

1989

# Utah v. Jerry McKinley Armstrong : Brief of Appellant

Utah Supreme Court

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Rodger Cutler, Richard G. Hamp; attorney for plaintiff.

Jerry McKinley Armstrong; pro se.

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UTAH SUPREME COURT  
BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 8910003  
UTAH  
DOCUMENT

UTAH SUPREME COURT  
BRIEF

State of Utah, (Salt Lake City  
Corporation),

Plaintiff/Respondent

vs

Jerry McKinley Armstrong,

Defendant/Appellant

APPELLATE NO. 830489-CA

CRIMINAL NO. 83023051TC

8910003

BRIEF OF APPELLANT

Appeal from judgement and conviction for driving under the influence and driving without a driving license, both being misdemeanors, in violation of Article 5, Constitution of the State of Utah - section 41-6-44, in the fifth Circuit Court in and for Salt Lake City, State of Utah, the Honorable Shirley McCleve, Judge presiding.

Jerry McKinley Armstrong  
Pro Se  
Utah State Prison # 15774  
Post Office Box 250  
Draper, Utah 84020

Rodger Cutler and  
Richard G. Hamp  
Attorney for Plaintiff  
Salt Lake City Prosecutors  
451 South 200 East, #125  
Salt Lake City, Utah 84111  
Telephone: 535-7767

**FILED**

JAN 3 1989

Clerk, Supreme Court, Utah

### JURISDICTIONAL STATEMENT

Jurisdiction of this honorable Court is invoked pursuant to Amendment 5, and 14, Constitution of the United States of America, Article 5, Section 41-6-44, Subsection (1) and (2), Constitution of the State of Utah, Rule 2 Federal Rules of Criminal Procedure; and farther jurisdiction is conferred on this Court pursuant it's own Rules, Rule 24 and 27, Rules of the Utah Court of Appeals whereby a defendant in a cause may take an appeal to the Utah Court of Appeals from a final judgement and conviction had in a lower Court.

In this case final judgement and conviction was rendered by the honorable Shirley McCleve, Judge, Fifth Judicial Circuit Court, in and for Salt Lake City, Utah, State of Utah (Traffic Division).

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IN THE UTAH COURT OF APPEALS

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State of Utah, (Salt Lake City  
Corporation),

Plaintiff/Respondent

vs

Jerry McKinley Armstrong,

Defendant/Appellant

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APPELLATE NO. 330489-CA

CRIMINAL NO. 33023051TC

Priority No. 2

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal found from a judgement determined by the Honorable Shirley McCleve, Fifth Circuit Court in and for Salt Lake City, State of Utah. The Judge found the appellant guilty of driving under the influence and driving without a driving license, both misdemeanors, and in violation of Article 5, Constitution of the State of Utah - section 41-6-44, after a trial held on 22 of July, 1938.

STATEMENT OF FACTS

On approximately June 12 or 13, 1938, at approximately 2:00 a.m., the appellant, Sandra Bankhead, Kenney Farmer, and two other people left the Bunny Club on 17 and Main Street, Salt Lake City, Utah. When appellant went to the Club he and Mr. Farmer was together, which was approximately 10:00 or 11:00 p.m. . At statutory closing time for all bars in the Salt Lake City area the appellant and Mr. Farmer was about to leave when Miss. Bankhead asked appellant if he would give her and two friends a lift to there residences, appellant sayed sure since he had seen Miss. Bankhead off and on for the past several years.

On the way to the place that was calculated not to be vary far from the

illustrious Bunny Club, a dangerous situation surfaced between Miss. Bankhead and the other lady who appellant thought was a friend of Miss. Bankhead. They started an argument that was reaching the point where bodily threats were being tossed about. Consequently, appellant wishing that harm towards either of these individuals manifest decided the best way to handle the matter would be to evict half of the argument from his automobile. So appellant stopped his automobile immediately, turned on emergency flashers that are factory installed just for such emergencies, and proceeded to attempt mitigation of the argument that was either going to cause damage to appellants automobile, or destroy one of the individuals life form.

Such was the state of affairs confronting appellant when patrolman Swin approached appellants automobile first from the front, and then from the rear, on 12 or 13 June 1988.

As the arrest location will point out the place of arrest was on a residential street, and it will also point out that appellant was double parked, with flashers on. The appellant is a professional driver with over three-hundred thousand every type of weather and highway condition coast to coast miles driving eighteen wheels tractors-trailer combinations, without experiencing any accidents whatsoever.

When patrolman Swin stopped behind appellants automobile the appellant started searching for his automobile certification documents, which he found on the sun visor of the driver side of the automobile. Patrolman Swin then put his spot light in appellants mirrors and asked appellant to exit car, which appellant did, along with automobile documents. This all happen in the course of approximately one minute, or even a half of a minute. Argument was still ensuing in appellants automobile.

Upon exiting his automobile the appellant immediately went back to patrolman Swin's police cruiser and asked him if he would assist him in mitigating an argument that was getting out of hand in his automobile. Patrol-

eman Swin then asked appellant, " how much have you had to drink tonight "? Appellants answer was, " not much." In the mean time while appellants back was turned to his automobile two or three of the people in the car had gotten out and was standing outside appellants auto as appellant observed upon being escorted to the curb to begin taking the field sobriety test.

Appellant must point out here that officer Swin never even asked one single question concerning the problems I told him that I was having and such being the same reason that appellant was stopped in an illegal parking manner. Nor did patrolman Swin ask the young lone lady who was standing around after everybody else had taken flight, wheather or not my request for help was genuine, or wheather anybody was in an arguement or not. Appellant also would like to point out that Mr. Farmer, the individual who appellant brought to the bar with him, took flight along with Miss. Bankhead and the other individual, whoes name appellant does not know.

If appellant had professionally tought the probability of another motirist not seeing appellants automobile parked at the exact location in which it was parked; so appellant could address the arguement situation, outweighed the probability of someone getting hurt or killed as a results of the arguement going on in appellants automobile, appellant would have not parked in an illegal manner. However, the arguement in appellants car had reached very dangerous levels and appellant, thus, applied emergency brakes to deal with a life and death situation.

Consequently, all the appreciation that appellant received was a driving under the influence without license conviction and six months in Utah State Prison.

The appellant is not a patrolman by patrolman Swin's standards, neither does he characteristically profess to know the whole personalities of the individuals who were in his automobile that night in June. But appellant does know that if someone had gotten killed why patrolman Swin's

concerns prioritys were on giving appellat a field soberity test, natroleman Swin would have been grossly negeligent of his official duties which he swore to uphold upon entering the law enforcement vocation.

Before or while the appellat was taking the field soberity test, he told patrolman Swin that he was also taking mental hygiene medcine, and appellat feel patrolman Swin had the option to elect pursuance to sections 41-6-44, and 41-6-44.10, Article 5, Constitution of the State of Utah, which chemical test or test of appellants breath, blood, or urine, which best suited the purpose of determining if appellat was statutorily prohibited from operating his own automobile. Appellant feels that a blood test ought to have been the factor which determined the combination of alcohol contents, as determinative of the drug contents present in appelants system upon him issuring appellat an arrest for driving under the influence. Appellant find no fairness in the Court which allowed the admissibility of the breath analysis test because appellat is and was on precribed mental hygiene medication. And, 41-6-44, states: " a peace officer shall determine which of the aforesaid test shall be administered." See allegations: 3, 4, 5, 6, and 7, of appellants document - "appeal for driving under the influence conviction", filed with this Court already.

Article 5, Constitution of the State of Utah, 41-6-44, subsection (1) states: " that it is unlawful and punishable if a person have a combined influence of drugs or alcohol greater than .08% to a degree which renders the person incapable of safely driving a vehicle, or to be in actual physical control of such vehicle in this State."

Appellants alcohol contents, he thinks, read 104%, at the issuring of the driving under the influence arrest.

This section states farther: " upon a second conviction within five years after a first conviction, the Court shall impose a mandatory jail sentence of not more than 48 consecutive hours nor more than 10 days with emphasis on serving in the drunk tank of the jail." The appellant admits



to this Court that the culmination value of appellants driving under the influence causes equals two within the statutory five year time span prescribed by State Law. But for the sake of appellant his reasoning upon multiplication factors deployed by the Board of Pardons whoes common denominators fact finding criterias conveniently allows it to sentence individuals, just because they are on parole, to more time than the State Constitution requirements statutorily dictates regarding misdemeanors. At the conclusion of serving this time, only my second driving under the influence in forty years of driving, the appellant will have served exactly one full year in this Prison for a combined total of two driving under the influence convictions, plus meeting the other requirements that the highest order of Law in this state, statutorily requires. Appellant has even stayed in the drunk tank overnight???

Appellant has already addressed the fact that purviews of the 'double jeopardy' clause indicated that some controversy could emerge regarding the Constitutionality of how the rational components of this States statutory Laws are reflected within the guidelins of Adult Probation and Parole and the Board of Pardons, insofar as their procedures and processes which determines a probationers, or parolee, inconsequential infractions upon the States statutory Rules of Law measures, comparable to measures of punishments prescribed for other Citizens of this State who are not clients of their institutions.

What, then, your honors, constitutes a true and fair apprehension of this State's Laws. It is in violation of the Constitution of the United States of America to discriminate against any class or race of people, or individuals. But seemingly that is precisely what the Board of Pardons does regarding parolee. That in no form can be considered equal protection as the promulgators of the equal protection clause intended.

The appellant cites Waller vs Florida, 397 U.S. 387, 25 L. ED. 2d 435,

his already filed document: motion to vacate judgment and order pursuant to 28 USC 2255 and 13 USC 4244. The appellant additionally applies 23 USCA 2254, and Rule 2, United State Code Annotated, Title 28, Judiciary and Judicial Procedure, Section 2255.

Considering all factors present and demonstrative of the events whose specific fractions formed the basis differences which resulted in appellant landing in Prison, meaning appellants arrest, within the context of how the State of Utah Constitution discerns on "to a degree which renders the person incapable of safely driving a vehicle." The appellant frame this to mean in layman terms, that a person driving a vehicle under substances contents above the States .08% statutory alcohol level is not necessarily 'incapable of safely driving'; but if he has established a driving patterning of recklessness whereby that persons automobile is being controled by influences other than that persons normal self, then, that person is in violation of the driving under the influence statutory laws of the State of Utah.

The elements of appellants actions, nor the elements of appellants intentions, are determining factors which would have lead a prudent person to believe that the appellant was, citing instant of arrest, 'incapable of safely driving' his automobile. Because appellant was not driving when patrolman Swin approached his automobile. This impass, consequently, regarding how patrolman Swin reached his conclusions about appellants inability to operate his automobile, confounds appellants far beyond his comprehension of what the promulgators of the words arrangement 'incapable of safely driving a vehicle', 'to a degree', had in mind regarding formulation of statues which would allow the States law enforcement arm the opportunity to apprehend the incapable and unsafe driver.

The Federal Social Security Act, 42 USC § 416 (i)(1), now defines "disability" as (A) "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to

last for a continuous period of not less than 12 Months: or (B) blindness".

Appellant hereof contends that the Court of the trial instant ought to have ordered a hearing determinative to the mental sufficiency of appellant to grasp the handle of the intricate trial instant. Suggestive to corresponding issues as to wheather appellant should have been confined to a hospital or prison envioronment. An individual who is functional in a hospital setting, may not be functional in a prison setting.

The appellant knows that he has already mention the fact that he frames the rules of law that he has read as creating controversy revolving the elements of this cause interdependent with freedom of sneech, and due process of law, pursuance to the Fourteenth Amendment of the Constitution of the United States of America. Analyzing this impass farther the appellant must compare the efforts of his court appointed counsel to that of efforts of one receiving compensation for collective bargaining an individuals life away. In the instant of trial where the appellant asked his counsel of records to subpoena all of the individuals riding in his automobile the night of instant of arrest, counsel told appellant that what they would have to say in trial, would be 'irrelevant' to appellants inquiry. Appellant, thus, states that his counsels conduct was unsatisfactory, and harbored controversy in light of undermining the proper functioning of the adversarial process that the trial manifestations are not reliable as having produced fair and just results. Appellant, therefore, cites: Strickland vs Washington, 466 U. S. at 638, and 687.

It must be mention to this court that Miss. Bankhead was too a client of the Adult Probation and Parole Departments, Utah Department of Corrections, Intensive Supervision Program. Appellant has discovered this fact since he landed in Prison.

Appellant would also like to inform this court at this time that his automobile had commercial license plates. A type of plate which allows the vehicle to park in a yellow curb, and to stop anywhere with proper signals.

Therefore, inasmuch as appellant harboring thoughts that his laymans conception about the rationale and interpretations of the various rules, cases, and statutes cited herewithin, and hopefully conveyed in light of this Court finding different determinative factors which may promote appellants quest for properly framed and reasonable justice; he shall respectfully attempt to bring this retaliatory to a conclusion through farther conveying his laymans side of this coin as to wheather or not genuine probable cause conjunctive with illegal search and seizure raises sensational controversy regarding the instant of arrest.

According to the Constitution of the State of Utah, Article 5 - Driving While Intoxicated and Reckless Driving, section 41-6-43, subsection (2); probable cause, in the instant of a patrolling patrolman detaining an individual suspected of driving under the influence, exists when: " an ordinance adopted by a local authority that governs reckless driving, or driving a vehicle in willful or wanton disregard for the safety of persons or property shall be consistent with the provisions of this code which govern those matters." (found in Utah Code 1934-35, volume 2, Title 30-55).

Consequently, since appellant has already stated to this Court, purviews of section 41-6-44, which lays down the law of the Utah land regarding where and how an individual constitutes tremor upon this section of Utah law in regard to driving an automobile under the influence of substance, the issue remaining which need conveying to this Court reflects that nonewhatssoever probable cause was present at instant of arrest, and instant of encounter, which statutorily required patrolman Swin to request appellant yield to a driving under the influence field sobriety test.

It is a fundamental legal principle that criminal punishment should not be visited upon the blameless. An illustration of this principle was affirmed in, State vs Robinson, (Mo, Sup.) 328 S. W. 2d 667, " If a person commits an act under compulsion, responsibility for the act cannot be ascribed to him since, in effect, it was not his own desire, or motivation, or will, which led to the act."

Citing, Newman and Weitzer, Duress, Free Will and the Criminal Law, 30 So. Cal. L. Rev. 313.

And as appellant has stated to this Court he only was attempting to bestow some kindness upon a fellow human beings when dissent emerged within appellants automobile and confronted him with a horrific dilemma between his passengers. The evidence established at appellants trial assaults any other belief or circumstances which would lead a reasonable person to think that the appellant did not act with regards reflective of compulsion.

Thus, affirming the fact that the appellant established no conditions which statutorily can be construed as recklessness or negligent under section 41-6-44, justification from appellants 'horrific dilemma' compels him to hitch his defense to coercion pursurance to State vs St. Clair, (Mo. Sup.) 262 S. W. 2d 25, 27..... based upon the following brief arguement, " a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."

And appellant hereof respectfully rest the foregoing issues conveyed in this laymans arguement.

Dated this \_\_\_\_ Day of October, 1988.

cc: ROGER CUTLER and  
RICHARD G. HAMP

By: \_\_\_\_\_  
JERRY MCKINLEY ARMSTRONG

FILED

NOV 4 1988

*Salary*  
Walter T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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State of Utah, (Salt Lake City )  
Corporation), )

Plaintiff and Respondent, )

v. )

Jerry M. Armstrong, )

Defendant and Appellant. )

MEMORANDUM DECISION OF  
SUMMARY AFFIRMANCE  
(Not For Publication)

Case No. 880489-CA

Before Judges Greenwood, Billings and Davidson (On Law and Motion).

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PER CURIAM:

Defendant appeals his convictions of drunk driving and driving without a valid driver's licence. He was arrested in the early morning hours of June 12, 1988 after he admitted that he had been drinking and was unable to produce a valid driver's license. His intoxilyzer test results indicated a blood alcohol content of .14.

On appeal defendant argues that he was entitled to have a physician present at the time the blood alcohol breath test was administered. He also alleges the existence of a conspiracy among officers and others to have him arrested because the police officers failed to answer his request for help to resolve an argument between his passengers. Respondent Salt Lake City has moved for summary affirmance of defendant's convictions. Defendant has filed a response to the motion and his appellant's brief herein.

After considering the record on appeal and the authorities argued by defendant, we grant respondent's motion for summary affirmance because:

1) Many of the arguments by defendant on appeal were not presented to the trial court and will not be considered for the first time by this court. Lane v. Messer, 731 P.2d 488 (Utah 1986).

P.S. MR. BUTLER: THIS IS ONLY COPY OF THIS I HAVE!!

THANKS T.M.A.

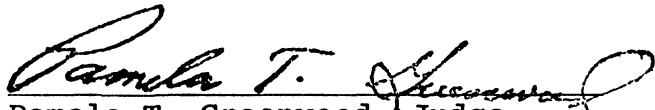
2) Defendant's argument that by parking illegally he was attempting to invoke the assistance of the police to resolve a dispute among defendant's passengers does not in any way excuse defendant's conduct of driving while intoxicated or without a valid driver's license.

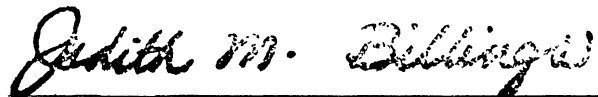
3) The representation of defendant by counsel was not inadequate under Strickland v. Washington, 466 U.S. 668 (1984).

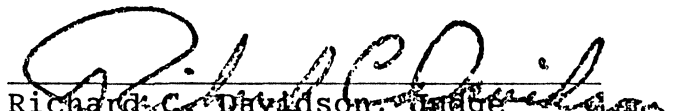
4) The remaining arguments raised by appellant in his brief require no discussion as they are wholly lacking in merit.

Plaintiff's motion for summary disposition is granted and defendant's convictions are summarily affirmed.

ALL CONCUR:

  
Pamela T. Greenwood, Judge

  
Judith M. Billings, Judge

  
Richard C. Davidson, Judge

CERTIFICATE OF MAILING

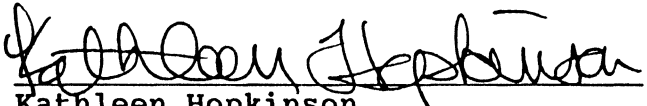
I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION by depositing the same with the United States Mail, postage prepaid to the following:

Jerry McKinley Armstrong  
P.O. Box 250  
Draper, UT 84020

Richard G. Hamp  
Salt Lake City Attorney's Office  
451 South 200 East #125  
Salt Lake City, UT 84111

Salt Lake County  
Third Circuit Court  
Case No. 88-2023051

DATED this 4th day of November, 1988.

By   
Kathleen Hopkinson  
Case Management Clerk