2005

State of Utah v. Brandon Williams : Reply Brief

Utah Court of Appeals

Margaret P. Lindsay; Counsel for Appellee.
Karen A. Klucznik; Assistant Attorney General; Mark L. Shurtleff Attorney General; Timothy L. Taylor; Counsel for Appellant .

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.		Case No. 20050098-CA
	:	
BRANDON WILLIAMS,	:	
Defendant/Appellant.		

REPLY BRIEF OF APPELLANT

APPEAL FROM ORDER DISMISSING POSSESSION OF A CONTROLLED SUBSTANCE IN A DRUG-FREE ZONE (WITH PRIORS) CHARGE, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a), (2)(c), (4)(c) (West 2004), AND BINDING DEFENDANT OVER INSTEAD ON POSSESSION OF DRUG PARAPHERNALIA IN A DRUG-FREE ZONE CHARGE, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-5(1) (West 2004), IN THE FOURTH JUDICIAL DISTRICT, UTAH COUNTY, THE HONORABLE STEVEN L. HANSEN PRESIDING

KAREN A. KLUCZNIK (7912)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Utah Attorney General's Office
160 East 300 South
PO BOX 140854
Salt Lake City, UT 84114-0854

TIMOTHY L. TAYLOR
Utah County Deputy Attorney

Counsel for Appellant

MARGARET P. LINDSAY
99 East Center Street
P.O. Box 1895
Orem, Utah 84059-1895

Counsel for Appellee

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Attorney General
Utah Attorney General's Office
160 East 300 South
PO BOX 140854
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TIMOTHY L. TAYLOR
Utah County Deputy Attorney

Counsel for Appellant

MARGARET P. LINDSAY
99 East Center Street
P.O. Box 1895
Orem, Utah 84059-1895

Counsel for Appellee

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REPLY BRIEF OF APPELLANT

INTRODUCTION

The State's Reply Brief of Appellant responds to the contention, raised in defendant's brief, that *State v. Fedorowicz*, 2002 UT 67, 52 P.3d 1194, altered the analysis applied under the *Shondel* doctrine. The State relies on its opening Brief of Appellant with regard to all other arguments.

ARGUMENT

FEDOROWICZ DID NOT ALTER THE RULE THAT *SHONDEL* APPLIES ONLY WHEN THE STATUTORY ELEMENTS OF THE TWO CRIMES AT ISSUE ARE IDENTICAL

Defendant asserts that the trial court "properly applied *Shondel* when concluding that the methamphetamine residue found in the plastic baggie could support both the misdemeanor charge of possession of drug paraphernalia and the felony charge of [possession of] a controlled substance." Aple. Br. at 5. Defendant further contends that, based on that conclusion, the trial court properly ruled that defendant could only be

charged with the misdemeanor crime under the facts of this case. Aple. Br. at 5-9. Defendant's contention fails.

According to defendant, once the trial court established that the mens reas of both crimes here were identical, the trial court correctly defined the issue before it as "'not whether the residue [in the plastic baggie] is sufficient to support a charge of drug possession, but rather, whether residue alone is sufficient to support two separate charges and whether the existence of the residue would be an identical prohibition under the present circumstances.'" Aple. Br. at 7 (quoting R. 75). And, because any paraphernalia charge would have relied on the same evidence relied upon by the State to prosecute the drug possession charge, the trial court properly concluded that *Shondel* required prosecution only for the lesser crime. Aple. Br. at 8-9.

However, the determinative question before the trial court under *Shondel* was not, as defendant suggests, whether the evidence relied upon by the State to prove the greater crime was the same evidence the State would have had to rely upon to prove the lesser crime had it been charged. *See* Aple. Br. at 5-9 (citing to actual evidence to be used by the State to contend that, in light of that evidence, "the same conduct is being proscribed").

Rather, the determinative question before the trial court under *Shondel* was whether the "statutes are wholly duplicative, [i.e.,] whether all the elements of the respective crimes are identical." *Fedorowicz*, 2002 UT 67, ¶ 51. As demonstrated in the State's opening brief, *see* Aplt. Br. at 6-9, the statute criminalizing possession of a controlled substance and the statute criminalizing possession of drug paraphernalia are

not "wholly duplicative" because "all the elements of the respective crimes" are not "identical," *Fedorowicz*, 2002 UT 67, ¶ 51.

In making his argument, defendant appears to suggest that *Fedorowicz* altered the well-established rule that *Shondel* applies only when the statutes at issue contain precisely the same elements. *See* Aple. Br. at 6. Defendant acknowledges that *Fedorowicz* states that *Shondel* applies only when the statutes "are wholly duplicative,'" i.e., "'whether all the elements of the respective crimes are identical.'" Aple. Br. at 6 (quoting *Fedorowicz*, 2002 UT 67, ¶ 51). He suggests, however, that the supreme court altered the *Shondel* doctrine when it then immediately stated: "'Thus, we must first determine whether the mens rea, or intent, element is identical, and then we must determine whether the same conduct is proscribed.'" Aple. Br. at 6 (quoting *Fedorowicz*, 2002 UT 67, ¶ 51).

According to defendant, this latter statement by the supreme court indicates that the *Shondel* doctrine no longer requires "that the crimes . . . be identical" but, rather, requires "only that the mens rea and actus reus elements of the crimes . . . be identical." Aple. Br. at 6. In other words, according to defendant, that single statement in *Fedorowicz* converts the *Shondel* doctrine from one resting solely on the identical nature of the statutory elements of the crimes at issue to a much broader doctrine applying whenever the evidence used to establish one crime is the same evidence that would have to be used to prove a lesser crime. *See* Aple. Br. at 6-7 (comparing statutory elements for mens rea portion of test; comparing evidence State would use to prove the crimes for the actus reus portion of the test).

A proper reading of *Fedorowicz* does not support defendant's contention. First, the statement quoted by defendant does not, itself, support defendant's contention that *Fedorowicz* transformed the *Shondel* doctrine from a statutory elements-based doctrine to an evidentiary-based one. *See Fedorowicz*, 2002 UT 67, ¶ 51.

Second, in the same discussion in which defendant's statement appears, the supreme court notes that "*Shondel* does not preclude a prosecutor from choosing between two different crimes in charging an individual for particular conduct" but rather only "requires that a prosecutor who elects to charge an individual with a crime carrying a higher penalty or classification . . . be required to prove at least one additional or different element to obtain a conviction for the higher-penalty crime." *Id.* at ¶ 48. These statements make sense only if the supreme court continues to view *Shondel* as a statutory elements-based doctrine.

Third, the supreme court's application of *Shondel* in *Fedorowicz* is a straight-forward comparison of the elements of the two crimes at issue. *See Fedorowicz*, 2002 UT 67, ¶¶ 52-58 (comparing mens rea elements and then "other elements") (emphasis and capitalization omitted).

Finally, nowhere in the *Fedorowicz* opinion does the supreme court suggest an intent to revise the *Shondel* doctrine in any way. *See Fedorowicz*, 2002 UT 67, ¶¶ 46-58. To the contrary, the court consistently cites prior *Shondel* case law to define the analysis it must apply. *See id.* ¶¶ 46-49.

In sum, nothing in *Fedorowicz* supports defendant's suggestion that *Fedorowicz* converted the *Shondel* doctrine from a statutory elements-based doctrine to an

evidentiary-based one. Thus, neither *Fedorowicz* nor prior case law applying the *Shondel* doctrine support defendant's contention that the trial court properly applied the doctrine in this case.

CONCLUSION

For the reasons stated above, and for the reasons set forth in the State's opening brief, the State asks this Court to reverse the magistrate's order and order that defendant be bound over for the possession of a controlled substance in a drug-free zone with priors, a first degree felony, and absconding, a third degree felony.

RESPECTFULLY SUBMITTED 23d January 2006.

MARK L. SHURTLEFF
Utah Attorney General

Karen A. Klucznik

KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January 2006, I mailed first-class postage prepaid two copies of the foregoing Reply Brief of Appellant to appellee's counsel of record, as follows:

MARGARET P. LINDSAY
P.O. Box 1895
Orem, Utah 84059-1895

Karen A. Klucznik

KAREN A. KLUCZNIK
Assistant Attorney General