2010

The State of Utah v. Randall Matthew Relyea : Reply Brief

Utah Court of Appeals

Case No. 20100077-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellant,

vs.

RANDALL MATTHEW RELYEA,
Defendant/Appellee.

REPLY BRIEF OF APPELLANT

Appeal from an interlocutory order granting a motion to exclude Intoxilyzer results in the Fourth Judicial District Court of Utah, Utah County, the Honorable Samuel D. McVey presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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ARGUMENT

Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to new matters raised in the appellee's brief.

A. THE ISSUES RAISED ON APPEAL ARE PROPERLY BEFORE THIS COURT.

In his opposing brief, Defendant claims that the State (1) "waived its objection to the trial court's finding that the *Baker* rule was not complied with," Aple. Brf. at 15-16; and (2) did not properly preserve the issue regarding the applicability of the *Baker* rule to Intoxilyzers, Aple. Brf. at 19-22. But a review of the proceedings below demonstrates otherwise.

1. The State did not waive its claim that officers complied with the *Baker* rule.

Contrary to Defendant's claim on appeal, Aple. Brf. at 15-16, the State did not waive its claim that Officer Brimhall complied with the observation requirements of the *Baker* rule. When Defendant moved to exclude the Intoxilyzer results for an alleged *Baker* rule violation, *see* R.55-52, the State argued—in both its memorandum in opposition to the motion and at the June 2009 evidentiary hearing—that Officer Brimhall's observation of Defendant following his arrest satisfied the *Baker* rule. *See* R.63-59; R.153:11-14. The State thus preserved the issue for appeal.

Defendant, however, points to the November 9, 2009 motion hearing as evidence "[t]he State agreed that under the current case law, the officer did not satisfy the foundational requirements necessary to admit intoxilyzer results." Aple. Brf. at 15-16. Specifically, he relies on the following colloquy between the district court and prosecutor:

> Court: We could reconsider the evidence, but . . . what the evidence still shows is that Baker wasn't complied.
>
> Prosecutor: And we agree with that, Judge. We're okay with that.

R.156:6-7. But this snippet from the November 2009 hearing is taken out of context by Defendant and does not support his claim.

The focus of the November 2009 hearing was not on the district court's June 2009 ruling of inadmissibility based on *Baker* rule noncompliance. Rather, it was on the authority of the court to augment the record with evidence from the August 2009 evidentiary hearing and reconsider the admissibility of the Intoxilyzer results, *notwithstanding* the court's June 2009 ruling. The prosecutor thus argued that the court still "could go ahead and take a look at the [additional] evidence," and that "even though [Officer Brimhall] didn't comply with the 15 minute observation, [it] could still go ahead and allow" the Intoxilyzer results. R.156:5. In other words, the prosecutor was simply making an alternative argument for admissibility based on the additional evidence.

The prosecutor went on to explain that because Defendant's motion to suppress was "really a motion in limine" on evidence admissibility, the trial court was "entitled to reconsider this evidence at any time." R.156:6-7. The district court, however, countered that "what the evidence still shows is that *Baker* wasn't complied with." R.156:7. The prosecutor replied, "And we agree with that, Judge. We're okay with that." R.156:7. That statement, however, was not a sudden concession on the merits. It simply clarified that notwithstanding that conclusion, there was an alternative reason for admitting the evidence, i.e.,

Baker rule compliance is not necessary to ensure the reliability of test results from the Intoxilyzer 8000.

Indeed, such a concession at that point would be an odd reversal, to say the least. As noted, when Defendant initially moved to suppress the Intoxilyzer results for *Baker* rule noncompliance, the prosecutor contested that motion in both a memorandum and at the ensuing evidentiary hearing. *See* R.63-59; R.153:11-14. Then, when the court granted the motion, the prosecutor filed a "Notice of Intent to Appeal and Motion for Leave to Supplement [the] Record." R.93-91. In that pleading, the State specifically advised the court "of its intent to appeal the court's *ruling of June 19, 2009*," and sought to supplement the record with expert testimony on Intoxilyzers to "become *part* of the state's appeal." R.91-92. Then, at the August 2009 evidentiary hearing, the State not only elicited expert testimony regarding the utility of the *Baker* rule for Intoxilyzers, but elicited additional testimony from Officer Brimhall regarding the degree of his *Baker* rule observation. *See* R.155:14-17,21-23.

In sum, the record, reviewed as a whole, demonstrates that the State never conceded the correctness of the district court's June 2009 admissibility ruling. The issue, therefore, was not waived.[1]

2. The issue of whether *Baker* rule compliance is required for admission of Intoxilyzer results is properly before the Court.

Defendant also claims that the issue of whether *Baker* rule compliance is necessary for admission of Intoxilyzer results is not properly before this Court. Aple. Brf. at 19-22. That claim also lacks merit.

* * *

As noted above, following the district court's June 2009 admissibility ruling, the State filed a "Notice of Intent to Appeal and Motion for Leave to Supplement [the] Record." R.93-91. In addition to giving notice "of its intent to appeal the court's ruling of June 19, 2009," the State moved for permission to supplement the record with expert testimony establishing that *Baker* rule

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[1] Even assuming arguendo it could be said that the prosecutor conceded the merits of the point, such a concession should not be construed as a waiver for purposes of appeal. As this Court observed last year, a party's "'[a]ffirmative representations that [he or she] has no objection to the proceedings" preclude appellate review of the matter "because such representations reassure the trial court and encourage it to proceed without further consideration of the issue[ ].'" *State v. Maese*, 2010 UT App 106, ¶ 9, 236 P.3d 155 (quoting *Newman v. White Water Whirlpool*, 2008 UT 79, ¶ 14, 197 P.3d 654). Yet, in this case, the issue of *Baker* rule observation was in fact litigated by the parties and duly considered, *see* 82-79, and "reconsider[ed], *see* R.133, by the district court.

compliance was not necessary to ensure a reliable Intoxilyzer result. *See* R.93-91. The State opined that notwithstanding such evidence, the district court would be "obliged" by the principle of stare decisis to follow *Salt Lake City v. Womack*, 747 P.2d 1039 (Utah 1987), and *State v. Vialpando*, 2004 UT App 95, 89 P.3d 209.[2] However, the State made plain that the purpose of the supplemental evidence was "to challenge the utility of the *Baker* decision requiring an officer to observe a suspect for 15 minutes before administering an intoxilyzer test," which would then "become part of the state's appeal." R.93,92.

At the August 2009 hearing addressing the State's motion to supplement the record, the prosecutor further explained that even though he "d[id]n't anticipate that [the court's] ruling would be any different," the State was "ask[ing] the Court to reconsider" its ruling that the Intoxilyzer results were inadmissible. R.155:7. "[N]ot aware of anything that would allow it to augment the record with facts after its already ruled" on the admissibility of the evidence, the district court "den[ied] the request to augment the record," but allowed the

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[2] The prosecutor was duty-bound to acknowledge that *Vialpando* required *Baker* rule compliance for Intoxilyzers. *See* Utah R. Prof. Conduct 3.3(a)(2) (stating that "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel").

State to put on the evidence as an "offer of proof" to preserve the issue for appeal. R.155:7. The State thereafter called Officer Brimhall (eliciting additional facts regarding his *Baker* rule observations) and Trooper Brierley (eliciting expert testimony on the necessity of *Baker* rule compliance for Intoxilyzer tests). *See* R.155:14-62. Both witnesses were subject to cross-examination by defense counsel. *See* R.155:17-20,23-24,55-62.

The State's motion was then set for argument at the November 2009 motion hearing. *See* R.156. At that hearing, the prosecutor again asked the district court "to reconsider its prior ruling" regarding the admissibility of the Intoxilyzer results. R.156:3. After hearing argument from defense counsel, the district court reversed its prior ruling refusing to augment the record. Noting that the motion to suppress was foundational, rather than constitutional, in nature, the court concluded that it could consider new evidence on the matter. R.156:10.[3] Accordingly, it "allow[ed] the State to augment the record" with the testimony from the August 2009 evidentiary hearing. R.156:11. The court

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[3] Defendant has not challenged that conclusion on appeal, *see* Aple. Brf. at 19-22, and for good reason. It is supported by precedent. *See Erickson v. Wasatch Manor, Inc.*, 802 P.2d 1323, 1326 (Utah App. 1990) (finding no abuse of discretion in reconsidering admissibility of evidence).

nevertheless refused to reverse its June admissibility ruling, concluding that it was bound by Vialpando. R.156:11-12.

Two months later, the district court entered written Findings of Fact, Conclusions of Law, and Order. R.141-132. The court's findings were based on testimony taken at the preliminary hearing, the June 2009 evidentiary hearing, and the August 2009 evidentiary hearing. *See* R.140. "After considering the additional evidence and reconsidering the issues presented," the court concluded that Officer Brimhall did not satisfy the observation requirements of the *Baker* rule. R.133:¶1. The court also recognized that the Intoxilyzer 8000 was designed to disallow testing where mouth alcohol is present. R.132:¶4. The court nevertheless concluded that because it was bound by the holding in *Vialpando*, the State failed to meet the foundational requirements for admission of the breath test results. R.132:¶5.

In sum, the district court received evidence on the capability of the Intoxilyzer 8000 to recognize mouth alcohol and abort testing when it is detected. It then ruled that despite that capability, *Baker* rule compliance was necessary for admission of Intoxilyzer results. In so concluding, it relied on this Court's decision in *Vialpando*. This issue is thus properly before this Court.

3. The issue of whether *Baker* rule compliance is required for admission of Intoxilyzer results is ripe and remand to further supplement the record is not warranted.

Defendant contends that appellate review should not occur until "expert testimony [is] presented on both sides of the matter, not after the uncontested offer of proof conducted at the trial court." Aple. Brf. at 22. He thus asks the Court to "temporarily remand this case to the trial court" so that "an adversarial presentation of evidence" can be made. Aple. Brf. at 22-23. Defendant argues that because the State's evidence was initially introduced as an offer of proof, he now "should be entitled to confront the State's expert testimony with an expert of his own." Aple. Brf. at 22-23. This Court should reject Defendant's argument.

As observed by the district court, following its decision to supplement the record with evidence from the August 2009 evidentiary hearing, the court "offered to take any additional evidence that Defendant might wish to introduce, but [Defendant] declined." R.140. Moreover, the additional testimony taken at the August 2009 evidentiary hearing was not "uncontested," as asserted by Defendant. Aple. Brf. at 22. Trooper Brierley, the State's expert on Intoxilyzers, was subjected to cross-examination by defense counsel. *See* R.155:55-62. In short, evidence on the applicability of the *Baker* rule for Intoxilyzers was subject to the adversarial process.

Defendant suggests, however, that he was precluded from calling an expert witness when the prosecutor stated he intended to seek interlocutory appeal. That claim lacks merit. After taking the supplemental evidence, the court specifically told defense counsel that she "would be able to get an expert." R.156:7. It reiterated the point later in the hearing:

> I'd also allow—if you want to put anything in the record at this point because this is really your only opportunity to bring in an expert on this, I would allow that so that if you—so that the issue could be properly framed and there would be an adversarial presentation of evidence. *If you want to get an expert, you can do that,* but now [the prosecutor] want[s] to file an application for interlocutory appeal and that's fine, but I would like to proceed with this case and get it off our docket . . . .

R.156:11 (emphasis added). The court then asked whether the parties wanted to set the matter for trial, or for "a pretrial conference"—which would have allowed defense counsel time to consult and call an expert. R.156:12. When the prosecutor asked for a trial, defense counsel asked for time to talk about it. R.156:12. Sometime thereafter, defense counsel asked that the matter be set for trial and trial was set for a date three months away. R.156:13.

Moreover, the trial court did not enter findings and conclusions for another two months, *see* R.141-132, ample time for the defense to reconsider and

schedule an evidentiary hearing for the introduction of additional expert testimony. Yet, defense counsel did not do so.[4]

Defendant complains that "overturning the *Baker* rule required by *Vialpando*," where no opposing expert testimony was presented, would be "haphazard," a violation of due process, and "potentially short lived." Aple. Brf. at 23. This case, however, presents a simple question of whether the State laid a proper foundation for admission of Intoxilyzer results *in this case*. In the past, our courts have required compliance with the *Baker* rule to ensure a reading of deep lung air by breath test machines that cannot decipher between deep lung air and mouth alcohol. The evidence presented below established that the Intoxilyzer used in this case had built-in mechanisms that prevented mouth alcohol readings. Thus, like the Idaho Court of Appeals in *State v. Charan*, this Court need only hold that "the uncontroverted testimony of [Trooper Brierley] provided sufficient foundation for admission of the evidence." 971 P.2d 1165, 1167 (Ida. App. 1999).

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[4] Contrary to Defendant's suggestion, Aple. Brf. at 20, t

B. OFFICERS WERE NOT REQUIRED TO RECHECK DEFENDANT'S MOUTH WHEN HE ARRIVED AT THE POLICE STATION.

Defendant does not contend that Officer Brimhall's observation of him for the 16 minutes immediately preceding the Intoxilyzer test was inadequate under the *Baker* rule. *See* Aple. Brf. at 14. Instead, he claims that because Officer Brimhall's observation of him during the five minute ride to the police station was inadequate, he was required to recheck his mouth. Aple. Brf. at 14. Defendant thus argues that "[e]ven if the police waited and observed Relyea for an hour at the police station, if they never rechecked Relyea's mouth following a period of time where the officer admittedly could not reasonably ensure that no alcohol was introduced[,] they cannot ensure that his mouth was free of alcohol." Aple. Brf. at 14. This claim ignores the facts.

Defendant does not suggest that anything could have been introduced into his mouth from the outside during the 2-minute period preceding the Intoxilyzer test. *See* Aple. Brf. at 14. He argues, however, that because Officer Brimhall could not tell whether Defendant regurgitated or burped during the ride to the police station (the first 5 minutes of the 21-minute observation period), he was required to "[re]verify [at the police station] that there was no foreign matter" in Defendant's mouth, "including burped or regurgitated

alcohol." Aple. Brf. at 14. This claim lacks merit because the eye cannot distinguish between alcohol and saliva. The purpose of the visual check is to detect foreign objects that may skew the test.

Moreover, and most significantly, Defendant claimed that he regurgitated "*during the ride to the police station . . . and then quickly swallowed it down.*" R.138 (emphasis added). Thus, the Court may assume that just prior to arriving at the police station, Defendant in fact burped or regurgitated alcohol and then swallowed it. However, there was no evidence suggesting that he burped or regurgitated during the next 16 minutes and the officer did not observe him do so. R.138. That 16-minute period thus satisfied the "most important function" of the *Baker* rule, which "is to ensure that any alcohol in a suspect's mouth is absorbed into the system before the test is administered." *Vialpando*, 2004 UT App 95, ¶18, 89 P.3d 209; *accord Womack*, 747 P.2d at 1041 (observing that subject must be kept under observation for 15 minutes "to allow any alcohol present in the mouth to be absorbed to ensure a reliable [test] result") (citing *State v. Baker*, 355 P.2d 806, 811 (1960)).

In sum, the facts established that: (1) nothing was introduced into Defendant's mouth from the outside during the 21-minute period immediately preceding the test; (2) Defendant may have burped or regurgitated and then

swallowed immediately before arriving at the police station; and (3) Defendant did not burp or regurgitate during the ensuring 16 minutes before administration of the test. These facts were sufficient, as a matter of law, to satisfy the 15-minute observation requirement of the *Baker* rule. As such, the district court abused its discretion when it excluded the Intoxilyzer results for failure to comply with the *Baker* rule. *See Gaw v. State By & Through Dept. of Transp.*, 798 P.2d 1130, 1134 (Utah App. 1990) (holding that a "trial court does not properly exercise [its] discretion where its decision is based upon a misconception of law").[5]

C. THE STATE HAS MET ITS BURDEN OF PERSUASION IN SHOWING THAT VIALPANDO SHOULD BE OVERTURNED.

Defendant also argues that "there has not been a change in conditions since *Vialpando*" that would merit overturning application of the *Baker* rule to Intoxilyzer tests. Aple. Brf. at 17-19. This claim too lacks merit.

The State recognizes that it bears "a substantial burden of persuasion" in demonstrating that prior precedent should be overturned. *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994). As observed in *Menzies*, "'a court is not inexorably

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[5] This Court should thus reject Defendant's claim that the district court die not abuse its discretion "[e]ven if this Court disagrees with [its] legal conclusion that the officer's observation of Relyea was inadequate to satisfy the *Baker* rule." Aple. Brf. at 14-15.

bound by its own precedents but will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.'" *Id.* at 399 (citations omitted). The State has satisfied this burden.

The State has demonstrated that the *Baker* rule was adopted to ensure that breath test results reflected deep lung air readings. It has shown that the rule was required for Breathalyzers and other instruments that were incapable of distinguishing between deep lung air and mouth alcohol. It has further shown that unlike the Breathalyzer, the Intoxilyzer 8000 used in this case is capable of distinguishing between the two. In short, the State has shown that the technology of the Intoxilyzer 8000 accomplishes the same purpose as does the *Baker* rule for breathalyzers. This change in the condition of the breath test instrument merits overturning rigid application of the *Baker* rule. Additionally, *Vialpando's* extension of the *Baker* rule to Intoxilyzers was "not the most weighty of precedents." *Id.* This is so because it did not examine the underlying rationale of the *Baker* rule and the salient differences between the breathalyzer and Intoxilyzer 8000. In sum, the State has met the "substantial burden of persuasion" necessary to overturn *Vialpando*.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the State respectfully requests the Court to reverse the judgment of the district court.

Respectfully submitted April 8, 2011.

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CERTIFICATE OF SERVICE

I certify that on April 8, 2011, two copies of the foregoing reply brief were ☒ mailed ☐ hand-delivered to:

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A digital copy of the brief was also included: ☐ Yes ☒ No