1964

State of Utah v. Vernon Howard Cannon : Brief of Defendant and Appellant

Utah Supreme Court

Barker & Ryberg; Attorneys for Defendant-Appellant;
Honorable A. Pratt Kesler; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
VERNON HOWARD CANNON,
Defendant-Appellant.

Case No. 10187

BRIEF OF DEFENDANT AND APPELLANT

Appeal From the Judgment of the Third Judicial District Court for Salt Lake County, State of Utah

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The Honorable Merrill C. Faux, Judge

BARKER & RYBERG
68 East 21st South Street
Salt Lake City, Utah
Attorneys for Defendant-Appellant

HONORABLE A. PRATT KESLER
Attorney General
State of Utah
State Capitol
Salt Lake City, Utah
Attorneys for Plaintiff-Respondent

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STATEMENT OF NATURE OF CASE

This is an appeal by the Defendant and Appellant, Vernon Howard Cannon, hereinafter referred to as the defenant, from a jury verdict finding the defendant guilty of automobile homicide.

DISPOSITION IN LOWER COURT

The case came on regularly for hearing on Tuesday, March 10, 1964, at the hour of 10:00 a.m. The above matter was heard before the Honorable Merrill C. Faux, one of the Judges of the above named Court sitting with a jury. After the jury had been impannelled and evidence submitted on behalf of the State, witnesses were called and

testified on behalf of the defendant, Vernon Howard Cannon. At the conclusion of the case, the Court instructed and submitted the case to the jury. On the 12th day of March, 1964, the jury returned a verdict finding the defendant guilty of the offense of automobile homicide as charged in the information.

RELIEF SOUGHT ON APPEAL

The defendant, Vernon Howard Cannon, seeks a new trial because of the fact that the Judge during the trial held March 10 through March 12, 1964, committed error prejudicial to the defendant.

STATEMENT OF FACTS

The defendant, Vernon Howard Cannon, was charged on the 24th day of October, 1963, before J. Patten Neeley, Judge of the City Court in and for Salt Lake City, Salt Lake County, State of Utah, with the crime of "Automobile Homicide" in violation of Title 76 Chapter 30, Section 7.4 Utah Code Annotated 1953, as follows"

> "That the said Vernon Howard Cannon at the time and place aforesaid, he being then and there a person driving and operating a vehicle on a public highway while being then and there under the influence of intoxicating liquor did then and there drive said vehicle negligently, carelessly and recklessly so as to cause the death of another, to-wit: Franklin Lester Hewlett and Fleming Christensen." (R-6)

The defendant appeared on October 30, 1963, and after being arraigned, asked the Court to appoint a day for a preliminary hearing. Preliminary Hearing was held February 30, 1964, at which time the State presented its case, after which defendant was advised of his right to make a statement not under oath. The defendant chose not to take

the stand, and the Court ruling that there was probable cause, bound the defendant over to the District Court to stand trial on the charge of automobile homicide.

On February 17, 1964, the defendant appeared before the Honorable Merrill C. Faux, Judge of the Third District Court, and entered a plea of not guilty to the information filed by Jay E. Banks, District Attorney for the Third Judicial District in and for Salt Lake County, State of Utah. Trial was set for March 10, 1964, at 10:00 a.m.

On March 10, 1964, the case of the State of Utah vs. Vernon Howard Cannon came on regularly for hearing. After the jury had been called and sworn, the District Attorney made a motion to amend the information as originally filed by striking therefrom the words "Franklin Lester Hewlett, and,"; to this the defendant objected. (R-57)

After the Court reconvened, the State called as its first witness a Mr. Jack Retallick, who after being sworn, identified himself as a Deputy Sheriff of Salt Lake County. On August 21, 1963 (October 21, 1963), he investigated an accident that had occurred on Wasatch Boulevard just South of the Parley's Canyon Interchange. (R-64) He received the call at 10:15 p.m. when he was in the area of 12th East and 39th South Streets (R-65), and arrived at the scene of the accident at 10:21 p.m. (R-66). When he arrived at the scene of the accident, he observed a Chevrolet automobile and a Morris Miner station wagon, a small foreign car, that had been involved in an accident (R-66). At the time he arrived at the accident scene, the roads were dry and the weather was clear (R-66). The Chevrolet was facing a "northward direction," and the Morris Miner station wagon was facing "southward" lying on its side (R-66). The highway upon which the ac-

cident occurred has four lanes, two for south bound traffic and two for north bound traffic. The north and south lanes are divided by two wide yellow lines. (R-68) Soon after arriving at the scene of the accident, the officer checked two individuals involved in the accident. Both had been passengers in the Morris Miner station wagon. One of them, identified by the officer as the Christensen boy, was lying on the side of the station wagon and at the time the officer examine this particular individual, he appeared to be dead (R-74).

When the officer checked the Chevrolet he observed Mr. Cannon seated almost in the driver's seat with a bandage around his head (R-75).

In the area where the accident occurred, there was a deep gouge just south of the wreckage that indicated the point of impact (R-75), and there were some skid marks coming in toward the gouge mark that were left by the left rear wheel of the Chevrolet (R-76). The tire marks crossed the double yellow line (R-76). The tire marks moved from the south bound traffic lane into the north bound traffic lane, the tire marks being at a 45 degree angle to the highway (R-77). The gouge mark was approximately two and one-half feet east of the edge of the double yellow line (R-78). The major damage on the Chevrolet automobile was to the right front (R-85), while the damage to the Morris Miner station wagon was along the front of the vehicle (R-86). In spite of the rather marked difference in the size of the two vehicles involved in the accident, the smaller car, the Morris Miner station wagon, knocked the Chevrolet 26 feet north from the point of impact (R-90). It was the officers opinion that the brake marks would indicate all four wheels of the Chevrolet

automobile were locked at the time it crossed over the double yellow lines (R-91).

Officer Retallick, while making his investigation at the scene of the accident, did not talk to the defendant (R-91).

George W. Golightly, one of the three eye-witnesses to the accident, was proceeding north on Wasatch Boulevard when he first noticed the Morris Miner station wagon pull up to a stop at his right at the intersection of Wasatch Boulevard and 33rd South Streets (R-97). After the light changed, the cars proceeded north and prior to reaching the point of impact the Morris Miner had pulled ahead and into his lane of traffic (R-98).

As Golightly proceeded North he observed two headlights from a car coming from the opposite direction cross the center lane into the north bound lanes of traffic where the impact occurred (R-98). After the accident occurred, Mr. Golightly pulled around to the right hand side of the accident and turned his car so that the lights of his car were directed at the accident (R-99). Golightly first looked into the defendant's car and observed the defendant on the floor of the car on the right hand side up under the dashboard (R-100). He helped the defendant back up onto the seat of the car at which time he thought he detected the odor of alcohol (R-101). At the time Golightly first observed the defendant in his automobile, the defendant appeared to be in shock (R-105).

Robert Bennion, another eye-witness to the accident, was proceeding south on Wasatch Boulevard shortly after 10:00 o'clock, he observed an automobile which was stopped or very nearly stopped at the bottom of the hill just south of the Parley's Canyon Interchange (R-112). As

he approached the stopped automobile, it started up, made a directional change from a westerly to a southerly direction, and approached the rear of a large grain truck going very slowly up the hill (R-113). The Chevrolet veared suddenly to the left across the south bound inside lane into the north bound inside traffic lane at which time the accident occurred (R-114). Mr. Bennion testified that the accident occurred shortly after 10:00 o'clock p.m. (R-115).

After the accident the defendant was transported to the Salt Lake County Hospital where Dr. Burton Janis, an intern at the Hospital, obtained a blood sample (R-121).

After extracting the blood sample from the arm of the defendant, it was placed in a vial provided by the officer (R-121). State's Exhibit 3 was identified by the doctor as the vial in which the defendant's blood was placed (R-122). The vial handed to the doctor by the officer, as far as the doctor can remember, was free of any visible material (R-123). The blood sample was obtained at 11:54 p.m. approximately one hour and forty-five minutes after the accident had occurred (R-125). Deputy Rosendaal talked to the defendant at the Hospital and received permission from him to extract blood (R-129).

At the hospital Deputy Rosendaal asked the defendant if he had had anything to drink, at which time he answered yes, that he had had a couple of drinks of whiskey (R-134). When asked what had happened just prior to the accident, the defendant answered, "I don't know. I either fell asleep or passed out." (R-135).

H. Kent Francis, a chemist employed by the State of Utah, received Exhibit 3, the vial in which the blood had been placed at the time it was extracted from the defendant,

on October 22, 1963, at 10:53 a.m. (R-147). Mr. Francis examined the blood to determine the per cent of alcohol by weight in the blood and according to his examination, it contained .193% of alcohol by weight (R-148).

Dr. Stewart C. Harvey testified extensively as to the effect of alcohol upon the human body (R-161 through R-172). The State then rested.

The defendant in Chambers made a motion to dismiss because of the State's failure to prove a case (R-183), and the Court stated, "There are a number of elements in the evidence which indicate to the Court that the jury might find intoxication — under the influence of alcohol — at the time of the accident; and the motion for dismissal is denied." (R-183)

The defendant then called witnesses and presented evidence which showed that on the day of the accident the defendant arrived at his sister's home where he resides at approximately 5:30 p.m. He changed his clothes and promptly left for the Parley's Canyon Cafe. Defendant at that time did not stop to eat and according to his sister had had nothing to drink at that time (R-193). The defendant arrived at the Parley's Canyon Cafe at approximately 6:00 p.m. (R-195). Soon after arriving at the Cafe, the defendant sat down with Robert E. Lee, his business partner, and Mr. Lee's wife in the Cafe. The defendant was seated between Mr. Lee and his wife and at the time the defendant gave no indication of having had anything to drink (R-196, R-219). At approximately 6:30 p.m. the defendant in the company of Mr. Lee left the Cafe and drove in Mr. Lee's car to Keetley, Utah (R-196). Upon arriving at Keetley, the defendant waited in the car while Mr. Lee went into a home to talk to an individual. When Mr. Lee

returned to the car, there was no evidence indicating that the defendant had had anything to drink during that ten minute period (R-197). On the way back to the Parley's Canyon Cafe, Mr. Lee and the defendant drove from Keetley to the junction at Park City. From there the two proceeded on down Parley's Canyon where they stopped at a small Cafe called "Fort Ute" and had a cup of coffee. After leaving the Cafe, the two drove down to the Parley's Canyon Cafe, arriving at approximately 8:10 in the evening (R-200). Upon returning to the Cafe, Mr. Lee invited the defendant to his trailer to have dinner with himself and his wife (R-200). Mr. Lee and his wife sat down with the defendant to dinner, in the trailer that is their home, at approximately 8:20 p.m. and at that time neither Mr. Lee nor his wife noticed any evidence of liquor on or about the defendant (R-202, R-221, R-222). After dinner was completed, the defendant was invited by the Lees to stay with them and watch a TV show (R-203). While the Lees and the defendant were together the only beverage consumed by any of them was coffee (R-204). Just before 10:00 p.m. the defendant in the company of Mr. Lee, left the trailer and went over to the Cafe where the defendant drank another cup of coffee (R-215). The defendant had had no intoxicating beverage to drink until after he had left the trailer home of the Lee's (R-232).

The defendant got into his car to leave. As he stopped preparitory to entering the highway, a pint of whiskey which was half full (R-235) and which had been left under the front seat, slid forward (R-223). While waiting for traffic to clear, the defendant took a "good jolt" (R-233). Approximately three miles down the Canyon, the defendant pulled off to the side of the road where he took another drink and smoked a cigarette (R-234). After

finishing the cigarette, the defendant proceeded on down the Canyon and stopped at the red light at the Parley's Canyon Interchange (R-234).

The defendant remembers nothing after stopping for the red light at the Parley's Canyon Interchange (R-234) and his memory is a blank until he regained consciousness at the County Hospital (R-234).

As a result of the accident, defendant received a concussion, a badly lacerated ear and the loss of several of his upper teeth. The defendant, after regaining consciousness at the County Hospital, when asked by the investigating officer what had happened, said he thought he had either gone to sleep or run off the road (R-235).

In March of 1962, the defendant was stricken with an infection of the inner ear known as "Meniere's Disease" (R-227). The first indication of the illness occurred one morning when the defendant in attempting to arise from his bed was unable to do so, and in fact, when he did gain his feet, he fell down several times (R-249). The symptoms he experienced were extreme dizzyness, inability to stand upon his feet, and a terrible nausea. For this particular illness he was treated by Dr. Gordon R. Evans (R-228). The defendant was a patient of Dr. Evans for approximately three months.

After the first attack, the disease was kept reasonably in check through the use of medications prescribed by the doctor (R-229). However, the defendant has experienced a very mild reoccurrence of some of the symptoms, but upon taking the medicine prescribed by the doctor, he has not experienced the violent symptoms as they originally occurred (R-229). The acute manner in which the

disease affected the defendant made it impossible to walk without falling (R-250). Meniere's Disease is a reoccurring type illness R-249). The symptoms may not reoccur for days, weeks, months or even years (R-249). There is no particular reason why the symptoms return in such a sporatic manner (R-249). Dr. Evans treated the defendant for Meniere's Disease during March, April and into May of 1962. He was also examined in October of 1962.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO STRIKE FROM THE RECORD ALL THE EVIDENCE OFFERED BY THE DEFENDANT CONCERNING MENIERE'S DISEASE BECAUSE (1) THE MOTION WAS UNTIMELY, AND (2) THE STATE INTRODUCED SOME ADDITIONAL EVIDENCE CONCERNING THE DISEASE.

At the conclusion of the defendant's case the trial court inquired of Mr. Banks, District Attorney, if the State had any rebuttal evidence. To this Mr. Banks replied in the negative (R-296). After a lengthy discussion between Court and counsel in chambers concerning the proposed instructions to be given to the jury (R-296 through R-302) the District Attorney made the following Motion: "MR. BANKS: Before he makes that Motion, I would like to make a Motion to Reopen." "MR. BARKER: For what?" "MR. BANKS: For the purpose of making a Motion. I rested on rebuttal, but I would like to move the Court to reopen at this time." "THE COURT: The Motion is granted." (R-302) "MR. BANKS: At this time, the State would move to strike all the evidence concerning — can't remember the name — Meniere's Disease, on the grounds

that there is no evidence that he was suffering from that at the time of this accident, and the only evidence that did come in related back toMarch, through May of 1962, and, by allowing the jury to consider that, it would be confusing and misleading." (R-303) The defendant objected to the Motion.

The Court granted the Motion and in Instruction No. 18, stated as follows:

"You are instructed that all evidence which has been admitted in this case relating to or concerning what the doctors have called 'Meniere's Disease' is struck from the record, and you are to pay no attention or give any consideration to that evidence." (R-25)

1. During the course of the trial Dr. John Waldo was called by the defendant as a witness. During a brief examination of Dr. Waldo, defense counsel asked several questions concerning Meniere's Disease. At this time the District Attorney objected. The basis of his objection was that no proper foundation had been laid (R-247). After the objection and a short conference at the bench, Dr. Waldo was excused and Dr. Gordon R. Evans was called on behalf of the defendant.

Dr. Evans testified extensively concerning an affliction the defendant was suffering from and identified it as Meniere's Disease. The objection above referred to is the only one that the State raised concerning testimony about Meniere's Disease during the full course of the trial.

It is axiomatic that an objection to the admissibility of evidence must be made at the time the evidence is offered and it is incumbent upon the party raising the objection to state the grounds therefor. In the case of *Scott v. United States*, 317 F.2d 908, on appeal, the appellant claimed that

the trial court erred when it allowed the government to place in evidence a pack of cigarettes which appellant had dropped at the time of his arrest which contained five gelatin capsules of heroin. The court citing *Fuller v. United States*, 53 App. D.C. 88, 288 F. 442, stated: "The general and obviously salutory rule is that objection to admissibility of evidence should be made at the time it is offered and the grounds therefor stated."

It is obvious that the State's Motion made at the time it was made was nothing more than an afterthought (R-302-303). It being granted tended, certainly, to influence the jury adversely in so far as the defendant's case was concerned. It deleted all of the evidence concerning the defense the defendant presented to the jury and it is the contention of defendant that the Motion was untimely and since the evidence went in without objection, it should have been submitted to the jury on that basis.

In the case of *Lambert, et al. v. United States*, 26 F.2d 773, 9th Circuit, a witness was called by the Government and testified about the general reputation of Lambert's business as a place where intoxicating liquor could be purchased. The witness was then asked, "Go ahead and tell what you know." His answer was lengthy and included facts concerning bootleggers who had been convicted under a different indictment. The defendant then made a motion to strike. This motion was overruled. The defendant on appeal assigned as error the court's ruling. The Circuit Court stated: "However, the answer was in a measure responsive to the question, and the question was not objected to. *A party will not be permitted to speculate as to that the testimony will be, and then move to strike the answer if not to his liking.*" (emphasis added)

That the State was speculating as to the testimony of the doctors examined and cross-examined is obvious.

In order that the full picture be developed and all necessary relevant evidence be given the jury, considerable latitude in examination of witnesses is ordinarily allowed in our trial courts, and counsel must accept the hazard of uncovering evidence which although relevant is unfavorable to his particular position. *United States v. Barbone,* 283 F.2d 628; *State v. Thompson,* 117 NW2nd 514; *State v. Favers,* 375 P.2d 260; *Isaac v. United States,* 301 F.2d 706.

2. The State in effect presented some of the strongest evidence when under cross-examination the District Attorney asked Dr. Bernson the question: "Doctor, can you tell us what is 'Meniere's Disease'?" (R-285) The Direct Examination of Dr. Bernson included absolutely nothing concerning Meniere's Disease. In response to the question asked by the District Attorney, Dr. Bernson stated as follows: "Meniere's Disease is a chronic, reoccuring disease involving eight nerves — nerves of hearing, and also the nerves of balance. They, for instance, were connected by the same nerve; as a result of this regenerative process, a patient — especially in periods of vertigo, commonly known as dizzyness, associated with nausea, vomiting disturbance, or other forms of the balance mechanism, which would include the eye and nystagmus, eyes jerk from side to side."

"In extremely violent cases, they will be knocked to the ground or to the floor just as if hit with a sledge hammer; not losing consciousness, as a rule, but complete loss of their power of coordination, motivation or locomotion." (R-285)

The State made Dr. Bernson its witness in so far as the initial examination of the doctor about Meniere's Disease. It is obvious that the District Attorney was speculating on the answer and as above noted in the *Lambert* case. This is not to be permitted.

In the case of *Dare v. State*, 378 P.2d 339 the plaintiff in error, Dare, was charged with the murder of his father-in-law. The State introduced three confessions all of which were substantially the same. Dare contended that the introduction of the third confession was merely repetitious and cumulative and therefore prejudicial. The Court held that the objection was without merit and cited *Foster v. State*, 294 P. 268. The portion pertinent to this case being: "We think, even though it was not shown, that the confessions were not voluntarily made, they should not on appeal be held erroneously admitted when no objected was interposed until the principal facts in that connection are told to the jury . . . *especially so in view of the use made of such confessions to establish the defendant's defense of insanity.*" (Emphasis added).

The motion made by the State after both sides had rested may have been proper had it been made at the time Dr. Evans concluded his testimony. However, from an examination of the record, the matter broached by the State in cross-examining Dr. Bernson appears to be nothing more than a fishing expedition, and upon catching a bullhead, now the State wants to throw it back into the turped waters so that it will not foul the rest of is cach.

In the case of *State v. Green*, 150 S.2nd 571 The Court states "The substance of the answer to the question objected to had already been given by the witness without his (the defendant's) objection in his answer to

the previous question. It is well settled that objection to the admissibility of testimony comes too late after testimony has gone to the jury."

As previously noted in the Statement of Facts, the defendant in March of 1962 was stricken with an infection of the inner ear known as Meniere's Disease (R-227). Meniere's Disease was identified and described by Dr. Waldo as ". . . a chronic disease involving the balance organ — the ninth nerve, which causes very severe dizzyness, *which is a chronic, reoccurrent disease.*" (R-246) (Emphasis added). Dr. Waldo further testified by that chronic, reoccurrent disease he meant, "disease that may have — that may have its manisfestations — that is, in this case, the dizzyness for a given period; then may stop completely, and may reoccur fater an interval of weeks or months." R-247)

Dr. Evans testified that all facts taken into consideration it would be difficult if not impossible to tell at the time an examination was made of the defendant at the hospital whether or not he had suffered an attach of Meniere's Disease. (R-272) His answer took into consideration the fact that the defendant had suffered a concussion and was examined while prone upon a hospital bed. The testimony of Doctors Evans, Waldo and Bernson concerning Meniere's Disease was all the same. The questions had been propounded while the jury was present and the answers had been received.

The State in no way controverted the evidence offered by the defendant that he had in fact suffered an attach of Meniere's Disease and at the time of the accident was subject to this reoccuring malady. The evidence presented by the defendant shows that he was rendered unconscious by

the accident and he remembers nothing after stopping for the red light at the Parley's Canyon Interchange (R-234).

At the time he was examined by Dr. Bernson at the County Hospital he was unaware of what had transpired and wasn't too clear as to exactly where he was or why (R-280). On page 272 of the record Dr. Bernson testified that it was his conclusion that the defendant had been rendered unconscious and that it was not unusual for persons sustaining the type of injury that had occurred to the defendant to suffer retrograde amnesia and identified the amnesia as the type that blots from the individual's memory the things that transpired just prior to the actual trauma which rendered the person unconscious.

The defendant readily admitted consuming a quantity of whiskey just eight or ten minutes prior to the accident. The evidence, both that presented by the State and by the defendant, was to the effect that if the alcohol had been consumed within eight or ten minutes before the accident, the defendant certainly would not have been under the influence of intoxicating liquor to such a degree as to render him incapable of operating his car in the manner that an ordinary, prudent and cautious person in the full possession of his faculties would have been able to operate a similar car under like conditions, and the only logical explanation as to what happened and the unusual movements of defendant's car was that he had suffered an attach of Meniere's Disease.

As previously noted, the State in this case introduced part of the evidence concerning Meniere's Disease and consequently the later objection and motion to strike the same is improper and its effect did deprive the defendant of any defense to the charge of automobile homicide, thereby

prejudicing his cause before the jury. *People v. Mitchell,* 26 Cal Rptr. 89; *State v. Holmwood,* 128 SE 2nd 28.

In the case of *Downey v. People,* 215 P2d 892, the State called the doctor who performed an autopsy upon the body of the deceased and on Direct Examination he testified that the death was due to strangulation. Accused's counsel, on Cross-Examination, asked what the results of a microscopic examination of the deceased's larynx disclosed. Based upon specimens which the doctor did not prepare, and which were not adequately traced to the body of the deceased, the doctor stated his opinion. The Court held that the accused could not assign as error on appeal the evidence thus elicited on the grounds that it is hearsay, because much of the damaging testimony was brought out during Cross-Examination.

In the case of *Burroughs v. State,* 158 P2nd 723, the Court held that the defendant could not complain of improper questions asked by the County Attorney of the Chief of Police, one of the State's witnesses, on rebuttal, where no exception was reserved by the defendant and, in addition, on cross examination, the defendant's attorney went into the same field and brought out additional matters far more damaging to the defendant than the answers of the Chief of Police to the original question.

In the case of *State v. Jensen,* 296 P.2d 618, 209 Or. 239, cert. denied 77 S.Ct. 329, rehearing denied 77 S.Ct. 388, the defendant was charged with first degree murder. A doctor called by the defendant made a voluntary statement on Direct Examination concerning a matter which he knew nothing about except as disclosed by medical records he produced. The Court held his statement should not have been permitted to go into evidence but such error

was not reversible error in view of the fact that the defendant introduced it.

In the Utah case of *State v. Meyers,* 385 P.2d 609, 14 Ut2d 417, the defendant was charged with the crime of rape. On appeal, the defendant assigned as error (1) he was denied a public trial; and, (2) that the testimony of the arresting police officer upon cross-examination prejudiced the jury when the officer stated that he did not ask the defendant whether or not he was guilty at the time of arrest because he knew him, thus implying the defendant had committed other crimes. The Court in commenting upon the second point stated, "In as much as it was defendant's own attorney who asked questions which brought forth the answers on cross-examination, he is in no position to complain of them." See also: *State v. Gransberry,* 307 P.2d 766; *Simmons V. State,* 372 P.2nd 239; *People v. Ketchel,* 381 P.2d 394; *State v. Borrego,* 195 P.2nd 622.

In all the cases above cited, it was the several defendants that failed to object to the introduction of evidence. It seems that the situation we are presently faced with is unusual. This writer has been unable to find any case that is similar to the one presently before the Court. However, the general rule as noted by the cited cases would apply equally to the prosecting authority as well as to the prosecuted.

In the case of *State v. Gooze,* 277, 81 A.2nd 811, the defendant was charged with negligent homicide in that an individual had been killed as a result of an automobile accident. The defendant had been hospitalized for treatment of Meniere's Syndrome (Meniere's Disease) which had subjected him to spells of dizzyness and "*blacking out.*" At the time of the accident, the defendant,

Gooze, had not suffered from such an attack for over a period of a year, but had been warned by his doctors about the possibility of its reoccurrence.

The defendant was found guilty in the Lower Court and appealed upon the grounds that the evidence presented by the State did not show the type of negligence ncessary to sustain the conviction. The Appellate Court however refused to reverse the matter finding that the evidence presented was sufficient.

It would seem only logical and reasonable in the light of the above cited case that the evidence presented by the defendant in this case should have been submitted to the jury for their consideration if in fact a person could be found guilty of a crime because of an attach of Meniere's Disease. It certainly would provide a reasonable hypothesis as to what caused the accident in that all the evidence presented is to the effect that the defendant consumed the only alcohol he took into his system that day eight to ten minutes before the accident. All the medical evidence, which was extensive, was to the effect that the defendant having consumed the alcohol just prior to the accident, would have had a blood count at the time of the accident not above .02 or .03 (R-179, R-255, R-178, R-270).

POINT II

THE TRIAL COURT ERRED IN ADMITTING THE BLOOD ALCOHOL TEST IN THAT (1) NO PROPER FOUNDATION WAS LAID AS TO THE REASONABLE ACCURACY OF THE TEST, AND (2) ITS RELATION TO THE TIME THE ACCIDENT OCCURRED WAS TOO REMOTE.

1. The instrument used by Dr. Burton Janis to obtain the blood sample that was eventually submitted to the State

chemist for analysis was a prepackaged syringe and needle. The prepackaged syringes and needles are supplied by the hospital and apparently purchased from a medical supply house. They are kept in a drawer in the emergency room of the Salt Lake County Hospital. It was from such a drawer that the doctor obtained the particular instruments used in obtaining the blood of the defendant R-121). According to the doctor, as far as he was aware, these prepackaged instruments have never been tested to see if they are free from contamination. His only qualification being that they were purported to be sterile (R-126). The word "sterile" as defined by Dr. Janis means "no life," and in no way implies that the instruments are free from chemical contamination (R-124).

After extracting the blood sample from the arm of the defendant, the blood was placed in a vial provided by the officer (R-121). On the evening of the accident, Deputy Jack Retallick obtained from a cabinet in the emergency part of the County Hospital the vial in which the blood was placed (R-135). He testified that he examined the vial and there didn't appear to be anything in it (R-136). After the blood was placed in the vial, a piece of tape was placed over the top and Deputy Retallick kept it in his possession until the next day (R-139).

Upon leaving the County Hospital the Deputy placed the vial in his pocket and proceeded about his business (R-140). The Deputy took the vial home with him and placed it on a shelf in his refrigerator (R-140). The next morning when Deputy Rosendaal picked up Deputy Retallick at his home, he took the vial from the refrigerator and then delivered it to the State chemist R-140).

Deputy Retallick testified that he had nothing to do with the locker at the County Hospital from which he obtained the vial and that he knew nothing about the preparation of said vial; and he knew of no medical or chemical tests that had been performed to determine whether there were any impurities in it R-141).

In running the test to determine the alcohol content, Mr. Francis, the assistant State chemist, placed in the vial that contained the blood sample a "small amount of sodium fluoride powder" (R-149). From the original sample three cubic centimeters were then withdrawn and placed in a 50 millimeter centrifuge tube (R-150). Fifteen cubic centimeters of distilled water was then added to the centrifuge tube along with three cubic centimeters of sodium tungstate solution and three cubic centimeters of two-thirds normal sulphuric acid solution. From this mixture a ten cubic centimeter quantity was withdrawn and placed in a distillation flask (R-150). What alcohol was present in the sample was then distilled and collected (R-150). This minute quantity was then increased in volume to twenty-five cubic centimeters (R-150). To this solution was added one cubic centimeter of potassium dichromate and also five cubic centemeters of sulphuric acid (R-151).

Mr. Francis testified that the chemicals used are only checked one against the other in that the dichromate is checked against the alcohol (R-155). He ran no tests to determine the purety of the sodium fluoride powder, distilled water, sodium tungstate solution or sulphuric acid solution.

Mr. Francis on Cross- Examination testified that if both the alcohol and the dichromate were not pure, then the test would be valueless and he stated on page 157, "Then,

I would be lost." On page 152 Mr. Francis stated that he did not know the manufacturer or supplier of particular chemicals used as re agents for the test, nor could he testify as to their purety. On page 153 he testified that these re agents had been prepared prior to the date defendant's blood was analyzed, and that in fact, some of the solutions had been prepared possibly three months before the date the test was run. The only statement made by Mr. Francis as to the quality of the chemicals used is on page 154 wherein he stated that he knew that the chemicals were of "re-agent grade." There was no evidence offered as to what "re-agent agrade" means. He is not certain that the chemicals used were pure. His conclusion was based upon the fact that the specifications given to the supplier call for this particular grade of chemical. At no time were the chemicals ever checked except against one another (R-157). Mr. Francis testified further that even though he later rechecked the blood he was not in any position to state whether the chemicals used in the second analysis run October 31, 1963, were any more pure than those used in the original test, and therefore, any result would be subject to the same error that occurred during the running of the first test R-140).

In light of the testimony of Dr. Janis, Deputy Retallick and Mr. Francis, it would appear that in no instance did the State prove that the instruments used in extracting the blood, and the vial in which the blood was placed were free from contamination that would later effect the result of the test. Nor did Mr. Francis in his testimony show that there was any degree of assurance that the chemicals used were of a grade that would guarantee a reasonably accurate result. Based upon such evidence, it is obvious that the jury could only speculate as to the accuracy of the test, and

in admitting the test into evidence, the Court erred and the error substantially prejudiced the defendant, because it was the only evidence of intoxication with the exception of Golightly's statement that he thought he smelled alcohol.

Dr. Janis testified that if the vial used was not clean it would have an effect upon the blood alcohol determination (R-124). The fact that the implements used by the doctor in extracting the blood and the vial in which the blood was placed were free from contamination is not shown in the State's evidence in that the doctor who administered the test answered that as far as he was aware the sterile or non-contaminated nature of the implements used was not something he was personally aware of, and in fact, his opinion was second-hand in that it was based upon the representations of others (R-126). The only evidence presented by the State that the defendant may have been intoxicated at the time of the accident was the blood alcohol test, which as above indicated, is subject to very serious doubt.

Officer Retallick testified that in making his investigation at the scene of the accident he did not talk to the defendant (R-91). George W. Golightly, one of the eye-witnesses, testified only that at the time he observed the defendant on the floor of the car, he thought he detected the odor of alcohol (R-101). There were no tests at the scene of the accident. There is no testimony from anyone that they observed the defendant either walk or stand. The only examination made of the defendant was while he was prone upon a hospital bed. The only evidence as to the manner in which the defendant operated his car involved only seconds just prior to the accident (R-113).

2. According to the State's witnesses, the accident occurred just shortly after 10:00 o'clock p.m. (R-115), and

the blood sample was not obtained until 11:54 p.m. (R-125). The only testimony before the jury was to the effect that the only alcohol consumed by the defendant was taken into his system within ten minutes before the accident. In the case of *Commonwealth vs. Harmman*, 119 A.2nd 211, the Court stated as follows: "The Commonwealth's expert, Dr. Muehlberger, testified that from one-half hour to an hour and a half is required for the alcohol in one's stomach to find its way completely into the blood stream. If defendant in fact did not drink prior to 3:00 p.m., the Commonwealth's own witness has demonstrated that the alcohol in his system may not have been fully effective until 4:30 p.m., about fifteen minutes before intoximeter test was apparently given, but at least forty minutes after he stopped driving. Under the circumstances just set forth, the result of the test would not be indicative of defendant's condition at the time he was arrested. . . . We conclude that the introduction of the evidence of the result of the intoximeter test, when evidence of the Commonwealth's witness, Dr. Muehlberger, indicates that the alcohol may not have completely entered the blood stream at the time of the defendant's arrest, was improper. Since the jury may have relied upon such evidence and may have found the defendant 'guilty' solely or largely from that evidence, we conclude that a new trial should be awarded."

The State's witness Dr. Stewart C. Harvey testified extensively about the effect of alcohol upon the human body (R-161 through R-172). However, on voir dire the doctor did state that a blood alcohol test shows only the concentration of alcohol in the human system at the moment the blood is withdrawn R-172). He testified further that the alcohol concentration may be increasing or decreasing de-

pending upon when the alcohol was ingested by the individual from whom the blood was extracted (R-172, 173).

Dr. Harvey testified that an average person weighing approximately 160 pounds would have to consume almost seven ounces of 86 proof whiskey to bring his blood alcohol level to .1 per cent (R-175). On Cross-Examination the doctor stated that the rate which alcohol is absorbed into the system depends upon whether or not the person who has ingested the alcoholic beverage has recently eaten or whether the beverage was taken upon an empty stomach (R-176). He was then asked, "If you were to take a blood test that was taken some hour and fifty-four minutes or two hours, or something like that, in order to be able to tell what the blood level was at the time of the accident, you would have to know when the alcohol was actually consumed?" His answer on page 177 was that that was correct. When further asked, "Now, suppose that the alcohol was actually consumed only about eight or ten minutes before the accident, would it be your opinion that the level of alcohol in the blood at the time of the accident would be less than .19?" He answered, "Sir, it would be; it would be, at that short time before the accident; probably not more than 15% or 20% of maximum; the first ten minutes, of course, are quite rapid —" According to the doctor's testimony, fifteen per cent of the total involved in this case would be approximately .03 (R-179). Dr. Harvey further testified that when a chemical analysis is run upon a blood sample if the re-agents are not pure, or reasonably so, the result would not be correct and even when tests of sample solutions are run, if the alcohol and the dichromate are not pure or reasonably so, then the results would be incorrect (R-180).

In this case as in *Commonwealth v. Harmman* (supra) the State's expert witness testified that there would be a material difference between the alcohol level of the blood in the defendant at the time of the accident as compared to the time when the blood was taken an hour and fifty-four minutes later. In an article titled "The Physiological Action of Alcohol," AMA Journal, Vol. 167, No. 15 (August 9, 1958) Dr. Muehlberger, the expert referred to in the Pennsylvania case made a very careful analysis of the rate of absorption after alcohol is ingested. It was his conclusion that the absorption rate depends upon the quantity of alcohol ingested, its concentration in the drink, the nature and quality of the dilluting material already in the stomach, and the duration of its sojourn in the stomach. The only definite figure he gives on the rate of absorption is that about 90 per cent of the alcohol from a single drink when taken on an empty stomach will be absorbed by the end of the first hour. All of the experts who testified during the course of the trial did admit that there is a possibility of error. Every real scientist in the field agrees that the chemical tests alone should never be used as a basis for a conviction, but should be used only as corroboration; and the great weight should be given to the objective's symptoms. In the case presently before the Court, the only evidence of intoxication is the blood test. See Forrester, Chemical Tests For Alcohol In Traffic Law Enforcement, page 57.

In addition to other possibilities of error heretofore discussed, one should never overlook the possibility that the blood sample may have been contaminated before it reached the laboratory and such contamination may have effected in the final result of the analysis. It is well known

that alcohol is commonly used by doctors and nurses and by the suppliers of medical implements as an anticeptic.

Quite frequently the defendant in a drunk driving case will have been injured in an automobile collision, as occurred in this case, and taken to a hospital before a blood specimen is taken. If his injury is serious, it is not unlikely that he will be given an anticeptic either immediately upon being placed in an ambulance or upon his arrival at the hospital. There are numerous types of anticeptics. Some of them are mildly diluted with alcohol. This is particularly true of novocaine.

The defendant did sustain a serious injury. According to the doctor he was rendered unconscious. He suffered a serious laceration of his face and ear. If the ordinary procedures were followed in this case, it would be logical to presume that either in the ambulance or upon his admission to the hospital some anticeptic was applied and that possibly some pain killer, such as novocaine, may have been administered to him. In the case of *Lynch v. Clark*, 194 P.2d 416, the Court stated: "When the ultimate issue is intoxication as in drunk driving cases, it may be that evidence of alcoholic content of the blood, properly secured and presented, may suffice to prove intoxication. Be that as it may, a blood test to determine intoxication is more remote from conduct, and therefore from contributory negligence, than the test based upon preceptability because of the known fact that the same quantity of alcohol in blood does not produce in all persons the same degree of perceptable divergence from the normal. In view of this fact, we may wisely limit our decision in the pending case to the narrow issue presented. We hold that in the absence of other evidence tending to show contribu-

tory negligence, evidence derived solely from a blood test indicating intoxication . . . was insufficient to present a jury question of contributory negligence. Thus the Court erred in admitting into evidence the blood test in that no proper foundation was laid to show that the test may be reasonably accurate and the blood test was too remote from the time the accident occurred."

POINT III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS AT THE CONCLUSION OF THE STATE'S CASE IN CHIEF BECAUSE OF THE STATE'S FAILURE TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME OF AUTOMOBILE HOMICIDE; AND THEREFORE, THE VERDICT OF THE JURY WAS BASED SOLELY UPON SUPPOSITION AND CONJECTURE.

The State in presenting its evidence relied upon three points. The first being the result of the blood test; the second being the automobile accident itself and the testimony of Robert Bennion who was one of the eye-witnesses to the accident; and the third point was the testimony of George W. Golightly who testified that immediately after the accident he thought that he observed the odor of alcohol on or about the defendant.

There was no evidence presented by the State about any test given at the scene of the accident. The usual tests given are a coordination test, i.e. tilting the head backward, closing the eyes, touching the nose with the tips of the forefinger; the walking tests, i.e. a heel to toe walk down a straight line; and the balance tests, i.e. dropping a coin or keys upon the ground and requiring defendant to pick them up while standing upon one leg. There is no evidence that at the time of the accident the defendant had any of the

obvious signs of intoxication such as a flushed face, bleary eyes, thick or slurred speech; nor was there any evidence presented by the State that the defendant's clothes were disarranged or dirty as a result of drinking.

The Court instructed the jury in Instruction No. 13 that the mere fact that the defendant's breath smelled of alcohol was not in and of itself sufficient to show that the defendant was under the influence of intoxicating liquor. However, the only evidence the State produced as to the condition of the defendant at the time of the accident was that there was an odor of alcohol on his person.

The Court instructed the jury also in Instruction No. 9 that the mere fact that the accident had occurred is not to be taken as proof in and of itself that the defendant at the time of the accident was engaged in an unlawful act or acts; and also instructed the jury that accidents may happen without any violation of law or criminal negligence on the part of anyone.

The State relied upon the testimony of the two eye-witnesses, Mr. Bennion and Mr. Golightly. Mr. Bennion described the rather unusual movements of the defendant's car just before the accident occurred. Mr. Golightly testified that he observed the headlights of the defendant's car cross over into the north bound lane of traffic just before the accident occurred.

The defendant's evidence did show that he was suffering from Meniere's Disease, and that he was subject to a reoccurrence of the violent symptoms he experienced in March of 1962. According to the medical evidence presented there was a very distinct probability that violent symptoms of the disease might reoccur at any time. If in fact these symptoms occurred on the night of the accident,

it would certainly explain the unusual manuevering of the defendant's car just prior to the time of the accident.

The jury, certainly, in rendering its verdict, had to resort to conjecture or speculation in finding that first, the defendant was under the influence of intoxicating liquor in that the only testimony before the jury was to the effect that the alcohol consumed by the defendant had been ingested eight to ten minutes before the accident.

The State's only evidence before the jury was the fact that an automobil accident had occurred and that one Flemming Christensen had died as a result of said accident. Speculation and conjecture would be the only method by which, under the evidence presented by the State, the jury could have found the defendant had operated his automobile in a reckless, negligent or careless manner; and at the time of so doing was under the influence of intoxicating liquor to such a degree as to render him incapable of safely driving his automobile in the same manner that a reasonable, prudent person with the full possession of his faculties would have operated said automobile under similar circumstances.

CONCLUSION

The Trial Court erred in granting the State's motion to strike out all of the evidence concerning Meniere's Disease and further erred in admitting the blood test because of its lack of foundation and in submitting the matter to the jury and therefore this Court should reverse the Lower Court and remand the case for a new trial.