5-7-2014

State v. Rocha Appellant's Reply Brief Dckt. 41535

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	No. 41535
	)	
v.	)	
	)	
ALFREDO ROCHA,	)	
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL MCLAUGHLIN
District Judge

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In response to the Respondent's brief, Appellant makes the following clarifications.

1. <u>The Trial Court Erred In Admitting Irrelevant Evidence Over Defendant's Objection.</u>

The State asserts that Mr. Rocha has not preserved for appeal several arguments with regard to the admission of the Administrative License Suspension; because the only basis for objection at the trial court level was relevance. This argument fails and should not be considered by this Court. An objection is not preserved for review **<u>only</u>** when the objection argued on appeal was either distinct from that raised below or the evidence objected to below and on appeal were substantially different. *State v. Williamson*, 144 Idaho 597, 166 P.3d 387 (Ct.App.2007). An objection to the admission of evidence on one basis does not preserve a separate and different basis for exclusion of the evidence. *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003).

In this case, the objection was made as to relevance which specifically encompasses I.R.E 401, 402 and 403. Those rule are routinely taken together to determine what is relevant and whether relevant evidence should be admitted or excluded based on whether its probative value is substantially outweighed by the danger of unfair prejudice. The arguments made on appeal all revolve around the admission of irrelevant evidence and whether the admission of this evidence unfairly prejudiced Mr. Rocha. These are not distinct or separate grounds which were made for the first time on appeal, these arguments should be considered by this Court as they are all encompassed by I.R.E. 401, 402 and 403. Mr. Rocha relies on his original briefing and incorporates it by reference herein.

The State makes a further argument that as a "matter of law," evidence of the Administrative License Suspension is relevant to show consciousness of guilt. (Respondent's brief, p.6). This argument is absolutely absurd and not supported by citation or reference to any case law, statute or higher authority. While the Courts of Idaho and neighboring jurisdictions have held that a <u>refusal</u> can be evidence of consciousness of guilt, an Administrative License Suspension through the Idaho Department of Transportation, which stems from a refusal, has no relevance to the criminal prosecution for Driving Under the Influence and even if determined relevant its probative value is substantially outweighed by the danger of unfair prejudice.

2. <u>The Prosecutor Committed Misconduct When He 1) Placed Before The Jury Facts Not In Evidence; and 2) Improperly Shifted The Burden Of Proof.</u>

The State makes a generic argument that "in context" statements made in the Prosecutor's rebuttal were not misconduct and even if improper the argument was harmless. (Respondent's brief, p.10). The problem whit this assertion is that the prosecutor was not simply asking the jury to draw an inference regarding the policy of the Meridian Police Department white respect to forced blood draw, the prosecutor stated the reason the City of Meridian has "chosen not to go that route. Obviously cause some kind of liability." This assertion is more than just an inference, or a possibility, it was stated as fact and implies that there was a basis for changing a policy, maybe because of a previous lawsuit or any number of other reasons.

It is even more crucial to note that during deliberations the jury sent a question to the judge which specifically dealt with Meridian City and its blood draw policy, and when it changed. This question from the jury during deliberations seems to imply that they believed the city use to force blood draws; that some type of event occurred at which point they changed their policy and now no longer force blood draws. Taking the record as a whole it cannot be said that the improper argument was harmless. Mr. Rocha has made a showing that the state improperly placed facts before the jury and it is the state's burden to show that the error was harmless. The State makes a generic conclusion that the argument asserted by Mr. Rocha is ridiculous but does not support its argument with any substantial evidence to show that the error was harmless.

Again the State fails to support its own argument with citation or reference to any case law, statute or higher authority and has therefore not met its burden.

Finally the state relies on "decades of precedent allowing the admission of evidence of refusal under implied consent as evidence of guilt." (Respondent's brief, p.12). However, even if Mr. Rocha impliedly consented to evidentiary testing, pursuant to the Fourth Amendment, Mr. Rocha retained the right to revoke his consent. The United States Supreme Court recently granted certiorari and vacated a case from Texas which had held that implied consent allowed a blood draw. *Aviles v. State*, 385 S.W.3d 110 (Tex.App.2012) The Court vacated the judgment and remanded to the lower court for further consideration in light of *Missourri v. McNeely*, 133 S.Ct. 1552 (2013). Accordingly, to the extent Mr. Rocha impliedly consented to evidentiary testing by operating a motor vehicle on Idaho roads, Mr. Rocha validly and unequivocally revoked his consent, when he refused to participate. Thus, if the State wished to prove that Mr. Rocha was under the influence of an intoxicating substance, it had the means to do so and could no longer rely on the theory of "consciousness of guilt."

3. <u>There Was Insufficient Evidence To Prove Beyond A Reasonable Doubt That Alfredo Rocha Was: 1) Driving or In Actual Physical Control Of A Motor Vehicle; 2) While Under The Influence Of An Intoxicating Substance.</u>

The State argues that there was evidence presented which reasonably allowed the jury to draw the inference that Mr. Rocha was under the influence at the time he drove. (Respondent's brief, p.13). The State highlights only one alleged statement of drinking two hours previously, yet fails to recognize that numerous statements were made, none of which add up to substantial and competent evidence. Testimony was offered that he had drunk four beers two hours prior to the stop. (1/11/2013 Tr., p.26, Ls.2-10). Testimony was also offered that he had been drinking around 7:30 pm at a bar, and then had gone to a friend's house and then a friend's work.

(1/11/2013 Tr. p.26 Ls.11-18). 1/11/2013 Tr. p.54 Ls.20-25). Further, testimony was elicited that Mr. Rocha had potentially been on the roadside asleep for an hour and a half to two hours; and the officer admitted that she did not know how long he had been on the roadside. (1/11/2013 Tr. p.56 Ls.1-16).

Consequently, there may be competent and substantial evidence that he was impaired at 4:50 in the morning, but there was not substantial and competent evidence which would lead a reasonable trier of fact to infer that Mr. Rocha was impaired at the time he was driving or in actual physical control of a vehicle because no evidence was admitted as to when the Mr. Rocha was actually driving. The logical inference that could be made was that if he drank two hours prior to the contact with law enforcement and he was potentially on the roadside for two hours both of which were testimony presented at trial, then he never drank while driving and only drank once the car was parked roadside. There is simply not enough evidence even circumstantial evidence for a reasonable trier of fact to infer impairment while driving, the only ability the jury had was to speculate that he may have been under the influence at the time he was driving, this speculation is not supported by the facts and evidence which was presented at trial.

CONCLUSION

For the reasons set forth above, Mr. Rocha respectfully requests that this court vacate his judgment of conviction and enter a judgment of acquittal.

DATED this 7th day of May 2014.

HTolman

HEIDI TOLMAN
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 7th day of May 2014, I caused to be served a true and correct copy of the foregoing document in the above-captioned matter to:

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