's motions and appeal. (R58)

#### ARGUMENT

THE APPELLANT SHOULD NOT BE PROSECUTED AGAIN FOR THE SAME MISDEMEANOR AFTER IT HAS ONCE BEEN DISMISSED.

On April 12, 1978, after a jury had been selected and sworn to try appellant's case, his counsel moved to dismiss the charge of driving with a blood-alcohol content of .10% or higher, which motion was granted by the Logan City Judge. Logan City filed an appeal and the Honorable VeNoy Christoffersen ruled that the Logan City Judge had erred in dismissing the criminal charge against the appellant.

Logan City then attempted to re-prosecute the appellant on that charge.

In opposition, appellant relies on 77-51-6, Utah Code Annotated, which states:

An order for the dismissal of an action as provided in this chapter shall be a bar to any other prosecution for the same offense, if it is a misdemeanor; but shall not be a bar, if the offense is a felony.

In Boyer v. Larson, 433 P. 2d 1015, the defendant had been convicted in City Court of a misdemeanor which he appealed to the District Court. The District Court inadvertantly dismissed the defendant's case before it ever came to trial. The defendant cited 77-51-6, Utah Code Annotated, as authority for preventing further prosecution. In Boyer, this Court held that 77-51-6, Utah Code Annotated, did not apply to that fact situation since the dismissal of the misdemeanor occurred before the trial of the matter had actually started. Therefore, it was not "other prosecution for the same offense".

In the appellant's case, the dismissal occurred after the jury had been sworn to try the case and the appellant urges that reverse reasoning of Boyer would place his case within the purview of 77-51-6, Utah Code Annotated, and prohibit additional prosecution.

The respondent contends that the dismissal referred to in 77-51-6, Utah Code Annotated, is only a dismissal that comes about pursuant to 77-51-4, Utah Code Annotated, which states:

The court may, either of its own motion or upon the application of the county attorney, in furtherance of justice order an action, information or indictment to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes.

However, Chapter 51 of Title 77 refers to other types of dismissals and 77-51-3, Utah Code Annotated, provides:

If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail shall be exonerated, or money deposited instead of bail must be refunded to him.

Appellant contends that section four includes a dismissal in the furtherance of justice which is a subjective standard by the trial judge and would apply to appellant's case. Section three would also include a dismissal made at the direction of the Court, but in response to a proper motion by the defendant.

If the respondent's logic is to be followed to its conclusion, the City or State would be free to appeal, and if successful, re-try any misdemeanor that was dismissed upon motion of a defense attorney during the course of a trial. This is obviously ridiculous and would also fly in the face of the

prohibition against double jeopardy.

In State v. Lewis, 536 P. 2d 738 (1975), the defendants Lewis and Robinson were both accused of kidnapping and rape. At the conclusion of the prosecution's case, the defense moved for a dismissal of both counts against both defendants which was granted by the Court. The prosecution appealed the trial court's ruling. On appeal, the Idaho Supreme Court held that the trial judge had erroneously dismissed the charge, but that the double jeopardy provision of the Idaho Constitution would prevent the re-trial of the defendants on those charges. Idaho's double jeopardy provision is identical to Utah's as well as the Fifth Amendment to the Constitution of the United States.

In Lewis, the Court referred to the Idaho Rules of Criminal Procedure which is similar to 77-51-6, Utah Code Annotated, except it includes a dismissal upon motion of the defendant.

Utah's Code of Criminal Procedure is silent upon the defendant's right to move for dismissal if the facts or law warrant. Obviously, a defendant has this right, and when such a motion is granted the Lewis rule should apply and prohibit re-trial even if the trial court erred.

Appellant is not conceding that Judge Champlin erred in dismissing the criminal charge, but has chosen not to use this forum to request an interpretation of the Single Criminal Episode Statutes.

#### CONCLUSION

Respondent should be prohibited from re-prosecuting the appellant and the original dismissal of the Complaint in City Court should stand.

Respectfully submitted,

FLORENCE AND HUTCHISON



BRIAN R. FLORENCE  
Attorney for Appellant

#### MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant, postage prepaid, to J. Blaine Zollinger, Attorney for Respondent, 256 North 100 West, Logan, UT 84321, and two copies to Robert B. Hansen, Utah State Attorney General, 236 State Capitol Building, Salt Lake City, UT 84114, on this 29th day of March, 1979.



ELLEN CHRISTENSEN, Secretary