2002

Salt Lake City v. Stanley Lucido : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, Plaintiff/Appellee, vs. STANLEY LUCIDO, Defendant/Appellant.	Case No. 20021018-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS, A CLASS B MISDEMEANOR, IN VIOLATION OF SALT LAKE CITY CODE, SECTION 12.24.100, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JUDITH S. ATHERTON AND JOSEPH W. ANDERSON PRESIDING

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ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR WAIVING THE ARGUMENT THAT LUCIDO'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BY THE WARRANTLESS BLOOD DRAW

Appellee first claims that the results of the blood draw were properly admitted because Lucido's "implied consent was in effect and he was incapable of revoking that consent" (Br. of Appellee at 23). Thus, Appellee relies squarely on the argument that Lucido's Fourth Amendment rights are to be ignored because Utah Code Annotated § 41-6-44.10 allows for implied consent to warrantless blood draws. Lucido, however, asserts that § 41-6-44.10 does not override Fourth Amendment protections against warrantless searches and seizures and, as such, Appellee's reliance on § 41-6-44.10 is misplaced.

To support its position that any reliance on the Fourth Amendment would be futile because Utah Code Annotated § 41-6-44.10 allows for warrantless blood draws, Appellee misapplies *State v. Wight*, 765 P.2d 12 (Utah App. 1988). In *Wight*, the defendant was unconscious when an officer had a certified technician draw his blood. 765 P.2d at 14. On appeal, the defendant asserted that his trial counsel failed to object to admission of the blood evidence "because the blood was not seized pursuant to a valid arrest and a proper foundation was not established." *Id.* at 16. The defendant further asserted that "the State laid an inadequate foundation for the blood sample and blood test results because the test was taken two hours or more after the accident, and because a sufficient chain of custody was not established." *Id.* This Court correctly determined that, pursuant to Utah Code Annotated § 41-6-44.10, an arrest is not required prior to taking a blood sample. *Id.* This Court also correctly determined that the State laid a proper foundation for the evidence and the chain of custody was sufficiently established and affirmed the defendant's conviction. *Id.*

Because the conviction in *Wight* was affirmed, Appellee assumes that any "further challenge on Fourth Amendment grounds would be futile" (Br. of Appellee at 15). However, Appellee fails to recognize that the defendant in *Wight* never asserted that the blood draw was taken in violation of his Fourth Amendment rights. *Wight*, 765 P.2d at 16. Thus, this Court was not required to consider and did not consider search and seizure law which may have been applicable to the facts of that case. *Id.* Therefore, *Wight* is not applicable to the present case.

It is elementary that the protections afforded by the Fourth Amendment are made applicable to the states through the Due Process Clause in the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). As such, by enacting Utah Code Annotated § 41-6-44.10, the Utah Legislature has not and simply can not ignore the protections in the Fourth Amendment. Moreover, it is clear that the U.S. Supreme Court in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), found blood testing procedures to "plainly constitute searches of persons" within the meaning of the Fourth Amendment, stating:

> Compulsory administration of a blood test ... plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.... Such testing procedures plainly constitute searches of "persons" and depend antecedently upon seizures of "persons", within the meaning of that Amendment.... [T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

Id. at 767; 86 S.Ct. at 1834; 16 L.Ed.2d at 914.

Accordingly, Appellee's argument that the "implied consent" found in § 41-6-44.10 effectively overcomes any Fourth Amendment concerns to a warrantless blood draw is without any basis in law. The Fourth Amendment protects against warrantless blood draws and trial counsel was ineffective for waiving the warrantless blood draw issue.

Next, Appellee argues that any reliance on *State v. Rodriguez*, 2004 UT App 198, 93 P.3d 854, is futile because *Rodriguez* was decided in 2004 and Lucido was convicted in 2002 (Br. of Appellee at 15). Appellee claims that *Rodriguez* "differs from prior case law" addressing Fourth Amendment protections and that trial counsel was not ineffective because "under available case law" at the time of trial, any suppression motion based on Fourth Amendment protections would fail (Br. of Appellee at 17-18). Lucido asserts that Appellee's argument is incorrect since *Rodriguez* added nothing new to the framework of Fourth Amendment analysis.

Appellee recognizes that the applicable law at the time of trial was *Schmerber* and *City of Orem v. Henrie*, 868 P.2d 1384 (Utah App. 1994). Appellee claims that *Rodriguez* differs from prior case law because it requires a trial court to consider relevant factors such as "the distance to the nearest magistrate, the availability of a telephonic warrant, the feasibility of a stake-out or other form of surveillance while a warrant is being obtained, the seriousness of the underlying alcohol-related offense, the commission of another offense such as fleeing the scene, the ongoing and continuing nature of an investigation, the extent of probable cause, and the conduct of the investigating officers" in determining exigent circumstances. *Rodriguez*, 2004 UT App 198 at ¶ 16; citing *Henrie*, 868 P.2d at 1392. Appellee then asserts that prior case law never required trial courts to consider these factors, but that *Schmerber* supposedly allows courts of appeal to "presume" that exigent circumstances exist and that

Rodriguez "places an affirmative obligation" on trial courts to consider these factors (Br. of Appellee at 18).

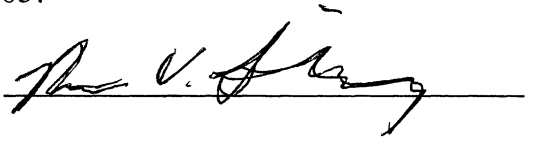
Appellee is incorrect that *Rodriguez* departs from prior case law by "plac[ing] an affirmative duty" on trial courts to consider the specific factors in *Henrie*. These are relevant factors only to be considered under the totality of the circumstances. *Rodriguez*, 2004 UT App 198 at ¶ 16. Moreover, *Rodriguez* does not turn on the analysis of whether an officer attempted to obtain a telephonic warrant. *Rodriguez* is clear that no one single factor is determinative, but the totality of the circumstances "is often a mosaic of evidence, no single part of which is itself sufficient." *Id.* at ¶ 15. Accordingly, Appellee's argument that *Rodriguez* departs from prior case law is without basis.

Furthermore, even if Appellee is correct that trial counsel could not rely upon *Rodriguez* merely because it was decided after the trial, Lucido asserts that if his trial counsel had moved to suppress the warrantless blood draw evidence based on Fourth Amendment protections, it is apparent that this Court would have granted it because the facts in this case are strikingly similar to the facts in *Rodriguez*. *Rodriguez* added nothing new to Fourth Amendment analysis regarding warrantless blood draws and as such, a motion by trial counsel would have been granted.

Appellee further attempts to distinguish *Rodriguez* by claiming that Lucido was not under the influence of alcohol, but drugs (Br. of Appellee at 17). Appellee then claims that "some drugs remain in the blood for months while other drugs remain for

CERTIFICATE OF MAILING

I hereby certify that I delivered four copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the SIMARJIT S. GILL , SALT LAKE CITY PROSECUTOR'S OFFICE, PAIGE WILLIAMSON, Assistant City Prosecutor, 349 South 200 East, Suite 500, Salt Lake City, UT 84111, this 12th day of January, 2005.



only hours," to support its position that exigent circumstances exist whenever a person may have ingested an illegal substance (Br. of Appellee at 17). Not only is Appellee's argument without foundation, it ignores prior case law and important policy. This Court in *Henrie* and *Rodriguez* rejected a finding of exigent circumstances in similar situations based solely on possible ingestion of a metabolizing substance. Thus, this argument is also without a basis in law.

Finally, Appellee is incorrect that trial counsel's ineffectiveness was harmless. Appellee merely relies on its argument that because "implied consent" could not be withdrawn due to Lucido's unconsciousness, a suppression motion based on the Fourth Amendment would have been useless since § 41-6-44.10 overcomes the need for a warrant (Br. of Appellee at 20-22). As stated above, this position is entirely without a basis in law and is in direct conflict with Fourth Amendment jurisprudence.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons and the reasons stated in the original brief, Lucido asks this Court to reverse his convictions.

RESPECTFULLY SUBMITTED this 10th day of January, 2005.

Patrick V. Lindsay
Counsel for Appellant