1964

State of Utah v. James Edward Bryan : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent;

— vs —

JAMES EDWARD BRYAN,
Defendant-Appellant.

Case No. 10065

BRIEF OF RESPONDENT

Appeal from Conviction of Automobile Homicide
in the District Court of Salt Lake County,
Hon. Ray Van Cott, Jr., Judge

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IN THE SUPREME COURT
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STATE OF UTAH,
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— vs —

JAMES EDWARD BRYAN,
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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

The appellant, James Edward Bryan, has appealed from his conviction of the crime of automobile homicide in violation of Section 76–30–7.4, Utah Code Annotated 1953, after jury trial in the Third Judicial District, Salt Lake County.

DISPOSITION IN LOWER COURT

By information filed by the District Attorney, Third Judicial District, the appellant was charged with crime of automobile homicide. Trial was had upon the charges on September 16–18, 1963, upon a jury trial with the Honorable Ray Van Cott, Judge, presiding. The jury returned a verdict of guilty of the crime as charged and notice of appeal was filed on the 14th day of November, 1963.

RELIEF SOUGHT ON APPEAL

Respondent, State of Utah, submits that the appellant's conviction should be affirmed by this court.

STATEMENT OF FACTS

The appellant submits the following statement of facts as being those relevant and material to the only issue raised on appeal.

On June 1, 1963, the appellant, operating a 1960 red Chevrolet automobile, drove the vehicle into the rear of a flatbed truck at 3965 South State Street in Salt Lake County at approximately 11:05 p.m. The appellant was the driver of the vehicle and his wife and two other persons were passengers in the vehicle (R. 57, 58). The appellant's wife and the two passengers died as a result of the collision. The appellant was charged with having killed Charles William Studham (R. 1), a passenger in the vehicle.

Deputy Sheriff Pete Kutulas arrived at the accident scene about 11:06 p.m. (R. 57). The appellant was sitting outside his car on the curb (R. 58). The officer examined the passengers and indicated that the female passenger in the front seat appeared to be dead (R. 58). The impact of the collision of the appellant's car with the flatbed truck caused the latter vehicle to strike a third car owned by a Mr. Bermer (R. 59). There were no injuries to persons in the Bermer vehicle. Officer Kutulas found a whiskey bottle in the appellant's vehicle and arranged to have the appellant taken to the hospital (R. 72). Officer Gary Steinfeldt, also a deputy sheriff, arrived at the scene of the accident at approximately the same time as Officer Kutulas. He observed the appellant sitting on the curb with his head in a handkerchief (R. 212). At one point the appellant attempted to stand, and fell down again. Officer Steinfeldt

asked the appellant if he were injured, and the appellant replied that he was drunk (R. 213). Officer Steinfeldt indicated there was a strong odor of alcohol on the appellant's breath (R. 234). Officer Kutulas, who saw the appellant at the Salt Lake County Hospital, also detected a heavy odor of alcohol and was of the opinion that he was drunk (R. 72, 74).

While the appellant was at the Salt Lake County Hospital, Officer Steinfeldt advised the appellant that he was under arrest and said that he would like to take one of three tests to determine the appellant's intoxication, and recommended a blood test (R. 217). Officer Steinfeldt testified (R. 216):

> "In further talking to the defendant I believe I asked him if he had been drinking. To this question I received an affirmative answer. Oh yes, I think I also told him that in circumstances such as this that we usually ask for a person that had been driving a car and had been drinking to submit to one of three tests for the purpose of finding out if he was driving the vehicle under the influence of alcohol; that one of those three tests could determine if he was over the specific amount of .150. I think I also asked him if he understood the process that I was explaining to him. He said — yes, that he did understand what I was talking to him about. I told him that I was placing him under arrest, that he had the choice of a blood analysis, a urine analysis, or a breathilyzer test, and that I would like to suggest the blood analysis because we were at the hospital. This is where we obtain this and it would be most expedient to have it. I asked him if he would take one of those — specifically, the one that I had suggested. He said he would."

Thereafter, Officer Steinfeldt had a nurse or social worker come over and verify the appellant's willingness to submit to a blood test. He testified (R. 218):

> "I took the vial back and stood by the defendant and called either one of the nurses' aides or social workers. Now I do not know which the terminology of the woman down there is. She is an assistant down there.
>
> * * *

"I asked her to come over with the paper and to witness the asking of the defendant if he would submit to a blood test. She came over. I asked the defendant if he would submit to a blood test, that I wished to draw a sample from him, or have a sample from him and he said, 'Yes.' The witness signed the paper, I also signed the paper. There is a special form down there that they have."

At the time Officer Steinfeldt had the appellant submit to a blood test, he did not know that the passengers of the appellant's vehicle were dead (R. 238). It was Officer Steinfeldt's opinion when he saw the appellant at the accident scene and at the hospital that the appellant was drunk (R. 239, 247). On cross examination, Officer Steinfeldt indicated that he thoroughly advised the appellant of the nature of the request for a blood test and the consequences of his refusal to take such a test (R. 249). He further adhered to his position that the nurse or assistant had also obtained a consent from the appellant (R. 252).

Officer Donald R. Fox testified that while at the hospital, the attending physician asked the appellant if he would submit to a blood test. He testified (R. 273):

"The Doctor asked Mr. Bryan if he would submit to the blood alcohol test and Mr. Bryan said, 'Yes.' "

The testimony of Dr. Richard S. Joseph was read into evidence as it was received at the time of the preliminary hearing (R. 271). Dr. Joseph testified that when he examined the appellant, he was alert and showed no signs of any "neurological disorder" and that he withdrew blood from the appellant for the purposes of a blood alcohol test. This apparently occurred after Officer Steinfeldt had obtained the appellant's consent. According to the Doctor, the appellant did not object (R. 285) although his compliance was reluctant (R. 295).

A chemist from the office of the State Chemist testified that the appellant's blood alcohol level was .247 per cent.

Under the provisions of 41–6–44, a blood alcohol level of .150 results in a presumption of intoxication. The trial court allowed the evidence of the blood alcohol test to be received against the appellant.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR IN ALLOWING THE EVIDENCE RELATING TO THE APPELLANT'S BLOOD ALCOHOL TEST TO BE RECEIVED IN EVIDENCE BECAUSE IT WAS NOT SECURED AS A RESULT OF ANY ILLEGAL SEARCH AND SEIZURE SINCE:

A. THE TEST WAS CONSENTED TO AS A MATTER OF LAW.

B. THE TEST WAS CONSENTED TO AS A MATTER OF FACT.

C. THE TEST WAS PROPERLY TAKEN INCIDENT TO A VALID ARREST BECAUSE THE ARREST OF THE ACCUSED WAS MADE UNDER CIRCUMSTANCES (1) CONSTITUTIONALLY PERMISSIBLE, (2) STATUTORILY PERMISSIBLE.

D. THE SEARCH WAS PERMISSIBLE BECAUSE OF THE NATURE OF THE CIRCUMSTANCES INVOLVED IN THE INSTANT CASE AND HAVING BEEN MADE UPON REASONABLE GROUNDS TO BELIEVE A CRIME HAD BEEN COMMITTED.

A. THE TEST WAS CONSENTED TO AS A MATTER OF LAW.

The appellant in this case has argued that the blood test performed by law enforcement officials and members of the State Chemist's Office should not have been admitted in evidence because the blood, upon which the test was based, was extracted from the appellant in violation of his constitutional rights under the Fourteenth Amendment to the Federal Constitution, prohibiting unlawful searches and seizures. It is submitted that there is no merit to the ap-

pellant's position in that he consented as a matter of law to having been given a blood test. 41–6–44.10, Utah Code Annotated 1953, provides:

> "(a) *Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath, blood or urine for the purpose of determining the alcoholic content of his blood,* provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition and in accordance with the rules and regulations established by the department."

In the instant case, the evidence disclosed the appellant to have been operating his motor vehicle on the highways of the State of Utah. The police officer, under whose direction the blood test was administered, had reasonable grounds upon which to believe that the appellant had been operating his vehicle while in an intoxicated condition. The obvious reasonable grounds are the accident, appellant's statement that he was drunk, the odor of his breath, the slurry speech, and other factors indicative of intoxication. The United States Supreme Court, in *Zap v. The United States,* 328 U.S. 624 (1946), upheld the inspection of an individual's books where there had been a contract between the individual and the United States under a cost-plus-fixed-fee contract and where both the statute and the contract provided for the inspection. In numerous other instances the concept of an automatic waiver, pursuant to statute has been recognized. In Varon, *Searches, Seizures and Immunities,* Vol. 1 (1961), page 228, it is stated:

> "It becomes evident that an automatic waiver of this privilege is either made in advance by the individual in exchange for a license to do business, by way of contractual agreement, or by operation of law in types of businesses that are coupled with a public interest."

In that work, the concept of automatic statutory waiver is discussed and it is recognized as a valid basis upon which to predicate a search.

In *Breithaupt v. Abram,* 352 U.S. 432 (1957), the United States Supreme Court was concerned with whether or not the extraction of blood from an unconscious motorist violated the due process clause of the Federal Constitution. It held that it did not. Although the court was not concerned with search and seizure as the exclusionary rule, *Mapp v. Ohio,* 367 U.S. 643 (1961), had not as yet been announced; however, the court noted in Footnote 2, at page 451, of the opinion:

> "It might be a fair assumption that a driver on the highways, in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony. In fact, the State of Kansas has by statute declared that any person who operates a motor vehicle on the public highways of that State shall be deemed to have given his consent to submit to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood. If, after arrest for operation of a motor vehicle while under the influence of intoxicating liquor, the arresting officer has reasonable grounds for the arrest, and the driver refuses to submit to the test, the arresting officer must report this fact to the proper official who shall suspend the operator's permit. Kan Gen Stat, 1949 (Supp 1955), § 8–1001 through § 8–1007."

In the instant case, the police officer taking the test complied with the requirements of the statute and with the decisions of this court in *Ringwood v. The State,* 8 U.2d 287, 333 P.2d 943 (1959) and *Bean v. The State,* 12 U.2d 76, 362 P.2d 750 (1961).[1]

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[1] It is the position of the State that the statutory consent is to having any one of the tests in the statute given and that the failure to offer a particular test does not vitiate the statutory consent nor prohibit the use of the evidence thereby obtained but that the failure to offer the three tests would prohibit the revocation of a driver's license.

Goff, *Constitutionality of Compulsory Chemical Tests to Determine Intoxication,* 49 Journal of Criminal Law, Criminology and Police Science (1958), early discussed the problems attendant to applying consent statutes. The author of that article notes, at page 65, with reference to implied consent statutes:

> "* * * Indications are, however, that the courts will favor it and, by so doing, will strengthen the statutes which prohibit driving while under the influence of alcohol."

Additionally, almost all states which have considered the propriety of consent statutes similar to 41–6–44.10, U.C.A. 1953, have upheld their constitutionality as against challenges that the statute violated federal constitutional rights. 88 A.L.R.2d 1064, 1068.

The concept of consent by statute, pursuant to the grant of a privilege, is in no way contrary to constitutional principles. *Manchester Press Club v. State Liquor Commission,* 89 N.H. 442, 200 A. 407 (1938). As was noted in the *Breithaupt* case, supra, the substantial interest of a state in protecting the health, safety and welfare of its citizens on its highways justifies such reasonable conditions on the privilege of driving. Reasonable conditions on privileges have been recognized in many instances and it has been held reasonable as a condition precedent to entering upon a military installation that the individual consent to the search of his person or motor vehicle. Judge Advocate General Activities 1952/3135, 2 Dig. Ops., Search and S., § 11.5; J.A.G.A. 1953/1738, 3 Dig. Ops., Search and S., § 11.1; J.A.G.A. 1952/4398, 2 Dig. Ops., Mil. Pers., § 20.1; J.A.G.A. 1952/8326, 3 Dig. Ops., Posts, § 23.1.

Consequently, it is submitted that the plain language of 41–6–44.10, U.C.A. 1953, operated as a consent as a matter

of law to the extraction of the appellant's blood for the purposes of a blood alcohol test.[2]

B. THE TEST WAS CONSENTED TO AS A MATTER OF FACT.

It is submitted that the appellant consented to the blood test as a matter of actual fact. It is well settled that an accused can consent to a search of his person. *The Federal Law on Search and Seizure,* F.B.I., 1962, p. 70; *Johnson v. Zerbst,* 304 U.S. 458 (1938). The appellant in the instant case was thoroughly advised by the arresting sheriff of his rights under the law. Although he was placed under arrest by the officer, in accordance with the statutory mandate of 41–6–44.10, he was not being subjected to any pressure of any kind and was being given medical treatment by attending physicians. The officer requested the appellant's consent and the appellant freely gave it. Thereafter, to insure that consent was properly obtained, the officer asked a nurse's aide or attendant to verify the fact that the appellant had consented to the blood test. The nurse asked the appellant if he did in fact consent and received a positive reply. Finally, prior to the time the doctor made the extraction, he again asked the appellant if he consented to the blood test. The doctor testified that although the appellant was reluctant, he made no protest and his reluctance was only a matter of his attitude towards the test and was not in any way based upon a vocal protest or a belligerent attitude of any kind. The doctor further indicated that the appellant was in full possession of his faculties at the time the extraction was made.

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[2] In Opinion 62–058, the Attorney General ruled that 41–6–44.10 operated as an implied consent statute, allowing a blood test to be taken on an unconscious individual where the officer has reasonable cause to believe the individual has been operating a motor vehicle under the influence of alcohol.

The mere fact that an accused is under arrest at the time he consents to a search of his person or property does not prima facie make the search non-consentual. *People v. Rodriguez,* 168 Cal. App. 2d 452, 336 P.2d 266 (1959); *People v. Faulkner,* 166 Cal. App. 2d 446, 333 P.2d 251 (1958); *State v. Hoffman,* 392 P.2d 237 (Wash. 1964). The question of whether or not a particular person consents or does not consent to a search is a question of fact. *State v. Hoffman,* supra; *People v. Torres,* 158 Cal. App. 2d 213, 322 P.2d 300 (1958); *People v. Gorg,* 45 Cal. 2d 776, 291 P.2d 469 (1955). Certainly, the facts in this instance would support a determination that the search was consentual. The appellant was a mature individual, not being subjected to any brutality, trickery or fraud, who was in full possession of his faculties. In Davis, *Federal Searches and Seizures,* p. 173 (1964), it is stated:

> "If officers clearly explain an individual's constitutional rights, there is little doubt that the waiver is made intelligently."

In *State v. Plas,* 391 P.2d 867 (Nev. 1964), the Nevada Supreme Court noted:

> "Whether in a particular case an apparent consent to a search without a warrant was voluntarily given is a question of fact. So far as appears from the record the respondent, without any force or coercion on the part of the officer who was questioning him, freely consented to the search of his automobile which disclosed the evidence he since has claimed was illegally obtained. In fact respondent admits that no actual threat was made to induce the consent. Under the facts of this case, a holding that as a matter of law respondent's consent was given because of an unlawful assertion of authority by the officer would be unjustified. People v. Burke, 47 Cal. 2d 45, 301 P.2d 241.
>
> "Although searches and seizures made without a proper warrant are often to be regarded as unreasonable and in violation of the federal constitution, the obtaining of the warrant may be waived by the individual; he may give his consent in the search and seizure. Such waiver and consent, freely and intelligently given, converts a search and seizure which otherwise would be

> unlawful into a lawful search and seizure. United States v. Mitchell, 322 U.S. 65, 64 S.Ct. 896, 88 L.Ed. 1140; Brainard v. United States, 95 U.S.App.D.C. 121, 220 F.2d 384; Judd v. United States, 89 U.S.App.D.C. 64, 190 F.2d 649. The mere fact that the consent was given while respondent was in the custody of a police officer does not render the consent involuntary. United States v. Mitchell, supra."

This court recognized as much in *State v. Louden*, 15 U.2d 64, 387 P.2d 240 (1963). In *State v. Tigue,* 95 Ariz. 45, 386 P.2d 402 (1963), the Arizona Supreme Court upheld a search where police officers stopped the appellant's car, noted that his eyes appeared watery and bloodshot, and that the driver of the vehicle smelled of alcohol. The officers searched the accused and recovered evidence leading to the accused's conviction. The Arizona Supreme Court noted, at page 404:

> "The constitutional protection against unreasonable search may be waived by unequivocal words or conduct expressing consent. People v. Sullivan, 214 A.C.A. 432, 29 Cal.Rptr. 515. Competent evidence in this case indicates that defendant Schipper invited a search. The officer who made the search testified:
>
> > " 'I talked with him for awhile. We just visited and then I asked him if he had anything on him that he shouldn't have, and he told me *no, he didn't — go ahead — and held his arms up.* And at that time I searched him and found the monies.' (Emphasis supplied.)"

See also *State v. Marshall,* 380 P.2d 799 (Ore. 1963). In that case the Oregon Supreme Court noted that proof of waiver of constitutional protection from unreasonable search and seizure need not be proved beyond a reasonable doubt but need only be shown by clear and convincing evidence.

The evidence in the instant case, when viewed in light of all the circumstances, including the accused's age, the admonition of the officer and the inquiry of the nurse and

doctor, support a conclusion that the consent to the blood test was given as a matter of fact.

C. THE TEST WAS PROPERLY TAKEN INCIDENT TO A VALID ARREST BECAUSE THE ARREST OF THE ACCUSED WAS MADE UNDER CIRCUMSTANCES (1) CONSTITUTIONALLY PERMISSIBLE, (2) STATUTORILY PERMISSIBLE.

(1) It is well settled that a search may be made incident to a valid arrest. *United States v. Rabinowitz,* 339 U.S. 56 (1950); *United States v. Harris,* 331 U.S. 145 (1947); *Ker v. California,* 374 U.S. 23 (1963); *State v. Dodge,* 12 Utah 2d 293, 365 P.2d 798 (1961). The appellant contends that the blood test taken in the instant case was improperly admitted because the officer arrested the accused for a misdemeanor, to wit: driving while intoxicated, when such a misdemeanor was not committed in the presence of the arresting officer. 77–13–2, U.C.A. 1953, requires that before an officer can arrest for a misdemeanor, the offense must be committed or attempted in the presence of the officer. *Oleson v. Pincock,* 68 Utah 507, 251 Pac. 23 (1926). However, the Court is concerned in this case not with the validity of an arrest for false arrest purposes, but with validity of an arrest for purposes of allowing evidence to be received against the accused without violating constitutional rights. The true question is whether or not an arrest made on the basis of reasonable and probable cause to believe a crime has been committed is constitutionally proper in a misdemeanor case so that evidence so obtained may be received. What standard is constitutionally applicable? In Leagre, *The Fourth Amendment and The Law of Arrest,* 54 Journal of Criminal Law, Criminology and Police Science 393, 406 (1963) it is stated:

"Thus is is clear from both the search and arrest cases that the Fourth Amendment applies the standard of probable cause to determine the validity of an arrest made without a warrant . . ."

See also Davis, *Federal Searches and Seizures,* Chapter 7 (1964).

In *Carroll v. United States,* 267 U.S. 132 (1925) the Supreme Court allowed a search made on probable cause where the individual was engaged in the commission of a misdemeanor, thus recognizing that police officers are held to no higher standard of constitutional requirement in a misdemeanor case than in a felony case. In Leagre, *supra,* 54 Journal of Criminal Law, Criminology and Police Science 393, 405 (1963) notes:

"It would seem to follow a fortiori that the right to arrest without warrant for lesser offences than felonies and breaches of the peace is constitutionally permissible."

See also Foote, *Safeguards in the Law of Arrest,* 52 NW, U.L. Rev. 16, 17–18 (1957).

Consequently, an arrest based on probable cause, although contrary to State law, would be constitutionally unobjectionable and the evidence obtained from such an arrest would be admissible. *United States v. Snyder,* 278 Fed. 650 (1922); *Davis v. United States,* 328 U.S. 582 (1946). If the arrest is constitutionally proper, the evidence obtained by search incident to such arrest is admissible. *State v. Dodge,* supra. Is the fact that a state statute may require a more severe standard for a legal arrest a basis for excluding evidence where the arrest was constitutionally sound? It is submitted not, unless the state as a matter of its own judicial policy chooses to apply an exclusionary rule under such circumstances. Utah does not apply such a rule. Although recognizing itself bound to follow the exclusionary rule by virtue of *Mapp v. Ohio,* supra, this

court recognized in *State v. Louden,* supra, that prior Utah cases had not adopted the exclusionary rule where state policy was involved. *State v. Aime,* 62 Utah 476, 220 Pac. 704 (1923); *State v. Fair,* 10 Utah 2d 365, 353 P.2d 615 (1960). Therefore, the evidence in the instant case was admissible since it was constitutionally obtained and Utah does not as a matter of state policy apply the exclusionary rule where federal constitutional issues are not involved.[3]

(2) It is submitted that the arrest in the instant case can be sustained, and thereby the search incident thereto, on the basis that the arrest was proper under statutes of this state. In the instant case at the time the officers arrived upon the scene, the accused was obviously intoxicated. As he started to walk, he fell down and he told the officer that he was drunk. Officer Pete Kutulas, one of the investigating officers, indicated that the accused was committing the offense of public intoxication (R. 80). It is immaterial that the arrest for the offense which was committed in the officer's presence, to wit, public intoxication, was delayed until the accused was taken to the hospital. *Dailey v. United States,* 261 F.2d 870 (5th Cir. 1958), cert. den. 359 U.S. 969; *Carlo v. United States,* 286 F.2d 841 (2nd Cir. 1961), cert. den. 336 U.S. 944; Davis, *Federal Searches and Seizures,* (1964) § 3.231. Therefore, the officers, at the time they first observed the accused, observed him committing an offense in their presence. 32–7–13, Utah Code Annotated 1953, makes it a misdemeanor for a person to "be in an intoxicated condition in a public place." The appellant was in an intoxicated condition, sitting on the curbing in the vicinity of 39th South and State Streets in Salt Lake County. Officer Steinfeldt testified that he arrested the

[3] Assuming for arguments sake that the evidence is not otherwise admissible vis a vis consent, or incident to a lawful arrest under State law, etc.

accused in the hospital for the offense of driving while intoxicated. The fact that the officer arrests an individual for one offense does not necessarily vitiate the arrest if he otherwise had sufficient grounds to arrest for another offense. Thus, in *State v. Tigue,* 95 Ariz. 45, 386 P.2d 402 (1963), the Arizona court stated:

> "* * * Nevertheless, the test regarding the legality of a search and seizure is whether it was 'reasonable' under the circumstances, and the courts have held that circumstances beyond the fact that there was an arrest might justify a search and seizure which otherwise would be unreasonable."

Implicit, therefore, in the Arizona court's opinion, is the concept that all the facts available to the officers must be looked at to determine whether their conduct was reasonable. The fact that the officers mislabeled the particular offense for which the arrest was made is immaterial.

Secondly, it is submitted that in the case of driving in an intoxicated condition, the police officers may arrest, even though the offense is not committed in their presence and is a mere misdemeanor, if they have reasonable grounds to believe the person has in fact been driving in an intoxicated condition. 41–6–44.10, Utah Code Annotated 1953, provides that a blood alcohol test may be taken if the police officer has reasonable grounds to "believe such person has been driving in an intoxicated condition." The statute further provides that if the individual is placed under arrest and has been requested to submit to "any one of the above" tests and refuses, it shall not be given. The statute seems to contemplate that at the time the officer requests the accused to submit to a blood test, the accused will be under arrest. Since the statute allows the blood test to be taken on reasonable grounds, it follows that the statute contemplates that the arrest will be made upon the showing of reasonable

grounds. As noted above, there is nothing unconstitutional about allowing an arrest for a misdemeanor on the basis of reasonable grounds to believe the offense has been committed. The Legislature, obviously aware of the problem of the drunk driver, intended to authorize an arrest for driving while intoxicated under circumstances more liberal than in the case of other misdemeanors. The officer in the instant case complied completely with the provisions of the statute. This being so, the arrest was proper and the search incident thereto appropriate. In *People v. Duroncelay,* 48 Cal. 2d 766, 312 P.2d 690 (1957), the California Supreme Court upheld the extraction of blood from an accused after he was taken to the hospital following an automobile accident. The accused was charged with drunk driving causing personal injury. The California Supreme Court stated:

> "It is obvious from the evidence that, before the blood sample was taken at the request of the highway patrolman, there was reasonable cause to believe that defendant had committed the felony of which he was convicted, and he could have been lawfully arrested at that time."

The facts in the instant case are similar to those in the *Duroncelay* case, where the California Supreme Court found reasonable grounds for the arrest. The officer in the instant case also having reasonable grounds, the arrest and search were proper.

D. THE SEARCH WAS PERMISSIBLE BECAUSE OF THE NATURE OF THE CIRCUMSTANCES INVOLVED IN THE INSTANT CASE AND HAVING BEEN MADE UPON REASONABLE GROUNDS TO BELIEVE A CRIME HAD BEEN COMMITTED.

In *Carroll v. United States*, 267 U.S. 132 (1925) the United States Supreme Court recognized an exception to

the general rule that searches must be predicated on warrants or incident to arrest. The basis of the court's decision in that case is the acknowledgment that automobiles and motor vehicles are so mobile that special considerations warrant the application of a different rule. In Davis, *Federal Searches and Seizures,* Section 5.0 (1964) it is stated:

> "The search of conveyances is an exception to the general requirement that searches be conducted under the authority of a warrant. The right to search extends to vessels, vehicles and aircraft; however, its greatest application is to automobiles. It is not surprising, therefore, that the increasing use of automobiles and their adaptability for violating the National Prohibition Act, resulted in the leading case of Carroll v. United States, 1925, 267 U.S. 192, 45 S.Ct. 280, 69 L.Ed. 543.
>
> "The basis for the rule that conveyances may be searched without a warrant is their capacity for being quickly moved from one locality to another. This element of mobility makes it impracticable, if not impossible, to obtain a search warrant in most instances. In this respect, it must be remembered that a warrant may be required if the element of mobility is no longer present."

See also 1 *Harvard Journal on Legislation,* 51, 55 (1964).

In *The Federal Law on Search and Seizure,* F.B.I., 1962, p. 187, it is stated:

> "The Federal law allows search of a vehicle in a mobile condition on probable cause to believe that it contains something subject to seizure and destruction. *Carroll v. U.S.,* 267 U.S. 132 (1925). Where such probable cause exists, a vehicle in a mobile condition may be searched without a search warrant, an arrest or a consent. In this respect, searches of vehicles are unique in the Federal law of search and seizure."

Although the *Carroll* case seemed to have been rejected in *United States v. DiRe,* 332 U.S. 581 (1947), the Supreme Court reaffirmed the *Carroll* case in *Brinegar v. the United States,* 338 U.S. 160, 149 and the *Carroll* decision may be clearly recognized as the law in the United States today. *Rea v. United States,* 255, F.2d 473 (4th Cir. 1958).

United States v. One 1957 Ford Ranchero Pickup Truck, 265 F.2d 21 (10th Cir. 1959). Davis, *supra,* p. 219, 222.

Speaking of the *Carroll* case, in Leagre, *The Fourth Amendment and The Law of Arrest,* 54 Journal of Criminal Law, Criminology and Police Science 393 (1963) at p. 399, it is stated:

> "* * * The first of these exceptions is found in *Carroll v. United States,* which recognized the necessity for dispensing with the requirement of a warrant when moving vehicles were involved. The Court realized that insisting upon the requirement of a warrant in these circumstances would afford ample opportunity for the owner to remove his suspect automobile prior to the time the officers were authorized to search. *This exception from the requirement of a warrant was thus grounded on a showing of absolute necessity on the facts of the particular case.*"

The State submits that the instant situation presents a set of factual circumstances warranting the application of a doctrine similar to that in *Carroll v. United States.* In the instant case, at the time the officers arrived on the scene, they had reasonable grounds to believe a crime had been committed. However, humanitarian considerations warranted swift action and warranted action other than the obtaining of a search warrant. First, the injured passengers in the appellant's vehicle needed medical attention. Second, the vehicles involved in the accident required removal and the normal flow of passage on the very busy street (State Street) had to be kept moving. Third, the appellant himself was in need of medical treatment. Fourth, the blood alcohol level varies in an individual case with time. The time necessary to procure a search warrant could have resulted in additional absorption or dillution thus impeaching the validity of any blood alcohol test. A fortiori it was necessary that the officers not stop to obtain a warrant under the circumstances. The conditions under which the blood alco-

hol test was taken were reasonable, and consequently in accord with constitutional requirements. *United States v. Rabinowitz,* supra. In the instant case there was an "absolute necessity" based upon "the facts of the particular case which necessitated action and dispensed with need for a search warrant." It is incongruous to argue that the officers should have taken the time to obtain a search warrant and thus neglect the appellant and passengers who were badly injured and at the same time to say that if they acted to save the lives of the passengers of appellant's vehicle and to render appropriate medical assistance to appellant that they are somehow precluded from obtaining the evidence revealed by blood alcohol tests. The extraction and test in the instant case were made at the most opportune time when the facts and exigencies of the case allowed.[4] Consequently, the search was reasonable and the Constitution demands nothing else. *State v. Louden,* supra. The facts of this case should be deemed to allow an appropriate application of the *Carroll* rule.

CONCLUSION

The appellant has challenged the admissibility of the results of a blood alcohol test performed on his blood on the grounds that the admission of such results violated his constitutional right to be free from unwarranted search and

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[4] In opinion 62–058, the Attorney General stated that the rule in the Carroll case may well be applicable to the exigencies raised in the case of a blood alcohol test where the motorist or his passengers are injured. The Attorney General stated:

"* * * It would seem the same rule should be applicable in the case of alcohol tests on motorists since alcohol concentration decreases with the passage of time, and often the necessity for immediate medical attention is present. Therefore, it would appear that the extraction of blood samples or other body fluids would be permissible if done when the officer has reasonable belief of a crime being or having been committed. However, the test should be performed as soon as possible. * * *"

seizure. However, an analysis of the facts and the applicable legal principles demonstrate that there are numerous legal bases which refute the claim of an unreasonable search in this case. This court should affirm the conviction.

Respectfully submitted,

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