7-5-2009

State v. Estes Appellant's Reply Brief Dckt. 35767

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO

PLAINTIFF / RESPONDENT

Supreme Court Cause:
35767-2008

V.

DAVID M. ESTES

Nez Perce County
Cause: CR07-08507

DEFENDANT / APPELLANT

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Second Judicial District in and for Nez Perce County.
Honorable Carl B. Kerrick, District Judge, Presiding.

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I. ARGUMENT

1.1. Has the Respondent lost her right to plead a case for visual estimation of speed by failing to plead?

The office of the Idaho State Attorney General through its deputy attorney general has filed a response to the appellant's brief without briefing the issue of whether the visual estimation of speed should be allowed to convict a person of speeding without corroborating evidence such as radar or other physical evidence. Neither has any person in any of the courts ever tried to make a scientific defense of the visual estimation of speed. Because the Assistant Attorney General in this case has failed to make any pleading pertaining to scientific evidence relating to the

visual estimation of speed the court must accept that none exists and failure to plead means the appellant wins on that point. Other courts have held this position. In 5 Am.Jur.2d, Appellate Review section 512 it reads, " If an appelle fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the appellant's position is correct. (Quoting Trammel v. State, 682 Sw.2d 1257 {Miss 1993})

2.1. Did the appellant fail to plead or object to the admission of testimony on the visual estimation of speed?

The Respondent in its brief at page 5 claims that the appellant did not raise the issue of Trooper Ferriss testimony at trial.

The issue of a timely objection rose for the first time on appeal by the respondent by Eric Johnson representing the state for Nez Perce County. (See Brief of Respondent Court Papers 51-58 or page 6 of that brief paragraph two of that page) The issue was responded to by the Appellant in the Reply Brief of the Appellant. (See reply brief of the Appellant Court Papers 59-77 at page 61 or page 3 of that brief) The appellant had directed the court's attention to page ten of the transcript of record. Again, the appellant asked the court to dismiss the charge before the testimony proceeded. The court overruled the motion to dismiss and proceeded to trial. As stated in the Appellant's reply brief (Court papers 59-77 at page 61 or page 3 of that brief) the court at the end of the testimony did not give the appellant an opportunity to object any further.

The point itself is moot. The visual estimation of speed argument was tried in magistrate court

after the appellant asked for a dismissal. The court ruled against him and proceeded to hear the evidence. Once the evidence was heard the court accepted the evidence and ruled against the appellant without any oral argument or chance for the appellant to once again ask for a dismissal. The court's decision falls under the plain error rule. It is error to allow a finding of guilty based solely on the visual estimation of speed without any corroboration. That is the appellant's position and the crux of this appeal. (U.S. v McCord, 501 F.2d. 334,341)

II. Did the court overrule the objection of failure to object by not ruling on the issue of whether the appellant raised a timely objection to the issue of visual estimation of speed?

When Judge Kerrick issued his Order on Appeal September 2nd 2008 (Court Papers 85-95) he had two things to consider. First there was precedence on the issue that dictated that he allow the admission of testimony on the visual estimation of Speed. Second Judge Kerrick wanted to clarify the issue and get a ruling from the State Supreme Court on the issue. This is evident when one reads the opinion entitled " Analysis" Section one. (Court Papers 85-95 at pages 88-90 or pages 4-6 of that order) The court clearly stated its reasoning for its decision to uphold the magistrate's decision based on the visual estimation of speed. What is missing from the court's order is that not once did the court rely on other cases and did not mention prior decision on the visual estimation of speed. The court went to great lengths to explain why the testimony of the officer should be accepted based solely on the officers experience and training. (Court papers 85-95 at pages 88-90) The court clearly intended to make a ruling on the issue of the visual estimation of speed. Because of this desire to obtain a ruling on the issue, the court did not rule

on the issue of whether the appellant had raised a timely objection in the magistrate court. By doing so the court overruled the respondent's defense of an untimely objection. The defense was waived when the respondent did not press for a decision on the issue of an untimely objection.

Our neighbors to the south in California addressed the failure to rule in a case known as Demps v. San Francisco Housing Authority, (2007), 149 Cal.App. 4th , 564, 566. In that case the court held that a trial judge's failure to rule on properly presented objections results in their being impliedly overruled. Such should be the case here.

The court deliberately failed to rule on the issue of an untimely objection so that it (the court) could do an in depth analysis of the issue of the visual estimation of speed for review by the Supreme Court of the State of Idaho. There had been no former analysis of whether a conviction could be upheld by the mere observation of a police officer. The court intended to overrule the untimely objection issue and did so by not ruling at all. The respondent did not file any motion to make a ruling on the objection thereby losing the right to make it an issue for the Supreme Court to consider.

CONCLUSION

In defense of the respondent's case, the attorney for the state relies mainly on the court's opinion on an officers experience and training and an untimely objection defense that was overruled by the court by making no ruling on the issue.

There are two opposing views on the issue of visual estimation of speed. The Kerrick court

holds that if an officer has the experience and training he can accurately judge the speed of a vehicle and that experience and training can be used to make the officer a lay expert in his field and a person can be convicted of speeding based on the testimony from the officer.

The opposing view is that the visual estimation of speed has no scientific basis and is unreliable. There are scientific instruments that have been developed over a number of decades to accurately measure a motorists speed. This technology would be discarded if an officer was allowed to stand on the side of the road and visually estimate the speed of a motorist.

Since about 1987 the Idaho Appellate Courts have allowed motorists to be convicted solely on the visual estimation of speed. One of the obvious facts of these cases is that the appellants have all been pro se appellants / defendants. There has been an unwritten rule in the judicial field that pro se defendants not prevail over a member of the bar. In fact the judiciary has defended this unwritten rule to the point that it is making decisions contrary to established case law and in some cases common sense. Thomas Jefferson once wrote, " A departure from principle in one instance becomes a precedent for a second; that second for a third: and so on, till the bulk of society is reduced to be mere automations of misery." The courts have made an error that needs to be corrected. The problem with the judiciary defending a closed system that holds only itself accountable and protects its members of the bar has become so acute that there are nationwide organizations forming to combat the problem. Mr. Ron Branson of the organization called Jail4Judges recently wrote, " There should exist no person, or class of persons, that should be

above the law, or shielded by immunity for wrong doing, which immunity has been vested by the judges.."

Nationwide organizations are now documenting judicial misconduct. In fact the Department of Justice and the Federal Trade Commission have either warned or filed suit against various state and county Bar Associations for illegal trade practices.

It appears from the cases on visual estimation of speed that the courts found a way to convict pro se people when they have prevailed on other points of law which would have led to a dismissal. In this case again decades of technology is ignored in order to convict. The Supreme Court should step back and take a look at these rulings and recognize them for what they are. A visual estimation of speed could be used to corroborate other pieces of evidence to convict a motorist but standing alone without corroborating evidence should never be the basis for a conviction.

Dated this 5 th Day of July 2009.

DAVID M. ESTES

David M. Estes, Appellant Pro Se