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David L. Wilkinson; William K. McGuire; Attorneys for Appellant;
C. Demont Judd, Jr.; Attorney for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	)	
Plaintiff-Appellant,	)	
vs.	)	CASE NO. 18365
EUGENE O. CHRISTENSEN,	)	
Defendant-Respondent	)	

BRIEF OF RESPONDENT

Interlocutory appeal from a pre-trial Order granting the respondent's Motion to Suppress Evidence, in the Second Judicial District Court, in and for Davis County, State of Utah, the Honorable Douglas L. Cornaby, Judge, presiding.

C. DEMONT JUDD, JR.
2650 Washington Blvd., Suite 102
Ogden, Utah 84401

Attorney for Respondent

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

WILLIAM K. McGUIRE
Deputy Davis County Attorney
Davis County Courthouse
Farmington, Utah 84025

FILED

SEP 22 1982

Clerk, Supreme Court, Utah

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Attorney for Respondent

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

WILLIAM K. McGUIRE
Deputy Davis County Attorney
Davis County Courthouse
Farmington, Utah 84025

Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	)	
Plaintiff-Appellant,	)	CASE NO. 18365
vs.	)	
EUGENE O. CHRISTENSEN,	)	
Defendant-Respondent	)	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Respondent was charged by Information with Assault by a Prisoner, a third-degree felony, in violation of Utah Code Ann., § 76-5-102.5 (1978). The matter was set for trial before the Honorable Judge Douglas Cornaby, but no trial was held based on the fact that the court granted a pre-trial motion to supress evidence. The matter is still pending before the District Court, despite the fact that respondent has moved dismiss for failure to prosecute.

DISPOSITION IN THE LOWER COURT

Respondent filed a pre-trial Motion to Supress Evidence which was granted. Thereafter, respondent moved the court to dismiss the case and that is the status of the case in the Lower Court.

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RELIEF SOUGHT ON APPEAL

Respondent seeks to have the appeal dismissed and to have the information dismissed with prejudice.

STATEMENT OF FACTS

On September 24, 1981, defendant was arrested after officers came upon a vehicle which was stopped on the side of the road. At the time of the hearing of the Motion to Supress Evidence, the officers testified that they had not seen the defendant driving. They testified that they did not have anyone who had seen the defendant driving; they further testified that no pattern of driving was identified and no physical control on the part of the defendant existed. Each of the officers also testified that they had not seen the open container placed in the vehicle (even though the vehicle was owned by the defendant) and had not seen anyone nor have any evidence linking the defendant to the open container. The officers had told a similar story to an administrative hearing officer of the Department of Public Safety Drivers License Division at a refusal hearing. The officer found that there had been no driving pattern and that there was no evidence to put the defendant behind the wheel of the car or in anyway in possession or control of the vehicle. At a hearing on the charge of driving while intoxicated in Layton City, the officers testified that they did not have a driving pattern and further it was demonstrated that they could not establish any Corpus Delicti. The court found no Corpus Delicti and the case was dismissed. At a preliminary hearing on the present case, efforts were made to demonstrate that the arrest of the defendant was a valid arrest, and after having filed a Motion to

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Supress Evidence in the Circuit Court and the court ruling that it had no jurisdiction to supress evidence, respondent finally waived preliminary hearing.

After the hearing in open court on the Motion the Supress Evidence, Judge Cornaby ruled that the arrest had been invalid on the grounds that the defendant-respondent was not a driver or in actual physical control of the vehicle and thus no grounds were shown that he was under the influence. That in fact since the charge arose out of two incidents after the arrest, that since the defendant was not properly arrested there was a defense to the assult by a prisoner.

ARGUMENT

POINT I

RESPONDENT HAD A RIGHT TO RESIST ARREST BY WHATEVER LAWFUL MEANS WHERE THE ARREST WAS UNLAWFUL AND NOT FOUNDED UPON PROBABLE CAUSE.

At no time in appellant's brief is there an assertion that defendant was in actual physical control, or that there was any evidence to demonstrate such actual physical control.

Appellant does not claim that the defendant left the open container in the vehicle, only that there was an open container in a vehicle which was registered to and apparently owned by the appellant.

Since the appellants cannot demonstrate any probable cause for the arrest, the respondent appropriately was entitled to resist the arrest.

In State vs. Rousseau, 241 P.2d 447, the Washington Court ruled that "every man, however guilty of crime, has right to shun illegal

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arrest therefore by flight, and exercise of such right does not subject him to arrest as a fugitive. Further, that the force used in resisting unlawful arrest must be reasonable and apportioned to injury attempted on party sought to be arrested..."

After citing a series of United States Supreme Court cases, the Washington Court said that "It is the law that a person illegally arrested by an officer may resist that arrest, even to the extent of the taking of life if his own life or any great bodily harm is threatened." At the various hearings where the respondent testified, he indicated that at the first instance he had been badly abused and was in fear of his health as a result of the officer throwing him onto a car. Past health problems have been that respondent has had two previous spinal operations and that he is presently under a doctors care for additional spinal injury. He was retired from Hill Air Force Base as a result of his injuries and his physical condition was exacerbated by the officer's treatment. His testimony was that he was only responding to the officer's treatment in an effort to protect himself. Pictures taken and physical examinations done immediately after his release from jail would indicate that the respondent suffered severe injury to which he testified, bringing him clearly within John Bad Elk vs. United States 177 U.S. 529, S.Ct 729, 44 L.Ed. 874; State vs. Gum, 68 W. Va. 105, 69 S.E. 463, 33 L.R.A., N.S., 150.

In a 1950 Maine case, it was said "an illegal arrest is an assult and battery. The person so attempted to be restrained of his liberty has the same right and only the same right to use force in defending himself as

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he would have in repelling any other assult and battery. State v. Robinson, Me. 1950, 72 A.2d 260, 262. All of the testimony with respect to the charge of assult on a police officer indicated only that defendant-respondent was attempting to protect himself.

It is defendant's perception of the arrest which seems to give him the right to resist arrest. In this case, the court ruled that there was no probable cause for the arrest, and because there was no probable cause for the arrest such evidence as was taken incident to the arrest should be supressed, including the so called confession and the open container.

Since the respondent must be a prisoner to commit assult by a prisoner, the burden is upon the State to demonstrate from the outset that his arrest was a valid arrest. The State has not met that burden, and since they have not met that burden in any of the presentations which have been made, the court did not err in supressing the evidence.

POINT II

APPELLANT, THROUGH THE MACHINATIONS OF VARIOUS PROSECUTORS HAS PERSECUTED THE RESPONDENT AND HAS CAUSED HIM TO GO THROUGH A SERIES OF HEARINGS WHERE THE FACTS DID NOT JUSTIFY SAID HEARINGS.

There is no inconsistant statement by the respondent nor by the witnesses for the appellant which demonstrate that at any point in time was the defendant under the influence or in actual physical control of the vehicle. The defendant has no responsibility to prove his innocence, but having demonstrated again and again that the State had no evidence on which it could rely with respcet to a driving pattern, he was entitled to the benefit of

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the doubt from the prosecution. In the event the prosecution failed to heed that benefit and give him that benefit, the result is persecution.

POINT III

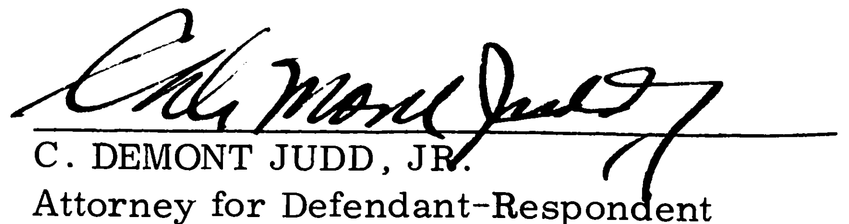
APPELLANT ATTEMPTED TO PROSECUTE DEFENDANT ON PROPORTED EVIDENCE OF A CONFESSION THAT HE WAS THE DRIVER OF THE VEHICLE.

This court has ruled in State vs. Ferry 275 P. 2d 173, that an accused cannot be convicted on his confession alone. In State vs. Olsen, 75 Utah 583, this court held that when the State can subsequently prove a Corpus Delicti evidence of an admission made by the accused may be received. In this case, the State had notice that it could not prove the Corpus Delicti since the same states' attorney tried the Circuit Court case and had specific knowledge of the failure of the Corpus Delecti.

CONCLUSION

The court did not err in supressing the evidence because the state could not present any evidence of (a) a valid arrest or (b) a driving pattern or (c) any wrongful act on the part of the defendant-respondent.

Respectfully Submitted this 22 day of September, 1982.



C. DEMONT JUDD, JR.
Attorney for Defendant-Respondent

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