1979

Layton City v. Ferrin Douglas Glines : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

LAYTON CITY, :

Plaintiff-Respondent, : Case No. 1665

vs. :

FERRIN DOUGLAS GLINES, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECO

DISTRICT COURT, IN AND FOR DAVIS COUNTY, STATE O

HONORABLE J. DUFFY PALMER, JUDGE, PRESIDING.

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DEC

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IN THE SUPREME COURT OF THE

STATE OF UTAH

LAYTON CITY,	:	
Plaintiff-Respondent,	:	Case No. 16659
vs.	:	
FERRIN DOUGLAS GLINES,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE J. DUFFY PALMER, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Ferrin Douglas Glines, was convicted before the Circuit Court of the State of Utah, in and for Layton, Utah, of the crime of Driving Under the Influence of Alcohol, in violation of Section 41-6-44, Layton Municipal Code. Upon appeal to the Second Judicial District Court, that judgment of conviction was upheld by the Honorable J. Duffy Palmer, Judge, Presiding. From that judgment of conviction, the defendant brought a direct appeal pursuant to the terms and provisions of Article VIII, Section 9, of the Constitution of the State of Utah solely and expressly to test the Constitutional validity and construction of Layton Municipal Code 41-6-44.

DISPOSITION IN THE LOWER COURT

The trial court found the defendant guilty of the crime of Driving under the influence of alcohol, in violation of Layton Municipal Code, Section 41-6-44. Subsequently, the trial court sentenced appellant to serve a term of six months in the Davis County Jail.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the verdict and judgment of the trial court upon grounds that Section 41-6-44, Layton Municipal Code is invalid.

STATEMENT OF FACTS

Respondent, Layton City, concurs with Appellant's Statement of Facts.

ARGUMENT

POINT I

REPEAL OF SECTION 41-6-43, U.C.A. (1953) DID NOT INVALIDATE SECTION 41-6-44 OF THE LAYTON MUNICIPAL CODE.

A. Layton City enacted Section 41-6-44, pursuant to several state statutes.

Respondent agrees with Appellant that Section 41-6-43 was repealed by the Utah State Legislature, but Section 41-6-44 of the Revised Ordinances of Layton City under which the Defendant was charged and convicted was not enacted solely upon the authority of Section 41-6-43. The position of Respondent is that Section 41-6-44 was enacted pursuant to authority granted under various state statutes including Section 10-8-84, U.C.A., (1953), which provides the following:

> They may pass all ordinances and rules and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein; and may enforce obedience to such ordinances with such fines or penalties as they may deem proper; provided, that the punishment of any offense shall be by fine in any sum less than $300 or by imprisonment not to exceed six months, or by both such fine and imprisonment.

In addition, it should be noted that Section 41-6-16, U.C.A., (1953), at the beginning of the traffic code states:

> The provisions of this act shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this act unless expressly authorized herein. Local authorities may, however, adopt regulations consistent with this act, and additional traffic regulations which are not in conflict therewith.

Therefore, the repeal of Section 41-6-43 does not affect municipal power to adopt an ordinance containing language substantially similar to Sections 41-6-44 and 41-6-45, as Section 41-6-16 specifically enables municipalities to adopt and enforce rules and regulations consistent with Chapter 6 of Title 41, Utah Code Annotated and "additional traffic regulations not in conflict therewith."

Additionally, Section 10-3-710, U.C.A., (1953) Sup. 1977) provides that municipalities may adopt provisions of state law by reference. Section 10-1-103, U.C.A., (1953) (Sup. 1977) provides:

> The powers herein delegated to any municipality shall be liberally construed to permit the municipality to exercise the powers granted by this act except in cases clearly contrary to the intent of the law.

Also, Section 10-8-11, U.C.A. (1953), specifically authorizes cities to "regulate the use of streets" and Section 10-8-30, U.C.A. (1953), authorizes cities to "regulate the movement of traffic on the streets." Section 10-8-47, U.C.A., (1953), provides that cities may prevent intoxication.

Thus, Section 41-6-43, U.C.A., (1953), was not the only state statute from which the Respondent derived authority to enact its ordinance prohibiting driving while under the influence of intoxicating liquor. There is value in general grants of authority and until such general grants are limited

by other state statutes, as in the Speth case, then the general grant of authority is valid and cities can pass ordinances under that general umbrella of authority.

Appellant argues that once a specific power statute has been enacted which limits the authority given by a general power statute and that specific authority has been repealed, "one cannot resurrect it under the guise of general authority." Respondent does not agree. The purpose of a specific statute may be to limit the authority which exists from the general statute. But, once this limitation is removed, all the power and authority which originally existed under the general statute returns.

B. Legislative intent in repealing Section 41-6-43 was to clarify the language and not to deprive cities of their right to regulate driving under the influence and reckless driving.

The legislative counsel and legislative analyst to the Transportation Subcommittee have advised the Utah League of Cities and Towns' legal counsel that it was the legislative intent in repealing Section 41-6-43 to remove from the Utah Code language which was inconsistent and in conflict with Sections 41-6-44 and 41-6-45, i.e., Section 41-6-44 relating to driving under the influence of alcohol or of any drug, and Section 41-6-45 relating to reckless driving, used language to describe drunken driving and reckless driving other than that used in Section 41-6-43.

The explanation for the difference in language is that Section 41-6-43 was enacted in 1941 and had not been amended. Sections 41-6-44 and 41-6-45 have been amended several times and reflect both court interpretations of those sections and the more recent scientific descriptions of the offenses. It was not the intent of the legislature to remove the authority, just the inconsistent language. This is evidenced by the re-enactment of Section 41-6-43 in the next legislative session.

C. The court should not construe a general recodification in the same light as a specific repealing statute.

The inclination of the courts in the past has been not to use the same rules of construction for recodifications as for specific repealers, i.e., the general repeal should not invalidate the general enabling legislation of Section 41-6-16 where the repealer was part of a 37 page "recodification." The focus of the legislature was not concentrated on the repeal of Section 41-6-43, U.C.A., (1953) alone which substantiates Respondents argument that the loss of Section 41-6-43 was more cosmetic, for consistency in language.

POINT II

CITIES MAY ENACT DRIVING UNDER THE INFLUENCE ORDINANCES PURSUANT TO A GENERAL GRANT OF AUTHORITY.

A. Salt Lake City v. Kusse is controlling case law.

In Salt Lake City v. Kusse, 97 Utah 113, 93 P. 2d 671, (1938), the defendant had been convicted of driving under the influence of an intoxicating liquor pursuant to a city ordinance which was identical with the state statute with minor changes to conform that statute to the form of a city ordinance. The defendant challenged the city's power under its general power to pass an ordinance prohibiting driving while under the influence of intoxicating liquor and on the theory that a state law pre-empts a local ordinance on the same subject.

The Supreme Court of Utah held in the Kusse Case that the grant of general police power to cities under the former equivalent statute to Section 10-8-84, U.C.A., (1953), being Section 15-8-84, R.S.U., (1933), authorized the city to pass an ordinance to prevent driving while under the influence of intoxicating liquor. The basis for the authority was "the public health, safety, morals, and welfare" authority of Section 15-8-84, R.S.U., (1933), which is the same as our present Section 10-8-84, U.C.A., (1953).

In Kusse, the Court raised a question which it never had to answer and which could be raised again here:

> There may be some question whether Section 15-8-30 does not pertain only to the regulation of the actual movement of traffic and the actual prevention of racing and immoderate driving; that is, whether the section permits only the operation

> on these acts as they occur without giving power to prevent an act or a condition which itself, if permitted, might affect the movement of traffic or be likely to result in racing or immoderate driving. While this seems a narrow construction, it need not now be decided....(97 Utah at 116).

The section before the Court in Kusse concerned the power of municipalities to regulate the movement of traffic. The ques was whether a driving under the influence ordinance was regulating the movement of traffic or regulating behavior whi could effect traffic. And, if it was not directly a regulati on the movement of traffic, could the ordinance still be just under that section because the behavior prohibited could effe traffic? The Court never reached those questions because the found authority for the ordinance under the general grant of authority, Section 15-8-84, R.S.U., (1933).

Kusse is still valid law and reasoning supporting t proposition that a municipality has authority pursuant to a general power statute to enact an ordinance prohibiting speci behavior. Appellant's cites are thus inapplicable to our fac circumstances because this Court has already decided the issu in Kusse.

B. The Attorney General has issued an opinion supporti Respondent's position that cities have power to enact a drivi under the influence ordinance.

Appendix "A" is an opinion from the Attorney General's Office of the State of Utah dated June 7, 1978, which supports Respondent's position that a general grant of authority exists enabling cities to enact ordinances prohibiting driving while under the influence of intoxicating liquor without the use of Section 41-6-43, U.C.A., (1953).

C. The Speth Case is not controlling case law.

In Speth, the Supreme Court ruled the state statute in question limited cities by its specific working. In our case, in brief, no similar statute of specific wording existed at the time of the Appellant's offense. Section 10-8-84 and others which were, and still are in existence, are statutes of general grants of authority.

Thus, Respondent was not going beyond the limits of a specific statute because there was none. Instead, Respondent's ordinance was pursuant to authority which it derived under the state statutes cited in Point One above. The issues are not the same as in Speth.

POINT III

THE SECOND ALLRED DECISION SHOWS THE STATE HAS NOT PRE-EMPTED THE FIELD IN RELATION TO THE OFFENSE OF DRIVING UNDER THE INFLUENCE.

Appellant cites the first decision by the Utah Supre Court in Salt Lake City v. Allred, 19 Utah 2d 254, 430 P. 2d 3 (1967), but that case was reheard by the Court to reconsider their opinion based on the pre-emption theory. The second Allred decision, found in 20 Utah 2d 298, 437 P. 2d 434, (1968 reversed the Court's first decision. In the second decision t Court said:

> It is a well established principle in this state that the city has the right to legislate on the same subject as a state statute where either the general police power or express grant of authority is conferred upon the municipalities. (Listed citations omitted.) (437 P. 2d at 436).

The real significance of the second Allred decision as it pertains to Appellant's argument that by allowing the offense of "D.U.I." to be punished as a Class "A" misdemeanor in certain instances shows the legislature intended to pre-emp the field is found on pages 301 and 302 under head notes 6 and 7 as follows:

> As to whether or not the difference of penalties between city ordinances and state statutes on the same subject creates an inconsistency that will invalidate the ordinance receives our next consideration and causes some difficulty. The previous decision in this case stated as follows:

"It must be conceded that the legislature did not intend to grant to cities the authority to prohibit acts as misdemeanors which the State has denounced as felonies."

It is statedin 37 AmJur., Municipal Corporations, Section 165, P. 791, as follows:

"A municipal ordinance is not in conflict with a statute authorizing its adoption because of a difference in penalties. Thus, further and additional penalties may be imposed by statute, without creating inconsistency and conversely, at least in some instances lesser penalties may be imposed by the ordinance for violation than by the statute without conflict."

See also annotation, 138 A.L.R. 1208, 1213. McQuillin, Municipal Corporations, Section 17.15, footnote 71, cites cases where it is held that ordinance is valid when it relates to same subject matter as state law where the ordinance prescribed a smaller penalty. In these cases both ordinance and statute are misdemeanors.

Although we do not believe there is anything inherently wrong in allowing a local government to punish conduct amounting to a felony under state law by a municipal ordinance which is only a misdemeanor, nevertheless we do not have to decide this question since the case here involved, under subsection 7 and 8 of the city ordinance, does not amount to a felony under any of the state statutes pertaining to sexual offenses. The elements involved in the present ordinance case would not be of the same as under the statute, or if any of the elements were the same or common to both, the statute in a felony case would require proof of additional elements, therefore a

> claim of double jeopardy would not be valid. Double jeopardy contemplates all the elements of an entire offense. See State v. Thatcher, 108 Utah 63, 157 P. 2d 258. We conclude that the difference in penalties does not create an inconsistency that will invalidate the ordinance where there can be no valid claim of double jeopardy. (Emphasis added.)

Respondent agrees with this Court and believes the re-enactment of 41-6-43 by the State Legislature further supp the Allred reasoning by showing that the legislature intended to allow cities to enact "D.U.I." ordinances even though they are limited to a Class "B" misdemeanor level of punishment.

In a prior decision, Salt LakeCity v. Kusse, 97 Uta 113, 93 P. 2d 673, with respect to the pre-emption question, court held: "An ordinance dealing with the same subject as a statute is invalid only if prohibited by the statute or incon therewith." (93 P. 2d at 673.) And in answering whether the ordinance was "prohibited by the statute or inconsistent ther the court cited Section 57-7-6, Revised Statutes of Utah 193 the proposition that nothing in the then state traffic code e prohibits cities from passing ordinances directed against dr driving. Section 57-7-6 provided in part:

> Local authorities, except as expressly authorized, shall have no power or authority to alter any of the regulations declared in this chapter, or to enact or enforce any other rule or regulations contrary to the provisions of this chapter.....

Compared to former Section 57-7-6, our present Section 41-6-16, U.C.A., (1953), is express and clear enabling legislation authorizing cities to prohibit driving under the influence of alcohol or intoxicants and to punish reckless driving.

CONCLUSION

Respondent had authority, under several state statutes, to pass an ordinance controlling driving while under the influence of intoxicating liquor. The enactment of Section 41-6-43 just put statutory language to the power cities already had as the Kusse case showed. The repeal of Section 41-6-43 only eliminated the language but not the authority. Cities went back to where they were before Section 41-6-43 was enacted and drew their power from the general state statutes.

Further, the re-enactment of Section 41-6-43 at the next session following its repeal, along with the reasoning of the second Allred decision, clearly shows the legislature did not wish to pre-empt the field. Therefore, Respondent urges this Court to uphold the verdict and judgment of the Trial and

Appellate Courts and rule that Layton Municipal Code Section 41-6-44 is valid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Respondent was duly served on counsel for the Appellant, TOM JONES, 211 East 300 South, Suite 219, Salt LakeCity, Utah 84111, by hand delivering two (2) copies thereof this 14th day of December, 1979.

C. BRUCE BARTON

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DEPUTY ATTORNEY GENERAL

June 7, 1978

Mr. B. H. Harris
Cache County Attorney
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Logan, Utah 84321

Re: 78-173

Dear Mr. Harris:

In response to your letter of June 2, 1978, we have found that H.B. No. 18 of the 1978 Budget Session did in fact repeal Section 41-6-43, Utah Code Annotated, 1953. Notwithstanding this repealer, we are of the opinion that city attorneys still have authority to prosecute the driving under the influence of alcohol cases and other offenses involving traffic if the ordinances are identical to or consistent with state statutes. We can find no legislative intent in the revision of many portions of the traffic code to restrict municipal powers which have been deemed necessary since statehood.

Section 10-8-30, Utah Code Annotated, 1953, (enacted in 1898) is still in effect and has not been repealed in our opinion. As this section is construed by Salt Lake City v. Kusse, 97 U.133, 93 P.2d 671, it is clear that the grant of power by the state to municipalities has and does include the power to regulate traffic by ordinance notwithstanding the adoption of statutes on the same subject. The limitation, referred to in the preceeding paragraph is that the ordinance must be consistent with the statutory plan or plans for regulation, and for example, could not provide greater penalties than those set out by statute.

The cities may of course prosecute violations of valid ordinances.

Very truly yours,

JOSEPH P. McCARTHY
Assistant Attorney General

JPM:hk

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APPENDIX "A"