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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19376
GARY T. COLES,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

- - - - - - - - - - -

APPEAL FROM A CONVICTION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL, IN VIOLATION OF UTAH CODE ANN. § 41-6-44 (1981), IN THE SECOND CIRCUIT COURT IN AND FOR RICH COUNTY, STATE OF UTAH, THE HONORABLE TED S. PERRY, JUDGE, PRESIDING; AFFIRMED ON APPEAL BY THE FIRST JUDICIAL DISTRICT COURT IN AND FOR RICH COUNTY, STATE OF UTAH.

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FILED

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Gary T. Coles, appeals his conviction for Driving Under the Influence of Alcohol, in violation of Utah Code Ann. § 41-6-44 (1981).

DISPOSITION IN THE LOWER COURT

Appellant was tried in absentia in a non-jury trial on August 24, 1982 in the Second Circuit Court in and for Rich County, State of Utah, and was found guilty of Driving Under the Influence of Alcohol by the Honorable Ted S. Perry. Appellant was sentenced on September 28, 1982 to serve 60 days in the Rich County Jail and was fined $299. On appeal to the First Judicial District Court in and for Rich County, State of Utah, the conviction was affirmed.

[illegible]

[illegible]

STATEMENT OF THE FACTS

On the morning of July [illegible], [illegible], Trooper [illegible] Slamavskie stopped appellant's car [illegible] speeding on State Road 1 in Rich County (TT. 4-[illegible]). Appellant pulled his car off the side of the road, [illegible] his automobile, and walked around the back [illegible] as Slamavskie pulled up behind him. Slamavskie [illegible] over the PA system to get back in his vehicle. Appellant responded, waved his arms over his head, then started walking back toward his car, as instructed, only to turn around, and start walking back towards Slamavskie. Trooper Slamavskie recalled at trial that he had to [illegible] the time that appellant must have been intoxicated (TT. [illegible]).

Slamavskie approached appellant and immediately noticed that appellant's eyes were "bloodshot and glassy". He also noticed the smell of alcohol on appellant's breath. At Officer Slamavskie's request, appellant performed three field sobriety tests. When appellant stood with feet together, hands at his side, eyes closed, and [illegible]

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1 "TT." refers to the trial transcript. "AT." refers to the arraignment transcript. "ST." refers to the sentencing transcript.

[illegible] attempted to walk [illegible], "the [illegible] was [illegible]," and "he was very [illegible]. [illegible] finally, appellant was [illegible] [illegible] with [illegible] either hand (TT. [illegible]).

Officer Slagavskie arrested appellant and read [illegible] rights (TT. 10). Appellant stated that he [illegible] his rights and agreed to answer [illegible] (TT. [illegible]). Appellant acknowledged that he had been [illegible]. Appellant also admitted that he had been drinking [illegible] and further stated that his friends mixed the [illegible] "pretty strong" (TT. 14-15).

Appellant agreed to submit to a breathalyzer test [illegible]. Officer Slagavskie, who is a certified breathalyzer [illegible], administered the test, following the breathalyzer [illegible] checklist (TT. 10-13). The test revealed that [illegible] had a blood alcohol level of .13 (ST. 6; R. 30). [illegible] breathalyzer device used had been checked by Officer [illegible] Peterson of the Utah Highway Patrol prior to this test [illegible], 1982 and subsequent to this test on July 5, 1982. [illegible] occasions it was determined that the machine was in [illegible] working condition (TT. 17).

Appellant's arraignment hearing, which had been [illegible] to permit appellant to retain counsel, was held on [illegible], 1982 in the Circuit Court of Rich County, State of [illegible], and appellant was charged with Driving Under the

Influence of Alcohol (AT. 2). Appellant plead "Not Guilty" and told the court he had retained Ronald Yengich as counsel. The court informed appellant that trial would be held the morning of August 24, 1982 and instructed appellant to so notify his attorney (AT. 2).

Appellant notified his attorney, who then filed a notice of appearance of counsel and a demand for jury trial (ST. 3-5; R. 6-7). Appellant's counsel assumed that the trial would then be removed from a bench calander and placed on a jury trial calander, changing the trial date. However, no such change was made, and consequently neither appellant nor his counsel appeared at the August 24, 1982 trial (TT. 3).

Because appellant had not given any reason for his non-appearance, the court, in accordance with Utah Code Ann., § 77-35-17(a)(2) (1982), discharged the jury and tried appellant in absentia (TT. 3). The court found appellant guilty of Driving Under the Influence of Alcohol and issued a bench warrant (TT. 19).

Appellant was notified by a letter dated August 24, 1982 that he had been tried in absentia and found guilty (ST. 3; R. 11). On August 27, 1982 appellant filed a Motion to Set Aside Judgment and Recall Bench Warrant, arguing that counsel, after filing an Appearance of Counsel and Jury Demand, had not been informed by the court that the jury trial had been scheduled for August 24, 1982 (R. 12). The court denied the motion, ruling that appellant at the July 27, 1982 arraignment

appellant had received personal notice of the date and time set for trial and been advised that he should inform his counsel of that date (R. 13).

Appellant appeared with counsel John O'Connell, law partner of appellant's counsel Ronald Yengich, at the September 28, 1982 sentencing hearing and renewed his motion to set aside the judgment (ST. 2-4). O'Connell admitted that appellant had told Yengich of the August 24, 1982 trial date, but said that Yengich had advised appellant that a new date would be set because a Jury Demand had been filed (ST. 5). O'Connell argued that appellant should not be deprived of his right to defend himself merely because of counsel's mistakes and that a new trial should be ordered. The court again denied the motion, ruling that even if appellant's absence was justified, appellant still had not discharged his burden of establishing that he would present a substantial defense (ST. 6-7). The court then sentenced appellant to serve 60 days in the Rich County Jail and pay a fine of $299 (ST. 8).

On appeal, the First District Court of Rich County affirmed the trial court (R. 53-54). The District Court held that appellant's motion to set aside the judgment for failure to receive notice of the trial was properly denied inasmuch as the record established that appellant and counsel in fact did have notice of trial. The District Court further ruled that the other issues raised by appellant, the right of a defendant to be present and represented by counsel at trial, were

"without merit" because they were raised for the first time on appeal. In any event, the District Court stated, appellant had every opportunity to be present and be represented by counsel (R. 53-54).

ARUGMENT

POINT I

THE TRIAL COURT PROPERLY TRIED APPELLANT IN HIS ABSENCE SINCE HE WAS VOLUNTARILY ABSENT AFTER HAVING RECEIVED NOTICE OF THE TIME FOR TRIAL.

Appellant in his brief contends that the trial court committed error by trying him in his absence. While, as appellant notes, a defendant does have an affirmative right "to appear and defend in person and by counsel," Utah Code Ann. § 77-35-17(a) (1982), that right is not absolute. State v. Glenny, Utah, 656 P.2d 990 (1982); State v. Myers, 29 Utah 2d 254, 508 P.2d 41 (1973). Utah Code Ann. § 77-35-17(a)(2) provides:

> In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present.[2]

(Emphasis added).

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[2] Subsections (1) and (3) of Utah Code Ann. § 77-35-17 describe other exceptions not pertinent to the case at bar.

Appellant was charged with Driving Under the Influence of Alcohol, a class B misdemeanor (R. 2). This offense is not punishable by death. Utah Code Ann. § 41-6-44(d). Thus, if appellant had received notice of the time set for trial and had voluntarily absented himself from trial, then it was proper for the trial court to proceed with the trial in appellant's absence in accordance with Utah Code Ann. § 77-35-17(a)(2).

Appellant in his brief even admits that he had been notified as to the time for trial (Appellant's brief p.5). However, appellant contends that he should have been notified a second time by service on his retained counsel as to a new trial date. This contention is based on two assumptions: first, that the trial date would be rescheduled merely by appellant's filing of a Jury Demand; and second, that the trial court was required to serve written notice of the expected new trial date on appellant's counsel in accordance with Utah Code Ann. § 77-35-3 (1982).

Neither assumption has merit. The trial court in no wise indicated to appellant or appellant's counsel that the filing of a Jury Demand would result in the rescheduling of the trial, nor is this result required by statute. Appellant's argument that such is the practice in other districts (ST. 3, 5) does not excuse appellant's absence from trial. In the absence of notice to the contrary, appellant would have assumed that the trial would proceed on the date

originally scheduled.

Section 77-35-1 1990 provides that [illegible] written notice is required to be served on a party [illegible] by an attorney, such service shall be made [illegible] This requirement, however, is inapplicable to the present [illegible] since Section 77-35-17 a 1 does not require written notice to be served on the defendant; it merely states that [illegible] for the trial to proceed in the defendant's absence, the defendant must have been notified of the time set for trial. Appellant admits to having been so notified Appellant's Br. p.5 . Therefore, the notice requirement of section 77-35-17 a 1 was satisfied.

Appellant next contends that he was absent from trial involuntarily. Courts generally have ruled that a defendant's absence was involuntary only in cases where the defendant was in custody, Bustamante v. Eyman, 456 F.2d 1 9th Cir. 1971 , cert. St. Louis v. Walker, 711 S.W.2d 471 Ct. App. 1986 , unaware of the trial date, Butcher v. Commonwealth, 276 S.W.2d 447 Ky. 1955 , or otherwise prevented from being present at trial. In the case at [illegible] appellant was not prevented from being present at the trial and he has offered no evidence to demonstrate that his absence was other than voluntary. State v. Gleason, supra, 844 P.2d 991.

Appellant attempts to construe [illegible] in State v. Myers, supra, to mean that a defendant's [illegible]

from trial is voluntary only if done in an attempt to gain an advantage. Although the rule espoused in Myers, permitting a waiver of the right to be present at trial by a defendant's voluntary absence, is designed to prevent the manipulation of courts by a cunning defendant, the opinion in Myers cannot be fairly read to require a finding that the defendant's absence was mischievously motivated before it can be determined that such absence was voluntary. Significantly, this Court in State v. Clenny, supra, recently ruled that the defendant's absence was voluntary even though "no evidence suggests that defendant's absence was used as a means of obtaining a favorable advantage for either side." Id. at 992.

Appellant in his brief also claims that his absence was not voluntary because he was simply following the advice of counsel. Appellant does not claim that counsel prevented his appearance or otherwise coerced him. Counsel merely told appellant incorrectly that the trial date would be changed. Appellant voluntarily acted on that information. In any event, appellant's acting on counsel's advice should be deemed voluntary. An entry of a plea of guilty on the advice of counsel is presumed voluntary and intelligent. Guglielmetti v. Turner, 27 Utah 2d 341, 496 P.2d 261 (1972); State v. Mills, Utah, 641 P.2d 119 (1982); Moxley v. Morris, Utah, 655 P.2d 640 (1982). By analogy, therefore, the absence of a defendant who has relied on counsel's statements should also be presumed voluntary.

Finally, appellant was not prejudiced by being tried in absentia because the evidence of his guilt was overwhelming: Patrolman Slagavskie testified that he observed appellant driving his vehicle at an excessive speed (TT. 4-5); appellant admitted driving the vehicle (TT. 14-15); appellant failed three field sobriety tests (TT. 7-9); appellant had a blood alcohol level of .13 (ST. 6; R. 30); and appellant admitted that he had been out drinking with friends and that they mixed the drinks "pretty stong" (TT. 14-15). Because of the strength of the state's case, there is no sufficient likelihood that the result would have been different had appellant been present at trial. Therefore, the conviction should not be disturbed. State v. Eaton, Utah, 569 P.2d 1113, 1116 (1977); Harrington v. California, 395 U.S. 250, 254 (1969).

POINT II

APPELLANT WAS NOT DENIED THE RIGHT TO COUNSEL.

A. APPELLANT CANNOT RAISE THIS ISSUE FOR THE FIRST TIME ON APPEAL.

It is well settled in Utah that a party cannot raise an issue for the first time on appeal absent exceptional circumstances. Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 7[illegible] (1971); State v. Steggell, Utah, 660 P.2d 252 (1983).

At the sentencing hearing appellant complained [illegible] that the trial court erred in proceeding in absentia because

counsel had not been served with notice (ST. 2-7). Appellant claimed he had been denied the right to counsel for the first time on appeal to the First District Court of Rich County, which ruled that the denial of the right to counsel issue was "without merit" because it had not been raised at trial (R. 53-54).

Because appellant has advanced no exceptional circumstances warranting an exception to this rule, appellant should not be allowed to raise this issue on appeal.

B. APPELLANT'S TRIAL IN ABSENTIA RESULTING FROM THE VOLUNTARY ABSENCE OF APPELLANT AND HIS COUNSEL WAS NOT A DENIAL OF APPELLANT'S RIGHT TO COUNSEL.

Assuming arguendo that this issue is properly before the Court, appellant was not denied the right to counsel when the trial was held in his absence.

Appellant's July 13, 1982 arraignment hearing had been continued so that appellant could retain counsel (AT. 2). Appellant informed the trial court at his arraingment that he had retained Mr. Ronald Yengich as counsel (AT. 2). Mr. Yengich subsequently filed an Appearance of Counsel (R. 6).

Although appellant claims that he failed to appear at trial in reliance on counsel's mistaken assumption that the trial time would be changed, appellant does not contend that counsel was ineffective, and, in fact, appellant cannot so claim because he continues to employ the same counsel.

Appellant had every opportunity to be present and be represented by counsel at trial. Significantly, appellant cites no cases supporting the proposition that a defendant may be denied the right to counsel by the voluntary absence of the defendant and his counsel. On the other hand, this Court in other cases involving a defendant's voluntary absence from trial has held that " a defendant cannot by his voluntary act invalidate the proceedings." State v. Aikers, 87 Utah 507, 51 P.2d 1052 (1935); State v. Ross, Utah, 655 P.2d 641 (1982).

Therefore, appellant was not denied his right to counsel, and the judgment appealed from should be affirmed.

CONCLUSION

The trial court properly proceeded with the trial *in absentia* because appellant had received notice of the time set for trial and was voluntarily absent.

Appellant cannot raise the issue of denial of right to counsel for the first time on appeal. In any event, appellant retained counsel and had every opportunity to be represented by him at trial.

Therefore, the judgment below should be affirmed.

RESPECTFULLY submitted this 22 day of November, 1983.

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Attorney General

J. STEPHEN MIKITA
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief of Respondent, postage prepaid, to Ronald J. Yengich, Attorney for Appellant, 44 Exchange Place, Salt Lake City, Utah 84111, this 22nd day of November, 1983.

Kathleen Bellersbergen