

1992

Layton City v. Karl John Weihert : Brief of Appellant

Utah Court of Appeals

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Janene H. Eller; Layton City Prosecutor; Attorney for Appellee/Respondent.

D. Bruce Oliver; Attorney for Defendant/Appellant.

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IN THE UTAH COURT OF APPEALS

LAYTON CITY,

:

Plaintiff/Respondent,

:

APPELLANT'S BRIEF

vs.

:

KARL JOHN WEIHART,

:

Appeal No. 920394-CA

Priority No. 2

Defendant/Appellant

:

APPELLANT'S BRIEF

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

D. BRUCE OLIVER
180 South 300 West, Suite 210
Salt Lake City, Utah 84101
Telephone: 328-8888
Attorney for Appellant

JANENE H. ELLER
Layton City Prosecutor
437 North Wasatch Drive
Layton, Utah 84041
Telephone: (801) 546-8530
Attorneys for Appellee

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D. BRUCE OLIVER
180 South 300 West, Suite 210
Salt Lake City, Utah 84101
Telephone: 328-8888
Attorney for Appellant

JANENE H. ELLER
Layton City Prosecutor
437 North Wasatch Drive
Layton, Utah 84041
Telephone: (801) 546-8530
Attorneys for Appellee

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D. Bruce Oliver #5120
Attorney for Defendant/Appellant
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1218
Telephone: (801) 328-8888

IN THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

The specific statutory authority that confers jurisdiction on the Utah Court of Appeals to decide this appeal is Utah Code Annotated Section 78-2a-3(2)(c).

NATURE OF PROCEEDINGS

This case is an appeal from the final Judgment of the Second Circuit Court dealing with a DUI (driving under the influence of alcohol).

STATEMENT OF THE ISSUES

Whether the prosecution in this case was commenced properly?
Whether the affidavits were legally sufficient to be admitted?

DETERMINATIVE CONSTITUTIONAL PROVISIONS OR STATUTES

Utah State Constitution Article 1 Section 13

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

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case is an appeal from a jury verdict and conviction in the Second Circuit Court, Layton Department.

II. COURSE OF PROCEEDINGS

The Defendant/Appellant was charged with Driving Under the Influence of Alcohol. The case came to trial on May 20, 1992. The jury convicted the Defendant/Appellant of Driving Under the Influence of Alcohol. The defendant was sentenced. A Certificate of Probable Cause was requested and granted.

III. DISPOSITION AT TRIAL COURT

At the trial in this matter the Defendant/Appellant was convicted of Driving Under the Influence of Alcohol by a jury.

IV. STATEMENT OF FACTS

On December 22, 1991 the Defendant/Appellant was stopped and arrested for Driving Under the Influence of Alcohol. The matter came on for trial on May 20, 1992. At the beginning of the trial counsel objected to the manner in which the Information was filed. The Judge allowed the trial to proceed over the objections of defense counsel. The City attempted to introduce affidavits into evidence to show the reliability of the breath machine used to test the Defendant/Appellant's breath. Defense counsel objected based

upon the form and adequacy of the affidavits. The trial Judge allowed the affidavits to be admitted over the objections of counsel. The jury found the Defendant/Appellant guilty and this appeal followed.

SUMMARY OF THE ARGUMENT

Both the Utah State Constitution as well as statutes of the State of Utah require that criminal prosecutions be commenced in specific ways. This prosecution was commenced in a manner not allowed by law.

In civil cases in Utah Courts, affidavits may be used for specific purposes. In order to use affidavits under Utah Rules of Civil Procedure the affidavit must rise to certain levels of content and reliability. They may not contain hearsay nor conclusions. They must be based on facts and personal knowledge and the content must be admissible at trial. If Rule 56 of the Utah Rules of Civil Procedure sets these standards for the use of affidavit in civil matters then the same or greater standards must be applied to criminal matters. In the present case the affidavits were full of hearsay and conclusions and as such should not have been admitted at trial.

ARGUMENT

POINT I

WHETHER THE PROSECUTION IN THIS CASE WAS COMMENCED PROPERLY?

The defendant/appellant in this case was stopped by Officer Keith and subsequently arrested for violation of Utah Code Annotated 41-6-44 (1953 as amended) (hereinafter UCA). This matter

came to trial on May 20, 1992 in Layton Circuit Court. The information in this matter was filed with the Clerk of the Court and signed by the prosecutor on May 15, 1992 at 3:55 p.m. (see Trial Transcript p. 29) (hereinafter TT p. 29). At the time of the filing it was not presented to the Magistrate for his examination and commitment. Prosecution is "commenced" with the filing of the Information (see UCA 76-1-302 (2)) which provides that "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 Rules of Criminal Procedure Rule 5 (hereinafter URCrP Rule 5) provides:

Unless otherwise provided all criminal prosecutions whether for felony, misdemeanor or infraction shall be commenced by the filing of an information or the return of an indictment. Prosecution by information shall be commenced before a magistrate having jurisdiction of the offense alleged to have been committed unless otherwise provided by law.

This is the requirement for the commencement of a criminal prosecution . This provision does not allow for the commencement of the criminal prosecution upon the filing of the traffic citation, which was prepared by the arresting officer.

URCrP Rule 4 provides further that:

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed. (emphasis added).

UCA 77-7-21 (2) provides:

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.

In the case at bar the Information was filed 5 days prior to the time of trial and some*****days after the date of the arrest. This is clearly not a case where the criminal prosecution was commenced by the filing of the Information.

The Utah State Constitution requires that criminal prosecutions proceed by way of Information:

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 State Constitution Article 1 Section 13)

There are no provisions which allow the bypass of the presentment, examination and commitment by a magistrate of an Information. The provisions are very specific and consistent from provision to provision. In this case the Information was never presented to the Magistrate until after the jury had been sworn. (see TT p. 30-32 and 39). This was an unacceptable means to commence the prosecution of this matter. The prosecution of this matter was commenced in an unconstitutional and unlawful manner.

POINT II

WHETHER THE AFFIDAVITS WERE LEGALLY SUFFICIENT TO BE ADMITTED?

Utah Rules of Civil Procedure Rule 81 (e) states:

(e) **Application in criminal proceedings.** These

rules of procedure shall govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement. (emphasis in original).

This is an attempt to round out the rules by which criminal prosecutions are governed. It provides that in the absence of other governing provisions, rules, or statutes then Utah Rules of Civil Procedure (hereinafter URCP) are applicable and actually govern.

In the case at bar there was an attempt by the prosecution to introduce affidavits. The affidavits were to be introduced pursuant to UCA 41-6-44.3. This section provides:

(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.

The State attempted to satisfy this requirement by the introduction of three affidavits (see TT p. 108). The introduction of these affidavits is an attempt to satisfy this requirement was objected to by defense counsel at that time (see TT p. 109). The affidavits which were proffered by the State contained statements which were hearsay and also contained

conclusions which were more appropriately left to the Judge to find. (see Exhibit 1 herein).

URCP Rule 56 places certain criteria on affidavits to be introduced and used in a pending case. This rule deals with a Motion for Summary Judgment. Pursuant to URCP Rule 81 and the absence of any rule to the contrary, this rule will control in a criminal prosecution. URCP Rule 56 (e) is the provision which establishes the standard of affidavits to be used in court, it states:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. ...but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts... .
(emphasis added)

The affidavits as introduced by the prosecution contained conclusions and hearsay. Neither of the foregoing would be admissible at trial on the issues.

Some of the conclusions contained in the affidavit of the breath testing technician is as follows:

- A. This was done according to the standards established by the Commissioner of the Utah Department of Public Safety
- B. Gives readings in grams of alcohol per 210 liters of breath.

One of the hearsay statements contained in Christian Koorring's Affidavit is:

- A. The attached tests were done before and after the date of December 22, 1991.

The Affidavit of Christian Koorring contained hearsay when he

swore that the attached tests were conducted on the given dates when he indeed did not or in the alternative did not indicate that he had personal knowledge thereof. Further the conclusion that he was the custodian of the records is just that a conclusion. The fact that he was or was not the custodian of the records is a decision or finding to be made by the Court after reviewing specific facts which would allow the court to make such a decision. This affidavit would be improper as a document in support of a parties Motion for Summary Judgment and as well should be improper in a criminal matter. In the civil case the burden of proof for the plaintiff to prevail is by a preponderance of the evidence. In a criminal matter the burden of proof is beyond a reasonable doubt (see UCA 76-1-501). With the higher burden of proof it would not be appropriate to relax the standard for an affidavit to be introduced and used.

The affidavit of the breath testing technician is flawed as well. Therein he makes the conclusion that the steps taken comply with the standards of the Commissioner of Public Safety. The appropriate means of presenting this information would be to give the specific requirements and the specific conduct satisfying the requirements and allow the Judge to determine if indeed the requirements had been met. In the affidavits introduced and based upon the conclusions stated therein we have no way of knowing what requirements or standards the technician is referring to and what he actually did to comply therewith. This removes from the Court the opportunity to look past the conclusions and to make the

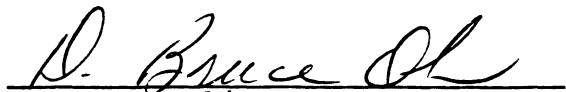
appropriate findings. The affidavits as they were presented were woefully inadequate. They certainly did not comply with the standards as required by URCP Rule 56 (e). It was error to admit the affidavits based upon the content.

The affidavit as offered which was executed by Ronald Elsworth the technician in this matter manifest signs of unreliability. This unreliability was not cleared up by the prosecution. Ronald Elsworth is claiming to have performed certain things on a machine in Davis County, Utah however, the affidavit was executed in Daggett County, Utah the following day. This raises a question of the reliability of the affidavit. On its face the affidavit should not be admitted. The location at which the affidavit was executed raises the question as to whether or not the documents were prepared contemporaneously with the act or event.

CONCLUSION

In this case the criminal prosecution was not commenced with the filing of an Information. The Information further was not sworn to before the committing magistrate. This makes the procedure defective. The affidavits which were admitted were admitted in error and the exclusion of these affidavits would preclude the admission of exhibits 1 and 2 at the trial. This was error. The decision of the trial court should be reversed and the verdict vacated.

RESPECTFULLY SUBMITTED this 24 day of November, 1992.


D. Bruce Oliver
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing **APPELLANT'S BRIEF** to Janene H. Eller, Layton City Prosecutor, 437 North Wasatch Drive, Layton, Utah 84025 dated this 25 day of November, 1992.

D. Bruce Oh

A D D E N D U M

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

(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 memorandua 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 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 Rules of Civil Procedure, Rule 56 (e)

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. ...but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts... .
(emphasis added)

Utah Rules of Civil Procedure, Rule 81 (e)

(e) **Application in criminal proceedings.** These rules of procedure shall govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement. (emphasis in original).

Utah Rules of Criminal Procedure, Rule 4

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed. (emphasis added).

Utah Rules of Criminal Procedure, Rule 5

Unless otherwise provided all criminal prosecutions whether for felony, misdemeanor or infraction shall be commenced by the filing of an information or the return of an indictment. Prosecution by information shall be commenced before a magistrate having jurisdiction of the offense alleged to have been committed unless otherwise provided by law.

T R A N S C R I P T S

1 received a copy of the Information this morning, your Honor.

2 THE COURT: Mr. Bailiff, we're going to have the
3 jury step out for just a minute more. I'm sorry. We have a
4 preliminary matter.

5 MR. OLIVER: Just received a copy of the
6 Information this morning. It was apparently filed with the
7 Court on May 15th at 3:55 p.m., which was on Friday of this
8 week past. And the bottom of the Information says this
9 Information is based upon evidence obtained from the
10 following witness: Donald J. Keith, and that's signed by
11 Janene H. Eller, Layton City Prosecutor.

12 Then the next line, I--is scratched out, and put
13 "filed this 15th day of May, 1992," Circuit Judge is crossed
14 out, and I don't know who signed this. I don't read--I
15 can't read the signature, but that's neither here nor there.

16 The Constitution of the State of Utah, Article 1,
17 Section 13 requires that offenses heretofore required to be
18 prosecuted by indictment shall be prosecuted by Information
19 after examination and commitment by a magistrate. This was
20 not sworn to before a Judge nor authorized by a Judge.

21 I think that even technically speaking and I'll
22 raise the argument now commensurate therewith, but the
23 important thing is that they be commenced by the commitment
24 of the--examination and commitment by the magistrate rather
25 than being filed in the middle of a case. I think the

1 filing is inadequate, but I think that's really the crux of
2 my motion to dismiss is that this has not been presented to a
3 magistrate and authorized for filing. And that's improper
4 and totally improper and we would move to dismiss the case.

5 THE COURT: City?

6 MS. ELLER: Yes. He's correct, it was not sworn
7 to before the Judge. I--I was informed by the clerk that an
8 Information had not been filed in this case. I came over and
9 met with Judge Bean, who indicated that due to--because of
10 amendment, I'm not sure if it's to a rule or statutory
11 requirements, that they no--these Informations no longer
12 need to be sworn before the Judge. And so based on that
13 information from Judge Bean, I signed the Information and
14 filed it at that time.

15 If the Court wants to give me a minute, I'm sure
16 that I can find a reference to the amendment.

17 THE COURT: Well, there is a new rule on that;
18 however, in order to have the proper record here, I'd
19 indicate that the citation itself appears to have been
20 filed by the Court--or with the Court quite some time ago,
21 it's in the file itself. And I would allow the State or
22 the City at this time to sign the Information under oath,
23 or to verify it under oath, and I would even subscribe, the
24 new rule in the event there is any problem with prior
25 offenses, I think it's more of a technical, procedural

1 matter than anything else; so would you raise your right
2 hand, please?

3 MR. OLIVER: Judge, before you do that--

4 THE COURT: Yes.

5 MR. OLIVER: --if I may just address briefly--

6 THE COURT: Yes.

7 MR. OLIVER: --what the Court has just raised.

8 77-7-21, Utah Code Annotated indicates that the
9 citation is not sufficient.

10 THE COURT: I understand.

11 MR. OLIVER: As a matter of fact, to proceed on
12 the citation requires--

13 THE COURT: I understand.

14 MR. OLIVER: Well, I appreciate that, but I still
15 would like to make it for the record.

16 The 77-7-15 requires that a waiver be had prior
17 to proceeding on the citation, that waiver has not been had,
18 definitely Mr. Weihert nor myself, neither one, has waived
19 that in writing, and do not waive that. And the very fact
20 that the prosecution must be commenced is not technical,
21 it's a Constitutional requirement.

22 THE COURT: I--

23 MR. OLIVER: And as such, the appropriate remedy
24 at this point in time is to dismiss because it's been
25 improperly commenced and we're here improperly before the

1 Court, and the appropriate remedy is to dismiss the case.

2 THE COURT: I understand your position.

3 Now, would you raise your right hand, please, and
4 be sworn?

5 Do you solemnly swear that the facts set forth
6 in this Information are true and correct to the best of
7 your knowledge, so help you, God?

8 MS. ELLER: I do.

9 THE COURT: Would you sign again where you have
10 already signed?

11 MR. OLIVER: Your Honor, not knowing how far the
12 Court is going to go with regards to the jury instructions
13 at this point in time, I do have some objections and if the
14 Court anticipates--excuse me--anticipates reading those to
15 the--the entirety to the jury at this time, I would like to
16 address that.

17 THE COURT: Okay. This might be a good time to--
18 to make the objections, also to have the--your position
19 concerning the jurors that--

20 MR. OLIVER: Oh. The--

21 THE COURT: --that you had asked be excused for
22 cause, put that on the record so we have the record.

23 MR. OLIVER: Okay. Thank you, your Honor. The
24 instructions are not numbered, so I'm referring to the
25 instruction that has at the top of the page a G. It says,

1 THE COURT: But you felt that she could not be
2 fair and impartial because of her involvement with--

3 MR. OLIVER: The affiliation with her husband,
4 her son who is a paramedic, discussion of the cases,
5 contribution to M.A.D.D., the whole scenario, I think,
6 created the feeling that Ms. Whitecar may indeed be a little
7 bit more prejudiced than she was willing to admit, and we
8 moved to strike her for cause based upon the entire
9 scenario as she related it.

10 THE COURT: Okay. And the Court denied there--the
11 defendant's motion to strike for cause of those two jurors.

12 Are we ready to proceed then?

13 Bring the jury back in.

14 One of these days, I'm going to get these jury
15 instructions down pat. I have more trouble here, for some
16 reason, than anywhere else that I've gone. We've got to
17 get them straightened out. Good practice, huh?

18 I'll make note for the record that a sworn
19 information has been filed; however, it was filed after
20 the jury was empaneled.

21 MR. OLIVER: Thank you, your Honor.

22 THE COURT: But there was--I mean, the one
23 signed before the Judge was filed after the jury was
24 empaneled. There was one filed, signed by the Court
25 Clerk's Office prior to the jury being empaneled.

1 A The actual breath sample was administered at 1912,
2 which would be 7:12 p.m.

3 Q And do there appear to have been any alterations
4 made to those documents that you filled out at the time you
5 gave the test to Mr. Weihert?

6 A No.

7 MS. ELLER: Your Honor, I'd like to offer
8 Plaintiff's Exhibit 3 which is custodian certificate and
9 intoxilyzer test and affidavit regarding the intoxilyzer
10 machine.

11 THE COURT: Has defense counsel seen that?

12 MS. ELLER: He has.

13 MR. OLIVER: I've seen them just briefly, your
14 Honor. Do have some objections to them.

15 THE COURT: All right. We will have a very brief
16 removal of the jurors while we discuss a legal issue here
17 and you're again advised not to discuss the case until you
18 go into the jury room to finally discuss it.

19 MS. ELLER: Your Honor, if Mr. Oliver's objection
20 goes to the admission of those--that affidavit and ultimately
21 to the other documents that are before Officer Keith, then I
22 would have an objection to him raising that objection at
23 this time. I would like to go forward with that.

24 THE COURT: Well, let's go ahead and hear what the
25 objection is at this point. What is your objection?

1 MR. OLIVER: May I approach the bench, your Honor?

2 THE COURT: Yes.

3 (Whereupon, an off-the-record discussion was held
4 at side bar.)

5 MR. OLIVER: With regards to Exhibit P-3, I think
6 there are a couple of significant (inaudible). Point 3,
7 which is the stan--the standards for chemical breath analysis,
8 the evidence. Under this, and I have perused this today
9 specifically in conjunction with this case--

10 THE COURT: 41-6-44.3?

11 MR. OLIVER: That's correct, your Honor.

12 THE COURT: Okay. Go ahead.

13 MR. OLIVER: It says, the Department of Public--
14 the Commissioner of the Department of Public Safety shall
15 establish standards for the administration and interpreta-
16 tion of chemical analysis of a person's breath, including
17 standard of training.

18 Now, first thing, those standards are not available
19 here and we don't know what the standards are; but going on
20 to Paragraph 2, says, in any action or proceeding in which
21 it is material to prove that a person was operating or in
22 actual physical control of a vehicle while under the
23 influence of alcohol or any drug, or operating with a blood
24 or breath alcohol content statutorily prohibited, documents
25 offered as memorandum or record of acts, conditions or