

1990

# Layton City v. Frank R. Aragon : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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UTAH COURT OF APPEALS  
BRIEF

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900247-CA

IN THE UTAH COURT OF APPEALS

LAYTON CITY,

Plaintiff-Appellee,

vs.

Case No. 900247-CA  
Priority No. 2

FRANK R. ARAGON,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from a Jury Verdict  
in the Second Circuit Court  
State of Utah, County of Davis, Layton Department  
Honorable K. Roger Bean, Presiding

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NOV 19 1990

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Defendant-Appellant.

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JURISDICTION OF APPELLATE COURT

This Court has jurisdiction to review the judgment entered in the Second Circuit Court in accordance with Section 78-2a-3(2)(d), Utah Code Annotated.

ISSUES OF APPEAL

1. Did the Circuit Court err in failing to suppress the verbal statement of Defendant obtained by Layton City police officers and in admitting such statement into evidence during the jury trial. The standard for review as to this issue is whether the defendant knowingly and intelligently waived his right of self-incrimination as to the claim that a Miranda warning was not given to him and this Court does not accord any particular deference to the trial court's conclusions but rather reviews them for correctness. State v. Sampson, 143 Utah Adv. Rep. 12, 14 (Utah App. 1990). As a second ground for wrongfully admitting the statement of Defendant did the lower court abuse its discretion in admitting such statement when the state had failed to establish independent evidence of the corpus delicti of

driving while under the influence? State v. Anderson, 561 P.2d 240 (Utah 1977); Pearce v. Wistisen, 701 P.2d 489, 491 (Utah 1985); Ostler v. Albinia Transfer Co., Inc., 781 P.2d 445, 447 (Utah App. 1989).

2. Excluding the wrongfully admitted statement of the defendant, was there sufficient evidence presented by the prosecutor to sustain the conviction for driving under the influence. The standard of review for this issue is whether there is sufficient evidence from which findings of all the requisite elements of the crime can reasonably be made. State v. Booker, 709 P.2d 342 (Utah 1985); State v. Petree, 659 P.2d 443 (Utah 1983).

#### CONSTITUTIONAL PROVISIONS

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. Amendment 5 to the United States Constitution.

In criminal prosecutions . . . the accused shall not be compelled to give evidence against himself. Article 1, Section 12, Utah State Constitution.

#### NATURE OF THE CASE

This is an appeal from a criminal conviction of Defendant in the Second Circuit Court, Layton Department, for the offense of driving while intoxicated.

#### COURSE OF PROCEEDINGS BELOW

On February 7, 1990 an information was filed by the City of Layton against defendant Frank Aragon charging him with driving



under the influence of alcohol, delaying and obstructing an officer, and disorderly conduct. [Note: For some unexplained reason there are two separate pleading files which have been docketed with the Clerk of this Court. Defendant's counsel does not understand the necessity of these two files since they are basically in duplicate. The order of the various documents, however, is different and some files contain documents that are not contained in the other. Since it will occasionally be necessary to refer to both files during this brief Appellant will designate the file dated May 21, 1990 as File No. I and the file dated August 20, 1990 as File No. II.].

On August 28, 1989 Defendant moved to dismiss the charges filed against him on the basis there was no evidence legally sufficient to entitle prosecution and to suppress evidence. (R.I., 17) On September 28, 1989 a hearing was held before the Honorable K. Roger Bean for the purpose of determining Defendant's motion to suppress evidence. (R.I., 121; 101-111). The lower court denied Defendant's motion on October 27, 1989. (R.I., 95-96; see "Memorandum of Decision" contained in Addendum to this Brief).

On January 9, 1990 Defendant filed a motion to reconsider the previous ruling on Defendant's motion to dismiss based upon a decision of the Honorable John A. Rokich, Third District Judge, in an appeal from the Department of Motor Vehicles determination that Defendant would lose his license for failing to submit to a blood alcohol test. Judge Rokich reversed the determination of the Department and found that the officers had no probable cause

to arrest the petitioner for driving under the influence at the time the arrest was made. (R.I., 91, 89-90; see "Memorandum of Decision", Aragon v. Schwendiman contained in the Addendum to this Brief). The lower court on February 7, 1990 denied Defendant's motion to reconsider. (R.I., 84; see "Memorandum of Decision" dated February 7, 1990 in the Addendum to this Brief).

A jury trial was held on February 8 and February 9, 1990 before the Honorable K. Roger Bean. At the conclusion of the City's case Defendant moved to dismiss. (Trial Trans., 182-37). The lower court denied these motions. (Trial Trans., 188). The following day defense counsel presented arguments in support of his previous motion to strike any testimony of the defendant that had been elicited from the officers making the arrest. The Court took this motion under advisement. (R.I., 199). It was never ruled upon. A verdict was returned by the jury finding Defendant guilty of driving while under the influence of alcohol, guilty of delaying and obstructing an officer, and guilty of disorderly conduct. (R.I., 12). On April 16, 1990 Defendant was sentenced to four days in jail, fined \$750 and placed on probation for twelve months. (R.I., 10). On May 16 Defendant filed his Notice of Appeal. (R.II., 26). This appeal is taken only from the DUI conviction.

On June 19, 1990 Defendant filed an application for a Certificate of Probable Cause and Stay requesting the lower court to prevent Defendant's license from being suspended during the pendency of an appeal to this Court on the basis that the suspension of the license would most probably be completed before

this Court could review the conviction. The lower court denied a stay on the basis that it had no jurisdiction over the driver's license division and that such effort would have to be made in the District Court or the Court of Appeals. (R.II., 14-15).

On July 17, 1990 Defendant filed a petition for stay of execution pursuant to Rule 27 of the Utah Rules of Criminal Procedure before this Court. (R.II., 9-13). The matter was remanded to the lower court for consideration. After a hearing, the district court denied the stay. (R.II., 8). This Court subsequently issued an opinion that it would not decide the stay issue.

#### STATEMENT OF FACTS

The basic facts in this case are essentially undisputed. One or more of the arresting officers testified in four separate proceedings related to the incident occurring on April 2, 1989. These proceedings included a driver's license revocation hearing before the Department of Motor Vehicles, a trial de novo before the Honorable Third District Judge John Rokich in an appeal from the Department of Motor Vehicle decision, a hearing concerning Defendant's motion to dismiss in the Second Circuit Court, and a jury trial in the Second Circuit Court. For purposes of this appeal the most complete factual scenario of what occurred on April 2, 1989 is contained in the September 28, 1989 suppression hearing transcript. As will be noted later in this brief certain portions of the evidence that was given during the suppression hearing was not introduced during the jury trial because of hearsay objections. These exclusions will be noted in detail

infra as it relates to the jury trial and the evidence upon which Defendant was convicted. However, for purposes of this Brief the suppression hearing will be principally utilized as a basis for the statement of facts.

At approximately 1:40 in the morning three Layton City officers were dispatched to an address within Layton City on the basis that a family fight was in progress. (Suppression Hearing transcript, p. 10; hereinafter SH). As the officers arrived they observed a male and female standing in a driveway next to a car which was running and which had its lights on. The man was standing next to the car on the right-hand passenger side. (SH, 11). A male and a female officer approached the couple who at that time did not appear to be having any kind of dispute. (SH, 12). The female officer began talking to the woman and the male officer began talking to the man who was the defendant Frank Aragon.

The conversation between the male officer and Defendant became aggitated. The male officer, John Lynch, stated that as soon as he began talking to Defendant he could smell alcohol and that he noticed Defendant had glassy eyes. (SH, 59). While the officer was questioning Defendant, the officer testified that the defendant became irritated and started to approach him. The officer stated that he pushed him back at which time Defendant doubled up his fist and made threatening comments. (SH, 60). As the confrontation increased the third officer came up from behind and told Defendant that he was under arrest for disorderly conduct. The two officers then wrestled the defendant to the

ground and handcuffed him. (SH, 61). The defendant sustained an injury to his cheek at the time he hit the pavement which was lightly termed "road burn". (SH, 41). After the defendant was restrained he was told that he was being placed under arrest for disorderly conduct. (SH, 20, 68).

The officers then took the defendant and placed him in the back seat of Officer Sharon Beckett's police automobile. (SH, 19). At that time he was handcuffed, seatbelted and was therefore unable to leave the vehicle. (SH, 19). It is undisputed that Defendant was not present during any of the subsequent conversations that the officers had with various individuals.

Officer Lybbert and Officer Beckett interviewed a woman named June Trujillo who was present at the house where the car had been parked. Ms. Trujillo told the officers that the defendant had been in the house earlier but that he had been there with a friend. She said she did not know who the person was and that she did not know whose vehicle was in the driveway. (SH, 24).

In the meantime, the other officer, John Lynch, talked to Rose Aragon, Defendant's wife, who was the female standing near him at the time the officers came to the scene. Officer Lynch asked her how the defendant got to the house and she stated he drove. (SH, 62). He then talked to a young lady named Nicki Trujillo who also said that Defendant had driven there. (Id.).

While this questioning was going on by Officer Lynch, Sgt. Lybbert and Officer Beckett returned to the police vehicle to

question the defendant. At that point Defendant had already been placed under arrest for disorderly conduct and was sitting quietly in the back seat of the vehicle. The officers opened the left rear door of the vehicle in order to talk with him. (SH, 27). Officer Lybbert asked the defendant who his friend was. (SH, 25). He responded that he was there by himself and that he had driven there three or four minutes before the police arrived. (SH, 28-29, 54-55).

During this interview with the defendant Sgt. Lynch was speaking with June Trujillo. She told him that the defendant had come to the house earlier with a friend just as she had previously told the same story to Sgt. Lybbert. Officer Lynch then talked to Sgt. Lybbert who told him that Defendant said there was no friend which made Officer Lynch assume that Ms. Trujillo was telling him a story. He therefore returned to her and gave her a Miranda warning informing her that if she was telling him a story she could be charged with obstructing an investigation. At that time she said she didn't know anything. (SH, 63).

Officer Beckett stated that during this period of time that Defendant was parked in her police vehicle she did not have any information concerning the ownership of the car. (SH, 29). It was not until she returned to the jail and ran a vehicle check that she discovered that the vehicle parked in the driveway was registered to the defendant. (SH, 37).

Since the defendant was already under arrest while sitting in the back of the vehicle Officer Beckett did not believe that

she specifically told him that he was also being placed under arrest for driving under the influence. She had been instructed by Sgt. Lybbert to file the DUI paperwork since she was the only officer still on shift while at the police station. It is undisputed that during the entire period at the arrest site and in the police vehicle Defendant was never given the Miranda warning. (SH, 55).

Several additional facts which were not brought out in the suppression hearing but were elicited during the trial complete the factual story. Officer Lybbert testified that upon searching the vehicle in the driveway he discovered one full beer can and one empty can. (Trial Trans., 117). The car was ultimately turned off by June Trujillo. (Trial Trans., 118). Officer Lybbert further testified that because of the confusing statements given by the witnesses he did not have any real idea who drove the automobile to the house until he spoke to Defendant who verified that he was the driver. (Trial Trans., 124-130).

Upon arriving at the jail Officer Beckett asked Defendant if he would submit to a breath test. Defendant requested to talk to a lawyer at which time he was informed that the right to counsel and the right to remain silent does not apply to the implied consent law and that he would lose his license if he did not take the test. (Trial Trans., 164-65). After Defendant refused to take the test Officer Beckett gave him the Miranda warning. When asked whether he wished to answer any questions he then informed her that he did not. (Trial Trans., 166). Subsequently, Defendant informed her that he was now willing to submit to a

blood but not a breath test. She did not give him a blood test and subsequently placed him in a cell for the evening. (Trial Trans., 167).

#### SUMMARY OF ARGUMENTS

1. The lower court erred in failing to suppress the statements of Defendant that he was the driver of the automobile and that he had driven it there at the scene some three or four minutes before the police arrived. This statement should not have been allowed to go to the jury for two reasons. First, the statement was made while defendant was handcuffed, seatbelted, injured and physically restrained in the back of Officer Beckett's police vehicle. At no time while he was at the scene of the incident or in the police vehicle did he receive the Miranda warning. Defendant had already been arrested for disorderly conduct and was basically restrained while the officers investigated the circumstances. He was neither given a Miranda warning for the disorderly conduct charge nor for the driving under influence charge even though the officers strongly suspected that he had driven the automobile to the scene in an intoxicated condition after speaking with several witnesses.

As a second alternative ground for suppressing the statement of the defendant, the State failed to prove the corpus delicti of the charge of driving under the influence without the admission of the defendant. At trial, the State did not produce any witnesses who allegedly saw the defendant driving the automobile or could have testified when the automobile was driven and the condition of the defendant when he was driving it. Without



Defendant's admission that he was the driver and that he had only been there three or four minutes there is no evidence sufficient to establish a corpus delicti and therefore the admission should have been excluded.

2. When the admission of the defendant is excluded from the evidence introduced at trial there is simply nothing left for which a jury could convict the defendant of driving under the influence. Taking the evidence most favorably for the State shows that Defendant was intoxicated while standing next to his vehicle which had its motor on and its lights on. Such evidence is clearly insufficient to convict Defendant of driving while intoxicated.

#### ARGUMENT

#### POINT I

THE LOWER COURT ERRED IN ADMITTING  
DURING THE TRIAL THE STATEMENTS OF  
DEFENDANT MADE TO THE ARRESTING  
OFFICERS WHILE RESTRAINED IN A  
POLICE VEHICLE.

During the jury trial of this matter Officer John Lybbert was called as a witness on behalf of the State.

Q. (By Prosecutor) Okay. You talked to other people that were there, too, didn't you?

A. Yes. I did.

Q. Okay. And that would be, I guess Rose Aragon?

A. Yes. Rose Aragon, June Trujillo.

Q. Okay. And during that conversation with them, you discussed the incident as it had occurred?

A. Yes. I did.

Q. From that, you made a determination; is that

right?

A. Yes. I did.

Q. What did you determine?

A. I determined that Mr. Aragon was the driver of the car when it arrived.

Q. Okay.

MR. LONG: Your Honor, I would have to move to strike that answer as being nonresponsive to the question. I mean, there is no way to object when he says what conclusion did you make and he comes out--off the wall with what he came up with.

THE COURT: I agree there is no way to object to that, but what do you claim as the basis for the objection?

MR. LONG: Well he is going to the truth of the matter asserted and he is making a generalization as to what he came to this conclusion without even the hearsay evidence to base upon his conclusion.

THE COURT: Well, when we had our conference at the bench, this is why I asked you if you wanted a limiting instruction because it is relevant as to whether or not they had probable cause.

MR. LONG: Right.

THE COURT: And of course, he could talk to others for that purpose, and he could make that determination for that purpose. Would you--all right. I deny your motion to strike and to instruct the jury to disregard, well, to strike; but I do instruct the jury to disregard for the purpose--

Members of the Jury, disregard the witness' last answer relative to the elements of the cause of action, whether defendant was driving. It's a preliminary matter, it's been covered already in motions before the court. It's admissible for a limited purpose to show that the officer had a reason, this officer or some other officer at the scene, had a reason to arrest Mr. Aragon at the scene, but you should disregard it--that answer as to whether or not, for purposes of your determinations, Mr. Aragon was driving this motor vehicle at this point. You may go ahead.

MR. STONEY: Thank you.

Q. (By Mr. Stoney) Now, at some point in your investigation, you actually came back to the car where Mr. Aragon had been sitting; is that right?

A. Yes. I did.

Q. He was handcuffed, I believe, and seatbelted in the back seat of that car?

A. Yes. He was.

Q. Okay. Was the door open when you were talking to him?

A. Yes. I opened the door to talk to him.

Q. Okay. And you reached in and you asked him the question "who was your friend". Is that right?

MR. LONG: I would have to object, Your Honor, on the ground that this is--

MR. STONEY: I'll restate the question, Your Honor. I apologize, counsel.

Q. (By Mr. Stoney) What was the question that you asked him?

A. The question I asked him was, I asked him, "Where is the other person that was in the car with you, since I need to talk with him?"

Q. And did he respond to that?

A. He did.

MR. LONG: I'd have to object to the response, Your Honor.

THE COURT: And the ground?

MR. LONG: Well, he's handcuffed in the back of the police car, he's under arrest and he hasn't been given the Miranda warning, and they are interrogating him.

MR. STONEY: Your Honor, if I could remind the Court that underneath the voluntary exception in the Miranda warnings, the officer is allowed to ask a few basic questions. Here in this

question, the officer had no reason to believe that there would be an incriminating response come in. That's why the defendant's response becomes important, because if that response is incriminating, it's unresponsive to the question that he asked. His question is, "Where is your friend?" It has nothing to do with incriminating him in the process. The officer here is impounding a car, he's got a vehicle with him, he's got--and he is merely asking where the friend is, so it's completely unresponsive to what the officer has to say.

MR. LONG: But the response is incriminating, as we know.

THE COURT: Well, but what about the fact that it isn't responsive to the question?

MR. LONG: Well, it is responsive to the question.

THE COURT: He's received--testimony so far is that he's received information somebody else drove it.

MR. LONG: Well, but it is response to the question. It's just more encompassing than the question asked, which is what the last officer was attempting to do. Answer the question and then go on and explain some other things as well, that were not--

THE COURT: Objection is overruled. You may go ahead, Mr. Stoney.

MR. STONEY: Thank you.

Q. (By Mr. Stoney) Officer, what was the defendant's answer to the question, and I believe it was, "where is the other person?"

A. Mr. Aragon stated to me "there isn't anyone else with me, I was alone when I drove here."  
(Trial Trans., 100-104).

Officer Sharron Beckett who was also present during the conversation with the defendant also was allowed to testify concerning this conversation. The following dialogue occurred redirect examination by the prosecutor.

Q. Prior to the time when the defendant was wrestled and handcuffed to the ground, he did make some statements regarding the actual time that he had arrived, did he not?

A. Prior to that, I didn't hear a time frame.

Q. Did you hear him make statements then, at some point?

A. Yes. I did.

Q. Okay. When was that that he made statements about when he had arrived?

A. When he was in my patrol car.

Q. Were they in response to a direct question or was he just making statements to you?

A. He was answering a question of Sgt. Lybbert's.

Q. Which, was that the question that you discussed yesterday, about where was this other person, or whatever the question was?

A. It was in regards to where his friend was.

Q. Un huh, and the answer to that question, we discussed yesterday, but he also added something to that, did he not, about his time of arrival?

A. Yes. He did.

MR. LONG: Your Honor, I'd have to object on grounds of Miranda and corpus delicti of the crime, and that this relates, his answer relates directly to an interrogation by the officer.

THE COURT: Objection is overruled. You may continue.

MR. STONEY: Thank you.

Q. (By Mr. Stoney) And what was his response about the time that he had just arrived?

A. I just got here three or four minutes ago. (Trial Trans., 230-31).

During the closing argument Mr. Stoney, the prosecutor, made

the following statement to the jury:

So, the first one, with regard to--and we'll go to the DUI, first of all, the driving under the influence. It starts out, number 1, that on or about the second day of April, 1989, the defendant drove a vehicle, or was in actual physical control--or excuse me, just drove a vehicle. I apologize for that last part. Drove a vehicle.

Now, if he drove a vehicle to that situation, if you believe that he drove a vehicle, you've heard the testimony, you've heard his admissions, you've heard that the vehicle was running, the lights were on, the officers were there, other people, you've heard the whole situation; then the prosecution's met that element. I would suggest to you that the prosecution has met that element, because there has been no contradictory evidence whatsoever to that. (Trial Trans., 247).

On rebuttal during the argument to the jury the prosecutor made the following remarks:

Really, what it comes back to is the facts. They arrive at the scene, there's a car there, running, there's lights on. There is an argument going on. An officer approaches and Aragon starts in. That's what occurred with respect to it.

Was he driving? Well he admitted to driving. Now, I guess nobody is calling him a liar. How soon was he driving? Three to four minutes before the officers got there. Three to four minutes, that's what he said. I was driving. Nobody's accusing him of lying. He was driving. There isn't any question about that, there's no evidence to tell you that he wasn't driving. (Trial Trans., 269).

Although the information filed in this case originally charged Defendant with two separate offenses; i.e., driving while intoxicated and having actual physical control of a vehicle while intoxicated. (R.I, 125). The prosecutor and the court subsequently agreed that actual physical control was not an issue in the case and that only driving was relevant. (Trial Trans., 209; R.I, 16, 20). Thus, in order for Defendant to be convicted

of driving under the influence it was necessary as stated in the jury instructions to find "beyond a reasonable doubt, all of the following elements of that offense: (1) that on or about the second day of April, 1989 Defendant drove a vehicle and (2) that at the time Defendant was under the influence of alcohol to a degree which rendered him incapable of safely driving a vehicle." (R.I, 20).

For purposes of this appeal, Defendant will concede that there was sufficient evidence in the opinion of the arresting officers that Defendant was intoxicated and was incapable of operating a vehicle. The sole issue of this appeal was whether there was sufficient evidence to show that the defendant was driving a vehicle at the time of such intoxication. As such, therefore, the statements made by the defendant were critical to establishing this element of the offense and it was prejudicial error to admit such statements for two distinct and separate reasons.

First, the statements given to the officers occurred at a time when Defendant was clearly in custody after having been arrested on disorderly conduct and at a time when a Miranda warning should have preceded any questioning of the defendant. Since no Miranda warning was given until much later at the police station any statement made by the defendant was inadmissible.

Second, at trial the prosecutor failed to establish by independent competent evidence that Defendant had driven the vehicle while intoxicated and the admission by Defendant is insufficient to establish the corpus delicti of a crime without

other competent corroborating evidence. Here there was none.

These two reasons for excluding Defendant's statements will now be addressed.

- A. Because Defendant Was Not Given the Miranda Warning as Required by the United States Supreme Court His Right of Federal and State Self-Incrimination Was Violated and any Statements Were Inadmissible at His Trial.

During the suppression hearing the lower court and defense attorney discussed the concept of requiring a Miranda warning in this case. The Court's subsequent denial of Defendant's motion for suppression was based upon this dialogue. The following statements occurred:

THE COURT: All right. You're not taking the position, I gather, that once a person is arrested for one offense, that they couldn't then arrest for another?

MR. LONG: No, if they had probable cause--

THE COURT: All right.

MR. LONG: --at the time of the arrest.

THE COURT: Well, they could investigate while that person is under arrest, the fact that that person may have committed another offense. The prosecution would have the right to do that, wouldn't they?

MR. LONG: Without Miranda warnings?

THE COURT: Well, investigate, yes. Without Miranda warnings, unless the nature of the investigation is such that it does require Miranda warnings.

MR. LONG: Well, I think absolutely it requires the Miranda warnings.

THE COURT: Well, it does, if they are going to interrogate in a custodial situation under the kinds of circumstances Miranda dictates.



MR. LONG: Well, I don't see how much more custodial you can get than to have handcuffs on and sitting in the back of a police car.

THE COURT: Well, you can get more custodial, Miranda talks about it. You can be isolated for a period of time from outside contact, you can be--feel that you are cut off from the world and so forth. He's sitting in the back seat of a car, his wife standing not far from there, I guess, and--but I'm not--you know--I'm not prepared to debate that at this time; but I'm just saying so far--you're not taking the position that they could not go ahead and investigate, aside from asking him questions without giving the Miranda warning, they could do any other kind of investigation they wanted, couldn't they?

MR. LONG: Well, in this particular case, she had no information at that time.

THE COURT: Well, my question isn't that. My question is, could they investigate?

MR. LONG: Well, I would respond by--by quoting the language from the Carner case in 1983, which is still the law in Utah. An accused must be apprised of his Miranda rights if the setting is custodial rather than investigatory. In other words, at the point environment become custodial or accusatory, all police questions must be prefaced with Miranda warnings.

THE COURT: Well, but aren't you between a rock and a hard place a little bit here? His custody is not related to the offense they are doing an investigation on; his custody is for disorderly conduct.

MR. LONG: So, if someone is being interrogated after being placed under arrest for being the Boston Strangler and he confesses to other crimes, that's all right?

THE COURT: Yeh, if they're not, they're interrogating him and under the intense interrogation that I think Miranda is directed to, if he confesses to an improper left turn, couldn't they charge him on that?

MR. LONG: Absolutely not. I mean, the language

is clear. It says all police questions, that includes his name, his address, and his social security number; all police questions. That's the language of the Supreme Court. (Suppression Hearing, pp. 72-75).

The lower court committed fundamental error in allowing these admissions to go before the jury. In 1966 the United States Supreme Court in the landmark case of Miranda v. Arizona, 384 U.S. 436 (1966) held that once a person was subject to "custodial interrogation" it was required that a police officer advise him of his constitutional rights including the right to remain silent before any further interrogation could occur. The court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444. Later, in California v. Behler, 463 U.S. 1121 (1983) (per curium) the court stated that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Id. at 1125. In a still later case the U.S. Supreme Court held that the test of custody is an objective one, i.e., that "the only relevant inquiry is how a reasonable man in the suspect position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

This Court in the recent case of State v. Sampson, 143 Utah Adv. Rep. 12 (Sept. 11, 1990) reviewed the federal and state cases concerning custodial interrogation. This Court stated:

The Utah Supreme Court has identified several key factors to consider in order to determine when a defendant who has not been formally arrested is in

custody. They are (1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation. Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983).

Another factor which we find pertinent to our analysis was recognized by our Oregon counterpart in State v. Herrera, 621 P.2d 1209 (Or. App. 1980). That factor is (5) whether the defendant came to the place of interrogation freely and willingly. Id. at 1212. 143 Utah Adv. Rep. at 15.

Thus, the law is crystal clear as to the requirement of a Miranda warning when a person has either been accused of a crime which results in a custodial interrogation or has in fact been arrested because he is charged with a crime. The Supreme Court in Berkemer, supra, specifically applied the Miranda requirement to cases involving traffic offenses. The Court stated "[a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda, regardless of the nature or severity of the offense of which he is suspected or for which he is charged." 468 U.S. at 439.

The court in Berkemer specifically applied Miranda warnings to traffic violations. It stated, "If a motorist who has been detained pursuant to a traffic stop thereafter is subject to treatment that renders him in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda. 468 U.S. at 440.

The officers in this case should have given Defendant a Miranda warning for two separate and distinct reasons. First, at the time he was arrested for disorderly conduct the warning clearly should have been given since he was handcuffed and placed

into custody. Second, at the time the investigation on drunk driving focused upon the accused based upon the questioning of the other witnesses Defendant should have been given the Miranda warning before being asked any statements concerning the circumstances then existing.

The question asked by Officer Lybbert concerning the defendant's alleged friend was directed to the defendant for the purpose of learning who had driven the automobile to the investigation scene based upon the statement of Mrs. Trujillo. Since it was essential for the officers to learn whether Defendant had driven the vehicle to the scene in an intoxicated condition such questioning regardless of how indirect requires the Miranda warning. Thus, even if he had not been previously arrested a Miranda warning would have been required. In this case, however, since he was clearly under custodial restraint there is no question but that the Miranda warning should have been given before any statements concerning any of the charges was obtained.

A number of cases from other jurisdictions support Defendant's contention that these statements should have been suppressed. In State v. Chapman, 724 S.W.2d 713 (Mo. App. 1987) an officer responded to a call that an accident had occurred on a rural road. Upon arriving the officer found a pickup truck had left the road and was twenty feet below in a creek bed. At the scene the officer determined that the defendant was intoxicated and placed him under arrest for driving while intoxicated. At no time was he given the Miranda warning.

Subsequently, he was asked a number of questions and the defendant established that he had been driving the pickup and that the accident occurred less than thirty minutes before the officer arrived at the scene. The defendant contended that the trial court erred in admitting the incriminating statements he made after he was arrested because he had not been given the Miranda warning. He raised the objection by a motion to suppress which was overruled and a similar motion at trial which was again overruled. In reversing the conviction the Court of Appeals stated, "It is held that the defendant's incriminating statements made after he was arrested and in the absence of a Miranda warning were inadmissible." Id. at 715.

In Tate v. Wells, 650 P.2d 117 (Or. App. 1982) a police officer noticed that a motorist was basically in a stupor while stopped at a semiphor. The officer approached the defendant's car and smelled alcohol on defendant's breath and asked the defendant to get out of his automobile and walk in front. The officer testified that while he was not absolutely certain that defendant was under the influence of an intoxicant that the defendant was not free to leave the scene. The officer questioned him about his use of alcohol and defendant answered several questions about the amount and time that the alcohol consumption had occurred. The district court denied defendant's motion to suppress the oral admissions made to the officer.

The Oregon Court of Appeals stated the following:

The trial court's refusal to suppress defendant's oral statements and admissions was error. State v. Roberti, 644 P.2d 1104, 646 P.2d 1341 (Or. 1982)....

[O]nce an officer has decided to arrest a person, it is necessary to warn the person of his right to remain silent. There was equivocal testimony in this case concerning the point at which the officer made that decision. However, the other historical facts, including that defendant appeared to the officer to have been in kind of a "stupor" permit no other conclusion than that defendant was not free to leave the scene and was in fact under arrest from the time the officer saw him walk to the front of his car. Statements made thereafter should, under Roberti, have been suppressed. Id. at 118-19.

In Commonwealth v. Meyer, 412 A.2d 517 (Tenn. 1980) a police officer while making a routine patrol came upon a car which was resting on a guardrail along the highway. The defendant was standing within a few feet of the motor vehicle at the time of the officer's arrival. The defendant asked the officer to call a wrecker to take the car off the guardrail but the officer did not call a tow truck and instead called another patrol car to assist him. The officer told the defendant he would have to wait at the scene until the state police arrived. He subsequently asked the defendant to wait in his patrol car. The officer waited until two state troopers arrived to investigate. The officer told the state troopers that he believed the defendant was under the influence of alcohol. The state troopers without administering Miranda warnings addressed the defendant and asked him what had happened. The defendant subsequently gave incriminating statements to the state trooper.

In ordering suppression of defendant's pre-arrest statement the lower court relied upon a Pennsylvania Supreme Court decision which stated that "Whenever an individual is questioned while in custody or while the object of an investigation of which he is

the focus, before any questioning begins the individual must be given the warnings established in Miranda." Commonwealth v. D'Nicuola, 292 A.2d 333 (1972) (emphasis in original).

The Supreme Court of Pennsylvania affirmed the lower court's determination that the state trooper's investigation had "focused" on defendant before he addressed him and asked "what happened" and therefore should have been given the Miranda warning before interrogation. In addition, since defendant clearly could not leave the scene of the accident he was held to be in actual custody or otherwise significantly deprived of his freedom requiring a Miranda warning to be given. 412 A.2d at 521.

Finally, in State v. Kingsbury, 460 A.2d 452 (Vt. 1983) a police officer noticed a truck weaving badly and stopped it on suspicion of driving under the influence of alcohol. After the stop the defendant was asked to perform several sobriety tests which he successfully accomplished. The officer then asked defendant about the load of lumber and where he had obtained it. Being suspicious, the officer detained the defendant at the scene until he could call the owner of a local lumber yard who had recently been robbed of a load of lumber. The court held that any statements made by the defendant prior to his formal arrest while waiting for the lumber yard owner to appear were not admissible at trial since the defendant was subject to custodial interrogation even though he was no longer being held on suspicion of drunk driving.

The preceding cases amply support Defendant's argument that

his statements concerning his driving of the vehicle and the time in which the vehicle was driven should not have been admissible at trial. Contrary to the lower court's reasoning, it is difficult to imagine a situation which would more demand the giving of the Miranda warning. Here, Defendant was arrested for disorderly conduct and placed in handcuffs in the back seat of a police vehicle. He was not given the Miranda warning at the time of this arrest. Compoundly, while clearly in an extreme custodial situation, the police officers began questioning him for the purpose of establishing his involvement with the vehicle for the purpose of charging him with still another crime.

It is also interesting to note two ancillary facts. Officer Lynch gave June Trujillo the Miranda warning even though he did not make any arrest of her when he believed that she was not truthfully telling him about the status of the automobile and Defendant. Obviously, the warning was being utilized to communicate to Mrs. Trujillo the seriousness of her statements and in an attempt to make her tell the officer the truth. It is strange that Officer Lynch at the time he arrested the defendant for disorderly conduct failed to give the same warning to the defendant.

Second, at the time Defendant was taken to the police station he was finally given the Miranda warning. At that point upon being asked whether he would answer questions of the officers he replied that he would not. Clearly, the Miranda warning impacted his conduct.

For these reasons, therefore, the statement of the defendant



admitted at trial should have been excluded and it was prejudicial error to allow such statements to go to the jury for consideration.

B. As a Separate and Alternative Ground, the Lower Court Should Not Have Admitted the Statement of the Defendant or Should Have Granted a Motion to Strike Such Statement Since the Prosecutor Did Not Prove the Corpus Delicti of the DUI Offense Absent the Defendant's Statements.

To establish the corpus delicti of a crime the state must prove, independent of any admissions made by the defendant, that the crime charged in the information was committed. State v. Knofler, 563 P.2d 175 (Utah 1977); State v. Anderson, 561 P.2d 240 (Utah 1977); State v. Erwin, 120 P.2d 285 (Utah 1941). Moreover, there must be independent, clear and convincing proof of the corpus delicti. State v. Weldon, 314 P.2d 353 (Utah 1957).

The policy behind these rules was stated by the Washington Court of Appeals in State v. Hamrick, 576 P.2d 912 (Wash. App. 1978). The reasoning why confessions and admissions cannot be used to establish the corpus delicti was stated by the court as follows:

This limitation on the use of admissions for purposes of the corpus delicti rule is widely accepted and is based upon the suspect nature of out-of-court concessions. Corroboration of the confession is required as a safeguard against the conviction of innocent persons through the use of a false confession of guilt. E. Cleary, McCormick's Handbook of the Law of Evidence, Chap. 14, Sec. 158 (2d Ed. 1972); R. Perkins, Criminal Law, Chap. 2, Sec. 1(G) (2d. Ed. 1969); 7 J. Wigmore, Evidence, Sec. 2071 (3d. Ed. 1940). See annotation, 40 A.L.R. 460 (1926).

Extensive safeguards on the use of confessions,

such as the doctrine of Miranda v. Arizona, 384 U.S. 436 (1966) are a recent development in the law. In view of the numerous safeguards against unreliable confessions which have developed since the corroboration rule, it has been questioned whether the corroboration rule still serves a useful purpose.... While we have some reservations about the need for the corpus delicti corroboration rule, such a requirement "does not seem unwise." E. Cleary, supra at 349.

In many instances the only witness to an encounter will be the police officer and the party whose admission is the only evidence that a criminal act occurred. Under these circumstances, it seems wise to adhere to the corpus delicti corroboration rule as a protection against potential police abuses. Id. at 913-14.

"[T]he corpus delicti of the offenses...may...be established by circumstantial as well as direct evidence...provided it is sufficient to exclude every other reasonable hypothesis save that of the guilt of the accused." Brown v. State, 405 S.E.2d 785 (Ga. 1958). As noted by one leading treatise, "In other words, it is not enough that circumstantial evidence only offer a reasonable basis for believing a defendant to be guilty. The circumstances of a case must also exclude every reasonable hypothesis of the facts except those consistent with a defendant's guilt. R. Erwin, Defense of Drunk Driving Cases, Sec. 1.01, pp. 1-23-24 (3d. Ed. 1990).

Applying these principles to the instant case shows the following. The prosecution clearly had sufficient evidence at trial to establish the corpus delicti of disorderly conduct and obstructing an officer based upon the observations and testimony of the three Layton City officers. The jury had sufficient evidence to conclude that Defendant was in fact intoxicated and

was acting in a disorderly and obstructing manner.

As to the third charge, however, of driving while intoxicated there was insufficient evidence. It was essential as acknowledged by Officer Beckett that the prosecution prove both that the defendant was intoxicated and that he was driving while intoxicated. In a dialogue between Defendant's attorney and Officer Beckett the following occurred:

Q. So, if there had been someone else who was sober and they said they had driven the car there, would you have arrested him for driving under the influence?

A. Not if they were not intoxicated.

Q. So, in other words, someone drinking and driving are the critical elements you need to put together to charge someone with a crime; is that right?

A. Of driving under the influence?

Q. Un huh.

A. They would need to be driving and they would need to be under the influence, yes.

Q. And they would have to be driving a car while they were under the influence, wouldn't they?

A. They would have to have been under the influence while they were driving or driving while under the influence.

Q. And were you ever able to ascertain through any independent sources, other than Mr. Aragon, when he arrived?

A. Not a definite time, no.

Q. Did anyone establish that, to your knowledge?

A. Not that I know of.

Q. So if someone was there who was sober and said they had driven there, you wouldn't arrest him; but if there was someone there who had been

intoxicated you would have arrested them for drunk driving?

- A. It would have depended on the circumstances.
- Q. Wouldn't you have to know when they drove there and whether they were intoxicated when they drove there?
- A. We would have to have had some kind of a time frame. (Trial Trans., pp. 219-20).

Thus, it is evident that to establish the corpus delicti of driving under the influence it was necessary for the prosecution not only to prove that the defendant had driven the car to the location of his wife but that he had actually been intoxicated at the time he drove it. In other words, if he had driven the automobile to the house and became intoxicated while he was there he clearly could not be charged with driving while intoxicated. As noted by Professor Erwin, supra,

If, for example, the defendant is the only victim of and witness to a one-car collision, the fact that he was driving at the time of the accident, or intoxicated when the first witnesses arrived on the scene, or when he took a chemical test will not suffice to convict him. Instead, the prosecution must prove by direct or circumstantial evidence that the defendant's intoxicated condition occurred at the same time that he was driving. Otherwise, the evidence would be insufficient for a conviction for driving while under the influence since there was no way of knowing when the accident occurred, when the police arrived, or what happened between the time of the arrest and the time of the accident. See, Erwin, supra, Sec. 1.04, p. 1-76. (Emphasis added).

A number of other cases from different jurisdictions support Defendant's contention. In State v. Friesen, 725 S.W.2d 638 (Mo. App. 1987) the defendant was driving with a friend when their pickup truck became stuck in a culvert. The two men got out of the truck to assess the situation and five minutes later

flagged down a highway patrol trooper. The trooper testified that when the defendant approached him he stated, "I overshot the driveway" thereby implying that he had been the driver when it went into the ditch. The trooper stated, however, that at no time did he see the defendant or his friend driving or seated in the truck. He then asked the defendant if he had been drinking and after receiving an affirmative reply arrested him and took him into custody where a breath analyzer test was given.

The Missouri Court of Appeals noted the following:

The corpus delicti of the offense with which defendant was charged required that someone operated a motor vehicle while in an intoxicated or drugged condition. The record before us establishes that the defendant was intoxicated but does not show, either by direct or circumstantial evidence, that he or anyone else operated the truck while under the influence. Indeed the only evidence of the corpus delicti is the defendant's statement to Trooper Townsend "I overshot the driveway" bringing the facts squarely within the rule of Kansas City v. Verstraete, 481 S.W.2d 615 (Mo. App. 1972). [In Verstraete the court held that a defendant's statement that "he did not think he struck anything" was inadmissible since there was no other evidence other than defendant's admission to show that he had been driving the car.]

In this case, the state's burden of establishing the corpus delicti was made more difficult by the presence of Arnold LeFever at the scene. Obviously, he may have been the driver, but that possibility was not eliminated by the on-the-scene questioning of LeFever by either Trooper Townsend or Deputy Buscher. Their testimony did not show that LeFever was not the driver.

The corpus delicti cannot be presumed. The state has the burden to prove the corpus delicti by legal evidence sufficient to show that the crime charged has been committed by someone. The state has failed to meet the burden of proving the corpus delicti in this case. Id. at 640.

In State v. Hamrick, 576 P.2d 912 (Wash. App. 1978) an

investigating officer arrived at an accident scene and found a pickup truck in a ditch south of a road and a car 200 feet west of the pickup. Both vehicles were damaged and skid marks led to the car. The officer testified that upon being interrogated the defendant admitted he had been driving the car even though there was an occupant in the car at the time. A second trooper also testified he had admitted driving the car.

The lower court dismissed the charge because it refused to admit the admission of the defendant concerning his driving. The appellate court affirmed and stated:

Exclusive of defendant's admissions, the state's evidence establishes only that defendant was present when the officer arrived at the scene of the accident. There is no independent evidence of inference connecting defendant with control of the car. We do not have the slight evidence necessary to logically and reasonably deduct that defendant was driving the car. Because there is not sufficient independent evidence to allow consideration of defendant's admissions, the state failed to establish the corpus delicti and the trial court properly dismissed the matter. Id. at 914.

In summary, while the state proved that defendant was intoxicated at the scene of the confrontation it did not prove, absent his admissions, that he was in fact the driver of the car and that when he did drive the car he was in the same state of intoxication as he was when the police officers arrived. Thus, in addition to excluding the admission under the Miranda rule the court should have excluded it under the corpus delicti rule.

#### POINT II

WITHOUT THE ADMISSIONS BY THE DEFENDANT AS TO HIS DRIVING OF THE AUTOMOBILE AND THE TIME THE AUTOMOBILE WAS DRIVEN, THE STATE PRODUCED INSUFFICIENT EVIDENCE TO

ALLOW THE MATTER TO GO TO THE JURY ON  
CHARGES OF DRIVING UNDER THE INFLUENCE  
AND THE LOWER COURT SHOULD THEREFORE HAVE  
DISMISSED THIS CHARGE AGAINST THE DEFENDANT.

Defendant was originally charged with operating and being in actual physical control of a vehicle while intoxicated. As this Court recently held in Richfield City v. Walker, 131 Utah Adv. Rep. 37, 41 (Utah Adv. 1990) statutes similar to this actually described two distinct offenses namely; operating a motor vehicle and being in actual physical control of a motor vehicle. At trial, the state submitted the case solely upon defendant's driving of the vehicle.

Assuming that Defendant's admission as to driving and time is excluded then the record shows there is insufficient evidence for a conviction. Absent this testimony the only competent evidence remaining is the following: (1) the officers observed a motor vehicle sitting in a driveway with its lights on and the motor running; (2) the motor vehicle was registered in the name of Defendant; (3) Defendant was found in an intoxicated condition several feet away from the vehicle while standing there with his wife. The prosecutor failed to produce any evidence which showed that the defendant had driven the car to the scene, or that if he did he was in a state of intoxication at that time. In addition, there was evidence which created ambiguity such as the fact that defendant's wife was standing next to the automobile at the time the officers arrived, that there were several other individuals immediately near the automobile, and that the automobile was ultimately turned off by Mrs. Trujillo and that an empty bottle

of beer and a full bottle of beer were found in the car.

Defendant would refer this Court to State v. Willson, 534 S.2d 55 (La. App. 1988) as a prime example of insufficiency established by the state as to an element of the prima facie case. In that case, two deputies received a report of an accident and upon arriving at the scene observed a pickup truck off the roadway and stuck in the mud. The officers were informed by a prior officer who had arrived at the scene earlier that the truck was owned by the defendant. The defendant verified he owned the vehicle and admitted driving the vehicle to the scene but did not specify when he had last operated it. Defendant was not observed operating the vehicle by any of the police officers nor was he in the vehicle when the initial police officers arrived. A half-consumed pint bottle of whiskey was found in the bed of the truck. The Court of Appeals of Louisiana dismissed the prosecution on the basis that no evidence was presented by the state to suggest how long the vehicle was off the road and to show that he was intoxicated at the time he drove it. "The circumstantial evidence fails to exclude or negate every reasonable hypothesis of innocence as required by law." Id. at 58.

In a similar type of case, State v. Rutan, 448 S.2d 267 (La. App. 1984) the owner of a lounge called police to report an accident in the lot of his lounge. An undetermined amount of time later, the investigating officer discovered the defendant asleep at the controls of his vehicle. The vehicle was damaged, the engine was not operating, and the defendant was admittedly



intoxicated. In reversing the conviction, the Court of Appeals emphasized that the state had presented no evidence to suggest defendant had actually operated the vehicle. Furthermore, because there was no testimony as to how long after the accident the arrest was made, it might just as well be presumed that defendant while parked at the lounge never operated the vehicle while in an intoxicated state. See also, State v. Lindinger, 357 S.2d 500 (La. 1978); State v. Phinney, 467 S.2d 1188 (La. App. 1984).

In State v. Chapman, supra, the Missouri Court of Appeals after holding that defendant's admissions were improperly admitted found the evidence insufficient to support the conviction. The court stated:

The defendant's ownership of the pickup does not preclude a reasonable hypothesis that another, perhaps one of the Bests, had been driving the pickup. The defendant also points out properly admitted evidence does not establish the time the pickup was being driven. The insufficiency of the evidence in this respect is critically analyzed in State v. Liebhart, 707 S.W.2d 427 (Mo. App. 1986). For these reasons, defendant's contention the properly admitted evidence was insufficient to support the conviction has merit. cf. State v. Phinney, 460 S.2d 1188 (La. App. 1984). Id. at 716.

Similarly, in State v. Friesen, supra, once the erroneous admission of the defendant had been excluded as competent evidence the Court of Appeals held that the state had failed to meet its burden of legally sufficient evidence and reversed defendant's conviction. 725 S.W.2d at 640.

Thus, there was insufficient evidence available to the jury for it to conclude pursuant to Jury Instruction 9 that (1) on or

about the 2nd day of April, 1989 Defendant drove a vehicle and (2) that at the time Defendant was under the influence of alcohol to a degree which rendered him incapable of safely driving a vehicle. (R.I., 20). While the state, for purposes of this appeal, proved Defendant was intoxicated it did not prove that he was driving while intoxicated and therefore he was not guilty of the offense of "driving a motor vehicle while under the influence of alcohol." (Jury Instruction 3) (R.I., 16).

Parenthetically, it might be noted that even had the prosecutor and lower court submitted the matter to the jury on "actual physical control" under the other provisions of the statute that the evidence of Defendant's location some two or three feet from the parked vehicle would also be insufficient to establish a violation. See, Dearden v. State, 430 P.2d 844 (Okla. App. 1967); Schram v. District of Columbia, 485 A.2d 623 (D.C. App. 1984); and Overbee v. Commonwealth, 315 S.E.2d 242 (Va. 1984).

#### CONCLUSION

The lower court clearly erred in allowing the jury to consider the statement of the defendant after he had been placed in custody, handcuffed, and restrained in a police car. Clearly established federal constitutional law mandated that he be given the Miranda warning prior to any statements no matter how innocent the state now claims such statements may be. In addition, a second ground for suppression of these statements is based upon the corpus delicti rule which again has been formulated to protect criminal defendants from wrongful police

interrogation.

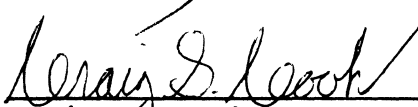
As this Court recognized in State v. Sampson, supra, that while the results in particular cases may be unwelcome, "The Fifth Amendment exclusionary rule is clearly dictated by the constitution and is the only possible means of protecting the value underlying the privilege against self incrimination." 143 Utah Adv. Rep. at 18.

The crime of driving under the influence carries a severe penalty to a convicted defendant by the loss of his driver's license for a sustained period of time. Thus, the burden upon the state to prove all of the necessary elements of this case must be strictly monitored in order to prevent convictions on improper inferences or illegally obtained evidence.

For these reasons the conviction of the defendant as to the driving under the influence of alcohol charge must be vacated.

Respectfully submitted,

  
Larry Long

  
Craig S. Cook  
Attorneys for Defendant-  
Appellant

#### MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Appellant to Paul Van Dam, Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114

this \_\_\_\_\_ day of November, 1990.

*L. Long*

## **ADDENDUM**

## INDEX

"Memorandum of Decision" dated October 27, 1989

"Memorandum of Decision" in Aragon v. Schwendiman

"Memorandum of Decision" dated February 7, 1990

SECOND CIRCUIT COURT, STATE OF UTAH

Davis County, Layton Department

MEMORANDUM OF DECISION

LAYTON CITY  
Plaintiff,

vs.

FRANK R. ARAGON  
Defendant

No. 892001620

Date 2-7-90

Judge Bean

MATTER: RULING ON DEFENDANT'S MOTION TO RECONSIDER

After argument on the motion, the Court took it under advisement.

1. Defendant focuses on "actual physical control" as that phrase is ordinarily used in DUI cases, but that is not the basis for the prosecution's claim of probable cause to arrest. What the prosecution is saying is that there was circumstantial evidence from which Officer Beckett could reasonably conclude that defendant had driven to the location where he was found, and that he was in the same condition when driving as when observed by the officers.

2. Having reconsidered defendant's motion and the Court's earlier ruling on it, the Court finds no basis for changing the prior ruling and therefore reaffirms it.

  
Judge

UCF 13 1989

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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FRANK R. ARAGON,	:	MEMORANDUM DECISION
Petitioner,	:	CIVIL NO. 890903616
vs.	:	
FRED C. SCHWENDIMAN,	:	
Director Driver License	:	
Services, State of Utah,	:	
Respondents.	:	

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This case was tried on the 21 day of September, 1989.  
The petitioner was present and represented by L. Long, and the  
respondent was represented by Richard D. Wyss.

The Court heard the testimony of witnesses, admitted  
documentary evidence, read the Memoranda submitted, and heard  
oral argument. The Court took the matter under advisement.

The Court being fully advised in the premises, makes its  
ruling.

The Court finds that petitioner was placed under arrest for  
being a disorderly person, and subsequent thereto for driving  
under the influence.

The arrest for driving under the influence was based upon  
the police officer's observations of the petitioner's conduct,



the smell of alcohol on his breath, and that he was standing next to a motor vehicle parked on petitioner's driveway with the motor running. The officer had not observed any driving violation on the part of the petitioner that could have given the officer cause for stopping the petitioner.

The Court concludes that the arresting officer did not have probable cause to arrest the petitioner for driving under the influence at the time the arrest was made. The officers could not establish at the time of the arrest that the petitioner was in actual physical control over the vehicle. Subsequent to the arrest, the officer may have obtained sufficient information after the arrest to warrant arresting petitioner, but the critical time is at the time of the arrest.

Since the officer did not have probable cause to make the arrest, the petitioner would not be required to submit to a blood/alcohol test; therefore his license should not be revoked for failing to submit to an intoxilyzer test.

Dated this 12 day of October, 1989.

  
\_\_\_\_\_  
JOHN A. ROKICH  
DISTRICT COURT JUDGE

SECOND CIRCUIT COURT, STATE OF UTAH

Davis County, Layton Department

MEMORANDUM OF DECISION

LAYTON CITY

Plaintiff,

vs.

FRANK R. ARAGON

Defendant

No. 892001620

Date 10-27-89

Judge Bean

MATTER: DECISION ON DEFENDANT'S MOTION

The Court took this matter under advisement so that applicable statutes, court decisions and text authorities could be reviewed. That having been done, the Court now finds and concludes:

1. On 5-2-89, defendant filed his motion to dismiss and notice of hearing. The basis for the dismissal, set forth in the motion, was that "there is no evidence in the case legally sufficient to entitle prosecution to a conviction against defendant herein." It was heard 5-15-89 by Judge Heffernan, and denied.
2. The clerk set a pretrial, it was continued, and at the later date defense counsel moved to suppress evidence. However, no written motion to suppress was filed. Hearing was had and testimony taken. This judge doesn't know what was argued to Judge Heffernan, but has proceeded and is proceeding on the assumption, acquiesced in by counsel, that this is a separate motion based on different grounds.
3. The testimony of officers Beckett and Lynch showed that:
  - a. The officers were dispatched to a family fight and given information that Frank Aragon was beating his wife and was about to leave in a black Monte Carlo.
  - b. When officer Lynch arrived at the location, defendant was standing next to and leaning on a black Monte Carlo, parked in the driveway. There were other persons at the location.
  - c. The car's lights were on and the engine was running.

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- d. Defendant was the registered owner of the car.
- e. Rose Aragon told the officers defendant drove there.
- f. Niki Trujillo told them defendant drove there.
- g. Defendant told them he drove there.
- h. There was an absence of evidence anyone else had driven the car there.
- i. There was an absence of evidence defendant had arrived there by any other means.

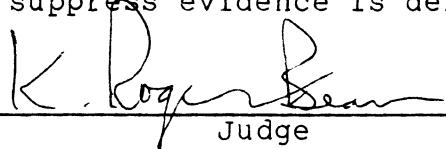
4. Utah code sec. 41-6-44(8) says:

A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

5. At the hearing on the motion, defense counsel took the position that defendant hadn't been advised of his rights before he was asked whether he'd been driving the car, and therefore his answer was not admissible in evidence, and without it the prosecution could not establish the corpus delicti, and therefore the case should be dismissed. This judge must assume that is the question passed on by Judge Heffernan, but if this judge were to consider it now, the motion would be denied. Under the Utah decisions on corpus delicti, defendant's statement would be admissible at trial, but even if it weren't, Officer Beckett was permitted to consider it to establish probable cause for an arrest for driving under the influence of alcohol. 5 Am Jur 2d, Arrest, secs. 44, 48.

5. The Court finds and concludes that officer Beckett, having the information set forth in paragraph 3 above, and the authority granted in sec. 41-6-44(8), had ample probable cause to place defendant under arrest for driving under the influence of alcohol. In fact, she had probable cause without considering defendant's statement. Layton City v. Noon, 736 P.2d 1035, (1987). Schmerber v. California, 384 US 757, 16 L Ed 2d 908, 86 S Ct 1826, (1966).

Accordingly, defendant's motion to suppress evidence is denied.

  
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Judge