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State of Utah v. Robert Glen Houtz : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

20608

STATE OF UTAH,

Plaintiff and Respondent,

vs. Case No. 20608

ROBERT GLEN HOUTZ,

Defendant and Appellant.

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty of two felony counts of Automobile Homicide and five misdemeanor counts consisting of Driving while Under the Influence of Alcohol and Inflicting Bodily Injury to Another, two counts, Leaving the scene of Accident involving Death and Injury to Persons, Leaving Scene of Accident Involving Damage to Property and Failure to Report Accident, in the Fifth Judicial District Court in and for Beaver County, State of Utah, the Honorable J. Harlan Burns, presiding.

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IN THE SUPREME COURT FOR THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Respondent, vs. ROBERT GLEN HOUTZ, Defendant and Appellant.	Case No. 20608

BRIEF OF APPELLANT

Statement of Issues Presented on Appeal

A. Did the Court's decision to try the case in the Defendant's absence deny Defendant his constitutional right to be present at trial.

B. Were Defendant's conviction and sentence a denial of his right to the equal protection of the laws.

C. Was there sufficient evidence as a matter of law to find the Defendant was under the influence of alcohol at the time of the accident.

Statement of the Nature of the Case

The Defendant-Appellant, ROBERT GLEN HOUTZ, appeals from a conviction and judgment of two counts of Automobile Homicide, a felony of the third degree, two counts of Driving while under the Influence of Alcohol and Inflicting Bodily Injury to Another, a Class A Misdemeanor and one count each of Leaving

the Scene of Accident involving Death and Injury to Persons, a Class A Misdemeanor, Leaving Scene of Accident Involving Damage to Property, a Class B Misdemeanor and Failure to Report Accident, a Class B Misdemeanor, in the Fifth Judicial District Court in and for Beaver County, State of Utah, the Honorable J. Harlan Burns, presiding.

Disposition of the Lower Court

The Defendant-Appellant, ROBERT GLEN HOUTZ, was charged with two counts (Counts 1 & 2 of the Information) of Automobile Homicide, a Felony of the Third Degree, in violation of Section 76-5-207, Utah Code Annotated, 1953, as amended, two counts (Counts 3 & 4 of the Information) of Driving while under the Influence of Alcohol and Inflicting Bodily Injury to Another, a Class A Misdemeanor, in violation of Section 41-6-44, Utah Code Annotated, 1953, as amended, and one count each of (Count 5) Leaving the Scene of Accident involving Death and Injury to Persons, a Class A Misdemeanor, in violation of Section 41-6-29, Utah Code Annotated, 1953, as amended, (Count 6) Leaving Scene of Accident Involving Damage to Property, a Class B Misdemeanor in violation of Section 41-6-30, Utah Code Annotated, 1953, as amended and (Count 7) Failure to Report Accident, a Class B Misdemeanor, in violation of Section 41-6-34, Utah Code Annotated, 1953, as amended. The Defendant was convicted of all counts as charged in a jury trial held without the presence of

the Defendant and was sentenced to incarceration at the Utah State Prison for an indeterminate term of not to exceed five years and a fine in the amount of $5,000.00 on Count 1, an indeterminate term of not to exceed five year to be served consecutively on Count 2, a term of 364 days to be served consecutively on Count 3, a term of 364 days on Count 4, to be served concurrently with the term imposed on Count 3, a term of 364 days on Count 5, to be served concurrently with the term imposed on Count 3 and no additional term of imprisonment on Counts 6 and 7 since they are deemed merged into the offense committed in Count 5 of the Information.

Relief Sought on Appeal

Defendant-Appellant seeks reversal of the conviction and judgment rendered below and reversal of the lower court's denial of Defendant-Appellant's Motion to Dismiss, dismissal of the information or in the alternative to have the case remanded to the Fifth Judicial Court for a new trial.

Statement of Facts

On August 12, 1984, DONALD GRONDEL, NONA GRONDEL, SHIRLEY ANN GRONDEL and DEREK GRONDEL were travelling north on

I-15 in a small four door Datsun. (T. 34, 35, 36)[1] Sometime between 6:00 and 9:00 p.m. (T. 44) or just before twilight or dark (T. 67), the GRONDEL vehicle was merging onto Highway I-15 from a rest stop. (T. 37) I-15 at that point had two lanes of traffic going each way. (T. 37) Just as the GRONDEL vehicle was merging onto the right lane of I-15, a white truck (T. 39), or a brown or bronze colored truck (T. 55), travelling at a high rate of speed (T. 59), struck the GRONDEL vehicle from behind. (T. 40, 62) The GRONDEL vehicle rolled over ejecting all four passengers (T. 41), and the truck continued up the road. (T. 62) The point of the accident was seventeen miles north of Beaver on I-15. (T. 155)

Floyd Vaughn from Honolulu, Hawaii testified that he witnessed the accident (T. 54, 55), that he had seen what appeared to be the same truck about one-half hour before the accident (T. 56), that at that time the vehicle was travelling about seventy to eighty miles per hour when it passed Vaughn's vehicle (T. 57), and that the truck ran off the side of the road on the passing lane and then cut in front of Vaughn's vehicle. (T. 57)

Later a few minutes before the accident, Vaughn observed the same truck coming up. At that time Vaughn observed

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[1]References to the trial transcript of February 27, 28, 1985 will be designated "T". References to the February 26, 1985 hearing will be designated "T_2".

the same shirtless male with light-colored hair as being the occupant of the truck. (T. 60) After passing the van, Vaughn observed:

> . . . he was going fast and he kinda from -- he almost ran off the road on the -- in his own lane side, which is the median like between the roads." (T. 60) I saw him run off one side of the road, then the other at a high speed. (T. 61)

When the truck came to the GRONDEL vehicle it was on the right hand lane and ". . .it looked like he was pulling in to pass, only he just slammed into that car." (T. 62)

Vaughn stayed at the scene five minutes then drove up the road to call for an ambulance and the highway patrol. (T. 66)

As Vaughn continued along I-15 he saw the same truck pulled over by the side of the road. (T. 69) He stopped, wrote down the California license plate number, saw the same person he had seen driving the truck before, asleep in the vehicle. (T. 70) Vaughn noticed the odor of what he assumed to be alcohol. (T. 75) He called the Utah Highway Patrol. (T. 72)

State Trooper Brent Shelby testified he had been given a license plate number and description of a vehicle from the Orem Highway Patrol dispatcher (T. 84), the description being a bronze GMC or Chevrolet pickup with a damaged right front and California License No. 1W01049. (T. 85, 86)

Trooper Shelby located a vehicle matching the description in Juab County a couple of miles north of the Yuba

Lake Interchange northbound just to the side of I-15 (T. 86), at approximately 10:50 p.m. on August 12, 1984. (T. 96, 98) A male adult in his latter forties or early fifties, grayed white hair, six feet tall, 175 - 185 pounds, was observed asleep in the vehicle (T. 17), identified by California Driver's License as ROBERT GLEN HOUTZ. (T. 89)

MR. HOUTZ was awakened and informed he was under arrest for DUI and suspicion of automobile homocide. He was taken to a hospital and a blood sample was taken at 11:36 p.m. (T. 96, 98) The blood sample tested at .27 weight per volume percent. (T.134)

Trial was scheduled for February 25, 1985 and notice was given to Defendant's counsel. (T. 13) The Court was advised by counsel for Defendant that the Defendant intended to waive the jury and try the case before the judge. (T_2.3) Since the Court had a jury already summoned for February 25, 1985, the Court scheduled another jury trial on February 25, 1985 and informed counsel that non-jury trial would begin on February 26, 1985. (T. 22) The Defendant did not appear at trial on February 26, 1985 because he was in custody in San Diego, California on a charge of driving under the influence of alcohol. (T. 13) MR. HOUTZ was arrested on the DUI charge in San Diego on February 25, 1985. (T. 13)

The Defendant's counsel moved the Court to continue the trial until HOUTZ could be present but the Court denied the motion. (T. 24) The jury trial took place on February 27th and

28th, 1985. The jury returned a verdict of guilty on all counts charged in the Information. The Defendant waived extradition on March 1, 1985 and returned to Beaver County just a few days after trial. The Defendant appeared for sentencing on March 18, 1985.

SUMMARY OF ARGUMENT

(1) The Defendant has a constitutional right to be present at trial but that right can be waived by conduct or words, such as where the Defendant voluntarily absents himself from trial. Generally, a person in custody is not a free agent and therefore cannot voluntarily waive his right to be present at trial. The burden is on the State to show voluntariness on the part of the Defendant who absents himself from trial.

The Defendant, ROBERT GLEN HOUTZ, did not appear at trial because he was incarcerated in jail in San Diego, California prior to the date set for trial. The State made no effort to determine if the Defendant would waive extradition and how quickly he could be brought to Utah, even though the State was aware that the Defendant was in jail. In actuality, the Defendant did waive extradition and was brought to Beaver County very quickly. The State failed to meet their burden of showing voluntariness and the Court should have granted Defendant's Motion to Continue the Trial until Defendant could be present.

(2) Equal protection of the laws guarantees like treatment of all those who are similarly situated and our

criminal justice system contemplates a series of graded offenses, that depend upon increasingly culpable mental states. The recent decision of State v. Bryan, No. 18948 (Utah, June 6, 1985), where the court reversed Defendant's sentence on a manslaughter conviction and ordered the lesser punishment provided under the negligent homicide statute in the motor vehicle code because both statutes specified the same "reckless" conduct, has created a situation where this Defendant, ROBERT GLEN HOUTZ, has not been treated equally.

Either Mr. HOUTZ received a more severe punishment than the Defendant in Bryan, for identical "reckless" conduct because the prosecutor chose to file automobile homicide charges rather than manslaughter charges or in the alternative, the Defendant's conduct was less culpable than the Defendant's conduct in Bryan (negligent rather than reckless conduct) and this Defendant is being unfairly punished more severely than the Defendant in Bryan. Therefore, the Defendant's sentence should be reversed and the lesser punishment provided in Bryan, should be awarded HOUTZ.

(3) The State provided no direct evidence that the Defendant, ROBERT GLEN HOUTZ, was under the influence of alcohol at the time of the accident, only circumstantial evidence that the Defendant was speeding and going from side to side on the road. That driving pattern could have been caused by circumstances that are not alcohol related. Results of a blood

alcohol test taken approximately two and one-half hours after the alleged driving should not have been admitted in accordance with the rules of evidence.

The Defendant was discovered about two hours after the accident approximately eighty (80) miles away from the accident scene. The State did not present any evidence that excluded the possibility that the Defendant could have become intoxicated after the accident. Since the State had the burden of excluding this possibility and failed, Counts 1, 2, 3 and 4 of the Information should have been dismissed or alternatively Counts 1 and 2 reduced to Negligent Homicide.

ARGUMENT

POINT I

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL.

The right to be present at trial is guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States and by Article I, Section 12 of the Utah Constitution. This right has been codified in Section 77-1-6(1)(a)(d) Utah Code Annotated 1953, as amended and Section 77-35-17(a)(2) Utah Code Annotated 1953, as amended.

In State v. Aikers, 87 Utah 507, 51 P.2d 1052, 1055 (1935), the Court stated the applicable law with regard to the right to be present at trial:

> The right to be present at all stages of the trial is claimed to be of such an absolute character that it cannot be waived either by counsel or the Defendant, and when the Court permits the trial to proceed in the absence of the Defendant the judgment of conviction must be set aside. There is no doubt but that the constitutional right to appear and defend in person and by counsel is a sacred right of one accused of crime which may not be infringed or frittered away, and is one which may not be denied by a Court or be waived by counsel.

Concerning whether the right to be present at trial can be waived by a Defendant, the Court said:

> Whether such right may be waived by the Defendant personally is a question on which the authorities are divided. . . The great weight of authority is that the Defendant may, by conduct or in words, waive such right, and that he may not take advantage of his voluntary absence, if he is at liberty on bail during some part of the proceedings at which it is his duty as well as his right to be in attendance. (Id at 1055)

However, when the Defendant is in custody, the Court must see that he is present for trial:

> Where Defendant is in custody, and therefore not a free agent, the duty is on the Court to see that he is personally present at every stage of the trial . . . His absence would be imputed, not to him, but to his custodian. . . Proceedings had in the absence of the Defendant without his fault and without his knowledge or consent, is ground for reversal. (Id at 1056)

In State v. Okamura, 570 P.2d 848 (1977), the Hawaii Supreme Court held that the burden rests on the prosecution to show voluntariness on the part of one who absents himself from

trial. With regard to whether a Defendant in custody can waive his right to be present at trial, the Court said:

> It is true that a Defendant not in custody may consent to a waiver of his right to be present at trial. . . but it is doubtful in a felony case that he has the power to do so when he is being held in custody. (Evans v. United States, 284 F.2d 393, 395 (6th Cir. 1960) Id at 852

The Supreme Court of the State of Utah apparently agrees with the Hawaii Supreme Court that the burden is on the State to show voluntariness on the part of the Defendant who absents himself from trial. In State v. Ross, 655 P.2d 641, 642 (1982), the Utah Supreme Court said:

> Counsel for Defendant, on appeal, urges that the onus is on the State to show voluntariness of absence and lack of consent to a trial in absentia to satisfy one's constitutional right to "due process." No one denies the general principal involved, but if the State failed in any respect in its obligation to establish voluntariness, or waiver of consent, the Defendant supplied any such void by his own actions which prevented his attendance at trial. (Id underlining added)

In State v. Ross, (supra), the trial had actually commenced with the Defendant present but after several days the trial was continued because of the Defendant's medical problems. Defendant, who was released on bail during this continuance, absconded and was arrested on other charges in Nebraska. He was released on bail and could have returned immediately to Utah, with Nebraska's consent, to continue the trial, but the Defendant refused to return and even fought an extradition warrant. The

Court held that the Defendant's voluntary actions were sufficient to establish voluntariness or waiver of consent.

In the present case, written notice of trial was sent to Defendant's counsel, setting trial for on the 25th day of February, 1985. (T. 21) The Court, based on information that the Defendant intended to waive the jury, rescheduled the matter for February 26, 1985 upon oral notice to Defendant's counsel. (T. 22) Defendant's counsel contacted Defendant and told him the trial would start Tuesday, the 26th. (T. 14) The State became aware that the Defendant was in jail in California in San Diego on the 26th of February. (T. 13) The Court had continued the trial date until February 27th (T_2. 8), and the trial lasted two days. (T. 1) Nowhere in the record did the State make any attempt to contact Mr. Houtz or to determine if he would be willing to waive extradition and how quickly he could be brought to Utah. In actuality, Mr. Houtz did waive extradition and was immediately brought to Beaver County and appeared for sentencing on March 18, 1985. (See Judgment and Sentence and Commitment)

In State v. Ross, supra, the fact that the State made the effort to try to extradite the Defendant in order to conclude his trial and that the Defendant refused to waive extradition seemed to carry at lot of weight in the Court's decision that the Defendant voluntarily absented himself or waived his right to be present.

In the present case, the State made no effort at all to contact the Defendant, while he was in custody, to determine if he could be brought back to stand trial. Since the Defendant was arrested before he was to appear for trial, he was in custody and unable to voluntarily waive his right to be present at trial. The State's failure to make any effort to bring Defendant back from San Diego for trial seems to be prima facie evidence that they failed to meet their burden of showing voluntariness on the part of Defendant.

The lower Court's refusal to continue the trial resulted in a denial of MR. HOUTZ Constitutional right to be present at trial. The fact that the lower Court did proceed without the presence of the Defendant requires a reversal of the judgment of conviction and this Court should remand the case to the District Court for a new trial.

POINT II.

DEFENDANT'S SENTENCE OF TWO CONSECUTIVE ZERO TO FIVE YEAR TERMS FOR HIS CONVICTION ON TWO AUTOMOBILE HOMOCIDE COUNTS WAS A DENIAL OF HIS EQUAL PROTECTION RIGHTS.

The Utah Supreme Court has recently explained the Court's responsibility to insure the evenhanded application of the criminal laws.

> . . . Nevertheless, we cannot disregard our responsibility to assure the rational and evenhanded application of the criminal laws. Equal protection of the law guarantees like treatment of all those who are similarly situated.

> Accordingly, the criminal laws must be written so that there are significant differences between offenses and so that the exact same conduct is not subject to different penalties depending under which of two statutory sections a prosecutor chooses to charge. That would be a form of arbitrariness that is foreign to our system of law. . .State v. Bryan, No. 18948 (Utah, June 6, 1985)

With regard to specific statutes this Court has said:

> Statutes which treat classes of citizens differently do not offend equal protection guarantees unless the classification and different treatment bear no rational relationship to the objective of the legislation. (Liedtke v. Schettler, 649 P.2d 80 (Utah 1982).

> Statutes may deal with different classes differently, if all within the same class are treated uniformly, and so long as there is some reasonable basis for differentiation between classes related to the purpose of the statute. (State v. Piepenburg, 602 P.2d 702 (Utah 1979)

In State v. Bryan, supra at 6, the Supreme Court explained that if an intoxicated driver negligently causes the death of another, he can be found guilty of automobile homocide, a third degree felony, but if an intoxicated driver acts "recklessly" he can be found guilty of manslaughter, a second degree felony. The Court said:

> Our justice system contemplates a series of graded offenses, that depend upon increasingly culpable mental states. If the State can prove that a defendant acted with the more culpable mental state, the defendant can be convicted of the higher offense.

However, the Court, in Bryan, supra, reversed Defendant's sentence on a manslaughter conviction because the

definition of "recklessness" under the manslaughter statute and "reckless disregard of the safety of others", as defined in the negligent homocide statute in the Motor Vehicle Code were determined to be the same. The Court then determined the Defendant was entitled to the lesser punishment provided under the negligent homocide statute in the Motor Vehicle Code.

Now, due to the decision in Bryan, supra, and until the legislature can consider this problem, there is no longer a series of graded offenses as contemplated by the legislature and the classification and different treatment given intoxicated drivers who cause the death of others bears no rational relationship to the objective of the legislature. There is no reasonable basis for the differentiation between reckless and negligent conduct of intoxicated drivers. The current statutes and court rulings provide the person guilty of the more culpable conduct with a lesser sentence.

In Bryan, supra, the evidence established that the Defendant had been drinking heavily and had been driving at a high rate of speed while driving through red semifor lights on heavily travelled roads.

In the present case, the prosecution claims that the Defendant was heavily intoxicated and was driving at an extremely high rate of speed. The prosecutor chose to charge the Defendant with two counts of automobile homocide rather than attempt to gain a conviction for two counts of manslaughter. Had the

prosecutor charged and obtained a conviction on manslaughter, the Defendant would have been entitled to be punished under the misdemeanor statute of negligent homocide under the Motor Vehicle Code.

Alternatively, if the conduct of the Defendant HOUTZ was actually negligent and not reckless, then the Defendant's conduct was less culpable than the Defendant's conduct in Bryan, supra, and this Defendant is being unfairly punished more severely than the Defendant in Bryan, supra.

In order to provide the Defendant, HOUTZ, with equal protection of the laws Defendant should be entitled to be sentenced under the misdemeanor provisions.

Therefore, Defendant requests that this Court reverse his sentencing under the felony provisions of the automobile homocide statute and remand the case to the District Court to be sentenced as a misdemeanor.

POINT III.

AS A MATTER OF LAW, PLAINTIFF FAILED TO PROVE BEYOND A REASONABLE DOUBT DEFENDANT WAS UNDER THE INFLUENCE OF ALCOHOL AT THE TIME OF THE ACCIDENT.

The trial transcript does not reveal an exact time of the accident. Mr. Conrad Grimshaw testified that he received a call to respond to the accident at 9:30 p.m. on August 12, 1984. (T. 49) Mr. Grimshaw testified that he was the second ambulance and that he thought the first ambulance was enroute about 9:15

p.m. and probably received a call approximately 9:10 to 9:12 p.m. (T. 51) SHIRLEY ANN GRONDEL, one of the victims in this matter, testified that she did not remember what time the accident happened other than sometime between 6:00 and 9:00 p.m. (T. 44) Mr. Floyd Vaughn testified that he stopped for around five minutes to give aid and then he drove for a long time until he could call in and report the accident. (T. 66) He testified that "the time of the accident was just before twilight or dusk. There was no need for light but it was right at the end of the day." (T. 67) The amount of time it took Mr. Vaughn to stop and give aid and then drive to a phone is probably about the amount of time before 9:10 p.m. when the accident happened. The accident took place approximately 16 or 17 miles north of Beaver. (T. 155)

MR. HOUTZ was found parked to the side of I-15 just North of the Yuba Lake Interchange approximately 15 to 18 miles south of Levan. (T. 86) The Court can take judicial notice of the distance between the accident scene (16-17 miles north of Beaver on I-15) and where the Houtz vehicle was located (just north of the Yuba Lake Interchange on I-15). The distance appears to be around eighty miles. MR. HOUTZ was approached by the officers at approximately 10:50 p.m. (T. 96), and a blood alcohol test was drawn at the hospital at 11:36 p.m. (T. 98)

The only evidence of intoxication presented at the time of the accident was the testimony of Floyd Vaughn. Mr. Vaughn

did not provide any direct evidence of intoxication at the time of the accident but he did observe the Defendant's driving ability. Mr. Vaughn testified that he witnessed the accident (T. 54, 55), that he had seen what appeared to be the same truck about one-half hour before the accident (T. 56), that at that time the vehicle was travelling about seventy to eighty miles per hour when it passed Vaughn's vehicle (T. 57).

> He went by fast. He was in the passing lane and like ran off onto the berm on that side, came back in and moved like all the way into the front of us in our lane in one fast motion so that Mr. Zadick had to brake to avoid, I don't want to say a collision, but danger. (T. 57)

Later a few minutes before the accident Vaughn observed the same truck coming up.

> As he came up alongside our van, I had to get over real fast because he almost like bumped us side to side or we -- he came over like right next to me and I just looked directly out my driver's side window and he was like -- the truck was partially in our lane right exactly next to me. So I had to move over onto the road shoulder and allow him to pass me. (T. 58)

At that time Vaughn observed the same shirtless male with light-colored hair as being the occupant of the truck. (T. 60)

After passing the van, Vaughn observed:

> . . . he was going fast and he kinda from -- he almost ran off the road on the -- in his own lane side, which is the median like between the roads ". (T. 60) I saw him run off one side of the road, then the other at a high speed. (T.61)

When the truck came to the GRONDEL vehicle it was on the right hand lane and ". . .it looked like he was pulling in to pass, only he just slammed into that car." (T. 62)

Other than this driving pattern, which could be attributed to sleepiness, recklessness, negligence or other conditions not caused by intoxication, no other evidence was presented to show that the Defendant was under the influence of alcohol at the time of the accident.

POINT A

EVIDENCE OF DEFENDANT'S BLOOD ALCOHOL LEVEL AND THE BURNOFF RATE OF ALCOHOL SHOULD NOT HAVE BEEN ADMITTED.

The Court, over the objection of Defendant's trial counsel, admitted the results of a blood alcohol test taken at 10:36 that evening and evidence of the burnoff rate or dissipation rate of alcohol from the blood.

Section 41-6-44.5 Utah Code Annotated, as Amended, 1953 as it was written at the time of the accident is as follows:

> (1) In any action or proceeding in which it is material to prove that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or with a blood alcohol content statutorily prohibited, the results of a chemical test or tests as authorized in section 41-6-44.10 shall be admissible as evidence.
> (2) If the chemical test was taken within two hours of the alleged driving or actual physical control, the blood alcohol level of the person at the time of the alleged driving or actual physical control shall be presumed to be not less than the level of the alcohol

determined to be in the blood by the chemical test.
(3) If the chemical test was taken more than two hours after the alleged driving or actual physical control, the test result shall be admissible as evidence of the person's blood alcohol level at the time of the alleged driving or actual physical control, but the trier of fact shall determine what weight shall be given to the result of the test.
(4) The foregoing provisions of this section shall not prevent a court from receiving otherwise admissible evidence as to a defendant's blood alcohol level at the time of the alleged driving or actual physical control.

Section 76-5-207, Utah Code Annotated, as amended, 1953, as it was in effect at the time of the accident:

76-5-207 (1) Criminal homicide constitutes automobile homicide if the actor, while under the influence of alcohol, a controlled substance, or any drug, to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner. For the purposes of this section, the standard of negligence shall be that of simple negligence, the failure to exercise that degree of care which ordinarily reasonable and prudent persons exercise under like or similar circumstances.
(2) Any chemical test administered on a defendant with his consent or after his arrest under this section, whether with or against his consent, shall be admissible in accordance with the rules of evidence.
(3) For purposes of this section, a motor vehicle constitutes any self-propelled vehicle and includes, but is not limited to, any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.
(4) Automobile homicide is a felony of the third degree.

Section 76-5-207 (2) provides that any chemical test is admissible according to the rules of evidence. Section 41-6-44.5 (3) allows the result of chemical tests administered more than two hours after the alleged driving to be admitted but the weight to be given such a test is to be determined by the trier of fact.

In State v. Bradley, 578 P.2d 1267 (1978) the Utah Supreme Court, in a case decided before the current amendments to the above statutes, allowed a test of Defendant's blood alcohol content taken nearly four hours after the accident to be admitted into evidence because it was relevant to corroborate the testimony of the State's witness who observed the Defendant and concluded he was under the influence of alcohol.

It is unclear whether Section 41-6-44.5 (3) applies to Section 76-5-207 since 76-5-207 (2) seems to clearly and precisely state the standard for admissibility of chemical tests. Bradley, supra, appears to be consistent with the standard in 76-5-207 (2). That is to base admissibility on the rules of evidence. In the present case, there is no direct evidence of intoxication and the blood alcohol test and burnoff rate testimony are irrelevant and much to prejudicial to be allowed into evidence. Under the Rules of Evidence, that testimony should not have been allowed.

POINT B

THE STATE HAS THE BURDEN OF EXCLUDING THE POSSIBILITY THAT THE DEFENDANT COULD HAVE BECOME INTOXICATED AFTER THE ACCIDENT.

Mr. Burtis Quarnberg, as an expert witness for the State, testified on cross-examination that it would take a little over a pint of whiskey injested all at once to achieve a blood alcohol level of .27. (T. 147,,128), and that it was possible for a person to achieve a blood alcohol level of .27 in two and a half hours. (T. 125,149) Mr. Quarnberg felt is was unlikely but not impossible. (T. 149)

The State failed to provide any evidence of drinking alcohol prior to the accident and failed to prove Defendant had no access to alcohol after the accident.

In State v. Clark, 296 A.2d 475 (Vermont, 1972), the officers came upon an overturned truck and discovered the Defendant who appeared to be intoxicated. The Defendant admitted that he was the driver of the truck and that the accident happened because he had fallen asleep.

> Entirely lacking in the presentation of the State was any evidence, direct or circumstantial, of the time when the Defendant had the accident... "Intoxication may be evidenced circumstantially by prior or subsequent condition within such time that the condition may be supposed to be continuous" 2 J. Wigmore, Evidence §235 (3d ed 1940) "This accords with our rule that an inference may be and often is retroactive; a trier may from present conditions infer a previous fact" Ackerman v. Kogut, 117 Vt. 40,44, 84 A.2d 131,134 (1951).
>
> But it is obvious to have the inference of being under the influence of intoxicating liquor

> applied retroactively in the present case that the burden was upon the State of showing by evidence that the accident caused by the defendant occurred within a time that the intoxicated condition, in which he was found at the scene, had been continuous since the accident time. This burden of proof was not met by the State, and its chain of evidence was broken. By the omission of this link in its chain of evidence, the State failed to prove the defendant guilty as charged beyond a reasonable doubt.

In Brown v. State, 584 P.2d 231, (Oklahoma, 1978), the Court held:

> The evidence showing the defendant was intoxicated when arrested at the scene of the accident was insufficient to sustain a conviction in the absence of evidence as to when the accident occurred and of evidence excluding the possibility that the defendant could have become intoxicated after the accident but before the police arrived.

In the present case it is clear that at the time of the accident the Defendant was speeding and that he was going from one side of the road to the other. However, in each instance, this side to side motion occurred while passing a vehicle on the two lane highway. Whether this driving pattern was caused by sleepiness, recklessness, negligence, or drunkennesss is not shown by the evidence. Following the accident the Defendant's vehicle was not observed again for at least an hour and probably closer to two hours later and approximately eighty miles away from the accident scene. The record does not show if Defendant consumed alcohol after the accident but before his arrest. At trial, no one bothered to ask any witnesses if the Defendant had

access to alcoholic beverages in his vehicle. In Brown v. State, supra at 234, the Court said:

> The fact there was no testimony concerning whether the defendant's car contained liquor must therefore inure to the benefit of the defendant. Had the officers been able to testify positively that they looked in the car and in the near vicinity, and found no liquor or "empties," then that would have been one more circumstance tending to indicate that the defendant was intoxicated while driving.

At the conclusion of the State's case, defense counsel moved to dismiss Counts 1 and 2 or alternatively to reduce them to negligent homocide on the basis that the State did not show at the time of the accident that the Defendant, ROBERT GLEN HOUTZ, was intoxicated. The Court should have granted this motion and in addition, Counts 3 and 4 should also have been dismissed since they also require evidence of intoxication at the time of the alleged driving.

CONCLUSION

The lower Court's refusal to continue the trial until MR. HOUTZ could be present resulted in a denial of MR. HOUTZ constitutional right to be present at trial. The fact that the lower court did proceed without the presence of the Defendant requires a reversal of the judgment of conviction and this Court should remand the case to the District Court for a new trial.

In order to provide the Defendant, HOUTZ, with equal protection of the laws Defendant should be entitled to be

sentenced under the same misdemeanor provisions as the Defendant in the Bryan, supra, case. Therefore, Defendant requests that this Court reverse his sentencing under the felony provisions of the automobile homocide statute and remand the case to the District Court to be sentenced as a misdemeanor.

Plaintiff failed to prove that Defendant was under the influence of alcohol at the time of the accident and consequently, the conviction and judgment should be reversed and Counts 1, 2, 3 and 4 of the Information dismissed or in the alternative Counts 1 and 2 should be reduced to negligent homocide.

RESPECTFULLY submitted this 21st day of October, 1985.

LEO G. KANELL
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I certify that I hand delivered four (4) true and correct copies of the foregoing Brief of Appellant to Mr. David L. Wilkinson, Utah State Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 21st day of October, 1985.

LEO G. KANELL
Attorney for Defendant/Appellant

A D D E N D U M

76-5-207. Automobile homicide. (1) Criminal homicide constitutes automobile homicide if the actor, while under the influence of ~~intoxicating liquor~~ alcohol, a controlled substance, or any drug, to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner. For the purposes of this section, the standard of negligence shall be that of simple negligence, the failure to exercise that degree of care which ordinarily reasonable and prudent persons exercise under like or similar circumstances.

(2) ~~The presumption established by subsection 41-6-44(b), relating to blood alcohol percentages, shall be applicable to this section, and any~~ Any chemical test administered on a defendant with his consent or after his arrest under this section, whether with or against his consent, shall be admissible in accordance with the rules of evidence.

(3) For purposes of this section, a motor vehicle constitutes any self-propelled vehicle and includes, but is not limited to, any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.

(4) Automobile homicide is a felony of the third degree.

History: C. 1953, 76-5-207, enacted by L. 1973, ch. 196, § 76-5-207; L. 1974, ch. 32, § 11; 1981, ch. 63, § 1; 1983, ch. 99, § 20.

Compiler's Notes.

The 1981 amendment added the second sentence of subsec. (1); substituted "subsection 41-6-44(b)" in subsec. (2) for "section 41-6-44(b) of the Utah Motor Vehicle Act"; substituted "this section" in subsec. (3) for "the automobile homicide section"; and made a minor change in punctuation.

Repealing Clause.

Section 21 of Laws 1983, ch. 99 provided: "Section 41-6-44.2, Utah Code Annotated 1953, as last amended by Chapter 4, Laws of Utah 1982, Second Special Session, is repealed."

Effective Date.

Section 22 of Laws 1983, ch. 99 provided: "This act shall take effect August 1, 1983."

Law Reviews.

Utah Legislative Survey — 1981, 1982 Utah L. Rev. 125, 139.

DECISIONS UNDER FORMER LAW

Criminal negligence required.

Criminal negligence, not simple negligence, is required to support a conviction of automobile homicide under this section; criminal negligence is defined by 76-2-103(4), and jury must be instructed in accordance therewith. State v. Chavez (1979) 605 P 2d 1226, overruling State v. Durrant (1977) 561 P 2d 1056, State v. Anderson (1977) 561 P 2d 1061 and State v. Wade (1977) 572 P 2d 398.

Where defendant's judgment upon conviction of charge of automobile homicide was not final at time of State v. Chavez (1979) 605 P 2d 1226, ruling that conviction of such charge required a finding of criminal negligence, defendant was entitled to claim benefit of that ruling. State v. Belgard (1980) 615 P 2d 1274.

41-6-44. Driving under the influence of alcohol or drug or with high blood alcohol content — Criminal punishment — Arrest without warrant — Suspension or revocation of license. ~~(a)~~ (1) It is unlawful and punishable as provided in ~~subsection (d) of~~ this section for any person with a blood alcohol content of .08% or greater by weight, or who is under the influence of alcohol, or ~~who is under the influence of~~ any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely driving a vehicle, to drive or be in actual physical control of ~~any~~ a vehicle within this state. The fact that ~~any~~ a person charged with violating this section is or has been legally entitled to use alcohol or a drug ~~shall~~ does not constitute a defense against any charge of violating this section.

~~(b) In any criminal prosecution for a violation of subsection (a) of this section relating to driving a vehicle while under the influence of alcohol, or in any civil suit or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's blood, breath, or other bodily substance shall give rise to the following presumptions:~~

~~(1) If there was at that time 0.05 per cent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol;~~

~~(2) If there was at that time in excess of 0.05 per cent but less than 0.08 per cent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol;~~

~~(3) If there was at the time 0.08 per cent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol;~~

~~(4) The foregoing provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the person was under the influence of alcohol.~~

~~(c)~~ (2) Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood.

~~(d)~~ (3) Every person who is convicted the first time of a violation of subsection (1) of this section shall be punished by imprisonment for not less than 60 days nor more than six months, or by a fine of $299, or by both such fine and imprisonment; ~~provided~~ except that ~~in~~ if the ~~event such~~ person ~~shall have~~ has inflicted a bodily injury upon another as a proximate result of having operated ~~said~~ the vehicle in a negligent manner, he shall be punished by imprisonment in the county jail for not more than one year, and, in the discretion of the court, by a fine of not more than $1,000. For the purposes of this section, the standard of negligence ~~shall be~~ is that of simple negligence, the failure to exercise that degree of care which ordinarily reasonable and prudent persons exercise under like or similar circumstances.

~~(e)~~ (4) In addition to the penalties provided ~~herein~~ for in subsection (3), the court shall, upon a first conviction, impose a mandatory jail sentence of not less than ~~two~~ 48 consecutive hours nor more than 10 days with emphasis on serving in the drunk tank of the jail, or require the person to work in ~~an alcohol rehabilitation facility~~ a community-service work program for not less than two nor more than 10 days ~~or~~ and, in addition to the jail sentence or the work in the community-service work program, order the person to ~~obtain treatment at an~~ participate in an assessment and educational series at a licensed alcohol rehabilitation facility.

~~(f)~~ (5) Upon a second conviction within five years after a first conviction under this section or under a local ordinance similar to this section adopted in compliance with subsection 41-6-43 (1), the court shall, in addition to the penalties provided for in subsection ~~(d)~~ (3), impose a mandatory jail sentence of not less than ~~two~~ 48 consecutive hours nor more than 10 days with emphasis on serving in the drunk tank of the jail, or require the person to work in ~~an alcohol rehabilitation facility~~ a community-service work program for not less than 10 nor more than 30 days ~~or~~ and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility and the court may, in its discretion, order the person to obtain treatment at an alcohol rehabilitation facility. Upon a subsequent conviction within five years after a second conviction under this section

or under a local ordinance similar to this section adopted in compliance with subsection 41-6-43 (1), the court shall, in addition to the penalties provided for in subsection ~~(d)~~ (3), impose a mandatory jail sentence of not less than 30 nor more than 90 days with emphasis on serving in the drunk tank of the jail, or require the person to work in ~~an alcohol rehabilitation facility~~ a community-service work project for not less than 30 nor more than 90 days ~~plus~~ and, in addition to the jail sentence or work in the community-service work program, order the person to obtain treatment at an alcohol rehabilitation facility. No portion of any sentence imposed ~~pursuant to~~ under subsection ~~(d)~~ (3) shall be suspended ~~nor shall~~ and the convicted person shall not be eligible for parole or probation until such time as ~~the~~ any sentence ~~provided for in this subsection~~ imposed under this section has been served. Probation or parole resulting from a conviction for a violation of this section or a local ordinance similar to this section adopted in compliance with subsection 41-6-43 (1) shall not be terminated and the department shall not reinstate any license suspended or revoked as a result of such conviction, if it is a second or subsequent such conviction within five years, until and unless the convicted person has furnished evidence satisfactory to the department that all fines and fees, including fees for restitution, and rehabilitation costs, assessed against the person, have been paid.

(6) The provisions in subsections (4) and (5) that require a sentencing court to order a convicted person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility, obtain, in the discretion of the court, treatment at an alcohol rehabilitation facility, or obtain, mandatorily, treatment at an alcohol rehabilitation facility, or do any combination of those things, apply to a conviction for a violation of section 41-6-45 that qualifies as a prior offense under subsection (7), so as to require the court to render the same order regarding education or treatment at an alcohol rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under section 41-6-45 that qualifies as a prior offense under subsection (7), as he would render in connection with applying respectively, the first, second, or subsequent conviction requirements of subsections 41-6-44(4) and (5). For purposes of determining whether a conviction under section 41-6-45 which qualified as a prior conviction under subsection (7), is a first, second, or subsequent conviction under this subsection, a previous conviction under either section 41-6-44 or 41-6-45 is deemed a prior conviction. Any alcohol rehabilitation program and any community-based or other education program provided for in this section must be approved by the department of social services.

~~(g)~~ (7) (a) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of section 41-6-45 or of an ordinance enacted pursuant to subsection 41-6-43(b) in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense. The statement shall be an offer of proof of the facts which show whether or not there was consumption of alcohol or drugs, or a combination of both, by the defendant, in connection with the offense.

(b) The court shall advise the defendant ~~prior to the acceptance of~~ before accepting the plea offered ~~pursuant to~~ under this subsection of the consequences of a violation of section 41-6-45 as follows: If the court accepts the defendant's plea of guilty or no contest to a charge of violating section 41-6-45, and the prosecutor states for the record that there was consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense, the resulting conviction shall be a prior offense for the purposes of ~~paragraph (f)~~ subsection (5) of this section.

(c) The court shall notify the department ~~of motor vehicles~~ of each conviction of section 41-6-45, which shall be a prior offense for the purposes of ~~paragraph (f)~~ subsection (5) of this section.

~~(h)~~ (8) A peace officer may, without a warrant, arrest a person for a violation of this section when ~~such~~ the violation is coupled with an accident or collision in which ~~such~~ the person is involved and when ~~such~~ the violation has, in fact, been committed, although not in his presence, if the officer has reasonable cause to believe that the violation was committed by ~~such~~ the person.

~~(i)~~ (9) The department of public safety shall ~~revoke~~ suspend for a period of 90 days the operator's ~~or chauffeur's~~ license of any person convicted for the first time under subsection (1) of this section, and shall revoke for one year the license of any person otherwise convicted under this section, except that the department may subtract from any suspension period the number of days for which a license was previously suspended under section 41-2-19.6 if the previous suspension was based on the same occurrence which the record of conviction is based upon.

History: L. 1941, ch. 52, § 34; C. 1943, 57-7-111; L. 1949, ch. 65, § 1; 1957, ch. 75, § 1; 1967, ch. 88, § 2; 1969, ch. 107, § 2; 1977, ch. 268, § 3; 1979, ch. 243, § 1; 1981, ch. 63, § 2; 1982, ch. 46, § 1; 1983, ch. 99, § 13; 1983, ch. 103, § 1; 1983, ch. 183, § 33.

Compiler's Notes.

Laws 1983, ch. 183, discontinuing separate classification for chauffeur's license, is effective January 1, 1984.

The 1982 amendment increased the minimum term in subsec. (d) from 30 to 60 days; deleted "not less than $100 nor more than" before "$299" in subsec. (d); inserted subsec. (e); redesignated former subsec. (e) as (f); increased the period of work from not less than two nor more than 10 days to not less than 10 nor more than 30 days in the first sentence of subsec. (f); added "or to obtain treatment at an alcohol rehabilitation facility" to the first sentence of subsec. (f); increased the periods in the second sentence of subsec. (f) from not less than 10 nor more than 30 days to not less than 30 nor more than 90 days; added "plus obtain treatment at an alcohol rehabilitation facility" to the second sentence of subsec. (f); inserted subsec. (g); redesignated former subsecs. (f) and (g) as (h) and (i).

Effective Date.

Section 2 of Laws 1982, ch. 46 provided that the act should take effect upon approval. Approved February 19, 1982.

Laws 1983, ch. 183, discontinuing separate classification for chauffeur's license, is effective January 1, 1984.

Section
41-6-29. Driver's duty in event of accident — Stop at scene of accident — Penalty.
41-6-31. Give name — Render assistance.

41-6-29. Driver's duty in event of accident — Stop at scene of accident — Penalty. (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 41-6-31. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment in the county jail for not less than ~~thirty~~ 30 days nor more than one year or by fine of not less than $100 nor more than $5,000 or by both such fine and imprisonment.

(c) The department shall revoke the operator's ~~or chauffeur's~~ license of the person so convicted for a period not to exceed one year.

History: L. 1941, ch. 52, § 19; C. 1943, 57-7-96; L. 1961, ch. 86, § 1; 1983, ch. 183, § 31.

41-6-30. Accidents involving damage to vehicle or other property — Misdemeanor. The driver of any vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of section 41-6-31. Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop or comply with said requirements under such circumstances shall be guilty of a misdemeanor.

History: L. 1941, ch. 52, § 20; C. 1943, 57-7-97; L. 1977, ch. 269, § 1; 1979, ch. 242, § 6.

Compiler's Notes.

The 1977 amendment inserted "or other property" near the beginning of the section; and substituted "an infraction" for "a misdemeanor" at the end of the section.

The 1979 amendment substituted "a misdemeanor" for "an infraction" at the end of the section.

41-6-31. Give name — Render assistance. The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address, and the registration number of the vehicle he is driving and shall upon request and if available exhibit his operator's ~~or chauffeur's~~ license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

History: L. 1941, ch. 52, § 21; C. 1943, 57-7-98; L. 1983, ch. 183, § 32.

41-6-34. Accidents involving injury, death, or damage of $400 or more — Duty to notify police. The driver of a vehicle involved in an accident resulting in injury to or death of any person or property damage to an apparent extent of $400 or more, shall immediately by the quickest means of communication give notice of such accident to the local police department if such accident occurs within a municipality, otherwise to the office of the county sheriff or to a state trooper.

History: L. 1941, ch. 52, § 24; C. 1943, 57-7-101; L. 1955, ch. 71, § 1; 1977, ch. 269, § 3; 1979, ch. 242, § 7.

Compiler's Notes.

The 1955 amendment inserted "or property damage to an apparent extent of $100 or more"; and substituted "state trooper" for "state highway patrolman."

The 1977 amendment increased the damage amount from $100 to $200.

The 1979 amendment increased the damage amount from $200 to $400.

Cross-References.

Collision with unattended vehicle or other property, 41-6-32.

Failure to report accident, penalty, 41-12-32.

False or forged reports, penalty, 41-12-32.

Notice given by occupant of vehicle, 41-6-36.

41-6-43.10. Negligent homicide — Death occurring within one year — Penalty — Revocation of license or privilege to drive. ~~(a)~~ (1) When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide.

~~(b)~~ (2) Any person convicted of negligent homicide shall be punished by imprisonment in the county jail for not more than one year or by fine of not less than $100 nor more than $1,000, or by both such fine and imprisonment.

~~(c)~~ (3) The department shall revoke the license or permit to drive and any nonresident operating privilege of any person convicted of negligent homicide.

History: C. 1953, 41-6-43.10, enacted by L. 1955, ch. 71, § 1; L. 1957, ch. 78, § 2; 1983, ch. 99, § 12.

AMENDMENTS
TO THE
CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Comparable Provision.

Montana Const., Art. III, § 16.

Cross-References.

Defendant as witness, 77-44-5.

Double jeopardy, statutory provision, 77-1-10.

—acquittal notwithstanding defect in information or indictment, 77-24-12.

—acquittal or dismissal without judgment, 77-24-11.

—acts punishable in different ways, punishment limited to one, 76-1-23.

77-1-6. Rights of defendant. (1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

History: C. 1953, 77-1-5, enacted by L. 1980, ch. 15, § 2.

Cross-References.

Actions without payment of fees by impecunious suitors, 21-7-2 to 21-7-4.

Arrest of judgment, effect on further prosecution, 77-35-23.

Attorneys, rights in disbarment proceedings, 78-51-16.

Constitutional rights of accused, Const. Art. I, §§ 7-13.

Counsel for indigents, 77-32-1 et seq.

Criminal Code provisions on multiple prosecutions and double jeopardy, 76-1-401 et seq.

Discharge of defendant turned state's witness, 77-17-2.

Discharge of defendant upon compromise of offense as barring further prosecution, 77-35-25.

Due process of law, Const. Art. I, § 7.

Errors and defects not affecting substantial rights disregarded, 77-35-30.

Husband and wife, marital privilege as to confidential communications, Rules of Evidence, Rule 28.

Husband or wife not competent witness against or for each other without consent, exceptions, 78-24-8.

Jury trial and waiver thereof, Const. Art. I, § 10; 77-35-17.

Lineup procedures, 77-8-1 et seq.

Ordinance violation cases, jeopardy in, 10-7-65.

Proceedings when facts charged do not constitute an offense, 77-35-17.

Self-incrimination, Rules of Evidence, Rules 24, 25.

Subpoena for witnesses for impecunious defendant in criminal case, 21-5-14.

Witness unable to procure bond, examination, 77-35-7.

Appearance at trial in prison clothing.

Defendant has a constitutional right not to appear in identifiable prison clothing at trial; this does not require state to provide defendant with an expensive wardrobe, but state should provide clean, respectable clothes, not identifiable as prison clothes, for defendant at trial. Chess v. Smith (1980) 617 P 2d 341.

Waiver of right not to stand trial in prison clothes.

Trial judge should on his own initiative inquire of a defendant whether he wishes to waive his right not to appear in prison clothes so that the record affirmatively shows an intelligent and conscious waiver by the defendant if he chooses to stand trial in prison clothes. Chess v. Smith (1980) 617 P 2d 341.

77-35-17. Rule 17 — The trial. (a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

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

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(1) Misdemeanor cases when defendant is in custody;

(2) Felony cases when defendant is in custody;

(3) Felony cases when defendant is on bail or recognizance; and

(4) Misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in section 78-46-5.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impanelled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(3) The prosecution shall offer evidence in support of the charge;

(4) When the prosecution has rested, the defense may present its case;

(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and

(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(j) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(k) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits and papers which have been received as evidence, except depositions; and each juror may also take with him any notes of the testimony or other proceedings taken by himself, but none taken by any other person.

(l) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(n) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(o) At the conclusion of the evidence by the prosecution, or at the conclusion of all of the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

History: C. 1953, 77-35-17, enacted by L. 1980, ch. 14, § 1; L. 1981, ch. 60, § 1; 1982, ch. 11, § 1.

Compiler's Notes.

The 1981 amendment changed the time for requesting a jury trial from five to ten days prior to trial in subsec. (d).

The 1982 amendment substituted subsec. (e) for "In capital cases the jury shall consist misdemeanor cases the jury shall consist of eight persons; and in all other misdemeanor cases the jury shall consist of four persons. The court may order the selection of alternate jurors in any case."

Cross-References.

Capital felony, penalty, execution of penalty, 76-3-206, 76-3-207, 77-19-1 et seq.

Circuit court trials for ordinance viola-