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Park City v.Samuel A. Levy : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PARK CITY, Plaintiff/Appellee, vs. SAMUEL A. LEVY, Defendant/Appellant.	Appeal No. 990777-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM DEFENDANT'S CONVICTION OF DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS WITH AN UNSAFE BLOOD ALCOHOL CONCENTRATION, IN VIOLATION OF UTAH CODE ANNOTATED §41-6-44(2)(a)(i) (1953 AS AMENDED).

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POINT ONE

THE TRIAL COURT DID NOT COMPLY WITH UTAH JURY SELECTION PROCEDURES AND DEFENDANT PRESERVED THE ISSUE FOR APPEAL.

The disruption of the trial court's calendar and inconvenience to additional jurors, witnesses and counsel does not obviate compliance with the United States Constitution, the Utah Constitution, and Utah Law. "Article I, section 12 of the Utah Constitution and the sixth amendment to the United States Constitution guarantee a criminal defendant the right to trial by an impartial jury." State v. Woolley, 810 P.2d 440, 443 (Utah App. 1991), accord State v. Baker, 935 P.2d 503, 505 (Utah 1997). "It is the policy of this state that persons selected for jury service be selected at random from a fair cross section of the population of the county . . . ." Utah Code Ann. §78-46-2 (1999).

Rule 4-404, Jury selection and service, of the Utah Rules of Judicial Administration outlines the process of selecting random, qualified jurors from a master jury list. "Utah Rule of Criminal Procedure Rule 18(e) implements these constitutional mandates and offers guidance as to when a juror should be removed for cause." Woolley, 810 P.2d at 443. The two rules work simultaneously to ensure that a jury is selected properly and impaneled in accordance with Utah law.

The trial court abused its discretion on account of both laws in this case. In State v. Suarez, 793 P.2d 934, 937 (Utah App. 1990) the Utah Court of Appeals upheld the trial court's decision to direct the clerk of the court to summon additional jurors from a group that had been selected, earlier that day, at random from a qualified jury wheel. Using

qualified unused jurors from another trial substantially complied with the litany of directives embodied in Rule 4-404. In this case there was no evidence that the clerk of the court made any effort to comply with Rule 4-404 before the judge hastily told the clerk, "[y]ou can go to the clerk's office, go to the sheriff's office, go over to the industrial building and you bring me four more jurors post haste." (Transcript p.37 lines 11-15). To make matters worse the clerk only picked additional jurors from the immediate building, although there are several industrial buildings and businesses within a small radius of the courthouse. Unlike in Suarez, the additional jurors summoned here were neither randomly selected, in fact they all worked for the law enforcement community in the same building, nor were they drawn from a qualified jury list.

The proper application of Utah Rule of Criminal Procedure 18(e)(4) (1999) could have fixed this error, but the trial court refused to strike the Summit County dispatcher, and the Justice Court clerks for cause. The fourth additional witness, the Summit County Deputy Sheriff was correctly removed for cause. The Defendant challenged the three remaining additional jurors and one of the original jury members for cause. (Transcript p.74 lines 4-13; p.94 lines 5-17).

> (4) the existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted to or employed by the state or a political subdivision thereof;

Utah Rule of Criminal Procedure 18(e)(4) (1999). (Emphasis).

The Appellee relies on the last sentence of the statute above, which provides, "[a] prospective juror shall not be disqualified solely because he is indebted or employed by the state . . . ."(Emphasis). In this case the two Justice Court clerks, and the Summit County dispatcher "[should] not be disqualified solely because" they are state or county employees. They should be removed because they all work in the same small building, are members of the law enforcement community, and may have formed opinions about drunk drivers from work experiences. The three additional jurors' "relationship[s] [to the other law enforcement officers in the case, the prosecutor, and the judge] when viewed objectively, would suggest to reasonable minds that they would be unable or unwilling to return a verdict which would be free of favoritism." "Accordingly, trial courts must adequately probe a juror's potential bias when the juror's responses or other facts suggest a bias." Woolley, 810 P.2d at 443. (Emphasis original).

The Appellee is mistaken when they argue that any alleged impropriety in the jury selection process was waived when Defendant failed to use his peremptory challenges. "If the defendant can later show that the "loss" of the peremptory challenge resulted in actual prejudice, reversal would be an available and appropriate remedy." State v.Baker, 935 P.2d 503, 507 (Utah 1997). Here, the "loss" of the peremptory challenge occurred by making the Defendant's three strikes completely ineffective and resulted in a biased jury. In Baker, the defendant needed to use only one of his peremptory strikes to remove a juror that was challenged for cause, but instead chose to remove a different juror. In this case, the Defendant would have been required to use all of his peremptories to remove the three additional jurors that should have been removed for cause. The Defendant

could not have reserved the peremptories for the original jurors that had also demonstrated bias. In this case the cure-or-waive rule would "create a mechanism that could be seen as giving judges the ability to force defendants to use all their peremptories to cure trial court refusals to strike biased jurors." Id. at 511, (Zimmerman, J., dissenting).

The trial court abused its discretion when it ignored the constitutional and statutorily prescribed jury selection process. The Defendant preserved the subsequent issue for appeal and the cure-or-waive rule if applied here would be inherently unfair and produce results contrary to its intent.

POINT TWO

THE TRIAL COURT'S MISAPPLICATION OF THE LAW IMPROPERLY EXCLUDED ALCOHOLIC ABSORPTION RATE EVIDENCE AND RESULT WAS NOT HARMLESS ERROR.

The Appellee's simplistic interpretation of Utah Code Ann. § 41-6-44(2)(a)(i) is incorrect and would create an irrebuttable presumption. Greaves v. State, 528 P.2d 805 (Utah 1974), addressed the elements of the crime necessary to convict a person for Driving Under the Influence. The statute at the time, Utah Code Ann. § 41-6-44.2 (1953 as amended) stated: "It is unlawful and punishable as provided in subsection (b) of this section for any person with a blood alcohol content of .10% or greater, by weight, to drive or be in actual physical control of any vehicle within this state." The newest version of the statute, 41-6-44(2)(a)(i) (1999) provides:

> A person may not operate or be in actual physical control of a vehicle within this state if the person: (i) has sufficient alcohol in his body that a chemical test given

> within two hours of the alleged operation or physical control shows that the person has a blood or breath alcohol concentration of .08 grams or greater;

The elements are the same. Applying Greaves to the 1999 statute, "[t]his statute states with sufficient clarity and conciseness the two elements necessary to constitute its violation. They are (1) a blood alcohol concentration of [.08 grams or greater], and (2) concurrent operation or actual physical control of any vehicle." 528 P.2d at 807. Ideally the Defendant would be tested with an accurate, reliable, instrument at the roadside stop. This would effectively satisfy the two elements, and the probative value of the evidence linking the driver to the level of alcohol in their body would be concurrent. In actual practice the portable breathalyzers in use today are capable of dubious results and the State must rely on more accurate, calibrated, stationary intoxilyzers located at police stations. As such the driver suspected of driving under the influence must be shuttled to the station to undergo the more reliable test. This raises practical concerns because the State must be given a reasonable amount of time to get from the traffic stop to the station and administer the test. It also raises evidentiary concerns because the State is no longer actually testing the blood alcohol concentration concurrently with the traffic stop and has introduced a margin of error that reduces the probative value of the test results. In order to prove beyond a reasonable doubt that the defendant had a blood alcohol concentration equal to or greater than the statutorily defined limit, the State would need to bring in an expert that could accurately extrapolate the driver's blood alcohol concentration back to the time of the traffic stop. The Utah Legislature adopted the two-hour window in an effort to relieve the State of producing expert witnesses at every D.U.I. trial and relieves

the State of having to prove that the defendant's blood alcohol level was illegal at the instant the traffic stop took place. See Roosevelt City v. Nebeker, 815 P.2d 738, 740 (Utah App. 1991) (explaining that Utah Code Ann. §41-6-44.3(3) is an inclusive evidentiary rule); Ronald N. Boyce & Edward L. Kimball, Utah Rules of Evidence 1983—Part III, Utah L. Rev. 717, 752 (1995).

The Appellee concedes that under Utah law evidence may be presented to disprove the presumption pursuant to the 1998 D.U.I. statute, but argues that clever legislative rewording in the 1999 statute supports a conclusive presumption. This is incorrect. In City of Orem v. Crandall, 760 P.2d 920 (Utah App. 1988) stated that "the defendant is allowed to challenge the accuracy of the test on any relevant ground." And in State v. Preece, 971 P.2d 1,6 (Utah App. 1998) the court held "that the trial court erred in sustaining the State's objection to evidence on the absorptive and metabolic rates of alcohol." The case law is clear, an irrebuttable presumption is unconstitutional. Id. Although the State is given a two-hour grace period for chemical testing by the statute the Prosecutor is still responsible for proving that there is some rational connection between the fact proved and the ultimate fact presumed, and this presumption is rebuttable.

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. . . . These types of presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. . . . A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicated facts, but does not require the jury to draw that conclusion.

Francis v. Franklin, 471 U.S. 307, 315 (1985), accord State v. Chambers, 709 P.2d 321 (Utah 1985).

In this case the jury was not instructed that the blood alcohol concentration evidence was only a permissive inference and since the Defendant was not permitted to introduce evidence to rebut that evidence, the trial court's actions violated the Defendant's Due Process rights. "Accordingly, there is a reasonable likelihood of a different outcome absent the trial court's error, and, therefore the error was not harmless." Preece, 971 P.2d at 8.

The Appellee gives Section 41-6-44(2)(a)(i) (1999) a tortured interpretation in order to abrogate the holding laid out in Preece. Appellee's understanding of the new statute would produce absurd results if it really proscribed driving a vehicle if a test could show, up to two hours after the alleged control of that vehicle, that the person had a blood alcohol concentration of .08 or more.

For example—a person hits some ice in their car and slides off of the road into a ditch driving home from grocery shopping. They bought beer at the store. While waiting for help to arrive they decide to drink a few beers to calm their nerves. Their car was made inoperable by the collision. The police arrive, smell alcohol on the person's breath and take them to the station on suspicion of driving under the influence. The police then administer a intoxilyzer-test up to two hours after the time they arrive at the prior accident. The test comes back positive, .08, and they arrest the person for D.U.I. Under the strained interpretation the Appellee asserts, this person could be successfully convicted by the State and would be unable to attack the presumption that the statute provides.

CONCLUSION

The Appellant, Mr. Levy, should have his conviction reversed. The jury was improperly selected and impaneled. The trial court misapplied Utah Code Ann. §41-6-44(2)(a)(i) and created an unconstitutional conclusive presumption by not permitting the Defendant to rebut the intoxilyzer data with contrary blood alcohol concentration evidence.

Dated this 27 day of April, 2000.

D'ELIA & LEHMER

Gerry D'Elia
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was served via first class mail postage prepaid to the following:

Park City Prosecutor
Terry Christiansen
P.O. Box 128
Coalville, Utah 84017

DATED this 27 day of April, 2000.