

2001

Utah v. Rodney Lehi : Brief of Appellant

Utah Court of Appeals

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William L. Schultz; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

vs.

RODNEY LEHI,
Defendant/Appellant.

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Case No. 20010139-CA

Priority No. 2

OPENING BRIEF OF APPELLANT

**APPEAL FROM THE JUDGMENT AND ORDER OF COMMITMENT TO
UTAH STATE PRISON**

IN THE SEVENTH DISTRICT COURT

**IN AND FOR THE COUNTY OF SAN JUAN, STATE OF UTAH
THE HONORABLE JUDGE LYLE R. ANDERSON, PRESIDING**

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FILED
Utah Court of Appeals

JUL 12 2001

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3 of the Utah Rules of Appellate Procedure. See also Section 78-2A-3(e) Utah Code Annotated, conferring jurisdiction on this Court.

The Judgment and Order of Commitment to the Utah State Prison was signed on February 5, 2001 and entered by the Clerk of the Court on February 6th, 2001. The Notice of Appeal was filed on February 6th, 2001, within 30 days of the entry of judgment. The Appeal is therefore timely pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

The issues presented for appeal are as follows:

- I. Were two prior convictions sufficient for an enhanced conviction when the State had put Defendant on Notice it would prove three prior convictions? Should the lower Court have allowed the State to amend the Information to charge Defendant with two prior convictions rather than three?

Standard of Review: Correctness of Law. “We accord a lower Court’s statutory interpretations no particular deference, but assess them for correctness as we do any other conclusions of law.” Salt Lake City v. Emerson, 861 P. 2d 443, 443 (Utah App. 1993).

II. Was the evidence sufficient to support the Defendant's conviction?

Standard of Review: Whether reasonable minds must have entertained a reasonable doubt. "The Appellate Court must review all evidence and inferences in light most favorable to the conviction. Reversal is appropriate only when evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained reasonable doubt." State v. Brown, 948. 2d 337 (Utah, 1997).

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 12, of the Constitution of Utah provides, in relevant part, that:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel...to be confronted by the witnesses against him... and the right to appeal in all cases...The accused shall not be compelled to give evidence against himself.

Amendment Five of the Constitution of the United States provides, in relevant part, that:

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 Six of the Constitution of the United States provides, in relevant part, that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Amendment Fourteen of the Constitution of the United States provides, in relevant part, that:

No State shall...deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

Utah Code Section 41-6-44 provides, in relevant part, that:

(2)(a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

- (i) has sufficient alcohol in his body that a chemical test given within two hours of the alleged operation or physical control shows that the person has a blood or breath alcohol concentration of .08 grams or greater; or
- (ii) is under the influence of alcohol and any drug, of the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.

(6)(a) A third or subsequent conviction for a violation committed within six years of two or more prior convictions under this section is a third degree felony.

Utah Code Section 76-1-501(1)(2)(a)(b) provides, in relevant part, that:

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

- (a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

Utah Rules of Criminal Procedure Rule 4 (b)(d) provides, in relevant part

that:

(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, detail concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.

(d) The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

Utah Rules of Criminal Procedure Rule 21 (a) provides, in relevant part

that:

(a) The verdict of the jury shall be either “guilty” or “not guilty,” “not guilty by reason of insanity,” “guilty and mentally ill,” or “not guilty of the crime charges but guilty of a lesser included offense and mentally ill” provided that when the defense of mental illness has been asserted and the defendant is acquitted on the ground that he was insane at the time of the commission of the offense charged, the verdict shall be “not guilty by reason of insanity.”

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Mr. Lehi appeals his conviction following a jury trial of Driving Under the Influence of Alcohol in violation of Section 41-6-44 Utah Code Annotated. His conviction was enhanced to a Third Degree Felony under subsection (6)(a) of that statute on the basis of Defendant's prior convictions.

Defendant was also found guilty of Driving on Suspended or Revoked Operators License in violation of Section 53-2-222(1) Utah Code Annotated, a Class C Misdemeanor. Defendant stipulated to this offense and does not appeal this conviction.

B. COURSE OF PROCEEDINGS.

Mr. Lehi was charged in a two count Information signed on November 15, 1999 and filed on November 17, 1999 with the above referenced charges. (R-1; Addendum) After Preliminary Hearing on September 25, 2000 Defendant was bound over on both charges. Defendant argued before bind over that he should not be bound over on the felony charges because the State had introduced evidence of only two prior convictions, not three as charged in the Information.

Defendant had a one- day jury trial on January 5, 2001. The parties stipulated before hand that the trial would be bifurcated with the enhancement issues reserved for the Bench sitting as finder of fact. At trial defendant stipulated that he has been driving the vehicle previously and was guilty of the charge of Driving on a Revoked or Suspended License (TR-71). Defendant was found guilty of Count I, DUI by the jury. The matter then proceeded to the enhancement phase at which the State again produced evidence of two prior convictions. The Court took the matter under advisement until Sentencing and instructed counsel to prepare memorandum (TR-185).

C. DISPOSITION IN THE COURT BELOW.

Sentencing was on February 5th, 2001. The Court sentenced Defendant to up to five years in the Utah State Prison, to be served consecutive to any other jail time the Defendant was serving.

D. STATEMENT OF FACTS.

This action arises from a contact between Trooper Rick Eldredge of the Utah Highway Patrol and Mr. Lehi on November 9th, 1999 (TR-80-3). (References designated “TR-“ refer to the page number of volume I of the official court transcript of this case. Referenced designated “Sent TR-“ refer to the page number of the transcript of the February 5, 2001 sentencing). Trooper Eldredge was on patrol, driving northbound on Utah Highway 191 when he noticed Mr.

Lehi walking southbound (TR-83). He had passed by this area approximately 45 minutes to one hour earlier (TR-84). He did not observe Mr. Lehi or his vehicle at the time of the earlier patrol (TR-84).

Trooper Eldredge stopped to see if Mr. Lehi had problems or needed help. Mr. Lehi stated that his car had broken down and that he had parked it “back there” (TR-84). The Trooper told him to get in and he would assist him (TR-84). As Mr. Lehi entered the officer’s vehicle, Trooper Eldredge noticed the odor of alcohol and Defendant’s red, glassy, bloodshot eyes (TR-85). Defendant’s speech was slow and his conversation made no sense (TR-85).

The parties returned to Mr. Lehi’s vehicle. The vehicle had been parked west of a stop sign and appeared to have lost control and rolled backwards into a small bar ditch (TR-86-7). There was another individual in the vehicle, asleep or passed out. He was slumped over in the back seat, smelled strongly of alcohol, and was hard to rouse (TR-88).

Trooper Eldredge interviewed Mr. Lehi after the Intoxilyzer results. Mr. Lehi acknowledged that he had been operating a vehicle southbound by Recapture Wash (TR-99). He acknowledged drinking beer earlier, finishing an “hour-couple of hours ago.” (TR-100). He stated he was “trying to park it.” (Tr-101), and never stated that anyone else was driving the vehicle (TR-101).

Trooper Eldred testified that in addition to Mr. Lehi having a blood alcohol level of over .08, that he was impaired to drive and that he was qualified to make such assessments (TR-100-5).

E. MARSHALLING OF EVIDENCE.

The above Statement of Facts accurately reflects the record in this matter.

All evidence supporting Defendant's conviction can be summarized as follows:

1. Trooper Eldredge has observed the area where he found Mr. Lehi walking 45 minutes to an hour earlier and nothing was amiss. He did not see Mr. Lehi or his vehicle.
2. Mr. Lehi admitted to Trooper Eldredge at the initial contact that he had been operating his car and had left it "back there."
3. When Mr. Lehi entered Trooper Eldredge's car he smelled of alcohol and his eyes were glassy and bloodshot.
4. Mr. Lehi's speech was slow and his conversation did not make much sense.
5. Mr. Lehi's performance on the field sobriety test indicated impairment.
6. Mr. Lehi's Intoxilyzer test result was over the legal limit of .08.
7. In an interview subsequent to the breath test, Mr. Lehi admitted operating the motor, had been drinking been an "hour-couple of hours ago." Mr. Lehi acknowledged trying to park the vehicle and never stated anyone else had driven it.

8. Trooper Eldredge was qualified to give an opinion as to whether Mr. Lehi was too impaired to safely operate a motor vehicle. Trooper Eldredge's opinion was that Mr. Lehi was too impaired to do so.

SUMMARY OF ARGUMENT

I. The State did not carry its burden of proving three prior convictions for enhancement purposes. It should not have been allowed to amend the Information after the jury had reached its verdict.

II. Even considering that all of the marshalled evidence is time, reasonable minds must contain a doubt as to whether Mr. Lehi operated a motor vehicle impaired or with a blood alcohol level of .08 or greater.

ARGUMENT

Point I: **The State did not carry its burden of proof of each element of the offense beyond a reasonable doubt.**

The Utah statute prohibiting driving a vehicle while impaired or with a blood alcohol level of .08 or greater contains a provision that enhances the degree of the offense from a Class B Misdemeanor to a Second Degree Felony if the Defendant has two or more prior DUI convictions. (All references are to the law applicable at the time of Defendant's alleged offense.) However for whatever

reason the State gave notice to Defendant in its charging document that it would prove three prior DUI's.

As early as his Preliminary Hearing Defendant objected to the State's introduction of proof of only two prior DUI convictions (Sent TR-5). Rather than amend the Information or present evidence of three or more prior convictions, the State went to trial with the same evidence it had presented at Preliminary Hearing. Subsequent to the jury returning its verdict of guilty, and pursuant to a stipulation with Defendant as to how the enhancement phase would proceed, the State introduced certified copies of Defendant's 1998 DUI conviction in Wayne County Utah and a San Juan County Utah DUI conviction in 1994 (Exhibits 5 & 6). Defendant agreed that the Court could not convict without proof of a timely third DUI conviction.

Defendant bases his argument on Federal and State Constitutional requirements as well as Utah statutory mandate. The United States Constitution in Article VI Amendment, and the Utah Constitution in Article I, Section 12 guarantee the Defendant the right to "be informed of the nature and cause of the accusation." See State v. Montoya, 910 P. 2d 441, 446 (Utah App 1996). The most cited Utah case interpreting this right to notice appears to be State v. Wilcox, 808 P. 2d 1028 (Utah 1988). Wilcox held that a criminal Defendant has the right to adequate notice "that the elements of the offense be alleged." ID at 1032. Once the elements are set out, the Defendant is "presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt.

In absence of such proof, the defendant shall be acquitted.” Section 76-1-501, Utah Code Annotated, emphasis added.

The entire purpose of the Information is to inform the Defendant of the theory the prosecution hopes to establish at trial. It’s burden in that undertaking is beyond reasonable doubt. Although it admittedly appears in this instance that the State undertook to prove more than statutorily necessary, once the prosecutor chose his theory under which to prosecute, a necessary quid pro quo of our constitutional notice system is that he prove that theory by the requisite quantum. Wilcox, at 1033-4, cited favorably State v. Eberwein, 21 P. 3d 1139 (Utah App. 2001).

As if to concede the validity of Defendant’s arguments, four days after trial the State filed a Motion to Amend the Information to enhance on the basis of only two prior convictions. The State alleged this was permissible under Rule 4(d) of the Utah Rules of Criminal Procedure since it was before verdict and no additional or different offense was charged and the substantial rights of the Defendant were not prejudiced. In the instant case the Jury had issued its verdict. This fact was recognized by the lower court (TR-174, Sent TR-4). It is not clear whether the lower court amended the information before it ruled Defendant was guilty of a Third Degree Felony. No Order is apparent from the record. If an amended was made it should be stricken as non-timely.

Point II: Reasonable minds must entertain a doubt as to whether Mr. Lehi operated a motor vehicle with a blood alcohol level of .08 or greater or while impaired.

Mr. Lehi concedes that the burden is on him when challenging the sufficiency of the verdict to marshal all of the evidence supporting the jury's conclusion, and to show how after making all reasonable inferences there from that the same is legally insufficient to support the jury's conclusion. State v. D.M.Z., 830 P 2d 314, 317, (Utah App 1992), citing State v. Moosman, 794 P 2d 474, 475-6 (Utah 1990), State v. Gray, 851, P 2d 1217, 1225 (Utah App. 1993).

Defendant position is that although the State did show both impairments and a sufficiently high blood alcohol level, and although he did admit operating the motor vehicle, his apprehension a great distance from the vehicle precludes any reasonable mind from finding actual physical control while impaired.

Several facts support Defendant's non-culpability. In fact it is impossible to see how the jury believed the State had carried its burden. As noted, Mr. Lehi was not found in actual physical control or anywhere near his vehicle (TR-84). Although the officer testified that Mr. Lehi had no "objectivity of conversation," on cross examination he acknowledges that the Defendant was coherent at the side of the road (TR-113-4) and that the non-objectivity did not occur until an hour later at the San Juan County Jail (TR-114). This fact, coupled with the Defendant walking a substantial distance, the presence of beer at the site of the car, and defendant admitting drinking at approximately a time right after the vehicle was parked (TR-84, TR-113-4, TR-121, TR-122) show that Defendants blood alcohol

level was on the upswing and had been so since the time of the actual physical control. The State did not show the necessary conjunction of impairment and actual physical control.

Defendant's situation is distinguishable from Utah cases that liberalize the definition of "actual physical control," such as Lopez v. Schwendieman, 720 P. 2d 778 (Utah 1986) and Richfield City v. Walker, 790, P. 2d 87 (Utah App 1990) whose purpose is to prevent an intoxicated driver whose vehicle was rendered inoperable from escaping prosecution.

The Richfield Court stated that the finder of fact should look to the totality of circumstances to determine whether a Defendant was in actual physical control of a vehicle. The Court set forth relevant factors for making the determination including but not limited to the following:

1. Whether Defendant was asleep or awake when discovered.
2. The position of the automobile.
3. Whether the automobile's motor was running.
4. Whether Defendant was positioned in the driver's seat of the vehicle.
5. Whether Defendant was the vehicle's sole occupant.
6. Whether Defendant had possession of the ignition key.
7. Defendant's apparent ability to start and move the vehicle.
8. How the car got where it was found; and

9. Whether the Defendant drove it there. The Court did not require a finding of all or even a majority of these factors.

That the above criteria are to be applied prospectively rather than retroactively is clear from the language in Richfield. “Specifically, actual physical control statutes have been characterized as preventative measures which deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers, and which enable the drunken driver to be apprehended before he strikes.” “We believe that the actual physical control language of Utah’s implied consent statute should read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants.”

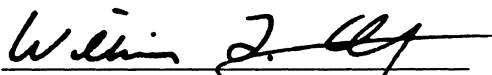
Clearly Defendant, who was walking away from his vehicle, cannot be deemed to be in actual physical control at the time of his apprehension or intoxication. The failure of the State from establishing impairment at the time of the control should have kept a doubt within reasonable minds and precluded a conviction.

CONCLUSION

When the State undertakes to prove elements beyond what may be statutorily necessary and provides notice to Defendant of its intent to establish those elements, it must do so beyond a reasonable doubt in order to obtain a conviction. The State’s failure to introduce evidence of three prior DUI convictions is fatal to Defendant’s felony conviction which should be reversed.

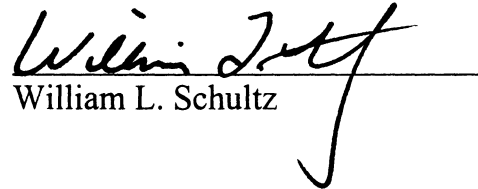
In the alternative, Defendant's conviction should be reversed since the evidence was insufficient to support the same.

DATED this 10th day of July 2001.


WILLIAM L. SCHULTZ
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed true and correct copies of the foregoing
Opening Brief of Appellant to Jan Graham, Attorney General, 160 E. 300 South,
Heber wells Bldg., Salt Lake City, Utah 84114, postage prepaid, this 10th day of
July 2001.


William L. Schultz

ADDENDUM

Copy of February 5, 2001, Judgment and Order of Commitment to Utah State Prison.

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Phone: (435) 587-2128
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EC 111-111

DEPT. OF CORRECTIONS

DEPT. -

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

RODNEY LEHI

Defendant.

**JUDGEMENT AND ORDER
OF COMMITMENT TO
UTAH STATE PRISON**

Case No. 9917-156

Case Judge: Lyle R. Anderson

IT IS HEREBY ORDERED:

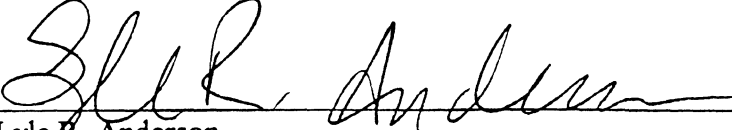
That the Defendant is forthwith remanded to the custody of the San Juan County Sheriff for transportation to the Utah State Prison and execution to the sentence given herein. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted of the offense(s) of:

Count 1: DRIVING UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS
(WITH PRIORS), a third degree felony

Defendant being now present in court and ready for sentence and represented by William L. Schultz, defendant is now adjudged guilty of the above offense(s) and is now sentenced to a term in the Utah State Prison not to exceed five years; such sentence is to run consecutively with sentence he is already serving .

DATED: February 27, 2001.




Lyle R. Anderson
District Court Judge

ATTEST:

Margo Yehas
Clerk of the Court

CERTIFICATE OF MAILING/HAND DELIVERY

I hereby certify that I mailed, postage prepaid, or hand delivered a true copy of the foregoing JUDGEMENT AND ORDER OF COMMITMENT to William L. Schultz, Attorney for the defendant; Adult Probation Department at 1165 South Highway 191 #3, Moab, UT 84532; and to the Department of Corrections, P.O. Box 250, Draper, UT 84020

DATED this 16th day of February, 2001.

Margo Yehas