

1980

State of Utah v. Larry Vale Potter : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :

Plaintiff-Respondent, : Case No.
16355

-vs- :

LARRY VALE POTTER, :

Defendant-Appellant. :
----- : -----

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT RENDERED IN
THE SEVENTH JUDICIAL DISTRICT COURT, IN
AND FOR CARBON COUNTY, STATE OF UTAH,
THE HONORABLE BOYD BUNNELL, JUDGE

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LARRY VALE POTTER,

Defendant-Appellant.

Case No.
16355

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by complaint and information with one count of aggravated robbery, a violation of Utah Code Ann. § 76-6-302 (1953), as amended; one count of failure to stop at the command of a police officer, a violation of Utah Code Ann. § 41-6-169.10, as repealed, 1978; and one count of aggravated assault, a violation of Utah Code Ann. § 76-5-103 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury before the Honorable Boyd Bunnell in the Seventh Judicial District Court for Carbon County and found guilty of aggravated robbery and failure to stop at the command of a police officer on

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Following a presentence investigation and report appellant was sentenced to a term of 5 years to life in the Utah State Prison with a fine of \$2,000. Execution of the prison sentence and payment of \$1,500 of the fine were suspended for 5 years and appellant was placed on probation.

Appellant's probation was revoked on May 23, 1979, and he was ordered committed to the Utah State Prison. Upon filing a Notice of Appeal and a Certificate of Probable Cause signed by the Honorable J. Frank Wilkins of this Court, appellant was allowed to remain free on bond pending the decision of this Court.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the verdict and sentence of the lower court as well as affirmance of the action of that court in revoking appellant's probation.

STATEMENT OF THE FACTS

On February 22, 1978, Von Wayne Johnston and his wife responded to a knock at their door in Wellington, Utah, at 1:30 a.m. (T. at 3,17).¹ Upon opening the door, Mr. Johnston confronted appellant who stood with a cocked pistol at his side (T. at 6). Appellant stated, "I want in. Let me in," and then followed Mr. Johnston into his house.

1 T. refers to the transcript of the trial held November 21 and 22, 1978. R. refers to the record on appeal. H. refers to the transcript of the hearing to show cause why probation should not be revoked held May 23, 1979.

When they reached the kitchen, appellant said, "I want a roll of toilet paper and some matches." Mr. Johnston got some matches out of a kitchen cabinet and his wife retrieved a roll of toilet paper from the bathroom (T. at 4,17-18). The items were placed in appellant's hat and Mrs. Johnston was told that she was no longer needed (T. at 4). She went to the sewing room where, because of on-going remodeling, she could see into the living room and observed her husband and appellant as they went out the front door (T. at 18). On the front porch, the roll of toilet paper fell out of appellant's hat and appellant got "kind of nervous" (T. at 4). Mr. Johnston put his hands on the door while appellant picked up the roll (T. at 5 and 18). Appellant then said "thank you," shook Mr. Johnston's hand, got in his car and drove away at a very rapid pace (T. at 5 and 13). Mrs. Johnston then called the highway patrol (T. at 18).

Mr. Johnston noted that he thought appellant might well shoot him or his wife. He stated that appellant walked and talked normally and did not sway or lean against the wall. He said appellant drove normally except that he accelerated very quickly (T. at 12-13). He did not think appellant was drunk (T. at 16).

Mrs. Johnston testified that although appellant had seemed in a daze, with a blank expression, he had

walked normally and that his eyes and demeanor had seemed about the same at the preliminary hearing (T. at 19,20). She had seen appellant at a bank some time after the incident and immediately noticed that his voice sounded the same, which frightened her at that time considerably (T. at 20-21). She stated that she thought something was wrong with appellant largely because of what he asked for and that her analysis of appellant's mental state would have changed if he had asked for a large sum of money (T. at 26 and 28). She could not smell any alcohol about his person (T. at 27).

Officer Larry Prince of the East Carbon City Police Department, after having been notified by the Price dispatcher, spotted appellant and gave chase (T. at 30). With both his overhead lights and siren on, he reached a speed of 110 miles per hour as he followed appellant toward Green River, Utah (T. at 30). Eventually appellant's car stopped and appellant stood in the middle of the road with a gun in his hand (T. at 48). Officer Prince kept his distance and waited for other officers to arrive (T. at 31-32).

As Officer Larry Penrod of the Price City Police Department sped past Officer Prince, appellant got into his car and turned back towards Price (T. at 48). After

very nearly having a head-on collision with another Price City police car driven by Officer Vuksinik (T. at 32,48 and 57), appellant continued towards Price with all three police cars in pursuit with lights and sirens on (T. at 49). Officer Prince described the chase:

On occasions we reached speeds up to 70 or more miles an hour. Several times the subject slammed on his brakes, trying to disable Officer Penrod's car--tailgate him. He stopped several other times. We tried to talk him out of the car and he would proceed. He would not get out of the car. Finally, we passed the Horse Canyon Mine Junction and headed toward Columbia. Several other times he slammed on his brakes. At one time he motioned at Officer Penrod to come up alongside. So Officer Penrod went up--to pull up to try and get in front of him so we could stop the vehicle.

Q. How did he motion?

A. With his left arm. I couldn't really tell exactly what he was doing. I could see a hand, maybe, you know, sticking out. So Penrod pulled up alongside of the car and at that time I saw the suspect vehicle swerve to the left, hitting Officer Penrod's right front. He went off to the left in the barrow pit and back in to the road, almost lost control of his vehicle. A little bit later his vehicle stopped again and we tried talking him out. And he went to get out of the car but then he took off again. Several times this happened.

(T. at 33-34).

Officer Prince stated further that "every time Officer Penrod would try to pull alongside, he would control his car enough to block off the lane of travel. He was using his mirrors. He had full control of his car."

(T. at 46, see also T. at 49). His driving was not characteristic of someone who was under the influence of alcohol, according to Officer Prince (T. at 46).

Officer Penrod added that ". . . while going around one of the curves, I observed the suspect reach back towards us with a hand gun, and I observed a flash from the weapon," (T. at 49). He stated that appellant was not a candidate for a charge of driving under the influence and that he had good control of his car (T. at 55). Returning to Officer Prince's narration:

. . . [F]inally there was a big cloud of smoke--dark blue smoke, and he stopped his vehicle. We had a roadblock about a mile up on the road. And at that time I thought that maybe he was stopping for the roadblock. . . .

Officer Penrod exited his car, using his door as cover. I positioned my car to the left rear of Officer Penrod's car. I exited my car using my door as cover. We ordered the subject out of the car, which he did. And he was standing there with the--a weapon in his hand, waving it with the barrel down. And Officer Penrod told him several times to put it down. And at one time he said: "Put the gun down and don't do anything stupid." And finally he did put the gun down. Officer Penrod and Sheriff Passic came up and subdued the subject. And I came up and I grabbed the weapon at that time.

(T. at 34).

Despite the fact that a blood test given at 3:00 a.m. indicated a blood-alcohol content of .24 (T. at

42 and 44), all of the officers noted that appellant walked and talked normally (T. at 39, 53, and 60). Officer Prince stated that his movement and speech were not characteristic of one who was under the influence of alcohol (T. at 46). He could not smell alcohol and did not suspect that this was a case of driving under the influence of alcohol (T. at 42, 44). Officer Prince said that, given the excitement of the chase appellant seemed fairly normal (T. at 39). Officer Penrod's testimony paralleled that of Officer Prince and he also noted that appellant acted normally and was not a candidate for a driving under the influence charge (T. at 53-54). Officer Vuksinik, who knew appellant as a bartender at the Elk's Club and had seen him quite often, noted that appellant's speech was normal and that he "carried himself fine." (T. at 60). Officer Vuksinik did not feel that a driving under the influence charge would have been appropriate (T. at 59).

After appellant had been placed into a police car, he overheard Officer Vuksinik commenting about running out of gas. He said, "what's the matter, Vuksinik? Did you run out of gas?" He then laughed (T. at 54 and 59).

In his own defense, appellant testified that he had been hit on the head with a small bat in 1974

which had left a scar on the left side of his head (T. at 68). He said that he had been taking medication for gout every day and had been drinking a blended whiskey after work on February 21, 1978 (T. at 69). He noted that he was drinking what he always drank (T. at 69-70). Although he had had that medication and liquor before at the same time, he claimed to have never had problems before (T. at 78-79). He stated that he remembered drinking about five drinks until about 9:30 or 10:00 p.m. and nothing thereafter until he awakened in jail (T. at 70-71).

Dr. Lincoln Clark, a psychiatrist, testified at length about the potential effects of the scar on appellant's head, the drinks, and the medication. He hypothesized that appellant was experiencing a seizure which left him in a dream-like state, able to walk and talk normally but not able to consciously direct his actions (T. at 92). Dr. Clark did note that his opinion was not conclusive or the only possible explanation for appellant's actions. He said:

I'm simply trying to make sense out of what, to me, was a very puzzling event in this man's life, as to why this thing happened; and to try and determine what it was related to.

(T. at 105).

Dick Foster testified for the state in rebuttal that he had met with appellant in the evening of February 21st and that appellant, Mr. Foster and his wife had been drinking beer and tequila (T. at 115), but that he did not believe appellant was intoxicated (T. at 113). Mr. Foster said that appellant had been "coming on" to his wife all evening and that he took them to his house to "see his puppies," (T. at 113). When Mr. Foster refused to go into appellant's house, appellant said "okay" and ran in by himself. Mr. and Mrs. Foster, suspecting trouble, ran away. As they ran they heard appellant come back out and gun shots (T. at 114). Mr. Foster said he thought appellant's actions were strange in that he was acting as he was towards Mrs. Foster (T. at 115).

After hearing the evidence, the jury deliberated and returned a verdict of guilty on the charges of aggravated robbery and failure to stop at the command of a police officer and not guilty on the charge of aggravated assault (R. at 60-62). Following a presentence investigation by the State Department of Adult Probation and Parole, appellant was sentenced to a term of five years to life in the Utah State Prison and a fine of \$2,000. Execution of the prison sentence and payment of \$1,500 of

the fine were suspended and appellant was placed upon probation with the following terms:

1. That appellant would pay the \$500 fine within 90 days:

2. That appellant serve thirty days, on weekends, in the Carbon County Jail;

3. That appellant remain in present treatment with Dr. Lincoln Clark and enter alcohol therapy as designated by Adult Probation and Parole;

4. That appellant submit to a breathalyzer test at the discretion of Adult Probation and Parole within reasonable circumstances and hours;

5. That appellant totally abstain from the use of alcoholic beverages; and

6. That appellant pay \$100.00 restitution to the Price City Police Department for damages to the patrol car.

Appellant was also given a sentence of six months in the Carbon County Jail, to be served concurrently with the prison sentence, which was also suspended and probation imposed upon the same terms and conditions (R. at 85,86).

On April 27, 1979, the Price City Police received a call which indicated a possible assault with a firearm

(H. at 28-29). Officer Larry Penrod responded and found Ms. Lucille Begay barefoot wearing just pajamas and a nightgown, standing in the driveway at 345 South 100 East in Price (T. at 27,29). She told Officer Penrod that, at appellant's invitation, she was living in his house. She said that he had beaten her, thrown her out of the house, and threatened her with a gun (H. at 29). She said that she wanted to retrieve her clothes and other property (H. at 2,47).

Fearing that additional help might be needed because of the possibility that appellant was armed, several other police officers were summoned (H. at 30, 40 and 46). The officers realized that appellant was on probation and summoned probation agents Troth and Reid (H. at 4). In an attempt to retrieve Ms. Begay's property (H. at 29 and 47), the officers knocked on the door of appellant's house and no one answered (H. at 30). Ms. Begay then opened the unlocked door and led them to appellant's bedroom (H. at 5,6,13 and 30). Agent Reid knocked on the locked bedroom door, identifying himself and asking to talk to appellant (H. at 6,30,41 and 48). There was no threatening language used (H. at 41). Suddenly, appellant opened the bedroom door and grabbed Agent Reid. Officer Christensen of the Carbon County Sheriff's Office pulled appellant off but not before he tore Agent Reid's shirt (H. at 6,30,42 and 49). Deputy

Christensen noted that there was a strong odor of alcohol about appellant (H. at 50). Agent Reid asked appellant to submit to a breathalyzer test, which he refused to do (H. at 8,9,31 and 50). One of the officers noted that appellant sounded quite upset, that his voice level was rising and that he was, at times, screaming (H. at 43). Eventually he threw a drawer full of Ms. Begay's clothes out into the living room (H. at 9 and 34).

Appellant testified that he had put Ms. Begay out of the house because she had been drinking and acting violently (H. at 56-57). He said she was staying in his house while looking for a job (H. at 54-55). He admitted having a struggle with Agent Reid but said that he did so after his bedroom door had been thrown open and light had been shown in his face (H. at 53).

After hearing the testimony, the Court felt that Ms. Begay had demonstrated enough of an interest to admit the officers to the house (H. at 63). The Court ruled that appellant had been shown to have violated his probation by acting violently toward Agent Reid, drinking alcohol, and refusing to submit to a breathalyzer examination at what was, in view of all the circumstances, a reasonable time (H. at 64-66). Appellant's probation was revoked and he was committed to the Utah State Prison (H. at 66-67).

ARGUMENT

POINT I

THE EVIDENCE OF REDUCED CAPACITY OR INTOXICATION IS NOT SO OVERWHELMING AS TO COMPEL A REASONABLE DOUBT OF APPELLANT'S GUILT.

In State in Interest of R.G.B., 597 P.2d 1333 (Utah 1979), this Court restated the rule of review with respect to a jury verdict challenged on the basis of insufficient evidence. Citing State v. Mills, 530 P.2d 1272 (Utah 1975), the Court stated:

It is the prerogative of the jury to judge the weight of the evidence, the credibility of the witnesses, and the facts to be found therefrom. For a defendant to prevail upon a challenge to the sufficiency of the evidence to sustain his conviction, it must appear that viewing the evidence and all inferences that may reasonably be drawn therefrom, in the light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt. To set aside a verdict it must appear that the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly must have entertained reasonable doubt that defendant committed the crime. Unless the evidence compels such conclusion as a matter of law, the verdict must be sustained.

Id. at 1272.

In this matter the only issue raised by appellant concerns whether or not the jury was correct in finding that he had the requisite intent to commit the crimes charged (see Appellant's Brief, p. 8). It is well

. . . specific intent may be proved by circumstantial, as well as direct, evidence, and that it may be inferred from the acts and conduct of the accused, the nature of the weapon used by defendant and manner in which it was used, taken together with all the other circumstances in the case. . .

As to whether or not the specific intent existed in the mind of the accused is a question of fact to be submitted to and determined by the jury from all the evidence in the case and the inferences to be drawn therefrom, and is not a matter of legal presumption.

State v. Minousis, 64 Utah at 206, 211-212, 228 Pac. 574 (1924). See also State v. Kazda, 15 Utah 2d 313, 392 P.2d 486 at 488 (1964).

Appellant contends that the presence of the specific intent to commit aggravated robbery was negated by evidence of insanity and/or intoxication. Nevertheless, evidence tending to demonstrate either or both of those defenses presented at trial does not compel a reasonable person to conclude that the jury was mistaken in finding appellant guilty of aggravated robbery.

REDUCED CAPACITY

Appellant raises, for the first time, the defense of insanity under Utah Code Ann. § 76-2-305 (1953), as amended. The record is devoid of any notice, prior to trial, of an intent to use the insanity defense as required by Utah Code Ann. § 77-22-16 (1953), as amended. Given the absence of the required notice or any discussion

of good cause for permitting evidence indicating insanity, it must be assumed that any evidence which might demonstrate insanity was presented and considered in connection with the defense of voluntary intoxication under Utah Code Ann. § 76-2-306 (1953), as amended. This is especially true in this matter where the evidence of reduced capacity was particularly aimed at demonstrating the effect of alcohol and/or drugs upon appellant. It would be improper to consider the defense of reduced capacity under Utah Code Ann. § 76-2-305 (1953), as amended, as raised at this time. To do so would defeat the purpose of the notice requirement of Utah Code Ann. § 77-22-16 (1953), as amended, since the State would be effectively prevented from countering such a defense with affirmative evidence.

Nevertheless, even if it is assumed, for the sake of argument, that the defense of reduced capacity or insanity under Utah Code Ann. § 76-2-305 was raised in a timely manner and should now be considered, appellant's evidence on the point does not compel this Court to set aside the jury's determination of guilt.

It is well settled in Utah that once evidence is introduced which raises the issue of the defendant's sanity, the presumption of sanity disappears and the matter of the defendant's ability to form any necessary

criminal intent becomes a jury question. State v. Green, 78 Utah 580, 6 P.2d at 177 at 182 (1932). See also State v. Dominguez, 564 P.2d 768 (Utah 1977).

In State v. Brown, 36 Utah 46, 102 Pac. 641 (1902), a jury verdict of guilt was reversed because it was apparent that the jury had disregarded overwhelming evidence of insanity which had been left unrebutted by the prosecution. The Court said:

At the trial the defendant made no attempt to deny or explain the acts charged as constituting the offense, but relied solely upon the defense of insanity, while the state relied entirely upon proof of the acts charged, without in any way attempting to rebut or explain the evidence of insanity submitted on behalf of the defendant.

Id. at 642.

The Court did, however, note that:

There, no doubt, may be instances where the evidence offered by the defendant upon the question of his sanity is so weak and inconclusive that the state may well insist upon the presumption of sanity, and thus need not offer any evidence in rebuttal of defendant's evidence upon the question.

Id. at 644.

Finally, the Court said:

If the state of the evidence upon the issue of insanity had been such as to permit reasonable men to arrive at different

conclusions when considered in connection with the presumption of sanity, then the question would be one of fact merely, and we would be powerless to interfere.

Id. at 646.

In State v. Hadley, 65 Utah 109, 234 Pac. 940 (1925), a jury verdict of guilt in the face of evidence of insanity was upheld. The Court noted that the evidence was not so overwhelming as in earlier cases and said:

The question of the sanity or insanity of any one accused of the commission of a crime is a question of fact primarily for the jury to determine. Courts should not set aside a jury's verdict, unless it appears from the whole record that the jury, without reason and in disregard of the uncontradicted testimony, rendered its verdict contrary to such testimony.

Id. at 842.

Still later, in State v. Holt, 22 Utah 2d 109, 449 P.2d 119 (1969), the defendant claimed that a jury verdict of guilt should have been reversed because the testimony of two psychiatrists to the effect that he was not responsible for his actions in killing an ex-girlfriend went unrebutted by any expert testimony. The court first restated State v. Hadley, supra, and then, citing Dusky v. United States, 295 F.2d 743, 754-757 (8th Cir. 1961), stated:

This and other courts have said that expert opinion as to insanity rises no higher than the reasons upon which it is based, that it is not binding upon the trier of facts, and that lay testimony can be sufficient to satisfy the prosecutions' burden even though there is expert testimony to the contrary. . . . (citations omitted).

There is nothing essentially sacred or untouchable in expert testimony. The mere fact that the primary evidence on one side may be typified as expert in character while that on the other is exclusively from the mouths of lay witnesses and from lay facts must not of itself serve to destroy the jury's traditional function.

State v. Holt, supra, 449 P.2d at 120-121.

The Court then cited People v. Wolff, 61 Cal.2d 795, 394 P.2d 959 at 964-965 (1964):

In People v. Wolff, four psychiatrists testified that the defendant was insane; the court stated:

* * * It is only in the rare case when "the evidence is uncontradicted and entirely to the effect that the accused is insane" [citation omitted] that a unanimity of expert testimony could authorize upsetting a jury finding to the contrary. While the jury may not draw inferences inconsistent with incontestably established facts [citation omitted], nevertheless if there is substantial evidence from which the jury could infer that the defendant was legally sane at the time of the offense such a finding must be sustained in the face of conflicting evidence, expert or otherwise, for the question of weighing that evidence and resolving that conflict "is a question of fact for the jury's determination" [citation omitted]. * * *

* * * it is settled that "the conduct and declarations of the defendant occurring within a reasonable time before or after the commission of the alleged act are admissible in proof of his mental condition at the time of the offense."

State v. Holt, supra at 121. The Court cited further:

. . . To hold otherwise would be in effect to substitute a trial by "experts" for a trial by jury, for it would require that the jurors accept the psychiatric testimony as conclusive on an issue--the legal sanity of the defendant--which under our present law is exclusively within the province of the trier of fact to determine.

To guard against misunderstanding of our rules it is pertinent to observe that we do not reject expert testimony simply or solely because it may also answer the ultimate question the jury is called upon to decide (citation omitted); but, strictly speaking, a psychiatrist is not an "expert" at all when it comes to determining whether the defendant is legally responsible. . . .

Id. at 122 (emphasis in original). The Court then held:

In the instant action . . . the testimony respecting the insanity of the appellant is not so positive or conclusive that it can be said as matter of law that the jury, in returning a verdict of guilty, acted arbitrarily or failed to give consideration and regard to the evidence in the case.

Id. at 122.

The position of this Court as stated in State v. Holt, supra, is consistent with the weight of authority from other jurisdictions. See State v. Cano, 103 Ariz. 37, 436 P.2d 586, 590 (1968); Griswell v. State, 443 P.2d 552, 555, 556 (Nev. 1968); Gonzales v. State, 388 P.2d 312, 317 (Okla. Crim. 1964); United States v. Coleman, 501 F.2d 342 at 346 (10th Cir. 1974); United States v. Dube, 520 F.2d 250 at 250-252 (1st Cir. 1975); and People v. Lowe, 184 Col. 182, 519 P.2d 344, 348 (1974).

In the instant matter there was sufficient evidence to support the jury determination of guilt. Appellant's expert witness noted that his opinion was not conclusive or the only possible explanation for appellant's actions (T. at 105). Virtually every person involved testified that appellant walked and talked normally (T. at 10,13,16,19,20,53 and 60). Appellant had had the scar on his head for four years (T. at 68). Drinking along with taking medication was a regular occurrence (T. at 69-70). He recognized Officer Vuksinik (T. at 54, 59), and was able to drive home with the Fosters after drinking at several bars (T. at 113-115). Dr. Clark's testimony that with the right combination of alcohol and medication appellant could believe he was back in Viet Nam looking for "C" rations is, at best, a tentative suggestion of an explanation for appellant's behavior.

Reasonable persons could certainly find that appellant's overall conduct was inconsistent with the Doctor's theory, and conclude that appellant did, indeed, know what he was doing. Respondent does not pretend that the facts in this matter are not bizarre. But the mere fact that appellant asked for toilet paper and matches instead of something of greater value does not

compel a finding that appellant did not have the capacity to form larcenous intent. Appellant did not steal anything of great value or cause any great, tangible harm. He did, however, terrorize two persons in their own home as well as jeopardize the lives of a number of law enforcement personnel. Why appellant did what he did is not a question that can be answered by a court. The jury did, however, determine that appellant was capable of intending to do what he did. The evidence of Dr. Clark is not so compelling that the evidence from which intent and capacity may be inferred so weak that a reasonable person is compelled to determine that appellant lacked the capacity to direct his actions. Consequently, the verdict of the jury should be affirmed.

INTOXICATION

Appellant claims to have negated any possibility of specific intent via proof of voluntary intoxication in accordance with Utah Code Ann. § 76-2-306 (1953), as amended, which provides that voluntary intoxication is a defense when "such intoxication negates the existence of the mental state which is an element of the offense." Where the charge is aggravated robbery under Utah Code Ann. § 76-6-302 (1953), as amended, the

actor must unlawfully and intentionally take personal property from the victim. Reading the two statutes together, in order for a person to have a defense to aggravated robbery, he must be so intoxicated that he is unable to intend to unlawfully take property from another. Mere evidence which indicates some degree of intoxication does not, by itself, establish a defense. The intoxication must be to the extent that it negates the requisite mental state. In Rice v. State, 500 P.2d 675 (Mont. 1972), the Court stated:

. . . [T]he understanding of one who has been drinking must be determined on the facts of each particular case. In Rice's case, it was for the jury to decide whether his drinking had rendered him insane. . . .

If the defendant is to stand on a claim that he, because of drunkenness, could not have intended the consequences of his acts, that fact would first have to be proven to the jury. . . . To claim insanity on account of drunkenness is equivalent to claiming the absence of intent on account of drunkenness. The question is clearly a jury question. . . .

Id. at 676, 677.

In Griggs v. Commonwealth, 255 S.E.2d 475 (Va. 1979), the defendant was charged with robbing a bank and claimed amnesia and a lack of intent due to a toxically based organic brain syndrome induced from the use of drugs. The Court held:

We believe that it was for the jury to decide whether the defendant acted with criminal intent in the commission of the crimes." While the Commonwealth may not have produced "concrete evidence" of intent, such a failure is not unusual; of necessity, intent often is established by circumstantial evidence. There was abundant circumstantial evidence before the jury from which it could have inferred criminal intent.

Id. at 478.

Finally, in State v. Bunn, 283 N.C. 444, 196 S.E.2d 777, 788 (1973), it was noted that the intoxication required to make a person guilty of driving under the influence and the level of intoxication required to negate criminal intent was not congruent.

In the instant matter, while there was evidence of intoxication, there was also evidence from which it could be inferred that appellant was not so intoxicated that he could not have intended to commit the crime of aggravated robbery. None of the police officers who testified felt that appellant was intoxicated (T. at 42, 44, 46, 53-54, 59-60). Appellant was able to walk, talk, and drive normally (T. at 12-13, 19-20, 46, 49, 39, 53 and 60). He recognized acquaintances (T. at 54 and 59). His voice was the same on the evening in question as it was later at a casual setting in a bank (T. at 20-21). Mrs. Johnston stated that although she thought appellant had

primarily because of what he asked for, not because of the way he acted or talked (T. at 26 and 28). The psychiatrist's speculative explanation was only offered as one possible reason for appellant's actions (T. at 105). Again, why appellant acted as he did was not before the Court. The jury's function was to determine that appellant was able to intend to act as he did. The mere fact that he had been drinking and was, in fact, intoxicated to the point that under the laws of this State he was driving unlawfully (T. at 42 and 44), does not establish a lack of ability to form the requisite criminal intent to commit aggravated robbery. There was ample evidence to support the jury's conclusion that appellant knew and intended the consequences of his act. The jury verdict must be affirmed.

Several additional cases are instructive in this matter. In People v. Fisk, 62 Mich.App. 638, 233 N.W. 2d 684 (1975), the defendant was convicted of armed robbery. Two psychiatrists testified that the defendant suffered from a sociopathic personality disorder and from alcoholic psychosis and that alcohol intake caused him to lose the willpower to resist the impulse to commit the

crime. The prosecution offered no expert witnesses in rebuttal. The court noted that "the prospect of sending a man who has obvious emotional problems to prison for twenty to forty years prompts this Court to examine carefully the findings of fact and conclusions of law." Id. at 686. The Court then stated: "The ultimate determination of sanity and the existence of specific intent rests with the trier of fact, whether court or jury." Id. at 686. The Court held that there was not sufficient evidence of reduced capacity to overturn the jury verdict of guilt and affirmed the verdict.

In United States v. Williams, 332 F.Supp. 1 (D. Maryland, 1971), the defendant was charged with robbing a bank. The evidence in the case indicated that the defendant had been drinking whiskey and had taken 6 or 7 "yellow jackets" or barbiturate pills. He had also taken LSD pills. Witnesses said that he smelled strongly of liquor and had been drinking but did not seem drunk. His speech was heavy and he did not seem to walk normally. A psychiatrist testified that the defendant was unable to control his actions when so intoxicated. Another psychiatric witness for the government testified that while the defendant could have controlled his actions if not intoxicated, defendant was a passive dependent type and had a condition something

short of total mental health. The Court cited Heideman v. United States, 104 U.S. App. D.C. 128, 259 F.2d 943 at 946 (1958), wherein then Circuit Judge Burger stated: "Drunkenness, while efficient to reduce or remove inhibitions, does not readily negate intent." The Court in United States v. Williams then held:

. . . [T]hat the defendant had taken alcohol and drugs to the point of being "under the influence" but that he was not so intoxicated as not to understand what he was doing or to not have the intention to steal from the bank. There is a marked difference between the accounts of the persons who observed defendant and defendant's own account as to his condition. It appears from a witness called by the defense that he was able to write a "stickup" note shortly before the robbery, to go into the bank, hold a coherent conversation about a loan, present the note, obtain over \$4,000 in cash, none of which has been returned, and make good his escape. The Court concludes beyond a reasonable doubt that defendant had the intent to steal from the bank as required for conviction. . . .

Id. at 7.

Finally, in People v. Bacon, 293 Ill. 210, 127 N.E. 386 (1920), a retired policeman who was employed as a security guard was charged with the murder of a close friend. The defendant had been wounded at one time with two bullets in the brain and, according to expert testimony, suffered intervals of unconsciousness during which he was not responsible for his actions. Apparently, he had encountered his friend in a bar where they had had a few beers.

Suddenly, the defendant pulled his gun and shot the victim.

for no reason. Upon being told later of his action the defendant said, "You are crazy; I did not shoot him; he was one of the best friends I had in the world; I would not hurt a hair on his head." The Court held:

While the circumstances surrounding this shooting are strange, and while it is difficult to account for the conduct of plaintiff in error, it is clear that there was in the record undisputed evidence which justified the verdict of the jury. . . This court will not interfere with a verdict of guilty except when this court is able to say, from a careful consideration of the whole testimony, that there is clearly a reasonable and well-founded doubt of the guilt of the accused.

Id. at 388.

There is no question but that the circumstances in the instant matter are also strange. There was also evidence of intoxication. Nevertheless, the jury listened to the witnesses and determined that appellant was not so intoxicated that he was unable to form the requisite criminal intent. Many crimes are senseless. Hopefully, one could say that anyone who specifically intends to commit a criminal act of violence is not "normal." Still, such persons are held responsible for their conduct. It is when they cannot intend the consequences of their conduct that they are not responsible for their actions. It would be a miscarriage of justice to reverse the

jury's determination of guilt because it is difficult to determine why appellant did what he did. The jury found that he intended to do what he did and that he was guilty of aggravated robbery as charged. That verdict is reasonable and should be upheld.

Finally, appellant argues that the jury finding of not guilty of aggravated assault, a general intent crime, is inconsistent with an inference of ability to form the specific intent necessary for aggravated robbery (Appellant Brief at p. 38). Appellant's contention, however, rests upon several assumptions which are not supportable. First, he assumes that the jury found him not guilty of aggravated assault because they felt that appellant did not intend to assault Officer Vuksinik with his car. While that may be true, there is no way to determine that fact from the verdict of the jury. It is virtually impossible to tell why the jury determined that appellant was not guilty of aggravated assault. They may have felt that he was guilty of all the offenses but should only be punished for some of the offenses.

A second assumption upon which appellant must rest his contention is that if the jury found appellant not guilty of aggravated assault because he had no intent to assault Officer Vuksinik, he lacked the intent because

he lacked the capacity to form the intent. This is clearly not supportable. The jury may simply have believed that appellant did not intend to run into Officer Vuksinik with his car. Such an action would have ended any chance he had to escape. Perhaps the jury simply felt that an intent to assault Officer Vuksinik was inconsistent with his vigorous attempt to escape the pursuing police cars. Clearly, it need not be assumed that because the jury found appellant not guilty of aggravated assault, they could only have consistently returned a verdict of "not guilty" on the aggravated robbery charge as well.

In summary, the verdict of the jury should only be discarded if the evidence compels a reasonable doubt as to the guilt of appellant. Evidence of intent may be inferred from the facts and circumstances of a case and testimony of an expert with respect to the lack of capacity to form intent need not be countered by additional expert testimony. Indeed, to apply such a rule in this case would be unjust since there was no notice of any intent to claim reduced capacity prior to the trial as required by Utah Code Ann. § 77-22-16 (1953), as amended. There were sufficient facts in this matter to support the jury's conclusion that appellant was neither insane nor intoxicated to the point of irresponsibility. The verdict

POINT II

THE COURT PROPERLY INSTRUCTED THE JURY.

Appellant contends that the lower court erred in the instant matter in instructing the jury. He complains that the jury was improperly instructed with respect to the State's burden of proof on the question of intent and as to the weight to be given evidence of intoxication in determining the existence of the requisite intent (Appellant's Brief, Point II). Nevertheless, if all of the instructions are read together and placed in context, it is readily apparent that there was no error in the instructions given.

It is well established that jury instructions should be considered as a whole and "not considered in isolation in order to predicate a claim or error." Taylor v. Johnson, 18 Utah 2d 16, 414 P.2d 575 at 577 (1966). See also State v. Coffey, 564 P.2d 777 at 779 (Utah 1977), and State v. Dock, 585 P.2d 56 at 57 (Utah 1978).

Taking all of the instructions together, it is clear that the jury in the instant matter was properly instructed on the State's burden of proof on the question of intent. Appellant was charged with the commission of three crimes: aggravated robbery, failure to stop a vehicle at the command of a police officer, and aggravated assault.

(R. at 17,18). In Instruction Number 2, the court told the jury that appellant's not guilty plea denied all of the essential allegations of the information and "casts upon the state the burden of proving each and all of the essential allegations thereof to your satisfaction and beyond a reasonable doubt" (R. at 19). Each of the crimes charged was then explained. One of the material elements of aggravated robbery was:

That the defendant on or about
February 22, 1978 unlawfully and
intentionally took personal property
from the possession of Von W. Johnston.

(R. at 20, emphasis added.) A material element of the charge of failure to stop a vehicle at the command of a police officer was: "That the defendant continued to operate his vehicle in willful or wanton disregard of such signal." (R. at 21, emphasis added.) No specific intent requirement was outlined for the crime of aggravated assault (R. at 22). In each of instructions 3, 4 and 5, outlining the material elements of the crimes charged, the jury was also told that:

If. . .the State has failed to prove
to your satisfaction beyond a reasonable
doubt either of the foregoing propositions
. . . or if you entertain a reasonable doubt,
then it is your duty to acquit the defendant.

(R. at 20, 21 and 22).

The jury was additionally instructed in
Instruction Number 6 that:

No person is guilty of an offense unless his conduct is prohibited by law and he acts intentionally or knowingly with respect to each element of the offense as defined for you by these instructions. It does not require a specific intent to violate the law but merely an intent to engage in the acts or conduct that constitute the elements of the offense.

Therefore, if you find that the mental conditions of the defendant at the times of the alleged offenses was such that he did not have the intent as that term has been defined for you in these instructions to perform the acts or conduct required for the commission of the offense charged, or if you entertain a reasonable doubt thereof, then you should find the defendant not guilty of the crimes charged.

(R. at 23, emphasis added.)

"Intentionally" was defined in Instruction Number 7 as when an actor has a "conscious objective or desire to engage in the conduct or cause the result" (R. at 24). "Willful," although not defined in the instructions is a word commonly understood and is defined as intentional. See Webster's New International Dictionary, 2d Ed., Unabridged. See also Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 and 452-453 (1966), where this Court noted that jury instructions "should be read in their entire context and given meaning in accordance with the ordinary and usual import of the language. . . ."

Although appellant contends that Instruction Number 6 misstates the law, he is mistaken (see Appellant's Brief

Utah Code and as they were explained to the jury, the "specific intent" required is clearly nothing more than that appellant consciously intended the result of his actions. See LaFave & Scott, Handbook on Criminal Law, 1972, at 196. In the case of aggravated robbery, appellant must have wanted or consciously desired to "take personal property in the possession of another . . . by means of force or fear" (Utah Code Ann. § 76-6-301 (1953), as amended). For failure to stop a vehicle at the command of a police officer appellant must have consciously ignored a signal or command from a police officer to stop his vehicle (Utah Code Ann. § 41-6-169.10, repealed 1978). Instruction Number 6 is correct when it states that appellant had the necessary intent if he had the "intent to engage in the acts or conduct that constitutes the elements of the offense."

Clearly, in the instant matter, the jury was instructed that the state had the burden to prove, beyond a reasonable doubt, the specific intent required for the crimes of aggravated robbery and failure to stop a vehicle at the command of a police officer. As appellant notes, no specific intent is required to establish the crime of aggravated assault (Appellant's Brief at p. 38). Moreover, they were told that if they had a reasonable doubt of

appellant's mental ability to possess the required intent then they were to find appellant not guilty.

Appellant also questions the instruction on voluntary intoxication, Instruction Number 8. That instruction provided:

Our law provides that "no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition." This means that such a condition, if shown by the evidence to have existed in the defendant at the time when allegedly he committed the crime charged, is not of itself a defense. It may throw light on the occurrence and aid you in determining what took place; but when a person in a state of intoxication, voluntarily produced in himself, commits a crime, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct.

However, when the existence of any particular motive, purpose or intent is a necessary element to constitute a particular kind or degree of crime the jury, in determining whether or not such motive, purpose or intent existed in the mind of the accused, must take into consideration the evidence offered to prove that the accused was intoxicated at the time when the crime allegedly was committed.

This fact requires an inquiry into the state of mind under which the defendant committed the act charged, if he did commit it. In pursuing that inquiry, it is proper to consider whether he was intoxicated at the time of the alleged offense. The weight to be given on that question and the significance to attach to it, in relation to all the other evidence, are exclusively within your province.

(R. at 25, emphasis added.)

In evaluating Instruction Number 8, it is important to remember that, although appellant was convicted of two specific intent crimes, he was charged with three crimes, one of which did not have a particular state of mind as a material element. It is clear, under Utah Code Ann. § 76-2-306 (1953), as amended, that "(v)oluntary intoxication is no defense to a criminal charge." In the normal situation, where no specific intent need be established as a material element of the crime charged, evidence of voluntary intoxication is irrelevant and should be disregarded. When, however, the State is bound to establish that a particular mental state existed, evidence of voluntary intoxication becomes relevant but only as it pertains to the presence of the requisite mental state. Proof of intoxication, of whatever degree, does not mandate a finding of no intent and not guilty. Voluntary intoxication is never an absolute defense in the sense that establishment of voluntary intoxication precludes guilt. Such evidence must be weighed, along with all other evidence to determine if the material intent element was established. Only if the intoxication was of such a degree or nature that the defendant was precluded from forming the necessary intent must a not guilty verdict be returned.

Instruction Number 8 correctly stated the law. Where both crimes requiring proof of a particular intent and crimes not requiring such proof are charged, the court must instruct as to the effect and weight to be given evidence of voluntary intoxication in both situations. By giving both explanations together in one instruction, the court makes it clear that there is a difference and that one situation is an exception. There is much greater potential for confusion where one instruction explains the law for specific intent crimes and another gives the general rule. The court had already made clear the material elements of the crimes charged, including the fact that a particular intent was material to two of the three. There was no need for further reference to those particular mental states and, indeed, such a reference may have unduly emphasized appellant's case. Instruction Number 8 correctly stated the law and was not error.

Although it is true, as noted by appellant, that instructions framed within the facts of the case are helpful to the jury and better than abstract explanations of the law in most cases, the court did not err in this matter. Each of the crimes charged was explained carefully and concretely within the facts of the case (Instruction Numbers 3, 4 and 5). As has

already been noted, the relevance of voluntary intoxication to each crime differed. A general description of the law of voluntary intoxication, easily applicable to each of the other, more concrete explanations, was proper and less confusing than separate, differing explanations would have been.

The gist of appellant's claim seems to be that the court did not emphasize his theory of reduced intent due to the combined effects of alcohol, medication, and brain disorder. There was no need for the court to summarize appellant's defense in the instructions. There was never any contention that appellant would have done what he did without having ingested, voluntarily, alcohol and medication. The jury was told to consider evidence of intoxication in determining the presence of the requisite mental intent. There was no indication that appellant had taken any unusual medication or had anything to drink which he had not had with his medication before. Rather, the evidence indicated that he was drinking what he always drank and that he had been taking medication daily for some time (T. at 69-70, 78-79). It certainly is not the law that one who becomes more intoxicated than he wanted to through voluntary ingestion of drugs or alcohol has a defense on that basis.

Appellant's proposed instructions on involuntary intoxication were not supported by the evidence. What there was to appellant's defense was covered by the instructions on mental capacity and voluntary intoxication. Significantly, these instructions placed at least as great a burden upon the State, if not greater than would appellant's proposed Instruction Number 4 where appellant noted that:

Should you find that defendant was under involuntary intoxication to the extent that there was no functioning of the conscious mind at the time of the alleged criminal acts, you must find the defendant not guilty.

If the jury had found appellant to be so intoxicated for any reason as to have no functioning of the conscious mind they would have been bound to find appellant not guilty of aggravated robbery and failure to stop at the command of a police officer under Instruction Numbers 3, 4, 6 and 7.

In summary, the necessity of proof of intent and consideration of evidence indicating a lack of capacity to prove such an intent were both properly presented to the jury. The elements of the offenses charged were concretely presented with reference to the facts of the case and the jury was specifically told that

the State had to prove beyond a reasonable doubt that appellant acted intentionally in committing the acts constituting the crimes of aggravated robbery and failure to stop at the command of a police officer. Appellant's theory was adequately presented through the instructions on reduced capacity, requisite intent, and voluntary intoxication. The court did not err and the jury verdict should be affirmed.

POINT III

THE VERDICT OF GUILT ON THE CHARGE
OF FAILURE TO STOP A VEHICLE AT THE
COMMAND OF A POLICE OFFICER IS SUPPORTED
BY THE EVIDENCE.

While it is true that an element of the crime for failure to stop a vehicle at the command of a police officer, as stated in Utah Code Ann. § 41-6-169.10, as repealed 1978, is that the actor acted "wilfully" or intentionally, that element was fully and completely explained to the jury (see Point II, supra), and there was ample evidence from which they could infer that essential element (see Point I, supra). Neither was appellant's evidence of reduced capacity so overwhelming or compelling as to mandate a not guilty verdict. As was explained more completely in Point I, specific intent may be inferred from the acts and conduct of the accused. State v. Minousis, supra, and other cases as cited in Point I. In the instant matter, the evidence clearly indicates that appellant was

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lucid and in control of his faculties at all times during the night in question. He walked and talked normally (T. at 12,13,16,19,20,37,53, and 60). He recognized Officer Vuksinik as an acquaintance (T. at 54 and 59). Appellant was in full control of his car during an extended high speed chase (T. at 33-34,46, 49 and 55) during which it appeared as if he fired a weapon at the pursuing officers (T. at 49).

It is clear that although once a defendant raises the question of insanity any presumption of insanity disappears, the question of the defendant's ability to form the requisite intent then becomes a jury question. Moreover, the issue of voluntary intoxication as a defense is also primarily a jury issue since the question is not whether or not intoxication existed but whether or not the intoxication, if it existed, acted to negate the defendant's ability to form the requisite intent. (See Points I and II for extended discussion of these issues.) In this matter there was enough evidence to support the reasonable view that appellant knew what he was doing when he robbed the Johnstons and led the police on a dangerous, high speed chase. The verdict of the jury should only be overturned when a reasonable doubt is compelled (see State

v. Mills, supra) which is not the case here. The testimony of the psychiatrist was tentative at best. The weight to be given the testimony of experts, even when uncontradicted by additional expert testimony, is for the jury (see State v. Holt, supra). The verdict of the jury was proper and should be affirmed.

POINT IV

REVOCATION OF APPELLANT'S PROBATION WAS SUPPORTED BY THE EVIDENCE.

When appellant was placed on probation following conviction, he was directed to "submit to a breathalyzer test at the discretion of the Adult Probation and Parole Department within reasonable circumstances and hours;" and to "totally abstain from the use of alcohol beverages" (R. at 85). Moreover, he agreed to "be of good behavior" (R. at 87). The Court revoked his probation on the ground that appellant had acted violently toward his probation officer and had refused a reasonable request to take a breathalyzer test (R. at 83, H. at 66).

The Court's conclusions were supported by the evidence introduced at the Show Cause for Revocation Hearing on May 23, 1979. Police officers received a report that a barefoot woman in pajamas and nightgown was beating on a door around midnight screaming that someone was trying to kill her (H. at 28-29). She told the officers that she

threatened her, and had thrown her out of the house (H. at 29). She expressed a desire to retrieve her property from appellant's house (H. at 29 and 47).

The officers knocked on the door of appellant's house and got no response (H. at 30). The young woman then opened the door and led the officers to appellant's room (H. at 5,6,13, and 30). Appellant's probation supervisor, Agent Reid, knocked on the locked bedroom door and identified himself while politely asking to talk (H. at 6,30,41 and 48). Without warning, appellant opened his bedroom door and grabbed Agent Reid. Appellant was restrained by Sheriff's Deputy Christensen but not before he tore Agent Reid's shirt (H. at 6,30,42 and 49). Deputy Christensen noted a strong odor of alcohol about appellant (H. at 50). Faced with a report of drinking and violence and the fact of appellant's violent reaction and hysterical behavior (H. at 43), Agent Reid requested that appellant submit to a breathalyzer test. Appellant refused to take the test (H. at 8,9,31 and 50). Appellant admitted the struggle with Agent Reid (H. at 53) and remembered the request to take a breathalyzer test (H. at 53). He also noted that the woman had clothes in his room in a drawer which he eventually threw into the living room (H. at 54).

The evidence clearly indicates that appellant engaged in violent behavior with respect to Agent Reid. His refusal to take a breathalyzer test was also shown by uncontradicted evidence. Appellant does not now contend that these matters were shown. Nor does he contend that the terms of his probation were unreasonable. Rather, he argues that the actions of the officers in entering his home and requesting a breathalyzer exam were improper and unreasonable (Appellant's Brief at 54-57). He further argues that the lower court acted unreasonably in revoking his probation on those grounds (Appellant's Brief at 64-65).

It is well settled that revocation of probation is a matter within the discretion of the trial judge. In Williams v. Harris, 106 Utah 387, 149 P.2d 640 at 642 (1944), this Court noted:

The right to suspend imposition of sentence and the right to place one on probation is a discretionary right. One placed upon probation has a right to be heard as to whether he has violated the conditions upon which suspended sentence was based. . . Upon such a hearing, the trial court has discretionary power to continue probation or impose sentence, but to authorize termination of probation there must be some competent evidence of violation of the terms of probation. Violation of the terms and conditions of suspension or probation is usually a ground for revocation and the imposition of sentence. . . When it appears

that a trial judge has exercised discretion in suspending imposition of sentence or in revoking probation and imposing sentence, after a hearing as heretofore mentioned, the judgment of the trial court should not be molested. (Emphasis added.)

See also State v. Janis, 597 P.2d 873 at 874 (1979), and State v. Knowles, 25 Utah 2d 13, 474 P.2d 727 at 728 (1970).

The standard of proof in a revocation hearing is also much lower than the "beyond a reasonable doubt" standard employed in criminal trials.

A revocation of probation is an exercise of broad discretionary power by the trial court akin to that utilized in imposing the probated sentence initially. Evidence that would establish guilt beyond a reasonable doubt is not required to support an order revoking probation. Probably evidence rising to the level of substantial evidence is not even required, absent arbitrary and capricious action in the revocation. All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation. . . . On review an action of the trial court revoking probation will not be disturbed in the absence of a clear showing of abuse of discretion.

United States v. Francischine, 512 F.2d 827 at 829 (5th Cir. 1975). See also United States v. Cobb, 588 F.2d 604 at 606 (8th Cir. 1978); Armstrong v. State, 294 Ala. 100, 312 So.2d 620 at 624 (1975); and People v. Witherspoon, 9 Ill. App.3d 317, 292 N.E.2d 202 at 203 to 204 (1972).

The evidence in this instance showed at least two violations of probation without contradiction. The

evidence indicated that the request for a breathalyzer test was entirely reasonable. The officers had a report of drinking and violence and had been directly confronted by appellant's further aggressive, violent behavior. He smelled of alcohol. He had the clothing of the pajama-clad woman who complained of his earlier, violent behavior. The testimony of four officers agreed that appellant reacted violently to a polite, non-belligerent request to talk. The Court's conclusion that appellant violated his probation by acting violently and refusing a reasonable request to submit to a breathalyzer test finds clear support in the evidence. There is absolutely no showing of any abuse of discretion and the action of the trial court should be affirmed.

POINT V

THE FOURTH AMENDMENT TO THE
UNITED STATES CONSTITUTION DOES NOT
REQUIRE REVERSAL OF THE DECISION OF
THE LOWER COURT TO REVOKE APPELLANT'S
PROBATION.

Appellant contends that the evidence upon which his probation was revoked was obtained in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution and should not have been considered by the lower court (Appellant's Brief at p. 58).

The United States Supreme Court has held:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted.

Bell v. Wolfish, 99 S.Ct. 1861 at 1884 (1979). See also Pennsylvania v. Mimms, 98 S.Ct. 330 at 332 (1977); State v. Lopes, 552 P.2d 120 at 121 (Utah 1976); and State v. White, 577 P.2d 552 at 553 (Utah 1978).

The "search" in the instant matter was something less than a full-blown room by room examination of appellant's home. The officers merely accompanied a woman, clad in night clothes, into a house she claimed to live in to question appellant (H. at 5,6,13 and 30). When confronted with appellant's locked bedroom door they stopped and requested appellant to come out and talk (H. at 6,30,41 and 48). Although the officers testified as to what they saw in the house, it was clear that the purpose for entering the house was to confront appellant, retrieve the woman's property, and to determine if, in fact, appellant had violated the terms of his probation. The lower court clearly based its conclusion that probation had been violated on the actions of appellant in the presence of the officers, not upon any evidence obtained as the result of an illegal

Appellant notes that Fourth Amendment requirements where probationers are involved are different than for the ordinary citizen (Appellant's Brief at p. 54). In Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975), the Court compared the privacy interests of a parolee and the interests and needs of society in seeing that conditions of parole are met and concluded that it was not appropriate to require a parole officer to obtain a warrant (Id. at 250). The Court stated:

We think that one. . . (restriction) . . . necessary to the effective operation of the parole system, is that the parolee and his home are subject to search by the parole officer when the officer reasonably believes that such search is necessary in the performance of his duties. The parole officer ought to know more about the parolee than anyone else but his family. He is therefore in a better position than anyone else to decide whether a search is necessary. His decision may be based upon specific facts, though they be less than sufficient to sustain a finding of probable cause. It may even be based on a "hunch," arising from what he has learned or observed about the behavior and attitude of the parolee. To grant such powers to the parole officer is not, in our view, unreasonable under the Fourth Amendment. The principal protection against abuse of this authority is the "helping" function of the parole officer's job, and the training that he has received to fit him for that job. A good parole officer does not regard himself as a policeman.

Id. at 250.

In United States v. Jeffers, 573 F.2d 1074 (9th Cir. 1978), the same Court noted that a blanket requirement to submit to warrantless searches was an overbroad condition of probation but held that "since the probation officer had reason to believe that appellant was violating his probation, this search which took place at a reasonable time and in a reasonable manner was proper." Id. at 1075.

In Hunter v. State, 139 Ga.App. 676, 229 S.E.2d 505 (1976), the court expressed what appears to be the majority view with respect to a determination of what searches are reasonable when conducted by probation officers:

The search by a probation officer is reasonable if under all the circumstances, it is actuated by the legitimate operation of the probation supervision process and the probation officer acts reasonably in performing those duties.

Id. at 506. See also Grubbs v. State, 373 So.2d 905 at 905 (Fla. 1979); Seim v. State, 590 P.2d 1152 at 1154 to 1155 (Nev. 1979); State v. Jeffers, 116 Ariz. 192, 568 P.2d 1090 at 1093 (1977) (condition of probation upheld here was held overbroad in United States v. Jeffers, supra, but the specific warrantless search involved was approved in both opinions and revocation of probation was affirmed); and United States v. Farmer, 512 F.2d 160 at 162 (6th Cir. 1975).

In this case, irrespective of whether probable cause for an arrest or search existed, and irrespective of whether proper consent was given for entry into the house, Agent Reid was acting within the scope of his duties when he sought to confront appellant and determine if he had violated the terms of his probation. There was no abusive or violent action by any of the officers. Had Agent Reid waited until morning to confront appellant, any indication that he had been or was consuming alcohol might have disappeared. Moreover, it was entirely reasonable to accompany the young woman in an attempt to retrieve her property. Given appellant's probationary status, there was no Fourth Amendment violation and revocation of appellant's probation was appropriate.

Even if it is assumed, but not admitted, that Agent Reid could not enter appellant's home without a warrant or proper consent, the revocation of probation in this matter should be affirmed. As stated above, the Fourth Amendment prohibits only unreasonable searches. State v. Lopes, supra. In Pennsylvania v. Mims, supra, at 332, the United States Supreme Court stated:

The touchstone of our analysis under the fourth amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. . . ."

The officers in this case had clear and obvious

indications that the complaining woman lived at that time in appellant's house. She told them so (H. at 29). She had only night clothes on and the rest of her clothing was said to be in appellant's bedroom (H. at 29). The officers had no reason to disbelieve her story or suspect her right to consent to their entry. Again it should be borne in mind that no extensive search or arrest was undertaken on the authority of her statement. All the officers did was to enter the house and ask to speak to appellant. His violent response and subsequent refusal to submit to a breathalyzer exam caused his probation to be revoked. This limited invasion of appellant's privacy at the consent of a woman who was sharing his roof, however temporarily, was proper and reasonable.

Nevertheless, even if it is also assumed, but not admitted, that the officers improperly entered appellant's home, the revocation of appellant's probation should still be affirmed. It is generally held that although the Fourth Amendment has some limited application to probationers, application of the strict exclusionary rule in probation revocation hearings does not serve the purpose of that rule. In United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), the Court noted:

The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:

"[T]he ruptured privacy of the victim's homes and effects cannot be restored. Reparation comes too late." Linkletter v. Walker, 381 U.S. 618, 637, 85 S.Ct. 1731, 1742, 14 L.Ed.2d 601 (1965).

Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.

94 S.Ct. at 619-620.

In United States v. Wiygul, 578 F.2d 577 at 578 (5th Cir. 1978), the Court said that "[t]he exclusionary rule does not apply to probation revocation hearings absent a demonstration of police harassment of probationers." See also United States v. Fredrickson, 581 F.2d 711 at 713 (8th Cir. 1978); United States v. Farmer, supra; United States v. Vandemark, 522 F.2d 1019 at 1020 (9th Cir. 1975); and United States v. Winsett, 518 F.2d 51 at 55 (9th Cir. 1975).

Clearly, the mere consideration of tainted evidence in a probation revocation hearing does not require reversal of a decision to revoke probation. The damning evidence in this case was the personally observed violence of appellant and the refusal to submit to a breathalyzer test (H. at 64-66). Officers testified that beer was in the refrigerator and that empty beer cans were in the house (H. at 34), but the Court did not include that

finding of probation violation (H. at 64-66). Even though the officers may not have completed the necessary formalities to properly enter the house, appellant's violent reaction to a request to talk and his refusal to submit to the reasonable request for a breathalyzer exam were unjustified. The officers did not threaten, or harass appellant and his actions in violation of his probation requirements could not be overlooked even if the officers had failed to conform to all the technicalities of the law.

In summary, the entry of the officers into appellant's home was reasonable and not in violation of the Fourth Amendment guarantee against unreasonable searches. The action was taken as a legitimate exercise of a probation officers' powers necessary to the adequate performance of his duties. The request for submission to a breathalyzer exam was entirely reasonable in light of appellant's conduct. Even if Agent Reid had no authority on his own to enter the house, it was reasonable for the officers to act in reliance upon the woman's representation that she lived in the house and could allow them to enter. Moreover, even if she had no such authority and the officers should not have entered the house without a warrant, the strict exclusionary rule should not be applied in the probation revocation setting and the fact of appellant's violent behavior and unreasonable refusal to take a

breathalyzer exam could not have been overlooked by the trial court. The revocation of probation was proper and should be affirmed.

CONCLUSION

The evidence of appellant's reduced capacity due to insanity and/or intoxication was not so overwhelming as to require the jury's determination of guilt to be overturned. Specific intent may be inferred from circumstantial evidence. It cannot be said that the jury, without doubt, acted unreasonably since they were properly instructed as to the required proof of intent and the potential defenses of reduced capacity and intoxication.

The lower court's exercise of discretion in revoking appellant's probation was also supported by the evidence. There is no indication of any abuse of discretion. Moreover, the Fourth Amendment was not violated by the entry into appellant's home without a warrant. It was reasonable for the officers to have relied upon the apparant authority of the complainant. In any event, if the entry was improper, it constituted harmless error.

The conviction, sentence, and commitment of
appellant should be affirmed.

Respectfully submitted,

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