

2005

Utah v. Millsap : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20050765-CA
JOHNNIE B. MILLSAP,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A NO CONTEST *SERY* PLEA TO DRIVING UNDER THE INFLUENCE OF ALCOHOL, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 41-6-44 (West 2004), IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY, THE HONORABLE W. BRENT WEST PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

:

Plaintiff/Appellee,

:

Case No. 20050765-CA

v.

:

JOHNNIE B. MILLSAP,

:

Defendant/Appellant.

:

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals a no-contest *Sery* plea to driving under the influence of alcohol, a class A misdemeanor. This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

ISSUES ON APPEAL AND STANDARD OF REVIEW

- I. Did the trial court properly deny defendant's facial challenge to the constitutionality of the DUI statute for lack of standing, where the factual premise of defendant's challenge is not present in his case?**

Whether a defendant "has standing is a question of law and [this Court] accord[s] no deference to the ruling of the trial court." *Stocks v. United States Fid. & Guar. Co.*, 2000 UT App 139, ¶ 9, 3 P.3d 722 (citation and internal quotation marks omitted).

However, this Court reviews any factual findings underlying the trial court's ruling with deference. *See Chen v. Stewart*, 2005 UT 68, ¶ 49, 123 P.3d 416.

II. Did the trial court properly deny defendant's facial challenge to the constitutionality of the DUI statute, where the ordinary person would understand that the challenged provision proscribes driving while under the influence of alcohol?

"A constitutional challenge to a statute presents a question of law that [this Court] review[s] for correctness." *State v. Nieberger*, 2006 UT App 5, ¶ 6, 128 P.3d 1223.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional and statutory provisions are attached at Addendum A:

Utah Code Ann. § 41-6-44 (West 2004);
U.S. Const. Amend. XIV and Utah Const. Art. I, § 7 (due process).

**STATEMENT OF THE CASE
AND
STATEMENT OF THE FACTS¹**

At approximately 12:04 a.m. on March 27, 2004, Officer Douglas D. Whitlock, of the Utah Highway Patrol, was driving on a road in Weber County when he noticed a vehicle driven by defendant traveling in the opposite direction driving in the right park strip (R. 4). After observing the vehicle for approximately one block, Officer Whitlock turned around and executed a traffic stop (R. 4). As the officer approached the vehicle, he noticed the smell of alcohol (R. 4). The officer then asked defendant to perform field sobriety tests (R. 4, 28). After defendant failed the tests, Officer Whitlock arrested him

¹Because defendant has not included a transcript of the preliminary hearing in the record on appeal, the statement of facts concerning defendant's crimes are based on the police officer's probable cause statement and the State's memorandum in opposition to defendant's motion challenging the constitutionality of the DUI statute (R. 4, 28).

for DUI, an open container violation, and driving on a suspended license (R. 4, 28). At approximately 12:57 a.m., defendant submitted to an Intoxilyzer test, which registered his breath alcohol level at .099 (R. 4, 28).

On April 1, 2004, defendant was charged with one count of driving under the influence of alcohol (with priors), a third degree felony; one count of possessing an open container in a vehicle, a class C misdemeanor; and one count of driving on a suspended license, a class C misdemeanor (R. 1-2). After a preliminary hearing, defendant was bound over as charged (R. 14-15).

On July 26, 2004, defendant filed “Motion to Declare Statute Unconstitutional, Suppress Evidence Thereunder and Dismiss the Case” with supporting memoranda (R. 20-25, 26-28, 33-37). The State objected to defendant’s motion (R. 28-32, 49-55).

On October 6, 2004, the trial court heard argument on defendant’s motion (R. 40-41).² On February 2, 2005, the trial court issued its oral ruling denying defendant’s motion (R. 56-57; R. 127:1). The trial court ruled that defendant lacked standing to challenge the constitutionality of the DUI statute because the facts of his case clearly fit within the statute (R. 59-60; R. 127:1). Alternatively, the trial court ruled that the statute was constitutional (R. 60-61; R. 127:1-5). A written ruling followed on February 22, 2005 (R. 59-61).

²A transcript of this hearing is not included in the record on appeal.

On June 15, 2005, defendant entered into a plea agreement with the State (R. 84-90; R. 127:10-15). As part of the agreement, defendant entered a no-contest plea to the reduced charge of attempted driving under the influence, a class A misdemeanor, in return for dismissal of the remaining charges (R. 84-90; 91-92).³ Also as part of the agreement, defendant reserved the right to appeal the trial court's ruling on the constitutionality of the DUI statute (R. 88).⁴

Defendant was sentenced to one year at the Utah State Prison (R. 94-95).

Defendant timely appealed (R. 116).

SUMMARY OF THE ARGUMENT

Issue I. Defendant claims that the trial court erred when it ruled that he did not have standing to challenge Utah's DUI statute as unconstitutionally vague. The trial court's ruling was correct.

To establish standing to challenge a statute for vagueness, a defendant must show that the statute is impermissibly vague in all of its applications. A defendant whose

³At the same plea hearing, defendant also entered a no contest plea to driving under the influence (with priors), a third degree felony, in another case in return for dismissal of the remaining charges there (R. 84-90).

⁴Defendant did not explicitly reserve the right to appeal the trial court's ruling that he lacked standing to challenge the constitutionality of the DUI statute. However, reservation of that right is implicit in the reservation of the right to pursue the constitutional challenge, since standing is a prerequisite to that challenge. *Cf. State v. Ansari*, 2004 UT App 326, ¶¶ 25, 45, 100 P.3d 231 (refusing to reach constitutional claims where defendants lacked standing to assert them); *see also* Aplt. Br. at 5-9 (challenging trial court's ruling on standing before addressing trial court's ruling on constitutionality of DUI statute).

conduct is clearly proscribed by the statute cannot make that showing, and thus lacks standing to challenge the statute.

In this case, defendant's conduct is clearly proscribed by the DUI statute. Thus, the trial court properly held that defendant lacked standing to pursue his constitutional challenge. Even if defendant does have standing, however, defendant's claim fails on the merits.

Issue II. Defendant claims that Utah's DUI statute is unconstitutionally vague because, according to defendant, one of its three definitions of the crime, subsection (2)(a)(i), allows conviction whenever a person drives a car and then at any time in the future measures a blood or breath alcohol level of .08 or greater. Defendant contends that, because subsection (2)(a)(i) does not require any nexus between a person's driving and his subsequent intoxication, that provision is unconstitutionally vague.

Defendant's claim, however, rests on an incomplete reading of subsection (2)(a)(i). Specifically, defendant's claim ignores language in the provision that establishes the very nexus he claims is lacking. Because subsection (2)(a)(I) does in fact require a nexus between a person's driving and his subsequent intoxication, defendant's claim fails.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S FACIAL CHALLENGE TO THE CONSTITUTIONALITY OF THE DUI STATUTE FOR LACK OF STANDING, WHERE THE FACTUAL PREMISE OF HIS CLAIM IS NOT PRESENT IN THIS CASE

Defendant claims that the trial court erred when it ruled “that Defendant does not have standing to challenge [the constitutionality of] Utah’s DUI statute.” *Aplt. Br.* at 5. Defendant contends, first, that he has standing because he “has a personal stake in the controversy.” *Id.* Alternatively, defendant claims that, “[e]ven if this Court agrees with the trial court and finds that someone with a longer time period between the driving and the [intoxilyzer] test would be in a better position to challenge the statute, it should still find that Defendant has standing” because the issue he presents “is one of sufficient importance.” *Id.* at 6. Because defendant cannot establish that he has standing under the test specific to constitutional vagueness challenges, defendant’s claim fails.

A. Proceedings below.

Defendant was charged *inter alia* with one count of driving under the influence of alcohol (R.1-2). The information cited Utah Code Ann. § 41-6-44 as the statute under which defendant was charged (the “DUI statute”) (R. 1). The information then set forth the relevant statutory language verbatim (R. 1). Thus, the information alleged that, on or about 3/27/2004, defendant

[(2)(a)] did operate or was in actual physical control of a vehicle and:

- (i) had sufficient alcohol in his body that a subsequent chemical test showed that the defendant had a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
- (ii) was under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree which rendered the defendant incapable of safely operating a vehicle; or
- (iii) had a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control

(R. 1); *see also* Utah Code Ann. § 41-6-44(2)(a) (West 2004).⁵

After his preliminary hearing, defendant challenged the constitutionality of the first subsection of the DUI statute (R. 20-27). Specifically, defendant claimed that subsection (2)(a)(i) was unconstitutional because “[a] test may be subsequently taken an hour, two hours, twenty four hours or a week after the alleged driving . . . and [the defendant still] be guilty of DUI.” In other words, defendant asserted, the condition of intoxication tested “may well be wholly unrelated to the driving or being in actual physical control of a motor vehicle” (R. 23). Consequently, defendant concluded, “[t]he language of this statute is so vague that a person of ordinary understanding could not determine the specific conduct that was illegal and therefore conform his conduct to the circumstances.” And, because “[t]here is no savings clause in the DUI statute[,] when any portion thereof is declared unconstitutional, the entire statute shall fail” (R. 23).

⁵This statutory provision has since been repealed and renumbered as Utah Code Ann. § 41-6a-502 (West Supp. 2005).

In response, the State argued first that defendant lacked standing to bring his challenge. Initially, the State argued that defendant lacked standing under the general standing test set forth in *Provo City Corp. v. Willden*, 768 P.2d 455, 456-58 (Utah 1989) (R. 29). The State then amended its argument to assert that defendant lacked standing under the specific rules governing constitutional vagueness claims, as set out in *State v. Ansari*, 2004 UT App 326, ¶ 44, 100 P.3d 231 (R.49-50).

The State noted that, under *Ansari*, a person ““who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others’” (R. 49-50) (quoting *Ansari*, 2004 UT App 326, ¶ 44) (additional citation and internal quotation marks omitted). Because his conduct was clearly proscribed by the DUI statute, the State asserted, defendant lacked standing to bring his vagueness challenge (R. 50).

The trial court ruled that defendant “has no standing to challenge the [DUI] statute” because “his concerns about the potentially significant time difference between operating a vehicle and taking an Intoxilyzer test is not applicable in his case since the officer tested him within an hour of operating his vehicle.” Moreover, “[a] person who has a more significant period of time between the operation of a vehicle and the taking of an Intoxilyzer test would be better suited to challenge the DUI statute” (R. 59-60).

B. Because defendant's conduct is clearly proscribed by the DUI statute, defendant lacks standing to raise his vagueness challenge.

Defendant claims that subsection (2)(a)(i) of the DUI statute “is unconstitutionally vague on its face.” Aplt. Br. at 9. Specifically, defendant claims that because subsection (2)(a)(i) places no time limit within which the subsequent alcohol test must be performed, “nothing in this statute . . . requires a nexus between the driving and being under the influence of alcohol.” *Id.* Thus, he argues, “a person could be convicted for DUI when they consumed alcohol a week or a month after they drove the vehicle.” *Id.* Because defendant's conduct is clearly proscribed by the DUI statute and, thus, his claim rests on facts not present in his case, the trial court properly ruled that defendant lacks standing to present this claim.⁶

“[T]o establish standing to challenge [a statute on] vagueness [grounds], a defendant has the burden of proving the statute is “impermissibly vague in all of its

⁶As did the State initially below, defendant claims that he has standing to challenge the vagueness of the DUI statute based on the general three-part analysis applied in *Provo City v. Willden*, 768 P.2d 455 (Utah 1989). See Aplt. Br. at 5. Under that test, a court considers, first, whether the person has been adversely affected by challenged provision. If not, the court considers whether there are other litigants with a more direct interest in the issue who would be better able to litigate the issue. And, if so, the court considers whether the issue nonetheless raises an issue of sufficient public importance to grant standing anyhow. See *Willden*, 768 P.2d at 459; see also *State v. Mace*, 921 P.2d 1372, 1379 (Utah 1996).

However, as *State v. Ansari*, 2004 UT App 326, ¶ 26, 100 P.3d 231, demonstrates, the general test articulated in *Willden* does not apply to defendants claiming that a statute is facially void for vagueness. Compare *Ansari*, 2004 UT App 326 at ¶ 29 (holding that defendants lacked standing to raise commerce clause challenge to statute under *Willden* test) with *id.* at ¶ 44 (holding that defendants lack standing to facially challenge statute as unconstitutionally vague where defendants' conduct is clearly proscribed by the statute).

applications.””” *State v. Ansari*, 2004 UT App 326, ¶ 44, 100 P.3d 231 (quoting *State v. MacGuire*, 2004 UT 4, ¶ 12, 84 P.3d 1171, quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982)). A defendant who “engages in some conduct that is clearly proscribed” by the statute cannot make that showing because, necessarily, the challenged statute is not impermissibly vague as applied to him. *Id.* at ¶ 44 (quoting *Greenwood v. City of N. Salt Lake*, 817 P.2d 816, 820 (Utah 1991). In other words, a defendant who is not injured by a statute has no standing “to complain of the vagueness of the law as applied to the conduct of others.” *Id.* (quoting *Greenwood*, 817 P.2d at 820). A court reviewing a defendant’s standing to raise a vagueness challenge “should therefore examine the [defendant’s] conduct before analyzing other hypothetical applications of the law.” *Village of Hoffman Estates*, 455 U.S. at 495.

In this case, the evidence supporting defendant’s DUI charge was as follows: Defendant was observed driving his vehicle in the break-down lane of a road in Weber County. A highway patrol officer immediately executed a traffic stop. Upon approaching defendant’s vehicle, the officer smelled alcohol (R. 4). The officer therefore asked defendant to perform a series of field sobriety tests. After defendant failed those tests, the officer arrested him. An Intoxilyzer test performed within the hour registered defendant’s breath alcohol level as .099. A subsequent search of defendant’s vehicle revealed an open container of alcohol (R. 4, 28).

Based on this evidence, defendant was charged under all three subsections of the DUI statute. Thus, defendant was charged with operating a vehicle while he *either*

- (i) had sufficient alcohol in his body that a subsequent chemical test showed that the defendant had a blood or breath alcohol concentration of .08 grams or greater at the time of the test”;
- (ii) was under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree which rendered the defendant incapable of safely operating a vehicle; *or*
- (iii) had a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control

(R. 1) (emphasis added); *see also* Utah Code Ann. § 41-6-44(a)(2) (West 2004).

In challenging the constitutionality of the DUI statute, however, defendant only challenged only subsection (2)(a)(i) (R. 20-27). The trial court properly ruled that defendant lacked standing to make his challenge.

First, regardless of whether it falls within the ambit of subsection (2)(a)(i), defendant’s conduct here—driving in the breakdown lane, smelling of alcohol, failing field sobriety tests, having an open container of alcohol in his car, and, within an hour, registering a breath alcohol level of .099—clearly falls within the ambit of subsection (2)(a)(ii) of the DUI statute. *See* Utah Code Ann. § 41-6-44(2)(a)(ii) (providing that person is guilty of driving under the influence if, while driving a vehicle, he “was under the influence of alcohol . . . to a degree which rendered the defendant incapable of safely operating a vehicle”). And, because defendant’s conduct “is clearly proscribed” by subsection (2)(a)(ii) of the DUI statute, defendant “cannot complain of the vagueness of

[subsection (2)(a)(i)] as applied to the conduct of others.” *Ansari*, 2004 UT App 326,

¶ 44 (citations and internal quotation marks omitted).⁷

Moreover, even had the State pursued him only under subsection (2)(a)(i), defendant would still lack standing to pursue his vagueness claim. Defendant’s contention is that because subsection (2)(a)(i) does not include any definite time frame in which a blood or breath alcohol test must be conducted to support a DUI conviction, a person “is guilty of DUI” under this subsection “regardless of how much time elapsed between the driving and the intoxication.” *Aplt. Br.* at 8. Thus, according to defendant, a person may be guilty of DUI under this subsection regardless of when the subsequent test registering his alcohol level above .08 was taken—whether “one hour, two hours, one day or one week” or even “a month after [he] drove the vehicle.” *Id.* at 8, 9. In other words, the crux of defendant claim is that “nothing in this [subsection] requires a nexus between the driving and being under the influence of alcohol.” *Aplt. Br.* at 9. Accordingly, the statute criminalizes anyone who drives a car and then—“at any time” in the future—“ha[s] a blood alcohol concentration of above .08.” *Id.*

However, nothing in the record establishes that the “subsequent test” in this case was taken months, weeks, days, or even hours after defendant was stopped for driving

⁷Defendant’s conduct may also fall within the ambit of subsection (2)(a)(iii). That provision provides that a person may not operate a vehicle when he “has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control.” Utah Code Ann. § 41-6-44(2)(a)(iii). Where defendant’s breath alcohol level registered .099 within an hour of his driving, the State might be able to prove that defendant’s alcohol level was at least .08 an hour before when he was driving.

under the influence. Rather, the record establishes that the “subsequent test” was taken within an hour of defendant’s being stopped in his vehicle (R. 4, 28). Consequently, defendant cannot—and indeed does not—contend that there is no nexus between his driving and the subsequent test here. *See* Aplt. Br. at 5-9.

In other words, defendant’s vagueness claim is not that the DUI statute is vague as applied to his case. Rather, defendant’s vagueness claim is based solely on “other hypothetical applications of the law.” *Village of Hoffman Estates*, 455 U.S. at 495. However, a defendant, uninjured by the statute he challenges, has no standing to bring a constitutional claim based on how that statute may be “applied to the conduct of others.” *Ansari*, 2004 UT App 326, ¶ 44 (citation and internal quotation marks omitted); *see also State v. Mace*, 921 P.2d 1372, 1379-80 (Utah 1996) (refusing to reach challenge to constitutionality of statute where defendant’s claim was based on hypothetical application of the law to others).

Thus, defendant’s claim that the trial court erred in denying his constitutional claim for lack of standing fails.

II. EVEN ASSUMING DEFENDANT HAS STANDING TO BRING HIS CONSTITUTIONAL CLAIM, IT FAILS WHERE A REASONABLE READING OF THE STATUTE REQUIRES A NEXUS BETWEEN THE DRIVING AND SUBSEQUENTLY MEASURED LEVEL OF INTOXICATION

As previously stated, defendant challenges subsection (2)(a)(i) of the DUI statute as unconstitutionally vague. Defendant contends that, because subsection (2)(a)(i) does not limit the time within which the subsequent blood or breath alcohol test must be

performed, subsection (2)(a)(i) allows conviction for a DUI even where there is no nexus between the person's driving and his subsequently measured intoxication. *See* Apl't. Br. at 8-9. Even assuming defendant has standing to present this claim, the claim fails.

“It is a basic principle that legislative enactments are endowed with a strong presumption of validity.” *State v. Ansari*, 2004 UT App 326, ¶ 10, 100 P.3d 231 (quoting *State v. Mohi*, 901 P.2d 991, 1009 (Utah 1995)). Therefore, “[w]hen addressing a constitutional challenge to a statute, [this Court] presume[s] that the statute is valid and resolve[s] any reasonable doubts in favor of constitutionality.” *State v. Nieberger*, 2006 UT App 5, ¶ 6, 128 P.3d 1223 (quoting *State v. Willis*, 2004 UT 93, ¶ 4, 100 P.3d 1218); *see also State v. Maguire*, 2004 UT 4, ¶ 8, 84 P.3d 1171. This Court will strike a statute only if “there is no reasonable basis upon which [it] can be construed as conforming to constitutional requirements.” *Ansari*, 2004 UT App 326, ¶ 10 (quoting *Mohi*, 901 P.2d at 1009). “As a result, ‘those who challenge a statute . . . as unconstitutional bear’ a heavy ‘burden of demonstrating its unconstitutionality.’” *Maguire*, 2004 UT 4 at ¶ 8 (quoting *Greenwood v. City of N. Salt Lake*, 817 P.2d 816, 819 (Utah 1991)).

“A statute is [unconstitutionally] vague if it either (a) ‘fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’ or (b) ‘authorizes or even encourages arbitrary and discriminatory enforcement.’” *Ansari*, 2004 UT App 326, ¶ 42 (quoting *Hill v. Colorado*, 530 U.S. 703, 732-33 (2000)); *see also Maguire*, 2004 UT 4, ¶ 13. “If a statute ‘is sufficiently explicit to inform the ordinary reader what conduct is prohibited,’ it is not unconstitutionally vague” under the first

prong of this test. *Maguire*, 2004 UT 4, ¶ 14, 84 P.3d 1171 (quoting *State v. Frampton*, 737 P.2d 183, 191-92 (Utah 1987)) (additional citation and internal quotation marks omitted). Similarly, “[if] the meaning of the [provision] is readily ascertainable,” it is not unconstitutionally vague under the second prong of this test. *Id.* at ¶ 32.

Determination of a statute’s constitutionality, therefore, begins with the statute’s plain language. *See id.* at ¶ 15. Statutory terms are interpreted “‘according to their commonly accepted meaning unless the ordinary meaning of the term results in an application that is either unreasonably confused, inoperable, . . . or in blatant contradiction of the express purpose of the statute.’” *State ex. rel. L.P.*, 981 P.2d 848, 850 (Utah App. 1999) (citations omitted).

In this case, defendant’s vagueness challenge focuses on subsection (2)(a)(i) of the DUI statute. *See* Aplt. Br. at 5-9. Under that provision, “[a] person may not operate or be in actual physical control of a vehicle within this state if the person . . . has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test.” Utah Code Ann. § 71-6-44(2)(a)(i).

Defendant contends that subsection (2)(a)(i) is unconstitutionally vague because it fails to place any limit on the time within which the subsequent chemical test must be performed. *See* Aplt. Br. at 8. Thus, according to defendant, a person may be guilty of DUI under subsection (2)(a)(i) regardless of whether the subsequent test was taken “one hour, two hours, one day or one week” or even “a month after [he] drove the vehicle.” *Id.*

And, because subsection (2)(a)(i) requires “no nexus between the driving and having a blood alcohol concentration of .08 or greater,” the provision “makes it so that anyone who consumes alcohol to the point that they reach the level of .08 is prohibited from operating a vehicle at any time since all that has to be shown is that a person drove the vehicle and [then subsequently] had a blood alcohol concentration above .08.” *Id.* at 8-9. Therefore, defendant concludes, “[t]he language in this [subsection] is so vague that a person of ordinary intelligence could not determine the specific conduct that is illegal.” *Id.* at 8. Moreover, “[i]t’s hard to imagine a [statutory provision] that is more open to arbitrary and discriminatory enforcement than this one.” *Id.*

Defendant’s contention might have merit if subsection (2)(a)(i) provided only that “[a] person may not operate or be in actual physical control of a vehicle within this state if . . . a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test.” However, that *is not* subsection (2)(a)(i).

As previously stated, subsection (2)(a)(i) provides that “[a] person may not operate or be in actual physical control of a vehicle within this state if *the person . . . has sufficient alcohol in the person's body that* a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test.” Utah Code Ann. § 71-6-44(2)(a)(i) (emphasis added). Defendant’s claim ignores the italicized language of the provision. *See* Aplt. Br. at 8-9. That language defeats defendant’s claim.

A reasonable interpretation of subsection (2)(a)(i)—read as a whole and therefore containing the italicized language—is that a person “may not operate or be in actual physical control of a vehicle within this state if,” at the time of operation or control, he “has sufficient alcohol in [his] body that a subsequent chemical test shows that [he] has a blood or breath alcohol concentration of .08 grams or greater at the time of the test.” Utah Code Ann. § 41-6-44(2)(a)(i). Thus, a reasonable interpretation of this provision does, contrary to defendant’s claim, require a nexus between a person’s level of intoxication at the time he drove and his level of intoxication at the time of the subsequent chemical test.

Because subsection (2)(a)(i) requires a nexus between a person’s level of intoxication at the time he drove and his level of intoxication at the time of the subsequent chemical test, subsection (2)(a)(i) “provide[s] ‘the kind of notice that enables ordinary people to understand what conduct [is prohibited].’” *Maguire*, 2004 UT 4, ¶ 13 (quoting *State v. Honie*, 2002 UT 4, ¶ 31, 57 P.3d 977) (additional citation omitted; second set of brackets in original). In other words, ordinary people would understand that subsection (2)(a)(i) does not prohibit any person who has ever driven a car from ever subsequently becoming intoxicated. Rather, as the trial court found, subsection (2)(a)(i) only prohibits a person from “drink[ing] alcohol and then tr[ying] to drive home before his or her breath alcohol level rises above a .08” (R. 60).

The nexus requirement in subsection (2)(a)(i) also defeats defendant’s claim that the provision “is open to arbitrary and discriminatory enforcement . . . since all that has to

be shown is that a person drove a vehicle and [at some time in the future] had a blood alcohol concentration of above .08.” Apl’t. Br. at 9. As discussed above, to convict a defendant under subsection (2)(a)(i), the State must show that defendant’s blood alcohol concentration at the time he was tested was a result of the alcohol defendant had in his system at the time he was driving. *See* Utah Code Ann. § 41-6-44(2)(a)(i). Thus, contrary to defendant’s claim, subsection (2)(a)(i) “[does not] make[] it so that anyone who consumes alcohol to the point that they reach the level of .08 is prohibited from operating a vehicle at any time since all that has to be shown is that a person drove a vehicle and [at some time in the future] had a blood alcohol concentration of above .08.” Apl’t. Br. at 9. Consequently, the statute is *not*, as defendant claims, “subject to arbitrary and discriminatory enforcement towards anyone who consumes alcohol in the State.” *Id.*

Defendant’s vagueness challenge to subsection (2)(a)(i) of the DUI statute, therefore, fails.

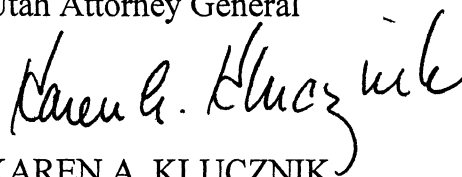
CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's conviction.

RESPECTFULLY SUBMITTED 19 May 2006.

MARK L. SHURTLEFF

Utah Attorney General

A handwritten signature in black ink, appearing to read "Karen A. Kluczniak", written over the printed name.

KAREN A. KLUCZNIK

Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 19 May 2006, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to Dee W. Smith, The Public Defender Association, Inc. of Weber County, 2550 Washington Boulevard, Ogden, Utah 84401, Attorney for Appellant.

Shawn A. Huczyk

Addendum A

Utah Code Ann. § 41-6-44 (2004)

(1) As used in this section:

(a) "assessment" means an in-depth clinical interview with a licensed mental health therapist:

(i) used to determine if a person is in need of:

(A) substance abuse treatment that is obtained at a substance abuse program;

(B) an educational series; or

(C) a combination of Subsections (1)(a)(i)(A) and (B); and

(ii) that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105.

(b)(i) "conviction" means any conviction for a violation of:

(A) this section;

(B) alcohol, any drug, or a combination of both-related reckless driving under Subsections (9) and (10);

(C) Section 41-6-44.6, driving with any measurable controlled substance that is taken illegally in the body;

(D) local ordinances similar to this section or alcohol, any drug, or a combination of both-related reckless driving adopted in compliance with Section 41-6-43;

(E) automobile homicide under Section 76-5-207;

(F) Subsection 58-37-8(2)(g);

(G) a violation described in Subsections (1)(b)(i)(A) through (F), which judgment of conviction is reduced under Section 76-3-402; or

(H) statutes or ordinances in effect in any other state, the United States, or any district, possession, or territory of the United States which would constitute a violation of this section or alcohol, any drug, or a combination of both-related reckless driving if committed in this state, including punishments administered under 10 U.S.C. Sec. 815;

(ii) A plea of guilty or no contest to a violation described in Subsections (1)(b)(i)(A) through (H) which plea is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement, for purposes of:

(A) enhancement of penalties under:

(I) this Chapter 6, Article 5, Driving While Intoxicated and Reckless Driving; and

(II) automobile homicide under Section 76-5-207; and

(B) expungement under Section 77-18-12.

(c) "educational series" means an educational series obtained at a substance abuse program that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105;

- (d) "screening" means a preliminary appraisal of a person:
 - (i) used to determine if the person is in need of:
 - (A) an assessment; or
 - (B) an educational series; and
 - (ii) that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105;
- (e) "serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death;
- (f) "substance abuse treatment" means treatment obtained at a substance abuse program that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105;
- (g) "substance abuse treatment program" means a state licensed substance abuse program;
- (h) a violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6-43; and
- (i) the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(2)(a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

- (i) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
- (ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or
- (iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control;
- (iv)(A) is 21 years of age or older;
 - (B) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .05 grams or greater at the time of the test;
- (C) has a passenger under 16 years of age in the vehicle at the time of operation or actual physical control; and
- (D) committed the offense within ten years of a prior conviction; or
- (v)(A) is 21 years of age or older;
 - (B) has a blood or breath alcohol concentration of .05 grams or greater at the time of operation or actual physical control;

(C) has a passenger under 16 years of age in the vehicle at the time of operation or actual physical control; and

(D) committed the offense within ten years of a prior conviction.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(c) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3)(a) A person convicted the first or second time of a violation of Subsections (2)(a)(i) through (iii) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner;

(B) had a passenger under 16 years of age in the vehicle at the time of the offense; or

(C) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense.

(b) A person convicted of a violation of Subsection (2) is guilty of a third degree felony if the person has also inflicted serious bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(c) A person convicted of a violation of Subsection (2)(a)(iv) or (v) is guilty of:

(i) a class B misdemeanor; or

(ii) a class A misdemeanor if the person has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(4)(a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 48 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening;

(ii) order the person to participate in an assessment, if it is found appropriate by a screening under Subsection (4)(c)(I);

(iii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (4)(d); and

(iv) impose a fine of not less than \$700.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e)(i) Except as provided in Subsection (4)(e)(ii), the court may order probation for the person in accordance with Subsection (14).

(ii) If there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order probation for the person in accordance with Subsection (14).

(5)(a) If a person is convicted under Subsection (2) within ten years of a prior conviction under this section, the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 240 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening;

(ii) order the person to participate in an assessment, if it is found appropriate by a screening under Subsection (5)(c)(i);

(iii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (5)(d); and

(iv) impose a fine of not less than \$800.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e) The court shall order probation for the person in accordance with Subsection (14).

(6)(a) A conviction for a violation of Subsection (2) is a third degree felony if it is:

(i) a third or subsequent conviction under this section within ten years of two or more prior convictions; or

(ii) at any time after a conviction of:

(A) automobile homicide under Section 76-5-207 that is committed after July 1, 2001; or

(B) a felony violation under this section that is committed after July 1, 2001.

(b) Any conviction described in this Subsection (6) which judgment of conviction is reduced under Section 76-3-402 is a conviction for purposes of this section.

(c) Under Subsection (3)(b) or (6)(a), if the court suspends the execution of a prison sentence and places the defendant on probation the court shall impose:

(i) a fine of not less than \$1,500; and

(ii) a mandatory jail sentence of not less than 1,500 hours.

(d) For Subsection (6)(a) or (c), the court shall impose an order requiring the person to obtain a screening and assessment and substance abuse treatment at a substance abuse treatment program providing intensive care or inpatient treatment and long-term closely supervised follow-through after treatment for not less than 240 hours.

(e) In addition to the penalties required under Subsection (6)(c), if the court orders probation, the probation shall be supervised probation which may include requiring the person to participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(7) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(8)(a)(i) The provisions in Subsections (4), (5), and (6) that require a sentencing court to order a convicted person to: participate in a screening; an assessment, if appropriate; and an educational series; obtain, in the discretion of the court, substance abuse treatment; obtain, mandatorily, substance abuse treatment; or do a combination of those things, apply to a conviction for a violation of Section 41-6-44.6 or 41-6-45 under Subsection (9).

(ii) The court shall render the same order regarding screening, assessment, an educational series, or substance abuse treatment in connection with a first, second, or subsequent conviction under Section 41-6-44.6 or 41-6-45 under Subsection (9), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), and (6).

(b)(i) The court shall notify the Driver License Division if a person fails to:

(A) complete all court ordered:

(I) screening;

(II) assessment;

(III) educational series;

(IV) substance abuse treatment; and

(V) hours of work in compensatory-service work program; or

(B) pay all fines and fees, including fees for restitution and treatment costs.

(ii) Upon receiving the notification described in Subsection (8)(b)(i), the division shall suspend the person's driving privilege in accordance with Subsections 53-3-221(2) and (3).

(9)(a)(i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45, of an ordinance enacted under Section 41-6-43, or of Section 41-6-44.6 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) The court shall advise the defendant before accepting the plea offered under this Subsection (9)(b) of the consequences of a violation of Section 41-6-44.6 or of Section 41-6-45.

(c) The court shall notify the Driver License Division of each conviction of Section 41-6-44.6 or 41-6-45 entered under this Subsection (9).

(10) A peace officer may, without a warrant, arrest a person for a violation of this section when the peace officer has probable cause to believe the violation has occurred, although not in the peace officer's presence, and if the peace officer has probable cause to believe that the violation was committed by the person.

(11)(a) The Driver License Division shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (2);

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (2) or if the person has a prior conviction as defined under Subsection (1) if the violation is committed within a period of ten years from the date of the prior violation; and

(iii) suspend or revoke the license of a person as ordered by the court under Subsection (12).

(b) The Driver License Division shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223 or 53-3-231, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

(12)(a)(i) In addition to any other penalties provided in this section, a court may order the operator's license of a person who is convicted of a violation of Subsection (2) to be suspended or revoked for an additional period of 90 days, 180 days, one year, or two years to remove from the highways those persons who have shown they are safety hazards.

(ii) The additional suspension or revocation period provided in this Subsection (12) shall begin the date on which the individual would be eligible to reinstate the individual's driving privilege for a violation of Subsection (2).

(b) If the court suspends or revokes the person's license under this Subsection (12)(b), the court shall prepare and send to the Driver License Division an order to suspend or revoke that person's driving privileges for a specified period of time.

(13)(a) If the court orders a person to participate in home confinement through the use of electronic monitoring, the electronic monitoring shall alert the appropriate corrections, probation monitoring agency, law enforcement units, or contract provider of the defendant's whereabouts.

(b) The electronic monitoring device shall be used under conditions which require:

(i) the person to wear an electronic monitoring device at all times;

(ii) that a device be placed in the home or other specified location of the person, so that the person's compliance with the court's order may be monitored; and

(iii) the person to pay the costs of the electronic monitoring.

(c) The court shall order the appropriate entity described in Subsection (13)(e) to place an electronic monitoring device on the person and install electronic monitoring equipment in the residence of the person or other specified location.

(d) The court may:

(i) require the person's electronic home monitoring device to include a substance abuse testing instrument;

(ii) restrict the amount of alcohol the person may consume during the time the person is subject to home confinement;

(iii) set specific time and location conditions that allow the person to attend school educational classes, or employment and to travel directly between those activities and the person's home; and

(iv) waive all or part of the costs associated with home confinement if the person is determined to be indigent by the court.

(e) The electronic monitoring described in this section may either be administered directly by the appropriate corrections agency, probation monitoring agency, or by contract with a private provider.

(f) The electronic monitoring provider shall cover the costs of waivers by the court under Subsection (13)(d)(iv).

(14)(a) If supervised probation is ordered under Section 41-6-44.6 or Subsection (4)(e) or (5)(e):

(i) the court shall specify the period of the probation;

(ii) the person shall pay all of the costs of the probation; and

(iii) the court may order any other conditions of the probation.

(b) The court shall provide the probation described in this section by contract with a probation monitoring agency or a private probation provider.

(c) The probation provider described in Subsection (14)(b) shall monitor the person's compliance with all conditions of the person's sentence, conditions of probation, and court orders received under this article and shall notify the court of any failure to comply with or complete that sentence or those conditions or orders.

(d)(i) The court may waive all or part of the costs associated with probation if the person is determined to be indigent by the court.

(ii) The probation provider described in Subsection (14)(b) shall cover the costs of waivers by the court under Subsection (14)(d)(i).

(15) If a person is convicted of a violation of Subsection (2) and there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order the following, or describe on record why the order or orders are not appropriate

(a) treatment as described under Subsection (4)(d), (5)(d), or (6)(d); and

(b) one or both of the following:

(i) the installation of an ignition interlock system as a condition of probation for the person in accordance with Section 41-6-44.7; or

(ii) the imposition of home confinement through the use of electronic monitoring in accordance with Subsection (13).

United States Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Utah Const. Art. I, § 7

No person shall be deprived of life, liberty or property, without due process of law.