

2001

## Utah v. Rodney Lehi : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH :  
Plaintiff/Appellee, : Case No. 20010139-CA  
v. :  
RODNEY LEHI, : Priority No. 2  
Defendant/Appellant. :

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BRIEF OF APPELLEE  
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APPEAL FROM A CONVICTION FOR DRIVING UNDER  
THE INFLUENCE OF ALCOHOL, A THIRD DEGREE  
FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-  
44 (SUPP. 1999), IN THE SEVENTH DISTRICT COURT, IN  
AND FOR SAN JUAN COUNTY, STATE OF UTAH, THE  
HONORABLE LYLE R. ANDERSON, PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED. **D**

Utah Court of Appeals

OCT 11 2001

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**BRIEF OF APPELLEE**

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**JURISDICTION AND NATURE OF PROCEEDINGS**

This is an appeal from a conviction for driving under the influence of alcohol, a third degree felony, in violation of Utah Code Ann. § 41-6-44 (Supp. 1999), in the Seventh Judicial District Court, in and for San Juan County, State of Utah, the Honorable Lyle R. Anderson, presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2001).

**STATEMENT OF THE ISSUES ON APPEAL AND  
STANDARDS OF APPELLATE REVIEW**

1. Whether defendant, knowing his conviction for driving under the influence of alcohol could be enhanced by proof of only two prior driving under the influence of alcohol convictions, was prejudiced by an information that asserted he had three such prior convictions?

“The question of the adequacy of the notice given defendant is one of law,” *see State v. Wilcox*, 808 P.2d 1028, 1031 (Utah 1991), and, accordingly, is reviewed for correctness.

See *State v. Stringham*, 2001 UT App 13, ¶10, 17 P.3d 1153 (appellate court reviews questions of law for correctness).

2. Whether this Court should consider defendant's challenge to the sufficiency of the evidence to support defendant's conviction for driving under the influence of alcohol where defendant failed to preserve his claim in the trial court and has not alleged exceptional circumstances or plain error on appeal?

An appellate court has no ground for considering a challenge to the sufficiency of evidence where a defendant has failed to preserve the claim in the trial court and has not alleged exceptional circumstances or plain error on appeal. *State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346.

### **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

The following determinative statutes and rules are set out in Addendum A:

Utah Constitution, article I, section 12;  
Utah Code Ann. § 41-6-44 (Supp. 1999).

### **STATEMENT OF THE CASE**

Defendant, Rodney Lehi, was charged with driving under the influence of alcohol ("DUI") (Count I) and driving on a suspended or revoked operator's license (Count II) (R. 1-2). The information also asserted that defendant had at least three prior conviction for driving under the influence of alcohol or drugs, elevating the underlying DUI offense, a class B misdemeanor, to a third degree (R. 1). The parties stipulated that the underlying DUI would be tried to a jury and the issue of defendant's prior DUI convictions would be decided by the



trial court (R. 117:141-42; Aplt. Br. at 6). The jury found defendant guilty on both counts (R. 117:174-75). Thereafter, the trial court found that defendant had been convicted of two prior DUI offenses within six years of defendant's DUI violation in this case (R. 108; 117:181-82; 118:5-6). Accordingly, pursuant to Utah Code Ann. § 41-6-44 (6)(a) (Supp. 1999), the trial court found defendant's DUI conviction was a third degree felony (R. 111; 118:6).<sup>1</sup> The trial court sentenced defendant to a statutory zero-to-five-year term (R. 111).<sup>2</sup>

### **STATEMENT OF THE FACTS**<sup>3</sup>

At trial, Trooper Rick Eldredge of the Utah Highway Patrol testified for the State (R. 117:80-132). On November 9, 1999, Eldredge was on patrol in San Juan County (R. 117:81, 83, 112). Eldredge was going north on Highway 191, just outside of Blanding, Utah, when he spotted defendant walking south along the highway (R. 117:83). Eldredge had already passed this location going southbound about forty-five minutes to one hour earlier and had not seen defendant or defendant's vehicle (R. 117:83-84). Upon seeing defendant, Eldredge made a U-turn and pulled up along side defendant (R. 117:84). Eldredge asked defendant if he needed assistance. Defendant said his car had "broken down" and that "[i]t's back there

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<sup>1</sup> The trial court did not expressly refer to section 41-6-44 (6)(a) in sentencing defendant. However, that section provides: "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."

<sup>2</sup> The record is silent concerning any disposition of defendant's conviction for defendant's driving on a suspended or revoked operator's license (Count II).

<sup>3</sup> The facts are recited in the light most favorable to the jury's verdict. *State v. Wright*, 893 P.2d 1113, 1115 (Utah App. 1995).

a little ways by the dam,” about a quarter of a mile away (R. 117:84, 117, 120). Eldredge asked defendant to get into his patrol car in order to assist him (R. 117:84). Eldredge noticed “the odor of alcohol” and noticed defendant’s “red glassy eyes” (R. 117:85). Also when speaking to defendant, Eldredge noticed “[h]is speech was slow and his sentence structure and objectivity of conversation did not make sense” (R. 117: 85).

When Eldredge and defendant reached defendant’s car it was “high centered over a huge bush” on the south side of the dam, just west of a stop sign (R. 117:86, 88). Eldredge saw track marks on the side of the highway, and it appeared to him that “the vehicle had lost control and it had gone backwards over some bushes and down into a small bar ditch” (R. 117:86-87, 88). Eldredge noticed an individual in the back seat of the car (R. 117:88). He was either asleep or passed out, and Eldredge could smell alcohol on him (R. 117:88). Eldredge found two empty beer cans at the scene (R. 117:121, 128).

Based on what Eldredge both saw and smelled, he decided to give defendant field sobriety tests to determine if he was under the influence of alcohol (R. 117:89). Defendant failed all three field sobriety tests (R. 117:92).<sup>4</sup> Eldredge determined, based on his experience with over two hundred DUI cases and his observations of defendant, that defendant was not able to safely operate a vehicle (R. 117:102, 103, 105, 110). Eldredge arrested defendant and

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<sup>4</sup> Eldredge asked defendant to perform the one-legged stand and the nine-step walk and turn, and to recite the alphabet (R. 117:89-92). Defendant could not perform the one-legged stand without falling down (R. 117:89-90). Defendant was off balance and could not step heel-to-toe during the nine-step walk and turn (R. 117:90-91). Defendant missed the letters U and V when asked to recite the alphabet (R. 117:91-92).

took him into custody (R. 117:92).

At the station, about an hour after Eldredge first observed defendant on the highway, defendant consented to a breathalyzer test (R. 117:92-95). The breathalyzer indicated that defendant had a blood-alcohol level of .163 (R. 117:97). Eldredge then interviewed defendant (R. 117:98). When asked if he was operating a vehicle, defendant said, "I guess I did" (R. 117:99). He admitted to driving southbound near the dam (R. 117:99). Defendant said he was "[t]rying to make it down to White Mesa, but later said he was drinking at "White Mesa" (R. 117:100). He said he had been drinking beer earlier but did not know how much he had consumed (R. 117:100). He said he had his first drink "[w]hen [h]e was eight years old" and his last drink an "[h]our-couple of hours ago" (R. 117:100, 116). Defendant also admitted to being under the influence of alcohol during the interview (R. 117:100). Eldredge asked defendant where he was going and defendant said he was "[t]rying to park it," referring to his car (R. 117:100, 106). Defendant said no one else was driving the car (R. 117:101). The defense did not call any witnesses (R. 117:132-33).

## **SUMMARY OF ARGUMENT**

### **POINT I**

The trial court correctly recognized that defendant was neither surprised nor prejudiced by any discrepancy between an information that alleged he had "at least three prior [DUI] convictions," and the statute which required proof of only two prior convictions to enhance his conviction for a subsequent DUI offense. Defendant knew at the preliminary hearing the

requirements of the statute and had been provided with evidence proving specific convictions. Defendant cites no case in support of his claim that the State is required to prove allegations in the information that are superfluous to a statutorily defined offense of which he is aware.

## **POINT II**

Because defendant failed to preserve his claim that the evidence was insufficient to support his conviction for driving under the influence of alcohol, and because he has failed to argue plain error on appeal, this court should decline to consider his claim.

## **ARGUMENT**

### **POINT I**

**TRIAL COURT CORRECTLY CONCLUDED THAT DEFENDANT, KNOWING HIS CONVICTION FOR DUI COULD BE ENHANCED UNDER THE STATUTE BY PROOF OF ONLY TWO PRIOR DUI CONVICTIONS, WAS NOT PREJUDICED BY AN INFORMATION THAT ASSERTED HE HAD THREE PRIOR CONVICTIONS**

Defendant claims that because the information asserted that he “ha[d] at least *three* prior convictions for driving under the influence of alcohol” (Information, R. 1) (emphasis added), the prosecution was required to prove those three prior convictions, rather than only *two* such convictions required under section 41-6-44 (6)(a), a statutory requirement of which he was aware months earlier at the preliminary hearing. Aplt. Br. at 10-11. Because defendant’s argument misapprehends the notice function served by the information and fails to assert that defendant was prejudiced, it lacks merit.

### **A. The Factual Background.**

The information charged defendant with driving under the influence of alcohol and asserted the he had “at least three prior convictions” for the same offense (R. 1). At the preliminary hearing, defendant pointed out that although he recognized that section 41-6-44(6)(a) only required proof of two prior DUI convictions within the preceding six years to raise the charged offense to a third degree felony if he was convicted, the prosecution had asserted three convictions in the information (R. 118:5). The prosecution argued that defendant had notice that the statute required proof of only two prior DUI convictions within the preceding six years (R. 118:5). The parties stipulated that the underlying DUI would be tried to a jury and the issue of defendant’s prior DUI convictions would be decided by the trial court (R. 117:141-42; Aplt. Br. at 6). The prosecution did not amend the information before defendant’s jury trial to conform to the lesser statutory requirements (R. 118:5). Following the jury trial on January 5, 2001, but before the trial court had decided the factual issue of defendant’s prior convictions, the prosecutor sought to amend the information to conform to the evidence of the two prior convictions proven at the preliminary hearing (R. 92; 118:5).

At defendant’s sentencing, on February 5, 2001, the trial court found that it would have been better for the prosecution to amend the information to conform to proof at the preliminary hearing (Oral ruling following trial, R. 118:4-6, attached at Addendum B). However, the court concluded:

[B]ut I don’t think there’s any question that the defendant had notice, certainly by the time the preliminary hearing was over, that what the State was going to

be attempting to prove was two previous convictions within six years under the present statute. Um, I don't think there's any - - any - -there can be a viable claim of genuine surprise under those circumstances and, um, so - - well assuming that there are two previous convictions . . . .

(R. 118:5-6). Defendant immediately acknowledged that the prosecution had proved two convictions (R. 118:6). Accordingly, the trial court found defendant guilty of a third degree felony (R. 118:6).

**B. Defendant failed to show that he was prejudiced by any variance between the information and the statutory requirements for enhancement, of which he was aware.**

The trial court correctly recognized that notice is the central function of the information and that defendant could not claim prejudice through surprise if, notwithstanding any irregularity in the information, he has clear notice of the charge he was required to defend against. Article I, section 12 of the Utah Constitution provides: "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him [and] to have a copy thereof . . . ." In *State v. Wilcox*, 808 P.2d 1028 (Utah 1991), the Utah Supreme Court rejected the defendant's claim that failure to further limit the thirty-two month period alleged in an information charging child sex abuse provided inadequate notice and prevented him from formulating a defense. *Id.* at 1031-34. "As long as a defendant is sufficiently apprised of the State's evidence upon which the charge is based so that the defendant can prepare to meet that case, the constitutional requirement is fulfilled." *Id.* at 1032 n.1.

Defendant cites no case in support of his claim that the State must prove allegations

in the information that are superfluous to the statutorily defined offense. Indeed, while the State has been unable to find a case on point, the precise opposite of defendant's claim appears to be the rule. *See United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989) (finding that where an indictment charges several acts in the conjunctive and there is evidence sufficient to support conviction on one of the acts charged, the conviction will not be disturbed for lack of sufficiency of the evidence) (citations omitted).

Moreover, cases from other jurisdictions support the view that mere variance between the allegations of the charging document and proof adduced at trial is not prejudicial if the defendant was not misled by the discrepancy. *See Stewart v. State*, 856 S.W.2d 567, 570 (Tex. Ct. App. 1993) (in alleging prior conviction to enhance punishment, "[a] variance between the allegation [of indictment] and proof is material and fatal only if [it] would mislead a defendant to his prejudice"); *Selvage v. State*, 737 S.W.2d 128, 129 (Tex. Ct. App. 1987) (variance between date of prior conviction alleged in indictment, and date proved in trial did not preclude finding that narcotics defendant was repeat offender absent showing that variance misled defendant or prejudiced his position and also noting that "[i]t is well settled that it is not necessary to allege prior convictions for the purposes of the enhancement of punishment with the same particularity as must be used in charging the original offense"). *See also State v. Alexander*, 503 P.2d 777, 788 (Ariz. 1977) (trial court did not abuse its discretion in granting state's motion to amend information so as to charge two prior felony convictions, where record indicated that prosecutor gave defense counsel copies of almost all

documents and information pertaining to the priors and where defendant on appeal made no showing of prejudice, and where no question was raised as to the sufficiency of proof of the prior convictions).

In this case, defendant could not have been misled by any discrepancy between the allegation in the information that he had “at least three prior convictions for driving under the influence of alcohol,” and the proof of only two prior convictions required by section 41-6-44 (6)(a). The preliminary hearing was held on September 25, 2000 (R. 19-21). Defendant himself was aware at the preliminary hearing that the statute required proof of only two prior DUI convictions (R. 101). Defendant acknowledged following the jury trial on the underlying DUI that the prosecutor had provided him, through discovery, with evidence of the two prior convictions that were presented at the preliminary hearing, to wit: a 1998 conviction in Wayne County and a 1994 conviction in San Juan County (R. 117:180-82). At the sentencing, more than four months later, defendant was unable to explain to the trial court how he had been prejudiced by the overstated allegations in the information (R. 118:4-6). In sum, because defendant was fully aware of the statutory requirement enhancing his sentence and the proof the prosecution intended to use to prove that requirement, it is plain defendant was not prejudiced by any failure of the prosecution to more timely amend the information to conform precisely to the statutory requirement.



## POINT II

**BECAUSE DEFENDANT FAILED TO PRESERVE HIS CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HIS CONVICTION FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL, AND BECAUSE HE HAS FAILED TO ARGUE PLAIN ERROR ON APPEAL, THIS COURT SHOULD DECLINE TO CONSIDER HIS CLAIM**

Defendant claims that the evidence was insufficient to support his conviction for driving under the influence of alcohol. Aplt. Br. at 12-14. The Court should decline to consider the claim because it was not preserved in the trial court and because defendant has not alleged exceptional circumstances or plain error on appeal.

In *State v. Holgate*, 2000 UT 74, 10 P.2d 346, the Utah Supreme Court held that in order to raise a challenge to the sufficiency of evidence on appeal a defendant must first preserve the claim in the trial court through a motion to dismiss the information or to arrest judgment. *Id.* at ¶14. Alternatively, a defendant must allege that “exceptional circumstances” exist or “plain error” occurred. *Id.* at ¶11.

In this case, defendant failed to preserve his challenge to the sufficiency of the evidence in the trial court and has failed to allege exceptional circumstances or plain error on appeal. Therefore, the Court should decline to consider his claim. In any event, the evidence recited on pages three through five herein amply demonstrates the sufficiency of the evidence to support defendant’s conviction for driving under the influence of alcohol. *See State v. Gonzalez*, 2000 UT App 136, ¶10, 2 P.3d 954 (“[The appellate court] view[s] the evidence in a light most favorable to the jury verdict, . . . and will reverse only if the evidence is so

inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.”) (citations omitted).

### **CONCLUSION**

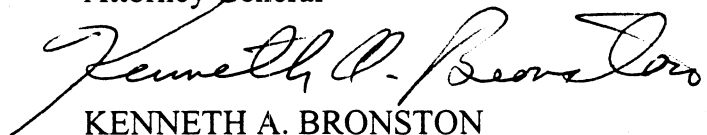
Based on the foregoing discussion, the State respectfully requests that defendant’s conviction be affirmed.

### **ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED**

Because this case presents no complex or novel questions, the State does not request that it be set for oral argument or that a published opinion issue.

RESPECTFULLY SUBMITTED this <sup>th</sup> 11 day of October, 2001.

MARK L. SHURTLEFF  
Attorney General

A handwritten signature in cursive script, appearing to read "Kenneth A. Bronston".

KENNETH A. BRONSTON  
Assistant Attorney General

**CERTIFICATE OF MAILING**

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to William L. Schultz, attorney for defendant, 69 East Center, P.O. Box 937, Moab, Utah 84532,, this <sup>24</sup> 11 day of October, 2001.

Kenneth L. Brumley

## ADDENDA

## ADDENDUM A

## **Utah Constitution, article I, section 12**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

## **Utah Code Ann. §§ 41-6-44 (Supp. 1999)**

### **UTAH CODE, 1953**

#### **TITLE 41. MOTOR VEHICLES**

#### **CHAPTER 6. TRAFFIC RULES AND REGULATIONS**

#### **ARTICLE 5. DRIVING WHILE INTOXICATED AND RECKLESS DRIVING**

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41-6-44 Driving under the influence of alcohol, drugs, or with specified or unsafe blood alcohol concentration --Measurement of blood or breath alcohol --Criminal punishment --Arrest without warrant --Penalties --Suspension or revocation of license.

(1) As used in this section:

- (a) "prior conviction" means any conviction for a violation of:
  - (i) this section;
  - (ii) alcohol-related reckless driving under Subsections (9) and (10);
  - (iii) local ordinances similar to this section or alcohol-related reckless driving adopted in compliance with Section 41-6-43;
  - (iv) automobile homicide under Section 76-5-207; or
  - (v) statutes or ordinances in effect in any other state, the United States, or any district, possession, or territory of the United States which would constitute a violation of this section or alcohol-related reckless driving if committed in this state, including punishments administered under 10 U.S.C. Sec. 815;

(b) "serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death;

(c) a violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6-43; and

(d) the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(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, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(c) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) A person convicted the first or second time of a violation of Subsection (2) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner; or

(B) had a passenger under 16 years of age in the vehicle at the time of the offense.

(b) A person convicted of a violation of Subsection (2) is guilty of a third degree felony if the person has also inflicted serious bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(4) (a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 24 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate; and

(ii) impose a fine of not less than \$700.

(d) For a violation committed after July 1, 1993, the court may order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility if the licensed alcohol or drug dependency rehabilitation facility determines that the person has a problem condition involving alcohol or drugs.

(5) (a) If a person is convicted under Subsection (2) within six years of a prior conviction under this section, the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 80 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate; and

(ii) impose a fine of not less than \$800.

(d) The court may order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.

(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.

(b) Under Subsection (3)(b) or (6)(a), if the court suspends the execution of a prison sentence and places the defendant on probation the court shall impose:

(i) a fine of not less than \$1,500;

(ii) a mandatory jail sentence of not less than 1,000 hours; and

(iii) an order requiring the person to obtain treatment at an alcohol or drug dependency rehabilitation program providing intensive care or inpatient treatment and long-term closely supervised follow-through after treatment.

(c) In addition to the penalties required under Subsection (6)(c), the court may require the person to participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(7) (a) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(b) The department may not reinstate any license suspended or revoked as a result of the conviction under this section, until the convicted person has furnished evidence satisfactory to the department that:

(i) all required alcohol or drug dependency assessment, education, treatment, and rehabilitation ordered for a violation committed after July 1, 1993, have been completed;

(ii) all fines and fees including fees for restitution and rehabilitation costs assessed against the person have been paid, if the conviction is a second or subsequent conviction for a violation committed within six years of a prior violation; and

(iii) the person does not use drugs in any abusive or illegal manner as certified by a licensed alcohol or drug dependency rehabilitation facility, if the conviction is for a third or subsequent conviction for a violation committed within six years of two prior violations committed after July 1, 1993.

(8) (a) (i) The provisions in Subsections (4), (5), and (6) that require a sentencing court to order a convicted person to: participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility; obtain, in the discretion of the court, treatment at an alcohol or drug dependency rehabilitation facility; obtain,



mandatorily, treatment at an alcohol or drug dependency rehabilitation facility; or do a combination of those things, apply to a conviction for a violation of Section 41-6-44.6 or 41-6-45 under Subsection (9).

(ii) The court shall render the same order regarding education or treatment at an alcohol or drug dependency rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 41-6-44.6 or 41-6-45 under Subsection (9), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), and (6).

(b) Any alcohol or drug dependency rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Human Services.

(9) (a) (i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45, of an ordinance enacted under Section 41-6-43, or of Section 41-6-44.6 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) The court shall advise the defendant before accepting the plea offered under this Subsection (9)(b) of the consequences of a violation of Section 41-6-44.6 or of Section 41-6-45.

(c) The court shall notify the department of each conviction of Section 41-6-44.6 or 41-6-45 entered under this Subsection (9).

(10) 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.

(11) (a) The Department of Public Safety shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (2);

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (2) if the violation is committed within a period of six years from the date of the prior violation; and

(iii) suspend or revoke the license of a person as ordered by the court under Subsection (12).

(b) The department shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223 or 53-3-231, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

(12) (a) In addition to any other penalties provided in this section, a court may order the operator's license of a person who is convicted of a violation of Subsection (2) to be suspended or revoked for an additional period of 90 days, 180 days, or one year to remove from the highways those persons who have shown they are safety hazards.

(b) If the court suspends or revokes the person's license under this Subsection (12)(b), the court shall prepare and send to the Driver License Division of the Department of Public Safety an order to suspend or revoke that person's driving privileges for a specified period of time.

(13) (a) If the court orders a person to participate in home confinement through the use of electronic monitoring, the electronic monitoring shall alert the appropriate corrections, probation monitoring agency, law enforcement units, or contract provider of the defendant's whereabouts.

(b) The electronic monitoring device shall be used under conditions which

require:

- (i) the person to wear an electronic monitoring device at all times;
  - (ii) that a device be placed in the home or other specified location of the person, so that the person's compliance with the court's order may be monitored; and
  - (iii) the person to pay the costs of the electronic monitoring.
- (c) The court shall order the appropriate entity described in Subsection (e) to place an electronic monitoring device on the person and install electronic monitoring equipment in the residence of the person or other specified location.
- (d) The court may:
- (i) require the person's electronic home monitoring device to include an alcohol detection breathalyzer;
  - (ii) restrict the amount of alcohol the person may consume during the time the person is subject to home confinement;
  - (iii) set specific time and location conditions that allow the person to attend school educational classes, or employment and to travel directly between those activities and the person's home; and
  - (iv) waive all or part of the costs associated with home confinement if the person is determined to be indigent by the court.
- (e) The electronic monitoring described in this section may either be administered directly by the appropriate corrections agency, probation monitoring agency, or by contract with a private provider.
- (f) The electronic monitoring provider shall cover the costs of waivers by the court under Subsection (13)(c)(iv).

## ADDENDUM B

ADDENDUM B

**ORIGINAL**

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH,	)	FILED
	)	
Plaintiff ,	)	
	)	BY
VS.	)	CASE NO. 991700156
	)	
RODNEY LEHI,	)	SENTENCING
	)	
Defendant ,	)	

BEFORE THE HONORABLE LYLE R. ANDERSON

SEVENTH JUDICIAL DISTRICT COURT

SAN JUAN COUNTY PUBLIC SAFETY BLDG.

MONTICELLO, UTAH 84535

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FEBRUARY 5, 2001

**FILED**

MAY 03 2001

COURT OF APPEALS

TRANSCRIBED BY: Joseph M. Liddell, CSR, RPR

20010139-1

9:00 A.M.

5TH FEBRUARY 2001

TRANSCRIPT OF PROCEEDINGS

THE COURT: I'm moving ahead at the request of the Department of Corrections to take State of Utah vs. Rodney Lehi, Case 9917-156. I've read the memoranda from both parties, um, and the question--the initial question is whether Mr. Lehi should be convicted of a Class-B Misdemeanor or a Third Degree Felony. Now do you have anything to add to what you put in your memorandum, Mr. Halls?

MR. HALLS: I don't, Your Honor.

THE COURT: Do you, Mr. Schultz?

MR. SCHULTZ: No, Judge. I'll stand on the memo.

THE COURT: I've gone back and listened to the tapes of the--of the hearing where I took the verdict from the jury and we discussed what I would be doing and I also went back to the preliminary hearing and listened to the tape of the preliminary hearing where we were discussing, ah, the--the amended information charge--charging three priors, um, and this is what I found. It's clear from the record of the--the taking of the conversation that followed the taking of the jury verdict that--that the defendant waived the right to have a jury return a verdict, with respect to the enhancement and--and that it was not a sentencing matter, but that it was viewed by all parties as, ah, being a question of whether those elements of the, um, enhanced offense had been proven.

1           When I looked at the preliminary hearing tape, it  
2       appeared that, um, at the preliminary hearing two previous  
3       convictions were proved and, ah, the defendant did point out  
4       that it actually two--that actually three priors had been  
5       alleged. The State argued that the statute only required, um,  
6       two previous convictions within six years. Um, the State  
7       argued that the defendant had notice of the statute, um,  
8       and--(Inaudible)--the State argued, at that part, that it was  
9       a sentencing matter and not an element of the offense, which I  
10      believe I'm now persuaded is not true; and the State also  
11      argued that there was no prejudice. Um, and what I ruled in  
12      my capacity as Magistrate is that even though what the State  
13      proved was not everything that alleged, what the State had  
14      proved was enough. I think the idea was that he--you--you can  
15      allege more than what you have to prove, um, and as long as  
16      you prove all that you have to prove, that's enough.

17           Um, it would have been better had the State, ah,  
18      moved to amend the Information to conform with the proof at  
19      the Preliminary Hearing, um, but I don't think there's any  
20      question that the defendant had notice, certainly by the time  
21      the Preliminary Hearing was over, that what the State was  
22      going to be attempting to prove was two previous convictions  
23      within six years under the present statute. Um, I don't think  
24      there's any--any--there can be a viable claim of genuine  
25      surprise under those circumstances and, um, so--well assuming

1 that there are two previous convictions, um, I believe--what?

2 MR. SCHULTZ: They proved two.

3 COURT FINDING

4 THE COURT: Then I believe he's--I'm going to find  
5 him guilty of the Third Degree Felony. It's a--it's certainly  
6 a live issue, but that's the way I come down on it, after  
7 listening to the tapes of those two previous hearings.

8 MR. SCHULTZ: All right.

9 THE COURT: Now he's already serving time, isn't he,  
10 on a DUI?

11 MR. SCHULTZ: Is that what you had? DUI?

12 MR. LEHI: Yes.

13 MR. SCHULTZ: Yes.

14 THE COURT: Mr. Halls, are you just asking that I  
15 send him to prison for another zero to five on this?

16 MR. HALLS: Your Honor, I think he has--I think we  
17 have an indication that he has as many as nine prior DUI's. I  
18 guess with that number of DUI's I would ask that the Court  
19 sentence this one consecutive.

20 THE COURT: Okay.

21 Mr. Schultz?

22 MR. SCHULTZ: I've spoken with him before about  
23 whether or not he wanted a pre-sentence report and I just  
24 asked him that question again. He indicated to me that he  
25 does not.

**B. The trial court correctly excluded evidence of the victim's alleged communicable disease as inadmissible under rule 412, Utah Rules of Evidence.**

Rule 412, provides that evidence of sexual misconduct "offered to prove that [an] alleged victim engaged in sexual behavior" or "offered to prove [an] alleged victim's sexual predisposition" is inadmissible. Utah R. Evid. 412(a). This inadmissible evidence is precisely the type that defendant sought to offer at trial. As the trial court correctly noted, evidence of a non-specific sexually transmitted disease presumably contracted by the victim, clearly relates to the victim's other sexual behavior, and is therefore inadmissible under rule 412. *See id.*

Notwithstanding the inadmissibility of the "communicable disease evidence," defendant attempts to qualify its exclusion as violative of his constitutional right to present his defense under Subsection (b)(3) of rule 412, Utah Rules of Evidence. *See Br. of Appt. at 33-36.* Subsection (b)(3) makes admissible evidence which would violate the constitutional rights of the defendant if excluded. Utah R. Evid. 412(b)(3). Defendant's claim fails, however, because he does not have an unfettered constitutional right to put on his defense. *See State v. Palmer*, 786P.2d 248, 249 (Utah App. 1990) (a defendant is not entitled to constitutional rights "unfettered by statutes and rules"); *State v. Johns*, 615 P.2d 1260, 1264 (Utah 1980) (constitutional right of confrontation was subject to relevancy rules); *State v. Moosman*, 794 P.2d 474, 479-81 (Utah 1990) (constitutional rights are subject to hearsay rules). In other words, defendant's right to put on a defense



is the right to defend himself within the framework of the Utah Rules of Evidence, including rule 412. *See id.*; *Palmer*, 786P.2d at 249. As explained above, evidence of Leslie's prior sexual behavior is clearly inadmissible under rule 412. *See Utah R. Evid.* 412. Thus, the trial court correctly held that defendant's constitutional rights were not violated by the exclusion of the "communicable disease evidence."

Additionally, defendant's alleged belief that Leslie had a communicable disease is not relevant to the present incident. *See State v. Smith*, 728 P.2d 1014, 1015-16 (Utah 1986) (evidence of defendant's state of mind must at least be relevant to a material fact). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination . . . more or less probable than it would be without the evidence." Utah R. Evid. 401. The basis for defendant's alleged belief is the "communicable disease letter" addressed to Leslie dated, May 24, 1997, which defendant claims to have found and read. *See R.* 105-09; 186:5. That letter was written one year and two months prior to the present incident. *See R.* 186:11. In the letter, the author states that Leslie is fortunate that her alleged disease is "curable." *See R.* 105-09. Therefore, even if Leslie had a communicable disease, which she now denies (*see R.* 186:11), it is reasonable to infer that she would have immediately sought medical attention and would have been cured many months before the present incident occurred. Accordingly, the letter does not make defendant's involvement in present incident more or less likely than it would without the evidence. *See Utah R. Evid.* 401.