1987

Salt Lake City v. Leland Dennis : Brief of Respondent

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

SALT LAKE CITY, a municipal corporation,	)	Case No. 870107-CA
Plaintiff-Respondent,	)	Priority Classification - 2
vs.	)	
LELAND DENNIS,	)	
Defendant-Appellant.	)	

BRIEF OF THE PLAINTIFF-RESPONDENT

Appeal from a Verdict of Guilty and Sentence
in the Fifth Circuit Court in and for
Salt Lake County, State of Utah
Honorable Judge Sheila K. McCleve

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STATEMENT OF JURISDICTION

This is an appeal from a criminal conviction after a jury trial in the Fifth Circuit Court for Salt Lake County, the Honorable Sheila K. McCleve, Judge, presiding. The case involved charges of violating Section 105 of the Revised Ordinances of Salt Lake City prohibiting driving or being in actual physical control of a vehicle while under the influence of alcohol. Authority for this appeal is provided in Section 78-2a-3, Utah Code Annotated.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court's Instruction No. 16 correctly state the law regarding "physical control" of an automobile necessary for conviction of driving under the influence under Section 105 of the Revised Ordinances of Salt Lake City?

2. Was there sufficient evidence presented to the jury to show that defendant/appellant Dennis ("Dennis") was in actual physical control of his vehicle?

3. Was the trial court's sentencing of defendant Dennis under Section 105 proper after the jury had convicted Dennis of violating Section 105?

4. Was the trial Court's admission of the intoxilyzer proper?

DETERMINATIVE ORDINANCES

Section 105, Revised Ordinances of Salt Lake City, Utah (1984)

> Users of drugs and intoxicants. It is unlawful and punishable as provided in 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 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 a vehicle within this city. The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug does not constitute a defense against any charge of violating this section

Section 108, Revised Ordinances of Salt Lake City, Utah (1965).

> Intoxicated person in or about vehicle. It shall be unlawful for any person under the influence of alcohol or any drugs to be in or about any vehicle with the intention of driving or operating such vehicle.

STATEMENT OF THE CASE

This is an appeal from a a criminal conviction and sentencing for the violation of Section 105 of the Revised Ordinances of Salt Lake City for driving or being in actual physical control of a vehicle while under the influence of alcohol. After a trial in the Fifth Circuit Court, the Honorable Judge Sheila K. McCleve presiding, a jury found Dennis guilty of Section 105. A motion for new trial was made and denied and Dennis was sentenced for violating Section 105. The facts, when viewed in the light most favorable to the jury's verdict are as follows:

FACTS

1. Dennis testified that on February 23, 1986 after completing a day of skiing at Park City, he had "several glasses of scotch "prior to eating some pizza for dinner at approximately 9:00. (R. 171.) Dennis weighs 170 pounds (R. 277) and had no lunch on the day in question. (R. 276.) Along with the pizza, and after the scotch, Dennis also drank wine prior to getting in his car to head for Salt Lake City. (R. 278.) Dennis admitted that while driving home he became lost on Foothill Drive and "at that time, I felt very tired and I felt the effects of alcohol coming on, I decided just to go to sleep." (R. 268-269.)

2. Dennis left his driving lights on and left his vehicle running while he was sleeping. (R. 275.) All that would have been required for Dennis to drive the van was for him to wake up from his drunken nap, take the emergency brake off and put the automatic transmission in drive. (R. 282.)

3. Salt Lake City Police Officer D. W. Holmes was called to the scene of 1240 South Foothill Drive after a report over the radio of a vehicle at that location. (R. 159, 169.) Officer Holmes arrived to find Dennis's van parked in a traveled roadway portion of Foothill Drive. (R. 175.) Holmes observed Dennis seated behind the steering wheel of the van with the engine running. (R. 160.) After receiving no response to his attempts to obtain Dennis's

attention from outside the vehicle Holmes opened the driver's door and turned off the ignition key whereupon Dennis woke up. (R. 160-161.) Holmes questioned Dennis and noted his confusion and slurred deliberate speech as well as an odor of alcohol within the vehicle. (R. 161- 162.)

4. After Dennis got out of the van almost falling to the ground Officer Holmes also noticed a very strong odor of alcoholic beverage on Dennis himself and began to suspect that Dennis might be intoxicated. (R. 162-163.) Officer Holmes then had Dennis perform four field sobriety tests which were all failed miserably. (R. 163-167.) At that point Officer Holmes placed Dennis under arrest for driving under the influence of alcohol. (R. 167.)

5. Officer Holmes then transferred Dennis to another Salt Lake City Police Officer, Jewkes, who had been called to the scene to transport Dennis to jail. Officer Jewkes properly performed an intoxilizer test on Dennis which showed that Dennis's blood alcohol content was .22, almost three times the legal presumption level. (Exhibits 1 and 2, R. 250.)

6. During the course of the trial discussions took place between the trial court and counsel on at least three separate occasions concerning Dennis's counsel's request for an instruction on the "lesser included offense" of being intoxicated in or about a vehicle under Section 108 of the Revised Ordinances of Salt Lake City. (R. 113-119, 228-249,

and R. 283-295.) The trial court ruled that, if the facts supported the possibility that a jury could find Dennis guilty of Section 108, but not Section 105, then Dennis was entitled to a lesser included offense instruction pursuant to State v. Baker, 671 P.2d 151 (Utah 1983). (R. 284.)

7. There was also discussion between the trial court and counsel to the effect that, if Dennis were convicted of both Section 108 and Section 105, he would have to be sentenced under the lesser of the two statutory penalties. (R. 245.)[1] To avoid the possibility of conflicting convictions the trial judge gave Instruction No. 19. (R. 67 & 304.)

8. The trial court also gave an instruction defining "actual physical control" as used in Section 105. The trial court's Instruction No. 16 read:

> You are instructed that to be in "actual physical control" of a motor vehicle the defendant need not be exercising conscious volition with regard to the vehicle and the vehicle need not be in motion, so long as the defendant, of his own choice, placed himself behind the wheel, either started the motor or allowed it to run. (R. 64 and 303.)

9. Contrary to the representation in Dennis's Brief, at page 11, the City Prosecutor did not say that Instruction

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[1] There is absolutely no support in the record for Dennis's unreferenced quotation at page 3 of his brief that "prior to that both counsel had been convinced that Judge McCleve would only impose the sentence for violating Section 108 if the defendant was convicted."

16 had "come directly from Garcia v. Schwendiman [645 P.2d 651 (Utah 1982)]." Instead, the Prosecutor said that the instruction was "taken from a charge that was prepared based on the Garcia case . . . ." (R. 232, 213-214.) Defense counsel raised no exception to Instruction No. 16. (R. 293-294.) Only after the charge to the jury did defense counsel object to Instruction 16 claiming that it did not properly represent the Supreme Court's "actual physical control" standards established in Garcia. (R. 318-322.) This was despite the fact that the City Prosecutor gave defense counsel a copy of the Garcia opinion early in the morning. The trial court polled the jury to find out whether they had placed any specific emphasis on Instruction No. 16 and all four jurors replied in the negative. (R. 323-325.)

Dennis was sentenced for his conviction under Section 105 and a motion for new trial was denied. (R. 89.)

SUMMARY OF ARGUMENTS

Instruction 16 correctly stated the law in Utah concerning "actual physical control." The Supreme Court has clearly and consistently ruled that "actual physical control" of an automobile is distinguished from "driving" and does not require either actual intent nor conscious volition. "Actual physical control" simply means that an intoxicated person seated behind the steering wheel of a car with the actual ability to drive is a threat to the safety of the public. Garcia, supra.

Dennis was clearly in actual physical control of his van while seated at the steering wheel in the traveled portion of the highway with the motor running and the lights on. His sole defense was: "I'm sorry Officer I was so drunk that I fell asleep"; this excuse is absurd and if accepted as a valid defense would completely vitiate the DUI statutes of both Salt Lake City and the State of Utah.

The trial court's giving of a lesser included offense instruction, at the request of Dennis, was appropriate under the facts and in no way prejudiced Dennis. The trial court's sentencing under Section 105 for a conviction under Section 105 was entirely appropriate because Section 105 and Section 108 are separable statutes having different elements and which are applicable under different circumstances.

Finally, the trial court's admission of the intoxilyzer results, without proper objection, was appropriate under the facts and case law.

ARGUMENT

POINT I

THE TRIAL COURT'S INSTRUCTION NO. 16 CORRECTLY STATED THE LAW OF UTAH REGARDING "ACTUAL PHYSICAL CONTROL" OF AN AUTOMOBILE NECESSARY FOR CONVICTION UNDER SECTION 105.

The recent case law on "actual physical control" is all derived from the implied consent statute cases under Section 41-6-44.10, Utah Code Annotated, 1953. The language of that statute is identical to both the State DUI statute, Section

41-6-44(1), and Section 105, Revised Ordinances of Salt Lake City. Interpretation of this language by the Utah Supreme Court is found in three cases: State v. Bugger, 25 Utah 2d 404, 483 P.2d 442 (1971); Garcia v. Schwendiman, supra; and, Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986).

In Bugger the defendant's automobile was completely off the traveled portion of the highway and the motor was not running. The defendant was asleep in the automobile but it is not clear from the opinion whether the defendant was in the back seat or the front seat.[2] Under the facts of the case the Court found that the defendant was not controlling the vehicle. The Bugger Court, however, expressly noted that the ruling would likely be different where, as in the instant case, the motor was running or the driver was in the driver's seat; it observed:

> It is noted that the cases cited by the [state] in support of its position in this matter deal with entirely different fact situations, such as where the driver was seated in his vehicle on the traveled portion of the highway; or where the motor of the vehicle was operating . . . . Bugger, supra 483 P.2d at 443.

Of course, in this case Dennis was seated behind his steering wheel in the vehicle on the traveled portion of the highway, with the motor running.

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[2] The dissent refers to the vehicle as a truck from which one could possibly deduce, though it is not in the record, that the defendant was in the front, or only, seat sleeping.

The narrow issue in Bugger was later substantially clarified in Garcia. In Garcia the defendant's vehicle was blocked from moving backwards by a concerned citizen's car and was faced in front by a fence. A police officer reporting to the scene observed Garcia attempting to start his car with the keys in the ignition. The Supreme Court extensively reviewed the law from other jurisdictions across the country to determine what constituted "actual physical control."

The Court noted that Bugger was simply a factual decision and did not apply a general rule. Garcia, supra, at 653. The Court held that:

> Acts short of starting the motor have been held to constitute actual physical control in other jurisdiction. Garcia, supra at 653.

The Court cited, with approval, an Oklahoma case holding:

> We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. . . . The defendant when arrested may have been exercising no conscious volition with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of a vehicle and could have at any time started the automobile and driven away. Garcia, supra, at 653 citing Hughes v. State, Okl. Cr., 535 P.2d 1023, 1024 (1975). (Emphasis added.)

Of course, in the instant case the vehicle was already started and running.

The Court also cited with approval another case whose facts are even closer to the instant case. In City of

Cincinnati v. Kelley, 351 N.E.2d 85 (Ohio 1976),[3] an intoxicated motorist seated in the driver's seat of a legally parked car with his hands on the steering wheel and the keys in the ignition was found to be in actual physical control of his vehicle, even though the engine was off. To reiterate, to the point of redundancy, Dennis's vehicle was running and he was in the travelled portion of the street.

The Court in Garcia also cited the case of State v. Juncewski, 308 N.W.2d 316 (Minn. 1981), where defendant who had been found inside a pickup truck seated behind and leaning against a steering wheel was held to be in "actual physical control" of the vehicles. The Garcia Court noted, Garcia, supra at 654,:

> While there was uncertainty as to whether the motor was running, the court held that "[w]hether a motor must be running before a person may be in actual physical control is essentially a policy issue." 308 N.W.2d at 320.

After this exhaustive review of national case law the Court stated its holding in Garcia as follows:

> As a matter of public policy and statutory construction, we believe that the "actual physical control" language of Utah's implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants as in Bugger, supra. Therefore, under the facts before us, where a motorist occupied the driver's position behind the steering wheel, with possession of

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[3] Garcia, supra at 654.

> the ignition key and with the apparent ability to start and move the vehicle, we hold that there has been an adequate showing of "actual physical control" under our implied consent statute. Garcia, supra at 654. (Emphasis added, footnote omitted.)

Footnote 3 to the quotation cited above notes that Garcia was having difficulty starting his car because of his degree of intoxication. The Court observed that:

> [N]othing in the record warrants a finding that the plaintiff was physically unable to start the car, as would be the case with an unconscious or sleeping motorist. Garcia, supra at 654, fn. 3.

In the instant case Dennis's van was already started. All that was required for Dennis to do to move the car was to wake up in his drunken stupor, take off the emergency brake and engage the automatic transmission.

In Lopez v. Schwendiman, supra, the intoxicated defendant was found asleep in the driver's seat with his head resting on the wheel. The truck's motor was not running, but there were tracks of the pickup in the freshly fallen snow. As a defense, Lopez contended that the truck's battery was dead and that he was merely waiting for his wife to come tow the truck home. The Court noted that the "inoperability" defense did not protect the defendant. The Court held:

> Utah's statute provides for the arrest of one "in actual physical control" of the vehicle while under the influence of alcohol and/or drugs. That requirement was intended by our legislature to protect public safety and apprehend the drunken driver before he or she

> strikes, . . . and may not be construed to exclude those whose vehicles are presently immobile because of mechanical trouble. Lopez, supra at 781.

Again, in the instant case there was no mechanical trouble with the vehicle which was running when the police arrived.

This extensive review of the law establishes conclusively that the Court's Instruction No. 16 was appropriate given the facts of this case. As the Court noted in Garcia, supra at 655:

> Similarly, we find it unnecessary for the [state] to show actual intent under the control provisions of the implied consent statute. Just as an intent to drive is inferred from one's actual driving, so also may an intent to control a vehicle be inferred from the performance of those acts which we have held to constitute actual physical control.

In Lopez and Garcia the Court held, in much the same language as Instruction 16, that a defendant who places himself behind the wheel of a car while intoxicated was guilty of "actually physically controlling" a vehicle while under the influence of alcohol. Instruction 16 was a correct statement of the law and should be affirmed by this Court.

POINT II

THE EVIDENCE AT TRIAL WAS MORE THAN SUFFICIENT TO SHOW THAT DEFENDANT WAS IN ACTUAL PHYSICAL CONTROL OF HIS VEHICLE.

The facts which were brought out at trial are extensively stated in the Statement of the Case above, pp.

3-6, and will not be reiterated in detail here. Simply put, Dennis admitted, and the police testified, that Dennis was stone drunk and asleep behind the wheel of an automobile whose engine was running and which was in the traveled portion of the roadway. There is simply no significant dispute about these facts and they are more than sufficient to meet any burden of proof possibly required.

POINT III

THE TRIAL COURT'S SENTENCING OF THE DEFENDANT UNDER SECTION 105 FOR HIS CONVICTION UNDER SECTION 105 WAS PROPER.

Over the strong objections of the City Prosecutor, the Court gave three instructions requested by Dennis concerning the lesser included offense of being drunk in or about a vehicle under Section 108, Revised Ordinances of Salt Lake City. (R. 303-304). The trial court apparently concluded that the facts presented by the defendant's testimony may have convinced a jury that Dennis was only guilty of being "drunk in or about" the vehicle, rather than being in "actual physical control" of the vehicle. Given this belief the Court properly read State v. Baker, 671 P.2d 152 (Utah 1983) to require giving an instruction on a lesser included offense, even though Section 108 was not a "necessarily included" offense. These instructions were, since they had been requested by Dennis, obviously not objected to by Dennis.

The facts in this case are so compelling for conviction that a directed verdict would have been appropriate, if such an option were available in criminal cases. Thus, even having the benefit of this lesser included instructions the jury found Dennis guilty of Section 105 for being in "actual physical control" of his vehicle. Dennis was then appropriately sentenced for violating Section 105.

Dennis now claims that Section 105 and Section 108 are identical and therefore subject to the generally accepted rule that:

> Where there are two statutes which prescribe the same conduct but impose different penalties, the violator is entitled to the lesser. Rammell v. Smith, 560 P.2d 1108, 1109 (Utah 1977). (Footnote omitted.)

There is a significance weakness in Dennis's argument which the Court set out in the very next sentence in Rammell, supra at 1109:

> The difficulty with petitioner's argument is that the two statutes referred to do not prohibit exactly the same conduct. (Emphasis added.)

Similar to that caveat, Section 105 and Section 108 in the instant case do not prohibit the same conduct.

One can quite easily envision circumstances where a conviction under Section 108 would be appropriate, but a conviction under Section 105 might prove impossible. For example, an intoxicated individual could get in the wrong car and thus be incapable of controlling the vehicle.

Similarly, an intoxicated defendant could pick up the wrong keys for his own car and thus be unable to control the vehicle. Section 108 only requires "intent[] to . . . operat[e]" whereas Section 105 requires "actual physical control." Since the two statutes, Section 105 and Section 108, do not proscribe the same conduct they do not entitle Dennis to the lesser sentencing.

The other cases cited by Dennis in his brief are similarly unavailing. State v. Loveless, 581 P.2d (Utah 1978) simply quotes and reiterates Rammell. State v. Fair, 23 Utah 2d 34, 456 P.2d 168 (1969), and State v. Shondel, 22 Utah 2d 343, 453 P.2d 146 (1969), merely restate the general rule concerning identical offenses. State v. Kish, 28 Utah 2d 430, 503 P.2d 1208 (1972), is absolutely and totally irrelevant. Kish deals with a co-defendant accepting a plea bargain while another defendant chose to go to trial. It has no bearing on the question of lesser included offenses.

Dennis also makes an argument to the effect that the Judge, by agreeing to allow a lesser included offense instruction somehow is bound to sentence on the lesser included offense even if the conviction was for the greater

offense.[4] This illogical argument is not supported by any relevant cases. The two cases cited by Dennis allegedly supporting this proposition are totally off point. In both Santobello v. New York, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971) and State v. Kay, 717 P.2d 1294 (Utah 1986) the issue involved whether the trial court's acceptance of a plea bargain, with sentencing restrictions, was appropriate.

In Santobello a change of counsel for the prosecution resulted in the prosecutor violating a plea bargain agreement for a "no recommendation" on the sentence. The Court held that such a violation of a plea bargain agreement required remand. In Kay the Utah Supreme Court considered whether the trial court could refuse to adhere to the terms of a plea bargain which allowed the defendant to plea guilty to three counts of capital homicide in exchange for a life imprisonment sentence, without the possibility of death. The Court found that numerous errors by the trial court and

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[4] Dennis's brief intimates that he was somehow "sandbagged" into taking the stand and "confessing" due to confusion on his counsel's part concerning sentencing in the event that he was convicted under both Section 105 and Section 108. (See, e.g. Brief of Appellant pp. 8-10 and 13-17.) The primary weakness in this argument is that it is totally unsupported by the record. There is no evidence in the record that Dennis's decision to take the stand was anything other than a tactical move in an attempt to convince the jury to find him guilty of Section 108, rather than Section 105. Dennis cites no case law, and there obviously is none, supporting his porposition that this Court should relieve him of his tactical error at trial.

the defendant's counsel allowed the invalidation of the plea bargain agreement.

The trial court in the instant case was instead faced with a defense request for instructions on a lesser included offense. There was no guarantee that the Court would sentence under Section 108 instead of Section 105. In fact, what the Court stated was that if Dennis was convicted on both Section 105 and Section 108 he could only be sentenced under the lesser offense. The relevant portion of the transcript reads as follows:

> MR. KEESLER: I'd like to make sure I follow the analogy that Counsel is saying. Counsel is saying that in every event if a person is guilty of a major offense and a lesser-included offense, he can only be found guilty of the lesser-included offense?
>
> MR. McINTYRE: Or he must be sentenced under--
>
> THE COURT: He must be sentenced under the lesser-included offense, and that's a rule that Justice Durham wrote in Baker, and--and the Court followed.
>
> Well, that's--you know--
>
> (Inaudible)
>
> MR. KEESLER: Everyone who commits murder can also commit manslaughter. So you're saying that every murder case then must be sentenced as a manslaughter.
>
> MR. McINTYRE: No, no, if--
>
> THE COURT: No, if the facts--
>
> MR. McINTYRE: If--it must be submitted under manslaughter, and then if he's convicted of it, he has to--

THE COURT: And to not give a lesser-included offense instruction is reversible error. But let me take a look at Baker, and I--

MR. KEESLER: Well, if I understood Counsel, he's saying that the defendant could be convicted of both, but can only be found guilty of the lesser-included offense.

MR. McINTYRE: No. If he's convicted of both, he can only be sentenced--

THE COURT: If he can be convicted of both, you have to sentence under the lesser, under this case. (Emphasis added.) (R. 244-245.)

Of course, the trial court properly avoided the possibility of conviction on both statutes by giving an "either or" instruction allowing conviction on only one violation. (R. 67, 197, 285 and 304.) That is exactly what the jury did.

POINT IV

ADMISSION OF THE INTOXILYZER RESULTS WAS PROPER AND WAS NOT PROPERLY OBJECTED TO.

One searches Argument IV of Dennis's Brief in vain for any reference to a proper objection to the admission of the intoxilyzer results. In fact, the only objection raised at trial to the intoxilyzer results dealt with whether the administering officer's operating certificate for the intoxilyzer was properly dated. (R. 215-223, 225, 226-227.) The transcript of the proceedings concerning the admission of the intoxilyzer results reads as follows:

MR. KEESLER: . . . We would at this time, your honor, offer the City's exhibits No. 1 and 2, the operational checklist and the intoxilyzer test record into evidence.

MR. McINTYRE: Objection, your honor.

THE COURT: . . . okay. Let me hear your grounds for the objection, again, and any response.

MR. McINTYRE: Your honor, this Officer has testified that he doesn't -- that his certification is not a valid certification. (R. 225-226.)

This appeal is not a Sixth Amendment denial of effective representation of counsel case. Dennis can hardly be claiming that his law partner, who represented him at trial, and on this appeal, was incompetent at trial. Rule 103(a) of the Utah Rules of Evidence provides:

> Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific grounds of the objection, if the specific ground was not apparent from the context; . . . (Emphasis added).

The argument which Dennis raises in his brief concerning the intoxilyzer admission was never presented to the trial court. It is thus obviously not proper to raise this objection for the first time on appeal. Barson by and through Barson v. E. R. Squibb & Sons, Inc., 682 P.2d 832 (Utah 1984).

Even had the objection been properly raised at the trial court it could not have been sustained. The law concerning "actual physical control" of a vehicle necessary

to convict under Section 105 of the Revised Ordinances of Salt Lake City was all drawn from the "implied consent statute" of Section 41-6-44.10 (Utah Code Ann.). The cases and law are cited in Point I, supra and make it undeniably clear that Dennis was in "actual physical control" of his van which was parked in the traveled portion of the highway, with the lights on and the motor running. As the Court noted in Lopez, supra at 781:

> The trial court here found that there were tire tracks leading up to the vehicle, that the vehicle had to have reached its point of rest "apparently on its own power," and that Lopez had failed the field sobriety tests.

The law and reasoning of Lopez and Garcia are applicable to the instant case, mutatis mutandis.

An obvious drunk who staggers out of his vehicle which is left running in the road with the lights on and fails all the field sobriety tests,provides more than ample probable cause to an Officer for the admission of an intoxilyzer. In any event, having failed to timely object to its admission, Dennis cannot now complain.

CONCLUSION

Instruction 16 correctly stated the law of Utah concerning "actual physical control" which does not require conscious volition, a functioning automobile, or driving. To meet the actual physical control element, a defendant simply must place himself behind the steering wheel of a car with the ignition key.

In this case, Dennis was drunk, seated behind the steering wheel of a car that was running with its lights on and in a traveled portion of the highway. The jury correctly found Dennis guilty based on overwhelming evidence of a violation of Section 105, even though he had the benefit of a lesser included offense instruction at his request. Thus, the Court's sentencing under Section 105 was entirely appropriate.

The trial court's admission of the intoxilyzer result was appropriate because there was more than ample proximate cause for the Officer to administer the test and, more importantly, defense counsel never properly objected to its admission. This conviction and sentence are entirely correct and should be sustained on appeal.

Respectfully submitted this 9th day of December, 1987.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing Brief of the Plaintiff-Respondent to James A. McIntyre, McINTYRE & DENNIS, P.C., P.O. Box 7280, Salt Lake City, Utah 84107-0280, by depositing the same in the U.S. mail, postage prepaid, this 9th day of December, 1987.