2016

Mike's Smoke, Cigar & Gifts, Petitioner/ Appellant v. City of St. George, Respondent/ Appellee.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

MIKE'S SMOKE, CIGAR & GIFTS,

Petitioner/Appellant Case No. 20151030-CA

v.

CITY OF ST. GEORGE,

Respondent/Appellee.

On appeal from the order of the Fifth District Court for Washington County, the Honorable Jeffrey C. Wilcox presiding.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

Statutes

ARGUMENT IN REPLY

I. UTAH CODE ANNOTATED 58-37-2(1)(g) YIELDS ABSURD RESULTS, HAS UNINTENDED CONSEQUENCES, AND REQUIRES THIS COURT TO APPLY AN INTERPRETATION THAT AVOIDS THE ABSURD AND UNINTENDED CONSEQUENCES OF THE STATUTE.

The City correctly points out that under standard rules of statutory construction this Court will attempt to give effect to legislative intent by first looking to the plain and ordinary language of a statute. Brief for Appellee City of St. George, 21-25 (hereinafter "BACSG")(citing *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, 267 P.3d 863). The City then proceeds to review U.C.A. § 58-37-2(1)(g) and concludes the language is unambiguous and clear and therefore "there is one correct way to interpret the statute." *Id.* The City goes further by contending this Court should turn a blind eye to the absurd results and constitutional concerns created by a disjunctive reading of the statute purely on the claim the statute is clear and unambiguous. *Id.* at 25-33. However, in taking this approach, the City completely ignores previous rulings relating to impact absurd results have on the interpretation of a statute and concerns with constitutionality.

The Utah Supreme Court has held that "[w]here a statute's plain language creates an absurd, unreasonable, or inoperable result, we assume the legislature did not intend that result." *State v. J.M.S.*, 2011 UT 75, ¶27, 280 P.3d 410. The Utah Supreme Court continued in stating, "[i]n applying this canon of construction, we have recognized the delicate line between 'refraining from blind obedience to the letter of the law that leads to patently absurd ends and avoiding improper usurpation of legislative power through judicial second guessing of the wisdom of a legislative act." *Id.* The control imposed by

the court to help navigate that "delicate line" is by limited the application of this rule to those situations where "a plain language interpretation is so absurd that the 'legislature could not have possibly intended' it." *Id.*

J.M.S. does not stand alone in the Utah Supreme Court's caution towards a blind application of the plain language of a statute. In *LPI Servs. v. McGee*, the Utah Supreme Court provided that "[w]hen the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed. However, 'a court should not follow the literal language of a statute if its plain meaning works an absurd result.'" 2009 UT 41, ¶11, 215 P.3d 135.

Under this approach to statutory interpretation and construction the analysis does not end merely because the language is purportedly clear and unambiguous. The district court acknowledged as much in its opinion where it explained that the "absurdity doctrine...has nothing to do with resolving ambiguities, but which is applied 'to reform unambiguous statutory language where applying the plain language leads to results so overwhelmingly absurd no rational legislator could have intended them." R. at 638 n.6 (citing *Utley v. Mill Man Steel, Inc.*, 2015 UT 75, ¶46, 357 P.3d 992). The question of whether that language results in absurd results remains and even prevails in the face of otherwise clear and plain language. To that end, the City is in error to contend that "the absurd results...canons do not apply in the absence of ambiguity. As can be seen from the aforementioned language, where that language renders patently absurd results this Court is not only within its prerogative to turn from the purported clear and unambiguous language but is required to do so.

It should be noted at this point that to date no one has suggested that a disjunctive reading does not in fact create the very absurd results complained of. They cannot, for a disjunctive reading creates the legal and factual reality of criminalizing a wide swath of innocent and common items, and the federal cases relied upon by Mike's Smoke Shop provide ample evidence of this fact. Instead, the City and to some extent the district court, attempt to side-step this issue by asserting that people are not being prosecuted for any of the unintended substances caught up in the disjunctive reading. BACSG at 33-34 and R. at 638 n.6.

For example, the City attempts to make the enforcement of the absurd results appear absurd in and of itself when it asks this Court to "[i]magine a drug task force raiding the corner market and bagging energy drinks and Doritos as evidence while hauling the unsuspecting shopkeeper down to the station to book on drug charges." BACSG at 33. While Mike's agrees that the likelihood of a drug task force taking down the wily suppliers of Doritos is low; Mike's contends the possibility of such an operation aimed at energy drinks is very much in the realm of possibility given the fact that they have been directly linked to deaths by the FDA, have caused a rash of health issues requiring emergency care, and target youth--all factors which contributed to spice being targeted. *See* R. at 269-296.

In 2011 it was reported that energy drink popularity was soaring and "that surge has also been seen in visits to hospital rooms due to related health issues such as heart arrhythmias, hypertension, and dehydration." R. at 291. Indeed, in a study relied upon in that article, ER visits resulting from energy drink consumption between 2005 and 2009

peaked at 16,000 in 2008. *Id.* Young people between the ages of 18 and 25 were disproportionately represented. *Id.* at 291-92. What is more, when energy drinks are combined with alcohol or drugs "the risk of significant, even life-threatening events increases." *Id.*

Those concerns were echoed by the FDA in a 2013 report which indicated "[t]he U.S. energy drink industry has grown rapidly since the drinks were first introduced. R. at 269. This is in part thanks to "aggressive marketing" which has made energy drinks "particularly popular among adolescents." *Id.* The FDA is more explicit in its health impacts analysis explicitly citing Monster Energy drinks as "implicated in the deaths of five individuals" and 5-Hour Energy drinks as having "possible involvement in another thirteen deaths. *Id.* at 271. The health consequences are even more serious when the energy drinks are mixed with alcohol, yet national data indicates that some "26% of high school seniors consumed an alcoholic beverage containing caffeine during the past year." *Id.* at 273.

The articles relating to energy drinks and their health impacts are startling. Nevertheless, these drinks remain widely available to all ages and from virtually any store. Accordingly, while the City may find the image of a drug task force taking down a purveyor of energy drinks far-fetched, or perhaps even humorous, Mike's does not share in the sentiment. The simple fact is, given the health consequences of the drinks, they probably should be regulated. An enterprising city or prosecutor awakening to that fact may very well seek enforcement through the most applicable statute currently available--the analog statute.

What is more, is that substances not normally intended to be caught up in the controlled substances statutes are in fact now covered, including tobacco and alcohol. Those substances have well documented severe health consequences to the public at large. Is it really so far out of the realm of possibility that providers of these substances may be targeted by a city or prosecutor seeking to stem those health consequences in their respective jurisdiction? When one considers this case arises from spice, a substance which pales in comparison to the impacts of tobacco and alcohol, one can readily see how the targeting of tobacco and/or alcohol is not far-fetched.

However, to focus on whether prosecution is likely for the purveyors of energy drinks or MSG laced Doritos is a red herring. The doctrine of absurdity does not ask whether the absurd results are actual prosecution for otherwise innocent activities, but rather whether the impact is the criminalization of said activities. In other words, even if not prosecuted, does an disjunctive reading of U.C.A. § 58-37-2(1)(g) factually render every day Utahns into felons? It does.

Put another way, should we consider a dealer of cocaine who is never caught or prosecuted as not being a felon routinely engaged in criminal activity? Does the behavior only become criminal upon prosecution? Obviously not. While a conviction may be necessary for the impacts of a felony to attach to the individual, the lack of prosecution does not remove the illegality of the act(s)[1].

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[1] While understanding that the interplay between religion and the law is sensitive, one cannot ignore the reality that Utah is made up of a substantial number of members of the Church of Jesus Christ of Latter Day Saints. A religion which espouses as a core belief "in being subject to kings, presidents, rulers, and magistrates, *in obeying*, honoring, and

It is perhaps for this reason that courts have long held that "no one may be required at peril of life, liberty, of property to speculate as to the meaning of penal statutes." *Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939). While this language is typically applied to vagueness issues relating to statutes, the principle is valid in the present context of absurdities. This is because there is no vagueness as to whether a disjunctive reading criminalizes a host of mundane and innocent substances as by its clear language it does. Rather, the issue is whether the public at large should bear the risk that their innocent activities, now criminalized, may one day be prosecuted. It is absurd that a clerk selling 5-Hour energy should daily run the risk of prosecution for a felony offense--even if that clerk, after considerable interruption to his life, considerable expense on minimal funds, and extreme stress can manage to defeat the charges on an unconstitutional as applied challenge, for the clerk should never have born the burden to begin with.

The salient point is this, the City, the district court, and a host of federal courts, have all recognized that a disjunctive reading factually and legally makes mundane and otherwise innocent products a controlled substance analog. In turn, a disjunctive reading will make a vast portion of the Utah population felons-in-fact. The City asks this Court to

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sustaining *the law*." 12th Article of Faith. https://www.lds.org/scriptures/pgp/a-of-f/1.11?lang=eng (emphasis added). This tenant of faith is not tied to prosecutions or raids by task forces but rather by a personal accountability to God. In this sense, the criminalization of everyday common items is objectionable to a good proportion of the citizens of the State as it invites and perhaps even necessitates the violation of the law in contravention to a core religious belief. It is absurd to think that the legislature, itself likely made up of numerous practicing LDS members, intended a result that would be so offensive to the practices and beliefs of the dominate religion in the State.

blindly permit this consequence to remain under the guise that it is the will of the legislature. Such is not the case. The results are so absurd, so far reaching, and so severe, the legislature could not have possibly intended it. As a result, this Court should not afford "blind obedience to the letter of the law" nor "follow the literal language" of the statute given the patently and undeniable absurd consequences such a reading would render. A conjunctive reading is necessary to both permit prosecutions of analogs to continue while avoiding the absurdity that follows from a disjunctive interpretation.

II. THE CITY NEVER MADE ANY FACTUAL FINDINGS THAT MIKE'S OR ITS EMPLOYEES EVER REPRESENTED OR INTENDED XLR-11 TO HAVE A SUBSTANTIALLY SIMILAR PHARMOCOLOGICAL EFFECT TO AM-694 AND NO ELEMENT OF SCIENTER IS REQUIRED OR MET.

The City contends that "[t]here was substantial evidence to show Mike's knowingly and intentionally possessed a controlled substance with the intent to distribute..." BACSG at 34. The City then equates evidence of possession with intent to distribute with U.C.A. § 58-37-2(1)(g)'s requirement that the defendant "represented or intended [the substance] to have" a "substantially similar" pharmacological effect as a controlled substance (in this case AM-694). The City does so by pointing to a single non-binding, non-majority, statement of Justice Roberts wherein he states "a person's lack of knowledge regarding the legal element can be a defense." BACSG at 35 (citing *McFadden v. U.S.*, 135 S. Ct. 2298, 2308 (2015)(Roberts, C.J., concurring)).[2] The City

[2] It should also be noted here that the City points out the U.S. Supreme Court did not address the issue of whether the federal analog law is properly read in the conjunctive or disjunctive and therefore the matter "remains unresolved." BACSG at 35 n.14. While the U.S. Supreme Court did not address the issue, that does not mean the matter is unresolved. As indicated in the Appellant's Opening Brief, there has been absolute

then makes a final step by taking Justice Robert's statement and concluding that means the analog law contains a scienter requirement (i.e. the knowledge and intent not just of the act, but that the act is illegal). *Id.* However, this runs absolutely contrary to Utah law and in particular Utah law relating specifically to spice and the analog law.

In *State v. Arghittu*, this Court was asked to consider a number of issues relating to the spice chemical AM-2201 as a controlled substance analog of another spice chemical, JWH-018. 2015 UT App. 22, ¶27, 343 P.3d 709. One such issue was whether the defendant's lack of knowledge was to the illegality of AM-2201 as a controlled substance analog was a defense. This Court held:

> Arghittu may have believed that AM-2201 was not illegal because it was not specifically listed in section 58-37-4.2. However, in light of AM-2201's potential to qualify as a controlled substance analog under section 58-37-2, such a belief would have constituted a mistake of law, which in most circumstances is no bar to criminal liability. *See State v. Steele*, 2010 UT App 185, ¶ 30, 236 P.3d 161 ("'[A] good faith or mistaken belief that one's conduct is legal does not relieve a person of criminal liability for engaging in proscribed conduct.'" (quoting 21 Am. Jur. 2d *Criminal Law* § 137 (2008))).
>
> *Id.*

Based on the decision in *Arghittu*, a person being prosecuted for possessing with intent to distribute a controlled substance analog cannot raise the defense of ignorance as to the illegality of the substance. Accordingly, so long as the defendant knowingly and intentionally possessed the substance, even if truly believing the substance to be legal, he

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uniformity in the federal courts interpreting the statute in the conjunctive. This uniformity stretches across multiple circuits and districts. To suggest the matter is unresolved is to suggest there is still some ongoing debate. There is none. Hence the Governments assumption in *McFadden* that the statute was properly read in the conjunctive.

is guilty of the offense. This completely removes the scienter component the City asserts saves U.C.A. § 58-37-2(1)(g) as a disjunctive statute.

The City's error as to scienter requirement is echoed in its claims that it found Mike's represented or intended XLR-11 to have a substantially similar pharmacological effect as AM-694. There is no such finding.

Indeed, the City lists a series of facts it claims are supported by substantial evidence and which it purports proves Mike's represented and/or intended XLR-11 to be substantially similar to the pharmacological effects of AM-694. BACSG at 39-40. In addition to those facts are the Findings the City made as detailed in its Findings of Facts, Conclusions and Order. R. at 42-49. Finally, the City also has a series of police reports detailing conversations with Mike's employees concerning the purchase and sell of spice containing XLR-11. R. at 59-173.

Nowhere in those facts and reports does any employee claim XLR-11 would create a substantially similar pharmacological effect on a person as AM-694. Nowhere in those facts and reports does any employee assert or acknowledge that he or she intended XLR-11 to have a substantially similar pharmacological effect as AM-694. Indeed, the closest acknowledgement is one employee's assertion that on one occasion he tried spice (he does not indicate what chemical(s) were present in the spice nor what the pharmacological effects were other than to say it made him sick), and that he knew one or more people were ingesting spice (again without any representation as to what chemicals were in the spice or what pharmacological effects were being manifested). R. at 71 and

108-109. Consequently, the City has no evidence of any kind that Mike's intended or represented XLR-11 to have a substantially similar pharmacological effect as AM-694.

It is important to note here that the comparison is between the alleged analog and the specific controlled substance the alleged analog is being compared to. *See Arghittu*, 2015 UT App. 22 (comparing the specific similarities between AM-2201 and JWH-018).

Since the City lacks that evidence and now wants to reverse engineer its decision in case it was wrong on its statutory interpretation, the City attempts to shift the focus to what it believes is evidence that Mike's intended to possess and distribute spice. Since Mike's does not contest the factual findings actually made by the City for purposes of this appeal, Mike's will adopt the position that there is substantial evidence it possessed spice with the intent to deliver it. In the end, it is of no import. The requirement is clear, the defendant must have represented or intended XLR-11 to have a substantially similar pharmacological effect as AM-694. Accordingly, for purposes of determining whether XLR-11 is an analog it matters not that it was being possessed for later delivery. Rather, it matters what the intent or representations were as to pharmacological effect. In that respect, the City lacks any factual findings and any evidence from factual findings could be derived.

Consequently, should this Court agree that U.C.A. § 58-37-2(1)(g) must be read in the conjunctive, the City's findings will only apply to one of the three prongs where at least two prongs are required. As a result the City's findings and conclusions must be reversed.

CONCLUSION

Treating each subpart of Utah Code Annotated § 58-37-2(1)(g) as a stand-alone subpart yields absurd results. These results criminalize vast numbers of otherwise mundane and innocent products, but more importantly, factually and legally makes felons of the substantial portion of Utahns. The City's attempt to hide behind the lack of prosecution over the last couple of years does nothing to change the status of everyday Utahns as habitual violators of the law. Nor does it remove Utahns from bearing the risk of prosecution. The results are absurd to a startling degree. So much so that the legislature could not have intended it.

Under such circumstances, even in the face of clear and unambiguous language to the contrary, this Court must depart from the literal language and afford the statute an interpretation that avoids the absurd results and avoids constitutional concerns. In the present case, this Court has the benefit of guidance in federal case law which sets forth the manner in which this is to be accomplished--a conjunctive reading. By reading the statute in the conjunctive, this Court still gives effect to the legislative intent of prosecuting analog substances while avoiding the appallingly absurd results that stem from a disjunctive reading.

Additionally, the City's reliance on a scienter requirement is misplaced and does not save U.C.A. § 58-37-2(1)(g). Knowledge of the illegality of an analog is no defense.

The City has never made any actual findings, nor does it possess any evidence that could support any findings, that XLR-11 has a substantially similar pharmacological

effect as AM-694. Accordingly, when U.C.A. § 58-37-2(1)(g) is read in the conjunctive, the City's revocation cannot stand.

Finally, while the City wants to focus solely on the case at hand, this Court will set a precedent when determining how U.C.A. § 58-37-2(1)(g) is interpreted. That precedent will determine if the statute is conjunctive or disjunctive as to all analog cases. It cannot be changed on whim to accommodate one case over another. If it is disjunctive here, it is disjunctive as to all analog substances. Therefore, it is wholly appropriate for this Court to consider the far reaching and long term ramifications of rendering a disjunctive reading to the statute. Under such considerations, a conjunctive reading is more appropriate.

For the foregoing reasons, Mike's respectfully requests this Court find that U.C.A. § 58-37-2(1)(g) be read in the conjunctive and that the City's revocation be reversed.

DATED this 27th day of June 2016.

Ryan L. Holdaway
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CERTIFICATE OF COMPLIANCE WITH RULE 24

This brief complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(f)(1) because according to the word processing program used to prepare this brief (Word 2007), this brief contains 3,856 words, excluding the parts of the brief exempted by Utah Rule Appellate Procedure 24(f)(1)(B).

DATED this 27th day of June 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2016, I served two copies of the Appellant's Opening Brief on the following by U.S. Mail, postage prepaid, addressed to the following:

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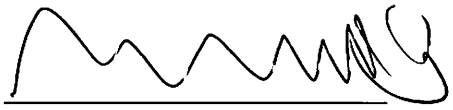

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