

2005

Utah v. John Vonderhaar Haltom : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

STATE OF UTAH

STATE OF UTAH,

:

Plaintiff/Appellee,

:

:

:

vs.

:

Case No. 20050815-SC

:

JOHN VONDERHAAR HALTOM,

:

:

Defendant/Appellant.

:

UPON CERTIORARI TO THE UTAH COURT OF APPEALS
APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. DENNIS FUCHS

REPLY BRIEF OF APPELLANT JOHN VONDERHAAR HALTOM

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SUMMARY OF ARGUMENTS

This Court granted Certiorari to decide what standard of negligence applies to §76-10-1206(1) U.C.A. Certainly the Court has agreed to consider all valid arguments by Defendant in support of his contention that the Court of Appeals wrongly decided this question; and the weight of authority proves Defendant's contention that criminal negligence is required.

Once that decision is made, it is necessary to decide whether there was sufficient evidence to support the verdict in the Trial Court; and Defendant believes

that the evidence is legally insufficient.

ARGUMENT

POINT I

A DETERMINATION OF CRIMINAL NEGLIGENCE IS NECESSARY TO CONVICT DEFENDANT; AND THE COURT OF APPEALS ERRED IN CHANGING THE STANDARD WITHOUT FULL BRIEFING ON THAT ISSUE.

Regarding the standard of criminal negligence, the State starts its Brief by setting forth its understanding of Defendant's arguments on the criminal negligence standard. It then claims that two out of three of Defendant's arguments were not properly brought before the Court of Appeals, and cannot be considered by this Court. The first point relates to the necessity of a scienter requirement in a case involving the First Amendment. The second argument regards the violation of due process implicit in punishing Defendant for the acts of an employee. The State then curiously states: "the second and third arguments were not raised in or addressed by the Court of Appeals and, therefore, cannot properly be raised for the first time on certiorari." This assertion is made by a party that admittedly did not raise any arguments against the use of a criminal negligent standard in the District Court. It was only before the Court of Appeals that the State, for the first time, argued that a

simple negligence standard should be sufficient. Because they did this in Respondent's Brief, and did not fully brief that point, Defendant had inadequate opportunity to respond to those arguments. The Court of Appeals did not find "plain error" and should not have considered the State's arguments for a lower standard of negligence at that time. It is the lack of opportunity that Defendant had below to even address the State's arguments, mostly made during oral arguments, that most certainly denies Defendant his right to Due Process of law. To assert at this time that Defendant cannot now fully address those issues, during his first opportunity to do so, has not merit whatsoever. This Court, granted Certiorari to decide the important legal question of the standard of negligence required for conviction; now is the time to fully brief it.

The State claims that Defendant "presents no authority which equates a 'failure to exercise reasonable care' with a higher standard than simple negligence." (Aplee. Br. 18). The State further claims that Defendant "wholly ignores this Court's holding in Martinez" which Respondent characterizes as recognizing "the legislative prerogative to dispense with traditional elements of culpability". (Id. 17-18). Defendant believes that he has fully addressed the issues raised by the State. It is not clear that the legislature intended to dispense with the traditional requirement of

culpability in this matter. The legislature made another attempt to clarify the meaning of this statute, and the level of care required, in its 2005 session. The fact that the standard needed clarification makes it most obvious that it was not clear. The fact that the “clarified” standard makes no more sense than the original version suggests that the clarification did not help much.

Defendant also claims that in areas where the First Amendment is implicated, all doubt must be resolved in favor of the Defendant. To do otherwise, would impermissibly chill those attempting to exercise their First Amendment rights. While Respondent cites United States v. X-citement Video, Inc., 513 US 64 (1994) for the proposition that more restrictions are permitted in the area of sexually explicit materials, it does not attempt to respond to the Court’s holding in that case that scienter must be read into the statute to avoid a conflict with the First Amendment.

Respondent replies to the Due Process arguments of Defendant in one short conclusory statement (Aplee. Br. 22). Once again, the State relies on its argument that it is too late for Defendant to raise these arguments, despite being blind sided before the Court of Appeals. The State has never attempted to justify its new theory of the case on appeal, after allowing jury instructions to be given about objection. Thus, the State appears to argue that it is not constrained by its failure to raise certain

issues in the trial court; but yet Defendant does not get to fully respond to those arguments. Defendant believes that Certiorari was granted in this Court in part because there was no opportunity to adequately respond to the State's argument before the Court of Appeals. Certainly to exclude Defendant's arguments at this point, while accepting the belated arguments of the State, violates due process.

POINT II

THE ISSUE OF WHETHER THERE WAS SUFFICIENT EVIDENCE OF CRIMINAL NEGLIGENCE TO CONVICT IS IMPLICIT IN THE GRANT OF CERTIORARI.

The State quotes Utah R. App. P. 49(a)(4) which states this Court will consider only those issues which are "fairly included" within the Petition for Certiorari. Defendant, in his Brief before this Court, addressed the sufficiency of the evidence because it most certainly is a subsidiary question fairly included within the grant of Certiorari. If the Court considers the level of negligence required for conviction, and determines that the level of negligence is something other than simple negligence, there is no way to avoid the question of whether the State met that burden. The Court of Appeals did not address it, because of its ruling that simple negligence was sufficient. If it is not addressed by this Court, Defendant would be denied the remedy

that he so clearly merits. Respondent claims that, if the Court finds that the Court of Appeals used the wrong standard of negligence, it should thereafter remand the case to the Court of Appeals for further proceedings. Defendant believes that this Court should follow through on its ruling and review the evidence to determine whether it is sufficient to sustain a conviction on the basis of criminal negligence, once that has been determined as the proper standard.

The State claims that “defendant acknowledges his marshaling burden, but does not fulfill it.” (Resp. Br. 25). The State then claims that “defendant merely reargues the merits of his trial defense”. Defendant has, in fact, marshaled the evidence carefully. The statement of facts prepared for the Court of Appeals, and reiterated for this case before this Court, sets out in detail the evidence upon which the State relied at trial. Most of that evidence is not in controversy. The State, however, misreads the law in putting a further burden on Defendant: “yet, defendant draws no inferences from this evidence in favor of the jury verdict.” (Id.). Respondent suggests that it is the duty of Defendant to draw inferences in favor of the verdict, and cites West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah App. 1991) and State v. Heaps, 2005 UT 5, 999 P.2d 565 (Utah 2000). Those two cases, taken together, do not place that burden on Defendant. Defendant’s burden is merely that of marshaling “every

scrap of competent evidence” which supports the verdict, and then “to demonstrate why the findings are clearly erroneous” 1818 P.2d at 1313 (Emphasis Added). It is then the Court which shall draw the inferences sufficient to sustain the verdict, if justified. Defendant does not deny that some inferences adverse to Defendant could be drawn from that evidence. Nevertheless, Defendant contends those inferences are not strong enough to support a verdict beyond a reasonable doubt. In fact, Defendant believes that they support a reasonable doubt, as a matter of law.

The statute then attempts to twist the evidence that Defendant produced, with the following unsupported statement:

Defendant testified that when Brittany provided the wrong address, he considered terminating the sale, but then decided to give Brittany a second chance. *See Statement of Facts Supra*. Defendant testified that when he made this decision, he realized that her wrong answers suggested that the driver’s license was fake and she was underage. (Emphasis added) (Aplee. Br. 25-26).

That is a deliberate misreading of the evidence produced at trial. Defendant testified that he was specifically asked by Sapergueldiev to go over again with him how to check for fake ID’s (R.677 P. 222). He checked out her facial features; and he asked for her social security number, which she quickly gave him correctly (R.677 P. 224). When asked her address, it did not comport with the address on the license (R. 677 P.225). He did give a brief thought to asking her to leave. Being new in the

area, however, he had only recently noticed that many streets were known both by a name and a grid number. He testified as follows:

But then earlier – you know, when you’re driving around looking for stuff, ‘cause I had to buy stuff locally there – to build out the store, you kinda learn that you’re driving down one street and it’s this name and all of a sudden, it’s a numbered street.

I asked her, “does it go by another name or number?” and then she rattled off the number or the name real quick. And I said ok, ‘cause if she knew both names, you know, both things, it’s got to be her address. (Emphasis Added) (R. 677 P. 225-26)

The State also takes issue with Defendant’s claim that Sapergueldiev was primarily responsible for checking the age of those attempting to enter the store. Respondent suggests that because Emily Wright was on duty at the time in question, and she had been assigned duty of checking identification, Defendant should not have relied on Sapergueldiev. That argument has no merit, as Sapergueldiev was the senior employee, responsible for training others in checking identification (R. 677, PP. 191-193, 201, 213-214); and Sapergueldiev set up the schedule, which obviously gave him the authority to alter it (R. 677 P.221).

Respondent closes its Brief with the statement: “In sum, defendant was aware of the risk that Brittany might be a minor and aware that if she was a minor, the sale of the adult-only video was illegal.” (Aplee. Br. 28) That is a misstatement of the

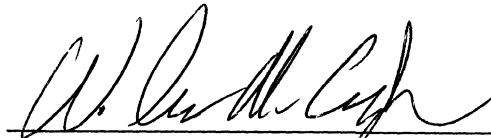
evidence. Defendant believes the evidence shows clear that Defendant reasonably relied on his most trusted employee to check date of birth, and simply assisted that employee, with a specific request, regarding the identity of a customer. Once that identity was verified, Defendant had done his job. In order for this conviction to be upheld, this Court must determine that Defendant's presence in the store required him to double check a responsibility that had been exclusively delegated to his most trusted employee. That simply is not the law.

CONCLUSION

The Court of Appeal erred in misstating the standard of care required of Defendant. Once that error is corrected, the evidence for conviction fails, as a matter of law.

DATED this 23 day of February, 2006.

W. ANDREW MCCULLOUGH, L.L.C.

A handwritten signature in black ink, appearing to read 'W. Andrew McCullough', written over a horizontal line.

W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of February, 2006, I did hand deliver two true and correct copies of the foregoing Reply Brief of Appellant, to Christine Soltis, 160 East 300 South, Salt Lake City, Utah 84114.

A handwritten signature in black ink, appearing to read "W. Andrew McGee", is written over a horizontal line.

Appeal/Haltom.SupCrt.ReplyBrief.2006