

2010

Utah v. Dykes : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
JEREMY DYKES, : Case No. 20100582-CA
Defendant/Appellant. : Appellant is incarcerated.

APPELLANT'S REPLY BRIEF

Interlocutory appeal from a denial of a Motion to Quash Information on one count of Theft by Receiving Stolen Property, a Third Degree Felony, in violation of Utah Code section 76-6-408, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Michelle Christiansen, presiding.

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INTRODUCTION

This reply brief responds to three contentions made by the State in its Appellee's Brief. First, when the State refiles a charge previously dismissed after a preliminary hearing for insufficient evidence, absent new or previously unavailable evidence, the State must demonstrate good cause for refileing—and not just the absence of bad faith. The State has not demonstrated good cause to refile and so the Utah due process clause bars refileing. Second, contrary to the State's contentions, Mr. Dykes's bindover on felony theft by receiving stolen property charges was quashed exactly because the State presented no evidence—and thus, insufficient evidence—of value at the preliminary hearing. Finally, this court should reverse the district court because the State committed a potentially abusive practice when it refiled charges that had been quashed because the State had failed to present evidence on a clear and essential element of the charged offense. The State's arguments that the element is not clear or essential fail as the State has conceded below and as Utah law dictates. Because refileing a charge after presenting

no evidence on a clear and essential element of that charge is a potentially abusive practice and because the State has not demonstrated new or previously unavailable evidence or other good cause, the State's newest refiling violates Mr. Dykes's due process rights and this Court should reverse.

ARGUMENT

I. In the Absence of New or Previously Unavailable Evidence, The Due Process Clause of the Utah Constitution Requires Good Cause to Justify Refiling Charges Dismissed After a Preliminary Hearing for Insufficient Evidence, Not Just the Absence of Bad Faith.

Because the State has not presented new or previously unavailable evidence and because the State lacks good cause to refile felony charges against Mr. Dykes, the State is barred by the due process clause of the Utah Constitution from refiling even if it is not proceeding in bad faith. “[D]ue process considerations prohibit a prosecutor from refiling criminal charges earlier dismissed for insufficient evidence unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling.” State v. Brickey, 714 P.2d 644, 647 (Utah 1986). For instance, good cause may be found to exist if at the preliminary hearing the prosecutor innocently miscalculates the quantum of evidence necessary for bindover. State v. Morgan, 2001 UT 87, ¶¶ 17–19, 34 P.3d 767.

On the other hand, the Utah Supreme Court has “provided a working list of potentially abusive practices that bar refiling under the Brickey rule, including ‘forum shopping, repeated filings of groundless and improvident charges for the purpose to harass, withholding evidence, . . . [and] refil[ing] a charge after providing no evidence of

an essential and clear element of a crime.” State v. Rogers, 2006 UT 85, ¶ 11, 151 P.3d 171 (emphasis added) (quoting State v. Redd, 2001 UT 113, ¶ 20, 37 P.3d 1160). These potentially abusive practices are not good cause to refile and, when present, create a presumption that refiling is inappropriate, which can only be overcome by showing that new or previously unavailable evidence or other good cause justifies refiling. Redd, 2001 UT 113, ¶ 20.

Contrary to the State’s assertion, Br. Appellee 9, n.2, and as the word “potentially” suggests, bad faith is not required to show that a potentially abusive practice exists—and all good faith mistakes do not necessarily constitute good cause to refile. Indeed, in State v. Redd, even at the appellate level, the State continued to maintain that the reason it did not present evidence on an element of the offense was because, in the State’s view, the first and second elements of the offense (desecration of a dead human body) could only be read as one element, such that it was unnecessary to present evidence on what the Supreme Court labeled the first of the crime’s three elements (that the dead body was buried or otherwise interred). Redd, 2001 UT 113, ¶¶ 14–15. In other words, according to the State’s theory in that case, any mistake the State made in not presenting evidence on an element of an offense was based on the prosecutor’s good faith belief that the first two elements were really one element. In ruling that failing to present any evidence on a clear element of a crime at a preliminary hearing was a potentially abusive practice, the Utah Supreme Court never accused the State of acting in bad faith. It merely noted that “the State’s experienced legal counsel should have been able to extrapolate these three simple elements and provide evidence sufficient for a bindover.” Redd, 2001 UT 113, ¶ 14.

This is exactly the point conceded by the prosecutor in the present case below—that experienced legal counsel should have been able to discern what the elements were and provide sufficient evidence for bindover. R.114:12, 14–15, 21. (“The . . . case was dismissed because I made a mistake. I did. I erroneously asserted that it’s a motor vehicle. Defense counsel very capably pointed out in her argument and I think correctly that it’s not. . . . I overlooked this evidence and this is—this is not—anybody could have looked this up. A diligent lawyer on either side could have consulted Kelly. I made a mistake. . . . This is an error, counsel’s error in his legal strategy . . .”). In neither instance can it be clearly demonstrated that the State’s misinterpretation of the relevant criminal statutes was in bad faith. The only difference between these cases is that in the instant case, the State has admitted that its interpretation of the elements was erroneous where in Redd, the State continued to maintain that its theory was correct on appeal, which would, if anything, tend to indicate good faith. Redd, 2001 UT 113, ¶ 14. Regardless, bad faith is not the standard; the State must demonstrate good cause for refiling charges previously dismissed for insufficient evidence. Brickey, 714 P.2d at 647. And the Utah Supreme Court has made clear that this condition is not met when the State fails to present evidence on a clear and essential element of the offense, Redd, 2001 UT 113, ¶ 14, which the State conceded below. R. 114:12, 14–15, 21. Accordingly, this court should reverse.

II. The State's Contention That the Third Degree Felony Theft By Receiving Charge Was Not Earlier Dismissed for Insufficient Evidence of Value Is Without Merit; That Is Exactly Why Bindover Was Quashed.

When the State charged Mr. Dykes by information with second degree felony theft by receiving stolen property, it elected to proceed under all available theories—including a theory of value. The Information alleges that Mr. Dykes received stolen property “and the value of the property was or exceeded \$5,000 or the property stolen was a firearm or an operable motor vehicle.” R.2–3. Each of these theories was available to the State at the preliminary hearing and Mr. Dykes had to prepare to defend himself against all three. Ultimately, the State presented evidence on none of the available theories at the preliminary hearing and, while Mr. Dykes was bound over as charged, that bindover was quashed as a result of the State’s lack of evidence on this element.

At the motion hearing where the bindover was quashed, the State argued that even if an ATV is not a motor vehicle, Mr. Dykes should be bound over on at least a class A misdemeanor based on a theory of value: “there is evidence in the case sufficient to draw a reasonable inference that the ATV in question had a value of over \$300 and under \$1,000,” R.117:11, which was the value then necessary to make theft by receiving stolen property a class A misdemeanor. Utah Code § 76-6-412(1)(c) (2008). The State argued that because it had presented evidence of the value of another stolen ATV not alleged to have been received by Mr. Dykes, the court could infer that the value of the ATV Mr. Dykes was alleged to have received could be estimated at over \$300:

So we’re left with value and the evidence we have is same year of 2004, same make of ATV, Honda, both yellow in color, one a Rubicon model, the other a Rancher model, were

on the trailer in Nephi in front of his sister-in-law's house, they were stolen by somebody. And the one that was being ridden is—because of the age and the make and condition—similar enough in value to the 1102 vehicle described by [the alleged victim] the different model which was . . . purchased in 2004 for \$5,849.10. I can't say that that's the fair market value evidence, but certainly there's enough plausibility and proof to show that this was a machine that had a value of over \$300.

R. 117:11–12.

But the court disagreed with the State's characterization of its evidence, finding first that the ATV in question was not an operable motor vehicle and then explicitly finding that it did not have sufficient evidence of value to bind Mr. Dykes over either on second or third degree felony charges:

Motor vehicle is defined as . . . a self-propelled vehicle that is intended primarily for use and operation on the highways. An ATV is not intended primarily for use and operation on the highway. That's just a matter of common sense that we follow and can take note of. . . . And so to bind this over as a second degree felony, the State would have to have presented evidence of value of the vehicle. I don't find that the information provided . . . is sufficient to either bind it over as a second degree felony or as a third degree felony. . . . [A]s it stands right now from the information that was provided at the preliminary hearing, I don't have any information about the value of this item and will bind it over as a Class B misdemeanor.

R. 117:16–17 (emphasis added). Based on the plain language of the district court's order, the State's contention that felony charges were not dismissed on the basis of the State's insufficient evidence of value is without merit.

Because the State's Information alleged the value of the allegedly stolen property as a reason for binding Mr. Dykes over on felony theft by receiving stolen property

charges, because the State proceeded under that theory at the bindover motion hearing, and because the court below ultimately ruled against the State on the basis of value, the State's contention that Mr. Dykes's felony charges were not dismissed on the basis of the State's insufficient evidence of value is without merit. Accordingly, since the State has not demonstrated good cause to refile charges dismissed for insufficient evidence, this court should reverse.

III. Refiling Felony Charges Against Mr. Dykes Is a Potentially Abusive Practice Because the State Produced No Evidence of a Clear and Essential Element of the Offense at the Preliminary Hearing. The State's Contentions That the Element Was Not Clear or Essential Are Without Merit.

When the State refiled felony charges against Mr. Dykes after failing to present any evidence of value at his preliminary hearing, it committed a potentially abusive practice such that refiling is presumptively barred. “[R]efil[ing] a charge after providing no evidence of an essential and clear element of a crime” is a “potentially abusive practice.” Rogers, 2006 UT 85, ¶ 11 (emphasis added) (quoting Redd, 2001 UT 113, ¶ 20). Such a refiling is presumptively barred unless the State demonstrates new or previously unavailable evidence or other good cause. Redd, 2001 UT 113, ¶ 20. The State has argued that it has good cause to refile because the element it failed to present evidence on was not clear or essential. Br. Appellee 14–18. These arguments fail.

First, it is clear that an ATV is not an operable motor vehicle under the theft statute. In its finding that the State had not presented evidence that the allegedly stolen item allegedly received by Mr. Dykes was either an operable motor vehicle or valued at over \$5,000, the district court noted that common sense dictates that “operable motor

vehicle” means a vehicle designed for use on highways: “Motor vehicle is defined as . . . a self-propelled vehicle that is intended primarily for use and operation on the highways. An ATV is not intended primarily for use and operation on the highway. That’s just a matter of common sense that we follow and can take note of.” R.117:16–17. While the definition of “motor vehicle” appears one section earlier than the section that defines theft of a motor vehicle as a second degree felony, common sense dictates that the Utah Legislature meant the term to have the same meaning in the very next section of the “theft” part of the code. Compare Utah Code § 76-4-410.5 with Utah Code § 76-4-412. Indeed, the prosecutor conceded as much below: “The . . . case was dismissed because I made a mistake. I did. I erroneously asserted that it’s a motor vehicle. Defense counsel very capably pointed out in her argument and I think correctly that it’s not.” R.114:12.

Further, the State’s contention that the theft statute was unclear because no appellate court had interpreted the term “operable motor vehicle” also fails. Br. Appellee 17. Indeed, in Redd, there is no indication that an appellate court had ever spelled out the elements of the crime of desecrating a dead human body, but the supreme court held that “the State’s experienced legal counsel should have been able to extrapolate [the] simple elements and provide evidence sufficient for a bindover.” Redd, 2001 UT 113, ¶ 14. This is an acknowledgement that it is the State’s burden to know what conduct constitutes a crime and to prosecute accordingly. Otherwise, the State risks mischarging offenses at the expense of the due process rights of defendants. The Redd rule applies in this case. It was the State’s burden to understand the statutes under which it charged Mr. Dykes and when it failed to “extrapolate [the] simple elements” of the charged offense, it violated Mr.

Dykes's due process rights. Id. Thus, the State's arguments that the theft statute is not clear run contrary to case law, its own concessions below, and common sense.

Similarly without merit is the State's contention that value is not an "essential" element of the theft by receiving stolen property statute as described by the supreme court in Redd. Id. ¶ 20; Br. Appellee 14–15. In Redd, the court found that refiling charges dismissed after a preliminary hearing for insufficient evidence was inappropriate because the State had failed to present evidence on an essential element of the offense of desecration of a dead human body, namely that there was no evidence that the body had been "buried or otherwise interred." 2001 UT 113 ¶¶ 14–17. To satisfy this element, the State would have needed to show either that the body in question had been buried or that it had been otherwise interred—either showing satisfies the element. Id. ¶¶ 16–17. Where the State provided no evidence on either of the alternatives, the supreme court found that the State had committed a potentially abusive practice and affirmed dismissal of the charge. Id. ¶ 17. Similarly, to bind Mr. Dykes over on felony theft by receiving stolen property charges, the State needed to show that the property Mr. Dykes was alleged to have received was either a motor vehicle, a firearm, or valued at \$5000 or more. Utah Code § 76-6-412 (2008). Despite the presence of alternatives within this element of the statute, just as in Redd, the State needed to demonstrate at least one of the alternatives at Mr. Dykes's preliminary hearing to bind him over—that is, without proof of at least one alternative, an essential element is not met and bindover is not appropriate. Just as in Redd, the State failed to produce a scintilla of evidence on a clear and essential element

of an offense and refiling charges is a potentially abusive practice not justified by good cause.

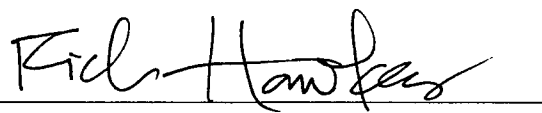
Finally, the State's claim that the issue of an ATV not being a motor vehicle was not raised in such a way that the State could properly respond is also without merit. At the preliminary hearing, defense counsel noted that the issue of value had not been raised and the prosecutor responded by saying that Mr. Dykes should be bound over because the ATV was an operable motor vehicle. R.116:17–18. Then, at the hearing on the motion to quash bindover, the State specifically requested an opportunity to reopen the preliminary hearing to present evidence of the ATV's value: "So I also move at this time for the opportunity to reopen the preliminary hearing just on the question of value, which is a great savings of effort and time as compared to refiling it. And I think under rule 7 that you're permitted to do that." R.117:17. The court then ruled on the State's request: "File a motion to reconsider if you wish, but I'm going to deny the motion to reopen the prelim and I'm binding it over as a Class B misdemeanor." R.117:18. The State's present claim that it was not given an opportunity to argue for reopening the case to present evidence of value is wrong. At the preliminary hearing, the State chose not to ask to reopen the preliminary hearing to add evidence of value after defense counsel argued that the case should not be bound over on that element. Then, after the trial court denied the State's request to reopen the preliminary hearing at the motion to quash hearing, the State did not file a motion to reconsider or appeal that decision. Thus, the State waived its opportunity to ask to reopen the preliminary hearing to introduce evidence of value and the issue of whether the State was fairly denied its request to reopen is not properly before this Court

and should not factor into this Court's decision. Accordingly, this Court should find that the State's failure to produce any evidence on a clear and essential element of the charged offense at the preliminary hearing was a potentially abusive practice not justified by good cause and this Court should reverse.

CONCLUSION

Because the State has committed a potentially abusive practice in refiling charges that were quashed for not providing a scintilla of evidence on a clear and essential element of the offense, and because the State has not demonstrated new or previously unavailable evidence or other good cause for refiling, the most recently filed charges violate Mr. Dykes's due process rights under the Utah Constitution and should be dismissed.

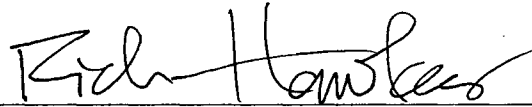
SUBMITTED this 26 day of January, 2012.

A handwritten signature in black ink, appearing to read "Rich Hawkes", written over a horizontal line.

E. RICH HAWKES
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, E. Rich Hawkes, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 26 day of January, 2012.



E. RICH HAWKES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this 26 day of January, 2012.

