

1962

# State of Utah v. Leonard Brennan : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Brief of Respondent, *State v. Brennan*, No. 9584 (Utah Supreme Court, 1962).

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Case No. 9584

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

JAN 24 1962

STATE OF UTAH,

*Clerk Supreme Court*  
*Plaintiff - Appellant*

vs.

LEONARD BRENNAN,

*Defendant - Respondent*

**Respondent's Brief**

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

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## TABLE OF CONTENTS

	Page
Statement of Facts .....	1
Argument:	
I. THE STATE DID NOT PRESENT EVIDENCE SUFFICIENT TO GO TO THE JURY ON THE ISSUES OF NEGLIGENCE AND PROXIMATE CAUSE .....	2
II. 41-6-44, UCA 1953, IS IN VIOLATION OF ARTICLE VI, SECTION 23, OR ARTICLE I, SECTION 24, OF THE UTAH CONSTITUTION .....	17
III. THE TRIAL COURT PROPERLY REFUSED TO SUBMIT TO THE JURY THE QUESTION OF DEFENDANT'S GUILT OR INNOCENCE .....	13
Conclusion .....	15
STATUTES AND AUTHORITIES	
Constitution of Utah, Article I, Section 24.....	13
Constitution of Utah, Article VI, Section 23.....	12
41-6-44, U.C.A. 1953 .....	2, 11, 14
41-6-87, U.C.A., 1953 .....	5
41-6-90, U.C.A., 1953 .....	4
57-7-111(a) U.C.A., 1943 .....	11
5A Am. Jur. Automobiles, Sec. 341.....	8
5A Am. Jur. Automobiles, Sec. 923 .....	10

23 C.J.S. Criminal Law, Sec. 909 .....	10
23 C.J.S. Criminal Law, Sec. 910 .....	11
60 C.J.S. Motor Vehicles, Sec. 276 .....	6
Boggs v. Plybon, 160 S.E. 77.....	6
Christensen v. Utah Rapid Transit, 83, Ut. 231, 27P 2nd 468 .....	7
Davidson v. Utah Independent Tel. Co., 34 Ut. 249, 97P. 124 .....	7
Morrison v. Perry, 104 Ut. 151, 140 Pac. 2nd 772.....	8
Presser v. Dougherty, 86 AT 854 .....	9, 10
Richards v. Palace Laundry 55 Ut. 409, 186. Pac. 439 .....	8
Rodriguez v. Abadie, 168, So. 515 .....	8
State v. Burch, 100 Ut. 414, 115 P2, 911.....	11
State v. Gutheil, 98 Ut. 205, 98 P2 943 .....	11
State v. Hendricks 123 Ut. 267, 258 Pac. 2nd 452.....	10
State v. Johnson 364 Pac. 2nd 1019.....	3
State v. Stewart, 110 Ut. 203, 171 P2 383.....	11
State v. Twitchell, 8 Ut. 2 314, 333 Pac. 2nd 1075.....	13

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

STATE OF UTAH,

*Plaintiff - Appellant*

vs.

LEONARD BRENNAN,

*Defendant - Respondent*

**RESPONDENT'S BRIEF**

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

**STATEMENT OF FACTS**

This is a prosecution for driving a motor vehicle while under the influence of intoxicating liquor. The District Court, upon motion of Respondent directed a verdict of acquittal. The State seeks to have the order directing the verdict reversed upon appeal.

Respondent wishes to set forth facts adduced upon trial of this case in greater detail than appellant has done.

Defendant was proceeding easterly upon twelfth street, in Ogden, just emerging from a sharp "S" turn. (Tr. 23, 30, photograph). This road is asphalt, 23' 2"

wide with no curb. The asphalt ends and a gravel or dirt shoulder 20 feet wide begins with no line of demarcation or drop off. (Tr. 23) The road has no dividing stripe. (Tr. 37) The point of impact was upon the paved portion of the road, not the shoulder, (Tr. 32). The accident occurred about 7:15 P.M. on March 26, 1960. It was dusk, or dark, the defendant's headlights were on, the street lights were not lighted, the girl's bicycle had no light, and an oncoming car may or may not have had its lights on. (Tr. 28, 22, 24, 16, 26). The girl was riding on the left hand side of the road (Tr. 11). There was no evidence of excessive speed. Defendant's car was partially off the hard surface, but otherwise appeared to be operating normally. (Tr. 20). Just prior to impact, the car began to slide as if the brakes had been applied suddenly (Tr. 21, 23). Further facts will be referred to in the argument.

## ARGUMENT

### POINT I

THE STATE DID NOT PRESENT EVIDENCE SUFFICIENT TO GO TO THE JURY ON THE ISSUES OF NEGLIGENCE AND PROXIMATE CAUSE.

Respondent, in moving for dismissal, argued three grounds: (Tr. 63-64).

(a) 41-6-44, U.C.A. 1953, is violative of Article 6, Section 23, and Article 1, Section 24, of the Constitution of the State of Utah.

(b) Criminal negligence, as opposed to simple negligence, is required to convict under 41-6-44, U.C.A.,

1953, when the State charged an indictable misdemeanor, and this burden was not met.

(c) The State did not make a sufficient showing to go to the jury on the issue of even simple negligence and proximate cause.

The trial court granted respondent's motion, and the State has taken this appeal. Argument (a) will be reviewed under point II. Argument (b) has been disposed of by the recent decision of this court in *State vs. Johnson*, 364 Pac. 2d 1019, and will not be argued in this appeal. It should be noted that the *Johnson* decision was made September 13, 1961, the very day this case was determined, and the trial court and counsel did not have it available when this case was decided.

Our major argument concerns the lack of evidence of even simple negligence. No violation of statute or ordinance was claimed or shown; the State (App. Brief page 6 and Tr. 4-5) rests its proof on the civil doctrines of "failure to keep safe and proper control of a motor vehicle" and "failure to keep a safe a proper lookout."

As to control, the State made no claim for and offered no evidence to show excessive speed. The eye witnesses agreed the car was not entirely upon the hard-top, but was partially upon the dirt or gravel side. This is not negligence, as we will argue *infra*. The witness Janet Sandberg, age 13, was upon a bicycle across the road, although her position varied in her testimony from being at the curve itself (Tr. 14) to being even with the rear of defendant's car (Tr. 13). The trial court could see and observe the conduct and demeanor of all the witnesses, and its interpretation of

the evidence should be given considerable weight. The other witness to the accident, James Abbott, age 19, testified he watched the car come around the curve and it was partially on the hard top and partially off. Other than this it seemed to be operated in a normal manner (Tr. 20). Just prior to impact, the car started to slide much as if the brakes had been suddenly applied. (Tr. 23-24). Kaylene Smart, the injured girl, age 12, was present at the trial but did not testify.

The evidence relied upon to show a failure to keep a proper lookout seems to be simply that defendant did not stop in time to avoid the accident, from which it can be argued that if he had kept a proper lookout, he could have stopped. In its brief, appellant asserts that defendant's car struck Kaylene Smart before the brakes were applied. (Page 6). The evidence did not show this—only that “identifiable” skid marks began at the point of impact. There were other brake marks on the ground, but the witness could not positively tie them into the defendant's car (Tr. 39). Abbott's testimony indicated the brakes were applied prior thereto (Tr. 23). At the very minimum, the brakes would have been applied a sufficient distance away to allow for the reaction time of the defendant, since the identifiable skid marks began at the point of impact, not after.

Kaylene Smart was riding an unlighted bicycle (Tr. 16) in violation of 41-6-90, U.C.A., 1953, which provides:

“Every bicycle operated during the nighttime shall be equipped with a lamp on the front ex-



hibiting a white light visible from a distance of at least 500 feet to the front and with a red reflector on the rear of a type approved by the state road commission which shall be visible from fifty to 300 feet to the rear when directly in front of lawful upper beams of head lamps on motor vehicles. A red light visible from a distance of 500 feet to the rear may be used in addition to the red reflector.”

She was riding on the left hand side of the road, in violation of 41-6-87, (a) and (c) U.C.A., 1953 which read as follows:

“(a) Every person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable, exercising due care when passing a standing vehicle or one proceeding the same direction.

(c) Whenever a usable path for bicycles has been provided adjacent to a roadway bicycle riders shall use such path and shall not use the roadway.”

Contributory negligence is not a defense to this action, but certainly is entitled to be considered in determining proximate cause and the question of whether defendant was negligent. Kaylene was riding an unlighted bicycle on the wrong side of the roadway, and there were no street lights operative. The lights of the Abbott car may have been on, shining into defendant's eyes as he came out of the turn. No evidence was offered as to the color of Kaylene's bicycle, or of her clothing on the night in question. Kaylene was “dodg-

ing” rocks being thrown at her by neighborhood boys, one of the rocks struck her bicycle just prior to the accident, and she was looking back to see where the rocks were coming so she could dodge them (Tr. 11, 15 & 16). Both Abbott and Sandberg testified she was riding on the shoulder, but neither witness watched her as the car approached and the accident occurred *on the hard top*. When questioned by police, defendant said she had “darted” in front of him. (Tr. 56).

It is not negligence to drive a car partially off the hard surfaced portion of the road, 60 C.J.S. Motor Vehicles, Sec. 276. No Utah statute concerns it. The Virginia Supreme Court in *Boggs v. Plybon*, 160 S.E. 77, espoused this principle and said:

“We have seen that this defendant, on a dark night, drove his car along the outside edge of a slightly curved road and on its right-hand side, measured by the direction in which he was going. Had he failed to keep to the right and had a collision followed, he might have been held liable. He did keep to the right and, by chance, a trifle too far to the right, so the his right wheel ran from the hard surface into the soft shoulder. If there was negligence at all, this was it. It is not claimed that he failed in any duty afterwards. It is not per se negligence for the outside wheel of any automobile, traveling at a reasonable rate, to run off the macadam. *Indeed, it is an everyday occurrence.* If plaintiff is to prevail, we must hold that such an incident is in itself negligence, and this we cannot do no matter what standards

we might adopt measuring the duty to a guest.”  
(Italics added).

The Utah cases of Davidson v. Utah Independent Telephone Co., 34 Ut. 249, 97 Pac. 124, and Christensen v. Utah Rapid Transit Co., 83 Ut. 231, 27 Pac. 2nd 468, have approved this rule. In the Davidson case this court said:

“But counsel for appellant contended, if we correctly understand their position, that the word “street” in this kind of a case should be restricted to mean only that portion of the highway laying between the sidewalk areas on either side, and where, as in this case, no part of the street has been laid off, set apart, or used as a sidewalk, an imaginary line should be drawn between that part of the street which would constitute a sidewalk if one were established and the balance of the highway, and, if it were shown that the accident causing the injury complained of happened within the sidewalk area so established, a recovery could not be had, and that the court should have so instructed the jury. The rule, as we understand it, is that where, as in this case, the full width of the street is open for travel, and there are no excavations, trenches, embankments, or visible objects of any kind to indicate that a portion of the street has been set aside or used as a sidewalk, *a party traveling along such highway may use any part of it as may suit his convenience or taste*, and he is entitled to protection against the unlawful acts of other persons or

corporations.” (Italics added)

In any event, such action could not be a proximate cause of injury because the impact took place upon the pavement.

Skidding or sliding is not evidence of negligence or lack of control. 5A Am. Jur. Automobiles, Sec. 341; *Rodriguez v. Abadie*, 168 So. 515, wherein the Supreme Court of Louisiana said:

“It is a matter of common knowledge that an automobile will skid when brakes are suddenly applied in an emergency. The fact that defendant’s car skidded in this case is, we think, mute evidence of an attempt on the part of defendant’s daughter to perform all acts possible to avoid the accident, when faced with an emergency.”

Defendant’s duty to keep a lookout is not absolute, but only reasonable. *Morrison vs. Perry*, 104 Ut. 151, 140 Pac. 2nd 772. Defendant was not required to anticipate he would be faced with an emergency, and could presume that the laws of the road would be observed by others.. No evidence was introduced by the State to show defendant should have anticipated a bicycle on the road or any other emergency. The case of *Richards v. Palace Laundry* 55 Ut. 409, 186 Pac. 439, is of significance here. In that case a motorist saw a bicyclist approaching on the proper side of the road, did not continue to watch him, and when the bicycle suddenly appeared in front of his car was unable to avoid a collision. In affirming a non suit at the close of plaintiff’s case, this court said:

"While in case the street or highway is not used by others one may drive on any part thereof, yet, when a traveler passes from the right to the left of the center of the street he, to say the least, loses some of his rights, and may not be heard to complain of the conduct of those who are on the proper side of the street to the same extent as though he also were on the proper side. In *Presser v. Dougherty*, 239 Pa. 312, 86 Atl. 854, the decision is correctly reflected in the head-note, where the law is stated thus:

"The mere fact that plaintiff collided with the automobile does not raise any presumption of negligence, especially where the plaintiff was riding on the wrong side of the street, and there was no evidence that the automobile was being operated at a dangerous rate of speed.

In *Babbitt, Motor Vehicles*, section 356, it is said:

"A driver on the right-hand side of the road has a right to assume that vehicles coming in the opposite direction will not violate the law of the road."

That is, that they will continue in the direction they are coming on the proper side of the road or street.

In *Ballard v. Collins*, *supra*, the rule is tersely stated in the following words:

"A person using a street as a highway has the right to presume that the law of the road

will be observed.”

The *Presser v. Dougherty* case quoted with approval is very close to the instant case, except that it occurred in broad daylight. In that case, a bicyclist pedaling down the wrong side of the road was struck by an oncoming car that had just turned into the street. The Pennsylvania Supreme court held that as a matter of law no negligence was shown on the car driver, and affirmed a non suit at the close of plaintiff's case.

The fact an accident happened is no evidence of negligence, 5A Am. Jur. Automobiles Sec. 923. Appellant, in the direct examination of a State witness, introduced defendant's statement that the girl on the bicycle had “darted” in front of him. The State is bound by its evidence of his explanation, unless it offer substantial evidence to show that the statement made by the defendant is not true. 23 C.J.S. Criminal Law Sec. 909, page 583. Here the State has not produced evidence to dispute this statement, but all the evidence substantiates it. The evidence shows that Kaylene Smart, in the dark on an unlighted bicycle, suddenly “dodged” or “darted” in front of defendant's car; that defendant slammed on his brakes, skidding, in an effort to avoid the collision, but was unable to do so.

Although “negligence” as here used is a civil term, it must be proved beyond a reasonable doubt as an element of the crime charged. *State vs. Hendricks*, 123 Ut. 267, 258 Pac. 2nd 452. Unless the proof is such as to preclude every reasonable hypothesis except that which it supports, and is wholly consistent with the defendant's guilt and inconsistent with his innocence, it

will not be sufficient. 23 C.J.S. Criminal Law Sec. 910, *State v. Gutheil*, 98 Ut. 205, 98 Pac. 2nd 943, *State v. Burch*, 100 U. 414, 115 Pac. 2nd 911.

## POINT II.

41-6-44, U.C.A. 1953, IS IN VIOLATION OF ARTICLE VI, SECTION 23, OR ARTICLE I, SECTION 24, OF THE UTAH CONSTITUTION.

Appellant took the position in its information (R-22), upon the Trial (Tr. 4, 5, 67, 68) and upon this appeal (Appellants Brief, Page 5) that 41-6-44 proscribes 2 crimes, one an indictable misdemeanor, the other a simple misdemeanor. This may not be so. The statute is similar in form, nearly identical, to 57-7-111 (a), U.C.A. 1943. This court has held that section defined only one crime, driving under the influence, with two punishments, the greater one for second offenders. *State vs. Stewart*, 110 Ut. 203, 171 Pac. 2d 383. Thus, the proper procedure under that Section was to try first the question of guilt or innocence of driving under the influence, and if convicted, then try the question of the second conviction. It was reversible error to admit evidence of other convictions during trial of the offense. *State vs. Stewart, supra*.

Therefore, if two crimes are now imposed, it is by virtue of the 1957 amendment. The title of this Act is

“DRIVING WHILE UNDER THE INFLUENCE OF LIQUOR

“An Act Amending Sections 41-6-43 and 61-6-44,



Utah Code Annotated 1953 Relating to Driving  
a Motor Vehicle While Intoxicated or under the  
Influence of Narcotics; and Providing for an In-  
creased Penalty.”

The title does not refer to any new or additional crime, but refers only to “increased punishment”, apparently for the same crime. We submit that if in fact there are two crimes, by virtue of the 1957 enactment, the new crime is not set forth clearly in the title of the Act, and in fact is not set forth at all, in violation of Article VI, Section 23 of the Utah Constitution:

“Except general appropriation bills, and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title.”

We think the 1957 Legislature did not intend to enact a new crime, but only to provide an additional penalty for negligent driving. This is because (1) prior to 1957 this court had construed 57-7-111 (a) as containing one crime, (2) the 1957 amendment did not change the first paragraph of the section, which defines the crime, (3) the 1957 amendment lifted out the second offense provision and substituted the negligence provision, (4) the clear reading of the Act and Section D thereof “\* \* \* such defendant” indicates the added penalty is to be considered only after conviction.

The conclusion is that the statute defines one offense, the driving of a vehicle while under the influence of intoxicating liquor, but provides two punishments.



This we submit is violative of Act. I, Sec. 24, Utah Consitution:

“All laws of a general nature shall have uniform operation.”

Disparate punishment may be nonviolative of this provision if it applies equally to all members of a class, and if the classification is a reasonable one. This court has considered the reverse of this in *State v. Twitchell*, 8 Utah 2d 314, 333 Pac. 2d 1075. As we read that case, it holds that the negligent homicide enactment is a reasonable classification, and a defendant may not complain because his punishment (as a drunken driver) is greater than it would have been had he been sober. We differentiate this case from Twitchell by (1) the Legislature did not declare the negligent driving while intoxicated to be a crime, but merely attempted to add an additional penalty to an existing offense, and (2) the classification here is unreasonable because it provides a highly increased penalty solely on the basis of doing *a lawful act*. This defendant was not charged with, and it has never been contended that he violated any statute or ordinance other than intoxicated driving. Under this law, one driver who while intoxicated, violates speed laws, runs stop signs, etc., and only manages to destroy property or injure himself has committed a simple misdemeanor; the other intoxicated driver *who violates no laws* but injures a person is subject to the heavier offense.

### POINT III.

### THE TRIAL COURT PROPERLY REFUSED

## TO SUBMIT TO THE JURY THE QUESTION OF DEFENDANT'S GUILT OR INNOCENCE.

Appellant, in its information (R-22), at the trial (Tr. 4, 5, 67, 68) and upon this appeal has taken the position that 4-16-44 contains two offenses. The elements of the crime charged, as asserted and relied upon by appellant, are:

- "1. Operating a motor vehicle,
2. While under the influence of intoxicating liquor,
3. Negligence,
4. Proximately causing or contributing to
5. Injury to another person.

As we have seen under Point I, elements 3 and 4 were not proved; as set out in Point II, this act contains one crime, not two. Therefore, at the close of the State's case, the court was faced with this:

(1) The State had charged defendant with violation of 41-6-44, U.C.A. 1953.

(2) The State had set forth in its information, opening statement, argument, proof and instructions five elements it was relying upon.

(3) The State had failed in its proof on two elements.

(4) *There was no included offense*, because the statute defendant was charged under contained but one crime.

Under these circumstances, the State having failed

to prove the elements it claimed essential to the offense, we submit the trial court was completely correct in granting the defendant's motion and directing a verdict.

### CONCLUSION

The Order of the District Court directing a verdict of acquittal should be affirmed.

Respectfully submitted,

HOWELL, STINE AND OLMSTEAD

By Richard W. Campbell

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