

1961

State of Utah v. Leonard Brennan : Brief of Appellant

Utah Supreme Court

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For the Appellant: L. Roland Anderson;

For the Defendant: Richard W. Campbell, Esquire;

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILE

DEC 20 1961

Clerk, Supreme Court, U

STATE OF UTAH,

-vs.-

LEONARD BRENNAN

Defendant

Case No. 9584

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● BRIEF OF APPELLANT

APPEAL FROM SECOND JUDICIAL
DISTRICT COURT OF WEBER
COUNTY, THE HONORABLE
PARLEY E. NORSETH, DISTRICT
JUDGE.

FOR THE APPELLANT:
L. ROLAND ANDERSON
DISTRICT ATTORNEY
By Calvin Gould,
Deputy District Attorney.

FOR THE DEFENDANT
RICHARD W. CAMPBELL, ESQUIRE

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STATEMENT OF THE KIND OF CASE

This is a prosecution brought under the motor vehicle code for operating a motor vehicle while intoxicated.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a directed verdict of acquittal, the State appeals.

RELIEF SOUGHT ON APPEAL

The State seeks a reversal of the order directing the verdict of acquittal.

STATEMENT OF FACTS

The defendant, immediately after turning from a northerly direction to a westerly direction on a curve on 12 Street in Ogden, Utah, struck and injured a 12-year-old girl on a bicycle on the north edge of the roadway. The defendant skidded off the edge of the road on the curve. He did not apply his brakes until the impact. The investigating police officer obtained, with defendant's consent, a blood sample which, when analyzed, showed an alcoholic concentration of .23% of alcohol in the defendant's blood. Twelfth Street is a public street without curbs, gutters or sidewalk. The accident happened at dusk during clear weather.

The defendant was charged with a violation of 41-6-44, Utah Code Annotated, 1953, as amended, commonly phrased 'negligently causing an injury.' (R 1 and 22) The case was tried to a jury. (R 28) At the conclusion of the state's case, the Court directed a verdict for the defendant. (TR 67)) The state seeks a reversal of the order directing the verdict of acquittal.

The information charges the defendant with a vio-

lation of 41-6-44, Utah Code A n n o t a t e d , 1953, as amended:

“41-6-44. Driving while under the influence of intoxicating liquor or drug—Habitual user of narcotics—Presumptions arising from alcoholic content in blood—Criminal punishment—Revocation of license.—(a) It is unlawful and punishable as provided in subdivision (d) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive or be in actual physical control of any vehicle within this state.

(b) In any criminal prosecution for a violation of subdivision (2) of this section relating to driving a vehicle while under the influence of an intoxicating liquor, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance shall give rise to the following presumptions.

1. * * * *

2. * * *

3. If there was at that time 0.15 per cent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor;

4. The foregoing provisions of this sub-

division shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating.

(c) It is unlawful and punishable as provided in subdivision (d) of this subsection (section) for any person who is an habitual user of or under the influence of any drug to a degree which renders him incapable of safely driving a vehicle to drive a vehicle within this state. The fact that any person charged with a violation of this subsection is or has been entitled to use such drug under the laws of this state shall not constitute a defense against any charge of violating this subsection.

(d) Every person who is convicted of a violation of this section shall be punished by imprisonment for not less than thirty days nor more than 6 months, or by a fine of not less than \$100 or more than \$299, or both such fine and imprisonment; provided that in the event such defendant shall have inflicted a bodily injury upon another as a proximate result of having operated said vehicle in a reckless or negligent manner or with a wanton or reckless disregard of human life or safety, he shall be punished by imprisonment in the county jail for not more than one year and, in the discretion of the court, a fine of not more than \$1,000.

* * *

This is the only state statute now in force governing the offense of operating a motor vehicle while under the influence of intoxicating liquor.

ARGUMENT

POINT I

SINCE THE STATE PROVED ALL THE ELEMENTS OF THE OFFENSE CHARGED IT WAS ENTITLED TO A JURY CONSIDERATION OF THE EVIDENCE AND THE OPPORTUNITY TO CARRY ITS BURDEN OF PERSUASION.

POINT II

SINCE THE STATE PROVED THE ACT OF DRIVING AND THE FACT OF INTOXICATION BEYOND A REASONABLE DOUBT THE VERY LEAST CASE PROVED WAS THE LESSER INCLUDED OFFENSE OF "OPERATING A MOTOR VEHICLE, WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR," A MISDEMEANOR.

The elements of Indictable Misdemeanor are:

- (1) Operating a motor vehicle
- (2) While under the influence of intoxicating liquor
- (3) Negligence
- (4) Proximately causing injuries
- (5) To another person

Elements (1) and (2) constitute the offense of “driving a motor vehicle while intoxicated, a misdemeanor,” a necessarily included lesser offense.

Without question the state proved elements (1), (2), (4) and (5) and the only element subject to dispute is the element of negligence. The state proved facts which constituted “failure to keep a safe and proper control of a motor vehicle” (TR 12 and 20 and “failure to keep a safe and proper lookout.” (TR 38) Both are well-recognized grounds of negligence. This negligence proximately resulted in injuries to the person of Kaylene Smart. (TR 13) The accident occurred at dusk.

Twelfth Street in Ogden, Utah immediately east of the scene of this accident forms an “S” curve. The western-most part of this curve changes from a general northerly-southerly direction to a general easterly-westerly direction. The defendant was operating a motor vehicle upon 12th Street and was traveling around the western-most part of this “S” curve and was turning to his left from a northerly direction to a westerly direction. (TR 20) Defendant was alone in his car. Kaylene Smart, age 12, was riding a bicycle east on the north side of 12th Street approaching the western-most part of the “S” curve. The defendant struck Kaylene Smart after having “skidded” on the curve with his vehicle. (TR 20) He struck Kaylene Smart before his brakes were applied. (TR 38) Following the accident the defendant was observed by Officer Gordon Hunter for approximately 20 to 25 minutes. (TR 55) Defendant also consented to a blood alcohol test. (TR 41) The blood alcohol test

showed a concentration of .23% of alcohol in defendant's blood and gave rise to the statutory presumption of intoxication. (TR 46) Officer Hunter, a police traffic patrolman with 2½ years experience testified that the defendant was intoxicated after having described the actions and conduct of the defendant. (TR 54, 55, 58) The defendant admitted to the officer the act of operating the vehicle in question. (TR 30) The state provided the court with instructions which clearly differentiated between the offenses of "operating a motor vehicle while intoxicated, an indictable misdemeanor" and, "operating a motor vehicle while intoxicated, a misdemeanor." (TR 67) The state also provided verdict forms clearly distinguishing between the two offenses. (TR 68) Upon this evidence the state rested. The Court, (apparently upon its own motion) held that the state "had failed to sustain its burden of proof" and thereupon directed a verdict of acquittal. (TR 67)

To contend that the word negligence is not a proper charge of a criminal act belies the plain language of the statute. *State vs. Johnson*, (S. Ct. Utah, 1961) _____ Utah_____; 364 P(2) 1019. This Court has earlier decided that this type of statute is valid and enforceable. (*State vs. Johnson, supra*).

This statute 41-6-44, Utah Code Annotated, 1953, as amended is the only statute governing "drunk driving." The statute defines two offenses: (1) An indictable misdemeanor where injuries result and (2) a misdemeanor when no injuries result. The offense of "driving a motor vehicle while under the influence of intoxicating liquor,"

a misdemeanor is therefore a necessarily included lesser offense when either negligence, proximate cause or injury to another person is lacking.

The verdict of acquittal was directed at the conclusion of the state's case. It is axiomatic that at that point the evidence must be viewed in the light most favorable to the state. Any reasonable view of the evidence demonstrates that the state proved:

- (1) The operation of a motor vehicle by the defendant;
- (2) While under the influence of intoxicating liquor;
- (3) negligence;
- (4) Proximately causing injuries;
- (5) To another person (Kaylene Smart).

It is respectfully submitted that the order of the District Court directing a verdict of acquittal was error. prejudicial to the state and should be reversed.

L. Roland Anderson

District Attorney

By “.....

Deputy District Attorney