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Roy v. Murphy : Brief of Appellee

Utah Court of Appeals

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DOCKET

920088

IN THE UTAH COURT OF APPEALS

CITY OF ROY,)	
)	
Plaintiff-Appellee,)	Case No. 920088 CA
)	
vs.)	
)	Priority No. 2
MELVIN MURPHY,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL, A CLASS B MISDEMEANOR, IN THE SECOND JUDICIAL CIRCUIT COURT, STATE OF UTAH, COUNTY OF WEBER, ROY DEPARTMENT, THE HONORABLE ROGER S. DUTSON PRESIDING

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COURT OF APPEALS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION AND NATURE OF PROCEEDINGS	1
STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4, 5, 6
CONCLUSION	6

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Miranda v. Arizona</u> , 384 U. S. 436 (1966)	4, 6
<u>Mark VII Fin. Consultants Co. v. Smedley</u> , 792 P.2d 130 (Utah App. 1990)	6
<u>State v. Cahoon</u> , 799 P.2d 1191 (Wash App. 1990)	5
<u>State v. La Roche</u> , 442 A.2d 602 (N. H. 1982)	5
<u>State v. Sanders</u> , 833 P.2d 452 (Wash. App. 1992)	4
<u>People v. District Court in and for City and County of Denver</u> , 743 P.2d 432 (Col. 1987)	5

CONSTITUTIONAL PROVISIONS, STATEMENTS & RULES

Utah Code Ann. § 41-6-44 (1953)	1, 2
Utah Code Ann. § 26-25-1 (Supp. 1992)	4, 6
Utah Code Ann. § 26-25-6 (Supp. 1992)	6
Utah Code Ann. § 26-25a-1 (Supp. 1992)	6
Utah Code Ann. § 78-2a-3(2)(d)(f) (Supp. 1992)	1
Utah Code Ann. § 78-24-8(4) (Supp. 1992)	3, 4, 5
Utah Code Ann. § 78-24-8(5) (Supp. 1992)	5

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of driving under the influence of alcohol, a class B misdemeanor, under § 41-6-44 Utah Code Annotated (1953).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(d)(f).

STATEMENT OF ISSUES PRESENTED ON APPEAL

AND STANDARDS OF APPELLATE REVIEW

The following issue is presented by the defendant for review:

1. Should the testimony of Roy City paramedic-emt Eric Froerer have been allowed regarding his observations and conversation with the Defendant?

Appellee does not dispute the standard of review set forth in appellant's brief.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes,

or rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant Melvin Murphy was charged with driving under the influence of alcohol, a class B misdemeanor, under § 41-6-44 Utah Code Annotated (1953).

The defendant requested a jury trial. At the trial on January 14, 1992, the City Attorney called paramedic Eric Froerer as a witness. Defendant objected. The trial court allowed paramedic Froerer to testify. A jury later convicted the defendant of driving under the influence. Mr. Murphy was sentenced the same date as follows: 90 days jail with all but 88 suspended; completion of 60 hours community service; completion of an alcohol program through Rocky Mountain Consultants; consume no alcohol or drugs illegally during probation; attend a minimum of one Alcoholics Anonymous meeting per week; finally, to pay a fine and assessment of \$700.00. He was placed on probation for a term of 18 months.

STATEMENT OF FACTS

Defendant has provided the Court with a limited transcript relating only to paramedic Eric Froerer's testimony; therefore, the statement of facts will be limited to that testimony.

Paramedic Eric Froerer arrived at the scene of an accident involving defendant's station wagon and a stationary semitractor-trailer (Tr. p.8). Paramedic Froerer testified that his training would be similar to a licensed practical nurse (LPN) (Tr. p.10).

He stated upon arrival at the accident scene, his responsibility was patient care (Tr. p.10). Once he made contact with the defendant he commenced to assess the defendant's consciousness (Tr. p.13). The defendant was later removed from his station wagon and carried on a back board to a Roy City Ambulance (Tr. p. 12, 13). Paramedic Froerer rode with the defendant in the rear compartment of the ambulance on the way to the hospital. (Tr. p. 18). Paramedic Froerer stated that the defendant was not under arrest at the time of his transport. On the way to the hospital, paramedic Froerer had a conversation with the defendant (Tr. p. 17, 18). Paramedic Froerer smelled a strong odor of alcohol coming from the defendant's breath (Tr. p. 16, 17). The defendant was asked by paramedic Froerer whether he had been drinking alcohol (Tr. p.18). Paramedic Froerer testified in his opinion the defendant was intoxicated (Tr. p. 19). He testified that while the defendant was confused, he attributed his confusion to his intoxication (Tr. p. 24). Paramedic Froerer testified that the defendant was conscious and responsive (Tr. p. 28).

SUMMARY OF ARGUMENT

Paramedic Froerer is not a physician or surgeon subject to a confidential relationship (Tr. p.9) and 78-24-8 (4) Utah Code Ann. The privilege relating to the physician-patient privilege states it applies to civil proceedings and does not indicate an inclusion of criminal proceedings. The only testimony relating to the defendant's arrest was paramedic's Froerer's testimony that he was not under arrest, thus not invoking the requirements of

Miranda. Miranda v. Arizona, 384 U.S. 436 (1966). Paramedic Froerer was not under the control of the police or acting as their agent. The statute cited by defendant relating to confidential disclosure, 26-25-1, Utah Code Ann. is not applicable to Paramedic Froerer's conversation with the defendant. Finally, defendant bears the burden of showing on appeal the error supported by the record. Defendant has failed to provide this Court with sufficient transcript to support his challenge. This Court should sustain the trial court's ruling.

ARGUMENT

DEFENDANT HAS FAILED TO SHOW THAT PARAMEDIC FROERER WAS AN INDIVIDUAL WITH WHOM THE PHYSICIAN-PATIENT PRIVILEGE APPLIES

The statute applying to privileged communications is focused upon physicians or surgeons. It is not an all-inclusive medical privilege. The statute was not drafted to exclude testimony from a paramedic in a criminal case.

Defendant asserts he had the right to invoke a medical privilege. Utah law is not so broad to recognize a medical privilege. The statute is 78-24-8(4) Utah Code Ann. which states in part, "A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." This privilege is a creation of statute. Other courts have held that this privilege did not exist at common law and therefore should be strictly construed. See State v. Sanders, 833 P.2d 452 (Wash. App. 1992), People v.

District Court In & For the City & County of Denver, 743 P.2d 432 (Col. 1987).

The first analysis is whether Paramedic Froerer would qualify as a physician. He testified he is clearly not trained or educated to a physician's level (Tr. 8-10). The statute states that the privilege applies only to a "physician or surgeon." 78-24-8(4) Utah Code Ann. Other states have held in similar situations where paramedic EMTs have responded to accidents and conversed with injured parties that the physician-patient privilege was not applicable. State v. Cahoon, 799 P.2d 1191 (Wash. App. 1990). State v. La Roche, 442 A.2d 602 (N.H. 1982).

Further, the statute states that the physician-patient privilege applies to civil actions. The statute excludes criminal proceedings. Further provision of the statute regarding privileged communications include the exclusion of testimony in criminal trials (see 78-24-8(5) Utah Code Ann).

His further conversations related to an assessment of the defendant's physical condition (Tr. 12, 17). Paramedic Froerer also made lay observations relating to smell and strength of an odor of alcohol coming from the defendant (TR. 18, 19).

ARGUMENT

DEFENDANT WAS NOT UNDER ARREST, NOR WAS PARAMEDIC FROERER AN AGENT OF THE POLICE REQUIRING ADVISEMENT OF THE DEFENDANT OF HIS RIGHT TO REMAIN SILENT OR AGAINST SELF INCRIMINATION

Nowhere in the transcript does the issue of arrest or even the charge of driving under the influence appear. The testimony of Eric Froerer relates to his activities as a paramedic and emergency

medical technician. The Miranda decision relates to in-custodial interrogations of suspects by police personnel. Miranda v. Arizona, 384 U.S.436 (1966). There is no indication in the record before this court that Paramedic Froerer was an agent of the police nor investigating criminal conduct. Quite the contrary, Paramedic Froerer testified that his assignment was patient care (Tr. 10). Failure by the defendant to support his claims by the record leave them as, "merely unsupported, unilateral allegation[s] which [the court] cannot resolve." Mark VII Fin. Consultants Co. v. Smedley, 792 P.2d 130, 134 (Utah App. 1990).

ARGUMENT

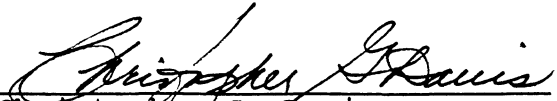
THE PROVISIONS OF § 26-25-1 UTAH CODE ANNOTATED RELATING TO CONFIDENTIAL INFORMATION RELEASE ARE NOT APPLICABLE TO PARAMEDIC FROERER'S TESTIMONY

Defendant has argued that § 26-25-1 Utah Code Anno. precludes paramedic Froerer's testimony. The statute, according to § 26-25-6 Utah Code Anno. indicates that the provisions of Chapter 25 relating to communicable diseases as set forth in Chapter 25a of Title 26. This statute does not apply to the present case. No discussion was had regarding any communicable disease.

CONCLUSION

Based upon the foregoing arguments, this Court should affirm the trial court's ruling allowing the testimony of paramedic Froerer to the jury. Further, this court should affirm the defendant's conviction.

Respectfully submitted this 10th day of May, 1993.


Christopher G. Davis
Roy City Attorney

Certificate of Mailing

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed, postage prepaid, to Robert Macri, Attorney for Defendant-Appellant, 211 East 300 South, #209, Salt Lake City, Utah 84111, this 10th day of May, 1993.


Christopher G. Davis