2004

State of Utah v. Daniel Perez-Avila : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	Case No. 20040174-CA
DANIEL PEREZ-AVILA,	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FIFTH DISTRICT COURT, WASHINGTON COUNTY, FROM A CONVICTION OF TWO COUNTS OF AUTOMOBILE HOMICIDE, SECOND DEGREE FELONIES; AND DRIVING UNDER THE INFLUENCE OF ALCOHOL, A THIRD DEGREE FELONY, BEFORE THE HONORABLE JAMES L. SHUMATE

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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO FILE A MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF THE WARRANTLESS BLOOD DRAW

Utah Code Annotated § 41-6-44.10(1)(a) states "a person operating a motor vehicle in this state is considered to have given his consent to a chemical test or tests of his breath, blood, or urine" if they enjoy the privileges of driving on Utah's roads. *See Appellee's Br.* at 10. If a person refuses to consent to the test then their license can be revoked. *Id.* On the other hand, if a person is "dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent." *Id.* (quoting Utah Code Ann. § 76-6-44.10(3)).

The State argues that Perez-Avila was unconscious when his blood was drawn.

The State contends that Trooper Hinton testified at trial that the defendant was unconscious when the nurse drew his blood. *See Appellee's Br.* at 5. However, the State also asserts that both Nurse Joanne Nielson and Trooper Kevin Davis testified that the defendant was unconscious. *Id*

Concerning Joanne Nielson's testimony, the State admits that Nurse Nielson stated that the defendant was awake and conscious when she drew his blood. *Id.* However, the State then contends that Joanne Nielson "almost immediately retracted her testimony and stated that she could not remember whether defendant was unconscious when she drew his blood." *See Appellee's Br.* at 12. The problem with the State's argument is that Joanne did not "almost immediately retract" her testimony. It was only on redirect examination that she stated that she did not have a clear recollection of that night but that she did remember him "moaning and a few things like that." (R. 245). Therefore, Nielson did testify that the defendant was conscious.

Furthermore, in the preliminary hearing Trooper Kevin Davis testified that the defendant was unconscious when the defendant drew the defendant's blood. *See Appellee's Br.* at 5. However, at trial Trooper Davis testified that when he arrived at the hospital he received the blood sample from Trooper Hinton. (R. 173). Therefore, it appears that Davis was not even present at the time the blood was drawn. Consequently, he could not have testified to whether or not the defendant was conscious at the time the blood was drawn.

There appears to be some confusion as to whether or not the defendant was conscious at the time his blood was drawn. The defendant asks this court to hold that he was conscious. Nurse Nielson's medical background and her interaction with the client at the time she drew his blood allow her to better determine if the defendant was conscious at the time of the blood draw.

Since the defendant was conscious when his blood was drawn, we ask this court to hold that his Fourth Amendment rights were violated. The State argues that *State v. Rodriguez* , 2004 UT App 198, 93 P.3d 854, *cert. granted,* 100 P.3d 220 (Utah 2004), does not apply since the Supreme Court of the United States ruled in *Schmerber v. California*, 384 U.S 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), that the dissipation of blood-alcohol evidence is an exigency. *See Appellee's Br.* at 12. However, this Court recognized that some jurisdictions have interpreted *Schmerber* to create a per se rule, but this Court conclusively held that "the *Schmerber* language comports with accepted exigent circumstances doctrine" and this court declined to adopt the per se rule advocated by the State. *Rodriguez,* 2004 UT App. 198 at ¶ 10. This Court then held that "exigent circumstances will be found where the situation involves blood-alcohol evidence, only when the 'totality of the circumstances,' supports a finding that the officer 'was confronted with an emergency, in which delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.* at ¶ 14 (citations omitted).

Therefore, Perez-Avila asks this court to follow *Rodriguez* and require the State to show exigent circumstances. Had trial counsel moved to suppress evidence of the warrantless blood draw, the trial court would have granted the motion because the State could not have met its burden of establishing exigent circumstances sufficient to overcome the need for a warrant. Had the blood alcohol evidence been suppressed, it is likely that Perez-Avila would not have been convicted of any of the charges, except for the open container charge. The State's only sure evidence that Perez-Avila operated a vehicle while driving under the influence derived from the illegal blood draw. Without that evidence, the State could hot have proven the elements of a DUI, automobile homicide, or child abuse.

POINT II

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST THAT THE DUI CONVICTION BE DISMISSED AS A LESSER-INCLUDED OFFENSE TO AUTOMOBILE HOMICIDE

Perez-Avila asserts that trial counsel was ineffective in failing to request dismissal of his driving under the influence conviction because it merged with his convictions for automobile homicide because it is a lesser-included offense. Utah Code Annotated § 76-1-402(3) states:

A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged.

In *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 122 S.Ct. 941, 151 Led.2d 908 (2002), a coal operator brought an action against the Commissioner of Social Security alleging that the Commissioner had wrongfully determined that the a purchaser of a defunct signatory coal operator was a "related person." If the purchaser was held to be a "related person" then the purchaser would have been eligible under the Coal Industry Retiree Health Benefit Act for health benefits of defunct operator's retired employees. The United States Supreme Court held that the act did not allow the Commissioner to assign beneficiaries to successor in interest of signatory coal operator. On appeal from the district court the Fourth Circuit concluded that the "act was clear and unambiguous and that the court was bound to read it exactly as it was written." *Id.* at 439. The Supreme Court of the United States stated that

As in all statutory construction cases, we begin with the language of the statute. The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808

(1997) citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S. Ct. 1026, 103 L. Ed. 2d 808 (1997)). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" 519 U.S. at 340, 117 S. Ct. 843. *Id.*

Furthermore, the U.S.Court in *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), also stated that in order for petitioner, Immigration and Naturalization Service (I.N.S.), to prevail on their claim that AEDPA and IIRIRA stripped federal courts of jurisdiction to decide pure questions of law they must "overcome both the strong presumption in favor of judicial review of administrative action and the long outstanding rule requiring a clear and unambiguous statement of congressional intent." 121 S.Ct. at 2278. The Supreme Court further explained that when a "statutory interpretation invokes the outer limits of Congress' power, there must be a clear indication that Congress intended that result." *Id.* at 2279. Secondly, the court stated that if an "otherwise acceptable construction would raise serious constitutional problems and an alternative interpretation is fairly possible, the statute must be construed to avoid such problems. *Id.*

Similarly, the Utah Supreme Court held in *Allisen v. American Legion Post No.*, 763 P.2d 806 (Utah 1988), that when "statutory language is plain and unambiguous, this court will not look beyond to divine legislative intent. Instead, we are guided by the rule that a statute should be construed according to its plain language." 763 P.2d at 809.

In looking at the plain language of Utah Code Annotated § 76-1-402(3) it is clear and unambiguous that the legislature intended a lesser included offense to be established by "proof of the same or less than all the facts required to establish the commission of the offense charged" and therefore the "defendant may not be convicted of both the offense charged and the included offense." Utah Code Ann. § 76-1-402(3). The State agrees that automobile homicide requires the same elements needed to be convicted of a DUI plus the additional element of causing the death of another by operating a motor vehicle in a negligent or criminally negligent manner. *See Appellee's Br.* at 17. Therefore, according to the Supreme Court of the United States in *Barnhart,* since the language is clear and unambiguous as to what the statute means then the inquiry stops. This particular statute is clear and unambiguous as to what constitutes a lesser included offense. If the legislature intended for automobile homicide to be an enhancement statute then according to *I.N.S.* their needs to be a clear indication in the automobile homicide statute that the legislature intended for the defendant to be convicted of DUI plus automobile homicide. Since there is not any unclear or ambiguous language in the statute then this court should allow the DUI to merge into automobile homicide which is required by § 76-1-402(3).

The State further argues that DUI and Automobile Homicide serve different purposes and punish distinct acts. *See Appellee's Br.* at 17. The State contends that the purpose of the DUI statute is to increase road safety by prohibiting intoxicated persons from driving on Utah's roads. *Id.* The State then argues that automobile homicide differs

from DUI because automobile homicide is an offense against the person. This argument fails because the purpose of DUI's as mentioned by the State is to increase road safety or in other words to protect people. The reason that people are charged with DUI is to discourage them from negligently committing automobile homicide. The lesser offense of DUI was created to deter individuals from committing the greater offense of automobile homicide, and therefore a DUI charge should merge into automobile homicide. Accordingly, Perez-Avila asks that this Court find that his trial counsel was ineffective in failing to request a dismissal of the DUI conviction because of its merger into the automobile homicide convictions.

CONCLUSION

As set forth in the Brief of Appellant, and as further set forth herein, Perez-Avila asks that this Court reverse his convictions for automobile homicide, driving under the influence, and child abuse.

SUBMITTED this 2nd day of June, 2005.

MARGARET P. LINDSAY
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I have caused to be delivered four copies to Matthew Bates, Assistant Attorney General, Appeals Division, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 2rd day of June, 2005.