2016

The State of Utah, Plaintiff/Appellee, vs. Romeo Lucero Olivarez, Defendant/Appellant

Utah Court of Appeals

39143

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, v. ROMEO LUCERO OLIVAREZ, Defendant/Appellant.	Case No. 20150284-CA Appellant is incarcerated.

REPLY BRIEF

Appeal from a judgment of conviction arising from *Sery* pleas to two counts of Possession or Use of a Controlled Substance, a third degree felony, in violation of Utah Code §58-37-8(2)(a)(i), in the Third District Court, in and for Salt Lake County, State of Utah, the Honorable Randall Skanchy presiding.

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INTRODUCTION

Mr. Olivarez's opening brief argues that the trial court erred when it failed to suppress evidence obtained from an unreasonable stop and an unjustified impound of the vehicle Mr. Olivarez was driving. Specifically, Officer Crowther lacked reasonable, articulable suspicion of criminal wrongdoing for the traffic stop when Mr. Olivarez complied with Utah's lane change law by signaling for two seconds before instigating his lane change movement involving multiple lanes. And, because this law is unambiguous, Officer Crowther did not make a reasonable mistake of law in interpreting the lane change statute to require a driver to signal and remain in each lane for two seconds when doing a lane change involving several lanes. In addition, the vehicle impound was unjustified where it was tainted by the improper stop, where it was not authorized by state statute, where there was no legitimate community-care taking purpose to impound the

vehicle, and where Officer Crowther failed to follow standardized impoundment procedures.

In response, the State contends that the stop of defendant was justified because Officer Crowther's interpretation of Utah's lane change law was correct, and if it was not, that he made a reasonable mistake of law in interpreting the lane change law to justify the stop. The State also contends that the totality of the circumstances justified the impoundment of the vehicle. For the reasons set forth in the opening brief and in this reply brief, the State is incorrect. *See* Utah R. App. P. 24 (c) ("Reply briefs shall be limited to answering any new matter set forth in the opposing brief.").

ARGUMENT

I. The trial court erred in not suppressing the illegally obtained fruits acquired from an improper stop and unjustified impoundment of the vehicle Mr. Olivarez was driving.

Mr. Olivarez's opening brief argues that the trial court should have suppressed the fruits of an unreasonable stop because: 1) Mr. Olivarez's lane change maneuver complied with Utah's lane change statute so Officer Crowther lacked reasonable, articulable suspicion to stop him, and 2) Officer Crowther did not make a reasonable mistake of law in interpreting the unambiguous statute to justify the stop. *See* Appellant's Br. 11-21. In addition, Mr. Olivarez's opening brief argues that the impoundment of the vehicle that Mr. Olivarez was driving was unjustified for numerous reasons, including that it was tainted by the unlawful stop, it was not justified by statute, it had no legitimate community-caretaking purpose, and it did not comply with standardized police procedures. *See* Appellant's Br. 22-36. In response, the State contends that both the stop

and impoundment of the vehicle was justified. *See* Appellee's Br. 9-25. The State is mistaken for the following reasons.

A. Mr. Olivarez complied with the requirements of Utah's unambiguous lane change statute.

The plain language of Utah's lane change statute shows that Officer Crowther lacked reasonable, articulable suspicion that Mr. Olivarez was engaging in criminal behavior when he made a traffic stop for a lane change maneuver where Mr. Olivarez initiated his signal for two seconds before travelling across two lanes of traffic "in one continuous movement" until he reached the far right lane.[1] R. 65-66, 142, 153. *See also* Utah Code §41-6a-804(1); *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). Utah's lane change statute says:

> (a) A person may not turn a vehicle or move right or left on a roadway or change *lanes* until:
> (i) the *movement* can be made with reasonable safety; and
> (ii) an appropriate signal has been given as provided under this section.
>
> (b) A signal of intention to turn right or left or to change *lanes* shall be given continuously for at least the last two seconds *preceding the beginning of the movement.*

Utah Code §41-6a-804(1) (emphasis added).

While the statute is addressing the requirements for both turns and lane changes, it is also clear that regarding lane changes, the statute refers to lanes in the plural, and not lane in the singular. Utah Code §41-6a-804(1). Thus, a plain language interpretation of the statute says that a person needing to "change *lanes*" (i.e. multiple lanes) must: 1) do

[1] The State and Officer Crowther never contested that Mr. Olivarez met the two second signaling requirement of the lane change statute when he initiated his signal before driving from lane two to lane three. R. 65-66, 141-42; *See also* Appellee's Br. 13.

so with "a movement [that] can be made with reasonable safety; *and*", 2) initiate a signal for two seconds "*preceding* the beginning of the *movement*[,]" which may involve one or more "*lanes*." Utah Code §41-6a-804(1) (emphasis added). Furthermore, the statute unambiguously states that the signal requirement applies to the two seconds "*preceding*[,]" or before, the vehicle begins changing lanes, (i.e. "*a movement*") and not during or after the lane change movement is underway. *Id.*; *see also Lorenzo v. Workforce Appeals Bd.,* 2002 UT App 371, ¶ 11, 58 P.3d 873 ("The plain language controls the interpretation of a statute, and only if there is ambiguity do we look beyond the plain language") (internal quotations omitted).

The State and Officer Crowther's reading of the statute is therefore incorrect in interpreting the statute to say that a driver must instigate a two second signal prior to *each* individual lane change, and to remain in each lane for two seconds, while signaling, when changing several lanes. R. 65-66, 142, 153; *see also* Appellee's Br. 11-14. This incorrect interpretation requires reading in additional words to the statute that are simply not there. The State is also mistaken in arguing that the statute requires that an individual stay and signal for two seconds in each lane in order to meet the "reasonable safety" requirements of the statue. *See* Appellee's Br. 14-15. An examination of Utah Code §41-6a-804(1)(a)(i), which outlines the safety requirement, shows that there is nothing in this section to indicate how many seconds a vehicle must remain in each lane to be safe. Nor should it. That is, the time required to change lanes in a reasonably safe manner is variable and depends upon traffic, road hazards, vehicle speed, and a plethora of other conditions that might exist for the driver at that moment. The State's reading of the statute therefore

incorrectly conflates the statutory requirement that a driver be required to signal for two seconds prior to changing lanes with a requirement that a driver stay in each lane for two seconds when changing lanes to be safe, thus incorrectly merging the requirements of subsection (1)(a)(i) and (1)(b) of the statute in a way that should not be merged. *See* Utah Code §41-6a-804(1)(a) and (b); *see also* Appellee's Br. 14-15. And, contrary to the State's view, it is more consistent with the purpose of the statute (i.e. to effectuate safe lane changes) to read the statute as not dictating the number of seconds that a vehicle is required to remain in each lane in order to be safe because of the variety of road conditions that a driver could face when needing to change lanes.

The State is also incorrect in arguing that if Officer Crowther's interpretation of the statute was wrong, then he made a reasonable mistake of law that justified the stop. *See Heien v. N. Carolina*, 135 S. Ct. 530, 532 (2014). A police officer makes an objectively reasonable mistake of law only when the law at issue is ambiguous, and Utah's lane change statute is not ambiguous. *Heien,* 135 S. Ct. at 539; *see also Bonham v. Morgan*, 788 P.2d 497, 500 (Utah 1989) ("Unambiguous language in the statute may not be interpreted to contradict its plain meaning."). That is, the plain language of the statute talks about *when* a signaling requirement must be met (i.e. "*preceding* the beginning of the movement"). Utah Code §41-6a-804(1)(b) (emphasis added). The statute also unambiguously indicates that a "movement" is either a "turn" or an instance of when a vehicle must "change lanes" (i.e. one or more lanes). Utah Code §41-6a-804(1)(a). Thus, because Utah's lane change statute is not ambiguous, and Mr. Olivarez fully complied with the statute by initiating his signal for two seconds prior to making a lane change

movement involving multiple lanes, Officer Crowther lacked reasonable, articulable suspicion to stop his vehicle and the trial court erred in not suppressing the evidence obtained from the unconstitutional stop of Mr. Olivarez. R. 65-66, 142, 153.

B. The impoundment of the vehicle Mr. Olivarez was driving was unjustified for numerous reasons.

A warrantless vehicle impound is justified by the Fourth Amendment by either "explicit statutory authorization or by the circumstances surrounding the initial stop." *State v. Hygh*, 711 P.2d 264, 268 (Utah 1985). The impoundment of Mr. Olivarez's vehicle was not authorized by Utah's vehicle impound statute, and the State concedes this. *See* Utah Code §41-1a-1101; *see also* Appellee's Br. 19. The question, then, is whether the circumstances surrounding the stop of Mr. Olivarez justified the impoundment. In other words, would a reasonable officer have impounded the vehicle? *See State v. Strickling*, 844 P.2d 979, 987 (Utah Ct. App. 1992). Mr. Olivarez's opening brief argues that the totality of circumstances shows that the impoundment violated the Fourth Amendment because it was tainted by the unlawful stop, had no legitimate community-caretaking purpose, and did not comply with the standardized police procedures that Officer Crowther was required to follow. *See* Appellant's Br. 22-36. The State and trial court are therefore mistaken that the impoundment was justified because Mr. Olivarez did not have a valid driver's license, was not the owner of the vehicle, and was the only occupant of the vehicle as these factors do not sufficiently address all of the circumstances that must be examined in assessing whether the impoundment was justified. *See United States v. Sanders*, 796 F.3d 1241, 1250-51 (10th Cir. 2015) R. 67;

see also Appellee's Br. 18-20. Furthermore, a more detailed and accurate examination of the circumstances shows that the impoundment in this case was not justified.

First, the impoundment of Mr. Olivarez's vehicle lacked a legitimate community-caretaking purpose. *See Sanders*, 796 F.3d at 1250-51 (providing a list of factors to consider when determining whether an impoundment meets an objective standard of a legitimate community-caretaking purpose); *see also State v. Gauster*, 752 N.W.2d 496, 502-503 (Minn. 2008); *see also* Appellant's Br. 26-27. That is, the vehicle Mr. Olivarez was driving was not unlawfully parked nor causing a traffic hazard, the vehicle was not implicated in a crime, the vehicle's owner and Mr. Olivarez did not consent to the impound, and an alternative to impoundment existed because Mr. Olivarez asked to call his brother, the registered owner of the vehicle, in order for him to quickly take the car. R. 147-53, 163; *see also Sanders*, 796 F.3d at 1250; *see also* Appellant's Br. 29-32. The alternative to impound that existed in this case shows that the State is mistaken in arguing that Officer Crowther had only two choices-- to leave the car there or to impound it. Appellee's Br. 18-20. That is, the ability of Mr. Olivarez's brother to quickly retrieve the car was apparent, as before it was towed, he arrived to retrieve the vehicle. R. 149-153, 163.

The State is also mistaken in arguing that the Fourth Amendment did not require Officer Crowther to determine whether any alternatives to impound existed. *See* Appellee's Br. 21. That is, established case law shows that an officer must allow for alternative arrangements once a viable and immediate option is requested and presented, otherwise, the impoundment is unconstitutional. *See Sanders*, 796 F.3d at 1250; *Gauster*,

752 N.W.2d at 507-08; *Hygh*, 711 P.2d at 268; *see also* Appellant's Br. 30. Here, a viable and immediate alternative option existed as before Mr. Olivarez was arrested, he asked to call his brother to come take quick possession of the vehicle. R. 147-153, 163; *see also Gauster*, 752 N.W.2d at 506-08; Thus, the impoundment of the vehicle was neither reasonable nor necessary because the totality of the circumstances shows that a legitimate community-caretaking purpose did not exist. *Sanders*, 796 F.3d at 1250-51.

Second, the impoundment failed to comply with the Salt Lake City Police Department's standardized procedures. R. 150-51; *see also Sanders*, 796 F.3d at 1243 (stating that impoundments are constitutional only when they are "guided by *both* standardized criteria *and* a legitimate community caretaking rationale.") (emphasis added). In *Colorado v. Bertine*, the United States Supreme Court held that police discretion for an impound may exist "*so long as* that discretion is exercised *according to standard criteria* and on the basis of something other than suspicion of evidence of criminal activity." 479 U.S. 367, 375 (1987) (emphasis added). Thus, "the *Bertine* decision establishes that ... warrantless impoundments are unconstitutional [when they] are not exercised according to standardized criteria" that limits an officer's discretion of when to impound a vehicle. *Sanders*, 796 F.3d at 1245. Standardized police procedures are necessary because they prevent discriminatory police impounds. *See id.* And, because "*Bertine* makes the existence of standardized criteria the touchstone of the inquiry into whether an impoundment is lawful[,]" *Sanders*, 796 F.3d at 1248-49, the State is mistaken in arguing that this Court should follow the rationale of First, Third, and Fifth Circuit's cases that hold that courts need not look at whether an impoundment follows

standardized protocols to be justified under the Fourth Amendment. *See Sanders*, 796 F.3d at 1248; *see also* Appellee's Br. 23- 24. Rather, this Court should follow the rationale of the Seventh, Eighth, Ninth, Tenth, and D.C. Circuits that hold that the legality of a vehicle impound does depend on whether a police officer complied with their localized, standardized impound procedures. *See Sanders*, 796 F.3d at 1248; *see also id.* at 1259 (stating that "to hold, as have the First, Third, and Fifth Circuits, that standardized criteria are never relevant is to ignore the plain language of *Bertine*.").

Here, Officer Crowther failed to follow Salt Lake City Police Department's standardized procedures ("Impound Policies") as these procedures restricted rather than expanded the discretion he could use when deciding whether to impound the vehicle Mr. Olivarez was driving. *See* Appellant's Br. 33-34. Specifically, the Impound Policies made clear that Officer Crowther needed to use his discretion in favor of preventing needless financial burdens and inconveniences to the vehicle's owner, which Officer Crowther did not do. R. 150-51. In addition, a review of the Impound Policies regarding the scenarios where impoundment is prohibited or discouraged reveal that Officer Crowther should not have impounded the vehicle because Mr. Olivarez was driving on a denied driver's license. R. 147, 148. *See* Appellant's Br. 33-34 (pointing out that the Impound Policies discourage and prohibit impoundments for scenarios involving no insurance, expired vehicle registration, and a driver's arrest for traffic violations, which are all similar in kind to driving on a denied driver's license). Thus, because the Impound Policies substantially limit an officer's discretion so that impoundment should only occur where absolutely necessary, and the impoundment in this matter was not necessary, the

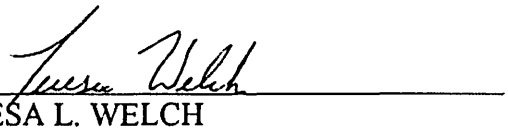
State is incorrect in arguing that Officer Crowther complied with the standardized police policies he was required to follow. *See* Appellee's Br. 25.

Ultimately, the impoundment of the vehicle in this case was unconstitutional because the totality of circumstances shows that the impoundment was tainted by the unlawful stop, not prescribed by statute, had no legitimate community-caretaking purpose, and did not comply with the standardized police procedures. *See* Appellant's Br. 22-37.

CONCLUSION

For the reasons given above and in the opening brief, Mr. Olivarez respectfully asks this Court to reverse the district court's ruling that the stop and impound of his vehicle was legally justified in this matter.

SUBMITTED this 11th day of May, 2016.



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CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 2,549 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

TERESA L. WELCH

CERTIFICATE OF DELIVERY

I, TERESA L. WELCH, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 11th day of May, 2016.

TERESA L. WELCH

DELIVERED this 11 day of May, 2016.