1995

Salt Lake City v. David Lee McClain : Reply Brief

Utah Court of Appeals

John D. O\'Connell, Jr.; Salt Lake Legal Defender Association; Attorney for Appellant.
Scott Fisher; Assistant City Attorney.

IN THE UTAH COURT OF APPEALS

SALT LAKE CITY,	:	
Plaintiff/Appellee,	:	
v.	:	
DAVID LEE MCCLAIN	:	Case No. 950173-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

An appeal from a jury verdict of guilty to DRIVING UNDER THE INFLUENCE OF ALCOHOL, a class B misdemeanor, in violation of Salt Lake Code § 12.24.100 (1995) in the Third Circuit Court, in and for Salt Lake County, State of Utah, Salt Lake Department, the Honorable Sandra Peuler presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court by Article VIII, Section 5 of the Utah Constitution, and by Utah Code Ann. § 78-2a-3(2)(f)(1994) which permits a defendant in a circuit court criminal action to appeal to the Court of Appeals for reversal of a final judgment and conviction for any crime other that first degree or capital felony.

ARGUMENT

I. Mr. McClain's conduct was reasonable, and he is entitled to ask for relief from having his rights to a fair trial and due process violated.

The city argues that Mr. McClain can not claim that his rights were violated when his own conduct was unreasonable. City's Brief at 14,17, 19-21,25-26 (hereinafter "CB"). The city fails to cite to any relevant case law, statute or rule to support this contention. This argument should be disregarded. State In Interest of M.S. v. Salata, 806 P.2d 1216, 1218 (Utah App. 1991).

The city contends that Mr. McClain failed to "timely" present a witness. CB at 13. However the city does not provide

any definition or authority of what should be considered timely. This argument should be disregarded. Id. That Mr. McClain presented the witness on the afternoon of the trial should be considered timely.

The city points out in State v. Maestas 815 P.2d 1319, 1324 (Utah App. 1991), that the defendant could not claim that his right to due process was violated when he failed to provided notice of his alibi witnesses. CB. at 12-13. The city claims that because Mr. McClain also failed to provide notice that his witness would appear in the afternoon he can not claim his right to due process was violated. However, providing notice of alibi witnesses is required by statute. Utah Code Ann. § 77-14-2 (1980). The city fails to cite any authority that requires the defendant to notify the city of what time his witness will appear at trial.

The city assumes that counsel for Mr. McClain was aware that having his witness testify at 4:00 p.m., created a problem that justified a pre-trial motion or notice of some kind. CB at 13-14. The witness coming in to testify at 4:00 p.m. did not become a problem until that afternoon. The actual need for a recess did not become clear until Mr. McClain finished testifying at 3:10 p.m. R. 171. Until this point no one knew how long the trial might last. It was possible that the Mr. McClain would not have finished with all his other evidence until after 4:00 p.m. The trial judge had indicated that as long as the defendant did not finish before 3:00 p.m., she would grant a short recess in order for the witness to testify. R. 134. So it was not until 3:10

p.m., when the trial judge denied the requested recess, that Mr. McClain was confronted with an actual problem. Considering that Mr. McClain had given the court notice earlier that day that there might be a problem, combined with the fact that no one knew for sure until that afternoon that there was going to be a problem, the defendant's actions were perfectly reasonable.

Further, the defendant deserves some leeway on what time he presents his witnesses, since the defendant presents his case second. Because the city presents its evidence first, the city has a better idea of when it will need its witnesses. The defendant presents his evidence second. And he can not be sure how long the city will take to present its case. Because the defendant goes after the city, the defendant does not know exactly when his witnesses will be presented.

Also, because the city goes first its witnesses do not have to wait around as long to testify. Since the defendant goes second if the defendant makes his witnesses come at the start of the trial they end up waiting around longer to testify. The city getting to go first makes it more convenient for its witnesses to testify. And this is especially important when the witness is a busy professional like a doctor.

Because the defendant presents his witnesses second the defendant should be given some reasonable leeway on what time he presents his witnesses. And having a witness come in to testify only fifty minutes after he would have been expected to testify is not unreasonable.

The city argues that there was no guarantee, other than a verbal guarantee, that the witness would appear. CB. at 24. This problem could be said for every motion for a continuance so a witness can appear, ever asked for. Even a subpoena does not guarantee the presence of a witness. And a subpoena does not guarantee what time a witness will appear. Since this is a problem with every motion to continue in order to secure a witness, this potential problem should be disregarded.

The city also argues that if the recess requested was granted and the witness appeared the trial may have had to continued to another day. CB. at 24. This argument is speculative and should be disregarded. And this is a potential problem that could arise at all trials. And it is unlikely that the fifty minutes requested would cause the trial to be moved to another day. Dr. Edward's testimony might cause the trial to go longer, but as argued in Mr. McClain's main brief this should not be held against the defendant. Defendant's Brief at 9 n. 1.

Finally the city argues that the witness, Dr. Edwards' testimony would have added very little. CB. at 23. The city seems to believe that Mr. McClain was arguing that it was his medication that caused him to behave and drive the way he did. The city fails to cite to where in the record Mr. McClain or his counsel made this claim, therefore this claim should be disregarded. Utah Rules of Appellate Procedure 24(a)(7),(e).

Mr. McClain's defense was based on the disease of diabetes and not the medication he was taking for it. R. 176-77.

The fact that the city is confused about Mr. McClain's defense adds further support that Dr. Edwards testimony regarding Mr. McClain's diabetes would have been helpful.

II. There was a rational basis, upon which the jury could have found the defendant guilty of reckless driving.

The jury could have found that Mr. McClain's action of driving while he was suffering from disorientation, caused by a diabetic reaction was reckless driving. In deciding the question of whether a lesser included offense instruction should be included, the requesting party has to demonstrate that there was a rational basis for the trier of fact to base a finding of guilty on that lesser included offense. State v. Baker, 671 P.2d 152, 159 (Utah 1983). In deciding this question, there only needs to be a sufficient quantum of evidence to establish the elements of the lesser included offense. State v. Baker, 671 P.2d 152, 159 (Utah 1983). And all inferences must be drawn in a light must favorable to the defendant. State v. Velarde, 734 P.2d 449, 451 (Utah 1986).

The city argues that there was no evidence provided at trial to prove the required element of intent. CB at 27-31. Reckless Driving requires that the defendant willfully and wantonly disregarded the safety of persons or property. Salt Lake City Code § 12.52.350. The city argues that there was not evidence presented at trial that can prove that the defendant willfully and wantonly disregarded the safety of persons or property. The city also implies that Mr. McClain's diabetic condition would prevent him

from forming the required intent. CB. at 29, 30. However the defendant never argued that the condition affected his ability to form intent. And the state fails to cite to any authority to support the contention that Mr. McClain's condition would have prevented him from forming the required intent.

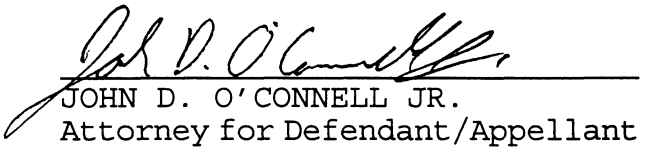
Evidence of intent is rarely susceptible to direct proof. State v. Goddard, 871 P.2d 540, 543 (Utah 1994). Therefore intent can be inferred from the defendant's actions and from the surrounding circumstances. State v. Lopez, 789 P.2d 39, 43 (Utah 1990). The jury could easily infer from the evidence that Mr. McClain continued to drive in spite of his condition, and because of this, Mr. McClain was driving in willful and wanton disregard for the safety of others. Especially in light of the evidence that Mr. McClain was driving at all in light of his prior knowledge that he was susceptible to becoming disoriented and prone to blacking out. R. 158.

With all inferences being drawn in favor of the defendant there is sufficient evidence presented to prove that Mr. McClain was driving in willful and wanton disregard for the safety of others.

CONCLUSION

Based on the foregoing, the Appellant Mr. McClain requests that the guilty verdicts be overturned and a new trial granted. Further it is requested that at this new trial Mr. McClain would be entitled to his lesser included instruction.

SUBMITTED this 11 day of December, 1995.



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CERTIFICATE OF DELIVERY

I, JOHN D. O'CONNELL JR., hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the office of the Salt Lake City Prosecutor, 451 South 200 East, Salt Lake City, Utah 84111, this 11 day of December, 1995.

JOHN D. O'CONNELL JR.
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DELIVERED this _____ day of December, 1995.