2015

State of Utah, Plaintiff and Appellee v. Wyatt Jeff Outzen Defendant and Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee

Appellate No. 20150953-CA

v.

WYATT JEFF OUTZEN,

Defendant and Appellant

On appeal from the Fourth Judicial District Court, Utah County, Hon. Claudia Laycock, District Court No. 145400088

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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I. The State's Construction of Utah Code Ann. § 41-6a-517 Disregards Established Canons of Statutory Construction.

The State appears to concede that the plain language of Utah Code Ann. § 41-6a-517 contemplates the continuum of impairment.[1] *See* Brief of Appellee, P. 12-13 ("Just as unconsciousness would seem to mark the upper limit of the continuum, the final point on the lower end, but still included thereon, would necessarily be the absence of impairment."). The difference between the parties' respective constructions of the statute is whether it contemplates zero impairment or not. *Id.* The State contends that it does contemplate zero impairment, while Defendant contends it does not.

The State's preferred construction cannot be accepted because it disregards a fundamental canon of statutory construction: *See Due South, Inc. v. Dep't of Alcoholic Bev. Cont'l,* 2008 UT 71, ¶ 27, 197 P.3d 82 (referencing the "principle of statutory interpretation that requires [courts] to avoid interpretations that will render portions of a statute superfluous or inoperative.")(internal quotations omitted). The simplest way to state the State's preferred construction is to state that the Metabolite Statute prohibits a person from "operat[ing] or be[ing] in actual physical control of a motor vehicle within

[1] The State takes issue with Defendant's use of the term "impairment," noting that the word does not appear in either the Metabolite Statute or DUI Statute. Brief of Appellee P. 15. This observation, while correct, is unimportant because it is beyond dispute that the construct of impairment appears in the plain language of the DUI Statute: ". . . to a degree that renders the person incapable of safely operating a vehicle. . . ." Furthermore, as explained herein, and in more detail in Defendant's principal brief, the clause "In cases not amounting to a violation of" the DUI Statute, found in the Metabolite Statute, incorporates that construct by explicit reference.

this state if the person has any measurable controlled substance or metabolite of a controlled substance in the person's body." Utah Code Ann. § 41-6a-517. This is the core of the State's position, and is –in an only partially accurate sense— grounded in the plain language of the statute.

But that is not all of the pertinent statutory language. The Metabolite Statute is only implicated in cases not amounting to a violation of the DUI Statute. *See* Utah Code Ann. § 41-6a-517. The State's construction of the Metabolite Statute, by contrast, disregards that important limitation because it reads the Metabolite Statute as though the limiting clause were not even in the statute. *See* Brief of Appellee P. 12, 13 ("The conduct prohibited by the Metabolite Statute is driving a vehicle after having consumed a controlled substance."); ("Rather, [the prefatory clause] must be read to set an upper limit, only, on the conduct prohibited by the Metabolite Statute, defining the single boundary point, or "line of demarcation," at which the two statutes meet. It does not propose, nor can it be fairly read, to limit or define the lower end of the continuum. Just as unconsciousness would seem to mark the upper limit of the continuum, the final point on the lower end, but still included thereon, would necessarily be the absence of impairment.").

To illustrate, consider if the limiting clause "in cases not amounting to a violation of Section 41-6a-502" were not present. The statute would, in that scenario, still criminalize driving a vehicle after with any metabolite in one's system, irrespective of whether the metabolite had impairing attributes or not. Importantly, the State contends that the Metabolite Statute with the limiting clause has the same scope of prohibited

conduct as it would have without the limiting clause. *Id.* If that construction is accepted, then the limiting clause accomplishes nothing that the language that follows does not. The limiting clause is therefore construed to be meaningless surplus verbiage. Thus, the State's proposed construction disregards this canon of statutory construction and leaves the limiting clause meaningless.

Interestingly, the State acknowledges this canon of statutory construction when it argues that Defendant's construction leaves superfluous the term "any," also found in the Metabolite Statue. The problem with this argument is similar to the problem identified above: it ignores the limiting clause "in cases not amounting to a violation of" the DUI Statute, and thus misapplies this canon. Defendant will agree that the term "any" modifies both nouns "measurable controlled substance" and "metabolite of a controlled substance." Clearly those two nouns are part of a parallel structure and nothing about Defendant's position fails to give meaning to the word "any." However, the phrase "any metabolite" remain subject to the limiting clause, "in cases not amounting to a violation of" the DUI Statute. And, if the limiting clause is to be given meaning –which it must— the limiting clause ties the scope of prohibited conduct of the Metabolite Statute to that of the DUI Statute. Thus, the State's contention that Defendant's construction empties the word "any" of meaning is incorrect. In fact, Defendant's construction is the only one that gives all of the pertinent statutory language meaning.

Additionally, it is noteworthy that the State offers little more than conclusory statements concerning the meaning of the limiting clause. *See generally,* Brief of Appellee PP. 12-13 (stating, without support, that the limiting clause "does not purport,

nor can it be fairly read, to limit or define the lower end of the continuum. Just as unconsciousness would seem to mark the upper limit of the continuum, the final point on the lower end, but still included thereon, would necessarily be the absence of impairment."). Absent from the State's construction is an explanation of *why* the statute "must be read to set an upper limit, only, on the conduct prohibited by the Metabolite Statute. . . ." *Id.* Instead, the State repeats the assertion, never citing to statutory language or other authorities to support why such is the case. The bare, conclusory nature of the State's construction therefore further undermines this construction.

The State also misapprehends the significance of other statutes containing similar limiting clauses. The continuum on which the brandishing statute (Utah Code Ann. § 76-10-506(2) and aggravated assault statute (Utah Code Ann. § 76-5-103) fall is the continuum of the use of force. *Compare* Utah Code Ann. § 76-10-506(2)(criminalizing exhibiting a dangerous weapon in an angry and threatening manner, or using one unlawfully in a fight or quarrel) *with* Utah Code Ann. § 76-5-103 (criminalizing attempting to use, or actually using unlawful force or violence in a manner causing bodily injury with the use of a dangerous weapon or other means likely to cause death or serious bodily injury). The same spectrum appears in the domestic violence in the presence of a child which can range from "violence or physical harm" on the low end (Utah Code Ann. § 76-5-109.1(2)(c)); § 77-36-1(4)), all the way up to criminal homicide on the high end. Utah Code Ann. § 76-5-109.1(2)(a). The common thread to all of those circumstances is the use of force. When one passes a defined point on that spectrum, one has left the realm of brandishing and entered the realm of aggravated assault.

If the State's approach is correct, then the limiting clause found in § 76-5-109.1(2)(c) would necessarily include the absence of use of force in its spectrum. That is, a person could still commit domestic violence in the presence of a child without using, threatening, or displaying force against the victim. Such an argument would be manifestly incorrect because § 76-5-109.1(2)(c) includes the term "domestic violence," which is defined to include to the continuum of use of force. *See* Utah Code Ann. § 77-36-1(4). And just as the plain language of § 76-5-109.1(2)(c) expressly incorporates the presence of some degree of use of force, so too does the DUI Statute expressly incorporate the spectrum of some degree of impairment. Thus, the State's bare contention that the limiting clause "in cases not amounting to" includes zero impairment in the spectrum it creates is betrayed by the plain language of the Metabolite Statute, and other statutes using a substantially similar limiting clause.

The State has therefore failed to substantiate its otherwise bald assertion that Defendant has taken a meritless position. In actual fact, those statutes provide contextual examples of how the legislature has used substantially similar language and what it means in those contexts. And, when properly considered, they demonstrate that the phrase "in cases not amounting to" –or its substantial equivalent— ties the scope of prohibited conduct in the referring statute to the scope of prohibited conduct in the statute referred to. And in each of those statutes, if the spectrum referenced extends all the way to zero, then the limiting clause "in cases not amounting to" carries no meaning because the same result could be more easily accomplished by simply deleting the limiting clause from the statute.

Last, the State chides Defendant's construction, contending that it would be troublesome not to criminalize driving with active controlled substances in one's system, while one shows no sign of active impairment. Defendant does not understand what is problematic about this construction, however unlikely the State's scenario might be. Such an individual poses no safety risk because s/he exhibits no signs of impairment. Moreover, such an individual may still be subject to criminal prosecution for the presence of the controlled substance in her system. *See* Utah Code Ann. § 58-37-8(2)(a)(i) (prohibiting a person from knowingly and intentionally using a controlled substance without a valid prescription), *see also State v. Robinson,* 2010 UT 30, ¶ 31, 254 P.3d 183 ("Utah's measurable amount provision criminalizes the act of using or being under the influence of a controlled substance in Utah. Although the "use" of a controlled substance clearly *begins* at ingestion. . . .") (emphasis in original). Thus, the law does not countenance the conduct with which the State is concerned; it simply does not punish it in a manner that the State urges.

But perhaps more importantly, this is the result the plain language of the statute commands. The only way to read a contrary intent into the statute, as the State urges this court to do, would be to give no independent significance to the Metabolite Statute's limiting clause. If the court gives that clause meaning, then the plain language of the statute allows an individual with active cocaine, methamphetamine, or THC in her system who shows no sign at all of impairment –however unlikely that might be—to drive. If, on the other hand (and more likely scenario), that driver demonstrated even a modicum of impairment while driving, then the driver has violated the Metabolite Statute. This is

precisely the result the plain language of the Metabolite Statute mandates, and any construction to the contrary disregards language the legislature advisedly included in the statute. Thus, when properly understood, the State's criticism here appears to be more of a complaint regarding the legislature's public policy judgment. The question before the court is not, however, one that allows the court to ground its decision on its public policy judgment. To the contrary, the court should keep its decision moored on the statutory language. And that language establishes that the Metabolite Statute does not contemplate driving with non-impairing metabolites. The court should reverse the trial court's construction to the contrary.

II. The State Relies on an Artificial Distinction Between This Case and *Robinson v. California.*

Initially, Defendant notes that when confronted with a constitutional challenge to a statute, courts are to construe the statute in a manner that saves the statute from constitutional infirmity. *E.g., State v. Mooney,* 2004 UT 49, ¶ 12, 98 P.3d 420. Because the analysis that follows demonstrates two constitutional infirmities that result from the trial court's construction of the Metabolite Statute, Defendant respectfully submits that the canon stated in *Mooney* requires the court to adopt the construction Defendant has propounded in the principal brief and above. Should the court adopt that construction, the constitutional issues briefed below are moot because Defendant's construction avoids the constitutional infirmities taken up below.

The State's primary argument against the rule of *Robinson v. California,* 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962) is its contention that *Robinson v. California*

only prohibits criminalizing a status, and this case involves criminalizing an act. The State is correct that the *Robinson v. California* court relied on the statute's punishment of a person's status as a drug addict to strike it down under the Cruel and Unusual Punishment Clause, as incorporated against the states by way of the Due Process Clause of the Fourteenth Amendment. *See id.* at 675. But it is not correct that this case involves just an act. Defendant here was not punished for the act of driving a vehicle, the State's repeated conclusory statements to the contrary notwithstanding. He was punished for driving a vehicle after having consumed THC. Notably, nowhere in the record is there any contention that his act of driving a motor vehicle was anything other than lawful for any reason other than his status of having previously ingested THC. It is disingenuous for the State to try to divorce the two because the Metabolite Statute inextricably binds them. *See* Utah Code Ann. § 41-6a-517. The State's primary attempt to distinguish this case from *State v. Robinson* is therefore unavailing. The status and act in this case cannot be separated, and because the act of driving a vehicle was otherwise lawful, the statute punishes the status of having previously consumed a controlled substance. Such is a cruel and unusual punishment under *Robinson v. California.*

Furthermore, the State's position ignores the Utah Supreme Court's interpretation of *Robinson v. California.* In *State v. Robinson,* 2010 UT 30, ¶ 31, 254 P.3d 183, the court stated that "*Robinson* stands for the proposition that a state cannot make the status of narcotic addition a criminal offense; it does not prevent a state from criminalizing the act of using or being under the influence of illegal drugs." (internal quotations omitted). Furthermore, the *State v. Robinson* court pointed out that a metabolite is a byproduct

created when a body metabolizes a controlled substance introduced to it. *Id.* at ¶ 32. When present, a metabolite only indicates that a controlled substance was introduced at a prior point in time. *Id.* "In other words, simply having the metabolite of a controlled substance in the body is similar to a 'status' of having previously ingested the controlled substance." *Id.* The court went on to note that the defendant in that case had active methamphetamine, and not metabolites of methamphetamine. *Id.* at ¶ 33. Thus, the statute at issue there criminalized being under the influence and therefore using the substance. *Id.* The court was also careful to distinguish between that scenario and the scenario before this court: "Thus if Utah's measurable amount provision criminalized the presence of metabolites in a person's body, Mr. Robinson's argument might have merit. But the measurable amount provision clearly precludes prosecution based on the presence of such metabolites." *Id.* at ¶ 32.

The facts of this case are different, as the *State v. Robinson* court's careful analysis demonstrates. Defendant's blood had only inactive metabolites in it, and not active metabolites. R. 300-301, ¶¶ 9-10. Thus, under *Robinson v. California,* as interpreted by the court in *State v. Robinson,* if the plain language of the statue truly does punish Defendant for driving while he had inactive metabolites in his system, the statute violates the Cruel and Unusual Punishment Clause. The trial court should be reversed for this reason as well.

III. The Metabolite Statute, As Interpreted by the Trial Court, Violates Art. I, 24 of the Utah Constitution.

A. A Statute's Classification Cannot Be Used to Defeat the Similarly Situated Inquiry.

The primary point of dispute between the parties concerning Uniform Operation of Law analysis concerns whether the Metabolite Statute imposes disparate treatment on persons similarly situated. According to the trial court and the State, it does not. The State then makes an important concession: it concedes that if the court can use the challenged classification to establish that persons so classified are not similarly situated, the Uniform Operation of Law Clause is a hollow tautology. Brief of Appellee P. 32-33. But the State attempts to steer its construction away from this self-apparent absurdity, arguing instead that the challenged classification here does not impact persons similarly situated because *other* statutes treat the persons in those classifications differently.

This is a tortured construction of Uniform Operation of Law analysis. For one, it is a thinly veiled attempt to bring through the back door something the State acknowledges it cannot bring through the front. To illustrate, the State acknowledges that the Metabolite Statute itself does not defeat the similarly situated inquiry, but then argues that because *other* statutes impose different treatment on legal users versus illegal users of controlled substances, those two groups are not similarly situated. *See* Brief of Appellee at 33. ("These groups are treated differently because of their underlying drug use, independent of the Metabolite Statute, was either sanctioned by or in violation of some other law."). That argument, however, holds no water because the Metabolite Statute incorporates that very same distinction. *Compare id. with* Utah Code Ann. § 41-6a-517(3) (establishing that legal users of controlled substances are treated different than illegal users of

controlled substances under the Metabolite Statute). Indeed, that classification is the very thing being challenged in this appeal. The State cannot, therefore, look to the legal/illegal consumption classification to defeat the similarly situated inquiry because that same classification is expressly included in the Metabolite Statute. *Id.* Thus, despite the State's acknowledgment that the Article I, § 24 cannot be read to be a nullity, the application it seeks is precisely that. Under the State's approach, the classes of people the Metabolite Statute creates are not similarly situated because the Metabolite Statute classifies them differently. *See* Brief of Appellee P. 33. Thus, any time a statute creates a classification, that same classification could be used to defeat the similarly situated inquiry. That is the very definition of a tautology and would reduce Article I, § 24 to self-consuming dead letter.

However, pursuant to counsel's obligation under Utah R. Pro. Cond. 3.3(a)(2), counsel notes that a recent Uniform Operation of Law case from the Utah Supreme Court appears to take exactly that approach, although the State did not cite to the case in its opposition brief. *State v. Roberts,* 2015 UT 24, 345 P.3d 1226 involved a Uniform Operation of Law challenge brought following a conviction of Sexual Exploitation of a Minor, now codified at Utah Code Ann. § 76-5b-201. The defendant contended that the statute violated Article I, § 24 because it imposes criminal and civil liability on individuals who knowingly produce, possess, or possess child pornography with intent to distribute, but exempts "law enforcement officers who encounter child pornography during an investigation, as well as certain organizations acting in good faith and within the scope of their employment to report or prevent child pornography." *Id.* at ¶ 42. The

court rejected the challenge, relying on the challenged classification between illegal use or possession of child pornography versus legal use or possession of child pornography to support its conclusion that the challenged statute did not discriminate between persons similarly situated. *Id.* at ¶ 43. The court therefore relied on the challenged distinction to defeat the similarly situated inquiry. *See id.* Defendant respectfully submits that the reasoning of *State v. Roberts* is an unexplained departure from prior precedent that did not sanction reliance on the challenged distinction to defeat similarly situated inquiry, and should be revisited. However, Defendant also acknowledges that this court lacks the authority to reverse or revise an opinion of the supreme court, and as such has contemporaneously filed with this Reply Brief a suggestion for certification to the supreme court pursuant to Utah R. App. 43(b)(1).

The result in *Roberts* notwithstanding, the fact remains that the State's approach herein is inconsistent with the manner in which the supreme court has articulated Uniform Operation of Law analysis since its decision in *Gallivan v. Walker,* 2002 UT 89, ¶ 43, 54 P.3d 1069. There, the court articulated for the first time the 3-step analytical model that appears in Article I, § 24 cases currently. *Id., see also e.g., Roberts,* 2015 UT 24 at ¶ 41, *Ainsworth,* 2016 UT App 2 at ¶ 10. And, as stated above, that approach requires the court to consider if the challenged statute creates a classification that imposes disparate treatment on persons similarly situated. *Roberts,* 2015 UT 24 at ¶ 41. By very definition, that approach precludes use of the challenged classification to undercut the similarly situated inquiry. The trial court's departure from the established Article I, § 24 framework cannot and should not be countenanced. The trial court should therefore be

reversed.

B. It is Improper to Look to Statutes that Do Not Create the Challenged Classification to Determine if the Challenged Classification Impacts Persons Similarly Situated Differently.

In support of its proposed Article I, § 24 analytical model, the State cites the court to the affirmative defense to prosecution under the Metabolite Statute found at Utah Code Ann. § 41-6a-517(3)(b). The State also cites to affirmative defenses to distributing pornographic material found at Utah Code Ann. § 76-10-1208(1) for scientific, educational governmental, or similarly justified possession of pornographic material, as well as the affirmative defense for use of force in defense of persons, property, habitation, etc… found at Utah Code Ann. § 76-2-402, and the affirmative defense to possession of a firearm by a restricted person created where a member of the household possesses a valid prescription for the controlled substance as stated at Utah Code Ann. § 76-10-503(6). According to the State, the court can look beyond the challenged statute in search of a distinction that will defeat the similarly situated inquiry. Brief of Appellee at P. 33.

This approach, if accepted, would mark a dramatic expansion to the analytical framework under Article I, § 24. The well-established approach requires the court to look at the challenged classification to determine if it impacts persons similarly situated. *See Gallivan,* 2002 UT 89 at ¶ 43 ("Initially we must address two threshold issues by determining (1) what, if any, classification is created and (2) whether that classification is discriminatory, that is, whether it treats the members of the class or subclasses disparately."). By contrast, rather than asking whether impacted persons are similarly

situated under the challenged statute, the State would now be allowed to comb the code in search of another statute that shows dissimilarity of situation. Notably, the State has neither cited any authority to support its request for such an expansion nor provided substance analysis as to why the request is justified, relying instead on bald argument that it is a proper approach. Given the dramatic shift in analytical framework and the dearth of authority or analysis to justify it, the court would be within its discretion to declare that issue inadequately briefed. *See State v. Thomas,* 961 P.2d 299, 305 (Utah 1998). But even if addressed on the merits, it is apparent that this approach is unjustifiably inconsistent with established Article I, § 24 analysis, and should be rejected for that reason.

The State then attempts to distinguish this case from *Lee v. Gaufin,* 867 P.2d 572 (Utah 1993), apparently on the basis that the children in *Lee* had no ability to escape their classification under the challenged statute, citing *ABCO Enterp., v. Merrill,* 2005 UT 34, 114 P.3d 585 in support. Brief of Appellee at P. 34-35. It should be noted that the portions quoted in the State's brief actually come from the discussion in *State v. Merrill,* 2005 UT 34, ¶ 38, 114 P.3d 585. There, the court relied on a defendant's "choice" not to file a motion to withdraw a guilty plea within 30 days, thereby subjecting himself to the provisions of the Post-Conviction Remedies Act and Utah R. Civ. Pro. 65C. *Merrill,* 2005 UT 34 at 39. Thus, by the choice not to file a timely motion to withdraw a guilty plea, the defendant joined a class of people to whom Utah Code Ann. § 77-13-6 applies uniformly. *Id.* at 40. The court was careful to distinguish this scenario from the scenario presented in *Lee,* where the minors had no legal ability to opt out of the otherwise Draconian provisions of the challenged statute. *Id.* at ¶ 38.

When one reviews the classification at issue here, it becomes apparent that the *Merrill* court's focus on the challenging party's choice does not apply. The overall class in which the classification operates is individuals who consume THC and later drive with non-psychoactive metabolites in their systems. The classification distinguishes between those who ingested THC illicitly, and those who did so either pursuant to a prescription from a provider, or otherwise legally. Utah Code Ann. § 41-6a-517(3). Stated another way, the classification distinguishes between individuals whose ingestion was legal and those whose ingestion was not. *Id.* But regardless of which side one finds herself on that classification, all members of that class joined it by choice.[2] Thus, the State's focus on the choice aspect apparent in *Lee* as discussed in *Merrill* is beside the point. The real question is whether the Metabolite Statute operates uniformly across the classification it creates, and if not, if the Legislature had a rational basis for imposing non-uniform treatment to persons otherwise similarly situated.

C. The Metabolite Statute Does Not Apply Uniformly.

Among the class of individuals who ingest THC and drive after THC has been metabolized but its metabolites remain, the statute does not apply uniformly. As illustrated by Defendant's hypothetical driver example in his principal brief, the driver whose ingestion was pursuant to a prescription from a provider in another state or country where such is legal, or legal recreational consumption in another state or country where such is legal, are not subject to criminal sanctions under the Metabolite Statute. If, on the

[2] The statute also has an affirmative defense for those who involuntarily ingested the controlled substance. That defense is not at issue herein and is therefore not addressed.

other hand, consumption did not occur legally, the driver is subject to criminal sanctions. This is the case whether the consumption happened several days prior, or a matter of hours prior because the critical facts are that no active THC remains, the driver is not impaired, but inactive THC metabolites are present. Thus, as individuals having previously ingested THC, they are similarly situated and yet treated differently. The Metabolite Statute therefore does not apply uniformly. The last remaining question then, is whether this classification is reasonable, whether the objectives of the legislation are legitimate, and whether there is a reasonable relationship between the classification and the legislative purposes. *Robinson,* 2011 UT 30 at ¶ 22.

D. The Classification Cannot Withstand Scrutiny, Even Under the Deferential Review Given to Classifications that Do Not Involve Fundamental or Critical Rights.

As Defendant acknowledged in his principal brief, this case does not involve a fundamental or critical right, nor does it involve an inherently suspect classification. The statute is therefore subject to lessened scrutiny. *Gallivan,* 2002 UT 89 at ¶ 40. The court therefore takes a deferential approach to assessing the reasonableness of a classification and its relationship to the legislative purpose of the challenged statute. *Robinson,* 2011 UT 30 at ¶ 17. But even under a deferential approach, the statute still fails.

i. The Legislative Purpose of Deterring Illegal Drug Use Violates Principles Articulated in State v. Robinson.

The State dismisses Defendant's contention that considering the legislative purpose of deterrence of illegal drug use violates the holding in *State v. Robinson.* The State relies on its assertion that the statute punishes not the status of having been

previously under the influence, but "the act of driving under those circumstances." Brief of Appellee, P. 37. The State then concludes that the statute's deterrent purpose is served "not by punishing the prior use, but by appealing to that individual's desire to drive without the fear of violating the law and to avoid potential punishment by doing so." *Id.*

The distinction the State draws between punishing and deterring is manifestly artificial. If deterrence is the purpose, then punishment is the means to accomplish that purpose and the two cannot be meaningfully separated. Furthermore, Defendant is left to wonder from whence cometh the individual's "desire to drive without fear of violating the law and to avoid potential punishment by doing so." Brief of Appellee, P. 37. Clearly the answer to that question lies in the punishment and the deterrent effect it provides. And because the punishment arises directly out of the defendant's prior drug use—coupled with driving under those circumstances— such a punishment would be an impermissible status offense as detailed in *Robinson,* 2010 UT 30 at ¶ 32 ("A metabolite of a controlled substance is a byproduct created when the controlled substance is metabolized by the body; thus, having the metabolite of a controlled substance in the body only indicates that the controlled substance was ingested at some prior point in time. In other words, simply having the metabolite of a controlled substance in the body is similar to a 'status' of having previously ingested the controlled substance.").

For these reasons, the reasons articulated above, and in the principal brief, the court therefore should not consider deterrence of illegal drug use in this context because, under the facts of this case, doing so would countenance imposing a punishment based on Defendant's status of having previously consumed THC. Such an approach would violate

Defendant's rights under the Eighth and Fourteenth Amendments to the U.S. Constitution as articulated in *State v. Robinson.*

ii. There is No Rational Nexus Between the Legislative Purpose of Deterring Illegal Drug Use and the Challenged Classification.

Should the court consider deterrence of illegal drug use as a purpose of the Metabolite Statute, that purpose still fails Uniform Operation of Law analysis. In support of its citation to deterrence of illegal drug use as a legislative purpose, the State relies on this court's decision in *State v. Ainsworth,* 2016 UT App 2, 365 P.3d 1227. Brief of Appellant 37-38. The State contends that this court has already determined that deterring the illegal use of controlled substances is also a valid purpose.

The trouble with the State's reliance on *Ainsworth* is that its analysis does not uphold the distinction at issue in this case. *Ainsworth* relied on the legislature's interest in regulating controlled substances because of their "high potential for abuse." *Id.* at ¶ 12. Such regulation occurs by way of "controls and safeguards, including, among other things, limits on their dosages and regulation of manufacturing consistency and quality, while those who obtain controlled substances illegally are not subject to any such constraints. Thus, the legislature has an interest in deterring the illegal use of controlled substances." *Id.* at ¶ 12.

However, those means bear no rational relationship to those goal of deterrence under the facts of this case. The State conveniently overlooks a critical fact when it argues that the Metabolite Statute is rationally tied to the legislative objective of deterrence of illegal drug use because those who use marijuana pursuant to a prescription

are subject to many of the same controls to which other users of controlled substances are subject. *See* Brief of Appellee at P. 39. The overlooked fact is that the controlled substance in this case – marijuana—can be legally cultivated and used recreationally in an immediately adjacent jurisdiction: Colorado. *See* Colorado Constitution, Article XVIII, § 16 (3) ("Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado … (a) Possessing, *using,* displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.") (emphasis added). That is, if an individual consumed marijuana in Colorado that she cultivated herself in Colorado, and later drove in Utah –even as little as 12 hours later—after the impairing effects of THC had faded and no active THC remained in her system, she would not violate the Metabolite Statute because her ingestion of marijuana was legal. *See* Utah Code Ann. § 41-6a-517(3)(c). Moreover, defendant notes that the same result would obtain if she had ingested marijuana in a country that allows legal consumption of marijuana.

The question is therefore whether there is a reasonable nexus between this classification and the legislative purpose of deterring illegal drug use. None can be found because identical conduct is either sanctioned or criminalized based on the physical location of the person at the time of consumption. In cases of recreational use in those jurisdictions that allow such use, there are no guarantees of manufacturing consistency, potency, quality, dose limits, etc…. There are no safeguards in the form of giving a medical history to a provider before she prescribes the substance. There is no dosage recommendation, nor is there ongoing monitoring of intake, revision of prescriptions,

etc…. Individuals in those places can use according to their own fancy in much the same way individuals in Utah can consume alcohol. Indeed, the only difference between the people in those two respective classes is the jurisdiction in which marijuana was ingested. The State's reliance on these factors as observed in *Ainsworth* is therefore unavailing. There is nothing inherently different about recreational consumption in one jurisdiction than there is in another. The underlying activity is identical. And yet the Metabolite Statute creates disparate treatment based on the physical location the consumption occurred. No reasonable, rational line of thought can sustain that distinction. It therefore violates Article I, § 24. The trial court's conclusion to the contrary was in error.

iii. The Legislative Purpose of Public Safety Cannot Sustain the Metabolite Statute.

In response to Defendant's hypothetical drivers, one of which consumed marijuana in Utah 5 days prior to driving, and one consumed in Colorado 5 days prior to driving, the State contends that the hypothetical is improper in an as-applied challenge because the challenge must be based on the facts of this case. While that statement is true as far as it goes, the State overlooks the fact that they hypothetical is illustrative of the disparate treatment under the Metabolite Statute imposed on persons similarly situated. The critical point is that the Metabolite Statute creates a classification between individuals who consume marijuana under illegal circumstances and those who do so under legal circumstances. *See* Utah Code Ann. § 41-6a-517(3). The length of time that elapsed between consumption and driving is irrelevant, as long as that period of time is sufficient to eliminate active THC from the system, but not long enough to eliminate all

THC metabolites. The balance of the facts from this case the State cites are red herrings because they have nothing to do with the question before the court.

The State's critique of the hypothetical also conveniently omits two findings of fact the trial court made that do not help its argument. Specifically, Defendant was subject to analysis by a drug recognition expert (DRE), as well as subjected to field sobriety tests (SFTs). R. 300, ¶¶ 4, 7. Importantly, even after being subjected to FSTs and DRE analysis, law enforcement officers concluded that Defendant was not too impaired to drive. R. 300, ¶ 7. These unchallenged findings of fact are important because they illustrate that Defendant was not under the influence of THC, which is an important point the court must consider when assessing the reasonableness of the connection between the challenged classification and legislative purpose of public safety.

The State next points to the testimony received from Dr. Glen Hanson in support of its contention that a reasonable basis supports the distinction between the challenged classification and the legislative purpose of public safety. Initially, Defendant notes that such reliance is troublesome because the State cites only to evidence offered at an evidentiary hearing, and not a finding of fact made by the trial court. Indeed, the findings of fact are devoid of any reference at all to Dr. Hanson's testimony. *See* R. 299-301. Instead, the only findings of fact concern the facts and circumstances of the collision and the investigation that followed. *Id.* The State therefore asks this court to rely on a factual issue the trial court never resolved. To rely on this testimony would effectively require this court to make a factual finding with nothing but the cold record – a function that typically does not fall within the purview of an appellate court. *See In Re Z.D.,* 2006 UT

54, ¶ 24, 147 P.3d 401 ("The doctrine that shapes and guides judicial review is that it is not within the province of an appellate court to substitute its judgment for that of a front line fact-finder except where exceptional circumstances warrant more rigorous scrutiny.").

But even if the court were to consider Dr. Hanson's testimony, it does not change the analysis of the challenged classification vis-à-vis public safety. Because the challenged classification can be reduced to whether marijuana was lawfully consumed or whether it was not lawfully consumed, any supposed deleterious effects of marijuana that persist after the individual is no longer under its influence are immaterial; they will exist irrespective of the legality of consumption, all else being equal. The location of consumption –and by extension the legality of consumption—changes nothing concerning public safety. So even if the court were to rely on Dr. Hanson's testimony in the absence of any findings derived therefrom, all persons effected by the classification will pose identical safety risks –*viz.,* none. Notwithstanding identically non-existent public safety risks, some are treated differently under the Metabolite Statute than others. The imposition of criminal sanctions on some, but not all, of these drivers therefore does absolutely nothing to further the purpose of public safety. The Metabolite Statute therefore bears no rational relationship to the legislative purpose of public safety and does not pass Uniform Operation of Law scrutiny. Because the trial court held to the contrary, its holding was in error and should be reversed. The matter should therefore be remanded with instructions to vacate the conviction under the Metabolite Statute and dismiss that charge with prejudice and on the merits.

Conclusion

For the reasons stated in this brief and in the principal brief, the trial court should be reversed and the matter remanded with instructions to the trial court to vacate the conviction and dismiss the charge brought pursuant to the Metabolite Statute.

Respectfully submitted on this, the 26th day of August, 2016.

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Dallas B. Young
PETRO & ASSOCIATES

Certificate of Compliance With Rule 24(f)(1)

I do hereby certify that the foregoing Brief of Appellant is compliant with Utah R. App. Pro. 24(f)(1)(A) because it contains 6,381 words and 497 lines of text, as calculated using the word count utility on my word processing software.

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Certificate of Service

I do hereby certify that on the 26th day of August, 2016, I did cause to be mailed 2 true and correct copies of the foregoing Brief of Appellant, as well as a CD containing the foregoing Brief of Appellant in searchable PDF format to the following, postage prepaid, addressed as follows:

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