1987

Salt Lake City v. Leland Dennis : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

SALT LAKE CITY, a Municipal Corporation,	)	
Plaintiff-Respondent	)	
vs.	)	
LELAND DENNIS,	)	No. 870107-CA
Defendant-Appellant.	)	

Priority #2

BRIEF OF DEFENDANT-APPELLANT

Appeal from a Final Judgment of the Fifth Circuit Court
in and for Salt Lake County, State of Utah,
Honorable Sheila K. McCleve

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

SALT LAKE CITY, a Municipal Corporation, Plaintiff-Respondent vs. LELAND DENNIS, Defendant-Appellant.	)	E R R A T A No. 870107-CA

JURISDICTION

This Court has appellate jurisdiction to hear this case under Article VIII, Constitution of Utah and Utah Code Ann., § 78-2a-3(2)(c).

NATURE OF THE PROCEEDINGS

This is an appeal from a conviction of § 105, Salt Lake City Code (DUI), in the Fifth Circuit Court, State of Utah, and the subsequent sentence resulting therefrom.

MAILING CERTIFICATE

I certify that on the 17th day of September, 1987, I mailed, postage prepaid, four (4) copies of the foregoing BRIEF OF DEFENDANT-APPELLANT and ERRATA, to the following:

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Constitution of the United States, Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Utah, Art. I, § 12

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.

Utah Code Ann., § 41-6-44(1) (1953)

> 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 state. 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.

Utah Code Ann., § 41-6-44.10(1) (1953)

> Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug as detailed in section 41-6-44, so long as the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drugs, or combination of alcohol and any drug as detailed in section 41-6-44. A peace officer shall determine which of the aforesaid tests shall be administered.
>
> No person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine, shall have the right to select the test or tests to be administered. The failure or inability of a peace officer to arrange for any specific tests is not a defense with regard to taking a test requested by a peace officer and it shall not be a defense in any criminal, civil or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

Sec. 105, Rev. Ord., 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.

Sec. 108, Rev. Ord., 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.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

SALT LAKE CITY, a Municipal Corporation, Plaintiff-Respondent vs. LELAND DENNIS, Defendant-Appellant.	)	No. 870107-CA

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented on appeal are:

I. Did the lower court err by not accepting the defendant's offered plea of guilty to the violation of § 108 and sentencing him under that section?

II. Did the lower court err in changing its original ruling that sentencing would be on the basis of § 108 after the defendant had been found guilty by the jury of violating § 105?

III. Was the lower court's charge to the jury in Instruction No. 16 error?

IV. Did the lower court err in admitting the intoxilyzer test result over objection?

STATEMENT OF THE CASE

This appeal is taken from the verdict of the jury rendered on the 18th day of June 1986 and the sentence imposed by the court on the 8th day of September, 1986 and further from the lower court's refusal to grant a new trial which was finally heard and denied on the 23rd day of February 1987.

STATEMENT OF FACTS

On February 24, 1986 the defendant was observed asleep in the driver's seat of a vehicle parked on the side of the road with the lights on and motor running at 1240 South Foothill Blvd., Salt Lake City, Utah by Officer D. W. Holmes of the Salt Lake City Police Department. (T. 51) Officer Holmes had been called to the scene by another agency and was investigating that report. At no time did Officer Holmes observe the defendant drive. Officer Holmes requested the defendant to perform several field sobriety tests after awakening the defendant and detecting an "odor of alcohol". (T. 54-55) Officer Holmes testified that he formed an opinion that the defendant was in actual physical control of a motor vehicle and was intoxicated and placed him under arrest for driving under the influence of alcohol. (T. 59) Officer Holmes testified that he requested the defendant to take a breath test and he agreed to do so. (T. 60) If any admonition was read to the defendant, no testimony was offered to indicate that the provisions of Utah Code Ann., § 41-6-44.10(1) were followed. Officer Holmes then requested Officer Brian Jewkes of the Salt Lake City Police Department to transport the defendant to the Metropolitan Hall of Justice for the purpose of administering a chemical breath test. Officer Jewkes testified that he was certified to operate the intoxilyzer maintained by Salt Lake City and that his certification card erroneously reflected that it had expired prior to the date of the test. (T. 117) He further testified that he administered a chemical test

to the defendant, identified the documentation, and those items were admitted as Exhibits 1, 2 and 3 over objection. (T. 143) Officer Jewkes offered no testimony concerning the defendant's actual physical control nor expressed an opinion as to the defendant's state of intoxication.

During the course of the trial the court expressed the view that, regardless of the verdict, the court could only impose sentence based upon §108 of the City Code. (T. 137, 179, 187) Only after the defendant confessed, the City and defendant rested, and the jury returned its verdict, did the court express the view that its prior ruling meant that the court "might" be required to sentence the defendant under §108. (T. 219) Prior to that both counsel had been convinced that Judge McCleve would only impose the sentence for violating §108 if the defendant was convicted.

SUMMARY OF ARGUMENTS

The provisions of Salt Lake City's D.U.I. law (§ 105) as they relate to a person who is not found actually driving, but rather is alleged to be in "actual physical control', are not distinguishable from the provisions of Salt Lake City's ordinance concerning intoxicated persons who are in or about a motor vehicle and, accordingly, the court should have allowed the defendant to plead guilty to the ordinance which carried the lesser penalty.

After the court did not allow defendant's motion to reduce the offense and to charge the lesser offense (but stated it felt

compelled to impose sentence according to the lesser penalty, and all parties relied and presented their cases based upon that understanding), it was fundamentally unfair for the court to change its mind and impose sentence under § 105. It was particularly inequitable, as stated above, where the original ruling was in fact the correct construction of the Revised Ordinances of Salt Lake City.

The lower court instructed the jury in Instruction No. 16 that "the defendant need not be exercising conscious volition with regard to the vehicle" to be in actual physical control "so long as the defendant, of his own choice, placed himself behind the wheel and either started the motor or allowed it to run." That instruction is a misstatement of the law.

In addition, the effect is to redefine the statutory language "actual physical control." The new definition has the effect of relieving the city of its burden of proof that the defendant was in actual physical control and substitutes that the "defendant place himself behind the wheel and either started the motor or allowed it to run." Thus, by defining actual physical control in the above manner, the city is the beneficiary of a mandatory rebuttable presumption which is unconstitutional.

The officer at whose direction the chemical breath test was administered did not have probable cause to believe that the defendant was in actual physical control of the vehicle and, in fact, the record shows that the defendant was not in actual physical control; and, therefore, the lower court erred in

admitting the results of the intoxilyzer test over objection.

ARGUMENT I.

THE LOWER COURT ERRED BY NOT ACCEPTING THE DEFENDANT'S OFFERED PLEA OF GUILTY TO THE VIOLATION OF § 108 AND SENTENCING HIM UNDER THAT SECTION

During the trial the court made a determination that, regardless of the verdict of the jury, the court would impose sentence under the provisions of the Salt Lake City Ordinances relating to a person being intoxicated in or about a motor vehicle. (T. 87, 137, 179-182, 187) The determination made by the court was that § 108 of the Revised Ordinances of Salt Lake City, Utah was a lesser included offense within § 105 of the Revised Ordinances of Salt Lake City, Utah.

§ 105 provides:

> "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."

§ 108 provides:

> "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."

The sole distinction between § 108 and § 105 to the instant situation is whether the defendant was in actual physical control of the motor vehicle.

A comparison of the elements of the two offenses illustrates no difference between the substance of the two sections.

Section 108	Section 105
It shall be unlawful for	It is unlawful and punishable as provided in this section for
any person	any person
under the influence of alcohol or any drugs	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 or any drug to a degree which renders the person incapable of safely driving a vehicle
to be in or about with the intention of driving or operating such vehicle	to drive or be in actual physical control of a vehicle
any vehicle	a vehicle within this city

The foregoing comparison of the two Salt Lake City ordinances illustrates that § 108 describes an offense in which every violation of § 105 must necessarily be included. § 108 carves out a much larger area of prohibited conduct in that § 108 does not require actual driving or actual physical control, but merely the intention of driving or operating.

In the instant case there was no evidence, and the City concedes, that the defendant was not "driving." The City's sole

contention was that the defendant was in actual physical control, which is somehow distinguished from the provisions of § 108 of the Revised Ordinances of Salt Lake City, Utah.

It should be noted that § 105 is parallel to Utah Code Ann., § 41-6-44(1) (1953); however, § 108 has no similar statutory provision. In Garcia v. Schwendiman, 645 P2d 651 at 654, (Utah 1982) Justice Durham said,

> 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 ...

While this analysis provides an adequate explanation of Utah Code Ann., § 41-6-44(1) (1953), the same can hardly be used to explain § 105 for the simple reason that § 108 covers the same territory. § 108 was enacted for the same purpose as the Supreme Court found to be the reason for our legislature's enactment of the actual physical control provision of Utah Code Ann., § 41-6-44(1) (1953).

It is submitted that when Salt Lake City revised § 105 of the ordinances to read verbatim as the provisions of Utah Code Ann., § 41-6-44(1) (1953) it had no such intention in mind or at least no legislative history to that effect has been found.

Thus, the definitions and interpretations of the phrase "actual physical control" by all the courts in the State of Utah make the provisions of § 105 and § 108, as applied to this case, indistinguishable except as to penalty.

ARGUMENT II

THE COURT ERRED BY NOT SENTENCING THE DEFENDANT IN ACCORDANCE WITH THE PROVISIONS OF § 108, REVISED ORDINANCES OF SALT LAKE CITY, UTAH.

A.

Judge McCleve ruled that the defendant could only be sentenced under § 108 even if the jury found the defendant guilty of § 105 in response to the discussion between counsel concerning a lesser included offense jury instruction. (T. 137) The prosecutor vehemently argued against the judge's ruling to the point where Judge McCleve suggested any further argument would be contemptuous of the court. (T. 179; 181)

It is clear that both counsel understood that the defendant would only be sentenced under the provisions of § 108 (T. 187) and it was only after the jury had returned a verdict that the court explained that she had meant to say, "I might be required to sentence on the lesser." (T. 219)

Based upon the court's ruling, the defendant had offered to plead guilty to the charge of § 108, the prosecutor had offered to allow defendant to plead guilty to § 105 and be sentenced under § 108. Clearly, it is impermissible to force a criminal defendant to be treated differently merely because he exercises his right to trial.

It is clear that a trial court may not make a judicial pronouncement that sentencing will be done under § 108 (an infraction), allow all parties to rely upon those statements, allow the defendant to plead guilty to § 105 with the

understanding that he will be sentenced under § 108 and, after accepting the guilty plea, then impose sentence under § 105. (See State v. Kay, 717 P.2d 1294 (Utah 1986); Constitution of the United States, Amend. XIV, § 1; Constitution of Utah, Art. I, § 12)

Likewise, the same considerations of fundamental fairness embodied in due process as set forth in Kay, supra, and Santobello v. New York, 404 U.S. 257 (1971), compel a similar result where all parties rely on a judge's statements regarding sentencing made during trial and retracted only after the jury returns a verdict.

It may be argued that such error is harmless; however, it must be clear that where a defendant is led to believe that regardless of the verdict of the jury, he will be sentenced to an infraction (§ 108) rather than the sentence for a D.U.I. (§ 105), the conduct of his defense is not the same as it would be if he is aware of the fact that, if found guilty, he will face the D.U.I. penalties.

Moreover, the decision of the defendant to take the stand on his own behalf and confess that the reason that he pulled his vehicle over, parked it and went to sleep because he felt he was becoming incapable of safely driving further, was predicated upon the court's ruling that he would be sentenced under the provisions of § 108.

The prosecutor relied heavily upon the defendant's confession in his closing statement and that confession was made

only after the court ruled that she would sentence the defendant under § 108 if the jury found him guilty of § 105.

B.

The court's initial ruling that sentencing of the defendant should be under § 108 rather than § 105 was, in fact, the correct ruling and it was error to sentence the defendant under § 105.

§ 105 is identical in all respects to Utah Code Ann., § 41-6-44(1) (1953). On the other hand, there is no Utah statute similar to § 108. If the Supreme Court's definition and construction of the "actual physical control" language is applied to § 108, then the intent of the City Council was to prevent "intoxicated drivers from entering their vehicles except as passengers or passive occupants." (See Garcia, supra, at 654)

Such a legislative intend applied to § 105 makes little sense inasmuch as the clear language of § 108 appears to be designed to prevent intoxicated persons from being in or about vehicles with the intention of driving or operating.

If the purpose of the two sections is to prevent the same conduct, then a defendant convicted of violating either is entitled to the benefit of the lesser penalty. [State v. Shondel, 453 P.2d 146 (Utah 1969); State v. Kish, 503 P.2d 1208 (Utah 1972); Rammell v. Smith, 560 P.2d 1108 (Utah 1977); State v. Loveless, 581 P.2d 575 (Utah 1978); State v. Fair, 456 P.2d 168 (Utah 1969)]

ARGUMENT III

THE LOWER COURT'S CHARGE TO THE JURY IN INSTRUCTION NO. 16 CONSTITUTED ERROR

It was error for the court to submit Instruction No. 16 to the jury.

> 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. (T. 196:7-12)

This issue was submitted by the prosecutor (T. 185:8) and was accepted by defense counsel on the representation by the prosecutor that the language had come directly from Garcia v. Schwendiman. No objection was raised, even though Garcia was not available to be read at the time, because of the prosecutor's representation. (T. 213:16-23; 214:8-10) Defense counsel became uneasy with the use of Instruction No. 16 after the prosecutor referred to it no less than twenty or thirty times in his closing argument. (T. 211:15-20) Later, defense counsel was given the opinion of Garcia v. Schwendiman (T. 212:11-15) and after reading it and being unable to find the language the prosecutor had been referring to, asked that the jury be polled. (T. 216:10-25; 217:1-25; 218:1-24) A reading of that poll clearly shows that in light of the prosecutor's closing argument with repeated emphasis upon Instruction No. 16, the jury may well have decided the case on that instruction.

Instruction No. 16 is a misstatement of the law under the facts of the instant case. Dennis was asleep behind the wheel,

and had been for approximately two hours and fifteen minutes at the time the officer woke him up. (T. 172:15-22; 173:2-9) Garcia clearly states at page 654, footnote 3,

> ....but nothing 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."

Under Garcia, Dennis was not in actual physical control of the vehicle. When a jury instruction misstates the law, the conviction must be reversed in order to prevent manifest injustice, even if no objection was made. [State v. Lesley, 672 P.2d 79 (Utah 1983), at 81]

Additionally, Instruction No. 16 is erroneous because it shifts the burden of proof by not requiring the prosecution to prove one of the elements, to wit: intent. State v. Bugger, 483 P.2d 442 (Utah 1971), at 443, defined actual physical control. "The term in 'actual physical control' in its ordinary sense means 'existing' or 'present bodily restraint, directing influence, dominion or regulation'." In other words, some intent or conscious volition is required.

Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982), at 653, adopts the definition of Bugger, and Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986), at 721, adopts Garcia and Bugger with respect to the definition of actual physical control.

Instruction No. 16 removes the element of intent or conscious volition required by Bugger, Garcia, and Lopez. Therefore, it is an instruction using a mandatory rebuttable presumption, which is unconstitutional. [State v. Chambers, 709

P. 2d 321 (Utah 1985)]

ARGUMENT IV

THE LOWER COURT ERRED IN ADMITTING THE INTOXILYZER TEST RESULT OVER OBJECTION

Under the facts of this case, the arresting officer had no probable cause to give defendant a chemical breath test. Utah's implied consent law Utah Code Ann., § 41-6-44.10(1) (1953) requires that before such a test can be administered, the officer must have reason to believe the defendant was "driving" a motor vehicle while under the influence of alcohol or that he was "operating" a motor vehicle by being in actual physical control.

No driving pattern of any kind was observed. The first person to observe the car was apparently a Murray City officer (T. 61:15-17) who requested assistance on his radio. This call was overheard by Officer D. W. Holmes who was the Salt Lake City policy officer who first responded to the scene and began investigating. (T. 51:19-24; 63:6-9) The only other officer to arrive on the scene was Officer Brian Jewkes, who arrived approximately ten to fifteen minutes after Officer Holmes. (T. 62:5-10) There is no testimony of any kind in the record concerning a driving pattern. No one saw the vehicle move.

In addition, no facts support the contention that defendant was "operating" his motor vehicle by being in actual physical control. The undisputed facts show that defendant was asleep. Officer Holmes found defendant asleep behind the wheel of the vehicle with the motor running and the lights on. (T. 51:19-22;

52:2-8, 19-24; 62:20-23)

The controlling case law concerning such fact situations in Utah are State v. Bugger, 483 P.2d 442 (Utah 1971), Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982), and Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986).

In the Bugger case, defendant was asleep in his automobile which was parked on the shoulder of the road, completely off the traveled portion of the highway, with the motor turned off. The officer had trouble awakening the defendant. The court held that Bugger was not in actual physical control of the vehicle. In the instant case, defendant Dennis was found asleep behind the wheel of the vehicle with the motor running and the lights turned on. (T. 51:19-22; 52:2-8, 19-24; 62:20-23) The officer had a great deal of difficulty in awakening Dennis. (T. 52:19-24; 62:14-23) Some confusion exists in the record as to whether Dennis' automobile was completely pulled off the travel portion of the roadway. Officer Holmes testified that he received information that there was a vehicle parked in the outside lane. (T. 51:19-20) However, it should be noted that no attempt was made to move defendant's vehicle, and Officer Jewkes testified that when he arrived, "There was a van pulled over on the side of the road and another police vehicle with the overhead lights on, to the - - a little bit to the left and rear of it." (T. 71:19-21) This strongly implies that defendant's van was properly parked. In addition, Dennis testified that he was lost and pulled over into a parking area in order to get a map out and try to decide which

way was the best way home. He then decided to go to sleep. (T.161:23-25; 162:1-2)

In Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982), the plaintiff was observed alone in the vehicle behind the steering wheel in the process of starting his motor vehicle by attempting to turn on the ignition. There was some dispute as to the exact location of the key, however, it is undisputed that Garcia had exclusive possession and control of the key. At page 654 the court held,

> "Where a motorist occupied the driver's position behind the steering wheel with possession of 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."

In the Garcia case, the driver was clearly awake behind the wheel. In the instant case, Dennis was clearly asleep. (T. 51:19-22; 52:2-8, 19-24; 62:20-23)

In Garcia, the court goes on to state (p.654, footnote 3) "Nothing 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." Therefore, under Garcia, Dennis would not be in actual physical control.

In Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986), Lopez was found sitting in the driver's seat with his head resting on the steering wheel. The truck's motor was not running. There were vehicle tracks from the pickup in the freshly fallen snow. The court held that plaintiff was in actual physical control of the vehicle. However, it should be noted that plaintiff was clearly

awake at the time the officer approached him. "Lopez was sitting in the driver's seat with his head resting on the steering wheel. Shofield tapped on the window, assisted Lopez in opening the door to talk to him, and had to catch him when he fell more than stepped out of his truck." In the instant case, Dennis was asleep. Additionally, it is apparent that Dennis had been asleep for approximately two hours and fifteen minutes at the time the officer woke him up. (T. 161:20-21; 162:1-2; 172:20-22)

Lopez continues and states the current rationale concerning what constitutes actual physical control under similar circumstances. At page 779 the court states,

> The court's upholding convictions in these and similar fact situations start out from the premise that as long as a person is physically able to assert dominion by starting the car and driving away, he has substantially as much control over the vehicle as if he were actually driving it....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.

It is clear from the testimony in the instant case that Dennis took his last drink at about 9:20 p.m. He left at about 9:30 p.m. and arrived at the scene at approximately 9:45 p.m. He was lost, consulted a map in order to attempt to find a way home, felt the effects of alcohol coming upon him and decided to go to sleep. (T. 161:7-25; 162:1-8) He had been asleep for approximately two hours and fifteen minutes before the officer woke him up. (T. 172:15-22; 173:2-9) Thus, it seems clear that Dennis' intentional stopping of his vehicle, pulling it off into

a parking area of the roadway and going to sleep because he felt the effects of alcohol coming on and did not want to drive, satisfies the requirement of "....to protect public safety and apprehend the drunken driver before he or she strikes." (Lopez, supra, at 779)

Under the facts of the case, there was no probable cause to give defendant a chemical breath test. Defendant was not observed driving and defendant was not in actual physical control of his vehicle.

Moreover, it should be noted that Officer Holmes arrested defendant (T. 59) and was presumably the peace officer who had grounds to believe defendant was in actual physical control, yet he did not perform the chemical test or the intoxilyzer. He turned the defendant over to Officer Jewkes who transported defendant to the Metropolitan Hall of Justice and at whose direction the test was administered. Officer Jewkes testified that Officer Holmes had requested him to do so (T. 71,72,77) but he offered no testimony which would support the contention that he was a peace officer who had "grounds to believe that person (defendant) to have been....in actual physical control." (See Utah Code Ann., § 41-6-44.10(1) (1953).

CONCLUSION

The conviction and sentence of the defendant in the above-captioned matter should be set aside, reversed and remanded with directions to the lower court to amend its information to charge the defendant with a violation of § 108.

DATED this 14th day of September, 1987.

Respectfully submitted,

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Attorney for Defendant-Appellant

MAILING CERTIFICATE

I hereby certify that on the 14th day of September, 1987, I mailed, postage prepaid, four (4) copies of the foregoing BRIEF OF DEFENDANT-APPELLANT, to the following :

Arthur L. Keesler, Jr.
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