1984

# The State of Utah v. Lonnie Ferris Lawson : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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| STATE OF UTAH,<br><br>Plaintiff/Respondent,<br><br>vs.<br><br>LONNIE FERRIS LAWSON,<br><br>Defendant/Appellant. | ) | Case No. 19106 |

BRIEF OF RESPONDENT

APPEAL FROM THE VERDICT AND CONVICTION
IN THE DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH, HONORABLE JAMES SAWAYA PRESIDING

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The defendant, Lonnie Ferris Lawson, was convicted by a verdict before Judge James S. Sawaya of criminal homicide, a third degree felony, and also convicted of driving under the influence of alcohol causing bodily injury, a class A misdeamor.

DISPOSITION IN THE LOWER COURT

The case was tried before Judge James S. Sawaya and a jury found appellant guilty of automobile homicide and also, driving under the influence of alcohol causing bodily injury. Appellant was later sentenced. The trial court granted a stay of execution for two years conditioned on (1) defendant serve one year in the Salt Lake County Jail; (2) retain jurisdiction; (3) the defendant was to pay restitution as recommended by Adult Probation and Parole; (4) to also maintain full-time employment after release from jail; (5) defendant participate

in and complete any rehabilitation program prescribed by Adult Probation and Parole; (6) to consume no alcohol and avoid places where alcohol is sold; and (7) to take antebuse if needed for his rehabilitation.

The one-year county jail sentence for driving under the influence of alcohol causing bodily injury ran concurrently with the criminal homicide sentence. The Trial Judge granted a stay of execution for two years and placed defendant on probation under the same conditions as the ones for Count I, criminal homicide.

## RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the jury verdict as being reasonable under the circumstances.

## STATEMENT OF FACTS

Witness Clinton Hepner testified (T. 2-35) that on October 8, 1982, he picked up his girl friend, Kelly Kehler, in his brother's 280Z Datsun. He testified that during the evening he had trouble starting his car, in fact, having to jump start and/or push start it on several occasions. Hepner stated that he purchased gasoline thinking that water in the tank might be the problem and that more gas would correct this problem. (T. 15) The night was clear and dry.

Hepner drove toward Sandy City on I-15, but was forced to exit the freeway at 3300 South when the Datsun's

engine stalled. He signaled and pulled into the emergency lane (T. 16) and brought the car to a stop. He saw the brake lights and tail lights were working (T. 9, 13). It was a two-lane exit (T. 32, also exhibit 27, T. 256, 257). He testified that his headlights were working but he turned them off and turned on the emergency flashers five to ten seconds before coming to a stop.

Orville Peterson testified (T. 35) that on October 8, 1982, as he was driving south on the freeway at about 2000 South, he noticed a Blazer pass him on the left. Peterson stated he was going about 50 M.P.H. but accellerated until within 150 yards of the Blazer and followed at that distance until the Blazer exited at 3300 South. Peterson testified he saw a cloud of dust after the Blazer exited and saw the Blazer roll and later saw it upside down (T. 39, 40). He stopped just north of the Blazer and walked up to it to assist. Peterson looked into the vehicle and saw the driver and he watched as the driver exited the Blazer (T. 43, 47, 50). The driver was talking or calling names, which gave Peterson the impression that someone else may have been thrown out, but no other person was found. A passer-by, Jay Bringhurst, testified that he saw the male individual lying on the roof inside the Blazer (T. 64, 67, 72). He also testified that he detected the odor of alcohol. Mr. Bringhurst also saw the male individual trying to

exit the Blazer (T. 54). He stated that he did not see anyone else inside the Blazer. Several witnesses, including a Salt Lake City Police Officer, were there almost immediately and found no one thrown from the Blazer (T. 43). Peterson testified that the occupant of the Blazer was standing there with the troopers.

Trooper Tom Kalma did an investigation and determined the point of impact and testified that "there were two distinct gouges on the emergency lane itself" (T. 335), which were parallel and of equal distance (T. 342-343) that were made by the Blazer. He not only identified and reconstructed the accident from the exhibits consisting of pictures and diagrams, but also visited the scene of the accident (T. 53). For an illustration of the gouge marks see Exhibit 33 (T. 378). Accident reconstruction specialist Newell Knight also testified and stated "very simply, from the photographs and the gouges on the road, the appellant hit the parked Datsun in the emergency lane" (T. 408, 414, 419). Mr. Peterson then saw the Datsun down by a gully near the fence, right side up and facing north. He testified that two people were in the Datsun, that the Datsun was smashed and he couldn't open any doors (T. 46).

Jay Bringhurst, a driver who stopped to render aid, and Vern Olsen, a police officer, both testified as to the two occupants of the Datsun. Both of them, as well as Peterson,

testified that the passenger, a female, was laying across into the driver's area. Two paramedics testified to the same fact.

Dr. Robert Hood testified that he is a qualified neuro-surgeon. He further testified that on October 9, 1982, at about 12:45 a.m. he examined two patients who had been involved in the same traffic accident. His examination of the female passenger showed irregular, shallow breathing and lack of response to stimuli. Dr. Hood testified that she was in an extremely deep coma (T. 79), and he diagnosed massive head injuries based upon neurogenic pulmonary odema.

Since there was little or no visible injury (T. 84), Dr. Hood concluded that the patient suffered injury to the nerve cells in the brain and the brain stem, the lower part of the brain that connects to the spinal cord. He further concluded that the patient had suffered forcible movement caused by some shearing force as a result of a sudden deceleration. He stated that death could have been caused by destruction of the medulla from trauma to the head. The CAT scan and neurological examination showed massive trauma to the brain causing brain contusion and injury (T. 87).

Officer Belka of the Highway Patrol testified that around midnight on October 8, 1982, he was dispatched to the accident on I-15 exit at 3300 South. He talked with the defendant and asked for identification. Defendant had to get

identification, his wallet and drivers license, from inside the Blazer (T. 220, 221). Belka testified that defendant was staggering and had slurred speech. Belka further testified that defendant was disoriented and smelled of alcohol. He was also the driver identified by witnesses (T. 246).

Officer Belka took defendant to St. Mark's Hospital where blood was drawn from defendant by Kay Fowler, a qualified R.N., who labeled the samples. Officer Belka had given his consent to draw blood at 1:18 a.m. (T. 272).

William Stonebraker, Toxicologist for the Utah State Toxicology Department, testified that he performed the blood alcohol determination on the sample of blood drawn from defendant (T. 427). The method used for the test was the use of a gas chromatograph, an accepted and proper method for such determination. He received two results, .141 and .151 percentage of alcohol per 100 cc (T. 435), both well above the Utah statutory standard of intoxication for driving under the influence.

Dr. Brian Finkle testified as to the effects one encounters with various blood-alcohol levels and stated the driving impairments encountered at less than .141 as being substantial. He also testified that he personally would have run other tests on blood samples that varied as did those taken

by Stonebraker. He did not, however, testify that Stonebraker's tests were invalid (T. 482-487).

Counsel for defendant objected to the admission of the blood test results. The motion was denied. Counsel for defendant moved for a directed verdict. This motion was also denied. A memorandum of law was filed (R. 023). The jury, weighing the evidence presented, found the defendant guilty as charged on both counts.

## POINT I

### JURY INSTRUCTION NUMBER EIGHTEEN DID NOT PREJUDICE THE RIGHTS OF THE DEFENDANT AND IS NOT REVERSIBLE ERROR

Defendant speculates that the only way the jury could read instruction numbers 18 and 20 together would require them to not consider at all the Court's proper instruction on proximate cause. All of the jury instructions should be read together and in light of the total evidence before the jury. State v. Ruben, 663 P.2d 445.

Jury instruction number 18 reads:

> In the crimes of automobile homicide and driving under the influence of alcohol causing bodily injury it is no defense that any victim may also have been negligent in one or more respects and thereby also contributed to the cause of the accident. The test to be applied is whether you find from all facts that the defendant was negligent and that said negligence caused the death of Kelly Fehler and proximately caused the injuries to Clinton Hepner. (Emphasis added.)

Instruction number 20 states:

> The proximate cause of an injury is that cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause -- the one that necessarily sets in operation the factors that accomplish the injury. (Emphasis added.)

Instruction number 18 is a simple restatement of the law on the defense of whether or not the victim was contributorily negligent. Instruction number 20 is a clear, simple statement on proximate cause often used in automobile homicide cases. These two do not conflict. Instruction number 21 sets forth:

> If you find that defendant was negligent and that the proximate cause of the alleged harm was an independent intervening act of a person not a party to this case, that the defendant in the exercise of ordinary care could not reasonably have anticipated as likely to happen, the defendant's original negligence is superseded by the intervening act and is not the proximate cause of the alleged harm. However, if in the exercise of ordinary care the defendant should reasonably have anticipated the intervening act, it does not supersede his original negligence or break the chain of proximate.

As defendant points out, Mr. Hepner, though a victim per instruction 18, was not a party to this case per instruction 21. But defendant jumps to the conclusion that the two instructions pertaining to different classifications of persons cannot be read together without confusing the jury. This conclusion is just not supportable. While it is the standard, as set down by this Court in State v. Ruben, Id.,

that jury instructions must be read as a connected whole, there is nothing evident in this case to indicate a breach of this standard. One instruction does not exclude the other. They are on different issues. The jury was still told to consider all of the facts. Clearly, the instructions are separate and contemplate two different classifications of persons and read as a whole under all the facts. Appellant creates his own confusion.

Clearly the jury was instructed that the total "test to be applied" was whether or not they could find "from all of the facts" that the petitioner proximately caused the injuries, by "natural and continuous sequence, unbroken by efficient intervening causes." They were also told in instruction number 21 that if they found that defendant was negligent and the proximate cause, that that "original negligence" could be superseded by an intervening act and, therefore, not be the proximate cause of the alleged harm. Although that was not the fact or the evidence before the jury, they were clearly given the opportunity to find in the appellant's favor. The appellant was clearly given the benefit of the doubt in the jury instructions and the opportunity to present truthful evidence.

POINT II

APPELLANT WAS NOT PREJUDICED

The California courts have held that it is permissible to give instructions that are in error, but which are not prejudicial error. People v. Butcher, 345 P.2d 127 (Cal. 1959). Even if after reading the transcript, by some stretch of the imagination, the instructions might be confusing, that alleged confusion is not prejudicial error. There is no indication that the jury had difficulty with the instructions by requesting clarification. The jury was instructed on the case and apparently they found that the evidence was so conclusive that any alleged error did not influence the verdict.

Appellant seems to contend that the jury instructions require that a defendant must be the only, or sole, proximate cause of death to be guilty of the proscribed conduct. Such a theory ignores the majority position that recognizes the possibility of concurrent causes in homicide cases. If two intoxicated drivers were to negligently cause the death of an innocent third-party pedestrian, neither driver could be guilty of automobile homicide on appellant's theory. Both drivers (in the hypothetical) are equally negligent and direct causes of the pedestrian's death, yet neither driver is the sole proxi-

mate cause. On appellant's theory, however, neither would be guilty although each would possess all of the characteristics necessary to be the proximate cause except the responsibility of being the sole proximate cause.

Proximate cause in the criminal contexts may require a more direct causal link than is demanded of proximate cause for purposes of tort liability, see People v. Scott, 185 N.W.2d 576 (Mich. 1971); State v. Newman, 513 P.2d 258 (Mont. 1973). However, it need not be the sole cause. The "tort contributory negligence" of a victim is not a proper consideration for criminal proximate cause issues, although the victim's actions may be considered to determine whether he is an intervening efficient cause. State v. Schaub, 44 N.W.2d 61 (Minn. 1950). It does not follow from either of these distinctions between tort and criminal law that criminal proximate cause requires the state to prove that the defendant was the sole or only cause of the victim's death.

This high Court made a similar decision on December 13, 1983, Case No. 18708, State v. Hamblin, pointing out that the standard in this case and under the statute is simple negligence. The court rejected the appellant's assertion that a failure to instruct the jury on a superseding intervening cause was not even warranted by the evidence, said that the appellant was "clearly negligent in racing through a yellow

light at excessive speed." Justice Durham said that the other party's "negligence, if any, could only have been a concurrent cause and not a superseding one," and could not have insulated the appellant from criminal liability anyway. In that case the other party was the victim. Hamblin, Id., page 4 (cites omitted).

Going by the standards set forth in the Hamblin case and the other line of cases supportive of that decision, in this case, one need only look at how wide the two-lane exit was, the severity of the impact, and the exhibits shown to the jury, to determine that it was clear that the Datsun was off the side of the road and hit almost directly by the Blazer driven by the appellant. Exhibit 19, the picture of the front of the Blazer, shows a clear almost center impact upon the other vehicle. The other exhibits clearly show that the Datsun was hit directly in the rear end and at quite a force. See for example State's Exhibit 3. Exhibit 33, a picture of the actual marks on the highway, would clearly indicate the point of impact was off the side of the road and in the emergency lane. We submit that this Court should again find that "this assertion of confusion in the minds of the jury because of a possible conflict between jury instructions as to the possible negligence of the victim or any other party to be incredible."

Hamblin, Id. page 4. Appellant clearly and unprejudicially negligently caused the accident.

POINT III

THE BLOOD TEST WAS PROPER AND NOT PREJUDICIAL

Mr. Stonebraker has testified that the blood test results were within the laboratory's standard, a standard prescribed to be followed in determining whether test results came within the error of tolerances. He further testified that when samples are taken from the specimen and run in duplicate and if a differentiation exists then the results must be within a differentiation of .01 or less. Mr. Stonebraker testified that the test here involved was within the accepted laboratory standard. In applying the facts given by Mr. Stonebraker, Dr. Finkle applied his standard and testified that he would have rerun the test. There is nothing in Dr. Finkle's testimony indicating that even if rerun, the original test is invalid. Respondent contends that both the testimony of Mr. Stonebraker and Dr. Finkle are admissible evidence in this case. The testimony becomes a matter of fact for the jury to weigh. There is only a question of weight, not of admissibility.

The test for admissibility of a blood test as evidence is whether the party offering the results of the test laid a proper foundation by producing an expert witness who can explain the test procedure and vouch for its correct

administration in a particular case. McCormick on Evidence § 209 p. 513. Respondent contends that this standard was clearly met by Mr. Stonebraker's testimony and that any question as to the appropriateness of this testimony can go only to the weight given it.

The evidence in the case clearly shows that there was sufficient evidence, besides the breath test, to find that the appellant was under the influence while driving at night. The circumstances of the accident alone and the point of impact on a clear, dry night alone would substantiate that. The standard of deviation on the test was still not sufficient to show, even giving it the benefit of all doubts, that there was not simple negligence.

## POINT IV

### SUFFICIENT EVIDENCE WAS PRESENTED FOR THE JURY TO DETERMINE THAT APPELLANT WAS THE DRIVER OF SUBJECT VEHICLE

Respondent believes that more than sufficient evidence was presented to establish by clear and convincing standard that defendant was driving the Blazer involved in the accident of concern in this case. While it is the law that a person shall not be convicted upon his own admission without independent evidence, that standard is surely met here. The Blazer was seen, while still rolling, with only one occupant in it. Several witnesses testified that the defendant was in the Blazer. Mr. Bringhurst identified the defendant as the person

he saw crawling out of the Blazer. Even though defendant contends there might have been other people in the Blazer, this is highly unlikely from the evidence. People came upon the scene immediately and they saw only the defendant in the Blazer. A thorough search of the area revealed no other people. There were no other drivers in the area with a cut on their chin, that the vehicle was registered to, who got their wallet out of the upside down Blazer with glass in it. No one else was pointed to by other witnessses.

By the defendant's own implied admission, as gleaned from Sgt. Belka's testimony, defendant was operating the car (T. 296). Clearly the evidence as presented is sufficient to sustain a finding that defendant was the driver of the Blazer.

## CONCLUSION

Respondent in conclusion submits that the jury was not confused by the judge; that the petitioner/appellant was not, in any way, prejudiced; and the evidence and total circumstances of the case, along with the jury instructions, leaves no doubt that the case is similar to State v. Hamblin, Id. There was obviously and clearly no intervening cause so that "a jury instruction on a superseding intervening cause would not have even been warranted by the evidence." As this Court said:

> The appellant also argues that the trial judge erred when he declined to instruct the jury that

they must find Hamblin to be the "sole proximate cause" of Stack's death before they could find Hamblin guilty. This argument is without merit. It is obvious that death may result from more than one cause. For example, a felon may shield himself from a pursuing officer with the body of an innocent bystander. If the officer, in an attempt to prevent the felon's escape, should shoot at the felon, but hit and kill the bystander, both the felon and the officer would be "causes" of the bystander's death. However, the felon would not be insulated from a conviction for homicide merely because he was not the sole cause of the bystander's death. This same logic holds true when applied to an instance of negligent conduct.

> The state, in a criminal case, is not required to prove beyond a reasonable doubt that the defendant's negligence was the sole proximate cause of the death. When a defendant negligently creates a risk of death to another person, the fact that the person actually died as a result of the combination of that negligence plus some other contributing factor does not serve to exculpate.

Hamblin, Id. page 3 (citations omitted).

Respectfully submitted this 30th day of December, 1983.

Bruce M. Hale

BRUCE M. HALE
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify I mailed a true and exact copy of the foregoing Brief of Respondent, first-class, postage prepaid to Sumner J. Hatch, 72 East Fourth South, #330, Salt Lake City, UT 84111.

DATED this 30th day of December, 1983.

Vicki L Walker