8-31-2017

State v. Austin Appellant's Reply Brief Dckt. 44276

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 44276**
	)	
v.	)	**ADA COUNTY NO. CR 2015-5045**
	)	
JUSTIN KEITH AUSTIN,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE MICHAEL REARDON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

The State claims that a violation of Idaho Code § 18-8004 occurs not when a defendant drives, but when a defendant submits breath samples over the legal limit, and it is clear that the legislature intended this. This is wrong. Under Idaho law, the lapse of time between driving and testing is relevant to the weight the jury attributes to the test results. The State also argues that it was not fundamental error to deny Mr. Austin an opportunity to allow the jury to properly weigh the test results. The statute is therefore void for vagueness and overbroad as it was applied to Mr. Austin. This violated his due process rights.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Austin's Appellant's Brief. They need not be repeated in this Reply Brief but are incorporated herein by reference.

ISSUES

I. Did the district court abuse its discretion when it granted the State's motion in limine because it did not apply the relevant precedent correctly and violated Mr. Austin's due process right to present a complete defense?

II. Does the dicta in *Tomlinson* render Idaho Code § 18-8004 overbroad and void for vagueness as applied?

ARGUMENT

I.

The District Court Abused Its Discretion When It Granted The State's Motion In Limine Because It Did Not Interpret Or Apply The Relevant Precedent Correctly, And It Violated Mr. Austin's Constitutional Right To Present A Complete Defense

Just because the State is not required to prove something does not mean a defendant cannot even mention it in his defense. Equating these is where the district court abused its discretion. Approximately 30 minutes after Mr. Austin was stopped by an Ada County Sheriff's Deputy, he submitted two breath samples. (Tr. Vol.2, p.199, Ls.4-14.) That period of time was relevant because it went to the weight the jury could give the test results. "The lapse of time prior to the extraction of samples goes to the weight to be afforded the test results and not to their admissibility." *State v. Sutliff*, 97 Idaho 523, 524 (1976) (citations omitted); *State v. Robinett*, 141 Idaho 110, 113 (2005).

Therefore, preventing Mr. Austin from presenting expert testimony that would allow the jury to weigh the test results—based on facts such as his physical characteristics and when he last consumed alcohol—was an abuse of discretion. (App. Br., pp.17-20.) Indeed, without such scientific testimony, the majority of jurors would have no idea how the lapse of time affected the test results.

The State, relying on the language from *Elias-Cruz v. Idaho Dep't of Transp.*, 153 Idaho 200 (2012) as determinative,[1] argues that the driving under the influence statute clearly was intended to criminalize testing above the legal limit. (Resp. Br., pp.8-17.) But the differences between this case and *Elias-Cruz* are crucial. *Elias-Cruz* concerned the margin of error in the

[1] The State also relies on this Court's holding in *State v. Jones*, 160 Idaho 449 (2016). (Resp. Br., p.15.) However, *Jones* concerned a measurement of uncertainty issue and is therefore also distinguishable from this case. *Id.* at 450.

testing machinery. *Id.* at 202-06. Lapse of time between driving and testing was not at issue. This is a crucial distinction because while margin of error has not been held to be relevant, lapse of time has been held to be relevant. And *Elias-Cruz* acknowledged this. *Id.* at 203 (quoting *Robinett*, 141 Idaho at 113). The district court, and the State in its argument here, overlooked this distinction. Indeed, the State simply repeats the well-established rule that there is no constitutional right to present irrelevant evidence. (Resp. Br., pp.16-17.) But lapse of time evidence is relevant. *Robinett*, 141 Idaho at 113. In fact, this Court in *Robinett* held that the only reason it is appropriate for a district court to admit test results taken well after driving is because the jury can consider the time lapse. *Id.*

The State claims that a violation of the statute occurs not when a defendant drives but when a defendant tests over the limit. (Resp. Br., pp.7, 10, 15, 16.) This claim actually supports Mr. Austin's argument that, if this is the case, the words "to drive" have been read out of the statute. (App. Br., p.23.) But the fact that the lapse of time between driving and testing is relevant means testing above the limit is not the crime; contrary to the State's portrayal of the current state of the law, the crime identified in I.C. § 18-8004 is still *driving* with an alcohol concentration over the legal limit.

The fact that the State could get test results admitted without having to extrapolate those results did not preclude Mr. Austin from bringing in evidence to show that his alcohol concentration was within the legal limit when he was driving. If it did so preclude him, then defendants such as Mr. Austin would be barred from presenting a defense to each element of a crime. That is what happened here. Driving is an element of this crime, and therefore Mr. Austin's due process rights were violated. (App. Br., pp.21-24.)

Finally, the State claims "it is clear that the legislature intended the operative BAC to be the BAC at the time of the analysis, not the BAC while driving." (Resp. Br., p.17.) This is most certainly not clear. Again, the State argues as if the issue is what evidence *the State* may submit as proof of a violation. The issue here, though, revolves around the defendant's right to rebut the State's evidence. It is true that it is not possible to analyze breath, blood, or urine at the moment of driving. But that does mean the crime is no longer driving with an alcohol concentration over the legal limit. That does not mean a defendant cannot raise doubts about the evidence submitted against him. The logic of the State's argument is simply flawed. Indeed, most crimes are proven with evidence gathered after the alleged criminal act. Yet defendants have a right to question or rebut that evidence. That is due process. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Our system allows defenses; it does not simply redefine the crime to meet the evidence gathered by the State. When the district court granted the State's motion in limine to exclude Mr. Austin's evidence refuting the meaning of the State's alcohol concentration evidence, it denied him due process.

II.

The Dicta in *Tomlinson* Renders Idaho Code § 18-8004 Overbroad And Void For Vagueness As Applied

The State suggests that, "Austin is not actually challenging the constitutionality of Idaho Code § 18-8004 itself" (Resp. Br., p.20.), but this misapprehends Mr. Austin's argument. The statute, on its face, does not prohibit a defendant from raising a defense to the crime. (App. Br., p.27.) However, as argued in the Appellant's Brief, the statute was rendered overbroad and void for vagueness as it was applied in this case when the district court held that, under "the existing case law," Mr. Austin could not raise a defense to rebut the State's evidence

that he was over the legal limit while driving. (Tr., Vol.2, p.11, L.20 – p.12, L.8.) Therefore, Mr. Austin is challenging the constitutionality of I.C. § 18-8004 as it was interpreted and applied by the district court to these facts.

Regarding the first prong of the fundamental error test, the State argues that I.C. § 18-8004 is not void for vagueness as applied because "[t]he statute, as interpreted by case law, does not fail to provide a person of ordinary intelligence fair notice of what is prohibited." (Resp. Br., p.22.) The State argues, "That 'close cases can be envisioned' is insufficient to 'render a statute vague' because the state must still prove its case beyond a reasonable doubt." (Resp. Br., p.22.) First, this is a close case. Mr. Austin's alcohol concentration was .085/.086 when he submitted to breath tests approximately 30 minutes after he was first stopped and approximately 45 minutes after he consumed alcohol. (Tr. Vol.2, p.316, L.15 – p.320, L.9.) Therefore, his expert would have testified that his alcohol concentration was rising as he was waiting for the breath tests, and was below the legal limit when he was driving. (R., p.122.) Moreover, the fact that his breath tests were just over the legal limit showed that Mr. Austin's conduct did not, as the State claims, fall "squarely within the 'hard core' of Idaho Code § 18-8004's proscriptions." (Resp. Br., pp.22-23.) Second, the State did not have to prove its case beyond a reasonable doubt. Mr. Austin did not get the ability to call his expert and raise a defense because the district court held that, under the precedent, his alcohol concentration when he was driving was not relevant. Thus, the statute as applied imposed a mandatory conclusive presumption, which violated Mr. Austin's right to have the State prove all the elements beyond a reasonable doubt. (*See* Appellant's Brief, pp.27-32.)

Additionally, this shows how the statute, as interpreted in the dicta in *State v. Tomlinson*, 159 Idaho 112, 122 (Ct. App. 2015), actually does fail to provide a person of ordinary

intelligence fair notice of what is prohibited. Most people of ordinary intelligence likely assume, quite reasonably, that they are prohibited from *driving* with a certain alcohol concentration. The State's position is that people of ordinary intelligence have fair notice that what is actually prohibited by the statute is testing over the legal limit sometime after driving. (Resp. Br., p.22.) This is absurd. It is common knowledge that people of ordinary intelligence use the acronyms DUI or DWI to describe this crime. The "D" stands for "Driving."

With respect to the second prong of the fundamental error test, the State asserts that the error here is not clear from the record because "there was no constitutional violation" and "[e]ven if there was error for the district court to not *sua sponte* rule I.C. § 18-8004 unconstitutional," such error was not clear from the record. (Resp. Br., pp.24-25.) On the contrary, the error is clear from the record here because the district court was aware that denying Mr. Austin the ability to bring in an expert to testify as to his alcohol concentration while he was driving was a due process violation. The district court's comments and questions on this issue demonstrated this awareness. (*See* App. Br., pp.5-8.) For example, when Mr. Austin's counsel reiterated his concern that Mr. Austin should be able to present extrapolation evidence "under his due process rights applied to the state under the 14th Amendment of the United States Constitution," the district court said, "Conceptually, I'll agree with you . . . and if I had a blank tablet that I was operating under, I would say, you know, you're right. But the Court of Appeals and the Supreme Court have ruled on the issue. Admittedly I don't think they ever discussed the due process concept." (Tr. Vol.2, p.26, L.16 - p.27, L.10.) It is hard to imagine any statement on the subject being more clear.

Finally, the State argues that Mr. Austin has failed to show the error here was harmless because "Austin would still have been convicted under the impairment theory of DUI."

(Resp. Br., p.26.) This was not a foregone conclusion. Nevertheless, the State lists several facts such as "Austin's eyes were 'a little bloodshot and glassy' and his speech was a 'a little bit' slow," and "Austin failed field sobriety tests" as though these facts definitely prove that the jury would have found Mr. Austin guilty under the impairment theory. (Resp. Br., p.26.) This is a flawed analysis for multiple reasons. First, the State neglects to mention that these were not the only relevant facts the jury could consider. For example, Mr. Austin had just finished an eight-hour shift as a server in a restaurant and explained that he had gout, which caused him severe foot and ankle pain throughout the sobriety tests. (Tr. Vol.2, p.314, L.17 – p.315, L.10, p.180, L.4 – p.181, L.11; State's Exhibit 2 at 0:35 – 0:45, 3:00 – 3:30.)

Most importantly however, the State asks this Court to decide a jury question. It was not possible to tell whether the jury convicted Mr. Austin under the per se theory or the impairment theory. Because determining whether the impairment theory applied was a significant factual question, there is a reasonable possibility that the error affected the outcome of the case. As such, the error was not harmless.

CONCLUSION

Mr. Austin respectfully requests that this Court vacate his judgment of conviction, reverse the district court's order granting the State's motion in limine, and order that the district court admit expert testimony regarding his alcohol concentration when he was driving at a new trial.

DATED this 31st day of August, 2017.

_____/s/_____
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of August, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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