

1955

# State of Utah v. Hugh Bailey : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

JAN 24 1957

STATE OF UTAH,  
*Plaintiff and Respondent,*  
— vs. —  
HUGH BAILEY,  
*Defendant and Appellant.*

No. 8288

BRIEF OF RESPONDENT

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STATE OF UTAH,  
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BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The Statement of Facts of appellant are substantially correct except that the following should be added.

Witness Armond A. Luke, highway patrolman, drove the defendant and his companion to the residence of Mr. Delong, who was the justice of the peace, and while he was talking to Mr. Delong's father, the defendant

“jumped out of the car and started running over towards Jack Yardley’s place.” (R.8) Whereupon Mr. Luke gave chase after the defendant and caught him.

William C. Bruhin, Mayor of Panguitch, observed the defendant for some minutes and testified that the defendant “definitely was” in an intoxicated condition. (R. 26)

Dewey Beckstrom, City Marshall, testified that the defendant “wobbled” as he walked. “He couldn’t walk like a normal person, sober person, no.” (R. 32) The witness, Beckstrom, stated further that he went out of Panguitch with Mr. Luke to bring the jeep, which defendant had driven, back into Panguitch. In describing where the jeep was, the record states:

“A. Out the road here. I would say maybe half a mile from the last house on the highway, right along in there.

“Q. This side of that Roller Mill Hill?

“A. This side of that hill a ways.”

(R. 35-36)

Hugh Bailey, appellant, was convicted, by jury, of driving while under the influence of intoxicating liquor. Counsel stipulated that a hearing of evidence of an information supplement could be heard before the court without a jury. The district attorney authenticated for the court the docket of the justice of the peace, Orian Salisbury, deceased, through his successor justice of the

peace. Counsel for defendant stipulated that the docket in question was the docket of Orian Salisbury, Justice of the Peace, and that the records contained therein were in his handwriting. (R. 66-67) The court received the justice's docket for "whatever it is and what it says." (R. 66) Whereupon, counsel for defendant stated "that disposes of the previous conviction and it is up to the court to examine that docket. We take the stand that it is not signed by anyone—" (R. 67). Defendant's counsel then made a motion to arrest the judgment of the jury on the theory that there was no proof of venue in the action. The case was continued to be heard in Richfield, where further argument from defendant's counsel was heard by the court.

Subsequently, J. L. Sevy, Jr., District Judge of the Sixth Judicial District Court, handed down a judgment on the information supplement which stated, inter alia:

"\* \* \* and the Court having heard the arguments by the State and the defense counsel, and the Court having denied the Motion to Arrest Judgment on the verdict, and the Court having heard the evidence pertaining to the offense charged in the Information Supplement regarding the previous conviction of Defendant of driving while under the influence of alcohol, and the Court finding that the allegations of the Information Supplement are sustained beyond a reasonable doubt, and that Defendant was guilty as

charged in the Information Supplement, and the Defendant having waived time for pronouncement of judgment and having stated that he had no cause to show why judgment should not be pronounced,

“NOW, THEREFORE, IT IS THE JUDGMENT OF THIS COURT that the Defendant, HUGH BAILEY, is guilty of having been convicted of the previous offense as alleged in the Information Supplement herein.”

(R. 81)

## STATEMENT OF POINTS

### POINT I.

THE STATE PROVED VENUE AND THE VERDICT OF THE JURY IS NOT CONTRARY TO THE EVIDENCE AND THEREBY THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR ARREST OF JUDGMENT.

### POINT II.

PROOF OF A PRIOR CONVICTION WAS INTRODUCED AND THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JUDGMENT OF THE COURT ON THE INFORMATION SUPPLEMENT.

### POINT III.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

## ARGUMENT

## POINT I.

THE STATE PROVED VENUE AND THE VERDICT OF THE JURY IS NOT CONTRARY TO THE EVIDENCE AND THEREBY THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR ARREST OF JUDGMENT.

Appellant argues that venue was not sufficiently established in this case upon the proposition stated as follows :

“Place. In the absence of a contrary statute, an averment of venue must be proved, and even an unnecessary allegation of place descriptive of the offense must be proved.”

42 C.J.S. 1263, Sec. 245.

However, such is not the law in the State of Utah. Section 77-8-4, U.C.A. 1953, states :

“\* \* \* When a public offense is committed near the boundary of two or more counties the jurisdiction is in any of such counties.”

The application of this statute precludes any such question from arising. However, the Supreme Court of the State of Utah has very carefully outlined what constitutes proof in establishing venue. In the case of *State v. Marasco*, 81 Utah 325, 17 P. 2d 919, the defendant was accused of the crime of arson and convicted in the district court. On appeal, the appellant sought to overturn the judgment on the theory that since the location of the



burned house was simply described as "located in the outskirts of Helper, not in the main business part of town," and that the defendant's place of business was "the west end of Helper, Bryner Subdivision," venue was not established as required. This Court, by C. J. Straup, Justice, stated, however:

"\* \* \* From such testimony it may reasonably be inferred that the building and the goods destroyed by fire were located in Helper. We judicially know that Helper is an incorporated city of the third class. \* \* \* Helper being an incorporated city or town, the trial court and jury could judicially know that it was in Carbon county. \* \* \* What in such particular the trial court in the cause could judicially know or was required to know, we know. It would have been better had the trial court charged the jury that they could judicially know that Helper is in Carbon county, but no complaint is made of that. The assignment as to venue is disallowed."

As has been shown by appellant's brief, the jury, before finding the defendant guilty as charged, were instructed by the court that it was absolutely essential to find, beyond a reasonable doubt, from the evidence in the case that the crime of driving while intoxicated occurred in Garfield County, State of Utah, on Highway 89, about one mile East of Panguitch. Assuredly, under the decisions heretofore rendered by this Court, such an instruction to the jury was excessive.

*State v. Green*, 38 Utah 389, 115 P. 181, was a case involving the crime of adultery. On appeal, the appellant plead that because the act was not positively proven to have taken place in the county in which the prosecution charged in the complaint, venue was not established. This Court, holding that venue was sufficiently established, said: *inter alia*:

“It is further contended that proof of the venue is wanting. It is said that, even though the evidence be deemed sufficient to show that the defendant had carnal knowledge of the body of Madge Morey, there is not sufficient evidence to show that such act was committed in the county of Sanpete. The venue may be inferred from circumstantial evidence as well as proved by direct evidence. \* \* \* It is not made to appear that such act could have been committed at any other place except at Mt. Pleasant, in Sanpete county, Utah.”

Again, defendant’s counsel at no time made any claim nor introduced any evidence which might have lead either the court or the jury to the conclusion that the crime was actually or even conceivably committed in any county other than Garfield County.

The most recent decision by the Supreme Court of the State of Utah, covering the subject of venue in criminal cases, is the case of *State v. Mitchell*, ..... Utah ....., ..... P. 2d ..... The Court stated:

“\* \* \* Some authorities, including this court,

permit venue to be established inferentially by circumstantial evidence. We believe and hold that, however it is proved, it must be done by a preponderance of the evidence only and not beyond a reasonable doubt, since venue is not an element of the offense, and there seems to be no reason to require the same quantum and quality of proof to prove venue as is required to prove such elements.”

Appellant in this case was found to be driving toward Panguitch on Highway 89, and at the time the highway patrolman, Mr. Luke, stopped the jeep, which the defendant was driving, the defendant was just East of Panguitch near what is called Roller Mill Hill. The court and the jury, on the authority of *State v. Marasco*, supra, had the right to take judicial notice of the fact that any reasonable distance to the East of Panguitch, Utah, had to be within the County of Garfield. The jury was charged with the specific responsibility of deciding that the evidence proved beyond a reasonable doubt that such was the case and under this specific instruction, the jury so held. Furthermore, jurors must be residents of the county in which the action is tried (78-46-8 (3), U.C.A. 1953), which is strong support on behalf of the knowledge of the jurors as to whether a particularly described area was or was not in the county in which they resided.

## POINT II.

PROOF OF A PRIOR CONVICTION WAS INTRODUCED AND THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JUDGMENT OF THE COURT ON THE INFORMATION SUPPLEMENT.

Appellant argues that no proof of a prior conviction was introduced and that the evidence is insufficient to support the judgment of the court on the information supplement. The record shows that evidence was introduced by the State in the form of the docket of the justice of the peace, Orian Salisbury, deceased. (R. 66-67) Mr. Delong, as successor justice of the peace, testified that he had received the docket referred to from the county attorney upon his appointment as justice of the peace and that no deletions or insertions had been made to the record. (R. 65-66) Defendant's counsel stipulated that the entry citing the conviction of the defendant, on page 234 of said docket, was written in the handwriting of the former justice of the peace, Orian Salisbury, and was in fact his docket.

Section 78-5-16, U.C.A. 1953, states:

“The several particulars in the next preceding section specified must be entered under the title of the action to which they relate, and, unless otherwise in this Code provided, at the time when they occur. Such entries in a justices' docket, or a transcript thereof, certified by the justice or his successor in office, are prima facie evidence of the facts so stated.”

To certify, according to Black's Law Dictionary, 3rd Edition, at page 301, is:

“To testify in writing; to make known or establish as a fact. \* \* \* To vouch for a thing in writing. \* \* \* To give a certificate, or to make a declaration about a writing. \* \* \*”

According to the section of the Utah Code, quoted above, the docket of a justice of the peace is “prima facie evidence of the facts so stated” and without being rebutted would be proper evidence to be considered by the court in this case with regard to the information supplement. There is no evidence in the record to rebut the docket which was authenticated by the successor justice of the peace, Harry Delong, through interrogation of the State. The court specifically states, in rendering a judgment against the defendant, that the evidence proved beyond a reasonable doubt that the defendant had been previously convicted as charged.

### POINT III.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

The evidence supports the verdict on the question of venue. The court denied defendant a new trial because the evidence proved the State's case beyond a reasonable doubt.

Appellant's argument centers around the point that the facts did not prove venue, nor the prior conviction

of appellant. However, the jury was instructed that before they could find defendant guilty, they must find that driving under the influence of intoxicating liquor "occurred in Garfield County, Utah, on Highway 89, about one mile East of Panguitch, Utah, in said county." (R. 72)

After said instruction, the jury found the defendant guilty. Identification of the area in which the crime was committed is made in the record on the following pages:

Mr. Luke, Highway Patrolman, R. 4, 5, 14.

Dewey Beckstrom, Panguitch City Marshall, R. 35,  
36.

Defense Witness, Garn Wilcox, R. 43.

Defendant, Hugh Bailey, R. 51.

It is important to note that defendant and defense witness both identified the same place all other witnesses did. As a result, the jury was not puzzled as to where the crime was committed.

Proof that the crime identified in the information supplement was correct is borne out by the authentication of the record of the justice of the peace, and, under Section 78-5-16, became prima facie evidence thereby. This evidence was never rebutted by defendant. Defendant's counsel on his motion to arrest judgment states:

"\* \* \* I can show Your Honor many cases, larceny cases and all where the venue isn't proved, and the State hasn't proved that it is in Garfield

County and I want to argue that motion before the court disposes of the case and then the judge can take judicial notice of whatever is on the conviction, \* \* \*."

(R. 68)

The defendant's counsel did not introduce any evidence to contradict the entry in the docket of the justice of the peace, but even gave the "judge" the right to take judicial notice of a record already declared by statute to be prima facie evidence.

### CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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