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State of Utah v. Budd Jay Read : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Respondent,

vs.

BUDD JAY READ,

Appellant.

Case No. 883

RESPONDENT'S BRIEF

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STATE OF UTAH,

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Budd Jay Read, the defendant and appellant herein, was convicted of the crime of involuntary manslaughter arising out of an automobile-bicycle collision in Logan, Cache County, Utah, on September 6, 1951, and appeals.

Appellant's brief summarizes fairly accurately the evidence which was presented to the Court and jury upon which the conviction was based. Respondent will therefore refrain

from making an independent presentation of the facts at this time but will do so where necessary in view of the fact that appellant asserts that the evidence does not support the conviction.

STATEMENT OF POINTS

1. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION.

2. THE COURT PROPERLY INSTRUCTED THE JURY.

3. THE COURT PROPERLY REFUSED TO GRANT A NEW TRIAL.

ARGUMENT

Point I.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION.

Points 1, 6 and 8 relied upon by appellant for a reversal all relate to the proposition that there was not sufficient evidence to submit the case to the jury or to sustain the conviction. It is respectfully submitted that an analysis of the record will show that there was ample evidence of the criminal negligence of the defendant which directly caused or contributed to the death of the deceased.

The evidence reveals that the accident occurred at approximately 5:00 P.M. on September 6, 1951, as defendant was proceeding north on the east side of Main Street between 5th and 6th North Streets in Logan, Utah. Defendant's own testimony establishes that just prior to the impact he was not keeping a proper look-out but that his entire attention was directed to a car coming out of Safeway's parking lot on the east side of the street (Tr. 191). He freely admitted he paid no attention to traffic conditions on the street (Tr. 203-4). There is no evidence in the record to show that the view of defendant was in any way impaired (Tr. 204). All of the evidence indicates that a reasonably prudent person under the same or similar circumstances would have observed the deceased and would have avoided hitting him. In addition to the fact that defendant's attention was directed away from the direction in which he was proceeding, there is substantial evidence to show that defendant was intoxicated and that his ability to keep his car under proper control was impaired (Tr. 79, 99, 125, 194). It is undisputed that the posted speed limit at the time and place in question was 25 miles an hour, and it is respectfully submitted that the evidence shows defendant drove his car in excess of the posted speed limit, and with marked disregard for the safety of others (Tr. 59, 149).

Eye witness testimony establishes that the death of the deceased was almost instantaneous and a direct and proximate result of the impact. The direct examination of Mrs. Bjorkman (Tr. 46) includes the following:

Q. Then what happened then? What did you observe with respect to the impact itself?

A. Well, when the car hit the bicycle the man flew up in the air, and as he came down the car hit him once more, and then the body kept rolling over and landed in front of my car.

Q. How far west did the body stop with respect to your car?

A. Just a little in front of my car.

Mrs. Bjorkman observed also that "blood was pouring out of his head" and that "there was a big pool of blood" (Tr. 47). The testimony shows further that as a result of the "terrific impact" (Tr. 45) the body was violently hurled a distance of 61 feet (Tr. 30).

The contradicted testimony reveals that the doctor was present at the scene within two minutes after the impact. Upon making appropriate observations he stated that there was no need to examine the body because the man was already dead (Tr. 77, 85). No other conclusion but that the terrific impact and the projection of deceased's body against the hard surface of the highway caused his death would be tenable. The jury, with whom rested the sole responsibility for resolving the evidence which was presented for their consideration properly came to that conclusion under appropriate instructions from the court that they must find beyond a reasonable doubt that the criminal negligence of the defendant was "the proximate cause of the accident and resulting death."

From the foregoing facts, the argument that there should have been a directed verdict of not guilty, that appellant's

motion for arrest of judgment should have been sustained, or that defendant's request not to submit the cause to the jury at all should have been sustained, is contrary to the ruling of this Court in the case of State v. Thatcher, 108 Utah 63, 157 P. 2d 258. That case dealt with a charge of involuntary manslaughter arising out of an automobile accident. This Court, in holding that under the circumstances the trial court erred in granting defendant's motion of dismissal, said:

It is a well established legal principle that a motion of dismissal and for direction of verdict for defendant is, in effect, a demurrer to the evidence. It admits the truth of the evidence as disclosed by the record and every reasonable inference that might be drawn therefrom. When different reasonable inferences can be drawn from the evidence, the question is one exclusively within the province of the jury. It is not the function of the court to substitute its judgment on questions of fact for that of the jury. Therefore, in considering the question of the sufficiency of the evidence, the record must be viewed in the light almost favorable to the state. Stat v. Rosser, 162 Or. 293, 86 P 2d 441, 87 P 2d 783, 91 P 2d 295.

* * * * *

Although the evidence may not have been sufficient to have proven that defendant was traveling as fast as 60 miles per hour as testified to by the patrolmen, nevertheless, after a careful examination of the record, we conclude, that the jury could have found from their testimony that defendant was exceeding the speed limit and that said speeding was a proximate cause of the accident.

* * * * *

We conclude that defendant's failure to keep his eyes and attention on the road in front of him while

driving at a high rate of speed at nighttime was sufficient evidence to have justified the jury in finding that his driving was in marked disregard for the safety of the deceased or criminal negligence. The trial court erred in granting defendant's motion of dismissal.

In the same case, in a separate concurring opinion, Justice Wolfe remarked:

The fact that defendant hit the pedestrians, if not explained, would itself justify an inference that he was not keeping a proper lookout.

In *Albert v. Commonwealth*, 181 Va. 894, 27 SE 2d 177, another case involving an appeal from a conviction of involuntary manslaughter as a result of an automobile accident, the Supreme Court of Appeals of Virginia said:

It may in passing, however, be said if Albert was drunk and if his drunkenness brought about Mrs. Johnson's death, he is still liable even though he was as careful as a drunk man could be expected to be.

The California Court in *People v. Kelley*, 70 Cal. App. 519, 234 P 110, had this to say about the sufficiency of the evidence to support the verdict of the jury in finding the defendant guilty of manslaughter in an automobile accident case.

As to the verdict against the defendant finding him guilty of manslaughter, appellant contends that the evidence is insufficient to support such a verdict. In support of this contention appellant claims that there was no proof introduced by the prosecution, aside from his own extrajudicial admissions, as to the rate of speed appellant was traveling at the time of and just

prior to the collision. Conceding for the present that the only evidence as to the speed appellant was traveling was that furnished by his own extrajudicial admissions, yet there was evidence tending to prove that appellant, at and just prior to the collision, was driving his car while under the influence of liquor, and that, while so driving his car, he collided with Mrs. Sarah Joy, and from such collision she sustained injuries which caused her death. This evidence was sufficient to support the verdict of manslaughter independent of any evidence as to the speed at which appellant was driving his car at the time he struck the deceased.

In *Keller v. State*, 155 Tenn. 633, 299 S.W. 803, 59 A.L.R. 685, it appeared that a person was undertaking to cross a street in the middle of a block when he was run over and killed by the accused, who was under the influence of an intoxicant at the time. The court, in affirming a conviction of involuntary manslaughter said:

* * * We think the policy of the law forbids an investigation as to probable consequence, when the driver of an automobile 'under the influence of an intoxicant,' as heretofore defined, runs his car over another person and kills him on the public highways of the state. There are many things that a sober man, in the exercise of due care, would do to avoid such a collision, which would be entirely beyond an intoxicated driver. Fatalities are too numerous and conditions too serious to permit speculative inquiries in a case like the one before us.

According to the well settled rules of law it is peculiarly within the province of the jury to determine from all the facts and circumstances surrounding the transaction whether there was such a failure of duty or negligence as to render one

criminally responsible for the death of another. 26 Am. Jur., Homicide, Secs. 507, 508. Where there is such evidence appellate courts are loathe to overturn the verdict of the jury. See State v. Johnson, Mo., 55 SW 2d 967; Pack v. State, 54 Ok. Cr. 234, 18 P 2d 284; Cain v. State, Tex. Cr. R, 178 SW 2d 267; Flowers v. State, Tex. Cr. 177, SW 2d 67.

Point II.

THE COURT PROPERLY INSTRUCTED THE JURY.

By requested instruction No. Four the defendant wanted the court to point out to the jury that even if they should believe that the defendant was operating his car while under the influence of liquor, their verdict should be not guilty if he was then exercising due and proper caution and was therefore not guilty of grossly negligent, wanton or reckless acts proximately causing injury to the deceased and his death. That is exactly what the court did when in Instruction No. Eight it defined the phrase "under the influence of intoxicating liquor" and in instruction No. Six it pointed out specifically that "if, however, you believe that the defendant was then exercising due and proper care and caution, and was not guilty of criminal negligence proximately causing injury to the deceased and his death, your verdict should be not guilty."

Instruction No. Nine given by the court embodies all the assumptions set forth in defendant's requestion Instruction No. Ten on which assumptions defendant claims he had a right to rely. We submit that the instruction as given is in

language even more favorable to the defendant than his requested instruction. Likewise defendant's requested Instruction No. One and one-half we submit was given to the jury in the court's instructions Nos. Two and Three.

It is a well recognized rule that instructions need not be given in the precise words in which counsel frames them. "If the court instructs the jury correctly and in substance covers the relevant rules of law proposed to him by counsel, there is no error in refusing to adopt the exact words of requests." 53 Am. Jur., Trial, Sec. 529.

The argument of appellant in Point No. 5 is not well taken. Instruction No. Ten given by the court merely states a fundamental principal of law that if defendant were not negligent he should be acquitted. When read in the light of the other instructions requiring the jury to find that the criminal negligence of the defendant, if any, must be the proximate cause of the accident and resulting death, it could not have prejudiced the defendant in any way.

In Points 9 and 10 appellant argues that the Court erred in admitting in evidence Exhibit "A," showing skid marks, or any testimony at all concerning skid marks, because it is claimed that there was no evidence that the skid marks were made by defendant's car. Further, appellant objects to Mr. Hadfield's computations of speed from the skid marks referred to because of appellant's claim that he purportedly was not qualified to do so.

The authorities all support the proposition that witnesses present at the scene of an accident at the time or shortly after

its occurrence may testify that marks leading to where an automobile was located were or could have been made by such automobile. See Blashfield, Cyclopedia of Automobile Law and Practice, Permanent Edition, Sec. 6320; Alabama Power Co. v. Jackson, 232 Ala. 42, 166 So. 692; Silsby v. Hinchey, 107 SW 2d 812; and, Alaga Coach Line v. McCarrol, 227 Ala., 686, 151 So. 834, 92 A.L.R. 470. In this case there were several witnesses who saw the skid marks and testified that they were or could have been made by defendant's car.

Mr. Tolman's testimony is explicit that they did come from defendant's car. He testified in part as follows (Tr. 16, 17):

Q. Is there any indication at all that those skid marks which you speak about, was there anything on the pavement there that tends to show that they came from this young man's car?

A. Yes, sir.

Q. What are they?

A. From the skid marks straight to where the bicycle was you could see distinctly two tire marks the distance—

Q. Just a minute.

THE COURT: Let him answer now. You asked him.

MR. NELSON: He's your witness now. Let him go ahead.

Q. Will you state it again now?

A. You could see skid marks the distance between an automobile's tires, so that you could pretty well tell it was the same car, because they went in the

same line the same distance apart straight to where the bicycle was, and that's where they ended, and that's where some more glass was found.

See also the testimony of Mrs. Bjorkman (Tr. 48, 49, 61, 62, 65), Mr. Merrill (Tr. 71) and Mr. Everton (Tr. 85, 86).

It is respectfully submitted that the testimony of Mr. Hadfield was not prejudicial to the defendant. His computations were made by applying a formula he learned at the Traffic School at Northwestern University, Evansville, Illinois, to hypothetical situations which were presented to him. He did not ascribe any particular speed to defendant's car but merely stated what speed was indicated from hypothetical facts submitted to him. It rested exclusively with the jury in considering all the other evidence as to the speed of defendant's car to determine what weight and credibility, if any, should be accorded Mr. Hadfield's testimony.

The alleged errors set forth by appellant in Point No. 11 we submit have been adequately answered in our argument under Point No. I. As to the questionnaire form of instruction number two, it is well established that the language, form and style of instructions in which the court expounds the law are matters within the sound discretion of the court. 53 Am. Jur., Trial, Sec. 539, 541.

POINT III

THE COURT PROPERLY REFUSED TO GRANT A NEW TRIAL.

The alleged errors set forth in Point No. 12 raise no issues

which have not already been covered and it is respectfully submitted that there is substantial evidence in the record to establish beyond a reasonable doubt that the defendant was guilty of criminal negligence which directly caused or contributed to the death of the deceased.

CONCLUSION

Respondent respectfully submits that a review of the transcript and proceedings in this case discloses ample and sufficient evidence to sustain the conviction of defendant of the crime of involuntary manslaughter. The crime was established by proper and uncontroverted testimony. It is submitted the instructions given by the Court fairly and completely covered the law pertinent to the issues raised in this case; indeed said instructions were favorable to the defendant. The conviction should be sustained.

Respectfully submitted,

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