

1992

State of Utah v. Gordon Snow : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Utah v. Snow*, No. 920272 (Utah Court of Appeals, 1992).

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)
Plaintiff/Appellee,) BRIEF OF APPELLEE
vs)
GORDON SNOW,) Case No. 920272-CA
Defendant/Appellant.)

BRIEF OF THE APPELLEE
APPEAL FROM THE SECOND CIRCUIT COURT
IN AND FOR THE COUNTY OF MORGAN, STATE OF UTAH
HONORABLE JUDGE MARK JOHNSON

GORDON SNOW
Defendant/Appellant Pro Se
220 E. Morris Avenue
Roy, UT 84067

**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 920272

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ARGUMENT PRIORITY 2

FILED

MAR 2 1994

COURT OF APPEALS

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TABLE OF AUTHORITIES AND STATUTES

Richfield City vs. Walker, 790 P.2d87 (Utah App. 1990)

Garcia vs. Schwendiman, 645 P.2d 651 (Utah 1982)

Lopez vs. Schwendiman, 720 P.2d 778 (Utah 1986)

State vs. Barnhart, 850 P.2d 473 (Utah App. 1993)

Section 41-6-44 (U.C.A. as amended)

JURISDICTION

Jurisdiction over this matter is conferred upon the Court of Appeals by Rule 3 of the Utah Rules of Appellate Procedure. This is a Circuit Court case involving Defendant's conviction for Driving Under the Influence.

This appeal is from a final order of the Second Judicial Circuit Court, County of Morgan, State of Utah, the Honorable Mark Johnson presiding.

STATEMENT OF THE ISSUE

Did the trial court error in its finding that the defendant was in actual physical control of a motor vehicle pursuant to Section 41-6-44 (U.C.A. as amended).

STATEMENT OF THE CASE

A. Nature of the Case

This case is an appeal from the Circuit Court conviction of the defendant for the offense of Driving Under the Influence of Alcohol.

B. Course of Proceedings and Disposition at Trial

Defendant was arrested and charged with the offense of Driving Under the Influence of Alcohol on or about the 31st day of July, 1991. Trial was held in the Justice Court in and for

Morgan County on or about the 10th day of October, 1991. Defendant was convicted at said Trial and appealed for a Trial De Novo to the Second Circuit Court in and for Morgan. Trial De Novo was held on or about the 8th day of January, 1992. Defendant was found guilty pursuant to a Memorandum Decision dated the 11th day of February, 1992.

C. Relevant Facts

That on July 31, 1991, at approximately 11:00 p.m., Morgan County Sheriff's Deputy Pierson was patrolling the Western end of the County. The Deputy observed a motor vehicle parked and stopped to investigate. The Deputy activated his "yelp" horn seven or eight times. The Deputy also shined all lights on the vehicle. There was no response from the Defendant. The Deputy then approached the vehicle and knocked on the vehicle several times. There was no response from the Defendant. The Deputy finally rocked the vehicle several times before the Defendant woke up. The Defendant was observed to be seated behind the steering wheel with the ignition keys still in the ignition. The Defendant's vehicle was located some distance off of a secondary street perpendicular to Interstate 15 in Morgan County.

The Deputy detected a strong odor of an alcoholic beverage

on the Defendant. Upon questioning, the Defendant indicated that he had had approximately 12 beers and stated that he was unable to drive. Defendant indicated to the Deputy of his intent to spend the night in that location.

The Deputy informed the Defendant that he was under arrest for driving under the influence and requested that he perform several field sobriety tests. The Defendant, in the opinion of the officer, failed all tests with the exception of one. A subsequent search of the vehicle recovered one quart sized bottle of Coors beer. The Defendant was asked to perform an intoxilizer test which results were .16. The Defendant was incarcerated in the Weber County Jail.

SUMMARY OF THE ARGUMENT

The facts and circumstances surrounding the Defendant's arrest for Driving Under the Influence of Alcohol fit squarely in with facts previously addressed by this Court in their determination that a driver was in actual physical control of his motor vehicle.

ARGUMENT

In determining whether or not a person has actual "physical control" of a motor vehicle the test is as set forth in Richfield

City vs. Walker, 790 P. 2d87 (Utah app. 1990). The factors listed by that Court as those that should be considered in determining actual physical control are as follows:

1. Whether the defendant was asleep or awake;
2. The position of the automobile;
3. Whether the vehicle's motor was running;
4. The Defendant's position within the vehicle;
5. Whether Defendant was Vehicle's sole occupant;
6. Whether Defendant had possession of the ignition keys;
7. Defendant's apparent ability to start and move the vehicle;
8. How the car got to where it was found;
9. Whether the Defendant drove it to that location.

The Court went on to indicate that these factors must be considered in their totality and that no single one is determinative. However, many of the facts present in the case at bar fit squarely with fact situations in previous cases wherein the Defendant was found in actual physical control. In viewing these circumstances the trial Court was well within its discretion in finding that the Defendant in this case was in actual physical control of his vehicle.

In Garcia vs. Schwendiman, 645 P.2d 651 (Utah 1982), as in this case, the driver was positioned behind the steering wheel, had possession of the ignition key and had the apparent ability to move the vehicle. (Items 4, 6, and 7 of the Walker test) the Court in that case rejected the Defendant's defense that he was unable to move his vehicle and therefore, could not have actual physical control. The Court rejected that argument saying that a person need not actually move the motor vehicle, but rather have "the apparent ability to start and move the vehicle" Id. at 654.

In Lopez vs. Schwendiman, 720 P.2d 778 (Utah 1986) the defendant driver was the sole occupant, was positioned behind the steering wheel, and have possession of the ignition keys (Numbers 4, 5 and 6 of the Walker test) the Court in that case in finding actual physical control repeated its rationale as set forth in Garcia.

In Walker, the Defendant was the sole occupant, had possession of the ignition key, had direct access to public streets and highways and the driver was asleep in the front seat. The Court in weighing all the relevant factors found that the trial Court did not abuse its discretion in finding actual physical control and affirming the conviction.

Finally, in a case decided by this Court the fact situation sat squarely with the facts in this case. In State vs. Barnhart, 850 P.2d 473 (Utah app. 1993) the Defendant/driver was the sole occupant of the vehicle, had possession of the ignition keys and was located in a position to have direct access to public streets and highways, and was located behind the steering wheel, (Numbers 5, 6, 7 and 8 of the Walker test). This Court, in upholding the lower Court's conviction, again emphasized that it is the State's policy to avoid the potential from harm from intoxicated drivers. It is the "public policy goal of preventing an intoxicating person from causing harm with a vehicle." Id at 480.


Defendant's position at the time of trial and thereafter, has been that it was his intent to park the vehicle and spend the night and did not have the intent to drive any further that night. This very argument was rejected by this court in Barnhart. "The subjective intent of a defendant not to operate a vehicle does not prevent a finding that a Defendant was in actual physical control" Id 479.

CONCLUSION

It is the policy of the State of Utah in dealing with

intoxicated drivers to avoid the potential of harm from such drivers. The trial Court, in looking at the totality of the circumstances, did not abuse its discretion in finding that this Defendant was in actual physical control of a motor vehicle.

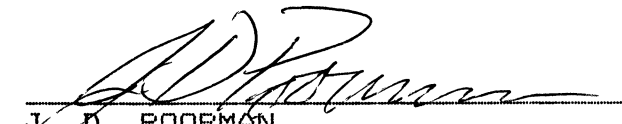
DATED this 2 day of Feb, 1994.



J. D. POORMAN,
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Appellee Brief was mailed to Gordon Snow, Defendant, 220 E. Morris Ave., Roy, UT 84061, on this ____ day of _____, 1994.



J. D. POORMAN,
Attorney for Plaintiff/Appellee

IN THE CIRCUIT COURT OF MORGAN COUNTY, STATE OF UTAH
MORGAN DEPARTMENT

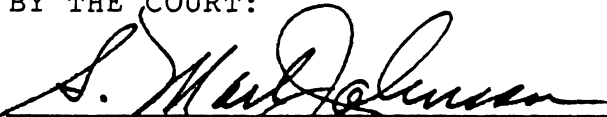
STATE OF UTAH, :
Plaintiff :
vs. : DECISION
Gordon Snow, :
Defendant : NO. 91-DI-8

THE COURT having reviewed evidence and heard oral arguments in the above entitled case wherein the defendant is charged with being in actual physical control of a vehicle while under the Influence of Alcohol, and having also considered the case of Lopez vs. Schwendiman (720 P2nd 778) and Richfield vs. Walker (790 P2nd 87), now finds that these cases are dispositive of the case at hand.

THE COURT finds the defendant guilty.

Dated This 11th Day of February, 1992.

BY THE COURT:



S. Mark Johnson
Circuit Judge