1965

State of Utah v. Larenzo Eugean Park : Brief of Appellant Larenzo Eugean Park

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

LARENZO EUGEAN PARK,
Defendant and Appellant.

Case No. 10270

BRIEF OF APPELLANT LARENZO EUGEAN PARK

Appeal from the District Court of Salt Lake County, Utah
Honorable Merrill K. Faux, Judge

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STATEMENT OF KIND OF CASE

This is an action brought to review the action of the District Court of the Third Judicial District, Judge Merrill K. Faux, wherein Larenzo Eugean Park was convicted of negligent homicide under Section 41-6-43.10, Utah Code Annotated, 1953.

DISPOSITION BY THE COURT

The State of Utah presented insufficient evidence that the appellant was guilty of a "reckless disregard of the safety of others", yet the trial court, sitting without a jury, found the appellant guilty and imposed sentence upon him.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the trial court's findings and sentence reversed and a finding of acquittal entered.

STATEMENT OF FACTS

On the evening of January 31, 1964, Larenzo Eugean Park was driving an automobile owned by his aunt and uncle. He was accompanied by his fiancee, Diane Frandsen, who is now his wife. They were proceeding in an easterly direction along 4800 South, a two-lane, paved highway in Salt Lake County, Utah at about 8:45 P.M. The automobile was in good mechanical condition. The road was black-topped and dry. (R-40). Darkness had fallen. Neither Mr. Park nor Miss Frandsen had been drinking.

The Taylorsville Ward is located on the south side of 4800 South Street at about 1246 West. There were some vehicles parked on the street in front of the chapel and a few persons were standing near the

steps of the church building. The vehicle in question passed two other automobiles about 400 feet west of the chapel and returned to the eastbound lane of traffic. (R-196). As the vehicle passed to the front of the church it struck and killed Clyde Milton McMillan, who was in the process of crossing 4800 South Street in a southerly direction. The speed of the automobile was approximately 40 miles per hour. The posted speed limit in the area was 35 miles per hour.

The victim was small in stature and was dressed in dark clothing. (R-34.) An indistinct crosswalk was marked on the highway immediately in front of the church with lines that were nearly obliterated. (R-42, 72.) There was no sign in or by the crosswalk noting its existence, but a sign indicating the presence of a pedestrian crossing was placed upon a post at the side of the road some distance to the west of the church. (R-59). The night was dark and the highway and surrounding area was but dimly lighted. (R-83).

The defendant was charged with negligent homicide and trial was had on June 15, 16 and 17, 1964, in the District Court of the Third Judicial District before the Honorable Merrill K. Faux. Defendant was found guilty and sentenced to six months in the county jail and was fined $500.00. Defendant was placed on probation, on condition that he voluntarily serve three months in the County Jail and pay a fine of $250.00.

STATEMENT OF POINTS

The defendant relies upon the following listed points as a basis for seeking a reversal of judgment of the court below.

ARGUMENT

POINT I

I. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS ON THE GROUND THAT THE STATE FAILED TO PROVE DEFENDANT'S CONDUCT CONSTITUTED A "RECKLESS DISREGARD FOR THE SAFETY OF OTHERS" AS REQUIRED BY SECTION 41-6-43.10, UTAH CODE ANNOTATED, 1953.

Section 41-6-43.10 provides:

> "When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard for the safety of others, the person so operating such vehicle shall be guilty of negligent homicide."

At the time the court denied defendant's Motion to Dismiss, the Court used the following language in supporting its reasoning. (R-191):

THE COURT:

> "I am impressed with these facts which Mr. Watkiss has not mentioned; if there was a two-lane street, cars parked in front of the Meet-

ing House, pedestrian walked from the north side toward the south side where he was struck, going—we might assume—at one-tenth the admitted speed—one tenth—the admitted speed of the vehicle, so that he was in view of the driver if the driver had wanted to look, for probably 200 feet."

"As the driver approached this congested area, with cars parked in front of the Meeting-House, people standing and talking; and, for 200 feet, as best he can calculate, the driver saw nothing in front of him, approaching the point of impact, at 40 miles per hour, in a second's time—from the time my finger reaches this point until it reaches it again—in that length of time, his car travels 60 feet; travelled at that rate of speed at the area where this occurred, it appears that this driver was operating the vehicle with such a negligence—such careless disregard as this statute contemplates."

"People could be expected to be crossing there. He was warned by a sign, which he apparently didn't see, 'Pedestrian Lane,' which he took no notice of."

"He didn't see for 200 feet, the person crossing the highway. He travelled at a rate of speed, which under proper conditions, would not be considered illegal at 35 miles per hour; but, under the condition of lighting under the County—the cars parked by the highway, people standing, it was utter disregard for the safety of others to proceed, blindly at his rate of speed, admitted to be 40 miles per hour—5 miles in excess of the posted rate."

"The Motion to Dismiss is denied."

Defendant submits this evidence, upon which the court's determination was made, was not sufficient to support the denial of defendant's Motion to Dismiss. The Court below simply applied the wrong legal standard to the facts in this case.

In order for a conviction to be sustained under the above statute, the State must prove more than the lack of due care on the part of the driver. The dereliction of the driver must meet the statutory requirements and definition of criminal negligence and the definitive test of reckless disregard of the safety of others. Mere negligence does not constitute a reckless disregard. *State v. Berchtold,* (Utah, 1960) 357 P 2d 183.

The Berchtold case, relied on by the defendant in arguing his Motion to Dismiss, well illustrates the test which the court below should have applied. There this Court said, at Page 187:

> " . . . reckless disregard requires a much greater degree of disregard for the safety of others than does ordinary lack of due care for such safety, or mere negligence. Although the distinction between these two concepts is a difference in degree of risk, this difference in degree is so marked as to amount substantially to a difference in kind."
>
> "We conclude that if the evidence reasonably supports a finding that defendant consciously chose a course of action knowing that such course would place his guests in grave and serious danger, or with knowledge of facts which would dis-

close such danger to any reasonable person, when he could have avoided such danger, he was guilty of reckless disregard for the safety of others . . . *Recklessness indicates indifference and utter disregard for consequences and is not mere inadvertence nor error in judgment.*" (Emphasis added).

The facts of the Berchtold case are strikingly dissimilar to those of the case at Bar and well illustrate a reckless act sufficient for a finding of negligent homicide.

There, the defendant was charged with driving his car in reckless disregard of the safety of his passenger, who was killed when the car left the road on a curve and collided with some trees and a utility pole. The evidence as to speed was conflicting, but was admitted by defendant to be 70 miles per hour. The State's expert opinion placed the vehicle's speed at a minimum of 110 miles per hour. The accident occurred on a dry, gradually curved portion of a hard-surfaced country road, at 8:30 p.m. It was dark and the weather was clear. Defendant testified that just prior to the accident he had increased his speed and brightened his lights to see which way the road turned. As he turned he felt the vehicle skid, whereupon it left the roadway and the crash occurred. On these facts the jury rendered a verdict of guilty, which was upheld on appeal. To the aforemenioned language, the court added, at page 187:

"Our statute does not require an intentional accident nor the choosing of a highly dangerous course while fully conscious or aware of the dan-

ger confronting him in following such course. It does require the choosing of a course with grave and marked dangers, and the driver must be conscious and aware of the course he chooses, and such course must be so fraught with danger that all reasonable persons, if they thought about it, could not fail to recognize the danger."

It is not possible that, if confronted with the same situation as the Court below has described in denying defendant's Motion, all reasonable persons if they thought about it would recognize a danger to others. There is a clear difference between the 110 miles per hour, on a curve, at night, as in the Berchtold case, and the 40 miles per hour on a straight roadway, at night, toward a small man dressed in dark clothing, who was difficult to see, as is shown by the evidence in the case at Bar.

Defendant submits that not only do the facts completely fail to show the required reckless disregard, but they would not even establish ordinary negligence, as a matter of law. The case of *Charvoz vs. Cottrell,* (Utah, 1961) 36. P 2d 516, provides a startling and revealing comparison of factual and legal determinations.

In the Charvoz case, the decedent was also killed by a defendant's automobile, as he proceeded as a pedestrian in a southerly direction across a dimly lighted street. There, too, decedent was wearing dark clothing and was approximately 6 feet past the center of the street when struck by the defendant's automobile, which was in the proper lane of traffic proceeding in an east-

erly direction. The weather was clear and the road dry. The fact differences in the Charvoz case in that defendant was only driving about 30 miles per hour and the decedent was crossing in a pedestrian lane at an intersection are not significant. In its decision, which held the evidence did not require a finding of even ordinary negligence, this court said, at page 518:

> "Defendant testified that he was travelling at a speed of approximately 30 miles per hour as he approached the intersection; that the headlights of his automobile were on low beam; and that he did not see the deceased until he was about 60-65 feet from the point of impact. He immediately applied the brakes, but was unable to stop the car in time to avoid the collision. Plaintiff reasons that the defendant could and should have observed the decedent at a distance of at least 100 feet from the crosswalk, which would have been a sufficient distance in which to stop the automobile and avoid striking the deceased; thus, defendant was negligent in failing to keep a proper lookout. This reasoning, however, overlooks certain other pertinent facts. It was dark at the time of the accident; the street had a black-top surface; the intersection was only dimly illuminated; the backdrop, as seen from defendant's automobile, was a dark vacant lot on the northeast corner of the intersection; there was a car stopped on the north side of the intersection with its lights burning; and the decedent was wearing dark clothing. Therefore, although the evidence is undisputed that the defendant could have stopped his car in time to avoid the accident had he seen the deceased at a distance of 100 feet, the circumstances are such as to

> create a doubt in the minds of reasonable men as to defendant's ability to observe the decedent at that distance and hence the issue of failure to keep a proper lookout was for the jury."

By comparison of the recited Charvoz facts with the evidence in this case, it appears that this court, had it been confronted with these same facts in a civil action for wrongful death would not find defendant's conduct herein constituted even ordinary negligence as a matter of law. That defendant's conduct then is not sufficient to constitute the reckless disregard contemplated by Section 41-6-43.10 must follow.

Of further aid in defining factually what is meant by "reckless disregard" are two cases construing the guest statute of Idaho, which holds a driver liable to his guest for the driver's reckless disregard of the safety of others.

In the first case, that of *Turner v. Purdum,* (Idaho, 1955), 289 P2d 608, the automobile in question collided with the rear end of a potato digger being towed by a tractor. The collision occurred in the darkness about 9:30 P.M. There was a slight wind, causing some dust, and an occasional sprinkle of rain. The potato digger had no reflector light on the rear, but the tractor had a white light showing to the rear. The vehicle approached from the rear at a speed of 45 to 50 miles per hour and the driver observed the white light from about ½ mile away. He then did not see the light again until it was about 25 or 30 feet away and it was too late to stop.

Upon suit by the passenger, who was injured in the resulting collision, the plaintiff was nonsuited at the close of his evidence. From this nonsuit, plaintiff appealed. The Idaho Supreme Court, in affirming the lower court, said at page 612:

> "The evidence does not disclose that respondent . . . was driving at a rate of speed which could constitute more than ordinary negligence under the circumstances. His failure to see the potato digger in time to avoid the accident could not be more than ordinary negligence. There is nothing in the record to indicate that respondent . . . was or should have been conscious of danger and to indicate a willingness on his part to assume the risk, or an indifference to consequences."

Can the court in the case at bar say, upon comparison with the Turner case, that the evidence showed defendant was driving at a speed which would constitute more than ordinary negligence? And did the defendant's failure to see the small, darkly dressed decedent constitute more than ordinary negligence? There is nothing in the record to indicate that defendant should have been conscious of the danger and that he willingly chose a course to the consequences of which he was indifferent.

The case of *Wood v. Taylor,* (Utah, 1958) 332 P.2d 215, wherein this Court found a reckless disregard of consequences, also graphically illustrates the factual inadequacies of the case at bar, for such a holding. In that case, defendant was driving down a straight road

at a speed of 70 miles per hour, in the daytime with the sun shining, toward the crest of a sand knoll, when a tractor pulling a load of hay entered the highway about 2 blocks away from the defendant's car. The tractor, after pulling on the highway, proceeded in the same direction as defendant's car, but in the left lane, at a speed of 4 or 5 miles per hour. Defendant without reducing his speed, attempted to pass the tractor on the right side but collided with the hayrack, causing his car to go out of control and roll off the road. The court said, at page 218:

> "Here appellant while driving at 70 miles per hour, saw, or should have seen, the tractor drawing a load of hay enter the highway when appellant's car was from 1100 to 1400 feet away. He could, or should have seen, that the load of hay occupied practically all of the right hand side of the hard surfaced road. The shoulder sloped down and varied in width from six to eight feet, making it highly dangerous for appellant to attempt to pass on the right-hand side of the hay load at such a high rate of speed. He could not pass on the left-hand side, as he apparently recognized, without violating the law and risking the chance of meeting traffic which he could not see from over the top of the knoll. Thus appellant, if he continued to travel at 70 miles per hour, exposed himself and his guests to grave danger. There is no reason to believe he was not conscious of this danger. Certainly the jury could reasonably conclude that all reasonable persons under these conditions would be aware of the danger to which such high rate of speed would expose his guests. Under such circum-

stances the evidence shows the appellant continued to drive into the right rear side of the load of hay and the right rear wheel of the tractor, thereby causing the accident and injuries complained of. During all of the time after the load of hay was fully within his view and obstructing his path to the right, he could have stopped his car within less than 300 feet and thereby would have completely avoided all danger. He could have completely stopped his car in about one-fourth the distance he actually travelled after the load of hay entered the highway and after he saw or should have seen that he was exposing himself and passengers to grave danger. Such conduct constitutes more than mere negligence. It shows he consciously continued a course which was highly dangerous to his guests when he could have, by slowing down or stopping his car, avoided such danger. Under all of the definitions above quoted, this meets the requirements of reckless disregard for the safety of others." See also 2 Restatement of the Law of Torts, Section 500. *Wilson v. Bacon,* (Idaho, 1956) 304 P 2d 908.

By comparison of the facts and decisions of these cases cited, and others too numerous to mention, it will become apparent that the trial court, in denying defendant's Motion to Dismiss, has applied an incorrect standard of law to the facts in the case at bar in finding the defendants guilty of a reckless disregard of the safety of others. The facts of this case are almost identical to those of the Charvoz case (supra) wherein this Court found that ordinary negligence was not necessarily determinable. The facts are nearly similar to *Turner v.*

Purdum (supra) wherein there was a finding of no "reckless disregard." On the other hand, there is no evidence that defendant consciously chose a course of action which exposed others to danger, such as found in the Berchtold and Wood v. Taylor cases. (supra.)

Defendant submits that had the area in which the accident occurred been brightly illuminated, which it was not, and if the deceased had been dressed in clothing which was more easily visible, and if defendant's speed had been greater than it was proven to be, 40 miles per hour, and if it had been shown that defendant was, or reasonably should have been, aware of all these factors, and then consciously chose to continue his course of activity, ignoring the existence of these facts, the test of the Berchtold case and the Wood v. Taylor case would have been met. But, since the area was dimly illuminated, decedent was small and dressed in dark clothing, and since defendant was not proceeding at a high rate of speed, the holdings of Charvoz and Turner are applicable.

The required conclusion from a comparison of the cases, factually and legally, is that the evidence presented by the State clearly does not sustain a finding that defendant chose a course of action when he was consciously aware, or reasonably should have been aware, that such course place others in danger and he was not guilty of a reckless disregard for the safety of others.

POINT II

THE COURT ERRED IN REJECTING THE EVIDENCE PRESENTED BY A WITNESS FOR THE DEFENDANT, MR. HARVEY FLORENCE.

Mr. Harvey R. Florence was standing in front of the Taylorsville Ward with his two sons-in-law at the time of the accident. He stayed on the scene and directed traffic prior to the arrival of the police officers. In his testimony (beginning at R-147), Mr. Florence stated he heard the thud of impact and the screech of brakes, and saw an object in the air, but that he could not be certain what the object was. He said that the Park automobile could not possibly have been traveling over 40 miles per hour (R-152) and that the impact occurred 15 or 20 feet east of the pedestrian lane (R-154, 155, 162, 163). There was no evidence presented which would show that Mr. Florence knew Larenzo Park, the defendant. On the contrary, the record shows a denial of any acquaintance between the two men (R-153).

In rejecting the testimony of Mr. Florence, the court said: (Proceedings of 17 June, 1964, page 5.)

"I can't give credence to the testimony of Mr. Florence."

Mr. Rampton: "Could I ask why, your Honor? He was a stranger to both parties."

The Court: "Because he was argumentative; he was

eager. He was desirous of having his views imposed upon the court. He had an interest in the case that required me — and, in fact — did cause me to disregard his testimony as an honest, disinterested witness."

Mr. Rampton: "You say 'an interest in the case,' your Honor; I have difficulty in understanding what you mean."

The Court: "An interest in having his views prevail."

Mr. Rampton: "He was subpoenaed originally by the District Attorney — or the County Attorney — in the court below; that is where we got his name."

The Court: "The only thing I can tell about him Mr. Rampton, is what we instruct the jury – that you may believe one witness as against many, and many witnesses as against one. You may take into consideration the demeanor of the witness his appearance on the witness stand; and, if you believe that he has testified falsely in one respect you may disbelieve all of his testimony unless it is corroborated by other credible witnesses or other credible evidence. I could not believe Mr. Florence."

Defendant does not here argue that the court below, as trier of fact, could not consider the demeanor of the witness in either accepting or rejecting his testimony.

Nor does defendant contend the court may not reject the testimony of an interested witness. However, the court here rejected the testimony of Mr. Florence on the ground that he was an interested party, "desirous of having his views imposed upon the court." Upon such an "interest," the court has here determined that Mr. Florence was not to be believed. Defendant submits that if all witnesses are to be disbelieved upon such ground, the administration of justice becomes virtually subject to the whims of the courts and not upon the orderly presentation of evidence, for it is not beyond reason that all witnesses are desirous of being believed in their testimony, or are desirous of having their views accepted by the court.

The kinds of interest which will justify a trier of fact in disbelieving a witness are limited to a pecuniary nature, or where the witness is a party, or sustains some legal or contractual relationship to a party, or has an interest in property involved in litigation, or where the witness is the accused or a participant in the offense which is the subject matter of the litigation. *Mitchell v. Churches,* 119 Wash. 547, 206 P 6; *Langley v. Devlin,* 95 Wash. 171, 163 P 395; *State v. Douglas,* 26 Nev. 196, 65 P 802. See also 58 Am Jur 495.

There was no proof before the trial court which would justify it in determining that Mr. Florence had any of these interests in this case, or any other interest as would justify the court in rejecting his testimony on grounds of interest. On the contrary, Mr. Florence was

a disinterested person who became involved in these proceedings only because he happened to be at the scene of the accident. He was perhaps the closest thing to an eyewitness to the accident presented by either side, and merely related what he observed for the consideration of the court.

Defendant recognizes the principle that the Court is not bound to believe or give credence to uncorroborated or conflicting testimony, but it does not appear in the record that the court has here considered any reason for rejection, aside from what it considered Mr. Florence's interest.

POINT III

THE COURT ERRED IN FINDING THE DEFENDANT GUILTY OF NEGLIGENT HOMICIDE UNDER SECTION 41-6-43.10, UTAH CODE ANNOTATED, 1953, AT THE CONCLUSION OF THE PRESENTATION OF ALL THE EVIDENCE.

The evidence presented as a part of the defendant's case disclosed that defendant and his fiancee, Diane Frandsen, were proceeding east along 4800 South Street following a visit with defendant's aunt and uncle in Kearns. (R-194). They had borrowed the automobile of defendant's aunt and left the home at about 8:00 p.m. (R-204). They were on their way to Diane's home in

Oakley, Summit County, and were in no hurry. They were proceeding along the highway at about 40 miles per hour. (R-197, 207).

Defendant did note the presence of some parked automobiles on the side of the road near the Taylorville Ward as they approached the chapel, but did not see any signs indicating the existence of the pedestrian lane. (R-215). About two blocks prior to the accident the defendant passed two other vehicles, one of which was pulling off to the right of the highway. (R-196, 213). The vehicle's lights were on low beam. (R-209).

Neither the defendant nor his fiancee observed the decedent until the moment of impact, but at that time noted he was dressed in dark clothing and appeared to be small in stature. (R-198). On impact, defendant applied his brakes and came to an immediate stop. (R-208). Neither the defendant nor his fiancee noted where the impact occurred, but a bystander, Mr. Harvey Florence, indicated the point of impact was 15 or 20 feet east of the crosswalk immediately in front of the chapel. (R-154).

Upon realizing what had happened after stopping the car, defendant ran to the decedent, then into a nearby house to summon help. Later, in this same house, defendant was told by Sgt. Kutulas, the investigating officer from the sheriff's office, that the collision was, in his opinion, an accident which could have happened to anyone. (R-200, 208).

The court, while agreeing that the weight of the evidence indicated defendant's speed to be only approximately 40 miles per hour, otherwise rejected or ignored the substantial testimony which clearly negatived any finding of recklessness, and which was, in the main, undisputed. This is obvious from the comments made by the court at the time announced its findings (Proceedings of 17 June, 1964, page 4):

> "But these things have made an indelible impression in my mind—the clear sign "Pedestrian Lane". He didn't see it, Anybody who is watching should have seen it."
>
> "Further back, there was a sign '35 miles per hour'. He didn't see it. There were cars parked at an angle beside the church; there were people standing at the approach to the church—all of these were warnings."
>
> "He admitted that, probably, within a hundred feet of the crosswalk, he passed the second vehicle, pulled out somewhere possibly over over into the north lane for west-bound traffic and at a little more than half-a-second away at his admitted speed, pulled back into his own lane of traffic."
>
> "That, for possibly two hundred feet, as best I can estimate, he had an opportunity of seeing a person crossing. None of these safety warnings were seen or heeded."
>
> "One matter that was undisputed, having a bearing upon speed, and that is that the body was propelled for 140 feet."

Defendant submits that the statement cited above, which constitutes the court's basis for its finding of guilty, clearly does not indicate facts upon which negligent homicide can be based. This reasoning, in fact, overlooks certain other pertinent facts material to the case at bar. The fact of darkness and that no evidence was presented which would indicate the signs in question were lighted and visible. It overlooks the small size and dark dress of the deceased, combined with the dark blacktop surface of the road and the poor lighting found at the scene. This reasoning overlooks all of the facts which the court in the Charvoz case (supra) found were such as to create a doubt in the minds of reasonable men as to the defendant's ability to see the decedent at such a distance as would enable him to stop short of collision.

This reasoning further overlooks the necessity of proof beyond a reasonable doubt that defendant consciously chose a course of action which he knew, or reasonably should have known, exposed other persons to grave danger. *State vs. Berchtold* (supra). *Wood v. Taylor* (supra). There is no evidence in the record which will sustain a finding that defendant was guilty of any acts which constitute more than mere inadvertence or inattention. A fair evaluation of all the evidence leads to the conclusion that defendant was not guilty of negligent homicide as defined by Section 41-6-43.10.

POINT IV

THE COURT ERRED IN SENTENCING THE DEFENDANT.

At the conclusion of the trial and upon announcing its findings, the court sentenced the defendant to six months in the County Jail and ordered him to pay a fine of $500.00. Defendant was then placed on probation on condition that he voluntarily serve three months in the County Jail and that he pay a fine of $250.00.

At the time of sentencing, the court made the following comments: (R-233, 234).

> "I have kept in mind your argument that this could have been—could have shown features of 'viciousness', as you referred to the case of a driver a hundred miles an hour or over—viciousness that would startle the mind of an average person, considering safety on the highways."
>
> "So, I have imposed the sentence of six months in the County Jail and $500.00 fine. Now, I am going to place him on probation on condition; and this will be the condition:
>
> "That he voluntarily serve three months in the County Jail, and that he pay a fine of $250.00.
>
> "Now, that means this; that, if he violates his probation, he will then have to pay (serve) the additional three months in the County Jail, and pay the additional $250.00. In other words, if he violates the terms of his probation, he will then have the original sentence to comply with. *But I am giving him the opportunity to accept*

> *on a voluntary basis, as a condition, that he will submit himself to the County Jail for three months;* that he will pay $250.00; and that, for six months, he will not drive a vehicle in the State of Utah." (Emphasis added.)

Article VIII, Section 9 of the Constitution of the State of Utah guarantees the right of appeal to the defendant:

> "From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court."

The above quoted Section has been held applicable to both civil and criminal cases. See ***State v. Booth***, 59 P. 553, wherein this court said at page 554:

> "Here is a plain and express provision of the fundamental law, which grants the right of appeal from all final judgments of the district courts. It is mandatory and applies alike to criminal prosecutions and civil actions. It is a limitation alike upon the legislative and judicial powers of the government. Neither the legislature by legislation nor the judiciary by interpretation can lawfully deprive any person, natural or artificial, from his sovereign right."

Defendant submits that the trial court, in causing defendant's probation to rest on his voluntary submission to the lesser and lighter sentence, has required the defendant to accept the court's findings and sentence as then announced at the peril of having his sentence doubled should he enter an appeal therefrom. Defendant

further submits that his right to appeal, as guaranteed by the Constitution of the State of Utah, has been restricted by the trial court which, under the above quoted statement from the Booth case, cannot lawfully do so. The defendant's Constitutional rights have been abridged by the trial court's sentence because he could not voluntarily submit himself to jail in acceptance of the lighter sentence otherwise than by foregoing his right of appeal.

Section 77-35-17, Utah Code Annotated, 1953, provides that, in certain cases "where compatible with the public interest," the trial court may place a defendant on probation. The case of *State v. Chesnut*, 356 P 2d 36, construed the above Section when this court upholding the terms of probation imposed by a district court, employed the following significant language at page 37:

> "Section 77-35-17 does not set forth any necessary conditions of probation but leaves the matter entirely within the discretion of the trial judge. While the instant order contained probation terms somewhat at variance with the usual orders, some of which are of questionable propriety, it was within the province of the trial court."

> "The conditions imposed upon the defendant were: (1) that he remain in the strict custody and supervision of his bondsman; (2) that he remain outside of Sevier County; (2) that he report to the court on March 14th; and (4) that he 'make every effort to make entirely good' and his 'conduct * * * be in every way satisfactory."

> "It was implicit from the foregoing that defendant's probation was conditioned upon his good behavior as it must be in every order granting probation. Such good behavior must be conduct conforming to the law."

Defendant urges that by imposing conditions of probation which required voluntary service in county jail for a lesser period of three months as opposed to six months, and payment of the lesser sum of $250.00 as opposed to $500.00, the court not only tampered with his constitutional right of appeal, but imposed probationary terms conditioned on other than good behavior. There is no good behavior implicit in the act of voluntarily going to jail or paying a smaller fine. Similarly there is no good behavior involved in the condition which required defendant's abstention from driving for a period of six months. The most that can be said of the conditions of defendant's probation, as imposed by the trial court, is that they are of "questionable propriety." *State v. Chesnut* (supra). It appears to defendant his probationary terms are wholly out of the realm of justice and inconsistent with the public interest. Defendant does not object to the status of probation, but feels the court has not compiled with the requirements of the law with respect thereto.

CONCLUSION

Appellant was convicted of negligent homicide on insufficient evidence and contrary to the weight of all

the evidence presented and was then sentenced contrary to his rights as a citizen of the State of Utah.

WHEREFORE, Larenzo Eugean Park urges the court to reverse the trial court's finding of guilty and its sentence pronounced thereon and to order his acquittal from the charge of negligent homicide.

Respectfully submitted,

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