

1958

State of Utah v. Levert Twitchell : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

LEVERT TWITCHELL,
Defendant and Appellant.

Case No.
8810

BRIEF OF RESPONDENT

FILED

DEC 28 1958

Clk, Supreme Court, Utah

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ARROW PRESS, SALT LAKE

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In the
Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

LEVERT TWITCHELL,
Defendant and Appellant.

} Case No.
8810

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Defendant, Levert Twitchell, was convicted on November 5, 1957, of a violation of Section 76-30-7.4, U. C. A. 1953, as amended by Chapter 165, Laws of Utah 1957, titled "Automobile Homicide." The evidence adduced at trial revealed that on the night of June 5, 1957, the defendant was the operator of an automobile involved in a two car head-on collision occurring in Salt Lake County, Utah. As a result of injuries suffered in that collision, a passenger of the other car, one Shirley Gillies, died on June 14, 1957.

This appeal is primarily an attack on the constitutionality of the above statute.

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR IN REFUSING TO HOLD THE STATUTE, SECTION 76-30-7.4, U. C. A. 1953, AS AMENDED, UNDER WHICH THE DEFENDANT WAS CONVICTED, UNCONSTITUTIONAL.

POINT II.

IT WAS NOT ERROR FOR THE COURT TO ADMIT INTO EVIDENCE THE RESULTS OF A BLOOD TEST TAKEN FROM THE DEFENDANT.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN REFUSING TO HOLD THE STATUTE, SECTION 76-30-7.4, U. C. A. 1953, AS AMENDED, UNDER WHICH THE DEFENDANT WAS CONVICTED, UNCONSTITUTIONAL.

Section 76-30-7.4, U. C. A. 1953, as amended by Chapter 165, Laws of Utah 1957, titled "Automobile Homicide", the statute under which defendant was convicted, provides as follows:

"Any person, while under the influence of intoxicating liquor or narcotic drugs, or who is under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle, who causes the death of another by operating or driving any automobile, motorcycle or other motor

vehicle in a reckless, negligent or careless manner, or with a wanton or reckless disregard of human life or safety, shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the state penitentiary for a period of not less than one year nor more than ten years. A death under this section, is one which occurs as a proximate result of the accident within a year and a day, after the day of the accident."

This statute was enacted by the 1957 session of the Utah Legislature and has not yet been subject to judicial review by this Court. It was patterned after a similar Colorado statute. See Section 40-2-10, Colorado Revised Statutes, 1953, discussed below.

Appellant has grouped a number of arguments under title of Point I in his brief. We shall deal with them individually and in the order there presented.

Appellant asserts that the statute makes a felon of a convicted drunken driver, who by *mere chance* happens to, without intention, fatally injure another. The argument is not grounded on a correct analysis of the law. Examination of the statute reveals four elements all of which must be satisfied before a conviction may be had. Those elements might be broken down as follows:

(1) Under the influence of intoxicating liquor ;

or

narcotic drugs ;

or

under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle.

- (2) Who causes the death of another.
- (3) By operating or driving any auto, motor-cycle or other motor vehicle.
- (4) In a reckless
or
negligent
or
careless manner;
or
with wanton or reckless disregard of
human life or safety.

Thus a person may not be convicted on the basis of a killing by mere chance; rather, it must be proven that the operation of the vehicle was reckless, negligent, careless or with a wanton or reckless disregard of human life or safety.

Appellant maintains that the statute amounts to special legislation forbidden by Article VI, Section 26 of the Utah Constitution. In the case of *State v. Kallas* (1939 Utah), 94 P. 2d 414, this Court defined general and special laws.

“Constitutional law—what are general laws. Laws which apply to and operate uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to themselves in the matters covered by the laws in question, are general and not special. (See 25 R. C. L. 814.)

“Definition—special and local law. Special legislation is such as relates either to particular persons, places, or things, or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applied, * * *.”

The Legislature may, without violating the constitutional inhibition against special legislation, make classifications so long as those classifications are reasonable. In *Lyte v. District Court of Salt Lake County* (1936 Utah), 62 P. 2d 1117, this Court said:

“The true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason,—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggest the necessity of propriety of different legislation with respect to them.” *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800, 802.

In the *Kallas* case, *supra*, counsel there took a position very similar to the one urged by appellant here. The statute under attack was one making it an indictable misdemeanor to maintain an establishment where alcoholic beverages were sold illegally, defining the violation as a nuisance. See Section 195 of Chapter 49, Laws of Utah 1937. Counsel there argued that since there was already on the statute books an offense titled a nuisance punishable as a misdemeanor, the Legislature had enacted special legislation to stigmatize the same act [meaning “nuisance”] with two distinct penalties, one a misdemeanor and the other an indictable misdemeanor, leaving to the whim or caprice of the pleador the procedure or practice to be followed in two similar cases. The Court rejected the argument holding that the legislation was general.

Appellant asserts that the automobile homicide law is a special law because it makes no distinction between those persons left in a class who may be guilty of involuntary manslaughter and those who may be guilty of automobile

homicide, making no distinction in the offensive act itself and leaving the method of classification to the whim and caprice of a prosecutor who may prosecute A for a felony and B for a misdemeanor when both can be guilty of exactly the same criminal act. See Page 9 of Appellant's brief. Such is not the case. Section 76-30-5, U. C. A. 1953, providing for the offense of involuntary manslaughter, and the offense under consideration here, are separate and distinct offenses. In certain cases it might be that a person guilty of violating the automobile homicide statute could have been convicted of involuntary manslaughter (but this is not certain because of the degree of negligence required under each offense). The converse, however, is certainly not true. The automobile homicide statute is a felony offense while involuntary manslaughter is a misdemeanor, and for conviction under the former, elements not required for conviction under the latter must be shown, viz., no one may be convicted of automobile homicide unless, first, death results out of the operation of a motor vehicle and, second, the person so operating the vehicle was intoxicated or under the influence of drugs. Death due to the reckless conduct of another, but absent the above two elements, could not be the basis of a prosecution under this statute. If it can be said that the statute classifies those persons who drive when under the influence of alcohol or other drugs, then it is submitted that such classification is reasonable under the circumstances.

Appellant's next argument within Point I asserts that the statute is violative of Article VI, Section 23 of the Utah Constitution, which provides:

"Except general appropriation bills, and bills for the codification and general revision of laws, no

bill shall be passed containing more than one subject, which shall be clearly expressed in its title."

It is urged that there are two subjects contained in the statute, the first, driving under the influence of alcohol, and the second, driving under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle and, furthermore, that the title of the statute mentions only the former.

This Court has on numerous occasions considered and construed Article VI, Section 23 and has expressed itself reluctant to declare acts unconstitutional on the ground that the subject is not sufficiently expressed or indicated in the title. *Naylor v. Crabbe* (1915 Utah), 148 P. 359. The Court has also said that this constitutional section should be applied liberally in favor of upholding the law, and that too strict an application might result in hampering wholesome legislation. *Salt Lake City v. Wilson* (1915 Utah), 148 P. 1104. The purpose of the constitutional provision was described by this Court in *State v. Kallas*, cited supra.

"The constitutional provision is for a practical purpose and it is not a technical restriction on the legislature. That practical purpose is to inform the legislature and the public what legislation is proposed, and a title is sufficient that will lead to an inquiry into the body of the act to ascertain changes proposed in the original and existing law."

Furthermore, a title was never intended to be an index to a law. If the title in its broad and popular and not in its technical and restricted sense gives the "general subject" of the enacted legislation, it is sufficient. *State v. McCorn-*

ish (1921 Utah), 201 P. 637. It was further said in *Martineau v. Crabbe* (1915 Utah), 150 P. 301:

“* * * Manifestly the purpose of this provision of the Constitution is to prevent the Legislature from intermingling in one act two or more separate and distinct propositions—things which, in a legal sense, have no connection with, or proper relation to, each other. The reasons for, and the scope of, constitutional provisions of this character, are well illustrated in 26 A. & E. Ency. L. (2d Ed.) 575, in the following language:

“ ‘This requirement of singleness is not intended to embarrass honest legislation, but only to prevent the vicious practice of joining in one act incongruous and unrelated matters; and if all the parts of a statute have a natural connection and reasonably relate, directly or indirectly to one general and legitimate subject of legislation, the act is not open to the objection of plurality, no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose.’ ”

Analysis of the statute does not reveal a violation of the above constitutional prohibition. The statute is directed against those individuals causing death through the operation of a motor vehicle who, while so operating, are under the influence of liquor, narcotic drugs or other drugs. These are not “separate and distinct propositions” nor are they “incongruous and unrelated matters.” They all pertain and are directed against the inherent danger arising when a person operates a motor vehicle when his physical faculties are impaired by a form of stimulant. An essential element of the crime is that the person be “under the influence of” (a) intoxicating liquor, (b) narcotic drugs or (c) any

other drug to a degree which renders him incapable of safely driving a vehicle. These factors are clearly related.

The title of the statute is found in Chapter 165, Laws of Utah 1957. It is quoted on page 10 of appellant's brief. It does omit mention of being under the influence of a drug; however, it does mention "driving a vehicle under the influence of alcohol" and "operation of a motor vehicle while intoxicated." The omission from the title is not significant. The substance of the statute, reasonably explained in the title, is that it seeks to prevent a person from operating a motor vehicle who has taken substances into his body which have impaired his physical faculties. The title explains the general subject sufficiently to inform the Legislature and the public of what legislation is proposed. Under the legal standards as quoted from the decisions above, it is submitted that there is but one subject to the statute and that is stated clearly in the title.

Counsel also objects that the phrase "any other drug" would include such drugs as antihistamines, sleeping pills and tranquillizers. It is noted, however, that the statute in that instance requires a more comprehensive showing of physical impairment by providing that a person using "any other drug" shall not be deemed guilty unless he is shown to be under the influence of the drug to the extent that he is "incapable of safely driving a vehicle."

On page 12 of appellant's brief it is urged that the statute is void because it violates Article I, Section 7 of the State Constitution in that the statute fails to require an intent to kill another, depriving defendant of a defense

and thereby violating due process. The Legislature has power to create a statutory offense and to establish the elements thereof, and it is not essential as a matter of law that an intent to kill be an element.

We are aware of no constitutional provision or common law right requiring that a penal statute, as the one here, to be valid, provide as an element proof of an intent to kill. Nor do we see how due process is violated thereby. Certainly the intent required in first degree murder prosecutions is of a different quality and nature than that required in second degree murder or voluntary manslaughter prosecutions. Appellant concedes that under the felony murder rule a person may be convicted of murder although there need be no showing of intent to kill, as where death occurs in the commission of certain felonies, e. g. arson, burglary and rape. It has long been a foundation of the criminal law that to constitute a criminal act there must be present two elements; an act and an intent. The intent may be a general one and here the Legislature did not see fit to require a showing of a specific intent. All that need be shown is that accused voluntarily did the acts which constitute the offense. The following statement quoted from Burdick, Law of Crime, Vol. 1, Sec. 113, is pertinent to this issue:

“In criminal law, ‘intent’ means a state of mind which willingly consents to the act that is done, or free will, choice, or volition in the doing of an act. It means that the act is voluntary, that it proceeds from a mind free to act in distinction from an act done without mental capacity to understand its nature, or under circumstances which sufficiently show that it was the result of involuntary forces and against the will.

“* * *

“Much misunderstanding has undoubtedly arisen by confusing the objective of this mental element of intent. It is not necessarily an intent to break the law, although such an intent is often present, because one may be entirely ignorant that the act he is doing is a violation of law, nevertheless his ignorance of the law is no excuse. It is not necessarily an intent to do anything wrong, or even immoral, but an intent to do the act.

“The intent to do what is done imports a criminal intent if the act is criminal. One who would not intentionally do what he believed to be wrong may commit an act that is punishable by law, and if his act is voluntarily done, the intent to do the act is present, and it constitutes a criminal intent.”

* * *

Appellant asserts that this statute, when considered together with the involuntary manslaughter statute, Section 76-30-5, U. C. A. 1953, is unconstitutional as violating the provisions of Article I, Section 2, in that it does not afford equal protection to all (see page 12 of appellant's brief), and further, that it violates Article I, Section 12 in that it puts the person twice in jeopardy for the same offense, to-wit: automobile homicide and involuntary manslaughter. As discussed above, these two offenses are separate and distinct; they have different elements. It might be the case under some circumstances that involuntary manslaughter would be a lesser included offense of automobile homicide, but on that basis appellant's argument would apply with the same strength to other offenses when considered together. Rape would include an assault and battery as would murder or manslaughter.

One of the primary purposes for the enactment of penal laws is their deterrent effect. The number of deaths resulting from motor vehicle collisions has been a matter of great public concern. It is likewise of concern that upon analysis the cause of a large percentage of such collisions may be attributed to the intoxication or doped condition of a driver. Presumably the Legislature, in enacting the "automobile homicide" law, had in mind the dangers inherent when a motor vehicle is operated on a public way by an intoxicated person. It is a matter of common knowledge that an individual's physical reaction is slowed, his judgment of speed and distance affected, and his general physical faculties impaired when he is intoxicated or under the influence of certain stimulants.

It is noteworthy that legislation of this nature is not original in this state. Colorado, as stated above, has a similar law. It provides:

"Driving under influence—death. Any person while under the influence of intoxicating liquor or of any exhilarating or stupefying drug, who causes the death of another by operating or driving any automobile, motorcycle or other motor vehicle in a reckless, negligent or careless manner, or with a wanton or reckless disregard of human life or safety, shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the state penitentiary for a period of not less than one year nor more than fourteen years."

Section 40-2-10, Colorado Revised Statutes, 1953. This measure was enacted by the Colorado Legislature in 1923. There are in the Colorado Code Annotated seven Colorado Supreme Court cases concerning appeals from convictions

under the above statute. Florida has a similar law. Chapter 860.01, Florida Statutes, 1957, provides:

“* * * If, however, damage to property or person of another, other than damage resulting in death of any person, is done by said intoxicated person under the influence of intoxicating liquor to such extent as to deprive him of full possession of his normal faculties, by reason of the operation of any of said vehicles mentioned herein, he shall upon conviction be fined not more than five hundred dollars, and also be imprisoned not less than three months nor more than twelve months, and if the death of any human being be caused by the operation of a motor vehicle by any person while intoxicated, such person shall be deemed guilty of manslaughter, and on conviction be punished as provided by existing law relating to manslaughter.” * * *

The Florida manslaughter statute provides for penalties of not to exceed 20 years in the state prison or of not to exceed one year in the county jail.

In *Barrington v. State* (1940 Fla.), 199 So. 320, a conviction was upheld by the Supreme Court of Florida where the defendant had been convicted of having effected the death of another person while intoxicated and while operating a motor vehicle in violation of the above quoted penal statute. The constitutionality of the statute was not attacked. The Florida court did say:

“* * * the purpose of such statutes is obvious, namely, to safeguard motorists and protect them particularly from those who venture forth on the highways in automobiles while at the time not having full possession of their faculties due to the over-indulgence of intoxicating liquors, * * *.”

It is noted that unlike the Utah statute, the Florida law does not require a finding of negligence or carelessness. See Chapter 782.07, Florida Statutes, 1957. A Texas statute, Article 802c, Vernon's Penal Code, provides:

“Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this state, or upon any street or alley or any other place within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, and while so driving and operating such automobile * * * shall through accident or mistake do another act which if voluntarily done would be a felony, shall receive the punishment affixed to the felony actually committed.”

The Texas statute does not require a finding of carelessness or negligence. Prosecutions under the above statute are termed murder without malice. See *McKinnon v. State* (1953 Tex.), 261 S. W. 2d 335. There have been a number of appellate decisions in the state of Texas concerning the above statute. In *Ruedas v. State*, 158 S. W. 2d 500, it was held that the above statute was not unconstitutional as embracing more than one subject. In *Brandon v. State*, 176 S. W. 2d 323, it was held that the statute was not invalid on the ground of indefiniteness. See also *Flowers v. State* (1947 Tex.), 202 S. W. 2d 462; *McCarthy v. State*, 218 S. W. 2d 190, and *Simmons v. State* (1943 Tex.), 169 S. W. 2d 171.

POINT II.

IT WAS NOT ERROR FOR THE COURT TO ADMIT INTO EVIDENCE THE RESULTS OF A BLOOD TEST TAKEN FROM THE DEFENDANT.

In Point II of appellant's brief it is contended that the admission into evidence of the results of a blood test taken from defendant when he was unconscious was a violation of Article I, Section 12 of the Utah Constitution, in that it compelled defendant to testify against himself.

The factual basis of this point is that defendant was unconscious at the time the blood sample was taken from him, but the transcript reveals contrary evidence. The witness, Doctor Parkinson, who took the blood testified that the defendant was conscious, that he was sitting in a chair and was able to talk, and that he offered no resistance to the procedure. See Transcript p. 114. Another witness, Dr. Heusinkveld, testified that the defendant signed a statement granting permission to take the blood, see Transcript, pages 94 to 97. Even if the admission of the blood test were error it is submitted that there was sufficient evidence that defendant was under the influence of liquor. A bartender testified that the defendant was intoxicated just prior to the time of the accident, Transcript p. 81. Two of the physicians who examined the defendant shortly after the collision testified that in their opinion he was clinically intoxicated. See Transcript, pages 94 and 114.

In response to appellant's contention, it is submitted that even assuming the defendant was unconscious at the

time of the examination it was not error to admit the blood test evidence.

The general rule and the better reasoned authorities conclude that the privilege against self-incrimination should not be construed to apply to evidence derived from physical analysis or examination, but that the purpose of the privilege is to protect persons from convicting themselves through their own testimony. It has been generally held that the privilege against self-incrimination was not violated by the reception of evidence of blood tests. *People v. Tucker*, (1948 Calif.), 198 P. 2d 941; *Block v. People* (1951 Colo.), 240 P. 2d 512; *State v. Ayres* (1949 Idaho), 211 P. 2d 142; *State v. Sturtevant* (1950 New. Hamp.), 70 A. 2d 909, and *State v. Cram* (1945 Ore.), 160 P. 2d 283. The same ruling has been applied in cases involving the admission of evidence derived from urine analysis for alcohol in drunken driving prosecutions. Also, requiring a person to exhibit scars on his body to the jury has been held to be no violation of the right, *State v. Oschoa* (Nev.), 242 P. 582, and the same rule has been applied to fingerprinting. *United States v. Kelly* (2d Cir.), 55 F. 2d 67.

In an Oregon conviction similar to the one at bar, *State v. Cram*, cited supra, a manslaughter prosecution based on death occurring as a result of an automobile accident, the Oregon Supreme Court held that the admission of testimony concerning alcoholic contents of a blood sample compulsorily taken from a driver following an accident, when he was unconscious, was not a violation of defendant's constitutional privilege against self-incrimination.

Wigmore has enunciated a rule of distinction followed by a number of states, that the privilege against self-in-

crimination was established in the common law for the purpose of protecting the individual against the employment of legal process to extract from the person's own lips an admission of his guilt; that the privilege should be confined to testimonial utterances and not applied to physical evidence. Wigmore on Evidence, Third Edition, Vol. 3, Sec. 2263.

In a very recent Oklahoma case, *Alexander v. State* (1956 Okla.), 305 P. 2d 572, a prosecution for drunken driving, the Criminal Court of Appeals of that state held that the privilege against self-incrimination was not violated by the admission of testimony of a police officer as to the results of the Harger breath test or drunkometer test for alcoholic content of blood, resulting from examination of defendant by police officer without defendant's permission. The Oklahoma court relied on the Wigmore rule stated supra, making a distinction between oral evidence and evidence procured by examination of the body or of bodily fluids.

Although appellant did not attack the admission of this evidence on the grounds that it deprived him of liberty without due process of law as was done in the *Rochin* case, *Rochin v. California* (1952), 342 U. S. 165, a recent decision of the United States Supreme Court clarified that question in circumstances similar to the case here. In *Breithaupt v. Abram* (1957), 352 U. S. 432, 77 S. Ct. 408, it was held that it was not a violation of due process to admit into evidence for the purpose of proving intoxication a blood sample taken from the defendant while he was unconscious.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

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