7-21-2017

State v. Castrejon Appellant's Reply Brief Dckt. 44783

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44783**
Plaintiff-Appellant,	)	
	)	**Gooding County Case No.**
v.	)	**CR-2016-1473**
	)	
CESAR GABRIEL CASTREJON,	)	
	)	
Defendant-Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

HONORABLE JOHN K. BUTLER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR PLAINTIFF-APPELLANT

BEN P. McGREEVY
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712

ATTORNEY FOR DEFENDANT-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

ARGUMENT

The District Court Erred Because The Information Charged Felonies For Striking A Police Officer

A. Introduction

A battery may be committed by "force or violence … or … touching or striking … or … causing bodily harm." I.C. § 18-903. A battery "except unlawful touching" committed on a law enforcement officer is, under certain conditions, a felony. I.C. § 18-915(3). The district court erred when it interpreted the legislative exclusion of batteries committed by "touching" an officer, articulated in I.C. § 18-915(3), as also excluding batteries committed by "striking" an officer. (Appellant's brief, pp. 5-6.)

Responding to this argument, Castrejon contends that the "plain language" interpretation of the statute is not a preserved issue and that, if applied, it leads to the same result reached by the district court. (Respondent's brief, pp. 6-11.) Review of Castrejon's arguments show they are without merit. The state did preserve the argument that the information charged a felony, and because the information did charge a felony (even if it also charged a misdemeanor) the district court erred.

B. The State's Argument That "Striking" A Law Enforcement Officer Is A Felony Is Preserved In The Record

Castrejon contends the state did not "preserve" the "plain language argument for appeal" because "it did not present that argument to the district court." (Appellant's brief, p. 7.) Application of the correct legal standards to the

record shows that the state did preserve the issue of whether it charged a felony by alleging battery on a law enforcement officer by "striking" that officer.

"The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal." Roe v. State, 135 Idaho 573, 580, 21 P.3d 895, 902 (2001). In addition, an adverse ruling is a prerequisite to appellate review. Forbush v. Sagecrest Multi Family Prop. Owners' Ass'n, Inc., No. 44053, 2017 WL 2644707, at *6 (Idaho June 20, 2017); Am. Semiconductor., Inc. v. Sage Silicon Sols., LLC, 162 Idaho 119, 395 P.3d 338, 353 (2017), reh'g denied (June 8, 2017).

The record shows the district court raised the issue of whether the information charged a felony, articulating the issue as follows: "the defendant in both counts is charged with actually, intentionally, and unlawfully touching and/or striking the officer, and the question I have is why is that not a misdemeanor offense?" (Tr., p. 3, Ls. 17-21.) After hearing the arguments of the parties, the district court held:

> Given the way that Counts I and II are charged as unlawful touching and/or striking, I find that that is the language that is excepted out in subsection (3) of 18-915, so I do not believe that the Court has jurisdiction over a felony offense, so I'm going to remand this matter back to magistrate court for further proceedings.

(Tr., p. 7, L. 22 – p. 8, L. 3.) The issue of whether the language "touching and/or striking" a law enforcement officer charged a felony under the applicable statutes was thus squarely raised and decided by the district court, and may thus be challenged on appeal.

Castrejon contends the state's "argument" of how the information charges a felony is different on appeal. (Respondent's brief, p. 6-9.) Other than pointing out that some of the words used are different, however, Castrejon has failed to support this contention from the record. Below, the state argued that inclusion of misdemeanor language in the charges was in the nature of a "clerical error" and potential flaws in the language had been discussed with defense counsel. (Tr., p. 3, L. 22 – p. 4, L. 9.) Defense counsel represented that in discussions with the prosecution he had "pointed out that unlawful touching is a misdemeanor" but concluded that he still believed the language was sufficient even though it "definitely has the misdemeanor language in it." (Tr., p. 4, Ls. 11-23.) The prosecutor, in further colloquy with the court, pointed out that the facts would show that "more than touching was done," that the misdemeanor of touching could be considered a "lesser included" offense of the felony, and, noting that he did not have the "statute in front of [him]," that the "striking" language was sufficient to charge the felony. (Tr., p. 4, L. 24 – p. 6, L. 12.) Although the brief on appeal was prepared with a 35-day deadline and is therefore more articulate than the oral argument of the prosecutor when the issue was sprung on him in court, the state's position has always been that the inclusion of misdemeanor language regarding "touching" as an "and/or" alternative ("lesser included") to the felony of "striking" was not a fatal defect in the charging document. The issue of whether the state properly charged a felony by striking "striking and/or touching" is preserved in this record, and the state's argument that the allegation that striking a law enforcement officer charges a felony is also preserved.

Castrejon next argues that the state invited the district court to erroneously conclude the information failed to charge a felony. (Respondent's brief, pp. 9-10.) This argument likewise does not withstand analysis.

"The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error." State v. Norton, 151 Idaho 176, 187, 254 P.3d 77, 88 (Ct. App. 2011) (citing State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993)). "One may not complain of errors one has consented to or acquiesced in." Norton, 151 Idaho at 187, 254 P.3d at 88 (citing State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); State v. Lee, 131 Idaho 600, 605, 961 P.2d 1203, 1208 (Ct. App. 1998)). A party "may not request a particular ruling by the trial court and later argue on appeal that the ruling was erroneous." State v. Griffith, 110 Idaho 613, 614, 716 P.2d 1385, 1386 (Ct. App. 1986).

The portion of the transcript Castrejon relies on, presented in context, is as follows:

> THE COURT: Well, but subsection (1) of—or subsection (a) charges a battery as force or violence. Subsection (2) is touching—unlawful touching or striking. Subsection (3) is causing bodily injury. So isn't subsection (2) the language that the legislature has excepted out as far as the felony's concerned?
>
> MR. ASH: Well, I think I would have to agree with the Court there that, yes, that is the case, but, as I mentioned, the language in our Information was a clerical—obviously, not one without impact, but it was a clerical error.

(Tr., p. 6, Ls. 13-24 (cited in part Respondent's brief, p. 9).) Castrejon's reading of this statement of agreement with the court—as abandoning or refuting the previously made argument that although there was misdemeanor language in

the charge it was a clerical error that could be treated as an included offense and that the "striking" language was sufficient to charge a felony—is untenable. Even if the prosecutor expressed some agreement with the district court's analysis, such "concurrence did not invite the court" to hold that the information did not charge a felony. State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999) (statement "we would concur" after court announced intent to give particular instruction did not invite any error in giving that instruction). The record simply does not support a claim that the state's "own conduct induce[d] the commission of the error." Atkinson, 124 Idaho at 819, 864 P.2d at 657.

The state has consistently maintained, contrary to the district court's holding, that the charges of "striking" the officers are felonies, even if they also included misdemeanor language about "touching." Castrejon's argument that the state waived or forfeited that issue is without merit.

C. The Information Charged A Felony By Charging Castrejon With Striking A Law Enforcement Officer

The plain language of the applicable statutes is that a battery by "touching" a law enforcement officer is not a felony, but battery on a law enforcement officer in any other form, including "striking," is a felony. (Appellant's brief, pp. 5-6 (citing I.C. §§ 18-903, 18-915(3)).) Castrejon argues that by excepting "touching" from the types of battery that are elevated to a felony when committed on a law enforcement officer, the legislature necessarily excepted "striking" because "striking" appears in the same subsection of I.C. § 18-903 as "touching." (Respondent's brief, p. 11.) The argument that by

specifically exempting "touching" set forth in I.C. § 18-903(b), without mentioning "striking" as set forth in the same subsection, the legislature meant to exempt both forms of battery makes no legal, grammatical, or logical sense. It is certainly contrary to the plain language of the statute. State v. Owens, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015) ("When the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect, and we do not need to go beyond the statute's plain language to consider other rules of statutory construction."). If the legislature meant to exclude "striking" an officer from the forms of battery that constitute the felony, in addition to excluding "touching" an officer, it could have done so in a number of ways that make linguistic and logical sense. The statutory language excludes only "touching" and does not exclude "striking" or any other form of battery. By the statute's plain language, only "touching" an officer is excluded, and therefore "striking" a law enforcement officer is included in the felony.

CONCLUSION

The state requests this Court to reverse the district court's order remanding the case to the magistrate division and that this Court remand the case for further proceedings on the felony charges of battery on a law enforcement officer.

DATED this 21st day of July, 2017.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of July, 2017, served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT by emailing an electronic copy to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd