

1960

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

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FILED

NOV 2 - 1960

STATE OF UTAH,

Plaintiff and Respondent,

vs.

PAUL L. NELSON,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No.

9287

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	2
ARGUMENT	2
POINT I. THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 8	2
POINT II. NO ERROR OCCURRED IN THE JUDGE'S CHARGE TO THE JURY TO DISREGARD THE TESTI- MONY OF THE STATE CHEMIST	11
POINT III. APPELLANT'S CONVICTION IN NO WAY VIOLATED EITHER THE UNITED STATES OR STATE CONSTITUTION	14
CONCLUSION	18

CASES CITED

State v. Anderson, 66 Utah 573, 158 P. 2d 127, at p. 130	4, 5
State v. Assenberg, 66 Utah 573, 244 Pac. 1027	16
State v. Braasch, 119 Utah 450, 229 P. 2d 289.. ..	18
State v. Burch, 100 Utah 414, 115 P. 2d 911	2, 5
State v. Cano, 64 Utah 87, 228 Pac. 563	15

TABLE OF CONTENTS—Continued

	Page
State v. Cobo, 90 Utah 89, 60 P. 2d 952	12
State v. Erwin, 101 Utah 365, 120 P. 2d 285, at p. 302	4
State v. Laub, 102 Utah 402, 131 P. 2d 805	8
Utah Farm Bureau Insurance Co. v. Chugg, 6 U. 2d 399, 315 P. 2d 277	3

STATUTES CITED

United States Constitution, Fourteenth Amend- ment	14
Utah Code Annotated 1953, 41-6-44, as amended	13
Utah Constitution, Art. I, Secs. 7 and 12	14

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent agrees with appellant's statement of facts as far as it goes, although it appears unduly detailed and to contain a great amount of irrelevant matter. However, there is considerable other evidence that should come to the attention of the Court in order that it not be afforded only an incomplete and slanted picture of the case, one highly favorable to appellant.

Respondent deems it more orderly procedure to set out the necessary additional facts in the course of its argument rather than in a separate statement of facts at this point. This will avoid repetition and unnecessary imposition upon the time of the Court.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 8.

POINT II.

NO ERROR OCCURRED IN THE JUDGE'S CHARGE TO THE JURY TO DISREGARD THE TESTIMONY OF THE STATE CHEMIST.

POINT III.

APPELLANT'S CONVICTION IN NO WAY VIOLATED EITHER THE UNITED STATES OR STATE CONSTITUTION.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 8.

It is true that the instruction requested by appellant has at times been given in Utah cases.

As appellant says, it was used in *State v. Burch*, 100 Utah 414, 115 P. 2d 911. That case, however,

differed radically from the one at hand in that all of the evidence there was circumstantial. Proof of this is the statement of the court at page 912:

“The present case is out of the ordinary in that there is not one ultimate fact necessary for a conviction that is substantiated by direct evidence. * * *

In this case, on the other hand, there is abundant direct evidence that defendant did considerable drinking prior to the accident, and this, coupled with the circumstantial evidence present, certainly was sufficient to prove his drunken condition.

Appellant relies heavily on the case of *Utah Farm Bureau Insurance Company v. Chugg*, 6 Utah 2d 399, 315 P. 2d 277. He takes from the context thereof this statement: “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” in an effort to support his theory about circumstantial evidence and the necessity of giving the requested instruction.

There was, of course, much evidence in this case additional to the smell of alcohol. A careful reading of the facts of the *Chugg* case shows it is not in point and cannot serve as much help in deciding this one. There the defendant had been rendered unconscious by the accident and was in pronounced shock. Here defendant was not knocked unconscious and, as he points out in his brief at page 15, was not hurt in the crash.

In the *Chugg* case the officer testified, "From the smell, I *imagine* he had been drinking quite a bit." (Italics ours.) The court observed that the officer had seen defendant for only about a minute altogether, and did not see him walk at all. In making a point of this, the court seems to have opened the door in this case to testimony of the appearance of defendant's walk as being proper evidence as to intoxication.

The apparent doctrine in the quotation appellant takes from the *Burch* decision (A. B. 17), if in fact it really meant what appellant contends, seems to have been watered down somewhat in later decisions. And, incidentally, the facts of the *Burch* case constitute just about as poor a case for the prosecution as can be imagined.

In the two cases cited by appellant himself, the court seems to limit the obligation of giving the instruction desired by appellant to a circumstance involving no direct evidence, as shown in the following statement: "where the proof of a necessary fact is dependent *solely* upon circumstantial evidence, such circumstances must be such as to exclude every reasonable hypothesis other than the existence of such fact and be inconsistent with its existence and inconsistent with its nonexistence." (Emphasis ours.) *State v. Erwin*, 101 Utah 365, 120 P. 2d 285 at p. 302, and *State v. Anderson*, 66 Utah 573, 158 P. 2d 127, at page 130.

The use of the term "solely" is important in this case because here, as previously stated, there was con-

siderable other evidence, direct evidence, indicating the fact of intoxication, and its existence did not rest upon circumstantial evidence alone.

The short concurring opinion of Justice Wolfe in the *Burch* case is enlightening and useful. There he states:

“I concur in the result. I do so in the belief that there was no substantial evidence to show the defendant’s participation in the alleged offense to warrant the submission of the matter to the jury. However, I do not agree in the views indicating that circumstantial evidence is to be considered by a jury in a different and more restricted light than is direct evidence. There are cases where the set of circumstances may be stronger than much direct evidence which could be adduced. In the dovetailing of circumstantial evidence criminal prosecutions may oft-times be made equally as strong and convincing as in the use of direct evidence. Juries and trial courts should not be required to view it as weaker evidence which must ‘exclude the hypothesis of innocence.’ We should rest content with a rule that if a jury has no reasonable doubts about the guilt of a man, taking into consideration all competent evidence, it may convict, without including in opinions expressions which may be seized upon to confuse and confound the ordinary jury whose task is at best a difficult one.”

In the *Anderson* case, Justice Wolfe again concurs with the result, but discusses the question of reasonable hypothesis as follows:

“I concur but I call attention to the inclusion in the opinion of the quotation from *State v. Erwin*, 101 Utah 365, 120 P. 2d 285, 302. I think the first and last sentence of that quotation helpful. The middle part of the quotation stating that the ‘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 non-existence’ is too abstruse for the ordinary jury, and from my experience has even misled judges to withhold from the jury cases which should properly have been submitted. I paid my respect to this sort of a test in my concurring opinion in the case of *State v. Burch*, 100 Utah 414, 115 P. 2d 911, at page 913.

“My objection is not that the test, properly understood and used, is not a valid one. In certain cases where the circumstances as to each necessary element of the crime are not of themselves anywhere near compelling as to such element, but when taken with those other transactions which give color or lend interpretation and also interlock and reinforce other groups of circumstances relating to other transactions in the history of the events which it is alleged constitute a crime, so that from the whole a definite conclusion of guilt may or may not be drawn, it may be wise to instruct the jurymen in such fashion as to cause them to parade before their minds all possibly reasonable hypotheses consistent with innocence as a method of deliberation. Such a case was *State v. Laub*, 102 Utah 402, 131 P. 2d 805. But even under the facts of that case I believe that less confusion would arise from the giving of an instruction that if

from all the circumstances the jury had no reasonable doubt as to the guilt of the defendants, they could find them guilty; that if all the circumstances pointed concurringly to the guilt of the defendants so as to remove all doubts founded on reason, they would be justified in finding the defendants guilty.

“The main objection to the test that the evidence must exclude every reasonable hypothesis lies in the phrase ‘reasonable hypotheses.’ It invites the jurymen and indeed judges (see *State v. Bruno*, 97 Utah 17, 85 P. 2d 795), to conjure up in their imaginations every sort of hypothesis which may be fitted into the evidence and then in the process of discarding some and retaining others the test of reasonableness is applied with great variation as to their judgment as to what is reasonable. Often in determining whether a particular explanation is or is not reasonable, judges invade the province of the jury and I fear that the method of taking up all possible hypotheses which the evidence permits and then sifting out the reasonable from the unreasonable, those terms depending of course on the judgment of the judges, leads to such invasion.

“It is odd how some abstract statement applicable when first devised as a test on the facts then in evidence persists down through the years to become an incubus on the law. There is no use of inflicting on a judge and much less on a jury a test which says that where a fact rests on circumstantial evidence alone the ‘circumstances must be such as to reasonably exclude [“in every reasonable mind” should I

suppose be supplied] every reasonable hypothesis other than the existence of such fact,' etc.

“The simple test is: ‘Under all the evidence in this case can I as a judge say that no normal functioning mind applying its reasoning faculties to the evidence in the case could conclude that the defendant was guilty.’ If so it must be withdrawn from the jury. If the judge has doubt as to that it should go to the jury with the instruction that it, the jury, must be convinced beyond a reasonable doubt as to defendant’s guilt before it should find him guilty. These are comparatively simple tests—albeit they do depend on the experience and capacity of the minds of the fact finders, a human element of uncertainty we cannot escape from. There are no absolutes in the human mind. We have no robots into which we can feed evidence, and turn a crank and get the exact, correct and perfect result. All that can be expected is human justice—that which emerges from not infallible and imperfect human beings even after every attempt to be fair and apply to the utmost their comparatively frail and limited human faculties.”

In *State v. Laub*, 102 Utah 402, 131 P. 2d 805, the court made this statement:

“While the State’s evidence is circumstantial, such evidence may be just as conclusive or even more so than direct evidence, but the prosecution still has the burden of proving beyond a reasonable doubt that the defendant is guilty.
* * *

At T. 87 Warren Haddenham, an ambulance driver, referred to a conversation involving defendant and Trooper Schmidt in which defendant said he had drunk two or three schooners of beer and two vodkas and a whiskey. On the following page, under cross examination, Haddenham said that defendant had mentioned he had gone to a bar for drinks prior to the accident.

At T. 106 Deputy Marshall Gwynn testified that defendant, in answer to Trooper Schmidt's question, said he had gone to the Ashtonian beer parlor for three schooners of beer, and that he also had a couple of drinks of whiskey and a drink of vodka at another place. At T. 109 under cross examination, Gwynn said the Justice of the Peace had asked defendant how much he had drunk, and that defendant said he had several drinks—four or five drinks.

At T. 135, North Salt Lake Town Marshall, Royal A. Reynolds, testified:

“He wasn't sure; it varied anywhere from two to four or five schooners of beer, two shots of vodka, and some whiskey. He wasn't definitely sure on how much whiskey.”

At T. 180 Justice of the Peace E. S. Arbuckle said he had talked with defendant and asked him if he had been drinking, and that defendant said yes. “* * * and I asked him how much, and he said two beers, a vodka and some whiskey.” After some

further conversation Arbuckle then testified he again asked defendant "How many did you say you had? And he said 'I had about four beers and two or three vodkas', that time."

At T. 219 defendant himself testified to having drunk three beers at a tavern and at T. 220 said he drank some vodka later at the home of a friend.

In circumstances such as existed in the *Burch* case where there was no direct evidence and the State's case had to ride or fall on circumstantial evidence alone, the instruction requested might be appropriate. However, such is not the situation here because of the abundance of direct evidence.

If the court were to adopt defendant's theory that whenever the evidence indicates a "reasonable hypothesis" of innocence, the case should not be allowed to go to the jury at all (A. B. 17), normal criminal practice would indeed be stifled and perhaps eventually destroyed. Any defendant could be expected to conjure up evidence of such nature as to constitute a prima facie "reasonable hypothesis" of innocence and the State's case would automatically dissolve. This should not be the law in Utah.

In addition, a defendant in a civil case is not entitled as a matter of right to have instructions given in his own words where the applicable law is set forth in substance otherwise. The proper law, as applied

to the facts of this case, was adequately covered by the instructions actually given by the Court, and particularly by Nos. 2, 5, 11, 15 and 17. Thus, the Court committed no error. Even if it should be held that error did occur, however, it could not be considered prejudicial under all the circumstances, since the jury was fully apprised that each and every allegation had to be proven beyond reasonable doubt.

POINT II.

NO ERROR OCCURRED IN THE JUDGE'S CHARGE TO THE JURY TO DISREGARD THE TESTIMONY OF THE STATE CHEMIST.

Admittedly the State Chemist did not attempt to tell the Court what effect certain amounts of alcohol in various body fluids would have upon the conduct of an individual, nor did the State produce medical testimony to this effect. On the basis of this, the Court gave Instruction No. 9 (R. 29), reproduced at page 21 of appellant's brief. The instruction is identical with appellant's requested Instruction No. 4 (R. 17). It reads as follows:

“You are instructed that, though there is evidence regarding the results of a chemical test of 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.”

Respondent believes that this instruction fully protects appellant’s rights and that it precludes the occurrence of any error that might otherwise have arisen in the jury’s considering the State Chemist’s testimony as to the results of his examination of appellant’s urine.

If there is any weakness at all in the instruction, it exists only in the use of the single word “if” at line 4 as the instruction appears at page 21 of appellant’s brief. It was however fully adequate to convince the jury that since no medical testimony of the effect of alcohol on the body was before it, it could not proceed to consider evidence of the alcoholic content of body fluids. This instruction alone fully protected appellant’s rights and no others were needed. We do not believe that the instruction is error. If it is, however, it was self-induced by appellant and he can take no comfort from his mistake.

Appellant now urges “palpable” error and asks that on the strength of *State v. Cobo*, 90 Utah 89, 60 P. 2d 952, the Court disregard the long established rule of this jurisdiction that errors regarding instructions will not be considered on appeal unless exceptions are taken at trial.

The Cobo doctrine, however, is to be invoked only in capital cases and in cases of grave and serious

offenses carrying long terms of imprisonment; (See page 958 and only where proper determination of the issues would otherwise be denied). *State v. Peterson*, 121 Utah 229, 240 P. 2d 504.

This, of course, is not such a case in either sense. It is not a capital case nor is it grave or serious in comparison with other felonies in this jurisdiction, the sentence being only for a period of from one to ten years, nor was appellant denied a fair trial by virtue of the instructions given.

Appellant comes to a strange conclusion in seemingly urging error in the Court's failure to give an instruction advising the jury of certain presumptions dealing with intoxication according to amounts of alcohol in the blood. These presumptions are given only in Section 41-6-44, U. C. A. 1953, 1959 Supp. (A. B. 22), and do not deal with the crime charged, except perhaps by analogy. There was no occasion for an instruction dealing with these presumptions. They relate to the crime of driving while under the influence of intoxicating liquor or drug—a completely different charge than that here, automobile homicide.

Appellant expresses a fanciful theory at page 23 of his brief, in urging that, had the presumptions been outlined for the Court, his chances for acquittal would have been improved. Not only were the presumptions not relevant to the crime charged at all, but in addition,

he indulges in mindreading and speculation in guessing at the jury's conclusion.

Appellant is mistaken in saying there was palpable error, and expects entirely too much under all the circumstances, in urging reversal for failure to give an instruction not asked for, especially when Instruction 9 fully protects him.

POINT III.

APPELLANT'S CONVICTION IN NO WAY VIOLATED EITHER THE UNITED STATES OR STATE CONSTITUTION.

Appellant interprets the Fourteenth Amendment of the United States Constitution and Sections 7 and 12 of Article I of the Constitution of Utah as prohibitions against compelling a defendant to give evidence against himself, which, as an abstract proposition, may be true.

Respondent is unable, however, to find from a careful search of the transcript any exercise of compulsion whatsoever at any stage of the case, beginning at the time of the accident. In the total absence of any evidence that defendant was compelled to give evidence against himself, it is unnecessary to go into the constitutional question.

Appellant complains that the record does not show evidence of any statement made to him by the

Justice of the Peace as to his constitutional right to remain silent. Occasionally, of course, records do not reflect everything which occurs in lower courts; nor is it common for testimony given in District Court trials to bring out everything which happened before the Justice of the Peace. Moreover, courts on appeal will presume, in the absence of a clear showing to the contrary, that proceedings prior to trial were in all respects regular.

Appellant has completely failed to bring forth any evidence to substantiate his inference (A. B. 24), and in the absence of such evidence, it must be presumed that the Justice acted properly and that he apprised defendant of his legal rights. It cannot be presumed to the contrary. If appellant had offered any evidence at all to back up his allegation, the state could have been expected to meet it. But there was no occasion for doing so. See *State v. Cano*, 64 Utah 87, 228 Pac. 563.

Even assuming that the Justice's questioning of appellant was somewhat unusual under the circumstances, still it was not prejudicial to him in light of the abundance of other evidence sufficient in and of itself to prove his guilt, and in light of his total failure to take the legal procedural steps available to him at the trial.

Mr. Arbuckle had no official role in the trial of the crime charged, except to serve as a witness (R.

1). He had only issued a commitment on a charge that was dropped, and did nothing at all as to the preliminary hearing or anything else connected with the charge of automobile homicide. As to appellant's statement (A. B. 25) that the magistrate must tell a defendant the charges against him, (and we believe that Mr. Arbuckle did his duty) there can be no prejudice here even if he did not since Mr. Arbuckle testified (T. 180) that during the informal proceeding before him the arresting officer, in the presence of appellant, said he had charged him with "drunken driving".

The alleged error really relates to the matter of admissibility of appellant's admissions to the Justice of the Peace and not to the question of being compelled to testify against himself. Neither he nor counsel raised any objection whatsoever to the introduction of the testimony of Mr. Arbuckle as to the admissions made by appellant. In failing to do so, appellant waived any right to raise the matter on appeal.

It is important to note, in addition, that even if error occurred in the act of the Justice of the Peace eliciting from appellant statements as to his drinking, such evidence resulted in no prejudice to him inasmuch as he himself testified at some length upon trial (T. 219-220) as to the facts of his drinking, thus making his objections moot, under the circumstances.

In claiming prejudicial error appellant relies to a great extent on the case of *State v. Assenberg*, 66 Utah

573, 244 Pac. 1027. That case, however, is readily distinguished from this one in several particulars. There, the defendant was a juvenile, age 19, without knowledge of his legal rights, who had been held in jail for nearly four days. Here the defendant was a mature man, a truck driver presumably cognizant of driving laws and the probable consequences to him of death or injury caused by driving negligently and under influence of alcohol, a man who had not been held in jail at all prior to going before the Justice of the Peace. He merely had freely assented to go with the officers to the hospital and then voluntarily accompanied them to the residence of the Justice of the Peace. No coercion of any kind was exercised upon him at any time.

Appellant urges error in the circumstances surrounding his visit with the officers to St. Mark's Hospital and their suggestions that he might desire to submit to a blood test.

The fact that he refused repeatedly to take a blood test is, in and of itself, clear proof that he was not coerced into giving evidence against himself. He refused and that was all there was to it. No brutal methods were used and in fact no force, violence or threats were brought to bear. Since he did not take the test, everything complained of by appellant at page 27 of his brief is pointless and moot. The *Ringwood* case (A. B. 27) is completely aside from the point. As to the urine test, appellant took it voluntarily.

For the record, however, it should be noted at T. 85 that Mr. Haddenham testified that Trooper Schmidt informed Defendant that the blood test could be used for him or against him, and that it would either free him or convict him.

It is not entirely clear how much or which phases of the questioning of appellant counsel now objects to as error. At page 24 of his brief, he seems to cast some doubt upon the right of peace officers to interrogate a defendant prior to his being taken before a magistrate. This, of course, is not a valid argument, as is shown by the holding of this Court in *State v. Braasch*, 119 Utah 450, 229 P. 2d 289, where a defendant gave a complete statement at his first interview with the peace officers.

Since it is clear that neither the Justice of the Peace nor any peace officers concerned exercised any coercion whatsoever upon appellant, his third point is to no avail.

CONCLUSION

Inasmuch as the court below committed no prejudicial error, and in light of the statutes and cases cited, respondent urges that this appeal be dismissed.

Respectfully submitted,

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