

2006

Walter Noel Stewart v. Bountiful City : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**WALTER NOEL STEWART,
Appellant,**

vs.

**BOUNTIFUL CITY,
Appellee.**

Case No. 20060047

**BENCH TRIAL NOVEMBER 10TH, 2005, ORDER OF THE SECOND DISTRICT
COURT, DAVIS COUNTY, STATE OF UTAH BOUNTIFUL DEPARTMENT
BEFORE THE HONORABLE THOMAS L. KAY**

Case No. 055801909

APPELLANT'S BRIEF

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**FILED
UTAH APPELLATE COURTS**

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STATEMENT OF JURISDICTION

Utah Court of Appeals has jurisdiction of this case pursuant to Sections 78-2a-3(2)(e) and 78-2-2(4) of the Utah Code Annotated. Appellant jurisdictional overview is evident as to matters that are final orders from a Utah District Court (not including capital offenses), or as transferred to the Court of Appeals from the Supreme Court if it has original jurisdiction.

STATEMENT OF ISSUES

Did the District Court err in its November 10, 2005 ruling, both as to the evidence and law? Specifically, was this Decision and Order supported by substantial evidence and relative to Bountiful Police Department Pursuit Policy [92-1 September 1, 1996]¹ for convictions of speed and failure to stop? Was Bountiful City Officer Kerry Bell (Bell), while patrolling 500 South in “rush hour traffic,” drawn to Walter Noel Stewart’s (Stewart’s) pick-up truck because of its emergency lights being activated, not because of excess speed? Could Stewart, or anyone, have been exceeding the speed limit in such traffic along 500 South Bountiful where there are traffic lights at every block and where at the 1000 - 1100 East location the road narrows from four total lanes down to one in each direction? Are circumstances plausible that in heavy “rush-hour” traffic for which Stewart was “moving with traffic (and looking to find Lakeview Hospital turn-off),” Bell had one

¹ Bountiful Police Department, Pursuit Driving Policy (September 1, 1996)

block from her stated patrol point (1000 East – heading westbound) to have estimated Stewart’s speed, turned on and differentiated her radar gun, then in heavy and enfilade traffic have clocked Stewart’s pick-up truck which was heading in the opposite direction, also have made a U-turn in traffic, arriving at where Stewart had stopped at 1100 East to ask directions of another party? Regarding failure to stop, did Bell recognize that Stewart did stop appropriately? Is this born out wherein Bell both, did not, as required, radio Bountiful communications that she was in pursuit of Stewart prior to when he had stopped (where he first was aware she intended stopping him and where he told of his injury and intentions to go to emergency care)? Also did the fact that Bell, at this point, deactivated her patrol lights and followed Stewart to the hospital contravene such citation? Why did Bell who stated she was not in pursuit of Stewart, then issue such citation? Was Bell’s “over zealous[ness]” ignored by the Hearing Officer, who did not find these after-the-fact citations suspect, even though against the instruction of superiors Criel and Gilbert who came to the hospital (and in the presence of Stewart), advised Bell “to let this matter drop?” Did the Honorable Thomas L. Kay rule for the Appellee (Bountiful City) by crafting a decision for what the Bountiful City prosecutor intimated, not what the record, along with relevant applicable pursuit policy showed? Did the Court in providing what is tantamount to anecdotal evidence and laded analogy of its own, disregard the factual basis for this case? Appeal is hereby taken from the entire judgement.

STATEMENT OF THE CASE

This is an appeal from a decision by the lower Court, Honorable Thomas L. Kay, ruling for Bountiful City convictions of speeding and failure to stop citations against Stewart (Appellant). The Defendant was sentenced the same day to a fine of \$155.00 for which he paid Bountiful City the same day, November 10, 2005. The Court of Appeals of Utah filed sua sponte for summary motion, which was withdrawn after Appellant filed a memorandum (Appellee chose not to respond).

STATEMENT OF RELEVANT FACTS

1. Stewart, a general contractor, was injured July 8th, 2005, from a serious construction related mishap (severe 8" wound from a skill saw getting caught in his shorts cutting into his upper thigh [8:1-3; 20: 14:20-21;19-23; 33:12-15; 39; 44: 20-21; 45: 6-8]). Stewart knew the construction sight was hard to find from previous experiences with knowledgeable sub-contractors, who with specific directions still got lost trying to find this location [39:19-23; 29:21-25; 30:1-10].
2. This among other reasons prompted Stewart, upon cutting his clothing loose from the framing saw, to get into his truck and drive to I-15 freeway [39]. Stewart, anticipating going south for medical help, entered the southbound access ramp to Bountiful [39]. During the same time, Stewart called 911 for an exact address for Bountiful Hospital [40:1-2]. When told by 911 of the Lake View Hospital location on 500 South Bountiful, Stewart declined ambulance service

expecting his arrival from the freeway either faster, or as fast as ambulance help could arrive to him [34:11-23; 40:22-24; 50:14-20; 50:15-20; 51:3-5]. Stewart had experience with this 500 South area in Bountiful because he had turned construction draws into a business located on this road [34, 40]. Stewart was aware of 911 current problems related to dispatching EMS services [41:2-12; 31, 32:1-5].

3. During the 911 call, Stewart informed her of his intention to proceed to the hospital, described the nature of his injuries, and offered the description and color of his truck as well as indicating that his flasher lights were activated on his vehicle [41:19-22, 50:4-7; also 911 tape]. 911 indicated to Stewart she would inform significant authorities “he was on his way,” and he expected from this he might obtain a police escort. [50:2-7].

4. Officer Bell did notice Stewart’s vehicle had activated emergency lights as she encountered his truck heading eastbound on 500 South Bountiful at the same time when she was westbound [9:5-9,18-22; 58:20-22] . Bell stated that Stewart was clocked at 45 mph [5:6-8]. Stewart and Bell had somewhat differing opinions of traffic conditions: Bell moderate [9:13-17] and Stewart stated heavy traffic with many stop lights and four lanes narrowing down to two in the vicinity where this incident occurred [12:9; 41:22-24; 42:1-5]. 500 South Bountiful is a traffic thoroughfare in Bountiful [49:21-24]. Despite signals at each block, a narrowing lane for traffic (four becoming two), and heavy traffic that would have both

impeded all traffic and given difficulty to Bell to find which vehicle if any was actually being clocked by the radar beam, and also whether any traffic could have been proceeding at 45 mph, Bell was able to clock Stewart at this speed [ibid; also 47:7-11].

5. Bell stated that she encountered Stewart while at 1000 East location on 500 South for which she was heading the opposite direction and evidently did not have her radar gun activated at the time, where she made an estimate of his speed [5:6-12]. She had one block to differentiate Stewart from enfilade traffic, activate her radar gun, clock his vehicle, make a U-turn to intercept Stewart's truck that by that time had slowed down and stopped so Stewart could ask directions to the Hospital turn-off road [13:19-25; 20:1-2; 41:22-24; 42:1-5; 42:22-25; 43:3-9; 58:20-24]. Stewart was during all relevant times moving with heavy traffic flow [47:7-11; 48:21-24; 49:17-24]. Stewart followed traffic laws and signals [47:5-13].

6. Stewart stopped again when making his U-turn because Bell, who evidently had been delayed in traffic, came into the intersection with her patrol car [14:22-24; 43:10-12]. It was during this time the Defendant realized that Bell had intentions to stop his vehicle [14:19-20; 42:16-23; 54:19-21; 59:8-11].

7. Stewart from the open window of his truck told Bell several times that he had serious injuries and needed emergency treatment at the hospital [43:14-22; 54:19-21]. After this conversation with Stewart, Bell called Bountiful Communications for the first time [10:16-18]. Whether on her own volition or having been instructed

by communications to turn off her patrol lights and to proceed to Lake View Hospital with Stewart, she did both [ibid; and 6:23-24]. Bell also called for back-up officers, Corporal Creil and Scott Gilbert [10:22-23]. Bell admitted she was not in pursuit of Stewart [10:6].

8. Bell and Stewart had conflicting testimony on the point of whether Stewart had also informed Bell that he was seriously injured, or just needed to go to the hospital [11:22-23; 43:10-21; 54:19-21; 59:18-25] (Bell only acknowledged that Stewart said he had to get to the Hospital – ibid).

9: Bell and the city prosecutor were conflicted on whether or not Bell was in pursuit of Stewart: Bell at [10:6] “I wasn’t in a pursuit with your vehicle;” also [10:17-18] “I advised them that I was going to be following you to Lakeview...”; yet for prosecutor Ynchausti: “...he’s already been evading her that he’s not going to just keep driving off. She doesn’t know that he actually has an injury...” [61:3-5]. There is not any record indicating that Stewart was “evading” Bell or intended to [10:6; 59:18-25].

10: At the Lake View Hospital parking lot, Stewart parked his truck and was walking into the emergency room where, if not before, it became apparent to Bell that he had serious injury [17:19-23]. Officer Bell had parked in the ambulance emergency lane and intercepted Stewart as he was attempting to enter the hospital and told him he would need to move his truck immediately or she would call a tow truck to impound his vehicle [17:7-11; 44:2-11]. Stewart had parked at a stall that

was located near the emergency room [ibid]. Despite his injuries, Stewart followed Bell's order, walked to his truck and moved it approximately 80 to 100 feet from the previous parking location at the hospital [ibid].

11: At Lakeview Hospital Bell attempted to come into the emergency room, evidently to issue traffic citations, but was told by both attending physicians and emergency nurses that she would not be allowed in because Stewart's injuries were too serious for her to be there [18:17-23;45:2-5]. Some hours later after Stewart's leg was sewn up, Bell accompanied by Officer Creil and Officer Gilbert came into the emergency room with Stewart [18:24-25; 19-1-7; 45:18-25] . During this time, Creil and Gilbert said words to the effect, we are done here this is over, let this matter drop and let's get out of here [46:2-15]. Bell left with Creil and Gilbert, but did not let it go. She came back and wrote the citations which are the instant proceedings [46:16-20].

SUMMARY OF THE ARGUMENTS

At stake is whether Stewart drove carefully and obeying traffic laws to travel to Lakeview Hospital for emergency care, also whether Bell's citations for speeding and failure to stop were wrongly issued? In the district case, Bountiful City focused considerably on whether Stewart should have accepted ambulance care from a remote construction sight. This had no bearing, Stewart did not even call 911 until sometime after his injury. He was alone at the site, where he knew it difficult to

locate, when injured by a power saw. Stewart, after cutting away clothing that had been entangled in the framing saw, proceeded to I-15 on ramp heading south to Bountiful. It was somewhere soon before or after entering the freeway that Stewart placed a call to 911 to ask directions to the Bountiful hospital and also declined ambulance service. He also inform 911 of his pick-up truck's description and that he had activated emergency lights on the vehicle.

The duty of peace officers to apprehend is not absolute. Whether Bell would have even noticed Stewart's truck among heavy-rush-hour traffic had not his emergency lights been flashing seems doubtful. More unconvincing is Bells testimony that within one block from where Stewart stopped to make a U-turn at 1100 East intersection, for her to have: estimated speed, activated her radar gun, clocked speed, made a U-turn and headed back to intercept Stewart. If Stewart were traveling at 45 mph, even given that he stopped to ask directions this would have been remarkable if not impossible. 500 South is a thoroughfare of Bountiful with average speeds of 40 mph, but rush-hour traffic would never attain such speeds given that there are signal lights every block and also that this road narrows from four lanes to two in the vicinity of where this incident occurred.

No testimony ever suggests that Stewart was not moving with rush-hour traffic, the Hearing Officer finds as much. But then he castigates Stewart as comparable to those who "rape and murder" for his attempt to get to Lakeview by

moving with rush-hour traffic flow. It is unbecoming finding, wrongly administered against the evidence.

Regarding failure to stop, Bell stated that she was not pursuing Stewart. Stewart did stop at the point he first became aware that Bell had such intentions. This was at 1100 East where he had also made a U-turn. This is where he informed Bell that he had serious injuries that required emergency care. After being so informed, Bell for the first time called communications. Pursuit Policy requires such call being placed by officers when initiating pursuit within the city. After conversations with Stewart and placing her call to communications, Bell deactivated her patrol lights and followed Stewart to Lakeview. Had this matter ended there it would not have been before the Court, including Appeals.

At the hospital Bell, who by then could see "blood covered," clothing stopped Stewart from entering the building and made him re-park his truck to another stall 80 to 100 feet away. She also attempted to enter the hospital emergency treatment room but was barred by hospital staff. Later after care had been provided, Bell was advised in the presence of Stewart, by superiors Creil and Gilbert "to let the matter drop." The Court disregarded this advise, as well as a contradiction of logic and testimony to arrive at its laded emotional findings. It is un-becoming and not appropriate and should be overturned in its entirety.

ARGUMENTS

13. Whether Stewart should have accepted 911's offer for ambulance assistance is not at issue though greatly focused upon during the trial by Bountiful City. Whether Stewart drove appropriately in heavy traffic on his way to get emergency care is, as well, whether Bell issued citations were both spurious and wrong? The duty of peace officers to apprehend is not absolute "...such as driving ten miles over the speed limit." Day v. State EX. Rel. D. of Public Safety 980 P2.d 1171 (1179) para 10. Whether Bell would have picked Stewart out at all in heavy-rush-hour traffic seems doubtful, had she not seen his emergency lights that Stewart had activated in response to his 911 call? This is not refuted by Bell or anyone else. Bell at the time was heading west at 1000 East location and in the opposite direction of Stewart. Also at this location the road narrows from a four lane (two either direction) to a single lane each direction, thereby slowing traffic to a greater extent than already it would be in coming through numerous signals. In addition, Stewart who was familiar with 500 South from earlier business matters, still did not know the exact location of the Lakeview Hospital turn-off and would not be speeding even if he could have in such traffic conditions. If Bell really used her radar gun, which she did not evidently turn on until after estimating Stewart's speed, it seems doubtful it could have been used to distinguish anyone's speed. The Court did not offer any explanation for its ruling and did not consider whether

speeding under the circumstances was even justifiable or whether it could have been detected.

14. By her own testimony, Bell had one block in which to have estimated Stewart's speed, powered her radar gun and clocked him, while at the same time trying to make a U-turn in such traffic to put her in a position to intercept his truck at 1100 East. By then Stewart was only one block away making a U-turn, this distance traveled could not be accounted for by a 45 mph speed. If traveling at 66 ft./sec., as Bell suggests, it seems impossible he could have still been within a city block (or even two) to have stopped for Bell. Bell's testimony seems further clouded since she did not even recognize that Stewart had asked directions at the 1100 East intersection. This was probably indicative that she was several cars back at the time, as Stewart had testified.

15. Stewart, aware that he had gone too far, stopped for directions. He evidently did learn from such directions that Medical Lane was the road to the hospital wherein he made a U-turn and ultimately went there, after stopping for Bell. Tellingly, Bell did not offer to lend any assistance, and did not in any respect do so when Stewart proceeded to the hospital.

16. Bell's testimony was clouded and not credible, such as her account that traffic was moderate rather than heavy, even the Hearing Officer from his own experience at such times along 500 South knew better [62:18-20]. Another example is that Bell did not remember the rather significant event that superiors,

Creil and Gilbert had been with her in the hospital room with Stewart (wherein they advised to let the matter drop). She only acknowledged they were at the hospital.

17. What is left are the self serving arguments by the prosecutor regarding 911 and Stewart's declining ambulance service, or "radar tuning forks," etc. to deliver a device that is calibrated, but even if it was used to determine such result is remarkable under the circumstances. Traffic flow at the most opportune on 500 South is roughly 40 mph [49:20-22], definitely not likely in rush hour circumstances, particularly in the section where this street narrows. The Court had a dilemma which he resolved by disregarding the facts and accepting suspect testimony, particularly under the conditions existing during this incident. That Stewart was proceeding with traffic flow is obviously evident, no other possibility exists from the record. Whether in this case selective enforcement is justified seems doubtful, Day v. State EX. Rel. D. of Public Safety 980 P2.d 1171 (1179) para 10. That probability under where the supposed violation took place, at 1000 East the point where the 500 South road narrows seems astounding if not also impossible?

18. There seems no contradiction that Stewart first knew of Bell's intent to stop his vehicle at 1100 East intersection. Bell suggests this when she states that she was not in pursuit of his vehicle prior to that time. It also is suggested by the fact that until that moment Bell did not call Bountiful communications as required, to inform them of any pursuit of Stewart, BOUNTIFUL POLICE DEPARTMENT

General Order 92-1 (Effective date September 1, 1996) Section A. Pursuit Within Bountiful para. 1.

19. After Stewart's conversations with Bell at 1100 East intersection where he had stopped, whether Bell agreed or not that he told her of his sever injuries, both agreed, that Stewart said he needed to go to the Lakeview Hospital for ER treatment. In any case, Bell did call Bountiful communications at this time. Also maybe resulting from that call, Bell deactivated her emergency patrol lights and followed Stewart to Lakeview. She also requested back up for which superiors, Creil and Gilbert arrived to the hospital sometime later, although the record does not indicate the time of their arrival. There is not any evidence that Stewart ever failed to stop for Bell, unless his leaving after indicating he needed to go the hospital and for which Bell had already turned off her patrol lights to follow to Lakeview. The only suggestion of evading was intimations from the prosecutor and also in the Hearing Officer's leading questions, apparently for ulterior motives against Stewart, since more than ample record already existed from previous testimony on any aspect he revisited (and he had previously castigated both parties for using too much time).

20. *This is born out in the laded emotional language of the Hearing Officer*, which along with his leading questions repeatedly asked of Stewart seemed intent on nothing more than entrapment and an un-becoming tirade. He thus equated Stewart: who was driving speeds allowed by rush-hour traffic;

following all relevant regulations, and signal lights; and even complied with the spurious ill intended orders from an “over-zealous” Officer Bell, who made a blood soaked Stewart re-park his truck or have it towed, before being allowed to access emergency help. His analogy to Stewart’s actions as comparable to “those who rape and murder ..excusing themselves by the actions of others” [63:1-6], is unconscionable for this Court.

21. This mind-set is rife throughout this decision including where the Court states that Stewart had “an attitude,” though nothing anywhere suggest anything but compliance by Stewart, even as previously mentioned when moving his truck at Bell’s demands, even though the officer by then, if not before knew full well there was a very seriously injured person at her mercy. Should Stewart as the Court suggests have waited on Bell for a normal traffic stop? See for instance Day v. State EX. Rel. D. of Public Safety 980 P.2d 1171,(1175) para 5 “.. government actions that reasonably induce detrimental reliance by a member of the public.” Clearly Stewart was wise to have proceeded to the hospital as he did when Bell insisted he stop for a possible minor speeding ticket after being told several times that Stewart had severe injuries. This is substantiated as well given the response that Stewart received by Bell at the hospital parking lot after she was certain of such injuries. The Court disregarded inconsistencies fraught throughout the record by Bell, whom it lightly castigated. The Court overlooked that Bell would not let this matter drop even in the face of hospital persons trying to accomplish emergency

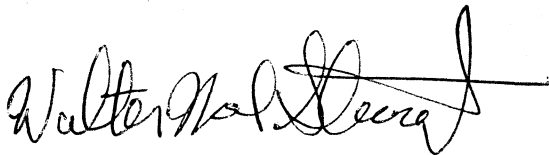
treatment and suggestions from superiors that she was being vehement without rational grounds for her actions. In fact the Court blames Stewart for Bell's behavior suggesting he "had an attitude." Bountiful pursuit policy 92-1 IV. para 1 it states, "The major objective of the Bountiful Police Department is the protection of life and property.....Pursuits are only justified when there is a necessity of immediate apprehension." In State of Utah, DEPARTMENT OF PUBLIC SAFETY vs. Utah Career Service Review Board 92 P.3d 776 para 3. it is applicable that officers do not have absolute discretion to determine necessity of pursuit. Specifically it states that a suspect must be exhibiting attempts to avoid apprehension by unlawful tactics that would further endanger the public. Certainly Stewart here was only trying to get to the hospital and in doing so following all traffic regulations.

CONCLUSIONS

Bell was attracted to Stewart's truck by the flashing emergency lights and could not have detected or clocked him speeding in rush hour traffic on 500 South 1000 East Bountiful. This is where the road narrows and traffic is further slowed from numerous signal lights by the road narrowing from four lanes to two (one each direction). Stewart did stop for Bell at the 1100 South intersection where for the first time she called communications, turned off her patrol lights followed to Lakeview. This depicted that Stewart had complied, and Bell admitted that she was not in pursuit of Stewart. At Utah Code Annotate 41-6a-212 "Emergency Vehicles

Policy Regarding Pursuit" it is stated "...do not relieve the operator of an authorized emergency vehicle of the duty to act as a reasonable, prudent emergency vehicle operator in like circumstances." Was Stewart acting both reasonably and lawfully to obtain emergency treatment at Lakeview Hospital, evidently so in the eyes of Bell's superiors, Creil and Gilbert. At the time they had little knowledge of the factual basis for Bell's citations, or even her vindictive barring Stewart from hospital care until he re-parked his truck, but still they thought it being over-zealous and wanted to just leave Stewart to his medical help. The Court stretched in its reach to attain otherwise, based on hunches and boiler plate that is the substance of every traffic stop, and not applicable here. But even more, the District Court offered an emotion laded invective that is unseemly, also ignoring substantive evidence to the contrary. This order and decision should be reversed, refunding Stewart the \$155.00 monies paid in fines to Bountiful City on November 10, 2005.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Walter Noel Stewart". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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CERTIFICATE OF SERVICE

I, Walter Noel Stewart certify that the foregoing **APPELLANT'S BRIEF**, was hand

delivered to the Court of Appeals and sent by U.S. Postal Service to: *AUGUST 25 4*

WNS

John C. Ynchusti Bountiful City Prosecutor
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Walter Noel Stewart
8/25/2005

NO AMENDMENT NECESSARY

Walter H. Hunt

8/25/06