

2005

Utah v. Millsap : Brief of Appellant

Utah Court of Appeals

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Dee W. Smith; Public Defender Association; attorney for appellant.

Mark L. Shurtleff; attorney general; attorneys for appellee.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT

THIS IS AN APPEAL APPEALING FROM A JUDGMENT, SENTENCE AND COMMITMENT, DATED FEBRUARY 4, 2005. THE DEFENDANT PLED GUILTY TO DRIVING UNDER THE INFLUENCE OF ALCOHOL, A CLASS A MISDEMEANOR, IN VIOLATION OF U.C.A. § 41-6-44(2004). THE PLEA WAS ENTERED PURSUANT TO *STATE V. SERY*, 758 P.2D 935 (UTAH CT. APP. 1988) IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE W. BRENT WEST PRESIDING.

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IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

:

Plaintiff/Appellee

:

vs.

:

JOHNNIE B. MILLSAP

:

Case No. 20050746-CA

Dist. No. 041901845

Defendant/Appellant

:

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

The Appellant is appealing from a Judgment, Sentence and Commitment in the Second District Court for Weber County, Utah, dated February 4, 2005. The Defendant pled guilty to Driving under the influence of alcohol, a class A misdemeanor, in violation of U.C.A. § 41-6-44(2004). The plea was entered pursuant to *State v. Sery*, 758 P.2d 935 (Utah Ct. App. 1988). The Defendant was sentenced to serve one year on this case. It was ordered to run concurrent to a zero to five sentence he received on a separate case. Jurisdiction for the Appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A. §78-2a-3(2)(j).

ISSUE ON APPEAL AND STANDARD OF REVIEW

- I. DOES THE DEFENDANT HAVE STANDING TO CHALLENGE THE DUI STATUTE?

Standard of Review: This issue presents a question of law and therefore no deference should be given to the district court's ruling. *See, Provo City v. Willden*, 768 P.2d 455 456 (Utah 1989)("Because the resolution of this case depends entirely on questions of law, we accord no deference to the rulings of the . . . district courts . . .")

I. IS U.C.A. §41-6-44 UNCONSTITUTIONAL ON ITS FACE?

Standard of Review: This issue presents a question of law which an appellate court should review for correctness giving no deference to the trial court's legal conclusions. "Constitutional challenges to statutes present questions of law, which we review for correctness." *State v. Ansari*, 100 P.3d 231, 234 (Utah Ct. App. 2004).

This issue was preserved for appeal when Defendant's attorney filed a motion to declare the statute unconstitutional. (R. 26-27).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH CODE ANNOTATED

§ 41-6-44(2004)- In 2001, section 41-6-44(2)(a) read;

A person may not operate or be in actual physical control of a vehicle within this state if the person:has sufficient alcohol in his body that a chemical test given within two hours of the alleged operation or physical control shows that the person has a blood or breath alcohol concentration of .08 grams or greater;

Section 41-6-44 was amended in 2002. This section now reads;

(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 his 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;

§78-2a-3. Court of Appeals jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(j) cases transferred to the Court of Appeals from the Supreme Court.

STATEMENT OF THE CASE

The Defendant was charged by Information with Driving under the influence with priors, a third degree felony, in violation of U.C.A. §41-6-44. (R. 001). His attorney filed a motion to declare Utah's DUI statute unconstitutional with an accompanying memorandum of points and authorities. (R. 20-27). The State objected to Defendant's motion. (R. 28-32). After a hearing and further briefing the trial court denied Defendant's motion. Findings of Fact, Conclusions of Law and an Order were prepared and signed by the Honorable W. Brent West. (R. 59-61). The Court ruled that the Defendant did not have standing to challenge the DUI statute, that the statute does not create a conclusive presumption, and that the statute was not vague or overbroad. (R. 59-61).

After the denial of his motion, the Defendant entered a plea agreement where he pled guilty to an unrelated third degree felony DUI and the charge in this

case was reduced to a Class A misdemeanor. (R. 91-92). The plea was entered pursuant to *State v. Sery*, 758 P.2d 935 (Utah Ct. App. 1988). The Defendant was sentenced to the Utah State Prison. His sentence on this case was ordered to run concurrent with his prison sentence. (R. 094-95) The Sentence, Judgment and Commitment was signed on August 3, 2005. (R. 094-95). A timely notice of appeal was filed on September 1, 2005. (R. 116).

STATEMENT OF THE FACTS

On March 27, 2004, the Defendant was stopped by a police officer and eventually cited for DUI in violation of U.C.A. §41-6-44(2004). The Defendant submitted to an intoxilyzer test and had a blood alcohol content of .099. The test was performed within one hour of the Defendant's stop.

SUMMARY OF ARGUMENTS

Section 41-6-44 of the Utah Code is unconstitutionally vague on its face. The statute prohibits anyone from being in actual physical control of a motor vehicle and then subsequently having a blood alcohol level in excess of .08. There is nothing in the statute that requires a nexus between the driving and the subsequent chemical test. The way the statute is written someone is guilty of a DUI when they are seen driving a vehicle one day and then the next day they submit to a chemical test that showed their blood alcohol content was in excess of .08. The statute is so vague that a person of ordinary intelligence would not know what specific conduct is prohibited. For these reasons, the statute is vague on its face and the Defendant respectfully requests this Court to reverse his conviction.

ARGUMENT

I. THE DEFENDANT HAS STANDING TO CHALLENGE UTAH'S DUI STATUTE.

The Defendant is challenging the constitutionality of U.C.A. §41-6-44 on its face.

The State argued and the trial court ruled that Defendant does not have standing to challenge Utah's DUI statute. (*See*, R. 028-32, 59-61). For a defendant to have standing he must show "some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute." *Provo City v. Willden*, 768 P.2d 455 (Utah 1989)(citations omitted). A defendant needs to have more than a "mere allegation of an adverse impact." *State v. Ansari*, 100 P.3d 231, 240 (Utah Ct. App. 2004).

If a defendant doesn't have a personal stake in the controversy, "then the defendant would still have standing if there were no challenger with a more direct interest in the issues who can more adequately litigate the issues." *Id.* (quotations omitted). In addition, a defendant may have standing "if the court determines that the issues raised by the [complainant] are of sufficient public importance in and of themselves to grant . . . standing." *Id.* (citations and quotations omitted)(alterations in original).

In the case at bar, the Defendant has standing to challenge U.C.A. §41-6-44 under any of the three theories. First, the Defendant has a personal stake in the controversy. He was charged with a third degree felony and eventually pled guilty to

a class A misdemeanor in this case and to a third degree felony in a separate case for violating the same statute. In the trial court's findings of fact and conclusions of law the court ruled that the Defendant didn't have standing because the intoxilyzer test was performed within an hour of the time the Defendant operated his vehicle. The Court further found that someone who had a more significant period of time between operating the vehicle and taking an intoxilyzer test would be in a better position to challenge the DUI statute. (R. 59-60, Finding of Fact #1).

Even if this Court agrees with the trial court and finds that someone with a longer time period between the driving and the test would be in a better position to challenge the statute it should still find that Defendant has standing. That is because this matter is one of sufficient importance. Standing should be granted when "the constitutionally protected interests infringed . . . are so important that their protection need not await the perfect plaintiff." *Provo City v. Willden*, 768 P.2d at 457.

Furthermore, the Defendant faces the potential of future prosecution and cannot conform his conduct to the requirements of the law as it is currently written. If the statute is not found to be unconstitutional this Defendant would be forced to give up drinking or give up driving. Additionally, this Defendant potentially faces prosecution for each instance he has driven in the past prior to March 27, 2004 when the test was administered since the test would be "a subsequent chemical test" that establishes a breath alcohol level in excess of .08.

Thousands of people are prosecuted each year for violating the State's DUI statute. In addition, the statute is one that is important for public safety. If the statute

is constitutionally flawed it is important that the issue be addressed in a timely fashion so that the rights and protections for Utah's citizens will not be affected.

II. U.C.A. §41-6-44 IS UNCONSTITUTIONAL ON ITS FACE.

U.C.A. §41-6-44 is unconstitutionally vague on its face. “[V]agueness questions are essentially procedural due process issues, i.e., whether the statute adequately notices the proscribed conduct.” *State v. Frampton*, 737 P.2d 183, 191-92 (Utah 1987). A statute needs to give explicit instructions concerning its prohibitions. A “statute is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader what conduct is prohibited.” *State v. Theobald*, 645 P.2d 50, 51 (Utah 1982)(footnote omitted).

In 2002, Utah's DUI statute was amended. The amendment deleted specific language with very vague language that allows the State to prosecute anyone who both drives a vehicle and consumes alcohol even if the two activities are not connected.

In 2001, section 41-6-44(2)(a) read;

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 his body that a chemical test given within two hours of the alleged operation or physical control shows that the person has a blood or breath alcohol concentration of .08 grams or greater;

U.C.A. §41-6-44(2)(a)(2001). Under the old statute the language clearly tied being in actually physical control of a motor vehicle with the prohibition of having a blood alcohol concentration of above .08. It required that the test be administered

within two hours of the driving. This is no longer required. Section 41-6-44 was amended in 2002. This section now reads;

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

- (ii) has sufficient alcohol in his 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;

U.C.A. §41-6-44(2)(a)(2004). Under the current statute there is no nexus between the driving and having a blood alcohol concentration of .08 or greater. A test may be given one hour, two hours, one day or one week after the individual was in actual physical control of a vehicle. Under this statute the person is guilty of DUI regardless of how much time elapsed between the driving and the intoxication. There is nothing in this portion of the statute that requires the person to have been under the influence at the time that he or she was in actual physical control of the motor vehicle.

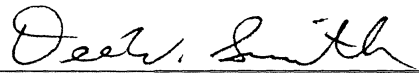
The language in this statute is so vague that a person of ordinary intelligence could not determine the specific conduct that is illegal. “The void-for vagueness doctrine requires that a statute or ordinance define an offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Salt Lake City v. Lopez*, 935 P.2d 1259, 1265 (Utah Ct. App. 1997)(quotations and citations omitted). It’s hard to imagine a statute that is more open to arbitrary and discriminatory enforcement than this one. The statute 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 a vehicle and had a blood alcohol concentration of above .08. There is nothing in this statute that requires a nexus between the driving and being under the influence of alcohol. Therefore, this statute is subject to arbitrary and discriminatory enforcement towards anyone who consumes alcohol in the State.

CONCLUSION


Section 41-6-44 is unconstitutionally vague on its face. The statute fails to give adequate notice in sufficiently explicit terms as to what conduct is prohibited. Under the statute a person could be convicted for DUI when they consumed alcohol a week or a month after they drove the vehicle. For these reasons, the Defendant respectfully requests this Court to declare the statute unconstitutional and reverse his conviction.

DATED this 16th day of February, 2006.


DEE W. SMITH
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtleff, Utah Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor PO Box 140854 SLC, Utah 84114-0180, postage prepaid this __ day of February, 2006.


DEE W. SMITH
Attorney at Law

ADDENDUM

ADDENDUM A

SECOND DISTRICT COURT

2005 AUG -3 P 3:47

ALC 3 2005

SECOND DISTRICT COURT - OGDEN COURT
WEBER COUNTY, STATE OF UTAH

| | | |
|-------------------------|---|--------------------------------|
| STATE OF UTAH, | : | MINUTES |
| Plaintiff, | : | SENTENCE, JUDGMENT, COMMITMENT |
| | : | |
| | : | |
| vs. | : | Case No: 041901845 FS |
| | : | |
| JOHNNIE BORDEN MILLSAP, | : | Judge: W BRENT WEST |
| Defendant. | : | Date: August 3, 2005 |

PRESENT

Clerk: pama
Prosecutor: LYON, NATHAN D
Defendant
Defendant's Attorney(s): GALE, GARY L
Agency: Adult Probation and Parole

DEFENDANT INFORMATION

Date of birth: November 12, 1952
Video
Tape Number: W8-3-05 Tape Count: 10:28

CHARGES

1. DRIVING UNDER THE INFLUENCE OF ALC/DRUGS (amended) - Class A
Misdemeanor

Plea: No Contest - Disposition: 06/15/2005 No Contest

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

The one year on this case to run concurrent with the 0-5 years on
case 041907049 and to be served at the Utah State Prison.

SENTENCE RECOMMENDATION NOTE


Court recommends to the Board of Pardons that the defendant be
granted credit for the time he has served and if he is paroled that
he may be compacted to the State of Mississippi.

Case No: 041901845
Date: Aug 03, 2005

SENTENCE JAIL

Based on the defendant's conviction of DRIVING UNDER THE INFLUENCE OF ALC/DRUGS a Class A Misdemeanor, the defendant is sentenced to a term of 1 year(s)

Dated this 3RD day of AUGUST, 2005.



W BRENT WEST
District Court Judge

ADDENDUM B

BRANDEN B. MILES, UBN # 9777
WEBER COUNTY ATTORNEY'S OFFICE
2380 WASHINGTON BLVD., 2ND FLOOR
OGDEN, UTAH 84401
TELEPHONE: (801) 399-8377

SECOND DISTRICT COURT

2005 FEB 22 P 1:14

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH, OGDEN DEPARTMENT

| | |
|--|---|
| STATE OF UTAH. Plaintiff, vs. JOHNNIE BORDEN MILLSAP DOB: 11/12/1952 Defendant. | FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE COURT Case No. 041901845 Judge W. BRENT WEST |
|--|---|

On October 6, 2004, this matter came before the Court for a hearing on Defendant's Motion to Dismiss and Suppress. Gary Gale, representing Defendant, and Brandon Maynard, representing the State, were present. After receiving memorandums and hearing oral arguments from both parties, the Court requested supplemental briefing. The State, now represented by Branden Miles, filed an additional brief on January 26, 2005. The Court makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. Defendant has no standing to challenge the Driving Under the Influence statute, § 41-6-44, because his factual situation and 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. 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.

2. The Utah State Legislature has the authority to change the DUI statute and this Court must pay deference to their decision to change how the prosecution may prove a DUI in Utah.
3. The Legislature intended the change in the DUI statute, which now allows a person who registers a .08 or greater at the time of the test to be charged, to punish the person who drinks alcohol and then tries to drive home before his or her breath alcohol level rises above a .08.
4. The DUI statute does not create a conclusive or irrefutable presumption that a person who takes an Intoxilyzer with a result .08 or higher and has operated a vehicle at some time in the significant past is guilty of DUI.
5. At trial, the State has the burden to prove a nexus between the operation of a motor vehicle and the taking of an Intoxilyzer test.
6. The State's burden to prove the connection between taking an Intoxilyzer test and operating a motor vehicle never shifts to the Defendant.
7. Though the burden does not shift, a defendant may challenge the nexus between the operation of a vehicle and the taking of an Intoxilyzer test.
8. The DUI Statute is not vague or overly broad because reasonable people can identify what behavior the statute prohibits.

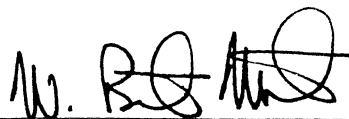
CONCLUSION OF LAW

1. The Defendant does not have standing to challenge the DUI statute. UTAH CODE ANN. § 41-6-44 (2004). The DUI Statute does not create a conclusive presumption, nor is it vague or overbroad.

ORDER

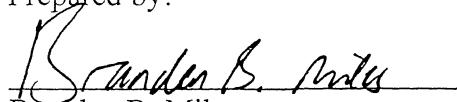
The Defendant's Motion to Dismiss and Suppress is Denied.

DATED this 17TH day of FEBRUARY, 2005.



W. BRENT WEST
DISTRICT COURT JUDGE

Prepared by:


Branden B. Miles

APPROVED AS TO FORM:

Gary Gale