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State of Utah v. Paul L. Nelson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

STATE OF UTAH,
Plaintiff & Respondent,

Clerk, Supreme Court Utah

VS.

Case No. 9287

PAUL L. NELSON,
Defendant & Appellant.

APPELLANT'S BRIEF

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STATE OF UTAH

STATE OF UTAH,
Plaintiff & Respondent,

vs.

PAUL L. NELSON,
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APPELLANT'S BRIEF

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE DEFENDANT'S REQUESTED CAUTIONARY INSTRUCTION NO. 8.

POINT II.

THE TRIAL COURT COMMITTED PALPABLE ERROR IN FAILING TO CHARGE THE JURY TO DISREGARD THE ENTIRE TESTIMONY OF H. KENT FRANCIS, STATE CHEMIST, WHICH FAILURE CONSTITUTED REVERSIBLE ERROR.

POINT III.

THE DEFENDANT WAS CONVICTED IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE

UNITED STATES CONSTITUTION AND ARTICLE I,
SECTIONS 7 & 12 OF THE CONSTITUTION OF UTAH.

STATEMENT OF FACTS

The defendant was involved in an automobile accident in North Salt Lake, Davis County, Utah, on the 14th day of November, 1959; and as a result of said accident, Floyd James was critically injured and died a few hours later in a Salt Lake Hospital. During the same evening defendant was arrested and taken to a Justice of the Peace, E. S. Arbuckle, who issued a commitment lodging the defendant in the Davis County Jail, on a charge of drunk driving. On the 17th day of November, 1959, a complaint was filed against the defendant, charging him with the crime of automobile homicide, in violation of Section 76-30-7.4 Utah Code Annotated (1953), to which charge a plea of "not guilty" was entered; and preliminary hearing was set for December 16, 1959. Following the preliminary hearing, the defendant was bound over to stand trial in the District Court of Davis County.

The information upon which the defendant was charged read in part as follows:

"That the defendant, Paul L. Nelson, while under the influence of intoxicating liquor, did willfully, unlawfully, and feloniously drive an automobile in a reckless and negligent manner upon U. S. Highway 91 in North Salt Lake, Davis County, State of Utah, and did collide with an automobile driven by

Floyd James, resulting in the death of the said Floyd James.”

A trial on the issues was held before the Honorable Charles D. Cowley on Wednesday, April 20 and 21, 1960, following which a jury returned a verdict of Guilty as Charged in the Information. The defendant appealed to this Court.

Since the proceedings and conduct of the State's Officers during the investigation is questioned, a rather detailed examination of the transcript will follow.

The evidence shows that on November 14, 1959, at approximately 7:45 P.M., the defendant was proceeding north on Highway 91. As he approached the semaphore-controlled intersection of Highway 91 with Cudahy Lane, which lane intersects Highway 91 in an east-westerly direction (See Plaintiff's Exhibit P), a 1950 Dodge automobile, owned and operated by a Mr. William Jackson, was in the process of making a left turn from Cudahy Lane, westerly and south onto Highway 91. The defendant's automobile struck the left rear of the Jackson automobile and then proceeded through the intersection and collided with a Chevrolet automobile driven by the deceased, Floyd James, as the James automobile was attempting to cross U. S. highway 91 from the west. (T. 14, 15). The testimony is conflicting as to whether at the time of the collision, the sema-

phore showed amber or red for north and south-bound traffic on U. S. Highway 91 and green for east and westbound traffic on Cudahy Lane. (T. 15). However, there is also testimony that the activated time device which controlled the semaphore had not been working properly prior to the accident. (T. 133, 144).

State's witness, Lester A. Blackner, testified that, following the accident, he noticed "that the smell of alcohol was on his (defendant's) breath," and that he "felt" that defendant was intoxicated (T. 35, 36). However, Beth Jackson, a passenger in the 1950 Dodge automobile driven by her husband, who observed defendant while she was seated in a police officer's automobile with him, said that, although she detected a smell of alcohol coming from the front seat, where Mr. Nelson was seated, (T. 58), she was unable to determine whether the defendant was intoxicated. (T. 58). Similarly, Mr. William Jackson expressed no opinion as to Mr. Nelson's alleged intoxication; and in fact, testified that, in his conversations with him, he experienced no difficulty in understanding the defendant and that his words were clear. (T. 65).

Mr. Kent Francis, a chemist for the State of Utah, testified of his receiving and testing a urine sample which was taken from the defendant. The urinalysis conducted for the purpose of determining

the amount of alcohol in the urine, was the subject of detailed examination. (T. 67, 68, & 69). The analysis showed that the urine sample contained .259 per cent ethyl alcohol. Through the use of a mathematical equation, Mr. Francis was permitted to testify, over defendant's objection, that the defendant's blood contained .184 per cent ethyl alcohol. (T. 68, 69). Mr. Francis admitted under cross examination that there was considerable variance in the conclusions to be drawn from alcohol-urine analyses, depending upon the specific gravity of the urine tested, the time, and amount of consumption. He did not profess to know or take these factors into consideration. (T. 71, 73-75). This witness did not profess to know or testify concerning the effect of the determined amount, or of any amount of blood alcohol upon the bodily functions of any person or upon the defendant.

Mr. Deveraux, a part-time ambulance driver, took Mr. James to the St. Mark's Hospital. While there, he witnessed a conversation between Trooper Schmidt and Mr. Nelson. A portion of Mr. Deveraux's testimony follows: (T. 80).

"A. Trooper Schmidt asked if he would submit to a blood test, and he said that he didn't know enough about what this test would do to him, and he would just as soon not give it.

Q. And then what?

A. And then the Trooper said, ‘— well, this man was quite concerned about Mr. James’ condition, and he said, ‘If he dies, what will this blood test do for me?’ and Trooper Schmidt said, ‘It may help you in court, and it may harm you.’ He said, ‘I wouldn’t want to say.’ And he said he had just as soon not submit to the blood test if he didn’t have to.

Q. And then what?

A. We just stood there for probably 30 minutes and just listened to them back and forth while we were waiting for the car.”

Although Mr. Devereaux stated that he had smelled an alcoholic odor coming from the corner where the defendant was sitting and expressed his opinion that the defendant was under the influence of intoxicants, (T. 81) he further explained on cross examination that defendant’s conduct indicated symptoms of shock; and that, if he hadn’t smelled alcohol, he didn’t know what his opinion would have been.

Mr. Warren Haddenham, who drives an ambulance for the South Davis Firemen’s Association, indicated that he saw defendant at St. Mark’s Hospital. He testified concerning a conversation between Trooper Schmidt and Mr. Nelson regarding a blood-alcohol test.

“A. And then the conversation went to Mr. Schmidt on this blood-alcohol test.

Q. What did the defendant say?

A. He didn't know what he wanted. He wanted to know what the blood test was. He didn't quite understand what Trooper Schmidt meant by blood-alcohol test." (T. 87).

Although this witness smelled alcohol on Mr. Nelson and believed him to be intoxicated, he too explained that many symptoms observable in defendant were compatible with mild shock, and frankly admitted that his opinion would have been different had it not been for the smell of alcohol. (T. 91).

Deputy Marshall, Cleon W. Gwynn, of North Salt Lake City, assisted in the investigation of the accident and was called as a witness for the State. He drove Mr. Nelson, in company with others, to St. Mark's Hospital in Salt Lake City, where Mr. James had been taken for emergency treatment. En-route, he observed that defendant appeared sick; and when asked if he were sick, said that he felt like "he wanted to vomit . . . all I want is air." (T. 105).

The Deputy also witnessed a conversation between Trooper Schmidt, a portion of which follows:

" . . . and he asked the defendant if he would sign for a blood-alcohol test, and the defendant then refused, wondering what effect that would have on him in case the person would die . . . Gary Schmidt had asked the defendant if he wouldn't just think this over. That it was for his own good." (T. 106).

The witness said that Mr. Nelson "did smell

of alcohol" (T. 106) and, in his opinion, appeared intoxicated.

Following the episode at the hospital, the witness, in company with the defendant, returned to the scene of the accident and then accompanied Marshal Reynolds with the defendant to the home of Judge E. S. Arbuckle. He testified that Judge Arbuckle questioned him concerning the amount he had had to drink. (T. 109).

Town Marshal, Roy A. Reynolds, of North Salt Lake, arrived at the scene of the accident at approximately 7:55 P.M. and assisted in interviewing witnesses at the scene of the accident. His interview with Mr. Nelson included questioning into his activities of the day and:

"...I asked him how much he had had to drink." (T. 135).

Following this conversation, Mr. Nelson was placed under arrest by Marshal Reynolds, and he was taken to the home of Justice of the Peace E. S. Arbuckle for the purpose of obtaining a commitment. Of the conversation which passed at the time the defendant was at the Justice's home, the following is pertinent: (T. 136).

"... I explained to the Judge at that time what the trouble was, why the defendant was there. Then he proceeded to talk to the defendant. He asked the defendant where he had been; he got no answer. He asked him how

much he had had to drink, and the defendant went into the same procedure of from two to five, he didn't know for sure. He broached the question of how long the defendant had been drinking — had been partaking is how he worded it, I believe . . .”

The Marshal was asked whether he observed any odors “about the defendant.” (T. 136). He replied that there was an odor of alcohol. (T. 137). The Marshal then concluded that the defendant “was definitely drunk.” (T. 139). On cross examination, however, the following was read from the transcript at the preliminary hearing. (T. 140). Mr. Palmer:

“From this experience did you form an opinion as to the condition that Mr. Nelson was in?

“I learned a long time ago not to form opinions.

Q. Did you form an opinion in this case as to whether or not he was under the influence of intoxicating liquor?

A. I definitely knew that he had been drinking but I didn't form an opinion until I got a report from the State Chemist.”

“Q. Was that your testimony at the preliminary hearing, Officer Reynolds?”

A. I believe you are right, yes.”

Marshal Reynolds also testified that prior to the time of the accident, they had experienced difficulty with the traffic light. (T. 143, 144). That

the safety engineer from the State of Utah had come to make adjustments upon his suggestion. (T. 145).

Officer Gary Schmidt of the Utah Highway Patrol, as previously indicated, accompanied the defendant and others to the hospital. The officer testified that he requested the defendant to submit to a blood test; but before the hospital technician would withdraw the blood, it was necessary to obtain the defendant's written consent. Mr. Nelson said that "he did not want to sign it." (T. 167). During this time, defendant repeatedly expressed concern for the condition of Mr. James. After again requesting defendant to submit to a blood test, the following conversation occurred:

" . . . I did explain to him that if he refused this blood test, that he could lose his driver's license.

Q. Did he give you a blood test?

A. No. About four times during the course of the time that we were there, I asked him for the blood test, and he refused all four times.

Q. Did you give him any other kind of test?

A. Yes, I secured a urine sample.

Q. Tell us how you got that.

A. About immediately after the last — the third refusal, I went out to my car and secured a bottle from the trunk of my car

that we used for that purpose, and brought it back in, and I asked Mr. Nelson, 'if you don't want to give us a blood sample, will you give us a urine sample?' And he readily agreed to it . . ."

The Officer testified that he smelled an odor of alcohol about the defendant, and based on this and his other observations, in his opinion, the defendant was intoxicated. (T. 173).

Judge E. S. Arbuckle, the Justice of the Peace of North Salt Lake was produced by the State as a witness. A part of the conversation which he had with the defendant in his home is as follows: (T. 180).

" . . . and he sat down, and Royal (Marshal Reynolds) told me he had charged him with drunk driving, and I talked to him — Mr. Nelson — and I asked him if he had been drinking, and he said, 'Yes.' And I asked him how much, and he said 'two beers, a vodka, and some whiskey. And then I talked to him a minute or two and asked him why he was driving — why was he trying to run a red light, and I just said to him, 'how many did you say you had?' and he said, 'I had four beers, and two or 'three vodkas,' that time. And he was talking so you could hardly understand what he was saying. His speech was very thick tongued, and you couldn't hardly understand what he said. And we talked there a while, and we decided that we had better lock him up for the night until he sobered up, and then bring him back so that he could talk so that we could understand what he said and he could understand us."

(T. 181).

Glen Townsend indicated that he arrived at the scene of the accident shortly after it had occurred and observed that the defendant was “white.” “He looked like he might be in shock from the accident.” (T. 190). He did not notice anything unusual concerning his walk. (T. 190).

Similarly, Rosemary Hendrickson, had seen defendant immediately before the accident, and in fact had followed him from 4500 South State Street in Salt Lake City, to St. Mark’s Hospital. (T. 192). She noticed nothing erratic or unusual about the way he drove. She talked to Mr. Nelson in the Sheriff’s car, following the accident, and indicated that the defendant didn’t have much to say, and observed that he appeared “pretty worried . . . and scared.” (T. 194).

Jay Hendrickson testified of his casual acquaintanceship with Mr. Nelson and indicated that on the day on which the accident occurred, they drank about three glasses of beer together between approximately 11:00 o’clock in the morning and 3:30 or 4:00 o’clock in the afternoon. (T. 197). Following this, the defendant accompanied the witness to his home, where they each drank a vodka mixed with orange juice. The witness prepared the drink and indicated that he had put about an ounce of vodka in each glass of orange juice. (T. 199).

A large dinner was then eaten by Mr. Nelson and Mr. Hendrickson, and neither had drunk more alcoholic beverage. Mr. Nelson left his home at 7:15 P.M., and at that time Mr. Nelson was not intoxicated. (T. 199). He explained that Mr. Nelson's "slow 'Oakie' walk" was normal, as was his speech. (T. 201).

Mrs. Joan Nelson, wife of the defendant, was following the defendant in Mrs. Hendrickson's automobile and had followed him from approximately 4500 South State Street in Salt Lake City to St. Mark's Hospital, where a traffic light separated them. She next found her husband sitting in a police car following the accident. She observed the he was "nervous and upset" (T. 210) but was not under the influence of alcohol. (T. 211).

The defendant, Paul Nelson, stated that about noon he went to a lounge in Salt Lake City with Jay Hendrickson and Ted Connors, where "he had about three beers". (T. 219). They then went to Mr. Hendrickson's house, where he had a drink of vodka and orange juice. He spent approximately 3½ to 4 hours at Mr. Hendrickson's home, where he ate a large meal and then proceeded to Bountiful. (T. 220, 221). At this time he did not feel the effect of the beer or the vodka and orange that he had drunk earlier in the day.

As a result of the accident, he suffered a bruise-

ed and lacerated knee and a bump on his head when he struck his chin on the steering wheel. (T. 225). The defendant denied that he had told the officers or Justice of the Peace E. S. Arbuckle that he had drunk whiskey earlier in the day. (T. 229).

ARGUMENT

POINT I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE DEFENDANT'S REQUESTED CAUTIONARY INSTRUCTION NO. 8.

Defendant requested the Court to give the following instruction, identified as Defendant's Requested Instruction No. 8:

"To warrant you in convicting the defendant, the evidence must to your minds exclude every reasonable hypothesis other than that of the guilt of the defendant; that is to say, if after a full consideration in comparison of all the evidence in the case, you can reasonably explain the facts given in evidence on any reasonable ground other than that of the guilt of the defendant, you must acquit him."

The Statute under which the defendant was charged reads as follows — Utah Code Annotated, 76-30-7.4 (1953):

"Any person, while under the influence of intoxicating liquor . . . to a degree which renders him incapable of safely driving a vehicle, who causes the death of another by operating or driving any automobile . . . in a reckless, negligent, or careless manner, or

with a wanton or reckless disregard of human life or safety, shall be deemed guilty of a felony; and upon conviction shall be punished by imprisonment in the State Penitentiary for a period of not less than one nor more than ten years."

The difference between this Statute, the violation of which constitutes a felony, and Utah Code Annotated 41-6-43.10, (1953) dealing with negligent homicide, which is a misdemeanor, is that the person causing the death is intoxicated. Intoxication while driving is the element which takes the conduct of recklessly driving an automobile out of the misdemeanor classification and makes it a felony. It becomes extremely important, therefore, to examine with great care the testimony upon which the defendant was convicted as pertains to his alleged intoxication.

The defendant was admittedly involved in a serious accident of considerable proportions. Extensive damage was done to three automobiles; defendant was shaken up considerably as a result of a knee and head blow; and deceased, Floyd James, received mortal wounds. Although the defendant indicated, immediately following the accident, that he did not think he was hurt, it is submitted that he was not in a position at that time to make such an appraisal. It is not difficult to understand that, as some witnesses testified, the defendant was

“white” and appeared “upset and scared.” He was worried about the condition of Mr. James, as well as the possible consequences to himself, which involved the possible loss of his job, and, of course, the possible legal consequences of the accident. (T. 225). The only evidence of intoxication was based upon the various witnesses’ opinions; and in each such case, an important element of their consideration was the smell of alcohol present. Several witnesses, including some of the State’s witnesses, did not believe the defendant was intoxicated; and some expressly stated that, although they believed him to be intoxicated, their opinion would have been different had the smell of alcohol not been present.

It has previously been established by this Court in the case of *Utah Farm Bureau Insurance Company v. Chugg*, 6 Utah 2d 399, 315 P. 2d 277, (1957), that the smell of alcohol is not sufficient upon which to sustain a finding of intoxication. In that case the defendant was found lying on the seat of his car, on which was also an empty bottle, and he smelled of liquor. The Deputy Sheriff observed the defendant’s eyes to be “rolling,” his speech incoherent, and that he was “kind of throwing his body around.”

The Court determined that:

“. . . the fact that there was an empty bottle in the car and the smell of liquor are

not sufficient to support a finding of intoxication.”

The Court has previously adopted the rule of law under circumstances such as those present in this case, where the State relies upon circumstantial evidence, that the trial court, in order to avoid or minimize the danger of permitting the jury to speculate upon such evidence, must give a cautionary instruction such as was requested by this defendant.

In the case of *State v. Burch*, 100 Ut. 414, 115 P. 2d 911 (Utah, 1941) the Court stated, page 912:

“If circumstantial evidence is submitted to a jury, it is accompanied by an instruction that to convict upon such evidence, that evidence must exclude every reasonable hypothesis of innocence. That such an instruction is given implies that there is a question for the jury to decide as to whether or not such evidence does exclude that hypothesis. But, if the evidence is such that reasonable men would not differ upon the fact that it includes such an hypothesis, then it is not a question for the jury, but is one for the Court.”

This rule was followed in the case of *State v. Anderson*, 66 Ut. 573, 158 P. 2d 127 (1945). See also the case of *State v. Erwin*, 101 Utah 365, 120 P. 2d 285, 302, where the Court in discussing the question of sufficiency of evidence in a conviction on circumstantial evidence said:

“In order to sustain a conviction, the evidence must be of such persuasive force that the mind might be reasonably satisfied of all

the necessary facts constituting the defendant's guilt beyond a reasonable doubt; and where the proof of a necessary fact is dependent solely upon circumstantial evidence, such circumstances must be such as to reasonably exclude every reasonable hypothesis other than the existence of such fact and be consistent with its existence and inconsistent with its nonexistence. It is not necessary that each circumstance in itself establish the guilt of the defendant, but the whole chain of circumstances, taken together, must produce the required proof."

The wisdom of this rule, as it should have been applied in the case at bar, is apparent. The sole evidence concerning the intoxicated condition of the defendant was based on circumstantial evidence, consisting primarily of the smell of alcohol coming from the presence of the defendant, and observations of his demeanor.

Reviewing the testimony in a light most favorable to the State, the evidence of intoxication is conflicting. Testimony from witnesses of both the State and the defendant indicated that he was not under the influence of intoxicants. Mr. Nelson's conduct following the accident was shown to be consistent with symptoms of shock. Certainly the evidence on this crucial point was not so conclusive as to exclude every "reasonable hypothesis of innocence."

Considerable time was spent at the trial with the testimony of Mr. Francis, the State Chemist, who

had analyzed a urine sample taken from the defendant. The nature and effect of this testimony will be separately treated in another section of this Brief. But even considering his testimony most favorably for the State, there was no evidence tending to show the effect that any amount of alcohol would have upon the defendant. This important consideration was left to the unbridled speculation of the jury.

Under the circumstances of this case, the defendant's conduct following the accident was just as consistent with defendant's innocence as with his guilt. Where the State based the strength of the case upon the intoxicated condition of the defendant, the evidence of which was wholly circumstantial, the failure of the Court to give the requested cautionary instruction constituted reversible error.

POINT II.

THE TRIAL COURT COMMITTED PALPABLE ERROR IN FAILING TO CHARGE THE JURY TO DISREGARD THE ENTIRE TESTIMONY OF H. KENT FRANCIS, STATE CHEMIST, WHICH FAILURE CONSTITUTED REVERSIBLE ERROR.

As observed above, the State was required to prove the defendant's intoxication as an essential element of its case. In an attempt to sustain this burden, the State called as a witness H. Kent Francis, a chemist for the State of Utah, who had conducted an analysis of a sample of urine taken from the defendant. His analysis in the sample of urine resulted in determining that there was .259%

ethyl alcohol in the sample of urine tested (T. 68,) and that by multiplying said figure by .72 he arrived at the figure of .184 per cent blood-alcohol. (T. 69). Over the objection of the defendant, he testified concerning the content of alcohol in the blood based upon a determination of the alcohol content in the urine at various periods of time following consumption. (T. 71). He indicated that there could be a variance in results of the urinalysis test, depending upon whether the urine tested had an average specific gravity, light or heavy. (T. 72). These factors were not taken into consideration in making tests of defendant's urine sample. Further, Mr. Francis' test did not take into account the lapse of time between consumption and time the sample was taken. He admitted this to be an important factor which could vary the result of the test, because following absorption the alcohol in the urine is greater than a blood alcohol content by approximately one-fourth. (T. 73). The chemist was permitted to testify concerning the relationship between urine alcohol and blood alcohol generally without the benefit of knowing the amount of alcohol allegedly consumed by the defendant nor the time in which it was consumed. Apparently these factors did not seem important either to the chemist or to the State, although admittedly they would have a bearing upon the result of the test.

No witness professed to know or state the ef-

fect which any amount of alcohol found in the body fluids of the defendant would have upon his ability to drive an automobile.

The District Attorney admitted that

“ . . . there was no testimony as to the effect upon defendant of the blood alcohol or alcohol within his urine . . . ” (T. 259).

The Court gave a requested instruction of defendant as follows:

“You are instructed that, though there is evidence regarding the results of a chemical test to the defendant’s bodily fluids; to wit, urine, if there is no evidence of the effect of that percentage or any other percentage of alcohol in the blood by weight upon the human being, you must disregard the results of the chemical test which has been received in evidence.”

It is submitted that this instruction did not correct the error which was committed in permitting the State to introduce considerable evidence concerning tests for alcoholic content of defendant’s bodily fluids without testimony showing the effect of such alleged amounts of alcohol in the blood of the defendant or of any human being. The jury was permitted to speculate upon this vital issue when it was admitted by the State that such effect “had not been shown”.

In this connection, this Court, in the case of *State v. Cobo*, Utah, 90 Ut. 89, 60 P. 2d 952, (1936), discussed the recognized rule that errors with re-

ference to instructions will not be considered on appeal unless sufficient exceptions were taken at trial. A recognized exception to that general rule exists, however, in "serious" cases when palpable error on the face of a record occurs which involves violation of fundamental rights and privileges and results in manifest prejudice. In such cases the Supreme Court can, even on its own cognizance, correct the same.

"But in capital cases and in cases of grave and serious charged offenses and convictions of long terms of imprisonment, cases involving the life and liberty of the citizen, we think that when palpable error is made to appear on the face of the record to the manifest prejudice of the accused, the Court has the power to notice such error and to correct the same, though no formal exception was taken to the ruling. In these days of widespread advocacy of reform to procedure in criminal cases to heal and cure misgivings and faulty prosecutions, the safeguards of the rights and privileges of the accused should not be overlooked and a loose reign held for the prosecution and a tight, technical, and restricted reign held on the accused."

The prejudicial nature of the error is enhanced when viewed in the light of Section 41-6-44, U.C.A. (1953, Pocket Supp.). The statute states in part:

"If there was at the time 0.05 per cent or less by weight of alcohol in defendant's blood, it shall be presumed that defendant was not under the influence of intoxicating liquor.

“(2) If there was at the time in excess of 0.05 per cent, but less than 0.15 per cent by weight of alcohol in defendant’s blood, such facts shall not give rise to any presumption that defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

“(3) If there was at the time 0.15 per cent or more by weight of alcohol in the defendant’s blood, it should be presumed that defendant was under the influence of intoxicating liquors.”

The Court completely failed to give an instruction advising the jury of these presumptions. In view of the uncertain and prejudicial testimony which Mr. Francis was permitted to give concerning per cent of blood alcohol, the jury could have concluded that the defendant’s blood alcohol fell below .015 per cent level, or within that area where no presumption of intoxication exists.

The Court’s failure to charge the jury that there was no evidence showing the effect of any amount of alcohol on any human being, or upon the defendant, when viewed in light of Section 41-6-44, U.C.A. (1953), was palpable error of which this Court can take judicial notice even though no formal exception was made to the same.

POINT III.

THE DEFENDANT WAS CONVICTED IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 7 & 12 OF THE CONSTITUTION OF UTAH.

As observed from the earlier recitation of facts, the defendant was placed under arrest by Marshal Reynolds following their return to the scene of the accident after having been to St. Mark's Hospital (T. 135). The defendant was then taken to the home of the Justice of the Peace to 'talk to Judge Arbuckle', (T. 135), where Marshal Reynolds

"... explained to the judge ... what the trouble was, why the defendant was there. He asked him how much he had had to drink, and the defendant went into the same procedure of anywhere from two to five ... He broached the question of how long the defendant had been drinking ... I wanted a commitment to lodge him (defendant) in the Davis County Jail ... The judge issued the commitment." (T. 136).

The record is completely devoid of any reference indicating that either Marshal Reynolds or Justice of the Peace Arbuckle advised defendant of his constitutional right to remain silent. It is interesting to observe that for approximately two hours, from 8:00 P.M., when the accident occurred, until 10:00 P.M., when the defendant was taken before the Justice of the Peace, defendant had been in the presence of numerous police officers and a

magistrate, and had not on one occasion been advised that his statements may be used against him, as ultimately proved to be the fact.

Under the provisions of the Fourteenth Amendment to the United States Constitution, and Article I, Secs. 7 & 12 of the Constitution of Utah, an “accused shall not be compelled to give evidence against himself”. These safeguards were completely ignored on this occasion by police officers and the magistrate insofar as this defendant was concerned.

Further, Section 77-15-1, U.C.A. (1953) requires that when “the defendant is brought before the magistrate upon an arrest . . . on a charge of having committed a public offense . . . the magistrate *must* immediately inform him of the charge against him and of his right to the aid of counsel at every stage of the proceedings.”

Rather than follow the statutory mandates imposed upon him, the magistrate undertook, albeit under questioning, to extract admissions from defendant as to his alleged drinking, and demanded explanations of assumed facts by asking him “why he was driving — why was he trying to run a red light.” (T. 180).

This Court underscored the necessity of law enforcement officers preserving these mandates inviolate in the case of *State v. Crank*, 90 Ut. 89, 142 P. 2d 178, 184 (1943), in the following language:

“Article I, Section 12 of the State Constitution, declares that no person shall be compelled to give evidence against himself. This applies to statements exacted from him outside of Court as well as in Court.”

In the case of *State v. Assenberg*, 66 Ut. 573, 244 P. 1027 (1926), the Court found prejudicial error in admitting at trial statements of defendant made at an inquest before a Justice of the Peace and before a formal charge had been made against him. In granting a new trial, the Court stated: P. 1028:

“He, (defendant) was not cautioned as to his right to answer questions nor his privilege to refuse to testify. Neither was he cautioned that any statement made by him at the time could or might be used against him in a subsequent prosecution.”

See also *State v. Byington*, 114 Utah 388, 200 P. 2d 723.

The material extent to which defendant was prejudiced by the Justice of the Peace's failure to advise him of his rights becomes apparent when it is realized that the Justice of the Peace appeared at the trial as a State's witness against the defendant. He appeared not as an impartial arbiter of rights between the State and defendant, but as an adverse witness, divulging admissions of defendant and restating irrelevant accusations made by himself on the night of the fatal accident, at a time when defendant remained in an upset and confused condition.

Instead of providing defendant with the shield of his constitutional rights, he used the occasion to probe him with questions, the answers to which he later used to assist in convicting him.

While defendant was at St. Mark's Hospital, he was requested by Officer Schmidt on four different occasions to submit to a blood test. The record indicates that the defendant did not understand the nature or ramifications of the test (T. 80, 87). The Trooper's only explanation was, "It may help you in court and it may harm you . . . I wouldn't want to say." On another occasion, although the conversation between the Trooper and defendant concerning the proposed blood test lasted for at least thirty minutes (T. 80), and later a conversation was had concerning a urine test, the defendant was not once informed that he had a right to refuse to submit to either or any test. He was not advised that the tests would be used against him if the analysis proved to be to the advantage of the State, but was told "it was for his own good" (T. 106). As a matter of fact, when defendant persistently refused to submit to a blood test, the Officer told him, if he didn't go through with it, he could lose his driver's license.

In the recent case of *Ringwood v. State*, 8 Ut. 2d 287, 333 P. 2d 943 (1953), the State revoked the defendant's driver's license for refusing to sub-

mit to a blood test in accordance with the provisions of Section 41-6-44, 10 U.C.A. (1953, Pocket Supp.). The Court reinstated the defendant's license because the arresting police officer did not properly advise the defendant that he had the right to choose between a test "of his breath, *or* of his blood, *or* of his urine, *or* his saliva." The Court stated at Page 289 (Utah Reporter) :

"It is realized that after considerable discussion about the blood test, the matter of a urine test was also mentioned. Mr. Ringwood likewise refused. But the basic fact is that the officer confronted him with the choice that he must give his blood for the test, or his license would be revoked. This was not in accordance with the requirements of the statute and there was therefore no proper basis for revoking his license."

It is aparent from a review of the record that defendant was not once during the entire proceedings of the evening properly advised of his constitutional rights.

It is no answer to assert that since defendant submitted to the test, the question is moot. The officers had an obligation to advise defendant of his constiutional privileges and to accurately explain the law as it pertains to tests taken to determine alcoholic content of bodily fluids. The officers failed in both responsibilities, and the State should not now be heard to say that no prejudice resulted to defendant. The urine test which was taken pro-

vided a vital part of the testimony concerning the alleged intoxicated condition of defendant.

In enforcing the laws of the State, the police officers cannot ignore the rights and privileges of its citizens to their material prejudice and damage.

The failure of the police officers and the Justice of the Peace to advise the defendant concerning his constitutional rights, including his right to remain silent, resulted in substantial prejudice to defendant. The defendant made incriminating statements which were subsequently used against him and deprived him of due process of law in violation of United States and State Constiutions.

CONCLUSION

The errors committed by the Trial Court in the conduct of the case constituted reversible error. Further, Mr. Nelson was convicted without due process of law inviolation of both the Federal and State Constitutions.

Respectfully submitted,

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&
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