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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, vs. JOSEPH C. VALDEZ Defendant.	Brief of Appellee Case No. 900427-CA Category 2

APPEAL FROM THE THIRD CIRCUIT COURT IN AND FOR TOOELE COUNTY, THE HONORABLE EDWARD A. WATSON PRESIDING

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STATEMENT OF JURISDICTION

Jurisdiction is vested in this court pursuant to Section 78-4-11 Utah Code Annotated.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal of a conviction for driving or being in actual physical control of a motor vehicle while under the influence of alcohol.

COURSE OF PROCEEDINGS BELOW

Defendant was arrested for DUI and driving while on suspension on February 17, 1990. He was arraigned in the Third Circuit Court, Tooele Department on March 8, 1990. Trial was scheduled for March 29, 1990 but was continued to April 23, 1990. Defendant was convicted of DUI. He was sentenced on June 8, 1990.

STATEMENT OF THE FACTS

On March 8, 1990, defendant appeared before the Honorable Edward A. Watson, Third Circuit Court, Tooele Department, for arraignment. At that time, the court set trial for March 29, 1990. (R. 9) Defendant stated that that time was only four days after a scheduled appointment with his attorney. The court then told defendant ". . . you call him and tell him you--you've been arraigned, you have the notice of the trial date, let him at least begin reviewing it, and he'll probably having [sic] you in earlier or something, to discuss it." (Arraignment T. 6) Notwithstanding the court's admonition to the defendant to see counsel sufficiently

in advance of trial, defendant apparently waited until just before trial to contact his attorney. (Motion T. 4).

On March 27, 1990, two days before trial, Mr. Franklin L. Slaugh filed an appearance and a jury demand. On March 29, 1990, the trial date, Mr. Slaugh moved the court for a continuance of the trial. As grounds for the motion, Mr. Slaugh said that he had had insufficient time to prepare and to interview the defendant's witnesses. Mr. Slaugh said he asked the defendant ". . . why he waited so long to get in touch with me, and his response was that he was trying to come up with the money before he contacted me. I would have preferred a little more lead time, as I've indicated, to prepare for the matter." (Motion T. 4) Defendant was not present on the date set for trial although he had been personally notified of the trial date and Mr. Slaugh directed him to appear. (Motion T. 3)

The prosecutor did not object to the continuance if the defendant paid witness fees and would not use the continuance as a vehicle to cure an untimely jury demand. (Motion T. 3) Mr. Slaugh expressly waived defendant's jury demand. (Motion T. 3,5) The court never indicated to Mr. Slaugh that the continuance would be denied unless defendant waived the right to a jury trial. (Motion T. 2-5)

Defendant was tried on April 23, 1990. Officer Shelton testified that the defendant was behind the wheel of a vehicle when the officer approached it (Trial T. 10) and that the engine was running at the time. (Trial T. 29) Officer Shelton noted that

defendant's speech was slurred, he had an odor of alcohol, and although the defendant searched for several minutes, he was unable to locate either his driver's license or the vehicle registration. (Trial T. 11) Defendant's balance was poor (Trial T. 11) and he admitted having consumed "a few beers." (Trial T. 12)

Officer Shelton also testified that after determining that defendant had no injuries, he administered some field sobriety tests on a smooth paved surface with no adverse wind conditions. (Trial T. 12) Defendant was unable to follow instructions, miscounted, and lost his balance repeatedly during the tests. (Trial T. 13-15)

Officer Shelton is a category one certified peace officer. (Trial T. 4-5) Based upon his training, experience, and observations of the defendant, Officer Shelton opined that the defendant was impaired to a degree that he could not drive safely. (Trial T. 15) Officer Shelton arrested the defendant and asked him to take an intoxilizer test. The defendant refused. (Trial T. 16-17) The defendant continued to refuse to take the test even after being warned that his license could be revoked for a year for refusing. (Trial T. 17-18)

The defendant called Kerry R. Lenzing as a witness. On cross examination, Mr. Lenzing testified that defendant was "drunk." (Trial T. 26)

Defendant was found guilty of Driving While Under the Influence of Alcohol.

SUMMARY OF ARGUMENT

Evidence adduced at trial from both the State's and the defendant's witnesses established beyond a reasonable doubt that the defendant was too intoxicated to drive safely while in actual physical control of a motor vehicle. Defendant could not find his license or registration, was unable to perform field sobriety tests, and had physical characteristics consistant with being under the influence of alcohol. The arresting officer testified that defendant was incapable of driving safely due to his alcohol impairment. Defendant did not testify but called a witness who on cross examination said that the defendant was "drunk." (Trial T. 26).

Defendant's trial counsel willingly waived defendant's right to a jury trial. The trial judge did not condition defendant's request for a continuance upon a jury trial waiver. While the prosecutor stated that the State would not object to a continuance if it would not be used to cure a late jury demand, the court did not indicate that granting of the continuance was contingent upon the waiver.

ARGUMENT

I. Defendant Was in Actual Physical Control of a Vehicle While Too Intoxicated to Drive Safely.

Defendant challenges the trial court's findings that he was too intoxicated to drive safely. Defendant has the burden on appeal to show that the court's findings were clearly erroneous.

> In order to show clear error, the appellant must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against attack.

State v. Moosman, 794 P.2d 474, 476 (Utah 1990).

The trial court found that 1) the officer had probable cause to stop the truck; 2) defendant was in actual physical control of the truck at the time of the stop; 3) defendant was impaired by alcohol to the extent that he was not able to drive safely. (Trial T. 37) Defendant does not challenge the court's findings that probable cause existed nor that defendant was in actual physical control of the truck. Rather, he asserts that the evidence did not establish a sufficient degree of impairment.

This argument ignores evidence presented both by the State and by defendant's own witness. The State's witness established that defendant's speech was slurred, he had an odor of alcohol, and, although he searched for several minutes, he was unable to locate either his driver's license or his vehicle registration. (Trial T. 11) Defendant's balance was poor (Trial T. 11) and he admitted having consumed "a few beers." (Trial T. 12) When Officer Shelton administered field sobriety tests, defendant was unable to follow instructions, miscounted, and lost his balance repeatedly. (Trial T. 13-15) Officer Shelton also offered his opinion as a trained and experienced peace officer that defendant was impaired to a degree that he could not drive safely. (Trial T. 15) Additionally, the defendant's refusal to take an intoxilizer test

(Trial T. 16-18) can best be described as conduct indicating a consciousness of guilt.

Defendant's own witness, Kerry R. Lenzing, testified that defendant was "drunk." (Trial T. 26)

While any one of these facts, taken in isolation, may not prove defendant's guilt, taken together the effect is synergistic and constitutes overwhelming proof.

Defendant's brief seems to imply that the trial court somehow improperly considered the driving pattern as proof of defendant's guilt. (Appellant's Brief 5). The court's findings, however, clearly show that the court considered the driving pattern only as providing probable cause for the stop and not as evidence of defendant's impairment. (Trial T. 37-8) Indeed, the other evidence of defendant's impairment, coupled with his actual physical control of the vehicle, was so strong as to make any consideration of a driving pattern wholly unnecessary.

II. Defendant's Waiver of Jury Trial Was Proper and Uncoerced.

Defendant asserts that he was "forced" to waive a jury trial because the court knew that "defendant's appointment with counsel was less than ten days before the date the [c]ourt set for trial." (Appellant's Brief 6). On the contrary, the trial setting gave the defendant more than adequate time to meet with counsel and timely demand a jury trial, or, if necessary, obtain new counsel. Moreover, the court warned defendant to contact his attorney sufficiently in advance of the trial. (Arraignment T. 6) Given current caseloads and speedy trial considerations, it would be

folly to expect trial courts to calendar cases around the appointment schedules of defendants and counsel.

Defendant also claims that his trial counsel "was told by the prosecutor that the only way he could get a continuance was to waive the jury demand." (Appellant's Brief 6) This assertion is simply unsupported in the record. When Mr. Slaugh made his motion to continue, the prosecutor made the following statement:

> Your Honor, I--I've told Mr. Slaugh that I didn't have an objection to the continuance with two caveats; one being that he pay the witness fee for Officer Shelton who will be here momentarily, and the other, my understanding is that the jury demand was not timely and that it would still be a bench trial, if it were continued.

(Motion T. 3) The court never indicated that the continuance would be denied if defendant did not waive the right to a jury trial. (Motion T. 2-5) In fact, Mr. Slaugh never opposed the notion of trying the case to the bench. Rather, he said "[a]nd I don't have any objection to that, your Honor, a bench trial in this is--would be fine." (Motion T. 3) Certainly, this court should not reverse defendant's conviction for lack of a jury trial when defendant's attorney expressly waived the jury rather than entreat the court to grant both a continuance and a jury trial. Nothing prohibited counsel from requesting the trial court to grant a jury trial in addition to a continuance. The waiver, in effect, took that issue out of the trial court's hands. While one may infer from the record that the prosecutor would have opposed the continuance if counsel had not waived the jury demand, (Motion T. 3), such

opposition is obviously not tantamount to the court's ruling on the issue.

Objections which have never been raised in the trial court may not be considered on appeal. Lopez v. Shulsen, 716 P.2d 787 (Utah 1986); State v. Chancellor, 704 P.2d 579 (Utah 1985). And, an express waiver of rights by trial counsel is not reversible error in the absence of a showing that counsel's representation of the defendant was incompetent. Defendant has not alleged incompetence of counsel in this appeal. In fact, nothing in the record suggests that counsel's decision was other than a tactical one. While some constitutional issues may be raised for the first time on appeal, State v. Pierce, 655 P.2d 676 (Utah 1982), the Constitution does not guarantee a jury trial for offenses punishable by a maximum of six months imprisonment. Blanton v. City of North Las Vegas, 489 US ___, 103 L.Ed 2d 550, 109 S Ct ___ (1989); Baldwin v. New York, 399 US 66, 26 L.Ed 2d 437, 90 S Ct 1886 (1970).

In misdemeanor cases, unlike felony cases, there is no requirement that the defendant waive the right to a jury trial in open court. In fact, no right to a jury trial exists in misdemeanor cases absent a written demand at least ten days before trial. Utah Rules of Criminal Procedure, 17(c)&(d). On March 8, 1990, defendant was given notice of trial to be held on March 29, 1990. (R. 9). Defendant's jury demand was not filed until March 27, 1990, only two days before the trial. (R. 10). Defendant thus had forfeited his right to a jury trial on the March 29 date. Further, the right to trial by jury may be waived not only in

misdemeanor cases, as is this case, but even in felony cases, where no jury demand is required. State v. Jamison, 767 P.2d 134 (Utah App. 1989). This right may be waived by counsel in the absence of the defendant. Id. at 138. In Jamison, the defendant was convicted by a jury of felony theft. The court recessed for lunch before beginning the enhancement phase of the trial. When the court reconvened, the defendant failed to appear. His attorney waived the jury on the penalty phase even though he had not received the defendant's authorization to do so. Id. at 136. On appeal, the defendant claimed that the court erred in dismissing the jury from the enhancement phase. This Court, however, affirmed the conviction and sentence.

> [W]hile the right to a jury trial is guaranteed by amendment VI of the United States Constitution and by article I. section 12 of the Utah Constitution, it may be waived. . . .
>
> Under the circumstances, it would be a miscarriage of justice to allow defendant to profit from his unexcused absence from the court.

Id. at 138. (citations omitted)

In this case, as in Jamison, defendant was absent from court without excuse. Defendant, by his absence, placed his attorney in the position of deciding whether to waive the jury without defendant's input. Mr. Slaugh then decided to waive the jury. As in Jamison, defendant should not now be allowed to profit from his unexcused absence.

CONCLUSION

Accordingly, the State of Utah respectfully requests that the defendant's conviction for DUI be affirmed.

Respectfully submitted this _____ day of January, 1991.

_____
John K. West, Deputy Tooele County Attorney

I certify that four copies of the forgoing Brief of Appellee were hand delivered this _____ day of January, 1991 to the office of Mr. Alan K. Jeppesen, Attorney for the Defendant/Appellant.

_____
John K. West