

1989

Logan City v. Don W. Dunbar : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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890731-CA

IN THE UTAH COURT OF APPEALS

LOGAN CITY,

Plaintiff and Appellee,

vs.

DON W. DUNBAR,

Defendant and Appellant.

* Case No. 890731-CA
* Case Type: APPEAL
* Priority No. 2

*

BRIEF OF APPELLEE

AN APPEAL FROM THE FIRST CIRCUIT COURT OF
THE STATE OF UTAH
COUNTY OF CACHE, LOGAN CITY DEPARTMENT
THE HONORABLE PAMELA HEFFERNAN PRESIDING

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FILED

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COURT OF APPEALS

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Contrary to opinion of Appellant, as set forth in his brief, Appellee maintains that the Utah Court of Appeals is in fact a lawful court and has been given jurisdiction over this case by lawful authority. The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Annotated, Section 78-2a-3(2)(d) 1953 as amended.

STATEMENT OF ISSUES PRESENTED

1. Did City officers Roper and Peterson subject Appellant to a pretext stop?

2. Was adequate evidence presented at trial to support a finding by the jury that Appellant was in actual physical control of his vehicle?

3. Was Appellant was denied his constitutional protection against being compelled to give evidence against himself when the officer requested he perform certain field sobriety tests before reading him the Miranda rights?

4. Did adequate justifications exist to arrest Appellant for both offenses charged?

5. Does Appellant have standing to challenge the accuracy and reliability of the intoxilyzer machine.

6. Are the trial court's proceedings below void because the assistant city attorney who prosecuted Appellant allegedly failed to file an oath of office?

7. Was it error for the trial court to allow Assistant City Attorney, Jeffery "R" Burbank, to prosecute Appellant when Appellant had filed lawsuits against him?

8. Was there sufficient evidence admitted in the trial below to establish the corpus delicti of the crime of being in actual physical control of a vehicle while under the influence of alcohol or other drug to a degree that rendered Appellant incapable of safely operating his vehicle?

9. Has Appellant failed to meet his burden to show the trial

court committed errors in its factual findings?

10. Was Appellant denied his Sixth Amendment right to a trial based on ineffectiveness of counsel?

STATEMENT OF THE CASE

Appellant was charged with driving under the influence of alcohol and/or being in actual physical control of a vehicle while under the influence of alcohol, a class B misdemeanor, and having an open container in a vehicle, a class B misdemeanor.

A jury trial was held in this matter on the 26th day of April, 1989 in the First Circuit Court of the State of Utah, County of Cache, Logan Department, The Honorable Pamela Heffernan presiding.

The jury returned a verdict of guilty on both counts. The court entered a judgment of the same on the 9th day of June, 1989.

Appellant is appealing from that verdict and judgment.

STATEMENT OF THE FACTS

Appellant's statement of facts, as set forth in his brief, is predominated with statements that were not presented at the trial held in this matter and find no support in the transcript. Few of Appellant's statements are accompanied by citations. Those fact statements that do have citations apparently refer to three separate documents listed by Appellant as "DLH," "SH" and "TR." Appellant's statements that are accompanied by a citation to the trail transcript (TR) generally find no support in the citation but are antithetical to it.

The vast majority of the statements Appellant offers as facts are actually nothing more than legal conclusions or argument.

Appellant decided to not testify in the trial below but is apparently attempting to do so through his brief.

Appellee objects to and disagrees with Appellant's statement of the facts, finds them wholly without support and provides the following facts offered as evidence in the proceedings below:

1. Appellee, City of Logan, called four witnesses, all of the city police department, to testify during their case-in-chief.

2. Officer Roper testified that he and Officer Peterson were on patrol in the City on February 11 1989. At approximately 2:00 am he observed two vehicles parked in the roadway just west of Main Street on 200 South Street. (All citations below refer to page numbers in the transcript of the trial held in this matter. p.29-30)

3. Roper walked up to one of the two vehicles, a pickup truck, and made the following observations: Appellant, Don Dunbar, the single occupant of the vehicle, was sitting in the driver's position behind the steering wheel; the keys to the truck were in the ignition, the engine was running and Appellant's left foot was depressed on the clutch pedal; an open beer can was positioned on the seat to the right of Appellant; and an odor of an alcoholic beverage emitted from inside the vehicle. (p.32-33) Roper later observed that the aforementioned beer can was partly full of beer. (p.49-50)

4. Roper asked Appellant to exit the vehicle. Appellant turned the ignition off and exited the vehicle. (p.33)

5. Roper smelled an alcoholic beverage on Appellant's breath

and asked him if he had been drinking. Appellant responded that he had had "two mini-bottles." (p.34) Roper noted Appellant's face was extremely red and very flushed. (p. 43)

6. Roper had Appellant perform several field sobriety tests. (p. 33-41) At the conclusion of the tests, Roper testified that based on his training and experience he was of the opinion that Appellant was "under the influence of an alcoholic beverage to the point where he was impaired and was not in a condition to safely operate a vehicle." At that time Roper placed Appellant under arrest, recited the "Miranda rights" to him and requested that he submit to a breath test. (p. 42-43, 45)

7. Roper transported Appellant to the jail, advised him of the consequences of refusing to submit to a breath test and read admonitions to him from a DUI report form. (p.43-44, 64-67)

8. Appellant refused to submit to a breath test. (p.44)

9. Roper gave Appellant his Miranda rights again and asked him if he understood them. Appellant responded that he did and agreed to an interview. (p.45)

10. During the interview, Appellant made several statements including: that he had been operating a vehicle (p.45-46); that he had been drinking, specifically "two mini-bottles and a mixed drink" (p.48); and when asked if he was "under the influence of an alcoholic beverage now" Appellant responded hesitantly and in slurred speech with the words "not significantly." (p.49)

11. Appellee's second witness, Officer Peterson, testified that he also saw the two vehicles parked in the road right next to

each other, with a distance of three feet between each other.
(p.70-71)

12. Peterson observed Appellant sitting in the driver's position inside his truck when they arrived on the scene. (p.72)

13. Peterson did not observe Appellant's performance of the field sobriety tests because he was talking with the driver of the other vehicle at the time Roper administered the tests. (p.72)

14. Peterson testified that he concluded Appellant was under the influence of alcohol to a degree that he was unable to operate a motor vehicle safely because of the following observations: Appellant had "a strong odor of alcohol coming from him . . . his face was extremely flushed, his eyes were very red . . . his speech was deliberate, and running words together and continuing to repeat words." He also noticed that Appellant was having problems with his balance inside the jail. (p.73)

15. Appellee's third witness, Officer Fillmore, testified that he impounded and conducted an inventory of Appellant's vehicle on the night in question. (p.80, 82)

16. Fillmore testified that when he arrived at the scene he observed Appellant's vehicle parked in the travel portion of the roadway. Upon searching the vehicle he discovered several containers of alcohol in the passenger compartment of Appellant's vehicle including an open beer can on the front seat next to where the driver would sit. The can was three-fourth full of beer.
(p.80-82)

17. Appellee's fourth and final witness, Officer Ken Kramer,

Evidence Custodial, testified for purposes of chain of custody with respect to the several containers of alcohol, including the open beer can, that were admitted into evidence. (p.83-84) After which, Appellee rested.

18. Appellant did not testify himself but did call two witnesses for his defense.

19. Appellant's first witness was Clyde Baugh. Baugh testified that he was the driver of the second vehicle the officers observed early in the morning of February 11, 1991. (p.89)

20. Baugh testified he was driving his vehicle, a van, on Second South at 1:30 am when he saw Appellant's vehicle parked along the side of the road. Baugh stopped his vehicle apparently to engage in conversation with Appellant. (p.90)

21. Baugh described the scene as follows: the two vehicles were parked on opposite sides of the road pointed in opposite directions; Baugh had his window down; Appellant had his door open (because the window would not open); Appellant was sitting sideways in the seat facing out the door; and the two were talking. (p.92-93, 107-08)

22. With respect to the vehicles' position on the roadway, Baugh admitted that "we were probably obstructing something . . ." but indicated that passing cars were able to get by them. (p.97-98, 101)

23. Baugh indicated that during the ten to fifteen minutes while they were conversing he did not see Appellant drink any alcohol. (p.98, 104)

24. Baugh testified that his vehicle was running but did not recall that Appellant's vehicle was running. (p.95, 97, 106-07)

25. Baugh further indicated that when the officers approached Appellant's vehicle Appellant exited his vehicle, shut his door and walked toward the officers. (p.104-106)

26. Appellant's second and final witness, Tracy Dunbar, testified that she drank the contents of a mini-bottle that was found in Appellant's vehicle. (p.111) No more testimony or evidence was offered.

27. The jury returned a verdict of guilty of driving under the influence of alcohol and/or being in actual physical control of a vehicle while under the influence of alcohol, a class B misdemeanor and having an open container in a vehicle, a class B misdemeanor -- both counts Appellant was charged with -- which verdict Appellant is appealing.

SUMMARY OF ARGUMENT

This is an appeal where the appellant has seemingly collected every possible argument to challenge a DUI conviction and bound the same in his brief. Several of his arguments have no application to this case whatsoever. Appellee has tried to sort out all of Appellant's arguments, group them appropriately and respond completely to them.

The testimonial evidence admitted at trial by Appellee was largely uncontroverted. What little was controverted by Appellant's witnesses proved to be immaterial. There was ample competent evidence admitted at trial to support the jury verdict

under Appellee or Appellant's theory of the case. This is an appeal that could easily be resolved by reading the Statement of Fact, supra, alone but the following argument is provided.

ARGUMENT

I

CITY OFFICERS ROPER AND PETERSON DID NOT SUBJECT APPELLANT TO A PRETEXT STOP.

Appellant's argument here is nonsense and without merit. It is completely uncontroverted that City Officers Roper and Peterson did NOT stop Appellant -- Appellant was already stopped. In fact Appellant's theory of the case is that, according to Mr. Baugh's testimony, when Appellant saw the officer approaching his *parked* vehicle he voluntary stepped out of and walked towards him. Under Appellee's theory Appellant did not step out of the already parked vehicle until asked.

Even so the officers would have been justified in stopping Appellant had it been necessary, or logically possible, because they were blocking the street with their parked vehicles, a violation of the state and city traffic codes.

II

THERE WAS ADEQUATE EVIDENCE TO SUPPORT A FINDING BY THE JURY THAT APPELLANT WAS IN ACTUAL PHYSICAL CONTROL OF HIS VEHICLE.

"It is unlawful and punishable . . . for any person to operate or be in actual physical control of a vehicle . . . if the person is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely operating a vehicle." U.C.A. Sec. 41-

6-44(1)(a).

Appellant suggests that when the Officers Roper and Peterson discovered him parked on the roadway in his vehicle early in the morning of February 11, 1989 he was not in actual physical control of his vehicle. Appellant correctly provides the standard for finding actual physical control in his brief. "Actual physical control can be established 'where the driver was seated in his vehicle on the traveled portion of the highway; or where the motor of the vehicle was operating; or where the driver was attempting to steer the automobile while it was in motion; or where he was attempting to brake the vehicle to arrest its motion'" (Quoting State v. Bugger, 483 P.2d 442, 443 (Utah 1971). (Brief of Appellant p.30).

More recently in Garcia v. Schwendiman, 645 P.2d 651 (1982) the Utah Supreme Court indicated that "As a matter of public policy and statutory construction, we believe that the 'actual physical control' language of Utah's implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants" The court went on to conclude that "where a motorist occupied the driver's position behind the steering wheel with possession of the ignition key and with the apparent ability to start and move the vehicle, we hold that there has been an adequate showing of 'actual physical control' under our implied consent statute." Garcia, 645 P.2d at 653.

The Court further indicated in Lopez v. Schwendiman, 720 P.2d

778, 781 (Utah 1986), that even if a vehicle is "presently immobile because of mechanical trouble," which would include a collision or having run out of gas, the driver can still be found to be in actual physical control.

Turning to the immediate case the evidence presented at trial clearly supports a finding that Appellant was in actual physical control of his vehicle while parked in the roadway of a city street. Two officers testified they saw him, the single occupant of his vehicle, sitting behind the wheel in the driver's position. The officer who approached Appellant further testified that he observed the keys to the truck in the ignition, could hear the engine running and saw Appellant's left foot depressed on the clutch pedal. When the officer asked Appellant to step out of the vehicle he observed Appellant turn the ignition of his vehicle off. Even Appellant's witness, Mr. Baugh, testified *he saw Appellant sitting in the driver's seat* of his vehicle parked on the side of the road.

Based on these facts and Utah law provided as provided in the Code and as annunciated by the Utah Supreme Court there can be no question the jury was justified in finding Appellant in actual physical control of his vehicle.

III

APPELLANT WAS NOT DENIED HIS CONSTITUTIONAL PROTECTION AGAINST BEING COMPELLED TO GIVE EVIDENCE AGAINST HIMSELF WHEN THE OFFICER REQUESTED HE PERFORM CERTAIN FIELD SOBRIETY TESTS BEFORE READING HIM THE MIRANDA RIGHTS.

Appellant intimates that he was "compelled to give evidence against himself" in violation of Article I Section 12 of the Utah

Constitution and also the 5th Amendment to the United States Constitution. His basis for this claim is founded in the fact that Officer Roper asked him to perform certain field sobriety tests without advising him of his Miranda rights.

The above-mentioned constitutional provisions constitute a bar against compelling "communication" or "testimony" but the privilege does not extend to barring compulsion which makes the accused the source of "real" or "physical" evidence. The leading case in this area is Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (). In that case, Mr. Justice Holmes stated, "The prohibition of compelling a man in criminal court to being a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

This privilege against being compelled to give evidence against oneself only extends to the extraction of guilt from a persons own lips. As a result, the use of the witness' body or aspects of his body which do not communicate thoughts or ideas is not prescribed. Illustratively, Defendants may be compelled to walk, stand, gesture, give hand writing examples, repeat phrases for voice identification, submit to finger or footprinting, don particular items of clothing, etc. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 908 (1966).

Additionally, Miranda rights need only be given to an accused "if the setting is custodial or accusatory rather than investigatory." And "for purposes of determining whether a crime

has been committed, investigation and interview are critical and, under such circumstances, the warning is not required." Salt Lake v. Carner, 664 P.2d 1168 (Utah 1983).

Specifically to the subject matter of this dispute, the Utah Supreme Court indicates that where field sobriety tests are requested and taken in a public street, with no indica of arrest such as readied handcuffs, locked doors, or drawn guns and the length of performance of the tests is only minutes, the setting is non-custodial, even though investigation had focused on the accused. Salt Lake v. Carner, 664 P.2d 1168 (Utah 1983).

In the immediate case, these field sobriety tests were administered in the investigatory stage before an arrest of Appellant was made and before it was determined that the crime was committed. Appellant was not placed under arrest until after the completion of the field sobriety tests when the officers came to the conclusion that he was in fact intoxicated to the degree that rendered him incapable of safely operating his vehicle. Appellant was not compelled to testify against himself when Officer Roper requested he perform several short field sobriety tests.

IV

THERE WAS ADEQUATE JUSTIFICATIONS TO ARREST APPELLANT FOR BOTH OFFENSES CHARGED.

"A peace officer may . . . without warrant, arrest a person . . . (1) for any public offense committed or attempted in the presence of any peace officer" U.C.A. Sec. 77-7-2. According to Officer Roper's testimony three offenses were committed in is presence. First, Appellant was parked in a roadway

in violation of U.C.A. Sec. 41-6-104, second, he had an open container of alcohol in his vehicle in violation of U.C.A. Sec. 41-6-44.20 and third, Appellant was in actual physical control of a vehicle while intoxicated in violation of U.C.A. Sec. 41-6-44. Appellant was arrested for the later two.

Apparently Appellant does not dispute the officer's justification to arrest him for the open container violation. He provided no evidence to refute the same during the trial below and provides no discussion concerning it in his brief. He does however challenge the fact that the officer had reasonable cause to believe Appellant was intoxicated. Officer Roper's testimony indicates he collected numerous data to support the fact that Appellant was intoxicated including the results of several field sobriety tests. Peterson also made several observations before coming to the conclusion Appellant was intoxicated.

Appellant correctly states in his brief what indicators "are enough to lead a 'reasonable and prudent person in the arresting officers position to be justified in believing . . .'" Appellant was intoxicated. (Quoting Layton City v. Noon, 736 P.2d 1035, 1037 (Utah App. 1987)). According to Appellant these indicators include "the smell of alcohol on defendant's breath; slurred speech; poor balance; drooling; various field sobriety tests." (Citations omitted.) (Appellant's Brief p.35.)

Appellant represents "the only objective fact that Officer Roper relied on was an odor of alcohol." (Appellant's Brief p.35) However in stating this, Appellant clearly misrepresents Roper's

testimony and wholly overlooks Peterson's testimony. Roper testified (i) that he observed an odor of alcohol on Appellant's breath, (ii) that he observed his face was extremely red and very flushed and (iii) that Appellant failed the several field sobriety tests administered by him. Officer Peterson testified that (i) Appellant had a strong odor of alcohol coming from him, (ii) his face was extremely flushed, (iii) his eyes were very red, (iv) his speech was deliberate, (v) he ran his words together, (vi) he continually repeated words and (vii) he had trouble with his balance.

The observations the officers testified they made before effecting an arrest met the standard annunciated by Appellant in his brief and went beyond. Clearly the officer's observed adequate indicia of intoxication to arrest Appellant for being in actual physical control of a vehicle while intoxicated to a degree that rendered Appellant incapable of safely operating a vehicle.

V

APPELLANT DOES NOT HAVE STANDING TO CHALLENGE THE ACCURACY AND RELIABILITY OF THE INTOXILYZER MACHINE.

Appellant goes to great lengths to argue the inaccuracy and unreliability of the intoxilyzer machine in his brief. Appellant's argument is confusing and misplaced. Appellant refused to submit to a test to determine the level of his intoxication; consequently, no evidence generated by an intoxilyzer machine was available or admitted.

VI

THE TRIAL COURT'S PROCEEDINGS BELOW ARE NOT VOID BECAUSE THE ASSISTANT CITY ATTORNEY WHO PROSECUTED APPELLANT ALLEGEDLY FAILED TO FILE AN OATH OF OFFICE OR EXECUTE A BOND OF SUFFICIENT SURETIES.

Appellant suggests the trial proceedings, where he was tried before a jury and convicted are completely void because he was prosecuted by Assistant City Attorney, Jeffery "R" Burbank, who had allegedly failed to *file* an oath of office required of all public officials. Appellant does not dispute Burbank is licenced to practice law in Utah, has taken an oath pursuant to membership in the state bar and an oath pursuant to being appointed Assistant Logan City Attorney. Appellant's claim is limited to the required filing only.

Appellee maintains however, that Burbank, by the very nature of his subordinate, part-time position in the City Attorney's Office, is not required to file such an oath. But still, Appellant's suggestion to void an entire trial proceeding from the entry of the information against Appellant through the entry of judgment and beyond is clearly not an appropriate corrective measure. U.C.A. Section 10-3-829 provides "no official act of any municipal officer shall be invalid for the reason that he failed to take an oath of office." Further, such defect of filing by itself does not affect the Plaintiff's substantial rights.

In the appendix of Appellant's brief he lists other government officials who have been acting as impostors because of the lack of filing the required oath. His enumeration includes, but is not limited to, Governor Norman H. Bangerter, Justice Gordon R. Hall

and all members of the Utah Senate and House of Representatives. Appellant apparently hopes this Court of Appeals will void all official acts taken by virtually every official in all three branches of state government due to similar deficiencies. Appellant's argument, if successful would void the law he was tried under, the officer who arrested him, the attorney who prosecuted him, the judge who tried him and the court who will hear this appeal.

The problem with Appellant's claim is two fold: first, his claim is nothing more than mere assertions unaccompanied by proof or affidavits (Burbank's oath of office is on file in the office of the city recorder and was when he signed the amended information charging Appellant and also on file when he prosecuted Appellant for the crimes that are the subject of this appeal); second, Appellant is, if you will, killing the goose that could potentially lay his golden egg. For example, Appellant adamantly argues in his Statement of Jurisdiction the Utah Court of Appeals is "unofficial, unlawful, unconstitutional, null and void." Yet he files this appeal seeking this court to assume authority it is without to declare it without authority to do the very thing he seeks.

Even if Appellant was correct with his assertion that the prosecutor, the courts and others' actions have been conducted without having properly filed an oath of office the remedy could not be to dismantle all three branches of state and local government.

VII

IT WAS NOT ERROR FOR THE TRIAL COURT TO ALLOW ASSISTANT CITY ATTORNEY, JEFFERY "R" BURBANK, TO PROSECUTE APPELLANT WHEN APPELLANT HAD FILED LAWSUITS AGAINST HIM.

Appellant argues this point without support in authority or logic that it was error for the trial court to allow the Assistant City Attorney, Jeffery "R" Burbank, to prosecute Appellant when Appellant had lawsuits filed against the him.

This argument is absurd on its face. Sheltering Appellant from being prosecuted by an attorney merely because Appellant has instigated civil action against the same could lead to a complete miscarriage of justice. Appellant could, through other well-placed lawsuits, be able to insulate himself from prosecution for any crime. Appellant would effectively award himself a license to be lawless within any chosen jurisdiction.

VIII

THERE WAS SUFFICIENT EVIDENCE ADMITTED IN THE TRIAL BELOW TO ESTABLISH THE CORPUS DELICTI OF THE CRIME OF BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR OTHER DRUG TO A DEGREE THAT RENDERED APPELLANT INCAPABLE OF SAFELY OPERATING HIS VEHICLE.

The standard for satisfying the requirement of corpus delicti requires "only that the state present evidence that the injury specified in the crime occurred, and that such injury was caused by someone's criminal conduct." State v. Knoefler, 563 P.2d 175, 176 (Utah 1977).

In the immediate case, Appellee met and went beyond this minimal corpus delicti requirement. Not only did Appellee put on evidence to show the crime of being in actual physical control of

the vehicle was committed, it put on evidence to show that the Appellant was the individual who committed the crime independent of any admissions by Appellant. In fact, two officers testified they saw Appellant sitting behind the wheel of his vehicle on a roadway and testified, based on their observations of Appellant, he was under the influence of alcohol to a degree that rendered him incapable of safely driving his vehicle.

IX

APPELLANT HAS FAILED TO MEET HIS BURDEN TO SHOW THE TRIAL COURT COMMITTED ERRORS IN ITS FACTUAL FINDINGS.

The Utah Supreme Court indicated in Garcia v. Schwendiman, 645 P.2d 651, 653 (1982), that "the standard for appellate review of factual findings affords great difference to the trial court's view of the evidence unless a trial court has misapplied the law or its findings are clearly against the weight of the evidence."

In this appeal, Appellant must show where the trial court "misapplied the law" or where its findings are "clearly against the weight of the evidence." Appellee maintains that the court's findings are not inconsistent with the law or evidence but rather completely consistent with competent evidence. A complete summary of the important evidence admitted at trial is included above in the statement of facts and argued herein with specificity.

In the immediate case, the jury chose to believe the officers' testimony and found Appellant guilty of the offenses charged. The law in Utah is clear: "When there are divergent elements of competent before the jury, its findings based on its belief as to which preponderates will be respected on appeal..." Weber Basin

Water Conservancy District v. Skeen, 8 Utah 2d 79, 328 P.2d 730 (1958).

Appellant's most serious problem here is that he could have reasonably been found guilty regardless of whether the jury believed the prosecution or defendant's version of the facts. All material facts leading to a conviction remain uncontroverted. Appellant's second witness, Tracy Dunbar, offered no evidence relevant to the charged crimes and Appellant's first witness, Clyde Baugh, largely substantiated the testimony of Appellee's witnesses Officer Roper and Peterson.

X

APPELLANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO A TRIAL BASED ON INEFFECTIVENESS OF COUNSEL.

Appellant claims in a general and vague manner that his right to a fair trial was denied due to the alleged ineffectiveness of his counsel. The burden Appellant must met for such a claim to be effective is set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S., 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Strickland the Court stated "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

The Court set forth two specific components that must be met by Appellant to be successful in this claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the

deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

id. The Court further indicated that aside from cases where an actual conflict of interest is shown the defendant must "affirmatively prove prejudice." *id.*

Appellant has not shown his counsel's performance was deficient, that an actual conflict of interest existed or affirmatively proved prejudice resulted. Appellant provides nothing in the argument portion of his brief to support his claim, merely providing statements presented as "facts."

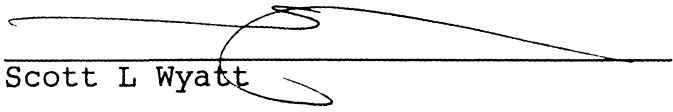
The only supporting evidence Appellant provides in his brief relative to the issue of effectiveness of counsel is correspondence concerning a complaint Appellant filed with the Utah State Bar against his counsel, Gregory N. Skabelund included in his Appendix. The letters Appellant includes in his brief injure his claim of ineffectiveness of counsel because they suggest the contrary. The complaints filed by Appellant against Skabelund were dismissed.

Because Appellant fails to provide support for his claim of ineffectiveness of counsel this argument of his must fail.

CONCLUSION

Based on the foregoing the conviction of Appellant should stand.

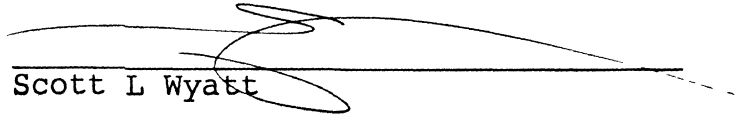
DATED this 25th day of March, 1991.



Scott L Wyatt

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing BRIEF OF APPELLEE, postage prepaid to Appellant Don W. Dunbar, 137 Third Avenue, #1, Salt Lake City, Utah 84103 this 25th day of March, 1991.



Scott L Wyatt

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