1987

Salt Lake v. John R. Rascon : Brief of Appellant

Utah Court of Appeals

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BRIEF IN THE COURT OF APPEALS OF THE STATE OF UTAH

SALT LAKE CITY,

Plaintiff-Respondent,

v.

JOHN R. RASCON,

Defendant-Appellant.

Case No. 870518-CA
Priority #2

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Driving Under the Influence of Alcohol, a Class B Misdemeanor, in the Fifth Circuit Court, in and for Salt Lake County, State of Utah, Salt Lake Department, the Honorable Maurice D. Jones presiding.

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TEXT OF STATUTES

UTAH CODE ANN. §41-6-44 (1953 as amended) DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUG OR WITH SPECIFIED OR UNSAFE BLOOD ALCOHOL CONTENT - MEASUREMENT OF BLOOD OR BREATH ALCOHOL CRIMINAL PUNISHMENT - ARRESTS WITHOUT WARRANT PENALTIES - SUSPENSION OR REVOCATION OF LICENSE.

(1)(a) It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within the state if the person has a blood or breath alcohol content of .08% or greater by weight as shown by a chemical test given within two hours after the alleged operation of physical control, or if the person 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 operating a vehicle.

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this court pursuant to Utah Code Annotated, Section 78-2a-3(2) (c), 1953 as amended, and Utah Code Annotated Section 77-35-26(b) (1), 1953 as amended whereby a defendant in a criminal action may take an appeal to the Court of Appeals from a final judgment of conviction. In this case, final judgment was rendered by the Honorable Judge Maurice D. Jones, Fifth Circuit Court, Salt Lake Department, Salt Lake County, State of Utah.

STATEMENT OF ISSUES

1. Whether the presence of denture cream in the mouth of a suspect during an Intoxilyzer test constitutes a foreign substance requiring suppression of the test.

DETERMINATIVE STATUTES

UTAH CODE ANN. §78-2a-3 (1953 as amended)

COURT OF APPEALS JURISDICTION [Effective until January 1, 1988].

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(c) appeals from the circuit courts;

UTAH CODE ANN. §77-35-26 (1953 as amended)
Rule 26 - Appeals

Rules 26 - Appeals. (a) An appeal is taken by filing with the clerk of the court from which the appeal is taken a notice of appeal stating the order of judgment appealed from andy by serving a copy thereof upon the adverse party or his attorney of record. Proof of service of such copy shall be filed with the court.

(b) An appeal may be taken by the defendant:

(1) From the final judgment of conviction;

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PROCEDURAL HISTORY

Defendant was originally charged with Driving Under the Influence of Alcohol, Driving on a Suspended License and Illegal Lane Change. On October 9, 1987, a jury trial was held in the Fifth Circuit Court of the State of Utah, Salt Lake Department, the Honorable Maurice D. Jones, presiding, The plaintiff did not proceed on the Driving on Suspension charge. The jury returned a verdict of not guilty on the Illegal Lane Change charge and a verdict of guilty on one count of Driving Under the Influence of Alcohol, a Class B misdemeanor. Defendant appeals from the judgment and conviction.

FACTS

On June 30, 1987, defendant Officer VanHuen stopped defendant due to his driving pattern (record at 27). Defendant was administered field sobriety tests (record at 30-34).

Defendant subsequently submitted to an Intoxilyzer test performed by a different officer (record at 44-59). At the time of the Intoxilyzer test, defendant was utilizing a cream as a fixative or adhesive to retain dentures which he was then wearing (record at 2 and 100). Plaintiff Salt Lake City did not attack the existence of the denture cream.

On August 28, 1987, a hearing was held before the Honorable Maurice Jones on a defense motion to suppress the results of the Intoxilyzer test (record at 1-18). It was the defense position that the presence of the cream itself constituted a violation of the rule enunciated in State v. Baker, 355 P.2d 806 (WA. 1960) (record at 15). See also In the Interest of Oaks, 571 P.2d 1364 (Utah 1977). At the hearing, the defendant testified that he was using a cream as an adhesive for his dentures (record at 2). Mr. Ahmed Tafesh testified that the presence of the cream would falsely inflate the reading of the Intoxilyzer. Mr. Tafesh also cited a study which supported his opinion (record at 6, 7). The court denied the defense motion. The court refused to explain whether it found that the dentures and denture cream were not foreign substances, merely stating that the defense had not sustained its burden (record at 17).

During a jury trial held October 9, 1987, the results of the Intoxilyzer test were admitted. Defendant did not renew his objection at that time.

SUMMARY OF ARGUMENTS

Defendant urges this court to overturn his conviction of Driving While Under the Influence of Alcohol, inasmuch as it is unrebutted in the record that defendant had denture cream in his mouth at the time of the Intoxilyzer testing. The presence of this cream violated the Baker rule. Because the City failed to satisfy all requirements for admissibility of the Intoxilyzer test, the admission of the test was error. The error was prejudicial. Defendant is therefore entitled to a new trial.

ARGUMENT

I. THE MOTION TO SUPPRESS THE INTOXILYZER RESULTS IS PROPERLY BEFORE THIS COURT, AS AN OBJECTION TO EVIDENCE NEED NOT BE RENEWED WHEN THE TRIAL JUDGE ALSO RULED ON THE PRETRIAL MOTION AFTER AN EVIDENTIARY HEARING.

In its motion for summary disposition, Respondent cited State v. Lesley, 672 P.2d 79 (Utah 1983), for the proposition that Appellant was required to renew his objection to the Intoxilyzer results subsequent to the motion hearing. However, in Utah v. Johnson, No. 29814 (Filed December 31, 1987), the Utah Supreme Court held that "[T]he rule in Lesley does not require a defendant to object or to renew his motion to suppress at trial where the trial judge is also the judge who ruled on the pretrial motion and where the record or transcript indicates that an evidentiary hearing was held." Johnson, supra, at 3. The requirements of Johnson were fulfilled in the instant case (record at 1 through 19). There was no possibility that trial evidence would affect the validity of earlier

rulings, inasmuch as Mr. Tafesh's trial testimony was substantially the same as his pretrial testimony, with the exception that he was not permitted to provide his opinion as to the effect of the fixative cream (record at 106 through 112). And, as indicated at the hearing on the request for the Certificate for Probable Cause, the trial judge continued in his opinion that his ruling was correct (record at 126).

II. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS RESULTS OF THE INTOXILYZER TEST.

The rule enunciated in State v. Baker, 355 P.2d 806, 811 (Wash. 1960); See also In the Interest of Oaks, 571 P.2d 1364 (Utah 1977), and Salt Lake City v. Womack, 71 Utah Adv. Rep. 37 (Utah App. Dec. 4, 1977)), requires that the mouth be free of foreign objects for an Intoxilyzer result to be valid. 355 P.2d at 810. Mr. Rascon testified that he was utilizing a cream as a fixative for his dentures during the Intoxilyzer testing (record at 2 and 100). The prosecutor did not present contrary evidence; the prosecutor did not cross-examine Mr. Rascon in an attempt to discredit this testimony (record at 2 through 3 and 101 through 105). The trial judge did not issue a finding that he disbelieved Mr. Rascon's testimony (record at 16 through 17). The presence of the denture cream was established and the Intoxilyzer results should have been suppressed on this basis alone. Indeed, the City's own witness conceded that foreign material cannot be in the mouth inasmuch as the absorption

of alcohol could distort the test (record at 62). It appears from the record that the court misunderstood the facts of Baker, inasmuch as the court stated that the foreign substance referred to in Baker was something "being chewed, eaten, or regurgitated." (record at 16). This is incorrect. Rather, in Baker there was "evidence tending to show that appellant may have had an absorbent poultice and a packing impregnated with medicine (toothache drops) containing alcohol in a cavity in his tooth at the time he took the test." 355 P.2d 811, 812. Similarly, in this case, defendant had in his mouth an absorbent cream which would have retained the alcohol he acknowledged consuming.

Nevertheless, defendant introduced the expert opinion of Mr. Tafesh that the cream would inflate the Intoxilyzer results. Mr. Tafesh also also cited a study supporting this finding (record at 6 and 7). Mr. Tafesh holds a Bachelor's degree of Science in Chemistry, a Master's degree in Organic Chemistry, and at the time of trial was working on his Doctorate in Organic and Synthetic Organic Chemistry at the University of Utah. He utilized an infrared spectrophotometer on a daily basis. Mr. Tafesh testified without contradiction that the infrared spectrophotometer is the device which detects alcohol being introduced into the Intoxilyzer. Mr. Tafesh had read material concerning the Intoxilyzer and had seen it in operation. Thus, based on his qualifications alone, Mr. Tafesh was qualified to render an opinion as to whether the presence of cream would inflate the Intoxilyzer results. However, he also

cited a study supporting his opinion, in which it was found that alcohol placed in the mouth but not swallowed lead to an Intoxilyzer test result of .112 even thirty-five minutes after the alcohol was removed from the mouth when denture cream was present (record at 7). The court expressed concern during its inquiry that only one individual was used in the study and that the type of cream was not identified. The court would not allow the expert to explain the basic properties of adhesive (record at 9). The Defendant's position is supported by the Utah Supreme Court's opinion in Womack, as a fixative cream is not a foreign substance which "will be absorbed during the observation period." Womack, supra at fn. 2. Based upon the unrebutted evidence presented by Appellant, the trial court's denial of the motion to suppress was an abuse of discretion.

III. THE TRIAL COURT'S FAILURE TO SUPPRESS THE INTOXILYZER RESULTS WAS REVERSIBLE ERROR.

The Appellate Court, of course, has no way knowing whether the jury's verdict of guilty stemmed from an acceptance of the Intoxilyzer test or from the officer's opinions as to defendant's intoxication. As was the case in Baker, the State's failure to satisfy all requirements for admissibility of the Intoxilyzer test leads to prejudicial error and the entitlement to a new trial. 355 P.2d at 812. Indeed, there is some support in the record that the jury did not believe the officer, inasmuch as they failed to convict on the Illegal Lane Change charge.

CONCLUSION

The Baker case requires that there be no foreign objects in the mouth at the time of Intoxilyzer testing. It is unrebutted in the record that defendant had denture cream in his mouth at the time of the Intoxilyzer testing. The presence of this cream violated the Baker rule. Because the City failed to satisfy all requirements for the admissibility of the Intoxilyzer test, the admission of the test was error. The error was prejudicial. Defendant is therefore entitled to a new trial.

DATED this 18TH day of March, 1988.

GLEN A. COOK
Attorney for Defendant/Appellant

MAILED/DELIVERED a copy of the foregoing to Larry Spendlove, Salt Lake City Attorney's Office, 451 South 200 East, Salt Lake City, Utah 84111 this _____ day of March, 1988.

CERTIFICATE OF DELIVERY

I, Glen A. Cook, attorney for Appellant, do hereby state that a true and correct copy of the brief in the above case has been filed with the Utah Court of Appeals and the Salt Lake City Attorney's Office.

DATED this 18TH day of March, 1988.

GLEN A. COOK
Attorney for Appellant

WE ARE AWARE OF THE ADDENDUM REQUIREMENT, NO ADDENDUM IS REQUIRED ON THIS BRIEF.