

1992

Layton City v. Karl John Weihert : Reply Brief

Utah Court of Appeals

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UTAH
DOCUMENT
FILE
AND
DOCKET NO.

920394 IN THE UTAH COURT OF APPEALS

LAYTON CITY,
 Plaintiff/Appellee

vs.

KARL JOHN WEIHERT,
 Defendant/Appellant.

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REPLY BRIEF

Appeal No. 920394-CA
 Priority No. 2

REPLY BRIEF

Appeal from the Judgment of the
 Second Circuit Court,
 Davis County, State of Utah,
 The Honorable S. Mark Johnson

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FILED

FEB 5 1993

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

LAYTON CITY,

Plaintiff/Appellee

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REPLY BRIEF

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vs.

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KARL JOHN WEIHERT,

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Appeal No. 920394-CA

Defendant/Appellant.

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IN THE UTAH COURT OF APPEALS

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Appeal No. 920394-CA

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Priority No. 2

Defendant/Appellant.

SUMMARY OF THE ARGUMENT

Plaintiff/respondent alleges that the statute in question is remedial in nature, however it affects the substantive rights of the defendant/appellant and is therefore not remedial. The weight of the law, from all sources in Utah, including the Constitution, statutes and case law indicate that this law has no retroactive applicability.

The affidavits submitted are inadequate on their face as an exhibit at trial and it was error to admit them.

ARGUMENT

POINT I

The plaintiff/respondent misstates the law. The law in the State of Utah does not allow the retroactive application of newly passed statutes unless otherwise provided. "No part of these revised statutes is retroactive, unless expressly so declared." (Utah Code Annotated Section 68-3-3 (1953 as amended).)

(hereinafter UCA 68-3-3). UCA 77-2-1.1 does not provide for a retroactive application.

The plaintiff/respondent relies on two cases to support their position on the retroactivity of the statute. On page 8 footnote 2 of respondent's Brief they rely on two civil cases to determine the rights of an accused in a criminal case. The cases cited in this reference are talking about contract obligations and/or civil relationships (payment of attorney's fees) and has no application to criminal law. The Utah Supreme Court has as well addressed the retroactivity application of a law. This they have done in Archer v. Utah State Land Board, 392 P.2d 622 (Utah 1964), in this case the Court states "This question can best be resolved by remarking that ordinarily the facts of the law in a given law suit are to be applied as of the date of the filing of the original complaint." The Court further states:

It is true, as the employer Oakland contends: that it is entitled to have its rights determined on the basis of the law as it existed at the time of the occurrence; and that a later statute or amendment should not be applied in a retroactive manner to deprive a party of his rights or impose greater liability upon him. Oakland v. The Industrial Commission, 520 P.2d 208 (Utah 1974).

The case law in Utah is clear in the area of civil litigation and this States position is contrary to that as indicated in the plaintiff/appellant's brief.

In this context, the more critical factor is the application of the Utah State Constitution is of paramount importance, which provides:

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed. Utah State Constitution Article 1 Section 18.

The scheme which is proposed by the plaintiff/appellant goes contrary to the law, including case law, statutory law and constitutional law in the State of Utah.


POINT II

The plaintiff/appellant deals with the acceptability of affidavits pursuant to UCA 41-6-44.3. That is not the issue on appeal. The sole issue as it pertains to the admissability of the affidavits is the sufficiency and the content. The Judge in this case did indeed make the requisite findings for the admission of these exhibits according to Murray City v. Hall, 663 P.2d 1314 (Utah 1983). There is a substantial question as to whether or not there was sufficient foundation laid for the Judge to make the requisite findings, that is not the issue here on appeal. The sufficiency of the affidavits is the only question before this Court as it pertains to the affidavits. The affidavits would not be acceptable in a civil case, they should not be acceptable in a criminal case. Reason dictates that the standard of proof in a criminal case being "beyond a reasonable doubt" as opposed to the standard in a civil case of "by a preponderance" the burden on the reliability and standard of the affidavit should be equally enhanced.

CONCLUSION

The Information in this case was not timely filed and the affidavits offered into evidence were substantively defective. This case should be dismissed.

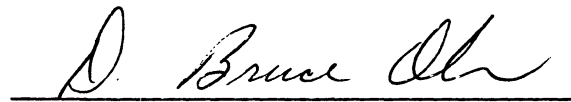
Dated this 27 day of January, 1993.



D. BRUCE OLIVER
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing **REPLY BRIEF** to: JANENE H. ELLER, Layton City Prosecutor, 437 North Wasatch Drive Layton, Utah 84041 this 27 day of January, 1993.



A D D E N D U M

Utah State Constitution Article 1 Section 18

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

Utah Code Annotated Section, 41-6-44.3

(2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memorandum or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

- (a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and
- (b) the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.

Utah Code Annotated Section, 68-3-3 (1953 as amended)

"No part of these revised statutes is retroactive, unless expressly so declared."

Utah Code Annotated Section, 77-2-1.1

The prosecuting attorney shall sign all informations. The prosecuting attorney may:

- (1) sign the information in the presence of a magistrate; or
- (2) present and file the information in the office of the clerk where the prosecution is commenced upon the signature of the prosecuting attorney.



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FEB 5 1993

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

LAYTON CITY,

Plaintiff,

:
:
:

AMENDMENT TO REPLY BRIEF

vs.

:

Case No. Appeal No. 920394-CA

KARL JOHN WEIHERT,

:

Priority 2

Defendant.

DETERMINATIVE CONSTITUTIONAL PROVISIONS OR STATUTES

Utah State Constitution Article 1 Section 13

Utah State Constitution Article 1 Section 18

Utah Code Annotated Section 68-3-3 (1953 as amended)

Utah Code Annotated Section 77-2-1.1

Utah Code Annotated Section 78-2a-3(2)(c)

Utah Code Annotated Section 41-6-44 (1953 as amended)

Utah Code Annotated Section 76-1-302(2)

Utah Code Annotated Section 77-7-21(2)

Utah Code Annotated Section 76-1-501

Dated this 4 day of February, 1993.

D. Bruce Oliver

D. BRUCE OLIVER

Attorney for Defendant/Appellant

Utah State Constitution Article 1 Section 13

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State...

Utah Code Annotated Section 41-6-44 (1953 as amended)

(2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

- (a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and
- (b) the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.

Utah Code Annotated Section 76-1-302(2)

A prosecution is commenced upon the finding and filing of an indictment by a grand jury or upon the filing of a complaint or information.

Utah Code Annotated Section 76-1-501

(1) A defendant in a criminal proceeding is presumed 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;
- (3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence.

Utah Code Annotated Section 77-7-21(2)

If the person cited wilfully fails to appear before a magistrate pursuant to a citation issued under Section 77-7-18, or pleads not guilty to the offense charged, or does not deposit bail on or before the date set for his appearance, an information shall be filed and proceedings held in accordance with the Rules of Criminal Procedure and all applicable provisions of this code, which information shall be deemed an original pleading, however, that the person cited may by written agreement waive the filing of the information and thereafter the prosecution may proceed on the citation notwithstanding any provisions to the contrary.

Utah Code Annotated Section 78-2a-3(2)(c)

The Court of Appeals has appellate jurisdiction of interlocutory appeals, over:
(c) appeals from the juvenile courts

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing
AMENDMENT TO REPLY BRIEF to: JANENE H. ELLER, Layton City
Prosecutor, 437 North Wasatch Drive Layton, Utah 84041 this
4 day of February, 1993.

D. Brundage