

2002

Utah v. Jim Hutchings : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

STATE OF UTAH,)
) APPELLANT'S REPLY BRIEF
Appellee/Plaintiff,)
)
vs.)
)
JIM HUTCHINGS,) No.: 20020840-CA
)
Appellant/Defendant.)
--oooOooo--

THIS IS AN APPEAL FROM A CRIMINAL CONVICTION
ENTERED IN THE FOURTH JUDICIAL DISTRICT COURT FOR
UTAH COUNTY, STATE OF UTAH. THE HONORABLE JAMES
TAYLOR, TRIAL JUDGE.

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)	
Appellant/Defendant.)	
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TABLE OF AUTHORITIES

STATUTORY OR CONSTITUTIONAL LAW

U.C.A. 41-6-44: (1)

(2) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

- (i) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
- (ii) is under the influence of alcohol, any drug, or the combined

influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or
 (iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control. . . .

STATEMENT OF ISSUES

The State claims:

- (1) Utah Case law holds that an inoperable vehicle is a vehicle over which a person can be in 'actual physical control' for the purposes of the DUI statute.
- (2) Defendant cannot claim error where the defendant reportedly invited error, in that; the defendant did not properly preserve his objection to the Court's failure to give his requested jury instruction.

SUMMARY OF ARGUMENT

1-Utah's DUI statute specifically mandates that the vehicle driven be an operable motor vehicle. Here the vehicle was inoperable. The State stipulated at trial that they had no proof, at trial, that they had any evidence to suggest he was impaired at the time of the driving. The State argues that since the defendant drove the car where it became inoperable it is enough. This is contrary to the case holdings of Utah.

2- The State argues that defendant invited error. The State's argument is based on a portion of the transcript which is taken out of context. Once the entire text is given, it is clear that the defendant did not invite error.

ARGUMENT

1.

State's Position.

Utah Case law holds that an inoperable vehicle is a vehicle over which a person can be in 'actual physical control' for the purposed of the DUI statute.

Defendant's Position.

The State stipulated, at trial, that they had no proof that the defendant drove the car off the road while under the influence of alcohol. They relied on the fact that by driving, the now inoperable car to its resting place, an inference can be made that he was impaired without further proof. Defendant asserts that if the State is to rely on this inference they must offer some proof to substantiate this inference of impairment.

Here, no evidence suggested that the defendant was under the influence of alcohol at the time he drove the car off the road. None. The State, in their brief, cites a transcript reference to circumstantial evidence suggesting that the defendant was under the influence at this time. Appellant cannot find such. Further, this suggestion contradicts

the State's position at trial. At trial, the State stipulated they could not prove he to be under the influence when the car went into the gorge.

Appellant cites this court to the following discussion at trial between the defense, State, and the trial court.

A discussion dealing with the application of Lopez v. Schwendiman occurred on record. The trial court commented that we do not know the particular factual scenario of Lopez-----in that, we don't know if he was drunk when he drove the car to the location where it was inoperable. The Court stated at page 99 line 20:

The Court: So we know he was drunk when he was apprehended at the truck. What we don't know in the facts of Lopez is if he was drunk when the tracks were made. That's the point.

The State responded at page 99 line 24 stating:

Mr. Probert: Right. And we don't know that here either.

The Court: Right.

Mr. Carter: And our statute requires he's actual physical control while he's under the influence.

The trial court, the defense, and the State all agreed that the proof was lacking. No proof existed as to his state of sobriety at the time of the alleged driving. This is based on the following evidence.

The officer under cross-examination stated: (Starting at page 84 Line 20)

Q. There was going to be some independent means applied to that vehicle to get it to move.

A. (Officer Mitchell). Yes. From where it was sitting.

Q. And you don't know the extent of what that might have been.

A. The extent it might have been was, help was called. A single person showed up. And the occupant was waiting with the vehicle.

...

Q. Do you know how long that Blazer had been there?

A. I don't.

Q. You obviously didn't observe the vehicle going into that area where it came to rest.

A. No.

Q. Pretty much your observations are limited to the time at 9:15 p.m. when you arrived at the scene to the time of the arrest at 9:50 p.m.

A. Yes.

Q. You don't have any other observations before that time of 9:50 p.m.

A. Just a dispatch that said there was a car that went off and an accident.

Q. We don't have a third party giving us any more information at all.

A. I know where you're leading. No. I tried to find out if there was a complainant that called it in, information. There wasn't.

Q. You see Mr. Hutchings at that time. You say he doesn't have alcohol coming from his breath.

A. No.

Q. You say it comes from his clothing or his perspiration or something of that nature.

A. Off his person, yes.

Q. Correct.

A. Yes.

...

Q. Do you know how much alcohol Mr. Hutchings had to drink?

A. No.

Q. Do you know how much alcohol he had before he arrived on the scene?

A. No.

Q. You don't know how long he had been there?

A. No.

Q. You don't know how the vehicle got there?

A. Just by the tracks, missed the curve and went over.

Q. The only thing you know is, he's about the vehicle?

A. He's in the driver seat in a vehicle. (Transcript Page 87 Line 13)

... (Transcript 83 Line 15)

Q. It wasn't going to move on its own volition or on movement? You couldn't turn the key, start it up, and drive it off?

a. No, you could not. (Line 18.)

The tow truck driver arrived and tried to start the car.
(Transcript Page 60 Line 14)

Q. What happened when he tried to start the vehicle?

A. It wouldn't start.

Q. Who removed the vehicle from the scene?

A. The tow company.

The defendant's position is based on Utah statutory law, which requires the car be operable. The trial court defined a motor vehicle to be a self-propelled vehicle intended primarily for use and operation on the highways. *See Court's Instruction 5.* This instruction is based on Utah law and was submitted to the trial court via jury instruction by the defense. *(Contrary to the State's position in their brief, the defendant had pre-filed his requested jury instruction with the trial court. The trial court even modified their initial instruction to conform to defendant's statement of the law. See transcript at page 95.)*

Utah statutory law (U.C.A. 41-6-1 (22)) defines a 'motor vehicle' as:

...every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails, except vehicles moved solely by human power and motorized wheel chairs.

U.C.A. 41-6-1 (55) defines a vehicle to be:

...every device in, upon, or by which any person or property is or may be

transported or drawn upon a highway, except devices used exclusively upon stationary rails or tracks.

In contradiction to this statutory language, the State seeks support in the Lopez v. Schwendiman, 720 P.2d 778, 781 (Utah 1986). Lopez is not a criminal case but an appeal from driver license suspension. As noted by the trial court, the factual scenario of Lopez is lacking. However, the language target by the State in Lopez is:

*Where, as here, **circumstantial evidence permits a legitimate inference** that the car was where it was and was performing as it was because of the defendant's choice, it follows that the defendant was in actual physical control.*

The language suggests that since the defendant had driven the car to that location there is a legitimate inference that may be drawn. See also Richfield City v. Walker, 790 P.2d 87 (Utah App. 1990).

Here, the evidence is lacking --- no evidence supports a legitimate inference that the defendant was intoxicated at the time he drove into the gorge. The State of Utah even conceded this point as noted above. Defendant argues that these stipulation are binding.

The problem with the State's theory was noted by the trial court. The Court commented at page 102 line 9.

The Court: Well, the problem I have with your argument, Mr. Probert, is that if I have a derelict motor vehicle sitting in a wrecking yard, hasn't been operated since memory of man, and a drunk stumbles in and sits down in the seat, under your argument, he would be in physical control of a motor vehicle. I'm not willing to go that far.

Defendant's position is similar to the trial court. The State must make some correlation to the actual driving of the vehicle (which is now inoperable) and the defendant's state of impairment. The scenario presented by the trial court is one problem. Many others exist.

What if, as here, the vehicle is in a location for an unknown time maybe even up to a number of days. The defendant returns to the inoperable car to have a tow truck pull it away. But in the interim, he has drunk to excess and slides behind the wheel. Is the person then guilty of the DUI?

What if two persons were in the car when it was driven off the road. The passenger is intoxicated but the driver not. The car is determined to be inoperable from this accident. The passenger slides behind the wheel as the officer arrives.

The State has some burden to prove that when he drove off into the gorge, he was impaired by alcohol. Here the time the car drove off the road is unknown (hours or days). The defendant's state of impairment is unknown. No effort was made to correlate the defendant's state of impairment when this accident (driving) occurred. The quantity of alcohol consumed after the defendant was cut off and drove into the gorge is unknown.

The State carries the burden of proof. If they are going to rely on the defendant driving to the location, they need give some evidence to support a legitimate inference that he did so while impaired. If the defendant was observed by the officer within

minutes of the accident, it may be a legitimate inference that he drove there while impaired.

Here, the State however failed to give us any evidence to substantiate a legitimate inference that when the defendant drove off the road he was impaired.

2. **State's Claim- Defendant invited error.**

Defendant submitted his requested instruction with supporting memorandum. The State also submitted their own jury instruction, which is almost identical to defendants.

See "Memorandum in Reference to Defendant's Requested Instruction."—Submitted July 16, 2002 twenty days prior to trial. The trial court decided to draft its own version Yet, somehow the State argues that the defendant invited error.

Defense Position:

The defendant had submitted his written jury instructions almost three (3) weeks prior to trial. The Court informed counsel that the Court had drafted its own jury instruction on 'actual physical control'. The defense thereafter sought modifications of the Court's given instruction to enhance his defense theory without success, This does not constitute 'inviting error.'

Defendant objected to the Court's given instruction throughout the trial court's discussion. Defendant particularized his objection to the Court's instruction contemporaneous with his motion to dismiss. *See page 92 line 4-10*. The Court had informed the parties that the Court was going to use its own instruction and not theirs. *See Page 91 line 2*. Further, contrary to the provisions of Rule 19 (e) of the Utah Rules of Criminal Procedure, the trial court did not provide an opportunity to express objections but simply advised that the Court would give the Court's instruction thereby rejecting the defendant's and State's.

The trial court then asked for input referencing the 'actual physical control' instruction given by the trial court. *Page 97 line 2*. The State here argues that defense counsel's objection was inviting error.

The defense stated referencing the Court's given instruction:

Mr. Carter: If they're going to rely upon the driver before the vehicle becomes inoperable, they're required to show some connection at that time to the defendant's intoxication. . . .
Page 97 line 17-20.

...

Mr. Carter: That's my point. There's no correlation here. We're limited on our findings regarding time sequence. We're limited on our alcohol consumption sequence. We don't have any connection to the actual driving. From my argument, they can't convict him of actual physical control sitting as the officer finds him. They have to use the statement before to surmise that maybe he was intoxicated at that time. *Page 99 line 5-11.*

...

Mr. Carter: My argument is, that's the essence of the statute. You've got to have both. As you said in your (State's) opening argument, you have to do the dot to dot. *Page 100 line 18-20.*

...

Court: ... Again, we're inferring. We're reading between the lines. What they're saying there is, they don't want to allow a drunken driver who wrecks his car to then not be able to be convicted because he wrecked the car. *Page 101 line 4-7.*

Mr. Carter. And we agree. *Page 101 line 8.*

Further discussion continues and the Court decides to move on and then asks for input on other instructions. *See page 103 lines 1 -3.* Mr. Carter then advises that the defendant had not elected to testify or not at this point. *Page 103 line 4.* The State wants to discuss further the 'actual physical control' instruction and the Court advises that the Court has already ruled and wants to move on. *Page 103 line 12.* The State persists and now wants to include hypertechnical verbiage. *Page 103 line 14-16.* The Court then asks defense if they have any objection to this technical addition and the defense states "No. That's fine." *Page 103 line 25.*

Defense counsel, although specifically proposing his version of 'actual physical control' was advised by the Court that it would not be given and the Court had drafted a different instruction and ask counsel's input. Defendant did not waive his objection. However, the defense did try, without success, to have the Court's given instruction modified.

The State had argued that the defense instruction had raised a list of factors to be considered as set out in Richfield City v. Walker, supra. The State sought to argue that further additional indicators should be added to the list set out in Walker.

Defense counsel suggested that he desired the Walker list be given as per his instruction but recognized that the Court had already ruled. Defense counsel stated:

...Walker just gave you a nine and didn't say it was a full list anyway. You know, I wouldn't mind see Walker in there. But I think the court has ruled. Let's move on. *Page 104 Line 19.*

The trial court then commented on the issue of a checklist advising that the Court was going to avoid giving a checklist and wanted to look at the 'totality of the circumstances'. *Page 104 Line 23.*

The State argues that counsel invited error. Appellant disagrees.

The State argues:

"After deciding that issue, the trial court asked, "Is there anything further we need to discuss on this instruction?" (R. 154:103) Defendant responded, "I don't think I have a problem with anything else" (R. 154: 103)". See page 15 of State's Brief.

The State misleads. This phrase noted immediately above is taken out of context. The State fails to report the entire text. In full, it reads:

Court: ... Is there anything further that we need to discuss on this instruction? Is there any argument or question about any of the other instructions?

Mr. Carter: We haven't elected at this point whether the defendant is going to testify. Want that to be optional. I don't think I have a problem

with anything else. (Emphasis Added indicated sentences eliminated by the State in their brief)

Once read within in the entire text in full, it is clear that the Court asked for some input on other instructions. The defendant advised that the instruction dealing with the defendant testifying or not maybe unnecessary since the defendant may not testify at all---he had not decided. Then the defense notes no other difficulties with any other instructions.

MANIFEST ERROR

Further, it does not matter. It is 'manifest error' not to define the elements of the offense. Here, the Court refused both the State's and defense's instruction and created its own. The Court here failed to follow the applicable case law in defining 'actual physical control' and chooses to go alone.

In State v. Jones, 823 P.2d 1059 (Utah 1991) the Court pronounced:

The jury must be instructed with respect to all the legal elements that it must find to convict of the crime charged, and the absence of such an instruction is reversible error as a matter of law. Laine, 618 P.2d at 35. In State v. Roberts, 711 P.2d 235 (Utah 1985), we stated, "The general rule is that an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." Id. at 239 (Utah 1985) (citing Laine, 618 P.2d at 35). See also State v. Harmon, 712 P.2d 291, 292 (Utah 1986) (per curiam); State v. Reedy, 681 P.2d 1251, 1252 (Utah 1984). Thus, the failure to give this instruction can never be harmless error.

The complete absence of an elements instruction on a crime charged is an error we review to avoid manifest injustice. See Utah R.Crim.P. 19(c); State v. Lesley, 672 P.2d 79, 81 (Utah 1983); Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945); State v. Cobo, 90 Utah 89, 60 P.2d 952, 958-59 (1936); People v. Wickersham, 32 Cal.3d 307,

650 P.2d 311, 326-27, 185 Cal.Rptr. 436, 451-52 (1982) (en banc). Cf. *State v. Bell*, 563 P.2d 186, 187 (Utah 1977). It follows that even though Jones failed to object to the lack of an elements instruction when the instructions were given, the trial court's complete failure to give an elements instruction on aggravated kidnapping is clear error and requires reversal of the conviction and remand for a new trial on that charge.

Here, the trial court failed to advise the jury of the legal definition of 'actual physical control'. It is the essential elements of this offense.

As set out in *State v. Verde*, 770 P.2d 116 (Utah 1989), the test of whether an unpreserved objection may be reviewed under the 'manifest injustice' exception is as follows:

... First, the error must be "plain" or "manifest." This is sometimes termed an "obviousness" requirement. After examining the record, an appellate court must be able to say "that it should have been obvious to a trial court that it was committing error." Second, the error must be of sufficient magnitude that it affects the substantial rights of a party. In other words, applying the standard we explained in *State v. Knight*, 734 P.2d at 919, the appellant must show a reasonable likelihood that absent the error, the outcome below would have been more favorable.

Here, the trial court chooses to create its own instruction and deviate from established precedent. The error is obvious. There was a conscious choice to avoid precedent as acknowledged by instructions submitted by both the State and defense.

Further, the defense argues that a different result would have occurred if the Court would have submitted the instructions tendered by the defense. Under the formula of *Richfield City v. Walker*, *supra*, a person should have the apparent ability to move the

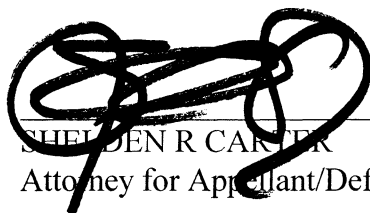
vehicle. There would be no danger of the defendant driving the car since it could not be moved. Absent such a showing, the defendant would be entitled to an acquittal.

CONCLUSION

The States failure to correlate the defendant's driving to a state of impairment is fatal. If the State is to rely on a legitimate inference, they must tender some evidence to support such an inference. Here, they did not do so.

Secondly, once the defendant's comments are read in full text, it is obvious that he did not invite error. The trial court had refused to give his instruction which represented years of case precedent and created its own. The trial court's instruction failed to define the offense of being in 'actual physical control of the car while impaired'.

Dated this 2ND day of August, 2003.



SHELDON R CARTER
Attorney for Appellant/Defendant

MAILING CERTIFICATE

I hereby certify that I mailed a copy of motion and order to extend time to file
appellant's reply brief to:

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Postage prepaid this 2 day of ^{AUG} July, 2003.


S. Carter

Addendum to Brief

1. Portions of the transcript with highlights.

1 A. Like I said, I've been policing for so long that when
2 I get a circumstance such as this or somebody calls for help
3 and it's not a tow truck and they say there's no damage to the
4 vehicle, my attitude is that that vehicle can move. It might
5 be out of gas. There's some reason. It might be a temporary
6 thing. It might be a permanent thing. The occupant of the
7 vehicle said there was no damage to the vehicle. When he
8 called somebody to pull him out, the vehicle was going to move
9 when somebody came there, either with a tow strap -- he stayed
10 with the vehicle, and the vehicle was going to move from that
11 spot without a tow truck.
12 Q. Eventually at some time?
13 A. Without a tow truck because it was never called
14 except by me.
15 Q. You and I aren't going to argue about semantics.
16 Someone might have called the tow truck and pulled it out
17 independent of your call, correct?
18 A. The fact of the matter is, he called his father to
19 come and help him.
20 Q. There was going to be some independent means applied
21 to that vehicle to get it to move.
22 A. Yes. From where it was sitting.
23 Q. And you just don't know the extent of what that might
24 have been.
25 A. The extent it might have been was, help was called.

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1 A single person showed up. And the occupant was waiting with
2 the vehicle.
3 Q. We're conjecturing what might or might not have been.
4 A. Actually, his father did show up on scene, and the
5 single person as occupant was waiting for his help to arrive.
6 Q. Did you check out any further what was wrong with
7 that vehicle?
8 A. No, based on the occupant saying there was no damage
9 to the vehicle.
10 Q. Do you remember when we had our conversation before
11 at a hearing where you advised me that the vehicle was
12 inoperable; it was not going to be moved?
13 A. I said it wouldn't start, if I remember right, on the
14 pretrial.
15 Q. Prelim.
16 A. It didn't start. I think the question was, the tow
17 truck came and got it, and the semantic was that I called the
18 tow truck and not the occupant.
19 Q. Do you know how long that Blazer had been there?
20 A. I don't.
21 Q. You obviously didn't observe the vehicle going into
22 that area where it came to rest.
23 A. No.
24 Q. Pretty much your observations are limited to the time
25 at 9:15 p.m. when you arrived at the scene to the time of the

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1 arrest, about 9:50 p.m.
2 A. Yes.
3 Q. You just don't have any other observations before
4 that time of 9:50 p.m.?
5 A. Just a dispatch that said there was a car that went
6 off and an accident.
7 Q. We don't have a third party giving us any more
8 information at all?
9 A. I know where you're leading. No. I tried to find
10 out if there was a complainant that called it in, information.
11 There wasn't.
12 Q. You see Mr. Hutchings at that time. You say he
13 doesn't have alcohol coming from his breath.
14 A. No.
15 Q. You say it comes from his clothing or his
16 perspiration or something of that nature.
17 A. Off his person, yes.
18 Q. Correct?
19 A. Yes.
20 Q. Do you know if any alcohol was spilled on him or
21 anything of that nature?
22 A. There's a difference between fresh alcohol and
23 consumed alcohol. Over the years, it's pretty prevalent when
24 somebody has been drinking and they breathe on you. You can
25 smell it on their breath versus coming off their body. If

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1 it's spilled on them, it's a different smell.
2 Q. Do you know how much alcohol Mr. Hutchings had to
3 drink?
4 A. No.
5 Q. Do you know how much alcohol he had before you
6 arrived on the scene?
7 A. No.
8 Q. You don't know how long he had been there?
9 A. No.
10 Q. You don't know how the vehicle got there?
11 A. Just by the tracks. Missed the curve and went over.
12 Q. The only thing you know is, he's about a vehicle --
13 A. He's in the driver's seat in a vehicle.
14 Q. Keys are on the passenger's side?
15 A. Passenger's front seat.
16 Q. The vehicle will not start?
17 A. I only knew that after the tow truck came.
18 Q. And it's going to require some independent means, a
19 third party, to help it move some direction or whatever.
20 A. Before I called for the tow truck, yeah, he told me
21 that he had walked off and actually called his father to come
22 and help him.
23 MR. CARTER: Nothing further. Thank you.
24 THE COURT: Mr. Probert?
25

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1 this physical control instruction?

2 MR. CARTER: That would be fine, Judge, but I'd like

3 to do something on the record. I'd like to move for a

4 dismissal at this point. I don't think the State has shown my

5 client to be in actual physical control. I have actually

6 formalized it by this memo, if I may approach. I faxed a copy

7 of that to Mr. Probert this morning. I believe he has it.

8 For the Court's information, I think it just basically resets

9 out my arguments on the instructions as well. I don't think

10 it adds a lot.

11 THE COURT: Your argument is that if the car wouldn't

12 go, it couldn't be physically controlled?

13 MR. CARTER: Keys are out of the ignition, on the

14 passenger's side. He's behind the wheel of an inoperable

15 vehicle. We do not think that fits within the definition of

16 actual physical control.

17 Just for purposes of the record, on the issue of your

18 ruling on the corpus delicti, at that time I thought there was

19 only identification of the vehicle being down there; there

20 wasn't any information relayed regarding the driving. The

21 only relationship to driving was the defendant's comments as

22 reported by the officer that some lady cut him off and forced

23 him down into that area.

24 THE COURT: Just to respond to that, I was satisfied

25 that there was enough of an inference. Doesn't have to be

1 proven beyond a reasonable doubt. I've got a vehicle, tracks,

2 off the road, someone who appears to be impaired. I'm

3 satisfied there's enough.

4 Mr. Probert, response to his motion to dismiss?

5 MR. PROBERT: Yes, Your Honor. The State would argue

6 that the law in the state of Utah is as described in the

7 decision of the Utah Supreme Court in Lopez versus

8 Schwendiman, which adopted the decision in State versus

9 Smelter, the Washington Supreme Court decision. I would like

10 to just read a short quotation from Lopez:

11 "Utah's statute provides for the arrest of one 'in

12 actual physical control' of the vehicle while under the

13 influence of alcohol and/or drugs. That requirement was

14 intended by our legislature to protect public safety and

15 apprehend the drunken driver before he or she strikes and may

16 not be construed to exclude those whose vehicles are presently

17 immobile because of mechanical trouble." That's page 791 of

18 the decision of the Utah Supreme Court in relation to that

19 case.

20 THE COURT: That's in Lopez?

21 MR. PROBERT: That's Lopez. I do have a photostat

22 copy of that case if Your Honor wants to look at it.

23 THE COURT: I have it in front of me.

24 MR. PROBERT: In that case, Your Honor is aware of

25 the factual situation, and I think that the factual situation

1 is strongly paralleled in this case. In State versus Smelter,

2 the Court said that, "The focus should not be narrowly upon

3 the mechanical condition of the car when it comes to rest" --

4 clearly, here we have a vehicle that came to rest -- "but upon

5 the status of its occupant and the nature of the authority he

6 or she exerted over the vehicle in arriving at the place from

7 which, by virtue of its inoperability, it can no longer move."

8 Then the Court went on: "Where, as here, circumstantial

9 evidence permits a legitimate inference that the car was where

10 it was and was performing as it was because of the defendant's

11 choice, it follows that the defendant was in actual physical

12 control."

13 The State would argue that the fact that the vehicle

14 was inoperable is rendered irrelevant by the decisions in

15 Lopez versus Schwendiman and State versus Smelter. The fact

16 that the vehicle is inoperable is not a consideration which

17 the supreme court has indicated is to be taken into

18 consideration, as I understand the decision in Lopez. The

19 statute "may not be construed to exclude those whose vehicles

20 are presently immobile because of mechanical trouble."

21 The State would submit it on that basis.

22 THE COURT: Mr. Carter, want to be heard further?

23 MR. CARTER: I assume the Court has read my briefs.

24 I differ with that argument.

25 THE COURT: I'm going to deny the motion to dismiss.

1 I think the Lopez case is almost directly on point. That's a

2 case with an immobile vehicle with tracks leading to the

3 vehicle. Lopez was presumably convicted. Although it wasn't

4 a criminal case, it was an appeal of the denial of a driver's

5 license or whatever. The rule of law is the same, although

6 the burden of proof is different. I think it's pretty close

7 to on point. I'm going to deny the motion.

8 Now what I had done on the physical control statute.

9 First of all, if you've got your instructions, if you'll take

10 a look at page 5 of 25 of the instructions, I put in a

11 definition of motor vehicle. I did it late in the day, and I

12 took it from the wrong chapter. Mr. Carter has submitted a

13 definition of motor vehicle which is from the correct chapter.

14 MR. CARTER: Wait a minute. I want to hear that

15 again.

16 THE COURT: You submitted the one from the correct

17 chapter.

18 MR. CARTER: Thank you.

19 THE COURT: But unless this is a trolley car, you had

20 a lot of language there that didn't really apply. I think

21 what's happened is, the definition I took is from 41-1, and

22 the one you took is from 41-6. They talk about applying to

23 chapters. There's a lot of language in the 41-6 one that

24 doesn't apply in the case. The principle difference is --

25 they both talk about a self-propelled vehicle. I think the

1 41-1(a) definition then talks about intended for use and
2 operation on a road. That's the instruction I used. And I
3 think the one that's later doesn't say that. It just says any
4 self-propelled vehicle.
5 Candidly, I have a problem with that definition.
6 It's not in this case, but, I mean, what about these kids that
7 are rodding around on these skateboards with a little motor on
8 them? Under the one section, it's a motor vehicle. Under the
9 other, it isn't. I don't think anybody in their right mind is
10 going to be putting on the blue lights and trying to chase
11 down a kid on a skateboard. Doesn't apply to this case.
12 MR. CARTER: Let me clear that up for you.
13 THE COURT: Doesn't apply to this case. I think what
14 you're concerned about, Mr. Carter, is, you're able to argue
15 it's not a vehicle because it's not self-propelled. Is that
16 fair?
17 MR. CARTER: That may be where I'm going.
18 THE COURT: I think that language is the same in
19 either case.
20 MR. CARTER: I don't think either one hurts me. I
21 think this is fine.
22 THE COURT: Are you comfortable with this definition?
23 MR. PROBERT: I'm comfortable with the incorrect
24 definition.
25 THE COURT: It's a vehicle so it fits either one.

1 MR. PROBERT: Yes.
2 THE COURT: The next instruction is page 6 of 25.
3 That's the physical control. I'll tell you, the genesis of
4 this instruction is that this is essentially the instruction
5 that will be included in the model criminal instructions for
6 Utah. They haven't been published yet, but I have a set.
7 They're out for comment right now. With the exception that I
8 added in the last paragraph, the last paragraph comes directly
9 from the Lopez case.
10 MR. PROBERT: It comes from the Smelter case.
11 THE COURT: Smelter as cited in Lopez. The portion
12 that Mr. Probert read to us, the quote that Mr. Probert read
13 to us, from Lopez is the following paragraph. What I did is
14 took it right out of the case. It's my view that the supreme
15 court adopted that by approval. But I'll hear you as to how
16 you think it ought to be worded.
17 MR. CARTER: If they're going to rely upon the
18 driving before the vehicle becomes inoperable, they're
19 required to show some connection at that time to the
20 defendant's intoxication. I think you have a reference in
21 that to that instruction, but it's not real clear. I think it
22 ought to be more clear. If they're going to rely on some
23 driving beforehand, then they need to correlate the
24 intoxication to the previous driving.
25 THE COURT: You're talking about a situation where,

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1 as a hypothetical, subject drives a car down the road; he's
2 involved in an accident; car becomes disabled; he then begins
3 to drink, so that the intoxication occurs thereafter. The
4 question is, under the language of Smelter and of Lopez, is he
5 nevertheless guilty under that language because what this case
6 says is that if it's inoperable because of his control, it's
7 irrelevant? That's Mr. Probert's argument, I think, that
8 under that circumstance, if he's in physical control of the
9 hunk of junk, if that's what it is once it becomes inoperable,
10 but he's in control of whatever used to be a vehicle, and it
11 used to be a vehicle, under my hypothetical, because he
12 wrecked it.
13 Your argument is, if the intoxication occurred
14 thereafter, he can't be under physical control while
15 intoxicated. I think Mr. Probert's argument is, it doesn't
16 matter. He caused it to become inoperable. Therefore, he
17 remains in physical control of it. And if the intoxication
18 and the physical control coincide, there's a violation.
19 Is that fairly stated?
20 MR. PROBERT: That's correct, Judge. And, of course,
21 the supreme court in Lopez versus Schwendiman raised the very
22 issue that if the defendant has rendered the vehicle
23 inoperable in a collision, he's not allowed to escape the
24 prosecution for DUI.
25 THE COURT: They raised it. The dilemma they have

1 is, we don't have enough facts to know if it was dicta or the
2 facts of the case because we don't know if there was a
3 correlation between the time of intoxication and the time of
4 control in Lopez.
5 MR. CARTER: That's my point. There's no correlation
6 here. We're limited on our findings regarding time sequence.
7 We're limited on our alcohol consumption sequence. We don't
8 have any connection to the actual driving. From my argument,
9 they can't convict him of actual physical control sitting as
10 the officer finds him. They have to use the statement before
11 to surmise that maybe he was intoxicated at that time.
12 THE COURT: Mr. Probert, do you want to be heard
13 further?
14 MR. PROBERT: If I could direct you to Paragraph 6 in
15 Lopez, the Court there says, "The trial court here found that
16 there were tire tracks leading up to the vehicle, that the
17 vehicle had to have reached its point of rest 'apparently on
18 its own power,' and that Lopez had failed the field sobriety
19 tests."
20 THE COURT: So we know he was drunk when he was
21 apprehended at the truck. What we don't know in the facts of
22 Lopez is if he was drunk when the tracks were made. That's
23 the point.
24 MR. PROBERT: Right. And we don't know that here
25 either.

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1 THE COURT: Right.

2 MR. CARTER: And our statute requires he's actual

3 physical control while he's under the influence.

4 THE COURT: Well, he's in physical control if it's

5 not necessary that the vehicle be operable in order for him to

6 be physical control. What I'm wondering about is the language

7 that I put in this instruction that says, "It is also possible

8 for a person to be in physical control of a motor vehicle when

9 the vehicle is disabled if the problem from the vehicle arose

10 from the act or behavior of the actor" -- that's right out of

11 Smelter -- "and the jury can conclude that the disabling

12 action is contemporaneous with the intoxication of the

13 Defendant." That phrase is something I added. I presume you

14 object to that, Mr. Probert; is that correct?

15 MR. PROBERT: Yes, I do, because that seems to put a

16 burden on the State to -- seems to be creating an element of

17 the offense which is not in the statute.

18 MR. CARTER: My argument is, that's the essence of

19 the statute. You've got to have both. As you said in your

20 opening argument, you have to do the dot to dot.

21 THE COURT: I'm looking directly at the quote from

22 Smelter. What it says is, "Where, as here, circumstantial

23 evidence permits a legitimate inference that the car was where

24 it was and was performing as it was because of the defendant's

25 choice, it follows that the defendant was in actual physical

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1 control. To hold otherwise could conceivably allow an

2 intoxicated driver whose vehicle was rendered inoperable in a

3 collision to escape prosecution."

4 Again, we're inferring. We're reading between the

5 lines. What they're saying there is, they don't want to allow

6 a drunken driver who wrecks his car to then not be able to be

7 convicted because he wrecked his car.

8 MR. CARTER: And we agree.

9 THE COURT: And I think that's what it says. So I'm

10 going to leave the phrase that I have added in, and that is

11 that you've got to show that the intoxication is reasonably

12 contemporaneous with his disabling of the car, although the

13 fact that the car is there after being disabled does not make

14 it impossible for him to be convicted. So there's evidence

15 here from which it's very possible for this jury to conclude

16 that he was driving the car when it went off the road.

17 There's no evidence at all -- we don't know why the car was

18 disabled, although we know that it was; he was in it; and the

19 tow truck driver couldn't start it. That's all the evidence

20 shows.

21 MR. PROBERT: Could I say something?

22 THE COURT: Yes.

23 MR. PROBERT: Judge, in the hypothetical scenario

24 that the defendant in this situation goes away and drinks a

25 considerable amount of alcohol after he has wrecked the

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1 vehicle and comes back and is sitting in the driver's seat

2 with the keys, the vehicle is inoperable. If the vehicle had

3 been just flooded and was unable to be operated because he had

4 tried too hard and had flooded the engine so it wouldn't go,

5 when he came back, by that time, he was intoxicated. The

6 statute is designed to stop him from driving off in that

7 vehicle. The fact that the vehicle is inoperable does not

8 make him not liable.

9 THE COURT: Well, the problem I have with your

10 argument, Mr. Probert, is that if I have a derelict motor

11 vehicle sitting in a wrecking yard, hasn't been operated since

12 memory of man, and a drunk stumbles in and sits down in the

13 seat, under your argument, he would be in physical control of

14 a motor vehicle. I'm not willing to go that far.

15 MR. PROBERT: Well, I don't think you have to go that

16 far.

17 THE COURT: I think you have to show that the car is

18 disabled because of his agency. And it makes no sense unless

19 the intoxication is also contemporaneous with that behavior.

20 MR. PROBERT: Well, would Your Honor tell me whether

21 the person in the scenario that I have created is liable under

22 the DUI statute? He's sitting in the vehicle. He has the

23 keys. He's intoxicated.

24 THE COURT: No, I won't answer the question because

25 it's not the facts before us.

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1 Is there anything further that we need to discuss on

2 this instruction? Is there any argument or question about any

3 of the other instructions?

4 MR. CARTER: We haven't elected at this point whether

5 the defendant is going to testify. Want that to be optional.

6 I don't think I have a problem with anything else.

7 THE COURT: I've given the horizontal gaze nystagmus

8 instruction, which I think is approved by the supreme court.

9 Mr. Probert, any other questions?

10 MR. PROBERT: I did, Judge, in relation to the

11 instruction that we've been discussing.

12 THE COURT: I've ruled. I don't intend to take

13 further argument on it. Let's move on.

14 MR. PROBERT: Well, there seems to be some words left

15 out. I'm sorry to ask you about this. In the first sentence,

16 I think you've left out the words "while under the influence."

17 MR. CARTER: That's a super-hypertechnical reading of

18 it. To me, it's not a big deal. I think the essence of it is

19 clear.

20 THE COURT: You want to add the words "under the

21 influence" after the word "individual?"

22 MR. PROBERT: Of alcohol and/or drugs or of alcohol.

23 if you prefer.

24 THE COURT: You object to that, Mr. Carter?

25 MR. CARTER: No. That's fine.

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1 MR. PROBERT: I also had another point which I hadn't
2 been able to address at this point.
3 THE COURT: Let me finish this. Just a minute.
4 MR. PROBERT: Mr. Carter raised the question of City
5 of Richfield versus Walker, and he mentioned the factors that
6 are mentioned in that case as being relevant factors to the
7 discussion of whether or not somebody is in actual physical
8 control. In this instruction, it talks about three factors
9 which the jury may consider. There are other factors which
10 were specifically mentioned in Walker, such as how the vehicle
11 got to the spot where it was, which are not mentioned there.
12 This seems to me to be a rather vague statement of what the
13 jury is supposed to do with the information when it says it
14 may consider whether the defendant occupied the driver's
15 position. That just seems to me that it doesn't cover all the
16 conditions. It doesn't say whether or not any of these is
17 determinative or whether it is a fullness of the factors which
18 are relevant.
19 MR. CARTER: Walker just gave you a nine and didn't
20 say it was a full list anyway. You know, I wouldn't mind
21 seeing Walker in there. But I think the Court has ruled.
22 Let's move on.
23 THE COURT: Well, the problem we have is and what I'm
24 going to avoid doing is creating a checklist because the law
25 is clear that they're to consider the totality of the

1 circumstances. I didn't draft this language. This is the
2 model instruction that's been prepared and to be approved in
3 all courts in the state. The reason it's drafted somewhat
4 vague is because it's a totality-of-the-circumstances test.
5 They don't need to go through and check off each item.
6 But having said that, in the second paragraph after
7 where it says "you may consider," if I added the words "the
8 totality of the circumstances, including but not limited to,"
9 would that satisfy? Then you can argue whatever circumstances
10 you think there are in this case that justify the appropriate
11 conclusion.
12 MR. PROBERT: I would ask Your Honor to include the
13 words "how the vehicle got there."
14 MR. CARTER: That's very well addressed below, Judge.
15 THE COURT: I think it's addressed below.
16 Mr. Carter, anything further? You object to that
17 verbiage?
18 MR. CARTER: No.
19 THE COURT: Other objections?
20 MR. PROBERT: I have one other instruction that I ask
21 the Court to include which the Court has not included. The
22 State submits that there should be some instruction in the
23 instructions to the jury about the refusal to submit to a
24 test.
25 THE COURT: You get to mention it. Do you want me to

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1 emphasize it? I think you can argue it. Why do you need an
2 instruction?
3 MR. PROBERT: Well, I think that the jury may wonder
4 what the significance of that is and what they're able to do
5 with that information, that he refused the test.
6 THE COURT: Is there a legal significance?
7 MR. PROBERT: Well, I suppose the information has
8 already been before the jury.
9 THE COURT: It's a factual conclusion, and the
10 evidence has been presented to them. You can argue it. You
11 can have them infer whatever they think they should infer or
12 should appropriately infer. But I don't think it's a matter
13 of law that they must conclude "A" or "B" or that they must --
14 MR. PROBERT: It isn't. It just gives them the
15 option to make a decision about what weight they're going to
16 give to it.
17 THE COURT: I think it's a factual argument.
18 MR. PROBERT: I think it's a question of weight that
19 they should apply.
20 THE COURT: Then they give it what weight they feel
21 they want to give it. I don't think it requires a further
22 instruction.
23 MR. PROBERT: The other question I had was, I haven't
24 had time to check this out against the instructions that you
25 gave me because I didn't know there were familial witnesses

1 going to be called today. But I did want to include an
2 instruction in relation to bias.
3 MR. CARTER: I thought the Court addressed that.
4 THE COURT: I think that's in there.
5 MR. PROBERT: I couldn't recall if it was.
6 MR. CARTER: Page 20 of 25: You are the sole judges
7 of all questions of fact, weight, and any of the testimony you
8 may --
9 MR. PROBERT: That's fine.
10 THE COURT: That's there. That's in the stocks.
11 Anything else?
12 MR. PROBERT: No.
13 MR. CARTER: No.
14 THE COURT: Let's take about five. Gather
15 yourselves, and come back in. What we'll do is start with the
16 question from the juror, then allow each of you to follow up
17 on that with the officer. Then Mr. Carter can go ahead.
18 (Brief recess is taken.)
19 THE COURT: Officer, if I can have you come back up
20 and take the stand. Apparently we have some questions.
21 Counsel, come on up.
22 (Bench conference is held.)
23 THE COURT: Officer, three questions. I'll give you
24 all three, allow you to respond and then allow the attorneys
25 to follow up if they want.

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